REVIEW OF THE IRAQ HISTORIC ALLEGATIONS TEAM

by Sir David Calvert-Smith

1. INTRODUCTION AND TERMS OF REFERENCE

1.1 In April 2016 I was asked to review and report on the systems currently in place at the Iraq Historic Allegations Team ('IHAT') for receiving complaints and processing them through to the ultimate decision as to whether to recommend prosecution. The IHAT, conceived in March and born in November 2010, has already been the subject of considerable judicial scrutiny as the result of proceedings before the Divisional Court and Court of Appeal.

1.2 These decisions have affected both the composition of the IHAT and the possible outcomes of its investigations – in particular the removal of all Army representation from the IHAT and the setting up in 2014 of a system of "coronial" inquiries under an Inspector, currently Sir George Newman.

1.3 The decision to ask former Director of Public Prosecutions and judge of the High Court and the recent author of a Justice Report into the investigation, pre-trial and trial processes involved in ordinary criminal proceedings, to look at the IHAT's systems seems to have been prompted by continuing concerns as to the length and expense of the process.

1.4 The large, and still increasing, number of claims arising from alleged wrongdoing by members of the British forces in Iraq from 2003 to 2009 has also prompted the appointment of a judge, Leggatt J, as the Designated Judge to oversee the progress of all such cases. He has recently made rulings some of which have a direct bearing upon the way in which the IHAT should deal with its investigations.

1.5 My terms of reference (ToR) were as follows:

(1) Review current practice and processes from the beginning of an investigation to a final charging decision.

(2) Recommend ways in which such processes could be:

a. made more efficient in order to shorten the length of time taken between the start of an investigation and a final charging decision by the

Service Prosecuting Authority or finding by the inspector in charge of independent fatality investigations;

b. *improved by greater and earlier liaison between prosecutors and investigators and, where appropriate, the investigator in charge of the quasi-coronial proceedings;*

c. *conducted in a manner that will enable the earliest possible identification of cases that could never result in a prosecution;*

d. *conducted in a manner that will enable prosecutors to prosecute cases in accordance with the principles set out by the President of the Queen's Bench Division in his Review of Efficiency in Criminal Proceedings.*

(3) take account of proposals from the Ministry of Defence about how the process might be made more efficient.

(4) consult with Sir George Newman for his views about whether there are any process changes which might assist his Iraq Fatality Investigations.

In doing so, the reviewer should take into account current legislation, resources and an overriding objective of any justice system to deal with cases justly and at proportionate cost.'

2. EXECUTIVE SUMMARY

2.1 I have considered a significant quantity of reading material and spent several days interviewing various individuals connected with the IHAT's work.[1]

2.2 The IHAT has developed almost out of all recognition from its inception as an entirely new form of investigative body with, as has since been acknowledged, a number of imperfections in its structure let alone its initial remit to consider a comparatively small number of cases.

2.3 In addition to the constant refining of its processes to take account of court decisions and to achieve a thorough but focused investigation of the cases brought to it by Public Interest Lawyers or Leigh Day or "self-generated" as the result of other investigations, the IHAT has become a tightly focused organisation with a strong and cohesive senior management team. Below it there have been inevitable stresses and strains caused by:

[1] See Appendix A for a list of those interviews

- the need to deploy service personnel with no Army background, contractors, whether investigators or "back office" staff, (mainly former police officers/employees from various forces) all of which will have had their own way of doing things, and
- the early involvement of SPA lawyers, some of whom are in-house though non-Army, and others have been seconded to the SPA from the CPS.

The inevitable "performance issues" of such a "cocktail" of staff have, I believe, been largely dealt with.

2.4 There are still a number of inbuilt disadvantages from which it suffers but which are unlikely to be improved. Its location, in the middle of Wiltshire, has meant that the task of attracting capable staff has not been easy. The location of the offices within the camp in three different buildings some distance from each other means that parts of the team rarely see other parts of it.

2.5 The investigation, which must be one of the largest ever mounted into possible homicides, sexual offences and war crimes etc, is perforce being conducted by investigators with no experience of policing the Army and, although of course familiar with the other ordinary criminal offences, unfamiliar with the concept of a "war crime".

2.6 The fact that it has been criticised by claimants and the courts over the years has understandably induced a mind-set which demands that every 'i' be dotted and every 't' crossed so that the entire process will withstand scrutiny at every stage. The biggest disadvantage of all lies in the difficulty of obtaining usable evidence from Iraq.

2.7 I have focused on the processes which have been developed over the years and which are are contained within flow charts, some of which have been amended many times so that the latest version of one of them is the 11th.

2.8 In making my suggestions, I have borne in mind – in particular drawing on my experience of managerial/administrative roles at the CPS, the judiciary/Court Service and the Parole Board – that some changes, while desirable, and, if one was starting from scratch, a sensible way of designing either structure or process, would now involve so much restructuring and consequent delay and resettlement that they would certainly not result in the speedier or cheaper completion of the IHAT's work.

2.9 In summary, and subject to the matters set out below and unforeseen circumstances, I am confident that the IHAT will be able to complete its work by the fourth quarter of 2019 in accordance with its projections.[2] I express this view on the basis that:

(i) the recommendations I set out below are implemented,
(ii) the transition of the IHAT from being "victim-focused" to "suspect focused" is matched by corresponding shifts in the balance of employees/contractors and resources.
(iii) the strong and experienced Command Team is retained or if replaced, that competent successors are recruited with a proper hand-over period,
(iv) no further surge of new applications is received.

3. BRIEF HISTORY OF THE IHAT

3.1 In order to understand the IHAT's current practice and processes, it is necessary to put them into their historical context.

3.2 The IHAT was established in November 2010 with a mandate to investigate cases involving death or alleged ill-treatment of Iraqi civilians in British custody. This was later widened to include some cases involving the allegedly unlawful killing by British soldiers of Iraqi civilians who were not in custody.

3.3 The IHAT's stated objective is to:

> *'investigate as expeditiously as possible those allegations of criminal conduct by HM Forces in Iraq allocated to it by the Provost Marshal (Navy)(PM(N)), in order to ensure that all those allegations are, or have been, investigated appropriately.'*[3]

3.4 The achievement of this objective is necessary to discharge the implicit duty to investigate set out in sections 116 and 113, of the Armed Forces Act 2006 ('the Act'). The IHAT is also playing an important part in discharging the

[2] See Appendix B for IHAT projections
[3] See Appendix C for 'Terms of Reference' 2.0 dated 19 May 2014

UK's investigative obligations under Article 2 and 3 of the European Convention on Human Rights ('the Convention').[4]

3.5 The IHAT had an initial caseload of 165 cases. The original first date for completion of the IHAT's work was 1st November 2012. This has been extended to December 2016 and since then to December 2019. [5]

3.6 In ***R (Ali Zaki Mousa) v. Secretary of State for Defence*** **[2011] EWCA Civ 1334 ("AZM1")** the Court of Appeal held that the IHAT was not sufficiently independent because of the involvement of members of the Royal Military Police in the investigation of matters in which they had been involved in Iraq. The response was to replace the RMP with other investigators, both retired officers from civilian police forces or serving Royal Navy Police personnel.

3.7 The transfer of responsibility for the IHAT to the Provost Marshal (Navy) took place on 1st April 2012.

3.8 In ***R (Ali Zaki Mousa) v Secretary of State for Defence*** **[2013] EWHC 1412 (Admin) and [2013] EWHC 2941 (Admin) ("AZM2")**, the Divisional Court criticised the absence of appropriate input from the Director of Service Prosecutions ('DSP'). The Court, consisting of the then President Queen's Bench Division, Sir John Thomas and Silber J. said (at para 181 of the first judgment given in May 2013):

> *"The Director of Service Prosecutions is a lawyer of very considerable distinction and experience. He should have been involved in making a decision at the outset of each case involving death referred to IHAT as to whether prosecution was a realistic prospect and, if there was something to suggest it might be, in directing the way that the inquiry was to be conducted and in a regular review of each case to see if a prosecution remained a realistic possibility."*

3.9 Since AZM2, the DSP and SPA (in the form of the IHAPT) have been given a greater role.

3.10 The Court in AZM2 also found that IHAT was sufficiently independent of the executive to be able to carry out investigations which comply with articles 2 and 3 of the Convention but that in order to secure compliance, a procedure should be developed based on the model of coroners' inquests

[4] The extent of those obligations were considered by Leggatt J. in *Al-Saadoon & Others v. Secretary of State for Defence* [2016] EWHC 773 (Admin), section C
[5] Ibid

involving inquiries into deaths. Such inquiries should be inquisitorial in nature and conducted by an Inspector, currently Sir George Newman.

3.11 In the second judgment, given in November 2013, the Divisional Court appointed Leggatt J. as Designated Judge "to have overview of the inquiries and to hear applications relating to general issues in dispute as to the overall conduct of the inquiries and for the judicial review of decisions made in the inquiries".[6]

3.12 On 13 May 2014, the Prosecutor of the International Criminal Court ("ICC") opened a preliminary examination of the responsibility of officials of the United Kingdom for alleged war crimes involving the systematic abuse of detainees in Iraq between 2003 and 2008.

3.13 In July 2014, the Secretary of State recognised that the IHAT's work was not going to be completed by the end of 2016. He approved additional funding of £24m to cover the period from the end of 2016 to the new date for completion, 31 December 2019.

3.14 Between November 2014 and April 2015, there was a vast expansion in the IHAT's caseload. As at 14 October 2015 the caseload was 1515 with a further 665 allegations to be screened[7].

3.15 In ***Al-Saadoon*** **[2015] EWHC 1769 (Admin),** Leggatt J. noted that over one and a half years after the Divisional Court in *AZM2* had emphasised the "need for urgent and realistic decision-making" on three specific 'category 2' cases under investigation by the IHAT, the final decision was still yet to be made.[8] Further, in relation to seven 'category 3' cases, only two investigations had been concluded. He described this state of affairs as "deeply disappointing".[9]

3.16 With respect to the IHAT's processes, he said this:

> *"I do not doubt the thoroughness with which IHAT is carrying out its work. Whether IHAT is working in the most efficient way is not for me to say nor something that I am in a position to judge. I do, however, welcome two developments.* ***The first is a plan mentioned by Mr Warwick to increase the resources allocated to interviewing complainants and***

[6] Paras 4-6
[7] Al Saadoon para 260,
[8] Para 33
[9] Para 35

witnesses…. *Secondly, I am encouraged that serious consideration is being given to how IHAT's resources can be targeted most effectively. It seems to me essential, given the large number of cases recently added to its caseload, that IHAT should continue to develop processes for sifting cases so as to identify those involving the most serious allegations to which priority needs to be given and also to identify at as early a stage as possible those cases where there is no credible allegation that an unlawful killing or ill-treatment amounting to a serious criminal offence occurred, and which it is therefore not necessary for IHAT to investigate."*[10]

3.17 In ***Al Saadoon and others*** **[2016] EWHC 773** Leggatt J. made some observations on the current processes of the IHAT. He maintained that, as a general rule, a decision whether to establish an inquiry (by the Inspector Sir George Newman) should not be made before IHAT has concluded its investigation of a case.[11] Furthermore, he endorsed the DSP's proposed amendment to the test to be applied at the outset of each case as to whether prosecution is a realistic prospect, thus:

"I therefore agree with the DSP that it is appropriate to ask at an early stage whether there is a realistic prospect of obtaining sufficient evidence to charge an identifiable individual with a service offence. If it is clear that the answer to this question is "no", there can be no obligation on IHAT to make any further enquiries. In some cases where the answer is not immediately clear, it may well be possible to identify one or more limited investigative steps which, depending on their outcome, may lead to the conclusion that there is no realistic prospect of meeting the evidential sufficiency test. Examples of such steps might be carrying out a documentary search or interviewing the complainant or a key witness. It goes without saying that it will be a matter for the judgment of the Director of IHAT in any particular case how the test formulated by the DSP is applied."[12]

3.18 Leggatt J. also addressed the issue of the level of information provided by the claimants. He said this:

"I am satisfied that, for both purposes [the IHAT's role under the Armed Forces Act and fulfilling its duties under articles 2 and 3] IHAT can properly take the view that it will not investigate an allegation of killing or ill-treatment by British forces in Iraq first brought to the attention of the Ministry of Defence many years after the incident allegedly occurred solely

[10] Paras 38-39. NB I have highlighted the passage in bold type.
[11] Para 273
[12] Para 283

on the basis of assertions made in a claim summary filed in these proceedings."[13]

3.19 It is against this background that I reviewed the IHAT. As at April 2016, when I began my review, the caseload comprised 250 alleged unlawful death cases and 1270 alleged ill-treatment cases. The latest figures, as at 30th April, are 325 allegations of unlawful killing and 1343 alleged ill-treatment cases. This increase is due to the last of the "bulge" of cases referred to above passing the pre-assessment stage and being allotted an IHAT number. While the increase is worrying at first sight the projections shown in the graphs (see next para) have taken account of the current situation.

3.20 The IHAT has provided me with two projection graphs showing how the IHAT intend to complete their investigations by December 2019.[14] It is important to note that the figures therein are estimates and extrapolations as opposed to targets or detailed analysis of likely outcomes.

4. OVERVIEW OF CURRENT STRUCTURE

4.1 The IHAT consists of the following elements:

- Command Team
- Intelligence Cell (including the Strategic Support Team (SST))
- Major Incident Room ('MIR')
- Investigative Pods
- Operational Support Team ('OST')[15]
- Case Assessment Team
- Specialist Interviewing and Overseas Liaison Office

4.2 The Command Team comprises:

- **Mark Warwick (Director)**. A former senior civilian police officer. He has been in post since November 2012.
- **Commander Stephen Hawkins RN (Deputy Head)**. The senior serving Royal Navy Police Officer in the IHAT who has statutory responsibilities (under the Armed Forces Act) and therefore makes the key decisions within the IHAT on the progress of investigations. He has been in post since January 2012.

[13] Para 288
[14] See Appendix B
[15] See 'Terms of Reference' 2.0 dated 19 May 2014 at Appendix C

- **Jamie Turner (Assistant Head (Resources)**. He has been in post since June 2014. He is responsible for the allocation and distribution of the budget received.
- **Captain David Teasdale RN (Legal Adviser)**. He has been in post for 5 years.

4.3 I have had the chance of meeting all the members of the Command Team both together and individually. I can confidently say that the team possesses all the necessary ingredients for success. All four are strong personalities but with a respect for the skills of the others. Meetings of the team are often lively as one would expect with different priorities in different hands but the result of sometimes difficult meetings has been decisions to which all are loyal. It is remarkable to observe how well the IHAT and its Command Team work when considering that its Director has 4 different ultimate "masters" – the PM(N) for investigative performance, the Army HQ for resources and, via DJEP at the MoD, the Minister, and finally his own investigational independence.

4.4 A small senior team of this kind is at risk if one of its members leaves or even if he is absent for a significant period without a competent deputy to take his place. I understand that it is possible that both Cdr Hawkins and Jamie Turner may not stay at IHAT for much longer.

4.5 The member upon whom, perhaps, most reliance is placed day to day is Cdr Hawkins due to his statutory obligations as the most senior RNP officer in the IHAT. In that connexion it is good news that in two aspects of his work there are already deputies learning aspects of his role.

4.6 A little later I shall be commenting upon the role currently played by the PM(N) in the process. If, as I understand may be the case, Cdr Hawkins effectively exchanges his post with the current incumbent, Tony Day, then the comments I make as to this aspect of the process will need to be modified since Cdr Hawkins has built up both a knowledge and an authority within the IHAT which it can ill afford to lose.

4.7 The Command Team oversee the work of the other elements which include:

- **Intelligence Cell (including the SST)**: A varied team of intelligence experts, including analysts, responsible for undertaking a wide range of analytical processes including searches of MoD databases;
- **CAT** – Case Assessment Team responsible for preparation of PIAs and PISs

- **MIR**: a team of former police officers and staff, responsible for undertaking database searches, recording information and the progress of each case and tasking Investigation Pods;
- **Investigation Pods**: five teams of Investigators (usually experienced former police officers) each headed by Senior Investigating Officers, which are responsible for undertaking investigative tasks.
- **OST**: a team of administrative staff responsible for receiving and processing allegations and corresponding with interested parties.

4.8 Their partner in this enterprise is the Service Prosecuting Authority (SPA). The SPA, headed by the Director of Service Prosecutions (DSP) Andrew Cayley Q.C. has assigned a dedicated team of lawyers to advise IHAT on cases, known as the Iraq Historic Allegations Prosecution Team (IHAPT). This takes account of the judgment of the President of the Queen's Bench Division (as he then was) already quoted – see para 3.8 above. The IHAPT, headed by Captain Darren Reed (Managing Prosecutor IHAPT) advises the IHAT from the stage at which the IHAT decides whether to embark upon an investigation until the final decision when the investigation has concluded. The IHAPT suffers from some of the same disadvantages as the IHAT. The "in-house" Army lawyers have stood aside and the lawyers have been drawn from the Navy and seconded from the CPS, none of the latter of whom had any previous Armed Forces experience or knowledge and most of whom will never have been involved in such a grave investigation before. Fortunately the DSP has a highly relevant background drawn from his previous service at the International Criminal Court (by which a preliminary investigation into possible war crimes by British Forces has been launched).[16]

5. OVERVIEW OF CURRENT PROCESSES

5.1 The progress of an allegation from its receipt into the IHAT to conclusion is governed by five processes or 'pillars'[17]. These were devised by the IHAT management team, have been in operation since late 2012/early 2013 and improved and adapted to meet changing circumstances, in particular the sudden spectacular increase in the case load in 2013 and 2014 and decisions of the Divisional Court from 2012 onwards. They diverge at pillar 2 below, according to whether the allegation under consideration is one of ill-treatment, which may amount to a war crime under the International Criminal Court Act 2001 Schedule 8, or of unlawful killing. Throughout the

[16] See para 3.12 above
[17] Copies of which are attached at Annex D

five pillars, the progress of the case is registered and monitored by the Major Incident Room (MIR).

6. PILLAR 1 – INITIAL ASSESSMENT AND RECORDING

Current process

6.1 This pillar has developed recently in an attempt to apply the earliest possible "sift" process to the cases which have come in in the years 2013-4 in particular.

(i) The IHAT Command Team receives an allegation from PIL, Leigh Day or the MoD – or the IHAT itself generates a new allegation as the result of its investigation of an existing allegation.

(ii) The Major Incident Room (MIR) and Strategic Support Team (SST) check the allegation against their respective databases.

(iii) The SST meets to consider whether the allegation meets the "initial assessment threshold", namely whether there is a possible (new) serious offence committed by British armed forces disclosed by the allegation. This important function has recently led to the discontinuing by the IHAT of some 1500 cases at this stage on the ground for instance that they concern the same allegations as existing ones.[18] In addition the sift will identify and prioritise cases according to a sensible list of priorities – briefly – deaths in custody, deaths of juveniles, other deaths, "serious" ill-treatment e.g. rape, grievous bodily harm, ill-treatment which may amount to a "war crime" under the Rome Statute and other ill-treatment.

(iv) If it does, the IHAT Command Team – in practice the Deputy Head - considers the papers and the SST recommendation and, if he considers it appropriate, the Director writes to the (PM(N), currently Commander Tony Day, asking him to endorse the decision to investigate. This part of the process has imposed an enormous burden on the Deputy Head. Fortunately the IHAT has recently employed a deputy to assist him.

(v) The PM(N) decides whether to allocate the case to the IHAT.

[18] This function is more difficult than might appear because, inter alia, of the problems associated with the transliteration of Arabic names.

Suggested improvements to the Pillar 1 process

6.2 As to (ii) - I was concerned to understand why two sets of checks were necessary at this stage. The answer lies in the existence of two stores of information. The MIR has access to the well-known HOLMES system used by police forces as a searchable database for more than 30 years (though updated from 2004 to 2006) with which to look for leads etc in the investigation of serious crime. The second, the FDHC, is a database of MOD and Army material. It is – at least so far as the IHAT is concerned – a far from perfect database since different collections of information within the ministry have in effect been "piled on top of each other". However it does contain material which HOLMES does not – and of course *vice versa*. I was assured that the use of both is essential and has enabled the identification of many duplicate or linked cases.

6.3 As to (iv) and (v) I questioned the value of this step. Unsurprisingly perhaps since he has played no part in the assessment himself, the PM(N) has never refused to follow the Deputy Head's recommendation. The concept that a Chief Constable has to sign off every decision to begin the process of investigating a possible crime is not one common to civilian policing. It is inserted we were told as a "defence mechanism" and usually only adds a few days to the length of the overall process. However,

a. The Deputy Head of the IHAT is an officer of the same rank as the PM(N).
b. The PM(N) has a full diary and workload connected with his principal role.

I would suggest that the steps could be removed without harming the integrity of the process.[19]

6.4 As already mentioned, a number of those to whom I spoke suggested that the concentration of this initial assessment/sift process in a single pair of hands was delaying the process and risked diverting the Deputy Head's attention from other important aspects of his duties.

6.5 The reality is that the vast majority of the claims are generated by PIL. The quality of the information supplied has often been very poor - sparse, often inaccurate as to identities, dates, times etc, and set out simply as a short unsigned narrative more or less accurately translated from the original

[19] But see my earlier comment about the predicted exchange of roles between the Deputy Head and the PM(N).

Arabic. After hearing argument the Designated Judge ruled on 7th April 2016 as follows:

> *"289. I consider that IHAT can as a general rule properly decline to investigate such an allegation unless it is supported by a witness statement which is (i) signed by the claimant, (ii) gives the claimant's own recollection of the relevant events, (iii) identifies any other relevant witness known to the claimant and the gist of the evidence which the witness may be able to give, and (iv) explains what, if any, steps have been taken or attempts made since the incident occurred to bring it to the attention of the British authorities. I think it reasonable and consistent with its responsibilities for IHAT to require such evidence for the following reasons:*
>
> *i) Communication through intermediaries in Iraq and solicitors in England gives ample scope for mistranslation and misunderstanding. It is reasonable to require confirmation in the form of a signature that the allegation made on the claimant's behalf does indeed reflect the claimant's own evidence.*
>
> *ii) Before an allegation made many years after the relevant events can be accepted as credible and such as would indicate to a reasonable person that a criminal offence may have been committed, it is reasonable to require a greater level of detail and explanation than might be required if the allegation had been made promptly. That detail and explanation, in my view, may properly include the information described above.*
>
> *iii) It is also reasonable to require this information to be provided before a decision can be taken that there is a realistic prospect of obtaining sufficient evidence to charge a person with a criminal offence. I have endorsed this test as one which it is appropriate for IHAT and the SPA to apply in deciding and advising on whether it is necessary to investigate a particular allegation.*
>
> *iv) As discussed, in order to manage its workload and deal with the vast influx of allegations in a proportionate way, IHAT needs to set priorities and target its resources. In doing so I consider that IHAT can reasonably take the view that it should only devote its investigative resources to allegations which meet defined minimum standards of evidential support.*
>
> *290.In expressing these views, I am not seeking to preclude the possibility that there will be cases which IHAT considers it necessary or appropriate to investigate in the absence of such a witness statement – for example, because of the nature or a particular feature of the allegation made or because information already in the possession of the Ministry of Defence indicates that the allegation is one that ought to be investigated.*

291.My provisional view, however, is that it is in fact appropriate to go further in setting the threshold level of information generally required and, as well as requiring a witness statement which meets the criteria indicated above, also to require claimants to provide any documents in their possession or to which they have access which are relevant to the allegation made. That would include copies of any statements made for the purpose of any Iraqi police investigation or court proceedings or for the purpose of a civil damages claim in England. The importance of such documents has been highlighted by cases discussed in this judgment, and in particular the case of Jaafar Majeed Muhyi where the fact that a witness statement and other documents prepared for the purpose of a civil damages claim were not disclosed until a late stage resulted in a substantial waste of time and costs."

6.6 This ruling, clearly sensible on its face, may have consequences of course in that cases already abandoned at this early stage – or later – will have to be reviewed if the claimants' representatives produce more and better evidence. Hopefully too it will lead to the abandonment of claims which proper scrutiny by those representatives would reveal to have no prospect of success.

7. PILLAR 2 – PRE-INVESTIGATION (ALLEGATIONS OF ILL-TREATMENT)

Current process

7.1 The case is "triaged" by the SST – in practice the Deputy Head. This involves a decision as to whether the case involves allegation(s) of "serious" ill treatment or of other key priority offences such as rape. If it does, the process of interviewing relevant witnesses is conducted by means of the Operation Mensa process. If it does not, it is assessed for its possible connexion to an ongoing investigation or "problem profile".[20] If neither it may be sifted out. Few cases in fact fall out at this stage. This decision is currently made by the Deputy Head.

[20] Such as a concentration of allegations within a particular unit or site, or a series of allegations of ill treatment in which the same individual is shown to have been present.

7.2 The Operation Mensa interview[21] process or "Mensa process" is then carried out with the complainant. Usually this is the first detailed witness account, since the information contained in the original complaint is often very brief.

7.3 Cases in the first category above are then subject to a second stage triage. This checks again – in the wake of the interviews - that the case does not fit a "problem profile" and thus merit allocation to one of the existing problem profiles.

7.4 The MIR registers the triage results and raises any necessary actions.[22] A Case Assessment Manager (CAM) then begins to prepare a report called the Pre-Investigation Summary (PIS) with accompanying documents.

7.5 A third stage triage is conducted by the SST/Director of Intelligence (DOI).[23] Following this the CAM or DOI presents the PIS to the IHAT Command Team – in practice the Deputy Head - for checking. Once checked, the PIS and relevant documents are then presented to a delegated Iraq Historic Allegations Prosecution Team (IHAPT) lawyer for advice.

7.6 The lawyer then considers the case and produces a 'point brief' for the consideration of the Director of Service Prosecution (DSP). This point brief and the PIS is then considered by the entire team of IHAPT lawyers who discuss the case at a "pre-meeting".

7.7 The Joint Case Review Panel ("non-fatal") attended by the entire IHAPT team including, when available, the DSP. The JCRP review the case with the benefit of the IHAPT lawyer's (oral) advice (and, if this is the case, any "dissenting judgment" from a colleague).

7.8 Following the meeting, the IHAPT lawyer settles their advice in writing and provides it to the IHAT Command Team.

7.9 The Director or the Deputy Head - then decides whether to embark on an investigation. The fall-out rate at this stage has been as follows:

- Ill treatment – 16
- Death cases – 35 before JCRP, 27 after JCRP

[21] See later for this area which is currently the single biggest problem facing the IHAT and its aim to complete its work within the current deadline of 2019.

[22] I asked for the turnaround time for "actions". All have a 42-day time limit. If not completed by then the system generates a warning to the recipients. However, the difficulty of carrying out some actions means that the 42 day limit is often grossly exceeded.

[23] This has sometimes meant returning to PIL if the information discovered through the interview process or otherwise is significantly different from that supplied by e.g. PIL.

7.10 Investigations are divided into two categories – Full investigation which means what it says, and Directed or Focused Investigation which, as its name suggests, involves a particular avenue of investigation the result of which will decide whether the case should be discontinued or proceed to full investigation. Once the particular investigation has been completed the case goes back to the CAM or DOI and is reconsidered by the JCRP.

7.11 I was informed that in the last 12 months only one case has been directed to a full investigation.

7.12 The case is then put into a holding stage until the Command Team is able to allocate the appropriate human resource/investigation team to it. This process involves the Tactical Tasking and Coordinating Group (TTCG). (See para 9 below).

Suggested improvements to the Pillar 2 process (ill-treatment)

7.13 This process, involving as it does, 15 stages before the decision to embark on one the two types of investigation, seems cumbersome. However, its evolution through 11 different versions and the omission of some 10 stage numbers during that evolution has undoubtedly been influenced by the results of court hearings, by the desire to ensure that the IHAT process and its audit trail will withstand close scrutiny, and by attempts to reduce the "bureaucracy" to the minimum necessary. It is also clear that since the Command Team are familiar with all cases, the reality, as explained to me by Cdr Hawkins, is that he will have from the outset a good idea of whether a particular case is likely to progress and if so which SIO/pod would be best placed to handle the investigation.

7.14 The key elements of Pillar 2 are:

(i) The decision by the Deputy Head following the 1st point triage.
(ii) The JCRP/Command Team decision following legal advice.
(iii) The allocation of cases which merit investigation, whether full or focused, to a Senior Investigation Officer.

7.15 The triage process could be streamlined without any serious risk to the two key aims of discontinuing investigations which have no prospect of leading anywhere and of progressing serious ones so that any prosecution or coronial-type inquiry (IFI) takes place as soon as is practicable.

7.16 The discontinuance rate resulting from the first stage triage is very small, since the Initial Assessment stage is so successful that few cases survive it if they are not potentially worth investigating. The important functions of prioritisation and/or allocation of a case to a particular "problem profile" could be performed at the time the case is deemed suitable for investigation at the conclusion of Pillar 1 when the consent of the Provost Marshal (Navy) is sought (see para 6.1.(iii) above).

7.17 The second stage triage is clearly necessary since the Mensa process will necessitate a fresh look at the case to see whether it is potentially worth progressing/falls into a problem profile.

7.18 It is hard to see much added value in the 3rd stage triage since the all-important JCRP in which the IHAPT lawyers will probably have their first input is itself a triage operation.

7.19 The IHAPT system, which involves all the IHAPT lawyers studying all the cases which are for review at the next JCRP seems unnecessarily cumbersome. Of course, with lawyers who have just joined the team and who have little or no previous experience of the kind of work which they are undertaking, there are obvious merits in a degree of formal team working. However, it ought to be possible for individual lawyers to make their own decisions as to the advice they give not forgetting that in the "chambers" environment in which they work at RAF Northolt and Upavon they can always go to colleagues (including their Director) to bounce opinions off if they wish. In any event, Captain Reed as the IHAPT Managing Prosecutor sees all point briefs, advices etc before they go out. The number of "non-fatal" JCRP meetings is set to increase as the death case backlog is reduced and the "problem profiles" become ready for consideration.

8. PILLAR 2 – PRE-INVESTIGATION (ALLEGATIONS OF UNLAWFUL KILLING) – "Death cases"

Current process

8.1 This pillar is broadly similar to the ill-treatment pillar with entirely sensible differences due to the different nature of the potential offences and the types of investigation which may result. Death cases will almost always be treated separately rather than being put into a "problem profile" as many of the ill-treatment cases are. The differences therefore are:

a) Earlier involvement in the process of the Case Assessment Team who prepare a Pre-Investigation Assessment (PIA).
b) The omission of the Mensa process and of
c) The potential categorisation of cases into problem profiles and of
d) The 3rd stage triage.
e) The inclusion (in a limited number of cases) of a further screening process carried out by the Deputy Head. This last is there because a number of cases have involved deaths caused by, for example, "air-delivered" munitions and it is often impossible to determine whether or not they were delivered by British forces. This is very likely to lead to the dropping of some 40 cases.

8.2 The JCRP meeting and the resulting decision by the Director or Deputy Head is the crucial outcome of this this pillar. I had the good fortune when near the end of my research of witnessing the work of a "fatal" JCRP. The meeting considered eight cases, which marked a significant increase on past meetings in which four was the usual throughput. The discussions were lively and comprehensive and all present had valuable input from their different standpoints to contribute to the discussions of the individual cases. In the event the cases had been looked at by four lawyers all of whom attended the meeting as did a 5th lawyer and the Managing Prosecutor, Captain Reed. Neither the DSP nor the Deputy Head were able to attend.

8.3 I make similar suggestions to those made in respect of the ill treatment pillar 2.

8.4 However the point I made above (para 7.19) concerning the involvement of new lawyers in the full process was borne out by the attendance of one such who presented his first two cases at the meeting.

8.5 The three basic functions of this pillar are the same, namely the filter process carried out by the Deputy Head, the JCRP/Command team decision and the allocation of cases which are to go forward to an SIO.

Suggested improvements to the Pillar 2 process (unlawful killing)

8.6 The triage process could be streamlined without any serious risk to the two key aims of dropping investigations which have no prospect of leading anywhere and progressing serious ones so that any prosecution or coronial-type inquiry takes place as soon as is practicable.

a. **The first stage triage is clearly necessary and has led to a significant sift out of cases which are "going nowhere".**
b. **It is hard to see much added value to the 2nd stage triage since the all-important JCRP in which the IHAPT lawyers will have their first input is itself a triage operation.**

8.7 **The IHAPT system, which involves all the IHAPT lawyers studying all the cases which are for review at the next JCRP seems unnecessarily cumbersome. Of course, with lawyers who have just joined the team and who have little or no previous experience of the kind of work which they are undertaking, there are obvious merits in a degree of formal team working. However, it ought to be possible for individual lawyers to make their own decisions as to the advice they give not forgetting that in the "chambers" environment in which they work at RAF Northolt and now at Upavon they can always go to colleagues (including their Director or Deputy Director) to bounce opinions off if they wish. Homicide offences are part of the staple diet of any experienced prosecutor and the military context has less relevance to them than to the "war crime/ill-treatment" cases.**

8.8 **I wonder too whether the Director's job would be made easier if in addition to the PIS/PIA in each case – and subsequent Report if the case had already been before a JCRP – the point brief to which each lawyer spoke at the meeting could have been sent in first for consideration by the IHAT Command Team. It may be that there are practical reasons for not doing so but it seems to me that the discussion would be even more focused and the confidence of the Director/the Command Team in his/their ultimate decision to drop an investigation, or to direct a focused or a full investigation would be greater.**

8.9 A very important issue became apparent during the discussions of some of the cases, namely the limits of the role of the IHAT and its duty – or not – to continue to conduct enquiries which may make it easier for the MoD to defend or concede civil claims or for the MoD to make a decision whether or not to refer the case to an IFI and, if so, to make it easier for the Inspector to conduct his Inquiry. There are obvious benefits in early resolution of such issues, which are likely to be ones which the state should undertake to satisfy its domestic and international legal obligations, and in the end the cost of such enquiries will be borne by the MoD in any event. It is also the fact that the IHAT are currently best placed, and perhaps the only agency able, to carry out such inquiries. However if the reality is that there is no "realistic prospect of obtaining sufficient evidence to charge an identifiable

individual with a service offence"[24] it is arguable that the IHAT – under such pressure to complete its core work – should not take on further work which is technically beyond its remit.

8.10 I raised this issue when I met Sir George Newman and his Assistant at the end of my review having previously taken the opportunity to attend a session of the most recent IFI hearing during which he took oral evidence. He well understood the dilemma referred to above. He has no criticism of the IHAT, save the occasional delay caused, in part, by the existence of the two databases to which I have referred, of the timeliness of the responses to his requests for information from both the IHAT and the SPA/IHAPT. His Terms of Reference require the provision within seven days of the relevant papers from the DJEP. He was very complimentary of the standard of the FCRs he has received and of the cooperation he has received from the IHAT. For practical reasons therefore I suggest that the current arrangement whereby the IHAT continues to assist the MoD and the IFI system is the best one is maintained

8.11 His one concern was over material not part of a particular case file/IHAT number, and the understandable caution about letting him see material which might one day form evidence or unused material in criminal proceedings. He (and I), was confident that he could be trusted with such material on undertaking that the contents of files pertaining to possible future proceedings would not be revealed during the IFI process. **I recommend that current and future IFIs be supplied with all material sought by the Inspector subject to suitable undertakings in respect of public disclosure of it.**

8.12 This issue is likely to become more pertinent as the investigations arising out of the problem profiles progress.

9. PILLAR 3 – ALLOCATION OF RESOURCES

Current Process

9.1 All investigations are conducted under criteria set by the Tactical Tasking and Coordinating Group (TTCG). This comprises Mark Warwick and/or Cdr Hawkins, Jamie Turner, SIO (Senior Investigating Officer) leaders, the Head of MIR and the Head of the Intelligence Cell (which includes the SST).

[24] Per Leggatt J at para 282 of *Al-Saadoon v Secretary of State for Defence* [2016] EWHC 773 (Admin)

The actions described below are of course generic in that the process is not applied case by case. But in general terms –

(i) The SST prepares a Strategic Assessment every 12 months to review current priorities etc. which is reviewed at the 6 month point.
(ii) The SST presents this to the IHAT Command Team.
(iii) The IHAT Command Team decides on priorities for the next 12 months to decide the IHAT Control Strategy.
(iv) The SST prepares a Tactical Assessment to manage resources.
(v) The SST presents the Tactical Assessment to the IHAT Command Team.
(vi) The IHAT Command Team then agrees plans of action.
(vii) The TTCG uses the Tactical Assessment and plans of action to decide whether there are sufficient resources available to allocate the case or group of cases to a particular group of investigators (a "pod"). If there are not the case is held in a "queue" in the Major Incident Room which has been recording all steps thus far.

9.2 Clearly the efficient deployment of manpower is vital to the success of an organization like the IHAT. While of course I did not get into the detail of the ongoing work or attend one of the half-yearly meetings it was clear that both the Deputy Head and Mr Turner were well on top of their "brief". The successful initiative of the front-loading of resources to identify the cases which have no prospect of a criminal prosecution (Pillar 1) which has resulted in the elimination of 1500 cases is testament to this.

10. PILLAR 4 – INVESTIGATION

Current process

10.1 In the event that the Command Team has, following advice and a meeting of the JCRP, decided that the test (as endorsed by Leggatt J in *Al Saadoon and others* [2016] EWHC 773 para 283) is satisfied, the case then goes to the Deputy Head of the IHAT for allocation to an SIO with an accompanying direction to conduct either a "full" or a "focused" investigation.

10.2 If it is "focused" the SIO conducts it and submits a report to the JCRP, so that the case goes back "down the snake" to para 7.5 or 8.2 above. One death case has been discontinued after a focused investigation.

10.3 If it is "full" the SIO and an IHAPT lawyer produce a Joint Investigation Strategy Document (JISD), based on the ToRs issued by the Command Team. The JISD is presented to the IHAT Command Team. If endorsed by the Team the investigation proper begins. Each month the SIO produces an updated report on progress to the TTCG. Each quarter the SIO/IHAPT lawyer produces a report to the IHAT Command Team. The IHAT Command Team then reviews progress with the SIO and lawyer. Nine death cases and two ill treatment cases have been discontinued after a full investigation.

10.4 There is an optional/possible further stage of an IHAT internal review of the investigation. I understand that that stage has been undertaken – and is currently being undertaken - by John Birch, a former Detective Superintendent, who provides Quality Assurance and Review. I will deal with his work later in the report.

10.5 At the end of the investigation the SIO produces an Evidential Sufficiency Report, and the IHAPT lawyer a Legal Advice, to the Deputy Head of the IHAT. He then decides whether in his opinion the Evidential Sufficiency Test has been met. If it has, a prosecution should follow unless the Public (including Service) Interest test is not met – a matter for the DSP to decide in due course. There is no system of caution or conditional caution which can be deployed in the non-service context.

Suggested Improvements to the Pillar 4 process

10.6 I was informed that investigators who need to use Regulation of Investigatory Powers Act 2000 (RIPA) powers frequently have to wait for long periods for the police forces who will actually conduct the surveillance necessary to do so, or that limitations on the number of applications which a given force will accede to are imposed as part of a contract.

10.7 All RIPA applications have to go through the PM(N) Navy as the responsible "Chief Constable". I see no alternative to this procedure, mirroring as it does those in the UK[25].

10.8 Similar problems – again not universal but confined to individual forces – attend requests for criminal records. I was not given "chapter and verse" about this issue but it was clearly a concern, even if only relevant to a small number of investigations. **I recommend that efforts be made to ease this problem if necessary via ministerial channels.**

[25] and the Channel Islands of which I am currently the Surveillance Commissioner

11. PILLAR 5 – POST-INVESTIGATION

Current process

11.1 If the Deputy Head decides that there is insufficient evidence to charge (see para 10.5), he consults the Director of Service Prosecutions (DSP) in writing.

11.2 The DSP responds in writing, either accepting the decision or asking for more to be done.

11.3 The Deputy Head then either:

(a) Asks for the further work to be done. This work then has to be prioritised/resourced through the TTCG and when completed the case goes back to the Deputy Head who starts again at para 10 of Pillar 4. Or:
(b) he sends the case to the MIR for the papers to be put together for the preparation of the Final Closing Report(FCR).

11.4 The FCR then goes to the Director IHAT who signs it off.

11.5 The IHAT Operational Support Team then:

(a) inform PIL/Leigh Day and the High Court of the decision and write a letter to the victim or the family of the deceased, the letter being translated and given to the family by a liaison officer in Iraq; and
(b) forward the FCR to the DJEP at the MoD to identify systemic issues and to decide whether to refer the case to an IFI.

11.6 Following on from para 10.5 of Pillar 4 – see para 11.3(a) above - if the Deputy Head decides that the evidential sufficiency test has been met he refers the case to the Commanding Officer or the DSP, depending on the classification of the offence to be charged within the Armed Forces Act 2006.

11.7 In theory, though not so far in practice in either situation the CO or the DSP may decide that further work is required in which case the case goes back to the TTCG.

11.8 If the CO or DSP agree with the decision, the process of informing the RCJ, PIL and the victim is followed as at para 5 above and the suspect is charged.

11.9 As will be clear from my ToR the post-investigation process is of limited relevance to this report. The only exception being the question of the co-operation of the IHAT with Sir George Newman's IFIs - see para 8.11 above.

12. THE SPA/DSP/IHAPT

12.1 The SPA/IHAPT/DSP are closely involved in the process up to the decision to investigate or not and thereafter at the decision stage for charging serious offences. That involvement is welcome. Also welcome is the increasing deployment of SPA lawyers to Upavon (now 4 – formerly 2) so that they can assist on the spot if someone has a legal question to which they need a quick answer.

12.2 The Managing Prosecutor of the IHAT (Capt Darren Reed RN) with whom I have spoken at length has an enviable mastery of his brief and of the processes and cases in which he and his lawyers are involved. The lawyers whom I saw presenting their point briefs to the "fatal" JCRP did so with a clear understanding of their cases and dealt with the points made at the meeting well.

12.3 As set out at paragraph 3.17 above, the SPA put forward a proposed test at the pre-investigation stage which was adopted by the Designated Judge, Leggatt J in *Al-Saadoon*. This test was accepted as the threshold for the decision to embark/not to embark on an investigation. Of course the evidential test for prosecution following an investigation is the same as that for Crown Prosecutors. The proposal and acceptance of this step was a positive move.

12.4 I have suggested ways in which the burden on the team might be reduced, thus hopefully freeing up some lawyer time to expedite the SPA's work at both stages of the process.

12.5 There have been concerns at the IHAT at the slow turn-round of legal advice. It is to be hoped that they will diminish with the recent arrival of the new recruits.

13. ISSUES WHICH MAY AFFECT COMPLETION OF IHAT'S WORK

13.1 Some of the comments within this section may be considered to be beyond my remit but I hope it is worth mentioning the issues below since their resolution or not will have a direct effect on the ability of the IHAT to complete its task on time and on budget.

13.2 While I have indicated where I believe yet more work can be done to streamline the processes within the IHAT there are a number of fundamental issues which need to be dealt with in order that the timetable set out in the enclosed projection graph can be delivered or even improved upon.

The Mensa process

13.3 The process of interviewing witnesses, both complainants (in ill-treatment cases) and other key witnesses (in all types of case) which is necessary to compile a proper file of investigation upon which decisions can be made, has been fraught with difficulty and represents the single most intractable problem facing the IHAT and the UK generally in approaching the issue of possible serious offending by its troops in Iraq. I hope it will be clear from what follows in this and the following section that in the event that there were further resources available to support the IHAT's work the first area to which they should be devoted is the process of interviewing witnesses – whether by the Mensa process or by the VTC process with which I deal below (paras 13.9-13.11).

13.4 Many of those who read this report will be better aware than I of the problems which have faced the IHAT in this context and of the various solutions which have been adopted.

13.5 The current Overseas Liaison Officer (OLO) has been in post since October 2015 and was engaged because of the need to employ someone with particular skills, e.g. in handling informants. I was impressed by his grasp of the issues and his assistance in trying to improve this process.

13.6 The recent use of a city in the region as a meeting point for some 260 witnesses and IHAT investigators etc has been brought to an end by a change in visa requirements for Iraqi citizens. It is now practically impossible for the IHAT's witnesses to enter the country concerned. I am aware as I write that strenuous efforts are being made to find other solutions

to this problem whether in Iraq or in another neighbouring country. It is to be hoped that they bear fruit. Even the former process – described to me as a "logistical nightmare" – is very resource intensive. I was informed of the problem of obtaining the services of someone to act as intermediary etc for the witnesses and the attempts to solve them. It is no part of my review to try to tell the MoD what it should do.

13.7 However, it is no exaggeration to say that the success or failure of the IHAT process and its credibility as a means of fulfilling the UK's legal obligations hangs on its ability to access witnesses. Frequently, direct contact with the witness has revealed that there were serious inaccuracies in the account presented to the IHAT by legal representatives such as to render further investigation unnecessary. Of course in other cases the evidence has been cogent enough to make further investigation e.g. by the interviewing of suspects or of other potential witnesses essential.

13.8 A failure to solve what is a very difficult problem will likely have very serious consequences, both in the domestic and international judicial context[26]. It would be hard for any court anywhere to accept that in the 21st century a country could not carry out its duties because there is no possible way of securing direct access to witnesses. After writing this and sending it to the Attorney General as a draft in case there were further issues he wished me to cover I heard and saw a summary of events of the previous week and up to the day I sent it. I heard that the visit to a city in Iraq had been successful and that, subject to getting the necessary Iraqi approvals, the conditions were right – in some respects better than before in the previous location – for the Mensa process to be reborn there. I understand that other Iraqi options might also need to be considered. It is of course not for me to try to make such decisions but it is appropriate to repeat that a solution must be found. For the UK/MoD/FCO to go to a domestic or international tribunal having unreasonably delayed or, even worse, failed to provide access, when such access was available, to its justice system to the key people, namely victims and eye-witnesses etc. of incidents involving death or ill-treatment, would be impossible to defend. The current situation in which the Mensa process is in abeyance is the biggest single obstacle in the way of completing the IHAT process in time and would be biggest single problem facing the UK government in defending its handling of the issue in either the Divisional Court or an international tribunal.

[26] See the excerpt from Leggatt J's judgment highlighted at para 3.16 above.

Extended use of VTC (video conferencing)

13.9 I have not been able, given my brief, to go through individual files **but I do believe that some of the witness access difficulties may be avoided by more extensive use of the VTC system now so commonly used in business and in legal proceedings.** The current view within the IHAT is that only (but all of) those people who allege that he/she has been the victim of serious ill-treatment or of a serious sexual assault must have the full ABE process at the pre-investigation stage. This represents a severe reduction in its use since a comment of the Designated Judge in *Al Saadoon* to the effect that the Mensa process, if used for all potential witnesses, would mean that the IHAT process would last till 2030). **In my view, although there will always be an irreducible minimum of witnesses who must be given the full ABE interview process, a video interview followed by an electronic transfer of the resulting statement to be signed by the witness in his or her home country would often enable decisions to be made as to the strength of the evidence to justify a full investigation or even for a charging decision, or a later decision to refer a case to an IFI, to be made.**

13.10 This suggestion is supported I believe by the fact that most Mensa interviews have been conducted in ill-treatment cases at a stage before there is an investigation and therefore before there is an SIO in place. I can picture the frustration felt by an SIO (and his/her counterpart IHAPT lawyer) who is allocated an investigation containing a Mensa interview with the alleged victim which is missing essential facts which are necessary in concluding whether there is sufficient evidence to prosecute.[27]

13.11 Delays in the interview process for complainants lead to delays in the process of obtaining evidence from former service personnel and a likely reduction in their ability or willingness to assist investigations. This has been apparent to the IHAT Command team, with some witnesses who were earlier prepared to assist, now withdrawing their assistance. I repeat what I said in para 13.3 above. Current – and any future - resources must be devoted to this issue of contact with witnesses, whether claimants or otherwise, which represents the single most intractable obstacle to the work of the IHAT and of the UK's domestic and international obligations.

The FDHC database

[27] We witnessed an example of this in a case before the JCRP in which a clarification statement was required because the witness had not been asked the relevant questions during their Mensa interview.

13.12 The IHAT has been hampered by patchy record-keeping or record-retention within the military especially for the period June-December 2003. In one instance that may itself be part of a systematic issue which the MoD needs to investigate. However even the information held on the FDHC is not held in a user friendly way. Searching is not easy although the Case Assessment Team has managed to achieve some improvements in "searchability". There has been a recent decision to transfer TELIC material to TNT, for ease of storage and retrieval.

Secret material

13.13 Although once DV-ed I understand that my clearance has expired and there was no time in the period during which I have been working to renew it. I have therefore had no chance to consider or discuss in detail any issues arising from pre-investigations or investigations which involve Top Secret Material and the like. I can report however that there are issues connected with the difficulties of obtaining Top Secret material of direct relevance to the IHAT decision processes, as well as issues concerning the obtaining of foreign secret material – usually our main partner in Iraq – the US. This was brought to my attention concerning a detention facility which was run partly by the UK and partly by the US during the period April to December 2003.

The Problem Profiles

13.14 The next issue for the IHAT is the question of the Problem Profiles – currently 43 in number (containing many more individual cases). It has been an entirely sensible decision to bring together under one umbrella allegations which are on the face of it linked to each other by e.g. the same personnel identified as being involved in a number of different and independent allegations of ill-treatment perhaps at the same facility over a particular period and under the supervision of the same commanding officer(s). I have of course not looked at the detail of these cases but when the time comes to perform the task of investigating these profiles the quality of both investigative and legal input needs to be of the highest standard. I have been involved myself in cases which have faced similar problems both as prosecuting counsel, and as DPP and later as the judge in charge of the terrorism list with an oversight role, and can, I believe, speak with some authority. It will be important for the person who may one day present the case to a court to be involved early since it is only in my experience possible for the person who would have to present the case to see clearly whether or not there is in fact a case worth putting before a court or not, and, if there is,

which parts of the evidence are necessary to make the case and which can be omitted in order to make the case manageable and, whether there are issues of disclosure under the Criminal Procedure and Investigations Act 1996 which may make a prosecution impossible.

13.15 In such cases, the interviewing of suspects has to be carried out with a clear idea of the possible uses to which the interview may be put. If the suspect may become a witness for the prosecution, the interview will no doubt have to be disclosed as unused material. If the suspect is charged – and, as frequently happens he/she has declined to answer questions after caution - it is essential that the questions are framed in such a way that a failure to answer particular questions can be properly deployed by the prosecutor at trial in support of the prosecution case.

13.16 Whether or not there are prosecutions based on the problem profiles and whether or not any prosecution results in convictions the problem profile issue will of course bring into sharp focus the UK's duty not only to investigate possible individual crimes but to identify and then take steps to rectify systematic issues which may have been identified.[28]

13.17 In short the problem profile issue will be another difficult though not of course impossible hurdle to jump.

The outstanding death cases

13.18 These will of course almost always be investigated as individual cases unless for instance more than one person is said to have been killed in the course of a single incident.

13.19 I was concerned that a significant number have not yet reached the decision stage for investigation or no. Even the most recent of them occurred nearly 10 years ago. The flow chart indicates that the case screening within the pre-investigation process in these cases will be over by the third quarter of this year. If that is achieved, it will be a significant milestone. The chart goes on to allow a further 3 years for all such investigations to be concluded.

13.20 I venture to suggest that both domestic and international courts would find that end date alarming, although it would of course represent a significant improvement on figures mentioned from time to time in judgments of the Divisional Court.

[28] see e.g. paras 192-4 of *Ali Zaki Mousa No 2* [2013] EWHC 1412 (Admin).

Legal advice

13.21 I was told that this is sometimes very slow to turn around. I understand that there have been continual difficulties recruiting IHAPT lawyers – whether from within the SPA, whose lawyers have their "ordinary" diet of work to attend to or from outside – e.g. the CPS – itself a hard-pressed organization in the present climate of austerity. It pleasing to note that during my time visiting Upavon the number of lawyers working full time at Upavon has doubled to four. It is essential that as the workload moves away from pre-assessment towards investigation and possible prosecution that that complement is at least maintained.

Over-reliance on certain individuals and resilience

13.22 It will be clear from what I have already said that the IHAT relies enormously on its Command Team. If any one of them were to leave suddenly it seems certain that the necessary leadership and supervision, to say nothing of the practical assistance and support each now provides, would be impossible to replace immediately and would very likely lead to a dip in performance. I have already referred to the projected exchange of roles between Commanders Day and Hawkins. In view of the knowledge and experience of both that should not present too much of a problem. However, it was generally felt that for all his undoubted ability, knowledge and energy, Commander Hawkins, and therefore anyone who is carry out his role as Deputy Head in future, has too much on his plate, no doubt because the IHAT is now dealing with far far more cases than it was when he was appointed back in 2012.

13.23 It is therefore comforting to hear of the recent appointment of someone to assist him in this role and of an Operational Team Leader to take over the day to day supervision of operations.

13.24 That brings me to the last of the problems which has been with the IHAT for years. The majority of its staff and all its investigators are contractors supplied after a competitive tender by an agency. The individual contractors are invited to apply and selected after an interview process. They are now – although at first they were not – subject to a form of appraisal process and I was told that over the last few years poor performers have been let go. While the evidence tendered by a former contractor was rejected by the Divisional Court the ability to supervise them has been too limited and there is clearly a need for a John Birch figure to act as an inspector for the foreseeable future.

13.25 However there has not been the degree of oversight which one would expect in a domestic police force of individual SIOs so that performance has in fact varied from pod to pod/SIO to SIO. Cdr Hawkins has neither the time nor, perhaps, the investigative background to tell former senior officers what to do to improve. Aware of this the Director has asked John Birch, to whom I have already referred, to carry out specific audits of investigations. Mr Birch is a veteran of the IHAT, having given evidence on this topic like Cdr Hawkins to the Divisional Court in 2012. He informed me that he speaks as he finds and has been referred to in the past as a "hatchet man" or "enforcer". He has produced some firm recommendations in respect of individual cases. It is not for me to comment upon those cases but he did express the concern that it is one thing to recommend improvements but another to see that those improvements are effected.

13.26 All I can say is that it is praiseworthy, as indicating a desire to achieve continuous improvements in its processes that the IHAT, and its Director and Deputy Head in particular, have re-engaged Mr Birch. However it will be essential that his recommendations are implemented or that good reasons are found for not doing so.

14. RECOMMENDATIONS AND MY TOR

"2. Recommend ways in which such processes could be:
…c. conducted in a manner that will enable the earliest possible identification of cases that could never result in a prosecution;"[29]

14.1 This topic has been the subject of a judicial ruling since I was asked to conduct this review. Leggatt J has, as I have indicated above, endorsed the SPA/DSP's suggested test.

14.2 The work that has gone into the pre-assessment phase and which has resulted in the early identification of 1500 or so such cases is praiseworthy and has led to the cautious confidence that the timetables set out in Appendix 3 are achievable. In general terms, and subject to the concerns about the current workload of the Deputy Head – hopefully to be reduced by the arrival of his deputy - and the change in roles between the Deputy

[29] I have changed the order or the ToR to reflect the chronology of the process.

Head and the PM(N) the system is working well and should not be radically changed. However I recommend:

Recommendation 1:	**That the need for the Director to have recourse to the PM(N) in person as opposed to a senior Service Police Officer (currently the Deputy Head) is superfluous. This may require an amendment to the IHAT ToR.**
Recommendation 2:	**That the 1st triage stage in Pillar 2 be amalgamated with the "sift" process in Pillar 1, and that the 3rd triage stage in Pillar 2 (ill-treatment), and the 2nd triage stage in Pillar 2 (death cases) be dispensed with.[30]**
Recommendation 3:	**That the MENSA process of interviewing witnesses during the pre-investigation be replaced in the Pillar 2 phase in all but the most vulnerable witness cases by VTC interview and the MENSA/ABE process deployed in the remainder if the case is directed to a full investigation – or specifically to a directed investigation requiring such an interview.**

14.3 Two matters however, relevant to this ToR, have been discussed in the report. First, the question of how far beyond its strict remit the IHAT should stray in conducting focused investigations which may assist either the MoD in its handling of civil claims or the Inspector in an IFI or in other work to be carried out by the MoD in respect of systematic issues. It may be clear that there is no likelihood of an investigation revealing evidence of a service offence, but every likelihood that it will reveal evidence which an IFI or the MoD would need to perform their functions in due course. Viewed strictly through the prism of my ToR the answer is obvious. The IHAT should stick to what has been mandated to do. And if in future it becomes clear that the projected timetable is slipping and the IHAT is shown to have been conducting focused investigations in cases which it has already decided do not pass the threshold for investigation I would expect the Designated Judge to be critical.

14.4 Second, the issue referred to at para 6.5 above concerning the provision by PIL and others of statements and accompanying material in support of its claims.

"b. improved by greater and earlier liaison between prosecutors and investigators and, where appropriate, the investigator in charge of the quasi-coronial proceedings;"

[30] The recommendation concerning these stages was based on information that very few cases were dropped at these stages.

14.5 I see no opportunity in general for greater and earlier liaison between prosecutors and investigators. The current arrangements seem to me to represent an effective way of combining the two skills of the two agencies while preserving the independence of each.

14.6 However I recommend that:

Recommendation 4:	**The JCRP process and the subsequent decision whether to mount an investigation might be improved by disclosure to the Command Team or the Head/Deputy Head of the "point brief" before the JCRP convenes.**
Recommendation 5:	**The recent increase of cases being considered by a JCRP meeting is maintained or further increased.**
Recommendation 6:	**Delays between requests for legal advice and the provision of the advice be reduced. The informal appointment of "standing counsel" to the IHAT might ensure the speedy turn-round of advices which require non-IHAPT legal advice.**
Recommendation 7:	**The process which currently involves all the team lawyers in discussions of each individual case be removed – save as a means of training new members of the IHAPT team – but that the existing review of advices etc carried out by the Managing Prosecutor IHAPT (currently Captain Reed, continues).**
Recommendation 8:	**When decisions come to be made on the problem profiles the advice of a senior advocate – possibly Treasury Counsel to be retained to perform this function at the expense of other work - is sought so that those decisions can be made with a clear vision of the consequences to a future criminal trial or other inquiry which the MoD may set up to deal with systematic issues.[31]**

a. made more efficient in order to shorten the length of time taken between the start of an investigation and a final charging decision by the Service Prosecuting Authority or finding by the inspector in charge of independent fatality investigations;"

14.7 Enormous and successful efforts have been made in this direction already. However I recommend:

[31] Such a move would, I believe, instil confidence in both domestic and international legal systems in the process employed by the domestic investigators.

Recommendation 9:	**That more extensive use be made, where appropriate, of the VTC system in place of the Mensa/ABE process whether at the Pre-investigation or Investigation stages.**
Recommendation 10:	**That a workable Mensa process, currently in abeyance, be restarted as soon as possible and without further delays while the "best" solution is sought.**
Recommendation 11:	**That efforts be made – if necessary at Ministerial level – to improve the response times and cooperation between the IHAT investigators and local police forces concerning the obtaining of police records and the deployment of RIPA techniques.**

"d. conducted in a manner that will enable prosecutors to prosecute cases in accordance with the principles set out by the President of the Queen's Bench Division in his Review of Efficiency in Criminal Proceedings."

14.8 I have considered this very far-reaching report, and have had to do so recently when compiling the Justice Report published in March this year.

14.9 Its four key recommendations are in summary:

1. Get it right first time.
2. Case ownership by a single investigator/SIO and a single lawyer.
3. The Criminal Procedure Rules to be drafted so as to allocate responsibilities and to clarify the need for the early engagement of the parties.
4. Better Judicial Management.

14.10 Clearly the last two of these have no direct relevance to the IHAT and its work.

14.11 The first is – subject to the recommendations I have made – already being at least as well dealt with by the IHAT as by other investigators. The need for focus and getting it right first time as – in particular – the problem profiles are worked through will obviously become even more acute. I am confident that the IHAT is aware of this and will be able to adapt its efforts to ensure that any prosecutions which are eventually recommended to the DSP will have "got it right first time".

14.12 The second has now been well entrenched for some time as the narrative above attests, save for the anomaly caused by the particular circumstances of all these cases that, unlike the normal process when in a domestic civilian

case, the complaint comes first to the investigator, here it comes to the IHAT command team and then to the IHAPT lawyer before the SIO is appointed.

'3. Take account of proposals from the Ministry of Defence about how the process might be made more efficient.'

14.13 I met Peter Ryan, at the outset of my review and again, towards the end of it, Jonathan Duke-Evans and Dr Ben Sanders. Later I was able to meet Humphrey Morrison the MoD legal adviser. While the discussions were informative and very useful, they did not make specific suggestions as to the increased efficiency of the IHAT process. Understandably, and rightly, all at the MoD are anxious to avoid meddling in the IHAT and thus actually or apparently interfering in the work of an independent body.

14.14 However I was asked to include in my report answers to the following questions.

- What the IHAT is and why it's necessary.
- The extent to which the IHAT refers servicemen/women to the availability of free legal support/advice.
- Whether the "front-loading" of resources was a good idea.
- The usefulness of VTC for interviewing witnesses/complainants.

14.15 As to the first, I hope the history set out above gives a clear picture of what it is. It is necessary because of the duties imposed by the common law, by the Human Rights Act 2000 and the International Criminal Court Act 2001 upon the UK to carry out proper investigations and, if appropriate, criminal proceedings against members of its armed forces who are alleged to have committed crimes while acting as occupying forces in a foreign country. The creation of the IHAT was an essential step towards the fulfilment of those obligations.

14.16 As to the second, I am informed that all suspects are informed of their right to free legal assistance before interview in the same way as civilian suspects, funded by the duty solicitors' scheme. A witness is not normally entitled to have a legal representative present at an interview. Where the IHAT interviews serving personnel as potential witnesses, if any issues are identified by the investigator before, during or after the interview then the individual's Chain of Command will be informed so that it can organise appropriate pastoral care. In the case of veterans if there are any concerns that the potential witness is, or appears to be, suffering from Post-Traumatic

Stress Disorder he/she will be provided with the contact details of their relevant NHS trust and also with details of various Veterans services.

14.17 As to the third, I have no doubt at all that the decision to "front-load" the resource was a good idea. It has – as I have pointed out – meant that some 1500 cases have gone nowhere and that many more are sifted out before being directed to full or focused investigation, and that many of the focused investigations will mean that in the end there will be no full investigation thus eliminating the need for instance to interview a large number of current or former service personnel as suspects or witnesses.

14.18 As to the fourth point, I have already indicated that I believe greater use of VTC (see Recommendation 9, above) would be productive, both in informing the IHAT early whether there is an allegation worth pursuing to investigation and – in some cases - as a way of obtaining evidence which can be later reduced to statement form.

'4. Consult with Sir George Newman for his views about whether there are any process changes which might assist his Iraq Fatality Investigations.
In doing so, the reviewer should take into account current legislation, resources and an overriding objective of any justice system to deal with cases justly and at proportionate cost.'

14.19 I have already referred at paragraphs 8.10 – 8.12 to issues raised by Sir George during our meeting. In summary, I was interested to learn that the IFI process was beset by the same problems suffered by the IHAT, in particular, access to witnesses in Iraq (in spite of access which is better than that currently available to the IHAT). Such issues still make the fixing of hearings, receiving of evidence etc., and completion of IFI's very very difficult. I have discussed above the issue of the degree of assistance the IFI process can expect from the IHAT.

Recommendation 12: That current and future IFIs be supplied with all material sought by the Inspector subject to suitable undertakings in respect of public disclosure of it.

14.20 I have conducted this review having studied the relevant legislation, a helpful "brief" prepared by Captain Reed, and the decisions of the Divisional Court and Court of Appeal in the cases which have led to the appointment of the Designated Judge – and of course his judgments since

appointment. I have done so against the background that on the one hand those who allege that they have been the victims of crime at the hands of British forces are entitled to proper investigation of their allegations and on the other that those against whom such crimes are alleged are entitled to fair treatment at the hands of investigators and the criminal justice system – and that "delay defeats justice".

14.21 The suggestions I have made which have resource implications would I believe repay themselves in achieving the right results in the most difficult and intractable cases within the problem profiles. I, and all those to whom I have spoken, are aware of the aim to identify and if so bring to trial those against whom there is a triable case in the shortest time consistent with fairness to both complainants and defendants.

14.22 Finally, I have been asked to express a view on the compatibility of the IHAT process with UK and international law. While I am not now professionally qualified as a former member of my profession to express a legal opinion, I hope I can say – as a former DPP – that the processes now employed would certainly satisfy the requirements of civilian investigation and prosecution organizations in England and Wales, and would be very surprised therefore if an international tribunal were to take a different view. Ultimately it will, of course in the domestic context, for the Designated Judge to decide whether, in an individual case or generally the IHAT process is falling short of the proper standard.

REVIEW OF IRAQ HISTORIC ALLEGATIONS TEAM

APPENDIX A

PERSONS INTERVIEWED

I have interviewed the following individuals individually and/or in small groups during the course of my review:

The Command Team

1. Mark Warwick (Director of the IHAT)
2. Commander Jack Hawkins RN (Deputy Head of the IHAT)
3. Captain David Teasdale (IHAT Legal Adviser)
4. Jamie Turner (Assistant Head (Resources))

The IHAT

5. Head of Intelligence
6. Principal Analyst Strategic Support Team
7. Senior Investigating Officer, Pod 2
8. Deputy Case Assessment Manager
9. Senior Intelligence Analysts
10. Overseas Liaison Officer
11. Head of Major Incident Room (MIR)
12. Quality Assurance and Review Officer

The SPA

13. Andrew Cayley Q.C. (DSP)
14. Captain Darren Reed (IHAPT)
15. Simon Brenchley (IHAPT lawyer based at Upavon)

Navy Command

16. Commander Tony Day RN (Provost Marshal (Navy)

MoD

17. Peter Ryan (DJEP)
18. Dr Ben Sanders (DJEP)
19. Jonathan Duke Evans (DJEP)
20. Humphrey Morrison (Legal Adviser MoD)

AG's Office

21. The Attorney General
22. John Grealis
23. James Gerard

IFI

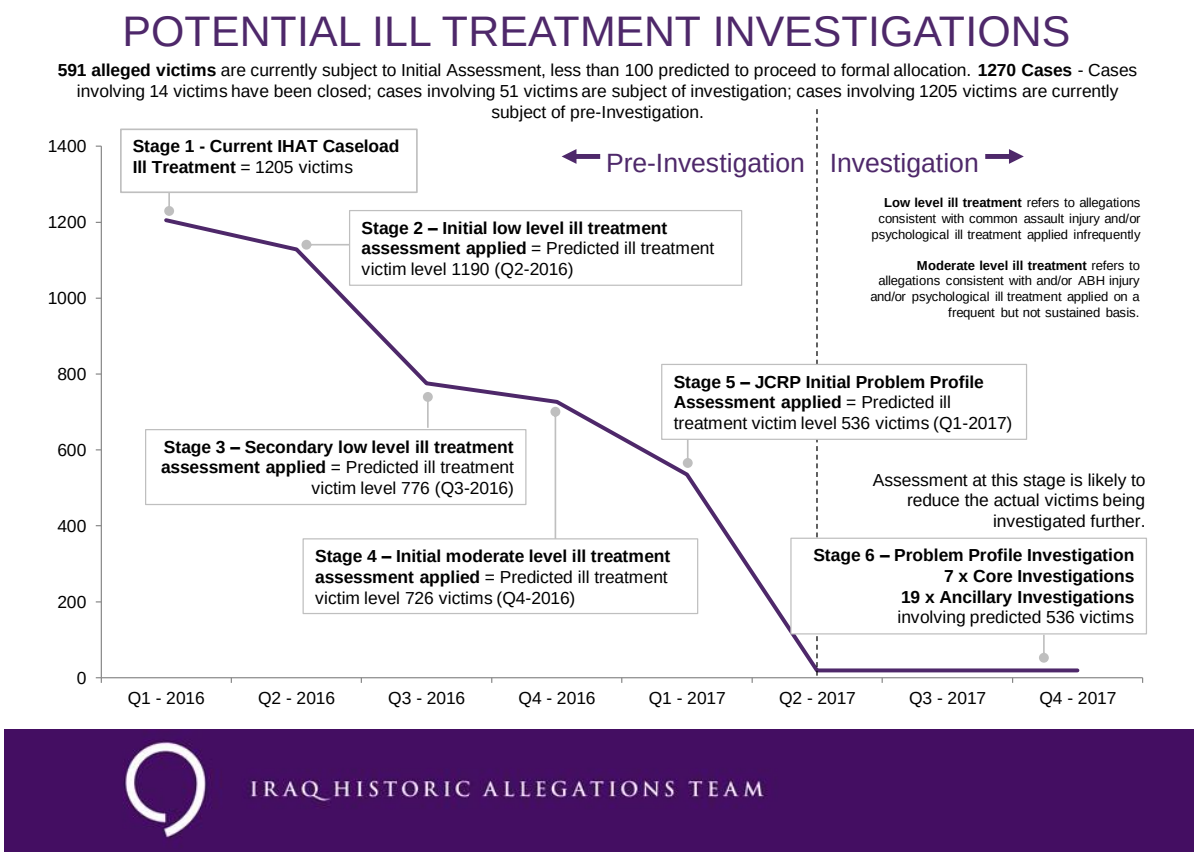
24. Sir George Newman (Inspector)
25. Julia Lowis (Assistant to the Inspector)

In addition I have attended meetings at which various of the above were present as well as:

26. Francis Davis (IHAPT)
27. James Ward (IHAPT)
28. Air Commodore Kell (ret) (IHAPT)
29. Head of Case Assessment Team

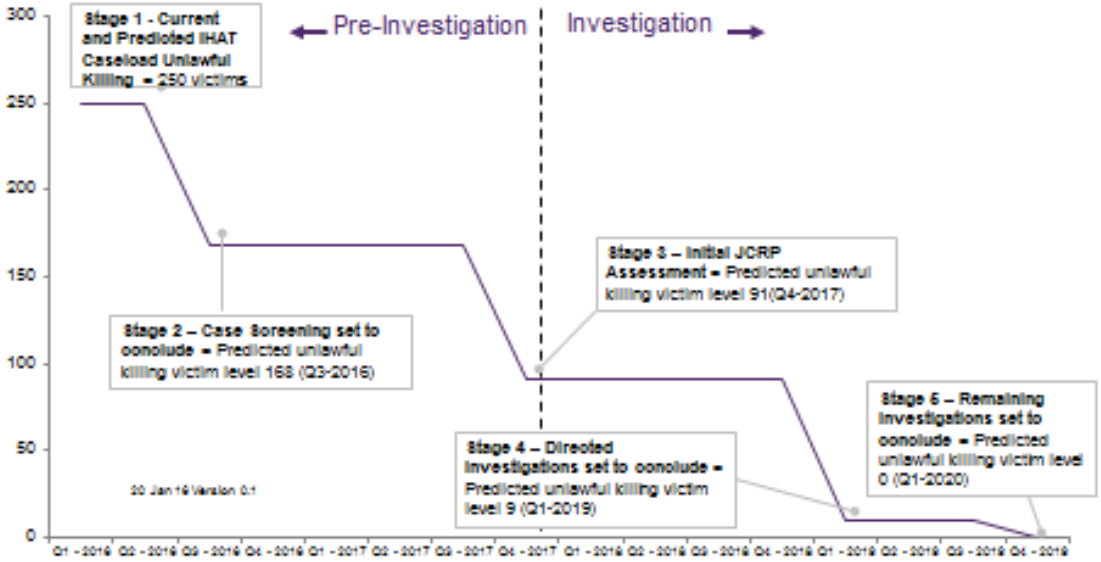
APPENDIX B

IHAT PROJECTIONS



POTENTIAL UNLAWFUL KILLING INVESTIGATIONS

161 alleged victims are currently subject to Initial Assessment, 40 are predicted to proceed to formal allocation. Current allocated caseload 288 - cases involving 58 victims have been closed or in the process of being closed; cases involving 20 victims are currently subject to full or focused investigation, cases involving 210 victims are currently subject of pre-investigation.



IRAQ HISTORIC ALLEGATIONS TEAM

APPENDIX C

IHAT Terms of Reference 2.0 May 2014

IRAQ HISTORIC ALLEGATIONS TEAM (IHAT)

TERMS OF REFERENCE

Author: Provost Marshal (Navy)

19 May 2014

PURPOSE

1. The purpose of these Terms of Reference is to describe the management arrangements for the operation of the Iraq Historic Allegations Team (IHAT). They also provide a documented basis for making future decisions and for confirming a common understanding of the role of the IHAT.

2. The IHAT is to investigate as expeditiously as possible those allegations of criminal conduct by HM Forces in Iraq allocated to it by the Provost Marshal (Navy) (PM(N)), in order to ensure that all those allegations are, or have been, investigated appropriately.

DELIVERABLES

3. By 31 December 2016, or such date as shall subsequently be agreed with the PM(N), the Head of IHAT is to have completed the work in relation to the cases allocated to him by PM(N), to include any referral of cases to the Director of Service Prosecutions or to a Commanding Officer in accordance with Section 11 6 of the Armed Forces Act 2006.

MANDATE

4. The transfer of authority for the IHAT from the Provost Marshal (Army) to the PM(N) was announced by the Minster of State for the Armed Forces by Written Ministerial Statement on 26 March 2012.

SCOPE

5. The caseload of the IHAT will be that allocated to the Head of the IHAT by PM(N).

ROLES AND RESPONSIBILITIES

6. The IHAT is led by a civilian, who is responsible solely to the PM(N) for the conduct of investigations. As delegated by PM(N) the Head of IHAT is responsible for organisation of the structure and establishment of investigation teams.

7. The IHAT will consist of the following elements:

- Command Team
- Intelligence Cell
- Major Incident Room
- Investigative Pods
- Operational Support Team

8. The Head of IHAT may however make changes to this structure as he sees fit so as to best achieve the objectives of IHAT.

REPORTING

9. All staff of the IHAT will ultimately report to the Head of the IHAT. The Head of IHAT is solely responsible to the PM(N) for the effective and efficient running of the IHAT and the achievement of its objectives. The PM(N) is responsible for the conduct and direction of all Royal Navy Police investigations, which are conducted independently of the service chain of command.

10. Where there is no prejudice to a criminal investigation the IHAT may also make available the findings of its enquiries to the Secretary of State and his officials for the discharge of their functions, including the identification of systemic issues arising from the investigations, in accordance with protocols agreed with the PM(N).

METHODS

11. All work undertaken by the IHAT must:

11.2 be in accordance with the requirements of the Armed Forces Act 2006.

11.2 be carried out in accordance with Royal Navy Police practice and such strategies and policies, agreed with the PM(N) and consistent with legal advice, as are put in place by the Head of IHAT.

12. Once the Head of IHAT is satisfied that a case has been investigated appropriately, he will direct the relevant Senior Investigating Officer to provide a final written report of the investigation promptly to the referral officer (RNP Commander and Deputy Head of the IHAT) for decision on what action should follow.

13. The IHAT shall maintain an accurate and complete case record for each case.

REVIEW OF IRAQ HISTORIC ALLEGATIONS TEAM

APPENDIX D

IHAT "PILLARS"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20160428-Pillar 2 -Pre-Investigation Pr


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20160428-Pillar 4 - Investigative Process


20160428-Pillar 5 - Post-Investigation P