Who guards the guardians? MoD support for former and serving personnel: Government Response to the Committee’s Sixth Report

Ninth Special Report of Session 2016–17

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The Defence Committee

The Defence Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Ministry of Defence and its associated public bodies

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Committee reports are published on the Committee’s website and in print by Order of the House. Evidence relating to this Report is published on the relevant inquiry page of the Committee’s website.

Committee staff

The current staff of the Committee are James Davies (Clerk), Dr Adam Evans (Second Clerk), Eleanor Scarnell, David Nicholas and Ian Thomson (Committee Specialists), David Gardner (Senior Committee Assistant), Carolyn Bowes (Committee Assistant).

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Ninth Special Report

The Defence Committee published its Sixth Report of Session 2016–17, *Who guards the guardians? MoD support for former and serving personnel* [HC 109], on 10 February 2017. The Government’s response was received on 5 April 2017 and is appended to this report.

Appendix: Government Response

**Introduction**

1. The UK Armed Forces have an exceptionally dangerous and difficult job and carry this out with bravery and professionalism. The Ministry of Defence (MoD) has a responsibility to support its personnel and veterans, in terms of ensuring that they have the correct welfare and legal support when they face legal proceedings, but also in helping to ensure that they are not subject to persistent claims which undermine their ability to do their job. It is a responsibility that the MoD takes extremely seriously and we are therefore grateful to the Committee for bringing these issues to the fore, and making some helpful recommendations for improvement.

2. There are, however, a number of inaccuracies in the Report, particularly on the legal framework within which Defence must operate, which in turn has led to an unfair characterisation of the Iraq Historic Allegations Team (IHAT) and its conduct. These are addressed in our responses below.

*The rationale for setting up IHAT*

3. Operations in Iraq were predominantly land-based and the majority of allegations were made against members of the Army. The Royal Military Police (RMP) were therefore responsible for investigating them. However the RMP faced numerous legal challenges to their independence, effectiveness and ability to conduct investigations which would comply with the European Convention on Human Rights (ECHR). Investigations carried out by the RMP in Iraq prior to the implementation of the Armed Forces Act 2006 on 31 October 2009 were particularly vulnerable to legal challenge.

4. By 2010, the capacity of the RMP to handle the cases was in danger of being overwhelmed. IHAT was therefore established to provide them with the additional support and resource they needed. Under the leadership of a retired senior detective, IHAT comprised RMP personnel supported by retired civilian detectives.

5. Subsequently IHAT had to be transferred from the RMP to the Royal Navy Police (RNP) and its RMP staff replaced with members of the RNP and additional contracted personnel following a successful legal challenge brought by Public Interest Lawyers (PIL). The Court of Appeal held that the practical independence of IHAT was, at least as a matter of reasonable perception, substantially compromised because Provost Branch members were investigating allegations which necessarily included the possibility of culpable acts or omissions on the part of their members – who were plainly involved in matters
surrounding the detention and internment of suspect persons in Iraq. The transfer to the RNP was significant because the RNP is a very small Service Police force and it meant that IHAT became more reliant on contracted personnel.

**IHAT: Political and Legal Context and Scrutiny**

6. The Iraq investigations had to be conducted in the face of sustained legal challenge by PIL and others, who argued that MoD was incapable of conducting independent and effective investigations (both before and after the implementation of the Armed Forces Act 2006) and that an additional public inquiry was required. The Baha Mousa and Al Sweady public inquiries were already under way. A further such inquiry into the growing number of abuse allegations would have been potentially open-ended, very expensive and incapable of addressing the allegations of criminality. The MoD contended that IHAT, operating under the Provost Marshal (Navy) and under the statutory framework of the Armed Forces Act 2006 was capable of discharging MoD’s criminal investigative obligations under domestic law and the ECHR, a position which was finally accepted in 2013.  

7. While IHAT remained under intense legal, political and public scrutiny, its caseload increased hugely (rising to 3,392 allegations) due to fresh claims brought by PIL. A Designated Judge (currently Mr Justice Leggatt) was appointed to oversee the progress of the RNP/IHAT investigations, and IHAT was required to submit periodic reports about the progress of investigations. In addition to avoiding any unnecessary delay, the focus of the Court was on ensuring that no investigation into any serious allegation was dropped without good reason. Mr Justice Leggatt continues to hold regular hearings where he monitors the progress of IHAT’s investigations, which are taking place against a backdrop of a large volume of litigation and compensation claims.

8. In early 2016, the Attorney General commissioned a report from Sir David Calvert-Smith into the work of IHAT. Sir David’s report, which was published in September 2016, concluded that IHAT was a “tightly focused organisation with a strong and cohesive senior management team.” IHAT publishes regular updates on its website and alerts families of complainants when it concludes cases. It works very closely with the Service Prosecuting Authority (SPA) and with officials in the MoD. IHAT is thus a closely monitored, accountable body, and far from the “unstoppable self-perpetuating machine” as characterised by the Report.

**The Conduct of PIL**

9. Allegations brought by PIL were handled by experienced investigators well versed in handling complaints. During the course of the Al-Sweady Inquiry (which was set up by the previous Government in the face of strong indications that the Courts would uphold a judicial review application by PIL alleging that such a Public Inquiry was required), the MoD became concerned about the conduct of some of the law firms through whom these

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1 Ali Zaki Mousa v Secretary of State for Defence & Anr [2011] EWCA Civ 133  
2 R (Ali Zaki Mousa) v Secretary of State for Defence (No 2) [2013] EWHC 1412  
4 Paragraph 122 of the Report
allegations had been brought and sustained. The Inquiry published its report in December 2014. This found that virtually all of the very serious allegations in this case against the Armed Forces had been fabricated. In early 2015, following the Inquiry’s findings, the Defence Secretary directed that evidence be submitted to the Solicitors Regulation Authority (SRA). The MoD’s submissions identified a number of apparent breaches of the SRA Code of Conduct and requested that they be investigated. At this stage, however, the MoD did not know the full extent of PIL’s wrongdoing.

10. The SRA investigation culminated in the referral of 24 allegations against solicitors from PIL and 19 allegations against solicitors from Leigh Day & Co to the Solicitors Disciplinary Tribunal (SDT).

11. On 2 February 2017, the SDT found that Mr Shiner should be struck off for misconduct in the course of bringing allegations against the Armed Forces and the MoD. This was made possible by the evidence initially submitted by the MoD to the SRA. When the MoD had concerns about PIL it took robust action to ensure that our Armed Forces were not subjected to allegations without merit.

12. The SDT will hear allegations against the firm Leigh Day & Co over six weeks, beginning in April 2017. Allegations include that the firm failed to provide key documents to the Court, authorising prohibited referral fees and continuing to maintain allegations and to seek damages when it was improper to do so.

The Closure of IHAT

13. Following Mr Shiner’s earlier acknowledgement of misconduct, IHAT had already begun to take account of the potential impact on its caseload. When the SDT made its decision to strike off Mr Shiner on 2 February 2017, IHAT took immediate steps to assess the impact on its caseload. It consulted the Director of Service Prosecutions (DSP) who has extensive experience of war crimes prosecutions in the international courts. Having considered his advice, the Director of IHAT concluded on 8 February 2017 that by the summer the number of cases which should be investigated would be greatly diminished, probably to about 20. That reduction enabled the Defence Secretary to conclude that the work of IHAT as a separate entity could end and the unit could be reintegrated into the Service Police system. He announced this on 10 February 2017. IHAT will close on 30 June 2017.

14. Over the period since November 2010, IHAT has conducted itself appropriately and professionally, with a tiny number of cases of misconduct by investigators having been dealt with swiftly and robustly by the senior management team. By the end of June 2017, it will have disposed of all but a small number of the most serious allegations.

15. The Report makes a number of references to the fact that IHAT investigations have not resulted in any prosecutions, and suggests that this is “the greatest indictment” of its work. The Committee has recently heard oral evidence as part of its Investigation into Fatalities Involving British Military Personnel, making clear that investigations are quite separate from prosecutions: there is a distinction between investigation and punishment.
As Mr Gavin Robinson MP said: “A successful investigation, you would accept, does not have to end in a prosecution.” The Report’s conclusion that a lack of prosecutions is “the greatest indictment” of IHAT is misplaced.

The Future Investigations

16. Following IHAT’s closure, the remaining investigations will be taken forward by the Service Police. These are likely to be some of most serious allegations, such as unlawful killing and serious sexual assault.

17. In view of the Court of Appeal’s finding about the perception of independence regarding the Royal Military Police (see paragraphs 3–5 above), which still stands, the investigations will be carried out by a mix of RAF and RN Police. They will be supported by a small number of contractors who will perform back-room functions and will have no contact with UK suspects or witnesses. This limited contractor support is necessary to provide specialist functions, expertise and, importantly, continuity, in order to bring the Iraq investigations to as rapid a conclusion as possible.

The MoD Handling of IHAT Issues

18. The Secretary of State for Defence has received a letter dated 22 February 2017 from the Chairman of the Defence Committee, setting out a number of concerns about how the MoD handled the announcement of IHAT’s closure.

19. The timetable for the Secretary of State’s decision is set out in paragraph 13 above. The Report repeatedly criticises the MoD for failing to take action in a timely fashion and so the Department makes no apology for making the announcement as early as possible.

20. The Chairman’s letter referred to a question raised at the Secretary of State’s evidence session before the Sub-Committee where he was asked why the investigatory team could not be wound up at that time. This was of course before Mr Shiner was struck off, let alone before IHAT and SPA had consulted on what the outcome of the SDT proceedings meant for IHAT and subsequent prosecutions. It remains true that the executive has no power to turn off investigations. Those which it is necessary to take forward will, from the summer, be taken forward by the Service Police.

21. The remaining questions raised in the Chairman’s letter are addressed in paragraphs 16–17 and our responses to Recommendation 29 below.

Conclusions and Recommendations: the MoD Response

The Report sets out a number of recommendations and conclusions. These are set out and addressed individually below.

Recommendations

1. As a nation we expect our servicemen and women to conduct themselves at the highest levels of professionalism on operations. Where the rule of law is broken, justice
must be done in military as in civilian life. Our inquiry has sought to test whether the professionalism demanded of the armed forces has been matched by the duty of care for them demanded of the Ministry of Defence during the IHAT investigations. (Paragraph 9)

The UK Armed Forces have an exceptionally dangerous and difficult job and carry this out with bravery and professionalism. The Ministry of Defence (MoD) has a responsibility to support its personnel and veterans, in terms of ensuring that they have the correct welfare and legal support when they face legal proceedings, but also in helping to ensure that they are not subject to persistent claims which undermine their ability to do their job. It is a responsibility that the MoD takes extremely seriously and we are therefore grateful to the Committee for bringing these issues to the fore, and making some helpful recommendations for improvement.

2. Both the Secretary of State and Mark Warwick, the Director of IHAT, assured us that the IHAT’s caseload will be reduced to the hundreds by the end of January 2017 and to around 60 cases by the summer of 2017. We ask the MoD to provide us with monthly updates on the number of outstanding cases until the process is concluded. (Paragraph 17)

The timelines mentioned in this recommendation have been superseded by events. On 2 February 2017, the SDT found that Mr Phil Shiner should be struck off for misconduct in the course of bringing allegations against the Armed Forces and the MoD. As Mr Shiner’s involvement has vitiated so many of the allegations, the Director of IHAT concluded, with the advice of the Director of Service Prosecutions, that by the summer the number of cases which should be investigated will be greatly diminished, probably to around 20.

IHAT publishes quarterly information on the size of its caseload, and the MoD would expect the Service Police who take on the remaining investigations to continue to do so.

3. It is clear to us that legal firms were empowered by the MoD’s approach to IHAT to generate cases against service personnel at an industrial level. The MoD cannot claim that it has been a victim of the industry; nor can it claim that it had no way of foreseeing the creation of this industry. The activities of two law firms in particular are now subject to investigations by relevant authorities which must remain a matter for them. The MoD must take responsibility for creating an environment in which the generation of cases—with little or no supporting evidence—was able to occur. They must identify remedies to ensure such a situation could never happen again. (Paragraph 26)

This is a mischaracterisation. The generation of cases with little or no supporting evidence was not an environment “created” by the MoD. Furthermore, it is simply inaccurate to suggest that the MoD’s approach “empowered” claimants’ solicitors. The allegations made were serious and needed to be dealt with properly and in accordance with law. Where arguments to contain the reach of the investigative obligations were properly available, they were taken and pursued.

In 2010 the Court set out the process by which PIL could file its judicial reviews in the Iraqi cases. “Claims” were to be set out in a register of claimants and, under the Court order, this was required to state only: (i) the claimant’s name, address and date of birth; (ii) the period of ill-treatment alleged; (iii) brief details of the alleged
breaches of ECHR rights and any other breaches of domestic, criminal or international law; (iv) the place or places of ill-treatment alleged; and (v) the type of remedy sought. The MoD’s position throughout that sequence of litigation has been designed to ensure that such claims as were made were managed as efficiently as possible, including using test cases in order to determine relevant issues of principle with a view to reducing the numbers of active cases as effectively as possible.

It was and is not possible for the MoD to have sought to control what allegations were made. Moreover, the MoD at no stage accepted the credibility or truth of the allegations. Once allegations of this extremely serious nature had been made and formally lodged in accordance with the process laid down by the Court, IHAT and the MoD were obliged to consider how most effectively to manage, investigate and deal with them.

So far as the MoD and the judicial reviews are concerned, the central focus of the litigation has throughout been designed to clarify and contain the applicable legal principles specifically in order to control and contain the scope of the asserted duties to investigate; and (on a separate aspect) to preserve so far as possible important operational powers (eg of detention and to transfer detainees to allies). That has largely succeeded (see the recent Supreme Court cases in Al Waheed and Serdah Mohammed). The MoD has consistently resisted attempts by claimants for more wide-ranging and elaborate inquiries; and has taken as strong a line as legally possible to the scope and extent of any inquiries that it has needed to instigate. Further steps, including the use of derogation, remain under active consideration in relation to future operations of this kind.

As soon as it became apparent that there was an issue about the propriety of the conduct of some of the claimants’ lawyers, the MoD provided evidence to the SRA. To date that has led to the SDT’s decision to strike off Mr Shiner. It was of course for the SRA to rule on and to deal with those issues - the MoD reacted as swiftly as it was able to in taking the correct and appropriate steps to ensure that the SRA could consider those matters. Once the SRA had ruled on those matters, the MoD and IHAT again reacted swiftly. With that ruling, it was then possible for IHAT to take the robust approach it has to the claims it had received. Mr Justice Leggatt was informed appropriately.

We will continue to consider and develop measures that will further reduce the likelihood of claims being brought in the future. We confidently expect that the Courts will be well alive to the problems that have occurred and the need to guard against repetition in any future operations. But if they have to consider such issues in future, they will be the more willing to listen both because the reaction of the state in the context of Iraqi investigations was properly to raise and argue points, but then assiduously to abide by the law; and because they will be anxious to guard against the manipulation of the process by the sort of impropriety that has now been established.

4. While IHAT operated within constraints of the legal judgements set down by the courts, it failed to discriminate sufficiently between cases which were credible and cases which were not. The tools to do so are available to the MoD; IHAT must now use the rulings from Mr Justice Leggatt to dismiss claims based on poor evidence in an expeditious manner. (Paragraph 27)

On the contrary, IHAT has taken steps to discontinue investigations where there was no credible evidence of wrongdoing by UK forces. Indeed, recognising the lack of evidence
in many of the cases provided by PIL, IHAT proactively raised the issue with Mr Justice Leggatt and sought his direction on the matter. At the same time the Service Prosecuting Authority requested clarification as to the legal test which should be applied by IHAT to dispose of cases. This judgement was handed down in April 2016 and has been applied by IHAT since then.7

Similarly, when the Solicitors Disciplinary Tribunal exposed evidence of wrongdoing by Mr Shiner, the IHAT took immediate steps to evaluate the impact of this development on its caseload. The Director of IHAT concluded, with the advice of the DSP, that a large number of cases, whose credibility had been tainted by the Shiner revelations, could be closed. It is for this reason that IHAT’s caseload is expected to be down to around 20 investigations by the time it closes in the summer.

In its day-to-day investigative work, IHAT has consistently taken a proportionate approach to its caseload. IHAT disposed of a significant number of allegations either before investigation or with minimal investigative work; indeed, nearly 70% of its caseload of 3,392 allegations had been disposed of without the need to interview serving personnel or veterans.

5. **The Secretary of State should explain why this change of policy [on appearances by serving members of the Armed Forces before the Committee] has been introduced.** (Paragraph 32)

There has been no change of policy. The Department continues to follow the guidance “Giving Evidence to Select Committees” issued by the Cabinet Office. The guidance is based on the general principle that evidence is given by departmental employees “not in a personal capacity, but as representatives of their Ministers” as it is Ministers who are accountable to Parliament for the evidence given to Parliamentary Committees.

6. **It is disappointing that we were unable to hear the testimony of individual service personnel during this inquiry. Our predecessor Committees have benefited from personal experience of members of the armed forces, service families and MoD employees through written evidence, oral evidence and through an on-line survey.** (Paragraph 35)

Previous Committees’ inquiries obtained personal evidence from Service personnel and their families through Parliament web fora, including online questionnaires. The information obtained may have assisted the scrutiny of the MoD’s performance in providing a service to the Armed Forces and their families, for example, Service children’s education and Defence medical services. These are not comparable to a Committee selecting individuals to give evidence, some of whom may be involved in current criminal legal proceedings. The risks to all involved in the latter example are plain, not least because suspects might provide information on current legal proceedings and possibly prejudice their case, undermine ongoing investigations, or include information about an incident that relates to operational sensitivities.

7. **We invite the Secretary of State to discuss with us how the distinction between individual welfare matters and policy matters can be managed so that we can benefit from the personal perspective of soldiers without undermining the MoD’s legitimate**
concerns over who may give evidence on Government policy. The MoD will be aware that its refusal could appear to be an attempt to suppress criticism of its failures of duty of care by serving personnel. (Paragraph 36)

There has been no attempt to suppress criticism, as explained in the response to Recommendations 5 and 6 above, nor do we accept that there has been any systemic breach of our duty of care in this respect.

8. **We recommend that the MoD establish an independent body within the MoD—with active Ministerial oversight—to investigate the level and nature of complaints of individuals subject to IHAT. That body should seek to engage with all those who have been involved in the IHAT process, either as a witness or as a suspect. Furthermore, we will expect the MoD to publish the results of such review.** (Paragraph 39)

The MoD has previously identified the process to complain about the conduct of Service Police investigation as an area for improvement. Progress is being made to establish an interim arrangement to provide for the independent oversight of those complaints against the Service Police which fall outside the scope of Service Complaints. It is expected that this work will result in the public appointment of a suitably qualified person who will fulfil an investigative function for those complainants who are not satisfied with the outcome of complaints handled within the existing framework or those who are not included within that framework. Whilst this appointment will not have a statutory basis, each of the single Service Police Provost Marshals have agreed that they will consider, under an agreed policy, any recommendations made by the independent person following review of a complaint. The detailed terms of reference for this appointment are now being drafted and the recruitment criteria are being drawn up. We are aiming to have this interim arrangement in place and operational by mid-2017.

Our long-term aim is that all complaints against the Service Police are placed under a single oversight mechanism. We are working with the Home Office to explore how this could be implemented, noting that it will require legislative change.

Given this ongoing work, the recommendation above is rejected.

9. **The IHAT process has now been running for seven years. By the time it has finished the cost to the taxpayer will be in the region of £60 million. A significant number of cases have still to be resolved and as yet, not a single conviction has been made. While the cost to the taxpayer is significant, the psychological and actual cost to individual soldiers is arguably greater. Their lives have been put on hold and their careers damaged, sometimes for years, because of allegations made against them—in many cases without any credible supporting evidence. The effects of this on the British military are profound and enduring.** (Paragraph 40)

Please see paragraph 15 above. Judging the success or otherwise of IHAT by the number of convictions secured by the SPA to date is misplaced, but also overlooks the fact that some very serious allegations remain and continue to be investigated. This recommendation also fails to reflect that nearly 70% of the allegations were disposed of without interviewing soldiers and that soldiers were interviewed in only 15 of the investigations which have been closed.
The MoD is second to none in its condemnation of the unfounded allegations which have led to this massive expenditure and the significant strain that these investigations have placed on Service personnel and veterans. But as the Committee recognises, Parliament has determined that it is necessary and right that credible allegations of criminal behaviour by our Armed Forces are investigated. The MoD takes its responsibility to support those facing investigation very seriously, continually reviews its policies and makes improvements as necessary. The Report itself recognises the progress that has been made in this area.

10. The UK military is clear that anyone from within its ranks who breaks the law must be prosecuted. A failure to do so would undermine the UK’s ability to conduct operations whilst at the same time upholding the rule of law. But despite massive expenditure, over seven years now, IHAT has failed to achieve even this. This is the greatest indictment of the organisation in its present form. (Paragraph 41)

Please see paragraph 15 and response to Recommendation 9 above.

11. IHAT has lost the confidence of service personnel, this Committee and the wider public. Furthermore, it is continually eroding the bonds of trust between those who serve, and their civilian masters. The MoD must direct that IHAT expedites its assessment of the remaining cases. As soon as the number of outstanding cases is reduced to the Secretary of State’s target of 60, IHAT must be closed with the cases transferred to the service police with the support of civilian police. (Paragraph 42)

This recommendation has been overtaken by events. IHAT will be wound up as a separate entity by the summer, with the remaining investigations being reabsorbed by the Service Police. See paragraphs 13 and 14 above for full details.

12. Despite assurances from Ministers in early 2016, the MoD has now acknowledged that between 300 and 350 potential witnesses and seven individuals under investigation, had been contacted without prior written notification. That it has happened at all indicates a lack of sufficient care for the individuals concerned. The first point of contact for a serviceman or woman, or a veteran should never be an unannounced approach by an IHAT employee, regardless of whether they are being treated as a witness or a suspect. We feel it is incumbent upon the MoD under its duty of care to ensure that in future, the first time serving personnel hear of their involvement with IHAT, either as a witness or as a suspect, it should be through their Commanding Officer. (Paragraph 56)

While the MoD understands the Committee’s concern, the reality is that the police (Service and civilian) need to have flexibility in investigating criminal allegations. There are well understood procedures for treating witnesses and suspects differently. The MoD cannot dictate how witnesses and suspects are approached as this would undermine investigative independence.

In terms of witnesses, as opposed to suspects, IHAT did endeavour to make initial contact in writing wherever possible, but there were occasions when this was not practicable, either because of a lack of a confirmed address or for reasons of lack of time. This is consistent with the approach taken in civilian police and other Service Police investigations.

With regard to suspects, IHAT considers, on a case by case basis, the necessity and proportionality of arresting a suspect and whether or not to inform them in advance that
they are to be interviewed after caution, against the circumstances of the suspect, the nature of the offence and the needs of the investigation. IHAT takes into account factors such as whether there is likely to be collusion or contact with other suspects in the same investigation, and the most effective way to manage multiple and concurrent interviews relating to the same offence. This may mean that it is not acceptable to provide advance warning. Again, this is accepted practice for UK police forces, both Service and civilian, where this is judged necessary to ensure an effective investigation.

If the MoD were to seek to dictate police practice on these matters, it could be guilty of improper interference and breach of operational independence.

13. It is deeply disturbing that instances of malpractice by contractors working for IHAT have emerged. The use of intimidatory tactics including an example of a contractor falsely claiming to be a policeman, and the contacting of family members of service personnel without prior notice or explanation, are completely unacceptable. The actions of contractors are the responsibility of IHAT management. We conclude that they have failed in this duty. (Paragraph 60)

The Government unequivocally condemns the false claim by a contractor to be a policeman. Prompt action was taken by IHAT management as soon as the incident came to its notice and the person was promptly removed from post and subsequently convicted in a Magistrates’ Court for impersonating a police officer. Any suggestion of widespread malpractice by IHAT contractors, who have extensive experience of working in UK police forces, is not supported by evidence.

14. We believe that the actions of the IHAT investigators, and the way some have approached inquiries demonstrates a ‘civilian mind-set’ which lacks a sufficient appreciation of the environment of operations. A detailed understanding of the scenarios in post-conflict Iraq, for example, would have been of far more use to IHAT investigations. We believe that service police officers have a unique understanding of the operational environment for investigations of historic allegations. To ensure wider confidence of such investigations, we recommend that the IHAT caseload be transferred to the service police, with the support of civilian police, as soon as possible. (Paragraph 65)

The Secretary of State announced on 10 February 2017 that IHAT’s remaining caseload would be reabsorbed by the Service Police by the summer of 2017.

That said, the criticism that IHAT investigations were characterised by a “civilian mind-set” is not accepted. Paragraphs 3–5 above set out the specific circumstances and reasons as to why IHAT investigations could not be carried out by Service Police alone and had to be supported by civilian investigators who were all ex-police officers or civilian police staff. Furthermore, the evidence given by Mark Warwick and Commander Jack Hawkins to the Committee, made clear that the position of the Courts is that it is not possible for the RMP to undertake these investigations without compromising the perception of investigative independence.8

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8 Defence Sub-Committee. Oral evidence of Commander Jack Hawkins RN, Deputy Head IHAT and Mark Warwick, Director IHAT. Q327.
With no other option but to investigate using the resources at their disposal, the Director of IHAT and its senior Service Police personnel did make efforts to ensure that contracted personnel had an understanding of the complexities of the environment in post-conflict Iraq.

15. **Civilian contractors should only be used in exceptional circumstances. Where they are required, their numbers should be kept to a minimum. Any such employment must be preceded by extensive training on the unique circumstances of military operations and their impact on servicemen and women. The MoD must address this as a matter of urgency. (Paragraph 66)**

Please see the response to Recommendation 14 above.

These were exceptional circumstances, and the use of civilian contractors was closely linked to the Court’s rulings on the perception of independence.

IHAT’s remaining investigations will be taken forward by the Service Police, supported by a small number of contractors who will perform back room functions only and will have no contact with UK suspects or witnesses. However, this limited level of contractor support is necessary to ensure that the Service Police has the specialist support it needs and to enable the remaining investigations to be completed as quickly as possible.

16. **We are deeply concerned about the use of covert surveillance by IHAT. Notwithstanding the assurances given that it would be used only in the most serious of cases, the questionable conduct of some external investigators means that this is a cause for serious concern. The Department cannot interfere in the direction of investigations, but it must provide detailed scrutiny of the exercise of these powers, and their use should be justified directly to MoD Ministers. That Ministers appeared either unaware or unwilling to address this aspect of IHAT’s investigation is unacceptable. (Paragraph 70)**

This criticism misunderstands the applicable legislative framework and appropriate role of Ministers. The exercise of such powers by any public body, including the Service Police and, as such, IHAT, is only permissible to the extent set out in legislation passed by Parliament and is subject to audit by the Office of the Surveillance Commissioners, a non-departmental public body responsible for the monitoring of surveillance activity. They are best placed to ensure that these powers, if used at all, are used appropriately. The MoD is confident that this mechanism would provide robust and sufficient oversight of any use of such powers.

17. **For three years the MoD paid an individual to work for IHAT while he was in the employment of Public Interest Lawyers. Although the MoD told us that it had stopped payments when it became aware of this, the fact that it continued for such a lengthy period of time represents a serious failing for which the MoD must take responsibility. We ask the MoD for a detailed explanation of what pre-employment checks were made on the individual and how this conflict of interest was able to continue unnoticed for so long. (Paragraph 75)**

The decision by IHAT to use this individual was taken in the face of significant pressure from the Court to progress investigations as quickly and effectively as possible, including interviewing Iraqi witnesses and complainants. This was important not least to establish...
whether complaints were credible. Bringing the witnesses to the UK for interview has been explored, but was not practicable. Interviewing witnesses on the ground in Iraq was not possible and so the overseas programme to interview Iraqi complainants in third countries, known as Op MENSA, was pivotal.

The role of the individual in question included tracing and securing the attendance of named witnesses for interview (either face-to-face or by video link).

When IHAT first engaged the services of this individual neither IHAT nor the MoD was aware of the financial arrangements he had made with PIL. These were subsequently exposed by the press in the course of their investigations into PIL's activities, although even at that stage the MoD had no direct evidence to support the claims. Nevertheless, Ministers directed that there should be no payments to any individual who might be in a conflict of interest. Alternative arrangements were therefore made, with some difficulty, to establish and maintain contact with the Iraqi witnesses in question.

18. The interviewing of alleged victims and witnesses in third countries was not prescribed by the court. Rather it was the result of IHAT's interpretation of the court ruling. To date it has cost nearly £4 million, which included payment of the costs of PIL representatives. However, the MoD was unable quantify the total amount paid to PIL. We are deeply concerned that the MoD has used public funds to cover the costs of those who were bringing spurious and unassessed cases against former and serving personnel. (Paragraph 80)

Please see response to Recommendation 17 above as to the importance the Court placed upon interviewing Iraqi complainants and witnesses, why witness interviews could not be carried out in Iraq, and why Op MENSA was therefore essential.

As has previously been explained to the Committee, the payments to PIL were prescribed by the Court following a Consent Order in February 2014. That Order determined that one PIL representative was entitled to attend witness interviews as a witness supporter, and that they should be paid for doing so.

19. We appreciate that, on occasion, the MoD may be advised to settle some cases without interviewing relevant individuals. However, the practice has gone too far. This approach can imply that someone is culpable without that person having had the opportunity to respond to the charge. We recommend that, before such payments are authorised, the individuals concerned are fully appraised of the claims and the reasons for the MoD's course of action. (Paragraph 82)

We are not aware of any case which has been settled which gives rise to a presumption that MoD accepts wrongdoing by an identifiable member of staff, except where it has clear evidence that such wrongdoing has occurred. The MoD makes these decisions on the balance of the available evidence, taking into account the risks in pursuing claims to trial and will look to settle in cases which would otherwise involve lengthy and costly legal proceedings. Settlement in such cases spares an individual from involvement in a case that may take years to conclude. Claims are brought against the Secretary of State for Defence and settlements are often agreed without admission of liability, meaning that there can be no implied culpability on the part of any particular individual.

9 Question 9 of the MoD's Response to HCDC Questions dated 12 December 2016
20. The admission that training material for interrogations contained information which could have placed service personnel outside of domestic or international law represents a failing of the highest order. We expect the MoD to confirm that no cases under consideration by IHAT are based on the actions of individuals who were following that flawed guidance. If there are, we ask the MoD to set out how it will support individuals who are subject to claims arising from actions which their training advised was lawful. (Paragraph 86)

The report of the Baha Mousa Inquiry, which was accepted virtually in full by the Government, set out in detail the inadequacies of the training provided for interrogators in the field. While this would a be matter for the Service Prosecuting Authority, in this case it is difficult to conceive of the circumstances in which an interrogator would be convicted if he or she were to show that the action in question was required or authorised by the training that he or she had received.

21. We are deeply concerned that the MoD’s package of support for service personnel appears to be fragmented, inaccessible and largely unknown. The MoD must, as a priority, devise and publish a single, accessible framework which sets out the MoD’s responsibilities and the support soldiers and veterans can expect to receive. That framework must be widely publicised and understood throughout the chain of command. (Paragraph 95)

The MoD accepts the Committee’s view that there has previously been a lack of clarity about the support package offered to Service personnel and veterans, and has already taken steps to address this. The Army Personnel Services Group has written to all Commanding Officers to ensure that there is an improved understanding of the package of support that is offered to both serving personnel and veterans. This included information on the background to IHAT’s investigations, the welfare and legal support available and the responsibility of Commanding Officers. Additionally, support for veterans who are subject to investigations has also been referenced in ‘Veterans Key Facts’, a document which outlines government support for veterans and the services that they are entitled to. This has been distributed to all MPs and will also be promoted through the Armed Forces Covenant microsite and gov.uk.

22. We welcome the Secretary of State’s announcement that the MoD will now meet the legal costs of soldiers being investigated by IHAT. If it comes to light that soldiers and veterans have already paid out legal expenses we recommend that the MoD commits to reimburse them. (Paragraph 100)

The Government confirms that it will meet any legal expenses necessarily incurred in their defence by members of the Armed Forces and veterans who are investigated as suspects over allegations arising out of operations in Iraq, or indeed Afghanistan or Northern Ireland.

23. At present, the MoD’s decision to grant legal aid rests on whether or not an individual was “on duty” or not at the time of the alleged offence. We believe that this distinction requires greater clarity. We recommend that any alleged offence committed on a named and defined operation—for example Op TELIC—should come within the definition of ‘on duty’. (Paragraph 101)
The new policy is clear. The MoD is committed to standing behind its people who act reasonably and in good faith in the course of their duties or work related activities. Those who served on Op Telic and Herrick and are suspected of a criminal offence arising from operations will not be means tested. They will not have to contribute to their legal costs.

24. Furthermore, we recommend that the MoD’s policy on legal aid be modified to ensure that no member of the armed forces has to pay out more for their legal aid than the cost of that representation. (Paragraph 102)

Service personnel/veterans not covered by the policy set out in the previous response, may be asked to make legal aid contributions. These are determined by means testing and are made at the outset if required. If these contributions exceed actual legal costs (which are finalised post-conviction) any such excess is refunded in full; applicants who are acquitted receive a full refund of contributions made, plus a small amount of interest. This is in line with the civilian Crown Court legal aid scheme.

25. We recommend that the MoD’s package of support should include an assurance that all service personnel should have access to, and representation by, legal professionals who are experienced in service law for either retrospective or future ongoing investigations. (Paragraph 105)

Service personnel supported by Armed Forces Criminal Legal Aid Authority (AFCLAA) have access to, and representation by, legal professionals experienced in Service law, including a large number with actual Service experience or Service family connections. This covers all those suspected of offences in Iraq or Afghanistan.

26. The IHAT experience has highlighted too many flaws in the manner in which investigations into historic allegations are conducted in the United Kingdom today. In the Annex to this Report we set out what we believe to be the key principles which should be adhered to in any future investigations. We look to the MoD to engage with these proposals when it considers future inquiries into the armed forces’ involvement in military conflicts. (Paragraph 106)

The Government agrees that the IHAT experience has helped to identify areas for improvement; in particular, it has already ensured better communication of the support available to serving personnel and veterans who are facing investigation. It welcomes the Committee’s proposals for key principles which should be adhered to in future investigations as an important contribution to thinking on this subject. Whilst some of these are not feasible for reasons set out elsewhere in our responses, others have already been implemented. We shall consider the proposals in full to determine a way forward for future investigations.

27. We welcome the Government’s intention to derogate from the European Convention on Human Rights under Article 15 of the Convention in the event of future conflicts. For clarity, we recommend that the Secretary of State—in conjunction with the Attorney General and the Chief of the Defence Staff—set out the conditions under which the United Kingdom could and would derogate from the European Convention

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10 For instance, the reasons why Service personnel under investigation cannot always be contacted first are set out in our response to Recommendation 12.

11 Not supplied by MoD
on Human Rights. The MoD must set out the action that has been taken by other participants in the Iraq war who are subject to the ECHR to derogate from any part of the Convention. (Paragraph 113)

The Government’s position on these questions is set out in the letter sent by the Secretary of State for Defence to the chair of the Joint Committee on Human Rights on 28 February 2017, which is undertaking an inquiry into this matter.

28. We further recommend that the Government sets out what amendments to the Human Rights Act would be necessary to ensure that any such derogation is both achievable and successful in protecting UK troops in future conflict from unnecessary widespread litigation. (Paragraph 114)

Where the Government assesses that the necessary conditions for derogation, as set out in article 15 of the ECHR are met, a designation order notifying the derogating measures and the reasons for adopting the derogation would be made by the Secretary of State in accordance with section 14(6) of the Human Rights Act 1998. Those measures would be listed in Schedule 3 to the Human Rights Act 1998.

29. We are not convinced that the International Criminal Court would commit to investigate such a large case load which is based, to a great extent on discredited evidence. While due process must be seen to be done, we recommend that the MoD presents a robust case to the ICC that the remaining cases would be disposed of more quickly and with no less rigour through service law rather than IHAT. (Paragraph 120)

The Government has made strong representations to the International Criminal Court (ICC), both before and since the confirmation of Mr Shiner’s wrongdoing, that it should recognise the integrity of the investigations which are being carried out by IHAT as the body entrusted with the investigatory task, and should therefore conclude that it should not and it cannot initiate investigations of its own. We have reinforced this message through a number of formal submissions to the Office of the Prosecutor (OTP) of the ICC and by regular meetings with OTP officials both in the UK and the Hague. We expect the ICC to announce its conclusion in due course.

The implication in the recommendation is that disposing of the remaining cases through Service law is an alternative to the role of IHAT is fundamentally mistaken: IHAT operates under Service law.

Conclusions

30. The United Kingdom ended its combat operations in Iraq in 2009. Eight years later, and some 14 years since the start of the conflict, a significant number of service personnel remain under investigation for alleged misconduct in that conflict. (Paragraph 121)

It is deeply regrettable that these investigations have gone on for so long. Much of the delay can be attributed to the relentless legal challenges mounted by PIL in relation to the independence and efficacy of these investigations and subsequently exacerbated by the large influx of cases brought by PIL in 2014–15. IHAT has made efforts to dispose of cases as quickly as possible, whilst satisfying the applicable legal requirements, proactively
seeking clarification from the Court and rapidly evaluating and responding to events such as the evidence of tainting which was confirmed during the SDT hearing against Mr Shiner. Those investigations which will remain are serious and credible.

That said, the situation which arose over the Iraq investigations is unacceptable and the Government will deliver its manifesto commitment to ensure that the Armed Forces operating overseas are not subject in future to persistent human rights claims that undermine their ability to do their job.

31. IHAT, the MoD-created vehicle for these investigations, has proved to be unfit for purpose. It has become a seemingly unstoppable self-perpetuating machine and one which has proved to be deaf to the concerns of the armed forces, blind to their needs, and profligate with its own resources. We look to the Secretary of State to set a firm and early date for the remainder of the investigations to be concluded, and for the residue of cases to be prosecuted by a replacement body which can command the confidence of the armed forces. (Paragraph 122)

The Government does not accept these criticisms of IHAT which has simply investigated the caseload that was put before it, either by law firms, the Government or the Armed Forces themselves. Sir David Calvert-Smith’s independent report confirmed the high quality of its leadership which was “strong” and “cohesive.” IHAT will close by the summer, not because it was failing in its job, but because revelations in the SDT’s hearing against Mr Shiner meant that the number of investigations in which there would be any prospect of conviction diminished very substantially. It is not for the Secretary of State to set a date by which the remaining investigations should be concluded.

32. A significant factor in this was the legal industry created around IHAT. That is now being dealt with by the SRA and Mr Shiner, the founder of PIL has now been struck off as a solicitor. The current Secretary of State is to be commended for his personal efforts in highlighting the conduct of law firms to the relevant authorities. However at the same time as it condemned those legal firms the MoD continued to authorise payments to them, including the use and payment of a middleman in Iraq who worked for both sides. Even if this was, as the MoD asserted, a contractual requirement, the failure to challenge the arrangement when those costs grew was a serious failing. Rightly or wrongly, it opened up to question the MoD’s commitment to supporting servicemen and women and veterans. (Paragraph 123)

Please see responses to Recommendations 17 and 18 above, as to why there was no alternative to making certain payments to agents and to PIL.

33. Of equal concern is the fact that former senior military personnel have questioned the culture of Whitehall and its attitude towards the military. Again, this points to a lack of genuine understanding around the human side of military matters in Whitehall. Ministers must address this as a matter of urgency. They must show leadership and ensure that the well-worn statement of “our people are our finest asset” is reflected in the policies and decisions that are made. (Paragraph 124)

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Please see the response to Recommendation 1, above. We are taking care to communicate to military personnel and veterans the steps we have taken to improve legal support and to communicate better our welfare support, to address PIL's conduct and, most importantly, to deliver the Manifesto commitment to “ensure our Armed Forces overseas are not subject to persistent human rights claims that undermine their ability to do their job”.

34. The MoD has made progress in its support for those under investigation. We welcome its recent announcements on funding legal aid for those under investigation, and the possibility of derogating from the ECHR in times of conflict. However, they are both works in progress. (Paragraph 125)

The MoD welcomes the Committee’s endorsement of these changes in policy. It confirms that the exemption that the means test applied to Service personnel and veterans who are defended under the Armed Forces Legal Aid Scheme will be waived for those who face accusations arising from operations in Iraq and Afghanistan is now fully in place. Similarly, the intention to derogate in appropriate circumstances is clear. Please see responses to Recommendations 27 and 28 above.

35. Our armed forces continue to strive to meet the highest standards of conduct. However, the perception of them on the International stage has undoubtedly been unfairly altered by this process, which in some respects has been self-inflicted. (Paragraph 126)

The revelations from the Baha Mousa Inquiry set the context for IHAT and the political and legal scrutiny around it. The small number of soldiers involved in such activities brought shame upon their Service, as the Secretary of State for Defence and leadership of the Army at the time emphasised. The Armed Forces undoubtedly strive to meet the highest standards of conduct but, as the Report itself recognises, credible allegations of criminal behaviour must be investigated. Any failure to do so would itself be extremely damaging to the reputation of the Armed Forces.

36. IHAT, and the subsequent explosion of so-called ‘lawfare’ in the United Kingdom has directly harmed the defence of our Nation. Unless the MoD learns the lessons of IHAT, the armed forces will be hindered in their ability to defend the Nation and the national interest. (Paragraph 127)

The MoD remains committed to ensuring that the Armed Forces operating overseas are not subject to persistent human rights claims that undermine their ability to do their job, and has already taken steps to deliver this. Please see response to Recommendation 26 above which sets out the MoD’s response to the Committee’s suggestions for lessons to be learnt for future investigations.

37. With the prospect of investigations into British deployments in Afghanistan and Northern Ireland, the Government must prove both in private, but especially in public that in adhering to the pursuit of justice and the rule of law, it does not lose sight of its moral responsibility and its commitment to the Armed Forces Covenant with those who have served. (Paragraph 128)

The Government wholeheartedly agrees with this conclusion. Please see response to Conclusion 33 above.
38. **There is a deep unfairness at the heart of the IHAT process and this is in danger of spilling over to other conflicts. Our Report offers the MoD an opportunity to reset the balance. (Paragraph 129)**

The MoD does not accept that there is such unfairness. Paragraphs 3–8 above, explain why IHAT had to be established, and why it had to be set up in the way that it was. These paragraphs also explain the high level of political and legal scrutiny to which IHAT has been subject. The fact that IHAT will now close in the summer is no reflection on IHAT or its conduct. But the approach taken by PIL and others has, as the Committee rightly notes, caused great anxiety to many members of the Armed Forces. As this response shows, the Government has already implemented many of the lessons learnt, and will continue to do so.