Service Justice System Review

(Part 2)

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SECTION ONE – INTRODUCTION

Following initial consideration of the reports of both Service Justice System Review (Part 1) (SJSR1) and the Service Justice System Policing Review (Part 1) (SJSPR1) a further set of Terms of Reference (TOR) were issued for this, the second part of the Service Justice System Review (SJSR2). These further TOR (see Appendix C) encompass matters covered in both the previous reports and the following joint report is the response to these TOR.

Part 2 Recommendations:

Recommendation 1: The Criminal Justice (Armed Forces Code of Practice for Victims of Crime) Regulation 2015 should be subject of periodic review and modification when necessary. [NL – Legislation not required]

Recommendation 2: Tri-Service Policy on compliance with the Code of Practice for Victims of Crime to be developed and implemented. [NL]

Recommendation 3: Consistent and mandatory recording of crimes reported to Commanding Officers / Service Police / Support Agencies. To be progressed through existing Crime Recording systems at a tri-Service facility. [NL]

Recommendation 4: COPPERS and REDCAP are replaced to enable efficient and effective deployment, appropriate and timely risk identification and enable appropriate management oversight and governance of victim and witness identification and compliance with the Code. [NL]

Recommendation 5: Training programme to be delivered to Commanding Officers to assist them in identifying, at an early stage, vulnerable victims and witnesses to enable appropriate support and safeguarding referrals. [NL]

Recommendation 6: Clear policy on the use of lawful orders to be developed and disseminated to Commanding Officers and Service Police to support victims and witnesses (see Recommendation 16). [NL]

Recommendation 7: Improved management oversight to ensure compliance regarding completion of Victims Needs Assessment. [NL]

Recommendation 8: The role of Victim Liaison Officer should solely be undertaken by the Service Police in investigations by the Service Police (General Policing Duties (GPD)) or SIB / DSCU (amended from Appendix E paragraph 10a of SJSPR1). [NL]

Recommendation 9: Formal training and Continuous Professional Development to be established for the role of Victim Liaison Officer (see Appendix E paragraph 10d of SJSPR1). [NL]

Recommendation 10: The role of a tri-Service Victim Liaison Officer Co-ordinator is created (amended from Appendix E paragraphs 10e of SJSPR1). [NL]

Recommendation 11: A Witness Care Unit is created within the DSCU. [NL]

Recommendation 12: The role of Family Liaison Officers / Family Liaison Co-ordinator is posted in the DSCU. [NL]

Recommendation 13: The Witness Charter is implemented within the Service Justice System, detailing minimum standards to be provided by all service providers. [NL]

Recommendation 14: Royal Military Police to introduce Victim Crime Surveys. [NL]

Recommendation 15: Victim to decide on the method of communication for investigative and prosecution updates subject to the limitations of when the victim is on operations. [NL]

Recommendation 16: Tri-Service agreement is reached on the scope of, the use of and the procedure for lawful orders in both pre-charge and post-charge situations. This agreement should be reflected in further advice to assist COs, SP and other service personnel by promulgation in the appropriate manuals. Training in these matters should be included in the courses for COs and in SP training (see Recommendations 5, 6 & 37). [NL]

Recommendation 17: Powers under Proceeds of Crime Act 2002 should be allowed to progress separately and should no longer be regarded as part of the SJS Review. [NL]

Recommendation 18: The grant of powers to issue fixed penalty notices and cautions to the Service Police is not pursued. [NL]

Recommendation 19: A power to transfer cases arising in the UK is not pursued. [NL]

Recommendation 20: The Prosecutors' Protocol and Home Office memoranda governing the exercise of the criminal jurisdiction in England and Wales be reviewed and particularised to ensure that they reflect the current requirements of the SJS and CJS. (Cross refer to Recommendations 1, 2 and 3 of SRSR1). [NL]

Recommendation 21: Taking powers to enable matters to be transferred for sentence from civil courts to the Court Martial not be pursued. [NL]

Recommendation 22: A power to transfer cases arising outside the UK is not pursued. [NL]

Recommendation 23. Section 2 Sexual Offences Act 2003 (SOA) offences join Murder, Manslaughter and Rape as being cases that are tried in the CJS when they are committed within the UK. Section 3 3 SOA offences should continue to be dealt with in the SJS. [L – Legislation required]

Recommendation 24: The qualified majority of five to one should be dealt with in a direction to the Board similar to that currently used for a simple majority. The Crown Court practice of two directions to the jury; first a unanimity direction and then a majority direction should not be followed. [NL]

Recommendation 25: The Court Martial sits with both three-member and six-member boards and that the differentiation between the two levels of board should be on the basis of the sentencing powers of the boards. The three-member board should be limited to trying those cases where no defendant could be sentenced to more than two years imprisonment or detention. [L]

Recommendation 26: OR7 ranks be included in the range of personnel qualified to sit on Court Martial boards. [L]

Recommendation 27: The Military Court Service (MCS) keeps a record of the usage of the personnel nominated for court service in the period January 2019 to April 2020 and that based upon this usage MCS give illustrative sets of figures for the numbers that would be required under more flexible rules for board composition. [NL]

Recommendation 28: OJAR / SJAR are not added to the list produced to the court contained in AF (CMR) 2009 Rule 114. The Defence may introduce them as personal mitigation if they so choose. [NL]

Recommendation 29: A working group chaired by the MOD centre and comprising representatives of the three Services, the Provost Marshalls, SPA and OJAG/MCS take forward for SJB consideration proposals for the common collation of management data and principles for its oversight. The Review's proposals are contained in **Appendix B**. [NL]

Recommendation 30: The same Working Group oversees the setting of target time scales as recommended in Sections A to D below at paragraphs 206 to 247. [NL]

Recommendation 31: The performance of the SJS set against the targets agreed should be laid before the SJB as a standing agenda item for its regular periodic meetings. [NL]

Recommendation 32: The Provost Marshalls and other appropriate authorities set a target time for the investigation of the less serious matters which, it is anticipated, will comprise largely of the service disciplinary matters. In addition, a further target time for more complex and serious matters should be set. This division of matters will in practice largely coincide with the split into non-criminal and criminal matters. An initial allocation of all investigations into one of these categories should be followed by the recording and monitoring of the progress of an investigation and of the time to referral or the time to any other completion of the investigation. Failures to achieve targets should be examined during the monitoring process so that the reasons for delay may be understood and action taken where necessary. Data should be collected so that results may be presented in the staged format shown at tables 11 and 12. [NL]

Recommendation 33: That the Provost Marshalls and other appropriate authorities set a target time for the completion of the bulk of investigations conducted by the GPD. Some cases will inevitably take longer. Recording and monitoring should be conducted of the progress of an investigation and of the time to referral or the time to any other completion of the investigation. Failures to achieve targets should be examined during the monitoring process so that the reasons for delay may be understood and action taken where necessary. Data should be collected so that results may be presented in the staged format shown at tables 11 and 12. [NL]

Recommendation 34: That the appropriate Service authorities set a target time for the completion of the bulk of investigations conducted by Units / COs. Some cases will inevitably take longer. Recording and monitoring should be conducted of the progress of an investigation and of the time to referral or the time to any other completion of the investigation. Failures to achieve targets should be examined during the monitoring process so that the reasons for delay may be understood and action taken where necessary. Data should be collected so that results may be presented in the staged format shown at tables 11 and 12. [NL]

Recommendation 35: The three Services should establish a Working Group to set out common target timescales for the completion of Summary Hearing (SH) and it is suggested that the bulk of hearings should be concluded within 30 days. The timescales should include a simple "working day" rule as a guide to the expected speed of advance of the individual steps within the process. The performance achieved set against the target timescales should be recorded and monitored. The achievements against target should be set out in the staged format shown in tables 11 and 12. [NL]

Recommendation 36: The tri-Service Working Group should set out common target timescales for the delivery of legal advice and it is suggested that the bulk of requests for legal advice should be cleared within five working days; this almost certainly happens now. Some cases will take longer. Performance against the timescales should be recorded, monitored and displayed in the staged format shown in tables 11 and 12. [NL]

Recommendation 37: The tri-Service Working Group should consider the SJS content of COs courses, seeking to establish best practice across the Services and drawing on the experiences of current and recent COs as to what the courses should cover. The SJS content of COs courses should be updated and matters that COs should be familiar with, in addition to the mainstream tasks of investigation and SH, are the treatment of witnesses and victims and the handling of domestic and child abuse allegations **(see Recommendations 5 & 6**). The use of custody and of lawful orders to exercise control short of custody should be included **(see Recommendation 16)**. The importance of giving the processes of Investigation and Summary Hearings the highest priority amongst the many administrative duties and responsibilities of the CO should be emphasised. [NL]

Recommendation 38: The Director of Service Prosecutions (DSP) continues to determine targets for the timescales of directing matters to trial for each case. A record of the performance achieved against these individual timescales would give a comprehensive guide to the performance of the SPA set against its own targets; such a record should be maintained and published for the meeting of the SJB. Aside from the individually assessed targets it is suggested that an overall target of 75% of cases directed to trial within 30 days would provide a broad-brush challenging and achievable aspiration. (70 % of cases are for disciplinary offences). [NL]

Recommendation 39: The Judge Advocate General (JAG) and Military Court Service (MCS) consider implementing the elements of Case Management, Listing Practice and Court Record keeping contained in **Appendix A.** [NL]

Recommendation 40: The "time to trial or other final hearing" in all Service Court matters be recorded and that these figures are made available at SJB when the performance of the SJS is being considered. Other data recorded by OJAG/MCS as detailed in Appendix A may be used in amplification of this basic "timeliness" information. [NL]

Recommendation 41: The inclusion of an "overriding objective" in The Armed Forces (Court Martial) Rules 2009 to parallel that contained in the Criminal Procedure Rules 2015 at Part I is undertaken. That consideration also be given to the inclusion in AFCMR 2009 of any of the specific duties contained in CPR Part III (Case Management) that it is thought would assist the case management process in the Court Martial. [L]

Recommendation 42: AFA 2006 and AF (CM) R2009 be amended so that the right to appeal against orders and rulings in preliminary proceedings in the Court Martial is restricted to those occasions in which it is available in the Crown Court. [L]

Recommendation 43: A power similar to that contained in the Magistrates' Courts Act 1980, but narrower in scope, should be taken allowing the CO to take any remedial action necessary when a sentence passed contains a "technical" illegality e.g. an impermissible combination of punishments. In addition, a power to enable the Reviewing Authority to refer such matters back to COs should be taken. [L]

Recommendation 44: A new niche independent body is established to deliver independent oversight of the Service Police and of investigative functions in the SJS.

The new independent body is policy led and funded by the MOD, but at arms-length from the MOD. The class of persons able to make complaint should be broadened to include all those subject to the Act and all those who have been subject to the Act. Those not subject to the Act but directly affected by the exercise of powers contained in the Act should also have access to the system. The MOD will wish to consider a time limit to be set on the bringing of complaints. Clear distinction should be drawn as to which complaints fall to the newly created independent body and which to the SCO. [L]

SECTION TWO – RESPONSES TO THE TERMS OF REFERENCE

A) IMPROVING SUPPORT TO VICTIMS AND WITNESSES

(i) The Service Justice System needs to ensure that victims and witnesses are properly supported; this helps them to deal with what has happened, and helps ensure that they are better prepared to take part in the subsequent court proceedings and Summary Hearings where applicable. With that in mind, current arrangements for supporting victims and witnesses in the SJS should be reviewed and where deficiencies are identified, proposals made for improvement (while recognising the limitations of the operational environment). There should be measures to become more consistent in best practice across the Services. This will need to take into account victim support to be provided by the Defence Serious Crime Unit (DSCU) if the proposal is accepted by the Minister. Consideration should also be given to mechanisms for victims and witnesses to provide feedback on their experience of the SJS.

1. The Criminal Justice (Armed Forces Code of Practice for Victims of Crime) Regulations 2015, provides guidance to service providers (Service Police (SP), Commanding Officers (COs), the Service Prosecution Authority (SPA), the Military Court Service (MCS) and the Military Corrective Training Centre (MCTC)) in respect of providing support and information to victims and witnesses of crime perpetrated by persons subject to Service law or civilians subject to Service discipline. The code came into operation in November 2015.

2. The Ministry of Defence also provided guidance, Joint Service Publication 839 Victims' Services Version 01, to support the implementation of the Code and assist service providers in complying with their obligations. Additionally, the Service Police forces have their own policy and procedure guidance.

3. As part of the SJSR1 and SJSPR1, concerns were raised by the principal authors HH Shaun Lyons and Professor Sir Jon Murphy that the vulnerability and the rights of victims and witnesses were not always at the forefront of the Service Justice System.

4. These concerns were reviewed in work that was carried out by a Service Police Working Group during November 2017 through to May 2018. The Group reviewed existing legislation, policy, guidance and practices. Its findings were recorded in Appendix E to SJSPR1.

5. Recommendation 14 from SJSPR1, states that the SP should put measures in place, consistent across the three Services that reflect the civil police focus on the needs of victims and the otherwise vulnerable.

6. In particular, the recommendation identified the need for a dedicated Witness Care Unit to be established within the proposed Defence Serious Crime Unit (DSCU).

7. It is acknowledged that a number of recommendations contained within this piece of work are dependent on the approval and establishment of the DSCU.

Conclusions

8. The Criminal Justice (Armed Forces Code of Practice for Victims of Crime) Regulations 2015 appears similar in content to the civilian Code of Practice for Victims of Crime (Victims' Code). The Code was introduced in 2006 and sets out the minimum levels of service which victims can expect from agencies that are signatories to it. In conjunction with existing legislation and regulations, the Victims' Code is the main mechanism used to transpose the EU Victims' Directive 2012/29/EU (the Victims' Directive) into domestic legislation. The Victims' Code has also been used to transpose parts of the Human Trafficking and Child Sexual Exploitation EU Directives.

9. The Victims' Code was revised in 2013 to reflect the commitments in the EU Victims' Directive. In addition, it also introduced an enhanced level of service for victims of the most serious crime, vulnerable and/or intimidated victims and persistently targeted victims; the Victim Personal Statement scheme; and CPS commitments under the Victims' Right to

Review scheme. Following a public consultation in 2015, further updates were made to the Victims' Code to complete the formal transition of the Victims' Directive into UK laws and systems.

10. The Armed Forces Code was implemented by way of a Statutory Instrument, which is not primary legislation and if the need arose, it would require secondary legislation to be able to amend or update the contents of that Code.

11. In December 2015, the MOD sought to make non-statutory Code-like provisions in a Statutory Instrument. This was subject to adverse criticism by the House of Lords and House of Commons Joint Committee on Statutory Instruments. In essence, the Joint Committee made reference to defective drafting and the manner in which the Code was implemented.

12. This will continue to remain an issue until a power to create an Armed Forces Code is in place in primary legislation.

13. The Joint Committee compared the Armed Forces Code with the legislation and structure that was to be introduced and implemented in Scotland. Section 2 of the Victims and Witnesses (Scotland) Act 2014 placed a duty on all service providers within the criminal justice process to prepare and publish standards of service for victims and witnesses.

14. In addition, this primary legislation directs that Scottish Ministers must keep the Victims Code for Scotland under review and may modify it when necessary. If the Code is modified, there is a clear direction that the revised Code must be published.

15. As working practices develop, along with identified best practice, it is obvious that the ability to review, refresh and update the Armed Forces Code is essential.

Recommendation 1: The Criminal Justice (Armed Forces Code of Practice for Victims of Crime) Regulation 2015 should be subject of periodic review and modification when necessary.

16. As stated previously, each of the three SP have their own policy and guidance to facilitate compliance with the Code. In general terms, they are similar in guidance and direction. Although the three SP operate in very different environments, it is more than feasible to create and implement a tri-Service policy.

Recommendation 2: For consistency in the treatment of victims of crime, tri-Service policy to be developed and implemented.

17. Identifying victims and witnesses at an early stage is critical in enabling the appropriate service provider to assess the level of support necessary.

18. Across the Armed Forces, the service provider may be the CO, SP, SPA, MCS or the MCTC. In some cases, the service provider will change as the investigation progresses through the Service Justice System.

19. The Code is somewhat vague in defining which particular service provider will provide the necessary service; however, this is understandable in view of the levels of investigation (CO or SP).

20. As such, the initial crime recording and identification of a victim lacks consistency. This is very dependent on who the incident is reported to (Chain of Command, Service Police, Home Office Police Force and Welfare/Support Agency).

21. These factors are compounded by a lack of appropriate systems that enable service providers to identify repeat and vulnerable victims and witnesses.

22. COPPERS and REDCAP, the initial incident reporting and subsequent investigation systems that are utilised by the three SP, have been the subject of previous reviews that have highlighted concerns regarding their efficiency and effectiveness in timely deployments, identification of risk to victims and witnesses, as well as service providers and their ability to present meaningful management information.

23. This review has also identified those concerns as a contributing factor in providing a quality service.

Recommendation 3: Consistent and mandatory recording of crimes reported to COs, SP and Welfare/Support Agencies. This should be progressed through existing tri-Service facility.

Recommendation 4: It is recommended that COPPERS and REDCAP are replaced to enable efficient and effective deployment, appropriate and timely risk identification and enable appropriate management oversight and governance of victim and witness identification and compliance with the Code.

24. COs are one of the Service Justice Systems service providers. As well as a multitude of other operational responsibilities, they are tasked with supporting victims of crime.

25. Certain crimes, such as controlling or coercive behaviour in an intimate or family relationship, may not be apparent, as well as other forms of domestic abuse. It is important that COs and others are able to recognise incidents of domestic abuse and comply with the provisions of the Code. This will also ensure that appropriate safeguarding assessments are undertaken and referrals are made to statutory partners.

26. In pursuance of this objective, COs should undertake formal training with regards to identifying vulnerable victims and witnesses. This would enable them to facilitate appropriate support in accordance with the Code and ensure necessary safeguarding and partnership working is undertaken.

Recommendation 5: Training programme to be delivered to Commanding Officers to assist them in identifying, at an early stage, vulnerable victims and witnesses to enable appropriate support and safeguarding referrals (see Appendix E paragraph 6c of SJSPR1).

27. If incidents are reported through the Chain of Command, there are circumstances when the victim and the offender will be from the same Unit/Barracks. Witnesses may also reside within the same accommodation.

28. As an investigation progresses, conducted by the CO or SP, and a suspect has been arrested and/or interviewed, the situation may arise where the suspect is not remanded in custody. This could have implications on the management and support of the victim and witnesses.

29. COs are able to issue orders and directions in respect of potential contact and place of residence, however there is an absence of clear and consistent policy to define what action could and should be taken to support the victim and witnesses.

Recommendation 6: Clear policy to be developed and disseminated to COs and SP to support victims and witnesses.

30. The Code requires the completion of a Victims Needs Assessment at the initial reporting stage. As previously discussed (at paragraphs 18 to 20) the pathway for reporting crimes can be varied.

31. The Victim Needs Assessment is a crucial element of identifying, at an early stage, the vulnerability and potential support necessary for the victim. It may also prompt the completion of additional vulnerability forms that are necessary to inform partners with regards to safeguarding and joint agency working (Domestic Abuse, Stalking and Harassment/Honour Based Violence Risk identification check-list).

32. The Victims Needs Assessment is not always completed and management oversight and governance should be improved to enable all service providers to understand the potential risks to victims, as well as their own organisations. As with Recommendation 4 above, improved governance would ensure compliance and reassurance to victims and witnesses.

Recommendation 7: Improved management oversight to ensure compliance regarding completion of the Victims Needs Assessment (see Appendix E paragraph 6e of SJSPR1).

33. Victim Liaison Officers (VLOs) were introduced as part of the Code. Their primary function within the Service Justice System is to provide information to victims of crime.

34. The Code directs what information should be communicated to the victim and witnesses.

35. A VLO should be appointed when a person is arrested, charged or taken in to custody. It is usually the CO of the suspect who appoints the VLO. If the identity of the suspect is unknown, the CO of the victim will make the appointment.

36. This could create potential conflict with the victim and other witnesses. It is feasible that the VLO may know the victim, witnesses and the suspect.

37. If the victim is a civilian, the VLO is "likely" to be appointed by the SP, although the direction and policy in respect of this is unclear.

38. The role of the VLO is crucial in supporting and re-assuring victims of crime and providing links to support agencies as they progress through the Service Justice System.

39. The Service Police should undertake the role of the VLO in cases conducted by the Service Police. They will have a greater understanding of the progression of the investigation and be able to communicate with the victim and any witnesses in a timely manner.

40. No formal training has been identified for officers who undertake the role of VLO. Some Services have devised briefing packs and leaflets.

41. To enhance the support provided by VLOs and professionalise the role, a bespoke formal training package should be developed.

42. Whilst acknowledging the uncertainty regarding the implementation of a DSCU, the creation of a tri-Service Victim Liaison Officer Co-ordinator would provide on-going support to VLOs, support their welfare and development, as well as enhancing the service and support provided to victims.

Recommendation 8: The role of Victim Liaison Officer should solely be undertaken by the Service Police in investigations by the Service Police (General Policing Duties (GPD)) or SIB / DSCU (amended from Appendix E paragraph 10a of SJSPR1).

Recommendation 9: Formal training and Continuous Professional Development to be established for the role of Victim Liaison Officer (see Appendix E paragraph 10d of SJSPR1).

Recommendation 10: The role of a tri-Service Victim Liaison Officer Co-ordinator is created (amended from Appendix E paragraphs 10e of SJSPR1).

43. Investigations conducted by civilian police forces place the onus on the officer in charge of the investigation to comply with the requirements of the Victims Code. This duty is undertaken up until the point when a suspect is charged or summonsed. Responsibility is then transferred to a unit within the civilian police force's Criminal Justice Team, who maintain contact with the victim and witnesses through the criminal justice process.

44. In some serious cases, where the civilian police force has a dedicated investigation team, the responsibility may remain with a Single Point of Contact from that team.

45. Each of the SP has guidance on how investigators have a continuing duty of care throughout the investigation, to maintain and update victims and witnesses as to the progress of the investigation / case. In view of the operating environment and potential deployments across the world, in some cases, it can be difficult to maintain that contact and provision of information to victims and witnesses.

46. In pursuance of Recommendation 14 from the SJSPR1, a dedicated Witness Care Unit should be located within the DSCU.

Recommendation 11: A Witness Care Unit is created in the DSCU.

47. The provision of Family Liaison Officers (FLOs) and Family Liaison Co-ordinators (FLCs) across the Service Justice System appears to be operating effectively. They are deployed in support of investigations into the death of military personnel.

48. It would appear practical and best practice to adopt a tri-Service approach to their function and as with other dedicated and defined roles, should be located within the DSCU. This would enable support and development of the FLOs and ensure a comprehensive service is provided to bereaved families.

Recommendation 12: The role of FLOs/FLCs is posted in the DSCU.

49. Unlike the Ministry of Justice Witness Charter (Criminal Justice System), the Service Justice System does not have a Charter that sets out the standards of support and provisions that witnesses should expect through the justice process. Each service provider does have policies and procedures in place for dealing with witnesses, but there is no consistency.

50. The creation of a Charter would define the minimum standards expected and provide re-assurance to potential witnesses.

Recommendation 13: The Witness Charter is implemented within the Service Justice System, detailing minimum standards to be provided by all service providers.

51. Each SP has varying policies on identifying vulnerable and intimidated victims and witnesses, as well as supporting them through the justice process based upon the Victims of Crime Regulations 2015.

52. The Criminal Justice (Armed Forces Code of Practice for Victims of Crime) Regulations 2015 also provides guidance and direction.

53. All SP have appropriately trained officers to deal with vulnerable and intimidated victims and witnesses in accordance with Achieving Best Evidence. The challenge is how they utilise and maintain those skills through practical application and Continuous Professional Development.

54. Service Police Incident and Crime Management systems (COPPERS / REDCAP) have no performance management facility to check compliance with the Code (Recommendation 4).

55. The Royal Navy Police and Royal Air Force Police manage Code compliance by way of Victim Crime Surveys. This is heavily reliant on the victim's response and record keeping by the respective police can be inaccurate.

56. The Royal Military Police do not conduct Victim Crime Surveys. In pursuance of previous recommendations by HMICFRS, they should consider implementing feedback surveys.

Recommendation 14: <u>Royal Military Police</u> to introduce Victim Crime Surveys.

57. It is worthy of note, that previous inspections conducted by HMICFRS recommended that there should be victim care management arrangements. This would facilitate improvements to victim care through benchmarking and identifying investigative flaws.

58. It is apparent that the SP comply with the provisions of the Code in respect of Victims Personal Statements.

59. In respect of Special Measures, the Code sets out the processes to be applied. It may be necessary to conduct further research as to how often these measures are applied for and granted.

60. The Code provides appropriate guidance and information in respect of the victim's right to review decisions that have been made throughout the justice process. Again, further work may be necessary to establish how frequently this is undertaken.

61. The Code places a responsibility on service providers to maintain contact with victims in respect of a number of issues. However, the guidance within the Code is that the service provider will decide on the method of communication. This appears to be service focused as opposed to the victim and the opposite should apply.

62. Within the civilian Code, the investigating officer will make contact with the victim at the commencement of the investigation and agree a Victim Contact Contract (VCC). This will include the frequency of contact and the method of communication, decided by the victim.

Recommendation 15 – Victim to decide on the method of communication for investigative and prosecution updates, subject to the limitations of when the victim is on operations.

ATTENDANCE OF WITNESSES

A (i) (continued) Further work should also be carried out to determine the implications of parties to the court martial being responsible for the attendance of their own witnesses.

63. This work has been removed from the Part 2 Terms of Reference and is being conducted by a Working Group comprised of representatives from Military Court Service (MCS) and Service Prosecuting Authority (SPA).

B) MEASURES TO IMPROVE EFFECTIVENESS OF THE SJS

(ii) There needs to be a mechanism for Commanding Officers and Judge Advocates to place suspected offenders in custody where that is appropriate. The arrangements for custody and the giving of lawful orders in lieu of Bail conditions should be reviewed, including the role of the Commanding Officers.

CUSTODY AND LAWFUL ORDERS

Introduction

64. In Part 1 of both the SJSR1 and SJSPR1 concerns were raised about the protection and safeguarding of vulnerable victims and witnesses, in particular in relation to domestic abuse cases. In addition, some uncertainty was expressed about what a CO may do in the situation where the CO does not find that an authorisation of pre-charge custody is justified or where the CO finds it justified but nevertheless believes measures short of custody will meet the needs of the situation. This uncertainty also extends to the position post-charge. The SJSR1 and SJSPR1 contained a number of recommendations concerning the handling of the related matters of Domestic Violence and Child Abuse and Witness and Victim Support. Amongst these recommendations was Recommendation 12 of part 1 of SJSR1:

    a. *"There should be a review of the arrangements for custody and the giving of lawful orders in lieu of Bail Conditions."*

Custody Mechanisms

65. **Pre-Charge Custody** may be authorised by the CO if it is necessary in order "to secure or preserve evidence relating to the service offence for which the person was arrested, or to obtain such evidence by questioning him" (AFA 2006 S99 et seq). The custody, if authorised, is subject to time limits (basically 48 hours) and to mandatory reviews within those time limits (every 12 hours). If a longer period of pre-charge custody is required then application by the CO must be made to a Judge Advocate (JA) who may authorise detention up to 96 hours after arrest. If custody is not authorised then the accused may be required to comply with such requirements as appear necessary to the JA in order to:

    a) Secure his attendance at any hearing in the proceedings against him
    b) Secure that he does commit an offence while released from custody
    c) Secure that he does not interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person; or
    d) For his own protection or, if he is aged under 17, for his own welfare or in his own interests.

66. **Post-Charge custody** may be authorised by a JA provided substantial grounds exist for believing that one or more of certain conditions are met. (AFA 2006 S105 et seq). If custody is not authorised then the accused may be required to comply with such requirements as appear to be necessary to the JA.

Frequency of Use of the COs Pre-Charge Custody provisions 2017

67. The Service responses to questions posed for the year 2017 shows:

Table 1: Use of pre-charge custody in 2017

	Navy	Army[1]	RAF[2]
How many times did SIB seek custody from a CO?	17	NA	NA
How many times did GPD seek custody from a CO?	42	NA	NA
How many times did CO authorise custody (SIB)?	17	NA	NA
How many times did CO authorise custody (GPD)?	42	NA	NA
How many times did CO seek legal advice in custody matter?	0	NA	NA

Source: Provided by Services to SJS Review

Post-Charge Custody Applications to a Judge Advocate in 2017

68. JA authorisation was sought on 98 occasions (hearings) in respect of 48 individuals. Of the 48 individuals for whom post-charge custody was sought, 24 were released with requirements, 20 were held in custody and four were held post-conviction.

Comment Supplied

69. The Navy acknowledged that its operating environment is such that problems of securing evidence, witness interference and absconding defendants are not frequently

[1] No figures supplied.
[2] No figures supplied.

encountered. The figures in Table 1 above show that in 2017 the Royal Navy Police (RNP) sought the authorisation for custody from COs on 59 occasions; on each occasion custody was authorised. On no occasion was an extension of pre-charge custody beyond 48 hours sought. The Navy commented that this incidence of the use of pre-charge custody powers was broadly consistent with its use in previous years.

Legal Advice

70. The Navy stated that on anecdotal evidence on none of the 59 occasions did a CO feel the need to seek legal advice though they may well have sought advice from their Command Advisors[3]. The Army commented that, while statistics of legal advice sought in custody before charge cases were not kept, anecdotally very few such requests were received and would be dealt with by the provision of informal legal advice by email or phone. The RAF held no central record of advice being sought in cases of the pre-charge custody.

Administrative measures / Lawful orders

71. All three Services noted the advice contained in JSP 830 Volume 1 Chapter 5.

Pre-Charge

> *"16. The CO's discretion means that, even if grounds for custody do exist, the CO does not have to place the person in custody. The CO may wish to put in place administrative measures as an alternative to imposing custody without charge. Examples might be ordering a suspect not to return to the scene of the alleged offence or to speak with the alleged victim." JSP 830 MSL Version 2.0 1-5-7 AL28*

Post Charge

> *"42. Once a person has been charged the CO may decide that they should be released from Service custody and impose administrative conditions on the Service person (see paragraph 57) (using T-SL-CAO04 Annex G). "*

[3] Command Advisors, embedded into every unit of the Navy are not legally qualified but do typically receive two weeks' of training in legal matters thus enabling the CO to take action without recourse to a lawyer in every instance and which may not always be possible for operational reasons.

And

> *"57. If a person is to be released from custody there is nothing to prevent the CO imposing conditions on an administrative basis by ordering that the accused complies with certain requirements or refrains from particular activities. However, a CO may wish a judge advocate to impose the sort of conditions set out at paragraph 56 above where they do not consider that ordering an accused to do, or not do, something would achieve the desired effect or where the accused is a relevant civilian and the CO has no power to give such an order."*

72. The Navy is content that the existing powers including the regimes for pre and post-charge custody and the power to issue lawful orders meet their requirement and seek no extra powers. The Army and RAF both acknowledge the power to give lawful orders but, perhaps reflecting their operating environment, express some concerns about the scope of such orders. The RAF raised the possibility that an order which interferes with a service person's right to see his or her spouse, partner or children might not be lawful and states that COs at times have expressed concern in such matters. Taking a power for COs to set conditions akin to bail conditions and similar to the powers of a JA is not recommended.

73. **The scope of lawful orders**. The expertise on the scope of lawful orders (JSP 830) lies within the MOD and the three Services. However, it is considered that, when the SP and COs are exercising their powers under Armed Forces Act (AFA) 2006 to investigate an alleged service offence, then orders given by a CO to facilitate such an investigation are likely to be lawful orders. In like manner orders given post-charge in order to ensure that the matter which is under investigation and is the subject of the charge is brought to a proper conclusion are likely to be lawful. Any orders given are entirely case specific and must be reasonable (e.g. the CO "has reasonable grounds for believing" AFA 2006) and proportionate to the situation.

Conclusions and Recommendations

74. **Conclusions**. The Services do not actively seek extra powers and it is not considered necessary for extra powers to be taken. However, given the concerns that have been expressed, it is clear that on occasion COs are uncertain as to the scope of their power

to issue lawful orders. It appears that the same uncertainty does not extend to COs using the power to authorise pre-charge custody.

75. The advice to COs in this area is apparently confined to the JSP 830 extracts in paragraph 71 above. Legal advice does not seem to be sought in such matters on any regular or frequent basis. Such advice must perforce be case specific. Nevertheless, subject to this specificity, there is a need for a formal MOD (tri-Service and MOD Law) policy agreement to be reached on the scope of lawful orders which may be given by COs when either pre-charge custody is not sought or where, despite a decision that grounds for the authorisation of pre-charge custody are found to be present, lesser measures may be sufficient to meet the needs of the case. This agreement should also include the use of such orders post-charge where it is not considered necessary or appropriate to seek post-charge custody. The agreement should consider the scope of such orders, should give advice on when it might be appropriate to seek legal advice before making them and should consider the procedures to be used in making them. Such procedures might include consideration of a time period after which the orders should be reviewed (e.g. every 48 or 72 hours) and the advisability of a written copy of the order being given to the service person in question. Advice based upon this agreement should be included in the appropriate Service manuals and should be included in the training of COs and the SP.

76. This advice would cover all cases in which service offences are under investigation but it should be noted that Recommendation 3 of SJSR1 addressed cases of Domestic Abuse and / or Child Abuse arising in the United Kingdom and recommended that they always be dealt with in the civil system. Implementation of this recommendation on Domestic / Child Abuse will mean that in these most sensitive cases any measures taken or authorised by a CO in the UK will only be of short duration as the matter will be handed over to the Home Office police for investigation and further progress.

Recommendation 16: That a tri-Service agreement be reached on the scope of, the use of and the procedure for lawful orders in both pre-charge and post-charge situations. That this agreement should be reflected in further advice to COs, SP and other service personnel by promulgation in the appropriate manuals. Training in these matters should be included in the courses for COs and in SP training (see Recommendations 5 & 6).

SIB SERVICE POLICE SECONDMENTS AND POWERS

(iii) The Review should report on the outcome of discussions with National Police Chiefs' Council (NPCC) about seconding SIB Service Police officers into Home Office (HO) Police Forces, and whether secondees should/could have full civilian powers during that period of secondment. The Review should also seek feedback from the Home Office on the ability of the HO Police Forces to 'support' investigations overseas and provide secondment opportunities for those in the Defence Serious Crime Unit, should it be agreed.

77. In SJSPR1 Sir Jon Murphy recommended the establishment of a Defence Serious Crime Unit (DSCU):

"Recommendation 2: A tri-Service Defence Serious Crime Unit (DSCU) is created following the civilian police Regional Organised Crime Unit (ROCU) model."

78. Sir Jon made a number of further recommendations in relation to the DSCU:

"Recommendation 3: The three existing Special Investigations Bureau (SIB) be brigaded into the DSCU together with all current specialist investigative support – intelligence, undercover, surveillance, digital units, forensic and scenes of crime.

Recommendation 4: SP personnel are seconded into the unit and should retain their individual SP identity.

Recommendation 5: The DSCU to provide a multi-disciplinary 'flying' response to the investigation of serious crime worldwide.

Recommendation 6: The individual SP Professional Standards units should be seconded into the DSCU.

Recommendation 7: The Ministry of Defence Police (MDP) and National Police Chiefs' Council (NPCC) to be invited to provide an appropriate level of resource to the DSCU."

79. In a prior report completed by the then MOD Policing Advisor for the Vice Chief of Defence Staff the advisor identified:-

'The lack of a coherent strategic vision for the SP regarding enhancing efficiency and effectiveness through greater collaboration.'

80. The advisor went on to note that despite previous commissioned reviews and studies into the benefits and opportunities of improved joint working, none of these had received the appropriate support and mandate to deliver on their recommendations.

81. At the time of writing this report decisions have yet to be made in relation to any of the recommendations of SJSPR1 (noted above). This being the case, further work in relation to this part of the TOR of SJSR2 has been limited to further discussions with National Police Chiefs Council (NPCC) and the Home Office regarding feasibility and how the establishment of the DSCU, secondments and support to overseas investigations might be made to work.

82. Should the recommendations be accepted then a joint working party comprising of all the relevant stakeholders will need to be established to carry out more detailed work to identify a desired operating model and what changes to legislation and policy are required to deliver the new model.

Secondments

83. The possibility of seconding SP (Special Investigations Branch (SIB)) investigators into Home Office (HO) police forces, for the purposes of gaining experience of serious crime investigation, has been subject of consultation with the NPCC. The position of the civilian police remains one of wishing to support and facilitate secondment. This has gone as far as appointing a NPCC lead on this work on behalf of HO police forces.

84. Further consultation has also taken place with the Home Office Powers Unit with regard to the SP being granted full civilian policing powers for the duration of the secondment. The Home Office remains supportive of the recommendation but are cautious of the proposal that SIB officers be attested as special constables to gain maximum benefit from secondment. The NPCC lead on the Special Constabulary has also been consulted.

Areas raised by the Home Office for consideration:

- Seconded SIB investigators would not be acting in the commonly understood role of a 'Special Constable (SC)'. Specifically, they would not be acting as volunteers and thus, it is suggested, may be perceived as undermining the ethos of the Special Constabulary. The NPCC-led National Citizens in Policing Programme is currently overseeing work to both clarify and develop the role of the Constabulary; this proposal appears to run counter to what they are trying to achieve.
- Training requirements – would the individuals in question undertake the full SC training programme or undertake an assessment to show that they meet the required standard.
- Personal Safety Training – this requires the use of force and an on-going capability to put the training into practice in the operational environment when needed. This also requires the personal issue of relevant equipment (CS gas etc).
- Queen's Regulations – currently explicitly prevent anyone in the Armed Forces from becoming a Special Constable. For those in the Reserve, there is an element of discretion. This is reflected in The College of Policing Eligibility Guidance.
- Off-duty as a constable – there is an expectation that SCs will intervene when appropriate in order to prevent crime and protect the public.
- Classification –would SIB 'specials' count in HO workforce statistics.
- Discipline – there would need to be clarity as to which discipline regulations apply. What impact any misconduct in the civil police environment would have in the individual's Service role.
- Expenses – SCs are entitled to expenses for costs of travel to duty, given that they would not be volunteers would SIB specials be entitled to this.
- Sick pay – SCs are entitled to sick pay from the force if injured on duty and consequently cannot work in their 'day job'.
- Conflict of Interest – when committed to a civil policing duty and then required in their Service capacity.

85. Accepting that The Queen's Regulations would need to be amended; these are all matters of detail that could be resolved through negotiation by the MOD.

86. An alternative though less attractive means of granting powers would be to grant those currently conferred on specialist civilian investigators. This has the disadvantage of not conferring powers of arrest but SIB investigators would be able to interview, obtain witness

statements and investigate. If added to a civilian forces list of those with designated powers, it would further provide the ability to exercise powers of entry and seizure and interview of suspects.

87. To establish whatever model is determined to be the most appropriate, a great deal of further work will need to be done to work out issues such as in this non-exhaustive list:
    - Will all civilian forces partake, if not which forces will form a suitable cadre?
    - What integration process will be required?
    - Terms & Conditions?
    - How will the process be managed/coordinated?
    - Will all SIB officers be seconded on a rolling programme, if not what criteria will be applied?

88. The NPCC lead on Special Constabulary has indicated that should MOD Ministers support the recommendation, he will explore this further with the NPCC.

89. Any alternative models to grant full civilian powers would appear to require legislation.

HO Police support to the SP in Investigations Overseas

90. The HO, NPCC and Police Scotland are supportive of the proposal but await an MOD decision before exploring the detail of how the recommendation would operate in practice.

91. This is seen as a relatively straightforward recommendation as there is significant precedence for this kind of activity:
    - Whilst having no operational jurisdiction, National Crime Agency staff (NCA) work overseas in an operational support capacity on a daily basis working in partnership with law enforcement agencies and police services across the globe.
    - The Metropolitan Police Service (MPS) has historically operated in this capacity in support of both UK victims and overseas policing.
    - The national Regional Organised Crime Unit (ROCU) network and the 43 HO police forces, particularly the larger metropolitan forces, all deploy investigators overseas on a reasonably frequent basis in support of pro-active organised crime operations and to conduct enquiries in relation to UK homicide investigations.

- In all of these cases they operate without jurisdiction but with the support of both the NCA international liaison officer network and local law enforcement.

92. It is a recommendation in SJSPR1 that HO police investigators be posted into the proposed DSCU. It would seem sensible that these individuals have a role in supporting their Service colleagues when deployed overseas. It may be the case that on occasions a niche skill or a more senior person may be required from a HO force.

Provide secondment opportunities for those in the Defence Serious Crime Unit.

93. This heading in SJSR2 TOR appears to be a misunderstanding of the SJSPR1 recommendations. The secondments referred to above do represent this opportunity, as the intention is to brigade the three SIB regiments into a single unit having had the benefit of immersion in civilian policing investigations.

94. It is anticipated that the DSCU will follow the civilian model in establishing niche and highly specialised sub-units dealing with serious sexual offending for example. At this point the opportunity should be taken for exchange secondments with similar units in HO forces.

ADDITIONAL SERVICE POLICE POWERS

(iv) The Review should consider whether there is a requirement for Service Police to have powers under Proceeds of Crime Act 2002, and to award Fixed Penalty Notices, and Cautions, and if there is a requirement what additional training would be required to use these and any other appropriate powers, and what legislative changes would be required.

95. In SJSPR1 Sir Jon Murphy considered the necessity for certain additional powers to be given to the SP. He recommended that further work be carried out to consider the feasibility of granting them.

Proceeds of Crime Act 2002

96. The Proceeds of Crime Act (POCA) 2002 carries wide-ranging provisions allowing investigators to seize and restrain property and assets and secure forfeiture orders when it is believed that they were criminally acquired. During fieldwork SP (SIB) investigators identified this as a lacuna in their investigative armoury, citing instances where they had been unable to strip individuals of their ill-gotten gains or had resorted to other agencies to utilise the powers on their behalf. It was highlighted that whilst the SP do not have access to the powers the Ministry of Defence Police (MDP) do.

97. Since the conclusion of SJSPR1 in April 2018, this matter has moved forward to the point of potential implementation. The accrediting body for the administration and use of POCA is the National Crime Agency (NCA). The formal POCA enablement application for the Service Police was submitted in November 2018.

98. The matter is now with the Home Office and it is anticipated that the SP will be granted the powers in the not too distant future.

Recommendation 17: This matter should be allowed to progress and should no longer be regarded as part of the SJS Review.

Fixed Penalty Notices and Cautions

99. The civilian police are granted powers to issue traffic fixed penalty notices (FPN's), penalty notices for disorder (PND's) and cautions which can be issued by police officers and some police staff for both criminal and traffic offences. The consequences and nature of these sanctions for breaches of the law differ depending on whether they relate to criminal conduct or breach of road traffic regulations.

Criminal Offence PND's

100. PND's are a statutory disposal established by the Criminal Justice and Police Act 2001. They are available for adults aged 18 and over. Lower tier offences have a penalty of £60, upper tier offences are £90. The recipient has 21 days to either pay the fine or request a court hearing, if they fail to do either then the fine is increased. An admission of guilt and consent are not required to issue a PND. A crime record is created when the PND is issued, but it does not form part of a criminal record. The PND will be shown as an outcome on the Police National Computer (PNC) and may be disclosed as part of an enhanced disclosure and barring service check.

Traffic Offences

101. There are a number of traffic offences for which FPN's can be issued[4] and some offences are used more readily than others. Only one endorsable offence can be dealt with by fixed penalty per stop of a vehicle, any more must be dealt with via the courts. There is a maximum of three offences per stop otherwise all offences must be dealt with by court proceedings. One exception to this is tachometer offences.

Adult Cautions

102. A caution can only be administered to an adult aged 18 or over and only if the suspect has fully admitted the offence. The scheme is designed to provide a means of dealing with low-level and mainly first time offending without a prosecution. Cautions can be issued for both summary and either-way offences, they cannot be issued for indictable only offences unless the CPS agrees. Cautions can be administered for any offence, however they are aimed at lower level offending. In issuing the caution the full code test as set out in the Code for Crown Prosecutors[5] must be met and there must be sufficient evidence to provide a realistic prospect of a conviction should the offender be prosecuted. The caution

[4] www.rac.co.uk/drive/advice/legal/fixed-penalty-notices or www.theaa.com/driving-advice/legal/fixed-penalty
[5] www.cps.gov.uk/publication/code-crown-prosecutors

can be issued only if the suspect has not previously been issued with a caution (although repeat cautions can be given if there are exceptional circumstances) or been convicted of any offence (again cautions can be given in exceptional circumstances, for example when the convictions are dated or of a different nature to the conduct of the caution). The caution can influence the decision to prosecute should any other offences go on to be committed. The caution can be cited before a court should the suspect be found guilty of other offences. The suspect has to accept the caution, if the suspect does not admit the offence or does not accept the caution then they may be charged or summonsed to court.

103. A caution is not a criminal conviction but will be entered onto the PNC if the caution has been administered for a recordable offence. If the suspect works within a notifiable occupation, cautions can be disclosed to their employer and will be disclosed during a DBS check. Cautions can also affect travel and residency in other countries.

Youth Cautions

104. Youth cautions are statutory out of court disposals which can be administered for any offence but are intended for low level offending. They apply to anyone under 18 years old and can be issued if there is sufficient evidence to charge, they admit the offence and it is deemed that they should not be prosecuted or given a conditional caution. They are kept on the PNC for recordable offences. A youth caution is not a conviction but is a formal criminal justice disposal. They are considered spent once delivered.

Jurisdiction

105. During SJSPR1 the SP made representations to have the ability to issue financial fixed penalties and cautions to deal with minor matters. Their rationale for this being that when dealing with such matters under the current regime there is no middle ground allowing the administering of a proportionate and quick sanction. They are faced with taking either no action at all or a full file submitted to the CO or DSP. In reality, given these are minor matters, this will almost always be the CO. Jurisdiction over investigation is not exclusive to the SP. When the AFA 2006 came into force, it left the CO at the heart of the SJS and thereby preserved the ability of the CO to maintain regimental/unit discipline, efficiency and morale. The AFA's of 2011 and 2016 have not fundamentally changed that position.

106. Whilst a CO is obliged to refer serious matters to the SP they retain the ability to investigate and then determine on less serious offences summarily, decide whether an individual is charged with an offence and authorise pre-charge custody for the purpose of SP investigations. Provided referral is made when it should be, then the system works well. The CO has oversight of not just the sanction, as would be the case with a fixed penalty or caution, but the conduct of the offending individual. In the service context these sanctions have the potential to undermine CO discipline, remove the ability to 'look the offender in the eye' and provide appropriate words of advice as to future conduct whilst administering a sanction for the matter referred.

Recommendation 18: It is recommended the grant of powers to issue fixed penalty notices and cautions to the Service Police is not pursued.

TRANSFERS

(v) Cases of offending should be dealt with in the most appropriate jurisdiction, and the Prosecutor's Protocol sets out a framework for that with the aim of getting it right at the outset. There may, however, be advantage in having the ability to transfer cases from one jurisdiction to another after the case has been investigated, right up to sentencing. The Review should give further consideration of the requirement for, and mechanics of, transferring cases between jurisdictions.

107. SJSR1 Annex E dealt with the issue of Transfers and recommended that further consideration be given in Part 2. This consideration is in three parts;

- Transfers of cases arising in the UK.
- Remittal of cases in the Criminal Justice System (CJS) to the Service Justice System (SJS) for sentence.
- Transfer of cases arising solely in the SJS system (e.g. under jurisdiction abroad) to the CJS.

108. The issue of transfer of cases in various guises has been canvassed on a number of occasions and discussed in the Service Justice Board (SJB) and other forums.

Transfers within the UK

109. **Discussion.** Currently offences involving service personnel committed in the UK in the jurisdiction of England and Wales are dealt with in either the SJS or CJS under the terms of the Prosecutors Protocol (PP) and Home Office Memoranda which govern the operation of the dual jurisdiction that exists. Once an allocation to a jurisdiction has taken place the matter is investigated and, where appropriate, tried in that jurisdiction. Once a charge has been preferred a change of jurisdiction would require proceedings in one jurisdiction to be discontinued and the new jurisdiction to commence its own investigation process. The ability to transfer post-charge would mean that the delay caused by this procedure could be ameliorated if the existing prosecuting authority were to continue with the case and present it in the new jurisdiction and venue. In Scotland and Northern Ireland no Protocols exist but allocation is conducted under ad hoc agreements.

110. However, concomitant with the consideration of transfers come a number of other issues which would complicate the legislative path to achieving a UK wide ability to transfer. Principal amongst these are:

- The devolution issues that would arise in attempting to create a transfer system for cases arising in Scotland and Northern Ireland where the SJS has no power to try criminal offences arising under the criminal law of those jurisdictions.
- The evidential and procedural difficulties that may arise post-transfer both in the jurisdiction of England and Wales and in those of Scotland and Northern Ireland.
- The authority of the Director of Service Prosecutions (DSP) and the Director of Public Prosecutions (DPP) to prosecute cases in the "alternative" jurisdictions in England and Wales. This issue would also arise in a more complicated form in Scotland and in Northern Ireland.

111. While the path to the ability to transfer in the dual jurisdiction of SJS and CJS under the law of England and Wales might be easier to negotiate it is considered unacceptable that service personnel in one part of the UK should be differently treated to those in another. The need for the ability to transfer is difficult to quantify. The allocation systems both formal and ad hoc appear to work satisfactorily and there is no evidence that any cases have required discontinuance and reinvestigation in a new jurisdiction. Elsewhere in this Review (see below) there are recommendations as to the content of the PP and Home Office Memoranda and during any such exercise the general content of these documents should be reviewed and confirmed as up to date and meeting the current requirements of the SJS and CJS.

112. **Conclusions.** There is no evidence of a need or indeed support for the taking of a power to transfer cases arising within the UK. The legislative and administrative effort that would be required is high and disproportionate to any benefit that might be gained. It would be unacceptable (and very possibly open to challenge) to create a position of disparity of treatment amongst service personnel. There is wide support for the continuation of the current allocation system and for the Protocols and Memoranda governing allocation to be reviewed and updated.

Recommendation 19: It is recommended a power to transfer cases arising in the UK is not pursued.

Recommendation 20: It is recommended that the PP and Home Office memoranda governing the exercise of the criminal jurisdiction in England and Wales be reviewed and particularised to ensure that they reflect the current requirements of the SJS and CJS. (Cross refer to Recommendations 1, 2 and 3 of the SJSR1).

Remittal of cases in the CJS to the SJS for sentence

Discussion.

113. The MOD has considered this in recent years. The debate has rehearsed a number of factors and has been conducted on a largely qualitative basis with apparently little examination of the type or number of cases that might be suitable for such remittal. The main thrust of the argument for such a power to remit is that it would give judges in the CJS a further tool in their sentencing armoury to be used on an optional basis where such a remittal was in "the interests of justice". The interests of justice in this context is taken to mean that any sentencing court should be in the best position to reach a just and proper determination of the appropriate sentence for the offence and offender before it. The power of the Court Martial to employ a wider range of sentences (dismissal, detention etc.) than the CJS is considered integral to the proposal.

114. The three Services whose personnel would be the subject of this power do not support such a provision on a number of grounds. These grounds are also largely based upon qualitative factors and include a concern that such a power will lead to a perception of "special treatment" for service personnel. This would be highlighted if a service person on trial with civilians in the CJS were to be, alone amongst the co-defendants, remitted to the SJS for sentence. There is also a concern that if such powers were achieved in England and Wales but not in Scotland or Northern Ireland then there would a disparity of treatment of service personnel. These concerns are also raised by other consultees (Attorney General's Office (AGO) / Crown Prosecution Service (CPS)) with the addition of the possible problems in "access to justice" entailed in the civilian victims of service offenders having to travel to the Court Martial centres for the sentencing process. The Services pointed out that they require an officer to attend when a member of the Services comes before a civilian court (when they are aware of it). This officer is available to advise the court on the character and personal circumstances (pay etc.) of the individual concerned. In this way the interests of justice are served by the sentencing court having available to it such information as may be necessary for it to reach a proper determination of sentence for the offence and offender before it.

Thereafter any further service interest in the outcome of the matter may be dealt with administratively.

Practicalities

115. The information that is available from the Services indicates that in 2017 the following numbers of service personnel were known to have been sentenced in civilian courts:

Table 2: Service Personnel known to be Sentenced in civilian courts in 2017

Navy	126[6]
Army	720[7]
RAF	23

Source: Provided by Services to SJS Review

116. The Navy provided a breakdown of the offences which may be simplified into:

Table 3: Navy offenders known to be sentenced in civilian courts in 2017

Motoring offences	72 (57%)
Violence (assault / ABH / GBH)	29 (23%)
Drunkenness / Threatening behaviour / criminal damage	23 (18%)
Possession of drugs	1
Sexual Offences	1

Source: Royal Navy for SJS Review

[6] This follows a similar figure in 2016.
[7] This figure included cases in Germany, Canada and Cyprus.

Conclusion

117. The likely scope of a power to remit for sentence is currently unknown – no category of offences or other circumstances where the power might apply has been propounded. The number of cases of service personnel sentenced as known by the Services is not necessarily the full extent of the incidence of such sentencing as individuals may well fail to report (particularly minor) matters to their units. In like manner the civilian courts will not always be aware that the individual is in the Services; though when they are they can ask for a Services representative to attend court. Such a power to remit would bring in extra work to the Court Martial but absent any proper quantitative analysis it is not possible to gauge the effect that this might have on the reduced estate and resources.

118. It is difficult to assess the benefit that might accrue from such a power being taken. The setting aside of the long established principle that between courts of equal standing, the court which heard the case should generally sentence the offender, coupled with the concerns over potential disparity between service and civilian offenders and between service offenders in different jurisdictions in the UK, would require clear and defined benefit to be identified. The Services confirm that minimal operational effectiveness issues arise from the process of being sentenced in the CJS and that the downstream consequences of any such sentence are then for the Services to manage. It is difficult to construe any fairness or protection issue arising where an offender remains for sentence in the court which heard the case.

Recommendation 21: It is recommended that taking the powers to enable matters to be transferred from civil courts to the Court Martial not be pursued.

Transfer of cases arising solely in the SJS system (e.g. under jurisdiction abroad) to the CJS.

119. Offences committed by those subject to AFA 2006 outside the territorial jurisdiction of England and Wales may be tried under the AFA 2006 (See SJSR1 paragraphs 4.8 to 4.11). There are a limited number of offences where further extra territorial jurisdiction exists (e.g. murder and sexual offences falling under SOA 2003 S72) and which therefore, when committed abroad, may also be tried in the CJS. The cases under S72 of the SOA 2003 may be summarised as sexual offences committed where the victim of the offence is under the age of 18.

120. The SJS sole jurisdiction encompasses cases of historic (e.g. pre-SOA 2003 Act) sexual abuse. A number of such historic cases have arisen where complaints are made in the UK by civilians about past offences committed against them abroad by persons then subject to the Service Discipline Acts but who are no longer so subject to Service Discipline. These cases have a lesser military nexus and consideration of an ability to transfer such cases after investigation to the CJS for trial has taken place. However as with transfers within the UK (see paragraphs 109 to 112 above) there are a number of attendant problems accompanying any measures that might be taken to enable such transfers to take place. In addition, the current jurisdictional position allows cases to be tried in one forum where such offences may have taken place both abroad and within the UK and also where offences may span a period both before and after the coming into effect of the SOA 2003; in both these situations the SJS has jurisdiction over the offence wherever and whenever committed. (It should be noted that it was to provide such facility for trial in one forum in cases of Murder, Manslaughter and Rape (MMR) where persons subject to the AFA committed such offences both in the UK and abroad that the AFA 2006 removed the pre-existing bar to trial of such matters under AFA 2006 when the offences were committed in the UK.) The number of these historic trials is small and will decrease with time and with the diminution of the numbers of personnel and dependents stationed abroad. The legislative and administrative effort that would be required to enable transfers to take place is high and disproportionate to any potential benefit that might be gained.

Recommendation 22: It is recommended a power to transfer cases arising outside the UK is not pursued.

SERIOUS SEXUAL ASSAULT OFFENCES

(vi) Notwithstanding the recommendation in Part 1 of the Review that the Court Martial should not deal with cases of Rape (and the other serious offences of Murder, Manslaughter, Domestic Violence and Child Abuse) in the UK unless the consent of the Attorney General is given, the Review should further consider how best to deal with remaining cases of serious sexual assault (Section 2 and Section 3 of the Sexual Offences Act 2003) in the UK, so that, the needs of the victim are met, cases are prosecuted as effectively as possible, and the system of command and discipline within the Service is maintained.

121. If a decision is taken not to implement Recommendation 1 of the first part of the SJSR1 then no further recommendation is required.

122. If it is decided to implement Recommendation 1 then the disposal of cases charged with S2 (Sexual Assault with penetration) and S3 (Sexual Assault without penetration) offences under the Sexual Offences Act 2003 (SOA) falls for consideration. SJSR1 examined the background to the removal of the statutory bar on the trial in the SJS of MMR where the offences were committed within the jurisdiction of England and Wales. This change was effected by AFA 2006. MMR were referred to in the HO Memorandum of the time as "very serious crimes" and in parliamentary papers and debates as "more serious" crimes. In SJSR1 the sentencing ranges of offences under S1, S2 and S3 of SOA were set out thus:

Table 4: Sentencing Range for Serious Sexual Offences Act 2003

Section	Offence	Sentencing Range	Maximum Sentence
Section 1	Rape	4 to 19 years	Life Imprisonment
Section 2	Sexual assault with penetration	Community Order to 19 years	Life Imprisonment
Section 3	Sexual assault without penetration	Community Order to 7 years	10 years' custody

Source: Sexual Offences Definitive Guideline

123. It can be seen that S1 and S2 offences have similar sentencing ranges indicating that the seriousness of the offences is also similar. SJSR1 indicated that other common law countries still retain exclusions for such more serious matters and that the breadth of the exclusion is in some cases wider. S3 offences while remaining serious sexual offences attract a considerably lower sentence range indicating that their seriousness is of a lower order.

Table 5: Sexual Offences Statistics in the SJS 2015 – 2017 by Defendant

No. of defendants (% of Defendants)	2015	2016	2017
S1. (Rape)	12 (25%)	16 (31%)	23 (29%)
S2. (Assault with penetration)	7 (14%)	11 (21.5%)	4 (5%)
S3. (Assault without penetration)	25 (51%)	15 (29.5%)	34 (42%)
Other sexual offences	5 (10%)	9 (18.0%)	19 (24%)
Total	49 (100%)	51(100%)	80 (100%)

Source: MCS

124. The Services have a strong interest in the maintenance of a cohesive and inclusive sense of belonging and unity within units, thereby fostering morale and discipline and leading to efficiency. Forms of behaviour that lead to division of that unity are corrosive to morale and efficiency and include bullying and harassment whether based upon a race, gender or rank.

125. The most serious offences of sexual misconduct committed in the UK are most properly dealt with in the CJS (as explained in SJSR1) and these cases should include

offences under S2 SOA. Those of a less serious nature are best kept within the SJS for the reasons set out above.

Conclusion and Recommendation

126. **Conclusion**. S2 SOA offences are as serious as S1 offences and indeed may at times carry heavier sentences depending upon the individual circumstances of the offence. It is therefore considered that these offences when committed in the UK should, like MMR, also be tried in the CJS and whatever arrangements are made to implement the MMR change should apply to S2 SOA offences. The upshot of these two recommendations is that the jurisdictional split within the UK for these very serious matters would revert to the position held from the 1950s until 2009 but with the addition of the Section 2 SOA offences. From Table 5 above it can be seen that S2 SOA offences form the smallest proportion of SOA S1, 2 and 3 offences each year and, of course, a number of these S2 offences will be committed abroad and not fall under the UK jurisdiction. To move these S2 offences committed in the UK into the MMR category will be to move a small number of cases and provide a coherent and cogent policy for dealing with those most serious of cases that arise in the UK while ensuring the best support is available to victims. S3 SOA matters and other sexual offences (see table 5), for the reasons set out above, should be retained within the SJS where the Services may demonstrate their commitment to equality of treatment for all personnel through speedy and rigorous disciplinary action within the SJS.

Recommendation 23: It is recommended that S2 SOA offences join MMR as being cases that are tried in the CJS when they are committed within the UK. S3 SOA offences should continue to be dealt with in the SJS.

SEXUAL OFFENDING CONVICTION RATES

(vii) The Review should examine the rate of convictions secured in the Court Martial – when compared to the civilian criminal courts – for sexual offending.

127. It is important to be aware that throughout this section of the Review Part 2, comparisons between the CJS and SJS are comparisons made between the Crown Court and magistrates' courts combined set against the Court Martial. In some instances, the statistics used are figures drawn directly from published statistics. In others they are figures extrapolated from published statistics. In all statistical work there are potential pitfalls to avoid and this is particularly so when using statistics in a comparative manner because it is necessary to compare like with like and secondly to be aware of the danger of reliance on a small body of data which may not allow reliable conclusions to be drawn. In the CJS statistics produced by the CPS and Ministry of Justice (MOJ) illustrate with some force the apparent anomalies that can arise.

CJS Statistics

128. **Rape cases**. The figures given for convictions in rape cases by these two authorities (the CPS and MOJ) vary for a number of reasons. The most important of these is the actual interpretation that each authority puts on the meaning of a conviction in a rape case. In the MOJ statistics it represents a case in court in which there was a conviction for a rape offence as the index offence; in the CPS statistics it represents a conviction in a prosecution / case where rape was charged (a rape flagged case) and in which there was a conviction either for a rape offence or an alternative or lesser offence. Furthermore CPS data includes all cases marked as flagged cases rather than completed court cases. The CPS data is by offence and does not provide data by defendant. There may be a number of offences carried out by each defendant. MOJ data relates to cases where the principal offence actually prosecuted in court was rape and is counted on a defendant basis. MOJ data is based upon the financial year while CPS data uses the calendar year. Given the high numbers of cases / offences used in the annual data provided (typically some 4,000 for MOJ and 5,000 for the CPS) and the consistency of yearly figures then, within the very real constraints that these differences impose, it is reasonable to rely upon these conviction rates. Accordingly in recent years the figures for conviction in rape cases as given by the CPS are in the mid to high 50% while the MOJ figures are at the mid 30%. The difference is thought to be largely

explained by the inclusion of convictions for “alternate and lesser” offences in the CPS figures and the varied bases used e.g. defendant based and offence based data.

129. **Sexual Offending other than Rape.** CJS figures for this group of offences show that the conviction rate increased from 79.5% in 2016–17 to 80.4% – the highest rate ever recorded. Historically the conviction rate has been in the very high 70% range. The MOJ does not record sexual offending excluding rape but for all sexual offending MOJ records show a conviction rate of around 62%. It is not easy to reconcile these figures but the difference is thought to lie firstly in the inclusion of rape statistics in the MOJ figures, which having a lower conviction rate than other sexual offending will bring the overall percentage down; in addition the differences in recording bases (defendant and principal offence as opposed to offences) will also contribute to the lower MOJ reported conviction rate.

SJS Statistics

130. The annual sexual offending statistics in the SJS are provided by the MOD. These statistics show those matters falling under the SOA 2003 and historic sex offences dealt with by the Service Police and SPA and tried in the Court Martial.

Rape

131. The conviction rates for rape tried at the Court Martial are recorded by calendar year and by offence and by defendant. The conviction rates of defendants found guilty of rape in the three years 2015/16/17 are:

Table 6: Rape conviction rates at Court Martial

	2015	**2016**	**2017**
By offence	9.4% (3/32)	8.6% (2/23)	4% (2/49)
By defendant	17% (2/12)	7% (1/14)	9% (2/23)

Source: MCS

Sexual Offending Other than Rape

132. The conviction rates of defendants found guilty of other sexual offences tried at Court Martial in 2015/16/17 are:

Table 7: Sexual Offences other than Rape conviction rates at Court Martial

	2015	2016	2017
By offence	54% (37/68)	67% (41/61)	50% (80/161)
By defendant	51% (19/37)	60% (21/35)	49% (28/57)

Source: MCS

Other Statistics

Overall Conviction Rates

133. The overall conviction rate for all cases in the Crown Court over the past three years is some 78% to 80% and in the Court Martial is 74% to 78%.

Attrition Rates

Percentages of Investigations passed to Prosecutors

134. In the CJS the percentage of investigations by the police into rape complaints that were referred to the CPS in 2016/17 was 16%.

135. In the SJS the percentage of completed rape complaints investigated by the police that were referred to the SPA in 2016 and 2017 were 61% and 82 % respectively.

Percentage of referrals taken to trial

136. In the CJS in 2016/17, 55% of rape referrals by the police to the CPS resulted in charge; the figure for 2017/18 was 47%.

137. In the SJS the equivalent figure for rape referrals in 2016 was 60% and in 2017 56%.

Discussion

Rape and other Serious Sexual Offences

138. The number of rape cases in the SJS is insufficient for any reliable conclusions to be drawn. In a base of ten cases, each case represents 10% of the total data and one or two changed outcomes can entirely change the presentation. Thus, while the rate of convictions in SJS rape cases seem to be significantly lower than that in the CJS it is noteworthy that the larger base of all other sexual offending, while still small, aligns more closely with the rate in the CJS. When all offending is considered (e.g. all trials at Court Martial) providing a data base of some 400 trials the SJS conviction rate is much the same as the CJS.

Factors that may be relevant

139. **Age** - The ages of those suspected of sexual offending in the SJS is younger than that in the CJS. Nearly half of suspected offenders in the SJS fall into the age bracket (e.g. under 26 years old) in which the conviction rate for rape flagged cases in the CJS is at its lowest – 30%.

140. **Good Character** - All defendants at Court Martial are likely to be of Good Character in the legal sense (as of course will be the complainant) and the Judge will give a Good Character direction. In CJS rape trials many defendants will be of Good Character but not to the extent that exists in the SJS.

141. **Known Defendants** – In cases whether the fact of sexual activity is not in issue the "hard" evidence provided by forensics e.g. DNA, medical examination etc. is of limited use to the fact finding tribunal. The issue before them is likely to be one of consent. The STERN Review of 2010 observed:

> *"The question with rape is not whether sexual intercourse took place and if the defendant was a participant. That is rarely what is being argued. The question is whether the complainant consented to sexual intercourse and the defendant reasonably thought he or she did. In such cases the jury has a difficult task and it is not easy to see how the conviction rate could reach a much higher level within the criminal justice system as it currently operates."*

142. The cases where consent is in issue are almost all cases where the defendant and complainant have some pre-existing relationship or social contact. Cases involving rape by strangers are in a very small minority. In the CJS the proportion of cases where the defendant and complainant have such a pre-existing relationship or contact is some 90%[8]. In the SJS it is likely to be close to 100%.

Attrition

143. A greater proportion of cases reach the prosecutors from the police in the SJS than in the CJS. This is thought to be unremarkable given the overall numbers involved and the circumstances of military service. The proportions of cases taken forward to trial by the Prosecutor in each system are roughly similar.

Conclusion

144. Sexual offending in the SJS when brought to trial at Court Martial results in lower rates of conviction that in the CJS. In rape cases the difference is most noticeable. The data pool of sexual offending in the SJS (particularly in rape cases) is too small for any accurate or reliable conclusions to be drawn but there are a number of factors which may help explain the lower conviction rate (the age bracket of service defendants, good character, the prevalence of cases in which the issue is consent).

145. The risk of reaching false conclusions from a small data base is underlined by the increasing congruity of the conviction rate statistics between the CJS and SJS as the size of the data pools used in measuring the statistics increases (e.g. in rape, then in all sexual offending and then in all offending). The overall conviction rates between the CJS and SJS are markedly similar.

146. Elsewhere is this report and in SJSR1 recommendations are made as to the appropriate jurisdiction for the trial of cases of rape and other sexual offences when committed in the UK.

[8] www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesinenglandandwales/yearendingmarch2017#how-are-victims-and-perpetrators-related

THE MAJORITY VERDICT AND DIRECTIONS

(viii) The Recommendation that Court Martial Boards should consist of six lay members in all cases should be explored further, and the work should include the following:

i. *The requirement for, and implications of the judge giving a majority direction to panels of six.*

At Present

147. Boards of three and five members reach verdicts which may be unanimous or which may be by a simple majority; in the case of five-member Boards the verdict may also be reached by a majority of four to one. The matter of majority verdicts has been extensively rehearsed in the Court of Appeal judgement in the case of R v TWAITE. Majority verdicts are safe and unimpeachable. See paragraph 29:

> *"There is no reason to conclude that a finding of guilt on a basis of a simple majority is inherently unsafe, or that there is an increased danger that it may be unsafe if, after conviction, the defendant may be sentenced to a substantial term of imprisonment. Equally we can see nothing in a process in which a verdict may be returned by a majority which infringes the right to a fair trial, or produces an unsafe conviction"*

148. In like manner the Court made it plain (at paragraph 33) that the *"confidentiality of the deliberations"* is an important safeguard for the independence of the lay members of a Board and that *"the deliberations of the Board are confidential and a member is forbidden to reveal any opinion or vote"*.

149. The judgement went on to say:

> *"We remind ourselves that magistrates announce their verdicts, without any investigation into the question whether they are unanimous, or not, and in the Crown Court on appeal from the Magistrates precisely the same rules apply. In short it does not follow from the fact that a guilty verdict may be returned by a majority of the court, that it is necessary or appropriate to seek to discover the answer to that question."*

150. As to the taking of a verdict they stated:

> *"In our judgement the first matter that which must be ascertained is whether the Board has reached a verdict. If so the simple question which should then be asked is, "Do you find the Defendant Guilty or Not Guilty?" No further questions should be asked. The answer to that question is conclusive. There are no circumstances in which the way the individual members of the Board, or the way in which they voted, should be revealed.*

151. The Court added that the non-statutory guidance which breached this principle should be reviewed.

In Future

152. Boards of three members should proceed as before with the same directions and the same method of taking the verdict. Six-member Boards should continue in a similar manner. The Defendant before a five-member Board under the current system knows that a guilty verdict means the five, four or three members returned a guilty vote. The Defendant does not know the detail of the voting. In future, the Defendant before a six-member Board will know that either six or five members returned a guilty vote. The Defendant will not know the detail nor is there any need that he or she should do so.

153. In the case of TWAITE, the Court made reference to the practice of the Crown Court in jury trials where majority verdicts are recorded in public as being a majority and where the voting relating to the majority is also so recorded. It may be argued that the Court Martial should parallel this Crown Court practice as a part of the general thrust that the SJS and CJS should where appropriate have similar practices. In this instance it is not considered appropriate to adopt this practice.

154. As is apparent from the lengthy Parliamentary debates that took place when majority verdicts were first proposed in the England & Wales criminal justice system, this was an emotive subject which troubled lawyers and laymen alike. However, this great disquiet arose from the fact that the proposal in 1967 to move to this qualified majority was not made in similar circumstances to those that now apply to the current proposal. In 1967 the proposal represented a break from a long-standing practice of unanimity; it was an entirely new concept. In contradistinction the five to one majority verdict in the Court

Martial will not be a drastic change of practice but merely a continuation of the long-standing practice of majority verdicts in the Court Martial but with a more exacting numerical requirement for the reaching of a verdict. The arguments for not revealing the voting of a six-member Board are exactly the same as set out in TWAITE and to maintain this current practice will also maintain adherence to the concept of confidentiality that is thought to be particularly apposite in the Service context. The circumstances are different and an argument for similarity of practice with the Crown Court has no real cogency.

155. The practice of recording in public the voting figures that led to the majority guilty verdict is nothing to do with the Defendants "rights". There is no right to know the details of the voting and in fact the presumption is otherwise (viz TWAITE). The record of the 1967 House of Commons debate shows plainly that the decision to publicly record the voting was taken in order to see how the system worked. The Home Secretary, Roy Jenkins, said:

> *"I firmly believe that this will not mean that in the great majority of cases one will not continue to have unanimous verdicts, which will be announced as unanimous verdicts, for reasons which I will come to later. I propose that it is right, if the Clause is accepted, that jurors should announce in open court whether their verdict is unanimous, and, if it is not, by what majority it is given.*
>
> *That is very important from the point of view of seeing how this system works in practice and learning a little more about it. We have been accused of not having done enough inquiry into the work of the jury system. It would be very foolish to introduce this majority system, and then blind ourselves as to how it was working by saying that it could not be announced in what number of cases it worked, or by what majority the verdict was given.*[9]*"*

156. The SJS is not introducing a majority system and there is no need for the SJS to know how many verdicts are by a majority and what the voting is. The SJS system already has majority verdicts and should continue under the regime for majority verdicts as stipulated in the TWAITE judgement. Enquiry into the nature of those verdicts was specifically disapproved by the Court. For the SJS to differ in practice from the CJS in this instance is right and entirely sustainable.

[9] Emphasis added.

157. Finally, it should be noted that the CJS operates two systems in two different courts; simple majority in the magistrates' courts and publicly recorded qualified majority in the Crown Court. To ape the Crown Court procedure in trials with a six-member Board and leave the trials with a three-member Board with a simple and undeclared majority would be to operate two systems in the same court. This would be unwise as well as unnecessary and inappropriate. To attempt to regularise this by seeking to have three member courts also publicly declare their voting would open up an unwelcome and inexplicable gap with the magistrates' courts practice.

Majority Direction

158. If the voting of the Board members is not to be revealed there is no requirement for a Judge Advocate to give a majority direction as is done in the Crown Court**.** The format of any direction used is a matter for the Judge Advocate General (JAG). However, the current direction which includes an exhortation to be unanimous if at all possible followed by an explanation that failing unanimity a majority verdict may be reached should require little change. When taking the verdict of three-member and six-member Boards no enquiry should be made as to whether the verdict has been reached by unanimity or by majority (See TWAITE).

No Verdict

159. The use of the qualified majority in six-member Boards raises the possibility that such a Board may not reach a verdict. In this situation the Judge Advocate (JA) may discharge the Board and the DSP must consider whether to seek a retrial. Again the content of any such Direction and the procedure to be adopted is a matter for JAG. The Crown Court Bench Book contains a useful guide to these matters.

Recommendation 24: It is recommended that the qualified majority of five to one should be dealt with in a direction to the Board similar to that currently used for a simple majority. The Crown Court practice of two directions to the jury; first a unanimity direction and then a majority direction should not be followed.

COMPOSITION OF COURT MARTIAL BOARDS

b) Further work should be undertaken to determine whether there is a need for every Court Martial Board to consist of six members, noting that the majority of Court Martial panels currently comprise three members. The possibility of retaining smaller boards for lower level offences should be explored.

160. The current position is reflected in AFA 2006 S 151 where the composition of a Board (not including the necessary presence of a judge advocate) is laid down as:

> *"At least three but not more than five other persons ("lay members")"*

And also that:

> *"Court Martial rules may provide that, in the case of proceedings of a prescribed description, there are to be—*
> *(a)at least five but not more than seven lay members; or*
> *(b)no lay members."*

161. There is widespread agreement that five-member Boards should increase in size to six, together with a power for the six-member Board to reach qualified majority verdicts in which at least five members have agreed. The need for larger Boards of seven made up with additional members will fall away. There must be a mechanism to cope with the death, sickness or other absence of a member occurring during trial such that a six-member Board is reduced to five members. In such circumstances it is suggested that unanimity would be required of the remaining five members. Any further loss of members below five should result in the termination of proceedings and this will require the minimum number of members for a six-member Board to be specified as five.

162. There is tri-Service agreement that three-member Boards should be retained for lower level work and that the sentencing level should be the point of differentiation. It is agreed that not all cases require the Court to sit with a six-member Board. The Court Martial must remain a mobile court and be able to function in widely disparate geographical areas and in areas where operations may be being conducted. To require a Board of six members in all cases, particularly in view of the low level of seriousness of some cases that the ability to opt for Court Martial will bring before the court, is

burdensome administratively and may have operational consequences. The Court Martial should continue to sit at two levels in future; those levels being three-member Boards and six-member Boards with a differentiation in the cases before them being determined by the maximum sentence available for the offence being tried. Other common law countries operate Court Martial Boards at two levels of three and five-member Boards; the point of differentiation varies greatly between them with New Zealand sending matters to the five-member Board when the maximum punishment for the relevant offence is twenty years or more. In Australia the breakpoint is at imprisonment for six months or more.

163. In the SJS the current point of differentiation is contained in The Armed Forces (Court Martial) Rules 2009. (AF(CM)R 2009) Rule 29 and sits at the level of more than seven years:

> *" the number of lay members shall be at least five if any defendant is charged with an offence listed in Schedule 2 to the 2006 Act ; or if ….any defendant could…., be sentenced to more than seven years' imprisonment; or….. more than seven years' detention….."*

164. It is recommended that this point of differentiation in future be set at the level of more than two years. This would place for trial before a six-member Board those offences listed in Schedule 2 (as before) and also those offences for which, upon conviction, a sentence of imprisonment or detention of more than two years could be passed. This new level will leave the SJS with three-member Boards which will deal with the great majority of the service disciplinary offences contained in AFA 2006 SS 1 to 41, and the more minor matters in the civil criminal sphere. The six-member Board will deal with that small minority of service disciplinary offences where the maximum punishment is more than two years and the more serious civil criminal offences. Some 70% of cases at Court Martial are for Service disciplinary offences and approximately 30 % are for civil criminal offences.

165. A break point of not more than two years for the maximum sentence that a three-member court may pass sits well with the sentences actually passed by the Court Martial.

166. In 2015 the following sentences were passed:

b. 236 Non-custodial sentences (63% of all sentences)
c. 73 sentences of less than six months custody (19%)
d. 53 sentences between 6 months and two years custody (14%)
e. 15 sentences of more than two years custody (4%)

167. This means that 82% of sentences were within the powers of a magistrates' court and 96% of sentences were below two years. In 2016 these percentages were 77% and 97%; and 76% and 93% in 2017.

168. Of course the maximum penalty available in a number of the trials which gave rise to these sentences would have been above two years, however it is not anticipated that the new proposed limit on the offences that may be tried by the three-member court will have a major effect on resourcing requirements. The new arrangement of the Court Martial estate into two court centres is designed to bring about more effective use of the resources called for by MCS and the ability to use the courts more efficiently and with less fallow time will exert downward pressure on the numbers required.

169. The power under the Armed Forces (Court Martial) (Amendment) Rules 2013 that following a guilty plea, a three-member board can sentence whatever the maximum sentence, as is current practice, should remain.

Recommendation 25: It is recommended that the Court Martial sits with both three-member and six-member boards and that the differentiation between the two levels of board should be on the basis of the sentencing powers of the boards. The three-member board should be limited to trying those cases where no defendant could be sentenced to more than two years imprisonment or detention.

RANK AND UNIFORM OF THE BOARD

c) Further options for examining the availability of board members to sit at the Court Martial (and assisting in making best use of court time and speeding up cases) should be explored and resourcing implications identified; this includes (but is not confined to) the circumstances where a tri-service or more than one service Board can be allowed, including if the majority of the Board should be from the Service of the accused and personnel of OR7 Rank as Board members.

Rank in the Composition of the Board

170. At present personnel who qualify to act as Board members are detailed in AFA 2006 S156 and the qualifications may be summarised briefly as officers who have held a commission for at least three years and warrant officers. The Act contains no provisions as to the ranks of Board members or as to the Armed Force in which they serve. The details relating to the rank and status of the President are contained the Armed Forces (Court Martial) Rules 2009 (AF(CM)R 2009) Rule 34, in simple terms, it states that that the President must be of Lieutenant Commander or equivalent rank and must be senior to other Board members and to the Defendant. Rule 31 states that when the defendant is an officer the Board members must be officers and that when the Defendant is below the rank of warrant officer then no more than two warrant officers may be on the Board. Further instructions are contained in the Court Martial Board Specification (CMBS) and it can be seen that the current rank composition of CM Boards is a construct not of the legal requirements but of the policy requirements that have been added. Thus:

The President

Legal Requirement - The President is to be of Lieutenant Commanders rank or equivalent and senior to the defendant and other board members

Policy Addition - The President is to be of Commanders rank or equivalent (unless none available) and two ranks senior to an officer defendant.

The Members

Legal Requirement - The members must be officers if the defendant is an officer and when the defendant is not an officer there must no more than two warrant officers on a Board.

Policy Addition - No officer on a Board may be junior to a defendant and no warrant officer may be junior in rank to any defendant and that there shall be no more than one warrant officer in a Board of three and two in a Board of five.

The proposal to extend eligibility to OR7 ranks

171. Army and RAF agree this proposal. The Navy disagrees and states that it considers that 'Command level' decisions are made by Warrant Officers and above, and that this is consistent with the responsibility of being a member of a Board. The Navy also expresses concerns that a large number of their Chief Petty Officers (OR 7) are relatively young due to either accelerated promotion or sideways entry schemes, and they may not have the necessary temperament, training or experience to sit on a Court Martial Board. One of the essential characteristics of a military court is that its Board, unlike a civil jury, not only determines guilt or innocence but also determines the appropriate sentence and in doing so utilises its collective experience of and expertise in service matters. [This is exercised subject to the legal directions of the JA and assisted by the JAs with regard to any sentencing guidelines be they for service disciplinary offences or for civil criminal matters]. The experience that an OR7 rank brings to such determinations is as valid as that of an officer or warrant officer.

172. Were the proposal to be agreed then the use of OR7 may be regulated by AF (CM) R and/or by CMBS so that:

- The existing rule about all lay members being senior to the defendant is maintained.
- Only one OR7 on six-member Boards. (This would mean on any six-member Board no more than two WO, or one WO and one OR7).
- On three-member Boards either one WO or one OR7.
- Rules for the eligibility of OR7 ranks (say, 10 years' service, continuous Good Character etc.).

Colour of Uniform on the Board

173. AFA 2006 sets out the statutory basis for a tri-Service discipline act *"An Act to make provision with respect to the armed forces; and for connected purposes"* and makes no provision as to the Service from which Board members should be drawn; nor does

AF(CM)R. As with the rank of President and Members the current construct of the uniforms of a CM Board is a product of policy and not law.

174. JSP 830 Vol 2 states some policy requirements both as to rank (see above) and uniform; CMBS repeats this policy and states *"The Board members will usually come from the Service of the defendant(s). If there are defendants from more than one Service, the Board will have at least one member from the Service of each defendant."* It is on this basis that MCS calls for the resourcing for Boards, however on occasion it is not possible to provide a Board comprising of members all from the same service as the defendant and on these unplanned occasions members of another service have been used and will be so used in the future.

The Legal Position

175. In the SJS just as in the CJS the judiciary are protected from involvement in the provision of the Board (jury). It is important for the independence of the judiciary and the integrity of the system that this separation is observed and this separation is underlined by AF (CM) R2009 Rule 15.1 which reads:

> *"The court administration officer must exercise his functions (other than that of specifying the lay members for any proceedings) subject to any direction given by a judge advocate."*

176. The listing of cases is solely a judicial function in both systems. The judge will list a trial and it is for the MCS (or in the CJS the HM Courts and Tribunal Service) to provide a Board (jury in the CJS) for the trial. On occasion in the CJS there are insufficient jurors in waiting to form a panel and the trial cannot start until a jury panel from which the jury is selected can be formulated. If a similar situation arises in the Court Martial where a matter is listed for hearing and on the day of hearing for whatever reason there is not available a Board of composition that meets the requirements of both the law and the policy then, if there are available personnel qualified to act President and members under the legal requirements, the Judge may proceed to swear in a Board. That the service policy requirements for qualifications are not met does not affect the legality of the proceedings and it is a matter of judicial independence and of law that the judge may so act.

177. It is accepted that good management will generally not allow the situation to arise where there is a major failure to meet the policy requirements of rank and uniform, but there have been occasions when cases could only proceed if a Board member from a different Service to accused was sworn. When this has occurred the Defence has been consulted and has agreed; this courtesy is wise but unnecessary as it would be perfectly proper for the judge to proceed even if the Defence objected.

Mixed Boards

178. The three services wish to retain Court Martial Boards comprised of members from the same Service as the defendant. The requirement for this is a matter to be articulated and justified by the three Services – they are the experts in this non-legal field and it is a question which bears on the ethos of military service. The Recommendation in SJSR1 of the Review as to mixed Boards arose from the concerns expressed over the resource requirement that the Court Martial requirements placed upon the Services. The move to six-member Boards, if not mitigated by the retention of three-member Boards for less serious offences, has the potential substantially to increase the resource requirement. The recommendation for the inclusion of OR 7 equivalent ranks as Board members, while recommended on its own merits rather than for reasons of resource, would also ease the load placed on the officer corps.

179. The rationalization of the Court Martial estate concurrent with this Review has led to the establishment of two court centres of two courtrooms in each in the UK. It is anticipated that this new estate layout will help speed the flow of cases through the system and will allow more effective use of the court buildings and staff and of all personnel who are required to supply the needs of the Court Martial system. The MCS calls forward from the Services panels of members to sit for two-week periods (assizes). The commitment of individual board members may over run this assize period if a trial spans the beginning of two periods. Given the ratio of cases arising in each Service the four courtrooms now available are supplied with Board member panels sufficient for the Army to provide Boards for three of the four courtrooms throughout the sitting year while the fourth courtroom alternates between Navy and RAF Boards, with a Navy and an RAF two week assize occurring every month. This pattern is followed to accommodate both the numbers of trial arising in each Service and the CMBS policy requirements as to rank and uniform; each Service thus largely "consumes its own smoke." The numbers specified are those required to fulfil the policy requirements laid down in CMBS; MCS

releases specified personnel to return to unit whenever possible. To move to a position of fully mixed Boards would increase the resourcing bill of the Navy and RAF whose use of the CM system is considerably less than the Army. [In 2017 CM numbers by Service were: Army - 295 (74%), Navy - 56 (14%), RAF - 41 (10%), Civilian - 8 (2%)].

180. The proposal in SJSR1 of the Review was that some of the members of a Board (up to three in the case of a five person Board) could be drawn from the two Services to which the defendant did not belong, the purpose being to give flexibility of composition in order to allow MCS to reduce the overall numbers specified for service at CM in any particular assize. If the Services wish to retain a position, as now, where the composition Board should reflect the Service to which the Defendant belongs then, as a matter of policy and subject only to the legal situation outlined above, it is matter for them and they must meet the resource requirements. If however there is preparedness to accept flexibility in Board composition to some degree then a reduction in the requirement should be possible. The first set of the numerical requirements for the new court estate, seeking nominations for Presidents and members for the period Jan 2019 to April 2020, has been issued. It is recommended that MCS throughout this period monitor and record the use of the personnel specified; the numbers returned to unit, the number of occasions where the use of a member from another service onto a board took place etc. Based upon this record MCS should give illustrative sets of figures on the reduction in the numbers specified that would be possible if, say, policy was altered to allow the expectation of one member (or two or three) of any six-member Board were to come from an “alien” Service.

181. The efficiency of the court process depends solely on there always being available a sufficient number of legally qualified service personnel of the right rank to meet the legal requirements of a Court Martial Board. This requirement is significantly less demanding than those of the policies the Services have chosen to add as an additional requirement. The work recommended for MCS to conduct will allow the Services to consider whether they wish to adjust these policies.

Recommendation 26: It is recommended that OR7 ranks be included in the range of personnel qualified to sit on Court Martial boards.

Recommendation 27: It is recommended that MCS keep a record of the usage of the personnel nominated for court service in the period January 2019 to April 2020 and that based upon this usage MCS give illustrative sets of figures for the numbers that would be required under more flexible rules for board composition.

USE OF OJAR/SJAR (APPRAISAL REPORTS) IN THE SENTENCING PROCESS

(ix) The Review should consider the requirement for, and implications of, presentation of OJAR / SJAR evidence to assist Boards in dealing with employment type sanctions in sentencing at Court Martial.

182. The proposal to amend the Court Martial Rules to require the Prosecution to produce appraisal reports for the purposes of sentencing was considered by the MOD in 2016. It is not intended to rehearse every argument put forward. The issue arises because Court Martial (CM) Boards when sentencing have available to them sentences which will or may directly affect employment – the paradigm being Dismissal. There are arguments that access to the appraisal records will assist the Board in taking sentencing decisions where the punishments may or will affect employment. A civilian criminal court does not have similar sentencing measures available but has to consider the implications of sentencing which will, when for instance custody is indicated, include loss of employment and / or of home or domicile.

183. It is common ground that an Offender in the civilian courts will not normally have his or her work/employment records placed before the sentencing tribunal. Whether or not the Offender is an efficient doctor, electrician or factory foreman is generally irrelevant to the sentencing matrix. However, if the matter in issue was one of professional competence and the work/employment records showed previous failings then such records might be not only probative of the offence charged but also relevant to sentence. If an Offender seeks to introduce such records in mitigation, presumably on the basis that the tribunal might be persuaded to regard them as evidence of [good] character, then that it is matter for him / her. Accordingly, the proposal that the CM should automatically see these reports is accepted to represent a departure from the practice in civilian courts. Despite the often articulated desire that the CM should where possible mirror the practices and procedures of the civilian courts, it is contended that the additional sentencing sanctions available to the CM justify such a variance in practice.

The Sentencing Process

184. Certain factors must be considered by CM Boards when sentencing (similar provisions apply in civilian courts). Statutory guidance for Boards is available in AFA 2006 and further guidance is contained in the Sentencing Guidelines published by the Sentencing Council (and to which the Board must pay regard) and also in the Guidance on Sentencing in the Court Martial (GSCM)[10]. The Board will also have the professional advice and guidance of the Judge Advocate.

185. The Board must first bear in mind the purposes of sentencing: (AFA 2006 S237). The Board must then consider the seriousness of the offence (AFA 2006 S238) by forming a view of the Offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or could foreseeably have been caused. The determination of seriousness will lead to the "starting point" or, in other words, the provisional appropriate level for the sentence. The Sentencing Guidelines indicate that in straightforward terms:

> *"The seriousness of an offence is determined by two main parameters; the culpability of the offender and the harm caused or risked being caused by the offence."*[11]

186. After reaching the starting point the Board must consider factors which may aggravate the seriousness of the offence. These factors will be both statutory and non-statutory matters and will include previous convictions (bad character). The Board will also consider lessening or mitigating factors such as youth, mental illness provocation etc. Mitigating factors may be statutory or non-statutory. Personal mitigation that the defendant may choose to lay before the court must also be considered.

Personal mitigation

187. Such evidence may be oral or written and may include testimonials of good character. Other evidence may be tendered and considered such as particular personal circumstances (e.g. defendant is the sole carer for an elderly / sick family member). The Defendant may choose to use appraisal reports as part of personal mitigation.

[10] www.judiciary.uk/wp-content/uploads/2018/03/sentencing-guide-v5-jan18.pdf

[11] "In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused."

Use of OJAR/SJAR (Appraisal reports)

188. The Services point out that these documents are not written with disciplinary proceedings and sentencing in mind, rather that they are written for performance assessment and career management. This alone would not necessarily disqualify them for use in sentencing if it were otherwise appropriate to do so. It is clear that such information contained on these reports would properly be an important part of any administrative process which reviewed the retention of a service person, such process either standing alone or being undertaken consequent upon disciplinary action.

189. The issue under consideration is whether this information should form part of the reasoning and procedure required of a Board in reaching a determination of the seriousness of an offence. Were the appraisal report to be included in the list of matters that the Prosecution is obliged to lay before the court (see AF(CMR) 2009 Rule 114) this could indicate to the Board that it was an appropriate matter to include in such consideration. However, the tests to be used in judging the seriousness of an offence are the culpability of offender and the harm caused or risked and for a matter to be a factor that aggravates or mitigates the seriousness of the offence it must be relevant to these two parameters. In the CJS employment records are not considered to be so relevant. It is not considered that the availability of those additional sanctions in SJS that are directly connected with employment is a sufficient reason to distinguish and justify a different practice in the SJS. In short, a record of the performance of one's employment remains irrelevant to the seriousness of the offence (except in some circumstances as laid out above where the Appraisal report has gone before the court for other reasons). Accordingly, the use of appraisal reports in the sentencing process at Court Martial is not supported.

190. It is noted that a Board is no longer informed whether or not a CO wishes to retain a defendant (GSCM 3.2.5) and it is suspected that this is precisely because such wishes, which may well be based upon a judgement of the Offender's conduct of his work or duties, are not a proper consideration for the Board in its function of matching the sentence to the seriousness of the offence. While it is obvious that certain sentences of a Court Martial Board do indeed have immediate employment effects and others have secondary employment effects, the Court Martial is acting as a disciplinary / criminal court and should use its sentencing powers in line with the procedures and practices based upon sentencing in the general criminal courts.

191. The GSCM 3.2.1 encapsulates the point that it is the seriousness of the offence which is the dominating feature in the sentencing process:

> *"Dismissal is a sentence imposed by a court; discharge is an administrative action resulting in the ending of employment. Although the effects may appear similar, there are significant differences. [……] The primary consideration for the Court Martial is whether the offence is serious enough that the offender should be dismissed as a sentence [s 265(1)]."*

And later at GSCM 3.2.2:

> *"It would be wrong in principle to dismiss purely because the offender is, for some extraneous reason, not fitted for Service life, or states that he does not wish to remain in the Service. In those circumstances administrative discharge ……."*

192. Although this passage is not, it is thought, necessarily aimed at the defendants performance of their duties it emphasises the necessary line to be drawn between matters which are proper to take into account when considering dismissal and those which are not.

Personal Mitigation

193. It is accepted that the latitude allowed to the Defence by the law and practice of both the CJS and SJS will enable the Defence to lay these reports before a Board in personal mitigation. That ability to do so does not necessarily make the reports relevant to the Boards considerations of seriousness. The Defence has a wide discretion and it may choose to lay any documents before the court (AF(CM) R 2009, Rule 116). Thereafter it is a matter for the Board in each case to decide whether any document laid before it is relevant and, if so, what, if any, account should be taken of it. The Board will have available to it the advice of the Judge Advocate.

194. There is expressed concern that when a defendant chooses not to place these documents before a Board then that Board may be inclined to draw an adverse conclusion as to the efficiency or competence of the Defendant. The Judge Advocate is part of the sentencing process and Board is "guided and directed by the Judge". The Judge Advocate will no doubt advise the Board as to the proper sentencing

considerations and on the need to proceed only on the basis of any evidence before it and not indulge in speculation.

Conclusions

195. It is considered that it would be inappropriate for appraisal reports to be included in the list of items material placed before the court by the Prosecution. Although it is recognised that the Court Martial has powers additional to those of the Crown Court which effect employment, this does not justify the inclusion of such employment information in the sentencing assessment. The Court Martial must reach its sentence on the basis of the seriousness of the offence as does the Crown Court and the fact that the sentence of Dismissal has the effect of ceasing employment (or other employment consequences) does not alter this basic principle. Appraisal reports written for career development may or may not contain material that a Board may or may not choose to regard as evidence relevant to personal mitigation and the appropriate manner for these reports to be before a board, if at all, is at the choice of the Defence. A Board should not draw any inference from a decision not to place these reports before them; the absence of evidence is not evidence and Boards may be so advised by the Judge Advocate.

Recommendation 28: It is recommended that OJAR / SJAR are not added to list produced to the court contained in see AF (CMR) 2009 Rule 114. The Defence may introduce them as personal mitigation if they so choose.

Other Matters

196. The conclusions and recommendation above mean that an analysis of the concerns of a potential breach of Data Protection rules need not be undertaken.

197. The Court Martial has authority to deal with serious disciplinary matters as well as criminal offences and in order to deal with these disciplinary matters has wider powers than the Crown Court and accordingly sentencing procedures will vary between the two courts. Having found the use of Appraisal reports to be inappropriate it is not necessary to consider the potential effects of creating a further difference in the sentencing processes and in the treatment of offenders before the civil courts and those before the Court Martial.

C) IMPROVING EFFICIENCY IN THE SJS

(x) The Review should identify ways in which to (i) remove unnecessary delay from the Summary Hearing and Court Martial processes and (ii) increase efficiency through streamlining processes, reducing waste and bureaucracy, whilst (iii) retaining fairness and supporting Service requirements. This should include an examination of the processes from end-to-end and the management data required to monitor performance.

General

198. The structure of the SJS is similar to that of the CJS in that the integrity of the system is reliant upon the independence of its component parts one from another. Thus the Judge Advocate General is wholly independent and appointed by HM Queen on the recommendation of the Lord Chancellor; the Director of Service Prosecutions is similarly independent. The Court Martial is staffed and supported by an independent MCS. The SP are given statutory protection from interference. What this means is that there is no one authority able to set out an overall template governing the timescales and procedures required for the SJS processes to operate at optimum efficiency. The issue by JAG of the guidance in Better Case Management in the Court Martial – BCM (CM) in 2016 has given rise to an improvement in the speed of process in SJS. However, while BCM (CM) provisions are binding on the Court Martial and its proceedings, BCM (CM) cannot, because of the separation and independence outlined above, be a document for the issue of authoritative guidance / instructions with regard to the internal operations and workings of other independent authorities in the SJS.

199. The delays that occur in the SJS post AFA 2006 are partly the result of the change from the strongly command centric control previously exercised over each of the three separate Service systems to the current more disparate system described above. The SJS has adapted to cope with the advent of Human Rights Legislation and this has been mirrored in other Common Law countries where service discipline systems have also adapted to meet the requirements of national Bills of Rights or Constitutions. Just as the SJS has developed its CJS style mosaic of independent authorities so have other countries (although not to the same extent) and delay has similarly followed there.

Other Countries

200. ***Canada***[12] - In Canada in 2018 the Auditor General of Canada to the Parliament of Canada reported upon the Administration of Justice in the Canadian Armed Forces. The report found delays in both the summary and court martial systems, it found that either there were no time standards set or, where they were, they were not followed and no reasons were given for not doing so. Delays occurred throughout the judicial process; in investigations, in the preferring of charges by COs, in prosecutors deciding to bring cases before a military court and in setting the date for trials in the court martial. The report criticised the data collected and the management systems in use. It found that the appropriate authority *"…..did not have the information needed to oversee the military justice system"*. It found that *"various stakeholders…….had their own case tracking systems that did not capture all the needed information."*

201. ***Australia***[13] - The Australian Defence Forces are in the process of a complete review and potential revision of the summary system. An internal enquiry has found that complexity and excessive delay in the summary system meant that the military discipline effect of summary proceedings was lost; the system was neither timely nor responsive to command and the delays engendered were not fair to those impacted by them. Measures had previously been introduced to lessen the overly legalistic and complex procedures however many of the issues remained. The remedies being considered include further training of personnel, the simplification of summary proceeding by lessening the criminal justice overlay and day to day command management and oversight of the system.

202. ***New Zealand***[14] - An independent review into the Military Justice System has been launched. It is in two parts. The first dealing with investigation and summary trials is due to report in February 2019. The second part will then follow and deals with the summary appeal process and Courts Martial. Initial informal contact reveals there are concerns about delays in the summary system and a requirement to examine training and to bolster the experience and confidence of those administering and using the system.

[12] Armed Forces comprising 88K regular and reserve personnel.
[13] The Australian Defence Force numbers some 80K regular and reserve personnel.
[14] The New Zealand Defence Force numbers 11.3K regular and reserve personnel.

Timeliness / Delay

203. It can be seen that delay is a problem in all these Common Law military systems and this section of the report deals largely with the timeliness of the SJS and how it may be improved by identifying the areas where delay occurs and setting time standards by which the system can be measured and performance monitored. Efficiency in policing and investigations has been dealt with in SJSPR1 and is also addressed in the earlier section of this report dealing with the secondment of SIB personnel to HO Police Forces and the joint operating between SIB and Home Office Police forces on cases involving service personnel.

MANAGEMENT DATA

This should include an examination of the processes from end-to-end and the management data required to monitor performance.

Data

204. In the CJS the requirement for management data is in part governed by S95 of the Criminal Justice Act 1991:

> ***95 Information for financial and other purposes.***
>
> *(1)The Secretary of State shall in each year publish such information as he considers expedient for the purpose of—*
>
> *(a)enabling persons engaged in the administration of criminal justice to become aware of the financial implications of their decisions;*
>
> *(aa)enabling such persons to become aware of the relative effectiveness of different sentences—*
>
> *(i) in preventing re-offending, and*
>
> *(ii) in promoting public confidence in the criminal justice system; or*
>
> *(b) facilitating the performance by such persons of their duty to avoid discriminating against any persons on the ground of race or sex or any other improper ground.*
>
> *(2) Publication under subsection (1) above shall be effected in such manner as the Secretary of State considers appropriate for the purpose of bringing the information to the attention of the persons concerned*.

205. It is not suggested that similar statutory provision is required for the SJS however the Working Group deciding upon the final range of data that is required for the proper management of the SJS (See Recommendation 29 below) should be informed by its

contents. The measuring and monitoring of the performance of the SJS relies upon the collation of data. Data collation and management is dealt with at **Appendix B**. However, it is appropriate to comment at this early stage that in the use of data "average" figures, while mathematically correct, can be wholly misleading as the reality of what they reflect and are also liable to distortion by a small proportion of exceptional cases. Accordingly, it will be recommended that in collating data the Services adopt systems which enable them to give in addition to average or mean figures, graduated responses such as 32% in 10 days, 50% in 20 days etc.

Recommendation 29: It is recommended that a Working Group chaired by the MOD centre and comprising representatives of the three Services, the Provost Marshalls, SPA and OJAG / MCS take forward for SJB consideration proposals for the common collation of management data and principles for its oversight. The Review's proposals are contained in Appendix B.

Recommendation 30: It is recommended that the same group oversee the setting of target time scales as recommended in Sections A to D below.

Recommendation 31: That the performance of the SJS set against the targets agreed should be laid before the SJB as a standing Agenda item for its regular periodic meetings.

The SJS

206. Enquiries into the working of the SJS have been focussed on the four areas:

A. The process of investigation up to the conclusion of an investigation.
B. The process in the unit after referral to the Commanding Officer and up to conclusion of the summary dealings.
C. The processes followed in the SPA following referral and up to the point of direction to trial at Court Martial.
D. The process of listing for trial and the management of cases through to trial in the Court Martial system.

A. THE PROCESS OF INVESTIGATION AND REFERRAL

207. Investigation is carried out either by the Service Police (SIB/GPD) in those serious cases set out in AFA 2006 Schedule 2 and in prescribed circumstances; or by unit personnel (the COs investigation). Statistics regarding the investigation and referral process are set out below:

Table 8: Volume of work – Investigations in 2017

	Navy	Army	RAF
Investigations SIB	35	207	45
Investigations GPD	769	1,734	633
Other / Unit	NA	NA	4
Total	804	1,734	682

Source: Provided by Services to SJS Review

Table 9: Nature of Investigations in 2017

	Navy	Army	RAF
Criminal	264	1,528	490
Other offences	540	206	192
Total	804	1734[15]	682

Source: Provided by Services to SJS Review

[15] Discrepancy reflects on going cases.

Table 10: Outcome of Investigations – Volume in 2017

Referrals	Navy	Army	RAF
SIB	28	62	29
GPD	572	376	192
Unit / Other	-	-	1
Sub-total	600	438	222
No action - SIB	7	65	15
No action - GPD	197	939	43
No action – Unit / Other	-	-	3
Sub-total	204	1,004	61
Total	804	1,442[16]	283

Source: Provided by Services to SJS Review

208. It appears that in SP investigations about 75% of naval investigations lead to a referral while in the Army the figure is approx. 30% and in the RAF some 33%.

Timeliness of Investigation

Table 11: Average time for Investigation to Referral in Days in 2017

	Navy	Army	RAF
Overall	27	94	41
SIB	101	144	99
GPD	23	79	34 (Other 45)

Source: Provided by Services to SJS Review

[16] Discrepancy reflects on-going cases

209. The Services measures the percentage of matters referred within certain time spans using different time intervals. Thus:

Table 12: Time intervals of Investigation to Referral in 2017

Navy	Army	RAF
Under 21 days: 59%	Under 30 days: 30%	Under 21 days: 51%
Under 60 days: 33%	Under 60 days: 42%	Under 90 days: 5%

Source: Provided by Services to SJS Review

Monitoring of the progress of investigations and referrals.

210. Each of the Services has a system for monitoring the progress of the investigations. The systems vary but there is evidence of well-structured procedures with an escalating overview.

Legal Advice during investigation

211. All three Services have issued guidance on how and when investigators should seek legal advice. There is common ground on the benefit of early involvement of legal advisors. Investigators use their ability to seek legal advice from SPA and figures from the SPA for uptake shows in 2017 that advice was formally (by Form 3) sought on 406 occasions and that advice was returned swiftly:

Table 13: Time taken by SPA to provide legal advice on Investigations in 2017

Time taken to provide advice	No of cases	By %
In one day	265	65%
In 2/3 days	59	15%
In 4/5 days	33	8%
Over 5 days	49	12%

Source: SPA

Discussion

Timeliness of Investigations

212. **SIB Investigations.** The data above shows that there were in total 287 investigations by the SIBs. The total manpower of the three SIBs is 292. This gives a crude figure of one investigation per officer per year. To break this down by Service gives individual figures of:

Table 14: SIB Investigation workload in 2017

	Staff	Investigations	Investigations per officer
Navy	25	35	1.4
Army	210	207	0.99
RAF	57	45	0.8

Source: Provided by Services to SJS Review

213. Such simplistic figure work is of limited value but it tallies with figures produced internally and indicates that there is not an oppressive workload.

214. The statistics above (Table 11) indicate that SIB investigations take on average 100 days or more. This figure (as already observed) is liable to be inflated by a small number of exceptional cases. In addition, the SIB work on the more serious cases often entails the need for the forensic testing and analysis of physical evidence, for digital data to be captured and reviewed, for medical evidence and third party data to be examined. These actions, dependant as they are on other authorities, necessarily delay the process of referral and are not under the control of the SP. BCM (CM) indicates in its "guideline timings" that the target for work to be referred to SPA is 21 days. Such a target would in many cases be unrealistic. It is accepted that all cases are individual matters and subject to a wide variation of complexity and/or difficulty.

Recommendation 32: That the Provost Marshalls set a target time for the SIB investigation of the less serious matters which, it is anticipated, will comprise largely of the service disciplinary matters. In addition, a further target time for the more complex and serious SIB investigations should be set. This division of matters may well in practice largely coincide with the split into non-criminal and criminal matters. An initial allocation of all investigations into one of these categories should be followed by the recording and monitoring of the progress of an investigation and of the time to referral or the time to any other completion of the investigation. Failures to achieve targets should be examined during the monitoring process so that the reasons for delay may be understood and action taken where necessary. Data should be collected so that results may be presented in the staged format shown at tables 11 and 12 above.

Suggested timescales for the two areas of work are 21 days and 90 days respectively.

215. **GPD Investigations.** For GPD investigations the workload is again not oppressive given the manpower available. The cases investigated by GPD are less complex and / or less serious than those dealt with by the SIB and the majority of these matters should be completed with a target date set by the Provost Marshalls. Some cases will necessarily take longer.

Recommendation 33: That the Provost Marshalls set a target time for the completion of the bulk of investigations conducted by the GPD. Some cases will inevitably take longer. Recording and monitoring should be conducted of the progress of an investigation and of the time to referral or the time to any other completion of the investigation. Failures to achieve targets should be examined during the monitoring process so that the reasons for delay may be understood and action taken where necessary. Data should be collected so that results may be presented in the staged format shown at tables 11 and 12.

Suggested timescale for this work is 14 days.

216. **Unit / CO Investigations.** The data available and discrete to these investigations is minimal. There will be overlap between these investigations and GDP investigations; in the Navy Service Police are embedded in ships (except minesweepers and submarines) and units. The majority of Unit / CO investigations should meet same time standard as those for GDP work. Some cases will take longer.

Recommendation 34: That the appropriate Service authorities set a target time for the completion of the bulk of investigations conducted by Units / COs. Some cases will inevitably take longer. Recording and monitoring should be conducted of the progress of an investigation and of the time to referral or the time to any other completion of the investigation. Failures to achieve targets should be examined during the monitoring process so that the reasons for delay may be understood and action taken where necessary. Data should be collected so that results may be presented in the staged format shown at tables 11 and 12.

Suggested timescale for this work is 14 days.

217. **Legal Advice.** The value of early engagement with legal advice is recognised and the formation of a DSCU would provide an opportunity to consider the provision of either dedicated or embedded SPA lawyers available to advise that unit in a manner similar to the CPS and HO police in the CJS. There is no evidence that the need to take legal advice is significantly delaying the investigative process and it is important that advice

should be provided informally by phone, text or email as well as more formally when the occasion arises.

218. **Content of Referrals.** The documents required to support a referral are laid down as are those required in the process of a Summary Hearing and in a Court Martial. The content of referrals has been reviewed in BCM (CM) and the volume cut down and indications are that this has assisted in the speed of processing the referrals. It is important that these referral papers are properly prepared and are proportionate to the severity and complexity of the case. Also that referral is not delayed in order to, say, provide continuity statements, fully typed interview transcripts or other matters that can be covered by subsequent Notice of Additional Evidence (NAE). The Service Police Case Referral (SPCR) Summary may refer to such evidence and its import while the detailed hard copy may follow later.

B. THE PROCESS OF SUMMARY HEARINGS (SH)

Volume

219. When COs receive a referral from the SP or the result of a unit investigation they may refer the matter to the SPA, decide to take no action or hold a Summary Hearing. In 2017 COs referred 421 matters to SPA of which 53 were returned to them.

Table 15: Number of Summary Hearings in 2017

	Navy	**Army**	**RAF**
For Criminal Offences	39	155 (+28 mixed)	27
For Service Offences	540	2,710	292
Total	579	2,893	294[17]

Source: Provided by Services to SJS Review

[17] It is accepted that these figures do not add up, no further information has been provided by the RAF.

Timeliness Overall:

220. The figures for timeliness for the Navy and RAF are based upon the time from referral to summary conclusion while those from the army are from "Date reported to Unit" and "Date to verdict". Therefore, the Army's measure includes the time taken to investigate the case.

Table 16: Time taken in days to conclude the summary process by reaching a verdict in a Summary Hearing in 2017

	Navy	Army	RAF
Overall	43	54	39
Criminal offence hearings	73	141 (144 for mixed)	49
Service offence hearings	41	48	Under 39

Source: Provided by Services to SJS Review

221. The Services measures the percentage of SH completed within certain time spans using different time intervals. Thus:

Table 17: Time Intervals of Summary Hearings completed by Service in 2017

	Navy	Army[18]	RAF
Cases completed within 30 days of referral / date reported to unit	52%	54%[19]	34%
Cases completed within 60 days	23%	19.3%	19%
Cases over 60 days	25%[20]	28.2%	47%[21]

Source: Provided by Services to SJS Review

Timeliness and Frequency of Legal Advice sought by Units

Timeliness

222. Differences in recording practices between the Services mean that a number of particular questions asked by the Review were not answered but generalised figures are shown here and a marked degree of commonality is demonstrated. The Navy states that Legal Advice takes on average eight days in all cases and 10 in criminal cases. The Army gives a figure of "within 10 days" but if further evidence is required before advice can be given then "the clock stops" for the timing of Legal Advice until that evidence is received. The RAF gave an overall figure of 10 days.

[18] As already noted, the Army figure includes time taken to investigate the case.
[19] Army policy directs that for AWOL cases the 'Date Reported to Unit' field should initially be the date/time that the Service Person first went absent. The 'Date Reported to Unit' field is subsequently updated to reflect the date that the Service Person is apprehended/arrested or voluntarily returns from AWOL.
[20] This 25% displayed common reasons for delay including operations (other than at sea or SSBN patrol), sickness, and move of unit.
[21] This 47% of cases were delayed because of operational reasons, leave, postings etc.

Frequency

223. Again the services report this in different formats however:

- Navy: Legal advice was provided in 404 of the 579 referrals that resulted in SH, legal advice was provided on 414 of these, representing 71%.
- Army: It appears that legal advice was provided on a total some 2048 occasions; this included advice to take no action (291 cases) and to refer to SPA (408 cases). There was a total of 2893 SH.
- RAF: Legal advice was provided on 599 occasions, there were 294 SH (table 15).

Recording and Monitoring

224. All three Services report structured systems for recoding and monitoring the progress of summary dealings.

Table 18: Outcomes of Summary Hearings in 2017

	Navy[22]	**Army**	**RAF**
Service Offences	Proven 98.5% Not proven 1.5%	Proven 97% Not proven 3%	Proven 97% Not proven 3%
Criminal Offences	Proven 86% Not proven 14%	Proven 82% Not proven 18%	Proven 81% Not proven 19%

Source: Provided by Services to SJS Review

[22] / [20]This apparently anomalous information results from the data being captured from two different systems.

Table 19: Plea Rates in Summary Hearings in 2017

	Navy[23]	**Army**	**RAF**
Service Offences	Admit 99% Deny 1%	Admit 96% Deny 4%	Admit 96% Deny 4%
Criminal Offences	Admit 86% Deny 14%	Admit 78% Deny 22%	Admit 74% Deny 26%

Source: Provided by Services to SJS Review

Discussion

225. The efficiency of the summary system may be judged by a number of factors. As noted in SJSR1 Table 6 some 80% of professional / personal failings and indiscipline are dealt with by Minor Administrative Action (MAA). This "civilianisation" of the vast preponderance of matters that would have fallen at the lower end of the old disciplinary systems means that SH now concern the more serious matters and of these SH 6/7% concern S42 criminal offences (SJSR1 Table 11). In 2017 the ability to elect for Court Martial trial resulted in 28 Courts Martial (well under 1 % of SH) while the number of Appeals to the Summary Appeal Court (SAC) following SH equates to less than 2% of the total number of SH. The extremely high rate of offences admitted (see Table 19 above) demonstrates a degree of trust in the system and also that the investigations are producing accurate and accepted bases for the Hearings. The Review System detects a low number of procedural or legal errors in SH (see later at paragraphs 256 et seq). The Summary System is working fairly and dispensing justice that appears widely accepted by those subject to it. The Services would wish to maintain the fairness of these dealings and to administer and use the powers granted by Parliament properly. The ability of the CO to seek legal advice is integral to that process as is the right of the accused to do so when considering the option to elect trial at Court Martial.

226. However, the speed at which SH are conducted is uneven and at times over lengthy. Since the publication of BCM (CM) action has been taken and recent figures show an improvement over earlier years. Requests for information have produced some

information about the conduct of matters following referral. The Navy reports that in 2017 the overall average length of time between referral and seeking legal advice was 21 days (21 days overall, 28 days in criminal cases and 21 days in service disciplinary cases). In similar manner in the Navy the overall time to conclude cases after the receipt of legal advice is 22 days (22 days overall, 36 days in criminal cases and 21 days in service disciplinary offence). The Army and RAF have produced no corresponding figures. However, the Army has conducted a "deep dive "of a sample of 200 cases dealt with 2016, taking information from JPA. These cases all took over 65 days to complete and some were extremely lengthy. The longest case took 313 days and the average of the 200 cases was 124 days. The conclusion of the deep dive was that some 50% of the SH delay lay within the unit. Of this, 40% was delay solely awaiting conduct of the hearing (e.g. not including any time due to investigation, additional evidence sought by Army Legal Service, Accused AWOL or on course / exercises or where JPA gave no explanation).

227. From these figures it appears that the conduct of cases within units both in the Navy and Army contain periods in which the advancement of cases stalls. Given the overall figures for timing produced by the RAF there is no reason to suppose that SH in the RAF do not also have such fallow periods. It is understood that there will be legitimate reasons for delay, including operations, however the powers of investigation and of the disposal of matters by COs were granted to enable and support operational effectiveness; unnecessary delay does not achieve this support and the disciplinary process must be given due priority. Each stage of the SH should be conducted expeditiously and this requires that the CO should throughout the procedure decide upon the next appropriate action within a short period – say three working days or other period decided by the Services.

228. Accordingly on receipt of a referral, a decision on how to proceed should be taken within three working days or other period, whether it be to seek legal advice or to proceed to charge or to refer to the SPA, to seek further information or to take no further action. If the decision is to proceed to charge then this must done and should be followed by a period of three working days in which accused, in considering his or her option of electing CM trial, may take legal advice if it is so desired. This consideration period may be extended up to ten days but only if this is necessary to enable legal advice to be obtained. JSP 830 lays down that the period for such consideration must

be at least 24 hours and the Navy advises COs in accordance with this. However, it is understood that a period of 10 days has become common usage in some instances. This is not a legal requirement and builds in automatic delay. A three-working day period is a suitable standard extension over the 24 hour minimum and itself may be extended on request. Operational considerations will differ between Services and it is not essential that all three Services give the same period for consideration of election provided it is at least 24 hours. (In New Zealand SH the accused has the right to consult a lawyer in respect of election "if it is reasonably practicable to do so" and the period the accused is given to consider election is "at least 24 hours *if the accused wishes it*") (emphasis supplied). After this three-working day (or longer) period the SH should take place within three further working days or as soon as possible thereafter. If the CO has sought legal advice or has referred matters to the SPA or has set in train some other enquiry then, on receipt of legal advice or the answer to such enquiry or following the SPA returning the matter, the CO should within three working days (or other period) decide upon the next action.

Recommendation 35: The three Services should establish a Working Group to set out common target timescales for the completion of SH and it suggested that the bulk of hearings should be concluded within 30 days. The timescales should include a simple "working day" rule as a guide to the expected speed of advance of the individual steps within the process. The performance achieved set against the target timescales should be recorded and monitored. The achievements against target should be set out in the staged format in tables 11 and 12.

229. **Legal Advice** - The tri-Service Working Group should consider the methods by which this advice may be given and the information that is to be sent when seeking such advice. Tri-Service work should seek to establish best practice across the Services while the operational needs of each Service should be taken into account.

Recommendation 36: The tri-Service Working Group should set out common target timescales for the delivery of legal advice and it is suggested that the bulk of requests for legal advice should be cleared within five working days; this almost certainly happens now. Some case will take longer. Performance against the timescales should be recorded, monitored and displayed in the staged

format in tables 11 and 12. Best practice in both the means of seeking advice and the supply of information when seeking it should be established.

230. **Commanding Officers.** Discussions with the Services reveal that it is common ground that COs will on occasion lack experience of their responsibilities under the AFA 2006 and in the SJS; they may also lack the confidence that long usage of a system will bring. COs courses cover the SJS and its operation but may leave lacunae in the knowledge of the CO.

Recommendation 37: The tri-Service Working Group should consider the SJS content of COs courses, seeking to establish best practice across the Services and drawing on the experiences of current and recent COs as to what the courses should cover. The SJS content of COs courses should be updated and matters that COs should be familiar with, in addition the mainstream tasks of investigation and SH, are the treatment of witnesses and victims and the handling of domestic and child abuse allegations (see Recommendations 5 & 6). The use of custody and of lawful orders to exercise control short of custody should be included (see Recommendation 16). The importance of giving the processes of Investigation and Summary Hearings the highest priority amongst the many administrative duties and responsibilities of the CO should be emphasised.

C. PROCESS WITHIN THE SPA

231. The SPA receives cases on referral from the SP and from COs. The SPA will decide whether to direct a matter to trial, or to return the matter to the CO or whether there should be no disciplinary action. The SPA also receives cases on Summary Appeal.

Table 20: Volume of SPA receipts in 2017

Number of referrals from SP	144
Number of referrals from COs	421
Total of referrals received	565
Total Summary Appeals Received	59

Source: SPA

Table 21: Disposals of SPA work in 2017

	No.	**By %**
Cases directed to CM	310	55%
Cases returned to COs	53	9%
Cases passed to other authorities	1	-
Cases not directed	164	29%
Cases discontinued after charge	32	6%
Cases not yet resolved	5	1%
Total	**565**	

Source: SPA

Recording and Monitoring.

232. The SPA records and monitors the progress of cases by a variety of mechanisms. All cases are seen on receipt by either the Deputy Director of Service Prosecutions (DDSP) or by a Managing Prosecutor (MP). Part of this initial review is the setting of a deadline for the case. Thereafter the deadlines and general case progression are monitored by means of the SPA data base, weekly statistical records, current status updates, and quarterly handling figures. Cases are also monitored by the DDSP at weekly case management meetings and daily by MPs. By these means all cases including those which present more than usual difficulties or problems are kept under close and constant review. No figures for the performance of the SPA against the initial deadlines set have been forwarded but Table 20 below shows the time to direction actually achieved.

Timeliness.

233. Of the 322[24] cases directed to CM in 2017 the period between receipt and direction was:

[24] Includes cases referred to the SPA prior to 01/01/2017 but were not directed until 2017.

Table 22: Time Interval of SPA cases in 2017

Time	Overall	Serious cases	Straightforward Cases (AWOL)
1-30 Days	221 (69%)	43	25
31-60 Days	50 (15%)	17	2
61-90 Days	24 (7%)	11	-
91-120 Days	11 (3%)	5	-
121+ Days	16 (5%)	8	-
Total	**322**	**84 (26%)**	**27 (8%)**

Source: SPA

Legal Advice

234. SPA provides legal advice to the SP (see paragraph 228 earlier dealing with the timeliness of legal advice). In 2017 advice was given on the following occasions:

Table 23: Legal advice given by the SPA in 2017

	Total	% of total
Serious sexual	90	22.1%
Serious violence	24	5.9%
Indecent Images	19	4.6%
Drugs	22	5.4%
Total	**406**	**38%**

Source: SPA

Discussion

235. BCM(CM) contains passages dealing with the timings of actions taken by the SPA. These cannot be binding on the SPA, an entirely independent authority. The SPA will decide when a case is fit for direction to trial. The SPA process includes continuous and

regular monitoring of cases and the setting of target times for direction to trial. The figures above (Table 22) show that in 69% of cases direction takes place within 30 days of the receipt of the referral, with a further 16% directed within 60 days. The remaining 15% is directed to trial over increasingly lengthy periods.

Recommendation 38: It is recommended that DSP continues to determine targets for the timescales of directing matters to trial for each case. A record of the performance achieved against these individual timescales would give a comprehensive guide to the performance of the SPA set against its own targets; such a record should be maintained and published for the meeting of the SJB. Aside from the individually assessed targets it is suggested that an overall target of 75% of cases directed to trial within 30 days would provide a broad-brush challenging and achievable aspiration (70% of cases are for disciplinary offences).

D.THE COURT MARTIAL

236. When DSP decides to direct a matter to trial in the Court Martial an Initial Hearing is held in court and thereafter the court sets the timetable to trial. The progress of matters through the Court Martial is governed by a number of factors.

Resources

237. **Courtrooms** - Following the recent decision to rationalise the Court Martial Estate there are now two permanent Court Martial centres in the UK, each with two courtrooms. In the north the courthouse is at Catterick and in the south at Bulford. The Court Martial is a fully mobile court and the requirement to sit abroad remains; this will be expected to occur principally in Germany (usually bi monthly) and Cyprus (bi annually). With the rationalisation of the estate a reduction in MCS staff numbers has occurred such that it is able to run four courts and no more; accordingly when a trial is to be held abroad one of the four UK courtrooms will not operate in order to free up the necessary staff to travel to service the Court.

238. **Sitting Days** - With four permanent courtrooms, a total approaching 1,000 sitting days would be expected to be available in the Crown Court. In the Court Martial this reduces to some 800 days as a result of the military stand-down periods at Easter, Christmas and in August. It is intended from 2019 to operate a full take up of all the 800 days, sitting continuously throughout the year except at stand down periods.

239. **Judiciary** - JAG has available the services of six full-time judicial office holders (JAG, Vice Judge Advocate General (VJAG) and four Assistant Judge Advocate Generals (AJAG)). This corps gives an availability of over 1200 judicial days sitting power which is employed in the Court Martial, in the Crown Court, and on administrative duties and training. JAG is able to guarantee a tribunal for all days that the Court Martial can sit. However, the size of the JAG corps is such that sickness, accident or sudden retirement could drastically alter its ability to meet all the planned commitments and JAG has the power to call on a number of Deputy Judge Advocate Generals (DJAG) (part time, fee paid AJAG) although this power has not been used for some years. JAG may also wish to call-in help in the form of Circuit Judges (who may be ex OJAG personnel). The regularisation of this latter facility is proposed at Recommendation 7 of SJSR1 which recommends that AFA 2000 S. 362 be amended to include Circuit Judges.

240. **The Provision of Boards** - The Court Martial sitting pattern is formed by Assizes of two-week duration. The three Services provide a pool of Board members for each two-week period. Any members not required are released back to unit, sometimes on a "recall if required" basis. A trial that starts and then runs over the end of the two-week period will continue until completed. Of the four courts running in each Assize period one will be allocated to RN or RAF matters in alternate Assizes (except for stand down months). This ensures that Army Boards sit for the whole time that the Court Martial is open for business, the Navy and RAF will have a court and Boards available for two weeks in every calendar month.

Performance

Timeliness

241. Currently the yearly workload of the Court Martial (CM) and the Summary Appeal Court (SAC) may be taken as being around 400 matters per year for the CM while the SAC has some 80 matters. The average time from Initial Hearing to completion of the case is for Court Martial matters 119 days and for SAC matters 74 days. The Crown Court achieves figures from first appearance (in the magistrates' court) to completions of around 170 days.

Court Usage

242. These timescales achieved in the CM and SAC should be set against the sitting days available and the effective usage of those days. The table below gives the court usage figures for 2015, 2016 and 2017.

Table 24: Court Martial Sitting Day Usage

	2015	2016	2017
Days allocated	985	797	730
Days sat	677	558	553
% sat	68%	70%	75%
No. of trials	476	410	400
SAC	60	82	84

Source: MCS

243. A wastage rate some 25% to 30% of court time cannot be afforded if the time to completion figures is to be reduced. The target MCS has now set is to use 90% of sitting days allocated which, if achieved, should markedly improve the “throughput” times.

Listing

244. Unlike the Crown Court, the Court Martial is largely unable to have matters “floating” awaiting a court room to come free. The need for certainty in an overall system which must maintain operational effectiveness leads to a requirement to “fix” most matters to a certain date. In addition, Crown Courts almost invariably have many more courtrooms in each court centre than the two available at Bulford and at Catterick and are able to benefit from the flexibility of listing that this brings and particularly the ability to have trials daily "waiting in the wings” for a court to come free. The “wastage” in the Court Martial partially arises from trials which either do not proceed on the due date because one or the other side is not trial ready (an ineffective trial) or because a Guilty Plea is entered on the first day of trial (a cracked trial). In each case it is then difficult to back fill the courtroom left empty because the scheduled trial is not proceeding. Accordingly, the listing patterns and procedures should be designed to prevent ineffective and cracked

trials as far as is possible and to have plans to employ the empty courts when such an event does occur. This requires strong judicial leadership and involvement in Case Management and records to be kept of case management and of court usage.

Records

245. At present no record of ineffective trials is kept although MCS best estimate is some 15/20 a year. If the trials that did not take place were listed for on average two and half days each then this would account for some fifty days wasted; and similar calculations may be undertaken on cracked trials. There is no record kept of the number of late pleas/cracked trials. The standard length of the sitting day is five and a half hours excluding a one hour lunch break (although commencing at 0930 and finishing at 1700 hours or later is not unusual).

Case Management

246. The current case management regime is set out in Memorandum No 13 - Better Case Management in the Court Martial - BCM (CM) which largely parallels practice in the Crown Court. It is understood that JAG intends that the courts at Bulford and Catterick will run with a nominated Judge acting as the Resident Judge whose responsibilities will include the need to monitor and enhance court performance and to ensure that best listing practice and case management practices are in force. It is noted that the current BCM (CM) at 13.25 anticipates a change to AF(CM)R 2009 to include a duty of Direct Engagement.

Conclusions and Recommendations

247. The Court Martial under JAG is an independent organisation supported by MCS. The Court Martial has sufficient resources for the anticipated work load, however the system operates on tight margins and full use of the resources ensured by strong case management and tight listing techniques will be essential in order to reduce the time it takes to complete matters before the court. The Court Martial already has a case management scheme in place and the following Recommendation is made in response to specific instructions in the TOR for the Review Part II and also recommends the consideration of the adoption of certain techniques and practices that may assist in the management of the work load through the Court martial system.

Recommendation 39: It is recommended that JAG and MCS consider implementing the elements of Case Management, Listing Practice and Court Record keeping contained in Appendix A.

Recommendation 40: It is recommended that the "time to trial or other final hearing" in all Service Court matters be recorded and that these figures are made available at SJB when the performance of the SJS is being considered. Other data recorded by OJAG / MCS as detailed in the Appendix may be used in amplification of this basic "timeliness" information.

AN OVERRIDING OBJECTIVE

The opportunity should also be taken to consider two specific issues which relate to the Court Martial; (i) Inclusion of an 'overriding objective' in Court Martial Rules, as there is in Civil Procedure Rules

248. The inclusion of an "overriding objective" in AF(CM)R 2009 such as is contained in the Criminal Procedure Rules (CPR) Part 1 will help focus the minds of all parties on their duties and obligations; judges conducting case management will be assisted by the clear statements contained in such a Rule. The overriding objective Rule is broad and all-encompassing and gives judges an admirable discretion and power to implement the aims of the overriding objective. It is noted that the current BCM (CM) at 13.25 anticipates a change to AF(CM)R 2009 to include a duty of Direct Engagement. The duty of Direct Engagement is contained in CPR Rule 3.3 and it is suggested that consideration be given to the inclusion of any other of the specific duties contained in CPR Rule 3 that might assist best listing practice and case management practices should include matters and procedures set out in the **Appendix A** The wholesale paralleling of the detailed and rather complex regime set out in CPR Part 3 is not thought necessary or appropriate for the Court Martial however certain specific Rules may meet a particular need in the Court Martial system.

Recommendation 41: That the inclusion of an "overriding objective" in The Armed Forces (Court Martial) Rules 2009 to parallel that contained in the Criminal Procedure Rules 2015 at Part I be undertaken. That consideration also be given to the inclusion in AFCMR 2009 of any of the specific duties contained in CPR Part 3 (Case Management) that it is thought would assist the case management process in the Court Martial.

REMOVAL OF RIGHT TO APPEAL TO COURT MARTIAL APPEAL COURT IN PRELIMINARY PROCEEDINGS.

249. The right to appeal orders and rulings made in preliminary hearings is contained in the Armed Forces Court Martial Rules 2009 at S.50 (AF(CM)R 2009) reflecting the powers given in AFA 2006 S163 (i) (ii):

> *50.— (1) The Appeal Court shall have jurisdiction to hear an appeal against any order or ruling made in preliminary proceedings.*

250. This a broad provision which, given that the AF(CM)R2009 definition of *"preliminary proceedings means any proceedings of the court held for the purpose of arraigning a defendant on a charge or giving directions, orders or rulings for the purpose of trial proceedings"*, allows a right of appeal against any order or ruling made prior to trial.

Appeals in Preliminary Proceedings in the Crown Court

251. In the Crown Court appeals in preliminary matters are confined to those cases where the court has ordered a preparatory hearing. Such preparatory hearings may be ordered where:

> *"….the evidence on an indictment reveals a case of fraud of such seriousness or complexity that substantial benefits are likely to accrue from a hearing …." (CJA 1987 S9)*
>
> Or
>
> *"…an indictment reveals a case of such complexity, a case of such seriousness or a case whose trial is likely to be of such length, that substantial benefits are likely to accrue from a hearing…". (CPIA 1996 S35)*

Such a hearing must be held where a charge of terrorism is on the indictment.

Discussion

252. There is a clear and apparently anomalous difference in the procedures between the Crown Court and Court Martial. While the right to appeal in the Court Martial subsists in all cases and as a result may apply to any order or ruling made in any preliminary hearing, in the Crown Court the right is restricted to certain classes of cases in which the

judge has taken a decision to order a formal preparatory hearing. This difference is underlined by guidance in *HMCTS Guide to commencing proceedings in the Court of Appeal Criminal Division August 2018:*

> *"Given the co-extensive powers of case management outside the preparatory hearing regime, Courts should now be very cautious about directing a preparatory hearing (barring terrorist cases) (R v L & L [2018] EWCA Crim 69; R v BM [2018] EWCA Crim 560).*

253. It seems therefore that in the Crown Court Preparatory hearings are rarely used and then only in special cases. Consequently, the right to appeal only rarely arises.

254. In the Court Martial this power at S50 (AF (CM) R 2009) is seldom used.

Conclusion

255. In the Court Martial this S50 right to appeal any order or ruling has the potential to be disruptive and to cause delays and inefficiency in the processes leading up to trial. It is not clear why this right in the Court Martial exists. There is no obvious explanation for it and such policy papers or explanatory notes as are available are not helpful. In the Crown Court this potential for disruption and delay has led to this right being available only in a limited range of cases.

Recommendation 42: It is recommended that AFA 2006 and AF (CM) R2009 be amended so that the right to appeal against orders and rulings in preliminary proceedings in the Court Martial is restricted to those occasions in which it is available in the Crown Court.

A SLIP RULE

In addition the matters for consideration contained in the TOR the Review has considered the introduction of a "slip rule".

In the SJS

256. In AF (CM) R 2009 at Section 118 there is a broad power to vary the sentence of a Court Martial reflecting the authority given by AFA 2006 S 163(3) (h) i. In essence this power enables a court to vary a sentence imposed by it within a period of 56 days from the date of sentence.

257. The MOD conducts a 100% review of all summary matters to ensure that the summary powers are used in accordance with the Act, that illegal sentences have not been passed, that proper proceedings have been conducted and to ensure that remedial action is taken where necessary.

258. Where an illegal sentence has been passed in Summary dealings the formal avenue for the correction of this error is for the matter to be referred to the Summary Appeal Court (SAC).

In the CJS (Crown Court / magistrates' court)

259. In the Crown Court such errors are dealt with under the broad "slip rule" set out at Section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 (PCC(S)A 2000). This enables the Crown Court to vary or rescinded any sentence or other order within the period of 56 days beginning with the day on which the sentence or other order was imposed. A similar broad power exists in the Magistrates Court Act 1980 (MCA 1980) at Section 142 which empowers a magistrates' court to vary or rescind a sentence or other order imposed or made by it when dealing with an offender if it appears to the court to be in the interests of justice to do so.

Discussion

260. The Navy has given a figure of ten cases referred to the SAC post Review over the two-year period 2017 and 2018; in 2017 completion of reviews of naval summary matters

took an average of 13 days post sentence. The Army has not had a "significant number of cases" referred to the SAC in recent years. The RAF, absent exact figures, estimated that no more than half a dozen cases of sentencing errors had occurred in the last 12 months and that such errors were detected between one day and one week after sentence.

261. The review of summary matters is conducted under AFA 206 S 156 and, when an error has been detected, the Reviewing authority is able to refer matters to the SAC. An illegal sentence would thus be brought before the SAC for what is a largely formal hearing but at which nevertheless parties must attend and the necessary corrective action is taken in open court.

Conclusion

262. It is concluded that a power similar to that contained in the MCA 1980, but narrower in scope, should be taken allowing the CO to take any remedial action necessary when a sentence passed contains a "technical" illegality e.g. an impermissible combination of punishments. The range of the illegalities that would come under this power is for the MOD to decide. This power would be available only within a certain window (say 56 days) and would allow an earlier and more effective and efficient method of correcting errors in Summary sentencing; after the closure of the allowed window the only remedy available would, as now, be through the SAC. The power of CO to take this action would have to be accompanied by a power for Reviewing Authorities to refer these matters to them when they are detected. The mechanics of the notification of detected errors to the CO for action is a matter for the Services but a possible course of action to be followed is that the Reviewing Authority when referring a matter to the CO for rectification should in parallel copy the referral to Command Legal Advisers. Thus the CO would have informed legal advice immediately available to them so that speedy remedial action may be taken.

Recommendation 43: It is recommended that a power similar to that contained in the MCA 1980, but narrower in scope, should be taken allowing the CO to take any remedial action necessary when a sentence passed contains a "technical" illegality e.g. an impermissible combination of punishments. In addition, a power to enable the Reviewing Authority to refer such matters back to COs should be taken.

D) GOVERNANCE / OVERSIGHT MECHANISMS

(xi) ***The Review should identify and consider a range of options for dealing with, and ensuring independent oversight of, complaints against the Service Police, including any complaints from non-Service personnel or veterans.***

263. With the agreement of the MOD, the governance aspect in the chapeau of this TOR has been excluded from the Review which has concentrated on oversight mechanisms.

Background

264. Police officers, whether Home Office or Service are granted a wide range of powers. These powers are designed to protect the public and military community and bring justice to victims of crime and wrongdoing. Powers include the ability to arrest and search suspects, use reasonable force, take fingerprints or forensic samples, enter and search private premises and seize property, engage in covert investigation and surveillance.

265. In both civilian policing and service policing a legislative framework exists, supported by various Codes of Practice, to regulate the lawfulness of the use of police powers. This in itself is not sufficient, in addition to establishing the legality of police actions, an effective independent complaints handling system can help to hold the police more broadly accountable for how they exercise their powers. This is important because communities and victims have a legitimate expectation that the police will use their discretion and exercise their powers to the highest standards of competence, fairness and honesty. Independent oversight is a critical factor in bringing transparency and building confidence in policing.

266. Whilst the overwhelming majority of encounters between the Civilian Police and the public and the Service Police (SP) and the service community are conducted to the highest standard, on occasions this is not the case. In both cases matters can be referred to internal conduct and discipline departments for investigation, however while the Home Office police forces, the MDP, National Crime Agency and other law

enforcement agencies are subject to independent oversight, independent oversight of the SP is not currently as extensive.

267. Independent oversight of the SP has been raised in Parliament and has been the subject of debate in both houses. There have been arguments that the civilian police 'watch dog', formerly the Independent Police Complaints Commission (IPCC) latterly the Independent Office for Police Conduct (IOPC) should be given responsibility to carry out the same function in respect of the SP. A proposed amendment to the Policing and Crime Act (2017) attempted to bring this change about but was subsequently not made.

268. The entire purpose of the IOPC is to oversee the civilian police complaints system and investigate the most serious incidents and complaints. The Police Reform Act (2002) gives the IOPC a specialist, hands on role in complaints of police misconduct and associated powers which extend to issuing statutory guidance.

269. It is fair to say that whilst establishing independent oversight along the lines of the IOPC model remains a challenge to the MOD, there appears to be general agreement that it is both desirable and necessary; the focus of debate therefore centres on how this is to be brought about and who should perform the role. The SP themselves are anxious to be seen as transparent; the perceived lack of independent oversight continually presenting a perception that the MOD has 'something to hide' and thereby fuelling public concern.

Service Complaints

270. The Service Complaints process can be used to make complaints about the Service Police but is subject to exceptions. The process is governed by Part 14A of the Armed Forces Act 2006 and comes under the oversight of the independent Service Complaints Ombudsman (SCO).

271. The complaints process is service wide and allows members of the Armed Forces to make a complaint if they feel they have been wronged in any matter relating to service while they are subject to Service law, subject to certain exceptions set out in secondary

legislation. A complaint can for example be about bullying, harassment, discrimination and improper behaviour.

272. Unlike civilian policing that does not time limit the reporting of complaints, service complaints must generally be made within three months of the matter complained of, subject to extension where just and equitable.

273. As regards the conduct of the SP themselves, all of the Services consider a complaint to reflect dissatisfaction with the conduct of a member of the SP whilst undertaking their duty; this reflects the definition of a complaint for the civilian police. It is not however possible to make a service complaint about certain decisions taken by the SP. A service person cannot make a service complaint about a decision by the SP under their functions in Chapter 1 of Part 5 AFA 2006 (mainly referral functions) (or in relation to the exercise of a victim's right of review), unless it is an allegation of discrimination, harassment, bullying, dishonest or biased behaviour or the improper exercise by the SP of their statutory powers.

274. The table below provides details of complaints made against the SP since 2014, the numbers are relatively low:

Table 25: Service Police Complaints 2014 - 2018

Year	RAFP	RMP	RNP	*Total*
2014	6	5	2	***13***
2015	4	22	5	***31***
2016	16	25	0	***41***
2017	7	24	1	***32***
2018 (Nov)	8	18	5	***31***
Total	***41***	***94***	***13***	

Source: Service Police for SJS Review

275. Each of the SP has a discrete Professional Standards Unit (PSU) that investigates according to an internal complaints procedure. Findings are reported to the officer designated to manage the complaint. If the complainant is not satisfied with the outcome, they may still bring a service complaint (unless the complaint is of a type excluded) and ultimately have recourse to the Service Complaints Ombudsman.

Issues to consider

i) Role of the Commanding Officer

276. As far as the Review team can discern, all of the focus to date appears to have been solely on oversight of the SP when the reality is that the vast majority of investigation across the three services lies in the hands of the Commanding Officer (CO). Whilst there is no equivalent for COs of the duty on Provost Marshals to ensure service police investigations are carried out free from improper interference[25], the Review is of the view that CO investigations should fall into the scope of Independent Oversight.

277. COs are able to investigate minor offences and after taking legal advice charge the suspect. They also have the power to hear certain offences summarily, having investigated and charged the suspects themselves or having had a case referred to them by the SP or SPA.

278. In addition to having the ability to investigate, charge and deliver sanction on minor matters the CO may play a role in the course of more serious investigations conducted by the SP (e.g. AFA 2006 s87 - CO giving permission to the SP to search premises) and may fall to be investigated by the independent oversight body in the same way as the SP (see paragraph 281). Interviews and research conducted for this review indicates that the role and responsibilities of the CO (and those working under them carrying out police type roles) has not previously been considered when determining where responsibility for independent oversight should lie.

279. In addition to investigations, COs also exercise powers contained in Part 3 of the AFA 2006 and which concern Arrest, Search and Entry. In this section of the AFA,

[25] Section 115A of the Armed Forces Act 2006

there are powers of arrest conferred upon SP and upon others. Powers of search and entry are given to SP and COs may also authorise this for others.

280. This being the case, 'what is the mischief that we are trying to remedy' – lack of independent oversight of the SP or lack of independent oversight of the totality of the Armed Forces internal investigative function and use of coercive powers?

281. The MOD will wish to further consider the internal scope of oversight, however the view of the Review team is that the oversight body should exercise jurisdiction over SP and over any other personnel carrying out police type roles (this includes COs) under Part 5 Chapter 1 (investigations). The MOD will wish to consider which, if any, of the COs powers exercisable under AFA 2006 Part 3 Chaps 1, 2 and 3 (searches and arrest) should also be subject to independent oversight.

ii) Scope - who can complain and when?

282. The purpose of independent oversight is to oversee the handling of complaints about the conduct of the SP (and others given powers under the Act – See i) above). It will therefore primarily be an avenue for service personnel and for all those subject to the Act to seek redress, because it is they with whom the SP and others interact when using the powers given by the Act. In like manner those who are no longer subject to the Act but who wish to complain about a matter concerning a time when they were so subject should also have access to the system. On occasion those not subject to the Act may be effected by the exercise of investigative powers by SP and others under the Act and they too should have the right to complain provided that they are directly affected and are complaining about that effect upon them; a complaint made on behalf of someone who is subject to Act and who is able to mount a complaint in their own right should not be eligible.

283. The current time limit for the making of complaints (ie a Service Complaint) is generally three months following the event complained of, although any complaint may be considered later than three months if it is determined just and equitable to do so. In view of the wider range of complainants (non-Service personnel and veterans) the MOD may wish to review the time scale for the acceptance of SP complaints.

iii) Jurisdiction

Scotland and Northern Ireland

284. Further and significant complicating factors lie in the arrangements as they currently exist in both Northern Ireland and Scotland. The SCO has jurisdiction for complaints in Northern Ireland, Scotland and overseas. However, the IOPC has no remit to operate in either jurisdiction in relation to complaints against civilian police with both countries having their own civilian police independent oversight body.

Police Ombudsman's Office for Northern Ireland (PONI)

285. PONI operates in much the same way as the IOPC with similar powers but has a very different and pertinent history. PONI has its origins rooted in the 'troubles' of the recent past in Northern Ireland and one factor in its creation was to overcome perceptions that when the RUC/PSNI were charged with investigating complaints against the British Army, investigations were perceived not to be as thorough and robust as they should have been.

286. The Ombudsman has made it clear that in his view the prospect of the IOPC taking on such responsibility in relation to SP investigations in Northern Ireland from London is remote in the extreme and would be politically challenging.

Scottish Police Investigations and Review Commissioner (PIRC)

287. Again, PIRC operate in a similar manner to IOPC with similar powers but with some significant differences. The role of the Procurator Fiscal (PF) is central to the independent investigation of wrongdoing by Police Scotland. All complaints that amount to allegations of criminal conduct must be referred at first instance to the Procurator who then decides what is referred to PIRC for investigation.

288. Like the Ombudsman in Northern Ireland, the Scottish Commissioner is of the firm view that any proposal that the IOPC be responsible for independent oversight of the SP in Scotland would be unworkable and equally politically challenging.

General

289. It is clear that whichever body takes on the role of oversight there will need to be an agreement or protocol with PONI and PIRC over who, in their respective jurisdictions, takes complaints from those subject to AFA 2006 and who takes complaints from those not subject to the Act. MOD will wish to consider further discussions on these issues with other Government departments.

iv) Overseas Jurisdiction

290. In addition to the issues in relation to Northern Ireland and Scotland, with the exception of the SCO, the oversight body (whether an existing body or a new one) will need the authority in UK law to investigate complaints overseas. In addition, UK law is likely only to be part of the picture regarding the lawful exercise of police-type powers to investigate complaints. Agreements with the local police – who would exercise their own police powers – may be required whoever is tasked with oversight.

v) Historic Enquiries

291. As in the civilian policing environment, there is the phenomenon of historic enquiries to be taken account of. A time limit for complaints that do not amount to criminal activity may go some way to addressing this issue but this may need considering further.

Options for Independent Oversight

292. The Review has identified three options for independent oversight of the SP:

<u>Option 1: The Service Complaints Ombudsman (SCO)</u>

293. The Service Complaints Ombudsman (SCO) is accustomed to operating in the Service environment. Whilst this may be the case, in the relatively short time it has existed it has never taken on investigations of the nature required to be an effective independent oversight body of the SP and, at the present time, the office does not possess the capacity and investigative skills required for serious and / or criminal matters.

294. Service complaints can be made by current and former serving members of the Armed Forces who can:

- Submit a written complaint through their chain of command.
- Ask the Ombudsman to refer their intention to make a Service complaint to their chain of command. (The Ombudsman can't investigate the Service complaint at this stage it must go via the internal complaints process).

295. The process is not open to family members of Service persons or members of the public who, should they submit a complaint, will be advised to write to the MOD.

296. In the three years since the SCO has been established it would appear that no complaints relating to the SP have been investigated. The reality being that the ambit of the SCO relates to matters of terms and conditions, pay pensions and allowances, grievances relating to matters such as promotion and minor cases of harassment and bullying. (More serious cases may amount to a crime and should be referred to the SP). For 2017 the total number of admissible Service Complaints per the SCO's report was broken down as:

- 41% Terms and conditions of Service
- 25% Pay, pension and allowances
- 16% Bullying
- 6% Improper Behaviour
- 3% Discrimination
- 3% Medical and Dental
- 3% Other
- 2% Harassment
- 1% Victimisation

297. Certain matters are excluded from being raised as part of a Service complaint pursuant to regulation 3 of the Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 2015. The only such exclusion specifically relating to the SP follows:

"A decision of a service policeman under any provision in or made by virtue of Chapter 1 of Part 5 of the Act or in relation to the exercise of a right of review under

the Schedule to the Criminal Justice (Armed Forces Code of Practice for Victims of Crime) Regulations 2015."

However, elsewhere those Regulations make clear that this exclusion does not prevent service complaints about the improper exercise by the SP of their statutory powers or discrimination, harassment, bullying or dishonest behaviour alleged to have occurred in connection with the excluded matter.

298. There is a divergence of views between the SCO and the MOD as to the scope of SCO powers. Regardless of this, it is the view of the Review that as currently constructed, the SCO has neither the expertise nor the resource to take on responsibility for independent oversight and investigation of complaints relating to the SP carrying out their duty in the way the IOPC does for civilian policing.

Option 2: The Independent Office of Police Conduct (IOPC)

299. Independent oversight of civilian policing goes back to the establishment of the Police Complaints Authority (PCA) in 1985. The IOPC is the latest incarnation of independent oversight and has the staff, expertise and experience to investigate misconduct in civilian policing but they have no context, understanding or experience of investigation in the Service environment.

300. To date, the position of the MOD and the Provost Marshals of all three Service Police is a strong belief that the IPCC/IOPC is best placed to provide independent oversight of the three forces.

301. On the face of it, this appears to be an obvious solution and a relatively easy fix. The IOPC is well resourced with experienced investigators, has a significant infrastructure and already performs the role that is required by the SP for the civilian police.

302. During previous deliberations involving the then IPCC, their position was one of resistance. They cited a number of factors influencing their reluctance: -

- At the time, the IPCC was going through significant organisational change (transition to IOPC) and this was a diversion that was not welcome.
- A lack of resources to complete the task allied to no knowledge of the military function.
- The SP have worldwide jurisdiction and consequently operate and investigate wherever the wider services happen to be (including on-board ships). The IPCC had no such jurisdiction.

303. Whilst all these factors carry some weight, none are strong enough or sufficient in themselves to determine that the IOPC is the wrong option. The fact is that no other body as currently exists is any better positioned, somebody will have to take on the role and these factors will have to be overcome.

How does the IOPC operate?

304. A complaint can be made to the IOPC by any member of the public who believes they have grounds for complaint, including by a third party member of the public acting on behalf of another. Whereas the Service Complaints System exists for use by Service personnel, the civilian system exists for the general public. Consequently, the nature of what is referred differs greatly; the terms and conditions and grievance type matters dealt with by the SCO do not feature in IOPC work.

305. Of note, there exist significant restrictions on civilian police officers as to when they can make a complaint to the IOPC, generally restricted to when the cause for complaint arises from circumstances when they are in their capacity as a member of the public e.g. as a victim of crime not happy with the policing service.

306. The overwhelming majority of civil police complaints are dealt with by the relevant police force; given the millions of police/pubic interactions the volume is extremely high and for the most part very minor in nature. Matters can be reported to the relevant force or direct to the IOPC who may choose to retain or refer it back.

307. There are four different types of investigation: -

- **Independent** – IOPC investigate using in house investigators.

- **Managed** – Police force PSU investigates under IOPC direction
- **Supervised** –Police force PSU investigates under IOPC supervision
- **Local** – Police force investigates with no involvement from IOPC

308. Note: - The Policing and Crime Act 2017 Schedule 5 makes a number of changes that are being implemented, including removing the option of a 'supervised' investigation and replacing 'managed' investigations with 'directed' investigations.

309. The IOPC are vested with significant powers including search and arrest and independently investigate the most serious matters. Police forces are required to make a mandatory referral following certain events most notably ‘death after police contact’. Other serious matters may result in voluntary referral.

310. It should be noted that any independent body possessing powers akin to the IOPC will be able to independently investigate matters currently dealt with by the SP, either by the SP concerned or through the tri-service protocol. Incidents such as deaths in custody would fall into this category.

311. In such circumstances there would be an expectation that the SP notify the IOPC at the earliest opportunity and carry out ‘golden hour’ actions until the IOPC attend and take control.

Option 3: A New Independent body

312. The third option is to recognise that what may be required is a highly skilled niche unit led by a newly appointed individual, possibly from a judicial background.

313. The structure of a new independent body could be designed to meet the niche requirements of the Service taking account of the small number of investigations involved and the high-level skill set required to investigate serious cases in the Service environment.

314. This being the case, a small permanent cadre could be established, funded by the MOD but sitting at arm's length in the way that the IOPC is constituted independent of the Home Office. This small unit of two or three people would be responsible for receiving complaints, assessment of incoming and review of ongoing complaints and reporting to the (new Ombudsman / Commissioner) who would determine if the matter should be referred back to the SP or retained for Independent, Supervised or Managed investigation.

315. In the case of the more serious independent investigations the unit could call upon experienced investigator contractors as necessary with the relevant niche skills for the particular case ie. death in custody etc.

316. Such an independent body funded by the MOD would enable it to have confidence that its resources would be spent solely on Service matters rather than being subsumed in a larger organisation. The required qualifications of the Office Holder and of the investigators may be set by the MOD to meet the specialist requirements of the AFA 2006 and the SJS. This would for instance, enable the Office Holder to have professional former police officers as investigators. The MOD could set the parameters for access to the system so as to meet the requirements of the SJS and the operational capabilities of the Armed Forces.

Conclusion

317. Whilst in many respects the SP perform a role similar to the civilian police, they are fundamentally different in equal measure, not least as they do not serve as constables.

318. The two existing entities (IOPC and SCO) both present factors mitigating for and against vesting responsibility in them for independent oversight of the SP. With suitable additional resource possessing the right skills training to operate in the service environment either body could take on responsibility but neither are ideal.

319. In civilian policing there is a clear divide as to what constitutes a grievance type matter and what is a complaint regarding conduct. The former being dealt with through internal HR processes, the latter by Professional Standards departments subject to IOPC

oversight. This divide needs to be reflected in the Service Policing with conduct issues dealt with by a body other than the SCO.

320. It is clear is that those investigations of the type that cause, Parliamentary and public concern when things go wrong, need to be investigated by highly skilled and experienced people who can operate in a Service environment, including overseas.

321. Such investigations are currently very few in number, when looking at the types of crimes retained by the IOPC for Independent, Supervised or Managed investigations they are a very small percentage of the overall number of complaints.

322. The likelihood is that the body that takes on responsibility for independent oversight of the SP, if they operate to the same remit as the IOPC, will only have very few investigations to carry out. Accepting the point that 'if you build a road people will drive on it' and numbers may go up, it is still estimated that investigations of serious crime and wrongdoing may not even reach double figures. However, such figures will depend upon the decisions taken about the scope of the system and upon who may access it and what time limits are placed upon it.

323. It is worth highlighting that regardless of the choice as to the body which is in future to conduct oversight, there are certain matters that are constant:

- The need for primary legislation;
- The need for resources and funding;
- Potential difficulties requiring resolution in Northern Ireland and Scotland;
- Worldwide jurisdiction will have to be exercised;
- Some exercise of oversight may deal with classified matters or take place in classified areas.

Recommendation 44: A new niche independent body be established to deliver independent oversight of the Service Police and of investigative functions in the SJS.

The new independent body to be policy led and funded by the MOD, but at arms-length from the MOD.

The class of persons able to make complaint should include all those subject to the Act and all those who have been subject to the Act. Those not subject to the Act but directly affected by the exercise of powers contained in the Act should also have access to the system. The MOD will wish to consider a time limit to be set on the bringing of complaints.

Clear distinction should be drawn as to which complaints fall to the newly created Independent body and which to the SCO.

APPENDIX A - CASE MANAGEMENT, LISTING AND COURT RECORDS.

Case management within the Court Martial is already well developed and many of the matters and techniques set out below already exist in one form or another within a wider scheme of management. Nevertheless these matters are those considered most important in the smooth running of criminal courts and are therefore emphasized; where they are already practised they are nevertheless repeated. The use of CCTV is already enshrined in BCM(CM) and should be facilitated and encouraged.

Case Management

The four themes chosen by the architects of BCM in the civilian courts were:

- Getting it Right First Time
- Case Ownership
- Duty of Direct Engagement
- Consistent judicial case management

The themes are endorsed and are clearly adopted in Memorandum No 13 BCM (CM).

Consistent Judicial Case Management

Consistency of Tribunal / Getting it right first time. It is suggested that the Resident Judge should set the standards for each court centre and that this will entail the Resident in conducting a large proportion of or even all of the preliminary matters (Initial Hearing (IH), Plea and Trial Preparation Hearing (PTPH), Further Case Management Hearing (FMCH) or any other case management hearing directed by the court). If a case is thoroughly investigated and set in order at the first hearing then a smooth passage through the court process is more likely. If a case has been allocated to a particular trial judge at an early stage then the management of the case should wherever possible be conducted by that judge. Where judges other than the Resident conduct these matters then an agreed consistent approach must prevail.

Consistency of Approach. There should be consistency across the Court Martial estate. This consistency should be marked by a common approach some important elements:

> **Arraignment** - should always take place at the first appearance. If for any reason the judge decides that it is not appropriate (e.g. perhaps legal aid is sought at a late stage, perhaps the judge considers further evidence should be served) then consideration should be given to a second early hearing in say 7 or 14 days at which arraignment will take place. It is essential that guilty pleas are identified as early as

possible. The judge, before arraignment, should ensure in open court that the defendant has been advised of the discounts available for guilty pleas and how they diminish. [1/3 at IH, 25% at PTHP or at a hearing held to take a plea after the IH and further diminishing to 10% on the day of trial.] If it is said that the defendant has not been advised or a conference has not taken place, then putting the matter back for arraignment later in the day's list or scheduling a further hearing the next day or in 7 /14 days (see above) days should all be considered. Keeping the impetus for early decisions and orders is vital (**Get it Right First Time**).

Witnesses - After a not guilty plea and when the matter is set down for trial the requirement for witnesses must be rigorously tested. The need for the attendance of prosecution witnesses should always be challenged if the judge can see no adequate reason for their attendance (e.g. continuity evidence, undisputed forensic evidence etc.), the defence should always be asked to say how many witnesses they intend to call and to state their availability. Witnesses are central to the trial process and the trial date and length is predicated by their availability and their number. Close examination and testing of these requirements will give:

A more accurate forecast of trial length

Less scope for either party to claim witness difficulties at a later stage

A trial date at which all witnesses can attend. Once a date has been set it should not be changed other than in the most extreme circumstances (subsequent non availability of counsel is not a reason for such a change). A sensible discipline might be to insist that any application to change dates must be heard by the Resident Judge.

Any witnesses subsequently notified to the court by either party should be stated at the time of notification to be available on the trial date. Requests to change the trial date to accommodate late witnesses should be dealt with robustly and particularly so when request are not made in a timely fashion. The court can always assist by offering to issue a witness summons.

Counsel / Representatives - It is important that the parties to the trial and those who have responsibility for its preparation and conduct are identified at the Initial Hearing. This includes the Officer in the case. This will give the parties and the court the knowledge of who has **Case Ownership** and enable the **Duty of Direct Engagement - DDE** (BCM (CM) Para 13.25**)** to be fulfilled. The availability of trial counsel should be established at the outset. In setting the trial date it is the availability of witnesses that is paramount. Of course, trial counsel's availability

dates should be considered and accommodated where possible; but no delay of more than, say. one or two weeks over the first suitable date for all witnesses should be countenanced. The earlier such decisions are taken the less involvement counsel will have had with the case and the easier it will be for a replacement to assume the responsibility. The courts requirement is for speedy justice and counsel's availability is subservient to this.

Court Orders and Compliance - Records of any orders or directions made by the court at any hearings must be kept. [AF (CM) 2009 and BCM (CM)] Copies of any such orders or directions should be given to each party on conclusion of the hearing. Compliance with court orders in the civilian system is poor. At present the Court Martial relies upon self-regulation and the operation of DDE to achieve compliance (BCM (CM) Para 13.21). It is suggested that the proactive court compliance check instituted by BCM(CM) in the requirement for the receipt a Trial Readiness Certificate be strictly enforced. This certificate should:

A. establish that there is still to be a trial (no change of plea etc.)

B. if there is to be a trial is the party trial ready?

C. if not why not?

D. that all orders have been complied with and, if not, which orders and why?

This certificate is currently due for return to the court 28 days before trial (BCM (CM) Para 13.47) 28 days before the trial is due to commence. However at BCM (CM) 13.49 the timeline shows that Stage 4 orders are to be completed 14 days before trial. Consideration should be given to the need for Stage 4 compliance and the return of the Trial Readiness Certificate to be coincident at 28 days before trial. If a hearing and remedial action is necessary then this 28 day period gives more time in which matter may be set right.

Pre-Trial Review (FCMH)- In serious and/or complex cases consideration should always be given to holding such hearing, in addition to the Readiness certificate at least three weeks before the trial date in order that all matters (disclosure, witnesses, etc.) may be checked in time for remedial action to be taken.

Sanctions - It is a regrettable fact that court orders are frequently not obeyed either in time or at all. In addition, it is the experience of the civilian courts (CJS) that self-regulation usually fails to meet the need for compliance. The institution of a formal sanctions regime has not been undertaken in the civilian courts (CJS) nor is it recommended; such a regime is likely to lead to satellite litigation and further

argument and delay. It is considered that the calling of a hearing to deal with failures or other problems is sufficient sanction. Thus the failure of a party, despite DDE and reference to the court, to comply with an order could lead to a hearing for that party only. If following DDE there is a dispute involving both parties then both parties should attend. If a party does not return the Trial Readiness Certificate then they should be called to a hearing. If the Trial Readiness Certificate indicates the matter is not trial ready then a hearing can be called and remedial action taken. A common and useful time for such compliance hearings is Friday afternoon when the main business of the court week is liable to be running to a close and when representatives are themselves liable to be free.

Get it Right First Time - The thrust of the above factors is directed to getting the case off to a clear, definitive and understood start. Everyone should be aware of the effects of the decisions made and orders given. Thus the Defendant appreciates the sentencing implications of his plea; the Crown and the Defence know what the issues in the case are; there is a clear understanding of what witnesses are required and of the actions that each party has to take. This makes it easier for the court to hold the trial date, and to deal robustly with all the subsequent applications about delay, non-availability of witnesses and the myriad reasons so often advanced as to why the trial should not take place on the due date.

LISTING and RECORDS

All courts have different requirements and different work patterns which lead to differing systems and practises of lasting. The Court Martial is no different and the expertise rests within the OJAG and the MCS. Listing is the responsibility of the Court Administration Officer (CAO) (AFCMR 16.1) subject to direction by the judge advocate (AFCMR 15). Given the system of two week assizes during which pools of potential Board members are made available it is inevitable that the Court Martial will run in a two week listing cycle with a weekly pattern within that cycle. Existing Listing practices are adapted to this repetitive work pattern. Longer cases (over two weeks) and their Boards are dealt with separately. It is suggested that to maximise court room usage all preliminary matters (IH, PTPH) should be scheduled on a Monday morning before the Resident Judge whose follow on trial should be scheduled for 12:00 or 14:00 depending upon the number of such matters. This will give certainty to advocates attending these hearings in person and will then free them for any longer matters that they may have listed at the court centre; it will enable those attending by CCTV to plan with confidence. A regular and consistent slot for these matters will also

emphasize the importance of these hearings. SAC hearings, sentences and other shorter matters should be listed later in the week / two week cycle.

With two courts in each centre a degree of that flexibility that is present in the large courts centre of the Crown Court will become available and list officers with growing experience of the new arrangements will be able to list more intensively as time passes. Thus it may become possible to list more matters than at present by a system of listing a number of shorter matters to be ready for listing in a period (of, say, a week or a 3 day period of a Wednesday, Thursday and Friday) with the proviso that they would be given 24 or 48 hours' notice of the actual day of the listing. It is important that the CAO can rely on a full court day being available each day the court is sitting. Late starts or early finishes for travelling time should not occur, the courts requirements must be met and all parties be they judiciary, court staff or those appearing before and in the court must be available for a full day, five days a week.

Court Records - The MCS currently keeps records of the time courts are sitting daily and the Resident Judge should be given a weekly statement of the times achieved. The Resident Judge should acquaint him or herself with the reasons for short sitting or fallow days and consider whether a change in listing or other management techniques can reduce the incidence of unused days. Currently no record is kept of either the incidence or of the reasons for ineffective or cracked trials. This is an essential piece of management information and it is suggested that the judge presiding over a trial that is ineffective should, as a result of the investigation that he or she conducted before agreeing the trial should not proceed, complete a form setting out the reasons. Such a form is used in the Crown Court and may be adapted for use in the Court Martial. It will allow the Resident Judge to examine the causes, discuss the failings that caused the trial to go off with any party that is at fault and may help prevent future failures. In like manner the incidence of and reasons for cracked trials should be recorded.

Timeliness - It is suggested that JAG consider issuing guidance as to the time scales within which he would expect to see guilty plea sentence cases, SAC cases and smaller "fast track" trials to be listed and completed; the guidance might also include the setting of the relative priority for listing of a categories of cases e.g. custody cases, sexual offending cases. MCS court records should be kept in such a way that JAG can have ready access to management information giving the speed of all matters through the courts, the incidence of "short" or fallow sitting days and their causes, the incidence and number of ineffective trials and of cracked trials. In addition, records should be kept that enable the easy presentation of the incidence of guilty and not guilty pleas by case and by offence; of guilty and not guilty verdicts by case and by offence. Not only is such information required to monitor the

performance of the Court Martial, it will enable JAG to hold discussions with SJS partners aimed at to achieving certainty in the system and to eliminating causes of delay and of ineffective trials. (**see Recommendation 29 on Data**).

APPENDIX B - THE COLLECTION STORAGE AND RETRIEVAL OF DATA IN THE SJS

GENERAL

Why Data

1. There are two main requirements for the SJS to maintain records of the conduct of business:

First - Ministers are publicly accountable for the performance of the SJS. Ministers must be able to account for the use of the powers granted by Parliament in the AFA 2006; they must also be able to demonstrate that the SJS is functioning effectively and efficiently and that it is providing value for money. Without accurate information it is impossible to discharge these responsibilities.

Second - One of the main reasons that the SJS exists is to support operational effectiveness. Management data is required by the SJB in order for it to be able to monitor the performance of the SJS in meeting this and other objectives (eg to provide fairness and protection to those subject to the Act when carrying out their duties abroad). This data will reveal any performance issues which have to be addressed and where further resources may be required. Such data may also indicate a need for a change in procedures or practices.

What Basis for the Collection of Data

2. It is essential that the collection of data is carried out on a common and consistent basis across the SJS. Accordingly, it must be decided whether the basic framework by which data is collected is by the calendar year or by the financial year or by the year to date on a rolling monthly basis. Data should show the performance of the SJS relating to cases/defendants as well as (if desired) by offences. The data collected must be easily retrievable and presented to SJB twice yearly at its meetings as a standard Agenda item on the performance of the SJS. The year on year consistency of what data is measured and how it is measured is the quality that makes such statistics useful.

3. The data base should be such that it can be interrogated for specific data e.g. how many leave breaking (AWOL) offences were committed, what proportion of GPD investigations were for criminal or drugs offences etc.

Current Data

4. The current collection of data presents as partial and patchy. Some areas of work are comprehensively covered (e.g. the work of the SIBs), other areas have little information available. Not all the data collected is relevant to the task of monitoring performance. In common with the CJS all the four main authorities within the system (Police/Services/SPA and JAG/MCS) have different IT systems and these systems do not currently record all the information that it is considered to be important. It appears that the ability of the Navy to provide a greater proportion of the information sought in the current Review rests up on the use of spread sheets to supplement the functionality of the main system (JPA[26]). In deciding what information/data is required to be collected it is vital that the capacity of systems to capture information should not dictate those decisions. If data is required that cannot currently be recorded then either resources must be found to enable platform amendments or agreed "work around" solutions e.g. spread sheet recording must be deployed. It is noted that criticism of the data collation in Canada resulted in the funding of a new IT system which;

> *"Will electronically track discipline files from the receipt of a complaint through to closure of the file. The system will allow military justice stakeholders to access real-time data on files as they progress though the military justice system and will prompt key actors when they are required to take action. It is expected that management of the military justice system files with [the new system] will significantly reduce delays. The [new system] will be integrated with a new military justice performance measurement system expected to be launched concurrently"*

What Data Should be Collected

5. Recommendation 29 in the Report advocates an SJB Working Group to determine what data is required to meet the two functions set out in paragraph one above. This Working Group should comprise representatives of all interested parties including the Service Police, the legal policy departments of the Services and representatives of SPA and JAG/MCS; other representatives as thought appropriate. The Working Group should be chaired by the MOD centre and should address and decide what data should be collected. Each authority will decide on the data it collects in its own area but this must be set in the overall framework

[26] JPA is an HR system which the SJS uses to record information. The SJS also uses COPPERS and REDCAP, see Recommendation 4.

of being able to monitor the performance of the SJS both from offence through to Summary Hearing outcome or to Court Martial verdict and also in the exercise of its other powers This WG will also be looking at the targets set for the timelines of the SJS and data collated must support the monitoring of those targets.

SUGGESTED DATA REQUIREMENTS LISTED BY REFERENCE TO AFA POWERS

Powers associated with policing functions

6. When considering the data to be recorded in this area of police powers and functions the WG should bear in mind that Independent Oversight of the policing functions conducted within the SJS is amongst the Recommendations of the Review.

7. The AFA 2006 invested the power to investigate alleged offences in the Commanding Officer (CO) and in the Service Police (SP). The exercise of these powers should be recorded. The exercise of the power to order pre-charge custody should be recorded.

Investigations

- The overall number of investigations – split into those conducted by SIB, GPD and CO/Unit.
- The nature of the offence e.g. service offences and criminal offences - split into those conducted by SIB, GPD and CO/Unit.
- The length of time that each investigation takes split into SIB, GPD and CO/Unit.
- The number of referrals to COs and SPA for charge – split into SIB, GPD and CO/Unit referrals.
- The number of referrals service offences and criminal - split into SIB, GPD and CO/Unit referrals.
- The number of defendants and victims - split into GPD and SIB and other.
- The number of investigations that do not result in a referral - split into SIB, GPD and CO/Unit investigations.
- The number of investigations started and then passed to HO police.
- The number of investigations where legal advice was sought from the SPA, split into SIB, GPD and CO/Unit investigations.

Use of Pre-Charge Custody

- The number of occasions where pre-charge custody was sought split into SIB and GPD.
- The number of occasions when it was granted split into SIB and GPD.
- The number of occasion when it was not granted split into SIB and GPD.
- The number of occasions when lawful orders restricting behaviour or liberty were given in lieu of custody.

- The number of occasions on a Judge Advocate was asked to extend pre-charge custody and agreed.
- The number of occasions on a Judge Advocate was asked to extend pre-charge custody and refused.

Use of Post-Charge Custody

- The number of applications to a Judge Advocate for post-charge custody.
- The number of application to a Judge Advocate for post-charge custody which resulted in an order for custody.
- The number of application to a Judge Advocate for post-charge custody which resulted in release with requirements.
- The number of application to a Judge Advocate for post-charge custody which resulted in release without requirements.

The power to order searches and to order entry (AFA 2006 s87 to s89 and s91)

S87 Searches by the Service Police

- The number of occasions upon which COs were asked to authorise entry and search by the Service Police split into SIB and GPD.
- The number of occasions upon which COs were asked to authorise entry and search by the Service Police and granted authorisation split into SIB and GPD.
- The number of occasions upon which COs were asked to authorise entry and search by the Service Police and refused authorisation split into SIB and GPD.
- The number of occasions upon which COs were asked to authorise entry and search by the Service Police and sought legal advice split into SIB and GPD.

S88 Search by other persons

- The number of occasions upon which COs were asked to authorise entry and search by other persons.
- The number of occasions upon which COs were asked to authorise entry and search by other persons and granted authorisation.
- The number of occasions upon which COs were asked to authorise entry and search by other persons and refused authorisation.
- The number of occasions upon which COs were asked to authorise entry and search by other persons and sought legal advice.

S89 Applications to Judge Advocate

- The number of occasions upon which COs applied to a Judge Advocate to review a search ordered.

S91 Entry by other persons

- The number of occasions upon which COs were asked to authorise entry for the purposes of arrest by other persons.

- The number of occasions upon which COs were asked to authorise entry for the purposes of arrest by other persons and gave authorisation.
- The number of occasions upon which COs were asked to authorise entry for the purposes of arrest by other persons and refused authorisation.
- The number of occasions upon which COs were asked to authorise entry for the purposes of arrest by other persons and sought legal advice.

On completion of investigation

- Time from offence reported to completion of investigation/referral.
- Time from start of investigation to completion/referral.
- The number of referrals received by COs – by defendant and by offence, split into SIB, GPD and CO/Unit.
- The number of referrals received by the SPA – by defendants and by offence, split into SIB, GPD and CO/Unit.
- The number of referrals which resulted in no charge by COs and by the SPA – by defendant and by offence, split into SIB, GPD and CO/Unit.
- The number of referrals passed to the civilian authorities split into SIB, GPD and CO/Unit.

The process of Summary Hearings (SH)

- The number of referrals received by COs – by defendant and by offence, split into SIB, GPD and CO/Unit which led to charge and SH.
- Time from referral to completion of SH.
- Time from offence reported to completion of SH.
- The number of SH in which COs sought legal advice split into Service and criminal offences and:
- How long after referral was legal advice sought.
- How long after receipt of legal advice before next action in the summary dealing taken.
- How long between request for legal advice and its receipt.
- Time between charge made and SH taking place.
- Number of cases where the accused seeks Legal Advice.
- What pleas of admit/deny entered at SH - by defendant and type of offence (including service / criminal)?
- In contested SH – how many were proved / not proved by defendant and by offence including service / criminal).
- Sentences passed in Summary Hearing – by individual, by index offence, including length of detention when awarded.

- In how many SH were errors detected by the Reviewing Process and:

    a. How many led to SAC hearings.
    b. How many otherwise dealt with.

- What time elapsed between the completion of the SH and the Reviewing process detecting the error.
- In how many SH was completion followed by appeal to SAC split into criminal offences and service offences.

The SPA Process

- Number of referrals received from SP or from COs split into criminal and service offences.
- Number of cases received by election for CM.
- Number of cases directed to trial.
- Number of cases not directed to trial and reasons for that.
- Number of cases discontinued after charge and reason for that.
- Number of cases passed to other authorities.
- Time taken to direct to trial set against the time scale allocated on receipt of case in SPA.
- Time from direction to completion of case (e.g. NG verdict or sentence).
- Case outcomes by principal offence category.
- Case outcomes by defendant and by offences.
- Overall Conviction rate by Defendants and offences.
- % of pleas at first hearing.
- Average number of hearings per case.
- Compliance with Judge's Order and Court Directions.
- Rape conviction rate.
- Domestic abuse conviction rate.
- Hate crime conviction rate.
- Number of SAC matters split into service and criminal offences and by appeals from SH and as a result of Reviewing Authority scrutiny.

Service Courts Business

- Time taken from First hearing to completion of CM matters split into trials, sentences, service offences and criminal offences.
- Time taken from first hearing to completion of SAC mattes split into SH appeals and matters referred post Review.
- Time taken from first hearing to completion of SCC matters split into trials, sentences, and offences.
- SH appeals and matters referred post Review.
- Court Usage by percentage of days allocated.
- Court Usage by daily sitting times.
- Number of CMs by individual case/defendant and by charge / offence and by Service of service and civilian defendants.
- Pleas at CM by case/defendant and by offence and by when plea indicted e.g. First hearing, PTH etc. or by subsequent information to court prior to trial.
- Overall conviction rate by defendant and by offence.
- Rape conviction rate by defendant and by offence.
- Other sexual offending conviction rate by defendant and by offence.
- Outcomes of contested cases by defendant and by offence.
- Cracked trial rates and when plea indicated e.g. first day of trial or later.
- Ineffective trial rates and reasons why trial ineffective.
- Outcomes - Sentencing – by type, non-custodial and custodial, duration and / or amount.
- Board compositions.
- Number of Appeals to CMAC and their outcomes.

Complaints against Service Police

- Number of complainants, number complaints received, and number investigated by Professional Standards Units (PSU).
- Outcomes of these investigations.
- Number of complaints referred by complainants to Provost Marshalls following initial investigation and decision by PSU.
- Outcomes of these referrals.
- Number of complaints not resolved by Provost Marshall to the satisfaction of the complainant and their disposal.

Information on the gender and race of defendants in the SJS

- The gender and race of defendants.
- The conviction rates in the SJS set out by gender and race.

[Reference to the data collated by the CJS in this field will assist the WG]

Other Information

- Compliance with the Witness Charter
- Level of Victim (and witness) satisfaction with SJS experience

APPENDIX C - TERMS OF REFERENCE: PART 2 OF THE SERVICE JUSTICE REVIEW

The Recommendations arising from Part 1 of the Service Justice Review do not propose fundamental changes to the framework of the Service Justice System, but they do make several recommendations to improve it and which need further consideration in Part 2[27]. There is a further issue which was not covered by the ToR for Part 1, which it would be appropriate for the Review to consider as part of the oversight and governance of the SJS: Independent Oversight of Complaints against the Service Police.

The Review is therefore asked to consider the issues set out below and to provide, by 28th February 2019, a single Report which deals with the points raised. Where appropriate, that Report should identify clearly where legislative change would be required to bring about the desired change(s) in policy.

A) Improving support to Victims and Witnesses

(i) The Service Justice System needs to ensure that victims and witnesses are properly supported; this helps them to deal with what has happened, and helps ensure that they are better prepared to take part in the subsequent court proceedings and Summary Hearings where applicable. With that in mind, current arrangements for supporting victims and witnesses in the SJS should be reviewed and where deficiencies are identified, proposals made for improvement (while recognising the limitations of the operational environment). There should be measures to become more consistent in best practice across the Services. This will need to take into account victim support to be provided by the Defence Serious Crime Unit (DSCU) if the proposal is accepted by the Minister. Consideration should also be given to mechanisms for victims and witnesses to provide feedback on their experience of the SJS. Further work should also be carried out to determine the implications of parties to the court martial being responsible for the attendance of their own witnesses.

[27] Recommendations from Part 1 of the Review not included in these Terms of Reference will be subject to an assessment by a 'Tiger Team' (and / or a Project Team for policing recommendations), comprised of SJS stakeholders, who will look at the feasibility and implications of each recommendation.

Drawn from: Recommendations 8 and 10 of HH Shaun Lyons' Part 1 Report and Recommendation 14 of Sir Jon Murphy's Part 1 Service Policing Report.

B) <u>Measures to improve effectiveness of the SJS</u>

(ii) There needs to be a mechanism for Commanding Officers and Judge Advocates to place suspected offenders in custody where that is appropriate. The arrangements for custody and the giving of lawful orders in lieu of Bail conditions should be reviewed, including the role of the Commanding Officers.

Drawn from: Recommendation 12 of HH Shaun Lyons' Part 1 Report.

(iii) The Review should report on the outcome of discussions with National Police Chiefs' Council (NPCC) about seconding SIB Service Police officers into HO Police Forces, and whether secondees should/could have full civilian powers during that period of secondment. The Review should also seek feedback from the Home Office on the ability of the HO Police Forces to 'support' investigations overseas and provide secondment opportunities for those in the Defence Serious Crime Unit, should it be agreed.

Drawn from Recommendations 11 and 22 from Sir Jon's Part 1Report.

(iv) The Review should consider whether there is a requirement for Service Police to have powers under Proceeds of Crime Act 2002, and to award Fixed Penalty Notices, and Cautions, and if there is a requirement what additional training would be required to use these and any other appropriate powers, and what legislative changes would be required.

Drawn from Recommendations 23 & 24 of Sir Jon's Part 1 Report

(v) Cases of offending should be dealt with in the most appropriate jurisdiction, and the Prosecutor's Protocol sets out a framework for that with the aim of getting it right at the outset. There may, however, be advantage in having the ability to transfer cases from one jurisdiction to another after the case has been investigated, right up to sentencing. The Review should give further

consideration of the requirement for, and mechanics of, transferring cases between jurisdictions.

Drawn from: Recommendation 11 of HH Shaun Lyons' Part 1 Report.

(vi) Notwithstanding the recommendation in Part 1 of the Review that the Court Martial should not deal with cases of Rape (and the other serious offences of Murder, Manslaughter, Domestic Violence and Child Abuse) in the UK unless the consent of the Attorney General is given, the Review should further consider how best to deal with remaining cases of serious sexual assault (Section 2 and Section 3 of the Sexual Offences Act 2003) in the UK, so that, the needs of the victim are met, cases are prosecuted as effectively as possible, and the system of command and discipline within the Service is maintained.

Drawn from: Recommendation 2 of HH Shaun Lyons Part 1 Report.

(vii) The Review should examine the rate of convictions secured in the Court Martial – when compared to the civilian criminal courts - for sexual offending.

Drawn from: Not a specific recommendation in Part 1, but something to explore in conjunction with (vi) above.

(viii) The Recommendation that Court Martial Boards should consist of six lay members in <u>all</u> cases should be explored further, and the work should include the following:

a) The requirement for, and implications of the judge giving a majority direction to panels of six.

b) Further work should be undertaken to determine whether there is a need for <u>every</u> Court Martial Board to consist of six members, noting that the majority of Court Martial panels currently comprise three members. The possibility of retaining smaller boards for lower level offences should be explored.

c) Further options for examining the availability of board members to sit at the Court Martial (and assisting in making best use of court time and speeding up cases) should be explored and resourcing implications identified; this includes (but is not confined to) the circumstances where a tri-service or more than one service

Board can be allowed, including if the majority of the Board should be from the Service of the accused and personnel of OR7 Rank as Board members.

Drawn from: Recommendation 4 of HH Shaun Lyons' Part 1 Report.

(ix) The Review should consider the requirement for, and implications of, presentation of OJAR / SJAR evidence to assist Boards in dealing with employment type sanctions in sentencing at Court Martial.

Drawn from: Service Court Rules Review Committee

C) <u>Improving efficiency in the SJS</u>

(x) The Review should identify ways in which to (i) remove unnecessary delay from the Summary Hearing and Court Martial processes and (ii) increase efficiency through streamlining processes, reducing waste and bureaucracy, whilst (iii) retaining fairness and supporting Service requirements. This should include an examination of the processes from end-to-end and the management data required to monitor performance.

The opportunity should also be taken to consider two specific issues which relate to the Court Martial; (i) Inclusion of an 'overriding objective' in Court Martial Rules, as there is in Civil Procedure Rules (ii) Removal of right to appeal to Court Martial Appeal Court in preliminary proceedings.

Drawn from: Recommendations 5, 6, & 15 of HH Shaun Lyons' Part 1 Report, Recommendations 8 & 9 of Sir Jon Murphy's Part 1 Report, and the most recent meeting of the Service Court Rules Review Committee.

D) <u>Governance / Oversight mechanisms</u>

(xi) ***The Review should identify and consider a range of options for dealing with, and ensuring independent oversight of, complaints against the Service Police, including any complaints from non-Service personnel or veterans.***

No recommendation as not covered in Part 1. But it would be helpful for the Review to look at this issue.