CENTRE FOR MILITARY JUSTICE

RESPONSE TO FURTHER CALL FOR EVIDENCE FROM THE DEFENCE COMMITTEE

WOMEN IN THE ARMED FORCES – FROM RECRUITMENT TO CIVILIAN LIFE

The Centre for Military Justice (CMJ) is a small, independent legal charity established in 2019 to advise current and former members of the Armed Forces or their bereaved families who have suffered serious bullying, sexual harassment, sexual violence, racism, other abuse or neglect. The CMJ also undertakes educational and outreach work within the armed forces sector, promoting the rule of law, human rights and access to justice.[1] Supporting women that have experienced gender-based violence continues to be a priority area for us as we move towards the end of our third year of operation.

The CMJ gave written and oral evidence before the original Inquiry. A copy of our original written evidence can be accessed here. On 25 July 2021, the Defence Committee published its final report on 'Women in the Armed Forces: From Recruitment to Civilian Life'.

On 3 October 2022, the Defence Committee announced a new call for evidence as part of a follow-up to its Inquiry on Women in the Armed Forces. The call for evidence aims to find out more about relevant changes in the Armed Forces over the last year. A very tight deadline was given, of Monday 17 October. This amounts to just 11 working days.

On 7 October, in light of Ministry of Defence policy that bans all service personnel from communicating directly with Parliament without first seeking the consent of the MoD, the Defence Committee confirmed that permission had been granted to current service personnel to give written evidence. It is not known to what extent the call for evidence and suspension of the ban have been internally advertised and/or serving personnel encouraged to come forward.

In summary:

While there has been considerable work inside MoD and at a high level reorganising and expanding the teams responsible for addressing some of the recommendations of the Defence Committee, this has so far been a been a poor substitute for the fundamental reform that is needed if we are to see meaningful, long-lasting change. The Defence Committee should take this opportunity to continue to press the MoD to accept its core recommendations.

There has been a failure to meaningfully engage with experts outside of Defence with a long track record of working with Violence Against Women & Girls. That is seen in the MoD 'Sexual Offending Strategy' and other areas where we would have expected to see more and better progress by now.

What this submission will address:

This short submission will focus upon the aspects of the Defence Committee Inquiry entitled, **'Responding if things go wrong' (Chapter 4 of the report).** It is necessarily high-level given the time frame.

It will address the following:

1. What the Defence Inquiry actually recommended and what the MoD actually accepted – a reminder.

2. The Eight Core Recommendations and some current issues

[1] www.centreformilitaryjustice.org.uk

3. Other issues arising from our casework

What the Defence Inquiry actually recommended and what the MoD actually accepted – a reminder:

The Defence Committee made a great many recommendations in its report, ranging from relatively 'low-hanging fruit' recommendations concerning issues like women's uniform and and equipment right the way through to issues of unacceptable behaviour and sexual violence.

The Defence Committee states, as part of its call for evidence, that in response to the Inquiry, 'the MoD agreed with many of the Committee's recommendations'.

It is important to be clear exactly what the Defence Committee recommended and what the MoD accepted.

In terms of unacceptable behaviours (including sexual violence), the Defence Committee summarised their eight core recommendations as follows, at page five of their report:

1. Establish a central Defence Authority, to provide a reporting and investigation system for bullying, harassment and discrimination, outside the Chain of Command and outside the Single Services.
2. Remove the chain of command entirely from complaints of a sexual nature.
3. Adapt performance assessment systems to prevent the progression of Service personnel, particularly leaders, who have acted unacceptably.
4. Commit to tri-service sexual harassment surveys annually.
5. Amend the Armed Forces Bill 2021 to retain the 6-week time limit for complaint appeals.
6. Make recommendations by the Service Complaints Ombudsman binding.
7. Remove Rape and Sexual Assault with penetration in the UK from the Court Martial jurisdiction, unless the Attorney General gives consent.
8. Publish greater data on the pathway for victims of rape and sexual assault.

Below we go through each of these original recommendations, comment upon the MoD's response, and make some observations about the current state of affairs.

The Eight Core Recommendations

Core recommendation 1:

Establish a central Defence Authority, to provide a reporting and investigation system for bullying, harassment and discrimination, outside the Chain of Command and outside the Single Services.

This was not accepted by the MoD, although the MoD maintains that it was 'partially accepted'.

As the Committee will recall, the Wigston Review into Inappropriate Behaviours in 2019 was convened following a series of incidents that had been reported in the press (which included allegations of sexual assault). The Wigston Review made a series of recommendations which the MoD stated it accepted 'in full'. One of the principle recommendation that was widely lauded when the Review was published, was the creation of a new central Defence Authority for Culture and Behaviours. This new Defence Authority, that would be separate from the single services, would have responsibility for the investigation of the most serious complaints, injecting a much-needed degree of independence and expertise to the system.

In the report of Danuta Gray, published in December 2020, designed to review the progress of implementing Wigston, it was revealed that this key recommendation had not in fact been accepted after all, nor did the MoD intend to implement it. Instead (without any process of public or service

consultation), the MoD had decided that the recommendation was now going to be met by the creation of an expanded 'diversity and inclusion' team within the Chief of Defence People's office. The handling of the most complex bullying, harassment and discrimination complaints would remain with the single services themselves. It is fair to make the observation that the MoD's response to this part of the Wigston Review was at best, opaque, and at worst, misleading.

The Defence Committee in its July 2021 report impressed upon the MoD the importance of accepting this particular recommendation of the Wigston Review which would lend a degree of relative independence and expertise to the reporting and investigation handling of the most complex bullying, harassment and discrimination complaints, (which are disproportionately made by women and Black and Minority Ethnic personnel), taking them outside of the single service branches concerned.

For the second time, the MoD rejected this important recommendation.

In defence of its position, the MoD relied upon the fact that it had instead:

1. Created a Diversity & Inclusion (D&I) Directorate that was independent of the chain of command – *it is important to note that there already was a D&I team in existence before the Wigston Review, which was expanded following Wigston*. *It is also important to make the point that this D&I Directorate is now responsible for Service Complaints reform and Service Justice reform as well as unacceptable behaviours and D&I work, a huge brief requiring expertise across a very wide range of disciplines.*
2. Updated its Service Complaints policy - *we say more about this below, but we suggest that the principle changes have made things considerably harder for service personnel suffering bullying, harassment or discrimination, not easier*.
3. Appointed independent members to Appeal Body boards for Service Complaints – *it is important to note that the services have for a long time appointed independent members to Appeal Body boards for Service Complaints where they involve an allegation of discrimination. This is not new.*
4. Piloted a 'central admissions team' (CAT) for admissibility decisions on Service Complaints, removing decisions on whether a complaint could proceed, from the chain of command itself. That has now been rolled out – *it has long been possible to request the Service Complaints Ombudsman for the Armed Forces (SCOAF) to make a referral (notifying the service of your intention to make a Service Complaint outside of the chain of command); and a Commanding Officer has never been permitted to make an admissibility or substantive decision on a Service Complaint if they are in any way implicated in it; and the CATs are now tasked with applying the new Service Complaints policy which, as we suggest above and below, is going to make it harder, not easier for service personnel complaining of bullying, harassment or discrimination.*

The Wigston/Committee recommendation remains important and outstanding and the MoD should be urged to think again. The quality of the existing Service Complaints teams and their ability to deal with complex cases of bullying, harassment and/or discrimination, is decidedly mixed, with some decisions being extremely low in quality, revealing a poor understanding of such concepts such as discrimination and unconscious bias. In 2021, 50% of all SCOAF substantive investigations, and 71% of all maladministration investigations, were upheld in favour of the complainant, raising serious questions about the quality of the two decision-stages that those complaints has to pass through before reaching her office. [2]

[2] See here at pg xi:
https://www.scoaf.org.uk/sites/default/files/202204/Annual%20Report%20and%20Accounts%202021_accessible%20%281%29.pdf

Many people within the services recognise the value of the Wigston proposal. Anecdotally, we can report that many individuals have expressed, in private conversations with the CMJ, the view that complex bullying, harassment or discrimination complaints would be better handled away from the services themselves.

In a very recent decision (summer 2022) of a Decision Body (the Decision Body is the panel appointed to consider a Service Complaint at first stage), in a case supported by the CMJ concerning a complaint of a lack of welfare and other support following a report of rape in the Army, the Decision Body itself took the opportunity to say: *"This is a specialist area requiring an understanding of law, policy and processes. Neither the Decision Body nor the investigating officer had any experience in dealing with victims of sexual assault, the law relating to it or the MoD policy. Whilst every effort has been taken to ensure all areas have been properly and diligently covered, and that you have been treated with sensitivity and compassion, the conduct of this process would have benefited from an expert in this area."*

In another recent example, a Service Complaint was brought by a black female private in the summer of 2020. Large parts of her Service Complaint were found to be inadmissible (on the grounds that some of the individual acts of alleged racism and sexism had taken place outside of the time limit for bringing a Service Complaint, in circumstances where she had put up with a lot of 'low level' conduct for a long time before complaining). Her remaining complaint was investigated by a Decision Body and rejected in March 2021. She appealed – now with legal help - to an Appeal Body that ordered the original alleged acts should have been taken into account after all and ordered the entire complaint be investigated again by a new Decision Body. This month, she has been informed that that Decision Body was not able to reach agreement on her complaint. The matter has now been remitted to be heard again by a yet another Decision Body. It is more than two and a half years since she raised her complaint which involves complex issues of race and sex discrimination and unconscious (as well as conscious) bias. Not only is this horrendous for the complainant (and those she accuses that must also face the uncertainty of no resolution), it prevents the Army from learning lessons, if warranted, and improving things for other young black females.

These are the kinds of cases we suggest would have been better and more competently handled by a central Defence Authority.

An alternative and better way forward – but one that has not been pushed hard by pragmatic campaigners to date because it was assumed that the MoD would be more comfortable with the Wigston model than this one – would be to expand the powers of (and resource accordingly) the SCOAF to enable her to hold and investigate these cases from the outset. At present, she can only investigate a case after the single services have finished with it. By then, most complainants will have given up and years may have passed. When asked why the MoD declined to act upon the Wigston recommendation, the Chief of Defence People relied upon the fact that there was already an independent body capable of injecting a sufficient degree of independence to the system, namely the SCOAF. On the MoD's own analysis therefore, there ought to be little objection to handing over such cases to the SCOAF in principle and it will be interesting to know if the MoD might reconsider.

Having a central Defence Authority or the SCOAF have conduct of these cases would:

1. Inject greater independence and (with appropriate resourcing and commitment) expertise into the complaints system;
2. Save enormous amounts of time and resources for the single services themselves;
3. Protect the single services from the obvious criticism that they are marking their own homework;
4. Engender confidence, which would mean more people would complain, which, while undoubtedly an uncomfortable process, would mean poor behaviour would be more effectively addressed, leading to an overall improvement in culture and behaviours.

Core recommendation 2:

Remove the chain of command entirely from complaints of a sexual nature.

This was accepted by the MoD.

It is important to recall that it has long been possible to make a Service Complaint via the SCOAF, whether concerning an allegation of sexually inappropriate behaviour or otherwise. Thereafter however the SCOAF could not control who actually oversaw the investigation and decision itself. The recent direction that the chain of command must not be involved in the complaint itself where of a sexual nature, in principle, is clearly positive (though beggars belief that this had to be the subject of a formal recommendation). Such Service Complaints will also now benefit from an independent member being appointed at Decision Body level too (when previously only available upon appeal), which is a further step in the right direction.

However, the larger problem is very great difficulty that the Service Complaints system in its current form suffers from in investigating and disposing of sexual harassment/unacceptable behaviour complaints effectively, efficiently or fairly (which the SCOAF continues to conclude year on year that it fails to do, most recently in her annual report published in April 2022).

This would be addressed by accepting the Wigston recommendation about a central Defence Authority or enabling the SCOAF to handle these cases, as proposed above. As long as those responsible for the investigation of complaints of a sexual nature remain in the single services themselves, the services will lay themselves open to marking their own homework and not having the appropriate level of expertise to deal with such cases. To that extent this concession is something of a red herring.

The acceptance of the above principle needs also to be seen in the context of the fact that there is no legal requirement on a Commanding Officer to refer the offences listed below to the service police (pursuant to s113 of the Armed Forces Act 2006). They are not listed in Schedule 2 to the Armed Forces Act and so are not required to be referred (to the service police) by law:

a. Common assault where there is a domestic abuse context (and this may still be dealt with summarily by a CO on the basis that a CO can deal with a common assault/battery).
b. Actual Bodily Harm where there is a domestic abuse context (ditto, albeit permission is required before a CO can deal with this offence summarily, though it remains within their powers).
c. Disclosing private sexual photographs and films with intent to cause distress ('revenge porn') (s. 33 Criminal Justice and Courts Act 2015).
d. Possession of extreme pornographic images (s.63 Criminal Justice and Immigration Act 2008).
e. Controlling or coercive behaviour in an intimate or family relationship (s.76 Serious Crime Act 2015); and
f. Voyeurism: additional offences ('up skirting') (s.67(A) Sexual Offences Act 2003).

Not requiring Commanding Officers to refer such matters to the service police seems entirely at odds with the current measures to require the services to deal appropriately with these kinds of offences that disproportionately affect women. The Defence Committee should urge the MoD to amend the law to add those offences to Schedule 2.

Core recommendation 3:

Adapt performance assessment systems to prevent the progression of Service personnel, particularly leaders, who have acted unacceptably.

The MoD stated that it accepted this recommendation. It explained that it was already using a 180 degree feedback tool which was ‘available to all ranks’. New characteristics would be added to

the appraisal process for leaders. Commanding officers deemed by SCOAF to have fallen short in their handling of Service Complaints would now have consequences that will appear on employment records.

Any leader handling a Service Complaint involving bullying, harassment or discrimination ought only to be doing so via their appointment as (or part of) a Decision Body and not in their capacity as chain of command over the complainant (given the assurance that the chain of command is now removed from dealing with any complaint of a sexual nature). If that Decision Body does not perform its task properly, there ought to be implications for the employment prospects of those involved in handling the complaint poorly. In the CMJs experience, some Decision Bodies perform their function carefully (particularly if they are aware that there is a lawyer in the background), others do not (particularly if they are not aware that there is a lawyer in the background) – relying far too heavily on their investigator's assessment of the evidence and/or being heavily steered by the work of their internal service complaints staff that drafted the Service Complaint response for them. There need to be repercussions for those individuals and that may be appropriate once an Appeal Body reviews the Decision Body's work. If career repercussions are only going to follow SCOAF's involvement, flawed work is likely to go unaddressed.

For example, in March 2022, one of our clients received an Appeal Body decision that almost entirely overturned a deeply flawed Decision Body decision. In that way, her experience of very serious sexual harassment and bullying in the Royal Navy was upheld, having originally been entirely rejected on the basis of a very poor quality Decision Body investigation and decision. The client firmly believes there should have been career repercussions for the captain that decided on her Service Complaint at first stage, indicating as it did a complete failure of understanding as to principles of discrimination, basic investigatory failings and an unpleasant tone suggestive of bias. Her case never got to the SCOAF (other than concerning an allegation of delay – upheld three times), because the Appeal Body addressed the serious flaws in the Decision Body decision and there was no need to take it any further.

The MoD response concerning SCOAF findings does nothing about situations like hers.

Core recommendation 4:

Commit to tri-service sexual harassment surveys annually.

The MoD stated that it accepted this recommendation.

The MoD has agreed to centralise the sexual harassment surveys across the tri-services. This is welcome, as long as the harmonisation bends towards the Army's more comprehensive approach to the surveys. The single services have approached the surveys at different times and in different ways over the years. The Army Sexual Harassment surveys ('Speak Out') were conducted every three years. The Royal Navy did not conduct a survey between 2015 and 2021 and the RAF did not conduct one between 2014 and 2020.

The MoDs response indicates the new centralised future survey will launch in 2023 and there will be a pilot 'with a view' to delivering enhanced annual surveys thereafter. It is not entirely clear to us that this amounts to an unequivocal commitment to an annual survey although it appears that it may.

Anecdotally, the CMJ has been informed that some surveys have been sent to service personnel that are not appropriately anonymised.

Core recommendation 5:

Amend the Armed Forces Bill 2021 to retain the 6-week time limit for complaint appeals.

This was rejected, rather disingenuously on the basis that '*the proposed reduction is just one part of a wider programme of transformation which is designed to reduce delays and improve the service complaints system for al*l.'

We suggest it was disingenuous because, as was repeatedly made clear during the Defence Committee hearings, delay in the Service Complaints system does not lie at this point in the process. The former SCOAF made that very clear. [3]

Subsequent to the hearings, this charity and two private firms of solicitors that work extensively with victims of bullying, harassment or discrimination in the armed forces wrote to the Chief of Defence People to explain our concerns. As we explained to him:

> '*Anything that will reduce a service person's right to appeal must be given the most careful scrutiny and the reasons given very closely examined. Central to this proposal is the purported imperative of increasing efficiency and speed. That suggests that one of the blocks in the service complaints system is the six-week appeal stage. As far as we are aware, this is not the case. That was also a point made by the former SCOAF, when she gave her evidence before the Armed Forces Bill Committee in March.*
>
> *The bulk of the delay lies at stage one of the complaint process, before a first stage decision is made, and is largely outwith the control of the complainant. The matter is particularly important because a service person's right of access to the court, the Employment Tribunal (ET), depends upon their having made and, if necessary appealed, a service complaint. If they fail to appeal a service complaint, it is deemed withdrawn and they lose their right to bring an ET claim. That is why this clause is so potentially serious.*
>
> *A typical service complaint of the kind that we often see tends to progress as follows:*
>
> *a. The person usually tries to make the service complaint themselves initially and without professional or other support. They may be doing it at a time when they are extremely upset and sometimes in the aftermath of a sexual offence or other very distressing event;*
> *b. The complaint is lodged either directly via the chain of command or via the Ombudsman;*
> *c. Once lodged, an admissibility decision needs to be made. This part of the process is supposed to take two weeks. Sometimes, it can months or even longer. The CMJ is currently assisting a woman who made a service complaint that did not get an admissibility decision for a year and two months, for example;*
> *d. If found to be admissible, the service complaint will then have to go through various stages including:*
>
> i. *appointing a 'Deciding Body' to oversee the complaint;*
> *ii. (in appropriate cases) appointing a 'fee earning harassment investigations officer' (FEHIO) to support the investigation;*
> *iii. appointing an Assisting Officer to support the complainant;*
> *iv. interviewing the complainant;*
> *v. identifying the respondents and potential witnesses;*
> *vi. interviewing and taking witness statements from respondents and witnesses;*

[3] 'Certainly, in my experience as the ombudsman—I am speaking on the basis of five years' experience—the delays are in the front part of the system, not the back. In other words, the delay is usually on the way to a level 1 decision and not from a level 1 to a level 2, to appeal, or from appeals to the Service Complaints Ombudsman. Therefore, if you reduce the time limit from six weeks to two, not only is that a drastic reduction—a two-thirds reduction right off the bat—but it also will not actually address the wrong. It will come across, in my respectful submission, as if you are trying to prevent people from exercising their right to appeal, although there is no attempt in the Bill to reduce the length of time that the matter takes to get to a level 1 decision'.

vii. considering evidence from the respondents and witnesses;
viii. pulling together an investigation report and file;
ix. disclosing that to the complainant and considering their comments;
x. and then having the Deciding Body make a determination.

The above is supposed to happen within 24 weeks but frequently does not. The complainant then has up to six weeks to lodge an appeal if they wish to do so.

If they want to get outside help at this point, now a decision has been made, they have to find a legal advisor or independent person willing to get their head around a very complex matter – usually there is a large file of papers to review - in a short period of time and help them draft a response. It is already extremely difficult to find someone at all, let alone someone with sufficient expertise, who can help in time for the six-week deadline.

During all this time, the service person will be still working full-time, which may include long hours and being away from home if deployed on training commitments or operations, and finding the process incredibly stressful.

Alternatively, they may be signed off sick through stress. They may be suffering mental health problems. They may be being ostracised and very unhappy inside their unit. In any case, six weeks is already a tight deadline in the circumstances and it can be very hard to engage with clients in the most safe and effective way as it is.

We have been very concerned at the priority that has been given to addressing so-called 'speculative appeals', for which no evidence has been provided, at the apparent expense of the need to support complainants with meritorious complaints, on which very important ET claims depend, that are already having to function inside a system that has never been found to be 'effective, efficient or fair'. We heard nothing in the evidence given before the Armed Forces Committee that addressed our concerns. Indeed, the MoD witness appeared to struggle to justify the proposal.'[4]

In reply, the CDP confirmed his intention to proceed with the reform, explaining that in most cases, two weeks was adequate, he would expect decision makers to conclude that it was 'just and equitable' to extend time in appropriate cases, and saying that it was not MoD's intention 'to automatically apply such a deadline without exception to all', echoing the MoD's formal response to the Defence Committee where it reassured the Committee that:

'It should be noted that the Armed Forces Bill presently before Parliament does not itself set a minimum time limit of two weeks for Service Persons to submit an appeal, it provides Defence with the ability to set out in regulations a time period for appeals that must be at least two weeks, but which can be longer and can set out the circumstances where different time limits will apply.'

Predictably, on 15 June 2022 the Armed Forces (Service Complaints) (Amendment) Regulations 2022 were presented that reduce the time limit for bringing an appeal in law, to just two weeks. While it is open to an individual to make an application that their appeal should be accepted after two weeks because it is 'just and equitable' to do so, we think this is rather contrary to the spirit of the assurance provided above.

The two-week deadline that is now contained within the regulations is likely to have a chilling effect, even though it is open to a complainant to make their case that their appeal should be accepted out of time on 'just and equitable' grounds. Certainly it gives the impression that the MoD is trying to make it harder for people to appeal. We suggest that people that do not have the benefit of legal help may not try and make an out of time appeal, deeming it to be likely to be dismissed and a

[4] A link to our letter and CDPs reply can be accessed here: https://centreformilitaryjustice.org.uk/wp-content/uploads/2021/07/Letter-to-CDP-Lt-Gen-James-Swift-with-reply.pdf

waste of time. The policy gives no guidance on what might be considered a 'just and equitable' basis to appeal out of time, and the CMJ thinks that this is a rather legalistic term that will be hard for some lay people to apply.

In addition to a two-thirds reduction in appeal time, these regulations also introduced new prescribed grounds of appeal, so that now an appeal may only be brought if it fits within prescribed grounds that are assessed by the single services themselves (the very institutions being criticised). It is too early to see how this is bedding in on the ground and we have only had one matter that has been considered under the new rules so far (as all Service Complaints that were decided before 15 June 2022 remain bound by the original rules, not the new rules).

In that case, on which we advised last month, a rape survivor attempted to appeal a Decision Body decision. In particular she was not content with the Decision Body's conclusions on certain points: including the conclusion that she had not needed to be referred to welfare services following her report of rape; the DB's incorrect understanding of the marker system (that is supposed to be available to ensure a victim and alleged perpetrator are not assigned to the same location in the future); and that no disciplinary action appeared to have been considered against her alleged perpetrator, apparently on the erroneous assumption by the DB that he was not a member of the British Army (when he was). Despite agreeing that the DB had misunderstood the marker policy, had incorrectly assumed the alleged perpetrator was not a member of the British Army, and overlooking completely her appeal about the fact that she had not been referred to welfare, the 'Army SC Sec Appeals team' decided her entire appeal was inadmissible because it did not fall within the prescribed new grounds set down in the regulations (which are: material procedural error; a material error of fact; and/or new evidence). The complainant will now have to appeal to SCOAF to have the admissibility decision reviewed which will cost her more time, energy and strain.

There is a strong perception that the regulations on time limits and grounds were not introduced with the aim of improving the timeliness of Service Complaints generally and for the benefit of complainants, but were rather introduced with the objective of permanently disposing of a greater number of Service Complaints for the benefit of the single services.

More generally, it will be important to monitor how these changes in the Service Complaints processes effect Employment Tribunal (ET) claims. The ET only has jurisdiction to determine a claim where a person has made but not withdrawn a Service Complaint. In circumstances where a Service Complaint is rejected by a Decision Body, and the complainant/ET claimant thinks they are unlikely to fall within the new grounds of appeal and declines to make one, or do make one but do not fall within the grounds of appeal, it will be important to ensure that the ET does not lose jurisdiction.

Core recommendation 6

Make recommendations by the Service Complaints Ombudsman binding.

While suggesting that this was 'partially accepted' it is clear that it was not. The MoD response confirms that '*Recommendations are non-binding but already have legal consequences. If the Defence Council refuse to accept them, they must provide written cogent reasons for doing so and failure to follow a recommendation can be judicially reviewed*.'

That observation goes no further than stating the obvious – that any public body making a decision may be at risk of being judicially reviewed on public law grounds. The reality is, as the MoD well knows, that judicial review is in the vast majority of cases not a practical available remedy for most service personnel who are not eligible for legal aid on means grounds, and who cannot afford to take the enormous costs risk of bringing judicial review proceedings.

The MoD's other response, that most other Ombudsman bodies do not having binding powers, overlooks the fact that service personnel already have very restricted rights as compared to civilians (in that for example they cannot bring most types of legal claim to the Employment Tribunal,

they cannot join a trade union) so making the SCOAF's powers binding (and expanding them) might be a fair way to address some of these deficits.

See above for our proposal that, in the event that the MoD remains unwilling to accede to the Wigston/Committee recommendations on creating a central Defence Authority, handing over complex bullying, harassment and discrimination complaints to the SCOAF at an early stage may present a useful alternative route.

Core recommendation 7

Remove Rape and Sexual Assault with penetration in the UK from the Court Martial jurisdiction, unless the Attorney General gives consent.

This was rejected by the MoD.

CMJ will not rehearse all the arguments and previous recommendations that rape and serious sexual assault cases in the military should be referred in the first instance to civil police, prosecuted by the Crown Prosecution Service, and heard at Crown Court. We set those arguments out extensively in our original briefing which can be accessed here. Nothing has changed from our original analysis. **In the latest MoD published data for 2021 the figures show that there were 25 rape charges heard at court martial for that year, 19 of which resulted in a Not Guilty verdict. That means that the conviction rate was around 24% and that three quarters of rape cases heard at court martial did not result in a conviction. By comparison, the Crown Court figure for convictions following a completed prosecution in 2021-2022 was almost 60%.** [5]

The MoDs reasons for rejecting the recommendation remain unconvincing. To the Committee, the MoD said, '*Defence does not agree that it is necessary—or practical—for the Attorney General to consent to sexual offences being handled in the Service Justice System when they occur in the UK.*' It is trite to point out that neither the Committee (nor the Lyons Review) was suggesting that the Attorney General's consent would need to be sought in all cases. Rather, the proposal was that there should be a presumption that rape and sexual assault by penetration cases should proceed in the civil system unless there was something exceptional about the case, at which point the Attorney General's consent could be sought.

We make the following observations about some of the internal work that was to be done in response to the Committee's recommendation, with the objective of improving aspects of the military justice system.

Prosecutors Protocol

The MoD explained that there would be a new duty placed upon the Director of Service Prosecutions and the Director of Public Prosecutions to agree a statutory protocol that would determine how rape and sexual assault cases (and other serious crimes) were to be taken forward.

This new protocol was originally proposed by the Secretary of State for Defence as long ago as November 2020 (in response to a judicial review being brought by three rape survivors in the military)[6], and despite those women being assured by the Secretary of State that there would be

[5] See table 6 of the data tables here: https://www.gov.uk/government/statistics/murder-manslaughter-and-sexual-offences-in-the-service-justice-system-2021_In_2021, Row G vs Row S. See also the CPS data tables accessible here: https://www.cps.gov.uk/publication/cps-data-summary-quarter-4-2021-2022, at Rape Annual Data Tables at AR 19.

[6] Letter dated 12 November 2020 from the Government Legal Dept (for the Secretary of State for Defence) to the CMJ, acting for the three women: 'Work has commenced on producing a new set of guidance for the allocation of cases, the guiding principle of which will be the requirement of fair and efficient justice. *The relevant policing and prosecution authorities will be required to engage with each other to determine jurisdiction on a case by case basis, subject to ultimate adjudication by the Director of Public Prosecutions in the unlikely event that the matter cannot be resolved in an individual case*. There will be no presumption of primacy; it is, however, envisaged that the guidance will set out a number of non-exhaustive factors which may be of relevance to the choice of jurisdiction. It is the Secretary of State's intention that there be public engagement on

a process of consultation about it, there is still no sign of it. The relevant part of the Armed Forces Act 2021 (creating a legal obligation on the respective prosecutors to agree their protocol) received royal assent on 7 May 2022. There has been no process of consultation, as far as we are aware, about the factors that should be considered when making a decision about prosecuting these cases, with independent charities or groups working with survivors of sexual violence and criminal justice reform.

It is therefore still not at all clear how important decisions on prosecutions are being made in practice today or to what extent the Crown Prosecution Service and Director of Service Prosecutions are consulting with each other and what factors they are considering. That is important because the latest statistics show that the number of sexual offences being handled by the military police and prosecuted through the court martial system continues to rise (jumping from 161 sexual offences under investigation by the service police in 2020 to 239 in 2021).[7]

Defence Serious Crime Unit.

In response to criticism of the service police's handling of sexual offences, and following the recommendations of two senior independent civilian judges, the MoD announced that the Special Investigations Branches (SIBs) of the single service policing branches, the Royal Navy Police, Royal Military Police, and Royal Air Force Police, would be combined into a single tri-service Defence Serious Crime Unit (DSCU). That remains in the process of being set up under a new Provost Marshal and as far as we are aware is not yet in operation.

The following observations and recommendations about the prospective DSCU were made by one of the independent civilian judges responsible for recommending its establishment:

1. The DSCU must have a first right of refusal on the handling of all serious crime.

2. The DSCU must have a civilian deputy Provost Marshal.

3. The DSCU should have a strategic policing oversight board that includes senior civilians.

4. Civilian police detectives could be employed to work full time at the DSCU.

5. The Provost Marshal (PM) must have sufficient seniority as compared with the other Provost Marshals. (*At one stage it was anticipated that the PM of the new DCSU could be lower in rank than those of the other PMs running the single service police forces. This makes no sense when this PM will be responsible for more serious crime).*

6. There should be annual reporting on the work of the DSCU.

7. The 'unified career model' whereby service police and prosecutors are usually only in post for a couple of years before having to move on, should be reviewed for them – *this is hugely important. The constant churn of staff handling investigations and prosecutions is deeply problematic for both the handling of the case and the victim's experience.*

8. DSCU staff must not fall under the chain of command of the single services for reporting or disciplinary purposes.

the factors to be considered relevant in guiding case-by-case allocation decisions. Moreover, Parliament will have an opportunity to consider these matters when parliamentary time allows, and the Secretary of State intends to bring forward proposals *to place the arrangements for allocating cases between the SJS and CJS on a statutory basis…'*

[7] https://www.gov.uk/government/statistics/murder-manslaughter-and-sexual-offences-in-the-service-justice-system-2021

9. The DSCU must have a significant focus on victim care and support.

Reading between the lines of that review, it seems that the DSCU proposals met with considerable resistance from the Provost Marshals of the single service policing branches. It will be important for the Committee to put these detailed recommendations to the MoD and assess whether all have been accepted and what progress has actually been made, given that difficult context.

Service Police Complaints Commissioner

This was a very important, long overdue and hugely welcome concession by the MoD that will enable service personnel who believe they have not received an appropriate service from the service police, to lodge formal complaints, in the same way that a civilian may lodge a complaint against the civilian police to the Independent Office of Police Conduct.

The relevant part of the Armed Forces Act 2021 (Section 11 and Schedule 4) have not been brought into force yet. It will be important for the Committee to understand when this provision will be brought into force and when the SPCC will be effective and available to service personnel.

Defence Strategy on Rape

On 19 July 2021 the Government published its '*Tackling Sexual Offending in Defence'* paper. The CMJ thinks this is what MoD witnesses referred to before the Committee as the much heralded 'rape strategy'. [8]

CMJ would have wished to see some or all of the following within the defence strategy on rape:

- recognition that the military justice system has failed rape survivors;
- meaningful, timely (ie not rushed) engagement with independent expert charities working with survivors of sexual assault in the civilian sphere, like Rape Crisis, the Survivors Trust or Aurora New Dawn, perhaps with some limited funding set aside for those charities to be able to dedicate the time needed to help Defence get the strategy right;
- independent research into who does and does not report sexual offending in the military and why;
- a review of the Service Prosecuting Authority arrangements for ensuring accountability for poor charging decisions, delays in progressing cases and conduct of cases at trial (including consideration being given to requiring counsel from the independent bar to be instructed in all serious sexual offence prosecutions);
- specialist research (or proposals for appropriate and safe research) on the role and efficacy of military boards hearing rape cases at court martial;
- specific proposals for public awareness and education campaigns on rape myths, consent, predator behaviour (especially around alcohol) and the true scale of false reporting; [9]
- recognition of the fact that, in a male-dominated military environment, it is even harder for women and men that have been the victim of rape to come forward – what can be done about that;
- recognition of the fact that there may be particular features of the military that make the process of recovery more difficult – what can be done about that;
- special attention to be given to the experiences of young recruits and trainees;

[8] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1091727/20220718_Sex_Offending_Strategy.pdf

[9] The strategy does state that it 'will ensure a component of (a communications) campaign is related to educating people (including the chain of command) about what constitutes rape and sexual offending, to counter myths, stigma, perceptions, any misogynistic narratives, and to encourage open discussion.' By when? Who will deliver this? What training will they have? How will its impact be measured?

- special attention given to the needs of those that join the military with a history of sexual trauma or other abuse that may make them particularly vulnerable;
- how to ensure access for survivors to specialist, independent and wrap-around support and advocacy provided by civilian organisations (that is encouraged and not, at best, tolerated), including funding for training those organisations to provide specialist services to service personnel;
- confirmation that the Victim's Commissioner has approved and endorsed the strategy.

The Defence Committee has not requested a detailed response to the strategy and it would not be appropriate to set down all of our concerns about it within this paper, however we make the observation that this document is less a strategy more a collection of 'things that are currently being done' across Defence, things that are in the pipeline, and other content taken from various other external documents.

The strategy document needs to be considered in light of the fact that the MoD has already rejected recommendations for the fundamental reforms that are needed in order to address unacceptable behaviours and improve the overall quality of rape investigations and the likelihood of successful prosecutions, as recommended by the Wigston Review, Lyons Review and the Defence Committee. However there is no acknowledgement of that or any analysis of the implications of those rejections.

For example, on page 11, the report states, '*The Service Justice System Review by HH Shaun Lyons and Sir Jon Murphy outlined a range of recommendations to improve how the SJS deals with perpetrators in the Armed Forces, and much work is ongoing to address this. The review also noted the highly trained investigators within the SJS*.' Given the recommendations made by the Lyons Review, that is a shockingly selective description, deliberately ignoring what HHJ Lyons and Sir Jon Murphy actually said about the lack of proficiency of investigators and prosecutors and the 'astonishingly low' conviction rate for rape at court martial. It also completely ignores that the MoD rejected the key recommendations of Lyons & Murphy on jurisdiction. If the MoD cannot be honest with itself about the recommendations that have previously been made and deal with the implications for its strategy of having rejected them, then this seriously undermines the usefulness of this document.

Shockingly, there is no analysis of the low conviction rates for rape at court martial. Even on the MoDs own admission, conviction rates for rape at court martial are significantly lower than those at crown court however this is not a feature of the document; nor is the fact that victims have (and continue to receive) an extremely poor service in the military after they report rape.

There is no analysis of the extent of under reporting of sexual offences. The CMJ has previously remarked upon the fact that there is a huge gulf between the number of experiences of 'particularly upsetting incidents' disclosed during surveys and the number of service police investigations actually opened – there is no acknowledgement or analysis of that gulf. Why are so few reporting?

There is no analysis on how accessible civilian ISVAs and IDVAs actually are to service women. Anecdotally we have been informed of civilian ISVAs being discouraged from supporting service personnel throughout their journey, either explicitly (on the grounds that the services have some sort of welfare services so their services are not required) or simply by making it logistically difficult for them (to attend meetings and visit military establishments). Defence needs to understand how meaningful service women's ability to access these services is in practice and work out what can be done to ensure that every victim receives the help they need. (For example, civilian organisations such as Aurora New Dawn can be funded to provide expert support, with military knowledge informing their work, but remaining firmly civilian). In our experience the single services welfare services are not able to provide specialist sexual violence/trauma-informed support.

There is repeated reference to 'the role of alcohol in unacceptable and criminal behaviour' in the context of consent. **There is a total failure to place at the heart of this strategy a recognition that perpetrators purposefully seek out and target victims to rape, who are vulnerable (including by reason of alcohol) and the implications of that.** The CMJ is concerned that the strategy does not adequately address the rape myth that it is a woman's responsibility to keep herself safe from being raped. Indeed, there is a flavour of this myth at page 9. This prejudice remains a common characteristic in many of the cases brought to our attention.

The reference to *Operation Soteria* is initially encouraging though ultimately disappointing. The strategy states that Defence will adopt '*aspects of*' the Operation Soteria approach to policing. Why only aspects? What does that mean? Operation Soteria was launched as a response to the government End-to-End Rape Review, and the Home Office pledge to increase the number of rape cases making it to court, and has at its heart an emphasis on a suspect-focused investigation including an enhanced specialised officer learning and development programme. As long as the MoD insists on permitting service police to conduct rape investigations, military policing should be fully integrated with Operation Soteria including through the use of pilot schemes and implementation.

The CMJ suggests Committee members look at the Government's End to End Rape Review Report (for the civil system) that was published just the month before. This is a helpful guide on what a comprehensive rape strategy should look like.

The Committee may wish to ask the MoD about how this strategy came about, how long they gave any external organisations consulted to engage with it (and how did they engage with them), and enquire whether the Victim's Commissioner (that it has persuaded to sit on the Service Justice Board) actually approved it.

Core Recommendation 8

Publish greater data on the pathway for victims of rape and sexual assault.

Defence agrees that their annual Sexual Offences Bulletin could benefit from the addition of further information relevant to the pathway followed. That has not happened yet and the new data is scheduled to be published in 2023.

However, in order to better understand the extent and nature of the challenges, it will be important to increase the range of sexual offences that will fall to be collated and published every year by the MoD in its sexual offences bulletins, to include the following:

- s63 Criminal Justice and Immigration Act 2008 (possession of an extreme pornographic image);
- s33 Criminal Justice and Courts Act 2015 (disclosing private photographs and films 'revenge porn');
- s67 Serious Crime Act 2015 (sexual communications with a child);
- ss1, 2A, 4, 4A Protection from Harassment Act 1997 (harassment and stalking offences); and
- sexual assault criminal attempt offences.

The Defence Committee may wish to enquire if the MoD would add those offences to its bulletins. They are important to understanding the extent of sexualised culture and sexual offending in the military.

The current reporting system is that where someone charged with multiple sexual offences, MoD only records that as a single offence. We recommend that all sexual offences charged should be recorded and published. The MoD will still be able to continue to record alleged offences by defendant if it prefers to do so, but it is important to accurately record the true scale of actual

alleged offending, which means recording and reporting all charges. Each charge, after all, represents a separate alleged crime perpetrated against a victim.

Data on service personnel accused of sexual crime against civilians or other service personnel, that are taken forward by the civil justice system also needs to be recorded and published alongside data concerning the military justice system. The MoD position on this is rather vague and it is not clear if, when or how this is actually to be achieved. It remains a huge potential gap in the MoD being able to understand and address the problem of military sexual offending.

OTHER POINTS

We would like to draw the following points to the Committee's attention that have come up in the course of our work in the past year.

Delay and Deficiencies in the Service Complaints system

Delays in the Service Complaints system continue to disproportionately affect women because bullying, harassment and discrimination complaints take longest to resolve and these are disproportionately brought by women. We are not aware of the delays having been resolved or improved significantly.

To give you an idea, the CMJ gave its original written evidence to the Defence Committee Inquiry on 31 January 2021, and we included anonymised examples of some of our cases which included six cases where there was an ongoing Service Complaint involving gender-based bullying, harassment or discrimination.

It is now almost two years on and of those six cases, just two have been resolved – in one case, on appeal the Service Complaint was upheld almost in its entirety, having been made more than 4 years previously (and rejected by the Decision Body); and the second has just concluded and partially upheld this month, having been made in summer 2020 – it's taken 2.5 years.

The other four all remain outstanding – all of them are now more than two years old.

Delay continues to be a major source of harm.

Delay also impacts upon service women's access to justice because if they have an Employment Tribunal claim, the position of the MoD is without exception to seek to stay the ET proceedings until it has concluded its Service Complaint.

A service person cannot drop their Service Complaint if they bring an ET claim. If they do, the ET loses jurisdiction. The CMJ can see no good reason to retain this requirement – the ET represents an independent and suitably expert body to oversee the matter for the benefit of both the complainant and the MoD/respondent. If, at the close of the ET proceedings, just as happens in criminal cases, if there is a matter still requiring the attention of the chain of command, then that can be dealt with at that point. But if an individual wishes to drop the Service Complaint and focus solely on the ET, then they ought to be permitted to do so. The current systems traps them into the deficient Service Complaints system and requires them to effectively litigate the issues twice. It is unfair.

Commanding Officers' responsibility for ensuring support to victims of sexual offences

Commanding Officers of the alleged perpetrator are still responsible for the provision of victims' services to the victim and COs are routinely ignorant of the relevant policy.

JSP 839 (including the Armed Forces Code of Practice for Victims of Crime) sets out what services are to be provided to victims of crime in the armed forces. The Code makes clear that it is the

Commanding Officer of the suspect that is to ensure services are provided, not the CO of the victim. The two may be different.

First of all, it is deeply problematic that ultimate responsibility for the provision of victim services lies with the CO of the suspect, not of the victim. This creates an obvious risk that the CO of the suspect will not have sight of the needs of the victim on a regular basis or even at all. In any event, if the CO is the same for both suspect and victim, that creates an obvious difficulty or even conflict (or perception of a conflict) for that CO that would be best avoided.

In the CMJs experience, the relevant part of the policy that mandates what support is to be provided to the victim is invisible. It is found within Annex B and its appendices to the above policy (also known as '*Defence Instruction Notice DIN2014- 209, 'Guidance to Commanding Officers and Victims when dealing with allegations of serious criminal offences including sexual offences'*). In every single case on which we are advising, and have advised over the past three years, the CO concerned has been unaware of this document or has ignored it or large parts of it.

Tri-services policing protocol

We have seen a number of cases in the last year where the person accused of a crime (that could be characterised as a gender based crime, such as stalking, harassment, or rape) has been a member of the service police and not been dealt with according to the Tri Services Policing Investigations protocol. That protocol was set in place following the case of the late Cpl Anne Marie Ellement who was a soldier within the Royal Military Police who reported being raped by two RMP colleagues and whose rape complaint was investigated by the RMP themselves. The protocol requires that a separate branch of the service police investigate in such cases to avoid a risk of bias. Awareness of the existence of the protocol seems to be patchy and it is not applied consistently.

Counselling for rape victims

We have had cases where an individual has been informed that they should not start therapy unless or until their case has concluded at trial at court martial. We note that the Crown Prosecution Service has recently updated its guidance on this issue and are keen to ensure that all military police units and the SPA are aware and that they should not be advising survivors to avoid therapy.[10]

The Diversity & Inclusion (D&I) Directorate – a general observation

The D&I Directorate is now responsible for Service Complaints reform and Service Justice reform as well as unacceptable behaviours and D&I work, a huge brief requiring expertise across a very wide range of disciplines. It is concerning to us that something as fundamental as criminal service justice reform should sit under a D&I brief. While we do not under-estimate the work that is going on inside the D&I Directorate, placing such vital work as criminal (service) justice reform under a D&I brief seems questionable and we struggle to understand why this has happened. The risk as ever is that policies may be reformed and improved but improvements are not reaching service women on the ground in their units.

Centre for Military Justice

17 October 2022

[10] https://www.cps.gov.uk/cps/news/rape-victims-should-not-delay-seeking-therapy-says-updated-cps-guidance