Service Justice System Review (Part 1)

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SECTION ONE -- INTRODUCTION

1.1. The Terms of Reference for the Service Justice Review (SJS) contain a series of questions and sub questions to be addressed during the course of the review. The responses to those questions are contained in **Annexes A, B and C**. This short paper will concentrate on the stated purpose of the review "to ensure that [the SJS] continues to be necessary, fair and efficient".

1.2. Statistics quoted in this paper have, in places, been approximated for ease of reading; the source material is contained at **Annex D**.

1.3. All matters arising during the course of the Review have been considered against a framework of International and National Law, the practice of other nations and the standard and procedures of the civil courts in England and Wales. Paramount criteria for this consideration have been:

a. Is the matter that is under consideration necessary to support operational effectiveness?

b. Is the matter that is under consideration necessary to provide fairness to and protection for the service personnel or other persons under the jurisdiction, be they an offender or a victim? [In asking this question the rights and welfare of non-service personnel involved (e.g. victims) must also be factored in].

1.4 Mr Derrick Bretherton conducted a Review into Service Discipline in 1986 and included the following passage:

> "My whole approach to the administration of Service Justice has been motivated by the desire to protect what is, in reality, a well tried and respected system, against any unjustified criticism, suspicion or concern from without or within. It must be seen to be, as well as actually be, beyond reproach."

These admirable sentiments hold true today. The Armed Forces Act 2006 (AFA 2006) has created a robust system for the tri-service administration of justice but the

working of the system from initial investigation through to determination must be examined critically to see what may be done to improve it. Every opportunity should be taken to tap the experience and practices of the civil Criminal Justice System (CJS) to enhance the performance of the SJS; close cooperation and joint working at all levels will improve and strengthen the SJS.

Part 1 Recommendations:

1. The Court Martial jurisdiction should no longer include murder, manslaughter and rape when these offences are committed in the UK, except when the consent of the Attorney General is given.

2. Consideration be given to including either S2 offences (sexual assault with penetration) or both S2 and S3 (sexual assault without penetration) offences in the category of cases that should be proceeded with under the civil jurisdiction when the offences are committed in the UK and placing guidance in the Prosecutors Protocol and other relevant protocols as to allocation of these cases.

3. Domestic Violence and Child Abuse offences committed in the UK should always be dealt with in the civil system and the Prosecutors Protocol should be amended to reflect this by containing specific guidance.

4. Court Martial Boards should consist of six lay members; verdicts should reach findings by unanimity or a majority of no less than 5:1; if a member is lost and the Board drops to five then unanimity is required; Boards should include OR5 Ranks (Chief Petty Officers and equivalent); in general discipline matters a Board need not be of single service composition.

5. The second part of the Review should include a detailed study into the processes of and the delays arising in Summary dealings.

6. The second part of the Review should include a detailed study into the processes of and the delays arising in Court Martial.

7. The power for the Judge Advocate General (JAG) to request that a puisne judge (High Court judge) be nominated to sit as a judge advocate should be extended to include the ability to nominate a Circuit Judge.

8. Victim and Witness support matters be reviewed as a joint study between both the Review Working Groups.

9. The Director of Service Prosecutions (DSP) reviews the requirements of the Service Prosecuting Authority (SPA) to establish the range and level of skills required for the expected future work load and propose an establishment for the future manning of the SPA with career progression in mind.

10. Parties to the Court Martial trial should be responsible for the attendance of their own witnesses.

11. The Transfer of Cases between jurisdictions should be looked into further in Part 2 of the Review.

12. There should be a review of the arrangements for Custody and the giving of lawful orders in lieu of Bail Conditions.

13. All outstanding legislative changes to AFA 06 should be implemented unless there are sound reasons for not doing so.

14. Establishment of the actual cost of running the SJS should take place.

15. A study of management data in the SJS should be undertaken.

16. Proposed new arrangements for SJB Governance are set out in the Review.

Annexes:

Annex A – SJS Review responses to the questions posed by the Terms of Reference

Annex B - Summary of Working Group members' responses to the Terms of Reference

Annex C - Full responses by Working Group members to the Terms of Reference by each question [NOT PUBLISHED]

Annex D – Statistical Information provided by Working Group members

Annex E – Transfer of jurisdiction

Annex F – SJB Governance

SECTION TWO -- THE CURRENT SYSTEM – AN OVERVIEW

2.1 Over the past twenty-five years systems of military justice around the world, be they from common law or continental or other jurisdictions, have undergone wide ranging change. This change has come about in response to a variety of factors: International Law (e.g. ECHR); national/constitutional law (e.g. NZ Bill of Rights Act 1990); decisions of international and national courts, and the expectations and changing attitudes of legislatures and societies at large. The change, which has led to the adoption of appropriate civil procedures and standards in military systems, is generally referred to by both academic and military writers as "civilianisation".

2.2. In the United Kingdom this change took place incrementally during the period 1990 onwards and in 2006 the AFA 2006 incorporated all the changes that had occurred and also set out a tri-service justice system with the attendant replacement of the single service discipline acts.

2.3. Eschewing detail and concentrating on the framework, the service system that now exists for the correction of personal failings, of misconduct and of breaches of Service or Civil law may be regarded in simple terms as a series of stages or steps of corrective action leading through to formal action dealing with disciplinary and criminal offences. These stages start with the daily exercise of military command, moving to the use of minor administrative action and progressing through summary proceedings to trial in the Court Martial, a forum with similar powers and procedures to the Crown Court. It is important to acknowledge that this overall system is more extensive than the SJS alone; the formal SJS forms the latter end of the continuum.

2.4. The First Stage. The Command Process.

The ordinary commerce of Service life will result in the first phase of control over misconduct and personal failings by means other than the justice system. Thus superiors will exercise daily control over subordinates in maintaining standards of efficiency, of equipment maintenance, the observance of Standing Orders and work routines and of personal bearing, cleanliness and efficacy; breaches of these

standards and norms will be met by verbal reproof and by lawful corrective orders as the errors or failings are observed or come to light. Other than the fact that in the Services the authority of superiors is backed by statute (e.g. AFA 2006 S12 Disobedience of Lawful Orders, S13 Contravention of Standing Orders), this first phase of control will differ little from the control and exercise of authority that takes place in non-military organisations.

2.5. The Second Stage. Minor Administrative Action.

This second step is also outside the justice system and Minor Administrative Action (MAA) must not be confused with disciplinary action. MAA is intended for use to set straight professional and personal shortcomings and is not to be used where, for instance, a criminal conduct offence has been committed. MAA is akin to sanctions that may be taken in a non-military environment for employment failings. So MAA is typically appropriate for failure to perform a duty or for its unsatisfactory performance, or for poor timekeeping in missing a muster or in a late return from leave.

2.6 MAA may be taken by Corporals and equivalent and by other ranks senior to them. MAA is subject to strict rules for its application including a standard of proof, a requirement for fairness and speed (the avoidance of delay). Where a superior wishes to take MAA they complete a form, select the appropriate sanction and inform the person subject to the MAA. The superior and the subject person then report to the reviewing officer. At this stage the person subject to sanction is asked if they wish a formal review. If they do, the reviewing officer conducts a hearing in which the subject person may explain why he should not be sanctioned or not given any particular sanction. If they do not wish a formal review the reviewing officer must nevertheless consider the matter by a review and will reach a disposal by which they may cancel the action or endorse the proposed sanction or reduce the sanction sought.

2.7. The sanctions themselves are framed wherever possible to reflect the relevant failing. Thus there may be a requirement to carry extra tasks or duty of the same or

similar nature to task or duty in which the individual failed. The individual may be required to report back for certain musters or parades at specific time and places in order to emphasize the need for timeliness and good order or for the need to maintain both person and equipment to the required standard. The sanction may take the form of either an Informal or Formal Interview which will set out the instant failings or shortcomings for discussion and lead to the giving of advice and guidance on how these matters may be rectified and as to future expectations of conduct and performance. MAA sanctions are recorded and retained for a period of at least two years or until the individual is posted from the unit, whichever is the earlier.

2.8. The MAA process follows a quasi-judicial procedure to ensure fairness and any person made subject to a MAA sanction may submit a Service complaint seeking redress of a personal grievance. This avenue of redress underlines the separate nature of MAA from the disciplinary sphere.

2.9. The Third Stage. Summary Hearings[1].

This, the third step, is the first formal disciplinary level within the SJS. Commanding Officers (COs) are obliged to cause an investigation into all suspected offending and this is achieved either by a reference to the Service Police (SP) or, on other occasions, the investigation will be conducted by unit personnel. The SP, in the performance of their police duties, is independent of Command and may seek legal and procedural advice from their Provost superiors and when appropriate, from the Service Prosecuting Authority (SPA). The independence of the SP is underlined by AFA 2006 S115A which bans interference or attempts to direct investigations by persons outside the SP. The SP must conduct an investigation and record the results in an initial disclosure of the prosecution case, known as the Service Police Case Referral (SPCR). COs must report suspected serious offences (Schedule 2 or "certain circumstances") to the SP. In such serious cases the SPCR is forwarded to the SPA (See Stage 4 - Court-Martial below) but for other matters the SPCR is forwarded to the CO.

[1] The following three paragraphs describe the procedures as they currently exist. When AFA 2016 Ss. 3 to 5 come into force there will be some changes

2.10. On receipt of the results of the investigation, from SP or Unit Personnel, the CO must consider the evidence before him or her and may proceed in a number of ways. Legal advice is available to COs throughout this process. The CO may discontinue the matter, they may seek further evidence, they may approve the proposed charge or frame and bring another, they may decide to refer the matter to the Director of Service Prosecutions (DSP) for consideration of a trial at the Court Martial, or they may decide to deal with the matter themselves. In certain circumstances they may need to apply for permission to try the matter and they may also make an application for extended powers of punishment.

2.11. If the CO decides to try the matter themselves, they must provide the accused with written notice of a number of matters including the accused's right to elect for Court Martial and he must cause the case papers to be served on the accused. If the accused does not elect for trial at the Court Martial, the CO may hear the case and award punishment, they may dismiss the matter or may decide to refer the matter to the DSP should the case prove to be unexpectedly complex or serious. The accused has the right to appeal a finding and / or sentence to the Summary Appeal Court (SAC).

2.12. The Fourth Stage. Court Martial.

Matters may come to trial in a Court Martial by a number of avenues:

- By the accused, at a summary hearing, electing trial in the Court Martial
- By a CO referring a matter to the DSP for consideration of a trial in the Court Martial
- By the SP referring a matter the DSP for consideration of a trial in the Court Martial.

Once the DSP has considered and brought both a charge and the accused before a court, the matter then closely parallels the procedures and standards of a trial in the Crown Court. The charge is brought by an independent prosecutor (DSP) supported by the SP (who are independent of Command) and the matter will be managed and

brought to trial by and before a court constituted of an independent civilian judge sitting as a member of a Standing Court and a lay board acting as a jury. The judge will set a trial date and give orders and directions so as to bring the matter ready for trial on the due date. The accused may have legal representation of their choice and may be granted Legal Aid under the normal rules for such assistance. The trial itself is conducted under rules of evidence and procedures which broadly correspond to those in the CJS; guilt or innocence is decided by a majority vote of the board of military personnel acting as a jury with guidance as to the law provided by the judge as in the civil courts. The sentence is determined by the board sitting with the judge. The accused, provided they have grounds for an appeal similar to those of an appeal to the Court of Appeal (Criminal Division) from Crown Court, has the right to appeal to the Court Martial Appeal Court (CMAC).

2.13. The Summary Appeal Court.

The Summary Appeal Court (SAC) hears those matters where an accused has exercised his unfettered right to appeal from a summary hearing. The appeal may be against finding and punishment or against punishment alone. The appeal is an entire re-hearing of the matter when both finding and punishment are before the court. When punishment only is appealed the facts are usually (but in some more rare cases the factual matrix which leads to a continued plea of guilty may be in dispute) read to the court as undisputed. The court is composed of an independent civilian judge and two service members. The decisions of the SAC are by a majority of its members. Appeal from the SAC lies to the High Court by way of a case stated where it is contended that the SAC erred in the law or acted in excess of its jurisdiction.

2.14. Civilians Subject to the AFA 2006. The Service Civilian Court (SCC)

Civilians who subject to the AFA 2006 may be tried for minor offences by the Service Civilian Court (SCC). The SCC, which only has jurisdiction over service offences committed abroad, consists of a Judge Advocate sitting alone. More serious matters may be tried in a Court Martial and accused persons appearing before the SCC have the right to elect for trial in the Court Martial rather than in the SCC. Any such Court

Martial trial is then usually conducted with an all civilian Board. In the event of a conviction the judge sentences alone as in civilian courts.

2.15. Major Administrative Action.

More serious administrative measures (e.g. dismissal) may be taken to deal with major personal and professional failings of service personnel. These measures may be taken in their own right or as a consequence of a service person having been tried and convicted in the civil criminal courts or in the Court Martial.

2.16. Comment.

The above brief summary of the legal and quasi legal processes by which the Services regulate their affairs does not address the minutiae of safeguards and procedures that exist. It does not refer to the wealth of regulations, instructions, and advice that exists at all levels to help all the participants in the system conduct their roles efficiently, fairly and speedily. It is set out in order to provide the basis for subsequent discussion of whether the system is necessary, fair and efficient.

2.17 The current system is more complex than its predecessor systems; it is more "lawyerly" and requires a greater degree of support and advice from legal officers than did its predecessors. It is at times more complex than its civilian counterparts. Such complexity arises in part for good service reasons including the requirement to keep the CO in their central position in the training, morale and discipline of their unit. Other complexities arise from a desire to ensure that the wide-ranging powers granted by Parliament are administered and used appropriately. Thus for instance AFA 2006 (at S152) gives a permissive power to the Services to review summary matters; such a review is independent of the Command being conducted either by the Defence Council or an officer nominated by the Defence Council. The Services choose to use this power to conduct 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. This safeguard replaces

that scrutiny which is afforded in the civilian CJS by magistrates' Legal Advisors and by the presence of legal presentation in at least some summary matters in the civilian system, and evinces a desire to be beyond reproach and to take all possible measures to avoid unfairness or error in the systems.

SECTION THREE – AUTHORITIES WITHIN THE SYSTEM

3.1. The Judge Advocate General and his Department

The Judge Advocate General (JAG) is appointed by HM The Queen while his Judge Advocates (a VJAG and four AJAGs) are all civilian judges and are appointed by the Lord Chancellor. They sit in a standing court (the Court Martial 2006 S154) and are by statute wholly independent of both Government and the Ministry of Defence. They also provide the judiciary for the Summary Appeal Court and the Service Civilian Court. The JAG is responsible for the allocation of trials to judges in the Court Martial and issues Guidance for the conduct of matters being conducted in the Court Martial and the Summary Appeal Court.

3.2. The Military Court Service.

The purpose of the Military Court Service (MCS) is to provide a criminal court service for the Royal Navy, Army and RAF in the Court Martial, Summary Appeal Court and Service Civilian Court. The MCS is independent of the Service Prosecuting Authority (SPA), the Service chains of command and those MOD branches responsible for discipline casework. To ensure his independence the MCS Director is appointed by the Defence Council and is accountable to the Service Justice Board. The Director (in the role of Court Administration Officer – CAO) is responsible for giving notice of court proceedings, specifying lay members of the court (equivalent to jury summoning) and notifying witnesses. The MCS discharges its duties at four permanent Military Court Centres (MCC). They are located at Bulford, Catterick, Colchester and Portsmouth in the UK; also in the UK is a court centre at Aldergrove (which has not been used for some years but has a trial scheduled for 2018). There is also a court facility in Germany at Sennelager. A study into the future of these locations is currently being conducted. The provision of court services is wholly flexible and MCS has facilitated and supported a number of trials overseas.

3.3. The Services Prosecuting Authority.

The Director Service Prosecutions (DSP) is head of the Service Prosecuting Authority (SPA); both he and the SPA are fully independent of the military command and operate under the superintendence of the Attorney General. The SPA receives cases either from the SP or from the Chain of Command and where and when appropriate prosecutes these cases before the Court Martial or the SCC. The SPA also acts a respondent in the SAC and will represent the Crown in cases taken to the Court Martial Appeal Court (CMAC). SPA also advises the SP in the conduct off investigations before they are formally referred to the SPA; this is growing commitment with the number of occasions of advice being given having nearly doubled since 2014 to over 400 cases in 2017.

3.4. The Three Forces Legal Services.

Legal advice on the conduct of the SJS is provided to Command by the three Legal Services; they also advise on the separate but associated matters of Minor (but not the RAF Legal Service) and Major Administrative Action and Service Complaints. The bulk of the advice provided in the SJS to Command is concerned with the summary dealings; once a matter is referred to SPA for review and possible court martial then the matter is out of the hands of the Legal Services. The Legal Services post officers to the SPA for tours of duty with that Authority.

SECTION FOUR -- IS THE SERVICE JUSTICE SYSTEM NECESSARY?

4.1 This question is answered in a number of the responses to the questions asked as part of the Review Terms of Reference; the detailed answers are in Annexes A, B and C which give detailed support to the portmanteau answer to this question in the succeeding paragraphs.

4.2. **General**. It might be thought, particularly given the nature and purpose of warfare and armed conflict, that the need for there to be a disciplinary system for the internal governance of the conduct of the Armed Forces would be accepted without question. Today, following a long period of peace with most conflicts involving the UK taking place in geographically remote areas, the realities of armed conflict are not fully understood by the bulk of the population. This contrasts with the experience of society at large in the post war period when the single service Acts were revised (e.g. Naval Discipline Act 1957 and Army Act 1955) and when personal knowledge of service in uniform at first or second hand was widespread. Accordingly, it is sensible to re-examine this need.

4.3. The Services are now and have been for some decades composed entirely of volunteers. By volunteering service personnel accept the imposition of wide ranging restrictions on their freedoms, of disruptions to family life, and of inconveniences on both a daily and long term basis all of which would be unthinkable and unacceptable in most aspects of civilian life. They also place themselves as subject to the AFA 2006. At the same time, a higher standard of general conduct is expected of service personnel both in peace time and in war. They remain citizens but are citizens in uniform. Service personnel are often required to risk injury or death in the performance of their duties and a SJS puts a premium on the necessity for discipline and cohesion. Put simply the task of service personnel is, when necessary, to kill or disable other combatants and to accept that they themselves may be killed – this ultimate duty cannot be glossed over. Operational effectiveness requires that service personnel carry out their tasks efficiently in the face of personal jeopardy and this requires training, morale and discipline.

4.4 Operational effectiveness. The realities of military life are acknowledged and expressed by the Supreme Court of Canada in R v Generaux (1992) in a clear judicial statement of the requirement for a separate service justice system:

> *"The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and wellbeing of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs.*
>
> *In addition, special military tribunals, rather than ordinary courts, have been given jurisdiction to punish breaches of the Code of Service discipline. Recourse to the ordinary criminal courts would as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus need for separate tribunals to enforce special disciplinary standards in the military."*

4.5. Discipline is the bedrock upon which morale and training are founded. The best protection for the individual Service Person when on operations and in jeopardy is that their comrades are all similarly trained and disciplined. The disaffection, inefficiency or lack of discipline of one person may place in jeopardy the other members of their unit. The justice system is designed so as to place the CO in a central position. It is the CO who is responsible for the operational effectiveness of the unit; flowing from that it is the CO who is responsible for the morale, training and discipline within the unit.

4.6. International Humanitarian Law / The Law of Armed Conflict.

Attempts to mitigate the rigours of war have long been attempted. Doctrines of just war and the customs and usages of war toward civilians and the unarmed or non-military have been recognised for centuries although their actual applications has been spasmodic and unreliable. Modern Law of Armed Conflict (LOAC) is expressed in the Hague Convention 2007, in the Geneva Conventions of 1949 and the later Protocols, and in subsequent treaties. If a State is to observe this LOAC then its armed forces must be disciplined and trained.

4.7. If the UK Armed Forces are to meet the nation's obligations under International Humanitarian Law (IHL) / LOAC then *" legislation… to provide effective penal sanctions …….safeguards of proper trial and defence is required".* (See variously the First to Fourth Geneva Conventions). The SJS provides this mechanism. The need for a disciplinary system is also clearly laid out in The Protocols Additional to the Geneva Conventions of 1949 which require:

> *Article 43 Protocol I— Armed forces 1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an* ***internal disciplinary system which, inter alia, shall enforce compliance*** *with the rules of international law applicable in armed conflict. (bold emphasis added)*

This Protocol deals with Prisoners of War and the SJS fulfils the obligation above and thus affords protection to service personnel in the event of capture by ensuring that they are entitled to treatment as Prisoners of War.

> *Article 87 Protocol I "The High Contracting Parties and the parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons their control, to prevent and , where necessary, to suppress and to report ….. breaches of the Convention and this Protocol" and later " …. Shall require any commander*

who is aware that subordinates or any other persons under his control are going to commit or have committed a breach of the Convention or of this Protocol, to initiate such steps as are necessary to prevent …. And, where appropriate to ***initiate disciplinary or penal action against the violators thereof.****" (bold emphasis added)*

The SJS fulfils the obligation under this article; it could of course be provided by other means e.g. a civil jurisdiction.

4.8. The ability to protect military personnel out of UK jurisdiction. (S42 AFA 2006)

S42 of AFA 2006 incorporates as an offence under the AFA 2006 any act that is punishable by law in England and Wales (or "if done in England or Wales, would be so punishable.") This jurisdiction conferred over those subject to AFA 2006 is a personal jurisdiction. The Service Person (and others so subject) therefore travels surrounded by their jurisdiction wherever they may be. In the UK, the Service Person is also subject to the general jurisdiction of the ordinary courts and abroad will, subject to the detail of any Status of Forces Agreements (SOFA) or (Memoranda of Understanding (MOU) or ad hoc agreements, also be subject to the laws of the country in which they find themselves. The universal jurisdiction for all criminal offences provides service personnel with a safeguard that offences committed in a foreign jurisdiction are justiciable by the law they take with them (subject to any agreement whereby the receiving State retains a form of concurrent jurisdiction e.g. NATO SOFA. Art VII(3)). This will help protect service personnel from regimes which patently fail to meet the customary norms (ECHR or UN); more particularly this jurisdiction will provide a forum for the trial of any offences they commit in areas where there may quite simply be no operating justice system at all. It will also encourage foreign authorities to hand service personnel back for trial by the UK military justice system and will facilitate the willingness of foreign authorities to enter into SOFA and MOU ceding jurisdiction to the AFA 2006. This flexible and portable system enables the SJS to reach findings, either in summary dealings or in the Court Martial, in the place where the offence was committed; it reduces the difficulty of

producing local witnesses at trial, and it provides a trial conducted in the language of the accused. The flexibility of the system allows either trial "on site" or back in the UK or elsewhere. These virtues apply to all three Services and the Navy has provided an example:

> *"A CM took place in Cyprus in 2009 where most witnesses were on board a RN and a US Warship, following an incident in Turkey where a RN sailor was alleged to have committed GBH with intent by head-butting an American sailor so that he fell back and hit his head on a kerb, sustaining brain damage. The Ships were both in the Mediterranean conducting operations and landed witnesses as required each day to give their evidence. It was … a very good example of the CM system supporting OE. If it had not been approached in that way, the case might have failed or been severely delayed. Ultimately the defendant was found guilty of GBH with intent and sentenced to a significant period of imprisonment."*

4.9. It is frequently stated that the Services are at their lowest level of manning for over 100 years and that they are now predominantly based in the UK. This statement should not be used to obscure the fact that much of the Services manpower is out of jurisdiction both in peacetime and, of course, when on active service. A snapshot of the numbers who are out of jurisdiction and protected by S42 AFA 2006 is:

Table 1. Numbers stationed abroad and at sea in 2016

Navy	Army	RAF
10,000	7,910	4,300

Source: Provided by Services for SJS Review and perfected by single service comment.

However these totals do not include numbers deployed on operations, exercise or training. These totals should therefore be viewed in the light of figures which show

that in addition during 2016 the Navy had a total of some further 8000 personnel deployed on operations and exercises, the Army deployed overseas an additional 47,300 soldiers giving an average of some 4,500 soldiers on any one day, while similarly the RAF deployed a further 2,050 personnel on exercise.

4.10. Extra Territorial Jurisdiction.

The protection that AFA 2006 S42 brings could be provided by other means. Parliament could decide to make all civil crimes the subject of Extra Territorial Jurisdiction (ETJ) (currently murder and some sexual offences are so covered); in doing so Parliament could provide that such ETJ applied universally or only to those subject to the AFA 2006. Were this done there would be a consequent need for civilian police forces to travel abroad to investigate offences (at times in areas of unrest and danger). However under current legislation it is doubted that civilian police would have powers overseas. It is understood that their powers of arrest/search/seizure under PACE can only be exercised in the UK. There would also be the need for witnesses to come to the UK for any trial. To adopt such a mechanism to replace S42 is likely to have the effect of prolonging the process of justice and adversely affecting operational effectiveness. It carries with it the risk that some cases might become “too difficult” to bring to trial.

4.11. If such an action were taken and S42 were to be repealed then without S42 the canon of Service offences in the AFA 2006 would have to be expanded considerably to fill the gap that would be left in the disciplinary system. An alternative would be for the civilian police forces and courts to deal with such matters but this would raise the previously rehearsed difficulties of "reach" abroad and of investigations in remote (or temporarily inaccessible) locations and dangerous environments. The succeeding paragraph indicates the lacunae that could arise.

4. 12. S42 used to supplement Service Offences.

The inclusion of civil criminal law by S42 of the AFA 2006 enhances the operation of the SJS and enables a range of offences to be used to give more specific and

focussed charges in any particular case. Thus if a service person were to strike or wound a superior officer then they would be liable to prosecution under the AFA 2006 for a Service offence – probably using violence toward a superior officer. If however the violence used were to be of a significant or protracted nature or resulting in some actual or serious harm then S42 could be used to charge ABH or S20 Wounding or S18 GBH under the Offences Against the Person Act 1861 as appropriate. The court could, on a finding of guilty, pass a sentence which not only reflected the gravity of the breach of discipline involved but also properly reflecting the degree of violence used and harm suffered. Such offences whether committed in the UK or abroad are most appropriately tried in a Service court and the availability of the wider corpus of civilian offences to the system enhances and reinforces the service discipline and ethos which the SJS seeks to maintain. The existence of S42 and the powers exercised under it, demonstrate that the Court Martial is a court of equal power, standing and authority to the Crown Court.

4.13. The practice of other nations. All the Common Law countries reviewed (USA, Canada, Australia and NZ) have similar service justice systems to the UK. Their systems comprise a first level of summary discipline with restricted powers administered by COs. This summary level is coupled with a superior level of military courts trying more serious matters. All these countries provide for a S42 type jurisdiction by means of which those subject to Service Law may also be tried for civil criminal offences whether committed on national territory or abroad. European jurisdictions are more varied in their systems and a consistent pattern is not easy to determine. A number of European countries (for instance France, Spain, Czech Republic, Portugal, Russia and Ukraine) on becoming a signatory to the ECHR entered reservations with Articles 5 and/or 6 for the purposes of Service Discipline. The Dutch system displays a two tier system of CO dealings and higher service courts and includes an extraterritorial jurisdiction over all criminal offences for service personnel.

Conclusion.

4.14. The SJS, both in its “internal” jurisdiction of regulating good order and discipline through the service offences and penalties laid out in AFA 2006 and also in the criminal jurisdiction conferred by S42 AFA 2006, plays an essential role in the operational effectiveness of the Armed Forces, in the meeting of the nation’s obligations under IHL and in protecting service personnel and others subject to AFA 2006 while they are serving abroad.

SECTION FIVE -- IS THE SERVICE JUSTICE SYSTEM FAIR?

5.1. The term “fair” indicates a broad concept and certainly encompasses “legal” but it also has wider connotation of equity and perception.

5.2. Summary Dealings.

In summary dealings under AFA 2006 the CO fulfils several roles (perhaps rather akin to an examining magistrate although of course he is not a lawyer). The CO is not an “independent and impartial tribunal” nor is there any right to legal representation. This system has been deliberately chosen to maintain the position of the CO in relation to the discipline of their unit in order that they may further the operational effectiveness of that unit and the safety and wellbeing of those within the unit (see paras 4.4 to 4.7 above). The dichotomy between International and / or National standards set for the conduct of fair trials and the military imperative of operational effectiveness is well recognised. In New Zealand, the Armed Forces Discipline Act 1971 (as amended) refers to rights under the New Zealand Bill of Rights Act 1990 and makes an election for summary trial equate to a waiver of the rights of legal representation and an independent court.

Thus:

> *“An accused is deemed to have irrevocably waived, in relation to a charge, the rights referred to ……if, having been given the right to an election …. He elects for* the commanding officer, detachment commander, or superior commander to proceed ……*The rights are ….*
>
> *the right that the accused had or has under section 24(c) of the New Zealand Bill of Rights Act 1990 to the extent that it relates to the right to legal representation; and*
>
> *(b) The right that the accused had or has under section 25(a) of that Act to the extent that it relates to the right to a hearing by an independent court.”*

AFA 2006 contains the right to elect for trial at the Court Martial in all cases. However, the decision of an accused not to elect for such a trial is not necessarily sufficient to amount to a waiver of the similar rights under ECHR. Nevertheless this right to elect coupled with the unfettered right to appeal from a summary hearing in respect of the finding and sentence or sentence alone to the SAC is considered to make the overall summary system ECHR compliant. This has not been tested in the courts with no challenge on this point having been mounted since 2006.

5.3. The incidence of exercising the option to elect for Court Martial and the incidence of appeals following a summary hearing are both set out below. This data indicates a degree of trust in and an acceptance of the fairness of the process of summary hearings.

Table 2. Elections for trial at the Court Martial and of Appeals to the SAC in 2017

	Number of elections for CM trial	Number of appeals to SAC
Navy	15	12
Army	13	62
RAF	0	10

Source: MCS statistics 2017

Table 3. Tri-Service SAC Appeals shown as a % of Summary hearings.

Year	Percentage
2014	1.7
2015	1.3
2016	1.8

Source: MCS statistics / SJB paper November 2017

5.4. Court Martial

The position as outlined in paragraphs 3.1 to 3.3 above demonstrate that in the SJS the Command has no influence over the judiciary, the prosecution, the courts administration or the composition of Boards. These measures ensure that the Court Martial is a compliant court, subject of course to future legal challenges.

5.5. Perceptions

AFA 2006 recognises that the SJS is a military system and that the maintenance of good order and discipline are its prime purpose. Its protection of those subject to the Act through S42, while very important, is not the prime purpose of the Act. It must be recognised that there is not universal trust for (and certainly little understanding of) the SJS amongst the public. Whilst service personnel have a great deal of support, this support does not extend to the same extent to the SJS. Sometimes the expression of mistrust is just simply one of misunderstanding, perhaps typified by the belief that title “Judge Advocate General” means that JAG is a uniform wearing senior member of the military command rather an independent civilian judge. The call that the SJS should wherever possible resemble the civilian system must be put in proper context. Where procedures can be made to more closely resemble civil procedures without damaging the purposes of the AFA 2006 then all well and good but simple adherence to this maxim can damage the primary purpose. A number of such matters are dealt with in the seventh section of this paper.

5.6. Jurisdiction/S42.

The degree to which S42 offences feature at Court Martial is, unsurprisingly, considerably higher than at summary level where the CO has limited powers to deal with civilian criminal offences (AFA 2006 Sched.1). Between 2010 and 2017 inclusive offences of murder, attempted murder, S18/20 violence, ABH and dishonesty, Rape and serious sexual assault consistently accounted for between some 25% and 35% of all trials. Of these the sexual offences formed between 2% and 9%.

5.7. Court Martial Numbers

The number of trials in the Court Martial and the number of cases in the Summary Appeal Court are shown below:-

Table. 4 Number of Court Martial Trials and cases in the SAC.

	2013	2014	2015	2016	2017
Court Martial[2]	483	462	476	410	400
SAC	77	84	60	82	84

Source: MCS statistics

[2] The Guilty Verdict percentage from 2014 to 2017 ranged between 74% and 80%; these figures being much the same as produced by Criminal Justice System (CJS).

Table 5. Number of appeals from Court Martial to the Court Martial Appeal Court[3].

	2013	2014	2015	2016	2017	Total
Conviction Appeals						
Allowed	1	0	0	0	1	2
Dismissed	0	3	4	0	1	8
Total	1	3	4	0	2	10
Sentence Appeals						
Allowed	4	7	0	1	4	16
Dismissed	2	2	4	2	1	11
Total	6	9	4	3	5	27

Source: HMCTS Criminal Appeal Office

The percentage of Court Martial which is taken to appeal each year is under 2% (except in 2014 when it was under 3%).

Conclusion.

5.8. The SJS is fair in that the measures put in place to "legitimise" the non-compliant summary system may be considered to render these dealings compliant. The many changes that have taken place in the Court Martial system have similarly rendered it compliant. It should be acknowledged that further challenges to both summary dealings and Court Martial proceedings will arise in the future. Certain measures should be considered in order to make the system more compatible with the current norms of civilian justice systems and which may thus further proof the system against successful challenge. **See Recommendations 1, 2 and 3 at Section 7.**

[3] Appeals against conviction *and* sentence are included in both the conviction and sentence figures – as, for example, the conviction appeal may be dismissed but the sentence appeal allowed.

SECTION SIX – IS THE SERVICE JUSTICE SYSTEM EFFICIENT?

6.1. Efficiency may be viewed in a number of ways and several questions must be posed in both summary and CM systems.

Speed and range of the SJS. Does the SJS provide the speedy justice that supports operational effectiveness and justifies the grant of the powers in AFA 2006? How do the powers under S42 protect the position of those subject to the Act? How should S42 powers be exercised in the UK? This is examined in both the summary and Court Martial systems.

Value for Money. Is the efficiency in terms of speed and quality value for money for the resources that the SJS absorbs? This question is not posed in terms of what is the actual cost of the SJS but in terms of manpower and comparisons with civilian systems. However it would be prudent for the actual cost of the SJS to be established in advance of others seeking this information, **see Recommendation 14 in Section 7.**

6.2. Minor Administrative Action.

Before examining the efficiency of the summary system mention should be made of MAA and the effect it has on the throughput of the SJS. The matters that are now dealt with by MAA would hitherto been dealt with either by the Command Function coupled with verbal remonstrance and guidance or by the disciplinary system. It is likely that the bulk of current MAA would have fallen to be dealt with at the bottom end of the disciplinary system under the powers delegated to Officers of the Day/Duty Officers under the previous systems. Certainly the bulk of the leave breaking offences would have led to disciplinary sanction. By use of this MAA practice, paralleling the usages of non-Service organisations, a very large number of cases are now diverted from the SJS. MAA is a success story; it empowers the more junior echelons in the command structure and allows a swift and relevant disposal of matters on a largely consensual basis. Importantly it means the SJS is not used for “petty” matters but may concentrate on substantial breaches of discipline and criminal offences. The role of MAA in this diversion may be seen thus:

Table 6. How matters of personal and professional failings, of indiscipline and offences against the AFA 2006 were dealt with in 2017

	MAA	Summary	Court Martial
Navy	86%	13%	1%
Army[4]	-	-	-
RAF	81%	17%	2%

Source: Provided by Services for SJS Review

When set against the numbers of summary matters (below) it can be seen how the absence of the MAA disposal would overload and inhibit the operation of the SJS.

Table 8. Number of summary matters in 2016

Navy	Army	RAF	Total
633	2,879	291	3,803

Source: SJB paper November 2017 as perfected by single service figures

Speed and Range of the SJS

6.3. Parliament has vested disciplinary powers in the Services in order that they may economically and effectively achieve their service aims and purposes. Prime amongst the virtues intended to be facilitated by the system is operational effectiveness. The need for speedy resolution of disciplinary matters is of paramount importance to operational effectiveness and the closer in time and location to active

[4] The Army is unable, without further time, to collate these statistics but supports the analysis that MMA prevents over load of the summary hearing system.

service that disciplinary measures have to be undertaken the greater need there is for timely resolution.

6.4. **Summary Speed**. At present this necessary speed is not being achieved and it may be said that the SJS is not using its powers so as to achieve one of the prime purposes for which the powers were given. It is known that speed of process has been a matter of concern to the Service Justice Board (SJB) for some while. Generally it appears that the time taken has increased since 2000 and again since the introduction of AFA 2006. There is some indication that the introduction of Better Case Management (BCM) in 2016 with its attendant drop in required paperwork has had a positive effect on the speed of providing SPCR.

Table 9 Average Time in days from offence to resolution of summary matters[5]

	1990	**2000**	**2010**	**2016**
Navy	N/K	18[6]	64[7]	77
Army	N/K	34[8]	52	69
RAF	N/K	N/K	45[9]	39

Source: Services for SJS Review

[5]These stats are not wholly reliable.
[6]The RN 2000 figures are based upon only about 50% of offences in that year as half the cases the data contained no date of offence.
[7] 2011 figure provided
[8] 2001 figure provided.
[9] 2013 figure provided. RAF was unable to use their 2010 figures because of obvious inaccuracies on the face of the data.

6.5. Legal Advice to Commanding Officers

Table 10. Advice given by Legal Services on summary matters in 2016.

	No. of cases advised	% of cases advised	Days taken to provide advice[10]
Navy	382	61	8
Army[11]	1755	58	6
RAF	257	88.3	7

Source: SJB paper November 2017 and perfected by single service comment.

6.6. The cause of delay in summary dealings needs a closer study. The study should then propose new methods of working and any changes to procedure that are required. **See Recommendation 5 in Section 7.**

6.7. Summary Range/Jurisdiction. S42 in the Summary system.

The number of criminal offences dealt with summarily is low as would be expected given the limited range of civilian criminal offences which may be the subject of Summary dealings (AFA 2006 Schedule 1) and gives no cause for comment. These offences are perforce at the lower end of the scale of offending.

[10] Figures rounded to full days.
[11] The army does not capture data in the same format so directly comparable figures are not available; nevertheless it is possible to say.

Table 11. Criminal Offences at Summary Dealings:

	By Number			By percentage		
	2014	**2015**	**2016**	**2014**	**2015**	**2016**
Navy	54	41	37	5.1%	5.6%	5.8%
Army	244	236	261	6.7%	6.7%	7.3%
RAF	21	28	17	7.6%	10.0%	5.8%

Source: SJB paper November 2017 as perfected by single service comment.

6.8. Court Martial Speed

In this area the times achieved are also unsatisfactory.

Table 12. Time to trial between Offence and Court Martial measured in days

	1990	**2000**	**2010**	**2016**
Navy	180	N/K	299[12]	496
Army	N/K	299[13]	257	355
RAF	N/K	N/K	N/K	266

Source: Services for SJS Review

These periods are considerably longer than those in the CJS where the median time from offence to trial in the Crown Court across all offences (many of which will be historic and/or reported considerably later than those in the Service sphere) is 260 days and where the wait for a trial after being referred to the Crown Court is 100 days. Such comparisons are not very relevant in terms of the actual periods of time

[12] Figure for 2011
[13] 2001 figure provided

revealed but they highlight how the SJS performance on speed of process, in a system intended for speedy resolutions, is not satisfactory.

See Recommendation 6 in Section 7.

6.9. Court Martial Range / Jurisdiction.

AFA 2006S42 is (as were its predecessor similar sections in the Single Service Acts) designed primarily to protect those subject to the AFA 2006 so that when a civil criminal offence is committed abroad by a person subject to it they may be tried by Court Martial for any such offence (AFA 2006 S50). S 42 also sensibly complements Service Law and offences in a number of areas both in the UK and abroad (see paragraph 4.8). The resulting position whereby civil crimes committed in the UK may be tried in either jurisdiction is regulated by a protocol - The Protocol on the exercise of criminal jurisdiction in England and Wales. (The Prosecutors Protocol). This Protocol acknowledges that in practice the jurisdiction in which an offence is pursued will depend upon a decision made at an early stage and in the local area by the police forces. The Protocol appears to work satisfactorily. There is no similar protocol in force in Scotland or in Northern Ireland. The changes proposed to the jurisdictional boundary for murder, manslaughter and serious sexual offences (see para 7.5) need not affect the working of the Protocol for other offences.

Value for Money

6.10. The SJS has ample resources and the background against which this should be viewed is that the service manpower numbers (regulars only) in 1990 and 2016 were and are:

Table 13 – Total Service Numbers

	Army	Navy	RAF	Total
1990	152,820	63,200	89,685	305,205
2016	85,038	32,400	33,320	150,758

Source: Services for SJS Review

6.11. JAG.

In 1990, the Office of the Judge Advocate General (OJAG) consisted of JAG, VJAG, 8 AJAG and 2DJA; a total of 12. In addition, a pool of 7 or 8 "plate" judges (DJA) were available to be called on. Two offices were maintained. In London, manned by JAG, VJAG, 5 AJAG and 1DJA, and in Germany manned by the senior AJAG(the DJAG) ,2 further AJAG and a DJA. In 1990, OJAG did not provide judge advocates for Naval courts martial. Today OJAG consists of JAG, VJAG and 4 AJAG. There remains a pool of 8 DJA who are rarely called on. There are two Circuit judges who are qualified to sit as AJAGs. In 2017 these Judicial Officers presided over 400 Courts Martial and 84 Summary Appeal Court cases. The judiciary for the Service Civilian Court were also provided. In a Crown Court manned by 10 Judges and visiting Recorders some 2,000 cases a year would be dealt with. It is understood that JAG feels there is sufficient judge power and VJAG is largely employed away from the SJS and in the Crown Court.

See Recommendation 8 in Section 7.

6.12. Police. Sir Jon Murphy will deal with Service Policing in his parallel and linked review of the Service Policing. However, for completeness, the ratio of police numbers to those policed taken from preliminary work in that Review shows:

Table 14: Police Officers per head of population

	Police Officers per head of population
Navy	1:108
Army	1:76
RAF	1:102[14]
Merseyside Police Force	1:390

Source: Services for SJS Review Police WG / Merseyside police

Of course these crude figures do not take into account the full and varied range of duties and activities, both policing and otherwise, in which the Service Police will be engaged and does not show how many of them are actually engaged in policing duties connected with the SJS. In addition, the requirements for effective discipline and for conduct of a higher order in the Services than is expected in the wider civilian population must be factored in. The separate study into Service Policing will deal with such matters.

6.13. Service Lawyers.

The commitment of the Service Legal Branches to the SJS has changed following the changes wrought by ECHR compliance and AFA 2006.

[14] The RAF had concerns that the original ratio of 1:27 had not been calculated on the same basis as the RMP figure and believes that if it were it would more accurately show the proportion to be 1:102.

Table 15 Service Lawyers in the SJS in 1990 and in 2016

	1990			2016		
	All	**SJS**	**SPA**	**All**	**SJS**	**SPA**
Navy[15]	9	7[16]	0	28+2/3	8[17]	4
Army	55	NA[18]	0	98	NA	15[19]
RAF	23/24	23/24[20]	0	46	9[21]	3

Source: Services for SJS Review

6.14. The Service Prosecuting Authority.

The Service Prosecuting Authority (SPA) has 28 full-time lawyers and three who are either part time or on contract or a Reservist. 24 of these lawyers work exclusively on the SJS and each these lawyers will have an average of some 25 cases to prepare and prosecute each year and some 10 to 12 cases to prepare and prosecute at any one time. This is a wholly sustainable work load for the complement as it appears, however many of the lawyers at the SPA are in their first service appointment and will not have prosecuted before. Over the past three years the percentage of all Service Lawyers posted to the SPA and who arrived without prosecuting experience varied between 33% and 50%; indeed for two of these years it was 50%. The turnover of Service prosecutors is quite high; particularly in the more junior ranks whose average length of tour is under two years.

[15] The Navy shows the number of lawyers posts filled and not the number of lawyers as the Service has lawyers serving in other non-legal appointments.
[16] CNJA and ACNJA not included in SJS figures as they were Policy posts rather than individual casework.
[17] 6 x RLOs 60% of their time is spent on SJS matters; 1 x 3 Cdo Bde Lawyer – 50% of time spent on SJS; 1 x SO1 Discipline – 90% of time spent on SJS
[18] The Army refuses to give figures for officers giving legal advice to the SJS as such figures "which could so easily be misinterpreted". This problem will recur during the exercise to cost the SJS (**Recommendation 14)** as the Army will not be able to say what resources they devote to this task.
[19] Includes one Reservist.
[20] No data is available as to what these posts did in 1990 but it is assumed that they all had some degree of involvement in the SJS.
[21] 9 posts in the RLOs, albeit it these do not always have a legal officer assigned to them; the RLO manning is very fluid with frequent operational commitments. It is estimated that the average time spent on SJS is 40%.

See Recommendation 9 in section 7.

6.15. Military Court Service.

The Military Court Service (MCS) has 39 staff spread over a number of locations; a review of the locations is presently being undertaken. The number of court sitting days allocated over the past three years has fallen from 985 in 2015 through 797 in 2016 to 730 in 2017. The percentage use of these days has been 69%, 70 % and 76% respectively across these three years.

See Recommendation 10 in section 7.

Conclusion.

6.16. The SJS has ample resources and crude comparisons with the CJS support the view that CJS staffing is leaner. Despite this the time to trial and general speed of the SJS lags behind the CJS, at times markedly so (e.g. see Para 6.7 and Table 12). The SJS is not as efficient as it should and could be, but does not need extra resources to achieve greater efficiency. The comparisons with the CJS should be viewed in the light of the scale of the operation. The CPS has some five to six thousand lawyers and staff engaged in the prosecution task of over 3 million offences from magistrates' courts to the Crown Court. They are more experienced – they are career prosecutors- and have a greater degree of staff stability; they are more familiar with the work and are able both as individuals and as an organisation to achieve faster throughputs. The SJS is manned by lawyers who will often be unfamiliar with the task they have been posted to conduct (see Para 6.13), particularly at the beginning of their careers, and will need time and experience to operate effectively. In like manner the SP, conducting many other tasks and only operating exclusively as investigatory police when with the Special Investigation Branch, lack the expertise and experience in that role of their Home Office police colleagues who constantly conduct what Sir Jon Murphy describes as the "daily grind". Such familiarity breeds experience and expertise and through them, efficiency and speed.

See Recommendations 11, 12 in Section 7.

SECTION SEVEN – DISCUSSION AND RECOMMENDATIONS

7.1. General.

It is important to keep in mind that the whole purpose of service justice is to enable the military to perform at their best. It is therefore thought that there is a clear set of essentials to be preserved:

First. That part of the SJS consisting of summary dealings and in the Court Martial, applying the "internal" disciplinary code contained in the Service Offences at Sections 1 to 39 of the AFA 2001

Second. The ability to supplement the armoury of offences available by use of S42 to enable the offender and any civil offences committed in the services context to fully and properly charged

Third. The ability to protect services personnel while abroad by use of the extra territorial jurisdiction that S42 bestows upon the SJS.

The diminution in the size of the Armed Forces means that it is ever more difficult to keep alive all the skills required in support of operational effectiveness as individual "branches" within each Service become smaller. This Review is conducted mindful of the need to keep a kernel of these skills alive so that they remain present for current needs and ready to expand if and when service numbers grow again. Part of that preservation of skill must come from close contact, training and cooperation with the civilian entities that practice these skills. It is known that the concurrent Review of Service Police, conducted by Sir Jon Murphy, is being conducted with consideration of similar principles of drawing on and benefitting from the strengths and abilities of civilian counterparts.

7.2. Court Martial Jurisdiction. Murder, Manslaughter and Serious Sexual offences.

Until AFA 2006 certain civil crimes committed by service personnel in the UK were not within the jurisdiction of the Court Martial – principally murder, manslaughter and rape. In AFA 2006 this restriction was removed and the change took effect in 2009. It appears that this change was passed into legislation on the grounds that the giving

the Court Martial system the jurisdiction to conduct these trials would, in very rare circumstances, assist the administration of justice. It apparently was not envisaged that the existing practice of the Crown Court being the normal forum for these trials would change. See the Armed Forces Select Committee - First Report (April 2006):

> **Jurisdiction of courts martial**
>
> 93. The Bill extends the jurisdiction of courts martial in the United Kingdom to include serious offences that previously could be considered only in civilian courts, or courts martial sitting overseas. Major General Howell, head of the Army Prosecution Authority, explained that the power to try *those more serious cases in courts martial in the United Kingdom would be used rarely, but would be useful if a Service man or woman committed related offences abroad*. He told us that:
>
> I can see a situation where if you had a soldier committing murders in a lot of different countries, one of which is the UK, it may be easiest for a court martial to try the case because the court martial can move around countries and listen to witnesses locally and has that other advantage*. I do think it is something that is going to be very rare, to be frank, but I can imagine the situation might exist.*
>
> **94. We accept the arguments for extending the jurisdiction of courts martial so that they may consider those serious cases. *However, we note that, unless there is a specific need to try such cases by court martial, public confidence may be better served by their being tried, as now, in the civilian system."***

Armed Forces Bill in the House of Lords at 3.07 on 6 November 2006

Lord Drayson gave the Governments response to Lord Thomas of Gresford's proposed amendment to the clause which enlarged this jurisdiction, giving an explanation of the Government's reasoning and saying:

"I recently wrote to the noble Lord, Lord Thomas, and provided details of two recent cases which illustrate the principle. The first concerned a soldier alleged to have committed offences of violence against service personnel in the United Kingdom and in Canada, who subsequently faced a charge of attempted murder in the UK which was dealt with in the UK civilian system. The second was a former soldier alleged to have raped the same female in the UK and Germany. Each demonstrated the current limitations of the civilian courts, and by contrast the flexibility of the service courts, to deal with such cases. The amendment would extend the circumstances in which such limitations would impact upon the administration of justice.

I have already told the House that we do not propose that, under the Bill, murder, rape or treason alleged to have been committed by a serviceman in the United Kingdom will normally be investigated and tried within the service system."

The Lord Drayson also said:

"The noble Lord, Lord Thomas, in our last debate asked who would decide whether a case would be dealt with in the service or civilian jurisdiction. The answer to that is clear. Our aim is that in relation to all serious offences, as is the case now, a decision should be made in accordance with Home Office protocols on which jurisdiction is the more appropriate. The decision should be made under those protocols by the civilian authorities, whether the police or the Crown Prosecution Service, on the basis of the principles set out in the protocols. Broadly speaking, if the case has any significant civilian context—for example, a civilian victim—the civilian jurisdiction should prevail. This is a common-sense approach which the amendment would deny."

The content of the Home Office Protocol, referred to (and as it was then in 2006) is not known. This Home Office protocol was a policing protocol and it is noted that a 2008 Home Office Circular (28/2008) gives the civilian police primacy over "very serious" crimes in the UK. In 2008, the AFA 2006 was not in force and so at that time murder, manslaughter and rape were still without the SJS jurisdiction. The

matter appears now to be governed by the Prosecutors Protocol of November 2016. This Protocol (which deals with prosecutions not policing) at paragraph 2.2(b) states:

> *"… offences alleged only against persons subject to Service law which do not affect the person or property of civilians should normally be dealt with in service proceedings"*

This is a broad principle and must be presumed to apply therefore to all matters unless a specific exception is made. None is.

It is not for this Review to suggest that this Protocol, approved as it is the by Attorney General, does not give effect to Government intentions as expressed by the Minister in debate. However, while the extracts above are only a part of the debate, it is a little difficult to square the examples given and language used with the actual effect of the Protocol Principle which is operated so that a certain type of rape (service person on service person) is now **normally** tried by Court Martial. It is noted that the Protocol is due for review in November 2018 and it is suggested that this review may include a closer and more informed scrutiny of the proper construction of the intentions of the government of the day in 2006 – shared with Parliament - in this sensitive area.

7.3. Be that as it may and regardless of whether the current practice is in accordance with those intentions, the trying of these cases in the SJS cannot be said to be for the protection of the individual nor yet for operational effectiveness. Service personnel remain citizens and in these serious cases when the civil courts are available to them they should be tried in that forum. It is clear that the Select Committee had concerns over public confidence. These concerns are shared. Trying these high-profile matters under Service Law has not been helpful to the Services and has led to criticism of the SJS. It is a matter of concern that current practise may not be what Parliament intended. In other Common Law jurisdictions the jurisdiction of the Court Martial is restricted to some degree. In Canada the offences of murder, manslaughter, and abduction of a minor, if committed in Canada by military personnel, must be tried in civilian courts. In Australia the consent of the DPP is required before a Court Martial can try treason, murder, manslaughter or

bigamy; or sexual assault in the first degree, second and third degrees, sexual intercourse without consent and sexual intercourse with a young person. In New Zealand this area of concern is dealt with in the Armed Forces Discipline Act 1971 at S74 thus:

> *"Except with the consent of the Attorney-General, a person subject to this Act may not be tried by the Court Martial for an offence against this section which is alleged to have been committed in New Zealand if the corresponding civil offence is treason, murder, manslaughter, sexual violation, or bigamy."*

7.4. Statistics.

The incidence of murder and manslaughter trials is so low as to not need further comment on a statistical basis. The MCS statistics for rape, and serious sexual assault (S2 Assault with penetration) and S3 (Assaults without penetration) tried at Court martial show:

Table 16. Sexual Offences Statistics 2015 – 2017 by Defendant

	2015			2016			2017		
	No. of defendants	**Guilty**	**Guilty as %**	**No. of defendants**	**Guilty**	**Guilty as %**	**No. of defendants**	**Guilty**	**Guilty as %**
S1. (Rape)	12	2	17%	14	1	7%	23	2	9%
S2. (Assault with penetration)	7	2	27%	10	4	40%	4	1	25%
S3. (Assault without penetration)	25	13	42%	14	9	66%	34	16	47%

Source: MCS Statistics

Table 17. Sexual Offences Statistics 2015 – 2017 by Charges

	2015			2016			2017		
	No. of charges	**Guilty**	**Guilty as %**	**No. of charges**	**Guilty**	**Guilty as %**	**No. of charges**	**Guilty**	**Guilty as %**
S1. (Rape)	32	3	9%	23	2	9%	49	2	2%
S2. (Assault with penetration)	9	5	56%	11	4	36%	4	1	25%
S3. (Assault without penetration)	40	23	58%	30	19	63%	53	16	30%

Source: MCS Statistics

7.5. It would be unwise to read too much into these statistics flowing as they do from a small data base; the results are unlikely to be sufficiently accurate for any firm conclusions to be drawn.

7.6. Recommendation 1 – Jurisdiction over Murder, Manslaughter and Rape Sexual Offences committed in the UK.

The ability to try these most serious cases of violence and of a sexual nature was given by AFA 06, changing the previous position where these matters had to be tried in the civil courts. For the reasons contained in earlier paragraphs it is considered that the previous position be to some extent restored by requiring the consent of the Attorney General before one of these matters may be tried in the Court Martial. **It is therefore recommended that the Court Martial jurisdiction should no longer include murder, manslaughter and rape when these offences are committed in the UK, except when the consent of the Attorney General is given.** This may be achieved by primary legislation with a caveated clause similar to that used in New Zealand or by giving effect to this change by the insertion of specific guidance into the Prosecutors Protocol and any other appropriate protocols. Earlier effect to this change may also be given in advance of any statutory change by use of the

Prosecutors Protocol. However, given the disparate jurisdictions in the United Kingdom in which such a change would have effect and there being no Prosecutors Protocol in Scotland or Northern Ireland, the preferred option for change is by primary legislation altering AFA 2006.

7.7. The SJS will still have responsibility for all these crimes when committed abroad and there is expressed concern that the system will lose expertise if these matters are not dealt with by the SJS in UK. This concern is understood, however in OJAG and SPA there is sufficient experience to cope with the loss of these cases. All OJAG judicial officers sit in Crown Courts and will continue to try sexual offences cases there as now, while SPA has both civil and service lawyers on complement with the requisite skills and the ability to instruct the Bar when necessary. The OJAG will have increased ability to call on other judicial resources as necessary. It is thought the retention of these matters in service courts when committed in the UK "to provide practice" is perhaps not a position or argument that the MOD would wish to contemplate advancing. Other methods of retaining and indeed enhancing the current level of the necessary expertise within the Service Police must be explored in conjunction with the Service Policing Review.

Recommendation 2. Jurisdiction over other serious sexual offences charged under S2 and S3 SOA 2003.

Offences under these sections involving sexual assaults with penetration (S2) or without penetration (S3) have a wide span ranging from assaults which are as damaging and distressing as rape itself to those which, while still serious as all such matters are, are less intrusive and which may be visited with sentences considerably lower than those for rape. Thus while life imprisonment is the maximum sentence available for S1 and S2 offences and ten years custody is the maximum for S3 offences the general range of sentences each may attract is:

Table 18. Sentencing Range for Serious Sexual Offences under 2003 Act

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

Further work is required to determine what guidance should be given as to the appropriate jurisdiction in which these matters should be allocated when the offences are committed in the UK. The extremely serious nature of some S2 offences will militate toward the allocation of these matters to the civil system on a par with the recommendation for rape. On the other hand the Services will wish to demonstrate their clear desire to protect service personnel from and deal with any sort of harassment, sexual or otherwise. Accordingly it may appropriate for the less serious matters in S3 to be retained in the SJS forum.

It is recommended that consideration be given to including either S2 offences or both S2 and S3 offences in the category of cases that should be proceeded with under the civil jurisdiction when the offences are committed in the UK and placing guidance in the Prosecutors protocol and other relevant protocols as to allocation of these cases.

7.8 Recommendation 3. Jurisdiction in the UK over Domestic Violence and Child Abuse.

Similar consideration should be given to the position regarding Domestic Violence and Child Abuse offences. These are two areas of great sensitivity with vulnerable

victims, which have already been identified by the Review of Service Policing as being in need of immediate attention. A discrete study is currently being undertaken. A great deal of expertise in these areas has been developed in civil Police forces, courts and associated agencies and authorities. It is understood that at present these matters are usually passed to the civil police forces at an early stage however **it is recommended that these offences should always be dealt with in the civil system when committed in the UK and the Protocol should be amended to reflect this by containing specific guidance.** It is not considered that the Attorney General need be approached in individual cases. Once again, the need to deal with such matters when abroad or indeed when in the same case there are offences both in the UK and abroad means that the SJS and particularly the SP must retain a sufficient degree of skill in these areas. This recommendation will need to be considered in the light of the Policing Working Group report and the result of the discrete study.

7.9. Recommendation 4. Court Martial Boards, their composition and the manner of reaching Verdicts.

Court Martial Boards currently sit with either three or five lay members (the panel may increase to six or seven lay members.) Officers and Warrant Officers may be lay members; so may civilians in certain circumstances. Their verdicts are taken by simple majority.

Size / Verdicts.

Currently the odd number of board members lends itself to a system where a simple majority is the required majority for a verdict. It ensures certainty of outcome and removes the possibility of retrials. The simple majority, which was upheld in *R V Twaite* by the Court Martial Appeal Court, is criticised as being inconsistent with the presumption of innocence and the requirement of proof beyond reasonable doubt. The Common Law world has largely settled, without any discernible reasoning or clear justification, on a jury of 12; in the USA a jury of less than 12 but not less than six may be used. In the USA rules as to the size of the jury vary from State to State but juries of 12 members are consistently required in felony cases while smaller

juries are often permitted to try misdemeanours. In England and Wales a simple majority suffices in the magistrates' courts and in Appeals to the Crown Court (this conforms with practice in the SAC). The simple majority in a jury verdict is an anomaly in the Common Law world (however Scotland operates a simple majority with a jury of 15).

7.10. Canada and New Zealand require their Courts Martial verdicts to be unanimous. In civil courts New Zealand operates a majority system while, alone in the Common Law area, Canada still requires unanimity from its juries in civil courts. In the US, the General Court Martial requires a Board of "at least" five members and a two thirds majority on the finding of guilt or innocence. (If the offence is one which carries a mandatory death penalty then unanimity is required). The requirement for unanimity in Court Martial in the UK has been examined before - by the Lewis and Pilcher committees shortly after the Second World War. Bearing in mind that at that time unanimity was still required in juries in civil courts, the Lewis Committee recommended that Courts Martial should reach unanimous verdicts while the Pilcher committee recommended a simple majority. The Government at the time implemented the Pilcher view. While it would be possible and sustainable to adopt unanimity of the Board as the criterion for Court Martial verdicts, this not the preferred option. Arguments currently mounted that a simple majority is insufficient might well become arguments that with unanimity "it is harder to convict" a Service defendant in the service courts than a defendant in the civil courts.

7.11. It is recommended that consideration be given to:

(A) **Court Martial boards of six lay members.** Boards of 12 are not recommended. The Court Martial is a service court and may be convened in locations of active service or conflict

(B) A board of 12 is burdensome administratively and disruptive to operational effectiveness. A Court Martial board is composed of officers and Warrant Officers who will be literate and numerate; who will have an experience of the world and of the service world; who will have the ability to assimilate and

process information and who are by temperament, training and experience well equipped and able to make decisions.

This proposal inevitably increases the demands made on the Services for the provision of Board members. In addition, it would result in a number of trials of lesser offences being dealt with at a trial with a Board of six members. This would include those offenders who have elected for trial at the Court Martial but who stand in no greater peril than at a summary hearing, the Court Martial sentencing powers being, in such cases, restricted to the COs powers. It would also include a number of trials dealing with Service disciplinary offences where the wide sentencing powers of the Court Martial are not called upon and where, inter alia, sentences of detention (and necessarily under two years in duration) are given. Currently the level at which a Board of five members is required is laid down in the The Armed Forces (Court Martial) Rules 2009 (Rule 29) and may be summarised as:

For Trial: The trial must concern an offence in Schedule 2 of AFA 2006 or an offence which carries with it a maximum sentence of more than seven years custody.

For Sentence: If the offender falls to be sentenced for an offence under Schedule 2 of the AFA 2006 or for an offence for which the maximum sentence is one of more seven years custody.

If it is considered that some trials at the Court Martial should continue to be conducted with a Board of three then certain matters must be rehearsed.

a. **To what level should the powers of such a court be limited?** Application of the current rules would leave a Board of three with powers up 7 years custody. Is this desirable given the analogy often drawn for the Court Martial when dealing with lower level cases is the magistrates' courts? The magistrates' powers put in simple terms are limited to one year's custody (and to six months on any one offence) and for those aged 17 and under up to two yeas detention).

b. **Is the verdict of a Board of three to be reached by a simple majority or should it require unanimity?** The arguments in Paras 7.8. and 7.9 apply. Unanimity raises the possibilities of retrials. The legality of the simple majority is confirmed by R v Twaite in which the judgment drew analogies with, inter alia, the magistrates' court which, as already observed, has sentencing powers

considerably lower than those currently held by a Court Martial trial with a Board of three.

(A) **That Verdicts should reach findings by unanimity or a majority of no less than five to one; if a member is lost and the board drops to five then unanimity is required.** It is accepted that the rare retrial may be necessary. The five to one mirrors the ten to two minimum requirement in the civil law.

(B) **That Boards should include OR5 Ranks (Chief Petty Officers and equivalent**.) Across most of the Common Law comparators the restriction of the Board to Officers and Warrant Officers is standard; in the US an accused who is an enlisted person may request that at least one third of the Board be enlisted personnel. The inclusion of OR 5 personnel would reflect the empowerment of the lower ranks of the chain of command that is found in MAA and would ease the burden on the officer corps that the proposed increase in numbers of a Board would impose. All members of the Board should be, as now, senior to the defendant.

(C) **That in general discipline matters a Board need not be of single service composition.** In a Board of six the President and two others should be from the Service of the defendant while up to three other lay members could be drawn from for the other two. In “professional” trials, e.g. ship or aircraft hazarding or collision, then a single Service panel may well remain appropriate. Anecdotal evidence reveals that on occasion and with the agreement of the parties such mixed Boards do sit. There is now a tri-Service Discipline Act and while the reluctance of Services to follow this path is understood, it is possible that the numbers called for an assize may be overall at a lower level if a degree of flexibility of the Board is accepted. **This recommendation sits with Recommendation 6 a detailed study of Court Martial.**

Efficiency

7.12. Recommendation 5. Speed of summary dealings.

The second part of the Review should include a detailed study into the processes of and the delays arising in summary dealings. The study should include the speed of investigations and should explore means to shorten the time taken and lower the load entailed in investigations (BCM has already started this work). The need for legal advice (not apparently a cause of delay in itself) should be examined as should the methods by which it is sought and provided. A review of the type of legal advice sought and provided may reveal common or consistent areas of advice which in turn might indicate the need for different or amplified training for COs; a review of the training currently provided to COs should be undertaken. The reasons for delay in proceeding after legal advice has been given should also be examined.

7.13. This study is on the cusp between the two Reviews and should involve both Working Groups. Conducted in this way and on a tri-service basis it should be able to identify best practice and to identify common themes across the Services. While not essential, a degree of commonality in future processes is desirable and a common system of monitoring and recording of the same data will help the SJB track progress in this area. Tri-service standards of timeliness to be achieved in summary dealing and agreed actions to be taken on failures to do so should form part of the study.

7.14. Recommendation 6. Speed of Court Martial.

The second part of the review should include a detailed study into the processes of and the delays arising in Court Martial. This subject is also on the cusp between the two Reviews and should, where appropriate, be conducted jointly. It should include an examination of the time taken to refer a matter to the SPA. Secondly, the time taken to get a referred matter before the court for an initial hearing and arraignment should be reviewed. Once before the court the matter becomes a question of setting the date for trial. When a date has been set all other preparatory work must be conducted to meet the timetable set by the court. Listing

of cases is therefore critical to the process and itself depends upon a variety of matters; the court days allocated to be sat, the availability of judiciary; the method of listing used to minimise the incidence of wasted days (see Para 6.14). At present it may be said that in each year there are available at least some 1,200 judge days of judicial capacity. If the courts are planned to sit for 730 days and in fact only achieve 76% of sitting days (e.g. 555 days actually sat) then it is clear that trials are not being brought on as quickly as the resources that are available could be deal with them. Of course, the more courts there are sitting then the earlier the date for trial may be set; however the position is more complicated than a simple requirement of more court days and a full study of the listing process including the availability and number of courtrooms, of authorized court days, of sitting patterns and of listing procedures should be undertaken.

Other Recommendations

7.15. Recommendation 7. OJAG Judicial Armoury

AFA 06 (Art 362 c) enables JAG to request that a puisne judge (High Court judge) be nominated to sit as a judge advocate. This power has generally been exercised (but not since 2006) when a sensitive or contentious matter has been by tried by Court Martial. It ensures a level of judicial power and experience but also, importantly, provides a degree of reassurance to the public that the trial is not a military "closed shop". **It is recommended that this power be extended to include the ability to nominate a Circuit Judge.** As OJAG has reduced in size it is possible that pressure of events, sickness or other circumstances such as a need for a particular expertise, may make it desirable to call in a Circuit Judge for a particular trial or series of trials.

7.16. Recommendation 8. Witness and Victim Support. Victim and witness support processes are embedded in some detail into the regulations governing the processes of summary dealings and at Court Martial. The SJS is clearly very aware of these issues and has factored them into the appropriate structures. **It is recommended that these matters be reviewed as a joint study between both Working Groups**. The study should seek to review the processes in place at each

stage of a matter as it passes through the system to ensure that it is working as intended, to check that the process is seamless from investigation though to trial and aftermath (in both summary dealings and Court Martial spheres). It is noted that the Review of Service Policing has already noted this area needs examining further.

7.17. Recommendation 9. The SPA

The prosecution task is vital to the trial process and to the SJS at large. Once a case has been referred to it, the SPA must decide whether to bring the case at all by applying the appropriate tests before commencing proceedings. If the decision to prosecute is taken, then the SPA must advise further enquiries as necessary and generally ensure the case is made ready for trial. The rigorous and competent discharge of this process is essential for the administration of justice, for fairness and to maintain confidence in the system. It is also a process which requires both expertise and experience, two qualities which both take time to acquire. These requirements are necessary not only for the preparation of a sound case but also for the presentation of it in court. It is considered that, despite the level of manning, the SPA may not have either the optimum mix of service and non-service lawyers or of experience and expertise that is required. Of course there must be a number of "training" billets for service lawyers to grow the prosecuting expertise for their future appointments back to the SPA in more senior positions**. It is recommended that DSP reviews the requirements of the SPA to establish the range and level of skills required for the expected future work load and propose an establishment for the future manning of the SPA with career progression in mind.** This Review would include consideration of the service/non service lawyer mix; the levels of expertise and experience required from both service and non-service lawyers; the need for career progression for service lawyers; the length of appointments to the SPA and the degree to which SPA lawyers prosecute in court as well as prepare cases. Training and/or secondment to CPS or prosecuting Chambers might be considered as a prerequisite to appointment to the SPA. While it remains essential that service and non-service lawyers both prepare cases and prosecute them in court, the Review should include consideration of the balance that might be achieved by of greater use of the Bar to present matters in court or alternatively developing an advocacy unit within the SPA. This might allow SPA personnel to concentrate more

fully on case preparation and thus manage a larger case load per person while still appearing in court in order to further their experience and expertise. The result of DSP's review of requirements should then be considered by the Working Group. The views of the Services who provide the bulk of the SPA personnel and of other Working Group authorities must be factored in. However, the overriding requirement is that DSP must have the correct blend of staff to enable him to conduct this vital role to a high standard.

7.18. Recommendation 10. Attendance of Witnesses

It is currently the responsibility of the MCS to ensure that witnesses attend Court Martial. This is an unusual task for a "neutral" authority to undertake and identifies the MCS too closely with the prosecution. The decision on what witnesses to call and the duty to have them at court as required are properly matters for the parties. **It is recommended that the parties to the trial should be responsible for the attendance of their own witnesses.** The resources to provide this service currently on MCS budget should transfer to the SPA budget to found a Witness Care Unit as in the CJS. It is understood that defence witnesses are currently arranged by Defence teams who will seek the assistance of the MCS on rare occasions when for instance it is necessary to issue a Calling Notice. This residual role may remain with the MCS; it is recognised that in the SJS Defences may on occasion need support in producing their witnesses and MCS are well placed to provide this support.

7.19. Recommendation 11. Transfer of Cases

See Annex E.

7.20. Recommendation 12. Bail and Custody

A review of the arrangements for Custody and the giving of lawful orders in lieu of Bail Conditions is recommended. The concurrent Review into Service Polices also contains a recommendation on the COs power to place personnel in Custody.

7.21. Recommendation 13. Outstanding Legislation. A body of legislative changes approved in Armed Forces Act 2011 and Armed Forces Act 2016 remains unimplemented. **It is recommended that all these amendments now be implemented unless there are sound reasons for not doing so.**

7.22. Recommendation 14. Cost of the SJS.

The contents of Section 6 of this paper examining efficiency show that SJS is generously staffed for the size of its constituency; this especially so when comparisons are drawn with civil norms. Not too much must be made of such comparisons as the requirements of Services, of mobility and flexibility and the division of service personnel into a large number of autonomous units will naturally need a richer mix than in the CJS; however it would be prudent for MOD to conduct an exercise to establish the overall cost of the SJS. The remit of the Review Terms of Reference to establish efficiency has led to a number of recommendations which themselves may result in revisions of how matters are conducted and of staffing levels. Quite apart from this and outside the second part of this Review **the MOD may wish to establish the actual cost of running the SJS;** it would be wise to know this before the question is asked.

7.23. Recommendation 15. Data.

During the course of Part 1 of the Review it has become clear the three Services and other authorities in the SJS do not always collate the same data and are they are not always able to present required data in a common format. The future management of the SJS requires clear and detailed management information and this should be collected to a common pattern and be capable of display in a common and comparable pattern. **It is recommended that a study of management data in the SJS be undertaken.**

7.24. Recommendation 16. SJB Governance

See Annex F.

SECTION EIGHT -- CONCLUSIONS

8.1 The SJS set up by the AFA 2006 is sound and has now run without major challenge for eight years (implementation having taken place in 2009). The AFA 2006, which parallels in many respects its parent single service Acts, has continued a system that has stood the test of time. Social perceptions and attitudes have changed and the system has changed with them. The use of MAA to mirror civilian practices is a prime example of this "civilianisation".

8.2 Overall the SJS jurisdiction does not give rise to a large number of summary hearings or of Court Martial trials, nor do the criminal (S42) powers figure greatly in the system. Of the summary hearings in 2016, a total of some 3803, only 315 offences concerned criminal (S42) matters; Table 11 shows that generally offences at summary hearing include only some 5/6% criminal (S42) offences. In the 400 Court Martial trials about 70% of cases were for Service offences. Succeeding Governments have, in their law and order policies, concentrated upon sexual, domestic and child associated offending in which the victims are all especially vulnerable. In like manner a similar critical focus on the SJS when dealing with these matters and other serious offences has grown up; this focus is not always helpful or very well-informed but has led to degree of loss of public confidence in the SJS. This area that creates such disproportionate attention is but a very small part of SJS business. Figures set out earlier in this paper show that the Court Martial deals with 1% or 2% of the total of misconduct, personal failings, disciplinary and criminal matters arising in the SJS. Of this small percentage between 3% and 9% concern serious sexual and other serious offences. Accordingly, this focus is concentrated upon 0.03% to 0.18% of SJS business. A number of these cases (murders/rapes committed in the UK) were not dealt with by the SJS before 2009 when a change in jurisdiction contained in AFA 2006 came into effect. This was a wise restriction giving the public confidence in the systems as they then existed and, coupled with the use of High Court judges to try the very high profile cases which remained within the Service system, emphasised the close relationship between the two jurisdictions. The restoration of this restriction will, it is believed, assist in the defence and retention of the current overall structure of the SJS. By acknowledging

that there is small likelihood that these cases will contain an overriding Service interest or affect operational effectiveness the case for arguing these same needs in respect of other offences is strengthened. The continuing concern surrounding the use of the Court Martial forum for such matters where the jurisdiction arises under S42 may be dealt with by an ability to transfer cases. The concerns expressed over jury majorities have no legal basis at present following R v Twaite but certain changes as proposed which may assuage concerns.

8.3. The efficiency of the processes of the SJS requires review. Both the disciplinary processes, summary dealings and Court Martial, are taking too long to complete. Speedy justice in support of operational effectiveness is one of the main reasons that Parliament gives the Services their wide-ranging powers and not to use them in a timely manner might lead to the need for them to be questioned.

Shaun Lyons
29 March 2018

Annex A: The Review's responses to the Terms of Reference

This annex set out the Review's responses to the detailed questions and bullet points contained in the ToR. Annexes B and C contain a wealth of information from WG authorities who also answered these questions. This annex does not attempt to repeat all the information contained in these two other annexes but relies upon it and upon the text of the main paper to both shorten the responses set out here and also to inform and supplement them.

ToR Responses.

What "functionality" do the Services want from a system of justice which applies to their personnel (i.e. what should it actually do?).

The SJS should provide the Services with the ability to deal with matters that pertain directly to the discipline, efficiency and morale of the Armed Forces; this means that the Services must be in a position to enforce internal discipline effectively and efficiently. The action taken must be speedy. In addition, the SJS should provide a "universal" jurisdiction over civil matters to protect service personnel serving abroad. In the absence of such a jurisdiction service personnel may otherwise be left to the judicial system of the country in which the offence occurred, or to a system of justice which does not meet the standards expected by Human Rights Act 1998 and the UK Criminal Justice System, or, where there is a vacuum with no functioning legal system, to the jurisdiction and actions of the International Criminal Court. The ability to charge offences under the civil law gives the SJS an ability to supplement the "simple" service offences with a degree of particularity and discrimination according to the circumstances of the offence/s.

<u>Do these previously established principles for the maintenance of the SJS still apply?</u>

- **To underpin operational effectiveness.**

Yes. See main paper and Annexes B and C.

- **To mirror the civilian justice system unless there is a clear reason not to.**

Yes. But the SJS is a Military System with requirements above and beyond those expected in a CJS. It has different standards of conduct expected of its subjects and different sentencing considerations. It is not a rival or parallel system to the CJS but a different one. When dealing with civil matters however the SJS should take note of CJS practice and adopt/adapt it where it does not have an adverse effect on operational effectiveness, where it does not change the character of the military court and where it is sensible to do so.

See also Annexes B and C.

- **To reinforce the relationship between command and discipline**

Yes. The Commander is in a unique position being responsible for the maintenance of discipline, morale and training of his unit. He has responsibilities under International law and the SJS enables him and the UK to discharge these responsibilities.

See main paper and Annexes B and C.

- **To provide ETJ in respect of offences committed by Service personnel and limited categories of civilians with a relationship to the Armed Forces.**

Yes. See main paper

To support the key legal relationship between those subject to service law and those in command?

Yes. See above and the main paper and Annexes B and C.

- **To fill a legal gap whilst on operations when there is no rule of law other than that which the Armed Forces take with them.**

Yes. In International Humanitarian Law there is requirement that Armed Forces have a disciplinary system. The Services may have to provide tribunals for civilians in occupied countries and also for PoWs.

See main paper and Annexes B and C.

- **To provide reassurance for local criminal courts overseas that cases transferred to the jurisdiction of the UK will be dealt with appropriately.**

Yes. Status of Forces Agreements (SOFAs) and Memoranda of Understanding (MOUs) dealing with jurisdictional matters are based upon the SJS capacity to take and try cases. Also the ad hoc agreements reached with local authorities for the handing over of offending service personnel from visiting ships and units are founded on the knowledge that the SJS has the capacity to deal with them.

See main paper and Annexes B and C.

- **To provide a level of protection for personnel deployed overseas where the local legal system does not accord with the rights and freedoms contained in English law.**

Yes. See main paper and Annexes B and C.

- **Create a number of service discipline offences which are subject to criminal procedures and penalties (but which are not crimes under the law of England and Wales)**

Yes. The service offences lie at the heart of operational effectiveness. They enforce the core values and expectations of conduct and obedience that are central to the aims and purposes of armed services. They reflect standards and requirements that are peculiar to

the circumstances of membership of the Services, of the stresses of armed conflict and to the maintenance of high levels of discipline, morale and training.

See main paper and Annexes B and C.

- **To provide a Service input into findings of innocence and guilt and into sentencing.**

Yes. The SJS is a military justice system and exists to meet the requirements of efficient and effective Armed Forces. It is necessary that there should be a service input into both matters; this input is required to reflect the unique and separate characteristics of the Service environment. In Service Offences this input is one of the main justifications for a service system, in civil matters tried by the military courts it is to provide the expertise required when operational effectiveness is considered and to provide the expertise required by the primary legislation governing sentencing considerations for Court Martial. In the submitted comment the Army quite properly includes the service interest in decisions to prosecute.

See Annexes B and C.

- **To provide for a judicial role for the Commanding Officer – including a role in the investigation of certain offences.**

Yes. But not as suggested. The SJS does not exist to give a role to the Commanding Officer. The Commanding Officer is central to the SJS. It is the CO who must control and discipline his unit. The SJS is there to support the CO who is responsible at IHL for the conduct of his subordinates. It is the CO who has the responsibility for the safety of his/her unit and for his/her unit's prosecution of its role in both peacetime and in conflict. The SJS exists to enable him/her to carry out this, the role of final responsibility in the field, and not to "provide a judicial role".

See Annexes B and C.

- **To provide a separate policing function.**

Yes. A service policing function that is mobile and accompanies units wherever they operate is essential to the proper conduct of the SJS. The Service Police Working Group will be addressing this function.

- **To be portable – so that personnel can be dealt with quickly (including outside the UK).**

Yes. The need for a separate SJS is to support Operational Effectiveness. This means that the SJS must operate speedily and must operate wherever the person subject to service discipline may be.

See Annexes B and C.

- ***To provide a single system of Service justice throughout the jurisdiction of the UK.***

Yes. Consistency and certainty of treatment is important. The single system operates regardless of where in the UK the service person is stationed.

(a) Is there any requirement for Service personnel always to be subject to an additional and separate system of justice (in comparison with civilians)?

Yes. The requirements of membership of the armed forces are such that personnel should be subject to the SJS at all times.

See Annexes B and C.

- **If someone commits an offence off duty and there is no Service interest in the case should the SJS still deal with it?**

This is rather a portmanteau question and needs to be broken down.

***Service offences**. Being off duty is a concept which has no value when in a service environment. So a service person "off duty" in a ship or in a unit in the field or in a barracks or air station remains and should remain just as subject to the SJS as if he /she were "on duty" in the same environment. If the service person is off duty and, say, at home on leave then it is less likely that he/she will commit a service offence. If however such an offence is committed the SJS will continue to deal with it. Membership of an armed service is not an on/off commitment and the additional standards and rules that are implicit in such membership are present at all times.*

***Civil Offences**. Civil offences apply equally to the non-service fellow citizens of service personnel and apply all the time. Being on or off duty is immaterial*

See Annexes B and C which add depth to this response

- **Should there be provision to transfer cases – both ways- between the SJS and civilian criminal justice system?**

See Annex E on Transfers.

c. What involvement should the Services have in the Governance of the Service Justice System?

- **Is there enough clarity about the responsibility and roles of each organisation in the SJS**
- **Is the current governance mechanism for the SJS efficient and effective?**

A proposed new scheme of governance for the SJS is at Annex F and Recommendation 16.

d. Is there a requirement for judicial process to deal with certain types of behaviour which, whilst not criminal offences in civil life, are incomparable with Service Life?

Yes. Service life, as exemplified by the duties and responsibilities of service personnel consistent with the maintenance of good order, discipline and operational effectiveness, requires there to be a judicial process to deal with breaches of the Service offences laid out in Sections 1 to 39 of the AFA 2006.

See also Annexes B and C.

- **Do we need to have Service discipline offences and do they need to be dealt with at Court Martial or Summary hearing? Can Administrative Action be used instead?**

Yes. Service discipline offences are needed as is the system of Summary dealing and the Court Martial. See the main paper and annexes B and C. Administrative action (MAA) is used in concert with the SJS and forms with it an effective alliance for the maintenance of service values and ethos and of operational effectiveness. MAA has removed from the disciplinary sphere a very large swathe of minor matters of personal and professional failings. Service offences constitute well over 90% of offences dealt with by summary hearings and are the majority of matters dealt with at Court martial. These are offences which cannot be dealt with by MAA.

MAA may be used after disciplinary or criminal proceedings in either Service or civilian criminal courts when consequential Service action is required to reflect the Services view of the matters and of the sentences passed. It may also be used on its own to deal with employment and other issues reflecting on the ability and propriety of service personnel to continue to serve in a particular capacity or in any capacity at all.

e. Is there a requirement for cases to be dealt with whilst overseas (including on operations)?

- **Do we need a court martial system which can be (i) deployed overseas and (2) deployed oversees on operations (including on ships)?**

Yes. See main paper and annexes B and C. It may be that the occasion for holding Court Martial trials overseas may not arise frequently. However, the current situation regarding the stationing of bulk of the armed services in the UK and the long period of peace enjoyed since the 1950s should not lead to system which only works when these two factors are present. The essence of the Services is mobility and the SJS disciplinary system should match this mobility and be completely portable. The future threat posed by potential enemies and the requirements placed upon the Services to meet these threats are wholly unpredictable and the SJS must remain flexible and ready to operate in all circumstances.

- **Do we need a summary system which can (i) be deployed overseas, and (ii) deployed overseas on operations (including on ships)?**

Yes. See the above Q and A.

- **Can most cases be dealt with in the UK by sending the accused /witnesses back.**

There is clearly the capacity for most Courts Martial to be held in the United Kingdom when and where lines of communication between the location of the incident are secure and

adequate. However the need to fly an accused and witnesses home from a unit abroad, say, a frigate on a visit to Perth in Australia, may have a serious effect on the operational effectiveness of that unit. While therefore Court Martial trials may well be capable of being held in the UK the ability to act worldwide remains important. It would be unwise to surrender any such capability in an uncertain world where future deployments and operational situations are unknown.

For summary matters the ability to operate abroad is essential for operational effectiveness.

f. Is it necessary for the Commanding Officer to have a role in dealing with certain disciplinary and criminal offences?

Yes. See main paper and Annexes B and C.

- **Do the Services consider that their COs have enough powers, or too many?**

See Annexes B and C. The general Services view is that they have the powers they need and that they are properly and carefully controlled. The ability to rise above 28 days detention at summary level is to reduce the incidence of trials at the Court Martial and has the capacity to maintain operational effectiveness. No need for change is seen.

- **What would be the implications of COs not dealing with any criminal offences?**

See Annexes B and C.

If only Courts Martial were able to deal with criminal matters then the numbers of such trials would rise. This would have an effect of operational effectiveness and the time to reach a resolution of matters would increase. The effectiveness of the summary hearing procedures would diminish and Commanding Officers abroad would be unable to reach swift resolutions of matters arising. It is also possible that receiving states involved in hosting short visits e.g. ship visits and short training / liaison visits for service personnel, may wish to increase the incidence of their retaining jurisdiction over criminal matters that arise in the duration of the visit. This would be easier for them than sending local witnesses to the UK for any trial.

- **What would be the implications of COs only dealing with those cases where the defendant pleads guilty?**

See Annexes B and C. It is agreed that this small percentage of cases should remain with the COs for all the reasons set out.

g. Does there need to be Service input into the process of dealing with all disciplinary and criminal offending by Service personnel?

- **Should the SJS deal only with offences that are specific to Service life?**

No. See main paper and Annexes B and C.

- **Should the Services have an input into sentences awarded to Service personnel in civilian courts?**

Yes. Currently the Services are able to provide information to the sentencing court which will assist the court in understanding the service person who is to be sentenced. The court may also be assisted by information as to the likely service consequences of any sentences that the court may pass on the service person before them. The ability to remit sentences from the civilian court to a Court Martial forum is dealt with elsewhere. (See Annex E on Transfers)

- **Are there alternative ways of providing service input into the handling of service offending?**

See Annexes B and C. In Annex E the practise of providing information to the civilian courts and the suggestion for cases to be remitted to Court Martial for sentence are examined.

- **Should some types of case (i.e. murder, rape) be always heard in a civilian criminal court where they are dealt with more frequently?**

See Annexes B and C. This question is many layered and is addressed in the main report, in Annex E and at Recommendation 11.

h. Does there need to be a specific SJS infrastructure for the investigation and prosecution of offences, and specific courts to hear them?

- **Do we need a separate prosecuting authority?**

Yes. Service discipline is a unique field of law and requires specialist knowledge of the area in which the law operates. In Service discipline there are wider considerations than exist in the civil justice system and the circumstances of military service with its inherent risks to life require a prosecuting authority with the knowledge and experience of service life necessary to take appropriate decisions.

See Annexes B and C.

- **Do Military Courts (as venues) offer anything civilian courts cannot?**

Military courts must be flexible as to location as a necessary part of Service requirements. The efficient conduct of military affairs indicates that dedicated Military Courts are necessary. One of the essences of service justice is appropriate speed and the existence of dedicated Military Courts in centres where accommodation and support is readily available enables a trial system serving a highly mobile population. The main Military Courts, while the locations where the Court Martial may sit must remain flexible for active service reasons, are currently located close to concentrations of service population.

- **Can the civilian/service courts share facilities?**

See Annexes B and C. The Services would wish to retain priority access to their courts and the location of the courts and their facilities may not lend themselves easily to civilian work.

- To what extent do Service factors drive the need for key differences between the Service and civilian criminal justice systems? For example the majority system of verdicts; the absence of any lower court to deal with more minor offences that would normally be heard at a magistrates court?

The mobility and reach required of the Services necessitates an entirely portable and self-contained system of justice to regulate the service and civilian offences that may be committed by service people. This need is met for the vast majority of offences by the summary powers of Commanding Officers. This "lower court" dealing with all the more minor transgressions operates with the accused person having an unfettered right to trial by Court martial and also the ability to appeal any decision of the court.

The question of majority verdicts at the Court Martial dealt with in the main paper and at Recommendation 4.

- **How does the SJS framework ensure Victims are properly supported?**

See Annexes B and C. Victim Support and Witness Support are the subject of detailed orders for all the Services and are appropriate procedures are imbedded in the processes of the SPA and MCS. However, Recommendations 8 *and 10 operate to provide a forum for a complete review of these systems to endure that the SJS is in the forefront of good practice.*

- **Should employment sanctions continue to be an integral part of the SJS, or left to the Services to consider under administrative action?**

Yes. See main paper and Annexes B and C. These Annexes sensibly and accurately rehearse the arguments that this question raises. The SJS is a military system designed for the Military in order that they may operate efficiently and effectively; administrative measures are part of the weft and warp of the overall maintenance of operational effectiveness. Thus in MAA (and outside the formal SJS) employment sanctions have been successfully employed as an invaluable tool for the correction of personal and professional failings of a lower magnitude. In like manner employment sanctions form a useful and relevant part of the sentencing armoury of this specialist system in both the lower and upper "courts". Major Administrative Action is available on its own or as an adjunct to the SJS and civil courts after action has been taken in these fora.

i. Does the current structure and skillset of the service police organisation, and the MDP, match the future requirement of the Service Justice System?

This section of the ToR is being dealt with by the separate Service Policing Review.

j. What is the benefit to the Armed Forces of a system of military detention (as a punishment?)

The SJS as a disciplinary system needs a sanction short of dismissal but more severe than employment measures. Military Detention is both a deterrent and a system for rehabilitating expensively trained personnel for further service in the Armed Forces.

MCTC Colchester has recently been inspected by HMIPC and received an excellent report (November 2017). With between 300 and 400 admissions each year it houses around 30 to 50 detainees at any one time who are split in roughly equal proportions between those being retained in the Services and those who are being dismissed or otherwise discharged. The focus on each part of this population is different. Those being retained are retrained for military service with military values and ethos re-inculcated in them. Those leaving are prepared for a future outside the Services and given help and guidance to start them in their new lives. These service personnel may be leaving the services but they remain not only service personnel during their time at MCTC but also they are and remain citizens. It behoves the Services to turn out these people as useful citizens just as much as it is proper for the Services to rehabilitate those who are remaining.

The offending behaviour pattern that brought the detainees to MCTC is predominantly one of military offences. The main engine of offending is leave breaking which accounts for 64 % of the military offences and 24 % of total offending.

- **Does the military detention result in changed behaviour of those who return to Service? How many repeat offenders are there?**

See Annexes B and C. The rate of return to MCTC is low and the rate of reoffending also is low. However recidivism is difficult to portray accurately as the most serious offenders leave the Services when they leave MCTC and there is thus no record of their subsequent offending. For those retained in the Services the incidence of repeat offenders at MCTC between 2015 to 2017 varied between 4% and 12 %.

- **What is the benefit to the Armed Forces if detainees are not returning to the Service?**

See opening remarks above and Annexes B and C. Those leaving the Service remain service personnel until release and will have given service of whatever nature over varying periods before their fall from grace. They also remain citizens throughout and the Services should make all efforts both to rehabilitate them and prepare them for their futures outside the services.

K. Is the current Service Justice System a feature of any international obligations (for example, European Convention on Human Rights and Status of Forces Agreements)? If so, what key aspect do we need to retain to fulfil those obligations?

No changes proposed in this Review or contemplated in the further work recommended will have any effect upon the current international obligations of the UK. Those obligations comprise:

Treaty obligations relevant to a SJS.

GC III, Art 5 (determination of status proceedings), Arts 82-108, in particular, Art 84 requiring military courts to be independent and impartial. At present time the SJS has, subject to implementation, jurisdiction to try PoWs, Armed Forces Act 2006, s 371A (inserted by the Armed Forces Act 2011). This only applies to PoWs as defined by s7 GCA 1957, which in turn refers to Art 4 GCIII].

a. *GC IV*, Arts 5(3)), 64, 66, 68, 71, 74, 123, 126. *API*: Arts 44(4), 45, 75.

b. *Rome Statute of the International Criminal Court*, Art 17(2)(c). This Art has not been implemented in the International Criminal Court Act 2001, but the crimes in Arts 6, 7, 8 have been, Schedule 8.

Other obligations.

These could, most importantly, include an obligation to ensure an effective SJS when the UK takes part in UN peacekeeping duties, to deal specifically with acts/omissions in breach of the Secretary-General's policy of zero tolerance of sexual activities carried out against the local population.

SOFAs and MoUs.

It may be necessary to distinguish between situations where the UK has exclusive jurisdiction and where that jurisdiction is concurrent. This may be relevant as to whether an appropriate charge is based on S 42 Armed Forces Act 2006 or as a disciplinary offence.

Reservations to the ECHR re armed forces.

Some States have entered reservations re Arts 5 or 6 only, whilst some have reserved re Art 5 only. It would be difficult politically for the UK to withdraw from the ECHR and then accede to it, making an appropriate reservation.

Annex B: Summary of Working Group members' responses to the Terms of Reference

This is a summary of the responses to the to the Terms of Reference for Phase 1 of the Service Justice Review. It does not set out in detail all the responses provided but is intended to highlight the main points made.

Responses were received from the Attorney General's Office (AGO) including the Crown Prosecution Service's (CPS) views, the Services (Army, Navy and RAF), the Office of the Judge Advocate General (JAG), the Military Court Service (MCS), the Ministry of Justice (MoJ) and the Service Prosecuting Authority(SPA).

a. What 'functionality' do the Services want from a system of justice which applies to their personnel (i.e what should it actually do)?

The majority of responses to the Terms of Reference cited the need for the Armed Forces to maintain operational effectiveness through the application of discipline and criminal justice for Service personnel and Civilians subject to Service discipline. The responses identified the unique operational roles of the Services and the standards required to underpin these roles and due to this a separate system of justice should apply to Service personnel. Moreover, it was noted that the Armed Forces are different to other organisations in the UK, as they are expected to apply lethal violence in the pursuit of Government Policy.

Do these previously-established principles for the maintenance of the Service Justice System (SJS) still apply?

There was broad agreement from all respondents that the established principles continued to apply. There were some additional comments on individual aspects which are set out below:

- *To underpin operational effectiveness.*

It was stressed in responses that underpinning of operational effectiveness is the most important and overarching principle for the SJS. It was also noted that failures in individual and collective discipline have a deleterious effect on the efficiency and effectiveness of units, which is not in the public interest. Moreover, that remote activity on deployment requires speedy and effective resolution of matters if operational effectiveness is not to be undermined.

- *That it should mirror the civilian justice system unless there is a clear reason not to.*

Although this principle was supported, respondents commented that where there are clear reasons to deviate from processes followed in the criminal justice system then exceptions must be made, in support of operational effectiveness. For example, awarding more serious sentences for drugs offences to reflect the implications of drug taking within the Armed Forces. A second example given is the need for disciplinary offences in addition to criminal offences, so Armed Forces personnel can operate in a disciplined manner to support operational effectiveness.

A separate point was made that there is no single criminal justice system in the UK but three and the SJS should look at and take the best from them. It was noted that there was an argument for the Court Martial Appeal Court to have representatives from the NI and Scottish systems.

- *To reinforce the relationship between command and discipline.*

It was commented that there is a direct relationship between the enforcement of international law and the satisfaction of national obligations to comply with it, which links command and discipline.

- *To provide extra-territorial jurisdiction in respect of offences committed by Service personnel and limited categories of civilians with a relationship to the Armed Forces.*

An amendment was proposed to add the following wording at the end of this principle: “In circumstances where it would otherwise be lacking.”

It was commented that the alternative is either a significant expansion of the jurisdiction of the UK civilian courts with the ability to try Service disciplinary offences (i.e. those offences not currently within the criminal lexicon of England and Wales) or subjecting Service Personnel (and limited classes of civilians) to application of local jurisdiction (which may not be compliant with ECHR) or the International Criminal Court.

- *To support the key legal relationship (the command relationship) between persons subject to service law and those in command? [i.e you must do as I say because it’s a lawful order and that is the law]. In particular to ensure that Commanding Officers (COs) are at the heart of the SJS.*

It was noted that care must be taken not to slow down the system or make it cumbersome just to keep the CO at the centre.

Moreover, it was commented that the ability to give lawful orders and ensure compliance is at the heart of the SJS. A system that is based on this, need not revolve around one post (i.e. that of the CO of the unit) and we must guard against making the CO the "single point of failure".

- *To fill a legal gap whilst on operations when there be no rule of law other than that which the Armed Forces take with them.*

It was noted that if there is no SJS and no extra territorial jurisdiction of a UK Criminal Justice System (CJS) and there is no "local" criminal justice system, then the only potential jurisdiction would be that of the International Criminal Court.

- *Provide reassurance for local criminal courts overseas that cases transferred to the jurisdiction of the UK will be dealt with appropriately.*

One respondent commented, in the absence of a functioning and effective SJS , the alternative may be that States in which HM Forces train or operate will be unwilling to "cede" jurisdiction to the UK (e.g. enter into an MOU) – making deploying to or training in those countries more difficult.

It was recognised that particularly in cases involving injury and deaths during training and exercises, it is important that there is public confidence in the accountability of the Armed Forces and the prosecutions that are brought.

- *To provide a level of protection for personnel deployed overseas where the local legal system does not accord with the rights and freedoms contained in English (and Welsh) law.*

A respondent proposed an amendment to this principle to: to provide a level of protection for personnel deployed overseas, particularly where the local legal system does not accord with the rights and freedoms contained in English (and Welsh) law or where it does not accord with basic principles of fairness.

- *Create a number of service discipline offences which are subject to criminal procedures and penalties (but which are not crimes under the law of England and Wales).*

One respondent identified a wish to include separate offences for minor criminal activity (such as assault – using violence to another person subject to Service Law) where personnel can be punished appropriately by the CO without a criminal record.

Another respondent noted that some contraventions of Service discipline are sufficiently severe that they require the application of criminal penalties, including the deprivation of liberty. While the CJS is concerned with the prevention and reduction of crime, it is not concerned with the maintenance of discipline of the population.

A further respondent noted that the requirement for separate Service discipline offences is related to the importance of Command and support to operational effectiveness. There is a need to have coercive criminal sanctions as the ultimate disciplinary deterrent. As set out in the Manual of Service Law (MSL)[22]:

> 'In order that the Armed Forces can operate effectively a necessary reliance is placed on the maintenance of both personal and imposed discipline. Although the Act includes offences under the criminal law of England and Wales, Service law creates additional offences that are exclusively of a Service nature. Service disciplinary offences, such as failing to attend for duty and ill-treatment of subordinates, are subject to the same procedures and the same sort of penalties as criminal offences. This reflects the unique circumstances and ethos that exist in the Services.'

- *To provide a Service input into findings of innocent or guilt, and into sentencing.*

One respondent noted that this previously-established principle is not considered important: we do not consider it appropriate to treat Service personnel any differently in the UK to any other citizen where there is no Service interest.

In respect of the Service context, others commented that there remains a requirement for specialist knowledge and input to reflect the unique characteristics of the Service environment. The circumstances of many offences committed by Service personnel are extremely relevant to the appropriate charge, finding and sentence. For that reason, the requirement to provide service input remains relevant.

Another respondent proposed an amendment to this principle to: to represent the Service interest in decisions to prosecute and to ensure the Service context, including the impact on operational effectiveness, is adequately understood by a court when it considers findings and sentences.

[22] JSP 830, Chapter 1, para 9.

- *To provide for a judicial role for the Commanding officer – including a role in investigation of certain offences.*

One respondent noted that this relationship has been described by COs as 'crucial' and 'intrinsic'. Moreover, that they see Summary Discipline as a fundamental aspect of the authority of military Command.

Another commented that the military is hierarchical, with the CO at the pinnacle of the hierarchy at unit level. It relies upon personnel following orders so that in times of war or operations every person can be relied upon to do their job. Respect for the chain of command takes you so far, but without recourse to discipline to back up that Command relationship, it is a system that relies upon voluntary acquiescence, without teeth to back it up.

A further respondent proposed an amendment to this principle so it becomes: the Commanding Officer's judicial role – to be seen to deal fairly and lawfully with offences - underpins his/her command function.

One other respondent qualified this principle noting that it should be in a much more limited way than it is today. They added that COs should only deal with disciplinary and minor criminal matters where the defendant pleads guilty. Continuing, they noted we must reform the cumbersome and administratively burdensome system which currently exists.

- *To provide for a separate policing function.*

Two respondents noted there is a requirement for a separate function in the Service environment, one questioned if there were no Service Police, who would investigate. The other commented that the SJS is different to the civilian system in relation to: the offences that are committed, the circumstances in which they are committed and the globally displaced geographic locations in which they are committed.

One respondent refined the principle, in that the principle is not to enable a separate policing function but a policing function which may be required to support the SJS. Another respondent proposed amending the principle to: to provide a deployable investigative capability.

Another respondent said there should be a mechanism which enables civilian police to bring matters to the CM.

- *To be portable – so that personnel can be dealt with quickly (including outside of the UK).*

A respondent commented that when applied properly the SJS is very effective, allowing cases to be dealt with very quickly by the CO (with an automatic right of appeal to a ECHR compliant court – the Summary Appeal Court).

Another respondent noted that extra-territorial jurisdiction is key to being able to operate globally, provide a consistent system of discipline for our personnel and deal with indiscipline swiftly. Adding that the deployable nature of the Services means that without extra-territorial jurisdiction we would be reliant on foreign nations to administer justice where criminal offences were committed by our people in their country, or offences would go unpunished where the national system did not wish to prosecute a matter, which flies in the face of the ethos of a disciplined Service and the basic principles of justice.

The respondent continued to explain where Service personnel are arrested abroad, they are frequently returned to their unit for the matter to be investigated and dealt with. This is particularly important for our relationship with foreign nations where the loss of the individual to await local prosecution would adversely affect operational effectiveness. It also ensures that our personnel do not face either investigation, trial or punishment by a non-ECHR compliant justice system. The ability for UK military units to be able to prosecute their own personnel abroad is also a legal requirement of several Status of Forces Agreements (SOFAs) with foreign nations, including the NATO SOFA, and a whole series of politically, though not legally, binding Memoranda of Understanding (MOUs).

- *To provide a single system of Service Justice throughout the jurisdiction of the UK.*

One respondent commented that the Services still have personnel based in units throughout the UK, subject to the jurisdictions of England and Wales, Scotland and Northern Ireland. The application of Armed Forces Act 2006, under the jurisdiction of England and Wales, to all Service personnel regardless of where they serve ensure consistency of treatment provided the civilian authorities cede jurisdiction to the Armed Forces.

b. Is there any requirement for Service personnel to <u>always</u> be subject to an additional and separate system of justice (in comparison to civilians)?

One respondent noted that even in the UK, the different legal systems that exist and the need to hold Service personnel to a high standard of behaviour means that it is beneficial to the individual and the Service that they are subject to the SJS at all times. Another commented that with so many variations of working patterns, stand down, on and off duty, living accommodation on service property, no clear 'on duty' 'off duty' definition when overseas, to have variations of when a Service Person is subject to Service Law would be confusing and may cause jurisdictional difficulties.

A further respondent commented that if it is accepted that the system is designed to underpin operational effectiveness, then the location of the offence or the status of the alleged victim, does not affect the status of a service person. Adding, that they should always be tried in the SJS unless there are compelling reasons for them to be tried in a civilian court. There may be some cases where the Service interest is outweighed by the need for the case to be tried in a civilian court, but with improvements to the current system such cases should be reduced further.

Another respondent explained that a number of cases each year over which the Crown Court has jurisdiction are tried by court martial. There is a protocol between the Director of Service Prosecutions (DSP), the Director of Public Prosecutions (DPP) and the Ministry of Defence that covers the allocation of these cases and recognises that the SJS should not always deal with cases involving service personnel. If an offence is committed off duty, or the victim is a civilian, then it will frequently be appropriate for the matter to be prosecuted by the CPS. This safeguard has generally worked well in practice and if the appropriate jurisdiction is not immediately apparent, the protocol makes it clear that the DPP and the DSP should consult, but that the final decision rests with the DPP.

- *If someone commits an offence off duty, and there is no Service interest in the case, should the SJS still deal with it?*

One respondent commented that there is always a Service interest because the person is a member of the Services. For example, a case where a service person assaults a civilian in a non-military town whilst on leave, where the likely sentence might be a short custodial, immediate or suspended, or a community sentence. The sentence is likely to affect the operational effectiveness of his unit and a sentence of service detention might be more appropriate. If there are compelling reasons for the case to be tried in the civilian courts, it may still be appropriate – and supportive of operational effectiveness - following a plea or finding of guilty, to remit the case to the Court Martial for sentence.

However, another respondent observed that Service personnel remain citizens and it is appropriate that some matters are dealt with in the civilian system; indeed some matters (e.g. driving offences) can only be adequately dealt with in the CJS. If the incident occurs in the UK, then there is no reason why the CJS can't deal with any offences that occur where there is "no link" to Service employment. However, there are likely to be many cases which appear at first glance to include "no link" but in which there is a Service Interest.

Another respondent took a similar approach, noting that where there is no clear Service interest then such a case should remain in the CJS. To remove the Service personnel into a different jurisdiction which the victims and witnesses may not understand would undermine the principle that a Service person is a member of civilian society. We are confident that the current prosecutors' protocol, appropriately applied, works well in determining the appropriate jurisdiction for an offence. Overseas, the ability to deal with offending without referral to local courts in itself creates a Service interest: the SJS provides Service Personnel with a criminal jurisdiction which operates in English (and Welsh) and delivers sanctions which the offender understands.

A further respondent noted that there may be a very small set of circumstances in which an offence committed in the UK, with little or no Service interest, is investigated by the Service police in the absence of a civilian police investigation due to a perception by the Services that the alleged offence is such that the individual's behaviour has fallen below the standards that the Services would expect. This situation is likely to be extremely rare and consultation between Service and Civilian police would have preceded any decision to investigate.

A different respondent commented that Service personnel are subject to Service law at all times and to limit this to "whilst only on duty" would cause unnecessary complication and increase the risk to them particularly when serving in certain locations overseas. For example, where there is no SOFA, MOU or Exchange of Letters with the Host Nation, the ability to deal with our own personnel under their own judicial system by subjecting them to Service Law at all times will safeguard our personnel. Equally, the current position enables the designation of civilians to be subject to Service Law whilst overseas; providing additional protection. In comparison, in the UK, an individual dealt with by the civilian authorities and charged with an offence where there is no Service interest, poses little risk to the individual.

One respondent identified a particular issue in the application of the SJS to the Reserve, particularly at Summary Hearing. Reservists are only subject to Service Law whilst mustered for duty or training. It has on occasion proved difficult to differentiate when Reservists are on duty and when they are not. The Flexible Engagement System will offer soldiers and officers a continuum of service between the traditional poles of full time Regular and part time Reserve service; therefore a more flexible application of jurisdiction may be required. Soldiers may be work flexibly by taking extended breaks in service or reducing their commitment to a few days a week. If an offence were committed during this period of

reduced service, a decision would be required in respect of the jurisdiction for dealing with it. This could be addressed by making all Service personnel (including Reservists) subject to Service Law at all times but to use the Service jurisdiction only where there is a Service interest.

A further issue raised was the restrictions placed on "consequential" (i.e. administrative) action on many sentences by Rehabilitation of Offenders Act 1974, as recently amended, with the result that many are spent immediately prohibiting an employer from taking any action, which may mean that the Service interest in having those cases heard in the SJS is stronger.

- *Should there be provision to transfer cases – both ways – between the SJS and the civilian criminal Justice system?*

Several respondents agreed that there should be this provision but differed on when it should occur during the process. One respondent noted this should be identified at the start of the investigation but recognised that this may only emerge during the course of an investigation.

A second respondent thought there should be provision for transfer of cases, particularly at the investigation and pre-trial stages, although this should not be routinely required. The respondent continued that there are cases where the CJS is the more appropriate jurisdiction, for example in dealing with domestic violence when care of the victim and consequential actions may involve local authorities and services. Similarly, it may be advantageous to transfer a case into the CJS where it is particularly contentious and where hearing it in that jurisdiction would obviate potential accusations of partiality in the SJS. In contrast, a fight between two soldiers, even if first attended by the civilian police, would more appropriately be dealt with under the SJS where it would not divert resources from the CJS and the Service interest would be better reflected in finding and sentencing.

Another respondent noted there is currently no mechanism for such transfer after charge (which has an effect on custody / referral) thus no ability to move a case to the more appropriate system. In addition, any transfer from the CJS to the SJS should not be done simply for the purpose of sentencing, unless there is a Service interest to do so. This view was reflected by another respondent who stated where a case is transferred from one jurisdiction to another, this must be done at the earliest opportunity. Adding that we do not support remitting cases at a late stage, for example for sentencing, as this is likely to cause delay, remove the accused from the community in which the offence was committed and result in duplicated effort.

A separate respondent commented that Judges in both systems should be able to remit cases to the other system if they are not passed across before they get to court.

A further respondent commented that Service personnel are not exclusively subject to the SJS; there is a Prosecutor's Protocol in place for the transfer of cases both ways between the SJS and the CJS. Schedule 2 offences of murder and rape would normally be referred to the CJS, however the Service should retain the right to deal with any offences committed should they impact on operational effectiveness, occur overseas or if there is a Service interest. The transfer of cases to the CJS should also be cognisant of skill fade and loss of expertise amongst Service investigators and prosecutors as there will still be a requirement to deal with such matters overseas.

One respondent identified an advantage in the transfer of possession of drugs charges cases to the SJS. Noting that, the civilian authorities do not treat such offending as seriously as the Services. For example, the civilian police will often award a Formal Police Caution for possession whereas the Services have a zero-tolerance policy towards drug taking. Another example might be where a case has been tried in the civilian court despite there being a strong Service nexus. For example, a case of Joint Personnel Administration (JPA) system fraud that had been dealt with in the civilian court would be appropriate to remit to the SJS for sentence.

c. What involvement should the Services have in the Governance of the Service Justice System?

The majority of respondents found that the Services should have a fundamental role in the governance of the SJS. They argued it is the Services' process and needs robust internal governance and a high level of assurance from the top to the bottom level.

One respondent argues that each Service should be represented across the SJS governance structure: the SJB, the Service Justice Executive Group (SJEG) and the Service Court Rules Review Committee (SCRRC). The SJEG should be the group of SJS experts that discuss relevant issues on a regular basis and provide papers for discussion, debate and decision at the Service Justice Board (SJB), chaired by the Minister. The SJEG should direct subordinate, desk-level working groups to produce draft papers for its consideration. At present the SJEG is not functioning as it should and is being invited to address issues in an ad hoc manner, particularly where last minute items are added to the already published SJB agenda, preventing proper analysis and consideration of the issues.

One respondent commented in relation to the representatives who sit on the SJB, it is extremely important that all three Services are represented. They added that there is a risk that without appropriate representation from the Services policy decisions may begin to mirror civilian CJS arrangements where it does not make operational sense to do so and, in

doing so, undermine the operational effectiveness of the Services. For that reason, it would be inappropriate to have all three Services represented by CDP or any other person. The single Service representatives must be sufficiently senior (PPO/DPPO) to engage at the Ministerial level.

Another respondent commented that all three Services must be adequately represented at the SJEG, which will require representation at the 1* level by legal and personnel experts. Once functioning correctly and meeting routinely this will provide appropriate support to the SJB members.

A further respondent argued given that the SJS is a separate system of justice that exists to meet the needs of the Services, we do not consider that anybody outside the Ministry of Defence can assume responsibility or take a governance lead for the SJS. It would, therefore, be inappropriate for the JAG to be described as the head of the SJS. The purpose of the SJS is to administer Service discipline. Discipline is a function of Command, not that of the judiciary. Though important, courts martial represent only a very minor (by volume) element of the overall discipline system.

However, one respondent offered a different view and answered - less than they have now. The system must maintain its independence from the Chain of Command to be compliant with Article 6. The Services provide manpower to the system, there is also a Service interest test which should be provided by the Services. However, there is no need for all three Services to be represented at all levels of Governance, and indeed it is often detrimental to have senior lay people having too much influence in a system, the detail of which they do not properly understand. At the SJB the CDP is sufficient to safeguard the Service interest.

- *Is there enough clarity about the responsibility and roles of each organisation in the SJS?*

There was a mixed response to this question as some respondents felt that although each service organisation is clear on its own role and undertakes its specific responsibilities effectively, there is a lack of clarity regarding what all the component SJS stakeholders do and what the requirement of independence is. One respondent noted that this may add to the perception that the SJS is not effectively governed and thus could undermine the integrity of the current system.

Another respondent noted that there is not currently sufficient clarity about roles within the SJS. JAG's role as a senior judge is clear; it is less clear whether he has a wider directional role in respect of the SJS outside the Court Martial such as in the delivery of SH. Similarly, DSP's role as a prosecutor is clear, but it is not clear whether DSP represents the SJS policy interest to the Attorney General or whether all matters pertaining to the SJS should be staffed via the MoD to the Ministry of Justice.

One respondent noted that if the purpose of the SJS is to underpin operational effectiveness, there must be a mechanism by which the Services can express their views as to whether the SJS is fit for this purpose.

A different respondent commented that it is the Service population which is affected by offending, from which the accused and, often, the victims are drawn. The Services provide the police, lawyers, custodial services and the magisterial function and therefore their role in the governance of the SJS should reflect this equity. Adding that, we believe the Services have a threefold role in the SJS:

a) Informing the SJS of the impact on operational effectiveness, particularly by ensuring the Service Interest is reflected in decisions to prosecute.

b) Delivering the investigative resource in an operational or foreign environment in which HOPF is not equipped to operate.

c) Delivery of SH in a fair and timely manner.

We therefore consider that in order to ensure effective policy-making and assurance in respect of these functions, full PPO membership of the SJB is imperative.

- *Is the current governance mechanism for the SJS efficient and effective?*

All respondents noted that the governance of the policy function and direction of the SJS is unclear and requires clarification. One respondent noted that in recent time, issues such as majority verdicts and transfer of cases between jurisdictions have been discussed repeatedly but without resolution. They went on to identify three principal factors: first the lack of clarity in governance; second the lack of a dedicated secretariat to drive issues forward; and third the lack of continuity resulting from successive changes in chairmanship due to changes in Ministerial appointments. A suggestion to address the latter issue is chairing the board at a lower level (e.g. CDP) with recommendations being made to the Minister.

A respondent added more detail, noting that meetings of the SJB / SJEG are not regular and there are too many members. A separate respondent commented that we understand the JAG holds a separate court users meeting and there may also be additional meetings held by the SPA, Military Court Service, Service Police and the MOD which all feed into the governance and effectiveness of the SJS.

One respondent noted that the MoD is not a justice department and does not inherently understand the relationship between the executive and judiciary. The respondent added that

changes take far too long because of the amount of consultation and the tendency of some to be resistant to change where there are suggestions for improvement.

One respondent noted that this is a question for further consideration once it is determined what the requirement for the SJS is.

d. Is there a requirement for a judicial process to deal with certain types of behaviour which, whilst not criminal offences in civilian life, are incompatible with Service life?

One respondent noted that some disciplinary offences are very serious – particularly those which undermine command or have an adverse affect on morale or unit cohesion and effectiveness. Adding that guilt should only be proved to the criminal standard and punishments administered should be through a criminal process.

Another respondent commented that there is an absolute requirement for specific Service offences and for them to be dealt with judicially at summary hearing or court martial. Offences which can result in detention could not be sentenced on the balance of probability (the standard required for Administrative Action), noting that some Service offences carry a full life tariff. Given the potential requirement to deal quickly with such offences in an operational theatre, the SJS must have a full range of punishments available.

- *Do we need to have Service discipline offences, and do they need to be dealt with at Court Martial or Summary Hearing? Can Administrative Action be used instead?*

One respondent noted that Administrative Action can be used in certain minor circumstances as it is now but added that the lack of the power to issue a Formal Police Caution (FPC) can lead to cases being tried in court which, in a civilian jurisdiction, would have resulted in a FPC. However, in a disciplined Service an FPC might not be sufficient, although MAA should be used in appropriate cases.

Another respondent agreed commenting that Service disciplinary offences cover a range of potential offending on operations, in barracks and in training and noted that some of the offences relating to failures in performance are based on risk rather than outcome. The respondent continued that the use of administrative action can be an effective alternative response to lower level offending, but even in relation to very minor offences, the options presented by administrative action may quickly be exhausted. Furthermore, some Service disciplinary offences are in and of themselves so serious that administrative action is not a sufficient response – there are Service disciplinary offences where the maximum punishment is life imprisonment e.g. s1 AFA 06 assisting an enemy, s2 AFA 06 misconduct on operations. Additionally, there are many other offences which are essential for the

maintenance of discipline (e.g. disobedience) which have no parallel in the CJS and for which administrative sanctions alone would be insufficient.

A further respondent noted that there are some criminal offences that may be treated particularly seriously in a Service context as they are aggravated by offending against Service ethos. A case of theft of low value items on board a ship, for example, would be regarded much more seriously by the Service Justice Authority than by a civilian court. "Discipline" offences are levelled where conduct falls short of criminal in the civilian sense but amounts to negligence in a military sense. Such offences carry a maximum sentence of two years' imprisonment and can be tried together with criminal offences in the alternative, and would not be available to CPS prosecutors considering the same conduct in a civilian court.

Another respondent also noted this point, in that particular Service offences which may have analogous offences in the CJS are required to reflect the unique Service context: for example looting is more serious than theft due to the position of an armed force in a situation where the normal rule of law has broken down. Desertion is more than absence from work if a post is abandoned putting lives or the mission at risk and ill-treatment of a subordinate is more serious than civil harassment given the power military superiors have over their subordinates.

Another respondent explained that Administrative Action is designed as an employment tool; it is a way of dealing with personnel who have demonstrated personal or professional failings. Whilst some of the behaviours currently amounting to service offences could potentially be (and are in certain cases) dealt with by Administrative Action, it is not designed to address disciplinary, criminal or operational effectiveness issues which the SJS is specifically designed to address. Service discipline allows the Services to deal swiftly with disciplinary offences and this should remain the aim in order to support operational effectiveness. Administrative processes within the Service can be complicated and subject to delay as the process is protracted.

A separate respondent continued this theme noting that by having Service offences, we can directly support operational effectiveness; the same stands for criminal offences committed in a Service environment/context impacting on operational effectiveness. There is also a requirement for a judicial process to deal with certain types of behaviour which, whilst not criminal offences in civilian life, are incompatible with Service life. There are charges that are not criminal offences within the civilian system. For example, negligently performing a duty, whilst not a civilian offence, deals with a range of offending in the Services such as negligent discharge of a weapon, which would be appropriately dealt with by the SJS.

This same point was summarised by another respondent as the unique work, life and potential need to put one's life on the line mean that it is imperative that personnel work effectively together, therefore, there is a need for criminal sanctions to be applied to non-criminal offences to support operational effectiveness.

A respondent set out that arguably, employment sanctions should not be imposed by a service court for criminal or disciplinary offences and should be left to the individual Services as the employer. However, restrictions should be part of the disciplinary process due to their very nature of restricting an individual's liberty.

Although, one respondent noted that Minor Administrative Action (MAA) was introduced by the three Services in 2005 / 2006 and fulfils an extremely important role in dealing with low-level misdemeanours, another commented that it would not be appropriate for administrative action to replace the SJS. Given the requirement to bear arms and risk one's life on operations, there must be a coercive regime which helps to underpin personal and collective discipline. Criminal punishments achieve this in a way that administrative sanctions do not.

e. Is there is a requirement for cases to be dealt with whilst overseas (including on operations)?

One respondent noted that Section 42 of the Armed Forces Act 2006 makes those subject to Service law subject to the criminal law of England and Wales wherever they are based. If this extraterritorial provision did not exist, the CPS would have significant challenges in prosecuting service personnel who commit civilian criminal offences on deployment overseas. There are particular considerations that apply to historic offences. The Sex Offenders Act 1997 and the Sexual Offences Act 2003, extended territorial reach for some sexual offences but prior their commencement there is no extra-territorial jurisdiction for sexual offences, including rape. The CPS would only be able to prosecute these offences if they occurred in England and Wales, whereas the SPA would have jurisdiction if these offences were committed by service personnel anywhere in the world. This applies even if the suspect has left the armed services, subject to the consent of the Attorney General.

- *Do we need a court martial system which can (i) be deployed overseas, and (ii) deployed overseas on operations (including on Ships)?*

One respondent noted that the Court Martial (CM) system needs to be portable to ensure that access to justice is not limited by location, particularly in permanent overseas locations such as Cyprus and where a Summary Hearing is not possible on deployed operations. This flexibility supports operational effectiveness and provides a contingency for future operations.

A second respondent agreed, commenting that a future SJS must therefore retain the ability to conduct trials in theatre and may need to consider such factors as a mobilized JAG and allocation of Service defence counsel. The respondent added a further benefit of a deployable CM is in allowing a host nation to share jurisdiction in respect of offences committed by service personnel rather than requiring that all offences are dealt with in their own courts. Hearing a case abroad where victims or witnesses are citizens of the host nation protects the service person from a foreign jurisdiction and also ensures that justice is seen to be done. Even if it is considered most appropriate to hear the case in the UK the SJS should retain the ability to deliver pre-trial care to victims and the accused outside the UK.

A further respondent commented that in an ideal world the CM would come to the unit where most personnel involved in a case were based, however, the Services are now used to a mainly UK based CM Service. CM have taken place in Cyprus, for example, to support operational effectiveness and it should not be the case that CM could not take place abroad. The responded added that it should be borne in mind that even with a portable CM system it will not deliver the agility that you get from the Summary Hearing system, and therefore does not support operational effectiveness in the same way.

- *Do we need a summary system which can (i) be deployed overseas, and (ii) deployed overseas on operations (including on Ships)?*

One respondent noted that Summary Heating (SH) must be portable in order that offences committed by Service Personnel and Civilians Subject to Service Discipline (CSSD) abroad can be dealt with without recourse to local legal systems which, even if ECHR compliant, may be unfamiliar to them. Another respondent noted that we need to retain jurisdiction overseas for the protection of our own SP and those CSSD, otherwise we risk exposing our personnel to potentially austere jurisdictions with less legal protection.

The respondent continued that it is essential that SH can be delivered in a timely manner when a force is deployed, offences which undermine cohesion or command relationships must be dealt with swiftly and with as little disruption as possible in order to maintain operational effectiveness. There are examples from Afghanistan where it was judged to better meet the needs of operational effectiveness for the CO to move to a forward location to conduct SH, than to move the accused and witnesses to the rear.

Another respondent agreed noting that a Summary System that can be deployed overseas whether on operations or otherwise is fundamental to the support of operational effectiveness.

- *Can most cases be dealt with in the UK by sending the accused/witnesses back?*

One respondent commented this could be done in most cases but certainly not in all. The respondent added that sometimes justice needs to be seen to be done in the operational theatre, adding that most cases can and should be dealt with summarily and quickly in theatre. Although the respondent noted that contested matters of some complexity may have to be sent home.

Several respondents noted that sending the accused / witnesses back would have a deleterious effect on operational effectiveness and that it would be neither efficient nor necessarily more cost effective but entail additional risk, a reduction in combat power for the period of their absence and disruption to the small teams on which operational capability is built.

One respondent explained that in order to avoid the impact on operational effectiveness that returning cases to the UK would have, COs might avoid dealing with the matter until their return to the UK introducing unacceptable delay. Alternatively, they might seek to deal with the matter by either downplaying its seriousness (by under-charging or using MAA inappropriately) or seeking to avoid the SJS completely and awarding 'local punishment'.

Another responded said that CM cases can be sent back to UK for trial, however it would be highly undesirable to send SH cases to the UK. Losing the ability to conduct SH on operations would also disempower the chain of command in theatre by removing its ability to be seen to maintain discipline.

A respondent added that there is also the knock on effect on Service Personnel who may be required to deploy at short notice to cover the gap created; this would have an impact on their own operational effectiveness.

There was a comment that in the SJS we have been making best use of VTC for many years and, in this respect, have been slightly "ahead" of the CJS.

Another respondent commented that there is a continued requirement for cases to be dealt with overseas as this avoids the constraints of CM centres by offering portability and flexibility so long as the JAG can preside (via VTC if required) and is far more cost effective.

f. Is it necessary for the Commanding Officer to have a role in dealing with certain disciplinary <u>and</u> criminal offences?

One respondent commented that it is necessary for disciplinary offences and probably also for minor criminal offences. However, the respondent continued, any finding or sentence from the CO should not lead to an entry on the PNC because it is a non-Article 6 compliant process without a lawyer to safeguard the defendant. The respondent added there have been several challenges and complaints about PNC entries post CO's findings and this must be addressed, offering a suggestion that it may be that service offences can be extended to cover minor criminal offences (using violence against another rather than assault for example)

Other respondents found that the current powers of a CO are right and remain central to ensuring operational effectiveness, protection of personnel, enhancing morale and meeting the mission objective. One respondent noted that the Armed Forces Act 2006 extended the range of offences with which COs could deal with by extending Schedule 1 and by giving them greater powers of punishment.

- *Do the Services consider that their COs have enough powers, or too many? What would be the implications of COs not dealing with <u>any</u> criminal offences?*

One respondent found that there are too many powers and that COs should be limited to detention for a maximum of 28 days and only following a plea of guilty. The respondent added that any plea of not guilty should be transferred to the CM (which must be able to deal with them in very short order – circa 28 days) – so a plea should be taken as soon as the CO knows of the offence – ie within 7 days. Another respondent noted that if a CO's powers of punishment were capped at 28 days, any case with a likely punishment in the region of 28 days would need to be sent to Court Martial to ensure flexibility in sentencing.

Several respondents found that COs did have sufficient powers to deal with disciplinary and criminal matters at Summary Hearing and that certain criminal offences are capable of being dealt with by the CO. One respondent noted that as COs have ready access to legal advice from Service advisory lawyers, this aligns with the powers held by civilian magistrates dealing with the equivalent summary only offences in the magistrates' court with legal advice from the Legal Advisor. Adding that the majority of COs are of the view that there is very little difference to them dealing with criminal or disciplinary offences, as long as they can access competent and professional legal advice.

However, a different respondent commented that the CO need only have a role in cases where s/he has a power to try the case. His/her involvement in all other cases merely creates an additional and unnecessary "layer" and adds to delay.

The majority of respondents would not want CO's powers to be reduced and noted that reducing the CO's powers would increase the number of CMs and then in turn increase delay, commit additional Service resource (e.g. panel members) and also increase the operating costs of the SJS. One respondent commented that the associated costs of a CM may result in decisions being taken not to prosecute an individual given the nature of the offending, undermining operational effectiveness.

A further respondent noted that it is essential that a CO retains the ability to deal with offences such as assault and theft, which whilst not serious in a civilian context, can have a corrosive effect on trust and cohesion in a unit and therefore on operational effectiveness.

Two respondents noted that disqualifying COs from dealing with criminal offences and allowing them to deal with discipline offences only would lead to an unbalanced approach to unit discipline and create the temptation for COs to resort to dealing with matters by using inappropriate charges to keep them within their remit.

- *What would be the implications of COs dealing with only those cases where the defendant pleads guilty?*

One respondent noted that the implications would be that advisory lawyers would not be needed, leading to significant savings, and all summary dealings could be complete within seven days of the offence.

In contrast, other respondents noted a risk for potential abuse, for example, personnel pleading guilty to avoid CM (one respondent noted that inducing a person to accept a lesser sanction if he/she chooses not to have a trial by process of law may infringe Article 6 of the ECHR) or matters which should be categorised as a criminal offence, treated as a Service disciplinary matter. Other implications given were that all cases would be passed to the SPA with a commensurate effect on workload and more cases would be dealt with by the CM, with a commensurate impact on cost of the system.

Another respondent questioned if such a process would remove the right of an individual to elect and have their case dealt with by a CM which may remove rights and protections from the individual to have their case heard independently. Furthermore, if this was the case, a CO would not be able to find the accused not guilty, and the individual would be denied the right to swift justice (this would appear especially unwieldy and unnecessary in straightforward cases). Referring all not guilty pleas to CM would have financial implications (to both the Service and the SP), introduce additional delay and undermine operational effectiveness.

A different respondent commented that whilst the number of cases where charges are denied is small, there could be a significant undermining of operational effectiveness if they were not dealt with by the CO, as it would require the accused and witnesses to return to the UK for court martial for a contested hearing. Additionally, if people thought that they could be returned to the UK by denying a charge, there is a serious risk that this would lead to a significant increase in the number of people doing so.

Another respondent noted that this proposition would make the CO a dispenser of punishment not of justice; the CO's ability to investigate and deal with cases fairly and to award fitting punishments underpins his/her command function.

One respondent commented that COs do need better understanding of their responsibilities within the SJS and should be encouraged to utilise their powers to full effect. Enhanced education and training in this area for COs should be considered.

g. Does there need to be Service input into the process of dealing with <u>all</u> disciplinary and criminal offending by Service personnel?

- *Should the SJS deal only with offences that are specific to Service life?*

One respondent noted that it would be hard (almost impossible) to categorise offences on this basis, giving the example that theft is not "specific to Service life" but it is corrosive to unit cohesion and can undermine operational effectiveness.

Another respondent commented that all offending can affect operational effectiveness even when an offence is committed away from the service environment on leave.

A different respondent explained that this would not provide a portable justice system and would mean that offences overseas could not be dealt with by the SJS, exposing personnel to other potentially non-compliant Human Rights legal systems and to increased risk on overseas tours. Thus it is a necessity for the protection of those subject to service law that justice can be portable. The ability to claim jurisdiction over our personnel is a vital tool when we negotiate SOFA arrangements with other nations.

A further respondent added that 'Offences specific to Service life' is too narrow a definition. The SJS should deal with cases in which there is a Service interest, beyond the single fact that a Service person is involved. The circumstances in which there is generally a Service interest and a Service jurisdiction should exist are: where the SJS extends English jurisdiction throughout the UK (e.g. to Scotland) to overseas garrisons and to operational theatres; where the offences are Service specific i.e. Service discipline offences and; where criminal conduct has a Service element or fulfils the current prosecutors' protocol test i.e. where there is a discernible Service Interest.

- *Should the services have an input into sentences awarded to Service personnel in civilian courts?*

One respondent noted that responsibility for sentencing must remain with the civil court, however, the Services should retain the ability to inform the court of the effect of a sentence on a service person where this is requested. Information on the employment effect of a sentence, particularly where it may lead to discharge, can normally be provided by a CO and an officer of the soldier's unit can assist the court further if required. This is a function of the chain of command rather than of the SJS *per se*.

Another respondent commented that it would be unclear how this would work beyond a Service impact statement taken into consideration at sentencing (in a similar way to a victim's personal statement).

A further respondent noted that the only 'sentences' that the Services would seek to influence now are the award of Formal Police Cautions (FPCs) for drugs offences as these undermine the Services' zero tolerance policy to drugs; the immediate rehabilitation period for FPCs means that the Services cannot take administrative action to discharge an individual as a result of such a caution.

One respondent suggested that there should be a mechanism to remit service personnel to the CM for sentence in appropriate cases – ie where a civilian court is considering a short custodial sentence or a community order, remitting to the CM where the service person can be sentenced to detention (to support operational effectiveness).

- *Are there alternative ways of providing a service input into the handling of service offending?*

One respondent commented that the current system seems to work but suggested that a Judge Advocate (JA) could sentence alone with service assessors providing advice rather than voting on sentence.

A suggestion from one respondent was that cases could be remitted from the CJS to the CM to provide Service input for sentencing, although it was noted that this would require either a CM board to hear the full circumstances of the case with the plea in mitigation or the JA to sentence alone. A further suggestion for input into the CM would be via a unit impact statement prepared by the CO and disclosed to the Defence but not to the Board until after finding.

Another respondent noted that no alternative ways could be considered effective and would require the involvement of more Service personnel, i.e. sitting as members of a jury; advising a judge on sentencing, etc., thus impacting upon operational effectiveness by tying up Service resources.

- *Should some types of case (i.e. murder, rape) be always heard in a civilian criminal court where they are dealt with more frequently?*

Several respondents noted that cases should be heard in the most appropriate court. One respondent commented that we need a system of justice in order to deal with operational offending and ideally this would be the SJS as opposed to the CJS. However, within the UK, serious cases such as murder and rape can be dealt with by the CJS and arguably the CJS should take precedence in such matters unless there is an operational context and where the Service is requested to deal. This also allows the growing of experience of the Service Police which would deal with such offending overseas.

One respondent noted that there are cases where only the SJS has jurisdiction. By way of example, the rape of a person aged 18 or over, which currently occurs overseas cannot be dealt with in the CJS because the Crown Court lacks jurisdiction.

Another respondent took a view that the important aspect in relation to whether a matter should be dealt with under the SJS or the civilian system is the Service interest or nexus in the case, regardless of its 'seriousness', and context plays a huge part in quantifying that Service interest. It may be that a murder committed by a Service person in the UK has very little connection to the individual's membership of the Armed Forces, therefore, it would be wholly appropriate for it to be heard in a civilian criminal court. However, two respondents noted that a murder on operations or unlawfully killing in an operational theatre, where the operational context is extremely relevant should be tried in a CM. In those circumstances, the requirement for a CM to be a trial by 'peers' who understand the context of the offence, is even more relevant but 'Peers' does not mean of the same rank/ Rate. Peers means Officer and Warrant Officers of their own Service who have a sentencing function as well as responsibility for making a finding. Provided that the judge and the prosecutors are sufficiently SQEP to undertake the prosecution, there is no reason why murder, rape, etc. should not be tried in a court martial in such circumstances.

Another respondent added to this point in that if Service personnel are to be sentenced in civilian courts, civilian judges will need training or assistance on the consequences of sentences. Misinformation can lead to a court imposing a significantly lesser sentence than deserved. Civilian courts do not have access to the range of Service punishments including military detention which may allow a Serviceman to receive a custodial sentence without losing his career and without the Service losing a highly trained individual.

Additionally, a respondent commented in light of recent issues regarding disclosure in the CJS in rape trials there is an argument that public confidence in the CJS in relation to this type of case, is not overly strong. It does not follow that just because the CJS is bigger or deals with cases more frequently, it is necessarily a fairer or more efficient or "better" system of justice than the SJS.

One respondent did note that perhaps cases involving historical sex offences committed by Service personnel overseas who have long since left the Services should be tried in the Crown Court, although that is not possible where the alleged offences occurred overseas. However, another respondent took a similar view noting that jurisdiction could not be extended with retrospective effect, therefore, unless these cases are simply not dealt with, the SJS will continue to deal with historic cases of this type committed overseas.

A respondent commented that in high profile and serious cases, it is essential that the impartiality of the SJS as a whole, and of the Service Police and CM is clearly demonstrable. An independent inspectorate for service policing would address the former issue.

One respondent commented that there is a case for moving away from simple majorities in the most serious cases (murder, manslaughter and rape) to improve public confidence in the Court Martial system. A CM panel of six with a requirement for either unanimity or a five to one majority would deliver an equivalent to the Crown Court in England and Wales.

h. Does there need to be a specific SJS infrastructure for the investigation and prosecution of offences, and specific courts in which to hear them?

- *Do we need a separate prosecuting authority?*

All respondents agreed on the need for a separate prosecuting authority. One noted that exercising the function of prosecutor, separate from the role of an employer, is a necessary safeguard. Prosecuting in the Service Courts and advising the Service Police is a specialist prosecutorial role that has no immediate parallel in the CPS. Many other organisations (such as the Health and Safety Executive) have their own prosecutors / prosecution section and thus the SJS is not unique in this regard. Furthermore, none of those other non-CPS prosecuting authorities are in the position of the SPA, which works in a system different to the CJS.

Another respondent noted that in order to achieve economies of scale, the Review might consider whether the SPA could function as a department within the CPS. The Services

must continue to own the resources for this authority which ensures our priorities, for example in respect of speed of trial, are met. Secondly, experience in prosecuting cases is an important component in attracting lawyers to serve and forms an important part of Service lawyers' professional development.

Another respondent commented that all prosecutors must be fair, objective and independent and this is particularly important in the Service Justice System, which must maintain independence from the service chain of command to fulfil its functions in support of operational effectiveness of the Armed Forces throughout the world.

One respondent noted that portability is fundamental to operational effectiveness and retaining Service prosecutors continues to provide the understanding of the military context, experience and portability. This would cover the eventuality of a CM being held overseas in an austere location if circumstances required it. It is important that prosecutors understand the Service and the Service Interest Test when providing advice or prosecuting. The Service prosecutors are Service SMEs and understand the nuances of the Service.

Another respondent noted that a separate prosecuting authority was crucial to apply the Service interest test and that uniformed prosecutors are the essence of a separate system. The respondent continued that it might be that uniformed defenders are appropriate – the removal of the need for advisory lawyers would throw up sufficient resource to provide a small and cost-effective Service defence authority.

One respondent suggested that the uniqueness of the offences and their underlying circumstances means that it makes sense for there to be a tri-Service body, which includes military lawyers who understand the military context and the service interest of those offences, and can prepare cases for CM. It is also right that they consider not just the public but the Service Interest (recently codified) when considering whether to bring a matter for trial. The SPA must be independent in order that its decisions are not put under pressure from the Services and to ensure a level of trust from the public in their decisions.

- *Do Military courts (as venues) offer anything civilian courts cannot?*

A number of differences were noted by respondents, including a greater degree of security for Service witnesses and defendants and increased comfort and space through the good facilities available. Another respondent commented that Service courts are fundamentally "geared" for the SJS and (should) ensure efficient dealing with Service cases (without competing with other cases). The layout is different (there is no dock for instance) and the facilities available (e.g. separate rooms for prosecution and defence witnesses which provide

space for counsel to meet privately with their clients) are far better than those in most civilian courts.

A further respondent noted that military courts offer guaranteed court time to the SJS; the requirement set by MCS is for 785 days. Several respondents noted that they are located close to concentrations of Service populations, minimising both the time many personnel are required to be away from their units and the expenses they incur in travelling to and from court. It is also the reason why the process of “listing” cases to court in the SJS (conducted jointly between the MCS and judiciary) tends to involve fixing dates, times and venues much more rigidly than in the civilian system, thereby again limiting the time spent away from other duties and providing greater certainty to the chain of command on when and for how long personnel are required to be released

Another respondent noted that military specific courts offer the benefit of convenience for the Services, but civilian court facilities arguably offer transparency as they are easier for the public to access. Sharing facilities with a civilian court could delay the efficiency of proceedings depending on case load and staff available.

One respondent explained that non-criminal offences are tried at CM and it would not be appropriate for those cases to be heard in a civilian criminal court, but the same objection does not ring true for a civil court.

One respondent noted that there may be potential for the SPA to co-locate with the CPS and another observed that with the suggested estate rationalisation co-location is likely to bring efficiencies.

A respondent identified a number of factors that would need to be taken into consideration for sharing of facilities: the number of Crown Courts required for use by the Services; would the Crown Court staff require specific training to understand the Military requirement and; will we have a CM service working in the Crown Courts.

In terms of facilities a respondent commented that all the military courts are comprehensively equipped with VTC facilities; allowing witness testimony (from military personnel based abroad or elsewhere in the UK) to be taken much more frequently than in the civilian courts. This also permits many Preliminary Hearings to be conducted with both sets of counsel appearing remotely. The same respondent added that the service provided by the MCS is entirely portable. This means Court Martial trials are able to be conducted wherever British Service personnel are based or deployed. It also relies upon the experience and knowledge of MCS staff in respect of mounting “out of area” proceedings which is, presumably, not currently available within HMCTS.

One respondent commented that it is doubtful that they (the Crown Court) could easily replicate such a bespoke service alongside their normal administrative responsibilities.

- *Can the civilian/service courts share facilities?*

The majority of respondents saw no reasons why this could happen in principle, although they identified practical considerations.

One respondent commented that since Judge Advocates all sit in the Crown Court, there is no reason why they could not do some of their work (sentencing for example) from the Crown Court in the CM centres.

In contrast, one respondent noted that the Military Court Centres are located within or close to military bases means that they are not as accessible to the public as most civilian courts, which tend to be situated within town and city centres. The military courts also differ in their infrastructure, in that each centre: has no more than two courtrooms; does not incorporate secure docks for defendants; does not use scanning devices for those entering the court; and generally has no secure detention facilities within the building. Additionally, civilian courts may be "uncomfortable" for Service personnel in uniform, who will undoubtedly attract (unwanted) attention.

Several respondents noted that it was questionable whether Crown Courts and magistrates' courts have sufficient spare capacity.

One respondent commented that the Service courts appear to be busy enough to justify their existence and they are geographically located in or alongside Service establishments. There is not perceived to be any need for the sharing of court facilities at present. If there was a reduction in the military courts estate that led to the loss of ethos and potential lack of access to justice, the case would be stronger for sharing court facilities in locations adjacent to military establishments/ bases (including spare capacity in Scottish courts).

One respondent considered that there are potential issues for victims in being able to transfer cases between the SJS and the CJS. Such a transfer is likely to have a significant effect upon victims, who may have to travel a considerable distance to attend the CM centres. This issue is not confined to the trial as victims may wish to attend sentencing hearings and to read their Victim Impact Statements in person.

- *To what extent do Service factors drive the need for key differences between the Service and civilian criminal justice systems? For example, the majority system of verdicts; and the absence of any 'lower' court to deal with more minor offences that would normally be heard at a magistrate court.*

One respondent observed that majority verdicts are routine and perfectly acceptable in some other UK national civilian courts; the CM is not unique in having majority verdicts. It also recognises that the panel is not a jury but more akin to a panel of experts (or bench of magistrates) who can deal fairly on a majority basis.

One respondent noted that the warfighting function requires discipline underpinned by command relationships and a criminal code to ensure that service personnel can be compelled to act in ways contrary to their own interests if required; the position of the CO in delivering justice where relevant to his/her ability to command is of paramount importance and; the requirement to provide a jurisdiction for Service personnel (and CSSD) when they are deployed abroad. As a result of these features simple majority verdicts allow for a small board, obviate a hung jury and the consequent requirement for retrials so are efficient.

One respondent noted that a CM that cannot reach a verdict results in an acquittal whereas in a civilian court the CPS would be able to consider whether the public interest was served by seeking a re-trial.

One respondent was supportive of a move away from simple majority verdicts in relation to serious crimes such as murder, manslaughter and rape, to improve confidence in the CM system. The respondent can see no operational effectiveness reason to prevent this. In particular, there is evidence to demonstrate that there would be a negligible re-trial rate. Therefore, concerns about the increased manpower requirement to Service CM retrials are unfounded.

Two respondents noted that the warfighting function of the Services driven by a requirement for deployability and support of the Chain of Command and operational effectiveness drive the absence of a 'lower court' and the need for a system of Summary Justice in its current form. Another respondent commented there is no pressing need for the lower court, provided the minor matters can get to trial quickly.

Several respondents noted there is a lower court, the Summary Hearing, which uses the CO as a magistrate (with access to legal advice), and allows swift resolution of minor offences, which has an appeals system and the ability for an individual to elect for CM as well as an ability for the CO to refer to CM. However, one respondent commented that the CO's jurisdiction is more limited that a magistrates' court (e.g. no power to imprison).

Consequently, the CM does deal with cases that would be heard in both the magistrates' and Crown Court.

- *How does the SJS framework ensure Victims are properly supported?*

Several respondents noted that the Code of Practice for Victims of Crime provides direction and guidance to all Service stakeholders on their obligations for victims of crime. One respondent explained that the CO of the accused allocates a Victim Liaison Officer for both CM and SH in every case where there is an identified victim. The SPA can apply to the CM for Special Measures to assist victims in giving evidence.

One respondent noted that the responsibility for the welfare of witnesses, especially complainants, is blurred at times between SPA and MCS. The respondent identified a concern that the Services can overlook the welfare of their complainants between investigation and trial and more work could be done to maintain contact and keep up to date with complainants concerns and worries. Much of this currently falls on MCS staff who have the responsibility of warning witnesses and securing their attendance at court. This role would be better undertaken by SPA.

One respondent commented that the CPS has worked with the SPA to improve standards in relation to the prosecution of sexual offending. Lawyers from the SPA now attend the specialist training in rape and sexual offences (RASSO) undertaken by CPS RASSO prosecutors.

However, the respondent noted that CPS has developed targeted strategies in prosecuting Violence Against Women and Girls (VAWG), including domestic abuse, rape, sexual offences, stalking and harassment, and there should be regular reviews of guidance, training and policy and the publication of an annual VAWG report to be reflected in the SJS.

- *Should employment sanctions continue to be an integral part of SJS, or left to the Services to consider under administrative action?*

One respondent commented that leaving employment sanctions to administrative action would make sentencing in the CM much simpler and more like the CJS. However, we would not wish to see the CM lose it status as a specialist tribunal and loss of employment sanctions would reduce its sentencing flexibility. Sentences such as Restriction of Privileges and Service Supervision and Punishment Orders stand in the place of community orders for serving soldiers which the CM does not have at its disposal.

One respondent noted that dismissal from CM is very useful as a quick way to have an individual removed from the Service, rather than go through an admin discharge process which can be burdensome, complicated and lengthy; we cannot begin proceedings to remove an individual from the Service until the disciplinary action has concluded.

One respondent did note that Service personnel are not employees in true legal terms, but rather serve under Royal Prerogative, a Royal Warrant or on a Queen's commission there is an argument that dismissal, particularly with disgrace, is more appropriate and not just an employment sanction.

Another respondent noted that punishments such as dismissal, disrating and reprimands, whilst also employment sanctions, are part of the rationale for having a separate system of Service justice, not least in relation to disciplinary offences which are dealt with in the SJS. Service personnel sitting on CM boards are able to apply their military judgement to make an assessment about whether such a punishment would be appropriate considering the offence committed. However, their inclusion as a potential punishment at CM does not prevent the Services taking a decision post-CM that the totality of the offending warrants the Service taking a decision as an employer to discharge, revert or censure the individual (the administrative equivalent of dismissal, disrating and severe reprimand / reprimand).

i. Does the current structure and skill set of the Service Police organisations, and the MDP, match the future requirements of the Service Justice System?

- *Do the skills and experience of the Service Police/MDP match the nature and scale of the cases they are required to deal with?*
- *Should all – or some – Service Police have additional powers?*
- *What impact will the increase in UK-based personnel have on the policing function in the SJS?*
- *Are there specific Service Police/MDP Skills that are required outside traditional policing functions?*

See separate report / Annex.

j. What is the benefit to the Armed Forces of a system of military detention (as a punishment)?

One respondent set out the main benefits of a system of military detention as: retention - in almost every case where a soldier who is sent to civil prison, he/she is subsequently discharged, primarily because he/she is not available for duty during the active and licence periods of his sentence, The prison regime often brings offenders into contact with negative influences and lastly because an offence that merits imprisonment is often a Gross

Misconduct which would result in dismissal in any case. The second benefit is operational effectiveness and training - a soldier in detention, for whom retention is planned, maintains and improves his training standards whilst undergoing punishment. Thirdly, care and contact - the obligation of care toward soldiers is not broken because they are undergoing punishment. Even when the eventual outcome is discharge there is an enduring requirement for the chain of command to exercise its duty of care towards its soldiers. This continued care and contact facilitates rehabilitation for those who return to Service and, for those who will be discharged, it demonstrates that the command relationship goes beyond mere employment.

- *Does military detention result in changed behaviour of those who return to Service? How many repeat offenders are there?*

One respondent commented that Military Corrective Training Centre (MCTC) is acknowledged as being effective in changing detainees' behaviour and another noted it is a very good punishment which essentially can turn the recalcitrant service person into a useful member of the armed forces.

A respondent noted that there are some repeat offenders but rates are lower than in HMP adding that it should, however be noted that the most serious offenders are discharged at the end of their detention and therefore there is no record of whether they go on to offend again.

A further respondent explained that detention is not only a useful deterrent punishment but it is also a highly effective sentencing tool in rehabilitating offenders.

- *What is the benefit to the Armed Forces if detainees are not returning to Service?*

One respondent noted that many Board Members consider the Services have a duty of care towards their personnel, even those who have offended and been dismissed. They consider that helping defendants who have been used to Service life for many years to resettle back into the civilian world after compulsory termination of their employment is responsible and in the interest of all. It has the benefit of reinforcing the duty of care towards all service personnel. Many defendants are dismissed with mental health or other personal issues caused directly or indirectly from Service life.

Another respondent commented that the welfare of veterans, whatever their reasons for leaving the Service, is of both substantive and reputational importance to the Services. Those who are unsuitable for further service having completed their sentences must be as

well prepared for civilian life as possible. MCTC provides literacy and numeracy education and resettlement training to enable those discharged to find civilian employment and housing. This ensures that the Services discharges their responsibility to the individual and also protects its reputation as a trusted and caring employer. Furthermore, individuals must be punished fairly for an offence whether they are retained or to be discharged. It would be wrong for an individual convicted of an offence that would normally attract a sentence of detention to escape that punishment because they are being discharged. It also delivers the ancillary benefit of acculturating service personnel sentenced to civilian prison prior to the start of their sentences.

A further respondent noted that the deterrent element is the main reason why you might have detention alongside dismissal, especially where the individual might wish to be dismissed in order to expedite their departure from the Service.

k. Is the current Service Justice System a feature of any international obligations? If so, what key aspects do we need to retain to fulfil those obligations?

One respondent noted that the SJS is currently configured to comply with the requirement to be compliant with Article 6(1) of the ECHR, as required by the Human Rights Act 1998. The respondent added that UK Armed Forces SJS supports and facilitates the requirements of several SOFAs, for example the NATO SOFA. The key aspects to be retained are the portability of the SJS and the jurisdiction that attaches to all Service personnel when abroad.

Another respondent commented that the SJS allows for offences (both criminal and non-criminal conduct offences) to be dealt with in the CM, which is compliant with our ECHR obligations. The Summary Hearing process provides the opportunity to elect for trial by CM or to appeal summary convictions and/or punishments to the (compliant) Summary Appeal Court. The respondent continued that the availability of the SJS underpins international SOFA arrangements (eg in Germany) by offering an alternative jurisdiction for disposal of cases arising in overseas locations. The ability to reassure Host Nations that a viable alternative jurisdiction is available is key to negotiating such agreements and an SJS which be exported overseas offers a more powerful demonstration of intent and capability. The ability to investigate and prosecute matters which would otherwise fall to be dealt with by the ICC is central to ensuring the UK retains control over cases which may otherwise be brought in The Hague.

One respondent noted that in essence, any UK personnel not subject to an internal disciplinary system essentially become unlawful combatants. The International Committee of the Red Cross Commentary to Additional Protocol of the Geneva Convention (API) states that “the expression "internal disciplinary system” covers the field of military disciplinary law as well as that of military penal law” and assert that “it is clearly impossible to comply with the requirements of the Protocol without discipline.” It is not sufficient under international law

that the Armed Forces be subject to an internal disciplinary system which can enforce compliance with the laws of war, but - as the expression 'shall enforce' indicates; there has to be effective compliance with this system in the field. That necessitates a military justice system that allows for a commander to deal with serious offences such as murder and rape.

Article 87(3) API provides that parties shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of Law of Armed Conflict to initiate such steps as are necessary to prevent such violations and, where appropriate, to initiate disciplinary or penal action against violators. This is further evidence that international law is premised on State militaries having an internal disciplinary system.

On a related point, without COs having a military justice system available to them they are exposed to increased risk they will be liable under command responsibility offences since they will not be directly able to discipline their troops.

Annex C - Full responses by Working Group members to the Terms of Reference by each question [NOT PUBLISHED]

Annex D: Statistical Information

MCS INFORMATION ON RECENT COURT MARTIAL BUSINESS

	2010	2011	2012	2013	2014	2015	2016
Court Martial Trials (Personnel – Tri-Service)	657	640	529	483	462	476	410
Summary Appeal Court (SAC)	N/A	N/A	N/A	77	84	60	82
SAC where summary judgement quashed	N/A	N/A	N/A	6	12	10	9
Murder	0	0	0	3	0	0	0
Attempted Murder	2	0	1	0	1	0	0
Rape/Attempted Rape	12	6	9	7	10	See separate table	See separate table
Serious Sexual Assault	9	7	10	6	13	See separate table	See separate table
S18/20 Violence	33	26	39	36	37	33	34
ABH	76	66	63	66	65	61	45
Robbery	1 robbery (19 theft, 1 burglary)	0 robbery (34 theft, 3 burglary)	2 robbery (23 theft, 5 burglary)	0 robbery (18 theft, 8 burglary)	1 robbery (25 theft, 4 burglary)	0 robbery (26 theft, 7 burglary)	1 robbery (17 theft, 4 burglary)

MCS STATISTICS for 2016

		RN (incl RM)	ARMY	RAF	CIVILIAN	TOTAL
1.A	Court Martial Trials (Personnel)	52	327	28	3	410
1.B(i)	Court Martial by Election	10	8	4	N/A	22
1.B(ii)	Court Martial owing to level of offence/directed by SPA	42	319	24	3	388
1.B(iii)	Summary Appeal Court (SAC)	6	67	9	N/A	82
1.C	Court Martial Guilty Verdicts	39	256	26	2	323
1.D	Court Martial Not Guilty Verdicts	13	71	2	1	87
1.E	SAC where summary judgement quashed	1	6	2	N/A	9
1.F	Murder	0	0	0	0	0
1.F	Attempted Murder	0	0	0	0	0
1.F	Rape/Attempted Rape	See separate table	See separate table	See separate table	See separate table	See separate table
1.F	Serious Sexual Assault/Sexual Abuse	See separate table	See separate table	See separate table	See separate table	See separate table
1.F	S18/20 Violence	7	23	4	0	34
1.F	ABH	5	40	0	0	45
1.F	Robbery	0	1 robbery (15 theft, 4 burglary)	0 robbery (2 theft)	0	1 robbery (17 theft, 4 burglary)
1.G	Court Martial sentence of 28 days detention or less	2	3	0	0	5

MCS STATISTICS for 2015

		RN (incl RM)	ARMY	RAF	CIVILIAN	TOTAL
1.A	Court Martial Trials (Personnel)	56	388	27	5	476
1.B(i)	Court Martial by Election	17	6	3	N/A	26
1.B(ii)	Court Martial owing to level of offence/directed by SPA	39	382	24	5	450
1.B(iii)	Summary Appeal Court (SAC)	8	46	6	N/A	60
1.C	Court Martial Guilty Verdicts	48	304	20	5	377
1.D	Court Martial Not Guilty Verdicts	8	84	7	0	99
1.E	SAC where summary judgement quashed	0	4	6	N/A	10
1.F	Murder	0	0	0	0	0
1.F	Attempted Murder	0	0	0	0	0
1.F	Rape/Attempted Rape	See separate table	See separate table	See separate table	See separate table	See separate table
1.F	Serious Sexual Assault/Sexual Abuse	See separate table	See separate table	See separate table	See separate table	See separate table
1.F	S18/20 Violence	3	29	1	0	33
1.F	ABH	9	49	3	0	61
1.F	Robbery	0 robbery (4 theft)	0 robbery (21 theft, 7 burglary)	0 robbery (1theft)	0	0 robbery (26 theft, 7 burglary)
1.G	Court Martial sentence of 28 days detention or less	4	3	0	0	7

MCS STATISTICS for 2014

		RN (incl RM)	ARMY	RAF	CIVILIAN	TOTAL
1.A	Court Martial Trials (Personnel)	53	376	26	7	462
1.B(i)	Court Martial by Election	18	10	5	N/A	33
1.B(ii)	Court Martial owing to level of offence/directed by SPA	35	366	21	7	429
1.B(iii)	Summary Appeal Court (SAC)	9	62	13	N/A	84
1.C	Court Martial Guilty Verdicts	41	300	22	5	368
1.D	Court Martial Not Guilty Verdicts	12	76	4	2	94
1.E	SAC where summary judgement quashed	2	8	2	N/A	12
1.F	Murder	0	0	0	0	0
1.F	Attempted Murder	0	1	0	0	1
1.F	Rape/Attempted Rape	0	7	2	1	10
1.F	Serious Sexual Assault/Sexual Abuse	2	7	2	2	13
1.F	S18/20 Violence	3	33	1	0	37
1.F	ABH	5	56	4	0	65
1.F	Robbery	0 robbery (6 theft, 0 burglary)	1 robbery (17 theft, 4 burglary)	0 robbery (2 theft)	0	1 robbery (25 theft, 4 burglary)
1.G	Court Martial sentence of 28 days detention or less	0	2	0	0	2

MCS Sexual Offences Statistics 2015 - 2017

	2015			2016			2017		
	No. of defendants	**Guilty findings**	**Guilty findings as %**	**No. of defendants**	**Guilty findings**	**Guilty findings as %**	**No. of defendants**	**Guilty findings**	**Guilty findings as %**
S1. (Rape)	12	2	17%	14	1	7%	23	2	9%
S2. (Assault with penetration)	7	2	27%	10	4	40%	4	1	25%
S3. (Assault without penetration)	25	13	42%	14	9	66%	34	16	47%

	2015			2016			2017		
	No. of charges	**Guilty findings**	**Guilty findings as %**	**No. of charges**	**Guilty findings**	**Guilty findings as %**	**No. of charges**	**Guilty findings**	**Guilty findings as %**
S1. (Rape)	32	3	9%	23	2	9%	49	2	2%
S2. (Assault with penetration)	9	5	56%	11	4	36%	4	1	25%
S3. (Assault without penetration)	40	23	58%	30	19	63%	53	16	30%

Sexual Offences in the Service Justice System 2017 Annual Statistics

Service Police investigations into offences contrary to the Sexual Offences Act 2003

Table 1 shows the numbers and types of sexual offences investigated by the Service Police during the 2015, 2016 and 2017 calendar years.

Source: Defence Statistics (Tri Service)

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	Rape			Sexual Assault (Penetration)			Sexual Assault (No Penetration)			Exposure			Voyeurism			Others			Historical		
	2015	2016	2017	2015	2016	2017	2015	2016	2017	2015	2016	2017	2015	2016	2017	2015	2016	2017	2015	2016	2017
By Service Police Force																						
RNP	2	5	7	2	1	1	7	7	7	-	2	2	-	2	-	-	-	1	-	-	-
RMP	16	18	19	7	5	7	27	34	43	2	2	6	3	3	3	6	4	7	9	6	8
RAFP	2	7	2	-	2	-	6	7	6	1	1	2	1	3	3	-	1	4	3	3	6
Totals	**20**	**30**	**28**	**9**	**8**	**8**	**40**	**48**	**56**	**3**	**5**	**10**	**4**	**8**	**6**	**6**	**5**	**12**	**12**	**9**	**10**
By Country:																						
UK	7	14	14	5	7	6	23	36	35	2	4	8	1	5	3	1	1	5	-	-	-
Germany	8	8	8	2	-	1	6	2	5	-	-	1	1	1	-	4	1	1	12	6	9
Cyprus	-	1	1	-	-	1	3	1	2	1	-	-	1	-	3	1	2	4	-	1	1
Canada	-	2	1	-	-	-	3	1	1	-	-	-	-	-	-	-	-	-	-	-	-
Falkland Islands	-	1	-	1	1	-	2	1	2	-	-	-	-	-	3	-	-	-	-	-	-
Gibraltar	1	-	-	-	-	-	-	-	1	-	-	-	-	2	-	-	-	-	-	-	-
Other	4	4	4	1	-	-	3	7	10	-	1	1	1	8	3	-	1	2	-	2	2
Totals	**20**	**30**	**28**	**9**	**8**	**8**	**40**	**48**	**56**	**3**	**5**	**10**	**4**	**8**	**6**	**6**	**5**	**12**	**12**	**6**	**14**
Investigation Outcome:																						
Referred	13	16	19	6	6	3	25	36	37	-	3	8	1	5	2	3	3	3	-	4	2
Not Referred	2	10	4	1	2	1	10	9	10	3	1	2	1	3	3	1	1	2	-	-	2
Under Investigation	5	4	5	2		4	5	3	9	-	1	-	2	-	1	2	1	7	-	5	10
Totals	**20**	**20**	**28**	**9**	**8**	**8**	**40**	**48**	**56**	**3**	**5**	**10**	**4**	**8**	**6**	**6**	**5**	**12**	**12**	**9**	**14**

Personnel suspected of offences contrary to the Sexual Offences Act 2003

Table 2 shows the total of personnel investigated for committing sexual offences, including gender, service rank and age

Table 2 - Personnel suspected of offences contrary to the Sexual Offences Act 2003

Source: Defence Statistics (Tri-Service)

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	Rape			Sexual Assault (Penetration)			Sexual Assault (No Penetration)			Exposure			Voyeurism			Others		
	2015	2016	2017	2015	2016	2017	2015	2016	2017	2015	2016	2017	2015	2016	2017	2015	2016	2017
By Gender:																		
Male	22	30	26	8	16	7	40	48	51	3	5	9	5	7	3	6	5	9
Female	-	-	-	2	-	-	1	2	2	-	-	-	-	-	-	-	-	1
Unknown	-	-	3	-	-	1	1	-	3	-	-	1	-	3	3	-	-	2
Totals	**22**	**30**	**29**	**10**	**16**	**8**	**42**	**50**	**56**	**3**	**5**	**10**	**5**	**10**	**6**	**6**	**5**	**11**
By Service:																		
RN/RM	3	4	5	2	1	1	9	8	7	-	1	2	-	2	-	-	-	1
Army	16	16	18	7	14	6	27	33	40	2	3	6	3	4	3	6	4	5
RAF	2	6	3	-	-	-	4	7	6	1	1	1	1	-	2	-	1	3
Civilian	-	1	-	-	-	-	1	-	-	-	-	-	-	-	-	-	-	1
Unknown	1	3	3	1	-	1	1	2	3	-	-	1	1	4	3	-	-	2
By Rank:																		
Officer	2	2	2	1	1	1	5	7	4	-	-	-	-	-	-	1	-	-
Warrant Officer	-	3	-	-	-	-	1	4	9	-	-	-	-	-	-	-	-	-
SNCO	1	2	3	4	2	1	10	8	15	-	1	4	-	1	-	-	1	-
JNCO	7	10	7	1	3	3	10	13	9	1	3	1	1	1	-	1	2	2
Private	11	8	14	3	10	6	14	15	27	2	1	4	3	4	2	4	1	4
Civilian	-	1	-	-	-	-	1	-	-	-	-	-	-	-	2	-	1	1
Unknown	1	4	3	1	-	1	1	3	2	-	-	1	1	1	3	-	-	1
By Age:																		
<20	4	1	5	1	2	-	1	2	4	-	-	-	1	-	1	1	1	4
21-25	2	12	5	13	7	7	13	10	2	2	1	4	2	3	1	2	1	1
26-30	7	5	7	9	4	1	9	7	-	-	1	-	-	1	1	1	-	4
31-35	6	2	4	8	1	2	8	10	-	-	1	1	-	1	-	1	2	2
36-40	1	4	1	2	1	-	2	6	3	1	1	3	1	1	1	-	1	-
>40	1	2	1	8	1	1	8	12	3	-	1	1	-	-	-	1	-	-
Unknown	1	4	-	1	-	-	1	3	-	-	-	-	1	4	-	-	-	-

Victims of offences contrary to the Sexual Offences Act 2003

Table 3 shows the total number of victims of sexual offences committed by Armed Forces personnel by gender, Service, rank and age.

Table 3 - Victims of offences contrary to the Sexual Offences Act 2003

Source: Defence Statistics (Tri-Service)

	Rape			Sexual Assault (Penetration)			Sexual Assault (No Penetration)			Exposure			Voyeurism			Others		
Return to Contents	2015	2016	2017	2015	2016	2017	2015	2016	2017	2015	2016	2017	2015	2016	2017	2015	2016	2017
By Gender:																		
Male	-	1	1	6	3	3	9	6	9	1	3	2	-	-	2	-	-	3
Femal	21	30	27	6	6	4	37	51	44	2	3	7	4	9	4	8	6	8
Unknown	-	-	1	-	-	1	-	-	3	-	-	2	-	-	-	-	-	1
Totals	**21**	**31**	**29**	**12**	**9**	**8**	**46**	**57**	**57**	**3**	**6**	**11**	**4**	**9**	**6**	**8**	**6**	**12**
By Service:																		
RN/RM	3	3	6	2	1	1	6	7	7	-	-	-	-	3	-	-	-	-
Army	3	13	11	8	6	4	26	38	28	1	4	3	2	1	2	2	-	2
RAF	2	6	2	1	2	-	6	7	4	1	-	-	-	3	3	-	-	1
Civilian	21	7	7	-	-	2	7	5	12	-	1	4	2	2	-	6	6	8
Foreign Forces	-	2	1	-	-	-	-	-	1	-	1	-	-	-	-	-	-	-
Unknown	1	-	1	1	-	1	1	-	4	1	-	3	-	-	-	-	-	1
By Rank:																		
Officer	1	2	2	1	1	-	5	1	1	-	1	-	1	-	-	-	-	-
Warrant Officer	-	-	-	-	-	-	-	1	-	-	-	-	-	-	-	-	-	-
SNCO	-	2	1	-	1	-	4	11	-	-	1	-	-	-	-	-	-	1
JNCO	4	7	3	2	2	-	6	11	2	1	-	1	1	2	1	2	-	-
Private	4	13	18	9	5	5	24	28	5	1	3	3	-	5	4	6	6	14
Civilian	12	7	8	-	-	2	7	5	-	1	1	5	2	2	1	-	-	10
Unknown	-	-	-	1	-	-	-	-	-	-	-	-	-	-	-	-	-	-
By Age:																		
<20	4	6	9	2	1	4	8	8	2	1	-	-	1	3	3	5	6	19
21-25	8	15	14	2	6	1	24	22	2	-	1	1	1	5	2	1	-	2
26-30	3	3	4	4	1	1	7	13	6	1	-	5	2	1	-	1	-	1
31-35	4		1	1	-	-	1	9	-	-	3	-	-	-	2	1	-	1
36-40	1	6	-	1	1	1	4	2	-	-	1	-	-	-	-	-	-	-
>40	1	-	-	1	-	-	2	3	-	1	1	3	-	-	-	-	-	-

Service Police investigations into Historic sexual offenecs

Table 4 shows Service Police investigations into historical sexual offenecs between 1 January 2017 and 31 December 2017

Table 4 - Service Police investiagtions into historical sexual offenecs.

Source: Defence Statisics (Tri Service)

	Rape			Buggery			Gross Indecency (with a child)			Indecent Assault (on an adult)			Indecent Assault (on a child)			Indecent Assault (towards a child)		
Return to contents	2015	2016	2017	2015	2016	2017	2015	2016	2017	2015	2016	2017	2015	2016	2017	2015	2016	2017
By Service Police:																		
RNP	-	-	-	-	-	-	-	-	1	-	-	-	-	-	-	-	-	-
RMP	3	3	1	2	-	1	1	-	-	1	-	1	-	-	3	1	3	-
RAFP	-	2	-	1	-	-	-	-	1	-	-	1	1	1	4	1	-	-
Totals	**3**	**5**	**1**	**3**	**-**	**1**	**1**	**-**	**2**	**1**	**-**	**2**	**1**	**1**	**7**	**2**	**3**	
By Country:																		
Germany	3	2	1	3	-	-	1	-	2	1	-	1	1	1	5	2	2	-
UK	-	2	-	-	-	-	-	-	-	-	-	1	-	-	-	-	-	-
Cyprus	-	1	-	-	-	-	-	-	-	-	-	-	-	-	1	-	-	-
Others	-	-	-	-	-	1	-	-	-	-	-	-	-	-	1	-	1	-
Decade of offence*																		
1960s	-	2	-	-	-	-	-	-	1	-	-	-	-	-	3	-	-	-
1970s	1	1	-	3	-	-	1	-	1	1	-	-	1	1	2	-	3	-
1980s	1	1	-	-	-	-	-	-	-	-	-	2	-	-	2	-	-	-
1990s	1	-	-	-	-	1	-	-	-	-	-	-	-	-	-	2	-	-
2000s	-	1	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
By Suspect Gender:																		
Male	3	3	1	3	-	1	2	-	1	2	-	1	2	1	4	2	3	-
By Suspect Status:																		
RN/RM	-	-	1	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Army	2	2	-	2	-	1	2	-	1	2	-	1	-	-	1	1	3	-
RAF	-	2	-	-	-	-	-	-	-	-	-	1	2	1	2	-	-	-
Civilian	1	1	-	-	-	-	-	-	-	-	-	-	-	-	1	-	-	-
Unknown	-	-	-	1	-	-	-	-	1	-	-	-	-	-	3	1		-
By Victim Gender																		
Male	-	1	-	5	-	1	1	-	-	1	-	1	1	1	2	-	2	-
Female	5	4	1	-	-	-	-	-	1	-	-	1	-	-	3	3	1	-
By Victim Status:																		
RN/RM	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Army	-	-	1	2	-	1	1	-	-	1	-	-	-	-	-	-	-	-
RAF	-	-	-	3	-	-	-	-	-	-	-	1	1	-	5	-	-	-
Civilian	5	5	-	-	-	-	-	-	2	-	-	1	-	1	2	3	-	-

*If the offences occurred over two or more decades, the decade of the earliest incident has been recorded.

Offences contrary to the Sexual Offences Act 2003 with Armed Forces suspects referred to the SPA

Table 5 shows offenecs contrary to the sexual offences Act 2003 referred to the SPA during the 2015,2016 and 2017 caledar years.

Table 5 - Offenecs contrary to the Sexual Offenecs Act 2003 with Armed Forces suspects referred to the SPA

Source: Defence Statistics (Tri-Service)

	Rape			Sexual Assault (Penetration)			Sexual Assault (No Penetration)			Exposure			Voyeurism			Others		
Return to contents	2015	2016	2017	2015	2016	2017	2015	2016	2017	2015	2016	2017	2015	2016	2017	2015	2016	2017
Referrals received by Service:																		
RN/RM	1	4	3	1	1	-	7	6	5	1	2	-	1	2	-	-	-	-
Army	27	24	14	9	5	5	28	42	27	2	1	7	3	3	1	8	14	7
RAF	2	6	2	-	2	-	4	11	9	-	3	-	1	-	2	4	4	4
Totals	**30**	**34**	**19**	**10**	**8**	**5**	**39**	**59**	**41**	**3**	**6**	**7**	**5**	**5**	**3**	**12**	**18**	**11**
Case charged by S																		
RN/RM	1	2	2	1	-	-	5	4	2	1	-	-	1	-	-	-	-	-
Army	12	11	6	6	4	3	15	23	13	1	1	2	2	2	1	6	4	3
RAF	1	5	1	-	1	-	1	7	4	-	-	-	-	-	2	1	4	6
Totals	**14**	**18**	**9**	**7**	**5**	**3**	**21**	**34**	**19**	**2**	**1**	**2**	**3**	**2**	**3**	**7**	**8**	**9**
Case discontinued by Service:																		
RN/RM	-	2	1	-	-	-	2	1	2	-	1	-	-	2	-	-	-	-
Army	11	8	6	3	1	2	9	14	10	1	-	-	1	1	-	1	5	2
RAF	-	-	-	-	-	-	2	4	3	-	2	-	1	-	-	1	-	1
Totals	**11**	**10**	**7**	**3**	**1**	**2**	**13**	**19**	**15**	**1**	**3**		**2**	**3**	**-**	**2**	**5**	**3**
Charged with alternative offence by Service:																		
RN/RM	-	-	-	-	-	-	-	1	-	-	1	-	-	-	-	-	-	-
Army	-	2	-	-	-	-	2	1	1	-	-	5	-	-	-	-	-	-
RAF	-	-	-	-	-	-	-	-	-	-	1	-	-	-	-	2	-	-
Totals	**-**	**2**	**-**	**-**	**-**	**-**	**2**	**2**	**1**	**-**	**2**	**5**	**-**	**-**	**-**	**2**	**-**	**-**

ARMY STATISTICS

1. **Strength.**

	1990	2000	2010	2016
Regulars	152820	110050	108924	85038
Reservists	81900	44800	33098	32421
Civilians	NK	NK	NK	NK

It has not been possible to acquire the population of civilians as Defence Statistics Agency has not kept these figures.

2. **Location.**

	1990		2001		2010		2016	
UK	87964	56.8%	78141	70.45%	86340	78.10%	77070	88.58%
Ge	53892	34.81%	21411	19.30%	18780	16.99%	5120	5.88%
Cyprus	2743	1.77%	2393	2.16%	1930	1.75%	1480	1.70%
ROW	8221	5.31%	6971	6.28%	1490	1.35%	1320	1.52%

3. **Courts Martial.**

	1990	2001	2010	2016
CM	918	620	530	350
SAC in addition to CM	Nk	Nk	82	73
Civ	1	10	5	4

4. **Mean Time to Trial Court Martial**

	1990	2001	2010	2016
CM Time to Trial days	Nk	299	257	304

5. **Summary Hearing**

	1990	2001	2010	2016
SH	Nk	12301	4789	3108

6. In 2003 AGAI 62 stated. “Summary Dealing must be completed without delay – normally within 30 calendar days of the offence being reported. Commanders are to forward to HA (Higher Authority) a 30 day summary dealing tracking report on the 30th day after an incident is reported and every 30 days thereafter until the case is closed.”

	1990	2001	2010	2016
SH Time to Trial days	Nk	34	52	69

7. **Statistics on Service Lawyers.** DALS has directed that this information is not supplied as it is outside the scope of the SJS Review.

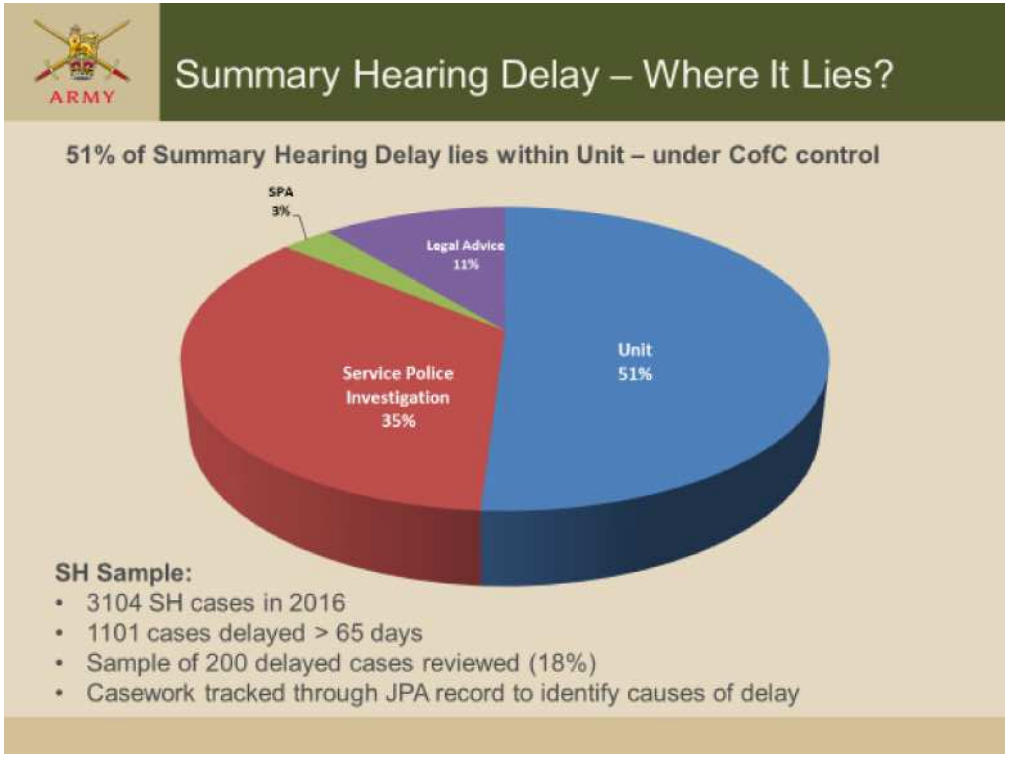
Summary Hearing Time To Trial is calculated from 'Date Reported to Unit' to 'Date of Verdict' (i.e. date of SH).

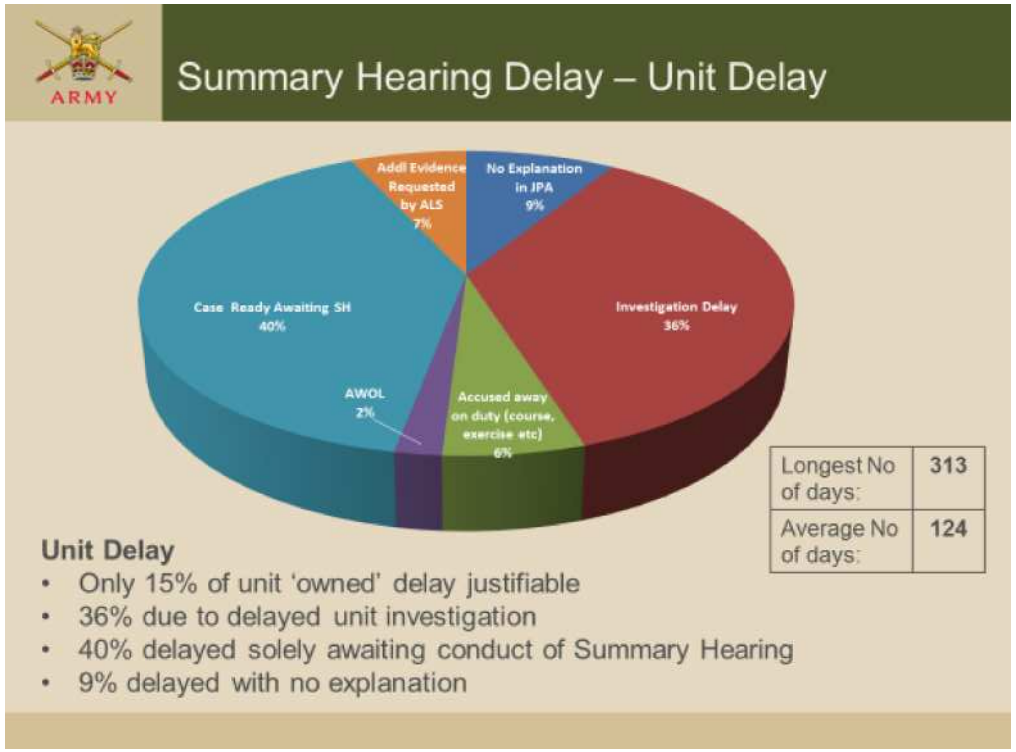
Month	No. of SH (Army CofC)	Average Time To Trial for Month (Days)
Dec-15	191	73
Jan-16	199	76
Feb-16	255	88
Mar-16	345	84
Apr-16	204	68
May-16	296	66
Jun-16	270	62
Jul-16	314	59
Aug-16	186	59
Sep-16	237	75
Oct-16	265	62
Nov-16	295	69
Dec-16	244	57
Jan-17	163	81
Feb-17	262	66
Mar-17	308	62
Apr-17	169	46
May-17	246	57
Jun-17	310	51
Jul-17	298	41
Aug-17	201	43
Sep-17	191	55
Oct-17	268	49
Nov-17	267	52
Dec-17	194	47
Jan-18	168	59

Court Martial Time To Trial is calculated from 'Reported Date' to 'Trial Start Date'.

Month	No. of CM (Army)	Average Time To Trial for Month (Days)
Dec-15	19	331
Jan-16	20	333
Feb-16	30	428
Mar-16	32	328
Apr-16	35	385
May-16	29	424
Jun-16	37	319
Jul-16	32	369
Aug-16	4	286
Sep-16	30	329
Oct-16	43	335
Nov-16	27	357
Dec-16	11	238
Jan-17	23	295
Feb-17	26	346
Mar-17	42	402
Apr-17	19	290
May-17	30	385
Jun-17	21	255
Jul-17	38	322
Aug-17	8	201
Sep-17	21	363
Oct-17	28	271
Nov-17	22	324
Dec-17	20	233
Jan-18	11	314

Results from a deep dive exercise using sample figures from 2016 SH cases





Notes:

- The sample used was 200 cases from across the 800 cases which had exceeded the key performance indicator in 2016. It does not reflect all cases it reflects delayed cases.
- The deep dive exercise was carried out to identify and correct delay; remedial measures were put in place as a result, so the charts reflect the 2016 position not necessarily the current one.
- The deep dive took 2 months to complete as each individual case had to be opened and interpreted to identify where delay had occurred it cannot be repeated easily.

RAF STATISTICS

Data for years 1990, 2000, 2010, 2016

2a **The size of the Service constituency subject to the Services Discipline Act operating at the time broken down into:**

a. Regulars
b. Reservists
c. Civilians

Source: Defence Stats Air

	Regular	FTRS Reg Res	RAuxAF	Sponsored Reserve	Civilian
1990	89685	No data	No data	No data	No data
Apr-00	54715	No data	No data	No data	No data
Dec-10	43070	337	1696	116	No data
Dec-16	33320	880	2692	181	No data

Cannot obtain Reserve Strength pre JPA (2006) as there is no data held.
There is no data held to provide the number of civilians/dependents subject to Service Law.

2b **Rough apportionment of where this constituency was stationed e.g. 40% Germany, 40 UK, 10 % Cyprus 10% various.**

Source: Defence Stats Air and A1 Ops

Year	Location
1990	No data
2000	No data
2010	1854
2016	4266

No data held by Defence Stats Air or A1 Ops prior to JPA (2006)
2010 This is the only data Defence Stats Air have (4.6% of Trained strength). A1 Ops cannot provide any further detail
2016 Breakdown on Sheet 2

2c **The number of Court Martials for each year.**

Source: www.gov.uk

Year	CM
1990	No data
2000	6
2010	24
2016	20

We cannot easily provide data on cases that elected for CM or those occasioned by the level of offence; this is not retrievable from JPA and to establish this level of information would be a lengthy process as we need to review each case
JPA does not record civilian cases and so, to establish any data we would need to approach the MCS if they were able to

2d **The average time from offence to CM**

Source: JPA and APC database

Year	Ave time to CM - days
1990	No data
2000	No data
2010	No data
2016	266

We have managed to obtain data for 2016 however, this was time consuming and involved interrogating every case. Earlier years data may be held by MCS.

2e **The number of Summary Trials**

Source: JPA

Year	Summary Trials
1990	No data
2000	No data
2010	403
2016	242

No data held pre JPA (2006)

2.f **The average time from offence to trial. It is accepted that this may simply not be recorded in the early years. If this is not retrievable then Services should show the guidelines which laid down the timescale in which Summary mattes should be completed. (Early equivalent of KPI)**

Source@ JPA

Year	Ave time to Trial - days
1990	No data
2000	No data
2013	45
2016	39

No reliable data pre 2013 so we have provided figures at this date. As an example of fallible data we have 57 cases in 2010 recorded as being dealt with prior to the date of offence.

3.a

Source: Defence Stats Air

Year	Legal Branch
1990	24
2000	32
2010	44
2016	45

Trained strength @ April each year

2016 Breakdown of where stationed

Source: A1 Ops

2016

Country	RAF Personnel
Afghanistan	104
Algeria	1
Ascension	23
At Sea SLQU	3
Australia	9
Austria	13
Bahrain	2
Bahrain Ops	8
Belarus	1
Belgium	7
Belgium NATO	9
Belgium Shape	75
Bosnia	3
Brunei	6
Brunei - Inc LSP	3
Bulgaria	1
Canada	13
Canada Alberta	13
China	2
Classified	7
Cyprus	1465
Czech Republic Vyskov	1
Denmark	1
Diego Garcia	2
Elsewhere	77
Estonia	1
Ethiopia	1
EUMS	8
Falkland Islands	647
France	50
Germany	79
Germany - Isolated Unit	21
Germany Ramstein	55
Gibraltar	32
Greece	161
Hungary	1
India	22
Iraq	74
Israel	1
Italy	41
Italy N - Rome	2
Italy Northern	34
Japan	1
Jordan	4
Kenya	17
Kuwait	20
Libya	1
Lithuania	1
Malaysia	5
Mali	1
Netherlands	53
New Zealand	7
Nigeria	75
Norway	11
Norway Bodo & Harstad	6
Oman	68
Pakistan	9
Portugal	1
Qatar	113
Saudi Arabia	59
Sierra Leone	1
Singapore	4
Spain	37
Switzerland	2
Tunisia	2
Turkey	10
UAE	181
Uganda	1
USA	497
Grand Total	4266

RAF LEGAL BRANCH – RFIs FOR SERVICE JUSTICE SYSTEM REVIEW

ISSUE

1. A narrative is sought which explains the increase in lawyers that has accompanied the shrinking of the Services.

STRUCTURE

2. Regular, Reserve, Civil Servant Numbers. For the FY17/18, DLS (RAF) is established for:

a. 45 officers. 2*, 1*, 4xOF5, 14xOF4, 12xOF3, 12xOF2 1xFTRS

b. Civil Servants. 7 Full-time (1xC2, 1xD, 4xE1, 1xE2) and 1 part-time (E1) civilian support staff.

3. **Recruitment**. The RAF model of recruiting is direct entry of qualified lawyers and we have occasionally recruited through in Service transfer (4 within the last 20yrs). The Branch has no 'misemployed' lawyers; all are engaged in the provision of legal advice (including the 1* and 2*). There is a significant training requirement to deliver a legal officer who can provide effective domain relevant legal advice to a forward commander on Operations. It takes approximately 2 years before an RAF legal officer is SQEP to deploy. The risk of insufficient training for Operations and inexperience is a breach of the LOAC/IHL or over-caution.

EMPLOYMENT

4. **Roles and Responsibilities**. The primary role for RAF Legal officers is support to operations; this is reflected in the 18 dedicated roles that directly support the RAF's operational output shown in the current DLS Organisation Chart at Annex A . A deployed RAF legal officer is involved in the kill chain and as a matter of law must be a combatant as he or she is integrated into the decision process for the use of offensive force. The Organisation Chart also shows there are only 3 roles in the Branch at the Service Prosecuting Authority. As the military has reduced in number, there has been a concomitant reduction in the number of RAF lawyers involved in the provision of advice on discipline. In 2001, 7 lawyers were assigned to the RAF Prosecuting Authority, in 2013 this had reduced to 4 lawyers (SPA) and currently sits at 3. Lawyers at the Regional Legal Offices do advise the Station Commanders in relation to summary dealing; however, this is only one area they advise upon. Offices in Cyprus and Germany do provide a defence function, but also advise on other areas. The number of DLS (RAF) lawyers has increased due to a requirement to expand into other areas as legal issues become increasingly the focus of commanders.

5. When not deployed or training for Operations, RAF legal officers provide in-house legal advice regarding: LOAC/IHL training to RAF personnel (a legal requirement), military aviation law including safety, ALARP and risk management, military discipline, administrative and public law, data protection and freedom of information and 'future' legal areas such as space and cyber.

6. Allied to our focus to support to operations, the DLS (RAF) geographic footprint has also changed. In 2002 DLS (RAF) were located in 4 UK and 6 overseas locations, currently DLS has a presence in 13 UK and 7 overseas locations emphasising the expansion into other legal areas such as the DSA/MAA, and 2 overseas locations that dealt primarily with discipline have been closed.

RAF data on Court Martials 2014 - 2017

Court Martial 2014 (not specified whether elected or not)	January	February	March	April	May	June	July	August	September	October	November	December
SR Numbers - Cases	11	21	15	8	7	10	4	5	2	7	1	1
Duration (Days) - Average	257	239	276	233	210	165	159	216	168	195	215	160

Court Martial Elected 2014	January	February	March	April	May	June	July	August	September	October	November	December
SR Numbers - Cases	2	1	2	1	2	6	3	1		8	4	4
Duration (Days) - Average	450	466	366	383	500	619	484	599		476	401	346

Court Martial Not Elected 2014	January	February	March	April	May	June	July	August	September	October	November	December
SR Numbers - Cases	12	27	28	21	31	43	27	22	27	44	35	22
Duration (Days) - Average	558	503	504	395	396	407	441	369	375	420	474	403

Summary Appeal Court 2014	January	February	March	April	May	June	July	August	September	October	November	December
SR Numbers - Cases	4	7	3	3	2	3	5	1	2	2	3	
Duration (Days) - Average	46	75	69	77	196	32	101	13	86	104	84	

Court Martial Elected 2015	January	February	March	April	May	June	July	August	September	October	November	December
SR Numbers - Cases	3	7	9	6	6	2	5	5	1	6	3	1
Duration (Days) - Average	361	371	440	437	485	571	288	348	273	239	361	594

Court Martial Not Elected 2015	January	February	March	April	May	June	July	August	September	October	November	December
SR Numbers - Cases	34	27	35	23	36	25	18	19	28	29	17	17
Duration (Days) - Average	435	430	476	508	551	445	389	450	490	468	494	352

Service Prosecution Authority 2015	January	February	March	April	May	June	July	August	September	October	November	December
SR Numbers - Cases					1	1						
Duration (Days) - Average					1300	617						

Summary Appeal Court 2015	January	February	March	April	May	June	July	August	September	October	November	December
SR Numbers - Cases	1	2	1									
Duration (Days) - Average	315	61	84									

Court Martial Elected 2016	January	February	March	April	May	June	July	August	September	October	November	December
SR Numbers - Cases	3	2	4		5	4	3	1	2	6	2	5
Duration (Days) - Average	336	232	249		182	447	345	342	277	272	207	288

Court Martial Not Elected 2016	January	February	March	April	May	June	July	August	September	October	November	December
SR Numbers - Cases	23	13	10	19	16	25	23	13	15	17	10	23
Duration (Days) - Average	371	387	379	319	330	314	298	260	210	253	261	250

Service Prosecution Authority 2016	January	February	March	April	May	June	July	August	September	October	November	December
SR Numbers - Cases	1		1			1						
Duration (Days) - Average	260		219			95						

Summary Appeal Court 2016	January	February	March	April	May	June	July	August	September	October	November	December
SR Numbers - Cases												
Duration (Days) - Average												

Court Martial Elected 2017	January	February	March	April	May	June	July	August	September	October	November	December
SR Numbers - Cases	1	1	3	1	3	2	3			1		
Duration (Days) - Average	283	156	104	131	150	155	180			110		

Court Martial Not Elected 2017	January	February	March	April	May	June	July	August	September	October	November	December
SR Numbers - Cases	1	1	2	1	3	2	3	1	1	2		
Duration (Days) - Average	243	228	194	201	199	175	172	161	45	129		

Service Prosecution Authority 2017	January	February	March	April	May	June	July	August	September	October	November	December
SR Numbers - Cases					1							
Duration (Days) - Average					203							

Summary Appeal Court 2017	January	February	March	April	May	June	July	August	September	October	November	December
SR Numbers - Cases												
Duration (Days) - Average												

RAF data on Summary Hearings 2014 – 2018

		2014	2015	2016	2017	2018
Jan	Case Counts	18	15	38	27	3
	Average	56	69	82	54	17
Feb	Case Counts	17	14	32	40	
	Average	107	76	47	108	
March	Case Counts	18	12	27	24	
	Average	24	91	70	91	
April	Case Counts	18	16	28	20	
	Average	48	101	51	73	
May	Case Counts	17	20	18	17	
	Average	31	87	67	67	
June	Case Counts	17	27	24	19	
	Average	87	87	70	63	
July	Case Counts	27	8	19	21	
	Average	84	64	95	65	
August	Case Counts	25	16	18	17	
	Average	86	57	53	69	
September	Case Counts	23	10	25	23	
	Average	66	105	81	58	
October	Case Counts	27	33	25	21	
	Average	97	79	106	39	
November	Case Counts	13	13	22	16	
	Average	95	65	53	51	
December	Case Counts	16	13	27	6	
	Average	90	98	80	24	

Month	No. of SH	Average Time To Trial for Month (Days)
Dec-15	13	98
Jan-16	38	82
Feb-16	32	47
Mar-16	27	70
Apr-16	28	51
May-16	18	67
Jun-16	24	70
Jul-16	19	95
Aug-16	18	53
Sep-16	25	81
Oct-16	25	106
Nov-16	22	53
Dec-16	27	80
Jan-17	27	54
Feb-17	40	108
Mar-17	24	91
Apr-17	20	73
May-17	17	67
Jun-17	19	63
Jul-17	21	65
Aug-17	17	69
Sep-17	23	58
Oct-17	21	39
Nov-17	16	51
Dec-17	6	24
Jan-18	3	17
Total	**570**	**66.61538462**

01 Dec 15 - 31 Jan 18	
Duration Factors	**Total SH**
Less then 1 Day	29*
1 to 30 Days	188
31 to 60 Days	94
61 to 90 Days	79
Greater than 90 Days	94
Other (Not Verdict Reported)	1
	* Data input errors made by personnel at Units

SUMMARY HEARING - Timeliness - 2017

(Timeliness is measured from 'Date Reported to Unit' to 'Date of Verdict')

Date run: 21/02/2018

	Num of SRs					Num of SRs
Person Servic	(a) Less than 1 day	(b) 1 to 30 da	(c) 31 to 60 d	(d) 61 to 90 d	(e) Greater th	
Army*		15	8	5	5	**33**
RAF	7	74	48	48	73	**250**
RN/RM*		1				**1**
Grand Total	**7**	**90**	**56**	**53**	**78**	**284**

* Personnel from other Services dealt with by the RAF

SUMMARY HEARING - Timeliness - 2016

(Timeliness is measured from 'Date Reported to Unit' to 'Date of Verdict')

Date run: 21/02/2018

	Num of SRs					Num of SRs
Person Servic	(a) Less than 1 day	(b) 1 to 30 da	(c) 31 to 60 d	(d) 61 to 90 d	(e) Greater th	
Army*	1	1	5	2	4	**13**
RAF	15	130	42	28	30	**245**
RN/RM*			2	1		**3**
Grand Total	**16**	**131**	**49**	**31**	**34**	**261**

* Personnel from other Services dealt with by the RAF

SUMMARY HEARING - Timeliness - 2015

(Timeliness is measured from 'Date Reported to Unit' to 'Date of Verdict')

Date run: 21/02/2018

	Num of SRs					Num of SRs
Person Servic	(a) Less than 1 day	(b) 1 to 30 da	(c) 31 to 60 d	(d) 61 to 90 d	(e) Greater th	
Army*	3	1	1	1	2	**8**
RAF	56	77	27	21	31	**212**
RN/RM*		1				**1**
Grand Total	**59**	**79**	**28**	**22**	**33**	**221**

* Personnel from other Services dealt with by the RAF

COMPARATIVE STATISTICS FOR THE ROYAL NAVY

1. Size of the Service Constituency subject to the Service Discipline Act operating at the time, broken down into Regulars, Reservists and Civilians:

1990

a. Regulars – 63,200
b. Reservists – 7,000 (Volunteer Reserves)
c. Civilians – It is not possible to obtain numbers for this category but the type of personnel covered would include NAAFI personnel on board Ship, Laundrymen on board Ship, Service Families in Gibraltar and Service Families in Hong Kong.

Note: A redundancy programme saw 2,400 Naval Service personnel made redundant by 1995.

2000

a. Regulars – 42,850
b. Reservists – 4,100 (Volunteer Reserves)
c. Civilians - It is not possible to obtain numbers for this category but the type of personnel covered would include NAAFI personnel on board Ship, Laundrymen on board Ship and Service Families in Gibraltar.

2010

a. Regulars – 38,730
b. Reservists – 3,215
c. Civilians – It is not possible to obtain numbers for this category but the type of personnel covered would include NAAFI personnel on board Ship, Laundrymen on board Ship, Service Families in Gibraltar and the civilian Policy Advisers in UKMCC Bahrain or Afghanistan. Some civilian contractors in Afghanistan/ Iraq would also be civilians subject to Service discipline in certain circumstances.

Note: A redundancy programme saw 1,020 Naval Service personnel made redundant in 2011 and the Naval Service reduce in size by 5,000.

2016

a. Regulars – 32,400
b. Reservists - 3430
c. Civilians - It is not possible to obtain numbers for this category but the type of personnel covered would include NAAFI personnel on board Ship, Laundrymen on board Ship, Service Families in Gibraltar and the civilian Policy Adviser in UKMCC Bahrain.

2. Rough Apportionment of where this Constituency was stationed:

1990

No reliable data available

2000, 2010 and 2016

Sum of Total		Strength Data Date			
World Area	Country	01-Apr-00	01-Apr-10	01-Apr-16	01-Jan-18
UK	England	36794	33027	26867	26889
	Scotland	4949	4322	4212	4074
	Wales	23	155	126	118
	Northern Ireland	175	34	4	8
UK Total		**41941**	**37538**	**31209**	**31089**
Europe	Austria		1		1
	Baltic States	7			
	Belgium	89	77	79	74
	Bosnia & Herzogovina		1	1	1
	Cyprus	6	29	21	22
	Czech Republic		4	3	3
	Denmark	8	1	1	
	Estonia			2	2
	France	8	9	19	16
	Germany	26	36	18	19
	Gibraltar	234	159	105	95
	Greece	2		1	1
	Italy	101	125	55	48
	Kosovo	26			
	Latvia				1
	Lithuania		1		
	Netherlands	34	37	32	36
	Norway	17	5	22	22
	Poland			1	1
	Portugal	45	22	13	13
	Romania			1	1
	Spain	3	3	2	1
	Sweden	1	1		
	Turkey	1		15	7
Europe Total		**608**	**511**	**391**	**364**
Rest of the World	Afghanistan		139	7	12
	Algeria				1
	Argentina	1	1	1	
	Australia	24	17	14	14
	Bahamas	2			
	Bahrain	1	89	73	72
	Bangladesh	1			
	Barbados	6			
	Brazil	2			1
	Brunei	14	14	10	9
	Cameroon				1
	Canada	18	11	6	7
	Chile	1	1	1	1
	China	1			1
	Colombia			1	
	Congo		2	1	1
	Diego Garcia	38	43	41	36
	Dubai	2	2	2	2
	Egypt	1		1	1
	Ethiopia		1	1	1
	Falkland Islands	43	64	45	39

	Ghana	1			1
	India	1	1	1	
	Indonesia				1
	Iraq		88	5	5
	Israel		1	1	1
	Jamaica		1	1	1
	Japan	1	1	1	1
	Kenya			2	2
	Korea	1			
	Kuwait	4	3	3	8
	Malaysia	2	1	1	1
	Mexico			1	2
	New Zealand	3		4	5
	Nigeria				3
	Not Specified	5			
	Oman	17	23	24	24
	Pakistan	2	7	1	2
	Philippines	1			
	Qatar		4	5	7
	Russia	4	3	2	3
	Saudi Arabia	11	15	20	19
	Sierra Leone	5	3	2	
	Singapore	3	4	3	3
	South Africa	3	3	2	1
	Sudan		1	1	1
	Thailand	1			
	Tunisia			2	1
	Turks & Caicos	2			
	UAE	1	1	5	7
	Ukraine	1	1	2	1
	USA	128	140	194	279
	Various			7	6
	Venezuela	1			
	Yemen		16	2	1
	Zimbabwe				1
Rest of the World Total		**353**	**701**	**496**	**586**
Grand Total		**42902**	**38750**	**32096**	**32039**

Sum of Total		**Strength Data Date**			
World Area	**Sea Shore Operational**	**01-Apr-00**	**01-Apr-10**	**01-Apr-16**	**01-Jan-18**
UK	Operational	6472	8422	8006	7624
	Sea	13286	12078	9470	9047
	Shore	22183	17038	13733	14418
Grand Total		**41941**	**37538**	**31209**	**31089**
	%Sea/Op	47%	55%	56%	54%

Note: This data is MoD Internal Management Information and not for release into the public domain. If there is a need to release the information more widely it must be cleared through Defence Statistics (JSP 200).

3. The number of Courts Martial:

Year	Number of CM	Number of Uniformed CM	Number of Civilian CM	Number of Elections	Number of Referals from CO	Number of CM Referred for seriousness	Number of Summary Appeals
1990	35*	-	-	-	-	-	-
2000	57	-	-	-	-	-	-
2010	68	68	1**	NK***	NK	NK	NK
2016	58****	58	0	12	11	31	6*****

* This number seems to have been abnormally low. Number for 1991 is 44, 1992 is 74, 1993 is 108 and 1994 is 105.

** Prosecution of a NAAFI employee during the same court martial as a sailor, hence it did not increase the number of CM to 69 for the year.

*** Very little CM detail was recorded in 2010.

**** Four of the 58 followed elections in 2015 so do not reflect in the 'Number of Elections' figure for 2016.

***** One of the six was withdrawn so only five were finally appealed.

4. The average time from offence to CM:

Year	Average time from offence to CM
1990	180 days
2000	N/K*
2010	N/K**
2016	579 days***

* Date of incident not recorded in records.

** Date of incident only rarely recorded on JPA so data is unreliable.

*** Average time for investigation was 250 days. Average time from completion of investigation to CM was 329 days.

5. The number of Summary Hearings:

Year	Summary Hearings
1990	N/K*
2000	N/K*
2010	1394
2016	633

* Records held are incomplete. Anecdotally it is believed that the number of Summary Hearings was approximately 3000. This preceded the introduction of Minor Administrative Action in the RN in 2007 which dramatically reduced the amount of indiscipline dealt with at summary trial/hearing. To date we have been unable to establish whether 6-monthly

punishment return records have been archived. If they have not been destroyed and can be sourced, the RN will be able to provide relevant confirmed figures.

6. The average time from offence to Summary Trial/ Hearing (SH):

Year	Average time from offence to SH
1990	N/K*
2000	18 days**
2010	N/K***
2016	77 days****

* Date of incident only rarely recorded (4 cases) so data is unreliable.

** This figure is based on a date of incident being available for approximately half of the cases, therefore the data is incomplete.

*** Date of incident only rarely recorded on JPA so data is unreliable.

**** Average time for investigation was 36 days. Average time from completion of investigation to SH was 41 days. The introduction of Better Case Management has dramatically reduced the timelines for SH, as evidenced in RN disciplinary statistics for 2017.

7. Guidelines for timely completion of Summary Matters:

2017 – In accordance with Better Case Management, 'In straightforward cases, the target timeline is 21 days after a complaint or report of an offence. Judge Advocates in the CM will make some allowance for the impact on a Service Police investigation of deployments or the complexity of a case… The SPA should direct straightforward cases within 21 days, and all but very complex cases within 28 days, of receipt of a case referral from the Service Police or from the CO… Other than in exceptional circumstances, on receipt of a case referral from the Service Police any Summary Hearing is to be held within 21 days.'[23]

[23] BR 3, Chapter 20, para 2043.

Statistics on Service Lawyers – Royal Navy

Year	Number of uniformed Lawyers	Lawyers in a Legal Job
1990	29	9
2003*	31	18
2010	33	23
2016	48	28 ⅔

***** No record available for 2000 and barristers not included in the Navy List for 2001 or 2002.

A. Number of uniformed lawyers (for the Navy both the number of lawyers overall and the number of lawyers in "LEGAL" jobs.)

When dealing with these statistics it would be helpful if Services could add explanatory notes e.g. for the Navy when the role of judging at CM disappeared the slack created may have been taken up by the Service Prosecutors/SPA. For Army and RAF the loss of large constituencies aboard e.g. BAOR may have create slack taken up by the need to provide the same advice in UK/ SPA etc. Overall there will need to a narrative which explains the increase in lawyers that has accompanied the shrinking of the Services.

Narrative

In 1990, the role of Royal Navy lawyers was principally to support naval commanders in the exercise of their disciplinary functions and to prosecute, defend and (in the case of more senior barristers who were 'ticketed' to do so) judge in naval Courts Martial.

By 2003, the Naval Prosecuting Authority (NPA) had been established following a successful ECHR challenge to the former system in which the local Flag Officer as the Court Martial convening authority appointed his own lawyer to prosecute the Court Martial. In addition, the Summary Appeal Court had been created in which the NPA acted as the respondent. Of note, by 2003, a naval barrister was serving in a dedicated operational law post for the first time providing advice to senior operational commanders. A further senior naval barrister served in MOD Centre on the Armed Forces Bill Team working on what would become AFA06.

By 2010, and in response to command pull, there was an increasing requirement to provide operational law advice to senior commanders on Law of Armed Conflict, Law of the Sea, etc. matters. As a result, naval lawyers were required to fill new posts on UK joint staffs and on international maritime staffs, as well as new posts supporting operational naval commanders within Navy Command and providing training to Naval Service personnel in fulfilment of international legal obligations. The NPA posts had migrated to the SPA when it was established as part of AFA06 reforms. Notwithstanding the successful ECHR challenge which resulted in the demise of naval judge advocates in 2004, it should be noted that those senior naval barristers who served as judge advocates at Courts Martial often did so whilst serving in non-legal posts. For those that were in legal posts, again it was only one element of their job. The increasing command pull for legal advice in other areas more than compensated for any reduction in time spent sitting as a uniformed judge advocate

By 2016, new legal posts had been created to support areas of activity where the command now sought legal advice. This included compliance activities such as legal advice on health and safety legislation, the Data Protection Act and the Freedom of Information Act. The expansion of employment law which applies to the Armed Forces (e.g. new areas of discrimination law) has also necessitated an increased requirement for legal support to the command in that area. Equally, the creation of a statutory Service Complaint system, and the independent oversight of that system by first the Service Complaints Commissioner and then the Service Complaint Ombudsman, has resulted in further command pull for legal advice. Furthermore, the increasing drumbeat of short term exercises (e.g. Exercise Joint Warrior) and deployments (e.g. CTF 150 in the Gulf) in which the deployed maritime commander has mandated the requirement for a LEGAD has necessitated the creation of further legal posts to facilitate that requirement.

In summary, the role of a naval lawyer in 2016 is very different to that of 1990. Notwithstanding the reduction in the size of the Royal Navy in the past quarter of a century, there has been a steadily increasing command pull for legal support in areas where previously there was no requirement.

B. Deployment of such lawyers (e.g. BAOR. Cyprus, CinCFleet , SPA , MOD etc.) and roles (e.g. advice to Command, MOD policy , Prosecution etc.)

1990

RN. 9 lawyers.

MOD Centre/Joint. Nil.

International HQ posts. Nil.

2003

RN. 16 (including 4 x Naval Prosecuting Authority - prosecution).

MOD Centre/Joint. 1 x PJHQ. 1 x AFBT (MoD legal policy).

International HQ posts. Nil.

2010

RN. 13.

MOD Centre/Joint. 5 x SPA (Prosecution). 1 x PJHQ. DCDC x ⅓. DCDC x ⅔.

International HQ posts. 1 x NATO. 1 x EUNAVFOR. 1 x CMF Bahrain.

2016

RN. 18.

MOD Centre/Joint. 4 x SPA (Prosecution). 1 x PJHQ. 1 x IHAT. DSA x ⅓. CDP x ⅓ (MOD legal policy). DCDC x ⅔. DCDC x ⅓.

International HQ posts. 1 x NATO. 1 x EUNAVFOR. 1 x CMF Bahrain.

Note. Unless otherwise annotated, all above posts are engaged in providing legal advice to Command.

Summary Hearings (SH)

Month	No. of SH	Average Time for RNP Investigation (days)	Average Time for Unit Investigation (days)	Average Time Completion of Investigation to SH (days)	Average Total Time Taken (days)
Jan-16	19	60.5	16.67	33.37	86.95
Feb-16	64	27.34	12.59	35.27	58.69
Mar-16	48	32.44	23.75	40.71	70.25
Apr-16	54	67.65	42.07	47.81	108.83
May-16	51	54.11	28.67	47.27	90.9
Jun-16	49	46.65	12	56.71	90.44
Jul-16	62	29.12	14.54	41.06	67.13
Aug-16	23	42.33	25.4	52	90.65
Sep-16	50	30.55	40.2	58.06	90.54
Oct-16	60	42.1	63.8	35.43	81.15
Nov-16	71	33.76	19.66	30.97	58.97
Dec-16	67	31.39	29.88	26.79	57.6
Jan-17	52	19.02	10.9	42.56	60.02
Feb-17	51	26.79	25.53	39.1	65.37
Mar-17	66	29	24.1	41.17	68.68
Apr-17	40	20.28	15.42	37.2	55.53
May-17	41	27.85	5.75	52.68	76.22
Jun-17	58	25.03	10.23	47.45	65.84
Jul-17	57	22.02	41.62	33.02	59.51
Aug-17	30	28.48	6.67	29.17	51.1
Sep-17	39	21.38	14.57	51.33	71.49
Oct-17	39	15.85	15.33	38.28	54.05
Nov-17	60	27.89	10.25	40.02	62.39
Dec-17	36	17.29	8.53	28.64	42.28

Courts Martial (CM)

Month	No. of CM	Average Time for RNP Investigation (days)	Average Time Completion of Investigation to CM (days)	Average Total Time Taken (days)
Jan-16	4	131.75	320	451.75
Feb-16	7	52.57	294	346.57
Mar-16	6	259	331.33	600.33
Apr-16	8	136.25	463.5	599.75
May-16	6	192.17	239.5	431.57
Jun-16	5	86.4	337.6	424
Jul-16	3	109.33	330.67	440
Aug-16	3	266.33	116.67	282
Sep-16	5	138.6	524.8	663.4
Oct-16	4	237.5	448	685.5
Nov-16	4	204.5	257.25	461.75
Dec-16	3	98.67	225.33	324
Jan-17	7	99.43	226.43	325.86
Feb-17	1	60	313	373
Mar-17	18	104	198.87	302.87
Apr-17	2	111.5	236.5	348
May-17	2	383.5	246	529.5
Jun-17	2	92	384.5	476.5
Jul-17	15	103.2	281.53	384.73
Aug-17	0	0	0	0
Sep-17	5	98.4	299	397.4
Oct-17	3	47.33	220.67	268
Nov-17	5	121.4	414.4	535.8
Dec-17	0	0	0	0

REDCAP INVESTIGATION FIGURES - does not include breakdown between SH and CM

Month	Average time in days taken to investigate Standard Listed Offences
Jan-16	45
Feb-16	43
Mar-16	51
Apr-16	37
May-16	46
Jun-06	47
Jul-16	49
Aug-16	27
Sep-16	20
Oct-16	21
Nov-16	20
Dec-16	25
Total Average for 2016	35.51

Month	Average time in days taken to investigate Standard Listed Offences
Jan-17	21
Feb-17	26
Mar-17	23
Apr-17	26
May-17	22
Jun-07	21
Jul-17	26
Aug-17	29
Sep-17	23
Oct-17	22
Nov-17	26
Dec-17	28
Total Average for 2017	24.41

SPA Sexual Offences Statistics

		2015	2016	2017
Rape	How many allegations of rape (contrary to s1 SOA 03 or s1 SOA 56) were referred to the SPA?	31	36	19
	How many of the allegations of rape (contrary to s1 SOA 03 or s1 SOA 56) referred to the SPA were prosecuted?	17	18	9*[24]
	How many of those cases of rape (contrary to s1 SOA 03 or s1 SOA 56) where we prosecuted was the finding guilty?	3	7	2*[25]
	Conviction rate (i.e. % of prosecuted cases where guilty verdicts returned)	18%	39%	
Assault by penetration	How many allegations of assault by penetration (contrary to s2 SOA 03) were referred to the SPA?	9	7	5
	How many of the allegations of assault by penetration (contrary to s2 SOA 03)referred to the SPA were prosecuted?	4	4	3
	How many of those cases of assault by penetration (contrary to s2 SOA 03) where we prosecuted was the finding guilty?	2	2	1*[26]
	Conviction rate (i.e. % of prosecuted cases where guilty verdicts returned)	50%	50%	
Sexual assault or indecent assault	How many allegations of sexual assault (contrary to s3 SOA 03) or indecent assault (contrary to s14 or s15 SOA 03) were referred to the SPA?	38	60	36
	How many of the allegations of sexual assault (contrary to s3 SOA 03) or indecent assault (contrary to s14 or s15 SOA 03) referred to the SPA were prosecuted?	21	36	16*[27]
	How many of those cases of sexual assault (contrary to s3 SOA 03) or indecent assault (contrary to s14 or s15 SOA 03) where we prosecuted was the finding guilty?	17	22	5*[28]
	Conviction rate (i.e. % of prosecuted cases where guilty verdicts returned)	81%	61%	

[24] Further 3 are still awaiting a decision to direct/non-direct.
[25] Further 5 still awaiting trial. I of the indicated 2 guilty trials was convicted in Jan 18.
[26] Further 1 still awaiting trial.
[27] Further 6 still awaiting a decision to direct/non- direct.
[28] Further 7 still awaiting trial.

Caveat

The above figures use the year baseline of when the referral was received. Therefore the number of directions is related to the original referrals; not the actual number of directions that year. Similarly the number of trials is related again to the original referrals not the number of trials for that year.

NOTES, regarding Sexual Assault (or Indecent Assault) directions,

In 2015, a further 3 were directed but not charged as Sexual Assault,

In 2016, a further 2 were directed but not charged as Sexual Assault,

In 2017, a further 1 was directed but not charged as Sexual Assault.

Court Martial Appeals Court Statistics 2013 - 2017

CMAC - APPEALS HEARD BY FC

	C					Total
	2013	2014	2015	2017	Total	
Allowed	1	0	0	1	2	2
Dismissed	0	3	4	1	8	8
Total	1	3	4	2	10	10

	S						Total
	2013	2014	2015	2016	2017	Total	
Allowed	4	7	0	1	4	16	16
Dismissed	2	2	4	2	1	11	11
Total	6	9	4	3	5	27	27

	159		Total
	2013	Total	
CON	2	2	2
REV	2	2	2
Total	4	4	4

	INT					Total
	2013	2014	2015	2016	Total	
REV	1	1	1	1	4	4
Total	1	1	1	1	4	4

	PRA			Total
	2015	2016	Total	
REV	3	1	4	4
Total	3	1	4	4

Notes

Appeals against conviction *and* sentence are included in both the conviction and sentence figures – as, for example, the conviction appeal may be dismissed but the sentence appeal allowed.

A result of “con” means the trial judge’s order was confirmed (dismissed), a result of “rev” means it was reversed (allowed). INT stands for Interlocutory Appeals and PRA stands for Prosecution Appeals.

Annex E: Transfers Between Jurisdictions

The Review Terms of Reference contain at the second bullet point of sub paragraph b, a question about the transfer of cases between the SJS and the CJS. The concept of such transfers has received support from all the SJS authorities who responded to the initial trawl for information and also from other consultees, including some who see no place for civilian crimes to be dealt with by the SJS. To get such a broad agreement indicates that there may not be universal agreement or understanding as to what the ability to transfer may mean or as to how it should be used if it were to be made possible.

The current situation.

At present transfer between jurisdictions or, perhaps more accurately, allocation to a jurisdiction, takes place before charge. The question only arises if the civil courts in England or Wales, Northern Ireland, or Scotland have jurisdiction to try the offence (this will normally, but not always, mean the offence was committed in the relevant part of the UK). This allocation is governed by the Prosecutors Protocol for England and Wales. No Protocol exists in Scotland or in Northern Ireland.

The cut-off point for transfers out of the civil system is likely to be arraignment in the Crown Court (or the equivalent in the magistrates' court), as after that a verdict must be reached and any proceedings in the SJS would be blocked. It is not clear how then cases would enter / re-enter the SJS, which only envisages the DSP / Commanding Officers (CO) taking forward cases after referral from Service Police / CO. The only way to transfer a case would be for the civilian police to refer the matter to Service Police, who could then refer the case to the SPA. In practice this would likely require a new investigation.

In the current situation, there does not seem to be any obvious way for cases to be transferred out of the SJS once Service Police have begun an investigation, they are then under a duty to refer to the CO or SPA.

One point to note is that Service Police powers are premised on there being an investigation into offences under the AFA 2006. It would be very complex for Service Police to use such powers and then transfer a case to the civilian police (along with evidence obtained via those powers). Even if everything is done in good faith it opens the way for challenge to both the Service Police and the civilian proceedings. This might suggest a re-investigation is the best approach, perhaps taking account of material generated by the Service Police. But even then there would be complex issues arising from the need for third-party disclosure etc. by Service Police in the civilian courts. The most robust solution legally (under the present system) is for decisions on who is responsible for investigations and which system cases will be tried in to take place at the very beginning of a case, i.e. when a crime is reported or shortly thereafter.

Transfer Mechanics.

The general support for transfer in responses to the Review Terms of Reference leads to a consideration of how the mechanics of a transfer might be achieved. If, for instance, the

investigation and trial of a matter that started in the SJS were to transfer to the CJS then who would take it through to trial? While it might be expected that the civil police and CPS would take the matter over completely, this in turn might depend upon the stage at which the transfer took place. If it were at an early stage and shortly after charge then the appropriate Police Force and the CPS could take the case over, reinvestigate anything already achieved if it were thought necessary, and then, proceeding normally, could prepare it and take it to the appropriate court as already noted above. If however an SJS case had been brought to the point of, or close to the point of, trial and it was then thought appropriate to transfer it into the CJS there could be difficulties. Such difficulties are likely to arise in the more serious matters where the trial forum would be at Court Martial although they may also feature at the Summary dealings or magistrates' courts. It is considered that currently the SPA could not act as the Prosecuting Authority and present a case at Crown Court. It is also possible that the SP and SPA disclosure regime does not comply with Article 6 ECHR or the requirements for a Crown Court trial (or the Scottish equivalent).

Different court rules would also apply. Accordingly the case, despite its advanced state of preparation, would have to be taken over by the civil police and CPS for presentation to the Crown Court. However it is possible that by that stage of the proceedings it may be far too late for the Civil Police to re-investigate or further investigate the matter, particularly if it had occurred abroad; indeed they may not wish to do so if it were abroad and in an area of conflict or sustained hostile activity.

If there is to be a transfer then it may be achieved simply by the power to move a case from one jurisdiction to another, accepting that this entails the complete change of both investigatory and prosecutorial authorities to that of the receiving jurisdiction. Alternatively, it could mean that powers are taken so that Court Martials are be able to take trials prosecuted by the CPS and civil police and the Crown Court to take matters prepared and presented by SP and SPA. Either course is likely to entail some considerable adjustment not only to primary and secondary legislation together with regulations, but to the training and practises of both SP and the lawyers of the SPA which may have to be revised.

What use would be made of the ability to Transfer?

Some consultees would wish this ability to be used to transfer to the CJS all murder, manslaughter and rape charges originating from offences committed abroad. This would replicate the position that this Review recommends should be in place for such offences when committed in the UK. It appears that the requirement as seen by some SJS authorities is largely to transfer some cases to the SJS for sentence. It is understood that on occasion civil courts pass sentences affecting operational effectiveness e.g. a lengthy Community Order which restricts the mobility of the offender. Also the civil courts do not have the same attitude to drug possession or use as do the Services. While therefore the transfer of at least some cases to the SJS for sentence is superficially attractive it must be recognised that the general principle that a court which hears a case should also sentence it will not lightly be set aside by the CJS. The identification of appropriate cases by the civil courts might well prove difficult. However, the attendance of an officer at court to provide information and assist the court in sentencing or assist the court in deciding to transfer if the power to do so were to exist.

Further Work.

Further work is required and will be the subject of a Recommendation. This work to be conducted jointly by both Working Groups should identify inter alia:

i. The purposes for which the ability to transfer is sought.
ii. The mechanics of transfer and the scope of the changes in legislation, regulation and training that would be required.
iii. The attitudes of non SJS authorities to the obligations, commitments and the changes in practices that the ability to transfer might entail.
iv. Best practice for informing and advising civil courts of service matters and attitudes when the courts are considering the sentencing of Service personnel.

Annex F: Governance of the Service Justice System

A number of issues were raised in relation to the governance of the Service Justice System (SJS) during Phase 1 of the SJS Review, these were:

- Clarity of governance and in the decision-making process, including the number of meetings covering similar issues without reaching a resolution;
- The need for representation of each of the Services in making policy decisions and assurance to ensure operational effectiveness;
- The need for the correct seniority and expert advice at the appropriate level;
- A lack of clarity on the role of the Judiciary (JAG) and judicial independence in governance of the SJS;
- A lack of a dedicated secretariat.

In the SJS there is a need for a senior level function to advise and support the Minister in policy decision making; address cross-agency operational issues; identify gaps in delivery and; share best practice. The Service Justice Board (SJB) is the forum where this should happen.

The SJB should be focused on strategic level issues and not taking on too many diffuse items at any one time. The SJB should be active in promoting cross-system collaboration and collective action, in particular cross-cutting services, such as victim services, where more collaboration could be beneficial. The SJB should also lead in creating a better understanding of the workings of the SJS, for example, how long cases take and how much the SJS costs.

As a comparator, in the civilian Criminal Justice System, the Criminal Justice Board (CJB) has a purpose to foster collaborative leadership across the criminal justice system. Its members hold the levers to enact system-wide change, and it is the most senior cross-criminal justice system forum through which to address issues that have a system-wide impact. The CJB is Chaired by the Lord Chancellor & Secretary of State for Justice, members include the Home Secretary, the Attorney General, the President of Queen's Bench Division, the Senior Presiding Judge and heads of the Criminal Justice agencies (a full list of current SJB members is at **Appendix A**).

Under a previous remit (during the Coalition Government of 2010 to 2015) the CJB, focussed on performance to make the criminal justice system more effective and efficient. Given this focus and the need to maintain judicial independence, the judiciary were not members of the CJB but the Senior Presiding Judge was invited to attend meetings as an independent observer.

The CJB cannot be replicated exactly by the SJS as its focus is on system wide change and impact. The CJB is also a consequence of political responsibility for the system being split between three Ministers (Justice Secretary, Home Secretary, Attorney General). Though there are independent agencies (and Attorney General has a superintendence function in relation to prosecutors), the responsibility for the SJS is with MOD Ministers. However, the CJB can be used as a guide for the SJB in particular with reference to the status of the JAG and maintaining judicial independence.

It is vital that the JAG maintain his independence and distance from the MoD and the Command Chain; the ECHR compliance of the Court Martial system is based upon this independence and this in turn mirrors the separation of powers that underpins judicial independence in the UK. If a JAG is, for instance, to give independent evidence to the Parliamentary Select Committee in which he may differ from the line taken by MoD or may give a different interpretation of some legal matter he cannot also be in the position of offering formal (legal) advice to the Minister. Equally the JAG must be free and untrammelled in his ability to express his view and his legal interpretation of matters when in court.

The SJB should be able to benefit from the unique experience and knowledge of the SJS that the JAG will possess. Like the SPJ in the previous constitution and the PQBD and SPJ in the current constitution of the CJB, the JAG must also be able to put the judicial view on policy matters affecting SJS performance and delivery. The JAG may also be able to assist the SJB with informal advice as to the legal impact of any policy matters that may be under discussion but not so as to cross the line into a position of giving the SJB or Minister formal legal advice – a responsibility which rests with others (namely MoD Legal Advisors).

It worth noting that it is a constitutional principle in the UK that there is an independent judiciary and Article 6 ECHR (right to fair trial) requires civil and criminal matters to be tried by an "independent" tribunal. However, it is highly doubtful that membership of the SJB alone would offend these principles.

There is a possibility that an issue might arise in particular Service justice proceedings which JAG had considered as a member of the SJB. For example, the ECHR compatibility of a policy proposal discussed by the SJB may later become a live issue in proceedings. It would be for the JAG to consider in each case whether the "real possibility of bias" test required him to recuse himself.

Recommendations

- A revised Terms of Reference for the SJB with clearer roles and responsibilities that set out its purpose, attendees and meeting frequency. These Terms of Reference are agreed by the SJB at its first meeting under the new configuration.
- The SJB meetings are chaired by MoD Minister (Min DPV), other standing members are the MoJ / Home Office Minister for Criminal Justice, the Solicitor General, all three Services at PPO level and their respective Provost Marshals, CDP, the Director of Service Prosecutions, and Director of the MCS also attend. The JAG has a standing invitation to attend meetings as an independent observer to maintain judicial independence, other observers are invited to attend meetings as required by agenda items.
- The SJB meets formally three times a year and the agenda for each meeting is set by the Steering Committee (see below).
- The SJB is supported by a Steering Committee at 1* or 2* level plus deputies e.g. Director Naval Legal Services, Director Army Legal Services, Deputy Director Service Prosecution Authority etc. and the Office of the Advocate General is present as an observer. This group prepares the papers for the SJB which are each sponsored and then presented by a member of the SJB at its meetings. The Steering Committee sets the agenda for the SJB and meets at least six times a year.
- The Steering Committee is supported by a number of subject specific working groups, including the Service Justice Executive Group (SJEG), the Service Court Rules Review Committee (SCRRC) and other groups as required to meet the needs

of the SJB. Each working group is sponsored by a member of the SJB to maintain focus and has its own terms of reference.

- A dedicated secretariat is provided to the SJB by People Secretariat, MoD.

APPENDIX A

CJB Membership

Membership

Chair:

- Lord Chancellor and Secretary of State for Justice

Members:

- Secretary of State for the Home Department
- Attorney General
- President of the Queen's Bench Division
- Senior Presiding Judge
- Chair, National Police Chief's Council
- Director of Public Prosecutions, CPS
- Commissioner, Metropolitan Police Service
- Police and Crime Commissioner Representative
- Director General, Justice and Courts Policy Group, MoJ
- CEO, Crown Prosecution Service
- CEO, National Offender Management Service
- CEO, HM Courts & Tribunals Service
- Director General, Crime Policing and Fire Group, Home Office
- Director General, Prisons and Offender Management Policy, Ministry of Justice
- Director/ Deputy Head of the Office, Attorney General's Office

Members to attend as required:

- CEO, Legal Aid Agency
- CEO, College of Policing
- Commissioner for Victims & Witnesses
- Head, National Crime Agency
- Chair, Youth Justice Board