

SSRO

Single Source
Regulations Office

**Opinions and determinations
guidance review**

Consultation on changes for 2019
December 2018

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Consultation on changes to guidance

Introduction

- 1.1 The Defence Reform Act 2014 (the “Act”) establishes the grounds on which, and the circumstances in which, the SRRO may be asked to give an opinion or to make a determination in relation to a qualifying defence contract (QDC) or sub-contract (QSC), or a proposed QDC or QSC. The Single Source Contract Regulations 2014 (the “Regulations”) supplement the Act and provide further detail on the grounds and circumstances for referral.
- 1.2 The SSRO has published guidance on its processes, which is intended to assist parties who seek an opinion or determination from the SSRO or become involved in such a request. The guidance is separated into two documents, one dealing with opinions and one dealing with determinations. The documents currently include guidance on:
 - the statutory grounds for an opinion or determination;
 - how to refer matters to the SSRO;
 - timescales; and
 - the procedure from acceptance to publication of a decision.
- 1.3 The SSRO’s guidance on opinions and determinations was first issued in March 2015 and was updated in February 2016. The SSRO’s Stakeholder Survey 2018 reported that 91% of stakeholders who have used the opinions or determinations guidance agreed that it was clear and applicable. We nevertheless consider it is appropriate to review the guidance periodically to ensure that it reflects current and good practice.
- 1.4 As part of this review, we have considered:
 - the opinions given, and the determination made, since the last guidance update;
 - views expressed by internal and external stakeholders, including feedback from the Ministry of Defence and contractors who have been involved in an opinion or determination;
 - procedures applied by regulators that had adjudicative functions.
- 1.5 Following this initial review, we believe the guidance should be updated. The following pages of this consultation document:
 - identify the areas of the guidance where changes are considered necessary;
 - outline the proposed changes; and
 - explain why the changes are considered necessary.
- 1.6 We have published revised versions of the two guidance documents on our website. We have indicated significant new text in blue, so that this can be clearly seen.

Consultation

- 1.7 The SSRO invites interested parties to comment on the changes proposed to the guidance, so that we can consider these views before reaching any conclusions on changes to the existing guidance.
- 1.8 The SSRO invites stakeholder views, together with supporting evidence where appropriate, on the following consultation questions:
- a. Do the proposed revisions make the guidance clear?
 - b. Do the proposed revisions make the guidance helpful?
 - c. Are there any other suggestions you have on how the guidance could be clearer or more helpful for parties?
 - d. Do you have concerns regarding any areas of significant changes in the guidance (set out in the table within this document) or the proposed text in the guidance itself?
 - e. Are there any issues in the topic areas covered in this guidance that have not been adequately addressed in the proposed guidance changes?
 - f. Do you have any concerns regarding the proposed publication and application dates of the revised guidance?
- 1.9 A consultation response form containing these questions has been published alongside this consultation document on the SSRO's website.
- 1.10 We ask that submissions are made using the response form and that all written responses are returned:
- a. by email to consultations@ssro.gov.uk (preferred); or
 - b. by post to SSRO, Finlaison House, 15-17 Furnival Street, London, EC4A 1AB.
- 1.11 The deadline for submissions is **5.00pm on Friday 25 January 2019**. Responses received after this date will not be taken into account in finalising the guidance for 2019 but may inform subsequent consideration of guidance changes.
- 1.12 If you have any questions or would like to discuss the contents of this consultation document, please contact us at the earliest opportunity via consultations@ssro.gov.uk. Alternatively contact Justine Wharton on 020 3771 4782 or Nina Mguni-Jones on 020 3771 4790.
- 1.13 In the interests of transparency for all stakeholders, the SSRO's practice is to publish named responses to its consultations, unless a stakeholder makes a specific representation to the contrary.
- 1.14 Stakeholders' attention is drawn to the following SSRO policy statements, available on its website¹ setting out how it handles the confidential, commercially sensitive and personal information it receives and how it meets its obligations under the Defence Reform Act 2014, the Freedom of Information Act 2000, the General Data Protection Regulation and the Data Protection Act 2018.
- a. *The Single Source Regulations Office: Handling of Commercially Sensitive Information*; and
 - b. *The Single Source Regulations Office: Our Personal Information Charter*.

1 <https://www.gov.uk/government/news/handling-commercially-sensitive-information>

Timetable

- 1.15 The SSRO intends to publish a summary of consultation responses and any revised guidance in April 2019. The revised guidance would apply to all opinions or determinations accepted after 1 April 2019.
- 1.16 The proposed timetable for the review process is summarised below.

Activity	Date
Consultation commences	10 December 2018
Submission of responses to consultation	25 January 2019
Consider consultation responses and prepare final guidance	February to March 2019
SSRO Regulatory Committee reviews and approves final guidance	20 March 2019
Publication of consultation response summary and new guidance (revised sections).	1 April 2019
Application of new guidance	1 April 2019

- 1.17 The SSRO welcomes views on the proposed timetable for publication and application of the revised guidance on these topics as part of this consultation.

1. Introduction and scope

Each guidance document previously had a section entitled “Scope of the guidance” which sets out a summary of the areas the guidance covered. It is proposed to re-label the section in both guidance documents and widen it to describe the regulatory framework.

To aid clarity and accuracy, throughout the documents the use of the term “referral” has been widely replaced with “giving an opinion” or “making a determination”.

Significant proposed changes	Reason for the proposed changes
1.2: This is a revised paragraph setting out the regulatory framework and the SSRO's role.	To provide the legal framework in which referrals are undertaken.
1.3: This new introductory paragraph sets out the content of the document.	To aid parties' understanding of the way the documents should be used as a “guide”.
1.5: This new paragraph sets out additional matters which may be referred to the SSRO but which are not covered by the guidance: <ul style="list-style-type: none"> • opinions/determinations are covered in separate documents; • appeals (s.29(5)); and • notices of cessation (s.30(4)(b)). 	To aid parties understanding of the matters which may be referred to the SSRO.
1.7-1.8: New paragraphs have been added to qualify the extent to which the guidance reflects current practice and making clear that processes may be adapted to deal with the circumstances of an opinion or determination. Parties are encouraged to refer to the underlying legal requirements and to take their own legal advice if required.	To aid parties' understanding of the way the documents should be used as a “guide”.

2. The SSRO's conduct

Each guidance document previously had a section entitled "The SSRO – what it is and what it does". This section has been re-named and amended to focus on the application of the guidance and decision making, including:

- the SSRO's commitment to comply with the Act and public law requirements;
- the role of the SSRO Referral Committee and the SSRO Case Team; and
- how a party can raise a procedural complaint if it feels the SSRO has fallen short of this commitment.

Significant changes to guidance	Purpose of changes
<p>2.2: In the previous version of guidance, there was some text on the role of the Referral Committee. This has been expanded to include the role of the SSRO Case Team.</p> <p>2.3: This new paragraph makes clear that contact details of the SSRO Case Team, referring and responding party, will be shared between all parties.</p>	To give a comprehensive picture of all SSRO personnel involved in a referral and their roles.
2.4 -2.5: These paragraphs have been added and refer to the SSRO's legal obligations and its approach to handling commercially sensitive information.	Making clear that the SSRO is committed to maintaining security and to ensuring a fair process when giving opinions/making determinations.
2.6-2.7: These new paragraphs explain how a party can go about raising a complaint if it feels "the SSRO is acting unfairly or has not complied with a legal requirement". In the first instance a complaint should be raised with the SSRO Case Team, and if the party is dissatisfied with the SSRO's response then it may raise a formal complaint through the SSRO's Complaints Policy.	To ensure parties know how they can raise a complaint on a matter of procedure and to make clear that in the first instance it is preferable to raise a complaint with the Case Team for a quicker resolution.

3. Summary of the stages in giving an opinion /making a determination

Each guidance document has a section with this title. It is not proposed to change the title, but to shorten the section and amend it to specifically refer to the different stages within the process. A process chart has been added, with a timeline to illustrate the sequence of events.

The content that previously appeared in this section included a broad outline of the acceptance, investigation, provisional and final determination as well as the anonymised summary. This content has been moved to subsequent sections of the guidance.

Significant changes to guidance	Purpose of changes
3.1: This paragraph has been updated to reflect the new section headings used to describe the stages in the process.	There are new sections that have been included in the guidance, which needed to be referenced here.
A process chart has been included to illustrate the different activities within the opinion or determination and to set out the timeline and the sequence of activities.	The process chart is a visually accessible chart which summarises the information in the guidance. The chart links to the section headings and provides a code to guide the reader throughout the remaining document.

4. Engaging with the SSRO before referring matters for opinion/determination

Each previous guidance document had a section entitled “Referring matters to the SSRO”, which it is proposed to rename and amend. A new sub-section has been added which outlines engagement between the referring party or referring parties prior to submission and acceptance of a question. The previous sub-section “What to include in an opinion/determination” has been updated and re-titled “Making a submission for an opinion/determination”.

Significant changes to guidance	Purpose of changes
<p>Early engagement with the SSRO</p> <p>4.1 – 4.3: These new paragraphs provide for early engagement with parties considering making a referral.</p>	<p>The intention is to support the efficient delivery of opinions and determinations. Early engagement should support referring parties to:</p> <ul style="list-style-type: none"> • understand the process and the requirements of a referral; and • refer questions that are within the SSRO’s jurisdiction and reflect their intent. • It should also facilitate early planning and understanding by the SSRO.
<p>4.4: The guidance indicates when the SSRO will make contact with non-referring parties as part of the early engagement process.</p>	<p>It is considered beneficial to engage with the non-referring party as early as possible. The guidance indicates when the SSRO may take this step with the permission of the referring party.</p>
<p>4.8: This changes the previous list of factual evidence which may be required to an example scenario with appropriate information.</p>	<p>To provide a better illustration to parties of appropriate information.</p>

5. Assessing whether to accept the opinion/determination

This section was previously titled 'Deciding whether to accept a referral' in each guidance document. It is proposed to rename the section 'Assessing whether to accept a determination/opinion'.

Revisions are proposed to make clear what information will be communicated to the referring parties if a request for a determination/opinion is accepted. Much of the previous content around informal meetings has been removed from the section and this is now covered in more detail in section 4.

Significant changes to guidance	Purpose of changes
<p>5.6-5.7: These amended paragraphs deal with notification of the timeframe for an opinion or and list the information that will be communicated to the referring parties after acceptance.</p>	<p>To make clear that the timeframe will be determined in each case, considering the nature and the complexity of the opinion or the determination.</p> <p>To help referring parties understand the information that the SSRO will usually provide following acceptance and when this will be communicated. It provides reassurance that referring parties will be informed of the composition of the referral team and have an opportunity to comment on nominations to the panel if necessary.</p>
<p>5.9. This new paragraph proposes that summary information is published on the SSRO's website when an opinion or determination is accepted.</p>	<p>To clarify what will be published and the reason for publication, which is to contribute to the evidence base of how the regulatory framework is working and provide greater clarity or understanding of the regime.</p>

6. Setting a timeframe for the opinion/ determination

This section is in each guidance document and was previously entitled “Timeframe for referrals”. It is proposed to re-name the section and clarify that case-specific timeframes will be set for each referral. The revised section includes more detail on adjustments to the timeframe, by introducing the possibility of the SSRO staying the timetable in specific circumstances and how this mechanism may work (“stop the clock” provision).

Significant changes to guidance	Purpose of changes
<p>6.3: This new paragraph proposes the investigation phase may be reduced where parties are able to agree a statement of the relevant facts of the case and provide this at the time of the original submission.</p>	<p>To make clear steps that referring parties can take that may shorten the timeframe for an opinion.</p>
<p>6.5-6.8: These new paragraphs clarify how adjustments to the timetable may work. The concept of staying or halting the proceedings is described, which effectively “stops the clock” on the timetable. The document sets out the circumstances when this may be appropriate and the effect it may have on the overall timetable.</p>	<p>The previous guidance identified that adjustments to the timeframe will be made in consultation with the parties to a referral. This reviewed version includes additional detail on how the SSRO may make adjustments.</p>

7. Investigating the opinion/determination

Each guidance document previously had a section entitled “The investigation stage”. It is proposed to rename the section and amend it. The revised section contains new introductory paragraphs setting out how the SSRO will conduct the investigation stage and explains how the SSRO considers information from sources other than the referring parties. It updates previous paragraphs explaining how the SSRO obtains information during the investigation.

Significant changes to guidance	Purpose of changes
7.1 to 7.2: These new paragraphs set out the purpose of the investigation and what other material other than from the referring parties may be considered.	To clarify the SSRO’s approach and help parties understand how the investigation may proceed.
7.6 to 7.19: These new and amended paragraphs explain the SSRO’s intention to be proportionate and expands and amends previous guidance on how the SSRO may obtain evidence and information in the investigation.	To clarify the SSRO’s approach and help parties understand how the investigation may proceed.
7.10: This new paragraph sets out the SSRO’s approach where a party does not want to share some information with the other party.	To ensure that the procedure is fair.

8. Making a provisional determination

The section appears in the determination guidance (as section 9) and was previously entitled “Issuing a provisional determination”. It is proposed to amend the heading and make some revisions to clarify how parties can make representations and how the SSRO considers representations made, as part of the processes for making a provisional determination. This stage does not apply to the opinion guidance.

Significant changes to guidance	Purpose of changes
8.3: This new paragraph sets out that the SSRO does not expect representations to include new evidence at this stage.	To aid parties understanding of the process.

9. Giving and publishing an opinion/ Making and publishing a final determination

Both guidance documents previously had sections on “Issuing a final opinion/determination” and “Publishing the final opinion/determination”. It is proposed to merge the two sections in each document to become section 9 in the determinations guidance and section 8 in the opinions guidance. The new merged section has been renamed and revised to clarify the SSRO’s processes and considerations in finalising and publishing an opinion or determination.

Significant changes to guidance	Purpose of changes
8.1/9.1: The revised paragraph sets out that the opinion or the determination is the decision of the Referral Committee on which the SSRO would not expect to engage further after it has been issued.	To clarify the status of opinion or the determination.
8.2. The revised paragraph clarifies that an opinion may affect the future conduct of the parties. [Opinion only]	This clarifies the impact of an opinion.
9.3 The new paragraph clarifies that the SSRO may require the payment of costs by one party or the other. [Determination only]	This was not included in the previous guidance.
8.4 to 8.6/9.4 to 9.6: The revised paragraphs set out the SSRO’s expectation that the published version of the opinion or determination will be anonymous or redacted, except in exceptional circumstances and that it will not contain confidential information.	To make the opinion and determination guidance consistent in the approach to anonymity.

10. Concluding the opinion/determination

This is a new section, which is section 9 in the opinion guidance and section 10 in the determination guidance. It provides a brief overview of the activities which conclude the opinion or the determination, including seeking feedback from the parties.

Significant changes to guidance	Purpose of changes
9.1/10.1: The guidance identifies that in exceptional circumstances the SSRO may close a referral process before giving an opinion or making a determination.	To assist parties to understand the limited circumstances in which a referral may be terminated prior to decision.
9.2/10.2: This paragraph notes that it may be appropriate to close a referral process if the parties reach a settlement and seek to withdraw the referral.	To assist parties to understand the limited circumstances in which a referral may be terminated prior to decision.
9.3/10.3: This paragraph notes that there is no appeal against an opinion or a determination, but that lawfulness can be subject to judicial review.	To assist parties to understand the limited opportunities to challenge an opinion or a determination.
9.4-9.6/10.4-10.6: These paragraphs provide for that the SSRO will seek feedback from the parties on conclusion of the opinion or the determination and the methods by which the SSRO will collect the feedback.	To be clear that the SSRO welcomes feedback on its referral processes and that it will actively seek such feedback.

11. Appendix 1 - Statutory grounds for opinions/determinations

Previously the content of this appendix was covered in section 4 of the guidance and titled “Statutory grounds for referrals for opinions” or “Statutory grounds for referrals for determinations”, as the case may be. The grounds are now set out in tabular format, with columns capturing the provisions relating to each ground. This is intended to make the information easily accessible and comprehensive from one source, negating the need to review multiple paragraphs to obtain the key information.

