US RESPONSE SYSTEMS PANEL ON MILITARY JUSTICE AND SEXUAL ASSAULT

SUBMISSION TO THE PANEL

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Introduction

1.1 The Statute of Gloucester 1278, asserted that the sovereign of England had the right to command all the military forces of the nation. The Royal Prerogative included the right to regulate and discipline the army. Military law applied only in time of war and was administered in the Court of the Constable and Marshal. The Constable was the commander, and the Marshal was the second-in-command of the King's armies. A list of Rules and Ordinances of War was issued by the King, usually on the advice of the Constable and Marshal, at the beginning of every expedition or campaign. By the 15th century, the Rules and Ordinances had become known as Articles of War. Military offences, such as disobedience, cowardice, and desertion were punishable by death, mutilation, flogging, and the forfeiture of possessions. In 1521, the Lord High Constable quarrelled with King Henry VIII and was attainted for treason and beheaded. His office was never filled again. The Marshal continued to convene the Court of the Constable and Marshal on his own authority, but gradually the right to try military offences was usurped by ad hoc committees of officers, known first as Marshal Courts and subsequently as Courts Marshal.[1]

1.2 In 1640, it appears that lawyers and judges were all of the opinion that the Articles of War could not apply in England, except "when an enemy is really near to an army of the King's".[2]

1.3 The Glorious Revolution of 1688 evicted the Stuart dynasty, and placed William of Orange and his wife Mary jointly on the throne of England. It was quickly followed by the Bill of Rights of 1689. The Bill expressly forbade the maintenance by the monarch of a standing army without the consent of Parliament. But Parliament, anxious to ensure the loyalty of the army to the new regime, passed in the same year the first Mutiny Act to control discipline in peace time. From this date on, Parliament passed a succession of Mutiny Acts but they were allowed to lapse during periods of prolonged peace. The prerogative Articles of War nevertheless continued to apply to active service abroad - for example, to the American Revolutionary War, the French Revolutionary War and the

[1] See J. Crim. L. (2008) 170 “Disciplinary uniformity in uniform: a success of the Human Rights At 1998?” Chris Gale

[2] Letter from Lord Conway to the Archbishop of Canterbury July 13th 1640 *Historical Collections of Private Passages of State etc. Vol 3 page 1199.* Rushworth (1721). The enemy in question at the time was the Scots Covenanters in the Second Bishops’ War, who under General Leslie defeated the Royalist forces under Lord Conway at the Battle of Newburn and occupied Northumberland and Durham.

Napoleonic Wars. It was only in 1813 that Parliament created a statutory power to govern military discipline, but with little influence over the manner in which the power was to be exercised.

1.4 In 1868, a Royal Commission on courts-martial and the system of punishment for military offences was appointed. Flogging had recently been abolished as a punishment, and other ameliorations were proposed. Their final Report of 1869 was followed by the Report of a Parliamentary Committee on the Mutiny Acts in 1878. The Army Discipline and Regulation Act 1879 sought to end the system in which the Mutiny Act and Articles of War co-existed, with the latter subordinated to the former. The aim was to simplify and modernise the system. The Army Act of 1881 repealed and re-enacted the 1879 statute and established a modern code, embodying the whole law relating to military offences and their trial and punishment, both summarily by commanding officers and by courts-martial. The Act had to be brought in each year and only for a year at a time, by an Army (Annual) Act.[3] The 1881 Act survived more or less intact until 1956 with annual renewals. The Army Act of 1955 substantially altered the rules relating to courts-martial and to the system of post-trial review of their findings. The 1955 Act was renewed each year for five years by an Order of Her Majesty in Council with the approval of Parliament. At the end of five years, a new Act was required. The same mechanism was applied to the Royal Air Force and the Royal Navy. Thus three separate statutory provisions governed the three services, which collectively were known as the Service Discipline Acts, (SDAs).

The Court Martial System under the SDAs.

2.1 The whole system became the subject of serious criticism in the early 1990s in its handling of both military as well as civilian cases. In an article in the New Law Journal in April 1991, a former member of the Army Legal Services commented:

> "By rights the system should not be unfair. On paper it is a good system with checks and balances that preserve the proper interests of justice and also ensure the utmost fairness for an individual accused. Many safeguards brought into existence by or under the Army Act 1955 give more advantages to a military accused than do the similar civilian provisions, especially during the trial process where there are greater opportunities for the defence to obtain an acquittal. Yet there is still unfairness in the way justice is dispensed in the army and these aspects of iniquity arise almost exclusively from the way in which discretionary powers are granted to commanding officers and superior authorities. These are officers higher in the chain of command, to whom a commanding officer is responsible for discipline, and who can therefore affect the pre- and post-trial

[3] See *A Guide to the Sources of British Military History* Ed. Robin HIgham (1972) Routledge and Keegan Paul Ltd.

process. Because discretion exists within the system to decide whether a matter should go for trial by court-martial, for example, it is possible for officers in the chain of command above the CO, who are responsible for overseeing the disciplinary system, to introduce bias in two ways: first, by reducing the discretion of individual commanding officers by direct influence; and, secondly, by initiating policies that will debar all commanding officers from using discretionary powers properly. Thus an individual facing an allegation which after investigation may require him to be charged and dealt with formally, may be dealt with more harshly than is appropriate, or more leniently, with consequent unfairness to others, simply because the system decrees this rather than the circumstances of his case."[4]

2.2 A number of applications were made by ex-Servicemen convicted by courts-martial to the European Commission of Human Rights contesting the independence and impartiality of courts-martial and courts-martial review procedures. The leading case is that of *Findlay*, a former Sergeant in the Scots Guards. In 1990 whilst serving in Northern Ireland, Findlay ran amok with a loaded pistol, threatening to kill himself and certain of his colleagues. Findlay subsequently pleaded guilty to the majority of the charges arising, including assault and threatening to kill, at a general court-martial held in November 1991. He was sentenced to two years imprisonment, reduction of rank and dishonourable discharge.

2.3 In a subsequent case in 1994 in which I appeared for the defence, L/Cpl. Darren Fisher was charged with the murder of Christina Menzies, the daughter of a warrant officer serving in the RAF in Germany. Fisher was acquitted at a general court-martial in Paderborn. Mr George Galloway MP raised the issue in Parliament and declared in an abuse of parliamentary privilege for which he is notorious: "The military police, who were soldiers with armbands, and the military prosecutor, who was a soldier with a wig, bungled the case and—for the interest of Tory Members—a murderer, Corporal Darren Fisher, walked free. He is still at large and is serving in Her Majesty's armed services. Is it not about time that we overhauled the archaic, anachronistic system of military justice which is widely discredited, even within the armed services?".[5] Dr John Reid, later to serve as Minister of Defence, Home Secretary and Foreign Secretary in the Blair Labour Government, on the Second Reading of the Armed Forces Bill in December 1995 said of the same case:

> 'Christina Menzies, a young girl, was the daughter of a sergeant in the British Army, and she was brutally murdered in Germany. The accused was a serving

[4] J. K. Venn, 'Military Justice - an oxymoron?', New Law Journal 19/4/91 & 26/4/91.

[5] HC Deb 28/3/95 c 812-813 and *The Scotsman* 3/3/95

soldier in the British Army and, although the tragic young victim was a civilian, it was decided to try the accused by court martial by the British military authorities rather than by the German civil courts and investigative bodies that had begun the procedure. Therefore, it was decided that the investigation and prosecution of the case would be undertaken by British military authorities.

I make it clear that I am not in a position to make a judgment about the innocence or guilt of the accused soldier, who was acquitted by the court martial. Many people, including Christina's parents, the local Member of Parliament and the German authorities feel strongly that justice was not served by that acquittal. There are grave doubts about whether the prosecuting officer had the necessary experience for such a role, especially as the defendant was able to hire a barrister who specialised in offences such as homicide. That barrister was hired at taxpayers' expense through the legal aid system.

There were equally serious doubts about the ability to handle complicated forensic evidence. In cases where a civilian victim is involved and where the offence occurs in a modern, civilised and democratic society, why is it necessary for a military court rather than a local court to be used? Is justice served by pitting armed forces officers, who perhaps are inexperienced in matters as serious as homicide, against the best that money can buy in an experienced criminal defence counsel? The Committee will need to examine seriously that general question and it will need to try to ensure that a case such as that involving the death of Christina Menzies never happens again. If we can achieve that, perhaps the tragic experience of that brutal murder can be put, at least in the long run, to some good purpose.'[6]

2.4 The political pressure therefore was to professionalise prosecutions of serious cases to ensure that there was equality of arms between the prosecutors and the civilian defence teams financed out of public funds under the services' legal aid schemes. There were also serious concerns about the resources available to the Service police adequately to investigate serious crime, and the direction that could be given to their enquiries.

2.5 Another concern was the impression given by what appeared to be antiquated relics of a harsher system of justice. At the time of these trials, the procedural rules required the accused to be stripped of his regimental belt and beret at all times, save when he gave evidence. He was required to sit to attention in the body of the court room under the supervision of a guarding corporal or sergeant. Members of the panel were officers who carried swords and laid them sheathed upon the table before them or placed them on the floor. The President sat centrally with the Judge Advocate to his right hand side.

[6] *HC Deb 13 December 1995 vol 268 c1028*

The Intervention of the European Court of Human Rights.

3.1 Findlay's application to the ECtHR challenged his conviction and claimed that his court-martial and subsequent sentence reviews contravened Article 6 (1) guarantees of a fair trial. Before his application was heard, the Ministry of Defence in a separate civil action, agreed to pay Findlay £10,000 in compensation for its failure to treat his PTSD and for an earlier back injury.

3.2 To the consternation of the government of the day, the European Commission of Human Rights which gave a preliminary opinion, prior to the case coming before the full Court, decided in February 1995 that Findlay's case was admissible. Twenty other pending applications challenging the fairness of court-martial procedures were put on hold, pending the Court's final decision. The case was remitted to the full European Court of Human Rights for their consideration. The system in place at the time, had a number of features as explained below.

The Role of the Commanding Officer (CO)

3.3 A person subject to military law found committing, alleged to have committed or reasonably suspected of having committed an offence was liable to arrest. Rules governed the rank of the person arresting. The arrest was reported to his CO who was under a duty to launch an investigation within 48 hours. The CO on receipt of the report of the investigation, had a discretion as to how to deal with the accused person. In the case of officers of the rank of Lt. Col. or above, he was required either to dismiss the charge or to bring the accused to trial by court-martial. In the case of an officer below that rank, a Warrant Officer or a civilian subject to military law, he was required either to dismiss the charge or to submit the case to higher authority. In the case of an NCO or soldier, he might dismiss the charge, deal with the case summarily or take steps to bring the accused to court-martial. Regulations specified what charges might be dealt with summarily. The CO had power to delegate to subordinate commanders the power to investigate and deal summarily with certain cases. Generally, disciplinary offences were dealt with summarily by company commanders.

The Convening Officer.

3.4 The central figure in the court-martial at the relevant time was the convening officer, who had to be a field officer or of corresponding or superior rank, in command of a body of the regular forces or of the command within which the person to be tried was serving. The convening officer assumed responsibility for every case to be tried by court martial. He or she would decide upon the nature and detail of the charges to be brought and the type of court martial required, and was responsible for convening the court martial. The convening officer would draw up a convening order, which would specify, inter alia, the date, place and time of the trial, the name of the President and the details of the other members of the Panel, all of whom he could appoint. He appointed the

military personnel who were to act as prosecuting officer, assistant prosecuting officer and assistant defending officer (to represent the accused in addition to his solicitor). He ensured that a judge advocate was appointed by the Judge Advocate General's Office and, failing such appointment, could appoint one himself.

3.5 The convening officer procured the attendance at trial of all witnesses to be called for the prosecution. When charges were withdrawn, the convening officer's consent was normally obtained and a plea to a lesser charge could not be accepted from the accused without it. He had also to ensure that the accused had a proper opportunity to prepare his defence, legal representation if required and the opportunity to contact the defence witnesses, and was responsible for ordering the attendance at the hearing of all witnesses "reasonably requested" by the defence.

3.6 The convening officer could dissolve the court martial either before or during the trial, when required in the interests of the administration of justice (section 95 of the 1955 Act). In addition, he could comment on the "proceedings of a court martial which require confirmation". Those remarks would not form part of the record of the proceedings and would normally be communicated in a separate minute to the members of the court, although in an exceptional case "where a more public instruction [was] required in the interests of discipline", they could be made known in the orders of the command. [7]

The Confirming Officer.

3.7 The convening officer usually acted as "confirming officer" also. A court martial's findings were not effective until confirmed by a "confirming officer". Prior to confirmation, the confirming officer used to seek the advice of the Judge Advocate General's Office, where a judge advocate different to the one who acted at the hearing would be appointed. The confirming officer could withhold confirmation or substitute, postpone or remit in whole or in part any sentence. He could not increase it.

The Reviewing Authorities

3.8 Once the sentence had been confirmed, the defendant could petition the "reviewing authorities". These were the Queen, the Defence Council (who could delegate to the Army Board), or any officer superior in command to the confirming officer (section 113 of the 1955 Act). The reviewing authorities could seek the advice of the Judge Advocate General's Office. They had the power to quash a finding and to exercise the same powers as the confirming officer in relation to substituting, remitting or commuting the sentence.

3.9 A petitioner was not informed of the identity of the confirming officer or of the reviewing authorities. No statutory or formalised procedures were laid down for the conduct of the post-hearing reviews and no reasons were given for decisions delivered

[7] Queen's Regulations, paragraph 6.129

subsequent to them. Neither the fact that advice had been received from the Judge Advocate General's Office nor the nature of that advice was disclosed. It was not the convicted defendant who suffered since the process could only act in his favour: the problem was that a decision to quash the conviction entered by a court-martial - who had the benefit of hearing the witnesses and being advised by the Judge Advocate in the case - could be made by non-judicial bodies: the confirming officer or the reviewing authorities. It was the victim whose rights were disregarded.

3.10 The convicted defendant did not lose his right to appeal to the Courts-martial Appeal Court, notwithstanding his petition for review. The Appeal Court (made up of civilian judges) could hear appeals against conviction from a court martial, but there was no provision for such an appeal against sentence when the accused pleaded guilty.

The Judge Advocate General and judge advocates

3.11 The Judge Advocate General was appointed by the Queen for five years. He was answerable to the Queen and was removable from office by her for inability or misbehaviour. Judge advocates were appointed to the Judge Advocate General's Office by the Lord Chancellor. They had at least seven and five years experience respectively as an advocate or barrister. The judge advocate was responsible for advising the court martial on all questions of law and procedure arising during the hearing but the panel remained the sole arbiters of the law and the facts and were not obliged to accept his advice. In addition, in conjunction with the President, he was under a duty to ensure that the accused did not suffer any disadvantage during the hearing. For example, if the accused pleaded guilty, the judge advocate had to ensure that he or she fully understood the implications of the plea and admitted all the elements of the charge. At the close of the hearing, the judge advocate would sum up the relevant law and evidence.

3.12 The judge advocate did not take part in the court martial's deliberations on conviction or acquittal, although he could advise it in private on general principles in relation to sentencing. He was not a member of the court martial and had no vote in the decision on conviction or sentence.

3.13 At the time of these trials, the Judge Advocate General had the role of adviser to the Secretary of State for Defence on all matters touching and concerning the office of Judge Advocate General, including advice on military law and the procedures and conduct of the court-martial system. He was also responsible for advising the confirming and reviewing authorities following a court martial.

4.1 In 1995, following the European Commission's ruling on the admissibility of Findlay's application, the Conservative government under John Major, decided to pre-empt the final decision of the European Court by introducing amending legislation. A Bill was promulgated in 1995 which ultimately became the Armed Forces Act of 1996. The division between the three services under the SDAs was however preserved.

4.2 The first change was to remove the powers of the Confirming Officer to confirm and revise the findings of a court-martial. Under revised procedures, the findings came into force with immediate effect. Secondly, the sequence of reviews to the reviewing authorities was scrapped and replaced with a single stage review by the appropriate Service Board of the Defence Council, with powers to quash the sentence or to substitute another sentence not being more severe than the original sentence. The Service Board was not to be able to review the findings of the court-martial or sentences on a subsequent occasion. Appeals to the Courts-Martial Appeal Court were to be allowed on sentence as well as conviction.

4.3 Further significant changes followed. An independent prosecuting authority was created outside the chain of command. Until 2009, in the case of the Army and the Royal Air Force, but unlike the Ryal Navy, the formal authority to prosecute had remained in the hands of the most senior service lawyer in those respective services, albeit that they delegated their authority to subordinates. Those senior lawyers were also the legal advisors to the chain of command. This would these days be regarded as compromising this independence, at least in perceptual terms. A case would be referred to that authority and it was the duty of the prosecutor appointed to determine any charge to be preferred. The prosecutor had the conduct of the court-martial proceedings against the accused and could amend the charge or discontinue proceedings as he thought fit. The convening officer was replaced by a 'court administration officer' who, having been notified by the prosecutor of the charge, convened the court-martial, specifying the officers who were to be the members of the Panel and naming the President. The judge advocate was appointed separately by the Judge Advocate General to sit with the Panel. Other amendments to Rules abolished the theatrical brandishing of swords and the constraints put upon the accused in the courtroom itself.[8] Other procedural changes were introduced to equate the court-martial more closely with trial of criminal offences in the civilian Crown Court. Undoubtedly, the status of the Judge Advocate was

[8] The practice lasted in the navy for some time thereafter, until I asked a question in the House of Lords on 22nd March 2004:

> 'To ask Her Majesty's Government whether the practice of the escort accompanying a defendant in a British naval court martial with a drawn and brandished sword, and the wearing and display of sheathed swords by the prosecutor and members of the court martial, is to be maintained.'

The Minister, Lord Bach, replied that the practice had been abandoned between my putting the question down and his answer a fortnight later.

enhanced to the equivalent of the Crown Court Judge who presides in the vast majority of criminal trials within the civil system.

4.4 The government also took the opportunity in the Bill to address issues such as the status of women in the armed forces, equality for ethnic minorities and homosexuality. It was recognised that the post-Cold War period had been one of rapid change for the armed forces. Not only had there been reductions in the number of personnel of about 25 per cent, but also substantial relocations and changes in the nature of the Armed Services. The government noted that apart from the two World Wars, the British armed forces had traditionally been somewhat isolated from British society as a whole. Whether on HM ships at sea, in distant colonial outposts or on windswept East Anglian airfields, the Services had been largely self-contained. Apart from recurrent manning problems, the armed forces were largely unaffected by wider social changes which began in the 1960s. It was not until the 1980s that the forces began to face the implications of societal shifts. The Army was reputed to be particularly conservative.[9] As one commentator remarked, "As recently as 1988, some senior officers were still asserting that the Army should always remain half a generation behind society as a whole".[10] Some of the changes in attitude were forced on the Ministry of Defence by legal challenges. Others were a consequence of the need to attract recruits of sufficient number and quality to operate increasingly sophisticated equipment.

4.5 Although there were significant changes to the court-martial system, the power of the commanding officer to deal with charges summarily was retained. The CO retained the power to dismiss the charge; to refer the charge to higher authority; or in most cases, deal summarily with a charge. He was still not entitled to deal with the charge summarily if the accused was an officer or warrant officer or if the offence were so serious as not to be triable summarily, for example, a charge of murder. Yet he could dismiss the most serious of charges under S 76 (5) of the Army Act. As for offences committed in theatre, the commander of a body on active service, if of the opinion that a charge could not be dealt with without serious detriment to the public service, had power to order a member of that body to be tried by field general court martial.

4.6 But most importantly, it was recognised that summary proceedings before the CO could never match the requirements of fair trial guaranteed by Article 6 (1) of the Convention[11]. Accordingly, the 1996 Act gave to an accused facing summary proceedings in all Army and Royal Air Force cases and in all but minor Royal Navy cases, the right to choose to be tried by court-martial. This was a concession unlikely to be exercised in the vast majority of summary offences and in particular, the right could not

[9] See Commons Research Paper 95/125 [Deposited Paper 3S/ 2462].

[10] A. Beevor, *Inside the British Army*, (1990) p. 362

[11] Article 6 (1): “In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law ...”

be exercised in the Army and Air Force until the CO had found the charge proved. Further, the court-martial had power to award a greater punishment than the CO. It was obviously not an attractive option for the accused person.

The 'Findlay' Decision of the 25th February 1997[12]

5.1 At the hearing of Findlay's case before the Full Court, it was argued that the court martial was not an "independent and impartial tribunal", that it did not give him a "public hearing" and that it was not a tribunal "established by law". Accordingly, he contended that there was a breach of Article 6 (1) guarantees of a fair trial.

5.2 Findlay referred in particular to the system prior to the 1996 Act: that the members of the court martial were appointed ad hoc, that the judge advocate's advice on sentencing was not disclosed, that no reasons were given for the decisions taken by the court-martial board and the confirming and reviewing officers, and that the post-hearing reviews were essentially administrative in nature and conducted in private.

5.3 The Court concluded that the convening officer was central to Mr Findlay's prosecution and closely linked to the prosecuting authorities. The Court gave weight to Findlay's concerns that all the members of the court martial, appointed by the convening officer, were subordinate in rank to him. Many of them, including the President, were directly or ultimately under his command. Furthermore, the convening officer had the power, albeit in prescribed circumstances, to dissolve the court martial either before or during the trial. His role as the 'confirming officer' was contrary to the well-established principle that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of "tribunal" and can also be seen as a component of the "independence" required by Article 6 (1). It concluded that there had been a violation of the Convention. Reference was made to the changes brought about by the 1996 Act since Findlay's original trial, in which many of the matters complained of had been dealt with.

5.4 The change of government at the general election of 1997 to the administration of Mr Tony Blair, led to the incorporation of the European Convention into British law by the Human Rights Act of 1998. That meant that the Courts were required to consider and construe the provisions of the Convention in any case in which the issue was raised before them. It did not mean that the decisions of the European Court of Human Rights in Strasburg changed the law of England and Wales, of Scotland or of Northern Ireland nor that they over-ruled the prior decision of the domestic court. However, a Minister under section 6 of the Human Rights Act is under a duty to comply with the Convention, and the government as a whole, is under an international treaty obligation under Article

[12] http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58016

46 of the Convention to "abide by" the judgments of the Court. [13] The pressure was on therefore to amend the system further in the light of the *Findlay* judgment.

Civilians – the case of R v Martin (1998) AC 917

6.1 Civilians who were members of the family of a serving soldier or who were on a military base as a civilian to carry out various functions were caught by military law. I appeared for the defendant Alan Martin in this case, leading a very experienced military court advocate, Gilbert Blades. Martin was a civilian, aged 17. His father, an army corporal, was serving with British forces at a British base in Germany He was charged with the murder of a young English woman in Germany, a civilian attached to the same base. Although he could have been tried in a civilian Crown Court in England and was remanded awaiting trial in Colchester Barracks in England, he was charged under the Army Act with having committed the civil offence of murder. The German Government waived its right to exercise jurisdiction. The officer, who since Martin was a civilian had to be appointed to be his quasi commanding officer, referred the case to higher authority with a view to his trial by court-martial. Pending trial, his father returned to England and was discharged from the army. The Attorney-General was informed that it was desirable that the trial should take place in Germany since many witnesses were German and could not be subpoenaed to attend a trial in England. He gave his consent to the prosecution of the appellant by court-martial in Germany rather than trial by jury in an English civil court, which would have had full jurisdiction. Martin was shipped out to the British base in Germany for his trial. My submission that the court-martial had no jurisdiction, on the ground that it was an abuse of process to try a young civilian by court-martial in Germany rather than by jury in England was rejected and he was convicted.

6.2 His appeal was dismissed and on appeal to the House of Lords, the Lords of Appeal held that the trial of the appellant by court-martial could not in itself have been an abuse of process when that form of trial had been approved by Parliament for juveniles charged with murder; and that the decisions of the appellant's commanding officer under section 77A of the Act of 1955 not to stay the proceedings by court-martial "in the interests of the better administration of justice," or the decision of higher authority under section 80 not to refer the case back to the commanding officer and the decision of the Attorney-General under section 132(3A) of the Act to grant his consent to trial by

[13] See eg Judgment of Judge Mahoney in *Vinter and others –v- UK,* Strasbourg 9th July 2013.

court-martial, had not been contrary to the rule of law or deprived the appellant of any basic human right so as to amount to an abuse of process or been so unfair and wrong that the courts ought to intervene. The case caused considerable disquiet. Indeed Lord Slynn in the course of his opinion said:

> 'As a matter of first impression it seemed to me disturbing and indeed wrong in principle that a 19-year-old civilian, albeit the son of a serving soldier at the time of the murder he was alleged to have committed in Germany, who had with his father returned to England more than a year before trial, should be sent back to Germany for trial by court-martial and thereby be deprived of the right to, or at the least of the opportunity of, trial by jury. That impression was only underlined by (a) my doubts as to whether the commanding officer had ever really considered whether pursuant to section 77A of the Army Act 1955 proceedings should, in the interests of the better administration of justice, be taken against the accused otherwise than under the Act, namely by proceedings before the ordinary courts in England; and (b) the fact that it was not shown that there was an opportunity for representations to be made by or on behalf of the accused before decisions were made by the commanding officer and by higher authority that the case should proceed before a court-martial.'

6.3 This case finally came before the European Court of Human Rights in 2006 who unanimously determined for the reasons given in *Findlay,* that there was a breach of his Article 6 (1) guarantees, notwithstanding that the Panel which tried him contained two civilian members as was necessary for the court-martial of a civilian under the Rules, and that the Judge Advocate was a civilian.[14]

The Armed Forces Discipline Act 2000

7.1 The European Court's decision in *Hood –v- UK*, Strasbourg 18th February 1999, led to further changes to modify the power of the CO. Hood, a serving soldier, was arrested by the civilian police in November 1994, having been a deserter for two and a half years. He was kept in close arrest in a cell in the guardroom at Brompton Barracks, except for certain visits to hospital for psychiatric care. It was in doubt whether he was so confined on the orders of the CO, but he argued in any event, that his CO was not impartial because of the central role he played in determining whether he should be

[14] http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77661

prosecuted. The European Court of Human Rights upheld his complaint. It was said in their judgment:

> 'The Court also considers, as did the Commission, that the commanding officer's concurrent responsibility for discipline and order in his command would provide an additional reason for an accused reasonably to doubt that officer's impartiality when deciding on the necessity of the pre-trial detention of an accused in his command. This view is reinforced by paragraph 6.005 of the Queen's Regulations, which allows for the commanding officer to refuse the pre-trial release of an accused if he is of the view that it is undesirable "in the interests of discipline" that the accused be at large or be allowed to consort with his comrades.'[15]

7.2 Accordingly, the main effect of the 2000 Discipline Bill, in addition to introducing greater commonality between the practices of the three Services, was to make provision in all three Service discipline Acts for a judicial officer, rather than the CO, to determine whether a suspect or accused should be held in custody. The judicial officer was to apply criteria similar to those used in ordinary domestic law, namely under the Police and Criminal Evidence Act 1984 pre-charge provisions and the Bail Act 1976 post-charge provisions. A 'judicial officer' would normally be a judge advocate or a naval judge advocate. If a CO wished to keep a suspect in custody during an investigation into his case, he was to be brought before a judicial officer in order for the judicial officer to authorise his continuing custody. In no circumstances could the period during which a person was in custody without charge exceed 96 hours. Once the 96 hour point was reached, the suspect either had to be charged or released. Once a suspect had been charged, he must be brought before a judicial officer as soon as practicable, if he were to be remanded in custody pending trial. The judicial officer might at this stage, and subsequently, authorise detention for periods of no more than eight days (28 days with the consent of the accused).

7.3 A further and very important provision in the 2000 Discipline Bill was the creation of a Summary Appeal Court (SAC). The SAC sat with a judge advocate and two officers. Anyone dealt with summarily and found guilty by the CO, had a right of appeal within 14 days to the SAC by way of a full rehearing of the case *de novo*. The SAC had power to quash or confirm the original findings or substitute its own. Any substituted sentence could not exceed the original sentence.

7.4 Further, the Discipline Bill expanded the right to elect trial by court-martial, so that the accused could exercise his right at the outset of summary proceedings and before the CO hearing. It was no longer a necessary precursor to his exercising his right of election, that the CO had found the charge proved.

[15] http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58913

7.5 Nothing contained in the Bill affected the CO's power to *dismiss* the proceedings following receipt of the initial report. Power was given additionally, however, to the Independent Prosecuting Authority to discontinue proceedings if it thought fit.

The Armed Forces Act 2001

8.1 The main purpose of this Bill was to renew the provisions of the SDAs as amended by the Armed Forces Discipline Act 2000 for a further five years. The opportunity was taken however to extend summary trial and access to a SAC to naval officers who previously could only be dealt with by court-martial.

8.2 The most significant step forward was however to extend membership of the court-martial panel to substantive Warrant Officers, provided that the accused was of junior rank to them. In the whole history of courts-martial, this was the first time that members of the panel were not confined to commissioned officers.

The Judgment in *Grieves v UK*[16] - Strasbourg 16th December 2003

8.3 The European Court however was not finished. In *Grieve,* a naval court-martial, two complaints, argued by Mr Blades, were upheld. First, the appointment of an ad hoc President: the Court concluded that the absence of a full-time President of a naval court-martial with no hope of promotion and no effective fear of removal and who was not subject to report on his judicial decision-making, deprived naval courts-martial of what was considered, in the air-force context in the case of *Cooper v UK*,[17] to be an important contribution to the independence of an otherwise ad hoc tribunal. In *Cooper*, the President was a Permanent President, a senior officer who was approaching retirement and for whom the position would be his last posting.

8.4 Secondly, and most importantly, the Court criticised the status of the Judge Advocate. In a naval court-martial, he was a serving naval officer who, when not sitting in a court-martial, carried out regular naval duties. He was subordinate in rank to the President and other members of the Panel. This judgment was delivered concurrently with the case of *Cooper*, an air force case, where the Judge Advocate was a civilian working full-time on the staff of the Judge Advocate General, himself a civilian. No fault was found in *Cooper* with a civilian sitting as Judge Advocate.

R v Spear (2003) 1 AC 798

8.5 This was a series of cases which were conjoined for hearing in the Judicial Committee of the House of Lords, in which I appeared, leading Mr Blades for the appellants. They challenged, unsuccessfully, the very basis for the hearing of civilian offences by way of courts-martial. In the first group of appeals, two defendants were convicted at an Army

[16] http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61550
[17] http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61549

district court-martial and a third at a Royal Air Force district court-martial of assault occasioning actual bodily harm. The defendants appealed against conviction, contending that, since the court by which they had been tried had been presided over by a permanent president, they had not been afforded a fair hearing by an independent and impartial tribunal established by law, in violation of article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms as set out in Schedule 1 to the Human Rights Act 1998.

8.6 In a second group of appeals, nine defendants were convicted of, or pleaded guilty to various offences at Army or Royal Air Force district or general courts-martial. In the particular cases before the House of Lords, the facts disclosed such trivial matters that in all probability they would never have been the subject of a criminal charge by the civilian authorities. On their appeals against conviction, it was contended, inter alia, that a trial by court-martial in the United Kingdom of an offence against the ordinary criminal law of the land was incompatible with article 6(1) of the Convention. The argument I advanced were that courts-martial should be confined to matters of "conduct to the prejudice of good order and discipline". The proceedings, including the factors influencing the decisions on guilt or innocence and sentence of the tribunal that hears the proceedings should be looked at as a whole. The decision to prosecute in these cases demonstrably did have regard to service factors. It would be unreal to suppose that the members of the tribunals before whom the cases were brought would not have been "sensitive to the need for discipline , obedience and duty on the part of the members of the military and also to the requirement of military efficiency." *R –v- Genereux (1992) 1 SCR 259.* The effect of conviction on these civilian charges, trivial though they were, was devastating to the careers and pensions of the appellants, far in excess of any punishment which any civilian court would inflict, even if the charges were brought before them.

8.7 These arguments did not succeed. Their Lordships held, dismissing the appeals, that the trial of a civil offence by court-martial was not in itself incompatible with the right of an accused to a fair hearing by an independent and impartial tribunal under article 6(1) of the Convention; that safeguards designed to ensure the independence and impartiality of the members of courts-martial, including the oath taken by them and their obligation to observe the directions of the judge advocate, were adequate; and that the independence and impartiality of courts-martial were not compromised by the presence of permanent presidents, or by the members being subject to annual report, though it would be preferable if that practice were discontinued in the case of permanent presidents, or by the existence of the reviewing authority created by the Armed Forces Act 1996.

***Thompson –v- UK* 15th June 2004[18]**

8.8 Thompson, a serving soldier, complained that the imposition of 28 days' military detention by his CO for being absent without leave had breached his rights under the European Convention on Human Rights 1950 Art.5 and Art.6. On the 13th February 1997, sentence was imposed by T's commanding officer following a period of close arrest after he had been returned to his unit. Thompson contended that he had been denied the option of a court martial, in breach of Art.6(1), and that he had not been legally represented when he opted for summary trial before his commanding officer, who was not an independent judicial authority for the purposes of Art.5(3). It was held, upholding the complaint, that there had been a violation of Art.5(3) as the commanding officer was not an independent figure between T and the military authorities, *Findlay v UK* and *Hood v UK* applied. The choice by the accused of summary trial before his CO did not constitute a valid waiver of T's rights under Art.6(1) and Art.6(3), given T's subordinate status to his commanding officer and to the fact that the maximum sentence that could be imposed was 28 days, whereas he faced up to two years' detention if found guilty by a court martial. The lack of legal representation for the summary procedure also meant that T had been unable to make an informed decision and was contrary to Art.6(3).

***Baines –v Army Prosecuting Authority* [2005] EWHC 1399 (Admin).**

8.9 It was not long after the decision of the European Court of Human Rights in *Thompson*, that the CO's summary proceedings were challenged by way of judicial review in the English Administrative Court. L/Cpl Baines had attacked a fellow trooper by punching him on the arm. It was initially thought the arm was broken and Baines was sent for trial by district court-martial. When it appeared there was no more than bruising, his very experienced solicitor, Lewis Cherry, applied for the case to be remitted to the CO for him to deal with it summarily, with the agreement of the Army Prosecuting Authority. Mr Cherry realised that the sentencing power of the CO was very much more constrained than the court-martial panel. Baines pleaded guilty before the CO. He was reduced to the ranks. Nevertheless he appealed to the Summary Appeal Court set up under the 1996 Act and with legal representation, argued a breach of Article 6 (1) on the basis of *Thompson.* The SAC pointed out that in the *Thompson* case, the accused had been dealt with by his CO before the changes introduced by the 1996 Act came into force.[19] These changes which now permitted the accused to choose trial by court-martial or alternatively, to appeal to the Summary Appeal Court after conviction by the CO, meant that taken as a whole, the procedure of summary trial before the CO *was* now compliant with Article 6 (1). A strong Administrative Court upheld that decision. There was no further appeal, not even to the ECtHR. This case therefore upheld a

[18] (2005) 40 E.H.R.R. 11; Times, June 24, 2004.

[19] 1st April 1997 – some six weeks after Thompson's summary hearing before the CO.

conviction and sentence under the summary trial procedure. The case did not of course deal with the CO's continuing discretion to dismiss a charge altogether following his receipt of the report of an investigation.

The Iraq War.

9.1 When the invasion of Iraq took place, the system of military law was under close scrutiny, notwithstanding the legislative changes which had been made in 1996 and 2001. The progress of the war and the subsequent occupation, threw up further problems.

The case of Trooper Williams.

9.2 This case focused entirely upon the discretion of the CO to dismiss charges brought before him. On 2nd August 2003, Trooper Williams was on patrol with other soldiers near Ad Dayr in South East Iraq. The patrol discovered six Iraqis moving a cart containing heavy machine gun ammunition. The patrol managed to detain three of the men, but one, Mr Said, ran off. Trooper Williams and another soldier, Corporal Blair, gave chase and followed him into the courtyard of a private dwelling. Despite attempts to restrain him, Mr Said refused to be handcuffed. During the attempts to restrain him, Trooper Williams shot Mr Said. Mr Said was unarmed and he died the following day in hospital. After full investigation and *upon legal advice,* not from the Army Prosecuting Authority, but from an Army Legal Service advisory officer, Williams' CO dismissed the charge of murder against him. There was considerable disquiet at his decision and the manner in which he had exercised his discretion, notwithstanding the legal advice he had received. The Attorney General, Lord Goldsmith, exceptionally referred the case to the civilian Crown Prosecuting Authority. He explained to the House of Lords on the 7th September 2004:

> "This case, which involves an alleged unlawful killing of an Iraqi citizen during the course of an arrest, was brought to my attention after charges were dismissed by the soldier's Commanding Officer. This meant the case could not be tried by court martial. I referred the case to the Crown Prosecution Service, who asked the Metropolitan Police for assisting in collecting further evidence. I can confirm that today the Metropolitan Police, on the advice of the CPS, charged Trooper Williams with the murder of Hassan Said."

9.3 In February 2005, Williams appeared to answer the charge of murder at the civilian Central Criminal Court, the Old Bailey, before Mrs Justice Hallett. Two applications were made to her on behalf of the defence: one to dismiss the charge and the other to stay the proceedings on the basis that a civilian prosecution in a criminal court, following the dismissal of military justice proceedings under the Army Act 1955, amounted to an abuse of process. In her ruling, the judge described the CO's decision as one which had

been made in good faith and which had not, in any sense, been part of an Army "cover-up". She also said that there can be nothing wrong in principle with the civilian prosecution as Parliament had seen fit to allow for concurrent jurisdiction in a case such as this. In addition she found that there can be no suggestion whatsoever that anyone connected with the case had succumbed improperly to political pressure or acted in anything other than good faith. As to the decision by the Crown Prosecution Service to prosecute Trooper Williams in this civilian court, she also described that as having been made in good faith. Indeed, throughout the argument, the defence had not sought to suggest otherwise. Although the trial could have proceeded, the CPS reviewed their decision to prosecute and offered no further evidence. Williams was accordingly acquitted.

9.4 The *Guardian* wrote:

> "The decision by the Crown Prosecution Service to indict Trooper Kevin Williams - the first British soldier deployed in Iraq to be charged with murder - was deeply resented by army commanders who argued that it was unjust, took no account of the dangers British troops had faced, and seriously undermined morale in the armed forces."[20]

The Advisory Officer's advice to the CO was therefore ultimately upheld and the probability is that if the CO had referred the case initially to the Army Prosecuting Authority for them to decide, they too would not have prosecuted – unlike the civilian CPS. The public concern was that a charge of murder had been dismissed at CO level.

9.5 A debate on the 14th July 2005[21] in the House of Lords sparked by the Williams case, drew from Admiral the Lord Boyce, C in C of British Land Forces in the invasion of Iraq, the purest exposition of the role of the CO in military discipline. He said:

> 'Command and discipline in the Armed Forces go absolutely hand in hand. A commanding officer, who has total responsibility for the command of his ship or unit, must, in turn, be responsible for—and carry out—its discipline. It is impossible to achieve and maintain the necessary level of discipline unless those under his or her command are in absolutely no doubt that their commanding officer has authority over them.
>
> It is discipline that ultimately underpins the way individuals respond to command. This necessary responsiveness and willingness, inculcated in everyone because they know exactly where they stand, has long been recognised in the British Armed Forces as essential to the maintenance of operational capability and the

[20] "Troops murder charge is dropped". *The Guardian,* 8 April 2005

[21] 2 days after the decision in *Baines* above.

ability to win—even when against the odds. Our history is littered with relevant examples.

That is why it is not just right, but essential, that the commanding officer himself should exercise disciplinary powers over those in his command. He is best placed to understand the circumstances of service life and of his particular unit—and the causes and significance of misconduct by those under his command. Parliament has legislated upon this very basis by providing a system of summary jurisdiction based around the commanding officer. This summary system of justice applies both within the United Kingdom and abroad—with the vital principle that it is consistent in application and that the individual soldier, sailor or airman is subject at all times to the same rights, powers, procedures and penalties under that system.

While there may be purist legal arguments for ensuring that those who decide guilt and punish offenders are independent of the person accused, we interfere with the unique linkage between the commanding officer and his men at our peril.

It is the commanding officer who will know best the importance of enforcing discipline by punishing misconduct expeditiously, with the whole unit being aware that justice has been done, and been seen to be done. The need for prompt action is true of any disciplinary system—but on operations it can be even more vital to deal swiftly with misconduct. The importance of having effective means for the commanding officer to deal with misconduct in deployed ships and submarines—as I know well from my experience—or indeed in any deployed unit, from whatever service, is vital to maintaining morale.

The commanding officer's summary powers enable straightforward dealing with offences—face to face between the member of the unit and the commanding officer—and are based on trust, authority and impartiality. I am absolutely certain that they play a vital part in underpinning our Armed Forces remaining world class, capable of operations across the full spectrum from diplomacy to direct action. Incidentally, I would contend that they are also why our Armed Forces have high morale and relatively low levels of criminality.

Of course there must be safeguards; but we see far too many examples of Ministers being tempted to deal with concerns in an organisation by bolting on some sort of independent oversight or adjudication. If we continue travelling down this road, there will come a point where the close relationship between a commanding officer and his or her people will be lost—and if that is destroyed, the consequences will be serious.

Your Lordships will not mind me, in this bicentennial year of the Battle of Trafalgar, recalling one of Nelson's famous command directives:

"No captain can do wrong if he lays his ship alongside that of the enemy".

The Armed Forces are under legal siege and are being pushed in a direction that will see such an order being deemed as improper or legally unsound. They are being pushed by people schooled not in operations but only in political correctness. They are being pushed to a time when they will fail in an operation because the commanding officer's authority and his command chain has been compromised with tortuous rules not relevant to fighting and where his instinct to be daring and innovative is being buried under the threat of liabilities and hounded out by those who have no concept of what is required to fight and win.'

9.6 In reply to the debate, the Minister, Lord Drayson, said:

"The military justice system is the bedrock of the chain of command. It applies to wrongs done by one member of the Armed Forces to another and to wrongs done by a member of the Armed Forces to a civilian. We see the commanding officer as central to the authority of the chain of command. He is the primary authority responsible not only for his unit's discipline but for the command, training, safety, security, education, health, welfare, morale and general efficiency of his troops. That wide span of responsibility illustrates why it is so important that the commanding officer is able to exercise disciplinary powers. He is uniquely placed to understand the circumstances of service life and of his particular unit and, hence, the causes and significance of misconduct."

9.7 It appeared therefore that the Ministry of Defence shared the view of Lord Boyce as to the central importance of the CO in dealing with his men. However, work was already in hand on a new Armed Forces Bill to introduce a single system of service law, amalgamating the law applicable to all three services. The Government's Strategic Defence Review, published as early as July 1998, had announced that there would be an 'examination of the need for a single tri-Service Discipline Act'. In its Second Report of the 2nd March 2005[22], the Standing Defence Committee of the House of Commons, following evidence both written and oral from Ministry officials and the Bill team, described the current position as follows:

"18. The guiding principle relating to discipline within the three Services is that command and responsibility for discipline should be aligned. The Commanding Officer (CO) of a Unit is at the heart of the discipline system. Any alleged offence is reported in the first instance to the CO who is responsible for ensuring that the matter is investigated. The CO can consider whether:

- To dismiss the allegation;
- Where the CO has jurisdiction, to deal with the case summarily; or

[22] http://www.publications.parliament.uk/pa/cm200405/cmselect/cmdfence/64/6402.htm

- To refer the case to higher authority.

19. In considering the second of these options, the CO has to consider whether the case is appropriate for summary disposal, i.e. for the CO to hear and decide. The CO and Service legal advisers have to take into account the limited range of punishments at the CO's disposal and the complexity of the case.

20. The summary hearing before the CO is not considered compliant with Article 6 of the European Convention on Human Rights (ECHR) for a number of reasons, including the CO's lack of independence, and the absence of legal representation for the accused. The overall system however is considered to be compliant, because of the accused's right before any summary hearing to elect trial by court martial, with the court martial having only the powers of punishment of a CO; and the accused's right after a summary hearing to appeal to the Summary Appeal Court (SAC). Both courts martial and the SAC are considered to be ECHR-compliant. There are a number of differences between the arrangements for summary hearing in each of the Services, and particularly between the Royal Navy on the one hand and the Army and RAF on the other. A Royal Navy CO is able to deal with a much wider range of offences than his counterparts in the other Services and to apply more severe punishments."

9.8 However, in the light of the pending Trooper Williams case, the Standing Committee on Defence commented as follows:

"48. MoD is proposing to remove the power of a Commanding Officer to dismiss, without any form of hearing, a criminal charge which the Commanding Officer would be unable to deal with summarily. This issue is a feature of a current case which we did not examine because it was *sub judice*. The proposal would appear to be sensible, but we recommend that MoD gives further consideration to the operational implications of such a change."

3rd Battalion, the Parachute Regiment

9.9 Another case which preceded the 2005 Armed Forces Bill and caused considerable concern, was the prosecution of seven members and ex-members of the Parachute Regiment charged with the murder of an Iraqi civilian. I appeared on behalf of one of them at their court-martial. The trial related to an incident in Iraq which occurred at the roadside in Maysan province in southern Iraq on 11 May 2003, following which Mr. Nadhem Abdullah, an Iraqi citizen, was said to have died. The seven individuals were jointly charged with murder and violent disorder.

9.10 On the 3rd November 2005, Judge Advocate General Jeff Blackett dismissed the case and directed that verdicts of 'not guilty' be directed against all of the accused. In taking this decision, concerns were raised by the Judge over the adequacy of the evidence presented and the integrity of the Iraqi witnesses. Indeed, one witness was unforgettable: a middle aged lady from this mud built rural village who had claimed that in the incident, a paratrooper had stripped her to the waist and exposed her breasts. Brought over to Colchester from Iraq, she admitted that she had lied and fabricated the whole story: she said that having sworn to tell the truth on the Koran, she could not do otherwise. Hard-bitten defence lawyers looked at each other with a wild surmise, silenced by the fact that a witness would actually tell the truth, simply by reason of taking an oath. Another weakness for the prosecution was that there was no body: three witnesses pointed to entirely different areas of the vast cemetery in Najaf where they said they had buried the alleged deceased.

9.12 Following the decision to dismiss the charges, it was said in a parliamentary statement by the Minister for the Armed Forces that the Royal Military Police was operating in a hostile and volatile environment, which clearly impacted on some aspects of its investigation, both in terms of its scope and its timing. The decision to prosecute had been taken by the Army Prosecuting Authority based upon the evidence gathered by the RMP. Opposition spokesman Michael Ancram said the prosecution had had a serious effect upon morale, and the collapse of the prosecutions has created even greater uncertainty and doubts in the mind of our armed forces.

9.13 In his decision to stop the cases in the light of the evidence which the Iraqi witnesses gave at the hearing, the Judge Advocate General described the investigation of the case as "inadequate" and much of the evidence as "inherently weak or vague". He referred to witnesses having "colluded to exaggerate and lie", and he referred to witnesses seeking "blood money". Mr Ancram, now the Marquis of Lothian, referred to a wider concern about the serious damage to morale arising from doubtless well intentioned but ultimately unsubstantiated prosecutions such as these and that against Trooper Williams, which also collapsed earlier this year.

9.14 The Liberal Democrat Defence Spokesman, Michael Moore, argued:

> "It is surely a fundamental principle in our country that, as the Minister said, our armed forces must never be above the law. However, is not the quid pro quo that any prosecution should be brought only on evidence gathered from proper forensics, timely witness statements and, in a murder case, some basic evidence that would allow a post mortem? Press comment suggested that given the unreliability of the witnesses and the shortcomings of the investigators, it was pertinent to ask why this case was ever brought. The suspicion remains that the APA was influenced by political as well as judicial considerations in bringing the case to trial on the evidence produced by the RMP. In other words, it thought it better, given the volatile conditions in which British forces operate in Iraq and

opposition to the war at home, to air the case in court rather than to decide not to proceed."

The Baha Mousa Case.

9.15 The procedures came under scrutiny also in the case involving the death of an Iraqi civilian, Baha Mousa, in September 2003. He with others was taken into custody and were held by soldiers from 1 Queen's Lancashire Regiment in a broken down detention facility attached to a British military base in Basrah City called Darul Dhyafa. After interrogation, the detainees were very badly treated, to the extent that Baha Mousa died. Mousa was subject to practices banned under both domestic law and the Geneva Conventions. Ninety-three injuries were observed on his body. Under the existing legislation, it was a matter for the military chain of command to decide whether to involve the Royal Military Police (SIB) at all. It was also open to the military chain of command to call off a police investigation. In turn, the RMP (SIB) delivered its report, when completed, to the military chain of command, and it was then a matter for that command to decide whether to forward the report to the Army Prosecuting Authority.

9.16 In early March 2005 the Attorney General, Lord Goldsmith, expressed concern to the Secretary of State for Defence, that many of the investigations arising out of incidents in Iraq appeared to have suffered not only from the operational conditions in which the RMP had to operate but also from a lack of resources and access to suitably qualified and experienced investigators. He mentioned the Mousa investigation in this context. Three weeks later he said he had become most concerned about the quality of the investigation into the Mousa incident. He referred to the fact that the case was referred for the first time to the APA more than nine months after the incident had occurred, and then at a level involving junior ranks only, and that when the had asked the RMP to carry out further inquiries they were not carried out effectively. His letter stated: "The referral to the Army Prosecuting Authority only included one junior NCO, one senior NCO and two soldiers….It is important that justice is seen to be done no matter what the rank of the individuals involved."[23]

9.17 Ironically, the CO of the Regiment himself, Colonel Mendonca, was eventually charged with dereliction of duty, along with his Intelligence officer, Major Peebles, for whom I acted, and an Interrogator, a warrant officer of the Intelligence Corps. They were all acquitted. Of the four other ranks charged with inhumane treatment and assault, only one, L/Cpl Payne, was convicted of the one offence to which he pleaded guilty. The three others were acquitted. Payne was sentenced to 1 years imprisonment and discharged from the army. The court-martial ran from September 2006 to March 2007.

[23] http://www.telegraph.co.uk/news/uknews/1542722/Justice-regardless-of-rank.html

9.18 Subsequently, a Public Inquiry was held which heard evidence from some 400 witnesses. The inquiry again cleared Mendonca of knowledge of the attacks, but found that as commanding officer he should have known of them. Although the Queen's Lancashire Regiment were cleared of an "entrenched culture of violence", the Inquiry found the violence used in the Baha Mousa case was not a lone example, and identified 19 soldiers directly involved in the abuses, including those already unsuccessfully tried at previous Courts Martial

The Armed Forces Bill 2005- 06.

10.1 This was the climate in which this Bill was presented in the House of Commons on the 5th November 2005. The stated purpose of the Bill was to harmonise offences across all three Services; to harmonise the disciplinary powers of Commanding Officers; to establish a regime governing the investigation of alleged offences; to create a single Prosecuting Authority; to establish a unified court martial system, including the creation of a single standing Court Martial; to establish a single Court Administration Officer for the Court Martial, the Summary Appeal Court and the Service Civilian Court; to abolish the right of the Reviewing Authority to review court martial convictions. On the role of the CO, the Bill proposed that all Commanding Officers (CO) would be able to deal summarily with certain officers and warrant officers, in addition to non-commissioned personnel. The range of criminal conduct (civil) offences that could be heard summarily, and the sentences that could be imposed, was to increase for Army and RAF COs, while the summary powers of naval COs was curtailed.

10.2 However, charges in relation to more serious offences, such as assisting the enemy or mutiny, and criminal conduct offences, such as murder, manslaughter, or sexual cases, would no longer be dealt with by COs: they would no longer have the power to dismiss charges in relation to offences they could not deal with summarily. Instead, the CO was to be under a duty to make Service police aware of allegations of more serious offences so that they could be investigated and cases in which there was sufficient evidence to bring charges would be referred directly to the Director of Service Prosecutions. The effect of these provisions was to shift the emphasis on the bringing of criminal charges in all serious offences from the CO first to the Service police, and then to the DSP. The CO's historical discretion in such cases to dismiss the charges was abolished.

10.3 At Second Reading, Dr John Reid MP, by this time Secretary of State for Defence, strongly supported the role of the Director of Service Prosecutions[24] :

[24]http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo051212/debtext/51212-15.htm#51212-15_spnew15

"We want to try to make sure that there is not a blockage with summary dismissal in the military system that prevents it from being considered at any other stage and therefore compels such cases to go to the civilian system. We want to remove that blockage to ensure that, as far as is humanly possible, the person who looks at the evidence with a view to prosecution—the director of service prosecutions—not only considers the evidential test and the public interest but has experience of a military or combat situation[25]. That is more important than ever, given, as I mentioned earlier, the asymmetric nature of warfare. Things that were regarded as unreasonable 20 or 30 years ago may, given the advent of suicide bombers who pretend to be prisoners and given other developments, now be considered reasonable. Actions that were considered beyond the bounds some time ago may now be considered reasonable, because of changed circumstances, not because of changes in the actions themselves. The person who is best placed to weigh the evidence of offence against mitigating circumstances is the director of service prosecutions, which is why I am trying to ensure that, as far as humanly possible, they make those decisions, independent of the chain of command, the Secretary of State and the civilian system."

10.4 He continued:

"In the heat of battle, the commanding officer would wish to reflect...He would wish, presumably, to take advice, to consult, to have a hearing on an offence committed in the heat of battle such as murder or rape or another sexual offence. The problem is that summarily dismissing an offence of such seriousness without a hearing, which is what happens under the present system, creates a situation where, no matter who else in the military may feel that that decision was wrong, it cannot be dealt with further in the military. That is precisely the situation that arose in the case of Trooper Williams, which was the route whereby the matter was referred to the civilian court.

…. If we ensure that the Director of Service Prosecutions is the responsible body, we prevent another Trooper Williams case. Incidentally, although this was not the primary reason, the commanding officer is then freed up for the responsibility of giving succour, support, assistance and advice to his man or woman who is accused of the crime. There is no conflict of interest then between the commanding officer's duty of care to the individual concerned and the Director of Service Prosecutions bringing a prosecution. By taking away the summary right to

[25] In fact, the Bill did not require the DSP to have military or combat experience and the appointed DSP under the subsequent Act did not have any. An undertaking was given to Parliament that if a civilian were to be appointed he/she would receive an in-depth induction into the life and work fo the three armed services. All three services took real pains to see this was done over a period of some 8 months. The present DSP now regards this induction as having been of the greatest importance in performing his functoions with a fulol understanding of the context in which crimes are committed both at home and in operationsal theatre.

dismiss cases as serious as those described, without even a hearing, we are protecting the system from the course of events that caused the civilian system to intervene."

10.5 At the Committee stage of the Bill in the House of Commons, an amendment which sought to retain a role for the CO in cases referred by the Service or civilian police directly to the Service Prosecuting Authority, was put to a vote which was initially tied, but following the casting vote of the Chairman the amendment was defeated. The Committee made the following statement:[26]

> "The majority of the Committee do not consider that the removal of the Commanding Officer's power to dismiss serious cases will undermine his central command and disciplinary role in a unit. Commanding Officers to whom we have spoken were not resistant to the changes which the Bill makes. The Committee recognises the importance of retaining the integrity of the chain of command but there were reservations among some Members on the potential risk to the chain of command by the removal of the Commanding Officer's powers to dismiss serious cases, especially on active operations."

10.6 When the Bill came back to the floor of the House of Commons, there was further debate. Julian Brazier MP said:

> "It is an old adage that a chain is as strong as the weakest link. All aspects—all levels—of the chain of command have to operate and have to feel confident in the system for it to work properly […]. In plain English, the clause boots the commanding officer right out of the picture; it is not just that a commanding officer's power to dismiss charges is being removed […] The one safeguard that such people had in the past was the knowledge that before they could be charged with a serious offence, someone who really understood what they were going through—a commanding officer—would first have the chance to examine the situation and, if necessary, dismiss the charge."

10.7 By contrast, Mike Hancock, Liberal Democrat MP, argued:

> "Clause 116 is all about the actions that occur after the service police or civilian police have carried out an investigation, and the list in schedule 2 covers everything from treason to murder to child abuse to child pornography. Are hon. Members really arguing that the commanding officer should be able to carry out such investigations? I would urge those Members who have not done so to read the report by the Surrey police into the events at Deepcut—not so much on the deaths of the four young people but the many examples that they gave of genuine complaints by members of our armed forces about abuse that they

[26] Select Committee on the Armed Forces Bill, *Armed Forces Bill: Special Report,* HC 828-I, p.14-18

suffered, including serious sexual assaults, which were never investigated by the service police or by the civilian police. The Surrey police were extraordinarily critical of the chain of command that allowed such serious allegations to go unchallenged.

If any individual in our armed forces has a serious allegation under schedule 2 being pursued against them, there is a duty and a responsibility for that to go further, and for it not to remain in-house and within the command structure. Anything short of that would enhance the public's perception of the armed forces being treated differently, and that cannot and should not be the case."[27]

10.8 The deaths of four trainees at Deepcut, between 1995 and 2002, were the attention of significant media interest, with investigations by Surrey Police indicating suicide being rejected by the families who called for a public inquiry into the circumstances. Criticism had also been directed at the army investigations of the deaths, with concerns over record keeping, maintenance of evidence and forensic material, and transparency. A number of Inquiries followed in which it was held that the deaths were indeed self inflicted, but that there were serious lapses in the Army's duty of care towards their recruits, leaving the opportunity and motivation for suicide open.

10.9 In the proceedings on the 2005-6 Bill in the House of Lords,[28] the removal of the CO's powers to dismiss serious charges drew little comment. On an amendment moved by Lord Campbell of Alloway, a veteran of Colditz, he referred to the Trooper Williams 'fiasco' and sought assurances that the Attorney General would exercise his discretion to remove a case from the military to the civil jurisdiction very sparingly. Lord Mayhew, Solicitor General in the Thatcher administration in the 1980s, said:

"I do not think that it can really be doubted that in the notorious case of Trooper Williams, the AG's decision to refer the case to a civilian court caused great surprise. It had not been widely recognised that such a discretion of the Attorney General existed, and had existed for a considerable time, particularly after a commanding officer had, by virtue of his own decision, dismissed a charge effectively blocking any further proceedings against the defendant on the same charge in the military system."

10.10 Lord Goldsmith, the Attorney General, in reply to the debate, said that the power of the CO to dismiss serious charges was removed by the Bill. The new mechanism was quite different. When the service police investigated allegations of serious offences and

[27] HC Deb 22 May 2006, c1269-70
[28] HL Deb 12th October 2006 cc312 - 324

decided there was sufficient evidence to charge, they would be required to refer the case to the Director of Service Prosecutions, *not* to the CO. However, the service police were required as soon as reasonably practical, to *notify* the Commanding Officer of the referral. Rules would provide for the CO to put any relevant factors he thought fit before the service police and the Director of Service Prosecutions. Such an input would be made before the police referred the case to the director, and before the Director decided whether to charge.

10.11 The AG would not say that a case would *never* be brought within the civilian jurisdiction. But the decision to prosecute was not one for government but for the Attorney General as the senior civilian authority. Constitutionally, if there was a disagreement between the Director of Service Prosecutions and the Attorney General, the latter would generally prevail. But he pointed out that the Bill gave power to the Director of Service Prosecutions to make a direction barring further proceedings in a particular case, whether military or civil, and that would operate as an acquittal when the rules for "autrefois acquit" would apply. What has happened since the 2006 Act was implemented is that a protocol[29] has been signed by the Director of Public Prosecutions and the Director of Service Prosecutions which now governs all matters relating to jurisdiction between the civilian and military courts. The Attorney General will only intervene in mattes of dispute. There have been no such disputes to date. In essence the protocol ensures that where the victim is a civilian, the case will normally be tried in a civilian court. Where the victim is from one of the services or the context is a military one, and almost certainly where the offence is committed abroad, the case will be heard at the new tri-service Court Martial. This unified Court now has civilian judges, usually civilian defence lawyers, largely mirror those of the Crown Court. Gone are the convening officers, the military judges and formal reviews; and the only significant vestige of former days is the military board who decide the facts. These officers and warrant officers also sentence together with the Judge Advocate who tries the case.

10.12 The Armed Forces Bill completed its stages and was duly enacted as the Armed Forces Act 2006. Its main provision, to set up a system common to the three services, was uncontroversial. There were other changes. Offences triable summarily by the CO were listed in Schedule 1 of the Act.. It should be noted that none of those offences were sexual offences. Schedule 2 contained offences which required a CO to ensure that the service police were notified of the offence as soon as practicable. If these offences, upon investigation, showed sufficient evidence to charge, there was then an obligation upon the service police to refer the matter to the Director of Service Prosecutions to consider the public interest in prosecution and whether or not a realistic prospect of

[29] http://spa.independent.gov.uk/test/about_us/publication_scheme.htm

conviction existed. The decision in respect of all such offences no longer remains with either the CO or the police but rests with the independent DSP. The CO has no longer any power to dismiss such allegations at his own discretion.

10.13 Schedule 2 was intended to cover all offences which are invariably or inherently serious. It was recognised that there remain outside the schedule a number of other offences which, while mostly serious, can in some circumstances be minor. Those offences included some sexual offences the consequences of which would not always be serious. This means that there were some exclusions from Schedule 2 (the serious offences list) which have since given rise to some controversy.

10.14 There are four sexual offences, not triable summarily, that are outside Schedule 2, the first of which may give rise to most concern: sexual assault (intentional sexual touching without consent); exposure; voyeurism; and sexual activity in a public lavatory. It should be stressed that COs still have a duty, albeit no obligation, to ensure that these unlisted offences are investigated appropriately. This is often satisfied by them making the Service police aware.[30] These omissions have greatly concerned the DSP and he has raised it with a number of people including Madeleine Moon MP, a member of the Defence Select Committee, and with the MOD. The issue is under review by Ministers. Certain other offences prescribed by regulation under section 113,116 and 128 but outside of Schedule 2, are required to be referred to the DSP– these include minor assaults that amount to bullying.. It is a way of bringing the minor sexual nuisance within the obligation to refer.

10.15 The Act permits the trial by way of court-martial of murder, manslaughter and other serious charges *committed in the UK*. This was a break with the common law position. From the 16th century to 2006, a soldier, airman or sailor who was charged with such serious offences committed on home soil, was invariably tried in the ordinary civil criminal courts.

10.16 Judge Advocate General Blackett in giving evidence to the Commons Committee in the course of the Bill's passage, called for the abolition of the simple majority verdict in courts-martial and for the extension of the membership of the panel across all ranks. He was concerned to equate courts-martial procedures as closely as possible with the civil Crown Courts. No doubt the fact that the jurisdiction had been extended to cover serious *UK* offences weighed with him. However, amendments to that effect moved by

[30] The Manual of Service Law currently states that the Service police **should** investigate offences which can only be tried at Court Martial. The Manual draws attention to a number of offences as examples of offences only triable at Court Martial to illustrate the point, but does not refer specifically to the four sexual offences referred to above.

myself in the House of Lords were soundly defeated. The Court of Appeal in a subsequent reference[31] under section 34 of the Courts Martial (Appeals) Act 1968 have held that the system of majority verdicts at the Court Martial are consistent with an accused right to a fair trial under Article 6 of the European Convention.[32]

10.17 The Bill received the Royal Assent as the Armed Forces Act 2006 in November of that year albeit that full implementation did not take place until late 2009.

Post 2006

11.1 The 2006 Act was a root and branch re-organisation of the Service Disciplinary Code and it took a number of years for all its provisions to be introduced into law. The Act was finally implemented in its full effect on 31 October 2009.

11.2 The practical effect of the 2006 Act has been that the power of the chain of command has not significantly been diminished in any manner which CO's would now consider inappropriate. Many of the concerns about breaking the link between command and discipline have not proved to be justified in practice. They still retain control of minor offences which are purely disciplinary and which are well within their powers of sentence. Those offences which should receive the attention of the Court Martial generally do. If there are cases of seriousness linked with purely comparatively minor disciplinary matters, the case file will be considered as a whole by the DSP. The DSP has power to remit minor charges back to the CO if he considers a Court Martial is not merited and the case can adequately be dealt with by the CO. If there is any service interest, which includes the public interest in not prosecuting, these factors are normally identified in discussion between the CO and the Service Prosecuting Authority, and the DSP will take such considerations into account before making a final decision to direct trial by Court Martial. The DSP is also required to take account of the effect on operations and the importance of the maintenance of military discipline in making the decisions that rest with him. This produces a kind of unwritten contract which still continues to underpin any residual concerns the military may have about the manner in which he will exercise his independent judgment.

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[31] Court Martial Appeal Court judgment in *R v. Timothy Twaite* [2010] EWCA Crim 2973

[32] Section 34 (1) If, in the case of the conviction of a person by court-martial, (a)it appears to the Judge Advocate of Her Majesty's Fleet or the Judge Advocate General that the finding of the court-martial involves a point of law of exceptional importance which in his opinion should be determined by the Appeal Court; …

11.3 The DSP, Bruce Houlder QC, who has been in post since the commencement, has given me his assessment of the effect of the Act:

> "My own personal (albeit perhaps subjective) view is that [COs] are really rather pleased about the changes. They no longer have to make the difficult decisions about certain cases, weighing up competing interests, nor are they open any more to having their ears bent of the question of the choice available to them. In addition to this they have a more important job to do than chasing errant soldiers and wasting time on paperwork, and possible summary trials which would have been necessary in such cases. A referral can be prepared by others (usually a Sergeant) and signed by the CO after checking in accordance with the Act for onward transit to the DSP. We then communicate only as necessary, but this communication is also important.
>
> The CO is of course informed of progress and still has to sign the charge sheet that we prefer and serve it on the accused. One might say this is unnecessary (as he has no choice) but within this remains the sense of ownership and the guarantee that the matter will continue to be dealt with on a certain level between the soldier and his CO. It also gives the CO some power to make his whole command understand that it will not be him but others that will decide these matters so they need not think that their sergeants' or a junior officer's good word, or their careers, will necessarily save them from a Court Martial. This is of course appropriate for sexual offences as I do detect that there is a problem in the Army about the way such offences are regarded sometimes. This leaves both young women and young men of junior rank somewhat exposed to their superiors. For this reason I was concerned about s.3 sexual assault not being a schedule 2 offence."[33]

11.4 Mr Houlder during his induction period felt it was very necessary as a civilian to secure the trust of the services and wrote accordingly to COs after visits in theatre and elsewhere, in words parts of which have found their way into the training manuals:

> "The induction that I have received over the last 6 months culminating in a visit to Afghanistan and Iraq has been most valuable. In the course of these months, alongside the work I have been doing towards setting up the new overarching prosecuting authority, I have seen just about every aspect of service life that will be relevant to my role, and responsibility towards discipline and prosecutions.
>
> May I say to you what I have said in writing to others who I met in theatre? All three services have offered me the greatest help and support towards gaining an understanding of the clear context in which I will be taking future decisions. These will bear not only on the lives of servicemen and their families, but also of

[33] Email DSP Bruce Houlder QC to Lord Thomas of Gresford QC 29th July 2013

the victims where criminal offences occur. In the course of my visit to theatre, I enormously appreciated the opportunity meet service men and women at every level, and discuss the very real problems they have in making decisions not only to protect their own lives but also the lives of others. These decisions are not easy, and are often the more difficult to make because of the "fog of war".

I have tried to reassure COs wherever I have gone, that whilst I clearly have my job to do, I am also here to support the operational effectiveness of HM Armed Forces. This requires me to understand the context in which actions and decisions are performed and made. It will be no part of my role to "second guess" a decision made in good faith, and a decision perceived by the serviceman to be the correct decision at the time, provided that it was based on his honest judgement of the legal circumstances he faced at the time. This will be so whatever the consequences. Mistakes are made however hard we try to avoid them. Crime and serious breaches of discipline tend to advertise themselves clearly, and it is this that I will be concerned with. The law is not there to punish the honest, or those who have tried to do their duty, or those who act properly in performance of their duty yet make errors, and I shall see to the best of my ability that this does not happen."[34]

11.5 Mr Houlder has provided me with the Service Prosecution Authority's Rape Policy which is annexed as Appendix A. It follows the policy of the Crown Prosecution Service and is intended to inform prosecutors, Service Police and agencies concerned with victims. Appendix B sets out the statistics of referrals, prosecutions, and convictions for the years from 2010 to 2013.

11.6 I have consulted with Lord Astor of Hever, Under-Secretary of State, Ministry of Defence and am informed that the MoD is not aware of any discontent within the Services over the removal of the CO's power to dismiss serious charges; it does not seem to have been raised at all since the changes were introduced and certainly not recently.

Armed Forces Bill 2011

12.1 This Bill introduced by the incoming Coalition Government, renewed the existing legislation for a further five years and, contained only minor amendments, mainly to punishments. Its main provisions were:

[34] Letter DSP to Admiral Peter Wilkinson (DCDS(Pers & Tng) 2008.

- for the Secretary of State to present an Armed Forces Covenant Report to Parliament every year on the effect of membership of the Armed Forces. Healthcare, housing and education are specifically listed for inclusion in that report.
- for safeguarding the independence of the Service Police by imposing a duty on a Provost Marshal to ensure that investigations are free from "improper interference", and subjecting Service police investigations to inspection by Her Majesty's Inspectors of Constabulary.
- for the testing of Service personnel for alcohol and drugs, in line with the provisions of the *Railways and Transport Safety Act 2003*. It did not, however, remove the military's current exemption from that Act. Nor does it replace any of the provisions in *AFA06* which provide for random drugs testing within the military.
- for limiting the power of the Director of Service Prosecutions to substitute or add charges after election for trial by court martial has taken place, specifically in relation to those changes which require the written consent of the accused.,
- for fixed terms of imprisonment which may be imposed if a fine or Service compensation order is not paid. -
- for the Service courts to make Service Sexual Offences Prevention Orders (Service SOPOs), designed solely for the protection of members of the Service community outside the UK, which were very closely based on the civil equivalent introduced by the *Sexual Offences Act 2003*. The prohibitions within the order must be necessary for the purpose of protecting the service community outside the United Kingdom from serious sexual harm from the defendant. Prohibitions could include, for example, preventing a defendant from having any contact directly or indirectly with a named person or persons, or preventing a defendant from being in the home of any female under the age of 16 if that person is there.

Conclusion

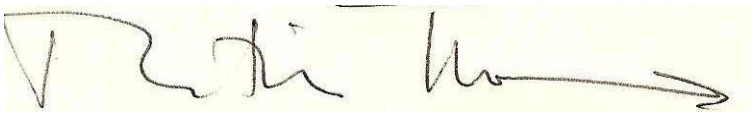
13.1 The military justice system has seen many changes in the last 25 years. They have generally been welcomed. I commented as such in the Second Reading debate in the House of Lords on the 2011 Bill. If I may be permitted to quote myself:

> "I was a bit startled to hear my noble friend Lord Burnett say that lawyers should be kept well away from military matters. My mind went back to a Welsh lawyer- a Liberal from Wrexham, my home town and I am pleased to say, home of the

Royal Welch Fusiliers[35] - George Osborne Morgan, Member of Parliament. He was the Judge Advocate-General in Gladstone's time and he abolished flogging in the armed services in 1881. He was a mild mannered person; he was not a military man at all. He was more interested in Sunday schools and in closing pubs in Wales on a Sunday. I think that lawyers have a contribution to make. Indeed, one of the senior judge advocates[36] said to me the other day, "Thank God for the Strasbourg court. Because of the decision in *Findlay v the United Kingdom*, there have been massive improvements to the justice system in the military". The 2006 Act, which was produced by the previous Government, was a milestone in improving the way in which justice is administered in the military courts."[37]

13.2 The Strasbourg court has been extremely influential in the cases to which I have referred. But tribute must also be paid to the leadership of Judge Advocate General Blackett and his judicial colleagues. They have ensured that military justice in the United Kingdom forces stands in good repute and have ensured that the standing Court Martial has modern and appropriate facilities for administering justice.

13.3 The removal of the power of the Commanding Officer to dismiss charges beyond his jurisdiction, has not so far thrown up any controversy, either in the Courts or in Parliament. That reflects the confidence gained by and reposed in the independent Director of Service Prosecutions, Bruce Holder QC, in the reorganisation and reform of the Service prosecuting system. It was a reform which needed to be done.



LORD THOMAS OF GRESFORD QC

HOUSE OF LORDS
12th August 2013.

[35] The 23rd Regiment of Foot who gained fame in the defence of the Fusiliers Redoubt at Yorktown 1781.
[36] Vice-Judge Advocate General Michael Hunter.
[37] HL Deb 6 July 2011 : Column 285

APPENDIX A

SPA Policy for Prosecuting Cases of Rape

1 - Introduction

1. The Service Prosecuting Authority (SPA) is an independent body under the leadership of the Director of Service Prosecutions (DSP), who is appointed under section 364 of the Armed Forces Act 2008. It is a Crown appointment and the DSP acts under the general superintendence of Her Majesty's Attorney General. The DSP is not answerable to the Secretary of State for Defence in respect of his decision making related to prosecutions or in respect of the cases he/she decides to prosecute.
2. The SPA work closely with the service police, and occasionally in joint investigations with the civilian police, but we are independent of each of them. We share the emphasis placed by the Crown Prosecution Service (CPS) on the importance of building cases, rather than merely identifying their evidential weaknesses.[38]
3. Although this policy principally concerns the prosecutorial aspect of joint working, at its root lies the recommendations of the Review of Baroness Stern into the Investigation and Prosecution of Rape, which were formally adopted by the SPA at a specialist joint disciplinary conference on these proposals in October 2011, which was opened by Baroness Stern. Insofar as relevant, this policy document mirrors that of the Crown Prosecution Service which has been followed by the SPA since its inception. Since October 2011, only prosecution advocates who have attended a CPS and/or SPA accredited course and have demonstrated the right skills while being monitored are able to undertake rape prosecutions in court.
4. No final decision in respect of an allegation of rape is made, and no case is prosecuted by the SPA without the specific authority of the DSP. All prosecutors in such cases must have undertaken the broad based specialist initial training necessary to be regarded as suitable to advise and prosecute cases of rape, will have attended continuous training courses in advocacy skills, and will have acquired the necessary courtroom skills and ability to handle cases of this sensitivity and complexity. In any case where for any reason no such prosecutor is available within the SPA, the DSP will instruct a specialist advocate approved to conduct such cases within the civilian system. If in the view of the DSP the case requires it, more than one such advocate including Queens' Counsel may be used to prosecute.
5. The close working arrangements at the SPA provides an ideal environment for the sharing of knowledge and experience, and the giving of mutual support in these difficult cases, and to reinforce their expertise and assist future rape prosecutions. Training is provided to all prosecutors on a regular basis, with particular emphasis given to the prosecution of sexual crime.
6. This policy statement explains how the Service Prosecuting Authority (SPA) deals with cases in which an allegation of rape has been made. It gives advice on what the SPA does, how rape cases are prosecuted, and what victims can expect from the SPA. The document is particularly designed for those within the service community who support victims of rape, whether professionally or personally, although it may be of interest to victims, witnesses and the general public. It should be recalled that many victims of rape are not service personnel, although they may be dependents.

[38] http://www.cps.gov.uk/publications/docs/prosecuting_rape.pdf

7. There is a protocol between the DSP and the DPP which governs the principles relating to whether a case should be pursued within the service justice system or the civilian justice system[39]. The civilian system has primacy although, unless there is a civilian victim, offences of rape committed by a serviceman or woman against someone falling within service law and discipline will normally be prosecuted by the DSP. Most offences of rape (as well as other offences which merit trial by the Court Martial) committed by service personnel outside the British Islands will be prosecuted by the SPA unless the foreign civil power assumes this responsibility.
8. Rape is one of the most serious of all criminal offences. It can inflict lasting trauma on victims and their families. Our aim is to prosecute rape cases effectively, and we want people to know what they can expect from us. The Service Justice System, and the SPA in particular, have demonstrated their ability to conduct effective trial of rape and other serious sexual offences at least as effectively as these cases are conducted in the Crown Court.
9. We are aware that there is a general perception that most rapes are committed by a single man against a woman unknown to him. In fact, the majority of rape victims are women and most know their rapist. In this respect the Service community is no different, although prosecutors will always bear in mind and be sensitive to the particular vulnerability of servicemen and women to those who may abuse their authority over them.
10. Rape can involve male and female victims of all ages. This policy statement covers the handling of all types of rape case, including marital and relationship rape, acquaintance and stranger rape, against male and female victims. All are equally serious and traumatic for the victim. Rape also has a devastating effect on families of victims. When committed by service personnel it also has a corrosive effect on the reputation of HM Armed forces and their ability to maintain a reputation for self discipline. If rape occurs in an operational setting, it becomes an instrument of torture rightly deserving of international condemnation.
11. Cases of rape where the victim is a child present additional challenges. We will take account of the needs of abused children, the effects of the crime, and the effects of the court appearance on the child witness.
12. We take account of the fact that victims of rape have difficult decisions to make that will affect their lives and the lives of those close to them, and will support them as victims at all stages of the prosecution process, and will liaise with the service police and the Military Court Service to see that their interests are closely regarded.
13. We acknowledge that barriers exist, which mean that some people are less likely to report offences. The classifications below are of general application in the wider community.
    - Victims who are or have been in a relationship with their attacker may blame themselves or feel that agencies will blame them, and may well face wider difficulties such as disruption to the lives of their children and extended families, including the service community.
    - People from black and minority ethnic communities may have experienced racism. They may fear that they will not be believed, or that they will not be treated properly. As a result they may be reluctant to report offences or support a prosecution. Cultural and religious beliefs may also prevent people from reporting offences or supporting a prosecution.
    - In cases involving rape within same sex relationships, victims may fear a homophobic reaction from the justice system. They may also fear being "outed" by the process.
    - People with physical disabilities may fear reporting rape if the offender is a carer, or fear the loss of residential care.

[39] See http://spa.independent.gov.uk/linkedfiles/spa/test/about_us/publication_scheme/20111007-protocolontheexerciseofcriminaljurisdictioninenglandandwales.pdf

- Elderly people, in particular, may be deterred from reporting rape by feelings of shame or embarrassment.
- People with learning difficulties or mental health problems may feel that they will not be believed if they report being raped.

14. We will assist victims in seeking support from both within and outside the Service community who may be able to offer support to victims throughout the proceedings. Special measures can be used to help a victim or witness to give evidence. Information will be provided to such persons to assist them in seeking such assistance during the trial of the accused. SPA policy in respect of victims is provided by Section 7 of the SPA "Legal Guidance". Guidance on the services to be provided to victims can also be found in the Home Office issued document 'Criminal Justice System' – The Code of Practice for Victims of Crime.[40] This Code of Practice governs the services to be provided in England and Wales by the CPS and the relevant civilian organisations to victims of criminal conduct. It is issued by the Home Secretary under section 32 of the Domestic Violence, Crime and Victims Act 2004. For the Service Justice System the most relevant document is JSP 839: Code of Practice on Services to be provided by the Armed Forces to Victims of Crime (the Code).[41] This is modelled on the Home Office code.
15. Although this policy statement applies specifically to rape, we will strive to apply best practices and procedures to all other types of sexual offence prosecuted, and ensure that these cases are treated seriously and sensitively.
16. Some words and phrases used in this document may not be familiar to everybody. We have therefore set out a glossary of terms at the back of this document in which we have defined some of the words and phrases used.

2 - What is the definition of rape?

1. The definition of rape was substantially changed by the Sexual Offences Act 2003, which came into force on 1 May 2004.
2. Offences committed before 1 May 2004 are prosecuted under the Sexual Offences Act 1956. This Act, in common with all other criminal offence creating statutes, is applied to the Services by virtue of section 42 of the Armed Forces Act 2006. Under the 1956 Act, the statutory definition of rape is any act of non-consensual intercourse by a man with a person, and the victim can be either male or female. Intercourse can be vaginal or anal. It does not include non-consensual oral sex. The courts had defined consent as having its ordinary meaning, and lack of consent could be inferred from the surrounding circumstances, such as submission through fear. It is a defence if the defendant believed that the victim was consenting, even if this belief was unreasonable, and this is a matter of fact for the jury. This is no longer an applicable definition of the offence nor is it an accurate summary in respect of this particular defence for offences committed after 1 May 2004.
3. Offences committed on or after 1 May 2004 are prosecuted under the Sexual Offences Act 2003. This Act, in common with all other criminal offence creating statutes, is applied to the Services by virtue of section 42 of the Armed Forces Act 2006. The 2003 Act extends the definition of rape to include the penetration by a penis of the vagina, anus or mouth of another person. The 2003 Act also changes the law about consent and belief in consent.
4. The word "consent" in the context of the offence of rape is now defined in the Sexual Offences Act 2003. A person consents if he or she agrees by choice, and has the freedom and capacity to make that choice. The essence of this definition is the agreement by choice. The law does not require the victim

[40] http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_073647.pdf

[41] http://defenceintranetds.diiweb.r.mil.uk/sites/polestar/cs/DocumentLibrary/12/1690_20090902-JSP839-u.doc

to have resisted physically in order to prove a lack of consent. The question of whether the victim consented is a matter for the jury to decide, although we consider this issue very carefully throughout the life of the case. The prosecutor will take into account evidence of all the circumstances surrounding the offence.

5. We are aware that the true meaning of consent can be of particular relevance in rape where there has been, or is, a pre-existing relationship between the defendant and the victim, or where domestic violence has existed prior to the rape. As the 2003 Act makes it clearer what is meant by the term "consent", it should help juries decide whether the victim was able to, and did in fact, give his or her consent at the time.
6. The Sexual Offences Act 2003 requires the defendant to show that his belief in consent was reasonable. In deciding whether the belief of the defendant was reasonable, a jury must have regard to all the circumstances, including any steps he has taken to ascertain whether the victim consented. In certain circumstances, there is a presumption that the victim did not consent to sexual activity and the defendant did not reasonably believe that the victim consented, unless he can show otherwise. Examples of circumstances where the presumption applies are where the victim was unconscious, drugged, abducted or subject to threats or fear of serious harm.
7. People who have consumed alcohol may reach such a level of drunkenness that they no longer have the capacity to give consent. The courts recognise that this stage may be reached well before they become unconscious.
8. Proving the absence of consent is usually the most difficult part of a rape prosecution, and is the most common reason for a rape case to fail. Prosecutors will look for evidence such as injury, struggle, or immediate distress to help them prove that the victim did not consent, but frequently there may be no such corroborating evidence. This does not mean that these cases can never be successfully prosecuted, but it does mean that they are more difficult. In the absence of any other evidence to help prove the victim did not consent, there is the possibility that some cases may fail to meet the evidential stage of the Code for Service Prosecutors. This Code mirrors the Code for Crown Prosecutors. The test is not a different one for the service prosecutors. Insofar as the Service code considers the service interest in prosecution, this is simply another way of stating the public interest in prosecuting such offences.
9. We recognise that both men and women can be victims, and we will apply our rape policy without discrimination in all cases.

3 - The role of the SPA

1. The SPA is one part of the service justice system, which includes other organisations such as those responsible for service welfare, the service police, the Military Court Service, the service judiciary, defence lawyers, and all those charged from time to time with responsibility for the management of convicted offenders both within and outside service establishments, and those concerned with the needs of victims' and witnesses alike.
2. The relevant service police Special Investigations Branch (SIB) is responsible for investigating allegations of rape and for gathering the evidence. It is to be expected that these independent police forces should have available all necessary expertise to pursue such investigations. In all cases, the DSP, acting directly or through one of his prosecutors, decides whether a person should be charged with a criminal offence, and, if so, what that offence should be. The DSP himself considers all cases of rape and makes the final decision on prosecution in all such cases that are referred to the SPA, and delegates his authority to conduct such a prosecution to the appropriate specialist prosecutor. The service police, or the chain of command, do not refer every complaint of a criminal offence to us. However where any commanding officer becomes aware of an allegation of rape he must see that the

service police is made aware[42]. It will then be investigated by the appropriate police force. Where a service police decision maker considers there is sufficient evidence to charge the offence of rape, they must refer that case to the DSP[43], who will make the decision whether to charge in accordance with the Code for Service Prosecutors[44]. The police decision does not involve a judgment on the sufficiency of evidence required for a successful prosecution. All that is required is some evidence for them to refer the case to the DSP for advice and eventually as decision on prosecution..

3. Early consultation will take place between the specialist prosecutor and the police to ensure that all possible avenues of evidence are explored and that the correct charge is identified. We intend wherever possible that the same specialist prosecutor will be responsible for the case from beginning to end and will work closely with the police throughout. This degree of continuity is important. It enables us to ensure that the victim is provided with the best possible support throughout the progress of the case. If this is not possible for reasons beyond the control of the DSP a full explanation will be provided to the victim.
4. If, following the receipt of an evidential report from the police, a rape specialist prosecutor decides that in his /her opinion there is insufficient evidence to found a realistic prospect of conviction, the DSP must confirm the decision.

4 - The Code for Crown Prosecutors

1. The Code for Service Prosecutors sets out how we make decisions about whether or not to prosecute, and is to be found under the heading SPA Legal Guidance HERE.

5 - Is there enough evidence to prosecute?

1. Rape usually takes place in a private setting where the victim is the only witness. Unless the defendant pleads guilty, the victim will almost certainly have to give evidence in court. Where there is conflicting evidence, the prosecutor has a duty to assess the credibility and reliability of the victim's evidence. This will always be done in a careful and sensitive way, using all the information provided to the prosecutor. A case may not proceed, not because the prosecution does not believe the victim, but because, when considering all the available evidence in the case, there is not enough to meet the evidential stage of the Code test.
2. There are rules about disclosing to the defence relevant material obtained during the investigation, which is not part of the prosecution case. The rules are complex, but broadly speaking, there is a duty to disclose to the defence any material that might undermine the prosecution case or assist the defence.
3. The police will always look for corroboration or supporting evidence (such as medical or scientific evidence, CCTV evidence, or eyewitnesses to events prior to or after the incident) but it is not essential and a prosecution can still go ahead without it. However, the prosecution must always prove the defendant's guilt. Cases may fail because a jury cannot decide between what the victim says and what the defendant says. This is why it is essential to obtain all possible forensic and scientific evidence as soon as possible. The earlier a rape is reported, the higher the chance of this being done, and the higher the chance of building a strong prosecution case.

[42] See s. 113 of the Armed Forces Act 2006
[43] See s. 116 of the Armed Forces Act 2006
[44] And see s. 121/122 of the Armed Forces Act 2006

4. Where a victim has disclosed being raped to other persons prior to reporting it to the police, strict legal rules of evidence govern whether these disclosures can be used as evidence at court.
5. All SPA specialist prosecutors, and indeed all who prosecute any case for the SPA, are aware that there are myths and stereotypes surrounding the offence of rape. Examples of such myths include:
    - rape occurs between strangers in dark alleys;
    - victims provoke rape by the way they dress or act;
    - victims who drink alcohol or use drugs are asking to be raped;
    - rape is a crime of passion;
    - if they did not scream, fight or get injured, it was not rape;
    - you can tell if they 'really' have been raped by how they act;
    - victims cry rape when they regret having sex or want revenge;
    - only gay men get raped/only gay men rape men; and
    - prostitutes cannot be raped.

    Prosecutors who deal with rape cases are taught about them as part of their specialist training. We will not allow these myths and stereotypes to influence our decisions and we will robustly challenge such attitudes at the Court Martial.

6. We know that some victims will find it very difficult to give evidence and may need practical and emotional support. The specialist prosecutor will know about the emotional and psychological effects of rape and will be aware that some complaints of rape are not made immediately. Any delay could be attributed to a fear of reprisals, intimidation or a significant number of other factors. It is possible that the effect on rape victims may render them emotionally incapable of providing a written statement shortly after an attack, or even for days or weeks. Specialist agencies can provide support and advice.

    What happens when the victim withdraws support for the prosecution or no longer wishes to give evidence?

7. Sometimes a victim may withdraw support for a prosecution and may no longer wish to give evidence. This does not mean that the case will automatically be stopped. If the victim has decided to withdraw support for the prosecution, we have to find out why. This may involve delaying the court hearing to investigate the facts and decide the best course of action.
8. We will take the following steps:
    - if the victim decides to withdraw support, we will ask the service police to take a written statement from the victim to explain the reasons for that withdrawal, to confirm whether the original complaint was true and to find out whether the victim has been put under any pressure to withdraw support; and
    - we will ask the service police to give their views about the evidence in the case and how they think the victim might react if they are compelled to attend court.
9. If the victim's statement, after withdrawing the complaint, is not the same as the earlier statement, we expect the service police to ask the victim to explain why it has changed.
10. If the victim confirms that the original complaint is true, we will consider first whether it is possible to continue with a prosecution without his or her evidence (the evidential stage) and then, if it is possible, whether we should continue the case without the support of the victim and against the victim's wishes (the public interest stage).
11. The prosecutor will want to know the reason why the victim no longer wishes to give evidence. This may be because the victim is experiencing feelings of embarrassment or fears that they may not be believed. It may be because they live in a place in which they feel isolated or particularly vulnerable

(and we recognise that feeling isolated or vulnerable may have deterred or delayed the victim from reporting the incident in the first place), where supporting the prosecution may place the victim at further risk of harm. In such cases, the prosecutor must have regard to any special measures or other support available to the victim that may help them to overcome their concerns.

12. If we suspect that the victim has been pressurised, or frightened into withdrawing the complaint, we will ask the police to investigate further. The investigation may reveal new offences, such as, for example, harassment or witness intimidation, or that bail conditions have been breached. If necessary, we will ask the court to delay any hearing so that a thorough investigation may take place before we decide about the future of the case. If the reason for a victim or witness's withdrawal is based on fear or intimidation, the prosecutor will consider that evidence and decide whether further charges, for example, of witness intimidation, should be brought.
13. We will explore all these options fully before we decide whether to proceed with a prosecution. The safety of the victim or any other potentially vulnerable person will be a prime consideration in reaching our decision.

What happens when a decision is taken to continue with a prosecution against a victim's wishes?

14. Generally, the more serious the offence (for example, because of the level of violence used or the real and continuing threat to the victim or others), the more likely we are to prosecute in the public interest, even if the victim says they do not wish us to do so.
15. In cases where we have sufficient other evidence, we may decide to proceed without relying on the evidence of the victim at all.
16. If we decide that the case should continue and that it is necessary to rely on the victim's evidence to prove the case, we have to decide:
    - whether we should apply to the Court Martial to allow us to use the victim's statement as evidence without the victim having to give evidence in court;
    - whether we can proceed with the prosecution by helping the victim to attend the court by the use of special measures; or
    - whether we should compel the victim to give evidence in person in court.
17. Background information is crucial in helping a prosecutor to make the correct decision about how to proceed in a case where the victim has withdrawn their support for the prosecution.
18. The law allows us to use the victim's statement in court without calling the victim to give oral evidence but only in very limited circumstances. It is for the court to decide and it will only allow this if it is in the interests of justice to do so. If the victim is the only witness to the offence, it may be difficult to satisfy the court that justice is being served when the defence cannot cross-examine the principal witness in the case.
19. The specialist rape prosecutor will only call a victim to give evidence against their wishes if the prosecutor is satisfied, after consultation with the police and any other interested person, that such a course of action is necessary.
20. We always prefer victims and witnesses to give evidence willingly and will take whatever steps we can to help them overcome their fears and give their best evidence.

Background information

Bad character

21. There are strict legal rules of evidence which govern whether a suspect's previous convictions or other evidence of bad character can be used in court. We have to bear these rules in mind when we are deciding whether we can proceed with a case.

22. Even if we cannot use this type of evidence, it may be important background information that will help us to put the offence in context. The victim may, for example, have been subjected to repeated attacks and may be vulnerable to other consequences if the prosecution does not proceed.
23. Some information might come from sources such as schools, employers, and social services. All this information must be collected by the police and given to the SPA prosecutor.

Victim Personal Statements

24. Another important source of information for the prosecutor and the court is the Victim Personal Statement. This is a statement made by a victim of crime explaining the effect that the crime has had on them. In the statement, victims can explain their wishes or needs during the case and whether they want help from any of the support agencies. They can say whether or not they support a prosecution and can raise their concerns about issues such as their safety, any intimidation or the defendant's bail. Victims can make more than one Statement which can help explain how the crime has affected them in the longer term. Victim Personal Statements are included in the case papers and are seen by everyone involved in the case, including the defendant and his lawyer. Victim Personal Statements help the prosecutor and the judge advocate and the Board who may sentence the defendant to understand the crime, and its effects and consequences. Victims have the right to choose whether to make a Victim Personal Statement and whether they need help to make a statement from a support worker or family member.
25. It should be clear in a victim's statement whether or not they have been told about the fact that they may make a Victim Personal Statement. Where it is not clear, the prosecutor will ask the police officer to go back to the victim and explain that they may make a Victim Personal Statement if they wish to do so. A leaflet is available which explains what Victim Personal Statements are and how they can be used. Copies of the leaflet can be found at:

    www.homeoffice.gov.uk/documents/victimstate.pdf (PDF Document, Opens in a new window)

    We will take account of any information contained in a Victim Personal Statement and we will tell the court about the effects of the crime on the victim. We can also use these Statements to help to make decisions about cases, for example, when deciding whether or not to ask the court to refuse bail or to impose bail conditions.

6 - Bail issues

1. Once a suspect has been charged with rape, a decision whether it is appropriate to apply to a judge advocate to remand the defendant in custody will be made. However, because rape is such a serious offence, the decision may be taken to keep the suspect in custody so that he may appear at the next available Court Martial.
2. At the bail hearing, a judge advocate will decide whether bail is appropriate after they have heard representations from both the prosecution and the defence. A defendant has a right to bail. The court may only refuse bail if it is satisfied that the defendant would fail to surrender to custody, commit an offence while on bail, or would interfere with witnesses or otherwise obstruct the course of justice. Bail can also be refused if the offence was committed while the defendant was already on bail for another serious offence, or for the defendant's own protection. There is an exception to the right to bail for some serious repeat offenders including those previously convicted of rape. Then the court can only grant bail in exceptional circumstances.

3. At the hearing, the service police will provide sufficient information to prosecutors to enable a decision to be made whether to oppose bail for the defendant.
4. Where there has been a relationship between the victim and the defendant, the police will provide as much background information as possible. This might include information about the number and ages of any children and the proximity of the addresses of the relations of the defendant to that of the victim. It will also include details of any civil orders in force and any other relevant information.
5. The prosecutor will take into account the Victim Personal Statement, if the victim has decided to make one, in making decisions whether or not to oppose bail, and what conditions might be suitable. In the Victim Personal Statement, the victim can choose to describe the effects of the rape and any concerns about the defendant being granted bail. Any decision during the case will take account of the Victim Personal Statement.
6. To protect the victim or witnesses from the risk of danger, threats or pressure, which might obstruct the course of justice, we may ask that the defendant is kept in custody.
7. Judge Advocates are required to give reasons in open court if they grant bail to a defendant. If they do not give reasons, we will ask them to state their reasons. We will work closely with the service police to obtain the views of victims and witnesses about bail conditions and any proposed changes to them. We will work with the service police and the MCS to make sure that the victim or witness is kept informed of any change to the bail conditions or custody status of the accused person.

7 - Helping victims and witnesses to give evidence

Special measures

1. Giving evidence in court can be a particularly traumatic experience for victims of rape. In particular, some victims may find it difficult to give evidence in the sight of the defendant. If this is so, we can apply to the court for the victim to give evidence in another way so that he or she can give their best evidence. These alternative ways of giving evidence are known as 'special measures' and examples include:
    - playing to the court the victim's or witness's video recorded interview (previously taken by the police during the course of the investigation). This means that the victim or witness will not have to give 'live' evidence about what happened to them, but they will still have to answer questions put to them by the defendant's lawyer in cross-examination;
    - giving evidence from behind a screen in a courtroom to prevent the victim (or other witness) and the defendant seeing each other; and
    - giving evidence away from the courtroom through a live television link to prevent the victim or witness having to go into court. The witness will not see the defendant over the TV link but the defendant will usually still see the witness on a TV screen.
2. Evidence may also be given in private by clearing the public gallery in sexual offence cases or cases involving intimidation.
3. The prosecutor is responsible for applying to the court for any special measures on behalf of victims and witnesses following discussion with the police. It is crucial that we know which special measures victims and witnesses want. It is also crucial that the advantages and disadvantages of each of the available special measures have been explained to the victim so that they can make an informed choice.
4. It is for the court to decide whether to grant or refuse applications for special measures in rape cases. A victim of rape is automatically presumed to be eligible for special measures unless the court is informed that he or she does not require this. If the victim or witness is a child, their evidence is video recorded and played in court unless the court considers that it is not in the interests of justice for this

to be done, for example, where the video recording contains technical faults, improper questions, or other material prejudicial to a fair trial.

5. Ideally, early decisions should be taken about special measures to assist victims and witnesses; however, circumstances might change and it is always possible to apply at any stage of the proceedings. If necessary, a meeting can be arranged with the victim or witnesses to discuss what special measures would be appropriate.
6. In some cases, victims initially state that they do not require special measures but may subsequently realise that they do and are then afraid to say so. We will ensure that victims and witnesses are made aware that they can change their minds about special measures.
7. It is important that we have all the available information that could help us to apply for special measures for a witness. Normally, the police or the Witness Care Officer will pass the information to us. Sometimes we may get the information by meeting the witness directly.

Using intermediaries for vulnerable witnesses

8. The use of an intermediary is another example of the "special measures" available to victims and witnesses. An intermediary is someone who is approved by the court to provide a service which enables witnesses and the court to communicate. Professional intermediaries – usually speech and language therapists or deaf intermediaries who understand deaf culture – work with witnesses to make sure they are understood and can understand the questions put to them. Intermediaries can work with witnesses and assist in the initial taking of their evidence and when they are in court so that they achieve their best evidence at the trial. Intermediaries may come from a range of backgrounds including social work, speech and language therapy or they may simply have a unique knowledge of the witness.

Special measures meetings between the SPA and rape victims and witnesses

9. When we have decided whether we are going to make an application to the court for special measures, we will ask the service police to find out if the witness would like to meet the prosecutor.
10. The purpose of such a meeting is to build trust and confidence and to enable us to reassure the witness that their needs will be taken into account. We will also offer such a meeting if we have decided not to apply for special measures so that we can explain that decision. The witness does not have to attend that meeting unaccompanied. They may bring a partner, a relative, a friend or other supporter. It may also be appropriate for an interpreter or other similar person, to attend the meeting. Wherever possible, the SPA prosecutor will ensure that the advocate who will be conducting the trial attends the meeting between the SPA prosecutor and the witness.

Pre-trial witness interviews

11. The SPA prosecutor is able to meet the victim or other witnesses at an early stage in the criminal process where they consider this to be appropriate at what is called a pre-trial interview. These meetings are different from the special measures meetings described above. The purpose of pre-trial witness interviews is to enable the prosecutor to reach a better informed decision about any aspect of the case. Our decisions will be objective but made within a framework that promotes support for victims by keeping them informed.
12. The witness may be accompanied by a supporter of their choice provided that the supporter does not have any actual or potential involvement in the case or any personal knowledge of the matters likely

to be discussed. The presence of a police officer will not normally be appropriate but exceptionally the prosecutor may request the presence of a police officer if they deem this necessary.

Anonymity

13. Many victims and witnesses are concerned about their safety and fear that personal details or information about them might become public knowledge and place them at risk of further attack or harassment.
14. Generally, it is a fundamental principle of our service justice system that those accused of crimes are entitled to know the name of their accuser. Most criminal proceedings at the Court Martial are held in public, and information about the identity of the witness will become a matter of public record.
15. However, victims of rape and serious sexual offences are entitled as a matter of law to anonymity in the media, even if their name has been given in court.
16. Furthermore, addresses of witnesses are not disclosed to the defendant and, unless already known (for example, where an offence is committed by a neighbour) or if required for evidential purposes, will not be mentioned in the court proceedings.
17. Only in certain exceptional circumstances may a court allow witnesses not to give their name in open court.
18. In other cases, the court has the power to forbid the media from reporting a witness's personal details if it considers that the quality of the witness's evidence or co-operation in the proceedings is likely to be reduced because the witness is afraid of being identified as a witness in the case. Media representatives have the right to object, in the interests of open reporting, to a court order that prohibits publication of this information.

Support for victims and witnesses at court

19. The SPA is fully committed to taking all practicable steps to help victims and witnesses through the often difficult experience of becoming involved in the criminal justice system.
20. We make sure that appropriate arrangements are made to have an interpreter available for the court proceedings when one is needed.
21. When a witness attends court, the SPA prosecutor presenting the case or the SPA caseworker will introduce themselves and answer any general queries that a witness may have. However, they are not permitted to discuss the detail of the case with a witness.
22. Sometimes, the prosecuting lawyer may be a barrister (also known as counsel) or a solicitor, who is not a member of the SPA but who has been employed by us to present the case in court. We expect every barrister or solicitor we employ to be familiar with our policies and procedures and to act in accordance with them. Such a barrister must also be a trained specialist in the prosecution of rape cases. We are committed to instructing advocates who have the right skills to prosecute rape cases, including their ability to deal sensitively with victims and witnesses. We will instruct them to speak to victims and witnesses before they give evidence and try to put nervous witnesses at ease.

Independent Sexual Violence Advisors

23. A network of Independent Sexual Violence Advisors (ISVAs) is being set up across England and Wales as part of a Government initiative to provide targeted professional support to victims of sexual violent crime. These professionally trained specialists work alongside victims from the point of crisis, such as initial contact with emergency services, throughout the legal process and beyond. Some advisors are based in Sexual Assault Referral Centres (SARCs) or specialist sexual violence voluntary organisations.

They provide the link with essential services such as victim and witness organisations, counselling and health, to ensure that the safety of the victim is co-ordinated across all agencies.

24. There is no reason why such services provided in the civilian community cannot be made available to victims from the service community who are equally entitled to such support as members of the public. We will work with the service police to assist victims wherever necessary to see that such support is made available.

The Prosecutors' Pledge

25. The SPA was one of the first prosecuting authorities to sign this ten point Pledge that describes the level of service victims can expect to receive from prosecutors. The Prosecutors' Pledge ensures that the specific needs of victims and witnesses are addressed; that they are assisted at court to refresh their memory from their written statement or video interview; and that they are protected from unwarranted or irrelevant attacks on their character.
26. The Prosecutors' Pledge leaflet is available HERE

Other Decisions

27. Often, decisions about the progress of a case may be taken at court. Victims will be informed about those decisions when they are at court, either by us or by the prosecuting advocate we have instructed. If they are not at court, they will be informed as soon as possible afterwards either by us or by the police.
28. In most trials, the defence lawyer will seek to challenge the victim's account of the allegations. This is normal and part of their job. The defence has a duty to challenge the victim about his or her account. However, there are rules about inappropriate cross-examination and particularly questioning about a victim's previous sexual behaviour. This type of questioning can only take place with the permission of the judge. We will ensure that the prosecuting lawyer is active in making appropriate objections to such questioning.
29. We will also object to allegations about the character or demeanour of the victim which are irrelevant to the issues in the case.

Pre-Trial Therapy

30. Rape victims may be undertaking or considering undertaking pre-trial therapy to help them recover from their experiences.
31. The best interests of the victim are paramount and men or women who have been raped should not feel reluctant to seek professional assistance.
32. Whether a rape victim should receive therapy before a criminal trial is not a decision for the police or SPA. It is for the person or their carers, in conjunction with the professional agencies providing support, to decide whether or not to undertake therapy.
33. It is important, however, that the police and SPA are informed if therapy is either proposed, or being undertaken.
34. Full Guidance can be found in: Provision of Therapy for Child Witnesses Prior to a Criminal Trial (Practice Guidance) and: Provision of Therapy for Vulnerable or Intimidated Adult Witnesses Prior to a Criminal Trial (Practice Guidance). Both these documents can be found at:

www.cps.gov.uk

and

www.homeoffice.gov.uk

8 - Accepting pleas

1. In some cases, we may consider accepting a guilty plea from the defendant to a charge other than rape. This might arise, for example, if a defendant pleads guilty to some but not all of the charges, or because the victim does not wish to proceed, or because new evidence comes to light.
2. When considering whether to accept a plea, we will, in accordance with our obligations under the: 'Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise 2005 (as further revised)', discuss the situation with the victim or the victim's family whenever possible, so that we can explain the position and obtain their views in order to help us to make the right decision. We will keep them informed and explain our decisions once they are made at court.
3. We will always take proper account of the victim's interests, and we will not accept a guilty plea which is put forward upon a misleading or untrue set of facts.

9 - Sentencing

1. If the defendant is convicted of rape, the judge advocate sitting with the Board decides the sentence. There are guidelines for judge advocates when sentencing defendants convicted of rape. The prosecution does not have any power to ask for a particular sentence.
2. The prosecuting advocate has a duty actively to assist the judge advocate and the Board with the law and guidelines on sentencing including any other orders that may be available to the court.
3. The guidelines state that relationship and acquaintance rapes should be treated by the courts as seriously as stranger rape. Male rapes are as serious as those between a man and a woman. All types of rape are equally serious.
4. We will make sure that the court has all the information it needs to sentence appropriately. If there is a Victim Personal Statement, we will advise the court of it so that it can help the court to understand the effect of the crime upon the victim. In this way we will ensure that the court is able to come to an informed decision regarding sentence. (For details of Victim Personal Statements, see section 5 paragraph 24.)
5. Before being sentenced, a defendant is entitled to make a plea in mitigation. We will challenge defence mitigation which is misleading, untrue or which unfairly attacks the victim's character.
6. If the defendant pleads guilty to an offence but disagrees with the prosecution version of events, the court has to decide on which version to sentence. In order to do this, the court may hold a 'Newton hearing', The court will only hold such a hearing if it feels that there would be a substantial difference in sentence if the defendant were to be sentenced on the prosecution's version of events. If the court considers that there would be no substantial difference to sentence, the defendant is sentenced on his version of events.
7. If, however, the court feels that it would make a substantial difference to sentence, the court can hear evidence from both parties and can make a decision based on representations from both the defence and the prosecution. At the end of the hearing, the judge must announce whether the prosecution has proved its version of events beyond reasonable doubt.
8. If the judge advocate passes a sentence which the prosecution considers to be unduly lenient because it does not reflect the seriousness of the offence, the DSP will ask the Attorney General to review the sentence.

9. If the prosecution does not consider the sentence unduly lenient but the victim disagrees, the victim can ask the Attorney General to consider it, but this has to be done within 28 days of the sentencing decision. If the SPA decides not to submit the case for the consideration of the Attorney General, it must notify the victim without delay so that the victim's option of complaining directly to the Attorney General is preserved, and so that the Attorney General has sufficient time to consider the case.
10. If the Attorney General thinks that the sentence is unduly lenient, the Attorney General can refer it to the Court of Appeal.
11. The application to the Court of Appeal must be made within 28 days of the sentence. The Court of Appeal decides whether or not the sentence is unduly lenient and, if it is, whether to increase the sentence.
12. We will keep victims informed of any appeals by the defence against conviction and sentence.

10 - Keeping victims informed

1. We understand how important it is for victims to be kept informed about the progress of a case and we will do so.
2. We are aware that some victims may prefer to nominate a friend, family member, ISVA or other member of the voluntary services to act as their point of contact, to receive information about their case and we are happy to accommodate this. Alternatively, they may rely on a specially trained police officer.

The Code of Practice for Victims of Crime

3. This Code sets out the obligations of the SPA towards victims. One of these obligations is to tell a victim if we decide that there is insufficient evidence to bring a prosecution (following a full evidential report from the police), or if we decide to drop a case, or substantially to alter the charges. In such circumstances, we will explain to a victim why we have made these decisions. Normally we will do this by writing a letter directly to the victim.
4. In a rape case, the prosecutor who made the decision to drop or substantially alter the charge will notify the victim within one working day and will also offer to meet the victim to explain personally the reasons for the decision. Where a prosecutor has made a decision not to charge during a face-to-face consultation with a police officer (that is, without a full, written evidential report), the police officer must notify the victim.
5. Copies of the Code of Practice for Victims of Crime are also available from the CPS website here - Code of Practice for Victims of Crime

11 - Community Engagement

1. We recognise the importance of working with the service community to build positive relationships. The publication of this policy statement is an important step towards achieving this goal. We have based our own policy on that developed by the CPS after wide consultation and will keep it under review after publication. We will put the policy into practice and seek thereby to build the trust of the service communities and in the wider community in the work we do and the decisions we make.

12 - Conclusion

1. We are committed to playing our part in improving the way that rape cases are dealt with in the service justice system. We want victims to have confidence in the way in which we review and progress cases.
2. We hope that this document will help victims of rape and their families to understand the work of the SPA, how we make our decisions and the different stages of the prosecution process.
3. We will continue to work with our colleagues in the criminal justice system and the third sector at national and local levels to help us develop best practice.
4. We will review this policy statement regularly so that it reflects current law and thinking. We welcome any comments and observations that help us to do this. Comments and suggestions can be made in writing to:

   The Director of Service Prosecutions

   RAF Northolt

   West End Road

   Ruislip, HA4 6NG

13 - Glossary

Adjournment
The postponement of the hearing of a case until a future date.
Appeal
A request for a higher court to change a decision made by a lower court.
Bail
The release of a person held in custody while awaiting trial or appealing against a criminal conviction.
Charge
When a suspect is formally accused of committing a crime.
Civil Proceedings
These are non criminal proceedings that usually take place in the County or High Court Applications for non-molestation orders, divorce proceedings, child contact and residence are all examples of civil proceedings
Code for Service Prosecutors
A document that sets out how the Service Prosecuting Authority (SPA) makes decisions about cases.
Conviction
A decision by the Board at the Court Martial that the defendant is guilty.
Cross-examination
Challenging the evidence given by a witness in court.
Defendant
A person charged with a criminal offence.
Evidence
The information given to the court to help make it to make a decision about whether or not a defendant is guilty. 'Evidence-in-chief' is the evidence presented to the court during the examination-in-chief.
Examination-in-chief
The questioning of the witness by the party who called him or her. Prosecution witnesses will be questioned first by the prosecution, before being cross-examined by the defence.
Intermediary
An intermediary is a person specifically trained to help children and adults who are considered vulnerable to

be able to communicate at the police station and at court.

Independent Sexual Violence Adviser (ISVA)

An independent specialist who works alongside victims throughout the legal process, and beyond. They link in with essential services such as victim and witness support organisations, counselling, health and housing, whilst making sure that agencies to coordinate to keep the victim safe.

Newton hearing

The court may decide to hold a 'Newton hearing' where the defendant pleads guilty, but the defence and prosecution dispute the facts upon which the court is going to sentence the defendant. The purpose of the hearing is to establish the factual basis for the sentence to be passed.

Plea

When a defendant says he or she is guilty or not guilty.

Prosecutor

The person who presents the case against one or ore defendants. Prosecutors present cases on behalf of the Crown (in other words, the state) and do not act on behalf of victims.

Re-examination

This involved the questioning of a witness in court by the person who originally called him or her to give evidence. It follows cross-examination.

Special measures

The help for witnesses that a court can offer so that they can give their best evidence in court. They include: live video links, video-recorded statements, screens around the witness box, and assistance with communication.

Statutory charging

The system through which the SPA has responsibility for deciding (in all but the most minor cases) whether a suspect should be charged, and, if so, what the charge(s) should be.

Trial

This occurs after a defendant has entered a not guilty plea or refuses to enter a plea. The Board hear what happened from the prosecution and defence, so that they can make up their minds about whether or not the defendant is guilty.

Victim

A person who has had a crime committed against them.

Witness

A person who can give relevant evidence in a criminal case. This will usually include the victim of a crime.

APPENDIX B

Comparison of Referrals – 2010 to 2013

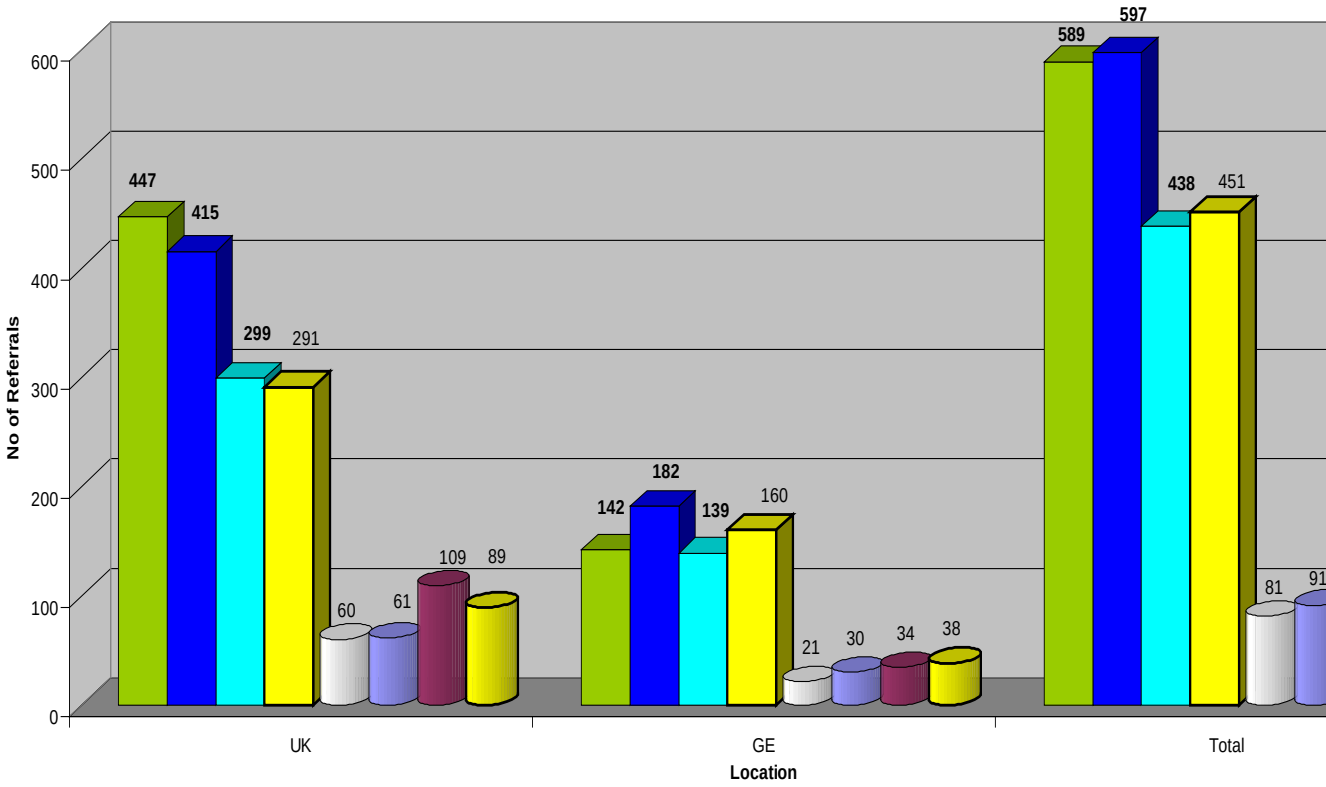
And Pre- Charge Advice requests for 2010 to 2013

	2010 Referrals	2011 Referrals	2012 Referrals	2013 Referrals
UK	447	415	299	291

PCA 2010	PCA 2011
60	61

GE	142	182	139	160	21	30
TOTAL	**589**	**597**	**438**	**451**	**81**	**91**

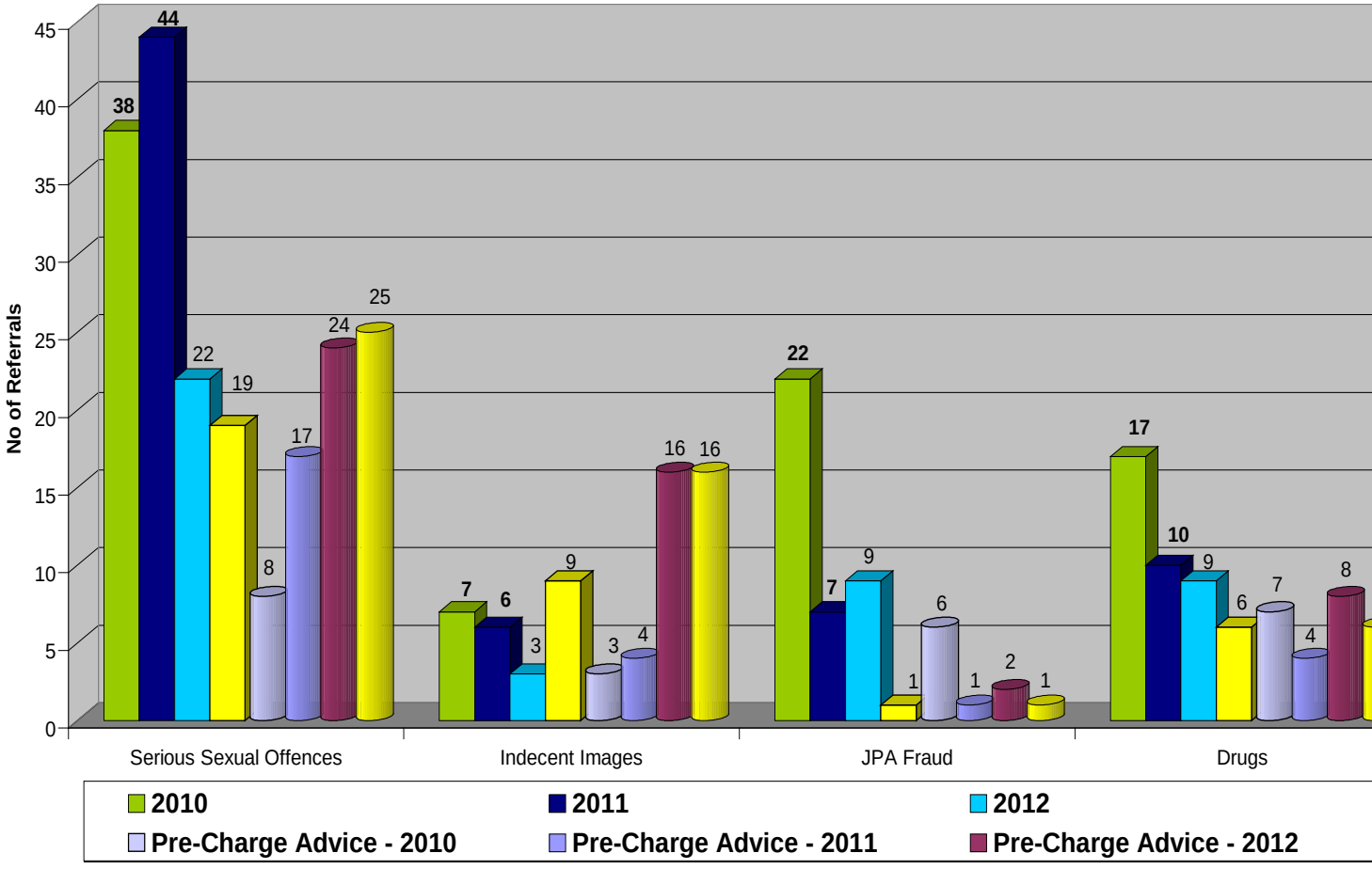
Compared to 2011, - peak year for referrals - UK referrals are down by 30%, Germany down by 12%. Overall SPA down by 24%. However PCA requests have increased by over 39% compared to 2011. Despite this, significant changes in the nature of our work has imposed more complex demands on the SPA which belie an assessment of workload based simply on referral numbers (see analysis below).



Comparison of complex and more serious referrals – 2010 to 2013

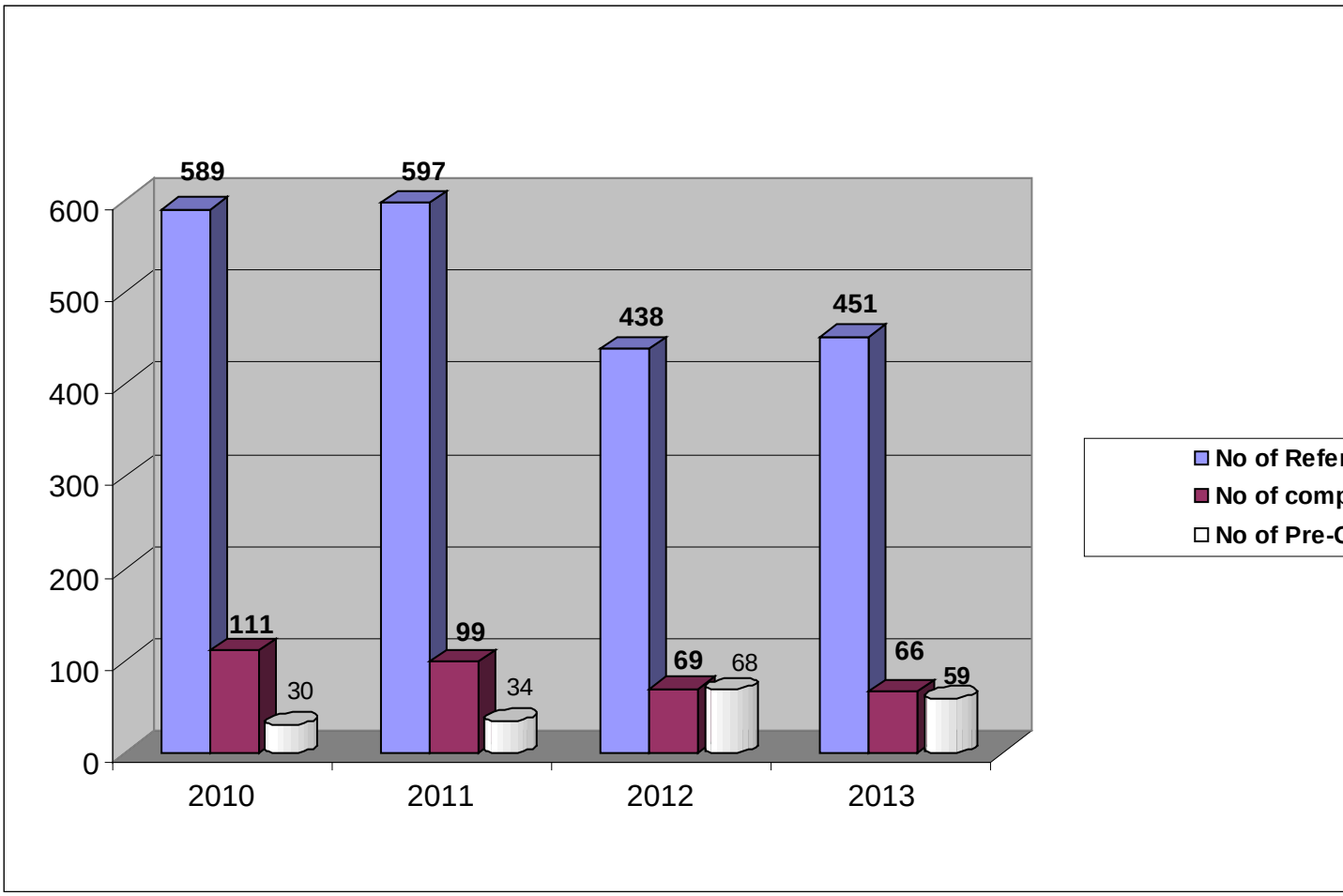
Serious sexual offences, indecent images, JPA fraud, drugs and serious violence

	2010	2011	2012	2013	PCA – 2010	PCA – 20
Serious Sexual	38	44	22	19	8	17
Indecent Images	7	6	3	9	3	4
JPA Fraud	22	7	9	1	6	1
Drugs	17	10	9	6	7	4
Serious violence	29	32	26	31	6	8



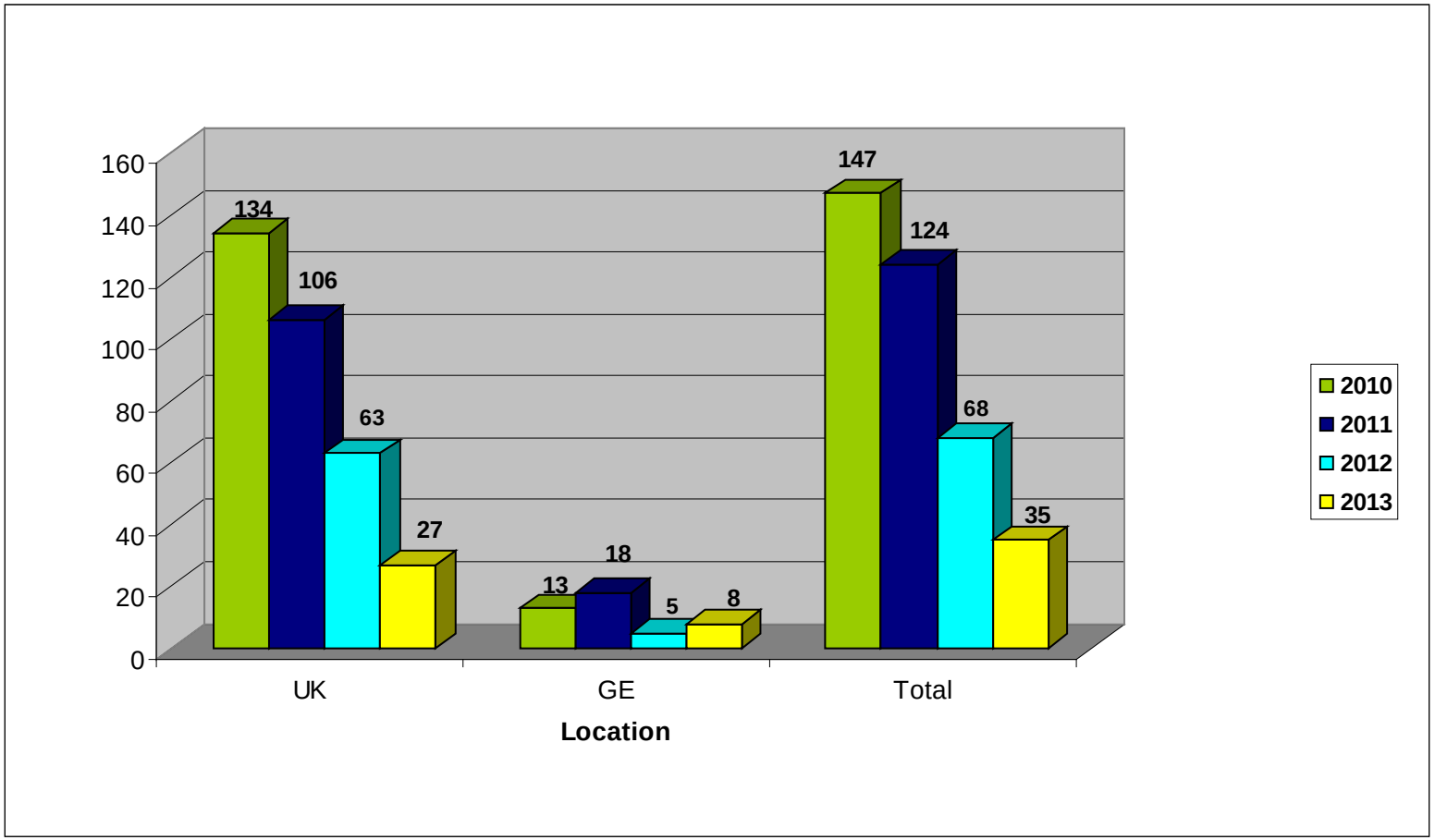
Comparison of No of Referrals/PCA and Complex Cases – 2010 to 2013

Year	No of referrals	No of complex cases	Complex cases as a % of referrals	Pre-Ch Advice 2013
2010	589	111	18.85%	
2011	597	99	16.58%	
2012	438	69	15.75%	
2013	451	66	14.63%	



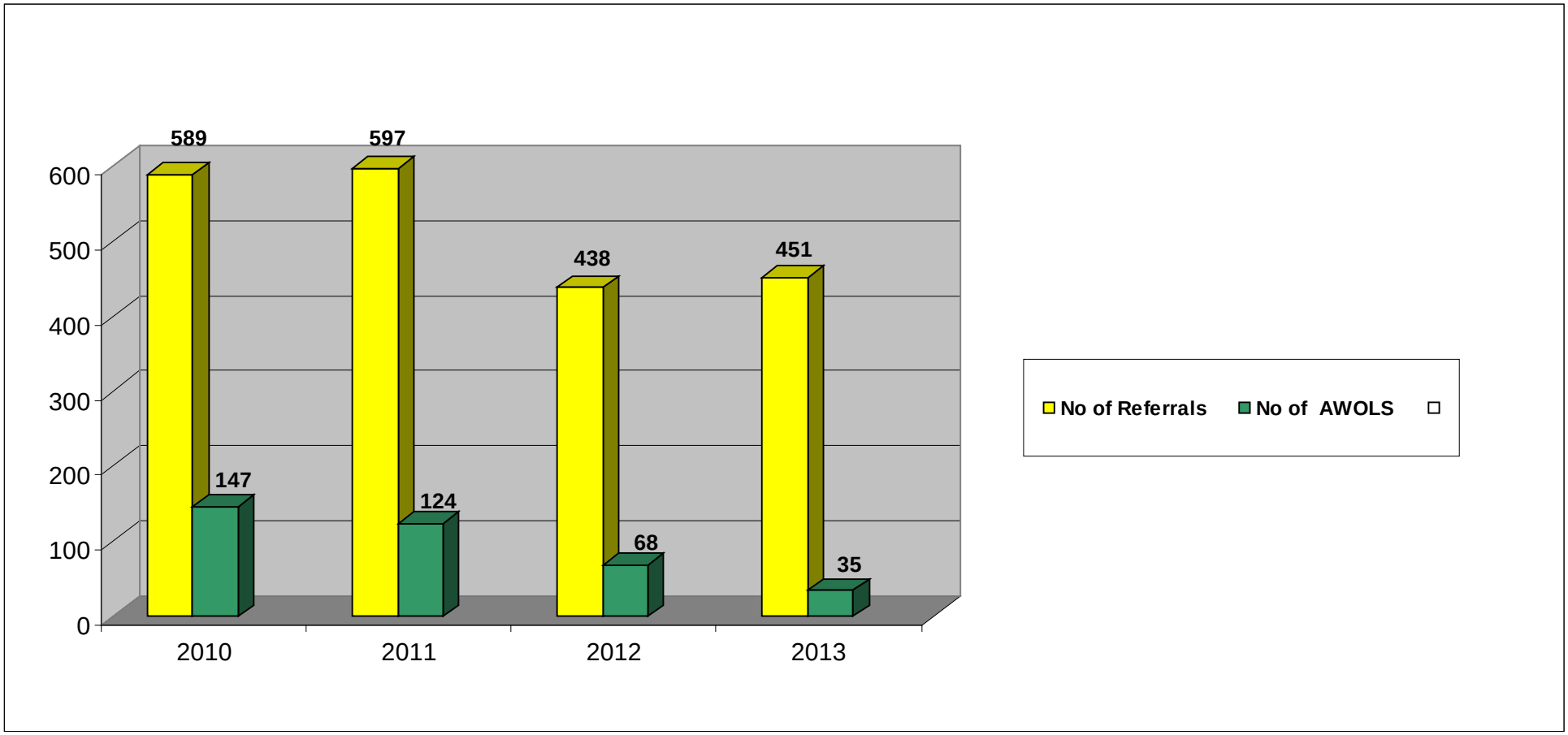
Comparison of AWOLS – 2009 to 2012

	2010	2011	2012	2013
UK	134	106	63	27
GE	13	18	5	8
TOTAL	**147**	**124**	**68**	**35**



Comparison of No of Referrals and AWOLS - 2009 to 2012

Year	No of referrals	No of AWOLS	AWOLS as a % of referrals
2010	589	147	24.96%
2011	597	124	20.77%
2012	438	68	15.53%
2013	451	35	7.76%


589
597
438
451
147
124
68
35
600
500
400
300
200
100
0
2010
2011
2012
2013
No of Referrals
No of AWOLS

Brief analysis and comment of First Quarter of 2013 referral and pre- charge advice statistics.

14. Compared to 2011, a peak year, UK referrals are down by 30%, Germany down by 12%. Overall SPA down by 24%. However PCA requests have increased by 39% compared to 2011. Despite this, significant changes in the nature of our work has imposed more complex demands on the SPA which belie an assessment of workload based simply on referral numbers.

15. Complex Cases.

The number of Serious Sexual Offences referrals has fallen slightly compared to 2012 but still considerably down on 2011. JPA Frauds total ONE in 6 months, and it is suggested that consideration be given to removing this category from the "Complex Case " list. Serious Violence and Indecent Images have increased. Again, the time-consuming Pre Charge Advice requests relating to Complex Cases have experienced further increases.

16. Comparison of Complex cases as a percentage of referrals.

As previously stated there has been a slight decrease in the overall number of complex cases compared to the first 6 months of 2012 (primarily due to the drop in JPA cases); as a percentage of referrals, this equates to 14.63% of the SPA's workload. However, whilst comparing the percentage of complex cases to the number of referrals, it should be noted that the number of AWOLS continue to decrease; see para 17 below.

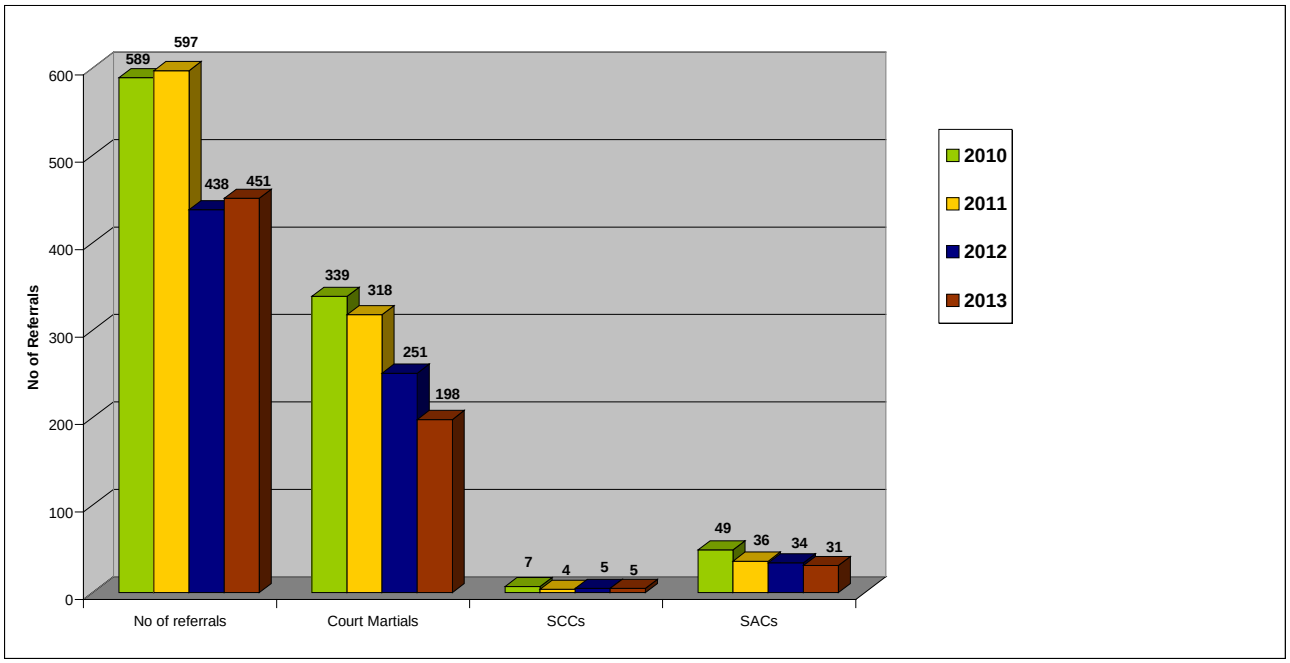
17. AWOLS.

The first 6 months of 2013 has seen a continuing reduction in the number of AWOLS referred to the SPA.

18. Comparison of AWOL cases as a percentage of referrals.

The first 6 months of 2013 indicate AWOLS reported as 7.76% of overall case referrals. This represents, as a percentage, over a 75% reduction on the AWOLS percentage of referrals in 2010.

Summary of Trials for 2013

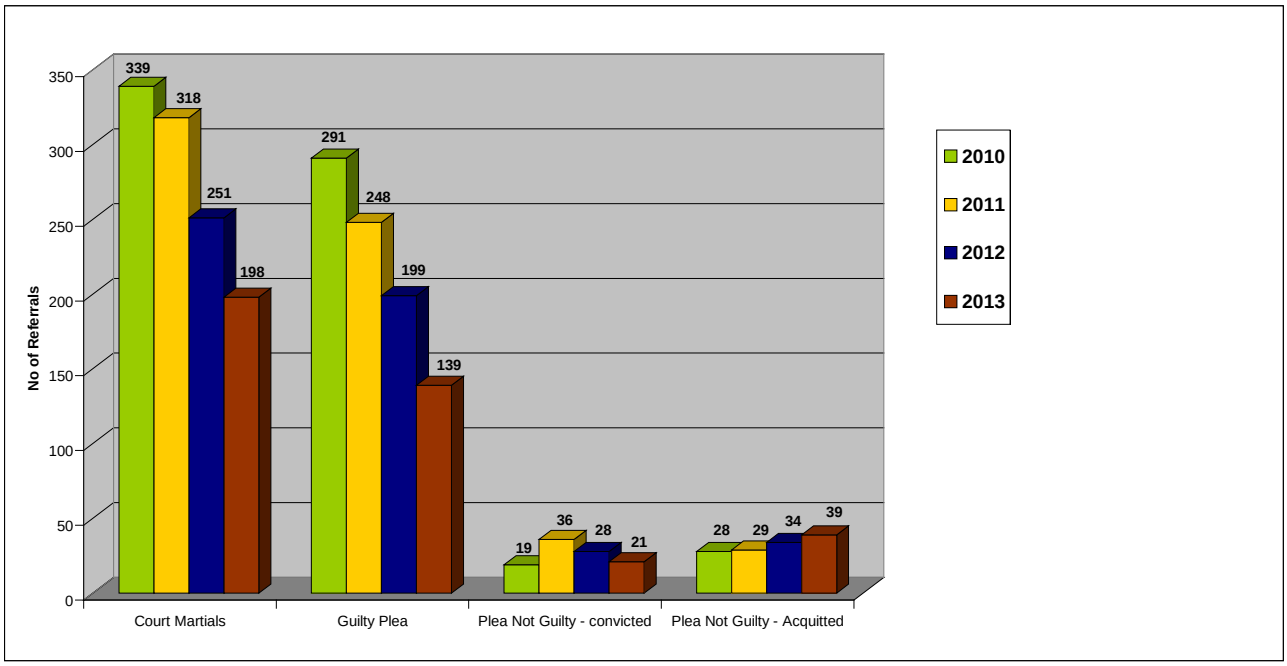


16. The above graph compares the overall number of referrals received in the first 6 months of 2013 (and compares with the 3 previous years) with the number of Court Martial, Standing Civilian Court and Summary Appeal Court.

17. As can be seen, there has been a continuing decrease in the number of Court Martial conducted throughout the period compared to 2012; a 21% decrease. A 37% decrease compared to 2011.

18. 43.9% of referrals in the first 6 months of 2013 resulted in Court Martial compared to 53.2% in the same period of 2011.

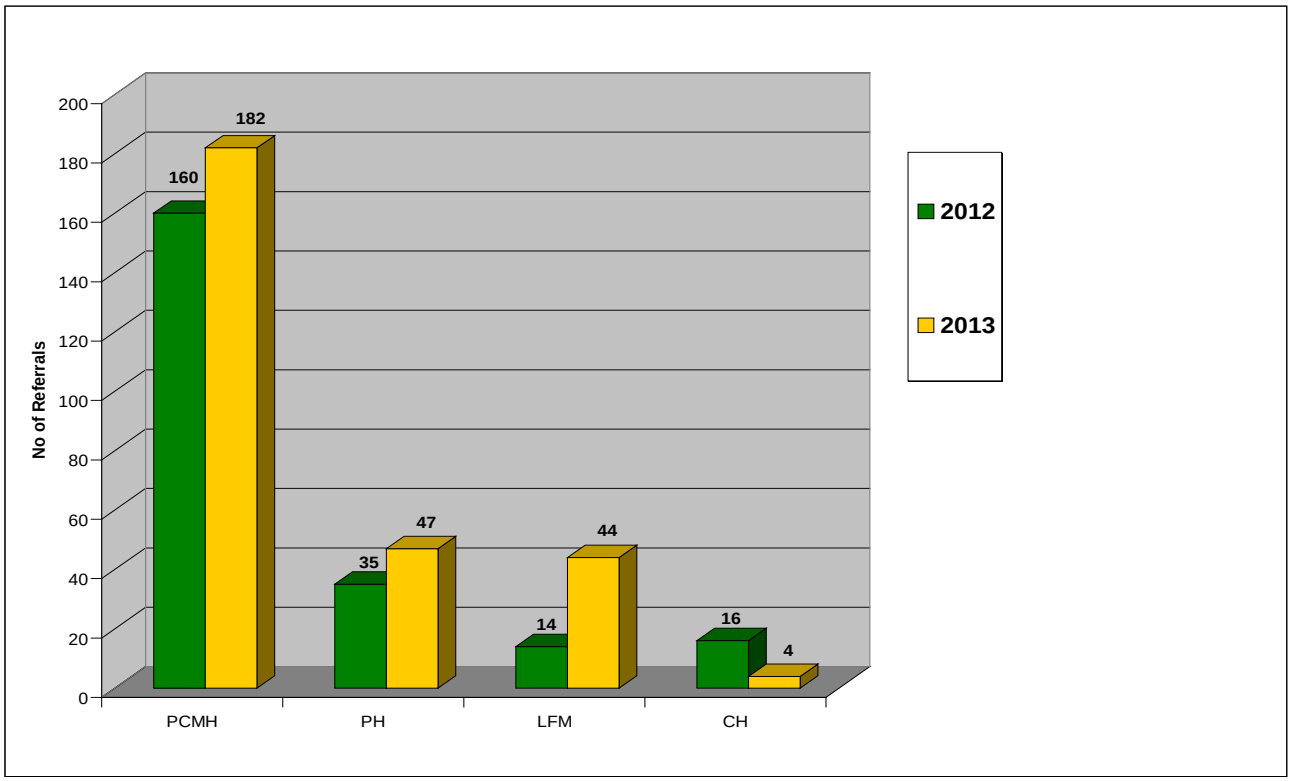
Summary of Court Martial outcomes for 2013



19. The above graph displays, total number of Court Martial cases including guilty pleas, plea not guilty/convicted and plea not guilty /acquitted.

20. As can be seen , Not Guilty - Acquitted, has increased significantly compared to 2011.

Other Court Hearings



21. The above graphs displays , Preliminary Case Management Hearings (PCMHs), Preliminary Hearings (PHs), Listed for Mention (LFMs) and Custody Hearings (CHs) carried out during the first 6 months of 2013, compared to the same period in 2012.

THE RT HON LORD THOMAS OF GRESFORD OBE QC.

Lord Thomas of Gresford is a graduate in classics and law of Cambridge University. He was called to the Bar in 1968 and became a Queen's Counsel in 1979 and a Bencher of Gray's Inn in 1991.

Lord Thomas has appeared in many leading cases in the Judicial Committees of the House of Lords and Privy Council and in the Supreme Court. He has also appeared as an advocate, both for the prosecution and defence, in a number of terrorist trials, and in more than 250 homicide trials and appeals, in England and Wales, Hong Kong, Singapore and the West Indies.

He is Honorary Chairman of the Association of Mlitary Court Advocates, having acted in serious courts-martial cases both at first instance and at appellate stages.

He was appointed to the House of Lords in 1996 as a Liberal Democrat peer and has served as front bench spokesman on legal affairs ever since, in particular, as shadow Attorney General 2003 – 2006; 2007 – 2010 and shadow Lord Chancellor 2006 – 2007.

His interests include Welsh affairs and Law Reform. Outside the law and politics, he is engaged in music making – harp, piano and choral singing – and sport – rugby football, rowing, fishing and golf.