

THE RT HON BARONESS GOLDIE DL
MINISTER OF STATE IN THE HOUSE OF LORDS

MSU 4.8.2.3

19 November 2021

Dear Lord Thomas,

ARMED FORCES BILL: DEFENCE SERIOUS CRIME UNIT

During Grand Committee for the Armed Forces Bill on 2 November you asked about the institutional independence of the Defence Serious Crime Unit and why further provision on this was not made on the face of the Bill. I offered to reflect on your remarks. I hope this letter provides you with assurance that no further provisions in the Bill are necessary to establish the new Defence Serious Crime Unit and that it will have the required independence.

In summary, I wish to be clear the provisions inserted in the Armed Forces Bill at Grand Committee make all the changes to primary legislation which are necessary in order to establish the Defence Serious Crime Unit (referred to in the Bill as the tri-service serious crime unit) as an independent unit.

On the matter of independence, the UK courts have already found that under the existing structure, the service police are capable of being “*hierarchically, institutionally and practically independent*” of those it is investigating. The provisions in the Armed Forces Bill will ensure that the Provost Marshal for serious crime and the Defence Serious Crime Unit will similarly be independent. Further institutional changes will be considered when the leadership, funding and organisation of the Defence Serious Crime Unit is reviewed in three years’ time (recommendations 10, 12 and 16 refer).

Background to the independence of the service police

It might be helpful if I set out the background to the independence of the service police. There are currently three service police forces: the Royal Navy Police, the Royal Military Police and the Royal Air Force Police. Each is headed by a Provost Marshal. When the Armed Forces Act 2006 (“AFA 2006”) was first enacted, there was little on the organisation of the service police in primary legislation. The Armed Forces Act 2011 introduced the main provisions (see sections 3, 4 and 5). These are:

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- a. The Provost Marshal for each service police force is appointed by Her Majesty; section 365A(1) of the AFA 2006. To be eligible for appointment as a Provost Marshal, a person must be a provost officer (that is, an officer who is a member of a service police force); section 365A(2) of the AFA 2006.
- b. In relation to each service police force, the Provost Marshal for that force has *“a duty, owed to the Defence Council, to seek to ensure that all investigations carried out by the force are free from improper interference”*; see section 115A of the AFA 2006. Improper interference is defined to include *“any attempt by a person who is not a service policeman to direct an investigation which is carried out by the force”*.
- c. The service police are subject to inspection by Her Majesty’s Inspectors of Constabulary. Those inspectors are required to report on the independence and effectiveness of service police investigations; see section 321A of the AFA 2006. These reports are laid before Parliament.

The courts have considered the organisation of the service police in several cases since 2010; considering in particular whether the arrangements for the service police are sufficiently independent of the chain of command. This has arisen in particular in the courts’ consideration of whether service police investigations into fatalities and allegations of ill-treatment can discharge the investigative duty under Articles 2 (right to life) and 3 (prohibition of torture) of the European Convention on Human Rights. The investigative duty requires in particular that where such allegations are made, the investigation must be *“hierarchically, institutionally and practically”* independent of those implicated in the investigation. Key cases include the following:

- a. In considering whether the Iraq Historic Allegations Team was sufficiently independent of the chain of command, the Court of Appeal initially concluded that that team was unable to show the requisite independence; *R (Mousa) v Secretary of State for Defence* [2011] EWCA Civ 1334. This was because the team included members of the Royal Military Police and the associated Provost Branch undertook detention operations in Iraq. However, the Divisional Court concluded that the restructure of the Iraq Historic Allegations Team to place the investigation in the hands of the Royal Navy Police rather than the Royal Military Police satisfied the independence requirements of Articles 2 and 3 ECHR; *R (Mousa) v Secretary of State for Defence (No. 2)* [2013] EWHC 1412 (Admin).
- b. Similarly, the independence requirements of the European Convention of Human Rights were satisfied in relation to a Royal Military Police investigation of serious allegations in relation to Afghanistan; *R (AB) v Secretary of State for Defence* [2013] EWHC 3908 (Admin).

In summary, the current state of the case law shows that the current arrangements for the service police are sufficiently independent. The courts have concluded that the service police are clearly capable of conducting investigations which are “*hierarchically, institutionally and practically*” independent of those being investigated.

The Defence Serious Crime Unit and the Provost Marshal for serious crime

In respect of Sir Richard Henriques’ important recommendations for improving the way the service police is structured, the recommendations which require primary legislation are as follows:

Recommendation 1: The Defence Serious Crime Unit previously recommended by Professor Sir Jon Murphy in the Service Justice System Policing Review (Part 1) should be established as an operationally independent Unit, and not as a capability based on existing Service Policing structures. Recommendations 1 – 4 of that review, which have previously been accepted, should be implemented without a further scoping review.

Recommendation 2: The Defence Serious Crime Unit should be commanded by a Provost Marshal, who must be a provost officer but should not be a current Provost Marshal of a Service police force. This new Provost Marshal should be designated Provost Marshal (Serious Crime).

Recommendation 7: The Provost Marshal (Serious Crime) should have a duty of operational independence in investigative matters owed to the Defence Council, on the same terms as that owed by the Service Provost Marshals under section 115A of the Armed Forces Act 2006.

The Government has accepted these recommendations and given effect to them in the primary legislation in the following ways.

- a. The Defence Serious Crime Unit is set up as an operationally independent unit (implementing **recommendation 1**) by the unit and the Provost Marshal for serious crime being given the same powers as the existing service police forces and provost marshals. See Schedule 5 to the Bill. This means that the Defence Serious Crime Unit and the Provost Marshal can exercise these powers without reference to the existing service police forces and provost marshals.
- b. The Provost Marshal for serious crime is subject to the same rules about appointment as the existing provost marshals. See clause 12(2) of the Bill. This means that the Provost Marshal for serious crime will be appointed by the Queen and must be a provost officer to be eligible for appointment. This implements **recommendation 2**.

c. The Provost Marshal for serious crime will be under a duty to seek to ensure that all investigations carried out by the Defence Serious Crime Unit are free from improper interference. See clause 12(3) of the Bill which amends section 115A of the Armed Forces Act 2006. As noted, improper interference is already defined to include *“any attempt by a person who is not a service policeman to direct an investigation”*. This means that any attempt by individuals in the chain of command who are not service police to direct in relation to an investigation the Provost Marshal for serious crime or a member of the Defence Serious Crime Unit would count as “improper interference”. This mirrors the duty on existing provost marshals in relation to the single Service police forces. It implements **recommendation 7** that the Provost Marshal for serious crime owe the duty on the same terms as the existing section 115A.

The Government has accepted the other recommendations by Sir Richard Henriques on the structure of the unit. However, unlike recommendations 1, 2 and 7 these do not require primary legislation. Further detail is supplied in the attached factsheet, but in summary:

- a. The Provost Marshal for serious crime will be closely supported by, and report to, the Chief of Defence People during the implementation period (**recommendation 3**). The Defence Serious Crime Unit will not fall under the chain of command of the single Services for performance reporting or disciplinary purposes (**recommendation 9**).
- b. The tri-service serious crime unit will have a victim and witness care unit (**recommendation 5**).
- c. The Provost Marshal (Army) will have no command responsibility for the Defence Serious Crime Unit and will retain her existing responsibility for operational detention (**recommendation 8**).
- d. The Provost Marshal for serious crime will be of OF5 rank (**recommendation 11**).
- e. The Government has accepted the recommendation to establish a Strategic Policing Board to provide effective assurance and governance of the Provost Marshal for serious crime and the Defence Serious Crime Unit (**recommendation 14**).
- f. The Defence Serious Crime Unit is being initially funded through the Army Top-Level Budget (**recommendation 16**).

g. The Provost Marshal for serious crime will report annually to the Minister for Defence People and Veterans and that report will be laid before Parliament (**recommendation 18**).

h. The position in relation to civilians is outlined in the factsheet.

The Government is confident that – in this way – the Defence Serious Crime Unit will be capable of producing investigations which are “*hierarchically, institutionally and practically*” independent of those being investigated. Although not arising from specific recommendations of Sir Richard Henriques’ report, it is also relevant to note that Her Majesty’s Inspectors of Constabulary will be able to inspect the Defence Serious Crime Unit, including as far as it concerns the independence of its investigations; see paragraph 31 of Schedule 5 to the Bill. The Defence Serious Crime Unit will also be subject to the service police complaints regime introduced by clause 11 of the Bill.

I note your preference that civilian institutional arrangements should be applied to the service policing context, in particular, by referring to Police and Crime Commissioners. Police and Crime Commissioners were created by Part 1 of the Police Reform and Social Responsibility Act 2011 for most police areas in England and Wales. Police and Crime Commissioners are elected to hold the Chief Constable for their police area to account. Police and Crime Commissioners are in turn accountable to local police and crime panels. We do not consider that further institutional changes for the service police along these lines are necessary or desirable for the following reasons:

a. Sir Richard Henriques considered carefully the institutional issues associated with the new Defence Serious Crime Unit and Provost Marshal for serious crime. The Government has accepted these recommendations and is giving effect to them. Sir Richard did not recommend the creation of a Police and Crime Commissioner model for the service police.

b. There is in any event a spectrum of ways in which civilian police forces in the UK are held to account. For example, even in England and Wales, there are different institutional structures in place for civilian forces such as the British Transport Police or the Ministry of Defence Police. The Government considers that the institutional framework should suit the policing context and is confident that the right structure has been chosen for the Defence Serious Crime Unit.

c. Sir Richard has in any event recommended a review of these issues at the three-year point.

Further review of the Defence Serious Crime Unit

It is important to highlight that Sir Richard Henriques made recommendations about the initial operating model for the Defence Serious Crime Unit. These are the recommendations that the Ministry of Defence is seeking to give effect to at this stage. However, Sir Richard also anticipates a further review of the leadership, funding and organisation taking place in three years' time. See recommendations 10, 12 and 16. The Government has accepted these recommendations and considers that this is the point at which wider institutional issues ought to be considered.

I hope you find this helpful in explaining the situation. I am copying this letter, the further information referred to and the two factsheets, to all who contributed to the debate in Grand Committee, and am placing copies in the Library of the House.

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*Yours sincerely,
Annabel Su. Goldie*

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