



BRIEFING PAPER

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The review of the service justice system

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Summary

The next five-yearly Armed Forces Bill is due in 2021. In 2017 the Ministry of Defence commissioned a review of the Service Justice System in preparation for the Bill, which it published in early 2020.

The Ministry of Defence says it is considering several of the recommendations as legislative proposals for inclusion in the Armed Forces Bill. However, the Defence Secretary has rejected one of the key recommendations of the review, that the most serious offences of murder, manslaughter and rape should be tried in the criminal rather than the service justice system when committed in the UK.

This paper explains what the service justice system is, the main outcomes of the review and the Government's response.

Box 1: About the Armed Forces Act

An Armed Forces Act is required every five years. The purpose of the Armed Forces Act is to provide the legal basis for the armed forces and the system of military law which exists in the UK. It sets out nearly all the provisions for the system of service law – of command, discipline and justice – that applies to all service personnel wherever they are operating. In the past the Act has also been used to introduce any new measures relating to the armed forces that fall outside the Act's traditional remit of service discipline. The *Armed Forces Act 2006* was extensive and amounted to a complete overhaul of the legislation relating to military law and Service discipline. Subsequent Acts have amended the 2006 Act. The *Armed Forces Act 2016* was extended by the [Armed Forces Act \(Continuation\) Order 2020](#) until the end of 11 May 2021. Any further Orders cannot extend the Act beyond the end of 2021 ([Armed Forces Act 2006, section 382](#)).

What is the service justice system?

The service justice system (SJS) provides a legal framework that ensures Service personnel are subject to a single disciplinary code that applies wherever they are serving.

The disciplinary systems of the three services – the Army, the Royal Navy and the Royal Air Force – were drawn together under a common system by the *Armed Forces Act 2006*. Subsequent quinquennial Acts amend the 2006 Act (see box 1).

While the service justice system mirrors the criminal law in England and Wales as closely as possible it also provides an avenue to enforce standards that are distinctive to the Armed Forces, for example absence and misconduct. Service personnel are subject to the service justice system wherever they may be serving and it applies to conduct both within and outside the United Kingdom.

The Commanding Officer remains central to the system and can investigate and decide upon less serious offences summarily. Serious cases are referred to the Service police for investigation and passed to the independent Director of Service Prosecutions, who heads the Service Prosecutions Authority. These are heard at Court Martial, a standing court which is headed by a civilian Judge Advocate.

Why was a review commissioned?

The review was announced in Parliament by Baroness Goldie, the spokesperson on defence in the Lords, in response to a topical question by Lord Morris of Aberavon, a former Attorney General, who had previously raised concerns about the Court Martial process with the Government. Baroness Goldie said:

In preparation for the next Armed Forces Bill in 2020, the Government have decided that the time is now right for an independent and more in-depth look at the service justice system so that we can be assured that it is as effective as it can be for the 21st century.¹

The service justice system has come under the spotlight in recent years in part because of several prominent cases. These focused on issues such as the handling of allegations of sexual assault and rape and the jurisdiction of the service police in investigating such offences in the UK, the prosecution of the most serious offences such as murder at Court Martial, and the use of majority verdicts at Court Martial.

About the review

The review was carried out by His Honour Shaun Lyons, a retired senior Crown Court Judge.

The review consists of two parts:

- Part one examined the need for the SJS and provides an overview of the system. It also examined in a separate document whether the service police match the requirements of the SJS (led by Professor Sir John Murphy²) and conducted a process audit of domestic abuse and serious sexual offences investigated by the Service police (led by retired police officer Mark Guinness). Submitted to the MOD in March 2018.
- Part two took further some earlier aspects of the review and recommended ways in which the system can be improved. Submitted to the MOD in March 2019.

All three documents were published on Gov.uk in February 2020: [service justice system review](#).

What has the Service Justice System review recommended?

The review makes a series of recommendations, some of which require legislative changes.

One of the most significant recommendations is that murder, manslaughter and rape should not be prosecuted at Court Martial when these offences are committed in the UK, except where the consent of the Attorney General is given. Rather, they should be prosecuted in the criminal justice system, as was the case prior to the *Armed Forces Act 2006*. If accepted by the Government, the review also recommends that

¹ [HL Deb 23 October 2017 c766](#)

² Professor Sir John Murphy of Liverpool John Moores University (Centre for Advanced Policing Studies).

service police should not investigate these cases when they occur in the UK.

The number of members who sit on the Board (jury) of a Court Martial should be amended; sitting with either three or six members (depending on the charge and sentencing power) and OR7 ranks³ should be able to sit on boards. The review also recommends the current simple majority requirement be replaced with a qualified majority of five to one. These recommendations require legislative changes.

The review recommends the creation of a new independent oversight body for the service police forces and the creation of a new tri-service Defence Serious Crime Unit to deal with major crime. A separate Library paper discusses these recommendations: [The Service police Review](#).

The review also makes a number of recommendations concerning the recording and investigation of domestic abuse and the support given to victims.

Given the number of recommendations made by the review, this paper focuses on those recommendations that the review has identified as requiring legislative changes (section 3). Domestic abuse and victim support is discussed in section 4.

Has the Ministry of Defence responded?

Yes. The MOD gave a response when it published the review documents, although it has amended this response during 2020 to reflect changes to its response.

The MOD has indicated acceptance of some of the recommendations of the review, for example it has started scoping work on establishing a Defence Serious Crime Unit (DSCU), and the need for additional independent oversight of complaints about the Service Police.

The MOD has also indicated that a number of the review's recommendations are being considered as legislative proposals for inclusion in the next Armed Forces Bill. These are discussed in detail in section 5 of this paper.

However, the Defence Secretary has rejected one of Lyons' main recommendations. Namely, that 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. The Defence Secretary has indicated the existing principle of concurrency between the service justice system and civilian criminal court system should be retained. The Centre for Military Justice is seeking a judicial review of this decision.

In October 2020, during the course of the Overseas Operations (Service Personnel and Veterans) Bill, the Government announced a new, judge-led review of how investigations are raised and investigated when they occur overseas on operations. The MOD explicitly said it will "build upon

³ OR7 rank is Chief Petty Officer in the Royal Navy, Staff Sergeant in the Army, Colour Sergeant in the Royal Marines, and Flight Sergeant/Chief Technician in the RAF.

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and not reopen” the recommendations of the Service Justice System review. This review is expected to be finished in summer 2021.

About this paper

This paper was written before the Armed Forces Bill 2021 has been introduced and therefore does not reflect the content of the Bill. The Library will produce a separate paper on the content of the Bill in time for Second Reading.

This paper replaces [The Military Justice System: an introduction](#), SN06823, 14 February 2014.

1. About the Service Justice System

The service justice system⁴ has evolved over the years to provide a legal framework that recognises the environment in which the Armed Forces operate. It ensures that Service personnel are subject to a single code that applies wherever in the world they are serving. While the service justice system mirrors the criminal law in England and Wales as closely as possible it also provides an avenue to enforce standards that are distinctive to the Armed Forces.⁵

The Commanding Officer remains central to the system and can investigate and decide upon less serious offences summarily.⁶ More serious offences are heard by Court Martial, a standing court which is headed by a civilian Judge Advocate. All defendants may elect trial by Court Martial rather than a Summary Hearing by the Commanding Officer. Serious cases are referred to the Service police for investigation and passed to the independent Director of Service Prosecutions, who heads the Service Prosecutions Authority.

1.1 Legal foundation

The Government overhauled the legislation relating to military law and Service discipline in the [Armed Forces Act 2006](#) (AFA 06). Previously all three Services had their own separate systems of Service Law. AFA 06 consolidated and modernised the previous Service Discipline Acts⁷ and replaced them with a single system of Service law that applies to all Service Personnel wherever they are serving in the world. It also brought the military disciplinary system into line, as far as practicable, with the civilian criminal justice system. The Act came into force in 2009. There is extensive secondary legislation with the Act.⁸ Further changes to the justice system were made by the *Armed Forces Act 2011* and the *Armed Forces Act 2016* although they were not nearly so extensive. Both amend the *Armed Forces Act 2006*. A new Act is required by the end of 2021.⁹

The [Manual of Service Law](#), also known as Joint Service Publication (JSP) 830, is the principle reference publication and provides guidance on the Armed Forces Act 2006. The manual is split into three volumes:

- Volume 1: commanding officers guide
- Volume 2: court guide

⁴ The terms military or service justice system are both used by Members during discussions on this topic. This paper uses Service justice system.

⁵ "[Overview of Service justice system and the Act](#)," *Armed Forces Bill Team, Ministry of Defence*; The Service Prosecuting Authority; JSP 830 Manual of Service Law.

⁶ A Summary Hearing "[is a disciplinary process where an accused's CO has jurisdiction to deal with a person](#)" SPA website, accessed 19 January 2021

⁷ The *Army Act 1955*, the *Air Force Act 1955* and the *Naval Discipline Act 1957*.

⁸ Further House of Commons Library material on the Armed Forces Act 2006 is listed in [Secondary legislation of the Armed Forces Act 2006](#), SN04342, 15 January 2008.

⁹ [Armed Forces Act 2016 section 1\(1\)\(3\)](#)

- Volume 3: legal compendium

JSP 830 gives detailed information on the powers of the Commanding Officer, investigative powers, the Summary Hearing and Court Martial processes among others. It also contains a list of secondary legislation made under the Armed Forces Act as well as other allied legislation and source material ([volume 3](#)). There is a simplified leaflet for those accused of a crime: [Your rights if you are accused](#).

1.2 Why have a separate Service Justice System?

The need for a separate Justice System for the Armed Forces is twofold.¹⁰ First, it reflects offences that are distinctive to the Armed Forces - absent without leave or disobeying a lawful command, for example. Second, in recognition of the fact the Armed Forces operate worldwide, it ensures that the Services' disciplinary system applies to service personnel wherever they may be serving.

When in the United Kingdom, Service personnel are subject to both service and civilian criminal jurisdiction. Allegations of wrong-doing may be reported to either service or civilian police and whether Service or civilian police investigate an alleged offence depends on the circumstances and the status of those involved. When overseas, Service police would normally take the lead.

1.3 Who is subject to Service law?

Every member of the Regular forces is subject to Service law at all times. The circumstances in which members of the Reserve forces are subject to Service Law are set out in the Armed Forces Act and broadly speaking apply when a Reservist is in service or undertaking any training or duty. More detail of when Service Law applies to a regular or reservist can be found in the Armed Forces Act 2006 or volume 1, chapter 3, part 1 of the Manual of Service Law.

Civilians may also be subject to Service Law if they fall into one of the categories set out in [Schedule 15](#) to the Act. This includes civilians in Her Majesty's ships and aircraft; persons in service custody; crown servants (eg Ministry of Defence civil servants) in a designated area; members of specified military organisations (NATO); members of other specified organisations in a designated area; persons residing or staying with certain people in a designated area; and persons designated by or on behalf of the Defence Council.

Where a civilian is subject to Service discipline, a Commanding Officer must be allocated to them. Civilians subject to Service discipline are only subject to Service jurisdiction for a limited range of offences.¹¹ Civilians can only be brought before the Service Civilian Court or tried before the

¹⁰ [JSP 830 Manual of Service Law](#) version 2.0, 1.1.3

¹¹ [JSP 830 Manual of Service Law](#) version 2.0, 1.3.7 details these circumstances in more detail

Court Martial (see below); they cannot be brought before a Commanding Officer.¹²

Box 2: Section 42, AFA 06

Section 42 (Criminal Conduct) of the Armed Forces Act provides that:

(1) A person subject to service law, or a civilian subject to service discipline, commits an offence under this section if he does any act that—

- (a) is punishable by the law of England and Wales; or
- (b) if done in England or Wales, would be so punishable.

Jurisdiction

In the **UK** jurisdiction over offences solely against service law (such as absence without leave) lies with the Service authorities. Concurrent jurisdiction (between the service and civilian police) may apply to other offences. Jurisdiction over who investigates offences depends on where the offence took place, what the offence is, the complexity, and who was involved. Where issues of jurisdiction are complex then agreement is reached between the military and civilian police as to who will lead the investigation.¹³

In cases that occur **overseas**, jurisdiction is often regulated by a treaty, Memorandum of Understanding or other agreement, including a Status of Forces Agreement.¹⁴

1.4 The different elements of the system

The process by which an individual who is subject to service law who is suspected to have committed an offence varies depending on the circumstances. The process will differ depending on the severity of the offence, the location of the offence (UK or overseas) and if the individual/individuals against whom the offence was committed is subject to service law or is a civilian. This will decide whether an investigation is conducted by a Commanding Officer (CO), one of the Service police forces or a Home Office police force; and whether the offence is heard in a Summary hearing by a CO, at Court Martial, at a Service Civilian Court or in the criminal justice system. Full guidance is given in [JSP 830](#).

Role of the Commanding Officer

Commanding Officers are at the heart of the Service Justice System and are responsible for standards of behaviour of those under their

¹² Armed Forces Act 2006, chapter 1

¹³ [JSP 830 Manual of Service Law](#), vol 1, chapter 3, part 3, discusses jurisdiction in more detail. [The Protocol on the exercise of criminal jurisdiction in England and Wales](#) between the Service Prosecuting Authority and the Director of Public Prosecutions and the Ministry of Defence is available on the SPA's website. Home Office Circular 028/2008 on jurisdiction between civilian police forces, the MOD police and the Service police forces is available in annex 3 of Liberty's report '[Military Justice – second rate justice](#)'

¹⁴ JSP 830 Manual of Service Law, volume 1, chapter 3, discusses jurisdiction at length. Chapter 6 also discusses jurisdiction in more detail in reference to CO or SP investigations.

command. They are vested with statutory powers to administer justice for certain offences. The Manual of Service Law, volume one, provides a detailed guide to the powers of COs.

COs are empowered by the *Armed Forces Act 2006* to investigate and administer justice for certain offences (listed in Schedule 1 of the Act) without the need for a Service police investigation. CO's must refer certain offences, listed in schedule 2 of the Act, to the Service police for investigation. These are often referred to as Schedule 2 offences (see box 2).

A Commanding Officer can determine less serious offences summarily through the Summary Hearing process. These may be disciplinary offences, for example failing to attend for duty, or criminal offences, for example assault and battery, criminal damage, theft.

Role of the Service police

Each of the three services has its own police force: The [Royal Military Police](#) (RMP) in the Army, the [Royal Air Force Police](#) (RAFP) and the [Royal Navy Police](#) (RNP). Collectively they are known as the Service police. They are empowered by the *Armed Forces Act 2006* to investigate service offences.

Service offences include all criminal offences under the laws of England and Wales, as well as some additional disciplinary offences unique to the military, for example desertion, absence and misconduct.¹⁵

There is a separate, national civilian [Ministry of Defence Police](#) (MDP) force, established by the *Ministry of Defence Police Act 1987*. Its primary function is to provide civil policing and armed security for the MOD's nuclear sites and other key defence assets in the UK.

More information on the role of the Service police can be found in Commons Library paper the [Service police Review](#).

Box 3: Schedule 2 offences

Schedule 2 lists those serious service offences ("Schedule 2 offences") to which sections 113 and 116 of the AFA 2006 Act apply. Section 113 of the 2006 Act requires a commanding officer to notify a service police force if he or she becomes aware that a Schedule 2 offence has or may have been committed by a person under his or her command. Section 116 of the 2006 Act requires a service police officer who considers that there is sufficient evidence to charge a person with a Schedule 2 offence to refer the case to the Director of Service Prosecutions.¹⁶ Schedule 2 offences cannot be heard summarily by a CO, they must be tried at Court Martial.¹⁷

Schedule 2 offences include both disciplinary and criminal offences, such as mutiny, desertion, dangerous flying, and serious criminal offences under section 42 of the 2006 Act, such as murder, manslaughter, high treason and certain sexual offences, including rape. The schedule was amended in 2018, by [the Armed Forces Act 2006 \(amendment of schedule 2\) Order](#) (SI 149) to include additional sexual offences: an offence under section 3 of the Sexual Offences Act 2003 (c 42) (sexual assault), an offence under section 66 of that Act (exposure) and an offence under section 67 of that Act (voyeurism).

¹⁵ [Service Justice review Policing review, Appendix D](#)

¹⁶ [The Armed Forces Act 2006 \(Amendment of Schedule 2\) Order 2018](#), explanatory notes

¹⁷ JSP 830, vol 1 chapter 6, para 23 (page 1.6.11). Lists of these types of offences can be found in JSP 830, volume 1, chapter 6, Annex D and Annex E.

The Service Prosecuting Authority

The Director of Service Prosecutions heads the [Service Prosecuting Authority](#) (SPA) which is independent of the chain of command and is akin to the Crown Prosecution Service. It was created by the *Armed Forces Act 2006* to replace the individual Service Prosecution Authorities and formed in January 2009.

The Service Prosecuting Authority is responsible for reviewing cases referred to it by the service police or chain of command and to prosecute appropriate cases at the Service Courts (see below).¹⁸

The Director of Service Prosecutions and the SPA act under the general superintendence of the Attorney General of England and Wales and remains fully independent of the Military Chain of Command. The SPA is based at RAF Northolt. Further information is available on the [SPA website](#).

The Attorney General is the UK Government's senior law officer for England and Wales. The Attorney General, among other functions, superintends the Crown Prosecution Service, headed by the Director of Public Prosecutions. More information on the role and functions of the Attorney General can be found in Commons Library paper [The Law Officers: a constitutional and functional overview](#) (CBP8919)

Further information is available on the [SPA website](#).

The Judge Advocate General

The Judge Advocate General is the Judicial Head of the Service Courts. The JAG is assisted by assistant Judge Advocate General (AJAGS).

All the judges are members of the independent judiciary and are civilians, although some may have served in the Armed Forces. The Judge Advocate General is appointed by HM The Queen. Judge Advocates are appointed by the Lord Chancellor.¹⁹

Further information about JAG is available from judiciary.uk: [Judge Advocate General](#)

The Military Court Service

The [Military Court Service](#) (MCS) was set up by the *Armed Forces Act 2006* to provide a tri-service military court service, merging the previous three Services court services. It is independent of the service chains of command and staffed by civil servants.

There are two permanently manned Military Court Centres in the UK, at Bulford and Catterick. An additional court is located in Germany at Sennelager.

Trials can be held outside the manned Military Court Services when required. The MCS says the court system is entirely "portable".

¹⁸ These are the Court Martial, the Court Martial Appeal Court, the Service Civilian Court and the Summary Appeal Court.

¹⁹ "The JAG is not a General of the Army; the word "general" signifies broad oversight, as in Secretary-General, Attorney-General", [Judiciary of England and Wales](#), accessed 11 February 2014

JSP 830 Manual of Service Law, volume 2, provides a [Court Guide](#).

Court Martial results from the Military Court Centres are published on Gov.uk: [Military court centre listings](#).

1.5 Hearings and Court Martial

Depending on the severity of the offence, an individual subject to service law may have their offence dealt with by their Commanding Officer in a summary hearing or by Court Martial. An individual has the right to elect to be tried at Court Martial rather than by a summary Hearing. A civilian subject to service law will have their case heard in the Service Civilian Court.

Individuals subject to service law may alternatively be prosecuted in the criminal justice system.

Summary Hearings

Commanding Officers have the power to award a range of punishments under the *Armed Forces Act 2006*. These include fines, stoppage of leave, restriction of privileges, compensation payments, reduction in rank, reprimand or a combination of punishments. The maximum sentence that can be imposed by a Commanding Officer is 28 days' detention.²⁰ A list of the punishments that may be awarded by a Commanding Officer can be found on Gov.uk: [CO punishments under AFA06](#).

Generally speaking, the most serious offences must be investigated by the Service police, rather than a CO, and reported directly to the Director of Service Prosecutions for Court Martial trial.

An individual has the right to elect to be tried at Court Martial rather than by a summary Hearing. If an individual chooses to have a Court Martial and is found guilty, the court will not be able to award a punishment that is more severe than a CO could give at a summary hearing.²¹

Summary Appeals Court

The Summary Appeal Court decides appeals from summary hearings. It is conducted by a Judge Advocate accompanied by two service members. It is modelled on an appeal from the magistrates' court to the Crown Court.²²

The Service Courts

While the Court Martial is the best known of the Service Courts, there is also the Court Martial Appeal Court, the Service Civilian Court and the Summary Appeal Court (see above).

²⁰ A CO who holds the rank of rear admiral, major-general, or air vice marshal automatically has extended powers under section 133 of the Armed Forces Act 2006 and can award up to 90 days detention. Section 133 also outlines how a CO may be given extended powers.

²¹ [Your rights if you are accused of an offence under the Service justice system](#), November 2014, page 1-6-G-10

²² [Military jurisdiction](#), Judiciary.uk, accessed 30 December 2020

The Court Martial

The Court Martial is a standing, permanent court established by the Armed Forces Act 2006. It is similar in its sentencing powers and procedure to the civilian Crown Court. It has jurisdiction to try any Service offence including criminal conduct and disciplinary offences, although it predominantly deals with serious cases.

A Court Martial is presided over by a civilian judge known as a Judge Advocate.

The jury, known as the board, is made up of between three, five or seven lay or board members. The numbers of lay members depends on the seriousness of the case, with lesser offences tried with three or five lay members, while seven members may sit in very serious cases. The lay members also help the Judge Advocate to decide on any sentence if the accused is found guilty. Whether lay members are service personnel (commissioned or warrant officers) or civilians depends on the status of the defendant.²³

The Court Martial has the same sentencing powers in relation to imprisonment as a Crown Court, including the power to impose life imprisonment.²⁴

A more detailed explanation of the Court Martial process can be found on Judiciary.uk. Full guidance on Court Martial constitution, rules, proceedings and sentencing powers can be found in [JSP 830 manual of service law, volume 2 \(court guide\)](#).

Court Martial Appeal Court

Those found guilty at Court Martial may appeal to the Court Martial Appeal Court, which has equivalent powers to the Court of Appeal (Criminal Division).

Service Civilian Court

The Service Civilian Court has similar powers to a Magistrate's Court and applies to civilians who are subject to Service discipline, or dependents of Service personnel resident overseas (e.g. in Germany or Cyprus). It consists of a Judge Advocate sitting alone trying cases. JSP 830 says it resembles the situation of a magistrates' court sitting with a District Judge instead of a lay bench. It can sit within or outside the UK.

The SCC may not award imprisonment for more than 12 months for one offence, or not more than 65 weeks for consecutive sentences.²⁵

The [Armed Forces \(Service Civilian Court\) Rules 2009](#) (SI 2009/1209) provides the statutory framework. Guidance is provided in [JSP 830, volume 2, chapter 32](#).

²³ [JSP 830: volume 2, chapter 28](#)

²⁴ "[Service Criminal Justice System](#)", *Judiciary of England and Wales*, accessed 11 February 2014

²⁵ JSP 830, volume 2, chapter 32, para 39 onwards.

2. Context: what prompted the review?

In 2017 the Ministry of Defence commissioned a [review of the Service Justice System](#), led by His Honour Shaun Lyons, a retired senior Crown Court judge.

Many of the recommendations made in Lyons' review reflected concerns raised previously by Liberty, the human rights organisation, and MPs and Peers, among others. The service justice system has come under the spotlight in recent years after several prominent cases focused attention on, separately, how allegations of sexual assaults and rape are handled in the service justice system; the role and capabilities of the Service police in investigating serious sexual offences in the UK; and the use of majority verdicts at Court Martial. Concerns have also been raised about the lack of clarity over jurisdiction of investigations and prosecutions of offences committed in the UK. These issues are discussed in turn below.

Announcement of the review

The review was announced by Baroness Goldie in the Lords in response to a topical question by Lord Morris of Aberavon, a former Attorney General, who has previously raised concerns about the Court Martial process with the Government. Baroness Goldie said:

In preparation for the next Armed Forces Bill in 2020, the Government have decided that the time is now right for an independent and more in-depth look at the service justice system so that we can be assured that it is as effective as it can be for the 21st century.²⁶

2.1 Investigation and prosecution of serious sexual assaults

In recent years several cases have focused attention on how allegations of serious sexual assault or rape are handled in the service justice system. Some changes were made in the Armed Forces Act 2016. However, the investigation and prosecution of allegations of sexual offences in the service justice system remains a live issue.

One of the most prominent cases is that of Corporal Anne-Marie Ellement, who committed suicide in October 2011. She had alleged two fellow soldiers had raped her at a barracks in Germany but military prosecutors did not take the case forward. The coroner ruled that bullying and the lingering effect of the alleged rape were factors in her suicide and also criticised the Army's handling of her records. The Army apologised after the coroner's ruling.²⁷ After the case was reopened, two former members of the Royal Military Police were put on trial for rape at a court martial in 2016 but [were acquitted](#). The judge, Jeff

²⁶ [HL Deb 23 October 2017 c766](#)

²⁷ "Cpl Anne-Marie Ellement: Army apologises as coroner finds bullying was suicide factor", Daily Telegraph, 3 March 2014

Blackett, criticised the pair's conduct and for the length of time it had taken the case to reach court.²⁸ The Royal Military Police later apologised for mistakes made in the original investigation.²⁹

In April 2019, after reports of a [serious sexual assault by six army soldiers](#) against a teenage female soldier emerged, the then Defence Secretary [commissioned a review](#) into inappropriate behaviours in the armed forces. In July 2019 the Ministry of Defence published the [Wigston review into inappropriate behaviours](#) in the armed forces, and in December 2020 it published a [review of the MOD's progress](#) in implementing Wigston's recommendations, conducted by Danuta Gray. The MOD said it accepted all the recommendations of both reports.

Armed Forces Act 2016: discussion of CO's power to investigate sexual assault

During the passage of the Armed Forces Act 2016, members of both Houses raised concerns about the power given to Commanding Officers to investigate allegations of sexual assault.

At the time, COs were required to report all allegations of rape or sexual assault with penetration to the Service police for investigation (as outlined in Schedule 2 of the Armed Forces Act 2006³⁰). However, the CO had discretion to investigate allegations of sexual assault, voyeurism, exposure and sexual activity in a public lavatory. The decision to exclude these offences had been discussed at length in the intervening years.

At Report stage of the Bill in the Lords, Lord Touhig, the shadow spokesman for defence, tabled an amendment that would remove a CO's discretion to investigate allegations of sexual assault. Lord Touhig suggested this discretion, which relied on COs understanding of sexual assault, "is an unexploded bomb within the system".³¹ In response, Earl Howe said the Service Justice Board would take a fresh look at this issue and report back to the Defence Secretary later in the year.³² In November 2016 the Government duly announced that the offences of sexual assault, voyeurism and exposure would be included in Schedule 2.³³ Earl Howe later acknowledged that the House was "instrumental" in making the case for the inclusion of these offences in Schedule 2.³⁴

Changes to Schedule 2 offences can be made through secondary legislation. Schedule 2 was amended by [the Armed Forces Act 2006 \(Amendment of Schedule 2\) Order 2018](#) (SI 149) to include the aforementioned offences: an offence under section 3 of the Sexual Offences Act 2003 (c 42) (sexual assault), an offence under section 66

²⁸ "[Judge criticises conduct of ex-soldiers cleared of raping colleague](#)", The Guardian, 20 April 2016

²⁹ "[Royal Military Police apologise to family of corporal who killed herself](#)", The Guardian, 19 October 2016

³⁰ At the time, Schedule 2 included any offence under Part 1 of the Sexual Offences Act 2003 except one under section 3 (sexual assault), 66 (exposure), 67 (voyeurism) or 71 (sexual activity in a public lavatory).

³¹ [HL Deb 27 April c1199](#)

³² HL Deb 27 April 2016 c1201. See Commons Library paper [Armed Forces Bill 2015-16: Lords amendments](#), CBP 758, 9 May 2016, for a more detailed discussion of this.

³³ [HC Deb 7 November 2016 c1252](#)

³⁴ [HL Deb 22 January 2018 c898](#)

of that Act (exposure) and an offence under section 67 of that Act (voyeurism). The offence of sexual activity in a public lavatory was excluded because it was deemed likely that, given it is a public space, any prosecution would be as a civilian rather than service offence.³⁵

Current concerns about sexual offences

Liberty, the human rights organisation, and the Centre for Military Justice have outlined a number of concerns about the service justice system and how serious sexual offences are handled within the system. The Centre for Military Justice (CMJ) was set up by Emma Norton, a former head of the legal team at Liberty, who authored a report on military justice for Liberty in 2019 entitled [Military Justice: Second-rate justice](#). (following on from a [2014 report](#)). She also represented the family of the late Cpl Anne-Marie Ellement. The Centre is representing three women [seeking a judicial review](#) of the Defence Secretary's decision to reject Lyons' recommendation regarding Court Martial jurisdiction and rape.

Liberty's Military Justice report recommends several ways in which the service justice system can be improved to better serve those who have been the subject of sexual assault or rape. Liberty notes that serious sexual offences that occur in the UK are being investigated by the Service rather than civilian police. It suggests the quality of such investigations can be poor, pointing to the "extremely poor" outcomes at Court Martial for victims of alleged rape compared to civilian conviction rates. The Centre for Military Justice says that the statistics that are available regarding prosecutions indicate "there is something very badly wrong with the way in which the armed forces investigate and prosecute sexual crime". Liberty also highlights a lack of information about serving personnel who are dealt with in the civilian system, meaning the "true extent of sexual offending in our armed forces is not known".³⁶

Liberty makes a number of recommendations in the report, which also reflect the Centre for Military Justice's demands. These include:

- Allegations of rape should always be investigated by the civilian police, prosecuted by the Crown Prosecution Service and sent to trial at Crown Court. Liberty calls for rape to be added to the list of "very serious offences" listed in Home Office Circular 028/2008.
- All serious offences (including sexual assault) should be investigated by the civilian police and prosecuted in the criminal justice system.

Liberty and the CMJ believe there are incidents in which allegations of sexual assault may be "downgraded" to a battery charge, meaning it can be heard summarily by a Commanding Officer. Liberty and the CMJ recommends:

³⁵ [HL Deb 22 January 2018 c898](#)

³⁶ [Military Justice: Second-rate justice](#), Liberty, 2019

- Any decision to downgrade an allegation of sexual assault from an indictable (equivalent) offence to a summary offence (which a Commanding Officer may deal with him/herself) be subject to independent review by the CPS.³⁷

Liberty, and the CMJ also raise concerns about the process by which domestic abuse is dealt with in the service justice system. The CMJ said:

We have received reports from victims of domestic abuse reporting that the Armed Forces own welfare services do not take reports of domestic abuse as seriously as they should, and that Service police staff are not prioritising these kinds of offences. We have heard about cases where commanding officers are dealing with allegations of domestic abuse without referring them to the Service police at all.³⁸

The Minister for Defence People and Veterans has said the SJS does not normally have jurisdiction for investigating or prosecuting cases of domestic violence, although he reports there have been several cases of [domestic abuse per year](#) that have been directed for court martial. He also said the “MOD does not hold centralised records of minor violence in a domestic setting which were dealt with at a Summary Hearing”.³⁹

The CMJ also calls for Commanding Officers to receive specialist training and support on how best to assist service personnel that have reported being the victim of a sexual offence.

Further information is available in Liberty’s [Military Justice – second rate justice](#) report and on the Centre for Military Justice’s website: [Sexual violence and sexual harassment in the Armed Forces](#).

Defence Committee inquiry

In December 2020 the Defence Committee launched a new inquiry into women in the armed forces. As part of the inquiry, the committee will be exploring incidences where female serving personnel are the victim of sexual offences. The committee undertook a survey during December to gather the experiences of women who are or who have served. The committee is accepting written evidence until 31 January 2021. Further information about the inquiry, including future evidence sessions, is available on the committee’s website - [Women in the armed forces: from recruitment to civilian life](#).

Box 4: Sources of data on sexual offences in the armed forces

- [Sexual offences in the service justice system](#), annual publication

Since 2016 the MOD has published statistics on sexual offences that are dealt with wholly in the service justice system. The most recent edition was published in March 2020 and covers the year 2019.

- [The Service Justice System review](#)

The SJS review examines the data available on allegations of sexual offences and charges brought under the service justice system. Statistics on sexual offences tried at Court martial between 2015 to 2017 can be found in table 16 and 17 of part one of the review (and can also be found in table 4 and 5 of part two of the review). The review warns it would be unwise to read too much into these statistics because

³⁷ [Military Justice: Second-rate justice](#), Liberty, 2019

³⁸ “[Sexual violence and sexual harassment in the Armed Forces](#)”, Centre for Military Justice, accessed 7 January 2021

³⁹ [PQ27670](#), 10 March 2020

of the small data base. Statistics on service police investigations into rape, sexual assault and related offences can be found in Annex D of part one of the review.

- [Armed Forces Continuous Attitudes Survey](#), annual publication

This includes questions on bullying and harassment. Future iterations will include a question on sexual harassment, as recommended by the Wigston report (see below).

- [Army sexual harassment survey report 2018](#)

The Army commissioned an investigation into the nature, prevalence, prevention and management of sexual harassment within the British Army 2018.

- [Royal Navy and Royal Marines sexual harassment survey](#), 2015

In May 2016 the MOD published a report on the findings from a survey investigating the extent, impact and management of sexual harassment in the Royal Navy and Royal Marines.

- [The Wigston review of inappropriate behaviours](#), 2019

The MOD commissioned Air Chief Marshall Wigston to look into inappropriate behaviour in the armed forces. Inappropriate behaviour includes sexual offences and bullying. The review recommends (recommendation 1.4) Defence conducts a harassment survey in 2021 building on the Army Sexual Harassment Survey 2018. The MOD accepted all of Wigston’s recommendations.

Current and future surveys

The progress review on Wigston’s report conducted by Danuta Gray in 2020 provides an update on sexual harassment surveys. Gray says the Army will publish the results of their sexual harassment survey in 2021 and the RAF survey will commence in November 2020. Gray reports the Royal Navy has lacked the resource to implement a survey this year (2020). Gray also says MOD head office will implement a survey for civilians in 2021 and lead a 2023 pan-Defence sexual harassment survey.

2.2 Jurisdiction

Liberty’s [Military Justice](#) report also highlights concern about “a considerable lack of clarity” over jurisdiction and whether the criminal or service justice system should apply in certain cases. Liberty suggests there has been a degree of “mission creep” with service police investigating serious UK-based criminal cases when they ought not to be, with the current policies and protocols failing to delivery clarity on which jurisdiction ought to apply. Liberty states:

It is an established and important principle that where there are overlapping civilian and service jurisdictions and authorities within the United Kingdom, civilian jurisdiction and the civilian authorities should take precedence.⁴⁰

This principle is reflected in the Prosecutor’s Protocol and the Police Circular (Home Office Circular 028/2008). Liberty notes that the Prosecutor’s Protocol allows for criminal cases in which both the victim and accused are serving members of the armed forces to be dealt within the service justice system, which Liberty argues contradicts the presumption that civilian jurisdiction should take precedence. Liberty argues the Police Circular lacks clarity about who should investigate, citing failures by the Service police in the case of the late Cpl Anne-Marie Ellement.⁴¹

⁴⁰ “[Military Justice – second rate justice](#)”, Liberty, January 2019

⁴¹ In October 2016 the Royal Military Police apologised for failings in the way they investigated her case “[Royal Military Police apologise to family of corporal who killed herself](#)”, The Guardian, 19 October 2016

2.3 Service police and oversight

Liberty recommends abolishing the three separate branches of the Service police and create a single Service police body. Officers should also be embedded within UK-based civilian police forces, with secondments to the Services to maintain their military skills and so that they can deploy abroad. Liberty also recommended ensuring oversight of the Service police via either the Independent Office of Police Conduct or by a wholly independent body.⁴²

2.4 Majority verdicts at Court Martial

HHJ Jeff Blackett, who [retired as Judge Advocate General](#) in November 2020, has criticised the majority system used at Court Martial. In 2013 Judge Blackett told the BBC's Law in Action programme that the current rule, in which a verdict can be reached by a majority of three to two on a five-member panel, should be amended to bring it into line with the Crown Court, which can accept a verdict reached by a majority of 10 to two.⁴³ The issue of majority verdicts came before the Court Martial Appeal Court in 2010. The Court ruled that then that a majority verdict did not infringe the right to a fair trial or produce an unsafe conviction.⁴⁴

Lord Morris of Aberavon, a former Attorney General (1997-1999) and Defence Minister (1968-1970), referred to Judge Blackett's concerns about majority verdicts when he raised concerns about the Court Martial system in a debate in the Lords in February 2019. Lord Morris criticised the majority verdict and pointed to New Zealand, which whilst adopting the UK system as a model, requires convictions to be unanimous. He also said he felt it more appropriate for the most serious cases, such as rape and murder, to be heard by High Court judges, who have more experience in dealing with such cases.⁴⁵ Lord Morris had previously raised such concerns when discussing the [Sgt Alexander Blackman](#) case⁴⁶ during a debate in November 2017. Noting the Minister's announcement of a review, he explicitly called for the review to consider the majority verdict.⁴⁷

Liberty similarly called for reform of the Court Martial process in their 2019 Military Justice report. Liberty recommended Boards at Court Martial are permitted to include Other Ranks, that the number of Board members be increased and unanimous verdicts be requested in the first instance, and for the role of President of the Board be abolished and

⁴² "[Military Justice – second rate justice](#)", Liberty, January 2019

⁴³ "[Military judge raises court martial concerns](#)", BBC News, 25 June 2013. The law on Crown Court majority verdicts is set out in s17 of the *Juries Act 1974*.

⁴⁴ "[Majority court martial verdict not breach of right to fair trial](#)", *UK Human Rights Blog*, 11 January 2011

⁴⁵ [HL Deb 20 February 2019 c2281](#)

⁴⁶ Sgt Alexander Blackman received a life term in 2013 for murder for shooting dead a wounded Taliban fighter in Afghanistan, but his conviction was reduced to manslaughter in 2017.

⁴⁷ [HL 23 November 2017 c382385](#)

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replaced with a system akin to that of a jury foreman in the civilian jury system.⁴⁸

⁴⁸ ["Military Justice – second rate justice"](#), Liberty, January 2019

3. Review recommendations requiring legislative changes

Several of the review's recommendations require legislation.⁴⁹

The recommendations may amend the Armed Forces Act 2006 or amend secondary legislation related to the Act, for example the Armed Forces (Court Martial) Rules 2009.

3.1 Jurisdiction in matters of murder, manslaughter, rape and serious sexual offences

Box 5: Court Martial and service police jurisdiction

- Recommendation 1, SJS review part 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.

- Recommendation 10, SJS policing review part 1

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 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/SP engaged investigations.

- Recommendation 23, SJS review part 2

Section 2 Sexual Offences Act 2003 (SOA) offences join murder, manslaughter and rape as being cases that are tried in the CJS (criminal justice system) when they are committed within the UK. Section 3 SOA offences should continue to be dealt with in the SJS.

Before the *Armed Forces Act 2006* (AFA 06) offences of murder, manslaughter and rape committed by Service personnel in the UK were dealt with in the civilian court. The Court Martial was only used when such offences were committed overseas.

This changed in the *AFA 06*, when the jurisdiction of the Court Martial was extended to try any service offence ([section 50](#)). The change raised concerns at the time.⁵⁰ The SJS review notes that the then head of the Army Prosecution Authority said the power to try those more serious cases in courts martial in the UK "would be used rarely", leading the Armed Forces Select Committee to accept the arguments for extending the jurisdiction of courts martial. However, the committee caveated that acceptance by noting that "public confidence may be better served by their being tried, as now, in the civilian court system".⁵¹

However, Lyons observes that, despite reassurances given by Ministers during *AFA 06*'s progress through the House that civilian jurisdiction

⁴⁹ Part two of the report lists all the recommendations indicating whether they require legislation or no legislation.

⁵⁰ See [Armed Forces Bill 2005-06](#), Commons Library Research Paper RP05/86, 7 December 2005

⁵¹ SJS review Part 1, para 7.2, quoting from the Armed Forces Select Committee First Report, April 2006.

should prevail, and the wording of the 2016 Prosecutors Protocol, a certain type of rape (service person on service person) is now **normally** tried by Court Martial (emphasis as given in the review).

Lyons says he shares the concerns raised in 2006 by the Armed Forces Select Committee about public confidence. Lyons says “trying these high-profile matters under Service Law has not been helpful to the current Services and has led to criticism of the SJS”. He also notes jurisdiction of the Court Martial is restricted to some degree in other Common Law jurisdictions:

- in Canada, the offences of murder, manslaughter, and abduction of a minor, if committed in Canada by military personnel, must be tried in civilian courts.
- In Australia, the consent of the Director of Public Prosecutions is required before a Court Martial can try treason, murder, manslaughter and other serious offences.

Lyons therefore recommends restoring to some extent the position before AFA 06, namely that 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.

Lyons says this can be achieved in primary legislation with a caveated clause similar to that used in New Zealand:

Except with the consent of the Attorney-General, a person subject to this Act may not be tried by the Court Martial for an offence against this section which is alleged to be have been committed in New Zealand if the corresponding civil offence is treason, murder, manslaughter, sexual violation or bigamy.⁵²

He alternatively suggests it could be given effect by inserting specific guidance into the Prosecutors Protocol and any other appropriate protocols, but says the preferred option for change is by primary legislation amending AFA 06.

The SJS will still have responsibility for all of these crimes when committed abroad.

Service police should no longer investigate serious offences in the UK

Following on from Lyons’ recommendation, the Service Justice System Policing Review, led by Joe Murphy, then recommended the Service police should no longer investigate these offences in the UK, and such investigations should revert to the civilian police.

Serious sexual offences should be tried in the criminal justice system when committed in the UK

In part 2 of the review, Lyons then goes on to recommend that other serious sexual offences committed in the UK should not fall under the jurisdiction of the Court Martial. Lyons notes that this recommendation

⁵² New Zealand Armed Forces Discipline Act 1971, section 74, as quoted by SJS review part 1, para 7.3

is dependent on his first recommendation being accepted and implemented.

Lyons' reasoning regarding serious sexual offences is section 2 offences (sexual assault with penetration), as outlined in the Sexual Offences Act 2003, carry similar sentencing ranges to S1 offences (rape): both offences carry a maximum sentence of life imprisonment. He concludes that S2 SOA offences "are as serious as S1 offences and indeed may at times carry heavier sentences depending upon the individual circumstances of the offence". As such, he recommends both S1 and S2 offences, as laid out in the Sexual Offences Act 2003 (rape and sexual assault with penetration) be tried in the criminal justice system rather than the service justice system when they are committed in the UK.

Lyons says S3 SOA offences (assault without penetration and other sexual offences) should continue to be dealt within the service justice system.

See section 6.1 for the review's discussion of how domestic abuse is dealt with by the armed forces.

Government response

Upon publication of the review in February 2020, the MOD said it rejected Lyons' recommendations to remove the ability of the Service Prosecution Authority to prosecute the most serious offences.⁵³ The MOD did not directly comment on Murphy's recommendation regarding Service police jurisdiction.

However, The Guardian and the Telegraph then suggested the Defence Secretary was minded to re-consider the MOD's initial opposition. In May 2020 the Guardian reported that three women serving in the armed forces have begun legal action aimed at preventing the military courts from trying UK rape cases, noting the conviction rate is five to six times lower than in civilian courts.⁵⁴ The [Telegraph](#) and the [Guardian](#) then reported in early June that Ben Wallace told the women's lawyer, Emma Norton at the [Centre for Military Justice](#),⁵⁵ that he is giving "fresh consideration to the matters that your clients seek to challenge".⁵⁶

This change was confirmed on 24 June when the MOD updated its response to the review to say it was looking again at whether the SPA should prosecute these offences:

⁵³ [Service justice system Review](#), section on jurisdiction of the SJS, Ministry of Defence, 27 February 2020 (accessed 22 June 2020)

⁵⁴ Lyons provides statistics on sexual offence statistics between 2015 and 2017, which show that the % of charges resulting in a conviction for rape were 9% in 2015 and 2016 and 2% in 2017. However, he warns "it would be unwise to read too much into these statistics flowing as they do from a small data base". SJS review part one, table 17 and para 7.5

⁵⁵ The Centre for Military Justice argues the SP [should not investigate serious crimes](#), especially sexual offences, in the UK, and that much more can be done to improve the SP's independence and competence in relation to their work overseas.

⁵⁶ ["Ben Wallace to review policy of trying UK rape cases in military courts"](#), The Guardian, 8 June 2020

The Secretary of State for Defence has decided to give fresh consideration to the recommendation on legislative changes to the jurisdiction of the Court Martial for the offences of Murder, Manslaughter and Rape when committed in the UK. This review is underway and due to complete by Autumn 2020.⁵⁷

However, on 12 November 2020 the Defence Secretary informed Parliament that, having completed the review, he had decided to “maintain jurisdictional concurrency when dealing with cases of murder, manslaughter and rape when committed by Service personnel in the UK”.⁵⁸

In a written statement, Ben Wallace said that, given he has agreed to take forward 79 other recommendations, he concluded “the SJS is capable of dealing with these offences when they occur in the UK, as well as overseas”. He argued Lyons’ recommendation “would undermine the principle of concurrency between the SJS and CJS which is set out in the current legislation”.

Wallace did say he intends to seek views on what improvements can be made to the protocols which guide the decisions on jurisdiction, and to “bring forward proposals to place the arrangements for allocating cases between the SJS and CJS on a statutory basis”. It is not clear when this exercise and public engagement is taking place. Full text of written statement:

I am today informing the House that, after further and full consideration of an earlier decision announced in February 2020 in response to the Service Justice System (SJS) Review, I have taken a decision to maintain jurisdictional concurrency when dealing with cases of murder, manslaughter and rape when committed by Service personnel in the UK.

Currently, decisions on which jurisdiction should deal with criminal offences in the UK by Service personnel are made by the SJS and Civilian Justice System (CJS) policing and prosecutorial authorities on a case-by-case basis. My intent is to seek views on what improvements can be made to the protocols which guide those decisions and which have developed since Parliament last expressed its view on this subject.

In considering the recommendations made by the Service Justice System Review, I have come to the conclusion that, having agreed to take forward 79 other recommendations, including assurance around the quality of investigations, the SJS is capable of dealing with these offences when they occur in the UK, as well as overseas. The Service Justice System Review strongly supported the continued existence of the SJS and sets out a sound roadmap for its future.

I am not, therefore, content to accept the first recommendation in the Review which would undermine the principle of concurrency between the SJS and CJS which is set out in the current legislation. While there will not be a presumption that either system takes primacy over the other, I plan to retain the current role of the Director of Public Prosecutions (in relation to cases in

⁵⁷ [Service justice system Review](#), section on jurisdiction of the SJS, Ministry of Defence, updated 24 June 2020

⁵⁸ HCWS577, 12 November 2020

England and Wales) of having the final say of where a case is tried in the unlikely event of disagreement about where the case should be handled.

In light of this decision, my department will lead an exercise with SJS and CJS policing and prosecutorial authorities to revise all current guidance around jurisdiction for criminal offending by service personnel in the UK. That exercise will include public engagement on factors to be considered relevant in guiding the case-by-case allocation decisions. Parliament will have an opportunity to consider these matters when parliamentary time allows, and I intend to bring forward proposals to place the arrangements for allocating cases between the SJS and CJS on a statutory basis.

My department will be engaging with the devolved administrations in Scotland and Northern Ireland to consider the corresponding arrangements that should exist there.⁵⁹

The SJS review webpage on Gov.uk was amended on 7 December 2020 to reflect the latest position of the Secretary of State.⁶⁰

The Centre for Military Justice is seeking a judicial review of the Defence Secretary's decision to reject Lyon's recommendation regarding Court Martial jurisdiction.⁶¹

3.2 Change to Court Martial Boards

Box 6: Court Martial Boards

- Recommendation 24, SJS review part 2

The qualified majority of five to one should be dealt with in a direction to the Board similar to that currently used for a simple majority. The Crown Court practice of two directions to the jury; first a unanimity direction and then a majority direction should not be followed (this does not require legislation)

- Recommendation 25, SJS review part 2

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.

- Recommendation 26, SJS review part 2

OR7 ranks be included in the range of personnel qualified to sit on Court Martial Boards.

Lyons first examined the composition of Court Martial Boards in part one of the review. The terms of reference for part two requested further work on the numbers required to sit on the board. In part two of the review, Lyons noted "there is widespread agreement that five-member boards should increase in size to six", with the power to reach qualified majority verdicts in which at least five members have agreed. The review also found tri-service agreement for three-member boards for lower

⁵⁹ HCWS577, 12 November 2020

⁶⁰ [Service justice system Review](#), section on jurisdiction of the SJS, Ministry of Defence, updated 7 December 2020

⁶¹ "[Armed forces rape cases in the UK – the MOD has agreed to look again](#)", Centre for Military Justice, 8 June 2020; "[Military courts 'failing to convict in sex cases'](#)", Daily Telegraph, 9 January 2021 (accessed via the Centre for Military Justice website).

level work, and that the sentencing level should be the point of differentiation. The review recommends the point of differentiation be set at the level of more than two years:

This would place for trial before a six-member Board those offences listed in Schedule 2 (as before) and also those offences for which, upon conviction, a sentence of imprisonment or detention of more than two years could be passed.⁶²

The three-member Boards are expected to deal with the great majority of the service disciplinary offences contained in AFA 2006 SS 1 to 41. The review notes that in recent years over 90% of sentences passed were below two years.

This change will require legislation. The current requirements are laid out in [The Armed Forces \(Court Martial\) Rules 2009](#) (SI 2041).

In addition, the review recommended eligibility to sit on boards be extended to OR7 ranks, although it notes the Navy disagreed with this proposal. At present, AFA 06 contains no provisions as to the ranks of Board members. [The Armed Forces \(Court Martial\) Rules 2009](#) and Court Martial Board Specification provides more detail. Without going into full detail, the guiding principle is that Board members must be senior to the defendant. OR7 rank is Chief Petty Officer in the Royal Navy, Staff Sergeant in the Army, Colour Sergeant in the Royal Marines, and Flight Sergeant/Chief Technician in the RAF.⁶³ The Navy expressed concern about the recommendation because a number of their Chief Petty Officers are relatively young and may not have the necessary temperament, training or experience to sit on a Court Martial Board. The review suggested this could be mitigated by the regulations or Court Martial Board Specification setting rules regarding eligibility of OR7 (e.g. length of service).⁶⁴

Lyons also examined the use of a simple majority at Court Martial. (Whilst his recommendation does not require legislation, it is included in this section for ease).

Government response

The Government said in its response to the review that it is considering these recommendations for inclusion in the next Armed Forces Bill.⁶⁵

The Lord Chief Justice commented on the review's recommendations regarding Court Martial in his 2019 report. Acknowledging the potential legislative changes, the Lord Chief Justice observed that "a number of recommendations will also require procedural rule changes and the Service Justice Rules Review Committee are looking at these".⁶⁶

⁶² SJS review, part 2, para 164

⁶³ A table of comparative ranks can be found in Annex B of the [explanatory notes](#) for the Armed Forces Act 2006.

⁶⁴ SJS review, part 2, para 171-2

⁶⁵ [SJS review](#), Ministry of Defence, 7 December 2020

⁶⁶ [The Lord Chief Justice's report 2019](#), p17

3.3 An overriding objective

Box 7: An overriding objective

- Recommendation 41, SJS review part 2

That the inclusion of an “overriding objective” in the Armed Forces (Court Martial) Rules 2009 to parallel that contained in the Criminal Procedure Rules 2015 at Part 1 be undertaken. That consideration also be given to the inclusion in AFCMR 2009 of any of the specific duties contained in CPR Part 3 (Case Management) that it is thought would assist the case management process in the Court Martial.

The review explains the reasoning behind this recommendation:

The inclusion of an “overriding objective” ... will help focus the minds of all parties on their duties and obligations; judges conducting case management will be assisted by the clear statements contained in such a Rule. The overriding objective Rule is broad and all-encompassing and gives judges an admiral discretion and power to implement the aims of the overriding objective.⁶⁷

An [explanation of the Overriding Objective](#) can be found in Part 1 of the Criminal Procedure Rules.

3.4 Removal of right of appeal to Court Martial appeal court in preliminary hearings

Box 8: Right of Appeal to Court Martial appeal court

- Recommendation 42, SJS review, part 2

It is recommended that AFA 2006 and AF (CM) 2009 be amended so that the right to appeal against orders and rulings in preliminary proceedings in the Court Martial is restricted to those occasions in which it is available in the Crown Court.

This recommendation is intended to bring the Court Martial procedures in line with the Crown Court. The review states there is a “clear and apparently anomalous” difference in the procedures between the Crown Court and Court Martial. In the Crown Court appeals to preliminary matters are confined to those cases where the court has ordered a preparatory hearing.⁶⁸ The review notes that Crown Court Preparatory hearings are rarely used and that the right to appeal only rarely arises. It also notes that in the Court Martial this power is rarely used. The review concludes that the right to appeal has the potential to be disruptive and to cause delays and inefficiency in the processes leading up to trial. The review goes on to say “it is not clear why this right in the Court Martial exists”.

The current rule is laid out in [The Armed Forces \(Court Martial\) Rules 2009](#) (SI 2041), section 50.

Government response

⁶⁷ SJS review, part 2, para 248

⁶⁸ See [Part 37 of the Criminal Procedure Rules](#) for further details

The Government said in its response to the review that it is considering this recommendation for inclusion in the next Armed Forces Bill.⁶⁹

3.5 A slip rule

Box 9: A slip rule

- Recommendation 43, SJS review, part 2

It is recommended that a power similar to that contained in section 142 of the Magistrates Court 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.

Government response

The Government said in its response to the review that it is considering this recommendation for inclusion in the next Armed Forces Bill.⁷⁰

3.6 Oversight of the Service police

Box 10: New independent body with oversight of the Service police

- Recommendation 44, SJS review, part 2

A new niche independent body be established to deliver independent oversight of the Service police and of investigative functions in the Service Justice System. The new independent body to be policy led and funded by the MOD, but at arms-length from the MOD.

The class of persons able to make complaint should include all those subject to the Act and all those who have been subject to the Act. Those not subject to the Act but directly 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 Service Complaints Ombudsman.

This recommendation goes to previous calls for independent oversight of the Service police. Oversight and governance of the Service police was outside the terms of reference for the [SJS policing review](#). The terms of reference for part 2 of the SJS review requested examination of options for dealing with complaints against the Service police. The review notes that currently the Service police are not subject to the Independent Office for Police Conduct (IOPC), as Home Office police forces, the MDP (Ministry of Defence police) and other law enforcement agencies are. The review found:

It is fair to say that whilst establishing independent oversight along the lines of the IOPC model remains a challenge to the MOD, there appears to be general agreement that it is both desirable and necessary; the focus of debate therefore centres on how this is to be brought about and who should perform the role.⁷¹

⁶⁹ [SJS review](#), Ministry of Defence, 7 December 2020

⁷⁰ [SJS review](#), Ministry of Defence, 7 December 2020

⁷¹ SJS review, part 2, para 269

The review notes that, while the Service Complaints process can be used to make complaints about the Service police, it is subject to exceptions. The review then looked at different options, including the Service Complaints Ombudsman and the Independent Office of Police Conduct, before favouring a new, independent body. The review finds that the two existing entities (the Ombudsman and IOPC) both present factors “mitigating for and against vesting responsibility in them for independent oversight of the Service police”.⁷²

The review says that primary legislation will be required regardless of the choice as to which body conducts oversight.

Government response

The Government said in its response to the review that it accepts the need for additional independent oversight of complaints about the Service police. The Government added:

In line with the recommendation in the review, the MOD accepts that a body independent of the MOD is needed to deliver this and we are considering further how best to do so, including the review recommendation of creating a new niche body.⁷³

3.7 Judge Advocates

Box 11 Nominating a Circuit Judge

- Recommendation 7, SJS review part 1
AFA 06 enables the Judge Advocate General to request that a puisne judge (High Court Judge) be nominated to sit as a judge advocate.... It is recommended that this power be extended to include the ability to nominate a circuit judge.

This recommendation would amend [AFA 06 section 362](#) which defines a Judge Advocate. Currently a Judge Advocate is either the Judge Advocate General or assistants to the JAG. It also enables JAG to request a puisne judge (High Court Judge) be nominated to sit as a judge advocate. The review observes that the size of the JAG corps is such that sickness, accident or sudden retirement could drastically alter its ability” to meet its commitments, and gives the JAG the power to call-in help in the form of Circuit Judges (who, it notes, may be ex OJAG personnel).

Government response

The Government said in its response to the review that it is considering this recommendation for inclusion in the next Armed Forces Bill.⁷⁴

⁷² SJS review, part 2, para 318

⁷³ [SJS review](#), Ministry of Defence, 7 December 2020

⁷⁴ [SJS review](#), Ministry of Defence, 7 December 2020

4. Review recommendations not requiring legislation

Many of the review's 44 recommendations in part two do not require legislation. This paper does intend to discuss these at length; the review is self-explanatory on the reasoning behind its recommendations. This section instead focuses on two areas discussed at length in the review: (1) support to victims and recognising domestic violence and (2) improving the efficiency of the Service Justice System.

Box 12: Service Justice System Policing Review

The main findings and recommendations of the Service Justice System Policing Review (SJSPPR) are covered in a separate Library paper: [Service police Review](#), June 2020, CBP8953, and are therefore not discussed in detail in this paper. Briefly, the SJSPPR supported retaining three separate Service police organisations but recommended the creation of a tri-service defence serious crime unit. The review also recommended Service police should no longer be responsible for investigating the most serious offences (murder, rape and manslaughter) in the UK.

The SJSPPR also contains a process audit of domestic abuse and serious sexual offences investigated by the Service police, conducted by Mark Guinness. The audit was initiated by Professor Sir John Murphy who had concerns, during the course of the review, of the "potential risk each of the SP is carrying as a consequence of fragmented processes in their response to Domestic Abuse". Murphy recommended that all of Guinness's recommendations be implemented as soon as practicable.

4.1 Improving support to victims

The Armed Forces Code of Practice for Victims of Crime (the code) has been in effect since November 2015. The code obligates the various elements of the Service Justice System to provide certain services to support victims of crime. Guidance is contained in JSP 839 Victims' Services.

Both part one of the review and the Service Justice System Policing Review (SJSPPR) expressed concerns that the vulnerability and the rights of victims and witnesses were "not always at the forefront of the Service Justice System".⁷⁵ A Service police Working Group examined the mechanisms and structures used by the Service police and MDP to provide victim support and its findings were included in the Policing Review (see appendix E of the SJSPPR).

The first 15 (of 44) recommendations contained in part two of the review concern victim support.

These recommendations do not require legislative changes (according to the review) but the relevant regulations and guidance are:

- [The Criminal Justice \(Armed Forces Code of Practice for Victims of Crime\) Regulations 2015](#), SI 2015/1811
- [Joint Service Publication 839 Victims' Services](#)

⁷⁵ SJS review part two, para 3

The Commons Library provides a separate overview of the civilian equivalent: [Code of Practice for Victims of Crime](#). Information is also available on the [Code of Practice](#) (from Gov.uk) and [victims support](#).

Recommendation 1: periodic review of the regulations

The review notes that, when introduced in 2015, the [Joint Committee on Statutory Instruments](#) criticised the drafting of the regulations. The review suggests these issues remain live and “will continue to remain an issue until a power to create an Armed Forces Code is in place in primary legislation”. The review does not recommend primary legislation, but does recommend the regulations be subject to periodic review and modified when necessary.

Government response

The Government said in its response to the review that it agrees with this recommendation, adding that “changes are currently being considered alongside changes to the civilian code being undertaken by the Ministry of Justice”.

In addition, the MOD said it will “explore the option of creating a power for the code in primary legislation to mirror the civilian system and make it easier to review, refresh and update”.⁷⁶

Recommendation 2: Develop tri-service policy

Each of the Service police forces produced bespoke operational guidance relevant to their own individual forces. The review recommends that, to avoid duplication and create efficiencies, tri-service policy be developed and implemented.

Recommendations 3 to 7: identifying victims and witnesses

One of the main issues the review found was a lack of consistency in identifying victims of crime, especially in cases of domestic abuse, given the different ways in which a victim can report a crime (a victim might report a crime to their Commanding Officer, to the Service police or to a civilian, Home Office police force).

The review was particularly concerned about the potential failures to track reports of domestic abuse if data and intelligence is held by different organisations. The review also expressed concern that Commanding Officer’s may not have had appropriate training to recognise some of the subtleties of domestic abuse, and therefore may record an incident as an individual assault rather than a potentially longer-term cycle of violence. The review gives as an example two people living within Single Living Accommodation who may not be immediately identified as being in a domestic relationship and therefore leaving the victim vulnerable if no safeguarding referrals are made. In other cases victims and perpetrators may be from the same unit or

⁷⁶ SJS review, Ministry of Defence, 7 December 2020

barracks, which could have implications for how support is given to victims and witnesses.

The review therefore makes several recommendations intended to improve the method of reporting crimes to ensure victims are easily identified, and ensure appropriate responses are given. The review recommends:

- Consistent and mandatory recording of crimes
- Replacing the existing COPPERS and REDCAP crime recording systems currently used by Service police
- Training for Commanding Officers to help them identify, at an early stage, vulnerable victims and witnesses (particularly in cases of domestic abuse)
- Disseminate clear policy to COs and Service police to support victims and witnesses
- Better management oversight to ensure the Code's requirement to complete a Victims Needs Assessment is met

Government response

The Government said in its response to the review that it will continue to raise awareness of domestic abuse through its strategy "[No Defence for Abuse](#)", which it introduced in 2018. It added:

The recommendations arising from the process audit of domestic abuse, rape and serious sexual offences have been incorporated into the MOD Domestic Abuse Action Plan wherever possible. The action plan is implementing the 'No Defence for Abuse' strategy under the 3 core pillars of prevention, intervention and partnering. Priorities include raising awareness of domestic abuse and inappropriate behaviour, improving coherence and consistency of policy and training across defence, reducing the rate and impact of domestic abuse and increase the safety and well being of all those affected.⁷⁷

Recommendations 8 to 10: Victim Liaison Officers

The Code introduced Victim Liaison Officers, who are given responsibility to provide information to victims of crime. The review says their role is crucial in supporting and re-assuring victims of crime.

However, the review finds a lack of clarity and potential for conflict in appointing Liaison Officers.

The review says it is usually the CO who appoints the Liaison Officer, but observes this could create conflict if the Liaison Officer knows the victim, witnesses and/or the suspect.

The review also notes that, if the victim is a civilian, it is the Service police who usually appoint a Liaison Officer, the direction and policy isn't clear.

⁷⁷ SJS review, Ministry of Defence, 7 December 2020

The review therefore recommends that, in investigations by the Service police, the role of victim liaison officer should be undertaken by the Service police.

The review also found a lack of formal training for liaison officers and recommends formal training be established.

Lastly, the review recommends the creation of a Tri-Service Victim Liaison Officer Co-ordinator.

Recommendation 11: Create a witness care unit in DSCU

The Service Justice System Policing Review recommended creating a Tri-Service Defence Serious Crime Unit (DSCU) is created following the civilian police Regional Organised Crime Unit (ROCU) model. This is discussed more fully in Commons Library paper [Service police Review](#).

Government response

The MOD said, upon publication of the review, that it has begun scoping work on a Defence Serious Crime Unit, led by a former Detective Superintendent. The MOD said this work will also look at the other policing recommendations, such as working more closely with the Home Office police and secondments.⁷⁸

Recommendations 12 to 15: miscellaneous

The review also recommends:

- Locating Family Liaison Officers and Family Liaison Coordinators in the DSCU
- Creating and implementing a Witness Charter (similar to the Ministry of Justice Witness Charter) detailing the minimum standards to be provided by all service providers.
- The Royal Military Police to introduce Victim Crime Surveys to bring them into alignment with the practice of the Royal Navy Police and RAF Police.
- Victims to decide on the method of communication for investigative and prosecution updates.

4.2 Improving the efficiency of the system

Many of the review's recommendations seek to improve the efficiency of the justice system and recommend ways in which the various components can improve data collection, case management and best practice. This includes setting target times and timescales for the completion of investigations and Summary Hearings.

⁷⁸ [Service justice system Review](#), Ministry of Defence, 27 February 2020

5. Review of investigations overseas

During the course of the Overseas Operations (Service Personnel and Veterans) Bill in autumn 2020, the Government announced a new, judge-led review of how investigations are raised and investigated when they occur overseas on operations. The MOD explicitly said it will “build upon and not reopen” the recommendations of the Service Justice System review.

The Defence Secretary said he expected the review to report to him in about nine months’ time. Given the announcement was made on 13 October 2020, this suggests a timeframe of around July 2021. At the time of writing, the MOD has not introduced the next Armed Forces Bill. It is not clear whether the MOD expects the review to make any recommendations that will require primary legislation.

Text of written statement

The Overseas Operations (Service Personnel and Veterans) Bill currently before this House will provide reassurance to service personnel that we have taken steps to help protect them from the threat of repeated investigations and potential prosecution in connection with historical operations overseas many years after the events in question. However, we are also clear that there should be timely consideration of serious and credible allegations and, where appropriate, a swift and effective investigation followed by prosecution, if warranted. In the rare cases of real wrongdoing, the culprits should be swiftly and appropriately dealt with. In doing so, this will provide greater certainty to all parties that the justice system processes will deliver an appropriate outcome without undue delay.

I am therefore commissioning a review so that we can be sure that, for those complex and serious allegations of wrongdoing against UK forces which occur overseas on operations, we have the most up to date and future-proof framework, skills and processes in place and can make improvements where necessary. The review will be judge-led and forward looking and, whilst drawing on insights from the handling of allegations from recent operations, will not seek to reconsider past investigative or prosecutorial decisions or reopen historical cases. It will consider processes in the service police and Service Prosecuting Authority as well as considering the extent to which such investigations are hampered by potential barriers in the armed forces, for example, cultural issues or operational processes. A key part of the review will be its recommendations for any necessary improvements. It will seek to build upon and not reopen the recommendations of the service justice system review by HH Shaun Lyons and Sir Jon Murphy. Work by the Department in response to the service justice system review is continuing to be taken forward separately.

I expect the review will report to me in around nine months’ time.⁷⁹

On 2 November, in oral questions, the Defence Secretary said the review is to be led by Sir Richard Henriques, who has conducted reviews for the

⁷⁹ [HCWS507](#), 13 October 2020

Crown Prosecution Service and the Metropolitan police. Mr Wallace said:

His review will consider options for strengthening internal investigation processes and skills, thus helping to ensure that in our future complex and demanding operations around the world, our armed forces are continuing to uphold the highest standards of conduct. It will not revisit past investigations or prosecutable decisions.⁸⁰

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