



Ministry
of Defence

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JOHNNY MERCER MP
PARLIAMENTARY UNDER-SECRETARY OF STATE AND MINISTER
FOR DEFENCE PEOPLE AND VETERANS

MSU/4/8/1/2/ap

18 September 2020

Dear Tobias,

Thank you for your letters of 6 May 2020 and 14 July 2020. We welcome the Committee's interest in and agreement to the approach we are taking to help address the issue of vexatious claims against our Armed Forces.

As you may be aware, we have corresponded with the Judge Advocate General, and have met with him to discuss the Overseas Operations (Service Personnel and Veterans) Bill and other Service Justice System matters. The Secretary of State's response to his letter of 14 May provided detailed responses to many of the questions that you have raised in your letter of 14 July.

In determining the measures to be included in the Overseas Operations Bill, we took account of the responses to last year's public consultation on proposed legal protections measures and to the HCDC's own inquiry into protecting veterans. We are confident that the measures provide the necessary reassurance to our Service personnel and veterans that the unique pressures placed on them during overseas operations will be taken into account in relation to alleged historical offences. Nothing in the Bill undermines the UK's commitment to upholding and strengthening the rule of law. Military operations will continue to be governed by International Humanitarian Law, including the Geneva Conventions, and with reference to the UK's membership of the International Criminal Court as a State Party to the Rome Statute.

Turning to the specific questions raised in your letters:

6 May 2020

1. Under the Overseas Operations (Service Personnel and Veterans) Bill, a decision to prosecute will be made after a prosecutor has weighed up various factors and has secured the Attorney General's consent: what is your estimation of the likelihood of successful legal challenge if that consent is refused?

The requirement in the Bill for the Attorney General to consent to prosecutions (in relation to alleged offences committed on operations outside the British Isles more than 5 years ago) would mean that Service personnel in those circumstances can be confident any decision to prosecute them would be considered at the highest level.

The Rt Hon Tobias Ellwood MP
Chair, House of Commons Defence Committee
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It is a constitutional principle that, when deciding whether to grant consent to prosecutions, the Attorney General will act in the public interest and independently of Government.

It is not possible to assess the likelihood of a successful challenge in the abstract. The Attorney General will of course consider any application for her consent independently and in accordance with public law principles of good decision making. Due to the quasi-judicial nature of the decision and the constitutional position of the Attorney General, the courts should be slow to interfere with such a decision.

2. Similarly, how confident are you that the factors outlined in the Bill are comprehensive enough for a prosecutor to take a decision whether or not to prosecute? Why have sexual offences been treated in a different way in the Bill?

We believe that the measures contained in the Bill are proportionate and strike an appropriate balance between victims' rights and access to justice on the one hand, and fairness to those who defend this country on the other.

In the Government's view, the "exceptional" test in Clause 2 sets the bar for rebutting the statutory presumption appropriately high. We decided against defining the term "exceptional" in order to safeguard prosecutorial independence and because it would be very difficult to set out all the circumstances in which an alleged offence could be considered "exceptional". However, we are confident that prosecutors will recognise the high bar it introduces.

In making a prosecutorial decision, the Bill requires that the prosecutor must take into account the exceptional demands and stresses of overseas operations and the adverse effect that they can have on Service personnel, including on their capacity to make sound judgements and their mental health. This measure is intended to ensure that prosecutors give full recognition to the marked difference in the circumstances surrounding an alleged offence committed on operations overseas, as compared with situations where the alleged criminal conduct occurs in a domestic civilian setting.

Prosecutors must also take into account whether there has been a previous investigation or investigations in relation to the alleged criminal conduct and consider whether any compelling new evidence has arisen since any such investigation(s). This requirement is aimed at addressing concerns over the impact on personnel of repeat investigations and the mental burden of the threat of criminal prosecution occurring long after the events in question, in particular where there is no compelling new evidence to be considered. The measure highlights the public interest in these cases coming to a timely and final resolution.

Giving weight to these matters may lead the prosecutor to decide not to bring prosecution proceedings.

We believe that these measures are suitably comprehensive to ensure that the unique context of overseas operations is given due consideration by prosecutors when taking prosecution decisions, whilst not fettering prosecutors' independent decision-making (which would potentially give rise to a breach of the investigative duty under Article 2 of the ECHR, by removing the possibility of an investigation leading to a criminal prosecution).

As set out in the Bill, the measures set out in Clauses 2, 3 and 5 do not apply to the sexual offences listed in Schedule 1. The decision to exclude these offences from the scope of the protections reflects the Government's strong and stated belief that the use of sexual violence or sexual exploitation during conflict is never acceptable in any circumstances. Under international humanitarian law, sexual offences including conflict-related sexual violence and sexual exploitation and abuse are prohibited.

3. The Northern Ireland Secretary's Written Statement of 18 March, which makes a commitment to "ensuring equal treatment of Northern Ireland veterans and those who served overseas", also states that:

"Only cases in which there is a realistic prospect of a prosecution as a result of new compelling evidence would proceed to a full police investigation and if necessary, prosecution. Cases which do not reach this threshold, or subsequently are not referred for prosecution, would be closed and no further investigations or prosecutions would be possible - though family reports would still be provided to the victims' loved ones. Such an approach would give all participants the confidence and certainty to fully engage with the information recovery process."

How similar will these legislative provisions be to those in the Overseas Operations Bill? Can you confirm that you have asked the Northern Ireland Office to make a commitment that service personnel and terrorists will not be treated equally in any way?

The Government has been clear that it will bring forward legislation to address the legacy of the Troubles which focuses on reconciliation, delivers for victims, and ensures that Northern Ireland veterans are treated equally to those who served overseas. The Northern Ireland Secretary remains committed to moving forward as quickly as possible.

4. We recommend that relevant legislation be remitted to an ad-hoc Select Committee for its Committee Stage, as is customary for Armed Forces Bills. Given that you have been unable to fulfil our recommendation to provide time for the Committee to conduct pre-legislative scrutiny, will you make a commitment to this recommendation for both the Overseas Operations Bill and the Bill, yet to be introduced, covering Northern Ireland?

An ad-hoc Select Committee would be most unusual for a Public Bill, as it is only hybrid Bills and the quinquennial Armed Forces Bills that are subject to this procedure - not all Defence Bills - and the Government is not willing to set a precedent for how primary legislation is scrutinised.

Although we were unable to provide Parliament with a draft Overseas Operations Bill for pre-legislative scrutiny, due to the election commitment to introduce legislation within the first 100 days, it should be noted that the matters to which this Bill relates were the subject of previous HCDC inquiries, and the previous Government also ran a public consultation in 2019 that helped shape the measures that are in the Bill.

While we are not prepared to agree to an ad-hoc Select Committee for the Overseas Operations Bill, the Government intends to continue to engage with stakeholders

including the HCDC and other Committees (e.g. JCHR) during the Bill's passage through Parliament.

Regarding parliamentary scrutiny of any Northern Ireland legacy legislation, the Northern Ireland Affairs Committee (NIAC) has launched an inquiry to examine the Government's legacy proposals. The Terms of Reference for the inquiry can be viewed at: <https://committees.parliament.uk/work/282/addressing-the-legacy-of-northern-irelands-past-the-uk-governments-new-proposals/>

The Secretary of State for Northern Ireland looks forward to working with parliamentary colleagues in NIAC, and from across both Houses, on this important matter.

5. What is the Government's strategy in the event that the European Court of Human Rights rules that the new legislative regime is contrary to our Convention obligations? What discussions have you had with the International Criminal Court?

The Secretary of State made a statement under section 19(1)(a) of the Human Rights Act 1998 on introduction of the Bill in the Commons that, in my view, the provisions of the Bill are compatible with the Convention rights. The details of our assessment of the compatibility of the Bill's measures with the European Convention of Human Rights ("ECHR") can be found in the ECHR Memorandum we prepared for the purposes of the Bill.¹

In the event of a finding by the European Court of Human Rights that measures contained in the Bill were incompatible with Convention rights, we would consider what action it was appropriate to take to ensure that the UK continues to uphold its obligations under the Convention.

We continue to engage through the FCDO with the International Criminal Court's Office of The Prosecutor in relation to the Iraq preliminary examination. Following questions from the Office of The Prosecutor about the operation of the Bill, we have written to reassure them that these measures do not introduce an amnesty or statute of limitations and are therefore compatible with the UK's obligations as a signatory to the Rome Statute.

6. Will legislative consent be sought from the Northern Ireland Assembly for any legislation incorporating 'New Decade New Approach' and legacy reforms, including this new arrangement?

What discussions has the Government had with the parties in the Assembly about whether they would accept the proposed arrangement?

In line with the Sewel Convention, the UK Government will work with partners in the Northern Ireland Executive and the Assembly to obtain a Legislative Consent Motion regarding devolved matters of the revised legacy legislation.

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873596/ECHR_Memo_-_OO_SPV_Bill_-_FINAL.pdf

The Government has begun engagement with the NI parties and other stakeholders on the proposed way forward, and is committed to progressing this fully and efficiently, notwithstanding the challenges of the current Covid-19 pandemic.

14 July 2020

1. We understand the Judge Advocate General was not consulted about the drafting of the Bill. Why not?

The Judge Advocate General (JAG), through his attendance at meetings of the Service Justice Board, is able to comment on all areas of policy which have a direct impact on his role within the Service Justice System - the management and delivery of the Military Courts System. As the measures in Part 1 of the Bill impact on the prosecutorial process, we felt it was more important to focus on engagement with the independent prosecutors, the Crown Prosecution Service and the Service Prosecuting Authority.

In his response to the JAG's letter of 14 May 2020, the Secretary of State acknowledged that due to the 100-day election commitment to introduce the Bill it was not possible for the Legal Protections project team to complete the level of stakeholder engagement post-public consultation that we would usually seek to undertake. However, we welcomed his interest in the Bill, and an offer was made for the project team to engage with him at a convenient time.

2. Who was consulted during the drafting of the Bill? Who are you consulting over the equivalent Bill for Northern Ireland?

As the Committee is aware, there was a 12-week public consultation last summer on proposed legal protections measures; the responses to which have helped guide the development of the measures contained within the Bill. During the public consultation, we also engaged with legal academics, and the Crown Prosecution Service and the Service Prosecuting Authority. We continue to engage with other government departments, including the Cabinet Office, FCDO, MOJ and NIO.

The UK Government remains committed to making progress on legacy issues in Northern Ireland as quickly as possible - engaging with the Irish Government, the Northern Ireland parties, victims' groups and colleagues from across the House on the way forward. This is rightly being conducted by the NIO and the Secretary of State for Northern Ireland recognises the particular importance of working with veterans, victims and all parts of the community in Northern Ireland as part of this process.

3. On what grounds have you chosen five years for the cut-off point?

The five years stated in the statutory presumption measure is not a "cut-off point" or a time limit; it is the point at which the presumption must be applied to appropriate cases (alleged offences by UK Armed Forces personnel on operations outside of the British islands more than five years ago) by a prosecutor when coming to a decision whether to prosecute.

While there was strong support for a ten-year timeframe in the public consultation, there was equally strong support for the measure to apply regardless of how long ago the relevant incident occurred. We also took note of the strong views in the explanatory

comments that ten years was too long a period to wait for the measure to apply, given the impact that historical allegations can have on a Service person's or veteran's mental health and wellbeing.

As the issue we are seeking to address relates to historical alleged offences, we did not feel able to apply the presumption without a timeframe; we did, however, consider that a timeframe of less than ten years would be more appropriate. In this context, the most appropriate alternative to a timeframe of ten years was judged to be five years.

4. We have been told the Bill's presumption against prosecution after five years may be seen by some as an indication of unwillingness to carry out domestic war crimes prosecutions, which could give rise to increased attempts to bring cases against British service personnel before the International Criminal Court. How do you respond to this argument?

We are aware of the views of some that the introduction of a presumption against prosecution would increase the likelihood of prosecutions of UK Service personnel in the International Criminal Court (ICC), as the ICC could step in and undertake their own investigation and prosecution if they consider that the UK is unwilling or unable to do so.

However, we are clear that the statutory presumption measure is consistent with the UK's historic commitment to international criminal justice and the rule of law, and the UK's obligations under the Rome Statute. The presumption is not a legislative bar to investigations or prosecutions, such as a statute of limitations or amnesty.

Rather, it creates a rebuttable presumption which leaves a prosecutor with discretion to prosecute where they consider it would be appropriate to do so, and our view is that it will not undermine the ability or willingness of independent investigators or prosecutors in the UK to investigate or prosecute alleged crimes within the jurisdiction of the ICC, bearing in mind the admissibility provisions of Article 17 of the Rome Statute.

Allegations of serious offences, including crimes within the jurisdiction of the ICC, will be investigated and, where appropriate, prosecuted in the UK. There is therefore no increased risk to UK Service personnel of prosecution in the International Criminal Court.

5. Why do the established public interest considerations that the Crown Prosecution Service follows when deciding on the prosecution of genocide, crimes against humanity, war crimes and torture cases, together with the existing Attorney General consent requirements under the Geneva Conventions Act 1957 and the International Criminal Court Act 2001, not provide a sufficient safeguard against vexatious prosecutions?

Clause 3 of the Bill provides additional reassurance to our Service personnel that prosecutors must take into account the unique circumstances of overseas operations when considering to prosecute for alleged offences under section 42 of the Armed Forces Act 2006 and offences punishable with a criminal penalty by the law of any part of the United Kingdom (except the sexual offences in Schedule 1), when arising more than five years ago on overseas operations. The requirement for the Attorney General to give consent to a prosecution (Clause 5) will mean that Service personnel can be

confident that their case has been considered at the highest levels of our justice system.

6. Do you agree that the Bill's provision creating a presumption against prosecution of serious offences after a specified time within domestic legislation will not prevent the International Criminal Court from undertaking their own investigations and bringing prosecutions?

As noted in the response to question 4, our view is that the statutory presumption will not undermine the ability or willingness of independent investigators or prosecutors in the UK to investigate or prosecute alleged crimes within the jurisdiction of the ICC, bearing in mind the admissibility provisions of Article 17 of the Rome Statute. Allegations of serious offences, including crimes within the jurisdiction of the ICC, will be investigated and, where appropriate, prosecuted in the UK.

7. Have you considered excluding from the presumption international crimes or those potential prosecutions that could engage the jurisdiction of the ICC or the exercise of jurisdiction by other States, if not pursued by a UK prosecutor?

We do not believe that such an exclusion to the Bill is necessary. The measures contained in the Bill do not amount to an unwillingness or inability to investigate or prosecute, and therefore we would expect proceedings in respect of UK service personnel to continue to be inadmissible before the International Criminal Court.

Prosecutors will continue to have discretion on whether to prosecute for criminal offences following an investigation, on the basis of their assessment of the sufficiency of evidence, and whether a prosecution would be in the public interest.

8. Sexual offences are not covered by the Bill. What will happen when Service personnel are involved in one incident and some but not all of them are accused of sexual offences?

We are aware of the concern that the decision to exclude the sexual offences listed in Schedule 1 of the Bill will lead to inconsistencies of approach in relation to serious offences.

However, in the situation you envisage the prosecutor retains discretion in decision-making in both circumstances. The presumption does not remove or diminish the discretion available to prosecutors to bring proceedings, rather it changes the way that a prosecutor exercises discretion and requires them to follow the steps introduced in the new process. In relation to offences covered by the Bill, the prosecutor may determine that the case is "exceptional" and therefore that a prosecution is appropriate, subject to the approval of the Attorney General.

9. What effect do you expect the Bill to have on the number and length of investigations, and the ease with which reinvestigations can be started?

While the statutory presumption may help to reduce the likelihood of investigations being reopened without new and compelling evidence, it deliberately does not create an absolute bar to investigations or prosecutions.

Prosecutors must take into account whether there has been a previous investigation or investigations in relation to the alleged criminal conduct and consider whether any compelling new evidence has arisen since any such investigation(s). This requirement is aimed at addressing concerns over the impact on personnel of repeat investigations and the mental burden of the threat of criminal prosecution occurring long after the events in question, particularly where there is no compelling new evidence to be considered. The measure highlights the public interest in these cases coming to a timely and final resolution.

Over time, as prosecutors become familiar with the presumption measure, they should be able to advise investigators earlier in the process as to whether this new statutory requirement (that it is to be exceptional for a decision to be made to prosecute for an alleged offence) would be met in a particular case.

In addition to the Overseas Operations Bill, you will be aware that we intend to take forward some of the key recommendations from HH Lyons' 2017 review to improve the Service Justice System, including Sir Jon Murphy's recommendation for the establishment of a tri-Service Defence Serious Crime Unit (DSCU), and for an oversight body for complaints against the Service Police.

These measures are intended to deliver a stronger, more collaborative and effective role for the Service Police within the Service Justice System. In doing so, we believe that the effectiveness of investigations at the time are less likely to be called into question, reducing the risk to our personnel of historical investigations - and particularly reinvestigations.

10. What account have you taken of the recently published ICRC/Geneva Academy Guidelines on Investigating Violations of International Humanitarian Law as a tool for establishing processes before, during and after operations that give peace of mind to armed forces personnel who can trust in the system having ensured that all evidence has been gathered and analysed and acted upon if needed?

We are aware of the recently published ICRC/Geneva Academy Guidelines, but we have found no requirement for any changes to our current processes.

The Armed Forces Act 2006 provides the statutory provisions that apply to all UK Armed Forces wherever they are serving. This provides a robust framework for criminal and disciplinary matters and affords Service personnel the same legal protections that they are entitled to in the UK.

Section 115A of the Armed Forces Act 2006 enshrines the independence of the Service Police in statute. Under section 115A, the Provost Marshal of each Service Police force has a duty, owed to the Defence Council, to seek to ensure that all investigations carried out by the force are free from improper interference. This includes any attempt by a person who is not a member of the Service Police to direct an investigation which is being carried out by the force. Furthermore, the Service Police also operate in accordance with the Criminal Procedure and Investigations Act 1996 which obliges an investigator to pursue all reasonable lines of inquiry, whether these point towards or away from the suspect.

I am copying this letter to the Rt Hon Suella Braverman QC MP, Attorney General, the Rt Hon Brandon Lewis MP, Secretary of State for Northern Ireland, and to Simon Hoare MP, Chair of the Northern Ireland Affairs Committee.

Yours sincerely,

A handwritten signature in black ink, consisting of a stylized 'J' followed by a series of loops and a final flourish.

JOHNNY MERCER MP