

Sexual offences committed by members of the Armed Forces: Is the service justice system fit for purpose?

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ABSTRACT

Recent policy reviews, academic research and high-profile media critiques have repeatedly emphasised the UK military as a hypermasculine culture, seemingly permissive of sexual violence, marked by high prevalence of sexual offences and an inadequate justice response. The service justice system (SJS) has been characterised by low conviction rates and poor treatment of victim-survivors of sexual offences, prompting recommendation that rape should be tried in the civilian criminal justice system (CJS) rather than SJS. Despite notable debate on this matter, the MOD ultimately rejected this recommendation in December 2021 and instead committed to implementing clear and meaningful change within the SJS response to sexual offences. In light of this decision, this paper interrogates available data about the current SJS response to sexual offending, and lessons that may be learnt from the civilian CJS, to highlight current obstacles to justice and outline areas in which further research and scrutiny is necessary.

KEYWORDS: Sexual Offences, Service Justice System, Criminal Justice System, UK Armed Forces.

INTRODUCTION

The extent of and response to sexual violence¹ in the United Kingdom (UK) Armed Forces has become the subject of considerable national debate and media coverage in recent years. Despite recent figures suggesting that over half of UK servicewomen have experienced some form of 'sexual trauma' during military service (Edwards and Wright, 2019), the military response continues to be characterised by poor conviction rates, unsatisfactory treatment of complainants, and negative consequences for those who make an official report (CMJ, 2021b).

The military remains a unique institution, boasting an independent 'service justice system' (SJS) that makes it somewhat incomparable to other institutional settings. The SJS sits largely outside the remit and scrutiny of the broader, civilian criminal justice system (CJS)². Although there is parity between the civilian and military justice systems, in that serious crimes (including rape) are subject to the same laws [Criminal Justice Act 2003] and follow similar stages of investigation, charging and prosecution, however there are notable differences in operation that will be discussed throughout this paper. Indeed, recent scrutiny has uncovered a range of issues in the SJS response to sexual offences, including low conviction rates, inaccurate recording of sexual offences, and failings in investigations by SJS prosecutors (Carson, 2020; Godier-McBard & Fossey, 2020; Newlan, 2019; Sheridan, 2021).

The Centre for Military Justice (CMJ), a charity that provides legal counsel and advocates for members of the Armed Forces and their families, has highlighted several case studies which point to concerning failures in the SJS. These cases have been characterised by substantial failings during the investigation and prosecution of sexual offences, victims being pressured into dropping charges, and victims being subjected to investigations of their own conduct. Case studies have equally highlighted servicewomen losing their military career as a result of the handling of these cases, thus indicating broader issues that sexual violence poses for the retention of Servicewomen and more importantly, the impact that such cases can have on the ability of personnel to confidently continue their service.

¹ The term sexual violence is used in the current paper to encapsulate all forms of non-consensual sexual acts, and subsumes more specific terms such as sexual assault, sexual harassment, and sexual offences.

² Though, some scrutiny does occur such as HMICFRS inspections of the service police, and the Attorney General's oversight service prosecuting authority.

As a result of public and political disquiet in this area, a comprehensive, independent review of the SJS was commissioned by Parliament in 2018, in anticipation of a new Armed Forces Act (Armed Forces Act, 2021). This review was conducted by retired senior Crown Court judge Shaun Lyons (2018: 2), to scrutinise whether the SJS remained a “necessary, fair and efficient” system for dealing with offences committed by military personnel. Findings of the review, however, condemned the SJS as ineffective, and highlighted concerns regarding inadequate protection for victim-survivors and a lack of public confidence in the SJS (Lyons, 2018). Lyons (2018) thereby recommended that rape cases (as well as murder and manslaughter) be dealt with in the civilian CJS rather than SJS, “except when the consent of the Attorney General is given” (Lyons, 2018: 3). Implementing this recommendation would bring the UK in line with other modern militaries, such as Australia, New Zealand and Canada³ (Lyons, 2018; Austen and Steinhauer, 2021).

The MOD however, rejected the Lyons’ recommendation in February 2020, on the basis the SJS is “capable of dealing with the most serious offences and should be able to continue to do so” (Sabbagh, 2021). This decision prompted high-profile campaigning, including judicial review being sought by the CMJ on behalf of three female victim-survivors of sexual offences who had their cases heard in the SJS, with none receiving convictions (Sabbagh, 2020b). Following their efforts, the defence secretary stated in June 2020 that “fresh consideration” would be given to Lyons’ recommendation (Sabbagh, 2020a). In July 2021 however, Henriques’ (2021) inquiry into the SJS concluded that MMR cases be kept within the military jurisdiction, highlighting that many of these cases occur outside the UK jurisdiction thereby seemingly favouring this approach for practicality and jurisdictional purposes. Later, following an inquiry which heard 4,200 serving and ex-servicewomen’s experiences of serving in the armed forces, a final Parliamentary decision in December 2021 ruled that cases of rape and sexual offences would continue to be heard in military courts (HC Deb 09 Dec 2021).

Whilst this decision attracted notable backlash (Victim’s Commissioner, 2021; CMJ, 2021c), we make it clear that having now made such a decision, this *must* provoke a commitment to clear and meaningful change within the SJS response to sexual offences. The current article thereby scrutinises available literature regarding the SJS response to sexual offences, highlighting potential areas of good practice alongside distinct shortcomings and areas for improvement. Importantly, we must caveat our critiques

³ There remain notable distinctions between systems, which are beyond the scope of this paper.

with the acknowledgement that some positive steps have already been taken by MOD (outlined throughout the paper), and seemingly illustrate recognition and commitment to effectuate change. However, we maintain that numerous obstacles to justice remain, and therefore scrutinise current procedure alongside distinct cultural issues that potentially exacerbate already well-proven challenges associated with the process of reporting, investigating, and trying sexual offences. In doing so, we draw on available evidence about the civilian CJS response to sexual offences, alongside wider consideration of specific military cultures, broader institutional cultures, and equally potential institutional failure outcomes.

SEXUAL OFFENCES IN THE UK MILITARY

The scale of the challenge: A pervasive sexualised culture within the UK military is illustrated by MOD statistics examining so-called 'inappropriate sexual behaviours in-service'. These reports suggest that the majority of Service Personnel (up to 99%) have experienced some form of generalised sexual behaviours, such as sexual jokes, language or obscene gestures, whether personally or directed at another, in the past 12 months (Markson, 2018; Ministry of Defence, 2015; Rutherford, Schneider, & Walmsley, 2006). The degree to which this behaviour was considered offensive varied by study, act (e.g. jokes, language, materialism, and gestures/body language) and gender; with servicewomen generally more likely to find this behaviour offensive (ranging from 27%-52%) than servicemen (ranging from 9%-18%) (Rutherford et al. 2006)

The 2021 Speak Out Army Sexual Harassment (MOD, 2021) survey revealed that 37% of servicewomen reported unwelcome sexual comments, 13% were exposed to sexually explicit material and 31% unwelcome attempts to discuss sexual topics. Further, the House of Commons Defence Committee (2021) found that 62% of surveyed female service and ex-service personnel, reported experiencing some type of bullying, discrimination, or harassment during their service, again suggesting a high prevalence of sexual harassment in this context. When compared to the civilian context, in which it is estimated that 30% of women experience sexual harassment at work (Adams *et al.* 2020) (though no direct comparison data is currently available), these figures seemingly exemplifying the scale of the issue. Ultimately, this has potential negative implications for gender equality within the Armed Forces as Servicewomen are significantly overrepresented in the SJS, making up 76% of victims of sexual offences (MOD, 2021), despite being a significant minority in the UK Armed Forces (11%; MOD, 2020).

Meanwhile, perhaps more concerning, of those who reported a “particularly upsetting experience” (35% of servicewomen) in Speak Out (2021), 60% reported unwelcome sexual comments, 11% sexual touching without consent⁴, 6% “serious” sexual assault, and 4% rape. Yet, official statistics likely remain lower than those revealed in self-report surveys (Godier and Fossey, 2018; Rough & Armor, 2017), with the literature suggesting that fear of negative repercussions for their career, fear of being blamed or labelled a troublemaker, and a lack of trust in the formal complaints process, all deter reporting (Harris Interactive, 2015; British Army, 2015; 2018; Rutherford et al. 2006). As such, it is difficult to determine the true extent of sexual violence in the Armed Forces, which may impact on the MOD response.

Considering sexual assault⁵ specifically, survey data shows concerning levels of prevalence, with 1.2% of Army service personnel (2021), 2% of Royal Navy/Royal Marines service personnel (2015), and 3.2% of female (tri)service personnel (2006) having experienced sexual assault in the last 12 months (Rutherford et al., 2006; MOD 2015; MOD, 2021). These statistics are comparable to the civilian population, with 1.8% of adults aged 16-74 in England and Wales reporting having experienced sexual assault in the past 12 months (CSEW, 2021). Yet, it is crucial to note that whilst only 6% of Army servicewomen reported “serious” sexual assault in 2021, 11% reported intentional unwanted sexual touching, which does amount to sexual assault under the Sexual Offences Act (2003). Researchers should thus be aware of the impact of service personnel’s understanding of what constitutes sexual assault when they are interpreting sexual offences data.

Whilst the impact of sexual violence on UK service personnel is under-researched, US literature shows that in-service ‘military sexual trauma’ negatively impacts of mental health, with increased depression, anxiety and post-traumatic stress disorder (PTSD) symptomology, increased likelihood of substance misuse and sleep problems (Stander & Thomsen, 2016; Turchik & Wilson, 2010). Godier and Fossey (2018) highlight that the proximity of working, living, and socialising in a military environment means that those who experience sexual violence are potentially more likely to be exposed to the perpetrator than in a civilian workplace. Self-report survey data has also shown the negative impact of sexual violence on service personnel’s experience of the workplace environment (Markson, 2018; Ministry of Defence, 2015).

⁴ Which is sexual assault under the SOA (2003).

⁵ Though there is an absence of clear definitions of sexual assault, in each of these MOD reports.

Positively, substantial efforts have been made over the past year to tackle the prevalence of these unacceptable sexual behaviours. A defence-wide strategy to tackle sexual offending has been implemented, as has a zero-tolerance approach, provoking mandatory discharge of personnel convicted of a sexual offence (MOD, 2022a). Whilst inevitably a positive recognition of the unacceptability of sexual offences in the military, and perhaps a clear deterrent for offenders, it must be noted that given the distinctly low conviction rates we observe in the SJS (discussed later), the impact of this zero-tolerance approach may be limited without concurrent improvements of SJS processes and outcomes. Moreover, given the high prevalence figures of sexual offending, cultural change beyond policy and procedure is seemingly necessary to adequately respond to the scale of these issues.

Military Culture: The military institution represents a unique culture, with its own values and standards and its own health, social care, education, and legal systems. These systems, as well as the basic training that each recruit will go through, are designed to maintain operational readiness and a strict hierarchy (Turchik & Wilson, 2010). Academics in the UK and internationally have identified several ways in which the military culture may be permissive of sexual violence. The value placed on obedience to the chain of command, strong group cohesion, deindividualization, and protection of the military institution, has the potential to cultivate shared normative values around sexual and gendered beliefs that may be permissive or tolerant of sexual violence, and protective of the perpetrators within their ranks (Hunter 2007; Morris, 1996). This presents a challenge for both reporting sexual violence, and the success of intervention/prevention strategies implemented by military organisations (Godier and Fossey, 2018).

Furthermore, the male-dominated nature of the military environment has often been described as hypermasculine, in which stereotypically masculine characteristics (e.g., strength, courage) are privileged over those portrayed as feminine (e.g., emotionality, caring). This represents a clear example of hegemonic masculinity, in which men's dominant position in society is reinforced, via a hegemonic hypermasculine ideal, resulting in the undervaluation, marginalization, and subordination of those that do not fit this ideal (often women) (Connell & Messerschmidt, 2005). This was evidenced recently by a MOD report, in which qualitative interviews with service personnel and civil servants revealed a 'White Male Prototype', characterized by 'alpha male traits', perceived to be pervasive across UK Defence (Defence Human Capability Science & Technology Centre, 2020).

This type of hypermasculine culture has been associated with sexual aggression (Murnen, Wright, & Kaluzny, 2002), and increased prevalence of sexual violence (Trade Union Congress, 2016). UK and U.S evidence has shown that masculinised, male-dominated occupations such as the military, have increased rates of sexual violence compared to the civilian context (Nawrockyi et al., 2014; Trade Union Congress, 2016; Stander & Thomsen, 2016). Furthermore, the heavy drinking culture presents a further potential risk factor for sexual violence (MOD, 2019; Stander & Thomsen, 2016), and over half of military sexual assault cases in US research involved alcohol use (Turchik & Wilson, 2010). Similarly, evidence shows that the UK Armed Forces remains permissive of sexualized banter on the basis it is necessary for building camaraderie and close bonds (Caddick, Smith, & Phoenix, 2015; Rutherford et al. 2006). In turn, UK servicewomen have reported sustained sexual harassment masked as 'banter', and some servicemen resistant to drawing boundaries around what is considered appropriate or inappropriate banter (Defence Human Capability Science & Technology Centre, 2020).

These factors combined highlight an environment in which risk factors for sexual violence are evident, and circumstances permissive or tolerant of sexual violence. It is important to note that the MOD have implemented numerous recent policies, in attempts to tackle unacceptable behaviors in service (MOD, 2022b), however MOD (2021) statistics remain clear that sexual offending continues to be a pervasive issue in the UK military. Further, independent evaluation of the most recent policy changes is imperative, as is the necessity to ensure that processes and policies to police this behavior are fit for purpose.

THE LEGITIMACY OF THE SERVICE JUSTICE SYSTEM?

Given the extensive research highlighting the hypermasculine culture of the UK armed forces which is potentially permissive of sexual violence (Wigston, 2019; Defence Human Capability Science & Technology Centre, 2020), we must ask whether a justice system rooted within this wider institutional context can legitimately and appropriately respond to cases of sexual violence. To answer this question, we scrutinise both the historical foundations, current practices, and operation of the SJS pathway.

Military law in the UK has undergone a series of legislative reforms over the years, reflective of paradigmatic shifts and tensions that have occurred throughout history regarding the autonomy, scope, and legitimacy of a SJS in relation to the civilian CJS. One of the primary purposes of military justice has always been to punish misconduct that could undermine discipline in the armed forces (Liivoja

2014), with the justification for a separate justice system rooted in arguments of expediency (Williamson, n.d., Liivoja 2014) and to prosecute offences outside the jurisdiction of civilian authorities (e.g. mutiny, desertion). There is also some argument that unique differences in military life mean civilian juries are perhaps less equipped to make judgements upon these cases (Liivoja 2014).

Between the mid-nineteenth to mid-twentieth centuries, military law in the UK experienced a period of significant autonomy from the civilian CJS (Rubin 2002). However, in the post-war era, accelerating in the 1960s, Rubin (2002) argues that military law was influenced by increasing ‘civilianisation’ of its laws and processes, whereby military legal autonomy was superseded by civilian supremacy and increasing influence of civilian and international laws. The increasing influence, especially of international laws, such as those relating to human rights (OSCE/ODIHR, DCAF 2021), have introduced paradigmatic conflict, and competing values within a military justice system underpinned by a military ethos that has traditionally prized duty over rights and the ‘collective good’ over those of the individual (Rubin 2002).

However, in a move that could be seen as contrary to the purported shift away from military autonomy, the Armed Forces Act (2006) allowed for the SJS to expand its jurisdiction, to deal with serious offences such as murder, manslaughter, and rape. Whilst this was originally only intended to be used in rare circumstances (Lyons, 2018), in practice it has now become normal for the SJS to try rape cases⁶. It is our assertion, that the current SJS response to sexual offences and wider military culture, can seemingly exacerbate and compound issues observed in the civilian CJS. However, whilst the MOD have declared it a matter of priority to “make the system fairer and more effective” (HC Deb, 2021 22 July), there remain paucities of empirical research and understanding about current obstacles and shortcomings. As such, we will now draw on available evidence from the civilian CJS, in conjunction with the limited evidence on the UK SJS response, to situate our analysis and identify key areas of contention and areas requiring further investigation.

REPORTING A SEXUAL OFFENCE IN THE SJS

The first stage of the justice process is reporting, which also acts as greatest stage of attrition in both the SJS and civilian CJS (CSEW, 2021; British Army, 2015; Rutherford et al. 2006). Ordinarily, formal, and informal complaints of any nature in the military, should be reported to the chain of command, who

⁶ Murder and manslaughter committed in the UK tend to be referred to civilian authorities.

will then refer criminal cases to the police, or manage non-criminal cases in-house (Parliament, 2021). However, in December 2021, following a landmark Parliamentary inquiry into the SJS response to sexual offences, the MOD announced that all cases of a sexual nature will now be dealt with outside of the direct chain of command, to ensure greater impartiality and accountability (House of Commons Defence Committee, 2021). This represents a promising step forward towards greater objectivity and independence in the investigation and handling of sexual offences. However, notably whilst this obligation exists, a recent HMICFRS Report (2022) remarked that the army does not currently have a mechanism in place to ensure that this happens in practice.

Nevertheless, whilst investigation has moved outside the chain of command, victim-survivors continue to have a choice of who to report to: either a Commanding Officer, the Service Police, or a civilian police force, as stated in the MOD Policy document: JSP 839 (2015 pg. Appendix 2). If reported to the Commanding Officer, for most sexual offences (except sexual activity in a public lavatory), these are regarded as a schedule 2 offence (Armed Forces Act 2006) and the Commanding Officer has a legal duty to inform the Service Police as soon as reasonably practical.

Guidance on these different avenues of reporting is outlined in MOD leaflets provided to victim-survivors. However in practice, research suggests that most female victim-survivors remain unaware that they can choose a civilian justice route (Norton as cited by Proctor 2021), despite protocol dictating that investigators should inform victim-survivors about the civilian justice avenue. Reasons for this are unclear and may be related to the adequacy, accuracy or timeliness of the information offered to victims. Moreover, the extent to which victim-survivors are informed of the benefits, drawbacks, variations in process and conviction rates for each route is also unknown. Given the notable differences between each, it is essential that victim-survivors are aware of how their case may progress via each route, to ensure a fully informed decision is made by the victim-survivor.

Barriers to Reporting: Alongside procedural queries regarding the process of reporting a sexual offence in the SJS, numerous practical obstacles have been identified. Research in the civilian CJS has tended to be more extensive than that examining the SJS, and suggests that only around 16% of rape victims report their victimisation to the police (Office for National Statistics, 2021). Reasons for under-reporting are diverse, however common reasons include fear of not being believed and an apprehension that procedural justice or success in court would not be achieved (Molina & Poppleton, 2020).

Similarly in the military context, despite limited research on this tri-service, army statistics have shown that formal reporting of sexual offences remains extremely low at just 5% (Rutherford et al. 2006; British Army, 2015). Further research is vital to comprehensively understand barriers to reporting, however existing evidence has highlighted comparable barriers to those cited in the civilian context, including fear of not being believed or of being blamed (Woodhead, 2013; Edwards and Wright, 2019), as well as compounded military-specific barriers (Godier-McBard, Gillin and Fossey, 2021). For example, not wanting to harm one's career, not wanting to break the so-called 'warrior-code,' lower morale, bring the service into disrepute, or fuel arguments surrounding female unsuitability for the job (Bourke, 2021). Indeed, UK service personnel report a perception of formal complaints processes as being protective of the accused, particularly where they were senior military personnel (Defence Human Capability Science & Technology Centre, 2020).

For those who wish to make a report against a line manager or senior ranking superior in their chain of command, a clear power differential emerges, alongside fears that the MOD will close ranks to 'protect their own' and having to continue to work alongside (or be line managed by) the accused (Defence Human Capability Science & Technology Centre, 2020). Furthermore, for those in minority groups (i.e., women and ethnic minorities) the military context may present an additional barrier, due to fear of others in the unit being able to deduce who the complainant might be, and a lack of senior representation or peer support (Defence Human Capability Science & Technology Centre, 2020). Indeed, recent research highlights a culture of covering up complaints and service personnel being pressurised by their chain of command to drop complaints or resolve issues informally, even when they may constitute criminal offences (House of Commons Defence Committee, 2021).

Taken together, these compounding factors result in a significant lack of trust amongst service personnel in the efficacy of the SJS (House of Commons Defence Committee, 2021), as a system which sits largely outside of public scrutiny and has attracted high profile critique in relation to its response to sexual offences. It seems, therefore, that an attitudinal change and greater degree of independence in the process is essential, alongside further research with victim-survivors themselves to understand factors which may influence their decision on how to report.

INVESTIGATIVE RESPONSIBILITY AND SERVICE POLICE INVOLVEMENT

Whilst reporting procedure appears relatively straightforward, the question of who should assume responsibility for *investigating* sexual offences once referred to the Service Police [either by the Commanding Officer or the victim themselves], is subject to variance. Indeed, where offences between military personnel are committed in the UK, the civilian police and service police hold concurrent jurisdiction meaning that either *could* take primacy for the investigation. Typically, it is assumed that whomever the victim initially reports to will lead the investigation, provided it is within jurisdiction and the force have the necessary resources. Yet, whilst this seems relatively straightforward, it again relies on victim-survivors being aware of the civilian route, which they are often not (Norton as cited by Proctor 2021). Moreover, findings from a recent process audit (Guinness 2018), found a lack of clarity on who should assume responsibility of these cases, setting out divergent guidance as to whether the SJS should retain jurisdiction (Prosecutors Protocol, 2016) or whether a flexible approach allowing civilian police jurisdiction (Home Office, 2008), should be favoured.

More recently, Murphy's (2020) review of the service police recommended that the *civilian* police should assume sole control of the most serious offences, including rape. The report cited 'areas of vulnerability' (Guinness 2018:128) within the Service Police, including concerns around consistency of approach/processes and lack of expertise, given the low volume of serious crimes amongst their typical workloads. Similarly, the CMJ have asserted that a lack of experience amongst Service Police - who are required to move roles every 2-3 years and only undertake simple CPD training rather than formal specialist police training – makes them inappropriate for sexual crime investigation (CMJ, 2021b).

Notably however, the recent review by HMICFRS (2022) exclaimed that service police investigations tend to be of a higher quality than many civilian police investigations, seemingly due to investigators having a lower caseload of offences. Whilst this does represent cause for optimism, the same HMICFRS (2022) report ultimately concluded that service police forces 'need to improve' their handling of sexual offences cases, finding that victim-survivors often feel unsupported and ostracised, whilst opportunities to make early arrests are often missed. Murphy (2020:34) suggested that the "service police do not investigate enough serious crime to be considered proficient", and that several investigations have not been carried out to a satisfactory standard. Moreover, numerous servicewomen shared stories to the

House of Commons Defence Committee (2021), highlighting procedural failures during investigation and inappropriate service police disclosure of case details to the victim-survivors' chain of command.

Positively, the MOD appear to be acting on these concerns, and announced the development of a tri-service 'Defence Serious Crime Unit' in October 2021, with the ambition to build an independent and more effective approach to policing across defence. This unit is expected to be operational by December 2022 and will promote multi-agency, collaborative working including development of a 'Victim and Witness Case Unit.' This is inevitably a positive recognition of current issues faced by victim-survivors of sexual offences in the SJS and reflects commitment and action to effectuate change. It is necessary now however, to await and observe the practical implementation and operation of this unit, to evaluate its efficacy.

PROSECUTIONS AND CONVICTIONS

Following investigation, the Service Police will either discontinue the charge if they consider that there is insufficient evidence or will refer onwards to the Service Prosecuting Authority to consider whether the case may be taken to Court Martial. In general, statistics from the last five years, reveal 61% of sexual offences investigations were referred to the Director of Service Prosecutions, and 48% of these resulted in a charge by the service prosecuting authority (MOD 2015-2020). For rape, these figures drop to 49% of those investigated being referred, and 44% being charged. Notably however, these figures do illustrate substantially higher prosecution rates than those seen in a civilian context, whereby rape prosecutions in the year ending September 2021 were just 1.3% (Home Office, 2022) and have been coined as the 'effective decriminalisation of rape' (End Violence Against Women Coalition, 2019). In this sense therefore, SJS data seemingly compares favourably to that of the civilian CJS.

Nevertheless, it is equally important to explore a third potential pathway of prosecutions. Whilst the investigation of sexual offences has been entirely removed from the chain of command in a positive step towards independence and impartiality, non-sexual offences may still be referred to the chain of command by the service police where deemed appropriate. However crucially, evidence suggests that some reported sexual assaults are being reclassified under the guise of a different offences, such as *22: Ill-treatment of subordinates* or *23: Disgraceful conduct of a cruel or indecent kind* [Armed Forces Act, 2006] (Guinness, 2018; Murphy, 2020), which carry lesser sentences and may be dealt with by the commanding officer. There are no published statistics to scrutinise the frequency with which this

happens, and therefore transparency and analysis of such figures is necessary to ascertain the extent of this issue. Without such data, understanding the scale of and response to reported sexual offences in the military remains difficult, as disciplinary offences and summary hearings are 'hidden from public view' (Grady 2016:7). Importantly however, if inappropriate reclassification of sexual offences to disciplinary offences is common, it risks diluting prevalence statistics and underestimating the scale of the problem. It also represents somewhat of a contradiction or paradox, as disciplinary offences are traditionally viewed as *additional* to those offered by the civilian CJS in a bid to hold service personnel to a higher standard, however, arguably this would represent a lessening of responsibility. It is important to caveat these remarks with the acknowledgment that the service police are subject to review by both internal police performance inspections and HMICFRS, which arguably should identify inappropriate reclassification as an issue if this were widespread. Nevertheless, further research scrutinising the extent to which sexual offences are being reclassified within the SJS, is imperative to comprehensively understand prevalence rates.

This is particularly concerning considering research that suggests military culture may cultivate an institution that is permissive or tolerant of sexual violence and protective of the perpetrators within their ranks (Hunter 2007; Morris, 1996), which can deter reporting due to fears of the military institution closing ranks to "protect" their own (Defence Human Capability Science & Technology Centre, 2020). Urgent research to understand the scale of this problem and to scrutinise how military culture may exacerbate these issues, is critical.

Court Martial: If the service prosecuting authority decide to charge, the court martial is the SJS equivalent of the civilian trial. It is presided over by a civilian judge who should ensure that the proceedings are conducted in a way which resembles a civilian trial (The Armed Forces (Court Martial) Rules 2009 R.26), however, several notable structural differences do exist.

For example, the court martial equivalent of a jury is known as a 'board' and is comprised of fewer 'lay members' (jurors) than the 12 required in a Crown Court. Boards consist of between three to six members, with six being used for the most serious cases. Meanwhile, Crown Court juries typically require a unanimous verdict, or failing that majority of 10-2 or 11-1, whereas boards are only required to reach a majority verdict. The Armed Forces Act (2021) recently changed this from a 'simple majority' to a 'qualified majority,' meaning that for example, a board of six must return a 5-1 majority. Given the

smaller number and proportion of board members required for a guilty verdict, court martials may be challenged as bearing a lower boundary for guilt than the civilian system. However notably, this is not reflected in conviction figures which are substantially lower than those observed in the civilian CJS.

Furthermore, board selection potentially poses additional challenges, with boards typically comprised of military personnel within the defendant's own service (JSP 830) and typically of senior rank to the defendant (Brooke-Holland 2021). The notion of trial by peers is not considered a right in the SJS, as it is in the civilian CJS. Instead, board members are drawn 'at random from the selected pool' (JSP 830: 11.) of senior military personnel, which is likely to draw a majority, if not a solely male board, given women's minority status in the armed forces (11.2f % at present (Harding, 2022)). This lack of representation arguably holds implications for sexual offences trials involving female victim-survivors (Sheridan 2021) with research in the civilian CJS indicating that men are more likely to endorse rape supportive attitudes than women (Suarez and Gadalla, 2010). As such, a predominantly male board may be more likely to victim blame or excuse the conduct of the perpetrator. Positively, the House of Commons Defence Committee (2021-2) have begun to recognise this as an issue and have announced that they are "undertaking work to ensure female representation on court martial boards related to sexual offending," however the impact of this work remains to be seen.

In terms of trial narratives, research in the civilian CJS has repeatedly illustrated frequent and routine reliance on so-called rape myths and stereotypes at trial, which serve to attack the character and credibility of the complainant, whilst serving to excuse or trivialise the behaviour of the accused (Durham, Lawson, Lord, & Baird, 2016; Smith, 2018; Temkin, Gray, & Barrett, 2018). A lack of comparable evidence examining the content and dynamic of court martial trials, means this aspect of the SJS process remains largely unknown. However, it is likely that rape myths permeate court martial proceedings in much the same way as civilian trials. Indeed, US literature highlights the link between the military culture and the development of hypermasculine and intolerant belief systems, such as those underpinning rape myths and hostility towards women (Turchik & Wilson, 2010). US research has found that men at a military academy were less likely to interpret an incident as rape, more likely to suggest that an incident was mislabelled as rape, and more likely to report that women 'acquiesced' to sex, compared to male university students (Caroll & Clark, 2006). The frequent all male composition of court martial boards is likely to exacerbate these issues.

Conviction Rates: Finally, and perhaps most notably, scrutiny of conviction figures has arguably become the central focal point of critiques of the SJS response to sexual offences. Lyons (2018) cautioned against directly comparing statistics (of which only the data for 2015-2017 were available at the time his review was published) due to the small numbers involved. However, the additional three years' worth of data reported in this paper, ultimately continue to suggest consistently low levels of convictions for sexual offences, particularly rape, in the SJS.

Crucially, reports have suggested that military personnel are twice as likely than civilians to be cleared in trials of sexual offences (Sheridan, 2021), with a reported conviction rate of 42% for sexual offences, dropping to just 11% for rape specifically (of cases charged), over the 6-year period of 2015-2020 (Sabbagh, 2020). These convictions of rape reached as low of just 4% in 2017 (MOD, 2017). This compared to a conviction rate of 71.2% for rape in the civilian CJS, in the year ending September 2021⁷.

At face value, this reflects highly inadequate conviction patterns in the SJS response, when compared to the civilian CJS. However, a note of caution must be applied. For example, it is important to reflect on the 1.3% prosecution rate observed in the civilian CJS response, meaning only a distinct minority of cases reach trial. As such, whilst the 71.2% conviction figure may initially seem encouraging, in practice it only relates to very few reported cases of sexual offences. Moreover, when dissecting these statistics further, 2018 figures showed a 46% conviction rate for CJS rape cases (that reached trial), but this dropped to 32% where the defendant was aged between 18-24 (Topping, 2018). This trend is significant when comparing civilian CJS data to court martial proceedings, as MOD (2020) statistics revealed that 46% of service personnel suspected of sexual offences in 2020 were aged 25 and under, and 68% aged 30 or under. Thereby, comparison of conviction rates amongst a younger cohort, is perhaps more prudent and reflects comparable low conviction rates across both systems. Meanwhile, comparing conviction rates from initial report to conviction, rather than just those reach trial, it seems that the SJS actually boasts a favourable conviction rate of 8% compared to 2% in the civilian CJS (Henriques, 2021).

Markedly however, the lack of data and independent insight into the SJS means that the reasons behind poor conviction rates are unclear. No data is available to determine the levels of attrition that may occur

⁷ It is important to interpret this with caution, given the extremely low prosecution rates in the civilian CJS.

prior to investigation by the Service Police, due to both underreporting by victims and decisions not to investigate complaints. Such data and insight is imperative to implement meaningful change and counter these poor outcomes, given the recent rejection of Lyons (2018).

REFLECTIONS

The current paper has highlighted wide-ranging obstacles to justice within the SJS response to sexual offences, including unacceptably poor conviction rates, inadequate treatment of victim-survivors and a lack of clarity around SJS processes. Alongside many of the same issues that have been identified in the civilian CJS response, military specific compounded barriers are notable. For example, challenges associated with reporting, a lack of clear guidance about how sexual offences cases should be dealt with, and ultimately the underlying hypermasculine military culture which is seemingly permissive of many of the risk factors associated with sexual violence perpetration. Numerous examples of problematic practices in the SJS response have been apparent, including poor victim treatment leading to mental health difficulties, a loss of retention of servicewomen and most notably, a probable lack of meaningful justice, given low conviction rates.

It is perhaps therefore appropriate here, to draw parallels between military culture and other public sector institutions such as NHS Trusts (Francis 2013) and the Metropolitan Police (HoC 2021), for whom organisational culture is a major contributing factor to systematic issues. Poor institutional culture can result in poor outcomes via two sequential mechanisms – firstly by creating causal conditions and poor practices, and secondly through ineffective corrective mechanisms (Hald et al 2021), leading to a spiral of silencing, collective denial, and ultimately, institutional failure (Hendy and Tucker 2020). One way to potentially correct these problematic outcomes – in this instance, low conviction rates and poor treatment of victim-survivors of sexual offences – is to ensure outside scrutiny, independent of the influence of military/institutional culture. This should not only scrutinize the policies and procedures that have been put in place, but importantly the application of these and lived experiences of service personnel involved. Implementation of Lyons (2018) recommendation to try rape in the civilian CJS, could have arguably served as an independent corrective mechanism. However, given the MOD's final rejection of this recommendation, and their ongoing stated commitment to improve the SJS response to sexual offences, we argue that there is now an urgent need to explore how corrective cultural mechanisms within the system can be harnessed as a means of improving outcomes.

The recent commitment by the MOD to take a zero-tolerance approach to sexual offences (MOD, 2022a) is a welcomed positive step, to acknowledge that radical changes are necessary to improve SJS processes. However, the scope and practical implementation of recent strategies and policies remains largely unknown, given the lack of independent research in this area. Markedly, despite positive policy attempts, there continues to be a strong media narrative castigating the MoD for both its' apparent hyper-masculine culture and poor response to sexual offending. Similarly, recent research by the Centre for Military Women's Research [CMWR] suggests that the challenges outlined in this paper continue to have a profound and damaging impact on service personnel and veterans, especially affecting women's confidence in accessing veteran-specific support (Godier-McBard *et al.* 2022). The NATO working group on sexual violence (*forthcoming*, 2023) have thus highlighted the necessity for a uniform approach to challenging the pervasive and insidious harms caused by a poor situational response to sexual violence, however this ultimately relies on an institutional appetite to change this culture and improve the experiences of victim-survivors. Further empirical research examining each stage of the SJS response to sexual offences, is crucial to effectuate directed and meaningful change from within the system. Cross disciplinary learning from other large, established, public sector institutions e.g. the police and the NHS, who share similar organisational features and who are vulnerable to comparable institutional failures that can occur as a result, could also provide a useful theoretical lens from which to undertake future research in this area – include how entrenched systemic cultural issues in military institutions such as the SJS may be overcome via internal corrective mechanisms. Only once thorough, independent research evidence has been gathered, can clear recommendations for meaningful change be developed and implemented.

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