

REPORT OF THE HENRIQUES REVIEW INTO THE FRAMEWORK, PROCESSES AND SKILLS THAT THE SERVICE JUSTICE SYSTEM REQUIRES FOR OVERSEAS OPERATIONS

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Introduction

1. I fully concur with His Honour Shaun Lyons' conclusions that there remains a need for a separate system of military justice and that the Service Justice System is broadly fit for purpose. The overriding challenges in leading this review have therefore been to fashion a Defence Serious Crime Unit with the size and several capabilities necessary to investigate allegations emanating from overseas operations; to ensure that such a Unit was independent and accountable to a person or persons independent of any military command within the Services and independent of those it had a duty to investigate; to ensure that the Service Justice System remained capable of maintaining discipline, efficiency and morale in our Armed Forces during overseas operations whilst simultaneously providing a fair and considerate process for those serving their country often in dire circumstance; to learn from past failings and set the context for the future; and to provide a system engaging the highest professional standards of policing, prosecuting and adjudicating in order to discharge our duties under domestic and international law to investigate and prosecute crimes as quickly and efficiently as possible, without compromising thoroughness or integrity.

2. I sincerely believe that the recommendations I have made will meet these challenges. As I hope my review demonstrates, these recommendations are made having learned lessons from Iraq and Afghanistan. Investigations and subsequent processes failed to bring all those who had committed offences to justice and likewise failed to exonerate those who were wrongly suspected. Chapter 1 highlights the several shortcomings and several lessons either learned or to be learned.

3. Chapter 2 describes the context in which this review is written, including reference to the Armed Forces Bill, the Overseas Operations Act and the Integrated Review. It should not be thought, nor advanced in argument by those resisting change, that any recommendation I have made has overlooked the Integrated Operating Concept and possible cuts in the numerical strength of the Service police.

4. Chapter 3 describes a vision of future warfare with invaluable contributions from the Chief of the Defence Staff and Professor Michael Clarke. Read together with the Defence Command Paper and the Integrated Operating Concept the imperative for change is compelling. Modernisation, professionalism and specialisation must be at the forefront of every limb of the Service Justice System. This is no time for stubborn resistance to change. Investigating and prosecuting allegations connected with the use of new technologies and

capabilities will present continuous challenges for the Service Justice System. Whilst evolving social values and contemporary legal norms will always drive some degree of change, the Future Operating Environment presents a more compelling case for a thoroughly modern and properly resourced elite investigative Unit.

5. Chapter 4 details in digestible form the legal duties created by domestic and international law which our Service Justice System must fulfil. I cannot overemphasise the fact that during many hours of interview I observed a widespread desire to expose and punish wrongdoing by Service personnel where it occurs. At the epicentre of this review is a determination that every tool has been engaged to ensure that those who commit criminal acts on overseas operations are brought to book whilst those facing vexatious or fabricated allegations are exonerated after a prompt and full investigation.

6. Chapter 5 details the Defence Serious Crime Unit. Operational independence, independent oversight, accountability and transparency are critical. I have agreed with the Chief of the Defence Staff and Chief of Defence People that this Unit will stand up on 1 April 2022, and that it should evolve to meet future challenges and demands. I hope that the very limited opposition to this development will now appreciate the absolute imperative to create a tri-Service elite Unit able to investigate the most sophisticated and serious crime in a fast changing world. There will remain General Policing Duties within the three Service police forces as a first step in a career as an investigator. It is imperative that the most capable investigators form this Unit. I am unequivocally opposed to any three-tier system, i.e. retaining an element of separate Special Investigation Branches in addition to General Policing Duties and the Defence Serious Crime Unit, for reasons set out in the review.

7. Chapter 6 deals with improving the timeliness and handling of investigations. It makes the obvious point that an investigation can only commence if or when Service police are notified of incidents or allegations. Several recommendations are made including the creation of a non-criminal Service offence of failure to report offences under sections 51 and 52 of the International Criminal Court Act 2001 (i.e. genocide, crimes against humanity, and war crimes) to the Service police. I regard the creation of an improved Operational Record Keeping System as a matter of vital importance, a view shared by the Chief of the Defence Staff. Critical contributions from His Honour Jeffrey Blackett and Lord Thomas of Gresford are gratefully adopted with only minor amendments. They will expedite investigations and provide oversight by the Director of Service Prosecutions and judicial oversight by the Judge Advocate General. I have proposed protocols for both Article 2 and Article 3 investigations. I am confident that protocols adopting the principles I have outlined will be agreed, failing which legislation may

be needed.

8. Chapter 7 commentates on the Service Prosecuting Authority and the Service Courts. The plea emanating from both the Director of Service Prosecutions and the Judge Advocate General was for appropriate software and technology to be made available in order to permit them to operate to maximum efficiency. They are both independent office holders and highly respected members of the legal profession. They have the necessary professional skills and facilities to prosecute and try cases of the greatest complexity.

9. Chapter 8 contains my plea for a Defence Representation Unit. We owe a compelling duty to Service personnel who have been engaged in overseas operations (as defined in section 1(6) of the Overseas Operations (Service Personnel and Veterans) Act 2021) to ensure that they are competently represented if they are subsequently accused of a criminal offence emanating therefrom. This representation should be provided free of charge to both Service persons and veterans. We owe a similar duty to all Service personnel accused of criminal offences to ensure that they receive fully informed advice before accepting a Summary Hearing or electing for trial at Court Martial. Assisting Officers must be properly trained if they are to provide real assistance.

10. Chapter 9 considers the controversial matter of Summary Hearings of criminal offences. Whilst I do not disagree that the ability to deal summarily with offences is critical to the maintenance of military discipline and operational effectiveness, I have concluded that the process is not sufficiently swift. Commanding Officers lack the necessary legal training to investigate, to charge, to conduct hearings and to adjudicate disputed criminal charges, and the need to obtain legal advice at each stage of the process adds delay. I fully understand that the Commanding Officer must be 'at the heart of unit discipline'. I propose that they continue to hear non-criminal Service offences, disputed or admitted, and to pass sentence if defendants are found guilty of criminal offences by Judge Advocates (sitting as Military Magistrates). I make a number of recommendations relating to early charging and Service police being authorised to charge.

11. I sincerely hope that this report will have a degree of strategic impact and that it will contribute to the further evolution of certain aspects of Service justice. It follows tradition and is written in the first person singular but is a team production. I have been hugely assisted by Dr Ben Sanders LL.M, described as Secretary to the Review, but very much more. As former deputy head of Judicial Reviews at the Ministry of Defence, he has unrivalled knowledge of events in Iraq and Afghanistan and is more of a lawyer than I will ever be. My military adviser,

Lieutenant-General (Retired) Philip Jones CB CBE DL has been a great support and invaluable member of this team. He served in the British Army in command and staff positions at all levels including more than 15 operational deployments around the world. This included being embedded in the United Nations three times and NATO commands twice. He spent almost four years in Afghanistan. With understanding and tolerance he has guided me through acronyms, ranks, protocols and standing orders. Victoria Ailes, of the Independent Bar, has ensured that I was the least proficient lawyer in this team and demonstrated a complete understanding of the maze of legislation touched upon in this report. I will follow her career with interest.

12. I have received enormous help and support from members of the Armed Forces past and present. In over 100 hours of interview I was enthused by the pride, commitment and ability of those who selflessly serve our country. I hope this report contributes to their future well-being. We have the most compelling moral obligation to ensure that they suffer no injustice in our Service Justice System.

Sir Richard Henriques

29 July 2021

Executive summary

Introduction

1. His Honour Shaun Lyons concluded in his 2018 review that a separate system of military justice remains necessary, and that the Service Justice System “*plays an essential role in the operational effectiveness of the Armed Forces.*”¹ Justice Morris Fish recently reached the same conclusion following a thorough review of the Canadian military justice system:- “*A separate system of military justice is demonstrably justified by the military’s need to maintain discipline, efficiency and morale.*”²

2. I have been greatly assisted by the conclusions of both these reviews. The introduction to Justice Fish’s review struck a chord:-

*“Members of the [Canadian Armed Forces] accept danger to themselves in order to protect others at home and abroad. Canada owes them more than a minimally acceptable system of justice. They are entitled to “a better system than merely that which cannot be constitutionally denied”. As a matter of principle, Canada is morally obliged to provide it.”*³

3. I agree wholeheartedly with Justice Fish’s sentiment, and with his observation that:-

*“A healthy system of justice must reflect not only the evolving social values of society at large, and not only the evolving cultural attitudes of the [Canadian Armed Forces] itself, but also the emerging shift in its ethnic and gender composition. It must also take into account any structural or operational requirements dictated by the changing nature of its foreign and domestic activities.”*⁴

4. Our Armed Forces are also entitled to a system of justice that is not merely minimally acceptable. Where the Service Justice System deviates from the criminal justice system (as it inevitably must, since it must be capable of operating equally well in the jungle, on submarines,

¹ His Honour Shaun Lyons CBE, “Service Justice System Review (Part 1)” (2018), at paragraph 4.14.

² The Honourable Morris J. Fish CC QC, “Report of the Third Independent Review Authority to the Minister of National Defence” (2021), at p.ii.

³ Ibid, at p.iii.

⁴ Ibid, at p.v.

or in Woolwich Barracks), those differences must be defensible by reference to current and future operational requirements rather than tradition.

5. Whilst the Service Justice System has been reviewed comparatively recently by His Honour Shaun Lyons and Professor Sir Jon Murphy, and the Armed Forces Act is updated every five years, I have concluded that the Service Justice System has not kept pace with the evolving values of wider UK society, and that it lags behind the military justice systems of other common law countries – and particularly those of Australia and Canada, whose military justice systems have been comprehensively and regularly reviewed over the past two decades – in some important respects. In particular, for the reasons I set out in Chapters 8 and 9 I have concluded that:-

i. The principle, established by Sir Michael Fallon in 2016, that Service personnel and veterans facing investigation and prosecution for alleged offences arising from historical operations in Iraq and Afghanistan should be exempted from the normal requirement to contribute to their legal costs should be extended to all overseas operations (as they are defined in section 1(6) of the Overseas Operations (Service Personnel and Veterans) Act 2021), and that a Defence Representation Unit headed by a Director of Defence Counsel Services should be established to provide or coordinate this free legal advice and representation.

ii. Responsibility for determining guilt or innocence in contested cases involving criminal charges should be taken away from Commanding Officers and given to Judge Advocates sitting alone (essentially as Military Magistrates). Commanding Officers should however retain responsibility for sentencing.

iii. There needs to be greater training for (and perhaps periodic certification of) Assisting Officers and Commanding Officers. Wherever possible the Assisting Officer, whose responsibility it is to support and assist accused Service personnel before and during Summary Hearings and cases in the Service Courts, should be sourced from a different chain of command to the Commanding Officer who will be hearing the case summarily.

6. The credibility of the Service Justice System depends on its ability not merely to reinforce operational effectiveness through the maintenance of good discipline, but also – and above all – to deliver justice. In conducting this review, I have sought to ensure that the Service Justice System is as well-positioned as possible to meet current and future demands, and to

deliver a fair outcome for accused and victims alike. Just as the Integrated Review aims to create a more professional Armed Forces, so my recommendations are intended to enhance the professionalism of the Service Justice System.

The context

7. My report falls into two parts, with Chapters 1 to 4 providing the context for my conclusions and recommendations in the remainder of the report. In Chapter 1, I identify the lessons that need to be learned from the investigations into allegations from Iraq and Afghanistan. Chapter 2 provides a brief overview of developments since His Honour and Sir Jon carried out their review. Chapter 3 seeks to understand the possible implications of the Future Operating Environment for the Service Justice System. Finally, Chapter 4 provides an overview of the still evolving legal landscape, the circumstances under which the duty to investigate allegations arises and the scope and form that any investigation must take.

8. The Ministry of Defence had proceeded on the assumption that the European Convention on Human Rights did not apply in Iraq. This was a reasonable view of the Strasbourg case law in 2003. However, subsequent Strasbourg judgments expanded the circumstances under which the duty to investigate allegations of unlawful killing or ill-treatment arose. The key judgment, in *Al-Skeini & Others v United Kingdom*,⁵ was handed down in July 2011, long after UK Forces had withdrawn from Iraq. Its implications were profound; it not only extended the investigative duty beyond the formal detention setting to include allegations of unlawful killing ‘outside the wire’, but (with some allowance for the operating environment) it also required those investigations to be of broadly the same form and scope as those conducted by Home Office police forces.

9. Subsequent legal challenges to whether the historical investigations and reinvestigations that followed were Convention-compliant resulted in the Royal Military Police being side-lined, and changed the Iraq Historic Allegations Team beyond all recognition; from a Service police resource with a caseload of some 100 allegations and a £6M budget, it became a contractor-heavy organisation with a caseload of over 3,600 allegations and a budget of nearly £60M. Replacing investigators to ensure the requisite independence, and again following a loss of public confidence in the Iraq Historic Allegations Team, was hugely disruptive and added to the delay and cost.

⁵ *Al-Skeini & Others v United Kingdom* ([GC] 55721/07), 7 July 2011.

10. The Strasbourg Court has continued to expand the circumstances under which the investigative duty arises. Its recent judgment in *Hanan v Germany* has included under the heading of “*special features*” that extend the Convention’s extra-territorial scope the fact of a State retaining “*exclusive jurisdiction over its troops with respect to serious crimes*.”⁶ It is unclear whether this will be the final word on the investigative duty as it applies to overseas operations, but with the legal landscape still so changeable the only safe assumption must be that any Service police investigation should come as close to the Human Rights standards applied to civilian investigations as is possible given the operational context. Where there are legitimate reasons for not meeting the standard, these should be meticulously documented.

11. I do not underestimate the challenges of investigating allegations arising during overseas operations. Several of those I have spoken to about the Iraq and Afghanistan investigations made the point that the Service police couldn’t put up a white tent and conduct door-to-door enquiries; it might require an entire battalion to provide the Force Protection necessary for investigators to get to the scene at all, and they would have mere hours at most to do what a Home Office police force might spend days doing. The evidence available to the Service police varied in terms of its availability and quality, and generally fell far short of the high standards required in English criminal law.

12. Although the Armed Forces will retain the ability to undertake large-scale, enduring operations, the Ministry of Defence’s plans for responding to the Future Operating Environment assume that these may become the exception rather than the norm. The key themes that emerge from the recent Defence Command Paper⁷ and other published information are:- the changing character of warfare; increasing integration between the five domains of warfare; further modernisation and professionalisation; greater innovation and experimentation; and a change of posture to one of persistent global engagement.

13. The Future Operating Environment and Integrated Operating Concept will present fresh challenges for the Service police, too. They will need to acquire or buy in the technical expertise necessary to investigate allegations connected with the use of new technologies and capabilities. Investigations may focus increasingly on command responsibility and/or on a wider range of actors than traditional use of force incidents.

⁶ *Hanan v Germany* ([GC] 4871/16), 16 February 2021, at §142.

⁷ “Defence in a competitive age,” Command Paper 411, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/974661/CP411_-_Defence_Command_Plan.pdf

14. However, there will also need to be a fundamental shift away from the current reliance on non-investigative General Policing Duties functions to establish a Service police presence in proximity to the battlefield. Whilst suitably qualified and experienced investigators without any non-investigative duties should be a non-negotiable presence on larger-scale overseas operations – and senior commanders in the UK and in theatre should take all feasible steps to facilitate their investigations – the change of emphasis to smaller-scale, less-enduring operations may require a flying response, or even preclude investigators from attending the scene of future incidents. It will therefore be necessary to find other ways of documenting the scene and preserving the information upon which investigators will need to rely.

15. Finally, there will need to be a cultural change. The Chief of the Defence Staff told me that operations are increasingly being carried out in a “*fishbowl*”⁸ and that their moral legitimacy is undermined not only by our adversaries but also by instances where our Armed Forces act improperly and by our inability to hold them to account. The Defence Command Paper emphasises the importance of our values and standards, including the rule of law.⁹ The Integrated Operating Concept fixes them as “*a centre of gravity*”¹⁰ – something that must be protected at any cost.

16. The Service Justice System has a role to play in protecting the Armed Forces’ moral legitimacy. This will require it to be more transparent than it has been in the past. The Service police should publish information on the nature of the allegations, and on the progress and outcome of their investigations. The Service Prosecuting Authority should explain publicly any decisions not to prosecute. This will require a change of mindset – including by the Ministry of Defence in empowering them to be more transparent and accountable – but, combined with timely and effective investigations, will increase public confidence in the Service Justice System’s ability to get to the truth.

17. In my opinion, a number of criticisms of the Iraq and Afghanistan historical investigations can be advanced:-

- i. Most cases did not proceed to the investigation stage for a variety of reasons:- the vast majority of allegations were relatively minor and a criminal investigation was not proportionate; in some cases it was not possible to identify the responsible

⁸ Note of meeting 59.

⁹ “Defence in a competitive age,” Command Paper 411, at paragraph 3.3.

¹⁰ “Introducing the Integrated Operating Concept,” (2020), at p.7.

individual even where there was clear evidence of a criminal offence; and in many cases it was not possible to find the evidence necessary to support a criminal investigation.

ii. By only answering the narrow question of whether it was possible to establish a prosecutable case, this approach did not provide an overall assessment of the credibility and validity of allegations. This prevented the Ministry of Defence and the Armed Forces from taking an overall view of the pattern of behaviour, and consequently limited their ability to learn lessons for future conflicts (although the Systemic Issues Working Group has still endeavoured to identify and resolve overarching issues that underlie the alleged incidents).¹¹

iii. The investigations failed both to bring all those who had committed offences to justice and to exonerate those who were wrongly suspected. They did not bring closure for victims and families. They caused distress to those Service personnel and veterans who were caught up in them, whether as witnesses or suspects, and to their families.

18. Although the lack of prosecutions following these historical investigations was ultimately due to problems with the availability and quality of evidence, the lack of transparency around those investigations (or reinvestigations) and their outcomes contributed to the competing public narratives of 'witch-hunt' and 'whitewash'.

The future

19. The foregoing context informs my consideration of the framework, processes and skills that the Service Justice System will require to enable it to investigate (and where appropriate prosecute) allegations arising from future overseas operations. In considering what will be required, I have received very considerable assistance from His Honour and Sir Jon. My recommendations are intended to build upon their excellent work.

The Defence Serious Crime Unit

¹¹ <https://www.gov.uk/government/collections/review-of-systemic-issues-arising-from-military-operations-overseas-index>

20. I am convinced that incremental development of the existing collaborative Service police capabilities is not the solution, and that here as in the Armed Forces more generally the Future Operating Environment requires a paradigm shift from 'joint' to 'integrated'. Nor do I subscribe to the three-tier model, under which the Service police forces would retain a smaller Special Investigation Branch to investigate those matters that exceeded the ability of their General Policing Duties cadre but which were not sufficiently serious to warrant investigation by the Defence Serious Crime Unit.

21. I wholeheartedly endorse Sir Jon's recommendation that the existing three Special Investigation Branches should be brigaded together, along with the specialist investigative capabilities, to form a Defence Serious Crime Unit. I conceive of this as a thoroughly modern, properly resourced, elite investigative Unit. It should aspire to achieve or exceed the standards of victim and witness care and of transparency demanded by wider society.

22. It is regrettable that this Unit has not yet been established. Nevertheless, I am reassured by my meetings with the Chief of the Defence Staff. During our first meeting, he informed me that the Chiefs of Staff had recently given clear direction that this Unit be established promptly, and indicated that it could reach full operating capability by 1 June 2022.¹² He clearly recognises the imperative of establishing the Unit as quickly as possible; during my second meeting with him and with the Chief of Defence People, we agreed that the Unit will stand up on 1 April 2022.¹³

23. This timetable has necessitated some pragmatic decisions regarding the Unit's command and funding. Whilst these differ from my provisional conclusions, which would have further increased the Unit's actual and perceived independence, I am content to endorse them in the interests of establishing this Unit as quickly as possible. However, I have recommended that these decisions should be reviewed within three years. This will allow sufficient time for the Unit to 'bed in' and permit an informed view of how it is functioning and informed decisions on its further evolution.

24. The essential features of this Unit, upon which both the Chiefs of Staff and I agree, are that:- it should have a military commander who will be designated as a Provost Marshal; it must be hierarchically, institutionally and practically independent of the chain of command and of those whom it will investigate; and it will not report to the Provost Marshals of the

¹² Note of meeting 59.

¹³ Note of meeting 60.

Service police forces. The degree of independence may need to increase incrementally; in the short term, however, it will be sufficient for the Unit and its Provost Marshal to be operationally independent.

25. As a further guarantee of independence, I have recommended that once the Unit has 'bedded in' this new Provost Marshal – which will be termed the Provost Marshal (Serious Crime) – should become a final posting. With no thoughts of further promotion, the Provost Marshal (Serious Crime) will be free from the indirect pressures to which others might be subject (whether consciously or unconsciously). Ensuring that no-one outside the Provost Marshal (Serious Crime's) chain of command is involved in writing performance reports on those within the Unit will similarly protect those of more junior rank from indirect pressure.

26. This Unit will possess the necessary independence to withstand future legal challenges, and possess the critical mass necessary both to allow systematic continual professional development during peacetime and to run investigations from battlefield to court room. Professionalism will be key, and I envisage the number two in this Unit being a civilian who will be responsible for aligning investigative standards with those in Home Office police forces, and who will put secondments or placements with Home Office police forces onto a systematic and structured footing. It follows that the number two should have attained a senior rank in a Home Office police force, and possess significant recent experience of running concurrent major investigations.

27. I have noted with interest the arrangements that the Defence Medical Service have put in place to enable single Service medical personnel to maintain and develop their skills in the National Health Service when not deployed, and the ongoing work to develop a Unified Career Model that will provide varied career pathways and may avoid the need for specialists to undertake generalist postings in order to be promoted. The possibility of adapting these initiatives to meet the needs of the Defence Serious Crime Unit warrants consideration.

28. I welcome the proposal to establish a multi-disciplinary Strategic Policing Board consisting of a Non-Executive Director, who will also be a member of the Service Justice Executive Group, a recently retired judge, a recently retired Chief Constable, and a recently retired senior military officer with operational experience. If the Non-Executive Director does not possess a scientific or technological background, consideration should be given to expanding the Strategic Policing Board to include someone with this essential expertise. I am confident that this Board will provide effective and independent assurance and governance in

relation to the work of the Provost Marshal (Serious Crime) and of the Defence Serious Crime Unit.

Timeliness

29. To achieve a fair outcome for victims and accused alike it is essential that investigations be not only effective but also prompt. This will require improvements both to how the chain of command reports incidents to the Defence Serious Crime Unit and to the response time thereto. It will also require changes to ensure that more complete contemporaneous evidence is available to investigators, even if there is a delay in complainants notifying their allegations to the Unit. Finally, it will require the Defence Serious Crime Unit and Service Prosecuting Authority to work closely to identify and refine lines of enquiry, to keep cases under regular review, and to conclude cases as quickly as possible.

Reporting

30. I welcome the Permanent Joint Headquarters' decision to review their Standard Operating Procedure for reporting serious incidents, and their consideration of establishing a Serious Incident Board with appropriate Service police representation to improve decisions as to whether incidents or allegations should be reported to the Defence Serious Crime Unit. Whilst this will generally be sufficient, I recommend that during overseas operations (as defined in section 1(6) of the Overseas Operations (Service Personnel and Veterans) Act 2021) consideration should be given to placing a senior officer from the Defence Serious Crime Unit in the Permanent Joint Headquarters as a Force Provost Marshal.

31. There should be greater training on the practical consequences of the Armed Forces' reliance on values and standards to underpin moral legitimacy. In particular, training should stress the moral obligation on Service personnel who witness serious offences on overseas operations to report them to the Defence Serious Crime Unit. However, training alone is insufficient to overcome the dangers of unit loyalty inhibiting reporting. To help Service personnel to rationalise reporting such offences by other members of their unit, I recommend that there should be a non-criminal Service offence of failing to report offences under sections 51 and 52 of the International Criminal Court Act 2001 (i.e. genocide, crimes against humanity, and war crimes) to the Service police. Service personnel should be provided with a safe (and if necessary anonymous) reporting mechanism to enable them to report such incidents to the Defence Serious Crime Unit without fear of reprisal.

The quality and availability of evidence

32. I have made several recommendations aimed at improving the availability and quality of evidence. In particular, I have recommended that serious consideration should be given to mandating the wearing and use of helmet- or body-worn cameras (save where to do so would impact the wearer's safety), and that the footage from these and other sources be routinely downloaded and retained. I have also recommended improvements to operational record keeping, and to detention records.

Investigative time limits

33. I have considered carefully the proposals by His Honour Jeffrey Blackett and Lord Thomas of Gresford.

34. I readily accept the proposal that the Armed Forces Act should be amended to achieve parity with the Magistrates' Court Act, which precludes minor offences being heard summarily unless the charge was laid within six months of the date of the incident.

35. I also readily accept His Honour's proposal that the threshold for a fresh criminal investigation should be raised, and that the test should be whether the Director of Service Prosecutions considers that there is new information capable of leading to compelling evidence which might:- (a) materially affect the previous decision; and (b) lead to a charge being laid.

36. However, to impose strict time limits for the investigation of serious offences, including war crimes, risks compromising the genuineness or effectiveness of the investigation. I believe that a better solution would be to draw up protocols that seek to ensure that investigations commence promptly, that their momentum is maintained thereafter, and that those cases where there is no realistic possibility of obtaining sufficient evidence to prosecute are promptly discontinued.

37. Although I have outlined in Chapter 6 the elements that I consider such protocols should contain, and have suggested some indicative timings for those elements, I am mindful that the Provost Marshal (Serious Crime), Director of Service Prosecutions and Judge Advocate General are independent. It must be for them to agree between them the final

content of any protocols. I have recommended that they should be asked to agree protocols along the lines I have proposed.

Judicial oversight

38. I consider that the judicial oversight of the Iraq historical investigations provided by the Administrative Court was a useful safeguard both in ensuring that decisions to discontinue investigations were reasonably taken and in preventing investigations being endlessly challenged and reopened. It appears also to have been recognised by the International Criminal Court's Office of The Prosecutor as a safeguard to ensure the genuineness of those investigations. However, I also believe that in future judicial oversight would benefit from a greater understanding of the military context. I therefore recommend that the Judge Advocate General or his nominee should fulfil this function in relation to the Defence Serious Crime Unit's investigations into allegations arising from overseas operations.

39. I have also concluded that the Iraq Fatality Investigations process, which has rested on a 2013 Court Order rather than any statutory foundation, should be put onto a firm footing. Any process must be capable of general application – i.e. it should be available in any case where the criminal investigation by the Defence Serious Crime Unit (and any prosecution) has not fully discharged the investigative duty under Article 2 of the European Convention on Human Rights – and be readily understood by the public. I have therefore recommended that the Ministry of Defence seek the Ministry of Justice's agreement to expand the coronial jurisdiction to enable Coroners to conduct inquests in such cases even though there is no body within the UK. Given the need to have a proper appreciation of the military context, it may be desirable to appoint one or more Armed Forces Coroners to conduct such inquests.

The Service Prosecuting Authority and the Court Martial

40. I have full confidence in the Service Prosecuting Authority and in the Court Martial process. My recommendations are made with the full agreement – and active encouragement – of the Director of Service Prosecutions and the Judge Advocate General.

41. In particular, I have followed His Honour Shaun Lyons and Professor Sir Jon Murphy in recommending urgent improvements to the information systems. This is essential both to obtain the management information that the Service Justice Board requires in order to assess

properly how the Service Justice System is performing, and to avoid the delays caused by having to move data between systems in order to share information between the Service Prosecuting Authority, the defence, and the Judge Advocate General. I therefore have recommended that the Ministry of Justice's agreement to allow the Service Courts to use the Common Platform (which will be functioning in every criminal court in England and Wales by the end of 2021) be urgently obtained. I have also recommended that a case management system capable of providing the necessary management information be put in place.

42. Finally, I have recommended that a uniform approach to conducting pre-posting training should be adopted across the Service legal services. This would remedy the current situation where, although the Service Prosecuting Authority is expected to release prosecutors to enable them to conduct training in preparation for their next posting, Service lawyers are not always prepared for the Service Prosecuting Authority. This training burden at both ends of a posting reduces the number of prosecutors available to prosecute cases.

Conclusion

43. I have been greatly assisted in this review by the many experts to whom I have spoken. They have given freely of their time, imparting their considerable experience and offering their ideas for how the framework and processes might be improved. Time and again during my many meetings I got the strong sense of a genuine willingness to learn lessons, to modernise, and to professionalise.

44. Throughout this review I have endeavoured to apply the lessons from the Iraq and Afghanistan historical investigations to the Future Operating Environment, and to ensure that the Service Justice System possesses the necessary framework, processes and skills to investigate (and where appropriate) prosecute allegations arising from future overseas operations.

45. Above all, I have sought to ensure that the Defence Serious Crime Unit will be a thoroughly modern, elite Unit of the necessary size and possessing the requisite skills and experience to conduct effective and transparent investigations that lead to a fair outcome for victims and accused alike.

46. It is my hope that, if adopted, my recommendations will help the Service Justice System to evolve and to remain more than minimally acceptable when compared to the civilian justice system and to the military justice systems of other common law countries. A system that is capable of withstanding future legal challenge, of effectively and promptly investigating (and where appropriate prosecuting) allegations arising from future overseas operations, and of helping to protect the Armed Forces' moral legitimacy. A system that enjoys the confidence not only of Parliament, the public and external observers (including the International Criminal Court's Office of The Prosecutor, and the International Committee of the Red Cross), but also of the Armed Forces themselves.

1. Lessons from the Iraq and Afghanistan investigations

1.1. Introduction

1.1.1. There has been much criticism of the investigations into alleged incidents during the UK's operations in Iraq (Operation Telic) and Afghanistan (Operation Herrick). The criticisms come from both ends of the spectrum. Those who are critical of the small number of successful criminal prosecutions at the time point to failures to conduct steps that a Home Office police force would have carried out as standard. Conversely, those who infer from the absence of any prosecutions resulting from the historical investigations in the aftermath of those operations that the allegations were untrue are critical both of the handling of those investigations and of the Ministry of Defence for not intervening to terminate them.

1.1.2. It is easy from the comfort of the UK and with the benefit of hindsight to find fuel for such criticisms. The problem is compounded by the Courts' tendency, when viewing matters through the lens of the European Convention on Human Rights, to reduce complex operational landscapes to a binary distinction, categorising incidents as warfighting or as security operations. This catch-all of 'security operations' invites comparisons to domestic policing, yet it encompasses a wide range of activities: from mounting patrols and vehicle checkpoints; through containing violent demonstrations; through 'hard knock' operations to detain those suspected of involvement in attacks on Coalition Forces; to large-scale operations to reassert control over insurgent-held territory.

1.1.3. Comparisons to domestic policing are unhelpful; demonstrators in London are not armed with automatic weapons, rocket-propelled grenades, and hand grenades.¹⁴ That policing in theatre is considerably more dangerous is borne out in the number of Service police killed on Operation Telic and Operation Herrick. Although the number of Royal Military Police killed during those operations (21 in total) is comparable to the number of police officers killed in England and Wales during the same period (18 during the period 2003-2014), when viewed as a percentage of their total strength the difference is stark. The number of those killed represents 1.4% of the total Royal Military Police strength compared to less than 0.02% of the total policing strength of the 43 Home Office police forces.¹⁵

¹⁴ See *Al-Saadoon & Others v Secretary of State for Defence (Rev 1)* 1 WLR 3625, at §§51-55.

¹⁵ "Police Service Strength," House of Commons Library Briefing Paper SN-00634 (10 February 2021), p.4: "England & Wales: on 30 September 2020, there were 132,467 police officers in England and Wales compared with 129,110 on the 31 March 2020 (Excluding British Transport Police and Central Service Secondments)."

1.1.4. Comparisons to Home Office police investigations are equally unhelpful. Several of those I spoke to pointed out that investigations during overseas operations are very different from those in Surrey or Birmingham; the ‘golden hour’ response, cordoning off the scene for days to enable detailed forensic examination, conducting door-to-door enquiries, the normal components of Home Office police force investigations are heavily constrained, and often impossible, in theatre. The Service police in theatre don’t have a police station on the High Street or operate a 999 service, and therefore rely heavily on the chain of command (rather than complainants or local witnesses) to notify them of incidents or allegations while operations remain ongoing. They also rely on the chain of command to provide the necessary logistical support and Force Protection to enable them to visit the scene and undertake any examination or enquiries on the spot. This support may not be immediately available; to provide it commanders on the ground have to divert vehicles and troops from operational objectives or to displace other (sometimes urgently needed) personnel from seats in a helicopter. One former Commanding Officer of the Royal Military Police’s Special Investigation Branch told me that, in a non-permissive environment such as existed during the early phases of Operation Telic, it required an entire battalion to provide the necessary Force Protection for investigators to move around.¹⁶ Once the Service police investigators reach the scene, what in a domestic setting might take days may need to be compressed into hours at most due to the security situation. A further attack may be imminent; in some cases the Service police may be working under fire. Finally, there are far fewer investigators in theatre than would be available to a Home Office police force covering a similar geographic area. The Service police must therefore make difficult decisions as to where these limited resources are best used, and what investigative steps it is realistic and proportionate to take.

1.1.5. In Iraq and Afghanistan the evidential problems that resulted from these operational realities were compounded by local customs: post mortem examinations were either not conducted or confined to an external examination of the body; and the deceased was buried within 24 hours of death.

1.1.6. One of those to whom I spoke used a football analogy to explain some of the frustrations arising from the way in which the different actors within the Service Justice System – the Commanding Officer, the Service police, and the Service Prosecuting Authority – interact under the Armed Forces Act 2006. In this analogy the football is the allegation, and the various actors are the players. The Commanding Officer is usually the first to receive the ball, and

¹⁶ Note of meeting 5.

may kick it around before deciding it should be passed to the Service police, who will kick it around before in turn passing it to the Service Prosecuting Authority. The ball may be partly or totally deflated by the time the Service police receive it, and may no longer resemble a ball by the time it reaches the Service Prosecuting Authority. It may simply not be possible to get the ball across the goal line (a conviction at Court Martial), or even to get a shot on goal. Any criticisms for that failure are generally directed at the Service police.

1.1.7. To adapt this analogy to the operations in Iraq (which predated the 2006 Act's entry into force) and Afghanistan: often by the time the Service police heard that there was a football match and reached the pitch, many of the players (those involved in the alleged incident) and spectators (the witnesses to it) had left. In the case of the historical allegations, the Service police never even made it to the pitch. All they had to work with was a partly deflated ball, an incomplete team sheet, differing recollections of who had been in the stands, and various match reports (in the form of radio logs, incident reports, etc.) many of which related to entirely different matches due to the frequently vague or inaccurate information provided by complainants regarding the timing and venue.

1.1.8. The process of tracing witnesses, locating records, and piecing together the evidence was complex and time-consuming. In many cases the evidential deficits outlined above could never be overcome; it was simply not possible to reach a conclusion about the facts of the alleged incidents. The evidence neither supported charging and prosecution nor disproved the allegations. This outcome has left critics at both ends of the spectrum dissatisfied.

1.2. Investigations in theatre

1.2.1. I make no criticism of any member of the Royal Military Police's Special Investigation Branch. It would be wholly wrong to conclude that individual shortcomings were responsible for the overall difficulties of the Service police in Iraq and Afghanistan. Its personnel faced an impossible ordeal in the circumstances into which they were deployed.

1.2.2. The Special Investigation Branch section that deployed to Iraq during Telic 1 was just 14 strong, and commanded by a junior Captain. Although at the time this was the largest Special Investigation Branch deployment since the Second World War, they were instantly numerically insufficient for the demands made of them. They were also ill-equipped; initially working from the back of Land Rovers, they had no computers or mobile phones, and had to

revert to notebook and pen. Nor were they adequately trained or prepared for what faced them; they lacked the experience necessary to conduct concurrent complex investigations away from the resources and support available in the Firm Base.

1.2.3. This lack of preparedness may have been the result of a late decision to deploy the Royal Military Police's Special Investigation Branch at all. One of its former Commanding Officers told me that military planners initially failed to include Special Investigation Branch investigators in the deployment plan for Operation Telic,¹⁷ although this was corrected before the operation commenced.

1.2.4. Another former Commanding Officer told me that during the early phase of Operation Telic, the Service police operated to the extant version of the Provost Officer's Pocketbook (essentially a set of standing orders), which was "*Rules of Engagement focused*" having been developed in expectation of a Cold War environment rather than counter-insurgency operations.¹⁸

1.2.5. Initially the Special Investigation Branch investigators principally investigated the deaths of UK Service personnel, providing support for inquests in the UK. In total, the Special Investigation Branch carried out a total of 633 investigations across the two theatres (179 in Operation Telic, 454 in Operation Herrick) to assist the Coroner.¹⁹ One former Provost Marshal (Army) told me that this was in stark contrast to previous operations; up to and including the Falklands, Service personnel had been buried in theatre, without any investigation or inquest.²⁰

1.2.6. During the warfighting phase, the Special Investigation Branch only investigated Iraqi deaths if it appeared that the Rules of Engagement had been breached, or if the death had occurred in UK Forces' custody. This changed with the transition to the post-warfighting phases and the adoption of a policy for reporting shooting incidents that had, or may have, resulted in civilian casualties or deaths.

1.2.7. Despite the comparatively recent experiences of Kosovo, when the Royal Military Police deployed to Pristina in 1998 as part of the multinational Kosovo Force (KFOR) had investigated over 90 civilian deaths in the space of a few months,²¹ it appears that military

¹⁷ Ibid.

¹⁸ Note of meeting 1.

¹⁹ Note of meeting 7.

²⁰ Note of meeting 8.

²¹ Note of meeting 7.

planners significantly underestimated the number of incidents that would require investigation during the occupation period. The shooting incident policy introduced at the end of May 2003 resulted in the Special Investigation Branch being overwhelmed, and was amended several times thereafter in an attempt to reduce the number of incidents requiring Service police investigation to a manageable level. The Special Investigation Branch had no access to legal advice in theatre, and investigations were often brought back to Germany or the UK.

1.2.8. Military planners also faced immense challenges in policing more generally during the occupation period in Iraq. A former Commanding Officer of the Special Investigation Branch told me that the de-Ba'athification of Iraq constituted a failure to learn lessons from 1945.²² There was no Iraqi administration or governance. Law and order had completely collapsed. Criminals had been turned out onto the streets. The Iraqi Police Service had been stripped out and the judiciary were in hiding. Crime was endemic and in parts of Basra a state of virtual anarchy prevailed. Hijackings, kidnap, looting and murder were rife. In this environment, the British Army was the sole agent of law and order within its area of operations.

1.2.9. The situation in Afghanistan was somewhat better. Not only did an effective Afghan police force remain in some areas of the country,²³ but military planners and the Service police knew better what to expect and were guided by the experience of conducting investigations in Iraq and by the early Iraq case law. Nevertheless, the Special Investigation Branch section was still small, and dependent on the chain of command for incident reporting, logistical support and Force Protection.

1.2.10. However, the demands of concurrent large-scale operations in two theatres resulted in an unprecedented period of intensity, both for the Special Investigation Branch and for the Service police more generally. One former Provost Marshal (Army) told me that, at their height, two thirds of the Royal Military Police's total strength was committed to the operational cycle (one third on deployment and one third preparing to deploy with the remaining third recovering from deployment ready to begin preparing for a further deployment).²⁴ This left little time or spare capacity to develop investigative skills in the Firm Base.

1.3. The availability and quality of evidence

²² Note of meeting 5.

²³ Ibid.

²⁴ Note of meeting 7.

1.3.1. The Service Police faced particular challenges in gathering evidence of a quality that would meet the very high standards required under English law.

1.3.2. There were no forensic testing facilities in Iraq, necessitating the despatch of items to Germany or the UK for analysis, involving lengthy delays.

1.3.3. Interviews compliant with the Codes to the Police and Criminal Evidence Act 1984 could only be conducted in Basra where tape recording equipment was housed. Away from Basra all interviews were recorded in notebooks. Interviews with Iraqi witnesses presented difficulties due to a lack of qualified interpreters. The solution adopted was to video record the interview using an interpreter and then send the recording to the UK to confirm the accuracy of the translation, a process involving considerable delay. Interviewing suspects who requested legal advice was also problematic. One former Provost Marshal (Army) told me that in one case a soldier had been flown back to the UK to consult a lawyer and to enable that lawyer to be present during the interview under caution, before being flown back to theatre the following day to resume operations.²⁵

1.3.4. Civilian deaths created particular difficulties. If a civilian was injured but subsequently died in hospital, UK Forces would be unlikely to have any knowledge of the death. The local custom of burying a body within 24 hours was a complicating factor. There were no UK pathologists in theatre,²⁶ and it was impossible to fly one out within the 24-hour period. Doubts existed concerning both the qualifications and independence of local pathologists, and the adequacy of local post mortem facilities. In any event, most families objected, for religious or cultural reasons, to a post mortem. Local hospitals did retain bodies, on occasion, at the request of the Service police, only to have members of staff threatened at gunpoint by the families of the deceased to facilitate the release of the body. Hospital staff understandably complied. Most families also withheld consent for exhumations, again for religious or cultural reasons. Absence of post mortem examinations resulted in the loss of ballistic and other evidence.

1.3.5. Problems also arose in investigating allegations of ill-treatment. Captured persons often reported ill-treatment only after they had been within a detention facility for some time.

²⁵ Note of meeting 8.

²⁶ Note of meeting 1: *“At the time, we thought a court would want a pathologist to theatre, but there are no military ones. Does the environment allow an individual to deploy, what's the risk to life? Is that a requirement? For example, we had to go into Najaf, a child was drowned, they were buried in 24 hours, we had no choice but exhume for two hours. Trying to do a post mortem in a hut by the side of the road in a cemetery. Not sure if it's better evidence or not.”*

This delay is understandable; complainants may have been concerned initially that any complaint would not be acted upon, or worse might result in further mistreatment. However, the delay also complicated the process of investigating the allegations.

1.3.6. Captured persons often transited through one or more temporary holding areas (from which a number were released following screening) before reaching the formal detention facility. It could take a couple of days to reach a detention facility.²⁷ Running these formal detention facilities fell to the chain of command with support from a small number of Military Provost Staff.²⁸ One former Provost Marshal (Army) told me that in Iraq the number of Military Provost Staff ranged between six and eight at any one time.²⁹ His recollection differs only slightly from the figure of between six and 12 used in the *Ali Zaki Mousa (No. 1)* proceedings.³⁰

1.3.7. One former Provost Marshal (Army) told me that there was much greater control within the formal detention facilities, and that the number of allegations against Military Provost Staff personnel requiring investigation was very small.³¹ Allegations of ill-treatment primarily related to the level of force used at the point of capture and to their treatment in transit and during those initial periods of detention in Battle Group holding areas.³² Another former Provost Marshal (Army) told me that he did not inspect the Battle Group holding areas, and that the Service police only went there if a captured person died in custody.³³

1.3.8. Although a detention record was created for each captured person processed into a formal detention facility, as part of which they were photographed and medically examined, the quality of records for the period prior to that in-processing varied. Records often lacked the specificity required to identify the sub-units and Service personnel who were in contact with the complainant at various points. In addition, the main detention facility during the early phase of Operation Telic, Camp Bucca, had separate areas operated respectively by UK Forces and US Forces, and it was frequently unclear whether the alleged conduct was attributable to UK Forces.

²⁷ Note of meeting 7.

²⁸ Note of meeting 8.

²⁹ Note of meeting 7.

³⁰ *R (on the application of Mousa) v Secretary of State for Defence & Another* [2011] EWCA Civ 1334, at §20.

³¹ Note of meeting 9.

³² Note of meeting 6; and note of meeting 47.

³³ Note of meeting 6.

1.3.9. The process for recording allegations improved over time. In Afghanistan, captured persons were asked whether they wished to raise any complaint whenever they were processed in or out (including for medical treatment) of a detention facility.³⁴ The Detention Oversight Team, which visited those captured persons who had been transferred to the Afghan criminal justice system, also asked whether they wished to raise any complaint. One former Provost Marshal (Army) told me that this process of recording complaints resulted in even minor allegations of non-criminal conduct (e.g. radios being played too loudly during prayer time, the temperature of the drinking water, and the presence of female soldiers) being recorded and passed to the Service police.³⁵

1.3.10. Custody records also improved over time. The units running the formal detention facilities initially maintained a Daily Occurrence Book, a single logbook in which they made handwritten annotations of significant interactions with all the captured persons within the facility on that day, rather than in the detention record for the relevant captured person. Routine matters, such as the provision of food and water, were frequently not recorded. In the event that an allegation of ill-treatment within a formal detention facility was made, the Service police had to check manually through each Daily Occurrence Book.

1.3.11. It will be clear from the foregoing that the information available to the Service police was variable both in its availability and quality. These shortcomings in contemporaneous evidence materially affected the outcome both of investigations at the time, and of subsequent historical investigations.

1.4. Legal challenges to investigations

Iraq

1.4.1. The initial legal challenges in relation to Operation Telic sought to establish that the European Convention on Human Rights also applied in relation to UK Forces' activities in Iraq, and that the investigative obligations that are parasitic upon Article 2 (right to life) of that Convention were also engaged.³⁶ In July 2011, some two years after UK Forces had

³⁴ Note of meeting 54.

³⁵ Note of meeting 9.

³⁶ These legal challenges are set out at this stage in order to explain the background to the various reviews, their cost and the legal and practical challenges facing investigators as the case law unfolded. An analysis of the up-to-date legal position is found in Chapter 4.

withdrawn from Iraq, the European Court of Human Rights handed down its judgment in *Al-Skeini & Others v United Kingdom*.³⁷

1.4.2. The case had been brought by relatives of six Iraqis killed under various circumstances:-

- i. Hazim Al-Skeini had been shot by a British soldier while attending a funeral ceremony in August 2003; the next of kin denied that he had been armed.
- ii. Muhammad Salim had been shot in his own home by a British soldier in November 2003.
- iii. Hannan Shmailawi had been killed in November 2003 when bullets fired during an exchange of gunfire between a UK Forces patrol and Iraqi insurgents passed through the window of her home; it was unclear which side had fired the fatal shots.
- iv. Waleed Muzban had been killed when a British soldier at a vehicle checkpoint fired on the vehicle in which he was travelling in August 2003.
- v. Ahmed Ali had drowned after being forced into the Shatt-al-Arab waterway by British soldiers in May 2003; the soldiers involved were acquitted of his manslaughter at Court Martial in 2006.
- vi. Baha Mousa had died in UK Forces' custody in September 2003; seven soldiers were acquitted of his manslaughter at Court Martial in 2006, but one of the seven pleaded guilty to ill-treatment and was convicted on that charge.

1.4.3. The Court held unanimously that the investigations into the deaths had not met the standards required by Article 2, but that in the case of Baha Mousa the establishment of a public inquiry had remedied the procedural violation. It found that the investigations were not independent: decisions as to whether to report deaths to the Service police, or to refer cases to the Army Prosecuting Authority, rested with the chain of command; in three cases the only investigation had been carried out by the chain of command and in one case the chain of command had caused the Special Investigation Branch investigation to be closed.³⁸ It also found that the investigations were not effective, due partly to the lack of independence and partly to lengthy delays – both in taking certain investigative steps, and between the incident and the Court Martial proceedings.³⁹ Finally, it found that the investigations were not open and were too narrow in scope: there should have been “*an independent examination, accessible*

³⁷ *Al-Skeini & Others v United Kingdom* ([GC] 55721/07), 7 July 2011.

³⁸ *Ibid*, at §§171-173.

³⁹ *Ibid*, at §§173-174.

to the victim's family and to the public, of the broader issues of State responsibility for the death..."⁴⁰

1.4.4. Subsequent legal challenges sought to establish that the investigations by the Iraq Historic Allegations Team also lacked the requisite independence, and that their form and scope would not satisfy the obligations under Article 2 and Article 3 (prohibition on torture and inhuman or degrading treatment or punishment) of the European Convention on Human Rights.

1.4.5. In *Ali Zaki Mousa (No. 1)*, the Court of Appeal ruled that "*the practical independence of IHAT is, at least as a matter of reasonable perception, substantially compromised*"⁴¹ by the role of the Provost Marshal (Army) as head of the Provost Branch, which includes both the Royal Military Police and the Military Provost Staff, and by the involvement of the Royal Military Police in the Iraq Historic Allegations Team given the roles that its General Policing Duties branch (and to a lesser extent the Special Investigations Branch) had fulfilled in Iraq.

1.4.6. In *Ali Zaki Mousa (No.2)*, the Administrative Court rejected the claimants' argument that, as a matter of principle, Service police investigations of allegations made against Service personnel (whether members of their own Service or another Service) are incompatible with the requirement for investigative independence under the European Convention on Human Rights.⁴² It ruled that the reformed Iraq Historic Allegations Team, in which the Provost Marshal (Navy) and Royal Navy Police had replaced the Provost Marshal (Army) and Royal Military Police following the Court of Appeal Judgment, was sufficiently independent for the purposes of Article 2 and Article 3 of the European Convention on Human Rights.⁴³ However, it recommended that Royal Navy Police or Royal Marine Police Troop personnel within the Iraq Historic Allegations Team be removed from the Royal Navy's disciplinary chain of command to remove any perception of a lack of independence.⁴⁴ This was duly done.

1.4.7. Whilst the Administrative Court also rejected (on the grounds of duration and cost) the claimants' argument that the Secretary of State for Defence should be required to establish

⁴⁰ *Ibid*, at §174.

⁴¹ *R (on the application of Mousa) v Secretary of State for Defence & Another* [2011] EWCA Civ 1334, at §38.

⁴² *R (on the application of Mousa & Others) v Secretary of State for Defence* [2013] EWHC 1412 (Admin), at §§110-111.

⁴³ *Ibid*, at §6 and §§121-122.

⁴⁴ *Ibid*, at §123.

a single public inquiry into all allegations arising from Operation Telic,⁴⁵ it ruled that in some cases a criminal investigation alone would not satisfy the wider requirements of Article 2 or Article 3. It set out here⁴⁶ and in its subsequent judgment in these proceedings⁴⁷ a concept for a modified coronial process, which borrowed some elements from coroners' inquests and others from public inquiries, that would be capable of fulfilling the Article 2 and Article 3 obligations in such cases. The Court later clarified, in the *Al-Saadoon* proceedings,⁴⁸ the circumstances under which these additional Article 2 and Article 3 obligations would arise.

1.4.8. Attempts to establish an investigative obligation in relation to alleged breaches of Article 5 (right to security) of the European Convention on Human Rights were unsuccessful, save in the narrow circumstances of 'enforced disappearance' by State agents.⁴⁹

Afghanistan

1.4.9. There have been fewer legal challenges to investigations into alleged incidents in Afghanistan. In the sole case to have been determined to date, the claimant attempted unsuccessfully to establish that the ongoing Royal Military Police Special Investigations Branch investigation into the death of his relatives would not meet the standards required by Article 2 of the European Convention on Human Rights.⁵⁰

1.4.10. Two further legal challenges – one relating to the same investigation, the other to the Royal Military Police's Operation Northmoor – remain ongoing. In both cases, the claimants are seeking to establish that the investigations did not meet the appropriate standard for promptness and effectiveness, and/or were not of the required scope.

1.5. Iraq Historic Allegations Team

⁴⁵ *Ibid*, at §211.

⁴⁶ *Ibid*, at §§213-225.

⁴⁷ *R (on the application of Mousa & Others) v Secretary of State for Defence* [2013] EWHC 2941 (Admin), at §§10-44.

⁴⁸ *Al-Saadoon & Others v Secretary of State for Defence (Rev 1)* 1 WLR 3625, at §§110-115 and §§238-240.

⁴⁹ *Al-Saadoon & Others v Secretary of State for Defence* [2015] 3 WLR 503, at §§204-206 and §§237-241; *Al-Saadoon & Others v The Secretary of State for Defence & Others* [2017] 2 WLR 219, at §§156-177.

⁵⁰ *R (on the application of AB) v Secretary of State for Defence* [2013] EWHC 4479 (QB).

Background

1.5.1. Iraqi claimants primarily notified the UK authorities of alleged criminal conduct via legal proceedings brought through two UK-based firms: Public Interest Lawyers and Leigh Day & Co. Whilst Public Interest Lawyers predominantly brought claims for judicial review based on an alleged failure to conduct Article 2- or Article 3-compliant investigations, in addition to alleged violations of substantive Convention rights, many of the compensation claims brought through Leigh Day & Co. also disclosed potentially criminal actions. In some cases, the same claimant brought proceedings through both firms.

1.5.2. Public Interest Lawyers lodged 47 compensation claims and 192 judicial review claims between July 2004 and the end of 2013. Between June 2014 and October 2015, Public Interest Lawyers lodged over 180 additional compensation claims and approximately 1,200 further judicial review claims.

1.5.3. Leigh Day & Co. lodged over 900 compensation claims in three tranches between 2008 and 2013.

1.5.4. In order to inform the Ministry of Defence's response to claims alleging a failure to conduct an investigation to the standards of Article 2 or Article 3 of the European Convention on Human Rights, the Royal Military Police reviewed the early claims to ascertain what investigative steps had been carried out. This led them to reopen some investigations that had been closed by the Special Investigation Branch, and to open investigations into some alleged incidents that had not previously been reported to the Service police.

1.5.5. By early 2010, the volume of claims alleging ill-treatment had reached a level where the Royal Military Police required a dedicated investigative resource to review the cases and, where necessary, to investigate the allegations. In March 2010, the then Minister of State for the Armed Forces announced the decision to establish the Iraq Historic Allegations Team.⁵¹ It was expected that it would take around two years to complete its caseload⁵² of around 100 cases at an estimated cost of £6M. However, the caseload increased following the European Court of Human Rights' judgment in *Al-Skeini* which brought allegations of unlawful killing

⁵¹ Hansard, 1 March 2010, columns 93WS-94WS, <https://publications.parliament.uk/pa/cm200910/cmhansrd/cm100301/wmstext/100301m0001.htm>.

⁵² Hansard, 1 November 2010, columns 27WS-28WS, <https://hansard.parliament.uk/Commons/2010-11-01/debates/1011012000009/IraqHistoricAllegationsTeam>.

within scope,⁵³ and snowballed following the *Ali Zaki Mousa (No.2)* judgments. This brought corresponding increases to the Iraq Historic Allegations Team's projected duration and cost.⁵⁴

Impact of legal challenges

1.5.6. The task facing the Iraq Historic Allegations Team was made more difficult by the successive legal challenges to its independence during the period 2010 to 2013. The *Ali Zaki Mousa (No. 1)* judgment was hugely disruptive: the removal of the Provost Marshal (Army) and Royal Military Police led to very significant delay as the new investigators familiarised themselves with these complex investigations; and the Royal Navy Police's smaller size necessitated the hiring of a much larger number of retired civilian police officers under a contract with the Red Snapper Group. Many investigations essentially stalled while these issues were being worked through.

1.5.7. In 2016, the then Attorney General appointed Sir David Calvert-Smith, a former Director of Public Prosecutions and retired High Court judge, to conduct a review of the Iraq Historic Allegations Team's practices and processes.⁵⁵ He identified a number of structural or other disadvantages, many of which were the consequence of having had to grow and adapt the investigative capability and structures in response to these successive legal challenges:-

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

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

⁵³ Hansard, 26 March 2012, columns 87WS-88WS, <https://hansard.parliament.uk/Commons/2012-03-26/debates/1203261000018/IraqHistoricAllegationsTeam>.

⁵⁴ Hansard, 27 January 2016, column 189WH, <https://hansard.parliament.uk/commons/2016-01-27/debates/16012756000001/IraqHistoricAllegationsTeam>.

⁵⁵ <https://www.gov.uk/government/publications/review-of-iraq-historic-allegations-team>

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

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

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

1.5.8. I regard the processes described in that report (as amended by Sir David’s recommendations) as a blueprint for how the Service police should structure a Major Incident Room to investigate a large volume of allegations arising during and after any future overseas operation. In particular, I regard it as essential that a sufficient number of Service Prosecuting Authority lawyers are co-located with Service police investigators in order to gain a detailed understanding both of individual cases and the wider context, and to provide timely advice to investigators. This expedient, which was belatedly adopted for the Iraq Historic Allegations Team (following the *Ali Zaki Mousa (No.2)* judgment⁵⁶) and continued for the Service Police Legacy Investigations, greatly contributed to earlier decision making.

Limitations on investigations

1.5.9. The Iraq Historic Allegations Team’s task was also complicated by other factors: the delays in making a complaint; the variable quality of those complaints; the absence of contemporaneous evidence; and difficulties in getting access to complainants and witnesses.

1.5.10. As noted above, the vast majority of complaints were only reported to the authorities in the period 2014-2015, in some cases 11 years after the alleged incidents. Whereas the

⁵⁶ *R (on the application of Mousa & Others) v Secretary of State for Defence* [2013] EWHC 1412 (Admin), at §181.

early complaints had generally been supported by a signed witness statement,⁵⁷ the later complaints consisted of a one- or two-page summary that had been typed up on the basis of a pro forma questionnaire and a short telephone interview through an interpreter.⁵⁸ This may explain why many complaints appear to have been produced to a template. Whilst this may have been an inevitable consequence of the creation of a Claims Register (replacing the full pre-action process to reduce the burden on Public Interest Lawyers and the Ministry of Defence in light of the increasing volume of claims), which in turn reduced the legal aid provision to a maximum of four hours' work per claimant,⁵⁹ the reduced level of detail increased the amount of work that the Iraq Historic Allegations Team had to do to establish the date and location of the alleged incident, to locate records, and to identify witnesses.⁶⁰ Furthermore, the absence of checks and balances at this initial stage of detailing their complaint meant that the account given by the complainant when interviewed by investigators often differed, and sometimes significantly, from that in their written summary-form complaint.⁶¹ In some cases the complainant denied having made certain allegations at all. This made it significantly harder for the Iraq Historic Allegations Team to assess allegations accurately at the outset⁶² and to prioritise their investigative resources, and introduced additional delay into the process.

1.5.11. Whilst the Court ruled in 2016 that, where there had been a significant delay in notifying an allegation, the Iraq Historic Allegations Team was entitled to decline to investigate it unless the complainant provided a minimum level of information (including a statement), they applied this approach only in relation to minor allegations.⁶³

1.5.12. In the absence of contemporaneous statements, or of forensic or physical evidence, the Iraq Historic Allegations Team investigators had to rely upon fragmentary records and upon the memories of witnesses and complainants which due to the passage of time were necessarily less accurate and less detailed. Although independent experts who performed psychological and medical examinations concluded that some complainants had suffered historical trauma, it was often impossible to date this trauma (and hence to exclude the possibility that this had been sustained during previous or subsequent periods of detention by the Iraqi authorities) or to identify a suspect.

⁵⁷ *Al-Saadoon & Others v Secretary of State for Defence (Rev 1)* 1 WLR 3625, at §284.

⁵⁸ *Ibid*, at §287.

⁵⁹ *Ibid*, at §287.

⁶⁰ *Ibid*, at §284.

⁶¹ *Ibid*, at §286.

⁶² *Ibid*, at §284.

⁶³ *Ibid*, at §§288-291.

1.5.13. As noted above, complainants frequently alleged ill-treatment by multiple units at various locations. To identify the units involved, and potential suspects, the Iraq Historic Allegations Team separated out the complaints into their constituent allegations, from which it constructed a number of ‘problem profiles’ around common units or locations. This enabled the Iraq Historic Allegations Team to assess whether minor allegations that it might be disproportionate to investigate in isolation potentially disclosed a systemic problem within the chain of command that required investigation.

1.5.14. The task of investigating allegations was significantly complicated by difficulties in getting access to complainants and witnesses. Whilst it was possible to interview some witnesses via video link, in accordance with the Ministry of Justice’s ‘Achieving Best Evidence’ guidelines the Iraq Historic Allegations Team conducted face-to-face interviews with any complainants and significant witnesses who were assessed as potentially vulnerable. Due to the security situation in Iraq, these interviews were conducted in a third country under a process known as Operation Mensa.

1.5.15. Having initially approved this approach – but only after the Iraq Historic Allegations Team agreed to fund Public Interest Lawyers’ attendance (in the capacity of a witness supporter pursuant to the UN-developed ‘Istanbul Protocol’⁶⁴ rather than in a legal advisory capacity) during these interviews – Public Interest Lawyers subsequently withdrew their support for Operation Mensa and frustrated all attempts to conduct interviews between November 2011 and early 2013. This corresponded with their attempts, through the *Ali Zaki Mousa (No.2)* proceedings, to argue that the Iraq Historic Allegations Team lacked the requisite independence and to secure a single public inquiry. Although face-to-face interviews resumed in March 2013, when the Iraq Historic Allegations Team subsequently reduced the level of funding (from three paralegals to one) in order to control the costs of these investigations, Public Interest Lawyers threatened to withdraw support for these interviews and advised their clients not to attend interviews or cooperate with the investigations until this disagreement was resolved. Thus, for a significant period, Public Interest Lawyers were actively obstructing the very investigations that they were arguing the Ministry of Defence should be required to carry out.

⁶⁴ Developed as part of an UN-backed project, “*The Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is intended to serve as international guidelines for the assessment of persons who allege torture and ill-treatment...*” (<https://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>)

1.5.16. This need to reach an accommodation with Public Interest Lawyers, combined with the Iraq Historic Allegations Team's recourse to the same Iraq-based agent that had put many of the complainants in contact with Public Interest Lawyers and Leigh Day & Co. (and who was the only person who knew how to contact most of the complainants and key witnesses) in order to progress investigations, fuelled the perception that these historical investigations were a 'witch-hunt'. Neither the Ministry of Defence nor the Iraq Historic Allegations Team succeeded in correcting this perception. Reports of apparent inappropriate conduct by some contractors added to these public and parliamentary concerns, and prompted a House of Commons Defence Committee inquiry⁶⁵ into the conduct of the Iraq Historic Allegations Team's investigations and the support provided to affected Service personnel and veterans.

1.6. Service Police Legacy Investigations

1.6.1. To restore public confidence in the historical investigations, in February 2017 the then Secretary of State for Defence announced that the Iraq Historic Allegations Team would close at the end of June, and that the remaining investigations would be reabsorbed by the Service police. A new Service police unit, Service Police Legacy Investigations, was established under the command of a Royal Navy Police officer for this purpose and started work on 1 July 2017. Once again, this was disruptive and investigations stalled while the new investigators got up to speed.

1.6.2. Service Police Legacy Investigations comprised 40 Service police, drawn equally from the Royal Navy Police and Royal Air Force Police, supported by a small number of civil servants and a reduced number of contractors. To avoid the perception problems that had beset the contractor-heavy Iraq Historic Allegation Team, the Ministry of Defence capped the number of contractors (initially at 25 although this number later increased slightly in an effort to reduce delays). For the same reason, the contractors were not involved in interviewing, and did not communicate with, any Service personnel or veterans.

1.6.3. Service Police Legacy Investigations was therefore significantly smaller than the Iraq Historic Allegations Team. Although it had been scaled for around 20 investigations (involving a larger number of allegations) based on the Iraq Historic Allegations Team's projections regarding the caseload to be transferred, it was immediately numerically insufficient for the

⁶⁵ House of Commons Defence Committee, "Who guards the guardians? MOD support for former and serving personnel," HC 109, <https://publications.parliament.uk/pa/cm201617/cmselect/cmdfence/109/10902.htm>.

actual demands placed upon it. Not only did the Iraq Historic Allegations Team hand over a larger number of ongoing investigations (43 investigations comprising 115 allegations) than originally envisaged, but it also handed over a much larger number of unassessed allegations.

1.6.4. Service Police Legacy Investigations' total caseload amounted to 1,287 allegations (including self-identified allegations),⁶⁶ of which 1,145 were either in initial assessment or pre-investigation case assessment at 1 July 2017. Due to the lack of detail in the summary-form complaints, Service Police Legacy Investigations faced the same problems as the Iraq Historic Allegations Team had done in assessing these allegations and prioritising investigative resources. Diverting investigative resources to initial assessment and pre-investigation case assessment, and the difficulties inherent in those assessments, added further delay.

1.6.5. This mismatch between caseload and resources meant that Service Police Legacy Investigations was unable to meet the initial target (December 2018) for completing its investigations. This overrun introduced an added complication; many of the Service police personnel had to be rotated out as their postings to Service Police Legacy Investigations came to an end. This problem arose several times thereafter, as Service police personnel were given shorter postings to align with revised completion dates that were successively missed. The investigation phase of Service Police Legacy Investigations was finally concluded in December 2020, and the work of the unit is therefore nearly complete.⁶⁷

1.6.6. I make no criticism of the Officer Commanding Service Police Legacy Investigations, nor of any of the personnel involved in the investigations. They carried out their task conscientiously despite these manifold difficulties. However, although the Officer Commanding was an experienced Service police officer, he was less senior and crucially had less experience of running concurrent high-profile complex investigations than the successive Directors of the Iraq Historic Allegation Team (both of whom had been former Detective Chief Superintendents). Whilst the Ministry of Defence arranged for him to be mentored by a retired Chief Constable, who also arranged for an independent review of the Service Police Legacy Investigations practices and processes, there was no equivalent of the Gold Group nor of the Independent Advisory Group that had been successfully adopted for Operation Northmoor.⁶⁸

⁶⁶ Service Police Legacy Investigations Quarterly Update for the period 1 April 2020 to 30 June 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/909154/20200708-SPLI_QTR_RPT-1APR20-30JUN20-FINAL.pdf

⁶⁷ The Royal Navy Police is still dealing with a small number of historical allegations that did not form part of the Iraq Historic Allegations Team or Service Police Legacy Investigations caseloads.

⁶⁸ Note of meeting 48.

This relative inexperience and the lack of a clear governance structure to resolve difficulties as they arose may have contributed to delays.

1.7. Iraq Fatality Investigations

1.7.1. As noted above, the Administrative Court ruled in *Ali Zaki Mousa (No.2)* that in some cases a criminal investigation alone would be insufficient to discharge fully the investigative obligations under Article 2 or Article 3 of the European Convention on Human Rights, and outlined a proportionate process for achieving compliance that borrowed features from Coroners' inquests and from public inquiries. The Ministry of Defence promptly implemented this hybrid process, which it termed Iraq Fatality Investigations.⁶⁹ I was surprised to discover that the process is only underpinned by a Court Order, and has no statutory basis.

1.7.2. Under the process that has been adopted, the Iraq Historic Allegations Team or Service Police Legacy Investigations produced a final report for each investigation and sent them together with the key underlying evidence to the Ministry of Defence. The Ministry of Defence reviews these materials and, applying the principles set out in the *Ali Zaki Mousa (No.2)* and *Al-Saadoon* judgments referred to above, makes a case-by-case decision as to whether any Article 2 or Article 3 obligation arises, and if so whether those obligations have been fulfilled or are capable of being fulfilled by a further, non-criminal investigation. Where the Ministry of Defence concludes that the obligations under the Convention require a further investigation (or has been ordered to establish an investigation), it requests the Inspector to examine the case and produce a report, and if appropriate to make recommendations. To date nine cases have been referred for an Iraq Fatality Investigation; of these four were the subject of Court Orders.

1.7.3. I have spoken to the current Inspector, the Right Honourable Baroness Hallett DBE PC, to understand whether the process works satisfactorily and whether it is a suitable model for the future. Baroness Hallett expressed satisfaction with the degree of discretion conferred upon the Inspector, but outlined three areas for improvement.⁷⁰ First, the lack of any statutory basis for the Iraq Fatality Investigations process means that the Inspector has no power to compel anyone to produce any documents or to give evidence. Although the Ministry of Defence has voluntarily provided full disclosure, and the Inspector could apply to the High

⁶⁹ Hansard, 27 March 2014, columns 29WS-30WS, <https://hansard.parliament.uk/commons/2014-03-27/debates/14032769000017/IraqFatalityInvestigations>

⁷⁰ Note of meeting 46.

Court for an order to compel witness evidence, Baroness Hallett felt strongly that the Inspector should have statutory powers. The Administrative Court had also recognised the need for powers of compulsion, however the absence of any statutory underpinning for this form of quasi-inquest meant that the Ministry of Defence was unable to give the Inspector direct powers without primary legislation. Secondly, the policy documents setting out various processes adopted by the Iraq Fatality Investigations were developed ‘on the hoof’ and require systematic review. Thirdly, the Inspector’s team lacks a proper case-management system. The workaround arrangements they have adopted for electronic file sharing are unsatisfactory, and introduce risk by placing too much reliance on ‘institutional memory’.

1.7.4. I understand that the Ministry of Defence also has some concerns about the current process. First, the decision as to whether a case should be referred for an Iraq Fatality Investigation can itself be the subject of a judicial review, involving the Department in further litigation. Secondly, the media and the public do not properly understand the Iraq Fatality Investigations process, which was intended to serve the same purpose as a Coroner’s inquest. This misperception is exacerbated by the length and quality of the Inspector’s reports, which are similar to Court of Appeal judgments and run to hundreds of pages. Thirdly and relatedly, the media and the public appear to believe that, by concluding that an Iraq Fatality Investigation is required, the Department has decided that the Service personnel involved acted improperly – even though they have not been convicted of any offence, and in some cases have not even been referred to the Director of Service Prosecutions for a charging decision. For the future, the Ministry of Defence would like to put the process on a more ‘normal’ footing that more closely mirrors a Coroner’s inquest.

1.7.5. With regard to who should decide which cases are referred, I asked Baroness Hallett whether responsibility for these decisions should be moved from the Ministry of Defence to the Inspector. Baroness Hallett observed that this would not address the Ministry of Defence’s third concern as the act of appointing an Inspector may be perceived as a decision that there is wrongdoing to investigate. While this difficulty might be overcome by amending the process so that in future Inspectors are appointed by the Lord Chancellor rather than the Secretary of State for Defence, Baroness Hallett suggested that dispensing with an Inspector altogether and giving the Chief Coroner the jurisdiction to order an inquest⁷¹ in these cases might better

⁷¹ I shall use the term ‘inquest’ since what is envisaged is a process running on similar procedural lines and reaching similar ‘Conclusions’ to those recorded on a Record of Inquest form, although the different context will necessitate some adaptations. It will be a question for others whether the terms ‘inquest’ and ‘coroner’ are used if the proposal is implemented, but to use these terms appears to me to have significant advantages in emphasising the summary nature of the proceedings and the departure from the lengthy and detailed reports produced under the current process.

meet the Ministry of Defence's aims. I understand that the Secretary of State for Defence would prefer responsibility for deciding whether there should be an inquest in such cases, and for conducting the resulting inquests, to be given to an Armed Forces Coroner, who would have the necessary understanding of the operational context.

1.7.6. As a matter of courtesy, I have spoken to the Chief Coroner, His Honour Judge Thomas Teague, on this point. He could see difficulties with giving this additional task to the holder of the office of Chief Coroner, which is a part-time role with virtually no executive responsibilities or power and is supported only by a small office, but could see advantages in an Armed Forces Coroner being appointed.⁷²

1.7.7. It is clear to me that, whichever option is ultimately preferred, it would require primary legislation to provide for inquests of foreign nationals killed during overseas operations whose bodies are not brought to the UK.

1.7.8. I have concluded that it is desirable that the process be aligned with coroners' inquests for the future. The current process goes beyond what the Administrative Court envisaged, and far beyond what is required by Article 2 of the European Convention on Human Rights. It is at least possible that future overseas operations would result in a larger number of cases requiring an Article 2-compliant inquest since, if criminal investigations are completed more quickly, the balance between the likelihood of obtaining further relevant evidence and the human and financial costs may shift. Coroners' inquests may provide a more rough and ready form of summary justice than the current process, but are better able to cope with a larger number of cases whilst still complying with the requirements of the European Convention on Human Rights.

1.8. Operation Northmoor

1.8.1. From July 2013, Leigh Day & Co. began bringing compensation claims on behalf of Afghans who alleged that they had been unlawfully detained and ill-treated by UK Forces. These were passed to the Royal Military Police's Special Investigation Branch. In December 2013, the Royal Air Force Police transferred its separate investigation into allegations of ill-treatment (which had been made by captured persons while in UK Forces' custody) to the

⁷² Note of meeting 56.

Royal Military Police. Thereafter responsibility for investigating both sets of detention-related allegations rested with the Royal Military Police's Special Investigation Branch.

1.8.2. In March 2014, the Provost Marshal (Army) identified a risk that investigative opportunities might be lost and systemic problems not identified if these various allegations continued to be investigated separately. He therefore directed the Royal Military Police's Special Investigation Branch to merge the outstanding allegations into a single investigation, designated Operation Northmoor. Additional allegations, including allegations of unlawful killing during detention operations, were subsequently also brought into Operation Northmoor.

1.8.3. At its height, over 100 personnel were allocated to Operation Northmoor. These were divided into three teams, each headed by a senior investigating officer:- Team 1 looked at allegations of offences under Schedule 2 to the Armed Forces Act 2006, including of unlawful killing; Team 2 looked at the other allegations of ill-treatment, including of non-criminal misconduct; while Team 3 provided investigative support. Tactical and strategic control of the investigations rested respectively with the Silver Commander and Gold Commander.

1.8.4. Given the scale and complexity of the task facing Operation Northmoor, the Provost Marshal (Army) approached the National Crime Agency and the Greater Manchester Police Major Case Review Team. These provided mentoring support and advice from a 'policing best practice' perspective, including in relation to the investigative strategy, until early 2017.

1.8.5. In July 2016, the Ministry of Defence arranged for more formal assurance of Operation Northmoor. An Independent Advisory Group, consisting of a former Chief Constable (who also provided mentoring support to the Provost Marshal (Army)) and an eminent criminal silk, was established. As part of this assurance, the Independent Advisory Group arranged for four independent reviews, by former senior Home Office police force detectives, to be conducted between December 2016 and January 2017 and on three occasions thereafter (November 2017, July 2018, and April 2019). The Independent Advisory Group also attended meetings of the Gold Group, which consisted of key stakeholders including the Provost Marshal (Army), the Director of Service Prosecutions, senior Operation Northmoor personnel, and the Service Prosecuting Authority's Operational Offending Team.

1.8.6. In total, Operation Northmoor investigated over 675 allegations by 159 complainants. Of these, most were allegations of non-criminal conduct (a mixture of Service disciplinary offences and conduct that might be described as cultural insensitivity, e.g. inappropriate handling of the Quran). Fewer than 200 of the allegations constituted criminal offences.

1.8.7. As with the Iraq historical investigations, Operation Northmoor's task was significantly complicated by difficulties in getting access to complainants and witnesses. Leigh Day & Co. declined to assist investigators in contacting complainants or obtaining supporting evidence from them, and like Public Interest Lawyers insisted on being present during the only Achieving Best Evidence interview that could be arranged. In accordance with Istanbul Protocol principles, this was a face-to-face interview conducted in Afghanistan.

1.8.8. As of June 2017, Operation Northmoor investigators had completed investigations into over 90% of the allegations. Although three Service personnel were interviewed under caution in relation to allegations of ill-treatment, investigators did not find sufficient evidence to refer anyone to the Director of Service Prosecutions for a charging decision.

1.8.9. Investigations into the allegations of unlawful killing continued until 2019. In July 2019, the Provost Marshal (Army) decided that all reasonable and proportionate lines of inquiry had been exhausted (a view with which the Independent Advisory Group concurred), and that there was insufficient evidence to refer any Service person or veteran to the Director of Service Prosecutions for a charging decision. Having consulted the Director of Service Prosecutions, the Provost Marshal (Army) therefore decided to close the investigations.

1.8.10. In contrast to the Iraq Historic Allegations Team and Service Police Legacy Investigations, which published quarterly updates on the progress of investigations and limited information on the nature and outcome of individual cases, Operation Northmoor did not publish any details of the allegations or its investigations. This lower level of transparency led both to erroneous suggestions that Operation Northmoor had closed in 2017 without having properly investigated allegations of unlawful killing,⁷³ and to calls for greater parliamentary scrutiny and oversight of overseas operations.⁷⁴ It also led to criticism both of the Service police and the Ministry of Defence for mishandling the investigations, and of the investigations as being conducted 'secretly' and a 'witch-hunt'.⁷⁵

⁷³ Hansard, 10 July 2017, columns 20-22, Topical Question 900321 and T9, <https://hansard.parliament.uk/Commons/2017-07-10/debates/EE2DD7B1-2247-412C-B01D-F9C3C9F279E0/TopicalQuestions>.

⁷⁴ Hansard, 7 January 2020, columns 353-366, <https://hansard.parliament.uk/commons/2020-01-07/debates/4B913D4B-8058-456B-A485-B56C447DE042/UKSpecialForcesIraqAndAfghanistan>.

⁷⁵ Larisa Brown, "Afghan troops witch-hunt was axed a year ago... but nobody told the veterans who were living in terror of prosecution," 21 June 2020, <https://www.dailymail.co.uk/news/article-8445271/Afghan-troops-witch-hunt-axed-YEAR-ago-told-veterans-fearing-prosecution.html>.

1.9. The International Criminal Court

1.9.1. Under the Rome Statute, the International Criminal Court has jurisdiction to investigate and prosecute allegations of genocide, war crimes, crimes against humanity, and the crime of aggression if a State Party is unwilling or unable to do so itself.

1.9.2. When it is notified of a situation, the International Criminal Court's Office of The Prosecutor conducts a Preliminary Examination to assess whether the allegations fall within the Court's jurisdiction, whether the allegations meet the Court's admissibility criteria, and whether the relevant State Party or States Parties is/are unwilling or unable to conduct their own genuine investigations and prosecutions. During the Preliminary Examination process, the Office of The Prosecutor is confined to assessing the situation as a whole rather than investigating individual allegations, and applies a low standard of proof, namely whether there is a reasonable basis to believe that crimes within the Court's jurisdiction have been committed.

1.9.3. Having completed the Preliminary Examination, if the Prosecutor is satisfied that crimes within the Court's jurisdiction may have been committed, that they meet the Court's admissibility criteria, and that the relevant State Party or States Parties is/are unwilling or unable to investigate and prosecute them, he or she can apply to a Pre-Trial Chamber of the International Criminal Court for authorisation to open a full investigation.

Iraq

1.9.4. In 2004, having received a communication from the Athens Bar Association alleging that UK Forces had committed war crimes in Iraq, the Office of the Prosecutor duly opened a Preliminary Examination. This concluded in 2006 that although there was a reasonable basis to believe that UK Forces had committed war crimes the allegations did not reach the Court's gravity threshold (either quantitatively or qualitatively).

1.9.5. In May 2014, the Office of The Prosecutor reopened the Preliminary Examination after receiving a further communication from Public Interest Lawyers and the European Center for Constitutional and Human Rights in January 2014.

1.9.6. Having reaffirmed in December 2017 its 2006 conclusion that there was a reasonable basis to believe that UK Forces had committed the war crimes of wilful killing, torture,

inhuman/cruel treatment, outrages upon personal dignity, and rape and/or other forms of sexual violence,⁷⁶ the Office of The Prosecutor proceeded to consider whether the allegations reached the Court's gravity threshold and whether the UK was willing and able to investigate those allegations. In December 2020, the Office of The Prosecutor concluded that the allegations reached the Court's gravity threshold.⁷⁷

1.9.7. With regard to the domestic investigations, the Office of The Prosecutor found that *"the initial measures taken by the British army to investigate and prosecute alleged crimes in the midst and immediate aftermath of the armed conflict fell short of the standards set out in article 17(1)(a)-(b) and article 17(2) of the Statute, both in terms of inaction and unwillingness to genuinely carry out the relevant investigations."*⁷⁸ However, in light of the subsequent steps to establish an independent investigative body to examine historical allegations – and despite disagreeing with some of the decisions by those investigators and the Service Prosecuting Authority to discontinue investigations⁷⁹ – the Office of The Prosecutor found no basis to conclude that the UK had not conducted genuine investigations.⁸⁰ It consequently closed the Preliminary Examination.

1.9.8. Getting to this point had required significant effort over a period of nearly six years by the Ministry of Defence, the Foreign, Commonwealth & Development Office, the Service Prosecuting Authority, and the Iraq Historic Allegations Team and Service Police Legacy Investigations. At various points throughout the preliminary examination, the Office of The Prosecutor had invited submissions, requested updates or specific information, and asked questions.

1.9.9. Due to the way the Iraq Historic Allegations Team and Service Police Legacy Investigations held their data, providing answers and updates diverted resources away from investigations and contributed to delays. Differences in the way these two bodies held their data, and the shift from quantifying the caseload in terms of victims or allegations (which the Iraq Historic Allegations Team appeared to use almost interchangeably) to quantifying it by reference to numbers of allegations and investigations, gave rise to discrepancies in the statistical information that required further effort to resolve.

⁷⁶ Office of The Prosecutor, "Report on Preliminary Examinations (2017)," at §194, https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-Iraq_ENG.pdf.

⁷⁷ Office of The Prosecutor, "Situation in Iraq/UK. Final Report," at §148, <https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>.

⁷⁸ *Ibid*, at §494.

⁷⁹ *Ibid*, at §499.

⁸⁰ *Ibid*, at §502.

1.9.10. The Office of The Prosecutor identified the lack of publicly available information regarding these investigations as a complicating factor in assessing their genuineness:- “*The Office also observes that the concerns it has noted largely stem from the overall paucity of the information available and the different possible inferences that might be drawn therefrom.*”⁸¹ However, it appears to have derived reassurance from the existence of judicial oversight of investigative and prosecutorial decisions, including those around prioritisation of investigative resource and the criteria for closing cases.⁸²

Afghanistan

1.9.11. In 2007, the Office of The Prosecutor opened a Preliminary Examination into allegations of war crimes and crimes against humanity committed in Afghanistan since 1 May 2003, or committed outside the territory of Afghanistan since 1 July 2002 but having a nexus to the armed conflict. In 2017, it concluded that the jurisdiction and admissibility criteria were met, and in November 2017 the Prosecutor applied to a Pre-Trial Chamber of the International Criminal Court for authorisation to open a full investigation. The Pre-Trial Chamber refused authorisation in April 2019. The Prosecutor appealed, and in March 2020 the Appeals Chamber of the International Criminal Court authorised the investigation.

1.9.12. In its 2017 annual report, the Office of The Prosecutor indicated that it was also seized of certain media reports alleging war crimes by the Special Forces of countries other than Afghanistan and the US, and would conduct a Preliminary Examination into these under the umbrella of the Afghanistan investigation once authorised.⁸³

1.9.13. Although the Office of The Prosecutor has not yet approached the UK authorities in relation to such allegations, it is thought that these media reports include allegations against UK Special Forces. If so, satisfying the Office of The Prosecutor’s requests for information on Operation Northmoor and other investigations by the Royal Military Police’s Special Investigation Branch is likely to involve significant Service police resource.

⁸¹ Ibid, at §362.

⁸² Ibid, at §196, §§308-312, §431, §495, and §498.

⁸³ Office of The Prosecutor, “Report on Preliminary Examinations (2017),” at §245, https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-Afghanistan_ENG.pdf.

1.10. Conclusion

1.10.1. Despite the best efforts of the Service police, the decision that the Ministry of Defence's obligations under the European Convention on Human Rights were best met through (largely historical) criminal investigations had unfortunate wider consequences in my opinion.

1.10.2. First, most cases did not proceed to the investigation stage for a variety of reasons: the vast majority of allegations were relatively minor and a criminal investigation was not proportionate; in some cases it was not possible to identify the responsible individual even where there was clear evidence of a criminal offence; and in many cases it was not possible to find the evidence necessary to support a criminal investigation.

1.10.3. Secondly, by only answering the narrow question of whether it was possible to establish a prosecutable case, this approach did not provide an overall assessment of the credibility and validity of allegations. This prevented the Ministry of Defence and Armed Forces from taking an overall view of the pattern of behaviour, and consequently limited their ability to learn lessons for future conflicts (although the Systemic Issues Working Group has still endeavoured to identify and resolve overarching issues that underlie the alleged incidents).⁸⁴

1.10.4. Thirdly, the investigations failed both to bring all those who had committed offences to justice and to exonerate those who were wrongly suspected. They did not bring closure for victims and families. They caused distress to those Service personnel and veterans who were caught up in them, whether as witnesses or suspects, and to their families.

Lessons

1.10.5. I have drawn the following key lessons from the experience of investigating allegations arising from Operation Telic and Operation Herrick, and of defending legal challenges to those investigations. I shall draw upon these lessons later in the report when considering the frameworks, processes and skills needed for the future.

1.10.6. First, it is essential that the Service police are notified as soon as possible of: any incident that may have resulted in civilian casualties or deaths; any allegations of unlawful

⁸⁴ <https://www.gov.uk/government/collections/review-of-systemic-issues-arising-from-military-operations-overseas-index>

killing; and any incidents or allegations involving ill-treatment of captured persons. It should not be for the chain of command to decide whether and when to call in the Service police. Whilst it is certainly true that not every use of force or allegation will require investigation, that decision should be taken independently of the chain of command. The current process can result in delays that may seriously affect the effectiveness of an investigation, and may result in some offences never being reported to the Service police. Wherever possible on overseas operations, the Service police should establish a means for complainants to report allegations to them directly. The existence of such a facility must be widely advertised, and accessible to the local population.

1.10.7. Secondly, obtaining a complete picture of an incident or allegation may take time, and it may be necessary to revisit decisions on whether or not to conduct an investigation as further information comes in. In order to demonstrate that investigations have been conducted promptly, and have been as effective as possible, it is essential that the Service police record and retain in an electronically searchable form all decisions as to whether or not to commence an investigation, and any decisions regarding the availability or non-availability of lines of enquiry, e.g. that the security situation precluded or limited examination of the scene. A failure to do so is likely to mean that decisions that were in fact quite properly taken may be the subject of later legal challenge.

1.10.8. Thirdly, it is essential that the Service police should have available to them as much contemporaneous evidence as possible, even if there is no allegation or investigation at the time. Helmet- or body-mounted cameras should be routinely worn, and footage from these and other sources should be regularly downloaded and securely stored. The routine use of cameras should enable the Service police quickly to establish an accurate picture of what happened, and will provide evidence either to prosecute or to refute allegations.

1.10.9. Fourthly, it is essential to minimise causes of disruption and delay to investigations once commenced. The same Service police force must retain conduct of Investigations throughout, seeing them through from the battlefield to prosecution. For this to happen, it will be essential that the Service police have the necessary independence from the chain of command and from those whom they may be required to investigate. The Service police also need the ability to secure access to, and take statements from, complainants and witnesses without input from claimants' lawyers.

1.10.10. Fifthly, to maintain momentum on investigations and ensure their timely completion, lawyers from the Service Prosecuting Authority should be co-located with the Major Incident

Room to enable them to advise promptly on investigations. The Joint Case Review Panel model of regularly reviewing investigations and deciding whether there is still a realistic possibility that they will result in a prosecutable case should be adopted as best practice.

1.10.11. Sixthly, the Independent Advisory Group model should be adopted from the outset for all future investigations arising from overseas operations. The Independent Advisory Group should include senior members of a Home Office police force and of the independent Bar to advise on civilian best practice, and may also need to include other expertise (on e.g. cyber) depending on the nature of the operation and the incidents to be investigated.

1.10.12. Seventhly, there should be judicial oversight of investigative and prosecutorial decisions. In the case of fatalities, this should be exercised by the relevant coroner (whether the Chief Coroner or his nominee under an extension of the existing jurisdiction, or an Armed Forces Coroner if appointed) reviewing the Service police report and deciding whether an inquest is required to comply with Article 2 of the European Convention on Human Rights. In the case of non-fatal incidents, this oversight role should be carried out by the Judge Advocate General or his nominee, to whom the Director of Service Prosecutions should apply for approval (or disapproval) of decisions to discontinue investigations and not to lay charges.

1.10.13. Eighthly, there should be greater transparency regarding allegations notified to the Service police, and the progress and outcome of investigations and any prosecutions. Increased transparency and public accountability are essential for maintaining confidence in the Service Justice System, as well as reassuring Service personnel and veterans of the legitimacy of investigations and prosecutions. The Service police and Service Prosecuting Authority should be encouraged to publicise their successes, even when this represents 'bad news' for the Armed Forces more generally.

1.10.14. Ninthly, the nature of overseas operations and the legal framework are not well understood by the public. This can lead to unrealistic expectations of the Armed Forces' ability to minimise civilian casualties, and to unfair criticism of the Service police when they are unable to ascertain precisely the facts of an incident. The Ministry of Defence should explore ways of educating the public on the unique challenges of the operational environment, and engendering a greater degree of realism as to what investigators can achieve in a non-permissive theatre of operations.

1.10.15. I shall make one final observation before leaving Iraq and Afghanistan. For many years, much of the discussion of historical investigations has focused on their deleterious

impact on Service personnel and veterans, and on the potential impact of 'Lawfare' on operational effectiveness. However, too often the need also to ensure a fair outcome for victims and the next of kin is overlooked in this narrative. It is my firm hope that the recommendations in this report will help to ensure future investigations provide timely and fair outcomes for victims and accused alike.

2. Developments since the Service Justice System Review

2.1. Introduction

2.1.1. My Terms of Reference direct me to “*Build upon the previous Service Justice System Review (by HH Shaun Lyons and Sir Jon Murphy) – the recommendations of which MOD is responding to...*” Therefore, before considering what changes to the framework, skills and processes may be required to facilitate the prompt and effective investigation of allegations arising in connection with future overseas operations, it is necessary to say something both about that review and about developments in relation to the Service Justice System in the years since it reported.

2.1.2. There are three elements to the Service Justice System Review: a Part 1 report by His Honour Shaun Lyons aimed at ensuring that the Service Justice System continued “*to be necessary, fair and efficient*,”⁸⁵ which was finalised in March 2018; a Part 1 report by Professor Sir Jon Murphy which assessed whether “*the structure and skillset of the Service police organisations, and the [Ministry of Defence Police], match the future requirements of the Service Justice System*,” and which was also finalised in March 2018;⁸⁶ and a Part 2 report, which was finalised in March 2019.⁸⁷ These three reports were published in February 2020.

2.1.3. Among their many excellent recommendations (e.g. on achieving Better Case Management; on improving the interoperability of case management systems, and on improving the consistency and quality of management information), I must draw particular attention to their recommendations for creating a new, elite investigative body, the Defence Serious Crime Unit. I shall address in detail what I consider to be the essential features of this Unit in Chapter 5.

⁸⁵ HH Shaun Lyons CBE, “Service Justice System Review (Part 1),” at paragraph 1.1, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918867/SJS_Review_Part_1_Report_for_publication_accessible_.pdf.

⁸⁶ Professor Sir Jon Murphy QPM DL LLB, “Service Justice System Policing Review (Part 1),” https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918869/SJS_Part_1_Policing_Review_for_publication_accessible_.pdf.

⁸⁷ HH Shaun Lyons CBE and Professor Sir Jon Murphy QPM DL LLB, “Service Justice System Review (Part 2),” https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918850/SJS_Review_Part_2_Report_for_publication_accessible_.pdf.

2.1.4. In a written statement to Parliament, dated 12 November 2020,⁸⁸ the Secretary of State for Defence announced that he had accepted 79 of the review’s 84 recommendations. The statement explains that he had rejected the first recommendation (that cases of murder, manslaughter and rape in the UK should always be dealt with under the civilian justice system⁸⁹), choosing instead to maintain the existing principle of ‘jurisdictional concurrency’. The other four recommendations that were not accepted had been rejected as being inextricably linked to that decision.⁹⁰

2.1.5. I have received invaluable assistance from His Honour and Sir Jon during my review. They have helped me to understand the rationale for and intent behind those recommendations that are also relevant to my review, and to refine my thoughts and conclusions.

2.1.6. Before building on their work, it is necessary to touch briefly on developments in the three years since their Part 1 report, and the extent to which these change the landscape of the Service Justice System.

2.2. The Davis/Pratt study

⁸⁸ Hansard, 12 November 2020, columns 45WS-46WS, <https://hansard.parliament.uk/commons/2020-11-12/debates/95de259c-d718-4160-9c3a-97c83fb3dcf9/WrittenStatements>. This was the second written statement to Parliament in relation to the reports and their recommendations; the first statement coincided with the publication of the reports on 27 February 2020, <https://questions-statements.parliament.uk/written-statements/detail/2020-02-27/HCWS131>

⁸⁹ HH Shaun Lyons CBE, “Service Justice System Review (Part 1),” Recommendation 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.*”

⁹⁰ HH Shaun Lyons CBE, “Service Justice System Review (Part 1),” Recommendation 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;*” and Recommendation 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;*” Professor Sir Jon Murphy QPM DL LLB, “Service Justice System Policing Review (Part 1),” Recommendation 10: “*In accordance with the recommendation of HH Lyons for the Court Martial jurisdiction to no longer include the most serious offences (murder, rape and manslaughter) when committed in the UK (except where the consent of the Attorney General is given), in future the SP should no longer investigate those offences in the UK. Such investigations should revert to the civilian police who should enter into a formal protocol to conduct joint civilian led police/SP engaged investigations;*” and HH Shaun Lyons CBE and Professor Sir Jon Murphy QPM DL LLB, “Service Justice System Review (Part 2),” Recommendation 23: “*Section 2 Sexual Offences Act 2003 (SOA) offences join Murder, Manslaughter and Rape as being cases that are tried in the CJS when they are committed within the UK. Section 3 SOA offences should continue to be dealt with in the SJS.*”

2.2.1. On 12 March 2019, Peter Davis and Lindsey Pratt – both very capable and experienced Ministry of Defence civil servants – published ‘A Study into the Service Justice System’. This study was intended to complement the review by His Honour and Sir Jon (Part 2 of which was still ongoing), and focused on the governance of the Service Justice System, about which His Honour had made a recommendation in his Part 1 report.⁹¹

2.2.2. Davis and Pratt identified the need to maximise independence from the single Services:- *“The People area should also own parts of the system that need to be independent of the chain of command. This includes Murphy’s proposed Defence Serious Crime Unit (DSCU).”*⁹²

2.2.3. They made 16 recommendations, predominantly relating to governance of the Service Justice System. Of these, two recommendations are worthy of particular mention, as also aiming to maximise independence from the single Services:-

“Recommendation 11: [Military Court Service] should transfer out of the Army [Top-level Budget] into the Head Office, with the Director MCS reporting to [Director of Armed Forces People Policy]. Service level agreements should be established with the [single-Service Principal Personnel Officers] detailing the service MCS is required to provide and the reciprocal commitments required to sustain that service.”

“Recommendation 13: There is a very strong case for the creation of a [Defence Serious Crime Unit]. The head of the DSCU should report directly into the Head Office and should be a civilian post recruited under fair and open competition via a panel chaired by a Civil Service Commissioner, to demonstrate maximum independence from the chain of command. Financial resources to support the DSCU should be provided centrally, rather than on a lead Service basis.”

2.2.4. I shall return to the issues of independence, command, control and funding of the Defence Serious Crime Unit, in Chapter 5.

2.3. The Wilcox study

⁹¹ HH Shaun Lyons CBE, “Service Justice System Review (Part 1),” Recommendation 16: *“Proposed new arrangements for SJB Governance are set out in the Review,”* and Annex F.

⁹² Peter Davis and Lindsey Pratt, “A Study into the Service Justice System,” at paragraph 8.

2.3.1. In October 2019, the Chief of Defence People appointed Nick Wilcox, a retired Detective Superintendent engaged through Red Octopus Solutions Ltd., to undertake a study “to determine the best means of creating of a Defence Serious Crime Unit.” His Terms of Reference envisaged that this work would be carried out in two stages: a strategic-level study that would identify by the end of March 2020 the best way to implement the unit “in strategic and economic terms,” followed by more detailed work to develop an implementation plan by the summer.

2.3.2. The first stage was completed on schedule; Wilcox submitted his interim and final reports in January 2020⁹³ and March 2020 respectively.⁹⁴ This is an excellent study. However, it records divergence from Sir Jon’s recommendations in two respects.

2.3.3. First, whilst that review had recommended that the Defence Serious Crime Unit be formed by brigading together the three Special Investigation Branches and the specialist investigative support capabilities,⁹⁵ Wilcox’s study proposed a ‘quad’ unit, i.e. one that comprised the three Special Investigation Branches and an element of the Ministry of Defence Police’s Crime Command.

2.3.4. Secondly, while agreeing with the concept of sharing specialist investigative capabilities, the study also suggested that the civilian Regional Organised Crime Unit model referred to in Sir Jon’s report⁹⁶ is not applicable to Service policing on the grounds that the Service police forces do not undertake proactive investigations to any significant extent. I have spoken to Sir Jon on this point. He told me that in hindsight he should have been clearer on this recommendation, and emphasised that he had never intended that the Defence Serious Crime Unit would replicate everything that the Regional Organised Crime Units do.⁹⁷ Not only is there variation between Regional Organised Crime Units, but the Defence Serious Crime Unit will have a national (and indeed international) focus. Sir Jon had intended this as a model which, suitably adapted, would bring together and enhance the Service police forces’ best capabilities, would give the Service police very easy access to a network of all the right skills

⁹³ Nick Wilcox, “A study to determine the best means of creating a Defence Serious Crime Unit: Interim Report,” 31 January 2020.

⁹⁴ Nick Wilcox, “Defence Serious Crime Unit (DSCU): Strategic Document,” 31 March 2020.

⁹⁵ Professor Sir Jon Murphy QPM DL LLB, “Service Justice System Policing Review (Part 1), Recommendation 3: “*The three existing Special Investigations Bureau (SIB) be brigaded into the DSCU together with all current specialist investigative support – intelligence, undercover, surveillance, digital units, forensic and scenes of crime.*”

⁹⁶ Ibid, Recommendation 2: “*A Tri-Service Defence Serious Crime Unit (DSCU) is created following the civilian police Regional Organised Crime Unit (ROCU) model.*”

⁹⁷ Note of meeting 37.

and experience, and would facilitate the Service police seconding personnel into civilian police groupings to gain essential experience.

2.3.5. When Wilcox submitted his more detailed implementation proposals in December 2020,⁹⁸ a further deviation from the Service Justice System Review was evident. Although the Ministry of Defence had not announced a departure from its acceptance of those recommendations, following resistance from the Service police the focus in these implementation documents had changed from implementing a Unit (as recommended by Sir Jon, endorsed by His Honour, and envisaged by the Terms of Reference for the study) to evolving the existing Service police capabilities to achieve greater collaboration.

2.3.6. Wilcox left the project in January 2021 after the Ministry of Defence appointed a member of the Senior Civil Service to lead on the further implementation work. It is significant that, whereas the previous project documentation had referred to this as the Defence Serious Crime Unit Project, Wilcox's final, handover report refers to this as the Defence Serious Crime Capability Project.⁹⁹

2.3.7. I shall return to this study in Chapter 5 when considering how the Defence Serious Crime Unit should now be implemented to ensure serious incidents and allegations arising in the context of future overseas operations can be promptly and effectively investigated. However, I should make clear that Wilcox's report was not formally accepted by the Ministry of Defence.

2.4. The Armed Forces Bill

2.4.1. The Armed Forces Bill currently before Parliament contains a number of clauses to take forward recommendations from His Honour and Sir Jon's review.

⁹⁸ "Defence Serious Crime Project. Proposal 3A7: Defence Policing Serious and Complex Crime Strategy," 21 December 2020; "Defence Serious Crime Project. Proposal 4A: Crime Management," 21 December 2020; "Defence Serious Crime Project. Proposal 4B: Tasking and Coordination – Phase 1 Crime Prioritisation & Allocation," 18 December 2020; "Defence Serious Crime Project. Proposal 5C: A Quad Service Secondment Team," 21 December 2020; and "Defence Serious Crime Project. Proposal 7I: Victim Witness Care Coordination Unit," 21 December 2020.

⁹⁹ Red Octopus Solutions Ltd, "DSCC Project Debrief Report 02.10.2020-22.01.2021"

2.4.2. Thus, clause 2 and Schedule 1 to the Bill amend the rules around the composition of Court Martial boards and the manner of reaching verdicts;¹⁰⁰ clause 3 makes provision for the Judge Advocate General to request that a Circuit Judge be nominated to sit as a judge advocate;¹⁰¹ clause 4 makes provision for Commanding Officers to correct punishments awarded at Summary Hearing;¹⁰² and clause 11 establishes a new statutory office holder, the Service Police Complaints Commissioner.¹⁰³

2.4.3. Whilst the Ministry of Defence did not accept His Honour's recommendation in relation to jurisdiction to deal with cases of murder, manslaughter or rape committed in the UK, clause 7 of the Bill requires the Director of Service Prosecutions and Director of Public Prosecutions to agree a protocol that will clarify how the principle of concurrent jurisdiction should operate in such cases.

2.5. The Overseas Operations Act

¹⁰⁰ HH Shaun Lyons CBE, "Service Justice System Review (Part 1)," Recommendation 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;*" HH Shaun Lyons CBE and Professor Sir Jon Murphy QPM DL LLB, "Service Justice System Review (Part 2)," Recommendation 25: "*The Court Martial sits with both three-member and six-member boards and that the differentiation between the two levels of board should be on the basis of the sentencing powers of the boards. The three-member board should be limited to trying those cases where no defendant could be sentenced to more than two years imprisonment or detention;*" and Recommendation 26: "*OR7 ranks be included in the range of personnel qualified to sit on Court Martial boards.*"

¹⁰¹ HH Shaun Lyons CBE, "Service Justice System Review (Part 1)," Recommendation 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.*"

¹⁰² HH Shaun Lyons CBE and Professor Sir Jon Murphy QPM DL LLB, "Service Justice System Review (Part 2)," Recommendation 43: "*A power similar to that contained in the Magistrates' Courts Act 1980, but narrower in scope, should be taken allowing the CO to take any remedial action necessary when a sentence passed contains a "technical" illegality e.g. an impermissible combination of punishments. In addition, a power to enable the Reviewing Authority to refer such matters back to COs should be taken.*"

¹⁰³ HH Shaun Lyons CBE and Professor Sir Jon Murphy QPM DL LLB, "Service Justice System Review (Part 2)," Recommendation 44: "*A new niche independent body is established to deliver independent oversight of the Service Police and of investigative functions in the SJS. The new independent body is policy led and funded by the MOD, but at arms-length from the MOD. The class of persons able to make complaint should be broadened to include all those subject to the Act and all those who have been subject to the Act. Those not subject to the Act but directly affected by the exercise of powers contained in the Act should also have access to the system. The MOD will wish to consider a time limit to be set on the bringing of complaints. Clear distinction should be drawn as to which complaints fall to the newly created independent body and which to the SCO.*"

2.5.1. Part 1 of the Overseas Operations (Service Personnel and Veterans) Act 2021 is intended to strengthen the legal protections for Service personnel and veterans against repeated investigations into, and prosecution for, historical offences on overseas operations.

2.5.2. It seeks to achieve this by means of a so-called 'triple lock'; three measures that together reduce the likelihood of historical prosecutions for certain criminal offences. First, a presumption that it is to be exceptional to bring (or continue) a prosecution for an offence committed during an overseas operation once more than five years have elapsed since the date of the alleged offence.¹⁰⁴ Secondly, a list of factors to which a prosecutor must give particular weight when deciding whether, exceptionally, to rebut that presumption.¹⁰⁵ Thirdly, a requirement that in cases where the prosecutor has rebutted the presumption the Attorney General must consent to the prosecution.¹⁰⁶

2.5.3. Although the Act may result in certain criminal offences committed on overseas operations not being prosecuted due to the passage of time, this will not apply to the most serious offences. Crimes under the International Criminal Court Act 2001 (genocide, crimes against humanity, and war crimes),¹⁰⁷ grave breaches of the Geneva Conventions,¹⁰⁸ torture,¹⁰⁹ and sexual offences under domestic law¹¹⁰ are expressly excluded from this presumption.

2.5.4. The Act does not directly impact on investigations into incidents or allegations arising in connection with overseas operations. The requirement that the prosecutor makes the decision as to whether to rebut the presumption independently of considering the Full Code test (i.e. whether the evidence establishes a realistic prospect of conviction, and whether prosecution is in the public interest)¹¹¹ implies that the presumption will only be considered once the Service police have decided that there is sufficient evidence to charge an identified Service person with an offence, and have formally referred the case to the Director of Service Prosecutions for a prosecution decision. However, it may be possible for the Service police to terminate investigations early in cases where the Service Prosecuting Authority advise that,

¹⁰⁴ s.2, Overseas Operations (Service Personnel and Veterans) Act 2001.

¹⁰⁵ Ibid, s.3.

¹⁰⁶ Ibid, s.5.

¹⁰⁷ Ibid, s.6 and Schedule 1, paragraphs 18-23 and 26-28.

¹⁰⁸ Ibid, s.6 and Schedule 1, paragraph 31.

¹⁰⁹ Ibid, s.6 and Schedule 1, paragraph 30.

¹¹⁰ Ibid, s.6 and Schedule 1, paragraphs 2-15 and 32-36.

¹¹¹ Ibid, s.1(2).

taking the allegation at its highest, the resulting charge is not one that would lead the Director of Service Prosecutions to rebut the presumption.

2.5.5. During the Act's passage through Parliament, concerns were raised that the existence of the presumption might incentivise suspects to frustrate or delay investigations until the five-year trigger point is reached.¹¹² Concerns were also raised that the Act does not prevent reinvestigations.¹¹³ Amendments to address those concerns were proposed but ultimately withdrawn. However, by letter dated 19 May 2021, the Secretary of State for Defence requested that I consider Amendment 6, which had been proposed by Lord Thomas of Gresford. I shall examine this amendment and similar proposals by a former Judge Advocate General, His Honour Jeffrey Blackett, in Chapter 6.

2.5.6. I recognise the force of the arguments that 'justice delayed is justice denied' and that Service personnel and veterans require greater certainty that incidents will not be repeatedly re-examined. Throughout this review I have sought to identify the framework, processes and skills necessary to ensure that the Service Justice System is able to deal with cases promptly and effectively in order to achieve a fair outcome for victims and accused alike. I shall return to the issues of timeliness and of the process for reopening investigations in Chapter 6.

2.6. The Integrated Review

2.6.1. In March 2021, the Government published two Command Papers which make up the Integrated Review: 'Global Britain in a competitive age'¹¹⁴ and 'Defence in a competitive

¹¹² Hansard, 9 March 2021, column 1531 per Lord Anderson: "One of the unsatisfactory things about the presumption against prosecution after five years is that it risks incentivising those who would spin out or frustrate a valid investigation."

<https://hansard.parliament.uk/Lords/2021-03-09/debates/B82D5065-8436-4DC1-8360-ADC61B9B8A05/details#contribution-EA799E87-4056-4D50-8E6B-4630ABE0E6E4>

¹¹³ Ibid, columns 1499-1500 per Lord Faulks; column 1520 per Lord Falconer; column 1523 per Baroness Smith; and Hansard, 13 April 2021, column 1167 per Lord Tunnicliffe; column 1168 per Lord Thomas of Gresford; and column 1171 per Lord Boyce. <https://hansard.parliament.uk/Lords/2021-04-13/debates/44CAE6C7-41C6-4D84-AA8F-39727B660205/details#contribution-F470FAFA-FD1D-4037-9172-16E9A72A0969>

¹¹⁴ "Global Britain in a competitive age: The Integrated Review of Security, Defence, Development and Foreign Policy," Command Paper 403,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975077/Global_Britain_in_a_Competitive_Age_the_Integrated_Review_of_Security_Defence_Development_and_Foreign_Policy.pdf

age'.¹¹⁵ These set out a vision of a modernised¹¹⁶ Armed Forces, equipped with cutting-edge technology,¹¹⁷ and possessing “*global reach and integrated military capabilities across all five operational domains*” and an “*ability to project power*”:-¹¹⁸

*“Armed forces: we will create armed forces that are both prepared for warfighting and more persistently engaged worldwide through forward deployment, training, capacity-building and education. They will have full-spectrum capabilities – embracing the newer domains of cyberspace and space and developing high-tech capabilities in other domains, such as the Future Combat Air System. They will also be able to keep pace with changing threats posed by adversaries, with greater investment in rapid technology development and adoption.”*¹¹⁹

2.6.2. I shall consider in Chapter 3 what this vision and the Integrated Operating Concept may mean for the types of incidents or allegations that may arise in the context of future operations, and possible implications for Service police investigators.

2.6.3. For now, I merely observe that it is expected that the restructuring of the Armed Forces will also impact the Service police. During my visit to Southwick Park on 25 May, I was told that the Royal Military Police expects to face cuts to its numerical strength but an increase in taskings.¹²⁰ Whilst the scale of those reductions had not been finalised, it was thought likely that as a minimum the Royal Military Police would lose one General Policing Duties Regiment. I was also told that there may be cuts to the Royal Air Force Police because of a shift of emphasis from investigations to security.¹²¹

2.6.4. It is likely therefore that the Defence Serious Crime Unit, with which I deal in Chapter 5, will have fewer investigators than the current three Special Investigation Branches. This will make it even more important that they have the necessary training and experience.

¹¹⁵ “Defence in a competitive age,” Command Paper 411, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/974661/CP411_-_Defence_Command_Plan.pdf

¹¹⁶ “Global Britain in a competitive age: The Integrated Review of Security, Defence, Development and Foreign Policy,” at p.5.

¹¹⁷ Ibid, at p.3.

¹¹⁸ Ibid, at p.7.

¹¹⁹ Ibid, at p.22.

¹²⁰ Note of meeting 54.

¹²¹ Ibid.

2.7. The professionalisation agenda

2.7.1. During my visit to Southwick Park, the Provost Marshal (Army) and the Commandant and Deputy Commandant of the Defence School of Policing and Guarding outlined the changes that have taken place with regard to the training and accreditation of Service police personnel since the Service Justice System Review. The Provost Marshal (Army) had previously told me that the ‘professionalisation agenda’ had been a high priority for her after taking up the post in July 2019,¹²² and explained during my visit that this had aligned with the School’s work under Operation Janus to link its training to civilian standards.

2.7.2. The Provost Marshal (Army) is the training requirements authority, and sets the requirements and standards for the training delivered by the Defence School of Policing and Guarding, which in organisational terms comes under a different chain of command, reporting via the Defence School of Logistics Training to the Land Warfare Centre.

2.7.3. The Defence School of Policing and Guarding trains around 300 Service police personnel per year. In addition to providing standardised ‘initial trade’ training for all three Service police forces,¹²³ and running more advanced policing courses (e.g. the Volume Crime Investigation Course and the Serious Crime Investigations Course), it also delivers some training for Hampshire constabulary. The Ministry of Defence Police will be relocating its training establishment to Southwick Park which will enable greater collaboration.

2.7.4. There is one significant difference between Service police and Home Office police forces. Whereas in Home Office police forces the initial period of training is followed by around two years’ on-the-job training before a police officer is allowed to “*single crew*”, I was told that the Service police are a “*live cop*” from the day they leave the School.¹²⁴

2.7.5. The Provost Marshal (Army) told me¹²⁵ that there had been a “*root and branch*” review of Service police training with a view to identifying “*opportunities to do better.*” The School has established a relationship with Portsmouth University, enabling Service police to earn credits

¹²² Note of meeting 47.

¹²³ Note of meeting 54. The joint police course comprises “*a common policing syllabus of 14 weeks*” but has “*different end points for the single Services*” due to the need to train “*single-Service specifics.*” Thus, the Royal Navy Police complete the course after 14 weeks, the Royal Military Police after 20 weeks, and the Royal Air Force Police after 22 weeks.

¹²⁴ Ibid.

¹²⁵ Ibid.

towards a degree-level course in professional policing, and devoted significant effort to aligning its training with the Professionalising Investigations Programme (PIP) so that Service police personnel are accredited to a nationally recognised standard.¹²⁶ They have also obtained formal approval, from the Minister for Apprenticeships and Skills, to deliver policing apprenticeships. These will be delivered to Level 4 (a two-year apprenticeship to reach foundation degree level) rather than to Level 6 (full degree level). The first apprenticeship is due to roll out in June 2021.

2.7.6. The Deputy Commandant told me:- *“In terms of PIP 1 and PIP 2, there was a need to align how we do training and align with the College of Policing. We went through an 18-month mapping exercise. We were 80-85% there in terms of what we were already doing. The 15% is the specifics of the criminal justice system, bail, those nuances that we don’t do in the Service Justice System. We’ve delivered a bolt-on course.”* The Provost Marshal (Army) told me that the School is already licensed to deliver PIP 1 training.¹²⁷

2.7.7. The Provost Marshal (Army) is in the process of formalising the secondments to Home Office police forces, and linking this to training and accreditation. With regard to secondments, the Provost Marshal (Army) told me:-

“The secondments, we do it anyway but informally – two or three weeks. The Provo Company in Aldershot with Hampshire or British Transport Police, the Provo Company in Colchester with Essex. We do all that anyway. The professionalisation agenda is formalising it so it doesn’t put secondments at risk. If it’s formalised in their career pipeline, a secondment with CID and then specialist ones further on, it’s all sort of written in stone. The same as the Army expects everyone to do leadership and promotion courses. We want to build in, in black and white like that, ‘you need to do this secondment before you promote.’”¹²⁸

2.7.8. With regard to how the combination of apprenticeships, training, and secondments will prepare the Service police to investigate serious crime, the Provost Marshal (Army) explained:-

¹²⁶ The Professionalising Investigations Programme has been running since around 2003. In simple terms its different levels accredit police officers to conduct the following activities: Level 1 – priority and volume investigations; Level 2 – serious and complex investigations; Level 3 – major investigations; and Level 4 – strategic management of highly complex investigations.

¹²⁷ Note of meeting 54.

¹²⁸ Ibid.

“In order for SIB to get to that standard, they need to start early and grow and develop. Complete their apprenticeship in the first two years and PIP Level 1, come back here as full Corporal to do the Volume Crime Investigation Course before they can promote. Do their VCIC – the intent now is to link that with PIP 2 with a bit of CPD requirement in force to provide the National Investigators Exam, and a secondment before they can promote. Then the SCIS (the SIB qualification course) will be more focused, at PIP 2 plus or PIP 3. Then go out to CID or the Major Incident Room and get their CPD from that course.”¹²⁹

2.7.9. This more formalised approach to secondments is currently at the pilot stage. As the Provost Marshal (Army) explained:-

“The pilot with Hampshire police, it’s a pilot because it’s the first one we’re running with set terms of reference – they must achieve ABC because they don’t get enough of it in the military environment. Once we prove that as a formal concept and expand that within Hampshire police, we’ll do the same thing – start targeting key garrison areas. Rather than going straight ‘NPCC, every police force take on some secondees,’ because some don’t have experience of working with the military.”¹³⁰

2.7.10. The Provost Marshal (Army) aspires to train the entirety of the Royal Military Police personnel to PIP Level 2, with the Special Investigation Branch acquiring additional specialist investigative skills.

2.7.11. This focus on professionalisation is not unique to the Royal Military Police. The Provost Marshal (Navy) told me that he already trains all Royal Navy Police personnel of the rank of Petty Officer or above to investigate serious crime,¹³¹ i.e. to PIP 2. Both the Provost Marshal (Navy)¹³² and the Provost Marshal (Royal Air Force)¹³³ regularly second personnel to Home Office police forces. Due to the smaller sizes of these Service police forces, they are only able to release small numbers of personnel (typically two from the Royal Navy Police, and three or four from the Royal Air Force Police at any one time split across two Home Office police forces) on secondments lasting a few months. These are not currently done on a

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Note of meeting 45.

¹³² Note of meeting 41; and note of meeting 45.

¹³³ Note of meeting 38.

formalised basis with specific outcomes that the personnel must achieve during the secondment.

2.7.12. His Honour and Sir Jon recognised that formalised secondments are vital in preparing the Service police to investigate serious crime.¹³⁴ I concur. I wholeheartedly support the efforts by the Defence School of Policing and Guarding and the Provost Marshal (Army) to improve training and accreditation, and to make secondments and other continuous professional development a pre-requisite for promotion and for entry into investigative roles. I shall return to the issue of training and secondments in Chapter 5.

¹³⁴ Professor Sir Jon Murphy QPM DL LLB, “Service Justice System Policing Review (Part 1),” Recommendation 11: “*At the earliest opportunity discussion between the [Service Police] and [National Police Chiefs Council] should take place with a view to establishing formal arrangements for [Special Investigation Branch] officers to be seconded into Home Office police forces to gain ‘immersion’ in day-to-day criminal investigation,*” and His Honour Shaun Lyons and Professor Sir Jon Murphy QPM DL LLB, “Service Justice System Review (Part 2),” at paragraphs 83-94.

3. The future operating environment

3.1. Introduction

3.1.1. My Terms of Reference direct me to focus on the future so that we can be sure that, for those complex and serious allegations of wrongdoing – against any of our forces – which occur in theatre on overseas operations, we have the most up to date and future-proof framework, skills and processes in place and can make improvements where necessary.

3.1.2. With regard to the importance of these frameworks, skills and processes I cannot improve upon a recent speech by the Chief of the Defence Staff:-

“Western states draw legitimacy from their respect for the rules, conventions and protocols of war. Where we see morals, ethics and values as a centre of gravity, authoritarian rivals see them as an attractive target. The idea of ‘lawfare’ becomes a helpful tool in their inventory. Now, the term ‘lawfare’ covers different meanings. In this context it entered national security parlance when it appeared in ‘Unrestricted Warfare’ – a book written on military strategy in 1999 by two PLA officers who used the term to refer to a nation’s use of legalised international institutions to achieve strategic ends.

But ‘lawfare’ from our perspective also applies to the challenge we have encountered in recent campaigns where we need to update our legal, ethical and moral framework to properly hold our forces to account if they break the law, while ensuring they have appropriate freedom of action to seize fleeting opportunities on the battlefield.”¹³⁵

3.1.3. There is no doubt that the moral legitimacy and the legal standing of our Armed Forces is being contested on a number of fronts. As the Chief of the Defence Staff told me:-

“What has changed since 1982 when we could marshal the message – the reality of modern warfare is that we’re doing it in a fishbowl. Whether it’s our own troops using social media, or others uploading things. What really matters is our values and standards, and the rule of law. That’s what gives us the moral authority. Over the last

¹³⁵ Chief of Defence Staff speech to the annual Royal United Services Institute conference, 17 December 2020. <https://www.gov.uk/government/speeches/chief-of-defence-staff-at-rusi-annual-lecture#:~:text=General%20Sir%20Nick%20Carter%20GCB,speech%20the%20Annual%20RUSI%20Conference>

25 years what happens in the fishbowl has the risk of undermining that moral authority. My starting point always is we have to find a way of securing our centre of gravity – and the moral rules underpinning that.

For a range of reasons that has been threatened. By ruthless opponents who try to exploit that. By our behaviour, which has not been brilliant in certain circumstances. The other reason we've been undermined is also by our ineptitude in getting after potentially bad behaviour when it's been called out. That is why I've been a very strong supporter of a Defence Serious Crime Unit that is far more transparent than what we have at the moment and properly agile.”¹³⁶

3.1.4. When describing the likely conditions for future operations Defence uses the term ‘The Future Operating Environment’. Any changes to policing, prosecutorial and other processes for addressing credible allegations emanating from overseas operations, must be considered within the context of this Future Operating Environment.

3.1.5. There is a wealth of official and unofficial published material discussing all aspects of the Future Operating Environment but in my contextual analysis I sought common strands of thought that would impact on how the UK’s Armed Forces report serious incidents, organise and conduct policing, and investigate and prosecute allegations of serious crime. The Defence Command Paper ‘Defence in a Competitive Age’ published in March 2021¹³⁷ as part of the Government’s Integrated Review, sets the strategic context for my review.

3.1.6. To understand this thinking better I also took evidence from a number of respected observers and commentators, including Professor Michael Clarke, who also contributed a note expanding upon the ideas that he had set out during our virtual meeting;¹³⁸ I read a range of official papers and policy documents published by the Ministry of Defence, including the Defence Concepts and Doctrine Centre’s ‘Future Operating Environment 2035’ paper¹³⁹ (which aimed to describe the characteristics of the 2035 operating environment and to provide

¹³⁶ Note of meeting 59.

¹³⁷ “Defence in a competitive age,” Command Paper 411, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/974661/CP411_-_Defence_Command_Plan.pdf

¹³⁸ Professor Michael Clarke, “Note to Sir Richard Henriques regarding some of the new trends in UK thinking about warfare and their impact on military responsibility in operations,” 14 May 2021.

¹³⁹ “Strategic Trends Programme: Future Operating Environment 2035,” (2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/646821/20151203-FOE_35_final_v29_web.pdf

evidence-based insights that can inform future Defence capability development) and the ‘Introducing the Integrated Operating Concept’ paper;¹⁴⁰ and I read speeches by ministers and senior military officers, including the Chief of the Defence Staff’s speech to the Royal United Services Institute given in December 2020,¹⁴¹ and the speech delivered by the Commander Strategic Command to the Royal United Services Institute in May 2021.¹⁴²

3.1.7. Through my recommendations in subsequent chapters, I aim to provide Defence with a much improved and enhanced toolset of the necessary sophistication and resilience to help strengthen and safeguard moral legitimacy in the “*congested, cluttered, contested, connected and constrained*”¹⁴³ operating environment of the future. This toolset in itself will be part of the systems and capabilities a military commander needs to preserve his or her freedom of action in the future; an explicit and defensible foundation of legitimacy and legality that is increasingly part of what it is to be a modern, professional military commander.

3.2. The UK’s Global Vision and the Integrated Review

3.2.1. The messages in the Government’s Integrated Review¹⁴⁴ include an increased commitment to security and resilience; strengthening homeland security; the UK playing a leading international role in collective security, multi-lateral governance, tackling climate change and health risks, conflict resolution and poverty reduction; a strengthened commitment to global peace and security; and a willingness to confront serious challenges.

3.2.2. The Integrated Review also signals the need for change in the face of an international order that is increasingly fragmented and riven by intensifying competition between States over interests, norms and values. It emphasises the need for increased efforts to protect open

¹⁴⁰ “Introducing the Integrated Operating Concept,” (2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/922969/20200930_-_Introducing_the_Integrated_Operating_Concept.pdf

¹⁴¹ Chief of Defence Staff speech to the annual Royal United Services Institute conference, 17 December 2020.

¹⁴² Commander UK Strategic Command speech to Royal United Services Institute Second Strategic Command conference, 26 May 2021, <https://www.gov.uk/government/speeches/commander-of-strategic-command-rusi-conference-speech>

¹⁴³ “Strategic Trends Programme: Future Operating Environment 2035,” (2015), at p.viii.

¹⁴⁴ “Global Britain in a competitive age: The Integrated Review of Security, Defence, Development and Foreign Policy,” Command Paper 403, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975077/Global_Britain_in_a_Competitive_Age_-_the_Integrated_Review_of_Security_Defence_Development_and_Foreign_Policy.pdf

societies and democratic values and to seek good governance. It also makes the point that this vision and its related policies rest on strong domestic foundations, including “*crucially, ... on a bond of trust with the British people.*”¹⁴⁵

3.2.3. There is a sense of a deteriorating strategic and global security picture in which previously held norms and assumptions around the global rules-based order are being challenged and traditional boundaries – such as those between peacetime and conflict, State and non-State, lawful and unlawful, military and non-military – are being blurred or erased. Technology is making geography less relevant and society in all its forms and activities more transparent, while also making information easier to manipulate and the truth harder to ascertain.

3.2.4. The Defence Command paper that flows from the Integrated Review talks of the UK being confronted by complex and integrated challenges below, and potentially above, the threshold of armed conflict. This will include “*state and non-state actors who will employ brinkmanship, malign activity below the threshold of armed conflict, terrorism, proxies, coercion and the deliberate use of economic tools to undermine our economic and security interests.*”¹⁴⁶

3.2.5. It is in this strategic environment that our Armed Forces will operate, actively and persistently, engaged across the spectrum of military activity at home and abroad. Undergoing significant change programmes already, the Armed Forces will continue to evolve rapidly to meet the demands of the UK’s global vision and the imperatives of the future operating environment. This includes reassessing how the Armed Forces meet the challenge of maintaining and defending moral and legal legitimacy and trust.

3.3. The evolving threat

3.3.1. There are common threads running through almost all of the discussion around current and future threats and risks. These threads headline in the Defence Command paper and the Integrated Operating Concept, and are echoed in many speeches and academic papers. They include the struggle between ‘world order ideologies’ and their institutions and ideas; intensifying competition between States, and between State and non-State actors;

¹⁴⁵ “Global Britain in a competitive age: The Integrated Review of Security, Defence, Development and Foreign Policy,” Command Paper 403, at p.12.

¹⁴⁶ “Defence in a competitive age,” Command Paper 411, at paragraph 2.1.

competition around resources and the impact of climate change; the explosion in information technology and the weaponisation of data; the growing sophistication and global reach of terrorism and organised crime; bio-threats and risks; and the utilisation of all of the instruments of power above and below the threshold of conflict to achieve objectives.

3.3.2. In respect of those evolving threats likely to impact most on the moral and legal environment in which the Armed Forces will operate, the clearest exposition is in ‘Introducing the Integrated Operating Concept’:-

“The threat has evolved:

- *Adversaries do not recognise the rule of law;*
- *Pervasive information and new technologies have enabled new tools and techniques to undermine our cohesion;*
- *Adversaries have studied the Western Way of war and modernised their capabilities accordingly;*
- *Adversaries proliferate their capabilities to proxies;*
- *The effects of ‘lawfare’.”¹⁴⁷*

3.3.3. Not only do these descriptions of evolving threats underline the sense that moral legitimacy and trust have become active battlegrounds in and of themselves, but also that this fight for legitimacy, truth and values will only intensify. During our meeting, Professor Clarke said about the UK’s commitment to the rules-based international order:- *“The fact we’ve had to put a name around it shows it’s under pressure; we never had to name it before.”¹⁴⁸*

3.3.4. Threats to legitimacy are evolving; our norms and values are being actively challenged; the rule of national and international law is increasing both in its complexity but also in its importance; and the moral and legal standing of our Armed Forces is coming under ever-increasing scrutiny, and in some cases is being actively undermined by adversaries.

3.3.5. The fact that the themes of values and moral legitimacy sit so prominently in official and unofficial publications is an indication of their importance to the Armed Forces and a recognition that how they conduct themselves and operate, whether actively engaged on operations or not, is crucial. This also reflects somewhat the experience of the recent past in which assaults on the legal standing and moral legitimacy of the Armed Forces have had

¹⁴⁷ “Introducing the Integrated Operating Concept,” (2020), at p.2.

¹⁴⁸ Note of meeting 22.

corrosive effects on perceptions and, arguably, on the degree of political trust that grants commanders the freedom of action they desire. Legality, moral legitimacy and trust have always been intrinsic to the ability of the UK's Armed Forces to deliver the operational effects they seek. What is new in the Future Operating Environment is the degree to which they are at stake and explicitly competed for in every theatre of operations at home and abroad.

3.3.6. To counter all of this, the Armed Forces must have robust, resilient and transparent systems, methodologies, structures, capabilities and cultures of discipline and legality that comply with the highest possible international standards and actively reinforce the values that bind us together. I make this point not to imply shortcomings today, but to underline the imperative to modernise and reform law, policing and Service Discipline to meet and overcome the strategic challenges facing us today and tomorrow. In delivering this legal and disciplinary toolset fit for the Future Operating Environment there is no doubt in my mind that an incremental evolution of the *status quo ante* will be insufficient.

3.4. Core elements of the UK approach

3.4.1. The UK's response to such assessments of the Future Operating Environment with its assumptions around current, emerging and future threats and risks is mapped out in the Integrated Review and the Integrated Operating Concept. As with the evolving threats, common themes and threads are also evident in the way the UK's approach is described in publications and speeches.

Change

3.4.2. The imperative for change stands out; it is mentioned everywhere. I interpret this pervasive message to mean that in the face of increasingly dangerous strategic pressures, those who change slowly and change to the least effect will be most at risk.

3.4.3. As the foundation for change, the Defence Command Paper restates the tenets of the UK's approach: protecting and promoting our sovereignty, security and prosperity. The fundamental purpose of Defence remains to protect our people, territory, critical national infrastructure and our way of life. In fulfilling this role, the Armed Forces reflect the values of UK society and, as the Defence Command paper states:-

*“The values that bind together citizens in all parts of the UK are also the Armed Forces’ abiding strength, and will remain core to the effort. We will seek to uphold the international laws, rules and behaviours that are founded on them – from International Humanitarian Law to the United Nations Convention on the Law of the Sea (UNCLOS).”*¹⁴⁹

3.4.4. The Integrated Operating Concept sets out how the Armed Forces will adapt, adhering to these principles by building on people, allies and partnerships, and innovation and experimentation. Of crucial importance for this review is the unequivocal inclusion of “*Our Values as the centre of gravity*”.¹⁵⁰ In military terms, as defined by Clausewitz, the military philosopher who has influenced Western military thinking more than any other, the Centre of Gravity is the “*hub of all power and movement on which everything depends.*”¹⁵¹ In this setting, “*Our Values as the centre of gravity*” implies something that is elemental to the collective capabilities and capacities of the Armed Forces to deliver against their mission. Something to be protected and strengthened at all costs and something without which cohesion and an ability to win is at risk. Without wishing to labour the point, these Values – underpinned and reinforced by laws, systems, organisations, structures, processes and cultures that engender and safeguard moral and legal legitimacy – are vital to the UK’s approach to future operations.

Integration

3.4.1. Alongside change, the next strategic theme that stands out is Integration: the move towards deeper integration across all levers of national power. Future combat will be defined by the increasing integration of the five domains of warfare – land, sea, air, space and cyber – alongside a much greater ‘reach-back’ from the battlespace to static headquarters in order to exploit all the benefits of data fusion and enhanced real-time command and control technologies. The Defence Command paper says:-

“As set out by the Integrated Review, we need a step change in integration across government, where we share responsibilities, to create a truly national enterprise that can harness all elements of our society to secure national advantage. Led by the direction set in the Integrated Review, we will build on the progress we have made in

¹⁴⁹ “Defence in a competitive age,” Command Paper 411, at paragraph 3.3.

¹⁵⁰ “Introducing the Integrated Operating Concept,” (2020), at p.7.

¹⁵¹ General Carl Von Clausewitz, *On War* (1832).

recent years through the 'comprehensive approach' and 'fusion doctrine'. But we must be bolder in our ambition."¹⁵²

3.4.2. In the Integrated Operating Concept, unveiled in 2020, the Chief of Defence Staff made clear that it "*will lead to a fundamental transformation in the military instrument and the way it is used.*"¹⁵³ The Integrated Operating Concept states:-

*"... maximising advantage will only be realised through being more integrated: within the military instrument, vertically through the levels of war – Strategic, Operational and Tactical, across government and with our allies, and in depth within our societies. Cohesion, trust, shared values, social habits and behaviour all form vital lines of defence against our adversaries' sub-threshold attacks on our societies and decision-making. On the new sub-threshold battlefield, assuring societal resilience constitutes deterrence by denial."*¹⁵⁴

3.4.3. It goes on to say:-

*"The central idea of the Integrated Operating Concept is to drive the conditions and tempo of strategic activity, rather than responding to the actions of others from a static, home-based posture of contingent response. A position of advantage aims to offer a breadth of political choice, credible military options that can be threatened or used to break the will of our adversaries, to deliver the military instrument of statecraft, and underpin our national and alliance cohesion."*¹⁵⁵

3.4.4. In this sense, the 'integration' response to assessments of the Future Operating Environment is not simply integration for its own ends: generating strategic competitive advantage in the Future Operating Environment requires integration beyond anything achieved up to now. As the Integrated Operating Concept makes clear, this is a departure from the 'jointery' that has prevailed up to now:- "*We are moving beyond 'Joint'. Integration is now needed at the Tactical level of war – not just at the Operational level where the term 'Joint' applies.*"¹⁵⁶

¹⁵² "Defence in a competitive age," Command Paper 411, at paragraph 3.7.

¹⁵³ "Introducing the Integrated Operating Concept," (2020), at p.1.

¹⁵⁴ Ibid, at p.8.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid, at p.10.

3.4.5. Only by integrating nationally and across all five domains will the UK achieve sufficient strategic tempo to 'drive the conditions' necessary to maintain a position of advantage. This notion implies a strong sense of interlocking and inter-dependent dynamism and fluidity across and between civil-military interfaces and throughout all the environmental domains.

3.4.6. This drive to inculcate 'integration' into every aspect of the generation and application of hard and soft power is being enabled by technological tools that grow in power and sophistication at exponential rates. The Defence Command Paper is explicit:-

*"We will invest in the agile, interconnected, and data-driven capabilities of the future, targeting generational leaps in capability development to outpace our adversaries. The pace of technological change will require us to constantly adapt, experiment and take risks, to preserve strategic advantage."*¹⁵⁷

3.4.7. Over the past few decades domestic and international law has become more complex. The challenges of developing and implementing complex legality on a practical basis in this environment of dynamic integration, enabled by an explosion in technological capability, are significant. The struggle that all governments are facing in terms of developing and enforcing regulatory data and privacy laws for social media and data companies is testament to this.

3.4.8. In my discussion with Professor Clarke, and in the note he wrote to support this review,¹⁵⁸ we examined the implications for legal and moral systems and practices. We discussed how the principles of military legality apply equally to all operational domains, but translating these to all domains is potentially difficult and replete with ambiguity. We discussed the legal and moral implications of 'more proactive reach-back' for individuals leading elements of integrated operations in extended, dispersed and remote chains of command. We discussed this as an issue for the employment of autonomous systems and artificial intelligence. We also discussed the implications for further integration between the military and civilian spheres.

¹⁵⁷ "Defence in a competitive age," Command Paper 411, at paragraph 3.9.

¹⁵⁸ Professor Michael Clarke, "Note to Sir Richard Henriques regarding some of the new trends in UK thinking about warfare and their impact on military responsibility in operations," 14 May 2021.

3.4.9. It is my view that this future as described by the Integrated Operating Concept is not one in which the Service police forces as currently structured, trained and equipped, are adequate. Current policing structures and practices force too many boundaries, discontinuities, shifts of culture, and divergences of roles, and uncertainties in responsibilities and mandates. With policing and legal equities dispersed across the Services it becomes impossible to generate the requisite professional excellence, deep expertise and agility that could flow from their more closely combined and integrated mass.

3.4.10. Notwithstanding strong justifications for continued single-Service and environmental policing including the day-to-day 'battlespace management' work of the Service police forces on and off operations, there is an imperative for a police organisation that is integrated in itself, has all the integrated characteristics of the environment it works within, and is better integrated with civilian policing and law. It must have the readily deployable skills, fields of expertise, experience, technological capabilities and knowhow, expert specialisations and dynamism required by this new paradigm. To my mind, this is change that runs far deeper and wider than a linear evolution of capabilities within the current Service police forces.

Modernisation and professionalisation

3.4.11. Another major theme is modernisation. This goes beyond developing and acquiring new capabilities and equipment.

3.4.12. With regard to people, the Defence Command Paper speaks of investing in the acquisition of specialist skills (both by attracting talented individuals, and through training),¹⁵⁹ of aligning career courses with professional accreditation,¹⁶⁰ and of transforming recruitment processes and career structures "*to develop a modern, holistic, through-life approach to the military offer.*"¹⁶¹

3.4.13. More generally, it also signals a significant shift in approach, an intention to create a modern Armed Forces that reflects developments in wider society. This includes a more defined role for the Reserves with "*a range of commitment options,*"¹⁶² more flexible service for the Regular Forces,¹⁶³ and renewed focus on diversity, inclusivity and social mobility.¹⁶⁴

¹⁵⁹ "Defence in a competitive age," Command Paper 411, at paragraph 6.3.

¹⁶⁰ Ibid, at paragraph 6.4.

¹⁶¹ Ibid, at paragraph 6.5.

¹⁶² Ibid, at paragraph 6.6.

¹⁶³ Ibid, at paragraph 6.10.

¹⁶⁴ Ibid, at paragraphs 6.12-6.14.

3.4.14. Increasingly, society demands transparency and accountability. Although these words do not appear in the Defence Command Paper, these concepts are just as important for ensuring the moral legitimacy of the Armed Forces' operations as they are in the intelligence and security sphere.¹⁶⁵ As the 'Future Operating Environment 2035' document observes:-

*"Further, growing intolerance towards civilian casualties and demand for increased levels of accountability will drive the need for greater distinction, precision and proportionality."*¹⁶⁶

3.4.15. Giving proper effect to them will have implications for Service Justice System, too. With regard to the Defence Serious Crime Unit that is to be established to improve the Service police's skills and experience of investigating serious crime, including war crimes, the Chief of the Defence Staff told me that he strongly supports a unit *"that is far more transparent than what we have at the moment"* and that *"We need to major on proper oversight and transparency."*¹⁶⁷

Innovation and experimentation

3.4.16. The words 'innovation' and 'experimentation', and their derivatives, appear 26 times and 12 times respectively in the Defence Command Paper. They are justifiably regarded as *"drivers of modernisation."*¹⁶⁸ Defence aspires to the rapid development and adoption of new technologies through which to preserve strategic and operational advantage:-

*"Capability in the future will be less defined by numbers of people and platforms than by information-centric technologies, automation and a culture of innovation and experimentation."*¹⁶⁹

*"Strategic Command will continuously experiment and innovate with technology to ensure we maintain operational advantage."*¹⁷⁰

¹⁶⁵ "Global Britain in a competitive age: The Integrated Review of Security, Defence, Development and Foreign Policy," Command Paper 403, at p.82.

¹⁶⁶ "Strategic Trends Programme: Future Operating Environment 2035," (2015), at p.17.

¹⁶⁷ Note of meeting 59.

¹⁶⁸ "Defence in a competitive age," Command Paper 411, at paragraph 3.6.

¹⁶⁹ Ibid, at paragraph 7.4.

¹⁷⁰ Ibid, at paragraph 7.10.

3.4.17. As noted above, this continuous innovation – which will include greater automation of tasks¹⁷¹ and investment in “*Artificial Intelligence (AI) and AI-enabled autonomous capabilities*”¹⁷² – will be made possible by an increased acceptance of risk.¹⁷³

Permanent and persistent global engagement

3.4.18. The next theme that stands out is that of persistent forward engagement. Our Armed Forces will continue to operate at a high tempo across the entire spectrum of Defence activity in support of Britain’s Global objectives. The Chief of the Defence Staff in his speech to the Royal United Services Institute in December 2020 stated:-

*“This posture will be engaged and forward deployed – to defend ourselves and our allies, our armed forces much expect to spend far more time deployed and based abroad training and exercising in the regions most exposed to the threat.”*¹⁷⁴

3.4.19. The Defence Command Paper talks about “*Evolving from a force that is primarily designed for the contingency of a major conflict and warfighting, to one that is also designed for permanent and persistent global engagement,*”¹⁷⁵ and states:-

*“In the current threat landscape, and in an era of constant competition, we must have an increased forward presence to compete with and campaign against our adversaries below the threshold of armed conflict, and to understand, shape and influence the global landscape to the UK’s advantage. To pursue our foreign policy objectives and shape conditions for stability, we will rebalance our force to provide a more proactive, forward deployed, persistent presence. This will ensure our armed forces are more in use whilst maintaining the deterrent effect that comes from being ready for managing crises at scale.”*¹⁷⁶

3.4.20. To achieve this, Defence plans to expand its global network of strategic hubs, thereby enabling “*forward based troops and aircraft to be more quickly available in the Eastern*

¹⁷¹ Ibid, at paragraph 6.7.

¹⁷² Ibid, at p.42.

¹⁷³ Ibid, at paragraph 3.9.

¹⁷⁴ Chief of Defence Staff speech to the annual Royal United Services Institute conference, 17 December 2020.

¹⁷⁵ “Defence in a competitive age,” Command Paper 411, at paragraph 3.6.

¹⁷⁶ Ibid, at paragraph 4.2.

*Mediterranean, the Middle East and North Africa.*¹⁷⁷ This forward presence will be reinforced, as required, by rapidly deployable forces and the Carrier Strike Group.¹⁷⁸

3.4.21. Wherever our Armed Forces operate they need to do so with the necessary legal and policing toolsets. These toolsets need to be as immediately deployable, readily available, and as persistently engaged as the rest of the Armed Forces. Deployability and scalability to meet the ebb and flow of operations will be a challenge, particularly in some of the more specialised fields of police work in which skills are always in short supply. In long periods of relative peace the hands-on experience of investigating serious incidents tends to diminish. Reach-back, information technology and global networks of command and control allow the Service police to innovate in terms of achieving forward presence quickly from within limited resources. But there comes a time when the capability to scale policing, especially investigators, rapidly becomes an imperative.

3.4.22. To support rapid surging of capabilities and deployability at scale, the Service police will need to use the principles of the existing 'Whole Force Concept' that seeks a more agile workforce by drawing people more routinely drawn from the Reserves, from the Civil Service, and from contractors and industry.

3.4.23. They will need to deepen and formalise the institutional relationships with Home Office police forces and specialist police organisations to enhance Service policing skill sets and professionalism, and to improve access to specialisations and experience outside of Defence. The Defence Medical Service's relationship with the National Health Service is a standard-bearer in this respect, especially in the cross-fertilisation of professional excellence and the creative use of Reservists.

3.5. Moral legitimacy and the rule of law

3.5.1. As noted above, the Integrated Operating Concept fixes the UK's values – including respect for the rule of law – as a centre of gravity:-

¹⁷⁷ Ibid, at paragraph 4.5.

¹⁷⁸ Ibid, at paragraph 4.6.

“... our own respect for the rules, conventions and protocols of war are a centre of gravity which must be protected. But the pace of technological change and the blurring of ‘peace’ and ‘war’ means that our legal, ethical and moral framework needs updating to deny our adversaries the opportunity to undermine our values.”¹⁷⁹

3.5.2. During our meeting, the Chief of the Defence Staff underscored the importance of these values for maintaining moral legitimacy:- *“What really matters is our values and standards, and the rule of law. That’s what gives us the moral authority. ... My starting point always is we have to find a way of securing our centre of gravity – and the moral rules underpinning that.”¹⁸⁰*

3.5.3. Professor Clarke said something similar:- *“When one looks at the growth of autocracy, we can’t afford to play fast and loose with any of these issues. We shouldn’t be arguably legal, we have to be absolutely legal. That will just be used by our adversary – that arguably legal is illegal.”¹⁸¹*

3.6. Technology and transparency

3.6.1. As noted above, technology is a pervasive theme. As a driver for change it has become a constant and a truism. In ‘Introducing the Integrated Operating Concept’ the Chief of the Defence Staff states:- *“the nature of war remains constant: it is visceral and violent, and it is always about politics. What is changing is the character of warfare, which is evolving significantly due to the pervasiveness of information and the pace of technological change.”¹⁸²*

3.6.2. Technological change is part and parcel of the intensified strategic competition between states and between states and non-state actors. The fight for technological advantage is present across the entire spectrum of hard and soft power. It is present in:- weapon systems, platforms and sensors; global reach and presence; cyber and space; communications and information; robotics and artificial intelligence; understanding and awareness; media and command of perceptions and narratives; bio-science and human capabilities, and so much more. Technology underpins and enables change in every

¹⁷⁹ “Introducing the Integrated Operating Concept,” (2020), at p.7.

¹⁸⁰ Note of meeting 59.

¹⁸¹ Note of meeting 22.

¹⁸² “Introducing the Integrated Operating Concept,” (2020), at p.1.

dimension and is both a key strategic risk and a strategic opportunity for the UK and our Armed Forces.

3.6.3. In relation to technology's impact on information and the growth of 'information warfare,' the Chief of the Defence Staff stated in his December 2020 speech to the Royal United Services Institute: - "*We now have new tools, techniques and tactics that can be used to undermine political and social cohesion, and the means to make the connection to an audience ever more rapidly. Information is now democratised.*"¹⁸³ In his note written for my review, Professor Clarke talks about the "*explosion in Open-Source Intelligence that creates a new dynamic for Armed Forces operating in conflicts.*"¹⁸⁴ This field of information technology is being weaponised at speed and at scale.

3.6.4. Throughout this analysis of the Future Operating Environment I have been seeking insights that impact on issues relating to the moral and legal standing of our Armed Forces, and how they may shape Defence's approach to law and policing in the future. Morality, law and policing need to do more than just avoid being outpaced by technological change; they need to find ways to benefit directly from it and to draw strength from it. In previous paragraphs I have discussed the legal, regulatory and governance challenges faced by all Governments in relation to advances in information technologies that outpace our ability to establish appropriate law and policing. Nowhere, in my view, does technology impact more on my review than in this field of information.

3.6.5. Our Armed Forces operate in an era of unprecedented transparency. A world in which almost everyone has a smart-phone and instinctively and instantly records and transmits anything and everything – for global consumption and comment. A world in which information from the most remote locations can find itself in the global arena in seconds. Global inter-connectivity is driven as never before by data science, cyber, automation and space. It is also a world in which the smallest snippets of information can be manipulated and used as a weapon. A world in which adversaries devote vast resources and intellectual effort to disseminating disinformation and 'fake news' to support their goals.

3.6.6. Philip Trehitt, who prior to becoming Executive Director of the Institute for International Criminal Investigations had spent some 17 years investigating war crimes and

¹⁸³ Chief of Defence Staff speech to the annual Royal United Services Institute conference, 17 December 2020.

¹⁸⁴ Professor Michael Clarke, "*Note to Sir Richard Henriques regarding some of the new trends in UK thinking about warfare and their impact on military responsibility in operations,*" 14 May 2021.

corruption in the international field, spoke to me about the importance of transparency, in relation both to operations and to investigations into allegations arising from them. He advised that Defence should become transparent by default, restricting information only where there is a defensible imperative for doing so, i.e. for reasons of operational security or of national security, or to prevent prejudicing ongoing investigations or prosecutions:-

“My view is that you share everything that can be shared; it enhances transparency and gives people confidence in the process. If you say you can’t share something, it makes people suspicious. There needs to be a presumption that you can share everything. ... If there’s an automatic presumption [against doing so], it engenders suspicion. You’re balancing two different needs: operational security against legitimacy.”

“[The test is] fairly easy: Does this disclosure pose any discernible threat to a current / future operation, or to ongoing investigations? If not, the presumption is put the information out there. The other thing is, that this is different. This is not prurient interest. You’ve mentioned [the International Criminal Court], you’re also waging a hearts and minds battle. So there is a big audience out there for that information. Any withholding is going to be seen as suspicious. That damage needs to be balanced against the damage from disclosure. The potential gain from transparency is higher.”¹⁸⁵

3.6.7. I agree. Rather than seeking to determine the credibility of allegations as part of the process of deciding whether to notify the Service police (a process that tends towards under-reporting of allegations¹⁸⁶), the chain of command needs to ensure that these are promptly reported to the Service police. The Service police need to publish information on the nature of the allegations, and on the progress and outcome of their investigations. The Service Prosecuting Authority needs to explain publicly any decisions not to prosecute. This will require a change of mindset – not only by the Service police, but also by the Ministry of Defence in empowering them to be more transparent and accountable – but, combined with timely and effective investigations, will increase public confidence in the Service Justice System’s ability to get to the truth. Philip Trewwhitt spoke of the need for a cultural shift in this regard:-

¹⁸⁵ Note of meeting 49.

¹⁸⁶ US Department of Defence, Defence Legal Policy Board, “Report of the Subcommittee on Military Justice in Combat Zones,” (2013), at pp.55-56 and p.67.

“One is cultural: an investigator’s job is not to build a prosecutable case, it’s to discover the truth; if the evidence leads to a prosecution, that’s one thing, but they should be gathering evidence to show what’s happened, not be tasked to gather evidence for a prosecution.”¹⁸⁷

3.6.8. In the fishbowl in which modern-day operations are conducted, there is nowhere to hide; only by being open about all allegations and investigations can Defence hope to minimise the risk to moral legitimacy – either from an inability to bring offenders to justice, or from false allegations.

3.6.9. Opportunities should be taken to use technological advances to combat threats, mitigate risks and defend ourselves in morality and legality. For example: the gathering, recording and independent validation of evidence; the timely passage of critical information; reach-back and reach-forward to support investigations and the establishment of the truth; and the universal wearing of body-cams and the recording and storing of communications in a searchable format. This is not just about seizing technological opportunities; it is about a cultural shift to weaponising information technology to our advantage for use on the battlefield of legitimacy. Technology which today may seem intrusive and burdensome should become the platform from which we protect our centre of gravity in the future.

3.7. People and culture

3.7.1. During our meeting Professor Clarke remarked on the cultural shift needed in the Armed Forces to see Values, legitimacy and policing as an explicit element of their capabilities and risk assessments.¹⁸⁸ Always implicit and inherent in our Armed Forces, for whom the highest possible standards of behaviour and ethics have always been part of their character and reputation, these foundations are being threatened. They are being threatened by the need to accelerate change in how they are protected and made more resilient, perhaps departing from traditionally-held perspectives on how law and policing can and should be done in the Armed Forces. And they are being threatened, indeed attacked, by adversaries who see them rightly as a centre of strength and influence, and a cornerstone of Western philosophies.

¹⁸⁷ Note of meeting 49.

¹⁸⁸ Note of meeting 22.

3.7.2. This 'cultural shift' is about how behaviours and mindsets should evolve at all levels in response to these direct threats and risks to legitimacy, such that measures taken are seen explicitly as part of the 'toolset' wielded by modern professionals. This includes the advantageous role that the routine, constant and by-default collection and storage of evidential information can play. The willing acceptance of potentially intrusive technologies such as body cameras and voice recording. Working to expedite by habit and by drill the inclusion of Service police in the response to operational incidents. The better integration of legal and police advisors into operational chains of command and decision-making processes.

3.8. Possible implications for the Service Justice System

3.8.1. This inexhaustive analysis of the Future Operating Environment is the context within which my recommendations in subsequent chapters have been made. This is in line with my Terms of Reference and the guidance I have been given by the Secretary of State for Defence. It is clear to me that as part of Defence's response to evolving threats, articulated clearly in the Integrated Review and other official publications, the Armed Forces need to adapt and change rapidly their policing, prosecutorial and other processes to meet the demands of current and future operations.

3.8.2. Investigating and prosecuting allegations connected with the use of new technologies and capabilities will present continuous challenges for the Service Justice System. The Service police and prosecutors will need to acquire or buy in the necessary technical expertise; and they will need to keep up with any developments in International Humanitarian Law regarding their use.

3.8.3. Whereas investigations and prosecutions in relation to 'boots on the ground' use of force incidents have typically focused on individual responsibility (on whether typically lower-ranking personnel acted unlawfully), the acceptance of risk and reliance on automation may cause investigations to focus increasingly on command responsibility and/or on a wider range of actors.

3.8.4. As Professor Clarke observes in his excellent note:-

"Future combat will be defined by the increasing integration of the five domains of warfare – land, sea, air, space and cyber – alongside a much greater 'reach-back'

from the battlespace to static headquarters in order to exploit all the benefits of data fusion and enhanced real-time command and control technologies. ... Reach-back means that direct tactical judgements may be made at the operational level, a long way away. This is already the case in drone warfare, but will probably become the norm in many other spheres.

That will coincide with the fact that integrated warfare across the 'five domains' will likely involve a wider range of responsible individuals. Command will be exercised in 'hubs' rather than 'chains', except at the highest levels (equivalent to Divisional or Corps HQs). ... legal and moral responsibility may quickly escalate upwards from a 'command hub' to the higher point where a responsible operational 'command chain' begins."¹⁸⁹

3.8.5. The move to a posture of more permanent and persistent global engagement is likely to have implications for the Service police. The Provost Marshal (Army) told me that she anticipates an “*up arrow on taskings*” for the Royal Military Police as a result of implementing the Integrated Review.¹⁹⁰ The Provost Marshal (Navy) told me that he had already adapted his Concept of Operations to enable the forward basing of Royal Navy Police.¹⁹¹

3.8.6. The move away from operations at scale to smaller-scale, less enduring operations is also likely to present challenges for the Service police. Whereas the Royal Military Police have historically relied upon their responsibility for wider support functions to ensure they are deployed in proximity to the battlefield,¹⁹² enabling General Policing Duties personnel to undertake any immediate investigative tasks until Special Investigation Branch investigators held in the rear are able to move forward, this model must be rethought both for large-scale operations and for smaller-scale, less enduring operations of the type now conceived.

3.8.7. I echo the conclusion of a review of the Australian military justice system that “*a sustainable number of investigators ought to be a permanent, non-negotiable presence in overseas deployments... When deployed in areas of operations, investigators should not be assigned extraneous duties that may interfere with or delay their capacity to undertake*

¹⁸⁹ Professor Michael Clarke, “*Note to Sir Richard Henriques regarding some of the new trends in UK thinking about warfare and their impact on military responsibility in operations,*” 14 May 2021.

¹⁹⁰ Note of meeting 54.

¹⁹¹ Note of meeting 41.

¹⁹² Note of meeting 47.

investigations in a timely manner."¹⁹³ This appears essential to enable the timely investigation of the volume of incidents and allegations to which large-scale, enduring operations will give rise. However, for other operations it appears unrealistic to assume that investigators will deploy alongside other troops; in those circumstances the best one may be able to achieve is to hold investigators at high readiness and to prioritise their deployment (something that is currently at the discretion of the chain of command rather than the Provost Marshal, and subject to operational considerations rather than non-negotiable¹⁹⁴) as a flying response. As the Chief of the Defence Staff told me:-

*"When you talk about deployable, we're probably not talking about [the Defence Serious Crime Unit] being permanently in Afghanistan. You'll send people forward – perhaps for a few weeks – and then they'll come home again. When the Army talk about people being deployable, they mean sending them for six months. That's not what we're talking about, it's really the ability to carry out investigations in Afghanistan from time to time."*¹⁹⁵

3.8.8. However, the Provost Marshal (Army) has warned that *"The Future Force will see greater dispersal, global hubs, operating in small, self-contained, self-survival units. You won't get investigators to all those incidents."*¹⁹⁶ It will therefore be necessary to find other ways of documenting the scene and preserving the information upon which investigators will need to rely.

3.8.9. Operation Northmoor found that the photographs taken when Afghans had been killed during operations to capture them were worthless from an investigative and evidential perspective. Bodies had been moved to facilitate photographing them; and the photographs gave no indication of scale or context. Whilst video footage (from helmet- or body-worn cameras and/or aerial platforms) would greatly help, it may be necessary to consider training UK Forces to take evidential 'crime scene' photographs. The intention is not to train every soldier as an investigator or to add to their duties, but teaching some simple techniques that can be applied in an operational setting when necessary will help to avoid protracted investigations.

¹⁹³ Australian Department of Defence *"Report of an Audit of Australian Defence Force investigative capability,"* (2006), at paragraph 7.61.

¹⁹⁴ Note of meeting 3.

¹⁹⁵ Note of meeting 59.

¹⁹⁶ Note of meeting 47.

3.8.10. This may be desirable in any event, as UK Forces may come across evidence of war crimes, crimes against humanity or genocide committed by third-parties that will need to be documented and passed to the appropriate authorities for investigation. As Philip Trewhitt observed:-

“... every UN mission has now as part of its mandate accountability for war crimes, particularly conflict-related sexual violence. If you look at any mission, Mali, for example, the mission will be to prevent impunity, promote accountability. If you’re part of that mission, and we are by deploying peacekeepers, we take on that mandate.”

“Every soldier on a peacekeeping operation will want to be able to do something if they come across a war crime. If you see a massacre, the idea of nobody being interested would be profoundly demoralising. There needs to be a procedure: if you’ve come back and you’ve seen something, you make a report, this is who it goes to. If the ICC comes or someone makes an allegation, you’ve got the report, it’s ready for them.”¹⁹⁷

3.8.11. The Future Operating Environment is driving a requirement for greater professionalisation and specialisation, for agility and changes of approach. Incremental change and greater ‘jointery’ are not the answer. These profound challenges for Service policing can only be met through a thoroughly modern, properly resourced elite investigative unit.

¹⁹⁷ Note of meeting 49.

4. The duty to investigate

4.1. Introduction

4.1.1. The purpose of this chapter is to set out the legal duties which a system of Service Justice must fulfil with regard to the investigation and prosecution of incidents or allegations relating to overseas operations.

4.1.2. I have set out in Chapter 1 the impact which challenges to the Service police's compliance with those duties had on the investigations arising from operations by UK Armed Forces in Iraq and Afghanistan.¹⁹⁸ That impact was profound. The need to adapt processes in light of the decisions of the courts led to delay, expense and a loss of public confidence. The desirability of avoiding any repetition of those outcomes, by ensuring that there is in place a system that is so far as possible beyond legal reproach, is self-evident.

4.1.3. In setting out the minimum legal requirements imposed by domestic and international law, I make no suggestion that they should be treated as a limit on the scope of ambition for reform of the system. My Terms of Reference invite me to propose "*the most up to date and future proof framework, skills and processes*" and not merely a system which meets the standard of legal compliance. In some respects – for example, timeliness – it is plainly highly desirable in the interests of victims, accused persons and the wider public that a much higher standard be achieved than the international courts might tolerate; my Terms of Reference implicitly recognise as much. But a future-proof framework must nevertheless be developed with the legal obligations it is required to fulfil kept firmly in mind.

4.1.4. There has been no suggestion in any of the numerous interviews that I have conducted that compliance with international standards is a matter of reluctance. On the contrary, those to whom I have spoken have repeatedly emphasised the matters which I have addressed in Chapter 3: the moral purpose of the Service Justice System, and of the work of the Armed Forces generally. It is evident that there is a widespread and genuine desire to lead by example; to expose and punish wrongdoing by Service personnel where it occurs despite efforts to prevent it, as well as to dispel harmful false suspicion against innocent Servicemen and women swiftly. It is rightly recognised that the moral legitimacy of the work of our Armed Forces, as well as the maintenance of good order and discipline, depend to a significant extent on doing so.

¹⁹⁸ See, in particular, section 1.4 above.

4.2. Overview

4.2.1. In domestic law,¹⁹⁹ there is no general duty to investigate and prosecute crime, but in the Service context such a duty is implicit in sections 113, 114, and 116 of the Armed Forces Act 2006. These provisions form part of a wider decision-making structure guiding a matter from allegation through to prosecution and conviction. That structure is summarised below.

4.2.2. In addition to the moral obligation to investigate allegations of wrongdoing by Service personnel on overseas operations, this structure is intended to fulfil the United Kingdom's obligations under three principal international instruments. These are:- the Geneva Conventions; the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights ('the European Convention'); and the Rome Statute of the International Criminal Court ('the Rome Statute'). The Geneva Conventions and Additional Protocol I create an obligation to investigate and punish grave breaches²⁰⁰ of their provisions. The European Convention creates a freestanding procedural obligation to investigate potential violations of the right to life and the right to freedom from torture and inhuman or degrading treatment or punishment where these fall within its jurisdiction. The Rome Statute creates an obligation to investigate suspected perpetrators of genocide, war crimes, crimes against humanity and the crime of aggression; where a State Party is unwilling or unable to do so, the International Criminal Court itself may step in to investigate and prosecute.

4.2.3. The scope and limitations of these duties are examined in this chapter.

4.3. Domestic Law

¹⁹⁹ Disregarding, for these purposes, the incorporation into domestic law of duties of international origin.

²⁰⁰ Article 49, Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Article 50, Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Article 129, Geneva Convention III relative to the Treatment of Prisoners of War; Article 146, Geneva Convention IV relative to the Protection of Civilian Persons in Time of War; and Article 85, Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts.

4.3.1. The main purpose of the Armed Forces Act 2006 was to create from the three separate Service discipline and justice systems a single, harmonised system of justice governing all members of the Armed Forces. It unified the Courts Martial into a single standing court; unified the three single-Service prosecuting authorities; and eliminated discrepancies between the codes of discipline and powers of punishment applicable to Service personnel. Importantly for present purposes, it created a system of reporting and referral requirements intended to ensure that allegations of serious wrongdoing would be brought to the attention of the Service police and Service Prosecuting Authority, while retaining a system of Summary Hearings for less serious and complex cases which retained the Commanding Officer at the heart of the justice process. I shall return to the issue of Summary Hearings in Chapter 8.

4.3.2. I am enjoined against carrying out “*another broad review of the Service Justice System*”. I do not, therefore, propose to analyse the Armed Forces Act in detail. However, it is worth summarising Part 1 of Chapter 5 of that Act, subtitled ‘Investigation’, from which the principal duties concerning investigations arise.

4.3.3. Sections 113 and 114 create an obligation on Commanding Officers to ensure that the Service police are aware of certain allegations or circumstances. The matters which must be reported are prescribed by Schedule 2 and by regulations, but cover serious offences including certain serious non-criminal Service offences. All grave breaches of the Geneva Conventions contrary to section 1 of the Geneva Conventions Act 1957, along with genocide, war crimes and crimes against humanity contrary to sections 51 and 52 of the International Criminal Court Act 2001, murder, manslaughter, torture are covered by Schedule 2, although many less serious offences and circumstances are also covered.

4.3.4. Section 115 provides that a Commanding Officer must ensure that any matter which he is not obliged to report to the Service police is investigated in such a way and to such an extent as is appropriate, unless he makes a voluntary report to the Service police.

4.3.5. Section 116 provides for the actions of the Service police upon a referral or report being made, including referring the case onwards for prosecution. Although there is not an express duty to investigate under section 116 (which deals with what must be done when the matter has been investigated), such a duty was held in *Al-Saadoon*²⁰¹ to be implicit in section 116, read together with section 113. The effect of these provisions is that the Service police

²⁰¹ *Al-Saadoon & Others v Secretary of State for Defence (Rev 1)* 1 WLR 3625, at §256.

must investigate an allegation or circumstances of which they are made aware which would indicate to a reasonable person that a Service offence has been or may have been committed.

4.3.6. Finally, section 115A was inserted into the Act by the Armed Forces Act 2011. This puts on a statutory basis the requirement that the Provost Marshal of any Service police force must be free from “*improper interference*.” For reasons to which I shall return in Chapter 5, this is a valuable provision, but not one which, on its own, is capable of providing a complete answer to allegations that Service police investigations lack the quality of independence required by the European Court of Human Rights and the International Criminal Court.

4.3.7. I should also mention the duty on a coroner to investigate a death under section 1 of the Coroners and Justice Act 2009. This only currently arises, in the context of overseas operations, where the remains of Service personnel are repatriated, since jurisdiction is triggered by the senior coroner becoming aware that the body of a deceased person is within their coroner’s area. Accordingly, coronial proceedings (which in other circumstances give rise to an automatic investigation in the case of any violent or unnatural death, or death in State detention, irrespective of whether an obligation to carry out such an investigation arises under the European Convention) do not, at present, usually cover the deaths of foreign nationals killed by our Armed Forces during overseas operations.

4.3.8. Where a statutory obligation to investigate does not arise, or has been discharged, the courts have declined invitations to impose such an obligation at common law²⁰² given that this is an area already covered by Parliament through a number of means, including the coronial system, the Inquiries Act 2005, and the incorporation of the European Convention into domestic law through the Human Rights Act 1998. It is through the latter means that the most significant and extensively litigated legal duties as to the manner and standard of investigations arise.

4.4. The European Convention on Human Rights

Introduction

4.4.1. As I indicated in Chapter 1, challenges to investigations arising from Iraq and Afghanistan have been principally concerned with the question whether they were compliant

²⁰² See *R (Keyu) v Foreign Secretary* [2016] AC 1355.

with the requirements of Article 2 (right to life) and Article 3 (right to freedom from torture and inhuman or degrading treatment or punishment) of the European Convention.

4.4.2. The European Convention is often described as a *'living instrument'*.²⁰³ It has been adapted to reflect social and technological developments which were wholly unforeseeable when it was first adopted. Many would say that it has been adapted to develop principles which were wholly unforeseeable irrespective of such developments. The relevant law has continued to evolve, indeed, while I have been receiving evidence.²⁰⁴

4.4.3. The pace of change in the Strasbourg jurisprudence, and particularly the unforeseen expansion of States' extra-territorial jurisdiction under the European Convention, created real difficulties. It is to be hoped that the recent period of intensive examination by the domestic and Strasbourg courts will at least have the advantage that principles have now been developed that will stand the test of time. Nevertheless, in planning for a 'future-proof' system, the approach must be to create structures that can be adapted to further legal development, and which are so far as possible robustly compliant with the spirit as well as the letter of the case law. That is not to say that Service police investigations can always be measured against the standards of civilian policing. There is a balance to be struck where investigations must be carried out in dangerous operating environments, and where they will divert resources needed to defend and protect Servicemen and women from direct threats. The need to carry out effective investigations on a battlefield without recklessly endangering life is a particularly stark example of the 'search for a fair balance' which is inherent in the whole of the European Convention.

Article 1 – Jurisdiction

4.4.4. The question in what circumstances the European Convention applies to the activities of UK Forces on overseas operations at all is one which has been particularly heavily scrutinised by the courts, and has been the subject of a number of reversals.

4.4.5. I set out a brief overview of the position below. However, I make no claim to address the subject exhaustively, nor to have done justice to the work of the many distinguished judges, lawyers and academics who have examined and contributed to the debate. That is because it is sufficient for my purposes to say that scope of extra-territorial jurisdiction is now

²⁰³ See, for example, *Tyrer v United Kingdom* (5856/72), 25 April 1978.

²⁰⁴ See, for example, *Hanan v Germany* ([GC] 4871/16), 16 February 2021.

on any view a broad one and covers a multitude of situations which could easily arise in future operations. To prepare for future overseas operations on the basis that the duties under the European Convention may well apply to Service personnel in a wide range of situations, including those with ‘boots on the ground’ whose activities will include the use of lethal force and capture and detention, is to make a sensible planning assumption.

4.4.6. Article 1 requires High Contracting Parties to the Convention to “*secure to everyone within their jurisdiction*” the rights and freedoms under it. It is on the meaning of the words “*within their jurisdiction*” that the debate has turned. Jurisdiction under the European Convention has always been understood to arise principally on a territorial basis, and the question has been how far it extends beyond the sovereign territory of the contracting State. The recent history of the legal development on this topic is, briefly, as follows.

4.4.7. In *Banković v Belgium*,²⁰⁵ the Grand Chamber held that it was only in ‘exceptional cases’ that the jurisdiction of a contracting State for the purposes of Article 1 extended to acts performed outside their territory. Such exceptional cases included circumstances in which a State exercised ‘effective control’ over an area outside its national territory, or where it exercised some or all of the powers of the national government by that government’s consent, acquiescence or invitation. Significantly, the Grand Chamber expressly rejected the suggestion that jurisdiction could be based on effective control of an individual (rather than an area).²⁰⁶ It was reasonable to conclude, therefore, on the basis of *Banković*, that the European Convention would not apply to British forces in Iraq save while they were on British military bases.²⁰⁷ More widely, it was then reasonable to assume that most UK military operations would fall outside the jurisdictional scope of the European Convention entirely.

4.4.8. Subsequent decisions of the Strasbourg Court, however gradually undermined that view. In *Issa v Turkey*,²⁰⁸ the Court (though rejecting the application before it on the facts) relied²⁰⁹ on “...*the fact that Article 1 of the Convention cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory*” in the context of the conduct of Turkish soldiers in Iraq. This appeared little short of an assertion of universal jurisdiction. There followed cases

²⁰⁵ *Banković & Others v Belgium & Others* ([GC] 52207/99), at §67. *Banković* was an admissibility decision made on 12 December 2001.

²⁰⁶ *Ibid*, at §75

²⁰⁷ This was a separate exception: see *R (Al Saadoon v Defence Secretary)* [2017] QB 1015 at §34.

²⁰⁸ *Issa & Others v Turkey* (31281/96), 30 March 2005.

²⁰⁹ *Ibid*, at §71.

including *Öcalan v Turkey*²¹⁰ (jurisdiction asserted over Turkish officials taking effective control of an individual on Kenyan territory (but not of the area)) and *Al-Saadoon and Mufdhi v United Kingdom*²¹¹ (jurisdiction asserted over detainees in British controlled military prisons in Iraq by virtue of “*the total and exclusive de facto, and subsequently also de jure, control exercised [by UK Forces] over the premises in question*”²¹²). Again, the decisions seemed difficult to reconcile with the result and reasoning in *Banković*.

4.4.9. Matters were brought to a head in the *Al-Skeini* litigation, which concerned the deaths of six individuals who died in Iraq at the time when the United Kingdom was recognised as an occupying power. The domestic courts,²¹³ following *Banković* in preference to *Issa* and subsequent cases, decided that there was no jurisdiction under the European Convention save in one case, that of Baha Mousa, who had been killed in a military prison on a British military base. The Grand Chamber disagreed.²¹⁴

4.4.10. Finding that jurisdiction under the European Convention arose in relation to all six applicants, the Strasbourg Court reiterated that Article 1 applies not only where a contracting State exercises “*effective control of an area*” (as *Banković* had established) or under other established exceptions including “*when, through the consent, invitation or acquiescence of the government of that territory, [the contracting state] exercises all or some of the public powers normally to be exercised by that government*”.²¹⁵ The case law since *Banković* demonstrated, the Court said, that “*in certain circumstances, the use of force by a state’s agents operating outside its territory may bring the individual thereby brought under the control of the state’s authorities into the state’s article 1 jurisdiction*”.²¹⁶ Obligations under the European Convention arose “*whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction*”.²¹⁷ On the facts on the ground in Iraq, “*...the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention*”.²¹⁸

²¹⁰ *Öcalan v Turkey* ([GC] 46221/99), 12 May 2005.

²¹¹ *Al-Saadoon and Mufdhi v United Kingdom* (69408/08), 4 October 2010.

²¹² *Ibid*, at §88.

²¹³ *R (Al-Skeini & Others) v Defence Secretary* [2007] QB 140 (Divisional Court and Court of Appeal); [2008] AC 153 (House of Lords).

²¹⁴ *Al-Skeini & Others v United Kingdom* ([GC] 55721/07), 7 July 2011.

²¹⁵ *Ibid*, at §135.

²¹⁶ *Ibid*, at §134.

²¹⁷ *Ibid*, at §137.

²¹⁸ *Ibid*, at §149

4.4.11. The question of jurisdiction was further complicated by departure from an ‘all or nothing’ approach to the protection of human rights outside a contracting State’s borders to a requirement to safeguard only “rights and freedoms... relevant to the situation of the individual”.²¹⁹ This ‘dividing and tailoring’ approach was a necessary corollary. The protection of all rights was potentially sustainable under the approach to jurisdiction in *Banković* (which remained essentially territorial, the question being whether the given territory was under effective control). Where there is no territorial control, however, a contracting State may be able to refrain from arbitrary killing contrary to Article 2 but may have no legal or practical ability to safeguard other rights (for example, to enact a system of laws to protect life under the same article, or to give effect to e.g. the right to freedom of expression). It follows that extraterritorial jurisdiction may need to be considered separately in relation to each right and each aspect of it. I return to the question of jurisdiction in relation to the duties to investigate below.

4.4.12. *Al-Skeini v United Kingdom* has been followed in subsequent cases by the Strasbourg Court²²⁰ and was recognised as authoritative²²¹ in the domestic jurisdiction by the decisions of the Supreme Court in *Smith v Ministry of Defence* [2014] AC 52,²²¹ and of the Administrative Court in *R (Al-Saadoon) v Defence Secretary* [2017] QB 1015.

4.4.13. In the latter case, Mr Justice Leggatt as he then was concluded (at first instance) that “whenever and wherever a state which is a contracting party to the Convention purports to exercise legal authority or uses physical force, it must do so in a way that does not violate Convention rights” and that the test of exercising ‘control and authority over an individual’ was “a factual one which depends on the actual exercise of control and not on its legal basis or legitimacy.”²²² In the final analysis, for UK Forces to shoot a person dead was “the ultimate exercise” of control and authority over them and would always establish jurisdiction.²²³ This appeared to reduce the question of jurisdiction to one of cause and effect, little short of an assertion of universal jurisdiction.

²¹⁹ Ibid, at §137

²²⁰ *Hassan v United Kingdom* ([GC] 29750/09), 16 September 2014; *Jaloud v The Netherlands* ([GC] 47708/08), 20 November 2014.

²²¹ This also recognised that the State’s own Armed Forces are within its jurisdiction for the purposes of Article 1 of the Convention.

²²² *Al-Saadoon & Others v Secretary of State for Defence* [2017] QB 1015, at §74.

²²³ Ibid, at §95.

4.4.14. The Court of Appeal did not accept that *Al-Skeini* had gone so far, describing this as a principle of “*enormous breadth*”²²⁴ and saying that if such a principle were to be developed, it must be done expressly and by the Strasbourg Court itself, not by a national court.²²⁵ The Court of Appeal nevertheless departed slightly from *Al-Skeini* in holding that what mattered was not the legal status of our Armed Forces (i.e. whether or not they were an ‘occupying power’ under international humanitarian law) but the specific task they were engaged in at the time of the incident. In practice, moreover, the Court of Appeal applied the ‘public powers’ exception fairly broadly; examples of cases where jurisdiction arose included UK Forces overseeing the supply of rationed fuel to civilians,²²⁶ attempting to stop a vehicle approaching crossroads,²²⁷ and (subject to further exploration of the facts) a raid on a family home.²²⁸ It did not arise from a security operation to which UK forces gave limited planning support but were not present during the operation²²⁹ and a case involving a road traffic accident in which a UK military vehicle collided with a civilian pedestrian.²³⁰

4.4.15. This ‘Al-Skeini plus’ position followed the Strasbourg Court’s conclusions in *Jaloud v Netherlands*, which had confirmed that the status of ‘occupying power’ under international humanitarian law was not determinative of Article 1 jurisdiction.²³¹ The Netherlands was held to have jurisdiction notwithstanding that:- (1) it was the United Kingdom and United States who had the status of ‘occupying powers’; (2) the troops in question were under the control of a UK commander and appear to have taken their day to day orders from foreign commanders; and (3) they were at a checkpoint nominally manned by the Iraqi Civil Defence Corps. The Grand Chamber held that the Netherlands exercised its ‘jurisdiction’ within the wider military structure for the purpose of asserting authority and control over persons passing through the checkpoint.²³²

4.4.16. There remains scope, however, for the deployment of UK forces on United Nations operations to be outside the jurisdictional reach of the Convention: in *Al-Jedda v United Kingdom* the Grand Chamber appears to have accepted (albeit on the basis of agreement between the parties) that the conduct of an organ of a State placed at the disposal of the

²²⁴ *Al-Saadoon & Others v Secretary of State for Defence & Others* [2016] EWCA Civ 811, at §62.

²²⁵ *Ibid*, at §63 and §70.

²²⁶ *Ibid*, at §§75-78 (PIL 6: Atheer Karim Khalaf).

²²⁷ *Ibid*, at §§79-81 (PIL 82: Captain Taleb).

²²⁸ *Ibid*, at §§82-83 (PIL 129: Raad Karim) and §§86-87 (PIL 73: Maytham To-ma Dahir Al-Salami).

²²⁹ *Ibid*, at §§92-94 (PIL 176: Oasim Sahib, Talib Al-Kharsa).

²³⁰ *Ibid*, at §§95-97 (PIL 45: Ahmed Awdeh).

²³¹ *Jaloud v The Netherlands* ([GC] 47708/08), 20 November 2014, at §142.

²³² The Court was not called on to decide whether the United Kingdom also had jurisdiction, but left that possibility open.

United Nations should be attributable to the United Nations if the latter exercises effective control over the conduct,²³³ and the correctness of *Behrami v France*²³⁴ (which held that detention in Kosovo was attributable to the United Nations and not individual states) was not doubted.

4.4.17. It would be dangerous to assume that the last word has been said in this area. Lord Dyson, speaking extra-judicially, has said of *Banković* that “until *Al-Skeini*, [it was] was regarded as a “watershed” and now is regarded as an “aberration”.”²³⁵ Even as he held that the principle in *Al-Skeini* must not be extended by the domestic courts, Lord Justice Lloyd Jones observed that “the genie having been released from the bottle, it may now prove impossible to contain”.²³⁶ It may be added that, despite doubts expressed in *Banković* about whether it was appropriate to do so,²³⁷ the Strasbourg Court has in practice treated Article 1 of the Convention, like other articles, as a ‘living instrument’. It follows²³⁸ that the list of circumstances in which contracting States are found to exercise jurisdiction extraterritorially can by no means be assumed to be closed even now. Equally, nothing I have said about recent developments in the Strasbourg jurisprudence should be taken as expressing any view that the domestic courts will or should agree with everything that Strasbourg has decided (though they are of course required to “take into account” any judgment of the Strasbourg court under section 2 of the Human Rights Act 1998) or on how any disagreement would ultimately be resolved. It is sufficient for present purposes to say that while operating within a legal context which lacks the desirable quality of certainty and foreseeability, the safer course is to ensure the ability to surge investigative capacity to the extent that it is considered might be necessary based on the broadest view of the European Convention’s jurisdictional reach.

Article 2 – The right to life

The Procedural Obligation

²³³ *Al-Jedda v United Kingdom* ([GC] 27021/08), 7 July 2011, at §84.

²³⁴ *Agim Behrami and Bakir Behrami v France* ([GC] 71412/01) and *Ruzhdi Saramati v France & Others* ([GC] 78166/01), 2 May 2007

²³⁵ Lord Dyson, “*The Extraterritorial Application of the European Convention on Human Rights: Now on a Firmer Footing, but Is It A Sound One?*,” 2014 annual University of Essex – Clifford Chance lecture, <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lord-dyson-speech-extraterritorial-reach-echr-300114.pdf>

²³⁶ *Al-Saadoon & Others v Secretary of State for Defence & Others* [2016] EWCA Civ 811, at §62.

²³⁷ *Banković & Others v Belgium & Others* ([GC] 52207/99), at §§64-65.

²³⁸ As noted by Lord Hope DPSC in *Susan Smith v Ministry of Defence* [2014] AC 52 at §30.

4.4.18. The right to life under Article 2 of the European Convention has three components. There is a negative duty to refrain from taking life (save in the circumstances described in the text, or as a result of “*lawful acts of war*”²³⁹). There is a positive obligation to protect the right to life by law. Finally, and most significantly for present purposes, there is a procedural obligation to carry out an effective investigation into alleged breaches of the substantive limb.

4.4.19. Although the text of the European Convention makes no mention of the investigative duty, it arises on the logic that without a procedure for reviewing the lawfulness of the use of lethal force by State authorities, the prohibition on arbitrary killing by agents of the state would be ineffective. It is a longstanding and often repeated principle of the Strasbourg jurisprudence that the European Convention is intended to guarantee “*not rights that are theoretical or illusory but rights that are practical and effective*”.²⁴⁰ Thus, the Strasbourg Court has interpreted Article 2 – together with the general duty under Article 1 of the European Convention to “*secure to everyone... the rights and freedoms defined in the Convention*” and the right under Article 13 to an effective remedy – as implying that some form of effective official investigation is needed in appropriate cases to reinforce the right. The Grand Chamber observed in *Al-Skeini v United Kingdom* that:-

*“The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. However, the investigation should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the State complied with its obligation under Article 2 to protect life.”*²⁴¹

A freestanding obligation

4.4.20. In recent years, the Strasbourg Court has consistently examined the questions of compliance with the substantive and procedural limbs of Article 2 separately. It has found

²³⁹ Article 15, European Convention on Human Rights.

²⁴⁰ See, amongst numerous examples, *Airey v Ireland* (6289/73), 9 October 1979, at §24.

²⁴¹ *Al-Skeini & Others v United Kingdom* ([GC] 55721/07), 7 July 2011, at §163.

violations of Article 2 on the basis of the duty to investigate without finding any violation of the substantive obligation, and has examined the procedural obligation without any such violation even being alleged.²⁴² In *Güzelyurtlu and Others v Cyprus and Turkey*, the Grand Chamber observed that the Article 2 procedural obligation “has evolved into a separate and autonomous obligation, albeit triggered by acts in relation to the substantive aspects of that provision... a detachable obligation arising out of Article 2 and capable of binding the State even when the death occurred outside its jurisdiction”.²⁴³ On this basis, jurisdiction for the purposes of an Article 2 duty involved separate considerations. There were two components to this. First:-

“if the investigative or judicial authorities of a Contracting State institute their own criminal investigation or proceedings concerning a death which has occurred outside the jurisdiction of that State, by virtue of their domestic law (e.g. under provisions on universal jurisdiction or on the basis of the active or passive personality principle), the institution of that investigation or those proceedings is sufficient to establish a jurisdictional link for the purposes of Article 1.”²⁴⁴

4.4.21. To put this another way, if there is an investigation at all it must be a Convention-compliant one.

4.4.22. Second:-

“Although the procedural obligation under Article 2 will in principle only be triggered for the Contracting State under whose jurisdiction the deceased was to be found at the time of death, “special features” in a given case will justify departure from this approach... However, the Court does not consider that it has to define in abstracto which “special features” trigger the existence of a jurisdictional link in relation to the procedural obligation to investigate under Article 2, since these features will necessarily depend on the particular circumstances of each case and may vary considerably from one case to the other.”²⁴⁵

4.4.23. Although it had declined to define the “special features” which would give rise to an expanded jurisdiction *in abstracto*, in *Hanan v Germany* the Grand Chamber demonstrated

²⁴² See, for example, *Armani Da Silva v. United Kingdom* ([GC] 5878/08), 30 March 2016.

²⁴³ *Güzelyurtlu and Others v Cyprus and Turkey* ([GC] 36925/07), 9 January 2019, at §189.

²⁴⁴ *Ibid*, at §188.

²⁴⁵ *Ibid*, at §190.

their breadth by relying as “special features” on “*the fact that Germany retained [in operations in Afghanistan under NATO Allied Joint Force Command] exclusive jurisdiction over its troops with respect to serious crimes which, moreover, it was obliged to investigate under international and domestic law*”.²⁴⁶ As the Strasbourg Court itself recognised, these ‘special’ circumstances will arise in practice “*in the majority of those Contracting States which participate in military deployments overseas*”.²⁴⁷ In a powerful dissent, three judges (including the UK judge) expressed the view that in light of the majority ruling, “*preserving jurisdiction as a tenable concept will become impossible or, at least, will entail a haphazard application of the concept, dependent on unclear legal considerations.*”²⁴⁸

4.4.24. On any view, these developments reinforce the observations which I have already made that the safe planning assumption is that the jurisdictional reach is extensive.

4.4.25. I turn next to consider when and how an investigative obligation under the European Convention must be discharged.

The threshold for investigation

4.4.26. Investigation is not required in every case where there is a death. However, the Strasbourg Court has identified certain categories of case in which a duty to investigate automatically arises because the context indicates that the State can, without more, be regarded as having some form of responsibility for the death. These include killings as a result of the use of force by State agents (though not killing of enemy combatants in the course of armed conflict) and all violent or non-natural deaths and suicides in custody. The threshold for investigation is also crossed, on ordinary principles, where there is an arguable breach of the negative or positive substantive obligations under Article 2. However, where the automatic duty to investigate arises, it appears that it will do so irrespective of whether there is also evidence of an arguable breach;²⁴⁹ it was this automatic obligation which was triggered by most of the allegations arising from operations in Iraq. The essentially automatic nature of the duty to investigate killings and deaths in custody increases the caseload for investigators, but helpfully underscores the fact that the need to carry out an investigation is not an indication that Service personnel have acted wrongly; as I indicate elsewhere in this report, it is important to reinforce the message (perhaps better understood in the context of deaths in UK civilian

²⁴⁶ *Hanan v Germany* ([GC] 4871/16), 16 February 2021, at §142.

²⁴⁷ *Ibid*, at §141.

²⁴⁸ *Ibid*, Joint Partly Dissenting Opinion of Judges Grozev, Ranzoni and Eicke, at §21.

²⁴⁹ See *R (Al-Saadoon) v Defence Secretary* [2016] 1 WLR 3625, at §95.

prisons where inquests are similarly automatic) that investigation in such circumstances is routine and carries no implication of blame.

4.4.27. There will be cases which do not meet the threshold for investigation. These will include cases where there is simply no evidence of UK Forces involvement, such evidence is so wholly lacking in credibility that no investigation is required, or where the deceased is clearly an enemy combatant killed in the course of armed conflict.

4.4.28. The Service police must act on a duty to investigate regardless of how the matter has come to their attention. Although an allegation by family members is one way in which an investigative duty may come to light, the authorities cannot leave it to the initiative of the next-of-kin to lodge a formal complaint if they have information which requires investigation.²⁵⁰

4.4.29. In practice this means not only that investigators must act when they have evidence which justifies it, but also that the greatest care must be taken to ensure that the facts of any use of force or any death in custody are immediately passed to those investigators.

Near-death situations

4.4.30. The investigative duty under Article 2 of the European Convention may arise even if a person whose right to life was allegedly breached does not die. In particular, the use of force by State agents which does not result in death may disclose a breach (or at least an arguable breach) of Article 2 of the Convention in exceptional circumstances, depending on the degree and nature of the force used, if by its very nature it puts life at serious risk. Such cases may also give rise to an obligation to investigate under Article 3, but will not invariably do so.

'Effective' investigation

4.4.31. The investigation required by Article 2 must be 'effective'. There are four central components to this requirement. An effective investigation must be independent. It must be 'adequate'. It must be prompt, and proceed with reasonable expedition. Finally, there must be a sufficient element of public scrutiny, including sufficient participation by the next of kin to safeguard their legitimate interests.

²⁵⁰ *Al-Skeini & Others v United Kingdom* ([GC] 55721/07), 7 July 2011, at §165.

4.4.32. Close attention must be paid to each of these requirements in planning for the policing of major future operations.

Independence

4.4.33. An effective investigation must be independent.

4.4.34. Challenges to the independence of Service police investigations have been a central theme of the litigation arising from Operations Telic and Herrick. One of the key insights from those challenges (in particular, the decision in *Ali Zaki Mousa (No.1)*)²⁵¹ is that where they succeed, they are particularly disruptive. An inadequate investigation can in principle be supplemented; a slow investigation can be expedited; but the financial and practical cost of remedying an investigation which lacks independence is unavoidably high. The recommendations by His Honour Shaun Lyons and Professor Sir Jon Murphy and the proposed establishment of a Defence Serious Crime Unit which I endorse in Chapter 5 represent a valuable opportunity to enhance the independence of Service police investigations and to make the system ‘future-proof’.

4.4.35. The formulation generally used by the Strasbourg Court is that:-

*“For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.”*²⁵²

4.4.36. *Al-Skeini* is an example of the Strasbourg Court finding that investigations lacked the first sort of independence. The Court’s reasoning was based on:-

“the fact that the Special Investigation Branch was not “free to decide for itself when to start and cease an investigation” and did not report “in the first instance to the [Army Prosecuting Authority]” rather than to the military chain of command, [which]

²⁵¹ [2011] EWCA Civ 1334.

²⁵² See, inter alia, *Hugh Jordan v United Kingdom* (24746/94), 4 May 2001, at §106; *Al-Skeini & Others v United Kingdom* ([GC] 55721/07), 7 July 2011, at §167.

*meant that it could not be seen as sufficiently independent from the soldiers implicated in the events to satisfy the requirements of Article 2.*²⁵³

4.4.37. Similarly, in *Ali Zaki Mousa (No 2)*²⁵⁴, the Court said:-

“It is axiomatic that decisions on whether to pursue an investigation and then whether to prosecute must be made independently of the Executive. No civil servant, let alone a Minister can be permitted to have any influence whatsoever.... [Investigators and prosecutors] must be able to make their decisions entirely independently of the Secretary of State for Defence, any civil servant in that Ministry and, even more importantly, of anyone in the hierarchy of the armed forces.”

4.4.38. However, the Strasbourg court has been clear that this form of hierarchical independence is a “*minimum requirement*”²⁵⁵ and not a sufficient guarantee of independence. An assessment of practical independence involves “*a concrete examination of the independence of the investigation in its entirety, rather than an abstract assessment*”.²⁵⁶ It is on this basis, likewise, that the domestic courts examined the question of independence in *Ali Zaki Mousa (No 1)*. The Court of Appeal did not doubt the evidence that Military Provost Staff had been formally under the command of the Officer Commanding the Divisional detention facility in question, not the command of Provost Marshal (Army), and that it was to the former that they were responsible for ensuring that detainees were held in a safe and secure environment.²⁵⁷ But it said:-

*“...the central concern in this case is not related to the formal chain of command or to the niceties of the hierarchical or institutional military arrangements. It is to do with the reality of the situation on the ground in Iraq and the extent to which that may impact on the practical independence of IHAT in view of the involvement of the Provost Branch.”*²⁵⁸

4.4.39. The ‘reality of the situation’ was that if the allegations had substance, members of the Provost Branch including members of the Royal Military Police, both on General Police Duties and in the Special Investigation Branch, would come under scrutiny. So too would the Provost

²⁵³ *Al-Skeini & Others v United Kingdom* ([GC] 55721/07), 7 July 2011, at §172.

²⁵⁴ [2013] EWHC 1412 (Admin) at §74.

²⁵⁵ *Sergey Shevchenko v Ukraine* (32478/02), 4 July 2006.

²⁵⁶ *Mustafa Tunç and Fecire Tunç v. Turkey* ([GC] 24014/05), 14 April 2015, at §222.

²⁵⁷ [2011] EWCA Civ 1334, at §27.

²⁵⁸ *Ibid*, at § 34.

Marshal (Army) himself. A body staffed principally by the Royal Military Police (both Special Investigations Branch and General Police Duty Officers) and reporting to Provost Marshal (Army) could not investigate such allegations independently. Due to the volume of allegations requiring investigation, a recusal mechanism was not a sufficient safeguard in all the circumstances, and indeed the extent to which it had been necessary to apply it in practice was further evidence of the extent to which there was no real independence. The Court of Appeal did not consider this to be a marginal case.²⁵⁹

4.4.40. A surprising number of those to whom I have spoken appeared not fully to have absorbed the lessons of *Ali Zaki Mousa (No 1)* as to the need for investigators to be independent of those they investigate. In particular, there was insufficient recognition that while a single figure – whether Provost Marshal (Army) or otherwise – simultaneously holds both an assurance role in connection with detention facilities, and ultimate responsibility for criminal investigations into allegations of mistreatment in detention, the prospect of legal challenge is likely to recur in investigations following any future armed conflict. The consequences of such a challenge if successful could easily be just as disruptive and expensive as they were for the Iraq Historic Allegations Team. It would require extraordinarily compelling reasons to run even a risk of those consequences. I return to this issue in Chapter 5.

4.4.41. There are also practical advantages to a greater degree of independence in terms of the intensity of review of investigative decisions. In *Mustafa Tunç and Fecire Tunç v. Turkey*, the Grand Chamber said:-

*“Where the statutory or institutional independence is open to question, such a situation, although not decisive, will call for a stricter scrutiny on the part of the Court of whether the investigation has been carried out in an independent manner.”*²⁶⁰

4.4.42. It is obviously right, in my view, that a more independent investigation warrants less judicial scrutiny of the steps taken, since independence will, in itself, promote effective investigation and allay public suspicion. Reducing the intensity of review (and thus, it is to be hoped, the extent of the disruption caused by legal challenge, even if that challenge is unsuccessful) represents a clear advantage in addition to the moral and presentational imperatives.

²⁵⁹ *Ibid*, at §38.

²⁶⁰ *Mustafa Tunç and Fecire Tunç v. Turkey* [(GC) 24014/05], 14 April 2015, at §224.

4.4.43. Equally, absolute independence (for example, giving responsibility for investigating offences to an entirely civilian police force) is not required by law. In the same case, the Grand Chamber said:-

“...Article 2 does not require that the persons and bodies responsible for the investigation enjoy absolute independence, but rather that they are sufficiently independent of the persons and structures whose responsibility is likely to be engaged... The adequacy of the degree of independence is assessed in the light of all the circumstances, which are necessarily specific to each case.”²⁶¹

4.4.44. This was reflected by the outcome in *Ali Zaki Mousa (No 2)*, in which the Administrative Court rejected the argument that Service police investigations of allegations against Service personnel are incompatible with the requirement for independence under Article 2.

4.4.45. A balance requires to be struck in relation to independence. As I set out in Chapter 5, I believe that the present responsibilities of Provost Marshal (Army) lack the requisite degree of independence in important respects, and I have made recommendations to address this. I have also made recommendations for greater civilian involvement in the revised system. Equally, I consider that there are limits. The proposition in *Ali Zaki Mousa (No 2)* that Service police should not be involved in Article 2 investigations at all was not a practical one, nor one which was likely to promote compliance with the European Convention overall. What was gained in terms of independence would plainly be lost in the reduced ability of civilians to investigate effectively. It is unlikely that such officers could even enter the areas where witnesses and crime scenes would be located; they would not be able to operate effectively in a military environment; they would lack the necessary military context to assess properly whether the use of force was justified. It follows that a ‘sufficient’ high level of independence must be achieved without compromising the adequacy of investigations, to which I now turn.

Adequacy

4.4.46. To be ‘effective’ an investigation must be ‘adequate’. The Grand Chamber summarised the principles in *Armani Da Silva v United Kingdom*, at §§233-234:-

²⁶¹ Ibid, at §223.

“This means that it must be capable of leading to the establishment of the facts, a determination of whether the force used was or was not justified in the circumstances and of identifying and — if appropriate — punishing those responsible. This is not an obligation of result, but of means. The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of the clinical findings, including the cause of death. Moreover, where there has been a use of force by state agents, the investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.

In particular, the investigation’s conclusions must be based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of inquiry undermines to a decisive extent the investigation’s ability to establish the circumstances of the case and the identity of those responsible. Nevertheless, the nature and degree of scrutiny which satisfy the minimum threshold of the investigation’s effectiveness depend on the circumstances of the particular case. The nature and degree of scrutiny must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work. Where a suspicious death has been inflicted at the hands of a state agent, particularly stringent scrutiny must be applied by the relevant domestic authorities to the ensuing investigation.”²⁶²

4.4.47. In relation to the requirement that an investigation be ‘capable’ of establishing the facts, the Court recognises that establishing the facts is not always possible in reality. It has held that the fact that an investigation ends without concrete, or with only limited, results is not indicative of any failings as such²⁶³ provided that reasonable investigative steps are taken. The duty to investigate is one of process not of result.

4.4.48. The Strasbourg Court has considered adequacy in the particular context of military operations in a number of cases. As on many issues, it has developed a refrain on the principles it adopts, based on the *Al-Skeini* judgment, which runs thus:-

²⁶² *Armani Da Silva v. United Kingdom* ([GC] 5878/08), 30 March 2016, at §§233-234.

²⁶³ *Giuliani and Gaggio v. Italy* ([GC] 23458/02), 24 March 2011, at §306.

“It is clear that where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and, as the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions has also observed, concrete constraints may compel the use of less effective measures of investigation... Nonetheless, the obligation under Article 2 entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.”²⁶⁴

4.4.49. Not always repeated, but equally important, is what the Strasbourg Court went on to say in *Al-Skeini* when applying the law to the facts:-

“The Court takes as its starting-point the practical problems caused to the investigating authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war. These practical problems included the breakdown in the civil infrastructure, leading, inter alia, to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time. As stated above, the Court considers that in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators.”²⁶⁵

4.4.50. A similar point was made by the Strasbourg Court in *Jaloud v The Netherlands* when considering the adequacy of an investigation by the Dutch Royal Military Constabulary into the shooting of an Iraqi citizen at a checkpoint in Iraq:-

“The Court is prepared to make reasonable allowances for the relatively difficult conditions under which the Netherlands military and investigators had to work. In particular, it must be recognised that they were engaged in a foreign country which

²⁶⁴ *Al-Skeini & Others v United Kingdom* ([GC] 55721/07), 7 July 2011, at §164; quoted or repeated in numerous cases including:- *Jaloud v the Netherlands* ([GC] 47708/08), 20 November 2014, at §186; *Georgia v Russia II*, (GC) 38263/08), 21 January 2021, at §326; *Hanan v Germany* ([GC] 4871/16), 16 February 2021, at §204.

²⁶⁵ *Al-Skeini & Others v United Kingdom* ([GC] 55721/07), 7 July 2011, at §168.

had yet to be rebuilt in the aftermath of hostilities, whose language and culture were alien to them, and whose population... clearly included armed hostile elements.”²⁶⁶

4.4.51. Nevertheless, the allowances that the Strasbourg Court actually made were disappointingly limited in light of the practical obstacles to investigation. The Court criticised the Dutch Royal Military Constabulary for not performing a post mortem examination (despite not having the facilities to do so) or recovering the bullet fragments and instead relying on the Iraqi authorities to do so.²⁶⁷

4.4.52. I have set out in detail in Chapter 1 the range of difficulties faced by investigators on the ground in Iraq and Afghanistan. While some of the difficulties arose from a lack of resources which did later improve, many others would have been incapable of improvement by even the best resourced and skilled investigative unit. The requirement of the European Convention is, in short, that investigators must do their realistic best, but are fully entitled to take into account the dangers, logistical difficulties and other realities in deciding what steps can practically be pursued. We should expect neither more nor less. It is readily understandable that steps which would be routine in an investigation carried out under the Queen’s peace may be far from straightforward without it. That said, the Service police should keep well in mind that in the event of challenge, reasonable allowances can only be made where the need is fully explained to an audience (including the judiciary but also the public) that may have no experience of armed conflict. A contemporaneous record of the rationale for decisions may be invaluable in making this explanation.

4.4.53. Finally, it is important to bear in mind that a criminal investigation (however thorough) may not exhaust the scope of the duty under Article 2. Where it is not possible to identify an individual who is guilty of homicide, it might be possible to determine whether the deceased was killed as a result of the use of force by State agents and, if so, whether the force used was justified; or there may be a need to explore systemic issues beyond immediate culpability for the death.²⁶⁸ In the context of deaths in custody, the Administrative Court said in *Ali Zaki Mousa (No.2)* that an investigation:-

“...must look into and consider the immediate and surrounding circumstances in which each of the deaths occurred. These circumstances will ordinarily include the instructions, training and supervision given to soldiers involved in the interrogation of

²⁶⁶ *Jaloud v the Netherlands* ([GC] 47708/08), 20 November 2014, at §226.

²⁶⁷ *Ibid*, at §§212-220.

²⁶⁸ *Al-Saadoon & Others v Secretary of State for Defence (Rev 1)* 1 WLR 3625, at §111.

*those who died in custody in the aftermath of the invasion. It should also identify the culpable and discreditable conduct of those involved, including their acts, omissions as well as identifying the steps needed for the rectification of dangerous practices and procedures.*²⁶⁹

4.4.54. Equally, there will be many cases in which a criminal investigation does fully discharge the obligation; and where there is a criminal prosecution, it must take place first.²⁷⁰

4.4.55. In *Al-Saadoon (No.2)*, Leggatt J accepted (albeit particularly in the context of historical allegations) that where investigations have already been carried out, a balance has to be carried out between the benefits of further investigation on the one hand, and the human and financial costs of further investigation on the other.²⁷¹ There are a number of factors which are relevant to that balance:-

- i. The seriousness of the alleged conduct leading to death;²⁷²
- ii. Whether there is any realistic possibility of obtaining further evidence which is relevant to the circumstances of the death;²⁷³
- iii. Delay in bringing the matter to the attention of the authorities: either because the matter should not be investigated in the absence of a reasonable explanation or the delay affects the credibility of the claim, or, irrespective of the reason for any delay, because of the effect of delay on what an investigation can achieve.²⁷⁴
- iv. The extent to which other investigations have already considered any factual/systemic issues which arise;
- v. The availability of a civil claim;²⁷⁵ and
- vi. The costs – both human and financial – of further inquiries.²⁷⁶

²⁶⁹ *R (on the application of Mousa & Others) v Secretary of State for Defence* [2013] EWHC 1412 (Admin), at §148.

²⁷⁰ *Ibid*, at §151.

²⁷¹ *Al-Saadoon & Others v Secretary of State for Defence (Rev 1)* 1 WLR 3625, at §§ 112-114 and §§ 198-203.

²⁷² The more “*heinous the conduct alleged, the greater is the interest in attempting to establish whether the allegation is true and, if so, in identifying and holding to account those responsible*”: see *Ibid*, at §200.

²⁷³ *Ibid*, at §§106-110 and §§197-203.

²⁷⁴ *Ibid*, at §§196-203.

²⁷⁵ See, in particular, *Janowiec & Others v Russia* ([GC] 55508/07 and 29520/09), 21 October 2013, at §§142-143.

²⁷⁶ *Al-Saadoon & Others v Secretary of State for Defence (Rev 1)* 1 WLR 3625, at §§111-114 and §§197-203.

4.4.56. The investigation that is required, in such circumstances, is a reasonable one and the test of reasonableness is ultimately fact-specific. It is my clear view that the standard of investigation achieved by the Iraq Fatality Investigations, which have detailed reports running to hundreds of pages, far exceeds the standard which is required. A process can be adopted which runs on lines more closely aligned to the coronial jurisdiction, which is well recognised as the primary means by which Article 2 obligations – sometimes of the gravest kind – are routinely discharged, and which is likely to prove more streamlined.

4.4.57. Finally, there are circumstances in which the procedural obligation to investigate, once apparently satisfied, is revived by a plausible, or credible, allegation, piece of evidence or item of information.²⁷⁷ The nature and extent of any subsequent investigation required by the procedural obligation will again depend on the circumstances of each particular case and may well differ from that to be expected immediately after the death has occurred.²⁷⁸ However, as the Strasbourg Court underlines, the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity.²⁷⁹

4.4.58. Equally, a decision to investigate in the absence of any obligation under the European Convention to do so does not give rise to a Convention right that would not otherwise exist.²⁸⁰

Promptness and reasonable expedition

4.4.59. The next factor required for an ‘effective investigation’ is that an investigation must be commenced promptly and pursued with reasonable expedition. Delay, in other words, may lead to a finding of a violation.

4.4.60. The reason for this is obvious; the passage of time is liable to undermine an investigation and compromise its chances of a meaningful outcome.²⁸¹

4.4.61. As with aspects of an effective investigation, promptness is fact-specific. However, the Grand Chamber noted in *Al-Skeini*:-

²⁷⁷ *Brecknell v United Kingdom* (32457/04), 27 November 2007, at §71; *Al-Saadoon & Others v Secretary of State for Defence (Rev 1)* 1 WLR 3625, at §176.

²⁷⁸ *Harrison & Others v United Kingdom* (44301/13), 25 March 2014, at §51.

²⁷⁹ *Jelić v Croatia* (57856/11), 12 June 2004, at §52.

²⁸⁰ *Al-Saadoon & Others v Secretary of State for Defence (Rev 1)* 1 WLR 3625, at §175.

²⁸¹ *Mocanu v Romania* ([GC] 56489/00), 24 May 2006, at §337.

“While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”²⁸²

4.4.62. For the purposes of planning, there are two principal lessons. The first is that it is essential that the Service police are informed as soon as possible of anything potentially engaging the investigative obligation under the European Convention. The second is that the Armed Forces’ investigative resources must be capable of responding to a potentially high caseload in the event of a future armed conflict, and/or be able to surge highly skilled capacity very significantly within an extremely short period. It is perhaps worthwhile to note that while investigations should not take five years to complete in any event, the new presumption against prosecuting after that period introduced by the Overseas Operations (Service Personnel and Veterans) Act 2021 may, by heightening the consequences of delay, have the consequence of more intense judicial scrutiny of the pace of investigations.

Public scrutiny and the participation of the next-of-kin

4.4.63. Finally, there must be a sufficient element of public scrutiny of investigations and/or their outcomes to secure accountability, and the next of kin must be entitled to participate.

4.4.64. This requirement does not go so far as to require the whole of any proceedings to be public. The degree of public scrutiny required may vary from case to case and it is recognised that in the investigation phase, in particular, there may be a number of sound reasons for withholding information (including security concerns and the effect on individuals), and it is not an automatic requirement. The requisite access for the public or victim’s relatives may be provided at other stages of the procedure.²⁸³

4.4.65. However, in all cases, the victim’s next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.²⁸⁴

²⁸² *Al-Skeini & Others v United Kingdom* ([GC] 55721/07), 7 July 2011, at §167.

²⁸³ *Hugh Jordan v United Kingdom* (24746/94), 4 May 2001, at §121.

²⁸⁴ *Al-Skeini & Others v United Kingdom* ([GC] 55721/07), 7 July 2011, at §167.

Article 3

4.4.66. Article 3 is the right to freedom from torture and inhuman or degrading treatment or punishment. In litigation arising out of operations in Iraq and Afghanistan, it was raised most often in relation to the treatment of captured persons, both at detention facilities and whilst being conveyed to them. Allegations falling under this head included sexual and physical assault or threats thereof, and the use of prohibited techniques (i.e. hooding or other sensory deprivation; use of stress positions; and deprivation of food, water or sleep).

4.4.67. In *Al-Saadoon (No.2)*, Leggatt J examined the question whether there was any difference in principle between the investigative duty that arises under Article 2 and that which arises under Article 3. He held²⁸⁵ that, although there had at one stage been a different emphasis, the principles had converged, and that, as the Court of Appeal had said in *D v Commissioner of the Metropolis*, “the nature, scope and rigour of the investigative exercise do not in principle shift as between articles 2 and 3”.²⁸⁶ It follows that it is unnecessary for me to set out the elements of a compliant investigation again.

4.4.68. Notwithstanding that the principles are the same, however, the different content of the duty has an impact. In particular, there is no counterpart in Article 3 to the obligation under Article 2 to look at the surrounding circumstances in order to determine whether all feasible precautions were taken to avoid loss of life. Without discounting the possibility that circumstances might arise in which a wider examination was needed, Leggatt J held in *Al-Saadoon (No.2)*²⁸⁷ that there should not normally be any requirement to hold an inquisitorial inquiry in an Article 3 case: a criminal investigation will ordinarily discharge the obligation. The distinction is not as to the standard of investigation, but as to the scope of what it must address.

4.4.69. I return in Chapter 6 to my recommendations for evolving Leggatt J's approach.

4.5. International Humanitarian Law

Introduction

²⁸⁵ *Al-Saadoon & Others v Secretary of State for Defence (Rev 1)* 1 WLR 3625, at §§236-238.

²⁸⁶ *Ibid*, at §237.

²⁸⁷ *Ibid*, at §240.

4.5.1. I turn finally to examine the United Kingdom's obligations to investigate crimes contrary to International Humanitarian Law. I note at the outset that the international law offences which I need to consider – namely, grave breaches of the Geneva Conventions, genocide, crimes against humanity and war crimes – have been made offences in domestic law, and that to this extent the domestic law processes set out above apply to them just as they would apply to criminal offences with their origins in the common law.

4.5.2. This reflects the principle of complementarity on which the processes of the International Criminal Court are based. Under ordinary circumstances it is for States Parties to investigate and prosecute crimes contrary to International Humanitarian Law. In particular, there is no jurisdiction (under Article 17(1)(a) of the Rome Statute) where a case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is *“unwilling or unable genuinely to carry out the investigation or prosecution.”*

4.5.3. The investigative obligation, therefore, can be analysed by reference to the criteria applied by the Prosecutor at the International Criminal Court in considering whether a State is *“unwilling or unable genuinely to carry out”* an investigation or prosecution, and by the factors considered when that question has been examined in practice.

4.5.4. It is right to note, however, that there is in any event an international law obligation to provide an effective remedy for violations of the United Kingdom's International Humanitarian Law obligations. The UN General Assembly Resolution 60/147 of 16 December 2005, setting out The Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Violations of International Human Rights and Serious Violations of Humanitarian Law, provides under Article 3 that:-

“The obligation to ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law...”

4.5.5. Article 22 of the Basic Principles defines the element of 'satisfaction' which are required as including, where applicable:-

:

- “(a) Effective measures aimed at the cessation of continuing violations;*
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;*
- (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;*
- (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;*
- (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;*
- (f) Judicial and administrative sanctions against persons liable for the violations;*
- (g) Commemorations and tributes to the victims;*
- (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels”.*

4.5.6. The jurisdiction of the International Criminal Court would not arise from every failure to comply with these obligations.

Commonality between Human Rights and International Humanitarian Law requirements

4.5.7. A very high number of allegations amounting to crimes under International Humanitarian Law will also raise issues under the European Convention. There is some commonality between the standards applied by the International Criminal Court and the Strasbourg Court respectively. The Strasbourg Court has said that Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of International Humanitarian Law. Equally, the International Criminal Court has held that while the Rome Statute was not designed to “*make principles of human rights per se determinative of admissibility*”, the Statute as a whole is underpinned by the requirement in Article 17(2) that the Court have “*regard to the principles of due process recognized by*

*international law.*²⁸⁸ In particular, the Court singled out the concept of independence and impartiality as “*one familiar in the area of human rights law*”. The fact that an investigation satisfies the standards of one is an indicator, but not a guarantee, that it will satisfy the standards of the other.

4.5.8. There are also differences; notably, the International Criminal Court is concerned only with criminal offending and not with the wider non-criminal systemic issues which can require examination under Article 2 of the European Convention.

4.5.9. Further the consequences are different. On the rare occasions when the Strasbourg Court finds a violation of the investigative duty under the European Convention, the United Kingdom is required to provide just satisfaction to the Applicant. However, where the United Kingdom fails to discharge its duty to investigate allegations of crimes within the jurisdiction of the International Criminal Court adequately, this raises the prospect that UK Service personnel will be investigated and prosecuted before the International Criminal Court instead.

Admissibility Criteria

4.5.10. The Appeals Chamber of the International Criminal Court has held that the complementarity test under Article 17 involves a two-step inquiry, involving a determination of whether the national authorities are active in relation to the same case (first step), and only if so, whether this activity is vitiated by unwillingness or inability of the authorities concerned to carry out the proceeding genuinely (second step).

4.5.11. In relation to the first step, the Appeals Chamber has said that ‘national investigation’ must “*signify the taking of steps directed at ascertaining whether those suspects are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses*”; for which it must be established that “*tangible, concrete and progressive investigative steps are being undertaken*”.²⁸⁹

²⁸⁸ *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi,” ICC-01/11-01/11 OA6, 24 July 2014, at §220 and §229.

²⁸⁹ Office of The Prosecutor, “Situation in Iraq/UK. Final Report,” at §155.

4.5.12. In relation to the second step, the Appeals Chamber has described the finding by the Court that a State is unwilling genuinely to investigate or prosecute as having to meet a “*high threshold*.”²⁹⁰ Article 17(2) of the Rome Statute sets out criteria to be applied when the Court considers whether a State demonstrates ‘unwillingness’ or ‘inability’ genuinely to carry out an investigation or prosecution:-

“2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”

4.5.13. The Office of the Prosecutor has published policy guidance²⁹¹ which makes clear that these factors may in appropriate cases be assessed based on circumstantial evidence. In particular, matters to be assessed when considering whether proceedings are being undertaken with intent to shield a perpetrator (but which are not direct evidence of that intent) include matters such as ‘lack of resources’, ‘flawed forensic examination’, ‘manifestly insufficient steps in investigation’, and ‘ignoring evidence or giving it insufficient weight’.²⁹²

4.5.14. Inability to proceed is assessed by reference to factors contained in Article 17.3:-

“3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial

²⁹⁰ *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi,” ICC-01/11-011/11 OA6, 24 July 2014, at §191.

²⁹¹ Office of The Prosecutor, “Policy Paper on Preliminary Examinations” (2013), https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf

²⁹² *Ibid*, at paragraph 51.

system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”

4.5.15. In considering inability to prosecute under Article 17(3), the Office of the Prosecutor may consider, *inter alia*, the lack of adequate resources for effective investigations and prosecutions.

The Preliminary Examination into the situation in Iraq/United Kingdom

4.5.16. The clearest guide to the standards expected by the International Criminal Court is the recent report of the Office of the Prosecutor following a Preliminary Examination of allegations that officials of the United Kingdom were responsible for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008. I set out the circumstances in which this Preliminary Examination was reopened in Chapter 1.

4.5.17. Ultimately, despite concluding that there was “*a reasonable basis to believe*” that various forms of abuse amounting to war crimes were committed by members of British forces against Iraqi civilians in detention²⁹³, the Prosecutor did not consider that there was ‘inaction’ or ‘unwillingness’ genuinely to carry out the relevant investigations and therefore accepted that the International Criminal Court did not have jurisdiction. Nevertheless, the Office of The Prosecutor carried out a detailed assessment of the United Kingdom’s investigative processes, gathering evidence for over six years; closely scrutinised aspects of the investigative decision making; and despite its eventual conclusions, made criticisms of various aspects of the decision making, the independence and impartiality of historical processes, and delay.

Inaction

4.5.18. In relation to the first step (‘inaction’), the Office of The Prosecutor set out the steps which had been taken by the United Kingdom to investigate the allegations (which were sufficient to require some 45 pages of the report to set out). It was accepted that there had been investigations, pre-investigative assessment of allegations, and in some cases

²⁹³ This is a low threshold and does not amount to a finding that war crimes were committed in individual cases.

prosecutions; and that where non-criminal proceedings had brought to light relevant facts these had fed into relevant criminal inquiries.²⁹⁴

4.5.19. Notwithstanding this, some concerns were expressed about the decision to ‘screen’ or ‘filter’ cases so that an investigation might not proceed after an initial assessment; but it was accepted that this was not a matter to be addressed as inactivity, since it was part of the investigative and prosecutorial process. Accordingly, the Office of The Prosecutor considered that these decisions required consideration at the second stage, as potential evidence of an unwillingness genuinely to prosecute.²⁹⁵

4.5.20. A question was also raised whether the United Kingdom could be accused of inaction on the basis that a focus of proceedings on low-level or marginal perpetrators, despite evidence on those more responsible, could constitute inactivity in relation to the latter. In this respect, the Office observed that the Iraq Historic Allegations Team and Service Police Legacy Investigations did appear to have examined issues of pattern that might be evidence of systematic or systemic criminal behaviour and give rise to criminal responsibility at the command/superior level. Again, the Office of The Prosecutor considered that these efforts required consideration at the second stage: *“the more pertinent question appears to be the genuineness of these efforts”*.²⁹⁶

4.5.21. In relation to the question of inaction, therefore, the lessons to be drawn are, first, that a process in relation to each allegation made – even if only a preliminary screening assessment – is indispensable; and secondly, that where multiple allegations are made arising from an operation, an attempt to identify patterns from individual cases which might give rise to responsibility at a command/superior level is also indispensable.

Unwillingness

4.5.22. The second question addressed was unwillingness genuinely to proceed.

4.5.23. The first issue arising under this heading was whether there had been any intent to shield the person concerned from criminal responsibility. The Office of The Prosecutor considered four matters under this head:-

²⁹⁴ Office of The Prosecutor, “Situation in Iraq/UK. Final Report,” at paragraph 275.

²⁹⁵ Ibid, at paragraph 276.

²⁹⁶ Ibid, at paragraph 278.

i. First, it considered the filtering criteria endorsed by Leggatt J in *Al-Saadoon (No.2)*.²⁹⁷ These involved considering at an early stage in an investigation, and an ongoing basis thereafter, whether there was a realistic prospect of obtaining sufficient evidence to satisfy the evidential sufficiency test required to be met before an alleged offender could be charged. If not, the investigation was discontinued. The Office of The Prosecutor also considered his conclusion that it was proper to decline to investigate historical allegations which were not supported by signed witness statements setting out the claimant's own recollection, identifying any known witnesses, and explaining any past steps or attempts to bring the matter to the attention of the British authorities. The Office of The Prosecutor considered that these measures appeared "*reasonable in the circumstances*"²⁹⁸ and had no apparent criticism of this approach. I conclude that there can be no objection to continuation of similar processes, which I also regard as reasonable in the circumstances and indeed essential to ensure that cases with a prospect of leading to prosecution are progressed swiftly.

ii. Secondly, it considered the approach taken in response to disciplinary findings against Phil Shiner, principal of Public Interest Lawyers, from whom many of the allegations under scrutiny (and all the allegations communicated to the Office of The Prosecutor) had been received. The Office of The Prosecutor considered that the process of filtering out cases in light of these findings was more far-reaching than may have been warranted, though not finding that it was so unreasonable or deficient as to constitute evidence of unwillingness to carry out relevant investigations or prosecutions genuinely. I need say no more about this issue, as it is to be hoped that the particular circumstances of Shiner's misconduct will not recur in future.

iii. Thirdly, the Office of The Prosecutor considered the closure of allegations of ill-treatment without full investigation on the basis of proportionality. The Office of The Prosecutor did not criticise an approach of identifying the most serious cases that warranted further information in order to enable prioritisation, observing that it did the same in its own work.²⁹⁹ It also acknowledged that it could not substitute its own judgment for that of the United Kingdom authorities. Again finding that there was no evidence of unwillingness to carry out relevant investigations or prosecutions

²⁹⁷ *Al-Saadoon & Others v Secretary of State for Defence (Rev 1)* 1 WLR 3625, at §§275-276.

²⁹⁸ Office of The Prosecutor, "Situation in Iraq/UK. Final Report," at paragraph 312.

²⁹⁹ *Ibid*, at paragraph 361.

genuinely, the Office of The Prosecutor raised concerns about the reliance on the passage of time to conclude that further investigation was disproportionate given that this *“is a factor within the control of the UK authorities and has typically resulted from their own past failings,”*³⁰⁰ and about the level of information provided both to victims and to the Office of The Prosecutor itself about how proportionality criteria had been applied in practice. One of the clear purposes of my review is to make recommendations which it is hoped will avoid repetition of the delays resulting from the chain of investigative processes into the Iraq allegations. As for the recording and communication of reasons for closing investigations on the basis of proportionality, that is in itself a balancing exercise, bearing in mind the need to manage the workload and prioritise the most serious cases on the one hand but the clear desirability of transparency on the other. It would be unhelpful for me to attempt to strike that balance, which is clearly a matter for those who have to make decisions about the best deployment of resources in practice. I will only invite them to bear in mind the Prosecutor’s comments that *“the Office must be provided with examples and indicators sufficient to demonstrate how relevant criteria were actually applied in practice”*³⁰¹ and *“the Office would have expected victims to have been provided with a fuller reasoning”*.³⁰²

iv. Finally, the Office of The Prosecutor considered whether the investigations had genuinely looked at the individual criminal responsibility of commanders and other superiors. Applying the test whether the outcome of inquiries was *“irreconcilable with the information available, or has resulted from mistaken factual or legal findings or manifestly insufficient steps,”* they found that the lack of prosecutions was not indicative of a lack of genuineness *per se*. They looked at allegations of cover up made by former investigators in relation to the Royal Military Police, the Iraq Historic Allegations Team, and the Service Prosecuting Authority and others. These allegations were treated by the Office of The Prosecutor with the utmost seriousness³⁰³ and had they been well-founded could clearly have established a basis for the opening of their own investigation. After a highly detailed examination, it concluded that the evidence available did not allow it to conclude that there was intent to shield persons under investigation from criminal responsibility; but it nevertheless recorded that investigators felt under pressure to close cases, as well

³⁰⁰ Ibid, at paragraph 360

³⁰¹ Ibid, at paragraph 362.

³⁰² Ibid, at paragraph 363.

³⁰³ Ibid, at paragraph 407.

as reiterating its own concerns about certain decisions made about the progress of investigations. It is, of course, axiomatic that if there is insufficient evidence to reach the threshold for charging a perpetrator with a war crime there will also be insufficient evidence to charge more senior personnel with command responsibility for failing to prevent or to punish that index offence.

4.5.24. The key lesson to be drawn from this final, and most serious, stage of the ‘unwillingness’ assessment is the paramount importance of measures to maximise independence and timeliness. The allegations made were serious, and taken seriously by the Prosecutor. Demonstrable independence and impartiality, in which not only the public but investigators themselves can have confidence, is the best safeguard against cover up, and the best safeguard against any perception of it. Timely investigations, by maximising the chances that either suspicion will be allayed or offenders prosecuted, will also counteract the possibility of cover up, real or perceived.

4.5.25. Also under the head of ‘unwillingness’, the Office of The Prosecutor examined whether there had been an unjustified delay, accompanied by the intention “*not to bring the person concerned to justice*”. The Prosecutor acknowledged historical delays recognised by the domestic and Strasbourg Courts, and pointed out that past failings had created the inability subsequently to carry out effective investigations; there was no such intention.

4.5.26. Finally under this head, the Office of The Prosecutor considered evidence of a lack of independence and impartiality in the proceedings, accompanied by the intention “*not to bring the person concerned to justice*”. In considering the work of the Iraq Historic Allegations Team after its reconfiguration, and that of the Service Police Legacy Investigations and the Service Prosecuting Authority, it made no finding that they lacked independence or impartiality (nor that the relevant intention was lacking). In conducting this assessment, and indeed throughout its analysis, the Office of The Prosecutor drew attention to resourcing levels and to the involvement of highly experienced and respected independent counsel and members of the judiciary. The civilian courts were noted to have “*demonstrated a consistent record of diligence, independence and impartiality*”.³⁰⁴ It is clear that the Office of The Prosecutor considers the independent oversight which judicial involvement provides to constitute a significant enhancement of the independence and impartiality of the process. Such measures should be retained.

³⁰⁴ Ibid, at paragraph 480.

4.5.27. Overall, despite expressing certain concerns, the Office of The Prosecutor did not consider that either investigative or prosecution decisions were vitiated by a lack of willingness genuinely to investigate or prosecute.

Conclusion

4.5.28. The Office of The Prosecutor ultimately found no inability or unwillingness to bring perpetrators of offences under International Humanitarian Law to justice. That would be a high hurdle to clear, and I would reiterate that I detected no sense from those I spoke to in order to prepare this review of any lack of commitment to follow evidence of such offences wherever it led. However, the searching nature of the Preliminary Examination conducted by the Office of The Prosecutor into the processes, structures, decisions and outcomes of the Iraq allegations should leave no room for doubt as to the importance of planning for the future with the concerns expressed in the Prosecutor's report well in mind.

5. Defence Serious Crime Unit

5.1. Introduction

5.1.1. In his 'Service Justice System Policing Review (Part 1)' report dated 29 March 2018 Professor Sir Jon Murphy made the following recommendations:-

Recommendation 1.

The three Service Police retain their individual identity and responsibility for General Policing Duties and their ancillary non-police functions in support of operational effectiveness.

Recommendation 2.

A Tri-Service Defence Serious Crime Unit is created following the civilian police Regional Organised Crime Unit model.

Recommendation 3.

The three existing Special Investigations Bureau [sic] be brigaded into the Defence Serious Crime Unit together with all current specialist investigative support – intelligence, undercover, surveillance, digital units, forensic and scenes of crime.

Recommendation 4.

Service Police personnel are seconded into the unit and should retain their individual Service Police identity.

Recommendation 5.

The Defence Serious Crime Unit to provide a multi-disciplinary 'flying' response to the investigation of serious crime worldwide.

Recommendation 6.

The individual Service Police Professional Standards units should be seconded into the Defence Serious Crime Unit.

Recommendation 7.

The Ministry of Defence Police and National Police Chiefs' Council to be invited to provide an appropriate level of resource to the Unit.

5.1.2. The Ministry of Defence responded to those recommendations in these terms:-

*“The Ministry of Defence recognises the unique and specialised roles that the Service Police have and is taking steps to further explore the recommendations made by Sir Jon. The Ministry has started scoping work for the recommendation of a Defence Serious Crime Unit. This work will be led by a former Detective Superintendent who has extensive experience of working with both Counter Terrorism Policing and Serious and Organised Crime. They will be working closely with the Ministry of Defence and the Provost Marshals and will look at the other policing recommendations from the Review.”*³⁰⁵

5.1.3. This work was initiated by letter in July 2019 and led by Nick Wilcox. On 31 March 2020 his team reported that *“If the project proposals are accepted as an effective DSCU structure, then this could be implemented in 6-12 months,”*³⁰⁶ and that *“the implementation of this recommendation will enhance operational effectiveness across defence policing for the short, medium and long term.”*³⁰⁷ His report was not formally accepted by the Ministry of Defence, which has pointed out that his timescales do not take account of the legislative changes that would be required.

5.1.4. In the meantime a 'Study into the Service Justice System' authored by Peter Davis and Lindsey Pratt of the Ministry of Defence had been published in March 2019. I found this to be an informed and well-reasoned paper. It detailed a number of arguments in favour of a Defence Serious Crime Unit to which I will return. It concluded:- *“we believe the creation of the DSCU is necessary.”*³⁰⁸

5.1.5. The response to the proposition that a single **Unit** should be formed was broadly, but not universally, positive:-

5.1.5.1. The Navy, through its Provost Marshal, stated *“I think it should be a Unit without a doubt.”*³⁰⁹ This support for a Unit was subject to a proviso that it must provide

³⁰⁵ <https://www.gov.uk/government/publications/service-justice-system-review>

³⁰⁶ Nick Wilcox, “Defence Serious Crime Unit (DSCU): Strategic Document,” 31 March 2020, at paragraph 8.4.

³⁰⁷ Ibid, at paragraph 9.3.

³⁰⁸ Peter Davis and Lindsey Pratt, “A Study into the Service Justice System,” at paragraph 37.

³⁰⁹ Note of meeting 41.

the Navy with a service that is equal to or better than that currently provided by the Royal Navy Police's Special Investigation Branch. In my interviews with him he remained firmly of that opinion with the single reservation that he needed to retain a small Special Investigation Branch element to respond to military incidents that might not be prioritised by a Defence Serious Crime Unit, i.e. his own flying squad.

5.1.5.2. The Provost Marshal (Royal Air Force) also expressed support with the same proviso:- *"In principle there are potentially real benefits;" "I can see the operational and political attractiveness... I would want to ensure an appropriate degree of service to the RAF. I would want to understand what we'd be risking in terms of what we deliver today and whatever the RAF Police would deliver in future. But I absolutely can see the benefit."*³¹⁰

5.1.5.3. The Provost Marshal (Army) disagreed:- *"If you're going to brigade all three Special Investigation Branches, you might as well form a joint Service police force.... To break the GPD/SIB chain – which is what it will do – that DSCU may wither on the vine after one or two turns of the handle... You've broken the career pipeline... the only way to fix that would be a joint Service police force,"* and *"I think it's all or nothing, a joint Service police force or what we're already striving to achieve."*³¹¹

5.1.6. The Royal Navy and Royal Air Force concerns echo the difficulties that the Australian Defence Force encountered in creating its tri-Service investigative unit (the Australian Defence Force Investigative Service), and later the Joint Military Police Unit:-

"The development of a tri-Service policing culture was a significant challenge following the creation of ADFIS, and took some years to bed down. This arose in no small part as a result of the Army dominance of the organisation, reflective of the fact that the overall composition of the Australian Defence Force of 2:1:1 viz Army: Navy: Air Force naturally flowed across into ADFIS. There was strong criticism from Navy and Air Force personnel of the perceived Army centricity, which resulted in a 'do-as-you're-told' culture that was seen as stifling communication and questioning; with references to the 'SIB mafia'. ...

Similar challenges continue to be experienced, following the expansion of JMPU in

³¹⁰ Note of meeting 38.

³¹¹ Note of meeting 41.

*January 2020 to include the general duties policing elements... JMPU is not considered an attractive posting by some of the Naval Police Coxswain and Air Force Police communities. The transfer of establishment from unit command to JMPU has not been welcomed by all, due to the loss of control and need to rely on an independent service provider over whom commanders have no direct influence.*³¹²

5.1.7. I have conducted around sixty interviews and found opposition to the proposed Unit to be limited to the present Provost Marshal (Army) and two of her four predecessors.³¹³ There has been abundant support from numerous sources.

5.1.8. I have also looked at arrangements in other common law countries:-

5.1.8.1. In the USA all three Services investigate serious crime separately. They have no shortage of numbers; each force has approximately 2,000 military and civilian personnel. The Provost Marshal General US Army is also Commanding General US Army Criminal Investigation Command, and Commanding Officer for the US Army Corrections Command. The US Air Force has its own Office of Special Investigations. There is a Naval Criminal Investigative Service and, for more minor offences, a Marine Corps Investigation Division.

5.1.8.2. In 2014, New Zealand established a tri-Service New Zealand Defence Force Military Police Unit. Its five-year strategic priorities included *“to operationalise the NZDF Military Police Serious Investigations Branch and develop a modern and capable military policing intelligence capability that better informs military policing operations and deployments”*.³¹⁴ Although the first New Zealand Defence Force Provost Marshal was a lateral appointment from the civilian police,³¹⁵ it appears that this may have been prompted by the need to oversee this transformation. The current New Zealand Defence Force Provost Marshal is a Colonel with significant experience of not only civilian policing but also of military policing and legal roles. There are some

³¹² Major-General Natasha Fox AM CSC, “Henriques Review – Australia Investigations.” This consolidated note draws together information provided by the Provost Marshal (Australian Defence Force), the Office of the Inspector General Australian Defence Force, the Head Summary Discipline Implementation Team, and Defence Legal Services.

³¹³ Note of meeting 7; and note of meeting 8.

³¹⁴ “New Zealand Defence Force Quarterly Report” for the quarter ending 30 September 2015, https://www.parliament.nz/resource/en-NZ/51SCFDT_EVI_00DBSCH_ANR_71774_1_A546049/42db25da32b40b07c2cc067a445c9a4a3a1271f2.

³¹⁵ Providence Consulting Group Pty Ltd, “First Principles Review of the ADF Service Police” (2017), at p.53.

notable differences between the New Zealand Defence Force Provost Marshal and those of near-peer allies:-

“In the New Zealand Defence Force, unlike most of our partner nations, the Provost Marshal neither commands the Military Police nor is the Provost Marshal for a single Service. Instead, the appointment sits at the strategic level, within the Office of the Chief of Defence Force with the Provost Marshal acting as a key advisor to senior leadership in relation to the Military Police, criminal and disciplinary investigations and custodial matters in the NZDF.

As the senior technical advisor, the Provost Marshal exercises Technical Control (TECHCON) and provides technical direction to the NZDF Military Police and in relation to policing, custodial matters and the conduct of criminal and disciplinary investigations throughout the NZDF. It follows that one of the most important roles of the NZDF Provost Marshal is setting the professional standards for and maintaining independent oversight and governance of these functions.”³¹⁶

5.1.8.3. In 2007, Australia established a tri-service Australian Defence Force Investigative Service as the sole body for investigating complex and serious matters. Although it was recommended that, on overseas operations, its investigators should have no other functions that would reduce their ability to conduct timely investigations,³¹⁷ this does not appear to have happened. According to the extremely helpful note that Major-General Natasha Fox, Head People Capability within the Australian Defence Force’s Defence People Group, has provided:-

“The position of the Provost Marshal Australian Defence Force (PM-ADF) was created in April 2006 in order to command and control specified investigations and oversee the implementation of recommendations from the 2005 report [by the Senate Foreign Affairs, Defence and Trade References Committee into the effectiveness of the military justice system] and relevant previous inquiries and reviews.”³¹⁸

³¹⁶ “New Zealand Army News,” issue 522 (May 2021), at p.15.

³¹⁷ Department of Defence, “Report of an Audit of Australian Defence Force investigative capability” (2006), at paragraph 7.61.

³¹⁸ Major-General Natasha Fox AM CSC, “Henriques Review – Australia Investigations.”

*“ADFIS was formed in 2007, under the command of the PM-ADF, to address complex and serious offences. This involved subsuming the single Service special investigation branches and specialist services, adopting the model of the Canadian Forces ‘National Investigation Service’.”*³¹⁹

*“The Australian Defence Force Investigative Service (ADFIS) was retitled the Joint Service Police Group (JSPG) in 2017, and subsequently retitled the Joint Military Police Unit (JMPU) in 2018. The term ADFIS was retained for a period after the renaming of the unit to denote the investigative element of the JSPG, with reference to regionally dispersed and deployed Joint Investigation Offices. Use of the term Joint Investigation Office in the domestic environment has ceased since the expansion of the role of JMPU in 2020 to encompass General Duties policing and the implementation of Joint Military Police Stations, which provide both investigation and General Duties policing services.”*³²⁰

*“Investigation is an integral function of the JMPU, with investigation sections incorporated within each Joint Military Police Station or detachment, and a Select Investigation section within the Headquarters Joint Military Police Force to undertake serious and sensitive investigations.”*³²¹

*“PM-ADF is a rotational OF6 position shared equally by the three Services (currently Navy) irrespective of the mix of personnel within JMPU. As is the OF5 position of Commanding Officer of the Joint Military Police Force, currently filled by a Royal Australian Corps of Military Police officer, but to be filled by a Naval Police Coxswain Officer from January 2022.”*³²²

5.1.8.4. Canada has a Canadian Forces Provost Marshal, who is also Commander of the Canadian Forces Military Police Group and thus in overall charge

³¹⁹ Ibid.

³²⁰ Ibid.

³²¹ Ibid.

³²² Ibid.

of military policing. It has a specialised, tri-Service investigative arm known as the Canadian Forces National Investigation Service. Although the National Defence Act stipulates that the Canadian Forces Provost Marshal must have a minimum rank of Colonel, recent appointees have held the rank of Brigadier. In his recent review, Justice Fish has recommended that the Canadian Forces Provost Marshal be retitled “Provost Marshal General” and that the Act be amended to make this a Brigadier-level appointment.³²³

5.1.9. The experience of Australia, Canada and New Zealand strongly suggests that the UK will need to consider in due course whether to bring together the three Service police forces into a fully Joint Service Police Force. The Integrated Review, which will reduce the size of the Army and may lead to increasing cross-over between the Service police forces through the use of global hubs and forward basing, may even have brought forward the day when this issue must be considered. However, this must not distract from the task of implementing the Defence Serious Crime Unit.

The rationale for the proposed Unit

5.1.10. It is tempting but quite wrong to believe that lessons and insights from the challenges from operations in Iraq and Afghanistan are increasingly less relevant. Reference to the engagement of UK Armed Forces since the second World War indicates that in every year since 1939 our Armed Forces have been engaged overseas. The list of countries indicates that 'boots on the ground' military engagement cannot be regarded as part of history:- Greece, French Indo-China, Dutch East Indies, Palestine, Eritrea, Malaya, China, Korea, Suez, Kenya, British Guiana, Cyprus, Muscat and Oman, Cameroon, Kuwait, Brunei, Aden, Oman, Falkland Islands, Bosnia, Kosovo, Sierra Leone, Afghanistan, Iraq, and Libya. Fragile States will continue to collapse and rogue nations will disrupt using conventional weapons. Our Armed Forces will continue to deploy and our Service police must ensure that the UK continues to fulfil its duty, and retains the ability, to investigate and prosecute violations of international humanitarian law, and crimes against humanity and genocide.

5.1.11. Whilst nations develop ever more complex devices to gain advantage over others, to disable economies, damage infrastructures or inflict more instant devastation, it is essential

³²³ The Honourable Justice Morris Fish CC, QC, “Report of the Third Independent Review Authority to the Minister of National Defence” (2021), Recommendation 14: “*The National Defence Act should be amended to restyle the Canadian Forces Provost Marshal as the Provost Marshal General and to provide that the Canadian Forces Provost Marshal holds a rank that is not less than brigadier-general.*”

that those mandated to investigate criminality possess the essential tools necessary to both investigate and prosecute war crimes and grave breaches of International Humanitarian Law and, of equal importance, the ability to protect our own Armed Forces from false, inaccurate, or fabricated allegations.

5.1.12. Never before has the breadth and extent of vital skills been so extended. Recent speeches by the Secretary of State for Defence,³²⁴ by the Chief of the Defence Staff,³²⁵ and the Commander Strategic Command,³²⁶ and my interview with Professor Michael Clarke,³²⁷ warn us all of the unpredictable and varied forms of future warfare and the corresponding difficulties inherent in the investigation of allegations arising from events which occur in theatre on overseas operations. Whenever our Armed Forces acquire new military capabilities, investigators must gain sufficient knowledge to investigate and comprehend any alleged misuse of those capabilities. This may be achieved by recruiting those with the relevant knowledge or by existing personnel learning from others within the Armed Forces. Such novel investigative tools will not replace traditional modes of investigation but will augment them. New techniques, new technology and new strategies cannot be strangers to investigators. Hybrid Warfare, Liminal Warfare, Grey Zone and Sub-threshold describe some of the modes of contemporary or future warfare. Investigators must comprehend the science underpinning each of those modes of conflict and many other potentially devastating strategies.

5.1.13. Whilst there has been a major expansion in the necessary skills of the military investigator it is reasonable to conclude that those in our Armed Forces liable to be accused of crime will likewise come from a wider spectrum. Integrated warfare across the five domains of land, sea, air, space and cyber will likely implicate a wider range of responsible individuals. Professor Michael Clarke observed³²⁸ that highly automated weapon systems and advanced artificial intelligence will place new intellectual demands (and thus, we deduce, a vulnerability to allegations) on pilots, captains and commanders responsible for military action. In cyber

³²⁴ Defence Secretary's speech to the Royal United Services Institute conference on UK Defence Reform, 11 December 2020, <https://www.gov.uk/government/speeches/defence-secretarys-speech-on-defence-reform>.

³²⁵ Chief of Defence Staff speech to the annual Royal United Services Institute conference, 17 December 2020, <https://www.gov.uk/government/speeches/chief-of-defence-staff-at-rusi-annual-lecture#:~:text=General%20Sir%20Nick%20Carter%20GCB,speech%20the%20Annual%20RUSI%20Conference>.

³²⁶ Commander UK Strategic Command speech to Royal United Services Institute Second Strategic Command conference, 26 May 2021, <https://www.gov.uk/government/speeches/commander-of-strategic-command-rusi-conference-speech>.

³²⁷ Note of meeting 22.

³²⁸ Professor Michael Clarke, "Note to Sir Richard Henriques regarding some of the new trends in UK thinking about warfare and their impact on military responsibility in operations," 14 May 2021.

and social media offenses the problem of accurate attribution is considerable. Responsibility may be at a very high level and involve significantly greater skills than investigating the abuse of captured persons by those detaining them.

5.1.14. I see the opportunity to create a Defence Serious Crime Unit as a means of establishing a highly professional, technologically advanced and independent Unit capable of evolving to meet contemporary and future challenges. We must grow capabilities and the Armed Forces must maintain their professionalism in theatre alongside a Service police force capable of investigating every criminal allegation whilst providing the traditional support mechanisms developed over generations.

5.1.15. I unhesitatingly advise implementation of recommendations 1 to 4 above. My own recommendations replacing 5-7 are approved and supported by His Honour and Sir Jon.

Criticisms of the proposed Unit

5.1.16. I have examined and discussed with interviewees ten arguments that had been advanced against forming a Defence Serious Crime Unit:-

i. Service Police investigations are reactive with minimal proactive investigation.

I regard the fact that the Unit will have the size and capability to conduct proactive investigations as progressive and necessary. The Armed Forces are vulnerable to organised crime. Defence needs a major crime team.

ii. A unit will have a negative impact on collaborative working between communities, General Policing Duties and Special Investigation Branches.

I see no negative impact. The Unit will exist to support investigations by General Policing Duties personnel as do Special Investigation Branches at present.

iii. There is a risk of breakdown in working practices between General Policing Duties and the unit by reason of implementation of added processes to allow for the sharing of specialist resources.

Whilst there are some differences in working practices between the Services, there

is no difference in the criminal investigation process. A single Standard Operating Procedure can be formulated for the Unit.

iv. There is a perception that an elite tiered system will lead to a breakdown in relationships between General Policing Duties and Special Investigation Branches.

This is an argument against any specialist unit within an organisation. Every police force has specialised units. I shall return to how to mitigate the risks associated with elitism at 5.1.32 below.

v. There are varying levels of commitment for overseas deployment. The three Serious Investigation Branches engage in differing levels of military training to deploy abroad.

Varying levels exist at present. The Royal Military Police will be the largest component and I see no problem in ensuring that the Unit is battlefield ready.

vi. Each operational environment is very different. Personnel are trained and experienced for their own Service needs.

Every member of the Unit will investigate serious crime. Whilst Naval investigators will usually investigate crimes on board ships, I see no difficulty in deploying an Army or Royal Air Force investigator if no Naval investigator is available.

vii. Career management paths for each Service are different.

There already exist a number of joint Service police units which work very effectively. Consideration should be given to whether, suitably adapted, the Unified Career Model currently under development for other specialisms will meet any existing problem. I shall return to this issue in 5.9 below.

viii. Placing Special Investigation Branches under a single commander transfers the risk when he/she has no control or authority over wider Service personnel.

This is the situation in all joint Service police operations. The person owning the investigation assumes the risk.

ix. *Service Provost Marshals must be free of 'undue influence'. A governing body will need to be implemented and operate in a way that will defend against undue influence.*

Placing the Provost Marshal (Serious Crime) under an equivalent duty to that owed by the Provost Marshals of the Service police forces under s.115A of the Armed Forces Act 2006 will protect against undue influence.

x. *Who will handle complaints against Service Police if all three Special Investigation Branches are brigaded together?*

The Provost Marshal (Navy) has persuaded me that the single Service police forces' professional standards departments should not be seconded into the Defence Serious Crime Unit,³²⁹ as Sir Jon had recommended,³³⁰ as those personnel perform other functions that the single Service police forces will need to retain. However, the Unit will require a professional standards element.

5.1.17. I invited a number of interviewees to consider these matters and am satisfied that none represent a barrier to an effective Unit. It is appropriate to quote paragraph 60 of Sir Jon's Policing Review:-

"In discussing this proposal with senior military leaders no resistance has been encountered and all recognise the potential benefits of improved operational effectiveness through the sharing of skills, knowledge and experience".³³¹

Advantages of the proposed Unit

5.1.18. For the reasons set out below, I have reached the clear conclusion that an independent Defence Serious Crime Unit, commanded by its own Provost Marshal (see section 5.4 below), will provide the most effective investigative body for our Armed Forces. I see the positive advantages as follows:-

³²⁹ Note of meeting 41.

³³⁰ Professor Sir Jon Murphy QPM DL LLB, "Service Justice System Policing Review (Part 1)," Recommendation 6: *"The individual SP Professional Standards units should be seconded into the DSCU."*

³³¹ Ibid, at paragraph 60.

- A combined independent Unit will provide capabilities to all three Services by sharing specialist resources and expertise under a single command.
- A single Unit will avoid triplication of training, equipment, organisational learning and resources.
- Transfer in and out of the Unit will add to the expertise of individual Service police forces.
- A single elite investigating Unit is likely to attract civilian and Reservist expertise in highly specialised fields.
- A single Unit will have both the size and expertise to negotiate with civilian forces for secondments.
- The Provost Marshal (Serious Crime) commanding the Unit will have exclusive control over the deployment of capabilities avoiding potential tensions between existing Provost Marshals when (at present) response to a request for a capability lies with the Service funding the capability.
- The Provost Marshal (Serious Crime) will have a right of first refusal over the investigation of serious offences and sensitive offences, including sexual offences.
- In theatre the Unit will have the single function of investigative responsibility free from support functions of mobility support, stability policing, support to security, close protection and responsibility for captured persons.
- The Unit will be responsible for continuous investigation from theatre to Major Incident Room, possessing the skills and processes necessary to refer cases to the Service Prosecution Authority for prosecution where appropriate.
- There will be a coordination of all serious crime investigative and supporting specialist capabilities.
- Intelligence and information from across Defence will be collected, reviewed, assessed and exploited by the Unit.
- The size and skills of the Unit will permit more proactive policing than presently conducted.
- A single serious crime investigating Unit will provide a single point of contact for the reporting of serious crime, shooting incidents and major incidents.
- Within the Unit, a centralised crime management unit with access to all crime reporting across Defence through a single crime management system will ensure that reporting, recording and management of crimes takes place in accord with Home Office standards.

- A victim and witness care unit will be embedded within the Unit ensuring national standards are observed.
- The increased size and enhanced capabilities of the Unit will demonstrate a determination to fully investigate every allegation of wrongdoing against any of our forces which occur in theatre on overseas operations.
- The Unit will represent a prestigious and impressive body attracting ambitious Service personnel and thus raising standards of policing throughout the Armed Forces,
- The Unit will drive up standards through the sharing of skills, knowledge and experience with General Policing Duties personnel.
- The Unit will provide greater flexibility and capacity to meet demand for investigative deployments.
- The Provost Marshal (Serious Crime) will be able to make judgments on pan-Defence investigative needs rather than single-Service priorities.

Conclusions regarding establishing the proposed Unit

5.1.19. I have concluded that the breadth of investigative skills required and the extent of those potentially accused necessitates a critical mass of investigators far greater than exist in each of the three Service police forces. It is best achieved by the creation of a Defence Serious Crime Unit. I was told by the Provost Marshal (Army) that the Royal Military Police have a Special Investigation Branch of 210 with 59 active investigators.³³² The Provost Marshal (Navy) told me he had 25 with 18 or 19 active investigators.³³³ The Provost Marshal (Royal Air Force) has 57 with 25 active investigators.³³⁴ Critical mass in a single Unit will be necessary to acquire and maintain the volume of necessary and contemporary investigative skills.

5.1.20. The Royal Navy and Royal Air Force police forces cannot possibly acquire and maintain the investigative capabilities essential in a highly skilled Service police force. Sir Jon recognised this when first formulating his model. Neither force has attempted to do so, nor could they, with the available numbers. The Royal Navy Police are particularly good at investigating sexual offences, murder and manslaughter. The Royal Air Force Police are particularly good at strategic analysis, information assurance, digital forensics and cyber. The

³³² Note of meeting 47.

³³³ Note of meeting 45.

³³⁴ Note of meeting 38.

Royal Military Police have particular expertise in digital, cyber, forensics and crime scene management and appear to have competence in the relevant capabilities identified by Sir Jon.

5.1.21. My review is not an implementation document. Nick Wilcox however was engaged on that task and his several papers contain a very detailed examination of the numerous working parts of the proposed Unit namely:- Command, Strategy, Intelligence, Investigative Support, Crime Demand, Management and Organisational Training, Funding, Training, Crime Management Unit, Victim Management, Hotlines, Criminal Intelligence, Sensitive Intelligence Unit, Service Police Data Standards, Analytical Oversight, Covert Authority Bureau, Intelligence Development Unit, Covert Functions, Surveillance, Sexual and Violent Support Unit, Crime Scene Investigation, Digital Forensics, Cyber Crime, Financial Investigation, Proceeds of Crime.

5.1.22. I would advise against any further scoping exercise. Wilcox's several papers contain all necessary detail and it is relevant to note that Davis/Pratt reference a Service Police Transformation paper dated 29 May 2018 which identified £45M potential savings over 10 years from the creation of a Defence Serious Crime Unit,³³⁵ although this figure is illustrative and untested. Further scoping will, I believe, harden such opposition as exists and make implementation more difficult. Wilcox endeavoured to resolve issues by tri-partite discussion and without success.

5.1.23. Much, if not all the scoping work has been done. The time has come for implementation. Wilcox agreed that initial operating capability can be achieved within 6 months with 18 months for a full operating capability:- "*They need to be told to get on with it*".³³⁶ He attempted unsuccessfully to reach a form of agreement by committee. I would advise regular consultation during implementation with Sir Jon Murphy and Mick Creedon, former Chief Constables of Merseyside and Derbyshire respectively. The several capabilities already exist across the three Services. They are often triplicated. There is understandable reluctance to change. It is vital and necessary.

5.1.24. I was reassured by my meetings with the Chief of the Defence Staff. During our first meeting, he told me that the Chiefs of Staff have agreed within the past few months that there

³³⁵ Peter Davis and Lindsey Pratt, "A Study into the Service Justice System," footnote 8 to paragraph 36.

³³⁶ Note of meeting 44.

must be an independent, tri-Service unit,³³⁷ and indicated that he thought that this could happen by 1 June 2022.³³⁸ It was clear that the Chiefs of Staff have issued clear direction that the Defence Serious Crime Unit be implemented, and implemented quickly. They have recognised and accept the imperative for change.

5.1.25. Nevertheless, I remained concerned by the possibility that this may result in a three-tier Service police structure in which the Service police forces retain a part of their Special Investigation Branches to investigate matters that are thought to exceed the investigative abilities of the General Policing Duties police but which are not sufficiently serious to fall within the purview of the Defence Serious Crime Unit. To my mind the better solution to the problem is to continue to improve the skills and experience of the General Policing Duties elements.

5.1.26. I firmly believe that the creation of a third tier would be disastrous. It would result in a worse service for the Royal Navy and Royal Air Force, as the number of investigators under their control would fall below viable limits. It would also prevent the realisation of those benefits that Sir Jon and I have indicated would result from the creation of the Defence Serious Crime Unit, as it would lack the numbers necessary to enable its personnel to be released for the training and secondments essential to become elite investigators. Finally, there is a risk that the Provost Marshals would seek to retain their most capable investigators within their vestigial Special Investigation Branches, reducing the calibre of investigators available to the Unit.

5.1.27. During our second meeting, the Chief of the Defence Staff outlined a solution that would address my concerns and enable the Unit to stand up sooner than he had previously suggested. We agreed that any legislative changes required to give the Provost Marshal (Serious Crime) the same powers as the Provost Marshals of the Service police forces and to establish the Unit should be included in the Armed Forces Bill currently before Parliament, and that the Unit should stand up on 1 April 2022.³³⁹

5.1.28. We also agreed that it is unhelpful to think of this Unit in terms of initial operating capability and full operating capability. As he pointed out, "*there will never be an FOC, we will keep learning by doing.*"³⁴⁰ Rather, the Unit will continue to evolve to meet future challenges and demands.

³³⁷ Note of meeting 59.

³³⁸ Ibid.

³³⁹ Note of meeting 60.

³⁴⁰ Ibid.

5.1.29. I am content that it is sufficient in the short term for the Unit to be operationally independent of the chain of command and of those it may be required to investigate, noting that the level of independence is one aspect that may increase over time.³⁴¹ I will say more about independence in section 5.4 below.

5.1.30. I do not underestimate the challenges in bringing together the three Special Investigation Branches into a single Unit. This will involve not only organisational but also cultural changes. The Australian experience indicates that creating a tri-Service policing culture will be particularly challenging and will take time:-

Cultural Reform Plan. *In considering pursuit of a single investigative unit, the UK MOD will need to consider the development of a robust Cultural Reform Plan to provide a strategy and collective blueprint for driving attitudinal change within the military police community, commanders and the broader workforce. A Cultural Reform Plan was submitted to the Chiefs of Service Committee (COSC) in 2018 as part of the overall approval paper for the Military Police Reform. The plan focussed on the following priorities:*

- *Leadership accountability, including empowerment and the need for active communication of intents and priorities for reform to ensure all military police understand and are able to contribute to their achievements.*
- *Professionalism, focussed on developing a joint training continuum to ensure universal preparedness for the unit roles.*
- *Inclusiveness, reinforcing the all of one team focus and removing barriers, ‘including archaic attitudes’ to create a more inclusive and capable organisation.*
- *Adoption of a proactive communications approach across all levels of the ADF to communicate the role.*
- *Creating an organisation where the structures, processes and behaviours provide more agile approaches to workforce management and support to flexible work practices.”³⁴²*

“Another important lesson from the Australian experience is that it is essential for the cultural reform plan to continue beyond the creation of the Joint unit into at least the

³⁴¹ Ibid.

³⁴² Major-General Natasha Fox AM CSC, “Henriques Review – Australia Investigations.”

first two years of operation, potentially extended if there have been interruptions such as COVID 19. A mistake made by the ADF in the implementation of the 2020 JMPU expansion was to disband the ADF Military Police Reform Implementation Team (AMPRIT) in order to fill positions within the new unit establishment. This resulted in a loss of expertise and dissipation of change-focussed personnel into 'business-as-usual' functions, before BAU was even achieved at the anticipated six-month mark.”³⁴³

5.1.31. Achieving the necessary cultural change will require strong and consistent messaging – including from senior commanders – both pre- and post-implementation:-

“The UK MOD also needs to be cognisant of the requirement for strong messaging from senior leadership, not only to the military police community but also to the broader workforce. Inherent in the 2018 Cultural Reform Plan was the need to communicate across all levels of the ADF the role of the JMPU to ensure better understanding of the capability and why change was being made. ADFIS, and subsequently JMPU, have experienced pushback from elements within the Services and individual military police personnel on the basis that things were better or more efficient in ‘the good old days’ when single Service commanders controlled the capability and did not have to request support from a Joint organisation.”³⁴⁴

“The Australian experience has been that it is therefore necessary for senior leadership to make very clear up front that:

- the new joint organisation is here to stay – there will be no repechage;*
- the unanimous support for reform demonstrates that senior leaders were not satisfied with the previous ‘business as usual model’;*
- anyone who is unable to accept the change may need to consider their future employment options within the military policing community.”³⁴⁵*

“The reform plan needs to continue to provide messaging across the entire Defence organisation during the subsequent period following implementation of the reform, to ensure a consistent narrative that:

- the reform has been a success, notwithstanding further work will be required to achieve organisational maturity;*

³⁴³ Ibid.

³⁴⁴ Ibid.

³⁴⁵ Ibid.

- *the new joint organisation is here to stay, because that is what senior leadership has decided and have ordered;*
- *deliberate undermining of or failure to properly support the reform, denoting defiance of superior orders/directions, will not be tolerated from any military police member or ADF commander;*
- *as a volunteer service, any military police member who is unable to accept the change will be supported in seeking a transfer to another specialisation or pursuing a request to discharge.”³⁴⁶*

5.1.32. Whilst the Defence Serious Crime Unit should be – and should be perceived to be – an elite (in the sense of ‘high performing’) unit, the Australian experience also highlights the need to manage carefully the messaging around the relationship between the Unit and the single-Service General Policing Duties elements:-

Inclusiveness. *Care is required in the development of a joint investigative organisation that the military policing community remains unified, to avoid creating – or perpetuating – a potentially toxic ‘us and them’ elitist culture. Members of the broader military police community should aspire to join such an organisation, rather than resent or despise it because of the attitude and conduct of its members. All military police are able to conduct investigations, but some are called or choose to specialise in that field. The additional training, specialist focus and higher remuneration that is concomitant upon a military investigative organisation reflects a situation of ‘better abled’ for a specific military policing function, but should not be permitted to give rise to a ‘better than you’ culture. Every element of military policing is essential to organisational performance, and an investigator who is ‘better than you’ at undertaking complex investigations because that is their primary role is, by definition, no longer ‘better than you’ at other policing activities.”³⁴⁷*

5.1.33. I therefore make the following recommendations:-

Recommendation 1: The Defence Serious Crime Unit previously recommended by Professor Sir Jon Murphy in the Service Justice System Policing Review (Part 1) should be established as an operationally independent Unit, and not as a capability based on existing Service Policing structures. Recommendations 1 – 4 of that review,

³⁴⁶ Ibid.

³⁴⁷ Ibid.

which have previously been accepted, should be implemented without a further scoping review.

Recommendation 2: The Defence Serious Crime Unit should be commanded by a Provost Marshal, who must be a provost officer but should not be a current Provost Marshal of a Service police force. This new Provost Marshal should be designated Provost Marshal (Serious Crime).

Recommendation 3: A Provost Marshal (Serious Crime) should be appointed to establish the Unit, which should stand up on 1 April 2022. During the implementation period, the Provost Marshal (Serious Crime) should be closely supported by, and report to, the Chief of Defence People.

Recommendation 4: The Provost Marshals of the three Service police forces should develop, in consultation with the Provost Marshal (Serious Crime), a plan to develop and inculcate a tri-Service policing culture.

5.2. Victim care and witness support

5.2.1. As Wilcox observed, processes to manage engagement with and support to victims and witnesses are not uniform across the three Services. He proposes a co-ordination unit ensuring the investigating officer is supported in providing care in line with national standards. Much work needs to be done supporting victims of sexual abuse and domestic violence in particular. The Victims Commissioner for England and Wales has designed a system of workplace champions for domestic abuse and sexual violence victims at Albemarle barracks in Northumbria.³⁴⁸ Both military and civilians are trained to receive complaints independent of the chain of command and to offer appropriate help. There is clear potential for expansion and adoption of the scheme. There is also scope for supporting veterans who have been victims of sexual assault.

5.2.2. I am conscious that Sarah Atherton's report on Women in the Armed Forces³⁴⁹ is due to be published at or about the same time as my review. It will, I know, disclose evidence that

³⁴⁸ Select Committee on the Armed Forces Bill, Oral evidence: Armed Forces Bill, Session 4, HC1281, Response to Q184, <https://committees.parliament.uk/oralevidence/1886/pdf/>.

³⁴⁹ <https://committees.parliament.uk/work/856/women-in-the-armed-forces-from-recruitment-to-civilian-life/>

Servicepeople are inhibited from speaking out, that the Armed Forces prioritise operational effectiveness and/or the Armed Forces' reputation over the needs of victims, and that a practice exists of seeking to discredit the allegation and/or the complainant. Lack of protection for complainants and lack of independence will be stressed. The role of Commanding Officers, who lack the training needed to deal with complex matters (in relation both to supporting victims of sexual assault, and to deciding complaints) and often lack the time to delve into an issue, will be severely criticised. Delay and a lack of timeliness in processes is a recurring theme. I see the establishment of a truly independent Defence Serious Crime Unit as a solution and antidote to many, if not all, of the matters raised. There must be a significantly enhanced focus on victim support and witness care.

Recommendation 5: The Defence Serious Crime Unit must have a significant focus on victim support and witness care. There should be consultation with Dame Vera Baird QC and Sarah Atherton during the implementation process.

5.2.3. I would also like to highlight the excellent work that is being undertaken in this area through the Foreign, Commonwealth & Development Office's Preventing Sexual Violence Initiative (PSVI), which has helped to fund projects through the Institute for International Criminal Investigations to develop guidelines and training for investigating conflict-related sexual and gender-based violence against women, children, and men.³⁵⁰ These emphasise the importance of specific training and experience for those interviewing victims and vulnerable witnesses in order to mitigate the risk of further harm, including re-traumatisation, being caused to survivors.

5.3. Serious crime

5.3.1. There have been numerous definitions of serious crime in various Acts of Parliament. The Armed Forces Act 2006 should however take precedence for the purposes of deciding whether a particular investigation should be conducted by the Defence Serious Crime Unit or by General Policing Duties namely:-

- An Offence listed at Schedule 2 of the Act or an offence committed in prescribed circumstances.
- An offence under s.42 of the Act for which the corresponding offence under the

³⁵⁰ See <https://iici.global/projects/> and <https://iici.global/publications/#IP>

law of England and Wales is an indictable offence.

- Any other offence which may not be dealt with at a summary hearing by a Commanding Officer.

5.3.2. In interview I heard representations that not all Schedule 2 cases should be investigated by the Defence Serious Crime Unit.³⁵¹ There is always a danger of an imbalance of work in a two-tier system and flexibility is essential. Justice Fish's review found that:-

*"The specialized investigative arm of the military police known as the Canadian Forces National Investigation Service has a right of first refusal over the investigation of serious offences and sensitive offences, including criminal sexual offences."*³⁵²

5.3.3. The Provost Marshal (Serious Crime) will, adopting an equivalent provision, be able to select the most appropriate cases for the Unit assessing matters on a case-by-case basis, and taking account of current workloads, available investigators, and particular expertise. This is a function of leadership and offers maximum flexibility. However, I would expect Provost Marshal (Serious Crime) to have regard, in selecting cases for the Unit, to the particular need for the additional level of independence which the Defence Serious Crime Unit will provide to investigations which fulfil a duty under the European Convention on Human Rights or International Humanitarian Law.

Recommendation 6: The Defence Serious Crime Unit should be given the right of first refusal over the investigation of offences, and may indicate its waiver of that right on a case by case basis or in relation to any class or category of cases at the discretion of Provost Marshal (Serious Crime).

5.4. Independence

5.4.1. An essential function of independence is the ability to investigate crime without any real or apparent fear or favour. An investigating body, charged with the responsibility of investigating serious crime allegedly committed by members of the Armed Forces, must be hierarchically, institutionally and practically independent both of the chain of command and of

³⁵¹ Note of meeting 41.

³⁵² The Honourable Justice Morris Fish CC, QC, "Report of the Third Independent Review Authority to the Minister of National Defence" (2021), at paragraph 309.

those whom they are under a duty to investigate. This independence is most effectively achieved by the creation of a wholly independent Unit.

5.4.2. Several of those whom we interviewed expressed the view that independence had been 'sorted out' by the Armed Forces Act 2006. They were referring to s.115A (inserted by the Armed Forces Act 2011, and not in force during Operation Telic):-

“(2) The Provost Marshal of the force has a duty, owed to the Defence Council, to seek to ensure that all investigations carried out by the force are free from improper interference.

(3) “Improper interference” includes, in particular, any attempt by a person who is not a service policeman to direct an investigation which is being carried out by the force.”

5.4.3. Whilst this provision ensures that Provost Marshals are not told what to investigate or what not to investigate, and are not interfered with improperly, it fails to ensure that the investigator is independent of those being investigated. In particular, and as a very real example, it fails to defeat any future argument that the role of Provost Marshal (Army) commanding Military Provost Staff renders any investigation of ill-treatment of captured persons by the Royal Military Police as contrary to the established law on independent investigations.

5.4.4. In *Jordan v United Kingdom* (2003) 37 EHRR 2 it was stated by the European Court of Human Rights thus:-

*“... it may generally be regarded as necessary for the persons responsible for and carrying out the investigations to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.”*³⁵³

5.4.5. It follows, in my judgment, that the decision in *Ali Zaki Mousa (No 1)* continues to render any investigation by the Royal Military Police of allegations against Military Provost Staff personnel of ill-treatment of captured persons, contrary to law. The judgment emphasised that recusal by individuals was no answer to the prohibition and the Court emphasised the importance of independence stating:-

³⁵³ *Hugh Jordan v United Kingdom* (24746/94), at §106.

*“One of the essential functions of independence is to ensure public confidence and, in this context, perception is important. As Lord Steyn said when giving the single opinion of the Appellate Committee in *Lawal v Northern Spirit Ltd* [2003] ICR 856 “Public perception of the possibility of unconscious bias is the key”.³⁵⁴*

5.4.6. The decision in *Ali Zaki Mousa (No.2)* admits the possibility of a Service police force investigating personnel from the same Service,³⁵⁵ provided they are appropriately independent of the events and personnel being investigated. This is the basis upon which the Royal Military Police’s Operation Northmoor investigated allegations of ill-treatment by Army personnel. However, the fact that they did so is no contrary indicator. No challenge has been made to the independence of the investigations under Operation Northmoor.

5.4.7. I cannot overemphasise the importance of independence in the investigative process. I raise no suggestion that any individual member of the Provost Branch was involved in reprehensible conduct towards detainees or internees. I merely identify the judicial response to investigators lacking independence from those they are under a duty to investigate.

5.4.8. This present difficulty was not overlooked in the Davis/Pratt study:-

“There is a further advantage associated with the creation of the Defence Serious Crime Unit. The Provost Marshal (Army) is responsible for Military Provost Staff and Royal Military Police personnel. As such he/she has responsibilities for custody and detention both for Service personnel in the UK and on deployed military operations overseas: yet he/she may also be required to investigate allegations of mistreatment of detainees held in military custody. While steps are taken to mitigate this obvious conflict, the problem could be removed altogether by the creation of a Defence Serious Crime Unit outside the Provost Marshal (Army)’s chain of command.”³⁵⁶

5.4.9. In a footnote the authors correctly observed that *“This would, incidentally, resolve the conflict that led to the creation of the [Iraq Historic Allegations Team] / [Service Policy Legacy Investigations].”*

³⁵⁴ *R (on the application of Mousa) v Secretary of State for Defence & Another* [2011] EWCA Civ 1334, at §35.

³⁵⁵ *R (on the application of Mousa & Others) v Secretary of State for Defence* [2013] EWHC 1412 (Admin), at §112.

³⁵⁶ Peter Davis and Lindsey Pratt, “A Study into the Service Justice System,” at paragraph 40.

5.4.10. An alternative solution advanced by the Provost Marshal (Army) to this particular problem is that she should transfer responsibility for operational detention elsewhere. I am not attracted by this suggestion. The Provost Marshal (Army) also has responsibility for Firm Base custody and detention, including the Military Corrective Training Centre at Colchester. She commands the Military Provost Staff who are detention experts. The Joint Doctrine Publication 1-10 Captured Persons,³⁵⁷ which is the Ministry of Defence's capstone publication for detention activities on overseas operations, runs to almost 500 pages. Assuring adherence to it will require deep expertise.

5.4.11. Responsibility for custody and detention of captured persons involves considerable learning and skill. Provost Marshals have carried this duty for centuries. Francis Markham's *Five Decades of Epistles of Warre*, published in 1622, described the Provost Marshal as "*the first and greatest Gaoler of the Army, having power to detain and keep prisoner whosoever shall be committed unto him by lawful authority*". Although in the early days of Operation Telic, detention policy "*was led effectively by the intelligence corps, on the basis of intelligence exploitation that may come from detainees, POWs, especially in the Cold War,*" following the death of Baha Mousa the Provost Marshal (Army) was directed to "*take control of training and inspection of detention arrangements in operational theatres*"³⁵⁸ to ensure the necessary level of humanitarian care. A large proportion of allegations made against our forces in Iraq and Afghanistan were made by those detained or asserting that they had been detained. The Allied Joint Publication AJP-3.21 describes the Provost Marshal as the senior military police officer responsible for coordinating all police activities and the provision of specialist advice to the commander and staff and responsible for coordinating all NATO military police activities and planning and supervising mobility support services, security activities, detention activities, policing activities and stability policing activities.³⁵⁹ Transferring responsibility for operational detention elsewhere would create more problems than it would solve.

5.4.12. Independence can be further underpinned by appropriate arrangements for command, control and funding. I recommend that Defence Serious Crime Unit personnel should not fall under the chain of command of the single Services for performance reporting or disciplinary purposes.

³⁵⁷ "Joint Doctrine Publication 1-10 Captured Persons," 4th edition (2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/922149/doctrine_uk_captured_persons_jdp_1_10.pdf.

³⁵⁸ Note of meeting 7.

³⁵⁹ Allied Joint Publication 3.21, "Allied Joint Doctrine for Military Police" (2019), at paragraph 3.1.1.

Recommendation 7: The Provost Marshal (Serious Crime) should have a duty of operational independence in investigative matters owed to the Defence Council, on the same terms as that owed by the Service Provost Marshals under section 115A of the Armed Forces Act 2006.

Recommendation 8: Provost Marshal (Army) should retain her existing responsibility for operational detention. In light of that responsibility, her role should involve no command responsibility for the new Defence Serious Crime Unit.

Recommendation 9: Defence Serious Crime Unit personnel should not fall under the chain of command of the single Services for performance reporting or disciplinary purposes.

Enabling organisation

5.4.13. I have also considered whether the Defence Serious Crime Unit should be implemented as an enabling organisation. The Directorate of Sponsorship and Organisational Policy (which in addition to owning the Defence Operating Model, is responsible both for sponsoring the enabling organisations and for managing the relationship between the single Services and those enabling organisations) includes the Defence Safety Authority on the list of enabling organisations.

5.4.14. In 2009 Charles Haddon-Cave QC (now Lord Justice Haddon-Cave) conducted an independent review into the loss of the RAF Nimrod and 14 lives in Afghanistan in 2006, having been appointed by the then Secretary of State for Defence. Lessons to be learned were profound and wide-ranging. They included a finding that there was a lack of independence throughout the regulatory regime:- "*It is important that that regulation is truly independent of operation*".³⁶⁰ A consequence of the report's findings was the formation of the Military Aviation Authority and the Military Air Accident Investigation Branch. In 2011 Lord Levene supported

³⁶⁰ Charles Haddon-Cave QC, "The Nimrod Review: An independent review into the broader issues surrounding the loss of the RAF Nimrod MR2 Aircraft XV230 in Afghanistan in 2006," HC 1025, at paragraph 20.21.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/229037/1025.pdf.

adoption of a similar regulatory and investigation arrangement more widely across Defence.³⁶¹ The subsequent merger of the Military Aviation Authority and the Defence Safety and Environmental Authority created a single Defence Safety Authority, which is led by a military three star Director General. The Defence Accident Investigation Branch is independent of the three Services. It is described as a ‘truly quad’ Service, with Navy, Army, Air Force and Civil Service personnel. The Defence Safety Authority was established by Charter. The Secretary of State for Defence issues a policy statement on health, safety and environmental protection in Defence. The Permanent Secretary is appointed as the senior official for putting the policy statement into practice.

5.4.15. I find much assistance in the formation of the Defence Accident Investigation Branch and its relationship with the Defence Safety Authority. Accident Investigation and Criminal Investigation have much in common demanding independence on the part of investigators from those they investigate. I had a most useful virtual meeting with the Head of the Accident Investigation Branch, Captain (Royal Navy) Chris Canning.³⁶² As an example, he told me that if there had been a very serious or fatal incident which they were investigating, the investigation would generally be led by an Officer from a different Service. Additionally, there would be cooperation with the Health and Safety Executive and with either the Service police or the relevant Home Office police force to ensure the appropriate preservation of evidence and investigative separation. Where a particular investigative body possesses specialist diagnostic skillsets, this may be shared; he is able to tap into a breadth of specialist units and capabilities both around the UK and internationally.

5.4.16. There may be positive advantages in establishing the Defence Serious Crime Unit as an enabling organisation, e.g. as a Non-Departmental Public Body. The Service Prosecuting Authority has been established as an enabling organisation under the Director of Service Prosecutions, who has separate legal personality. As a result, judicial reviews of decisions by the Service Prosecuting Authority are brought against the Director of Service Prosecutions rather than the Secretary of State for Defence. This may be a solution to creating a truly independent Unit in due course, which I advance for further ministerial consideration.

³⁶¹ Lord Levene of Portsoken KBE, “Defence Reform: An independent report into the structure and management of the Ministry of Defence,” (2011), at paragraph 12.12, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27408/defence_reform_report_struct_mgt_mod_27june2011.pdf

³⁶² Note of meeting 24.

Recommendation 10: When the leadership and funding of the Defence Serious Crime Unit are reviewed (see **recommendations 12** and **16**), consideration should be given to implementing the Defence Serious Crime Unit as an enabling organisation.

5.5. Command

5.5.1. I have considered the options in relation to command of the Unit in some detail and explored them with interviewees at some length. His Honour and Sir Jon concluded that command was a matter for the Services whilst advocating a protocol for civilian-led joint investigations. Davis/Pratt believed “*the Head of the DSCU should be a civilian post to demonstrate maximum independence from the chain of command.*”³⁶³

5.5.2. As noted above, the previous Provost Marshal New Zealand Defence Force was recruited from the New Zealand civilian Police and oversaw the transformation from Single Service to Joint Police.

5.5.3. I see the reasoning in that course. The task facing the head of the Defence Serious Crime Unit is similar:- to manage the conjoining of the three Special Investigation Branches; to establish a tri-Service policing culture; and to align with civilian best practice. Nevertheless, I have concluded that the head of the Defence Serious Crime Unit should be a uniformed person with an innate understanding of the military and be respected, trusted and supported across the Armed Forces. They should be designated as a Provost Marshal, which I had provisionally styled Provost Marshal (Defence) but which I have now agreed should instead be styled Provost Marshal (Serious Crime).

5.5.4. The Unit's leadership must be able to look other military leaders in the eye as peers and understand their thinking and language. They must be able to liaise with, negotiate with and if needs be investigate the most senior ranks.

5.5.5. I had provisionally concluded that the Provost Marshal (Serious Crime) should be a two star (i.e. Major-General equivalent) military appointment. Both His Honour and Sir Jon agree with this conclusion. However, this would inevitably mean that the role would always be

³⁶³ Peter Davis and Lindsey Pratt, “A Study into the Service Justice System,” Recommendation 13 and paragraph 38.

filled by the Army, as the other Services currently do not have any sufficiently senior posts to prepare a Service police officer to take up a two star command. This is a matter of concern to current and former Provost Marshals (Navy) and Provost Marshals (Royal Air Force), who favoured either a civilian head or a one star military head. The current Provost Marshal (Navy) told me:- *“The appointment of a Provost Marshal (Defence) needs to be based on competencies and skills, not rank, and it needs to be equitable. They may have the rank but have no recent experience of investigating major crime.”*³⁶⁴

5.5.6. During our first meeting, the Chief of the Defence Staff told me that the Chiefs of Staff have anticipated this difficulty: *“We don’t want to end up with something that gives the Army by default another job that won’t achieve the change of culture we’re trying to achieve. I’m absolutely certain we won’t want to create a 2* Provost Marshal (Defence) who would always be Army.”*³⁶⁵ Instead, they have made the following decisions regarding the leadership of the Defence Serious Crime Unit:-

*“We reached essentially the following position: there will be a unit; it will be led by someone at Lieutenant-Colonel level; and it will be properly tri-Service, will include Ministry of Defence Police if they want, and will include outsiders. It will become a properly professional unit capable of investigating serious crime. It will sit inside the Army Top Level Budget. They will be the lead command for administering it. However, it will not report to the Provost Marshal (Army).”*³⁶⁶

5.5.7. The Chief of the Defence Staff explained the rationale for setting the head of the Defence Senior Crime Unit at the same rank as the Provost Marshal (Navy) and junior to both the Provost Marshal (Royal Air Force) and the Provost Marshal (Army):-

*“We ultimately concluded that it should be the best person for the job. But inevitably in the short-term it will be an Army Lieutenant-Colonel. In setting up a professional structure, over time this is not going to be an Army benefit. Might have a Navy or RAF officer, or a civilian – the MDP for example. We’d want the MDP represented in it because they’ve got some very good people.”*³⁶⁷

5.5.8. I believe this to be a pragmatic solution, which will end the very significant delays that

³⁶⁴ Note of meeting 41.

³⁶⁵ Note of meeting 59.

³⁶⁶ Ibid.

³⁶⁷ Ibid.

have beset the Defence Serious Crime Unit and will ensure that it can be established quickly.

5.5.9. I am therefore content to recommend that the Defence Serious Crime Unit should be established on that basis, save that I think that the challenges involved in establishing this unit may overmatch an OF4 (Lieutenant-Colonel equivalent) and that consideration should be given to appointing an experienced OF5 (Colonel equivalent) instead. The Chief of the Defence Staff appears to agree; during our second meeting he spoke of the “*need to identify the relevant OF5 as quickly as possible,*” indicating that a Board could be convened for this purpose within a couple of months.³⁶⁸

5.5.10. In the longer term I do believe there is much to recommend the Provost Marshal (Serious Crime) having more senior rank than OF4/OF5 (Lieutenant-Colonel or Colonel equivalent):- it is desirable that he or she should not be junior in rank to the Provost Marshal (Army); and due to the high profile and wider impact of any war crimes allegations, he or she should have the wider perspective that Staff College brings. Furthermore, fixing the rank of the Provost Marshal (Serious Crime) at OF4/OF5 will make it considerably harder to attract a civilian number two with the requisite seniority and experience (see 5.5.12). I recommend that the leadership of the Defence Serious Crime Unit be reviewed within three years, and consideration be given at that stage to upgrading the Provost Marshal (Serious Crime) to a one star (Brigadier-equivalent) post.

5.5.11. During an informative and stimulating interview a former US Provost Marshal General, Lieutenant-General (Retired) Dave Quantock, informed me that almost invariably the post of Provost Marshal General was a terminal assignment. He was the exception and went on to become Inspector General of the Army. The rationale that the posting should be final, was to ensure that the office holder was not motivated in conduct by an ambition for further promotion. As General Quantock put it:- “*Provost Marshal General is really the end. As far as independence and going on to get promoted, it happens so rarely it doesn't impact*”.³⁶⁹ The Director General of the Defence Safety Authority is already a final posting.³⁷⁰ I advise that, when the leadership of the Defence Serious Crime Unit is reviewed, serious consideration should be given to making the post of Provost Marshal (Serious Crime) a final posting.

5.5.12. I also believe there should be a senior civilian appointment within the Defence Serious Crime Unit, a number two, with experience of major investigations and the ability and

³⁶⁸ Note of meeting 60.

³⁶⁹ Note of meeting 23.

³⁷⁰ Note of meeting 24.

necessary experience to control a major incident room, an ability to liaise with civilian police forces both for secondment and recruitment purposes. He/she will be far more than an office manager. Training, oversight of processes and liaison with experts will all be relevant. The experience and ability to record, retain, manage and process several hundred allegations simultaneously using the most up to date technology will be a requirement.

Recommendation 11: For the purposes of securing rapid implementation, the Defence Serious Crime Unit should be established under the command of an officer of OF4 (Commander, Lieutenant-Colonel, or Wing Commander) or OF5 (Captain, Colonel, or Group Captain) rank, to be designated Provost Marshal (Serious Crime).

Recommendation 12: The leadership of the Defence Serious Crime Unit should be reviewed within three years and due consideration given to upgrading the role of Provost Marshal (Serious Crime) to one to be filled by an officer of one star (Commodore, Brigadier, or Air Commodore) rank. Serious consideration should be given at that point to making Provost Marshal (Serious Crime) the final posting of an officer's Service career.

Recommendation 13: The Provost Marshal (Serious Crime) should have as a deputy a civilian. The Deputy Provost Marshal should have significant experience of major investigations and the ability and necessary experience to control a major incident room, recording, retaining, managing and processing several hundred allegations simultaneously using the most up to date technology, as well as having achieved sufficient rank and recognition within civilian policing to act as an ambassador for the interests of Service police within the wider policing community.

5.6. Governance and accountability

5.6.1. Ownership of a police force or investigative unit offends many right-thinking people and erodes public confidence in the service justice process. Much of the criticism of the initial Royal Military Police investigation (whether or not they were acting in support of Surrey Police, as the Ministry of Defence maintained during the Deepcut Review³⁷¹) into three of the four

³⁷¹ Nicholas Blake QC, "A Review of the Circumstances Surrounding the Deaths of Four Soldiers at Princess Royal Barracks, Deepcut between 1995 and 2002," (2006) HC 795, at paragraphs 1.6 and 3.24.

deaths at Deepcut Barracks between 1995 and 2002 derived from investigators' manifest lack of independence from those that they were investigating. The apparent lack of an effective forensic examination, Surrey Police's decision to carry out a re-examination, and prolonged media attention caused the media, commentators and families of the deceased to question the process of the Army investigating the Army and apparently deflecting responsibility for the four deaths.

5.6.2. In 2017 when the Iraq Historic Allegations Team was shut down after six years without any successful prosecution much was made of the fact that the Army budget was funding the criminal investigation of members of the Army. The lack of independence rendered the process a ready target for the media.

5.6.3. I am satisfied that the Defence Serious Crime Unit should be an investigating authority independent of – and accountable to a person or persons independent of – any military command within the Services.

5.6.4. However, insisting on absolute independence on a point of principle, no matter how valid, will sacrifice a huge amount of credibility and capability within the military. In practice and on the battlefield it is difficult if not impossible to see that you could have any Service police force in the theatre of war (conducting house to house inquiries, say, or controlling a crime scene) which was not subject to Service discipline. Absolute independence risks isolation, lack of support, lack of co-operation and alienation. It also goes beyond what the Strasbourg Court requires; as noted in Chapter 4, its case law requires independence to be 'sufficient' rather than 'absolute'. I have therefore considered possible ways of ensuring effective accountability and governance whilst still guaranteeing sufficient independence.

Accountability to an individual or a group

5.6.5. The problem has been resolved for most of the Home Office police forces in England and Wales by the creation of Police and Crime Commissioners. They are required to “*secure the maintenance of the police force for that area*” and “*secure that the police force is efficient and effective*,”³⁷² and must hold the Chief Constable to account in particular for:- the exercise of the latter's duty to have regard to the police and crime plan and to the strategic policing

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228930/0795.pdf.

³⁷² s.1(6), Police Reform and Social Responsibility Act 2011.

requirement;³⁷³ and “*the effectiveness and efficiency of the chief constable’s arrangements for cooperating with other persons in the exercise of the chief constable’s functions.*”³⁷⁴ The Police and Crime Commissioners in turn are accountable to Police and Crime Panels.³⁷⁵

5.6.6. However, there is currently no equivalent for Service police forces. An examination of arrangements in other common law countries suggests that ensuring that the Defence Serious Crime Unit will be independent and accountable to a person independent of any military command could be achieved by making the Provost Marshal (Serious Crime) answerable either to the Secretary of State for Defence or, if the Unit must have the DNA of the military woven through it in order to be effective, to the Chief of the Defence Staff:-

5.6.6.1. In the USA, in addition to an Inspector General of the Department of Defense each of the single Services has its own Inspector General to provide oversight and ensure efficiency. Each military criminal investigative organisation answers directly either to the Secretary or Inspector General of its respective Service.

5.6.6.2. Justice Fish in his recent report on the Canadian military justice system has recommended making the Canadian Forces Provost Marshal accountable to the Minister of National Defence (rather than the Chief of the Defence Staff as currently) thereby reinforcing the independence of the Canadian Forces Provost Marshal from the chain of command in policing matters.³⁷⁶ This recommendation was made on the advice of the Canadian Judge Advocate General.

5.6.6.3. In Australia, the Provost Marshal (Australian Defence Force) and the Australian Defence Force Investigative Service were initially under the direct command of the Chief of the Defence Force, with funding drawn from the budget of that office. “*The command of the PM-ADF/ADFIS was subsequently transferred to the Vice Chief of the Defence Force, and in 2017 to the Chief of Joint Capabilities (on the creation of the Joint Capabilities Group) with funding allocations drawn from the relevant budgets of those Joint organisations. The PM-ADF is currently accountable to the Chief of Joint Capabilities for the use of resources.*”³⁷⁷ Pursuant to a Chief of Defence Force directive:-

³⁷³ Ibid, ss.1(8)(a) and (b).

³⁷⁴ Ibid, s.1(8)(d).

³⁷⁵ Ibid, s.28.

³⁷⁶ The Honourable Justice Morris Fish CC, QC, “Report of the Third Independent Review Authority to the Minister of National Defence” (2021), Recommendation 13.

³⁷⁷ Major-General Natasha Fox AM CSC, “Henriques Review – Australia Investigations.”

“PM-ADF is commanded by and reports to the Chief of Joint Capabilities for day-to-day functions. Additionally, the PM-ADF is authorised to report directly to the Chief of the Defence Force on:

- *Military Police matters on operations;*
- *Military Police issues that have a Defence-wide impact;*
- *investigative matters that have a Defence-wide impact;*
- *significant incidents that might be of Ministerial and/or media interest; and*
- *other aspects of Military Police operations as deemed appropriate by the PM-ADF.”³⁷⁸*

5.6.6.4. As earlier indicated, the New Zealand Defence Force Provost Marshal is accountable to the Chief of the Defence Force.

5.6.7. During Operation Northmoor an Independent Advisory Group was formed. It comprised an ex Chief Constable and senior Queen's Counsel. The role of the group was to tender advice to the Provost Marshal (Army) or the Director of Service Prosecutions or their authorised staff during the investigation process. The group was expected to act as a sounding board using their knowledge and experience in relation to the investigation and any consequent prosecutorial decision, providing confidential advice. It also sponsored independent reviews of Operation Northmoor, thereby helping to assure those investigations. From all I have heard the arrangement was a considerable success and should be replicated during any future armed conflict.

5.6.8. The Australians have adopted the following recommendation:-

“An independent tri-service multi-disciplinary specialist operations inquiry cell be established for the conduct of administrative inquiries into operational incidents. The cell should comprise personnel drawn from arms corps (to provide the requisite forensic skills), investigators, and intelligence professionals, and be available as an independent resource for command in any military operation. Such a cell could reside in the Office of the Inspector-General.”³⁷⁹

³⁷⁸ Ibid.

³⁷⁹ Inspector-General of the Australian Defence Force, “Afghanistan Inquiry Report,” at p.114, <https://afghanistainquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>.

5.6.9. This cell was not formed as part of a criminal investigation process, but recognised the value of an expert and independent body which was multi-disciplinary. This would not affect the existing arrangements for governance and oversight of the work of the Provost Marshal (Australian Defence Force):-

*“**Joint Military Police Governance Board.** In 2008, the Chief of the Defence Force established, by directive, a governance board for the purpose of providing higher level oversight of the development of the ADF's investigative capability. The remit of the board has expanded to encompass the exercise of strategic oversight of the ADF military police capability. The board, which is chaired by the Chief of Joint Capabilities, includes senior representation at OF7 level (and equivalent) from within the Department of Defence, the Inspector-General of the Australian Defence Force, and a senior member of the Australian Federal Police. The board meets biannually, or more frequently as deemed necessary by the Chair. The PM-ADF submits a detailed report to the board, provides the secretariat, and appears before the board.*

***Joint Military Police Working Group.** In December 2020, [the Chiefs of Service Committee] agreed to the creation of the working group to assist the board in exercising oversight of the Joint Military Police capability. The principal function of the working group, which is chaired by PM-ADF, is to oversee the operation of the Joint Domestic Policing Service Level Charter (an agreement between the Chief of Joint Capabilities and the three Service Chiefs) and take action to resolve at the lowest possible level any issues related to service delivery by the JMPU.”³⁸⁰*

5.6.10. The team within the Ministry of Defence that has been leading on implementing the Defence Serious Crime Unit has recently proposed that a multi-disciplinary Strategic Policing Board should be established to provide an assurance and governance function. This Board would report to the Service Justice Executive Group (which, along with the Service Justice Board, is tasked with governance of the Service Justice System), and would consist of four people:- a Non-Executive Director who would chair the Strategic Policing Board and would also be a member of the Service Justice Executive Group; a retired senior military officer; a retired Chief Constable; and a retired judge.

5.6.11. The purpose of the Strategic Policing Board would be to maintain oversight of the

³⁸⁰ Major-General Natasha Fox AM CSC, “Henriques Review – Australia Investigations.”

Defence Serious Crime Unit and to hold the Provost Marshal (Serious Crime) to account. It is envisaged that “*Topics discussed at the board will include business continuity, resourcing, performance, reporting, structural changes and strategic Defence policing priorities.*”

5.6.12. During my second meeting with the Chief of the Defence Staff and the Chief of Defence People, we agreed that the retired senior military officer should be a recently retired senior officer with operational experience, and should not have been a member of the Service police, and that the retired judge and retired chief constable should similarly be recently retired. This will ensure that the Board has the benefit of current perspectives, while still maintaining its essential independence. I recommended that, if the Non-Executive Director does not possess a scientific or technological background, consideration should be given to expanding the Strategic Policing Board to include someone with this essential expertise.³⁸¹

5.6.13. I believe that the Strategic Policing Board will meet the requirements both for effective governance and accountability and for sufficient independence. Provided its Terms of Reference also permit it to examine the timeliness and quality of Defence Serious Crime Unit investigations, the Strategic Policing Board will obviate the need to establish a separate Independent Advisory Group. I am therefore content to recommend that the Strategic Policing Board should be established on this basis:-

Recommendation 14: A Strategic Policing Board, consisting of a Non-Executive Director (who is also a member of the Service Justice Executive Group), a recently retired Chief Constable, a recently retired senior military officer, and a recently retired Judge, should be established to provide effective assurance and governance of the Provost Marshal (Serious Crime) and the Defence Serious Crime Unit. It should have particular regard to the Unit’s resources and structure, and to the Provost Marshal (Serious Crime’s) performance against strategic policing requirements. Its Terms of Reference should permit it to examine the timeliness and quality of Defence Serious Crime Unit investigations, and to sponsor periodic independent reviews to assure the quality of investigations. If the Non-Executive Director does not possess a scientific or technological background, consideration should be given to expanding the Strategic Policing Board to include someone with this essential expertise.

³⁸¹ Note of meeting 60.

5.7. Ministry of Defence Police

5.7.1. I interviewed two senior members of the Ministry of Defence Police³⁸² and detected no enthusiasm for brigading their Crime Command (equivalent to a Special Investigation Branch) with the three Special Investigation Branches as part of the Defence Serious Crime Unit. It is comparatively small, having just 67 personnel, and deals substantially, but not exclusively, with fraud committed by contractors and with organised crime.

5.7.2. I have no difficulty in concluding that Crime Command does not belong within a Defence Serious Crime Unit. They have a different constitution, accountability and police powers. They have a different chain of command from that of the Armed Forces, and cannot be commanded by a military officer (including a Service police officer). They have no extra-territorial jurisdiction and are not trained to deploy abroad. They lack fitness and skills necessary for overseas deployment. On joining the force they cannot have contemplated overseas deployment.

5.7.3. That does not, however, mean that individual investigators might not be usefully employed within the Defence Serious Crime Unit. The Chief of the Defence Staff is keen that this should happen, and sees the infusion of talented investigators from the Ministry of Defence Police and from Home Office police forces more generally as driving the Unit's professionalism and expertise:-

"We have to improve our professionalism, by understanding the common skills framework that exists in policing. It will give opportunity for lateral entry – expertise from the outside. In achieving that we ought to be able to massively improve response times, agility and professionalism."

"We'd want the MDP represented in it because they've got some very good people. ... I think it would be helpful if we could [include them]. It just broadens the possibilities for getting professional people in there."

"I genuinely believe we should be opening it up to the possibility for civilian police investigators to be part of the unit. There needs to be some lateral movement. We

³⁸² Note of meeting 26.

would want some of our Service investigators to be sheep dipped in Birmingham or London. Trying to grow this from within, it will just be SIB on steroids.”³⁸³

Recommendation 15: Consideration should be given to ways in which experienced police detectives might be enabled to join the Defence Serious Crime Unit on a full-time basis, whilst remaining civilians.

5.7.4. I would also observe that even if this does not happen there is much to be gained from close cooperation between this force and the Unit, particularly in the field of Intelligence. It is also important to have compatible Information Technology.

5.7.5. The Deputy Chief Constable has drawn my attention to a recent significant criminal investigation by Crime Command, which has highlighted the absence of an effective Joint Crime Strategic Threat and Risk Assessment for the Ministry of Defence Police and Service police forces. He has also emphasised the need for improved intelligence sharing and tasking, both to provide assurance that Defence’s crime investigation assets are being targeted at the highest priority crimes and to mitigate the risk of compromise that might result from multiple forces investigating the same individuals. I see the Defence Serious Crime Unit as playing a key role in delivering these improvements. It will distil the Crime Command and Service police forces’ priorities to produce the Defence policing priorities, and will be the central point for crime reporting and tasking.

5.8. Funding

5.8.1. As noted above, the Chiefs of Staff have decided that the Defence Serious Crime Unit should be funded through the Army Top-Level Budget. The Chief of the Defence Staff envisaged that this funding would be ring-fenced, thereby preventing it being used for other purposes.

5.8.2. I am firmly of the view that the Defence Serious Crime Unit should be funded from the Defence budget. Both His Honour and Sir Jon agreed with this proposition,³⁸⁴ which is also consistent with the Wilcox study, which identified funding as an important strategic enabler:-

³⁸³ Note of meeting 59.

³⁸⁴ Note of meeting 42.

“Funding would be centrally allocated and provide a ring-fenced DSCU budget. This ensures the DSCU capabilities are mutually resourced from a single budget and will enable centralised resource targeting according to agreed priorities.”³⁸⁵

5.8.3. However, I recognise that the approach upon which the Chiefs of Staff have unanimously agreed is a pragmatic solution that avoids any further delay in establishing the Defence Serious Crime Unit. I am therefore content to recommend that the Defence Serious Crime Unit should be established on that basis. However, I have recommended that the leadership of the Defence Serious Crime Unit be reviewed in three years’ time, and I further recommend that consideration be given at that stage to moving the Unit’s budget from the Army Top-Level Budget to the Head Office budget:-

Recommendation 16: For the purposes of securing rapid implementation, the Defence Serious Crime Unit should initially be funded through the Army Top-Level Budget. When the leadership of the Defence Serious Crime Unit is reviewed (see **Recommendation 12**), consideration should also be given to moving the Unit’s funding line so that it is funded directly from the Defence budget rather than through the budget of any of the three Services.

5.9. Career structure

5.9.1. The military have to be recruited into one of the three Services. The argument that we should move to a tri-Service Defence Serious Crime Unit – or even, as our near-peer allies have done, a single Service police force – ignores the problems of recruitment, retention and promotion. Other than civilian staff, Joint Units cannot recruit their own. All uniformed personnel have to be recruited by a Service and then drawn, as required, into the Joint domain. Investigators start their careers with the least serious cases, in General Policing Duties, and if sailors will learn complementary skills at sea and likewise in the other forces. Some will wish to progress no further, as is often the case in civilian forces. Some will lack the ability. The Defence Serious Crime Unit will attract the more ambitious and more talented. It is said in opposition to the Unit that there will be nowhere for them to return to should they wish to leave the Unit.³⁸⁶ I envisage, as did Sir Jon, an enrichment of skills in General Police Duties by those returning. At present it is possible to return from the Special Investigation Branches as it will

³⁸⁵ Nick Wilcox, “Defence Serious Crime Unit (DSCU): Strategic Document,” at paragraph 3.11.

³⁸⁶ Note of meeting 47.

be in the future from the Defence Serious Crime Unit.

5.9.2. A greater problem arises in respect of persons with specialist skills who are not easily or immediately replaceable. This is a problem for the Service Prosecuting Authority just as much as for the Service police. I have heard time and again in interview of outstanding individuals acquiring skills as prosecutors or as digital or cyber scientists, becoming highly proficient, and leaving for promotion after two years or so. By the time they return, their skills have faded and the law or technology have moved on. This is inefficient and wasteful. However, changing this would require a fundamental rethink as to how people get promoted, for promotion boards to value expertise as much as breadth of experience.

5.9.3. I am assured that the Unified Career Model will deal with this problem. I understand that the scheme is in its infancy and formative stages, and is currently being developed to meet the needs of only two specialisms: medical and cyber. I cannot overstate the need to resolve the difficulty which has been off repeated. Consideration should be given to whether, suitably adapted, the Unified Career Model can also resolve this problem for the Defence Serious Crime Unit.

Recommendation 17: Consideration should be given to whether the Unified Career Model currently under development for other specialisms can be adopted, suitably adapted, to address the career needs of specialist investigators in the Defence Serious Crime Unit.

5.9.4. The Australian Defence Force have encountered similar difficulties in terms of investigator career models, and are currently considering whether their military police should be designated a Joint Workforce:-

“In terms of career employment of ADF Investigators, for all three Services, qualified investigators will not be posted to generalist roles in order to pass promotion boards, as there are promotion structures built into the respective investigation specialist career streams. They will ordinarily be posted to the JMPU in investigation roles, including investigation management, or other suitable investigative positions (e.g. as a Military Police Professional Standards investigator in the Office of the Inspector General ADF). ADF Investigators may diversify by undertaking career broadening postings in certain non-investigative roles, such as serving in the Headquarters JMPU, investigation instructor positions at the Defence Force School of Policing and,

at the Warrant Officer Class One (E) level, challenging staff and administrative positions (e.g. Command Warrant Officer). They will, other than in exceptional circumstances, only be posted to positions within the respective generalist single Service policing stream (e.g. 1st Military Police Battalion, Navy seagoing or shore based Naval Police Coxswain positions) if they elect to leave the investigator stream. Note that there are no generalist policing positions remaining within Air Force, all such positions having been transferred to JMPU as part of the Military Police reform.”³⁸⁷

“While the career models of the three Service investigator specialisations are fundamentally comparable, there remain systemic challenges to building a true joint culture, as opposed to tri-Service. The ADF military police are not currently managed as a Joint Workforce, which generates complexities and disconnects for commanders and support staff. As highlighted in a 2017 study into ADFIS organisational culture, the ADF continues to maintain three independent performance reporting systems and career management systems (down to three different performance appraisal report forms), resulting in differential levels of investigator experience at the entry point and challenges in aligning performance assessment and promotion. Broader ADF cross-cultural biases also can impinge on the investigator workforce, such as a tendency to partially discount a high-level of performance evaluation made by a supervisor from another Service, or to give less weight in single Service promotion boards to service in a Joint unit such as JMPU as compared [to] single Service policing elements. These are complex influences on the unit culture, which may impact on morale, retention and cultural solidarity, and which are extremely difficult, if not impossible, to fully overcome without broader Defence change. The ADF is currently examining some aspects of this challenge, including the potential for the military police to be designated as a Joint Workforce.”³⁸⁸

5.10. Training and secondments

5.10.1. It is not clear that either the Service police or the Home Office police forces derive maximum benefit from the current secondment arrangements. There is currently no central coordination of secondments. The Service police forces have established relationships with a number of Home Office police forces, and will seek to arrange secondments as needed. This

³⁸⁷ Major-General Natasha Fox AM CSC, “Henriques Review – Australia Investigations.”

³⁸⁸ Ibid.

can result in the same Home Office police force being approached by more than one Service police force. Secondments tend to be of short duration and, although the Provost Marshal (Army) is trialling a more structured secondment, have lacked set objectives that the secondee must achieve.

5.10.2. In his Part 1 report, Sir Jon advocated six-month secondments as a means of giving Defence Serious Crime Unit investigators greater experience of investigating serious crime and maintaining the currency of skills that is a pre-requisite for accreditation. The Deputy Chief Constable of the Ministry of Defence Police disagrees, arguing that secondments are no substitute for continuous immersion:-

*“My concern is about continuing development and competence of people who are not constantly immersed in a specialist environment – sexual crime, organised crime, more serious threats to life, etc. I’m concerned, even with establishment of a unit, about the level of work that will go to them. I had those conversations with Jon Murphy. Seconding people – I don’t think that works. You need that continuous immersion.”*³⁸⁹

5.10.3. A number of those I have spoken to have drawn my attention to the approach taken by the Defence Medical Service to the problem of acquiring and maintaining skills. The Director of Medical Personnel and Training, Air Vice Marshal Clare Walton, told me that they have *“an agreement with NHS that we place personnel within NHS for them to maintain their clinical skills. There is an understanding that, as and when we need them to deploy, they are readily available.”*³⁹⁰ The Defence Medical Service’s Joint Hospital Group coordinates the placement of around 1,200 single-Service medical personnel in the National Health Service nationwide, although the majority are concentrated within five trusts each supported by a Joint Hospital Group hub.

5.10.4. The Director explained that these placements are arranged under contract, and result in the National Health Service paying a proportion of the salary costs:- *“The way we place our personnel is under an agreed contract. An orthopaedic surgeon is committed to that trust to provide so many sessions per week. The trust pays us for that – a percentage of the going rate for that person’s salary. 50% on average – can be more or less.”*³⁹¹ The more time per week the Service medic gives to the National Health Service, the greater the proportion of

³⁸⁹ Note of meeting 26.

³⁹⁰ Note of meeting 27.

³⁹¹ Ibid.

their salary the Joint Hospital Group recoups, and vice versa. This ensures that Service medics are also able to undertake the military training they need to be deployable.

5.10.5. Both the Director and the Commander of the Joint Hospital Group believe that a system of coordinated placements or secondments might be applicable to the Defence Serious Crime Unit:-

“We’re blessed in the medical sphere that cases can be adopted by other people. Operations last hours. But the higher in the NHS you are, the harder it is to lose you – ward managers, etc. The way we’ve approached this is by a squadding concept. If an NHS trust is able to give us an anaesthetist position, we’ll put in three people to provide one – so can always provide continuity. For investigators, you’d probably put in two rather than one.”

“One solution is squadding – more people than specifically needed. Or you could give protected time while in that organisation – not deployable for e.g. 18 months. More like secondments. They then go back to their units.”³⁹²

5.10.6. However, they have emphasised that handovers are easier in some specialities than others, and that wherever possible they try to give the agreed notice period before ending secondments or placements.

5.10.7. A major benefit of brigading the three Special Investigation Branches and specialist investigative capabilities into the Defence Serious Crime Unit is that the Unit will possess the critical mass necessary to release investigators – in larger numbers and for longer periods – to acquire and maintain investigative skills and experience. I envisage that implementing a systematic and structured approach to secondments will be a major focus for the civilian number two within the Defence Serious Crime Unit.

5.11. Transparency

5.11.1. Transparency and publicity are critically important elements in policing. Home Office police forces can stand on Crown Court steps and proclaim their successes. In military policing however good news for the police is invariably bad news for the Armed Forces. The public

³⁹² Ibid.

receive less information from Service police than from their Home Office counterparts, who also publish annual reports. Good publicity aids morale and thus improves performance. I was delighted to hear that the Royal Military Police recently won two prestigious awards for digital technology. I visited Southwick Park shortly afterwards and the effect of the awards and the attendant publicity was obvious.

5.11.2. I was reassured by my meeting with the Chief of the Defence Staff, who told me that he has been “*a very strong supporter of a DSCU that is far more transparent than what we have at the moment and properly agile.*”³⁹³ I do not suggest that a Defence Serious Crime Unit would justify the permanent appointment of a Press Officer. I do however draw attention to the need for transparency, where possible and appropriate. The Service Prosecuting Authority face a similar problem and will no doubt advise and assist.

5.11.3. Whilst policing and transparency are not always complementary, I have concluded that the provision of annual reports by the Provost Marshal (Serious Crime) to the Minister chairing the Service Justice Board would greatly assist in promoting transparency. Pending investigations and covert activity would necessitate a degree of omission but the overall consequence of this mechanism would provide Parliament, the Armed Forces, the International Community, and the public with the necessary information to conclude that the UK has the capabilities and the willpower to fulfil its legal duties.

5.11.4. The Canadian Forces Provost Marshal reports annually, via the Chief of the Defence Force, to the Minister of National Defence. These reports are published online. The Provost Marshal (Australian Defence Force) has recently been directed to provide annual reports to the Chiefs of Service Committee.³⁹⁴ In addition, the Inspector General Australian Defence Force provides an annual report to the Minister of Defence who lays it before Parliament. The annual reporting process ensures transparency and establishes a consistent link between military policing and Parliament.

5.11.5. The question perhaps arises as whether the existing Provost Marshals should report annually. Since the investigation of Serious Crime, including war crimes, will be the responsibility of the Provost Marshal (Serious Crime), and the Defence Serious Crime Unit will be exclusively engaged in criminal investigation, I have concluded that the requirement and advantage in producing reports is far greater for the Unit than for the others. In due course, if

³⁹³ Note of meeting 59.

³⁹⁴ Major-General Natasha Fox AM CSC, “Henriques Review – Australia Investigations.”

reporting proves to be best practice, it may be desirable for the Provost Marshals of the Service police forces to adopt the same practice.

Recommendation 18: The Provost Marshal (Serious Crime) shall report annually to the Minister chairing the Service Justice Board, who shall arrange for the report to be laid before Parliament.

5.12. Major Incident Room

5.12.1. The Defence Serious Crime Unit will have a simultaneous presence in theatre and in the Major Incident Room, thus eliminating any delay between report and investigation. Elsewhere I will explain protocols which I propose should be adopted for fatality cases and ill-treatment cases. The Unit will have the considerable advantage of Sir David Calvert-Smith's review of the Iraq Historic Allegation Team's practices and processes. That review provides a blueprint for future major investigations. It highlights the importance of investigators having experience of policing the Services and being familiar with the concept of a war crime. It emphasises the importance of being able to attract and recruit capable staff at short notice. It contains detailed flow charts, refined through the experience of handling vast amounts of documentation alleging homicide, war crimes and various sexual offences all committed overseas.

5.12.2. The Major Incident Room must be equipped with the most up-to-date technology and run by a person, military or civilian, with significant experience of a major incident room. The independence of the Unit is critical. The removal of the Provost Marshal (Army) and the Royal Military Police from investigations in 2012 led to very significant delay. This is an appropriate moment to acknowledge the debt owed to the Navy who stepped into the breach, assuming investigative responsibility for the Iraq Historic Allegations Team in 2012 and continuing command and control for the Service Police Legacy Investigations from 2017, and to the Royal Air Force who shared the investigative burden from 2017 onwards. With no experience of investigations of this order they were confronted with an overwhelming workload and through diligence and commitment were able to maintain an investigative capability. Their ordeal was entirely attributable to a lack of independence by those preceding them.

6. Improving the timeliness and handling of investigations

6.1. Introduction

6.1.1. An investigation can only commence if or when Service police are notified of incidents or allegations. The speed of reporting and the response time thereto are equally important. Procedures exist for the reporting of serious incidents and use of force incidents (defined as “*an incident where munitions or other effects employed or controlled by UK forces are known or believed to have resulted in the death or injury of any person*”³⁹⁵). Any obligation to report criminal conduct is less defined. In both cases it is clear that there is scope for a significant improvement in the reporting to Service police of both incidents and criminal conduct. Failing to report has resulted in lengthy and inconclusive investigations, over many years, causing distress to victims, suspects, witnesses and families of deceased. A delay in reporting hinders, obstructs and often prevents investigation. Incident reporting is a Commander's responsibility and both good judgement and speed are required when identifying incidents to be reported.

6.2. Major incidents and shooting incidents.

6.2.1. During overseas operations in Iraq and Afghanistan the following incidents were among an unknown number not reported to Service police:-

- i. In the case of Ali Salam Naser shot dead in Basra in April 2007 officers decided, in good faith, not to refer the case for investigation by Service police. They conducted their own review recording 79 witness statements. 17 soldiers were identified as having been directly involved in the incident. Service police were not informed until late May 2007, Basra Police having informed British Forces. No post mortem had been conducted on the body to determine what kind of bullet killed Mr Naser. 10 years later Sir George Newman, sitting as the Iraq Fatalities Investigations Inspector after the Ministry of Defence was ordered to establish an Iraq Fatality Investigation into this death, was unable to rule out that Mr Naser may have been shot by someone other than a member of the UK Forces, and thus could reach no conclusion as to

³⁹⁵ “Permanent Joint Headquarters Standard Operating Procedure 3004 – Incident Reporting” (2020), at paragraph 13(b).

responsibility.³⁹⁶

ii. In April 2003 Tariq Sabri Mahmud died either as a result of violence at the hands of UK Forces or by reason of a heart attack. Permanent Joint Headquarters had the authority to order an immediate investigation. It should have done so. Exhumation followed by a post mortem could have taken place. In fact, acting on legal advice from Permanent Joint Headquarters a record was made that no further steps were necessary. In March 2019 Sir George wrote:- *“In the absence of these steps being taken, allegations of a cover-up have been advanced, lengthy investigations and reviews have taken place and the members of the Airborne Reaction Force who had the deceased under their control have lived with years of stressful uncertainty.”*³⁹⁷ It follows that Sir George was unable to reach any conclusion as to the cause of death. He did however write:-

*“I believe that the requirement for reporting to take place within four hours of an incident occurring is an essential first step in providing a practical foundation for ensuring that the 'benchmark' for the preservation of 'culture and humanity' is met. I suggest that a need exists for the person having the duty to report to be unambiguously identified and where Coalition Forces are involved, to liaise, inform and co-operate with the other forces.”*³⁹⁸

6.2.2. The above passage chimes with recommendation 4 of Sir Thayne Forbes at the conclusion of the Al-Sweady Inquiry:-

*“A shooting Incident Policy should be drafted which is achievable in practice in Theatre, which is compliant with Article 2 of the ECHR and which enables the ascertainment of the relevant facts leading up to, during and consequent upon the Shooting Incident by an independent body such as the Royal Military Police within a time limited period after the Shooting Incident.”*³⁹⁹

³⁹⁶ “Report into the death of Ali Salam Naser,” Cm 9410 (2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/595986/1080_WL_Iraq_FAT_Cm9410_Rpt_Death_of_Ali_Naser_Web_2.pdf

³⁹⁷ “Consolidated report into the death of Tariq Sabri Mahmud,” CP 78 (2019), at paragraph 13.7. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/789240/MAHMUD_FINAL_The_Iraq_Fatality_Investigations_2019_Web_accessible.pdf

³⁹⁸ Ibid, at paragraph 14.3.

³⁹⁹ “The Report of the Al-Sweady Inquiry,” HC 818 (2014), volume II, Part 5, Chapter 2, at paragraph 5.149.

6.2.3. I have considered the existing procedures and, except in cases where a captured person dies in a detention facility,⁴⁰⁰ find little in them designed to ensure that Service police are notified as soon as possible and in any event within the four hours stipulated by Sir George. I have canvassed the possibility and practicality of a Force Provost Marshal or Deputy being embedded in Permanent Joint Headquarters and other relevant headquarters with a view to ensuring the earliest possible knowledge of a reportable incident. I was told by a senior officer:-

“We’re keen to have a Force Provost Marshal, someone who can be involved in the planning of the operation, the considerations and pressures, and who can be on hand to provide advice and raise issues if something goes amiss. We’re very keen to have a Provost Marshal as part of our Headquarters.”⁴⁰¹

6.2.4. Accordingly I canvassed this possibility with Provost Marshal (Army) who told me:-

“You could have a full time job of Force Provost Marshal even in peacetime, in Permanent Joint Headquarters for every shooting incident and every overseas incident. At the moment it’s coming to General Police Duties or Commanding Officer Special Investigations Branch or to our Headquarters. That could be the primary point of contact for all operational theatres for anything to do with policing. It would need to be at least a Lieutenant-Colonel equivalent.”⁴⁰²

6.2.5. I subsequently met remotely with Major-General Nick Borton, Chief of Staff (Operations) and Deputy Chief Joint Operations, Permanent Joint Headquarters. It was an informative and constructive discussion in which he made the point that having a Provost Officer in the Permanent Joint Headquarters was unlikely to represent value for money from a Defence and public spending perspective as UK soldiers have not fired a shot in anger for two years. There are countless incident reports coming in daily from people trapping their fingers, to rockets being fired, to people slipping in barracks. Very few require Service police investigation. He did however tell me that as a result of my earlier meeting with his personnel⁴⁰³ discussions had taken place and they thought there would be merit in establishing a Serious Incident Board comprising senior people, including Service police representation in order to direct a Service police investigation if required.⁴⁰⁴

⁴⁰⁰ Joint Doctrine Publication 1-10, 4th edition (2020), at p.93 and pp.420-421.

⁴⁰¹ Note of meeting 36.

⁴⁰² Note of meeting 54.

⁴⁰³ Note of meeting 21.

⁴⁰⁴ Note of meeting 57.

6.2.6. It was common ground that more still needed to be done in order to ensure that Service police were informed of serious incidents at the earliest opportunity. Standard Operating Procedures need to be revised to ensure there was no chance of an incident being missed. One clear conclusion from our discussion was that just as there is a single point of contact for reports feeding into the Permanent Joint Headquarters, there should also be a single point of contact within the Service police for the receipt of incident reporting, in contrast to the situation as reported by the Permanent Joint Headquarters.⁴⁰⁵ Major-General Borton agreed that with a Defence Serious Crime Unit established as a single point of contact, “*it would make things easier for us*”.⁴⁰⁶

6.2.7. We discussed the possible automated reporting of information. This is clearly not practical. It would involve Service police carrying out the triaging process, for which they would require additional resources,⁴⁰⁷ and in any event, the fact that reports are frequently received on Secret or Top Secret information systems that do not communicate with the Service police reporting system⁴⁰⁸ renders automation impossible.

6.2.8. Accordingly I recommend that further work is carried out to ensure that Service police are informed with minimum delay of reportable incidents and that Standard Operating Procedures are amended accordingly.

6.2.9. I remain concerned that peacetime and budgetary considerations are defeating the need for a use of force policy that meets the needs of the battleground where the golden hour of investigating is so critical. Bodies disappear and are buried. Reporting deadlines indicate 24 hours for a 'first impressions report'. This means that if an investigation is launched thereafter, there will have been a very substantial delay. Service police must be informed very much sooner. This is a highly complex area with much to be considered, not least sensitive information. As time pressures are only likely to become more acute during armed conflict, it is essential that a system with the requisite speed and flexibility be well-established beforehand.

6.2.10. I am also concerned, as was Sir Thayne, that Commanding Officers have a discretion

⁴⁰⁵ Note of meeting 21.

⁴⁰⁶ Note of meeting 57.

⁴⁰⁷ Note of meeting 54.

⁴⁰⁸ Note of meeting 57.

not to inform the Service police where it appears to them that there is no known breach of law or the rules of engagement. As Sir Thayne observed, “*This appears to be at odds with the notion of 'operational independence' as discussed in Al-Skeini v UK.*”⁴⁰⁹

6.2.11. I recommend that consideration be given to placing a senior officer of the Defence Serious Crime Unit within the Permanent Joint Headquarters during every overseas operation (as defined by section 1(6) of the Overseas Operations (Service Personnel and Veterans) Act 2021). It is significant that Permanent Joint Headquarters staff includes subject-matter experts from a wide variety of disciplines. I conclude that during such operations a Service police presence in a location close to the Operations Controller will improve investigative capability. It is essential that if there is a Service police presence they are of sufficient rank and so stationed as to gain the necessary information at the earliest opportunity.

6.2.12. I have already indicated that the Permanent Joint Headquarters is considering the creation of a Serious Incident Board with appropriate Service police representation to improve decisions as to whether incidents or allegations should be reported to the Defence Serious Crime Unit. I welcome this development, and recommend that it should be pursued.

6.2.13. I further recommend that a single point of contact be established within the Service police for communication of serious incidents. This should be within the Defence Serious Crime Unit once implemented.

Recommendation 19: Further work should be carried out to ensure that Service police are informed with minimum delay of reportable incidents. Standard Operating Procedures should be amended accordingly.

Recommendation 20: Consideration should be given to placing a senior officer of the Defence Serious Crime Unit within the Permanent Joint Headquarters during every overseas operation (as defined in section 1(6) of the Overseas Operations (Service Personnel and Veterans) Act 2021).

Recommendation 21: The proposal to establish a Serious Incident Board within Permanent Joint Headquarters with appropriate Service police representation should be pursued.

⁴⁰⁹ “The Report of the Al-Sweady Inquiry,” HC 818 (2014), volume II, Part 5, Chapter 2, at paragraph 5.148.

Recommendation 22: A single point of contact should be established within the Service police for communication of relevant serious incidents. This should be within the Defence Serious Crime Unit once implemented.

6.3. Criminal conduct

6.3.1. There can be no doubt that criminal conduct within the Armed Forces goes unreported as indeed it does in the world at large. The gravity of unreported criminal conduct and its impact on operational effectiveness demands attention. The most obvious example of this failing was that of Sergeant Blackman's unit in Afghanistan who observed a wounded insurgent being shot dead "*in breach of the Geneva Convention*" and kept the matter to themselves. The Australian military have had their own well reported problems. Paragraph 56 of the Inspector-General's Afghanistan Inquiry Report cites the difficulty:-

*"The Inquiry has encountered enormous difficulty in eliciting truthful disclosures in the closed, closely bonded and highly compartmentalised Special Forces community, in which loyalty to one's mates, immediate superiors and the unit are regarded as paramount, in which secrecy is at a premium, and in which those who 'leak' are an anathema."*⁴¹⁰

6.3.2. It is impossible to assess the volume of unreported crime within the Armed Forces. The failure to report will not always be the failure of mates. Commanders will protect subordinates to ensure that incidents do not attract the scrutiny of higher command. Protecting the unit by concealing unlawful conduct may be prevalent at several levels of command. Initiation ceremonies in all three Services have recently attracted extremely bad publicity disclosing numerous serious criminal acts, none of them reported by the many observers. There is an obvious conclusion to be drawn, namely that the commission of a war crime or other serious crime may well not be reported. Such failures render the commission of such acts all the more likely.

6.3.3. I recognise that training already exists on the law of armed conflict and on ethical

⁴¹⁰ Inspector-General of the Australian Defence Force, "Afghanistan Inquiry Report," Chapter 1.01, at paragraph 56, <https://afghanistandinquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>.

issues. However, education and training is an essential tool to combat both the underlying wrongdoing and failures to report such wrongdoing. This is a good time to review the training that is provided, with a focus not only on what is required, but also on how to deal practically with the kinds of situations which have arisen in the past. I therefore make the following recommendations:-

Recommendation 23: Standard training for all should include education on the psychological, cultural and other factors that are capable of leading to the commission of war crimes, and how to deal with them.

Recommendation 24: Training should reinforce that not only is a Service person not required to obey an obviously unlawful order, but it is the Service person's responsibility and legal duty to refuse to do so.

Recommendation 25: Training should include practical ethical decision-making scenarios in which Service personnel are confronted in a realistic and high-pressure setting with the requirement to make decisions in the context of war crimes being committed by members of the same unit.

Recommendation 26: The training of officers and non-commissioned officers should emphasise that absolute integrity in operational and other reporting is both an ethical obligation and is fundamental for sound command decisions and operational oversight.

6.3.4. Before the Armed Forces Act 2006, s.45(1) of the Naval Discipline Act 1957 provided:-

"It shall be the duty of every person subject to this Act who knows or has reasonable grounds for suspecting that any other person subject thereto is committing or has committed an offence under any provision of Part 1 of this Act, to take all reasonable steps within his power to cause that person to be brought to justice."

6.3.5. This duty required Service personnel to report offending appropriately and for Commanding Officers or the Royal Navy Police to investigate the offending. The provision was not replicated in the Armed Forces Act 2006. More than one senior Royal Naval Officer regretted this omission and called for the return of this duty across the three Services. One observed that whilst he could report a Commanding Officer for failing to report an offence in

prescribed circumstances as a standing order offence “*it didn't attract much sanction.*”⁴¹¹

6.3.6. It is possible that the duty was omitted in the 2006 Act because there is no legal obligation to report a criminal offence under the law of England and Wales, save in cases of treason, funding of terrorism and money laundering. It may have been considered oppressive to place a duty on Service personnel not placed on the remainder of the community. I should indicate that I do not consider that failing to report a serious offence invariably amounts to conduct prejudicial to good order and discipline, there being no Service duty to report any offence upon Service personnel other than Commanding Officers.

6.3.7. Home Office police officers who have ignored serious offending have been found guilty of the offence of misconduct in public office; see *R v Dytham* [1979] QB 722 (constable witnessing an assault who failed to intervene or protect the victim). However, whilst a Service person can be a ‘public officer’, he or she does not generally have law enforcement responsibilities. For that reason I cannot conclude that the offence of misconduct in public office will be appropriate to bring to justice those who observe serious crime committed by a Service person and choose to ignore it,

6.3.8. I have no doubt that a non-criminal Service offence of failure to report offences under sections 51 and 52 of the International Criminal Court Act 2001 (i.e. genocide, crimes against humanity, and war crimes) to the Service police should be created. It is particularly important to ensure that violent offences are not committed and that Service personnel behave properly and abide by the Geneva Conventions. The commission of such offences undermines operational effectiveness and moral legitimacy, and a duty on all Service personnel to report them if witnessed is likely to have a powerful deterrent effect on potential offenders. Observers for their part will have greater regard to the possibility of committing a serious offence, punishable by imprisonment and likely discharge, than to anything said in training concerning ethical obligation.

6.3.9. I am very grateful to Ben Bridge of Ministry of Defence Legal Advisers for preparing an excellent paper on 'Legal issues raised by reporting alleged service offences'. He has considered in necessary detail the several issues arising should such a duty be created and should a specific offence of failing to report be created. Primary legislation will be necessary and I recommend that such an offence be created.

⁴¹¹ Note of meeting 45.

6.3.10. In addition to any duty to report a serious offence, it is critical that Service personnel should have available a safe reporting mechanism, separate from their chain of command in order to report or discuss every form of unacceptable behaviour. I have met with those operating a hotline⁴¹² and commend an excellent service. During overseas operations contact may not be possible. However, there should always be an available safe reporting mechanism available to all Service personnel. A confidential channel should be available on any long-term overseas operation through which Service personnel can raise concern about the conduct of others. Those handling such matters should be deployed alongside forces wherever feasible and should have experience of overseas operations. They should be able to offer anonymity if required and should be independent of the chain of command for relevant purposes. Protecting and ensuring the safety of those who report criminal conduct is of vital importance.

6.3.11. Better than any form of report is the evidence of a camera. I recommend that serious consideration should be given to mandating the wearing and use of an appropriate helmet camera or body camera by all ground forces actively engaged in overseas operations, save where to do so would impact on the wearer's safety. Footage from these cameras should be routinely downloaded and retained.

6.3.12. Cameras should, whenever possible, be fitted in detention facilities and in temporary holding facilities in such a way as to ensure that any abuse or ill-treatment of captured persons, if committed, is recorded and retained on an Information System compatible with that in Permanent Joint Headquarters.

6.3.13. Since difficulties arose in the identification of claimants post-Iraq, the feasibility of photographing and biometrically registering all captured persons on compatible Information Systems should be explored. This would entail DNA swabs being taken and fingerprints being obtained and stored.

6.3.14. Custody records for all captured persons (whether detained in temporary holding facilities or formal detention facilities) should be compiled digitally and recorded and retained on a compatible Information System.

6.3.15. Before being released, captured persons should be photographed extensively and interviewed, being asked if they have any complaints concerning their treatment whilst captured. The entire process should be video and audio recorded whenever possible. Any

⁴¹² Note of meeting 10.

such complaint must be investigated by the Defence Serious Crime Unit.

Recommendation 27: A non-criminal Service offence of failure to report offences under sections 51 and 52 of the International Criminal Court Act 2001 (i.e. genocide, crimes against humanity, and war crimes) to the Service police should be created.

Recommendation 28: There should be a safe reporting mechanism, independent of the chain of command, to enable Service personnel to raise concerns about the conduct of others. Those handling such matters should be deployed alongside Forces wherever possible, should have experience of overseas operations, should be able to offer anonymity if required, and should be independent of the chain of command for relevant purposes.

Recommendation 29: Serious consideration should be given to mandating the wearing and use of an appropriate helmet camera or body camera by all ground forces actively engaged in overseas operations, save where doing so would impact on the wearer's safety. Footage from these cameras should be routinely downloaded and retained.

Recommendation 30: Cameras should, wherever possible, be fitted in detention facilities and temporary holding facilities in such a way as to ensure that any abuse or ill-treatment of captured persons, if committed, is recorded and retained on an Information System compatible with that in Permanent Joint Headquarters.

Recommendation 31: The feasibility of fingerprinting and biometrically registering all captured persons on compatible Information Systems should be explored. This would entail DNA swabs being taken and fingerprints being obtained and stored.

Recommendation 32: Custody records for all captured persons (whether detained in temporary holding facilities or formal detention facilities) should be compiled digitally and recorded and retained on a compatible Information System.

Recommendation 33: Before being released, captured persons should be photographed extensively and interviewed, being asked if they have any complaints about their treatment whilst captured. The entire process should be video and audio recorded whenever possible. Any such complaint must be investigated by the Defence Serious Crime Unit.

6.4. Operational record keeping.

6.4.1. The creation and maintenance of operational records is of vital importance to the military, to investigators, to litigators, and to historians. A consequence of moving from paper to electronic data has been a hindrance to those seeking an accurate and readable account of past operations. Sir Thayne encountered such handicap to his learning and sought a remedy for future investigations when he drafted his first recommendation in his report of the Al-Sweady Inquiry:-

*“Consideration should be given to the establishment of a policy by the Ministry of Defence to ensure that all documents or other material, including electronic material, are retrieved from theatre and elsewhere at the conclusion of an operation, catalogued and stored in secure accommodation for a period of at least 30 years and all searches of that material recorded, so that the Department is able to say what material is available and its location, and if the need arises, to confirm in litigation or to a Public Inquiry that it has complied with the obligation to disclose relevant material.”*⁴¹³

6.4.2. Sir Thayne made reference to the Corporate Memory Guidance leaflet entitled ‘Your records are your defence.’ Also, in the Operational Record Keeping (7th attachment) document, dated October 2005, the final page summary section clearly states that *“the rigorous keeping of an operational record will provide valuable protection for commanders and soldiers against false or malicious allegations.”*⁴¹⁴

6.4.3. The necessity for keeping such an operational record is manifest. The manner of its compilation is more difficult to specify. There is every danger of data overload in such a process. The problem of record keeping is linked with technological change and the resulting proliferation of information. Whereas previously the operational record consisted of meticulously compiled commanders’ war diaries, now there may be many terabytes of largely unstructured information.⁴¹⁵ Bringing some form of structure to, or electronically cataloguing, this data will assist the Service police in quickly locating the information relevant to their investigations. It will be for the Military and for lawyers to specify the vital information to be

⁴¹³ “The Report of the Al-Sweady Inquiry,” HC 818 (2014), volume II, Part 5, Chapter 2, at paragraph 5.125.

⁴¹⁴ Ibid, at paragraph 5.111.

⁴¹⁵ Note of meeting 59.

collated and for technologists to identify and create the means of collecting and keeping the relevant data. I have no hesitation in recommending that the creation or upgrading of an Operational Record Keeping System be given immediate attention.

Recommendation 34: The creation or upgrading of an Operational Record Keeping System should be given immediate attention.

6.5. Investigative time limits.

6.5.1. Prolonged and seemingly endless investigations and reinvestigations have subjected many of our Service personnel to great stress and unjustifiable pressures. I have had regard to interesting, helpful and constructive suggestions by His Honour Jeffrey Blackett, Judge Advocate General of the Armed Forces, 2004-2020, whom I had the pleasure of interviewing, and by Lord Thomas of Gresford who tabled an amendment to the Overseas Operations (Service Personnel and Veterans) Bill which he withdrew after having received an undertaking that I would consider his amendment in this review.

6.5.2. There is considerable merit in both submissions and they have informed my consideration below of possible non-legislative protocols that would minimise delays in future investigations.

His Honour Jeffrey Blackett's proposals

6.5.3. His Honour made four proposals:-

1. *Introduce a statutory time bar for investigations into minor offences similar to "summary matters" in our Magistrates Courts. There should be a limit of 6 months where the allegations relate to summary only matters or to a matter which is de minimis.*

2. *Introduce judicial oversight of investigations to enable a court to set a timetable for investigations, providing an opportunity for a judge to stop an unmeritorious or vexatious investigation early.*

3. *Raise the bar for reinvestigation. Following a person's acquittal or a decision*

that an investigation should cease no further investigation shall be commenced unless compelling new evidence has become available and the evidence is sufficiently strong to support a conviction.

4. *Restrict access to public funds for complainants. There should be no access to public funds for complainants where the allegation is de minimis or after a decision has been made not to prosecute.*

6-month time limit

6.5.4. I have discussed this proposal with His Honour and others and see its merit, save and except that the provision cannot be used to prevent offences committed in prescribed circumstances or Schedule 2 offences being prosecuted.

6.5.5. I am informed that adopting section 127 of the Magistrates' Courts Act 1980 will not achieve the desired effect. Accordingly I adopt the following recommendation:-

Recommendation 35: The Armed Forces Act should be amended to seek to reproduce the effect of section 127 of the Magistrates' Courts Act 1980 which generally prevents offences only triable in a magistrates' court from being tried in the civilian system unless the charge was laid within 6 months from the time when the offence was committed. Nothing in this provision will apply to any Schedule 2 offence or an offence in prescribed circumstances.

6.5.6. This provision will necessarily be considered by a parliamentary draftsman. As to the *de minimis* aspect of the proposal, Jonathan Rees QC, Director of Service Prosecutions, observes that non-indictable criminal offences should not be prosecuted after six months. The Service Prosecuting Authority currently take account of how such a 6-month time limit would operate when applying the public and Service interest test.

Judicial oversight

6.5.7. His Honour's second suggestion was judicial oversight of investigations. I have adapted this suggestion having had regard to the role of the Director of Service Prosecutions. It is significant that in *Ali Zaki Mousa (No 2)* Sir John Thomas, as he then was, said:-

“The Director of Service Prosecutions is a lawyer of very considerable distinction and experience. He should have been involved in making a decision at the outset of each case involving death referred to IHAT as to whether prosecution was a realistic prospect and, if there was something to suggest it might be, in directing the way that the inquiry was to be conducted and in a regular review of each case to see if a prosecution remained a realistic possibility.”⁴¹⁶

6.5.8. My adapted suggestion accordingly gives the Director of Service Prosecutions a significant role in the process, including in ensuring timeliness.

6.5.9. It is important to underline at this stage that the Director of Service Prosecutions is independent and thus any process imposing timescales and duties would require an agreed protocol which the head of the Defence Serious Crime Unit and the Director – but also the relevant Coroner and the Judge Advocate General – would have to sign up to. Timescales would have to reflect the volume of investigations. I am confident, however, that agreements along the lines proposed, doubtless with variations to achieve flexibility, can be achieved once the issue of coronial jurisdiction has been resolved. I consider an agreed protocol preferable to legislation which could be perceived to compromise the Director's independence.

6.5.10. It is clear that my review can only suggest the form and outline of any agreement. I have prepared below a draft of the sort of agreement which I have in mind. The current Director, while positive about the intention underlying this proposal, was careful to reserve a right to consider further the detail of the proposals and the way in which they would interact with existing legal powers and duties.

6.5.11. I have drafted indicative protocols for Fatality cases (Article 2) and for Ill-treatment cases (Article 3). These serve the purpose of indicating the approach which I recommend should be adopted and of setting out the time limits which I consider might be observed. For the purpose of preparing these drafts, I have assumed that a ‘relevant Coroner’ will be given jurisdiction to oversee the investigations (see paragraphs 1.7.5 to 1.7.7 above). I recognise that that change may in itself require legislation, although I leave open the possibility that the existing role of the Inspector might be reformed to adopt a more coronial process without statutory authority. If legislation is introduced, some of the matters included in the Protocol may no longer need to be the subject of separate agreement; I have included them on the

⁴¹⁶ *R (on the application of Mousa & Others) v Secretary of State for Defence* [2013] EWHC 1412 (Admin), at §182.

basis that they set out my expectation as to how the process will work overall. In any event, the Article 2 protocol could not be brought fully into effect until the question of who will oversee non-criminal Article 2 investigations is resolved. I consider, however, that the parts which do not relate to the role of the relevant Coroner would be agreed on an interim basis.

6.5.12. Both the indicative protocols for Fatality cases (Article 2) and for Ill-treatment cases (Article 3) place the Service Prosecuting Authority and the Director of Service Prosecutions at the very centre of the process. They envisage that a prosecutor will be appointed and provide advice to the Service police from a very early point in the investigation, and that there will be regular formal reviews of cases to ensure they are completed as quickly as possible. The full text of the protocols indicates the crucial role of the Director which I believe will ensure timeliness and efficiency of both processes.

6.5.13. It is important to observe that the Director of Service Prosecutions currently has no power to direct a Provost Marshal or the Service Police to investigate any matter. The relevant legislation for Australia, Canada, and South Africa similarly confer no such power. Only New Zealand provides a statutory power for the Director of Military Prosecutions to direct a provost officer to investigate any matter or to arrange the investigation of that matter.⁴¹⁷ A provost officer must comply with such a direction.

6.5.14. I am satisfied however that, having regard to the overall working relationship between the Service police and the Director of Service Prosecutions, in the short term legislation along New Zealand lines will not be necessary to give effect to this protocol. It will be clearly understood that nothing in the protocols undermines the independence of either the Service police or the Director. For example, I have recommended that where consideration is given to reopening an investigation, the Director's opinion on the question whether there is new information capable of leading to compelling evidence that might materially affect a previous decision and lead to a charge being laid should be sought. This is information which any investigating officer, acting reasonably, would have regard to. The protocols merely set out the working expectations. In due course, if a decision is made to restructure the Armed Forces Act, the appropriate power should be conferred on the Director of Service Prosecutions.

Recommendation 36: The Provost Marshal (Serious Crime), Director of Service Prosecutions and Judge Advocate General should be asked to agree protocols along

⁴¹⁷ New Zealand Armed Forces Discipline Act 1971, s.101G (Power of Director of Military Prosecutions to direct investigation).

the lines I have outlined at 6.6 (Article 2 protocol) and 6.7 (Article 3 protocol).

Recommendation 37: If it is decided to restructure the Armed Forces Act, a power to direct an investigation should be conferred upon the Director of Service Prosecutions.

Bar for reinvestigation

6.5.15. His Honour's third proposal was to "*raise the bar for reinvestigation.*"

6.5.16. Underlying this proposal is the recognition that there is a balance to be struck between the need for finality in any criminal process and the need to ensure a rigorous investigation of any allegation which merits it. The balance between these two competing factors will always need to be considered on a case by case basis; but the proposal reflects a view that the balance has to date given insufficient weight to the need for finality. Given His Honour's former role as Judge Advocate General (which he held during almost the whole of the period since operations commenced in Iraq and Afghanistan), his views on this issue are to be accorded particular weight. From the evidence which I have seen, I agree that the balance needs to be reassessed.

6.5.17. It is of course an essential prerequisite to this proposal that any initial investigation be full, thorough and demonstrably sufficient to comply with the requirements of the International Criminal Court and the European Court of Human Rights, and to satisfy the public interest in establishing the truth wherever credible allegations are made. I am satisfied that the other proposals contained within this Chapter should provide sufficient safeguards to ensure that this will be the case. On this basis it is only where new information or evidence emerges that the question of reinvestigation should arise.⁴¹⁸

6.5.18. His Honour's proposal reflects ss.76-83 of the Criminal Justice Act 2003. Under those provisions, the Court of Appeal can order a retrial if there is new and compelling evidence against an acquitted person. Evidence is compelling if it is reliable and it is substantial and in the context of the outstanding issues it appears highly probative of the case against the

⁴¹⁸ In particular, given that there will be express judicial consideration of the requirements of the Convention, it is difficult to envisage circumstances in which reinvestigation is required to comply with the Convention unless new information has come to light. However, any truly unforeseen case could no doubt be dealt with by way of exception to an agreement which does not have the force of law.

acquitted person.

6.5.19. The legal context in which this test appears is slightly different, but I consider that the similarities are also important. Both situations involve the balance which I have identified between finality and the pursuit of justice. The Strasbourg Court has not questioned the importance of finality in the double jeopardy context.⁴¹⁹ In both contexts, the question is ultimately whether the new information or evidence is of such significance as to justify exposing what may be an innocent suspect to a further ordeal. In both contexts, that may well be justified if reliable, substantial and highly probative new information emerges. In both contexts, it will not be justified if the new material makes very little practical difference.

6.5.20. I therefore agree with the spirit of this proposal. I have, however, modified the language to reflect the fact that the assessment of the material is to be made at a different stage. It is unlikely that evidence will have been considered by a jury and the matters potentially triggering a further investigation may not be in evidential form. In this context, the key questions are whether the information may *generate* compelling evidence (which entails an assessment of the plausibility and credibility of the allegations amongst other factors) and likely to be of real significance to the outcome.

6.5.21. Accordingly, I propose that a fresh investigation should not be undertaken (if there has already been an investigation which accords with the protocols) unless the Director of Service Prosecutions indicates that the matters considered to require it constitute new information capable of leading to compelling evidence that might:- (a) materially affect the previous decision; and (b) lead to a charge being laid.

6.5.22. In my view, this provision would entail a reinvestigation in any circumstance in which that was required by Article 2 or Article 3 of the European Convention. The matters considered by the Strasbourg Court on any reinvestigation are very similar.⁴²⁰ However, on the basis that the jurisprudence in this (as any other) area may develop, it would be open to the Director and the Provost Marshal (Serious Crime) to insert an express provision to the effect that the matter will also be reinvestigated if Article 2 of the Convention so requires.

6.5.23. I note finally that s.115A of the Armed Forces Act prevents any person who is not a member of the Service police from directing an investigation. It is clear that while the Director

⁴¹⁹ Article 4 of Protocol 7 to the European Convention contains an express, though qualified, double jeopardy protection.

⁴²⁰ See, for example, *Brecknell v United Kingdom*, 32457/04, 27 November 2007.

of Service Prosecutions can advise (as he is clearly well placed to do) on what might affect any previous decision on prosecution or lead to a charge being laid, the ultimate question whether to investigate is one for the relevant Provost Marshal. I see no difficulty, in this connection, with the agreement of the protocols. This would simply constitute an indication, freely entered into, as to how the Provost Marshal (Serious Crime) proposes to direct his or her investigations (that is, whether or not to conduct them) in light of the relevant views of the Director of Service Prosecutions on matters relating to charge which are properly for him.

Recommendation 38: The protocols should include a provision agreeing that there will be no fresh criminal investigation unless the Director of Service Prosecutions considers that there is new information capable of leading to compelling evidence which might:- (a) materially affect the previous decision; and (b) lead to a charge being laid.

Public funds

6.5.24. I recognise the appeal of such a proposal. However, amending the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to restrict access to legal aid (whether under the general funding or exceptional funding provisions) may be incompatible with obligations under the European Convention on Human Rights. Whilst I do not adopt this proposal as a recommendation, I recommend that the Ministry of Justice be asked to consider the feasibility of restricting legal aid along the lines proposed.

Recommendation 39: The Ministry of Defence should ask the Ministry of Justice to examine the feasibility of restricting access to public funds for complainants where the allegation is *de minimis* or after a decision has been made not to prosecute.

Lord Thomas of Gresford's draft amendments.

6.5.25. A substantial part of Lord Thomas's draft has been replicated or developed in the draft protocols. It has been of invaluable assistance. Whilst I favour agreement of a non-statutory protocol at present, similar to existing arrangements for agreeing draft Protocols on concurrent jurisdiction with the Director of Public Prosecutions, with the Lord Advocate and with the Director of Public Prosecutions for Northern Ireland, it may be that in due course a

statutory procedure will evolve. The role proposed by Lord Thomas for the Service Prosecuting Authority and the Director of Service Prosecutions is replicated in the indicative draft protocols.

6.5.26. The proposal that the Judge Advocate General may give Practice Directions as he or she deems appropriate for the investigation of allegations arising out of overseas operations may, I respectfully suggest, risk confusion with the role of the Director of Service Prosecutions. I do believe however that there is a role to be played by the Judge Advocate General in Article 3 cases by way of judicial oversight once the functions of the Director have been completed. The Judge Advocate General or nominee would consider whether the Defence Serious Crime Unit investigation and any prosecution were sufficient in scope to discharge any investigative duty under Article 3 of the European Convention on Human Rights and whether the form of the investigation met an appropriate standard. In Article 2 cases a similar role may be performed by the Armed Forces Coroner subject to his or her appointment, failing which by the Chief Coroner or his or her nominee.

6.5.27. I recognise that these proposals may require an amendment to existing legislation or that legislation may be considered desirable to underpin any new judicial role. The Ministry of Justice will of course need to be consulted. I have however included indicative text which explains the role which I would propose for the judiciary in due course, subject to these matters.

Recommendation 40: The Judge Advocate General or nominee should provide judicial oversight in respect of investigations into allegations of ill-treatment on overseas operations. This role should be reflected in the Article 3 protocol.

Recommendation 41: The Ministry of Defence should engage with the Ministry of Justice on the proposal to extend the jurisdiction of coroners to include deaths of non-UK personnel on overseas operations where the Service police investigation has not fully satisfied any Article 2 obligation.

6.6. Indicative Article 2 protocol

6.6.1. This is the text of the protocol which I propose should be agreed for fatality cases:-

The criminal investigation

1. An investigation into an allegation of unlawful killing made against Her Majesty's Armed Forces in the context of an overseas operation will be commenced upon that allegation being communicated to the Defence Serious Crime Unit's crime reporting and management unit.
2. An appropriately qualified and experienced investigator will be appointed and assigned to the case as soon as possible, and in any case **within three days** of it being communicated.
3. Upon being allocated the case, the investigator will notify the Service Prosecuting Authority of the allegation and the facts as reported to them. An appropriately qualified and experienced prosecutor will be assigned to the case as soon as possible, and in any case **within seven days** of it being notified to the Service Prosecuting Authority.
4. The investigator and prosecutor will co-operate closely thereafter to agree the investigative strategy and to monitor progress. They will be accountable to the Provost Marshal (Serious Crime) and Director of Service Prosecutions respectively for ensuring the quality and timeliness of the investigation, and will be guided at all times by the need to reach the disposal or referral point as quickly as possible without compromising the effectiveness of the investigation.
5. **Within 30 days** of the case being notified to the Service Prosecuting Authority, the prosecutor will either:-
 - (a) advise that the criminal investigation should cease, if he/she considers that there is no realistic prospect of obtaining sufficient evidence to satisfy the evidential sufficiency test; or
 - (b) give appropriate advice and guidance to the investigator concerning avenues of inquiry.
6. **Within seven days** of receiving that advice, the investigator will submit an initial investigation report and assessment to the relevant Coroner.
7. As the criminal investigation proceeds, the Defence Serious Crime Unit and Service Prosecuting Authority will convene a Joint Case Review Panel – comprising

the investigator, the prosecutor, the relevant senior investigating officer, the relevant managing prosecutor, and if appropriate the Provost Marshal (Serious Crime) and Director of Service Prosecutions or their nominees – to review and monitor progress **at intervals not exceeding two months**. The purpose of the Joint Case Review Panel will be to assess whether prosecution remains a realistic possibility, and if so to agree reasonable and proportionate lines of inquiry.

8. At the conclusion of the criminal investigation, the senior investigating officer – whether in consulting or referring the case to the Director of Service Prosecutions as required by s.116 Armed Forces Act, or upon concluding that no such obligation arises – will submit a final report with accompanying case papers to the Director of Service Prosecutions. This report will be submitted **within 14 days** of the decision to conclude the investigation, and will include the senior investigating officer's assessment of the strength of the evidence that an offence has, or may have been, committed, identifying any lines of inquiry that have not been pursued and the reasons for the decision not to do so.

9. The Director of Service Prosecutions will formally respond to a consultation **within 28 days**.

Decisions and notifications

10. The Defence Serious Crime Unit's victim and witness support unit will take reasonable steps to notify the complainant, (or any legal representative where notice of acting has been served), of any decision to terminate the investigation **within 28 days** of the senior investigating officer receiving the Director of Service Prosecutions' response to the consultation. In cases where the complainant invokes the Victim's Right of Review process (if available), the victim and witness support unit will take reasonable steps to notify them (or any legal representative) of the outcome of that review **within 28 days** of that process concluding.

11. Where the case is referred to the Director of Service Prosecutions for a charging decision, the Director of Service Prosecutions will make a prosecution decision **within three months** of the case being referred by the Defence Serious Crime Unit, save in cases of exceptional complexity; in simple cases a prosecution decision will be made **within 30 days**.

12. In cases in which a decision is made not to prosecute, the Director of Service Prosecutions will take reasonable steps to notify the complainant, (or any legal representative where notice of acting has been served), **within 28 days** of that decision. Where the complainant invokes the Victim's Right of Review process, the Director of Service Prosecutions will take reasonable steps to notify them (or any legal representative) of the outcome of that review **within 28 days** of that process concluding.

13. Where a case is referred to a Commanding Officer, they will decide, **within 14 days**, whether to hear the case summarily or to refer it to the Director of Service Prosecutions.

Reinvestigation

14. After the Director of Service Prosecutions has received the senior investigating officer's final report, a fresh criminal investigation will not be commenced unless the Director of Service Prosecutions considers that there is new information capable of leading to compelling evidence which might:-

- (a) materially affect the previous decision; and
- (b) lead to a charge being laid.

15. In considering whether any fresh criminal investigation should be undertaken, the Director of Service Prosecutions will also take into account the quality, thoroughness, timeliness, independence and accountability of any previous investigative process.

Inquest

16. The senior investigating officer will inform the relevant Coroner of a charging decision **within seven days** of that decision being made.

17. **Within seven days** of any negative charging decision or of any final resolution of criminal proceedings, the Defence Serious Crime Unit will submit the final report together with a schedule of all evidence and material relating to the criminal

investigation and any prosecution to the relevant Coroner and the Ministry of Defence's Directorate of Judicial Engagement Policy.

18. Upon receipt of the said material the relevant Coroner will consider whether the Defence Serious Crime Unit investigation and any prosecution were sufficient in scope to discharge any investigative duty under Article 2 of the European Convention on Human Rights and whether the form of the investigation met an appropriate standard.

19. In considering whether the investigation has been of the required scope and form, the relevant Coroner will consider the factors set out in *Al-Saadoon v Secretary of State for Defence* [2016] 1 WLR 3625, in particular at §§110-116 and §§197-203.

20. If he/she considers that the investigative duty under Article 2 has not been discharged, the relevant Coroner will either hold an inquest or direct another Coroner to conduct an inquest.

21. The Coroner to whom the direction is given will conduct an inquest as soon as practicable.

22. The Coroner will conduct the inquest, adopting established procedures adopting the approach outlined in *R (Middleton) v HM Coroner for West Sussex* [2004] 2 AC 182, i.e. seeking to establish who the deceased was, and when, where, by what means and in what circumstances the deceased came about his death. The Coroner will also consider making recommendations about lessons to be learned, where appropriate.

23. It will be a matter for the Coroner to decide what needs to be disclosed to interested parties.

24. The inquest will be conducted by video link, and an interpreter provided, to enable the next of kin to follow the proceedings.

25. In the event of the relevant Coroner deciding not to hold or order an inquest, he/she will inform the next of kin and the Ministry of Defence **within 21 days** together with the reasons for not holding or ordering an inquest, and will give the next of kin any information relevant to challenging that decision.

6.7. Indicative Article 3 protocol

6.7.1. This is the text of the protocol which I propose should be agreed for ill-treatment cases:-

The criminal investigation

1. An investigation into an allegation of torture or of inhuman or degrading treatment or punishment made against Her Majesty's Armed Forces in the context of an overseas operation will be commenced upon the allegation being communicated to the Defence Serious Crime Unit's crime reporting and management unit.
2. The crime reporting and management unit will either:-
 - (a) accept the allegation for investigation by the Defence Serious Crime Unit; or
 - (b) cause the allegation to be investigated by a Service police force instead.
3. An appropriately qualified and experienced investigator will be appointed and assigned to the case as soon as possible, and in any case **within three days** of it being communicated.
4. Upon being allocated the case, the investigator will notify the Service Prosecuting Authority of the allegation and the facts as reported to them. An appropriately qualified and experienced prosecutor will be assigned to the case as soon as possible, and in any case **within seven days** of it being notified to the Service Prosecuting Authority.
5. The investigator and prosecutor will co-operate closely thereafter to agree the investigative strategy and to monitor progress. They will be accountable to the relevant Provost Marshal and Director of Service Prosecutions respectively for ensuring the quality and timeliness of the investigation, and will be guided at all times by the need to reach the disposal or referral point as quickly as possible without compromising the effectiveness of the investigation.

6. **Within 30 days** of the case being notified to the Service Prosecuting Authority, the prosecutor will either:-

(a) advise that the criminal investigation should cease if he considers that there is no realistic prospect of obtaining sufficient evidence to satisfy the evidential sufficiency test; or

(b) give appropriate advice and directions to the investigator concerning possible avenues of inquiry.

7. As the criminal investigation proceeds, the Defence Serious Crime Unit (or Service police force) and Service Prosecuting Authority will convene a Joint Case Review Panel – comprising the investigator, the prosecutor, the relevant senior investigating officer, the relevant managing prosecutor, and if appropriate the relevant Provost Marshal and Director of Service Prosecutions or their nominees – to review and monitor progress **at intervals not exceeding two months**. The purpose of the Joint Case Review Panel will be to assess whether prosecution remains a realistic possibility, and if so to agree reasonable and proportionate lines of inquiry.

8. At the conclusion of the criminal investigation, the senior investigating officer – whether in consulting or referring the case to the Director of Service Prosecutions as required by s.116 Armed Forces Act, or upon concluding that no such obligation arises – will submit a final report with accompanying case papers to the Director of Service Prosecutions. This report will be submitted **within 14 days** of the decision to conclude the investigation, and will include the senior investigating officer's assessment of the strength of the evidence that an offence has, or may have been, committed, identifying any lines of inquiry that have not been pursued and the reasons for the decision not to do so.

9. The Director of Service Prosecutions will formally respond to a consultation within **28 days**.

10. Where the case is referred to the Director of Service Prosecutions for a charging decision, the Director of Service Prosecutions will make a prosecution decision **within three months** of the case being referred by the Defence Serious Crime Unit, save in cases of exceptional complexity; in simple cases a prosecution decision will be made **within 30 days**.

11. Where a case is referred to a Commanding Officer, they will decide, **within 14 days**, whether to hear the case summarily, or to refer it to the Director of Service Prosecutions, or to take no further action.

12. In cases in which a Commanding Officer decides to take no further action, the Defence Serious Crime Unit's victim and witness support unit will take reasonable steps to notify the complainant, (or any legal representative where notice of acting has been served), of the Commanding Officer's decision that there will not be a summary hearing in relation to any allegation relating to that complainant investigated by the Defence Serious Crime Unit (or Service police force) **within 28 days** of that decision.

Judicial oversight

13. The Director of Service Prosecutions will apply to the Judge Advocate General or his/her nominee **within 28 days** of deciding:-

- (a) to agree with the senior investigating officer's decision to terminate an investigation; or
- (b) not to prosecute.

14. The application will include the senior investigating officer's final report and the Director of Service Prosecutions' assessment of the strength of the evidence and of the potential for further lines of inquiry to yield better evidence.

15. The Judge Advocate General or his/her nominee will decide such applications on the papers as soon as possible. In doing so, the Judge Advocate General will:-

- (a) approve the Director of Service Prosecutions' endorsement of the senior investigating officer's decision to terminate the investigation; or
- (b) find that the decision to terminate the investigation was not reasonable and remit the investigation to the senior investigating officer; or
- (c) approve the Director of Service Prosecutions' decision not to prosecute; or
- (d) find that the decision was not reasonable and remit the investigation to the Director of Service Prosecutions to be retaken.

16. The Defence Serious Crime Unit's victim and witness support unit will take

reasonable steps to notify the complainant, (or any legal representative where notice of acting has been served), of any decision to terminate the investigation **within 28 days** of being notified that the Judge Advocate General or his/her nominee has approved that decision.

17. In cases in which a decision is made not to prosecute, the Director of Service Prosecutions will take reasonable steps to notify the complainant, (or any legal representative where notice of acting has been served), **within 28 days** of being notified that the Judge Advocate General or his/her nominee approving that decision.

Reinvestigation

18. After the Director of Service Prosecutions has received the senior investigating officer's final report, a fresh criminal investigation will not be commenced unless the Director of Service Prosecutions consider that there is new information capable of leading to compelling evidence which might:-

- (a) materially affect the previous decision; and
- (b) lead to a charge being laid.

19. In considering whether any fresh criminal investigation should be undertaken, the Director of Service Prosecutions will also take into account the quality, thoroughness, timeliness, independence and accountability of any previous investigative process.

20. In cases where the Director of Service Prosecutions decides that a fresh criminal investigation should be undertaken but the Judge Advocate General or his/her nominee has previously approved a decision by the senior investigating officer to terminate an investigation or by the Director of Service Prosecutions not to prosecute, he/she will apply to the Judge Advocate General or his/her nominee for authorisation to open the fresh criminal investigation.

21. The Judge Advocate General or his/her nominee will decide the application on the papers as soon as possible.

22. The Defence Serious Crime Unit's victim and witness support unit will take

reasonable steps to notify the complainant, (or any legal representative where notice of acting has been served), of the outcome of that application **within 28 days** of being notified of the decision of the Judge Advocate General or his/her nominee.

Article 3 compliance

23. **Within 14 days** of being notified of:-

- (a) a decision by the Judge Advocate General or his/her nominee to approve an application in respect of terminating an investigation or a negative charging decision;
- or
- (b) any final resolution of criminal proceedings

the Defence Serious Crime Unit will submit the senior investigating officer's final report together with any material relevant to the criminal investigation and any prosecution to the Ministry of Defence's Directorate of Judicial Engagement Policy to consider whether the combination of the criminal investigation and any civil proceedings has fully satisfied any investigative duty that may arise under Article 3 of the European Convention on Human Rights.

24. In considering whether the investigation has been of the required scope and form, the Ministry of Defence will consider the factors set out in *Al-Saadoon v Secretary of State for Defence* [2016] 1 WLR 3625, in particular at §§238-240.

25. In cases in which a decision is made that no further investigation is required to satisfy any investigative duty that may arise under Article 3 of the European Convention on Human Rights, the Ministry of Defence will take reasonable steps to notify the complainant **within 28 days** of that decision.

7. The Service Prosecuting Authority and the Service Courts

7.1. Introduction

7.1.1. The head of the Service Prosecuting Authority, Jonathan Rees QC, took up his post as Director of Service Prosecutions in November last year. He is a former Senior Treasury Counsel at the Old Bailey, and follows Bruce Houlder QC and Andrew Cayley QC, both highly respected criminal practitioners. The ability and standing of all three is an indicator of the challenge and importance of this wholly independent role at the centre of the Service Justice System.

7.1.2. The Service Prosecuting Authority, at present, consists of the Director, Deputy Director, and 26 lawyers as Prosecutors, and a Support Staff of Practice Manager, Trial Arranger, Finance Officer, four Assistant Prosecutors and 16 Administrative Staff.⁴²¹ It is based at RAF Northolt. His Honour Shaun Lyons recommended that there should be a review of the staffing levels in the Service Prosecuting Authority.⁴²² This was done and the Director is confident that the current prosecutorial structure and prosecutor numbers and their experience will enable the Authority to meet current commitments and provide the nucleus from which to grow the organisation, should it be required. A significant increase in allegations of operational offending would require a growth in prosecutor numbers. A surge in requirement could be met by drawing additional lawyers from the single Services or by limited use of contractors.

7.1.3. A problem mentioned to me was the fact that a person may join the Authority for a tour, become a competent prosecutor and leave, not to be seen again for between two and eight years.⁴²³ They have to do their tours in other areas of Service law to gain promotion. Bruce Houlder QC was troubled by this requirement and prepared a paper proposing a corps of permanent prosecutors.⁴²⁴ I have read the paper. It did not achieve the desired effect. The Unified Career Model, which is currently being developed with the medical and cyber specialisms in mind, is being designed to cater for the problem of skilled individuals leaving after a single tour to gain promotion by providing varied career pathways. The current Director

⁴²¹ "Offences on Overseas Operations – the Service Prosecuting Authority Perspective," 13 April 2021.

⁴²² His Honour Shaun Lyons CBE, "Service Justice System Review (Part 1), Recommendation 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."*

⁴²³ Note of meeting 31; and Note of meeting 32.

⁴²⁴ "Improving the Effectiveness of the Service Prosecuting Authority: DSP Discussion Paper," 8 May 2009.

however has seen advantage in prosecutors gaining different skill sets as a result of having experience in other legal branches. He is seeking to negotiate longer tours with the three Service legal services as part of a service level agreement.⁴²⁵ There are longer tours at the senior end but shorter at the junior end. As to whether the Unified Career Model might in due course benefit the Authority, the Director has an open mind, seeing both advantages and disadvantages.⁴²⁶

7.1.4. By some distance the single largest problem facing the Authority is the lack of up-to-date information technology. Civilian Prosecutors have a digital case system which allows information to be shared with both the Courts and the Defence. The lack of such a system necessitates the moving of information from one database to another which is simply time wasted in avoidable processes.⁴²⁷ According to the Director:- *“We don’t have a digital case system that allows us to share information with the Judge Advocate General or the Defence. ... We’re trying to hitch ourselves to the bandwagon of the Common Platform. If we showed you our case management system, it’s prehistoric.”*⁴²⁸ It is significant that when I met the Judge Advocate General, His Honour Judge Alan Large, he made exactly the same point.⁴²⁹

7.1.5. The Common Platform digital case management system will be functioning in every criminal court in England and Wales by the end of 2021⁴³⁰ and will allow *“parties including the judiciary, solicitors and barristers, the Crown Prosecution Service and court staff to access case information”* while strictly controlling access *“to make sure that each participant only sees the material that is appropriate to them”*.⁴³¹ When I suggested that the Military Court Centres should simply be treated as another Crown Court and linked to the Common Platform, Judge Large expressed support for this proposition.⁴³² The combined size of the Military Court Centres (four court rooms) is no greater than a small Crown Court such as Burnley or Grimsby. I am told that the problem of security is raised as a possible ground for excluding the Service Courts from the Common Platform. I can see no justification for such apprehension. Terrorist trials with major security problems are heard elsewhere. It is extremely rare indeed for any Court Martial to involve secret or classified information. As Judge Large observed it would be

⁴²⁵ Note of meeting 32.

⁴²⁶ Note of meeting 51.

⁴²⁷ Note of meeting 32.

⁴²⁸ Ibid.

⁴²⁹ Note of meeting 55.

⁴³⁰ <https://www.gov.uk/guidance/hmcts-common-platform-participating-criminal-courts>

⁴³¹ <https://www.gov.uk/guidance/hmcts-services-common-platform>

⁴³² Note of meeting 55.

a simple matter to exclude any such case from the platform.⁴³³

7.1.6. His Honour Shaun Lyons and Professor Sir Jon Murphy made recommendations concerning case management systems and the capture of management information in the Service Justice System Review. Their Recommendations 29 and 30 refer to them.⁴³⁴ I do not intend to review that excellent work; indeed my Terms of Reference prohibit it. I refer to these recommendations as an indication of the necessity for up-to-date data collection and case management systems. As I write, *The Times* reports the Lord Chief Justice as having said that outdated technology was hindering efforts to tackle the backlog of cases in the civilian courts:-

*“You might think our system could produce an accurate figure of how many trials there were at the end of every day, but they can’t. We are using clunking old systems that frankly should be in the Science Museum”.*⁴³⁵

7.1.7. The Canadians have encountered similar problems:-

“Recommendation 3.70:- The Canadian Armed Forces should put in place a case management system, that contains the information needed to monitor and manage the progress and completion of military justice cases.

National Defence’s response:- Agreed. ...the Office of the Judge Advocate General has received funding for and is developing a military justice case management tool and database....⁴³⁶

7.1.8. The Department of National Defence’s response to a related recommendation (3.31) in the same report explains further:-

⁴³³ Ibid.

⁴³⁴ His Honour Shaun Lyons and Professor Sir Jon Murphy QPM DL LLB, “Service Justice System Review (Part 2), Recommendation 29: “A working group chaired by the MOD centre and comprising representatives of the three Services, the Provost Marshals, SPA and OJAG/MCS take forward for SJB consideration proposals for the common collation of management data and principles for its oversight. The Review’s proposals are contained in Appendix B;” Recommendation 30: “The same Working Group oversees the setting of target time scales as recommended in Sections A to D below at paragraphs 206 to 247.”

⁴³⁵ Jonathan Ames, “Judge hints juries could be cut in size to tackle trial backlog,” *The Times*, 22 June 2021, <https://www.thetimes.co.uk/article/cut-juries-tackle-crown-court-trials-backlog-c8lsm3f5h>

⁴³⁶ 2018 Spring Reports of the Auditor General of Canada to the Parliament of Canada, “Report 3—Administration of Justice in the Canadian Armed Forces,” https://www.oag-bvg.gc.ca/internet/English/parl_oag_201805_03_e_43035.html

“[This system] will electronically track discipline files from the receipt of the complaint through to closure of the file. The system will allow military justice stakeholders to access real-time data on files as they progress through the military justice system and will prompt key actors when they are required to take action. It is expected that management of military justice system files with [the new information management system] will significantly reduce delays. [The system] will also be integrated with a new military justice performance measurement system... [which] will deliver measurable data on the performance of the military justice system, allowing for the identification of system weaknesses – including in the area of delay – and the development of targeted measures to address them.”⁴³⁷

7.1.9. The UK Service police have common information systems namely REDCAP and COPPERS. Both are said to be antiquated and due for replacement. The Provost Marshal (Army) told me that the replacement system will enter service later this year and will be better able to exchange data with other systems, including potentially with the Military Court Service’s information system:-

“Later this year, the new IS system – we currently have REDCAP and COPPERS – a seamless IS system for all three services, compatible with the Ministry of Defence Police and Home Office police forces so we have information and sharing of intelligence. The Military Court Service were trying to talk to me this afternoon; they’re going through a similar process and want to have an IS system that’s seamless with ours.”⁴³⁸

7.1.10. I therefore recommend – and do so with the very active encouragement of both the Judge Advocate General and the Director of Service Prosecutions – that the Service Courts should have access to the Common Platform. I repeat my earlier conclusion that I see no problem with Secret or classified information finding its way onto a Common Platform. To quote Judge Large:- *“99.9% of our cases can be dealt with perfectly securely on the civilian system. If it’s terrorism, we’ll have a pink file.”⁴³⁹*

7.1.11. I also recommend that a case management system should be put in place that contains the information and technology needed to monitor and manage the progress and completion of Service Justice cases. This must permit the Service Prosecuting Authority and

⁴³⁷ Ibid.

⁴³⁸ Note of meeting 54.

⁴³⁹ Note of meeting 55.

Military Court Service to obtain the same performance data as the Crown Prosecution Service and Her Majesty's Courts and Tribunal Service.

Recommendation 42: The Ministry of Justice's agreement to allow the Service Courts to share the Common Platform should be urgently obtained.

Recommendation 43: A case management system should be put in place that contains the information and technology needed to monitor and manage the progress and completion of Service Justice cases. This must permit the Service Prosecuting Authority and Military Court Service to obtain the same performance data as the Crown Prosecution Service and Her Majesty's Courts and Tribunal Service.

7.2. Training

7.2.1. There appears to be a lack of consistency in the approach to training in advance of postings. During my first meeting with the Director and Deputy Director of Service Prosecutions, I was informed that one Service lawyer was training for their next posting during their time with the Authority. By contrast two other Service lawyers had recently arrived requiring full training by the Authority on its induction and training programmes.⁴⁴⁰ The Director's preferred system is that recruits should undergo the necessary training prior to commencing their tour with the Authority. This approach permits a full complement of prosecutors. On any view it is essential that a uniform system of conducting pre-posting training operates across the separate legal Services.

Recommendation 44: A uniform approach to conducting pre-posting training should be adopted across the Service legal services.

7.3. Overseas operations

7.3.1. His Honour Shaun Lyons recommended that Service Prosecuting Authority lawyers should be embedded with the Defence Serious Crime Unit and should deploy to theatre.⁴⁴¹

⁴⁴⁰ Note of meeting 32.

⁴⁴¹ Note of meeting 37.

The Deputy Director has expressed a contrary view, believing that modern technology obviates the need to expose prosecutors to significant personal risk and to divert other soldiers to protect them.⁴⁴² I have been told, and do not doubt, that lawyers would be a hindrance and represent an avoidable danger on or close to the battlefield. The Defence Serious Crime Unit will be fully trained in crime scene management and data collection and will possess the most up-to-date communications technology. I agree that prosecutors should not be present in theatre. This may be of importance in the recruiting process.

7.3.2. Whilst I conclude that prosecutors should not be in theatre, I have no doubt that they should be in or close by a Major Incident Room, and utilising virtual ways of working and increased connectivity should provide real-time advice. Members of the Service Prosecuting Authority Operational Offending Team – a mixture of Service and civilian lawyers – based themselves at Upavon throughout much of the Iraq Historic Allegations Team and the entirety of the Service Policy Legacy Investigations. In future overseas operations the presence of the Defence Serious Crime Unit on the battlefield and simultaneously in the Major Incident Room, advised by prosecutors, will maximise efficiency and expedition. Improved technology will ensure on-site legal advice during hostilities.

Recommendation 45: Service Prosecuting Authority lawyers should not deploy to theatre but should provide real-time advice using the most modern forms of connectivity.

7.3.3. Subject only to the lack of appropriate technology, the Service Prosecuting Authority is well prepared and has the appropriate skills and processes in place for our future operations. I am confident, given the present leadership, that appropriate protocols, based upon my indicative drafts in Chapter 6, will be agreed in order to investigate and prosecute allegations of wrongdoing which occur in theatre on overseas operations. The importance of swift and timely decision making is well understood.

7.4. The Court Martial

7.4.1. The pandemic has caused listing difficulties for the Court Martial, but certainly it would seem, no greater than in Crown Courts, and probably less so. The Lord Chief Justice's annual report provides the following assessment of its response to and performance during the

⁴⁴² Note of meeting 32.

pandemic:-

*“The Court Martial was one of the first parts of the justice system to go into full lockdown at the start of the pandemic and one of the first to recommence full operation. Backlogs have been kept to manageable levels by sitting through vacation periods and by conducting as much work as is consistent with the interests of justice by remote means. This has involved the conducting of preliminary hearings and the hearing of some witness evidence by remote, electronic means. A decision to move away from paper files and develop an electronic case filing system was taken in February 2020 and represents an important step in the modernisation of the Service Courts and the wider Service Justice System. The pandemic required a more rapid development and adoption of electronic case filing than would have been usual in normal times but this has been achieved successfully leading to increased efficiency and helping to minimise backlogs.”*⁴⁴³

7.4.2. I met the Judge Advocate General on 1 June and they were catching up and listing at Bulford into next February with Nightingale Courts later in this year. Judicial resources are fine, two Judges having been recently recruited. In the words of Judge Large:- *“We have the joy of being a fully resourced and fully funded justice system”*.⁴⁴⁴

7.4.3. The provisions currently before Parliament in the Armed Forces Bill, concerning the composition of the Court Martial boards and the manner of reaching verdicts are well conceived and answer past criticism. I have no reservations concerning the structure or quality of the process. A board will have the ability to contextualise conduct particularly if committed on overseas operations.

7.4.4. I also agree with the decision to retain concurrent jurisdiction for cases of murder, manslaughter and rape. A significant number of cases involve conduct probative of guilt both within and outside the jurisdiction of UK Courts, justifying a single all-inclusive trial. Further, I was unable to comprehend the choice of crimes to be excluded. Many other very serious crimes might have been considered if competence of the process was in question.

7.4.5. The debate about jurisdiction to investigate and prosecute these cases has recently

⁴⁴³ “The Lord Chief Justice’s Report 2020,” at p.22, https://www.judiciary.uk/wp-content/uploads/2020/11/6.6901_JO_Lord_Chief_Justices_AR_2020_WEB2.pdf

⁴⁴⁴ Note of meeting 55.

been reignited by a report in *The Times* that during the period 2015 to 2020 “the conviction rate for rape cases heard by courts martial was six times lower than for civilian courts,” and over the six years to 2020 stood at just 9%.⁴⁴⁵ I consider the statistics, based on conviction rates, relied upon by those who favoured a change, to be valueless based on too small a sample, and on cases arising in very different circumstances. In their Part 2 report, His Honour Shaun Lyons and Professor Sir Jon Murphy also warn of the dangers of drawing any conclusions from such a small statistical sample:-

“The number of rape cases in the SJS is insufficient for any reliable conclusions to be drawn. In a base of ten cases, each case represents 10% of the total data and one or two changed outcomes can entirely change the presentation. Thus, while the rate of convictions in SJS rape cases seem to be significantly lower than that in the CJS it is noteworthy that the larger base of all other sexual offending, while still small, aligns more closely with the rate in the CJS. When all offending is considered (e.g. all trials at Court Martial) providing a data base of some 400 trials the SJS conviction rate is much the same as the CJS.”⁴⁴⁶

“The risk of reaching false conclusions from a small data base is underlined by the increasing congruity of the conviction rate statistics between the CJS and SJS as the size of the data pools used in measuring the statistics increases (e.g. in rape, then in all sexual offending and then in all offending). The overall conviction rates between the CJS and SJS are markedly similar.”⁴⁴⁷

7.4.6. During the period from 2015 to 2017, the conviction rates at Court Martial for rape, penetrative sexual assault and non-penetrative sexual assault ranged between 7% and 17%, 25% and 40%, and 42% and 66% respectively.⁴⁴⁸

7.4.7. Comparison of conviction rates also overlooks an important fact; that the Service police refer, and the Service Prosecuting Authority prosecute, cases that would have been discontinued in the civilian system. In 2017, the Crown Prosecution Service adopted a 60%

⁴⁴⁵ Larisa Brown, “Military’s low rape convictions prompt call for civilian trials,” *The Times*, 13 July 2021, <https://www.thetimes.co.uk/article/militarys-low-rape-convictions-prompt-call-for-civilian-trials-kgxhclr3t>

⁴⁴⁶ His Honour Shaun Lyons CBE and Professor Sir Jon Murphy QPM DL LLB, “Service Justice System Review (Part 2), at paragraph 138.

⁴⁴⁷ Ibid, at paragraph 145.

⁴⁴⁸ His Honour Shaun Lyons CBE, “Service Justice System Review (Part 1),” at p.104.

conviction rate target in relation to rape cases.⁴⁴⁹ It is asserted that this change was responsible for a sharp reduction – by around 60% in the period from 2016-2017 to 2019-2020⁴⁵⁰ – in the number of rape cases prosecuted, and that this now stands at between 1.6%⁴⁵¹ and 3%⁴⁵² of those reported to Home Office police forces. The Crown Prosecution Service has recently announced an Action Plan to address this disparity between the numbers of allegations and prosecutions.⁴⁵³

7.4.8. This disparity is in sharp contrast to the Service Justice System, where 55% of rape investigations carried out by the Service police in the period from 2017 to 2019 led to a referral to the Service Prosecuting Authority, and 27% of rape investigations led to a suspect being charged. In 2020, 50% of rape investigations by the Service police led to charges and prosecution.

7.4.9. Viewed as a proportion of allegations reported rather than of cases prosecuted, the conviction rate in the Service Justice System is around 8% compared to around 2% in the civilian system. This rate is still too low, but does not justify departing from the current principle of concurrent jurisdiction. The establishment of a Defence Serious Crime Unit with greater focus on victim support and with structured secondments for investigators to gain greater experience of investigating rape and sexual assaults should help to drive up conviction rates.

7.5. Trials during deployment

7.5.1. If the pandemic has been of any benefit, it has been in the field of adopting virtual communication. Courts throughout the land have been able to sit in circumstances which only

⁴⁴⁹ “Rape prosecutions: Court of Appeal says change to CPS guidance was not unlawful,” BBC News, 15 March 2021, <https://www.bbc.co.uk/news/uk-56402068>

⁴⁵⁰ Caelainn Barr and Alexandra Topping, “Rape: why have prosecutions fallen so dramatically in a decade? Target-setting, police cuts and longer waiting times have contributed to alarmingly few cases going to court,” *The Guardian*, 17 June 2021, <https://www.theguardian.com/society/2021/jun/17/why-have-prosecutions-fallen-so-dramatically-in-a-decade>

⁴⁵¹ Caelainn Barr and Alexandra Topping, “Fewer than one in 60 rape cases lead to charge in England and Wales. Figures will put pressure on government to deliver overhaul of rape treatment by criminal justice system,” *The Guardian*, 23 May 2021, <https://www.theguardian.com/society/2021/may/23/fewer-than-one-in-60-cases-lead-to-charge-in-england-and-wales>

⁴⁵² “Rape prosecutions: Court of Appeal says change to CPS guidance was not unlawful,” BBC News, 15 March 2021.

⁴⁵³ <https://www.gov.uk/government/publications/end-to-end-rape-review-report-on-findings-and-actions>. See also:- “New minimum standards for rape and sexual assault victim support,” Crown Prosecution Service press release, 17 June 2021, <https://www.cps.gov.uk/cps/news/new-minimum-standards-rape-and-sexual-assault-victim-support>

a few years ago would have been unthinkable. Remote hearings have become crucial in keeping the civil courts functioning. Speaking to *The Times* on 22 April the Master of the Rolls, Sir Geoffrey Vos, said that Her Majesty's Courts and Tribunal Service is aiming to have most civil claims brought online by the end of 2023 with most family and tribunal claims to follow.⁴⁵⁴

7.5.2. Criminal Courts have not sat idle nor have they ignored remote hearings. Much evidence is now given remotely. Many appellants and defendants observe their own cases from prison by video link. I have no doubt that Service Courts must embrace virtual hearings. I have spent over 100 hours on Microsoft Teams meeting past and present members of the Armed Forces in the conduct of this review. I have met officers in the United States, and stationed in Estonia and in Gibraltar. The quality of sound and picture and lack of interruption has been immaculate. I have no doubt that many cases arising overseas can be dealt with remotely. Justice Fish has written in his review:-

“Technological advances that shorten distances virtually and facilitate travel free courts martial and tribunal hearings must be considered. In some measure at least, they reduce historic obstacles to timely courts martial, to expeditious disciplinary proceedings and to prompt administrative interventions.

7.5.3. It may well no longer be necessary to return Service personnel from distant shores in order to attend a Court Martial hearing. There may be considerable economies to make. I make the following recommendation:-

Recommendation 46: Technology and procedures should be maintained such that all parts of the Service Justice System are capable of operating remotely by video link or other similar means. In particular, there should be a presumption that remote court attendance by advocates, defendants and witnesses will occur in any case where such attendance will expedite the justice process. This should be subject only to the tribunal's discretion to conclude that this approach would be inconsistent with the right to a fair trial in a particular case. It will be necessary to ensure that technology is available to enable a defendant to communicate remotely and confidentially with his/her Assisting Officer or with any legal representative.

⁴⁵⁴ Jonathan Ames, “Sir Geoffrey Vos, the top civil judge, promotes a digital future for litigation,” *The Times*, 22 April 2021, <https://www.thetimes.co.uk/article/sir-geoffrey-vos-the-top-civil-judge-promotes-a-digital-future-for-litigation-3vfdgz7cf>

7.6. Conclusion

7.6.1. As in the case of the Service Prosecuting Authority, I express full confidence in the Court Martial process, subject only to the provision of the appropriate technology and a fairer legal support offer. I believe that it will be possible for cases to be heard in Bulford and Catterick with witnesses and defendants elsewhere. I apprehend that, in the event of an increased workload, steps can be taken to handle it. I was most encouraged by Judge Large's observation, very relevant in the context of the final chapter of this review:-

“There is an argument that anything remotely complex should go to Court Martial. Commanding Officers can do guilty pleas and scuffles outside the pub. But there is an argument for sending up the more complex cases. We've got the capacity to try them.”⁴⁵⁵

⁴⁵⁵ Note of meeting 55.

8. Legal support and The Defence Representation Unit

8.1. Introduction

8.1.1. When I read the introduction to Justice Fish's review it struck a chord:-

*“Members of the Canadian Armed Forces accept danger to themselves in order to protect others at home and abroad. Canada owes them more than a minimally acceptable system of justice. They are entitled to 'a better system than merely that which cannot be constitutionally denied". As a matter of principle, Canada is morally obliged to provide it”.*⁴⁵⁶

8.1.2. My Terms of Reference direct me to:- *“Make any such recommendations arising from your scrutiny of the above [list of issues] which will ensure we have the most up to date framework, skills and processes in place for our future operations.”* Therefore, in the final two chapters of this review, I will examine two issues that strike me as needing improvement if we are to provide our Armed Forces with more than a minimally acceptable system of justice for the future:- the availability of legal support to Service personnel and veterans facing investigation and prosecution at Court Martial; and the provisions relating to Summary Hearing of contested criminal charges.

8.2. Legal support in cases relating to overseas operations

8.2.1. In the House of Lords debate on the Overseas Operations Bill Baroness Goldie, The Minister of State, Ministry of Defence said:-

*“The Ministry of Defence has a long standing policy that where a service person or veteran faces criminal allegations in relation to incidents arising from his or her duty on operations, the Ministry of Defence **may** fund their legal support and provide pastoral support for as long as necessary. We offer this because it is right that we look after our Armed Forces both in the battlefield, where they face the traditional risk of death or injury as well as in the courts, particularly if they face the risk of a*

⁴⁵⁶ The Honourable Justice Morris Fish CC, QC, “Report of the Third Independent Review Authority to the Minister of National Defence” (2021), at p.iii.

*conviction and possible prison sentence. Because of the risks our Service personnel and veterans face, our legal support is very thorough.*⁴⁵⁷ [Emphasis added]

8.2.2. As the extant 2014 edition (version 3) of Joint Service Publication 838 (The Armed Forces Legal Aid Scheme) explains, Service Personnel and veterans can apply to receive legal aid under the Armed Forces Legal Aid scheme where a case has been referred to the Director of Service Prosecutions for a prosecution decision, or they face trial at Court Martial, or they are appealing following a Summary Hearing. Eligibility mirrors the Criminal Legal Aid scheme and is means tested by reference to applicants' income and assets. There is a one-off upfront payment followed by four instalments. I am told that a significant number of applicants find the initial payment prohibitive and wait until the last moment to take up legal aid to avoid the recurring monthly payments, and thus are not represented at pre-trial hearings, making attempts to agree facts, admissions, witness lists, schedules etc. virtually impossible. It is to be noted that unlike the majority of defendants in the civilian system all Service personnel are employed, and are thus likely to have to pay a contribution,

8.2.3. There is also some legal support outside the Armed Forces Legal Aid Scheme. Any person who is brought to a police station under arrest or arrested at the station having gone there voluntarily, is entitled to receive free independent legal advice and assistance if they are questioned by the police whether they have been arrested or not. This provision also applies where the interview is conducted by the Service police. The legal assistance may be provided under the Duty Solicitor Scheme or by a Service lawyer and does not require an application for legal aid. There is a further category of cases, not relevant to this review, where costs are met by the chain of command. There is also a range of welfare support and mental health support provided.

8.2.4. Following Baroness Goldie, Lord Tunnicliffe observed:- *"The situation is about overseas operations and the problems of defending oneself against criminal action in some overseas theatre-vastly more difficult than in the parallel situation in the UK. I note she said "may" be provided, but for servicemen that word sounds like "perhaps," like some or all of the necessary support only "may" be provided.*"⁴⁵⁸

8.2.5. Lord Burnett, a former Royal Marine, observed:-

⁴⁵⁷ Hansard, 11 March 2021, column 1867, [https://hansard.parliament.uk/lords/2021-03-11/debates/9D68F2AD-CE5F-41E6-8F50-9BDAC0A91C37/OverseasOperations\(ServicePersonnelAndVeterans\)Bill](https://hansard.parliament.uk/lords/2021-03-11/debates/9D68F2AD-CE5F-41E6-8F50-9BDAC0A91C37/OverseasOperations(ServicePersonnelAndVeterans)Bill)

⁴⁵⁸ Ibid, column 1868.

“... when charges such as these are contemplated, no expense should be spared in mentoring or assisting a defendant, who will need an experienced individual to guide him through the maze of criminal law and procedure. The defendant should have the very best legal team available and be able to access medical assistance to engage with the effect of the stress of operations, including being in mortal danger most of the time, and often in searing heat. This should all be at public expense.”

“As soon as an individual comes under investigation, it appears his colleagues are forbidden to contact him and he starts to feel isolated and abandoned. The Defendant should have someone of experience from his own corps, regiment or Service as a supporter he can rely upon. That supporter should be properly trained, independent and have access to the defendant at all times. As I said at the Second Reading, the Defendant will need the best legal team available. The Bar Council and the Law Society should be asked to co-operate with the Ministry of Defence in providing a list of suitably qualified and experienced barristers and solicitors, with their curricula vitae, to assist the defendant in his decision on who is going to represent him. The Ministry of Defence should liaise with the appropriate professional body to provide a list of experienced mental health professionals.”⁴⁵⁹

8.2.6. Lord Dannatt, former Chief of the General Staff, underlined the necessity to ensure proper representation for Service personnel:- *“When a soldier lays their life on the line at the behest of their employer, I am sure that he or she has a right to expect that employer to exercise a proper duty of care towards him or her as they go through any investigation or judicial process.”⁴⁶⁰*

8.2.7. It is significant that on 23 September 2016, Sir Michael Fallon varied the policy on legal support – but only with regard to Iraq and Afghanistan.⁴⁶¹ As a result of this change, Service Personnel or veterans who faced interview under caution or prosecution in relation to incidents that occurred during operations in Iraq or Afghanistan were no longer required to make up any shortfall between the means-tested award under the Armed Forces Legal Aid Scheme and their actual legal costs.

⁴⁵⁹ Ibid, column 1875.

⁴⁶⁰ Hansard, 13 April 2021, column 1244, [https://hansard.parliament.uk/lords/2021-04-13/debates/44CAE6C7-41C6-4D84-AA8F-39727B660205/OverseasOperations\(ServicePersonnelAndVeterans\)Bill](https://hansard.parliament.uk/lords/2021-04-13/debates/44CAE6C7-41C6-4D84-AA8F-39727B660205/OverseasOperations(ServicePersonnelAndVeterans)Bill).

⁴⁶¹ <https://www.telegraph.co.uk/news/2016/09/23/telegraph-victory-as-defence-secretary-announces-u-turn-on-troop/>

8.2.8. I am told that version 4 of Joint Service Publication 838 will take account of this change in policy, but will not extend it beyond Iraq and Afghanistan. It is my belief that Service personnel should know that if they find themselves engaged in armed combat or in any form of hostility, their employer will ensure that they are fully and professionally represented in any consequent investigatory or judicial process.

8.2.9. During the debate Baroness Goldie stated:- *“I am confident we already ensure Service personnel and veterans are properly supported when they are affected by criminal legal proceedings. A review of legal aid, as proposed by the amendment, is unnecessary, given how comprehensive our legal support package is.”*⁴⁶²

8.2.10. Filling in forms and making contributions to Legal Aid has no justifiable place on or near a battlefield, nor should there be any questions asked as to whether any alleged criminal conduct was in the course of duty. Service personnel need to know that if accused of crime whilst engaged in hostilities, they will be looked after, without financial contribution, in the most professional manner. They need to know before they face an enemy, and not years later when a knock on the door leaves them exposed to potentially vexatious and ill-founded allegations. I see no basis for debating a standard of care. In the provision of legal services, it must be the best available, as must our investigative and prosecutorial skills.

8.2.11. I make the following recommendation:-

Recommendation 47: Service personnel or veterans who are interviewed under caution or prosecuted in relation to incidents that allegedly occurred during overseas operations (as defined in section 1(6) of the Overseas Operations (Service Personnel and Veterans) Act 2021) should no longer be asked to make up any shortfall between the means-tested award under the Armed Forces Legal Aid Scheme and their actual legal costs.

8.3. The Defence Representation Unit

8.3.1. How best should legal services be provided to Service personnel or veterans? Upon learning that an investigation is under way, to whom does the suspect instantly turn? Lord

⁴⁶² Hansard, 11 March 2021, column 1868.

Burnett spoke of isolation and the need for support by an experienced individual. The immediate problem is how to obtain competent advice and, if necessary, arrange appropriate representation. That may be no easy task, not least for those still overseas. I have considered with care the creation of a Defence Representation Unit. A Defence Representation Unit, as a first port of call for those under investigation, will ensure appropriate legal advice, coupled with an initial assessment of the situation. This will be in addition to the 'experienced individual' referred to by Lord Burnett.

8.3.2. In the United States, each Service operates its own Trial Defence Service with attorneys who are independent from local commands and their legal advisors. They provide a full range of defence legal services to US Service personnel worldwide at no cost to them, both in Court Martial proceedings and in other tribunals where there is a right of representation. Each Service also operates a Defence Counsel Assistance Program, which provides training for Service lawyers defending cases and direct support on cases.⁴⁶³

8.3.3. The Australian military justice system has a Directorate of Defence Counsel Services. This Directorate coordinates and manages the provision of legal representation to personnel facing trial before a Defence Force magistrate or Court Martial.⁴⁶⁴ It manages the Defence Counsel Services Panel, a pool of more than 150 lawyers from the single Services who provide legal representation.⁴⁶⁵ As a result of a 2009 independent review, the Directorate of Defence Counsel Services was separated from the Defence Legal Division to ensure greater independence from the chain of command.⁴⁶⁶ This review recommended greater commonality and interchange between the Directorate of Defence Counsel Services and the Office of the Director of Military Prosecutions in order to enhance professional development and career structure.

8.3.4. The Canadian Military Justice System has a Director of Defence Counsel Services, a Colonel-level statutory appointment⁴⁶⁷ who is responsible for providing or supervising legal

⁴⁶³ “Department of the Air Force Report on Military Justice for Fiscal Year 2020,” at pp.8-9; “U.S. Army Report on Military Justice for Fiscal Year 2020,” at pp.4-7; “U.S. Marine Corps Report on Military Justice for Fiscal Year 2020,” at pp.4-5; “U.S. Navy Report on Military Justice for Fiscal Year 2020,” at pp.2-6. <https://jsc.defense.gov/Portals/99/Documents/Combined%20Final%20Article%20146a%20Reports%20FY20.pdf?ver=98Cf0H9WldMQXY5eL96KIA%3D%3D>

⁴⁶⁴ <https://www.defence.gov.au/Legal/Directorates/ddcs.asp> (Last visited 5 July 2021).

⁴⁶⁵ <https://www.defence.gov.au/mjs/Organisations.asp#5> (Last visited 5 July 2021).

⁴⁶⁶ The Honourable Sir Laurence Street AC, KCMG, QC and Air Marshal (Retired) Les Fisher AO, FRAeS, MAP, “Report of the Independent Review on the Health of the Reformed Military Justice System” (2009), http://www.defence.gov.au/publications/Report_Reformed_Military_Justice_System.pdf

⁴⁶⁷ National Defence Act, ss.249.18 and 249.19.

representation for Service personnel standing trial at Court Martial. There are two types of Court Martial:- Standing Courts Martial are conducted by military judges who sit alone, and are identical to the format I have proposed in Chapter 9 for the Summary Hearings of criminal offences; General Courts Martial are conducted by military judges and a panel of five Service persons. The Director provides an annual report to the Judge Advocate General,⁴⁶⁸ who has a broader range of responsibilities than their UK counterpart, including general supervision of both the Defence Counsel Service and the Military Prosecution Service.

8.3.5. In South Africa, the Director of Defence Counsel Services is also a statutory appointment.⁴⁶⁹ With regard to the costs of legal representation, the Act states that Service personnel are entitled:- *“to legal representation of own choice at his or her own expense, or to be assigned military defence counsel at State expense when he or she is to appear before or to be tried by a Court of a Military Judge or Senior Military Judge.”*⁴⁷⁰

8.3.6. By contrast, the UK currently has no equivalent representation unit. The Royal Navy provides limited representation in criminal cases for Naval personnel only. The representation is free of charge and provided by Naval Legal Services. Officers, all of whom have qualified as barristers, volunteer to undertake defence work on a case-by-case basis. As to any perceived conflict of interest, they take the stance that they are entitled to represent their employer and the clients of their employer. This approach has never been called into question, nor should it be. Members of the Bar understand potential or perceived conflicts of interest and acting on a case-by-case basis such conflicts are simply avoided.

8.3.7. The Royal Air Force provided a criminal defence service in Germany until about 2017. It was not restricted to Royal Air Force personnel and was free of charge. A soldier was given a choice of representation at the police station and at Court Martial. It was however subject to the availability of suitably qualified officers.

8.3.8. I have no doubt that a Defence Representation Unit should be created. It will be

⁴⁶⁸ <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law.html>

⁴⁶⁹ Military Discipline Supplementary Measures Act (1999), s.13(1)(c).

⁴⁷⁰ Ibid, at s.23(a).

considerably smaller than the Service Prosecuting Authority⁴⁷¹ and should provide a limited service ensuring that Service personnel under investigation for criminal conduct are always offered competent representation. The Unit will not handle non-criminal Service offences. Whenever appropriate, preliminary advice will be given. A triage service should be provided. The Unit should be headed by a Director of Defence Counsel Services, either military or civilian, and include as a minimum one lawyer from each of the three Services. The Unit must be fully independent of the military command and act under the general supervision of the Attorney General. Any guidelines or instructions issued by the Attorney General must be published.

8.3.9. The Director and his team will be able to access the advice and services of every lawyer in the three Services, with education in the criminal law. The implementation of this Unit will necessitate cooperation from the Directors of the three Legal Services. In addition to providing a triage service, the Unit should be responsible for the training and certification of Assisting Officers. I believe there should be a significant saving on Legal Aid from the creation of this Unit. Those with no runnable defence will be so advised and many will admit guilt at an early stage. The benefits of an early guilty plea will be advanced. If appropriate, assistance in completing Legal Aid application forms will be given. Lists of solicitors and counsel with appropriate specialist skills will be maintained as envisaged by Lord Burnett. Many of the delays at Court Martial may be avoided by the services supplied by the Unit.

8.3.10. Budgeting can only be a speculative process in this sphere. I have no doubt that there will be a saving in Legal Aid expenditure, the cost of Services Legal Aid approximating £1.8 million in the year 2019/2020. The cost of adjourned trials in the Court Martial caused by a lack of, or by delayed representation cannot be assessed. The provision of this facility to Service personnel and veterans should not be dictated by budgetary speculation, but by the moral obligation to provide proper support to those who serve or have served their country. The knock on the door will carry markedly less menace with the knowledge that competent legal assistance will be readily available.

⁴⁷¹ In Canada, Defence Counsel Services has a complement of 16 lawyers (a Director, a Deputy Director, an Appellate Counsel, six Trial Counsel, and seven part-time Reserve Forces legal officers) compared to 25 lawyers in the Military Prosecution Service (a Director, an Assistant Director, two Regular Forces and one Reserve Forces Deputy Director, an Appellate Counsel, a Senior Counsel, a Canadian Forces National Investigation Service legal adviser, nine regional prosecutors, and eight Reserve Forces prosecutors).

<https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/director-defence-counsel-services-annual-report-2019-2020.html>;

<https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/director-military-prosecutions-annual-report-2019-2020.html>

8.3.11. I recommend that a Defence Representation Unit be created to provide a triage service to Service personnel and veterans under investigation for criminal conduct.

8.3.12. I recommend that the Unit be headed by a Director of Defence Counsel Services. The Director and the Unit must be fully independent of the military command and act under the general supervision of the Attorney General. Any guidelines or instructions issued by the Attorney General must be published.

8.3.13. I recommend that advice given by the Unit may be given remotely or by telephone and should not justify any unwarranted delay in investigations or in any judicial process. The Unit must be contacted at the earliest available opportunity by those seeking advice.

Recommendation 48: A Defence Representation Unit should be created to provide a triage service to Service personnel and veterans under investigation for criminal conduct.

Recommendation 49: The Unit should be headed by a Director of Defence Counsel Services. The Director and the Unit must be fully independent of the military chain of command and act under the general supervision of the Attorney General. Any guidelines or instructions issued by the Attorney General must be published.

Recommendation 50: Advice given by the Unit may be given remotely or by telephone and should not justify any unwarranted delay in investigations or in any judicial process. The Unit must be contacted at the earliest opportunity by those seeking advice.

8.4. Assisting Officers

8.4.1. I will examine provisions regarding the selection and training of Assisting Officers to support the accused at Summary Hearings in Chapter 9. My conclusions are equally applicable to the role of Defendant's Assisting Officer in Court Martial proceedings. I shall therefore confine myself here to making the following two recommendations.

8.4.2. I recommend that 'experienced persons' from an accused's Corps, Regiment or Service be identified and instructed to act as a supporter and mentor. The Assisting Officer

should be properly trained, be independent and be available to the accused at all times.

8.4.3. I recommend that the Director of Counsel Services be responsible for the training and the certification of Assisting Officers in advising and assisting Service personnel in advance of and during cases in the Service Courts and Summary Hearings.

Recommendation 51: ‘Experienced persons’ from an accused’s Corps, Regiment or Service should be identified and instructed to act as a supporter and mentor. They should be properly trained, be independent, and have access to the accused at all times.

Recommendation 52: The Director of Counsel Services should be responsible for the training and the certification of Assisting Officers in advising and assisting Service personnel in advance of and during cases in the Service Courts and Summary Hearings.

9. The Summary Hearing process

9.1. Introduction

9.1.1. On 5 May 2021 Bruce Houlder QC, former Director of Service Prosecutions directed my attention to the following post on LinkedIn by a former Service lawyer:-

“In the UK Armed Forces, Service personnel can be found guilty of criminal offences by a Commanding Officer who is not legally qualified, without the need to apply the law of evidence. This peculiar process called a 'Summary Hearing' takes place in private in a room on a Service establishment. Defence counsel are not permitted to enter, but the Commanding Officer receives advice from the uniformed legal officers. The old 'joke' was that the Commanding Officer directed that the 'guilty [expletive]' be marched in. It is not a court – far from it – but it can result in a life changing conviction. Service personnel are trained to be loyal and obedient. Some Service personnel prefer to get it over and done with. Some regret doing so when they realise that the conviction may have serious lasting repercussions. I have a very simple message to Service personnel: you are entitled to the full protection of our nation's law and you should not feel disloyal by using it. I remain amazed that this system has been allowed to carry on, but as long as it exists, I will continue to ensure that clients of mine receive appropriately robust advice. Perhaps a few more 'vindicated [expletives]' will be marched out.”

9.1.2. Brigadier (Retired) Anthony Paphiti, formerly Director of the Army Prosecuting Authority and more recently author of 'Military Justice Handbook' responded to that post as follows:-

“You are quite right to voice deep disquiet about the non-compliant summary process. In 2015 I made a number of suggestions to the Ministry of Defence and [Armed Forces Bill Committee] (for the 2016 Bill) suggesting reforms that would retain summary hearing but make it compliant. You can guess what happened. Yet the current Bill is perpetuating the attack upon the compliant court martial system while ignoring the elephant in the room. Summary Dealing.

It is often argued that the Summary Appeal Court makes the summary process compliant but, as any soldier knows, this depends upon informed choices being made

– and, as you rightly point out, unit pressure to 'take it on the chin' cannot be neutralised by legal advice if an accused does not receive it, or is not represented at the hearing to deal with admissibility issues. When the Commanding Officer's powers were limited to 28 days, one might have thought that the summary process was still acceptable, but now a person can be locked up for 3 months without legal representation. It is a clear breach of the Engel principle in my view.

Best of luck.”

9.1.3. Bruce Houlder added his own comment:- *“Difficult to argue with especially re increased powers which I was not aware of these days”.*

9.1.4. When we met he told me;- *“There are strong arguments for maintaining the current system. I learned to live with it because no one ever complained. What is wrong is that it should be a recordable offence”.*⁴⁷²

9.1.5. Bruce Houlder was succeeded by Andrew Cayley QC as Director of Service Prosecutions. He told me:-

*“I remember being asked to sit in with a Commanding Officer during a summary hearing when I was with King's Own. He started with 'RSM march the guilty person in!’”*⁴⁷³

9.1.6. Andrew Cayley took the view that contested cases should be tried by a military magistrate (a Judge Advocate sitting alone) and in the event of a guilty finding the case should be remanded to the Commanding Officer for sentencing.

9.1.7. Article 6 (1) of the European Convention on Human Rights reads:-

“In the determination of his civil rights or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of

⁴⁷² Note of meeting 39.

⁴⁷³ Note of meeting 35.

juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

9.1.8. Whilst a summary hearing by a Commanding Officer is plainly not a hearing by an independent tribunal, nor is judgment pronounced publicly, it is contended that the combination of the right to elect trial by Court Martial (but with the Court Martial applying only the sentencing powers of a Commanding Officer) coupled with the right of appeal by way of rehearing to the Summary Appeal Court render the Summary Hearing process Article 6 compliant. The authority relied upon in support of this proposition is the case of *Baines v Army Prosecuting Authority & another*.

9.1.9. The Army Prosecuting Authority had originally charged Mr Baines with assault occasioning actual bodily harm, which would have been tried at Court Martial. However, this charge was subsequently amended to one of battery, which could be heard summarily, and remitted to the Commanding Officer for Summary Hearing. In July 2004 Baines appeared before his Commanding Officer, pleaded guilty and was reduced to the ranks. Baines subsequently appealed both the finding of guilt and the sentence to the Army Summary Appeal Court, which rejected the contention that the Summary Hearing had not been Article 6 compliant. He subsequently appealed that ruling to the Divisional Court.

9.1.10. At the time Baines applied in writing to be tried by his Commanding Officer he had the advice of an experienced solicitor. The Divisional Court observed that *“had it not been for the approach of [Baines' solicitor] the [Army Prosecuting Authority] would have allowed the matter to go before a District Court Martial on the charge of battery. Since the punishments available to a court martial for the offence of battery included the power to award imprisonment and detention for a term not exceeding two years as well as reduction to the ranks..., [the solicitor's] intervention secured a very real advantage to the appellant.”*⁴⁷⁴

9.1.11. In Baines' case it was manifest that the decision to be tried by his Commanding Officer was a voluntary, informed, and unequivocal election on the advice of an experienced solicitor, with the advantage gained (this preceded the 2006 Act) of reduced sentencing powers. Any 'pressure' to submit to the jurisdiction of his Commanding Officer had been very obviously overridden by the Solicitor's intervention.

⁴⁷⁴ *Baines v Army Prosecuting Authority & Another* [2005] EWHC 1399 (Admin), at §9.

9.1.12. I speak of 'pressure' to agree to be tried by one's Commanding Officer in this context. Firstly an election for Court Martial will necessarily involve a delay, possibly substantial, and considerable expense to the Services and possibly the accused. It may mean leaving a ship or a unit. It is the ambition of many Service personnel to avoid being 'court martialled'. An election for Court Martial will appear to many accused as a deliberate slight to a Commanding Officer indicating a lack of trust or confidence in them. The same might be said of a decision to Appeal to the Summary Appeal Court. Many may feel it better for them to 'take it on the chin'.

9.1.13. I fully understand that accused Service personnel facing Summary Hearing receive written guidance and Assisting Officers' verbal assistance, but typically nothing of the order of the solicitor's advice to Baines. The Divisional Court noted that Baines was entitled to legal aid when the charge was one that would have been tried at Court Martial, but not once the charge had been remitted for Summary Hearing (although he was still entitled to legal advice).⁴⁷⁵ Notwithstanding the use of Assisting Officers, a number of those I spoke to were aware of cases in which it was only upon returning to civilian life that individuals with convictions realised they had pleaded guilty to recordable offences with the potential to affect future job prospects and immigration status.

9.1.14. It may well be that in the event of an Article 6 challenge a Court will reach the same conclusion as the High Court in *Baines* and find the current process rendered compliant by reason of the right to elect Court Martial and the right of appeal by way of rehearing. That is by no means certain; it will depend on whether the Accused's decision to waive those rights was informed. Nevertheless it is important to examine the process before the Commanding Officer and to consider whether it is fit for purpose and fair to those who voluntarily submit to it.

9.1.15. Members of our Armed Forces are entitled to more than a minimally acceptable system of justice. Several thousand hearings take place every year before Commanding Officers (in 2017 there were 3,766). Can the process be improved and is it as fair as possible to Service personnel?

9.1.16. Before examining possible improvements, it is important to recognise necessary limitations on our Service Justice System. First, it must function both in war and in peace. We cannot adopt a different system the moment we go to war. Secondly, it must be the same for

⁴⁷⁵ Ibid at §7 and §10.

all personnel at all times. Thirdly, it must operate in all conditions, in submarines, in the jungle, and in Woolwich Barracks. Our allies face the same limitations. Whilst subject to these conditions precedent, it must be as fair as possible to those subject to the system and must be professionally operated. Those who contend for the *status quo* on the grounds that the Accused have voluntarily waived their rights and can in any event appeal, cannot justify a system of justice which exposes such persons to a minimally acceptable process overseen by persons wholly untrained in the law. Nor can such a system be justified by the bland assertion that it is an inquisitorial system and not an adversarial system, if the system is weakened by a lack of education and training.

9.2. The conduct of summary hearings of criminal offences

The role of the Commanding Officer

9.2.1. In the summary process the Commanding Officer is required to ensure investigation, charge, conduct proceedings, determine guilt and pass sentence. This responsibility demands skills routinely taught to the police, to lawyers and to the judiciary. It is justified by the fact that in the jungle or on a submarine there will be no police, no lawyer and no member of the judiciary. The Accused will not be represented because no lawyer will be available. The case should not be adjourned because discipline must be maintained and operational effectiveness assured. The role imposed on the Commanding Officer by Parliament is a heavy one.

9.2.2. The retort to criticism, namely that Parliament decided in 2006 that the present form of Summary Hearing was acceptable and accordingly should not be altered, cannot prevent change if technological changes permit and current standards demand. The Criminal Law has become increasingly complex, many such refinements post-dating the conception of the Armed Forces Act 2006. Dishonesty, Recklessness, Intent, Joint Enterprise, Hearsay, Drunkenness, Disclosure, Identification, to name but a few topics, may well feature in a list of apparently straightforward cases. A proper understanding of these topics and several others cannot be learned in hours, days or even weeks alongside other demanding responsibilities. Criminal convictions should be recorded by tribunals either learned in the law or instructed, as lay magistrates and jurors are, by those learned in the law.

Training for Commanding Officers

9.2.3. I asked to be informed as to the degree of training that Commanding Officers receive before they can conduct Summary Hearings. It varies between the three Services. The Army appear to receive the most training, one full day as part of the Commanding Officer Designate course. I have seen the day's timetable. Lectures on the Service Justice System, Commanding Officer's Powers, Investigation, and Service Complaints are followed by Discipline Seminars and Administrative Action Seminars, with 20 minutes Question and Answer at the conclusion. I was told that those attending the course will already have some familiarity with the Service Justice System earlier in their career, having completed e.g. the Intermediate Command and Staff Course, or in some cases served as an Adjutant, or in some cases been a member of a Court Martial board. Commanding Officers will previously have served as Officer Commanding a sub-unit and have completed the Sub-Unit Commanders' Management Course, which includes training on the Officer Commanding's responsibilities and powers in relation to the Summary Hearing process. In the Navy there is a half-day discipline forum for all Commanding Officers, and in the Royal Air Force a lawyer from the Regional Legal Office delivers a briefing lasting between one hour and one and a half hours as part of the Future Commanders Study Period. Again it is a fact that many of the attendees in all three Services will have had previous experience of operating in the Service Justice System, during previous Command tours or as subordinate commanders.

9.2.4. On 17 June, I met simultaneously with the Army Personnel Services Group and 5th Battalion, The Rifles. The topics under discussion were the powers of Commanding Officers and Summary Hearings. Present were three Brigadiers, two Colonels, two Lieutenant-Colonels and a senior Army lawyer. Whilst they steadfastly and resolutely defended the existing process, each and every one acknowledged that training could be improved:- *"I think perhaps the first thing we're to consider the enhancement of legal education for those empowered to carry out summary hearings;" "The training can be enhanced, there's no difficulty with that;" "I agree with the training points;" "Training – of course it could get better"*.⁴⁷⁶ There was unanimity on the topic. I am aware that there are a wide variety of topics on which Commanding Officers need to be trained, and consequential pressure on the training timetable. That is no answer to the fact that the existing training is plainly inadequate for a fair and credible system of justice. The need to provide proper training for their role must be regarded as the unavoidable cost of any system which retains Commanding Officers at the heart of the summary justice process.

9.2.5. I have no doubt that there should be significantly enhanced training for Commanding

⁴⁷⁶ Note of meeting 58.

Officers in the conduct of Summary Hearings. His Honour Shaun Lyons' recommendation 37 in his Part 2 Report was to that effect, albeit limited to a tri-Service Working Group considering the contents of courses.⁴⁷⁷ I have heard sufficient evidence to recommend that present arrangements give insufficient education. Mock hearings should be conducted.⁴⁷⁸ A form of periodic certification should be considered, as in Canada, ensuring that Commanding Officers have attained a sufficient level of competence.

Recommendation 53: Commanding Officers should receive greater training on conducting Summary Hearings. This should include mock hearings.

Recommendation 54: Consideration should be given to certifying, and periodically re-certifying, Commanding Officers as having attained a sufficient level of competence to conduct Summary Hearings.

Training for Assisting Officers

9.2.6. I have been told on several occasions that the accused are not unrepresented as they have Assisting Officers present during Summary Hearings to assist them. They are not lawyers and have limited training, if any, in criminal procedure. I propose that there should be enhanced education and certification for Assisting Officers.

9.2.7. Recommendation 47 of Justice Fish's review ensures that Assisting Officers are appropriately trained:-

⁴⁷⁷ His Honour Shaun Lyons CBE and Professor Sir Jon Murphy QPM DL LLB, "Service Justice System Review (Part 2)," Recommendation 37: "*The tri-Service Working Group should consider the SJS content of COs courses, seeking to establish best practice across the Services and drawing on the experiences of current and recent COs as to what the courses should cover. The SJS content of COs courses should be updated and matters that COs should be familiar with, in addition to the mainstream tasks of investigation and SH, are the treatment of witnesses and victims and the handling of domestic and child abuse allegations (see **Recommendations 5 & 6**). The use of custody and of lawful orders to exercise control short of custody should be included (see **Recommendation 16**). The importance of giving the processes of Investigation and Summary Hearings the highest priority amongst the many administrative duties and responsibilities of the CO should be emphasised.*"

⁴⁷⁸ The Honourable Justice Morris Fish CC, QC, "Report of the Third Independent Review Authority to the Minister of National Defence" (2021), at paragraph 393. See also, Recommendation 46: "*Practical exercises, such as moot summary trials, should be included in the curriculum of the Presiding Officer Certification Training. In the performance of her superintendence over the administration of military justice in the Canadian Forces, the Judge Advocate General should consider the desirability of including practical exercises in the curriculum of the Presiding Officer Re-Certification Training.*"

*“A formal Assisting Officer Certification Training should be developed and lead to a renewable certification, in much the same way as the Presiding Officer Certification Training. The course should include practical exercises, such as moot summary trials. Each Unit of the Canadian Armed Forces should create a roster of assisting officers who have successfully completed the Assisting Officer Certification Training. The accused should be invited to select their assisting officers from this roster.....”*⁴⁷⁹

9.2.8. Without proper training an Assisting Officer will have difficulty in providing constructive and valuable assistance to an accused. If my recommendation for the development of a Defence Representation Unit (see Chapter 8) is accepted, training and certification should be the responsibility of this Unit. Assisting Officers will accompany the Accused before Commanding Officers when non-criminal Service offences only are charged, and Defendants before Judge Advocates (sitting as Military Magistrates) when mixed criminal and non-criminal Service offences are charged.

9.2.9. The course should include practical exercises such as mock Summary Hearings. A roster of certified Assisting Officers should be created from which the accused may make a selection. Where possible Assisting Officers should be independent of the chain of command although still sourced from the Accused's corps, regiment or Service. It may be thought , possibly cynically, that an Assisting Officer in the same chain of command as the Commanding Officer may be more motivated to impress the Commanding Officer than the Accused. Whilst the best way to impress a Commanding Officer is to perform to maximum effect on behalf of an Accused, an Assisting Officer may well feel inhibited in raising a proper objection during a hearing, or in questioning his own Commanding Officer's knowledge or judgement. Accordingly I make the following recommendations:-

Recommendation 55: Assisting Officers should receive greater training on Summary Hearings, and on their role and responsibilities to the accused.

Recommendation 56: A list of certified Assisting Officers should be created and made available to all accused facing Summary Hearings whether for criminal offences or non-criminal Service offences.

Recommendation 57: Wherever possible, Assisting Officers should be from a

⁴⁷⁹ The Honourable Justice Morris Fish CC, QC, “Report of the Third Independent Review Authority to the Minister of National Defence” (2021), Recommendation 47. See also:- Ibid, at paragraphs 394-399.

separate chain of command to the Commanding Officer conducting the Summary Hearing, although from the same Regiment or Service as the accused.

The role of the Commanding Officer's Legal Adviser

9.2.10. One particular problem that I canvassed on 17 June was the difficulty in the room during the hearing with no lawyer present for the Commanding Officer to consult. The point was made that *"almost all cases I hear are straightforward. Whenever I do encounter anything that is complicated, I adjourn it. There are all sorts of procedural and systemic safeguards. Either I refer it, or the system takes it off me because it recognises I am not sufficiently qualified to deal with it;"* and that *"In the pre-summary hearing legal advice, the lawyers are very good at giving legal advice to the Commanding Officer. They will not sway from recommending a referral, or if they think the evidence in the investigation is not sufficient."*⁴⁸⁰

Convictions and their consequences

9.2.11. I readily accept that where complexity is manifest either in advance of a Hearing, or if it becomes clear to the Commanding Officer during the Hearing, there are procedures to resolve the difficulty. The problem arises where, due to a lack of education in the criminal law, a legal problem escapes the attention of all involved. This is not a remote or fanciful possibility. Rules of evidence have evolved over the centuries designed to promote justice. It is said that the strict rules of evidence do not apply at a Summary Hearing. It follows that criminal convictions are recorded after Summary Hearings in which established rules of evidence have not been observed. The Commanding Officer conducts the hearing with the Accused's service record in front of him/her although I am told that all criminal convictions are in a sealed envelope,⁴⁸¹ a method of proceeding unthinkable⁴⁸¹ in civilian courts.

9.2.12. In the United States convictions before Commanding Officers are not recorded for Criminal Record Office purposes. As a former US Provost Marshal General told me, *"Article 15 offences don't follow you round outside military service."*⁴⁸² Conversely, as matters stand in England and Wales, a criminal conviction recorded after a Summary Hearing has the same standing and legal effect as a conviction after a trial by magistrates, District Judge or trial by

⁴⁸⁰ Note of meeting 58.

⁴⁸¹ Ibid.

⁴⁸² Note of meeting 23. The reference to Article 15 is to §819 (Article 15, Commanding officer's non-judicial punishment) of the Uniform Code of Military Justice.

Jury, notwithstanding the fact that there was no right of legal representation, rules of evidence were not followed and guilt was determined by the judgment of a single person with no legal education. The dangers of a wrongful conviction are very real and must not be underestimated, nor must the consequences to Service personnel returning to civilian life, blighted by a wrongful conviction. It is no answer to say that they could have appealed. How is the unrepresented to know that recklessness or dishonesty has been wrongly defined or that evidence has been unfairly admitted?

9.2.13. Although each of the Services has a team that reviews the outcome of all Summary Hearings, and which can refer cases to the Summary Appeal Court if there are any irregularities (and even if the Accused does not exercise their right to appeal), there is currently no audio or video recording of proceedings to assist them in their assessment. I recommend that all Summary Hearings should be recorded.

9.2.14. I have considered the suggestion made by Bruce Houlder QC⁴⁸³ that what is unfair is that convictions obtained under this system are recordable. There is plainly the potential for unfairness under the present system, but I do not think that the preferable solution is to remove the requirement to record them so that convictions obtained by summary process do not appear on a criminal records check. Though the offences which can presently be tried by a Commanding Officer are comparatively minor, they include offences of violence and dishonesty which should, if they are found to have been committed, be held on the offender's criminal record.

9.2.15. I recommend that criminal offences, if denied, be heard by Judge Advocates sitting as Military Magistrates (without a board). Non-criminal Service offences should continue to be heard by Commanding Officers. Post-conviction, criminal cases should be referred back, together with any relevant findings, to the Commanding Officer for sentence.

9.2.16. I believe that this change in process will ensure that a conviction for a criminal offence is underpinned by the knowledge that the procedures adopted accorded with the criminal law. It will be possible for Military Magistrates to hear contested summary cases arising from overseas operations. I have dealt at length with trials being conducted online during deployment overseas in Chapter 7. Should it be impossible to conduct the Hearing by video link, the matter would be delayed pending return to the UK, just as it would had the accused elected Court Martial. I believe that the range of non-criminal Service offences available to

⁴⁸³ See paragraph 8.1.4 above.

Commanding Officers whilst deployed overseas are sufficient to maintain discipline and operational effectiveness.

9.2.17. Removal of Summary Hearings of criminal offences to Military Magistrates will overall expedite the hearing of these cases. They will never need to adjourn a case by reason of an unanticipated complexity and will not need to seek legal advice before hearing the matter, as Commanding Officers do, often at the cost of considerable delay. Further, a comparatively small number of contested Summary Hearings of criminal cases take place. According to the Service Justice System Review (Part 2, pages 77 to 79) there were only 249 Summary Hearings for Criminal Offences in 2017 of which over 75% were admitted, leaving approximately 60 contested cases in all across all three Services in a calendar year. There is available capacity within Judge Advocates. Andrew Cayley QC, recently retired Director of Service Prosecutions, confirmed the practicality of this measure observing, “*You can have a military magistrate and remand them to a Commanding Officer for sentencing.*”⁴⁸⁴

9.2.18. I recognise that the creation of a Military Magistrates’ jurisdiction to hear summary cases will require legislative change. Given that it involves a new jurisdiction for the existing Judge Advocates, rather than the creation of a new judicial office, that change may not be intolerably complex and will not involve a wholesale re-examination of the legislative framework for Service justice. It will represent a significant improvement for the Accused and for victims, and it also appeared that this change would be generally welcomed by those in the chain of command. Where concerns were voiced to me in discussion of this topic, they were generally allayed when it was appreciated that Commanding Officers would continue to sentence and thus retain full responsibility for discipline and good order, and that they would continue to deal with non-criminal Service offences (by far the majority). As I have indicated, the indications are that the change will apply only to a small number of cases every year, but will enhance the professionalism of the system as a whole.

Recommendation 58: All Summary Hearings should be video recorded, or where that is not possible audio recorded.

Recommendation 59: Legislation should be brought forward to remove the power to hear criminal offences summarily from Commanding Officers. No change is required in relation to non-criminal Service offences.

⁴⁸⁴ Note of meeting 35.

Recommendation 60: Judge Advocates should be given jurisdiction to sit as Military Magistrates (without a board) to try those cases that are no longer tried by Commanding Officers. In the event of conviction, criminal cases should be referred back, together with any relevant findings, to the Commanding Officer for sentence.

9.3. Early charging

9.3.1. The process created by the Armed Forces Act, designed to keep Commanding Officers at the centre of discipline, is convoluted and productive of unnecessary delay. Much of this delay is attributable to the numerous decisions to be taken by Commanding Officers, pursuant to the Act which are well demonstrated by the diagram at Figure 1.

9.3.2. A Commanding Officer may need to ask himself or herself the following questions:- Should I order an investigation? Is it more serious than it first appeared? Do I need permission from a higher authority? Should I seek legal advice? Should I refer it to the Service police or the Service Prosecution Authority? Are the UK police force or an overseas police force investigating the matter? Is there sufficient evidence to charge a Service offence? Can the case be tried Summarily? Has the offence been committed in prescribed circumstances? Should I bring a charge or refer it to the Director of Service Prosecutions? Does he require a police standard of evidence? Have I got concerns about the charge(s) or my powers of punishment or the complexity of the case? What discretion do I have in relation to the charge?

9.3.3. These and several other decisions may have to be taken by the Commanding Officer. Legal advice will always be available, except during the Summary Hearing itself. In many respects the Act is well constructed. It was described as risk averse. It is also speed averse. The imperative for swift justice in the military is compelling. The present process manufactures delay at the expense of expedition.

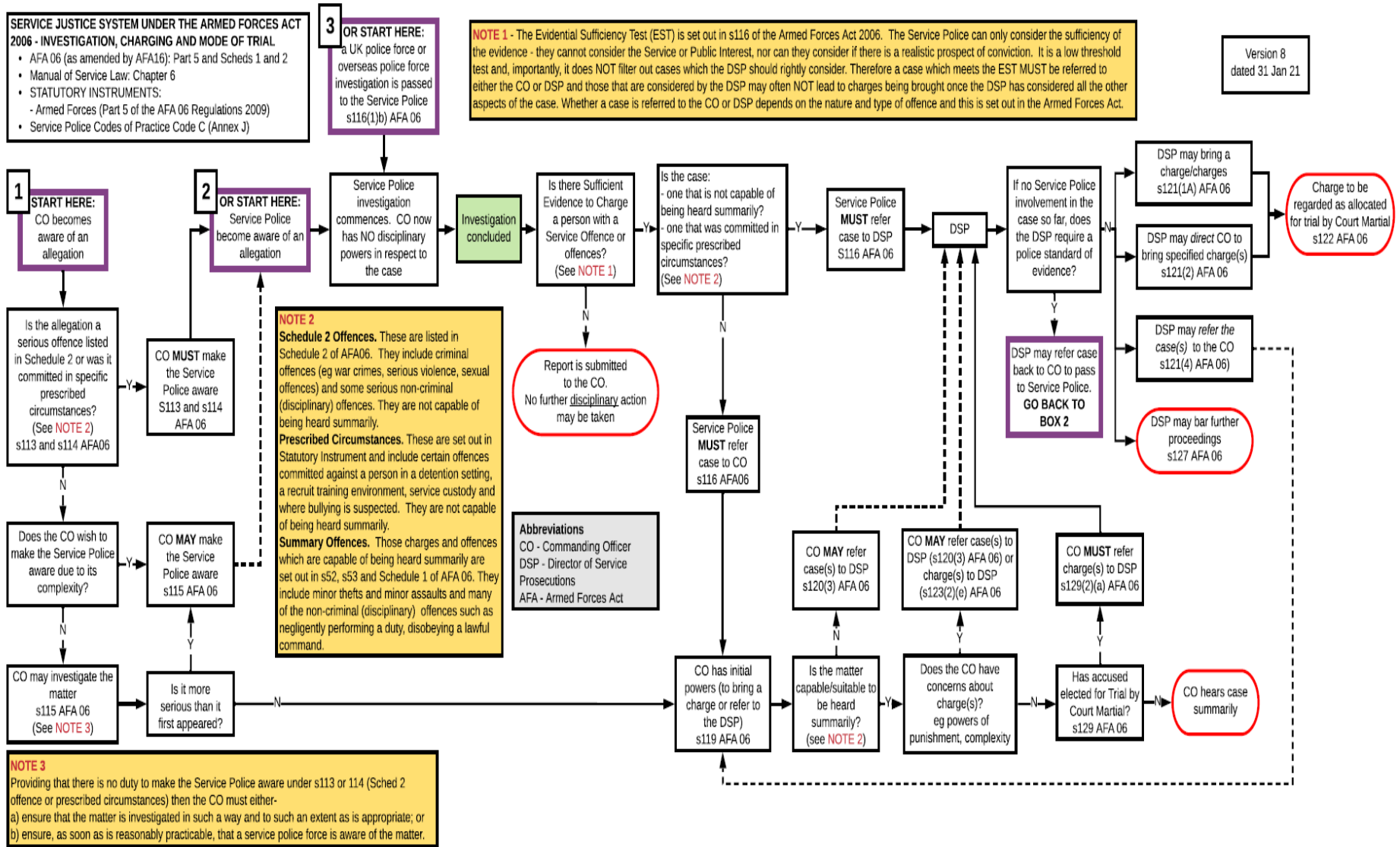


Figure 1. Investigation, Charging, and Mode of Trial under the Armed Forces Act 2006.

9.3.4. In one particular respect the delay created by the process is manifestly unfair to the accused and wasteful of time. It can be seen from the diagram above that the act of charging takes place at a very late stage of the process. The accused cannot either prepare a defence or admit an offence until he or she has been charged. An early charge will in a majority of cases result in a confession and avoid lengthy investigation. The point was well made by Justice Fish:-

“Subsection 161(2) of the [Canadian] National Defence Act should be amended to require that a charge be laid as expeditiously as the circumstances permit against any person, whether retained in custody or released from custody with or without conditions.”⁴⁸⁵

9.3.5. Charges can be amended or discontinued. In the civilian process, where a person is arrested for an offence, if the custody officer determines that he has before him sufficient evidence to charge the person arrested with the offence for which he was arrested he may charge him. This procedure can result in an admission of guilt and very swift and efficient justice. It also allows an accused person to prepare a defence at the earliest opportunity. I propose that Service police be given power to charge Service personnel. A Commanding Officer will retain the power to charge, as at present. Once a charge is laid, it must be referred to the Commanding Officer of the accused person. I have canvassed this proposal with the Judge Advocate General, who said this:-

“Anything that can speed the system up then I'm all for it. That is one of them. It's an oddity that we have to go round the houses to get to charging. It would take weeks off, and probably empower the [Service] police a bit”⁴⁸⁶

9.3.6. A Naval Captain told me:- *“Pre-Armed Forces Act 2006 we used to charge. It's all a bit daft because you still recommend the charge anyway. All you do now is 'the bringing of the charge', you get the Commanding Officer to sign it off. In the old days the Master at Arms would investigate, charge and present the facts for the Commanding Officer for the first time at trial.”⁴⁸⁷*

9.3.7. Quite apart from the speeding up of the process, the fact that the same individual

⁴⁸⁵ The Honourable Justice Morris Fish CC, QC, “Report of the Third Independent Review Authority to the Minister of National Defence” (2021), Recommendation 38.

⁴⁸⁶ Note of meeting 55.

⁴⁸⁷ Note of meeting 17.

both brings the charge and then proceeds to determine the charge, offends many common lawyers. There will be occasions when police are absent and not available, as in a Malaysian jungle when a Commanding Officer must have the power to charge.

9.3.8. I canvassed this proposal with the seven senior Officers at my meeting on 17 June. A Brigadier said this :-

“There is no magic in the Commanding Officer having to be involved in the charging decision from a legal point of view. It does underlie the Armed Forces Act view that the Commanding Officer is at the heart of the Service Justice System, which may be a dated concept. From a legal perspective, I would welcome the earliest decision to charge. Having the decision taken away from the Commanding Officer and put back into the hands of the Service police brings us closer in line with the civilian justice system, and the mantra that it should reflect the civilian system unless there is good reason to depart from it. We could still make it work.”⁴⁸⁸

9.3.9. For reasons I have stated above, I do not propose that charging capability or oversight be removed from Commanding Officers, merely that the ability to charge be extended to Service police.

9.3.10. Another Brigadier said:-

“I don't disagree. I think the principle makes sense. ... I don't recall as Commanding Officer charging many people. They were usually charged at Company level, by the Company Commander and referred to me. ... I think that the idea that the [Service] police might charge is a good one, but we'd have to look at second-order impact, look at how the mechanisms might work and prevent the Service police getting dragged into minor matters. Disobedience to standing orders can lead to criminality that needs to be dealt with in a single assize”⁴⁸⁹

9.3.11. With those observations in mind, I propose that the power of the Service police to charge should be restricted to criminal offences and should not include non-criminal Service offences. It is in the former category that the worst problems of delay have occurred. Covid renders recent statistics meaningless. His Honour Shaun Lyons however collated 2017

⁴⁸⁸ Note of meeting 58.

⁴⁸⁹ Ibid.

statistics demonstrating that criminal offences in the Army were taking on average over 140 days to conclude the summary process. The Navy took 73 days and the RAF 49 days.⁴⁹⁰ I believe that early charging can significantly improve these figures. His Honour described the process as “*uneven and at times over lengthy*.”⁴⁹¹ The word ‘summary’ implies brevity. In the military swift and fair justice is essential.

9.3.12. It is essential that if power is given to the Service police to charge a criminal offence that Commanding Officers’ ‘initial powers’ under s119 Armed Forces Act 2006 are not used to take no action. Accordingly I recommend that the Chain of Command should not have discretion to take no further action when Service police have charged a criminal offence.

Recommendation 61: Legislation should be brought forward to reintroduce a power for Service police to charge suspects with criminal offences, where the offence is one which would under current legislation be referred to a Commanding Officer under section 116(3) the Armed Forces Act 2006. The existing powers of Commanding Officers to charge both criminal offences and non-criminal Service Offences should be retained in parallel. Charging should happen at the earliest possible opportunity.

Recommendation 62: The chain of command should not have discretion to take no further action when Service police have charged a criminal offence.

9.3.13. Finally on the subject of charging, I would add this recommendation in the interests of expediting investigations:-

Recommendation 63: Investigations must be conducted as quickly and efficiently as possible without compromising their thoroughness or integrity. Where there has been no meaningful activity for 30 days the reason for such delay shall be recorded in a file created for that purpose.

9.3.14. This provision has been extremely successful in reducing delays in Canada, to such an extent that the time standard has now been repealed having achieved its purpose. Whilst it existed it was most effective.

⁴⁹⁰ His Honour Shaun Lyons CBE and Professor Sir Jon Murphy QPM DL LLB, “Service Justice System Review (Part 2),” Table 16.

⁴⁹¹ Ibid, at paragraph 226.

9.4. Legal representation at Summary Hearings

9.4.1. There will be many situations in which legal representation is simply not possible, not least during overseas operations (as defined in section 1(6) of the Overseas Operations (Service Personnel and Veterans) Act 2021). If an accused wishes to be represented at a hearing of a charge, he or she has the option of electing Court Martial and for that reason, and because obtaining representation would in many cases slow down the process, I am satisfied that it is fair, proportionate and appropriate that during Summary Hearings of both Service and criminal charges there should be no legal representation. I do however believe that the accused should have access to free legal advice between charge and hearing when facing a criminal charge in order to determine both plea and venue. Proper and informed legal advice is likely to expedite matters rather than delay them, as the involvement of an experienced solicitor demonstrated in the case of Baines. A Court Martial was avoided. Legal advice will also ensure that any decision is voluntary and informed and that an accused has understood his rights in relation to electing to Court Martial trial. This advice should be available, free of charge, from the Defence Representation Unit (see **Recommendation 48**). Such advice will be given either on line or by phone and is likely to be brief, and needs to be readily available. The Unit will only give advice and assistance to those facing a criminal charge.

9.4.2. For reasons given in Chapter 8 I am in no doubt that advice must be made available to those charged with criminal offences, and that if charges arise out of overseas operations (as defined in section 1(6) of the Overseas Operations (Service Personnel and Veterans) Act 2021), even years later, free advice and representation must be made available to all Service personnel and veterans, without contribution. Americans, Canadians and Australians all receive such assistance, as do members of the Royal Navy. My experience in the civilian system is that legal advice in advance of hearings saves considerable time in court. Many accused require both advice and reassurance before admitting their guilt, not least in an era of extra discount for early guilty pleas. It is important the accused have a choice of representation and that they are assured of the independence of legal advice. The Defence Representation Unit will provide all available options to those seeking their advice.

Recommendation 64: Free legal advice should be given to those charged with criminal offences before any hearing. This should be provided by the Defence Representation Unit and provide every option as to plea, venue and representation.

Annex A: Terms of Reference

Letter of 11 October 2020

By letter dated 11 October 2020 the Secretary of State for Defence appointed me to conduct this review. The following contextual information and Terms of Reference were enclosed in that letter:-

“POLICING, PROSECUTORIAL AND OTHER PROCESSES FOR ADDRESSING CREDIBLE ALLEGATIONS EMANATING FROM OVERSEAS OPERATIONS”

Context

*The existence of the Service Justice System was supported strongly in the most recent review of the system (by HH Shaun Lyons and Sir Jon Murphy) and the MOD is responding to recommendations which came out of that. This includes the creation of a **Defence Serious Crime Capability** (to focus and improve Defence investigative capabilities) and improved **independent oversight of the Service Police** to mirror that for civilian police.*

We do not see any need for another broad review of the Service Justice System currently.

It would be inappropriate and unhelpful to revisit investigations or prosecution decisions on previous cases. We want to shift our focus to the future; for example, through the Overseas Operations Bill and the introduction of a presumption against prosecution. It is therefore appropriate to consider whether there are further improvements that can be made to ensure the timely airing and handling of allegations of serious criminality in theatre on future overseas operations, reflecting our commitments to bringing culprits to justice while avoiding the need for protracted or repeat investigations.

The review I am asking you to undertake will need to include a detailed examination of the processes in place across the three Service Police organisations and the Service Prosecuting Authority. The aim of the review is to help reduce uncertainty for service personnel being investigated and for potential victims while ensuring

allegations are addressed quickly and appropriately. The risk of “justice delayed, justice denied” applies to those who are the subject of complaints, in addition to those who make them.

You and your team will have access to any MOD and other witnesses you need to speak to and any written guidance and procedures, and reports produced by those independent bodies which already have oversight of the service police and the Service Prosecuting Authority.

The Review should report to me by end of June 2021 and it will be published, together with our response. For that reason, it should not contain any classified material. If you believe it is necessary to make reference to such material, your secretariat should seek advice from the relevant officials here.

You will be supported by a former senior military officer, a junior barrister and a MOD civil servant. A panel of stakeholders has been established to provide any guidance and support you may require.

Terms of Reference

In carrying out the Review, you will:

- Build upon the previous Service Justice System Review (by HH Shaun Lyons and Sir Jon Murphy) – the recommendations of which MOD is responding to – and not undertake another broad review of the Service Justice System or investigate specific cases.*
- Focus on setting the context for the future so that we can be sure that, for those complex and serious allegations of wrongdoing – against any of our forces – which occur in theatre on overseas operations, we have the most up to date and future-proof framework, skills and processes in place and can make improvements where necessary*
- Draw on insights from the challenges of allegations from recent operations in Iraq and Afghanistan [Telic and Herrick]*

- *Pay particular attention to facilitating timely consideration of serious and credible allegations of criminal misconduct and, where appropriate, swift and effective investigation. Thus reducing uncertainty for service personnel being investigated and for potential victims*
- *Consider how our processes in such cases can ensure appropriate cooperation between independent investigators and prosecutors, thus facilitating timely and effective referrals from the Service police to the Service Prosecuting Authority, eliminating unnecessary delay in decision-making*
- *Consider the extent to which such investigations are hampered by potential organisational cultural barriers, or, for example, by lack of operational records or processes; and recommend steps for improvement*
- *Be forward looking and not seek to reconsider past investigative or prosecutorial decisions or reopen historical cases.*
- *Make any such recommendations arising from your scrutiny of the above which will ensure we have the most up to date framework, skills and processes in place for our future operations.”*

Letter of 19 May 2021

On 21 May 2021, the Secretary of State for Defence wrote to me supplementing my Terms of Reference as follows:

“During our recent meeting we discussed a number of issues arising from your review and I found it extremely useful. There was one issue that we did not explore in a huge amount of detail – timeliness of investigations. During the passage of the Overseas Operations (Service Personnel and Veterans) Bill, Lord Thomas of Gresford tabled an amendment which sought to introduce a new process to govern investigations into alleged criminal acts committed by Armed Services personnel on overseas operations.

While the Government resisted Lord Thomas' amendment, I gave an undertaking that we would bring it to your attention, and request that - in addition to your existing Terms of Reference - you consider it as part of your review work. A copy of Lord Thomas' amendment is hereby attached.

You may also find it helpful to review the debates on this amendment in both Houses, and the relevant Hansard references are listed below, for ease of reference:

- *Hansard Lords – 9 March 2021 (Committee Stage) – particularly Columns 1533, 1536-1540*
- *Hansard Lords – 13 April 2021 (Report Stage) – particularly Columns 1168, 1179, 1180*
- *Hansard Lords – 19 April 2021 (Third Reading)*
- *Hansard Commons – 21 April (Commons Consideration of Lords Amendments) – particularly Columns 1017 and 1018*
- *Hansard Lords – 26 April (Lords Consideration of Commons Amendments and Reasons) – particularly Columns 2100-2103*
- *Hansard Commons – 27 April (Commons Consideration of Lords Message) – particularly Columns 290, 291 and 300*

I look forward to seeing the outcome of your review in due course.”

The amendment tabled by Lord Thomas read as follows:-

“Investigation of serious crime related to overseas operations

- 1) *In deciding whether to commence criminal proceedings for allegations against a member of Her Majesty's Forces arising out of overseas operations, the relevant prosecutor must take into account whether the investigation has been timely and comprehensively conducted.*

- 2) *Where an investigator of allegations arising out of overseas operations is satisfied that there is sufficient evidence of criminal conduct to continue the investigation, the investigator must within 21 days refer the investigation to the Service Prosecuting Authority with any initial findings and accompanying case papers.*
- 3) *An investigation may not proceed after the period of 6 months beginning with the day on which the allegation was first reported without the reference required in subsection (2).*
- 4) *On receiving a referral under subsection (2), the Service Prosecuting Authority must either—*
 - (a) *order the investigation to cease if it considers it unlikely that charges will be brought, or*
 - (b) *give appropriate advice and directions to the investigator about avenues of inquiry to pursue and not pursue, including –*
 - (i) *possible defendants to consider,*
 - (ii) *possible explanations to consider for the circumstances giving rise to the investigation, and*
 - (iii) *overseas inquiries and seeking the help of jurisdictions*
- 5) *Where the investigation proceeds, the Service Prosecuting Authority must monitor and review its progress at intervals of three months and must on each review make a decision on the terms set out in subsection (4).*
- 6) *On the conclusion of the investigation, the investigator must send a final report with accompanying case papers to the Service Prosecuting Authority for the consideration of criminal proceedings.*
- 7) *After receipt of the final report, the facts and circumstances of the allegations may not be further investigated or reinvestigated without the direction of the Director of Service Prosecutions acting on the ground that there is new compelling evidence or information which might –*
 - (a) *materially affect the previous decision, and*
 - (b) *lead to a charge being made.*

8) *The Judge Advocate General may give Practice Directions as he or she deems appropriate for the investigation of allegations arising out of overseas operations.*

9) *For the purposes of this section –*

“investigator” means a member of the service police or a civil police force;

“case papers” includes summaries of interviews or other accounts given by the suspect, previous convictions and disciplinary record, available witness statements, scenes of crime photographs, CCTV recordings, medical and forensic science reports.”

Annex B: Recommendations

Recommendation 1: The Defence Serious Crime Unit previously recommended by Professor Sir Jon Murphy in the Service Justice System Policing Review (Part 1) should be established as an operationally independent Unit, and not as a capability based on existing Service Policing structures. Recommendations 1 – 4 of that review, which have previously been accepted, should be implemented without a further scoping review.

Recommendation 2: The Defence Serious Crime Unit should be commanded by a Provost Marshal, who must be a provost officer but should not be a current Provost Marshal of a Service police force. This new Provost Marshal should be designated Provost Marshal (Serious Crime).

Recommendation 3: A Provost Marshal (Serious Crime) should be appointed to establish the Unit, which should stand up on 1 April 2022. During the implementation period, the Provost Marshal (Serious Crime) should be closely supported by, and report to, the Chief of Defence People.

Recommendation 4: The Provost Marshals of the three Service police forces should develop, in consultation with the Provost Marshal (Serious Crime), a plan to develop and inculcate a tri-Service policing culture.

Recommendation 5: The Defence Serious Crime Unit must have a significant focus on victim support and witness care. There should be consultation with Dame Vera Baird QC and Sarah Atherton during the implementation process.

Recommendation 6: The Defence Serious Crime Unit should be given the right of first refusal over the investigation of offences, and may indicate its waiver of that right on a case by case basis or in relation to any class or category of cases at the discretion of Provost Marshal (Serious Crime).

Recommendation 7: The Provost Marshal (Serious Crime) should have a duty of operational independence in investigative matters owed to the Defence Council, on the same terms as that owed by the Service Provost Marshals under section 115A of the Armed Forces Act 2006.

Recommendation 8: Provost Marshal (Army) should retain her existing responsibility for operational detention. In light of that responsibility, her role should involve no command responsibility for the new Defence Serious Crime Unit.

Recommendation 9: Defence Serious Crime Unit personnel should not fall under the chain of command of the single Services for performance reporting or disciplinary purposes.

Recommendation 10: When the leadership and funding of the Defence Serious Crime Unit are reviewed (see **recommendations 12 and 16**), consideration should be given to implementing the Defence Serious Crime Unit as an enabling organisation.

Recommendation 11: For the purposes of securing rapid implementation, the Defence Serious Crime Unit should be established under the command of an officer of OF4 (Commander, Lieutenant-Colonel, or Wing Commander) or OF5 (Captain, Colonel, or Group Captain) rank, to be designated Provost Marshal (Serious Crime).

Recommendation 12: The leadership of the Defence Serious Crime Unit should be reviewed within three years and due consideration given to upgrading the role of Provost Marshal (Serious Crime) to one to be filled by an officer of one star (Commodore, Brigadier, or Air Commodore) rank. Serious consideration should be given at that point to making Provost Marshal (Serious Crime) the final posting of an officer's Service career.

Recommendation 13: The Provost Marshal (Serious Crime) should have as a deputy a civilian. The Deputy Provost Marshal should have significant experience of major investigations and the ability and necessary experience to control a major incident room, recording, retaining, managing and processing several hundred allegations simultaneously using the most up to date technology, as well as having achieved sufficient rank and recognition within civilian policing to act as an ambassador for the interests of Service police within the wider policing community.

Recommendation 14: A Strategic Policing Board, consisting of a Non-Executive Director (who is also a member of the Service Justice Executive Group), a recently retired Chief Constable, a recently retired senior military officer, and a recently retired Judge, should be established to provide effective assurance and governance of the Provost Marshal (Serious Crime) and the Defence Serious Crime Unit. It should have particular regard to the Unit's resources and structure, and to the Provost Marshal (Serious Crime's) performance against strategic policing requirements. Its Terms of Reference should permit it to examine the

timeliness and quality of Defence Serious Crime Unit investigations, and to sponsor periodic independent reviews to assure the quality of investigations. If the Non-Executive Director does not possess a scientific or technological background, consideration should be given to expanding the Strategic Policing Board to include someone with this essential expertise.

Recommendation 15: Consideration should be given to ways in which experienced police detectives might be enabled to join the Defence Serious Crime Unit on a full-time basis, whilst remaining civilians.

Recommendation 16: For the purposes of securing rapid implementation, the Defence Serious Crime Unit should initially be funded through the Army Top-Level Budget. When the leadership of the Defence Serious Crime Unit is reviewed (see **Recommendation 12**), consideration should also be given to moving the Unit's funding line so that it is funded directly from the Defence budget rather than through the budget of any of the three Services.

Recommendation 17: Consideration should be given to whether the Unified Career Model currently under development for other specialisms can be adopted, suitably adapted, to address the career needs of specialist investigators in the Defence Serious Crime Unit.

Recommendation 18: The Provost Marshal (Serious Crime) shall report annually to the Minister chairing the Service Justice Board, who shall arrange for the report to be laid before Parliament.

Recommendation 19: Further work should be carried out to ensure that Service police are informed with minimum delay of reportable incidents. Standard Operating Procedures should be amended accordingly.

Recommendation 20: Consideration should be given to placing a senior officer of the Defence Serious Crime Unit within the Permanent Joint Headquarters during every overseas operation (as defined in section 1(6) of the Overseas Operations (Service Personnel and Veterans) Act 2021).

Recommendation 21: The proposal to establish a Serious Incident Board within Permanent Joint Headquarters with appropriate Service police representation should be pursued.

Recommendation 22: A single point of contact should be established within the Service police for communication of relevant serious incidents. This should be within the Defence Serious

Crime Unit once implemented.

Recommendation 23: Standard training for all should include education on the psychological, cultural and other factors that are capable of leading to the commission of war crimes, and how to deal with them.

Recommendation 24: Training should reinforce that not only is a Service person not required to obey an obviously unlawful order, but it is the Service person's responsibility and legal duty to refuse to do so.

Recommendation 25: Training should include practical ethical decision-making scenarios in which Service personnel are confronted in a realistic and high-pressure setting with the requirement to make decisions in the context of war crimes being committed by members of the same unit.

Recommendation 26: The training of officers and non-commissioned officers should emphasise that absolute integrity in operational and other reporting is both an ethical obligation and is fundamental for sound command decisions and operational oversight.

Recommendation 27: A non-criminal Service offence of failure to report offences under sections 51 and 52 of the International Criminal Court Act 2001 (i.e. genocide, crimes against humanity, and war crimes) to the Service police should be created.

Recommendation 28: There should be a safe reporting mechanism, independent of the chain of command, to enable Service personnel to raise concerns about the conduct of others. Those handling such matters should be deployed alongside Forces wherever possible, should have experience of overseas operations, should be able to offer anonymity if required, and should be independent of the chain of command for relevant purposes.

Recommendation 29: Serious consideration should be given to mandating the wearing and use of an appropriate helmet camera or body camera by all ground forces actively engaged in overseas operations, save where doing so would impact on the wearer's safety. Footage from these cameras should be routinely downloaded and retained.

Recommendation 30: Cameras should, wherever possible, be fitted in detention facilities and temporary holding facilities in such a way as to ensure that any abuse or ill-treatment of

captured persons, if committed, is recorded and retained on an Information System compatible with that in Permanent Joint Headquarters.

Recommendation 31: The feasibility of fingerprinting and biometrically registering all captured persons on compatible Information Systems should be explored. This would entail DNA swabs being taken and fingerprints being obtained and stored.

Recommendation 32: Custody records for all captured persons (whether detained in temporary holding facilities or formal detention facilities) should be compiled digitally and recorded and retained on a compatible Information System.

Recommendation 33: Before being released, captured persons should be photographed extensively and interviewed, being asked if they have any complaints about their treatment whilst captured. The entire process should be video and audio recorded whenever possible. Any such complaint must be investigated by the Defence Serious Crime Unit.

Recommendation 34: The creation or upgrading of an Operational Record Keeping System should be given immediate attention.

Recommendation 35: The Armed Forces Act should be amended to seek to reproduce the effect of section 127 of the Magistrates' Courts Act 1980 which generally prevents offences only triable in a magistrates' court from being tried in the civilian system unless the charge was laid within 6 months from the time when the offence was committed. Nothing in this provision will apply to any Schedule 2 offence or an offence in prescribed circumstances.

Recommendation 36: The Provost Marshal (Serious Crime), Director of Service Prosecutions and Judge Advocate General should be asked to agree protocols along the lines I have outlined at 6.6 (Article 2 protocol) and 6.7 (Article 3 protocol).

Recommendation 37: If it is decided to restructure the Armed Forces Act, a power to direct an investigation should be conferred upon the Director of Service Prosecutions.

Recommendation 38: The protocols should include a provision agreeing that there will be no fresh criminal investigation unless the Director of Service Prosecutions considers that there is new information capable of leading to compelling evidence which might:- (a) materially affect the previous decision; and (b) lead to a charge being laid.

Recommendation 39: The Ministry of Defence should ask the Ministry of Justice to examine the feasibility of restricting access to public funds for complainants where the allegation is *de minimis* or after a decision has been made not to prosecute.

Recommendation 40: The Judge Advocate General or nominee should provide judicial oversight in respect of investigations into allegations of ill-treatment on overseas operations. This role should be reflected in the Article 3 protocol.

Recommendation 41: The Ministry of Defence should engage with the Ministry of Justice on the proposal to extend the jurisdiction of coroners to include deaths of non-UK personnel on overseas operations where the Service police investigation has not fully satisfied any Article 2 obligation.

Recommendation 42: The Ministry of Justice's agreement to allow the Service Courts to share the Common Platform should be urgently obtained.

Recommendation 43: A case management system should be put in place that contains the information and technology needed to monitor and manage the progress and completion of Service Justice cases. This must permit the Service Prosecuting Authority and Military Court Service to obtain the same performance data as the Crown Prosecution Service and Her Majesty's Courts and Tribunal Service.

Recommendation 44: A uniform approach to conducting pre-posting training should be adopted across the Service legal services.

Recommendation 45: Service Prosecuting Authority lawyers should not deploy to theatre but should provide real-time advice using the most modern forms of connectivity.

Recommendation 46: Technology and procedures should be maintained such that all parts of the Service Justice System are capable of operating remotely by video link or other similar means. In particular, there should be a presumption that remote court attendance by advocates, defendants and witnesses will occur in any case where such attendance will expedite the justice process. This should be subject only to the tribunal's discretion to conclude that this approach would be inconsistent with the right to a fair trial in a particular case. It will be necessary to ensure that technology is available to enable a defendant to communicate remotely and confidentially with his/her Assisting Officer or with any legal representative.

Recommendation 47: Service personnel or veterans who are interviewed under caution or prosecuted in relation to incidents that allegedly occurred during overseas operations (as defined in section 1(6) of the Overseas Operations (Service Personnel and Veterans) Act 2021) should no longer be asked to make up any shortfall between the means-tested award under the Armed Forces Legal Aid Scheme and their actual legal costs.

Recommendation 48: A Defence Representation Unit should be created to provide a triage service to Service personnel and veterans under investigation for criminal conduct.

Recommendation 49: The Unit should be headed by a Director of Defence Counsel Services. The Director and the Unit must be fully independent of the military chain of command and act under the general supervision of the Attorney General. Any guidelines or instructions issued by the Attorney General must be published.

Recommendation 50: Advice given by the Unit may be given remotely or by telephone and should not justify any unwarranted delay in investigations or in any judicial process. The Unit must be contacted at the earliest opportunity by those seeking advice.

Recommendation 51: 'Experienced persons' from an accused's Corps, Regiment or Service should be identified and instructed to act as a supporter and mentor. They should be properly trained, be independent, and have access to the accused at all times..

Recommendation 52: The Director of Counsel Services should be responsible for the training and the certification of Assisting Officers in advising and assisting Service personnel in advance of and during cases in the Service Courts and Summary Hearings.

Recommendation 53: Commanding Officers should receive greater training on conducting Summary Hearings. This should include mock hearings.

Recommendation 54: Consideration should be given to certifying, and periodically re-certifying, Commanding Officers as having attained a sufficient level of competence to conduct Summary Hearings.

Recommendation 55: Assisting Officers should receive greater training on Summary Hearings, and on their role and responsibilities to the accused.

Recommendation 56: A list of certified Assisting Officers should be created and made available to all accused facing Summary Hearings whether for criminal offences or non-criminal Service offences.

Recommendation 57: Wherever possible, Assisting Officers should be from a separate chain of command to the Commanding Officer conducting the Summary Hearing, although from the same Regiment or Service as the accused.

Recommendation 58: All Summary Hearings should be video recorded, or where that is not possible audio recorded.

Recommendation 59: Legislation should be brought forward to remove the power to hear criminal offences summarily from Commanding Officers. No change is required in relation to non-criminal Service offences.

Recommendation 60: Judge Advocates should be given jurisdiction to sit as Military Magistrates (without a board) to try those cases that are no longer tried by Commanding Officers. In the event of conviction, criminal cases should be referred back, together with any relevant findings, to the Commanding Officer for sentence.

Recommendation 61: Legislation should be brought forward to reintroduce a power for Service police to charge suspects with criminal offences, where the offence is one which would under current legislation be referred to a Commanding Officer under section 116(3) the Armed Forces Act 2006. The existing powers of Commanding Officers to charge both criminal offences and non-criminal Service Offences should be retained in parallel. Charging should happen at the earliest possible opportunity.

Recommendation 62: The chain of command should not have discretion to take no further action when Service police have charged a criminal offence.

Recommendation 63: Investigations must be conducted as quickly and efficiently as possible without compromising their thoroughness or integrity. Where there has been no meaningful activity for 30 days the reason for such delay shall be recorded in a file created for that purpose.

Recommendation 64: Free legal advice should be given to those charged with criminal offences before any hearing. This should be provided by the Defence Representation Unit and provide every option as to plea, venue and representation.

Annex C: List of contributors

During the course of my review, I have interviewed and received very considerable assistance from the following people:

1. Michael Addison
2. Mike Alabaster, Wing Commander
3. Richard Allen, Brigadier
4. Nick Ayling
5. Kevin Bailey, Group Captain
6. Richard Bassett, WO1
7. Jamie Baxter, Lieutenant-Colonel
8. Tim Billingham, Group Captain
9. Rachel Bird, Flight Lieutenant
10. Andrea Bishop, Assistant Chief Constable
11. His Honour Jeffrey Blackett
12. Nick Borton, Major General
13. Michelle Brewer
14. Ben Bridge
15. Paul Brogan, Lieutenant-Colonel
16. Vivien Buck, Brigadier
17. Chris Canning, Captain (Royal Navy)
18. Sir Nick Carter GCB CBE DSO ADC, General
19. Charlie Carver, Commander
20. Andrew Cayley QC
21. Edward Chamberlain, Brigadier
22. Graham Chetwynd, Lieutenant-Colonel
23. Ian Clark
24. Professor Michael Clarke
25. David Cornick, Flight Lieutenant
26. Mick Creedon QPM, Chief Constable (Retired)
27. Sophie da Silva
28. Dale Daborn, Air Commodore
29. Peter Davis OBE
30. Tony Day, Captain (Royal Navy)
31. Peter Defeo

32. Sam des Forges
33. Joanne Edwards, Lieutenant-Colonel
34. Brendan Elliot, WO1
35. Reverend Anthony Feltham-Wright
36. Colin Findlay CBE, Brigadier (Retired)
37. Eddie Forster-Knight CBE, Brigadier (Retired)
38. Paddy Ginn, Brigadier
39. Georgina Godden
40. Jeremy Green OBE, Colonel (Retired)
41. Julie Grugel
42. Jim Hadfield, Lieutenant-Colonel
43. The Right Honourable Baroness [Heather] Hallett DBE PC
44. Paul Hamilton, Group Captain
45. Jack Hawkins, Commander
46. Paul Holewell
47. Steve Horne, Air Commodore
48. Bruce Houlder QC
49. Mariette Hughes
50. Mark John, Colonel
51. Stephen Kell, Air Commodore (Retired)
52. His Honour Judge Alan Large
53. Robert Lennox
54. Isabel Letwin CBE
55. Gavin Lofthouse
56. His Honour Shaun Lyons CBE
57. Karen McQuade
58. Scott Meredith, Colonel
59. Mark Moakes
60. Craig Moran, Commander (Retired)
61. Paul Mullaney, Major
62. Professor Sir Jon Murphy QPM
63. David Neal, Brigadier (Retired)
64. Maurice Nugent CBE, Brigadier (Retired)
65. Dean Oakey, Commander
66. Lex Oliver
67. James Parker
68. Julia Parke-Robinson, Lieutenant-Colonel

69. Mark Phelps OBE, Air Commodore
70. Lindsey Pratt
71. Steve Prideaux
72. David Quantock, Lieutenant-General (Retired), US Army
73. Darren Reed, Captain (Royal Navy) (Retired)
74. Jonathan Rees QC
75. James Roddis, Brigadier
76. Martin Ryan, Lieutenant-Colonel
77. Peter Ryan
78. James Swift OBE, Lieutenant-General
79. Caron Tassel
80. Alex Taylor, Major General
81. Jim Taylor, Colonel
82. His Honour Judge Thomas Teague
83. Nick Thomas, Colonel
84. Philip Trewhitt OBE
85. Clare Walton, Air Vice Marshal
86. Clare Waterworth MBE, Colonel
87. Nick Wilcox, Detective Superintendent (Retired)
88. David Wilkinson, Group Captain
89. Gareth Wilson, Deputy Chief Constable
90. Rob Wood OBE, Commodore

In addition I have received a most helpful written contribution from Major-General Natasha Fox, AM CSC, of the Australian Defence Force. This note draws together consolidated information provided by the Provost Marshal (Australian Defence Force), the Office of the Inspector General Australian Defence Force, the Head Summary Discipline Implementation Team, and Defence Legal Services.