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Dear Harriet,

I am writing as a follow-up to my letter of 18 March 2020 which announced the introduction of the Overseas Operations (Service Personnel and Veterans) Bill, to respond to your letter of 23 October 2019 in relation to the public consultation on proposed legal protections measures.

I should also like to thank you for copying me your letter of 26 March 2020 to the Lord Chancellor. I do recognise the significance of the measures in the Overseas Operations Bill, and the importance of Parliament being able to conduct appropriate scrutiny of them. While it was a manifesto commitment to introduce this legislation quickly, it is not emergency legislation. It will be treated the same as other Bills currently before Parliament, enabling the usual level of close examination. As yet, we do not have a date for Second Reading, but we anticipate this will be confirmed in due course, noting, of course, the steps which have been taken by Parliament in light of the Coronavirus pandemic.

I apologise for not responding before now to your letter of 23 October 2019. Unfortunately, we did not receive a copy of your letter, and when staff were made aware of its existence on your Committee's webpage, it was incorporated in the analysis of the more than 4,200 responses that were received to the consultation. Given the sizeable response, this work took longer than anticipated and we entered the pre-election period before it was completed. After the election, work to deliver the Government's commitment to legislating within 100 days to help prevent vexatious claims against the Armed Forces became the priority, but we are now able to provide a detailed response to your questions.

Taking each of your points in turn:

Proposed Defence to Murder

Why was it felt necessary to reduce criminal liability for this type of action from murder to manslaughter, rather than having any extenuating or mitigating factors dealt with through sentencing and sentencing guidelines?

The Rt Hon Harriet Harman MP
Chair JCHR
House of Commons
London
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We included the proposal for a partial defence to murder in the consultation to reflect the concern that the law may not always take full account of the unique pressures and threats to life that Armed Forces personnel can face in operational circumstances.

This is a very complex area of law and we are currently reviewing all the possible options that are available - including whether it would be appropriate to amend existing law or introduce a new defence modelled on existing law - to determine the most appropriate and effective way of addressing this particular concern.

Do you consider that this pressure would be felt more by Armed Forces operating overseas rather than Armed Forces or police operating in similar circumstances in the United Kingdom? Could you please justify the distinction being drawn between the standards we expect our Armed Forces to adhere to overseas compared to the standards we expect them (and our other security forces such as the police force) to adhere to in the UK?

Operations conducted outside of the UK are hugely different from those conducted within the UK. Most importantly, we do not conduct combat operations within the UK. Within the UK, the military only operate in support of the civil authorities and, with the exception of Operation Banner in Northern Ireland - which was an absolutely unique circumstance - the operations rarely if ever require our personnel to operate in the same sort of extremely hostile, high threat environments that they face on operations overseas. This is why the MOD's Bill only focuses on the overseas operational environment, with the commitment from the Secretary of State for Northern Ireland that the NIO's "legacy" legislation will ensure those who served in Northern Ireland are treated as fairly as those who served overseas. Enhanced protections are not required for other operations within the UK, since allegations of wrongdoing can be more easily investigated and prosecuted (where appropriate) at the time; outside of Northern Ireland, there are no outstanding historical allegations relating to operations in the UK.

The measures we proposed in the consultation, and the measures that we have introduced in the MOD's Bill, do not in any way impact on the extremely high standards that we expect, and will hold our Service personnel to account for, wherever they serve.

What consideration have you given to when this defence to murder would apply? Would it apply when combatants have surrendered? Would it apply when individuals are unarmed and running away from a confrontation? How do you justify such an approach by Armed Forces personnel?

As noted above, we are working through all the possible options to determine the most appropriate and effective way of addressing this particular concern. This includes ensuring that we have identified and properly considered potential operational scenarios where the initial decision by a Service person to use force was justified, but where more force than strictly necessary was used for the purposes of self-defence.

Statutory presumption against prosecution

Why does the MOD propose that this presumption against prosecution should not apply to alleged offences committed against fellow Armed Forces personnel or against other Crown Servants, but it would seem to apply to alleged offences committed against other British nationals, civilians or nationals of other countries? Could you please explain this distinction? Does this mean that if information came to light that an individual murdered three people - a fellow member of the Armed Forces, a British aid worker and a local civilian, there would be a presumption that he could not be prosecuted in relation to the murdered British aid worker or the local civilian, but could be prosecuted only in relation to the murder of a fellow member of the Armed Forces? What is the justification for such a distinction?

The measures in the Bill do not apply to alleged offences against fellow Armed Forces personnel or Crown Servants, because it is highly unlikely that Service personnel would face attack by their own colleagues or Crown Servants (who are often in a theatre of operations in support of the Armed Forces). As a result, the justification for the additional protection provided by the statutory presumption would not be present in such cases. In contrast, Service personnel are at much greater risk of attack, in the context of a theatre of military operations, from the local population/other nationalities.

The Bill includes a new 'triple lock' in order to give Service personnel and veterans greater certainty that the unique pressures placed on them during overseas operations will be taken into account when deciding whether to prosecute for alleged historical offences. The decision as to whether to prosecute or not remains the responsibility of the independent prosecutor.

This 'triple lock' consists of:

- A presumption that once five years have elapsed from the date of an incident, it is to be exceptional for a prosecutor to determine that a Service person or veteran should be prosecuted for alleged offences on operations outside the UK;

- a requirement that when making a decision to prosecute, a prosecutor must give particular weight to certain matters, including the public interest in finality where there has been a previous investigation and no compelling new evidence has become available; and,

- where a prosecutor determines that a case should proceed to trial, notwithstanding the presumption and the circumstances of the case, then consent must be obtained before a prosecution can proceed. In England and Wales, for example, this will be from the Attorney General. In these cases, the Attorney General will be acting independently of Government, as guardian of the public interest.

In the scenario you set out, the prosecutor could determine that the case against the individual in relation to the death of a British aid worker or local civilian is "exceptional", and that a prosecution is therefore appropriate, subject to the approval of the Attorney General.

Could you please explain the reasoning behind the proposal that this presumption against prosecution should apply to alleged offences committed by Armed Forces personnel, including Reserves, but should not apply to alleged offences committed by Crown Servants or Defence Contractors? What is the reasoning behind this distinction?

The difference in treatment of Armed Forces personnel (as opposed to other groups) is set out in paragraphs 15 and 16 of the ECHR Memorandum, in respect of the MOD's Bill:

> *(Paragraph 15) "In as much as being part of Service Personnel not deployed overseas can amount to a relevant status for the purposes of Article 14, the difference in treatment is justified because when Service Personnel deploy on operations overseas, they do so in very different circumstances than those they experience when deployed in support of civil authorities in the UK. On operations overseas, Service Personnel act in the heat of the moment under unique pressures and they face a high degree of hostility and threat of violence."*
>
> *(Paragraph 16) "In as much as being non-Service Personnel involved in operations overseas (or any other person to whom the presumption cannot apply) can amount to a relevant status for the purposes of Article 14, the difference in treatment is justified because of the unique position of Service Personnel as set out above."*

In relation to both of the above distinctions, can you please explain whether they would engage Article 14 ECHR (prohibition on discrimination) as read with Articles 2 and 3 ECHR? Please explain your reasoning.

As set out in the ECHR Memorandum, MOD considers that clauses 2, 3 and 5 do not breach the obligations in Article 2, as investigations will still take place and will still be capable of leading to a prosecution. Prosecutors will remain independent and free to exercise their discretion and make decisions to prosecute. In so far as a broadly similar duty may arise under Article 3 as under Article 2 (and does not go further than the requirements of that article), the measures in clauses 2, 3 and 5 do not interfere with the obligations in Article 3 for the same reasons as set out in relation to Article 2. We do not consider that Article 14 is engaged, as read with Articles 2 and 3.

When would the presumption apply? Would the presumption apply to all "alleged offences committed during the exercise of operational duties" or only where the "UK Armed Forces came under attack, or face the threat of attack of violent resistance"? Could you please clarify what these terms cover and the significance of the difference in terms?

In the Bill, the presumption applies in relation to "any operations outside the British Islands, including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious public disorder, in the course of which members of Her Majesty's forces come under attack of face the threat of attack or violent resistance". There is no reference in the Bill to "alleged offences committed during the exercise of operational duties".

The Bill also contains the condition that, for the presumption to apply, the alleged offence must have taken place on an overseas operation, more than five years ago.

Is it your intention that this presumption would also apply to war crimes, crimes against humanity, rape, murder and torture/mistreatment? How do you justify such an approach, especially having regard to the UK's obligations under international criminal law and international human rights law?

In the Bill, a "relevant offence" includes service offences under section 42 of the Armed Forces Act 2006 and all criminal offences except those that are specifically excluded by virtue of Schedule 1 (i.e. sexual offences). Any alleged offences committed against a fellow member of the Armed Forces (including British Overseas Territories Force), a Crown Servant or a defence contractor are not considered to be a relevant offence.

Because the statutory presumption allows for an independent prosecutor to make a decision as to whether or not to prosecute in a particular case, the measure is compliant with both international criminal law and international human rights law.

No prosecution where a person has been previously investigated

What does it mean when you say that something was "investigated" at the time? Should that investigation be done to a certain standard in order to fulfil the criteria? What if the investigation was dropped at an early stage and was therefore not a meaningful or detailed investigation? Who should have undertaken the investigation? What if, with hindsight, the investigation was considered to be adequate? What if key information or evidence was missed or unavailable? What conditions or caveats are you considering attaching to such a rule? How do you envisage this working in practice?

Clause 4(1) of the Bill defines "relevant previous investigation". Clause 7(4) also lists the investigating authorities as: a Service police force, a UK police force or an overseas police force.

Service police (or other relevant police forces) are required to investigate credible allegations of wrongdoing. Where a subsequent investigation reveals compelling new evidence, this would be passed to the prosecutor for them to make an independent decision as to whether to prosecute.

Derogating from the ECHR

We would ask for a Memorandum to be prepared for the JCHR in relation to any Article 15 derogation. Such a Memorandum should explain how each of the Article 15 criteria are met for each derogation.

If you plan to derogate from the European Convention on Human Rights under Article 15 ECHR, are you planning to inform the Joint Committee on Human Rights in advance of any such derogation? When and how would you plan to inform the Committee?

The Human Rights Act 1998 provides that, unless a decision to derogate is confirmed by both Houses of Parliament within 40 days, a derogation order will lapse. We anticipate that the Joint Committee on Human Rights would play an important role in situations where the government considers that the case for derogation is made out. Nothing in the Bill changes what happens in such situations. Rather, the Bill seeks to bind future governments to give effect to the 2016 announcement[1] by requiring them to consider whether the criteria for derogation are met in relation to future overseas operations.

Why is this different language used [between the wording in the Foreword and the language used in Article 15 ECHR, about the circumstances for derogation]? What is the significance that the Ministry of Defence attaches to using this different language?

Clause 12 of the Bill sets out the duty on the Secretary of State to consider derogation from the ECHR. The wording in that clause is intended to avoid imposing an obligation on the Secretary of State to consider derogation even in cases that self-evidently would not satisfy the criteria in Article 15(1).

Compensation Scheme

We note the announcement in the Foreword to the consultation about the new compensation scheme that would apply where Armed Forces personnel have been injured or killed. If litigation is avoided, how will you ensure that any systemic failings in procedures, safeguards or equipment are scrutinised and remedied so as to avoid future unnecessary deaths of injury of Armed Forces personnel?

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[1] Sir Michael Fallon, 10 October 2016, House of Commons: "I am today informing the House that before embarking on significant future military operations, this government intends derogating from the European Convention on Human Rights, where this is appropriate in the precise circumstances of the operation in question. Any derogation would need to be justified and could only be made from certain Articles of the Convention.
In the event of such a derogation, our Armed Forces will continue to operate to the highest standards and be subject to the rule of law. They remain at all times subject to UK Service Law, which incorporates the criminal law of England and Wales, and International Humanitarian Law (the law of armed conflict including the Geneva Conventions) wherever in the world they are serving. Therefore any credible allegations of criminal wrongdoing by members of the Armed Forces will continue to be investigated, and prosecuted within the Service Justice System."

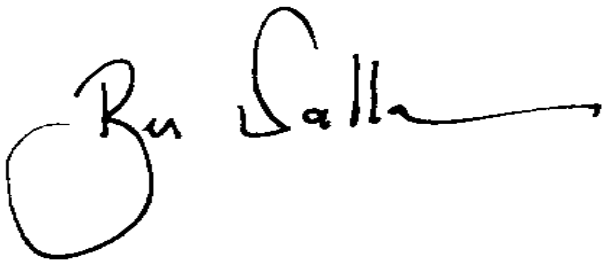
The Better Combat Compensation Scheme is not being taken forward in legislation at this time. Claims in relation to Armed Forces personnel injured or killed can still be brought either through the Armed Forces Compensation Scheme or (except where they are barred under the principle of combat immunity) through the Courts. The MOD has disaggregated its claims budget with the costs of compensation now being borne by the individual Services rather than centrally. This change will give the individual Services greater visibility of systemic failings, and increase the likelihood of them being identified and remedied early.

Differentiation between the standards and responsibility applied to UK Armed Forces operating overseas and UK Armed Forces operating in the UK

Could you please explain if (and if so, why) you consider that there is a justification for providing a different legal regime for UK Armed Forces operating overseas as compared to UK Armed Forces operating in the UK (or indeed other security forces operating in the UK).

This is a repeat of an earlier question in your letter and has been addressed above.

Yours sincerely,



THE RT HON BEN WALLACE MP