House of Commons
House of Lords

Joint Committee on Human Rights

Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill

Ninth Report of Session 2019–21

Report, together with formal minutes relating to the report

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Contents

Summary

The Overseas Operations (Service Personnel and Veterans) Bill contains three main elements:

a) A statutory presumption against prosecution after 5 years;

b) Shorter and more inflexible limitation periods for human rights violations and for personal injury claims; and

c) A duty to consider derogating from the European Convention on Human Rights (ECHR) in respect of future overseas military operations.

Investigations, inquiries and litigation into incidents arising from the UK's involvement in the conflicts in Iraq and Afghanistan have exposed rare but serious wrongdoing, such as unlawful detention, breaches of the prohibition on torture and inhuman or degrading treatment or punishment (Article 3 ECHR) and complicity in extraordinary rendition. They also exposed poor practices, procedures or equipment on the part of the Ministry of Defence (MoD) that led to unnecessary deaths and injuries to members of the Armed Forces. It is vital that such investigations, inquiries and litigation can continue to uncover any such poor practices so that lessons are learned in order to protect both members of the Armed Forces and civilians from harm.

The Government introduced this Bill to limit the ability to prosecute for crimes after 5 years or to bring litigation against the MoD after 6 years. However, there is little to no evidence that people are being prosecuted when they should not or that cases with no case to answer are being allowed to progress. Instead, we found that the real problem is that investigations into incidents have been inadequate, insufficiently resourced, insufficiently independent and not done in a timely manner. This has resulted in repeated investigations to try to remedy the flaws of previous investigations. It is this cycle of investigations that has caused stress and uncertainty for those accused of wrong-doing as well as for victims. Those who have committed crimes cannot be brought to justice based on inadequate investigations—and those who have done nothing wrong can feel that their investigation never gets resolved due to its inadequacy leading to no final resolution. Inadequate investigations are an impediment to justice being done. We therefore conclude that the MoD must, as a matter of priority, establish an independent, skilled and properly funded service for investigations. MoD investigations must be robust, take place promptly and be sufficiently independent and of high quality in order to prevent the need for repeated or protracted investigations.

This Bill will not remove the need for those investigations to be undertaken and will not address the inadequacy of those investigations. It does nothing to address the issue of repeated investigations. Instead the Government is effectively using the existence of inadequate investigations as a reason to legislate to bring in further barriers to bringing prosecutions or to providing justice for victims. It is therefore difficult to reconcile the contents of the Bill with either its stated objective or the underlying issues.

No problem has been identified of excessive or unjust decisions to prosecute members of the UK Armed Forces. We can therefore see no justification for introducing the statutory presumption against prosecution in cases where the MoD's own Service Prosecuting

Authority considers that there is sufficient evidence that a member of the Armed Forces committed an offence and has already decided (having regard to all relevant factors) that it is in the public interest to bring a prosecution. For these reasons we consider that clauses 1–7 should be deleted.

More specifically, we have significant concerns that the presumption against prosecution breaches the UK's legal obligations under international humanitarian law (the law of armed conflict), international human rights law and international criminal law. It risks contravening the UK's obligations under the UN Convention Against Torture, the Geneva Conventions, the Rome Statute and international customary law. At a minimum, the presumption against prosecution should be amended so that it does not apply to torture, war crimes, crimes against humanity or genocide.

It is particularly concerning that the Bill does not provide any incentives for the military hierarchy to ensure that members of the Armed Forces who are unable to make "sound judgements", who cannot "exercise self-control" or whose mental health is severely affected, are removed from operational duties and given the support that they need. Instead it puts in place barriers to prosecuting a person who commits a crime whilst on operations overseas even though they may have been known to lack adequate self-control or the ability to make sound judgements.

The introduction of an absolute time limit to bringing human rights claims or civil litigation risks breaching the UK's human rights obligations and preventing access to justice, particularly in light of the well-known difficulties to bringing timely cases where conflicts may be protracted, and the situation complicated. Indeed, had an absolute time limit existed in the past this would have prevented litigation that has brought to light mistreatment of detainees by UK Armed Forces, or UK complicity in extraordinary rendition and torture. Not only would that have prevented justice in those individual cases, but it would have meant that such practices would have continued unchecked.

We also recall that there are existing powers to strike out unmeritorious claims (including those that are an abuse of process) or repeated claims brought by vexatious litigants or lawyers acting unscrupulously. We are not aware of any suggestion that the Courts have allowed wholly unmeritorious or vexatious claims through any failure or reluctance to use these powers. We call on MoD Ministers to desist from using politicised and inaccurate language in relation to claims where the MoD did have a case to answer. Moreover, in the UK, solicitors, barristers and advocates are members of a regulated legal profession with clear codes of conduct and ethical standards. Sometimes the client they represent is the Government. Sometimes it is a member of the Armed Forces, a veteran or a civilian who wishes to bring a claim against the MoD. It is not appropriate for public office holders such as Ministers to refer generally to lawyers as "ambulance-chasing lawyers" (or other politically charged and inaccurate terms) when lawyers represent members of the Armed Forces, or civilians in their claims against the MoD—many of which have been well-founded claims. The calculated and repeated use of such derogatory language against legal professions is unbecoming and should have no place in a democracy that respects the rule of law. Similarly, the use of the term "lawfare" to describe generally any litigation brought by civilians or members of the Armed Forces against the MoD to seek justice for injuries or deaths of loved ones is also inflammatory and inaccurate.

In respect of the Government's proposed duty to consider derogating from the ECHR, we find that this provision would seem to do nothing beyond what the Minister would do in any event, but may increase the risk of litigation. We also note the limited number of rights that could be capable of derogation in respect of any war. We call on the Government to make an undertaking to consult with the Committee in advance of any proposed derogation and to provide the Committee with a memorandum to assist its consideration of any proposed—or actual—derogation.

Finally, we note with concern the impact that the introduction of this Bill has already had on the reputation of the Armed Forces and of the UK internationally. We urge the Government to consider carefully the message that this sends to troops about accountability and compliance with the rule of law, including both international humanitarian law and international human rights law. We also urge careful consideration of the impact that this may have on relationships with civilians in host countries. Compliance with the relevant international standards is all the more important where the stated purpose of deployment is to further respect for the rule of law and human rights standards.

1 Introduction

1. The Overseas Operations (Service Personnel and Veterans) Bill (OO Bill) was introduced in the Commons on 18 March 2020. The main provisions of the Bill are:

a) A statutory presumption against prosecution after 5 years;

b) Shorter and more inflexible limitation periods for human rights violations and for personal injury claims; and

c) A duty to consider derogating from the European Convention on Human Rights (ECHR) in respect of future overseas military operations.

Background: Key human rights issues at stake

2. A number of human rights issues are raised by the provisions in the Bill seeking to limit liability for criminal acts or human rights violations committed in military operations overseas:

a) The duty to prosecute torture allegations under the UN Convention Against Torture;[1]

b) The duty to prosecute war crimes, crimes against humanity and genocide under the Geneva Conventions, and customary international law;[2]

c) The duty to prosecute crimes against humanity and genocide under the Rome Statute to the International Criminal Court (ICC);[3]

d) The procedural obligation to conduct effective investigations into deaths of members of the armed forces and of civilians under Article 2 ECHR;[4]

e) The procedural obligation to conduct effective investigations into allegations of torture or mistreatment under Article 3 ECHR;[5]

1 A presumption against prosecution without the possibility of further discretionary extension could prevent victims of torture from seeking their right to redress, guaranteed under Article 14 of the UN Convention Against Torture (CAT). The United Nations Committee Against Torture has confirmed that the imposition of a limitation period for the offence of torture is inconsistent with a State Party's obligations under the CAT. There are therefore real risks that the limits on bringing prosecutions will cause the UK to be in breach of its obligations under the UN Convention Against Torture.

2 The International Committee of the Red Cross (ICRC) takes the view that customary international humanitarian law prohibits the application of statutes of limitation to war crimes. See ICRC Customary IHL Study, Rule 160

3 Article 29 of the Rome Statute, to which the UK is a State Party, states that crimes within the jurisdiction of the International Criminal Court (ICC) shall not be subject to any statute of limitation.

4 The UK is under a non-derogable procedural obligation under Article 2 and 3 ECHR (right to life) to conduct effective investigations into deaths. This procedural obligation can include criminal investigations (where appropriate) as well as inquests and inquiries. Indeed this procedural obligation has been a vital tool for the State to learn lessons and therefore to prevent future avoidable deaths e.g. relating to military equipment. Moreover, this obligation does not stop after a 5–6 year period.

5 The UK is under a non-derogable procedural obligation under Article 3 ECHR (freedom from torture or degrading or inhuman treatment or punishment) to conduct effective investigations into allegations of torture or inhuman or degrading treatment or punishment. This procedural obligation can include criminal investigations (where appropriate) as well as inquiries. Moreover, this obligation does not stop after a 5–6 year period. Similar procedural obligations exist under UNCAT.

f) The right to an effective remedy for a breach of human rights (Article 13 ECHR);[6]

g) Risk that cases involving UK service personnel will need to be tried before the ICC in the Hague rather than before British courts.

3. Given the Committee's significant concerns with the Bill's compatibility with human rights and international humanitarian law, the Annex contains a number of suggested Committee amendments to the Bill.

Overview

Timetable

4. The OO Bill was introduced into the House of Commons on 18 March 2020 and was debated at Second Reading in the Commons on 23 September. Whilst there is much support for greater legal protections for service personnel and veterans, during its Second Reading a number of Members expressed concern that the Bill risks breaching the UK's international legal obligations, placing the Armed Forces above the law, and that the proposals do more to protect the Ministry of Defence (MoD) than members of the Armed Forces. At the time of writing the Bill was in Public Bill Committee which was expected to Report to the House on Thursday 22 October 2020. At the time of publication, the Bill should be awaiting its Report stage in the House of Commons.

5. The Committee launched an inquiry on 27 July 2020. We received 32 pieces of written evidence and heard from witnesses, Reverend Nicholas Mercer, former Command Legal Advisor, UK 1st Armoured Division, Iraq War; Elizabeth Wilmshurst CMG, Distinguished Fellow, Chatham House, specialist in international law; Mark Goodwin-Hudson, former British Army Officer and head of the NATO Civilian Casualty Investigation and Mitigation Team in Afghanistan in 2016; and Martyn Day, Solicitor and Partner at Leigh Day; as well as from the Parliamentary Under Secretary of State for Defence, People and Veterans, Johnny Mercer MP; the MoD Minister of State Baroness Goldie; Damian Parmenter CBE, Director of the Defence & Security Industrial Strategy, MoD; and Katherine Willerton, Deputy Director and Head of the General Law Team, MoD legal advisers.

Government's policy position

6. The Government states that the purpose of this Bill is "to provide greater certainty for service personnel and veterans in relation to vexatious claims and prosecution of historical events, that occurred in the uniquely complex environment of armed conflict overseas."[7]

7. The Government suggests that this Bill is necessary "to address issues that have partly arisen from the unforeseen expansion of the European Convention on Human Rights (ECHR) to cover overseas military operations." The Government's proposals are framed

6 Article 13 ECHR provides that "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority." However, such remedies will be prevented under the Bill.

7 See the Explanatory Notes (EN) to the Overseas Operations (Service Personnel and Veterans) Bill [Bill 117 (2019–21) -EN]

as addressing "lawfare", or the judicialization of war, and what the Government perceives as excessive civil claims against the MoD and criminal prosecutions of service personnel/veterans.[8]

8. This Bill follows a MoD consultation launched in July 2019 which set out three key proposals:

a) a statutory presumption against prosecution for alleged offences committed on overseas operations more than 10 years ago [reduced to five years in the Bill]

b) creation of a new partial defence to murder [not included in the Bill];

c) a time limit on civil litigation claims for personal injury/death [reflected in the Bill].[9]

9. The Chair of the JCHR wrote to the Secretary of State for Defence in relation to this consultation on 23 October 2019[10] and we received a reply to this letter.[11]

Background

10. There have been a number of investigations and inquiries into incidents arising from the UK's involvement in the conflicts in Iraq and Afghanistan, including some allegations of offences committed by British serving personnel. According to the evidence submitted to this inquiry, due to the inadequacy of the MoD's system for investigating allegations, many investigations have been protracted and repeated. This has had unfortunate consequences for all involved and has not served the interests of justice. However, the evidence indicates that the problem lies in the inadequacy of MoD investigative processes and systems rather than the criminal or civil courts. The (rather limited) available litigation statistics are set out in the Appendix to this Report. Critics of the Bill have raised the point that the Bill fails to address the real root cause of the problem.[12] This is explored further in Chapter 2.

Scope of Bill

11. The Bill applies to litigation relating to military operations overseas (i.e. outside of the British Islands), including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious public disorder, in the course of which Her Majesty's forces "come under attack or face the threat of attack or violent resistance".[13] It therefore goes much wider than traditional "international armed conflict" situations.

12. The provisions in the Bill relating to prosecutions apply in respect of the Armed Forces and the British Overseas Territory Forces when operating with the UK Armed Forces in overseas operations.

8 Explanatory Notes (EN) to the Overseas Operations (Service Personnel and Veterans) Bill [Bill 117 (2019–21)–EN]
9 Ministry of Defence, Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the UK, July 2019
10 Letter to Rt Hon Ben Wallace MP, Secretary of State for Defence, regarding MoD proposed changes to legal responsibility for actions by UK Armed Services, dated 23 October 2019
11 Letter from Rt Hon Ben Wallace MP, Secretary of State for Defence, to the Chair, regarding the introduction of the Overseas Operations (Service Personnel and Veterans) Bill, dated 15 June 2020 although the letter was not received until 2 July 2020
12 For example, see evidence from the Centre for Military Justice (OOB0017), Mark Goodwin-Hudson (OOB0022), Emeritus Professor Francoise Hampson (OOB0011)
13 Overseas Operations (Service Personnel and Veterans) Bill, Clause 1(6) [Bill 117 (2019–21)]

13. The Bill extends to England, Wales, Scotland and Northern Ireland. However, it is important to note that the substantive provisions of this Bill do not apply to the conflict in Northern Ireland—the Government intends to deal with this in separate, forthcoming legislation.

Summary of the key elements of the Bill

The statutory presumption against prosecution of service personnel/ veterans after 5 years: Clauses 1–7 of the Bill

14. The Bill introduces a so-called "triple lock" against prosecutions after five years from the date of the alleged criminal conduct:

a) Firstly, the Bill introduces a presumption against prosecution of members of the Armed Forces after five years from the date of the alleged criminal conduct,[14] following which a prosecutor can only proceed with a prosecution if it is "exceptional";[15]

b) Secondly, in making a decision whether to prosecute after 5 years, certain matters must be given "particular weight" by the prosecutor. The matters are:

   i) the adverse effect (or likely adverse effect) of the conditions during the operation on the ability of members of the Armed Forces to make sound judgements, to exercise self-control, or any other impact on their mental health;[16] and

   ii) in cases where there has been a previous investigation and no compelling new evidence, there is a public interest in finality being achieved without undue delay.[17]

c) Thirdly, the consent of the Attorney General is required to prosecute after the expiry of the five-year period.[18]

15. The statutory presumption against prosecution only applies in respect of "relevant offences".[19] The definition includes service offences under section 42 of the Armed Forces Act 2006[20] and all criminal offences except those that are specifically excluded by virtue of Schedule 1 (i.e. sexual offences). This means that there would be a statutory presumption against prosecution in relation to torture, murder, genocide, war crimes and crimes against humanity.

16. Any alleged offences committed by service personnel (or veterans who were service personnel at the time of the conduct) against a member of the Armed Forces (including forces from British Overseas Territories), a Crown Servant or a defence contractor are also excluded from the definition of a "relevant offence" (i.e. offences committed within

14 Overseas Operations (Service Personnel and Veterans) Bill, Clause 1
15 Overseas Operations (Service Personnel and Veterans) Bill, Clause 2
16 Overseas Operations (Service Personnel and Veterans) Bill, Clauses 3(2)(a), 3(3) and 3(4)
17 Overseas Operations (Service Personnel and Veterans) Bill, Clause 3(2)(b)
18 Overseas Operations (Service Personnel and Veterans) Bill, Clause 5
19 Overseas Operations (Service Personnel and Veterans) Bill, Clause 6
20 The Armed Forces Act 2006 sets out offences that can be committed under service law.

the Armed Forces are excluded from the scope of the Bill). So, there is a difference in treatment depending on whether the victim is another member of the UK Armed Forces or not.

Amendments to limitation periods for claims under the Human Rights Act and claims in tort: Clauses 8–11

17. Claims under the Human Rights Act 1998 (HRA) are currently subject to a time limit of one year, subject to an extension if "equitable having regard to all the circumstances" (s. 7(5) HRA). The Bill introduces an absolute maximum of six years with no further extension even where an extension would be equitable in the circumstances. If, however, the date of knowledge[21] of the alleged human rights violation is later than the six-year time limit, the victim may still bring a claim within 12 months of the date of knowledge.[22]

18. The Bill also qualifies the courts' discretion to extend the time limit beyond one year by introducing a requirement that the Court must have regard to:

a) the cogency of the evidence after such a period of time, with reference to the ability of the service personnel/veterans to remember events and the extent of dependence on memories; and

b) the likely impact of proceedings on the mental health of any potential Armed Forces witness.[23]

19. Claims in tort for personal injury or death are currently subject to a limitation period of three years subject to judicial discretion to extend that period. The Bill amends the law on limitation periods by introducing an absolute maximum time limit of six years with no further extension allowed. It also introduces new factors to which the court must have regard when exercising discretion as to time limits (in particular the effect of the delay on the likely cogency of any evidence adduced, and the likely impact of the proceedings on the mental health of the witness (or potential witness) who was at the time a member of the Armed Forces).

Duty to consider derogation from the European Convention on Human Rights: Clause 12

20. The Bill amends the HRA to place an ongoing duty on the Secretary of State to consider derogating from the ECHR in relation to any future overseas operations.[24]

Amendments to the Human Rights Act 1998

21. The Bill, therefore, amends the HRA in two respects:

a) It inserts a new section 7A into the HRA to introduce an absolute bar on claims relating to overseas operations under the HRA after six years (unless the date of

21 Date of knowledge means the date on which the person bringing the claim first knew, or ought to have known, of the act complained of and that it was an act of the MoD or Secretary of State for Defence.

22 Overseas Operations (Service Personnel and Veterans) Bill, Clause 11(2) (inserting a new section 7A into the HRA)

23 Overseas Operations (Service Personnel and Veterans) Bill, Clause 11(2) (inserting a new section 7A into the HRA)

24 Overseas Operations (Service Personnel and Veterans) Bill, Clause 12

knowledge is later). It also limits judicial discretion to allow a claim in respect of a human rights violation more than one year after the facts, by introducing new factors to which the courts must have regard in exercising its discretion.[25]

b) It inserts a new section 14A into the HRA to impose on the Secretary of State an ongoing "duty to consider derogation" from the ECHR in the context of overseas operations.

25 Overseas Operations (Service Personnel and Veterans) Bill, Clause 11

2 The adequacy of Ministry of Defence investigations

The investigations, litigation and inquiries

22. There have been a number of investigations and inquiries into incidents arising from the UK's involvement in the conflicts in Iraq and Afghanistan, including some allegations of offences committed by British serving personnel. Some of these cases have exposed wrongdoing such as mistreatment of detainees, unlawful detention and breaches of the prohibition on torture and inhuman or degrading treatment or punishment (Article 3 ECHR). Other cases have exposed poor practices, procedures and equipment on the part of the MoD that have led to the unnecessary deaths of and injuries to members of the Armed Forces. Other cases have not exposed such wrongdoing. Despite these investigations and inquiries there have been few prosecutions even where there has been hard evidence, for example recordings of mistreatment and abuse of detainees, that allow soldiers to be identified.[26]

23. Some of the key inquiries, litigation and investigations concerning Iraq and Afghanistan are as follows:

a) Baha Mousa Inquiry, 2011: this public inquiry examined the death of Baha Mousa and nine others who were detained in Basra in 2003, beaten, subject to unlawful "conditioning techniques", and found dead. In 2011, the inquiry found that Baha Mousa died after an "appalling episode of gratuitous violence" and noted the MoD's "corporate failure" for the use of banned interrogation techniques.[27]

b) Al-Skeini, 2011:[28] concerned a number of individuals who were allegedly killed by British troops on patrol in UK occupied Basra. The European Court of Human Rights (ECtHR) determined that in certain very limited circumstances the ECHR will apply outside the territories of its member states. It was applicable to actions taken by British troops in Basra where the UK assumed the exercise of some public powers normally exercised by a sovereign government. The Court went on to find that there had been a failure to conduct an independent and effective investigation into the deaths of the relatives of five of the six applicants, in violation of Article 2 ECHR. In the related case of Al-Jedda, the Court found a violation of Article 5 ECHR (right to liberty and security) in relation to the detention of the applicant by UK Armed Forces in Iraq.

c) Al-Sweady Inquiry, 2014: this public inquiry arose from a case brought by Hamid Al-Sweady, who claimed that his nephew had been unlawfully killed while in the custody of UK Armed Forces. The inquiry also looked into other related claims of detention and mistreatment by British troops. In December 2014, the inquiry reported that certain aspects of the way detainees were treated amounted to actual or possible ill-treatment. However, a significant percentage

26 See for example "*Historical war crimes: an amnesty for British soldiers?*" The Guardian, Today in Focus, May 2019
27 The Baha Mousa Public Inquiry Report, The Rt Hon Sir William Gage (Chairman), HC 1452–I, September 2011
28 Al-Skeini & Others v UK (App. No. 55721/07), 2011

of the claims were found to be unmeritorious. Following action taken by the Solicitors Regulation Authority (SRA), the lawyer responsible, Phil Shiner, was struck off in 2017 for professional misconduct (i.e. dishonesty over false claims).[29]

d) Iraq Historic Allegations Team, 2010–2017: in 2010, the Government established the Iraq Historic Allegations Team (IHAT). IHAT received 3,400 allegations of unlawful killings and ill-treatment.[30] IHAT determined that for around 70% of those there was no case to answer or it was disproportionate to conduct a full investigation. The Government closed IHAT in 2017. The remaining 1,260 allegations were taken over by the Service Police Legacy Investigations (SPLI) branch of the Service Police.[31] As at 30 June 2020, they had closed 1,213 of the cases.[32] Some cases require further inquiry by the MoD after completion of an investigation by IHAT or SPLI, in accordance with obligations under Articles 2 and 3 ECHR. The MoD periodically publishes summaries of decisions and reasons for them. Claimants can request the full decision in their case.[33]

e) Smith and Others v MoD [2013] the Supreme Court held that members of the Armed Forces, or their bereaved relatives in the case of those who had died, were protected by the ECHR in relation to claims that their equipment was inadequate and had led to their injuries/deaths—this related to claims about the inadequacy of Snatch Land Rovers as well as claims about the lack of adequate protection against "friendly fire".[34]

f) Iraqi Fatalities Investigations, from 2014: this was established after the courts determined in 2013 that Article 2 ECHR required a publicly accountable investigation with the participation of the families of the deceased.[35] These investigations only take place after a decision not to prosecute and they do not establish civil or criminal liability—they are akin to coronial inquests.[36]

g) Hassan v UK [2014][37] The ECtHR held that in situations of armed conflict, the provisions of the ECHR should be interpreted against the background of the provisions of international humanitarian law. Specifically, the grounds of permitted deprivation of liberty under Article 5 ECHR should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who posed a risk to security under the Third and Fourth Geneva Conventions. Deprivation of liberty had to comply with international humanitarian law in order to be lawful, and also had to be in keeping with the fundamental purpose of Article 5(1), which is to protect the individual from arbitrariness. The Court

29 Ministry of Defence, Report of the Al Sweady Inquiry, HC 818-I, December 2014, and "*Professor Phil Shiner and the Solicitors Disciplinary Tribunal*" Solicitors Regulation Authority, 2 February 2017
30 Gov.UK, Iraq Historic Allegations Team (IHAT)
31 Gov.UK, Guidance: Service Police Legacy Investigations, August 2017
32 Overseas Operations (Service Personnel and Veterans) Bill 2019–21, Briefing Paper 8983, House of Commons Library, 22 September 2020
33 Gov.UK, Guidance, MoD decisions on alleged human rights breaches during Operation Telic, July 2017
34 Smith and Others v MOD [2013] UKSC 41.
35 Gov.UK, Collection, Iraq Fatality Investigations, June 2018
36 Overseas Operations (Service Personnel and Veterans) Bill 2019–21, Briefing Paper 8983, House of Commons Library, 22 September 2020
37 Hassan v United Kingdom (29750/09) [2014] 9 WLUK 388

concluded that there had been no breach of Article 5 in this case, because the capture and detention of the claimant's brother in Iraq had fulfilled these requirements.

h) Operation Northmoor: this was an investigation in 2014 by the Royal Military Police into allegations relating to UK detention operations in Afghanistan between 2005 and 2013. In total, 675 allegations were referred from 159 individuals. No case was referred for prosecution by the Service Prosecuting Authority.[38]

i) R (Al Saadoon) v Secretary of State for Defence [2016]:[39] The appellants sought orders requiring the Secretary of State to investigate allegations of unlawful killings of Iraqi civilians by British soldiers. The Court of Appeal held that the 'public powers' basis for extra-territorial jurisdiction of the Convention established in Al-Skeini could also apply during a post-occupation period. It would apply in situations where state agents exercised a degree of power and control over a person which went beyond the use of potentially lethal force, and included an element of control prior to the use of force. The Court then considered various test cases to determine whether Iraqi civilians who had been killed were under the effective control of UK Armed Forces and therefore came within the jurisdiction of the Convention.[40]

j) In 2017, the case of Alseran before the High Court revealed the use of prohibited interrogation techniques, physical assaults and sexually humiliating treatment of detainees by British soldiers.[41]

k) Mohammed v Secretary of State for Defence [2017]:[42] The Supreme Court considered whether the detention of enemy combatants for long periods in Iraq and Afghanistan breached Article 5 ECHR. It held that British forces had legal power to detain individuals for periods longer than 96 hours. Authority to detain was implicitly conferred by the UN Security Council Resolutions where it was required for imperative reasons of security. Article 5(1) should be read so as to accommodate as permissible detention pursuant to that power in the context of non-international armed conflict. This followed the reasoning of the ECtHR in Hassan, that Article 5(1) should be treated as non-exhaustive so as to accommodate the existence of a power of detention in international law.

24. More recently, the MoD has been criticised for failing to properly investigate alleged offences:

38 Overseas Operations (Service Personnel and Veterans) Bill 2019–21, Briefing Paper 8983, House of Commons Library, 22 September 2020

39 R (Al-Saadoon) V SoS for Defence [2016] EWCA Civ 811

40 Paras 75–105

41 Alseran and Others v MOD [2017] EWHC 3289 (QB). See written submission from The Centre for Military Justice (OOB0017).

42 Mohammed v Secretary of State for Defence [2017] UKSC 2

a) In November 2019, BBC Panorama and The Sunday Times conducted an investigation following which they alleged that the MoD had covered up evidence relating to war crimes in Afghanistan and Iraq.[43] The Foreign Secretary responded to say that all the allegations and evidence had been looked at.

b) In August 2020, The Times reported allegations of a cover up in relation to an alleged SAS execution force in Afghanistan, following the discovery of documents during a case before the High Court.[44] These allegations were denied by the Parliamentary Under Secretary of State for Defence, People and Veterans, Johnny Mercer MP in the House in January 2020.[45]

25. **It is clear that some of the investigations, inquiries and litigation into incidents arising from the UK's involvement in the conflicts in Iraq and Afghanistan have exposed wrongdoing, such as mistreatment of detainees, unlawful detention and breaches of the prohibition on torture and inhuman or degrading treatment or punishment (Article 3 ECHR). Cases have also exposed poor practices, procedures and equipment on the part of the MoD that have led to the unnecessary deaths of, and injuries to, members of the Armed Forces. *Such investigations, inquiries and litigation must continue to be allowed to uncover any such poor practices, so that lessons are learned in order to prevent people—whether members of the Armed Forces or civilians—being harmed or killed unnecessarily*.**

Inadequacy of Ministry of Defence investigations

26. According to the evidence submitted to this inquiry (as well as the findings of the APPG on Drones and APPG on Human Rights),[46] due to the inadequacy of the MoD's system for investigating allegations, many investigations have been protracted and repeated. This has had unfortunate consequences for all involved and has not served the interests of justice.

27. Indeed in May 2019, Johnny Mercer MP said, "one of the biggest problems with this was the military's inability to investigate itself properly and the standard of those investigations".[47] Further, in evidence to the Committee, he acknowledged the significant issues with MoD investigations and said that measures would be brought forward to address this issue but not in legislation.[48]

43 "*UK Government and military accused of war crimes cover-up*" BBC News, 17 November 2019, https://www.bbc.co.uk/iplayer/episode/m000bh87/panorama-war-crimes-scandal-exposed

44 "*Rogue SAS Afghanistan execution squad exposed by email trail*", The Times, 1 August 2020; "*Rogue SAS Afghanistan execution squad exposed by email trail*", The Sunday Times, 2 August 2020. See also "*Defence Secretary to review Afghanistan emails*", BBC News, 3 August 2020

45 HC Deb, 7 January 2020, cols 359–363

46 See written evidence, All-Party Parliamentary Group on Drones (OOB0026). See also Qq2–3 [Mark Goodwin-Hudson] "the ability to conduct accurate and timely investigations in theatre [is] the best means to stop this spiralling of reinvestigation and to understand and address the allegations against our soldiers."

47 "*Historical war crimes: an amnesty for British soldiers?*" The Guardian, Today in Focus, May 2019

48 Q14 [Johnny Mercer MP] "Yes, there has been a serious generational problem with the standard of investigations that this department has carried out into allegations of lawfare. Over the years that has manifested itself in the fact that a lot of the investigations have not withstood rigour as regards ECHR compliance and things like that. That has been a major problem.... That is not in the Bill, because that is not a piece of legislation. That is an internal process that absolutely the MoD has to do...I hope people will see even before the end of the week the steps we are taking to address some of the problems that you mention."

28. Critics of the Bill have argued that it fails to address the real root cause of the problem, which they say is the inadequacy of MoD investigative processes and systems rather than the criminal or civil courts.[49] Elizabeth Wilmshurst told us:

> No, [the presumption against prosecution] is not justified. There has been a problem, in that service personnel seem to have been the subject of inquiries and investigations, sometimes more than one in relation to the same incident. But the presumption is not the way to fix any problem that there may be. The presumption puts at risk the UK's reputation as an upholder of international law and puts UK service personnel at risk of being prosecuted not before our own courts but before the International Criminal Court.[50]

29. We heard from those with direct experience of investigations in the British Army who explained how the investigations were not sufficiently resourced, independent, timely or expert.[51] For example, Mark Goodwin-Hudson, former British Army Officer and NATO Civilian Casualty Investigation and Mitigation Team lead in Afghanistan, told us:

> […] what we need instead of the presumption against prosecution […] is the ability to conduct accurate and timely investigations in theatre as the best means to stop this spiralling of reinvestigation and to understand and address the allegations against our soldiers.[52]

30. This failure in independent, timely and expert investigations has meant that investigations were flawed and needed to be repeated—creating a cycle of investigations that was stressful for both victims and those accused.

31. We also heard of some of the cultural barriers to investigations. Reverend Nicholas Mercer, former Command Legal Advisor, UK 1st Armoured Division, Iraq War, told us:

> "Another factor is that soldiers, even to this day, have put up what has been termed a wall of silence. We heard in the Saville inquiry about soldiers not breaking ranks, and we heard about it in Baha Mousa. If you put a statute of limitations on it, there is a temptation to run down the clock. The law is fine as it stands. Any attempt to put a time limit on it raises problems of its own and is unnecessary."[53]

32. We heard how there were problems with accountability from senior figures and the instructions they were giving. Mark Goodwin-Hudson told us:

> "When I was in Iraq, for example, my general would run around saying, "Don't use two rounds if you can use 200 rounds. Don't fire twice if you think

49 For example, see evidence from The Centre for Military Justice (OOB0017), Mark Goodwin-Hudson (OOB0022)), Emeritus Professor Francoise Hampson (OOB0011). See also Martyn Day, at Q2 "The main problem is the failure of the prosecuting authorities, the Royal Military Police, to do a thorough job at the start. It is even recognised by the Ministers that, if they had done their job at the start, there could have been a proper analysis of whether prosecutions could be brought on the evidence that they had. The fact that the Royal Military Police were so poorly resourced and so nonindependent meant that, first, the investigations were not carried out properly and, secondly, when they eventually came in front of the courts, the courts said, "This is not an independent body, and it needs to be an independent body to carry out these sorts of investigations". It is the wrong way to approach the problem."

50 Q2 [Elizabeth Wilmshurst]

51 Qq 2–8

52 Q2

53 Q2 [Reverend Nicholas Mercer]

> you can fire 200 times". That is a very provocative and deliberate attempt to increase the violence, yet the soldier is often the fall guy for mistakes and innocent people getting killed in those situations. I am a former officer. We should be held to account just as much as the person who pulls the trigger."[54]

33. We also heard how there were concerns that operational legal advice to comply with the UK's torture obligations was overridden by the MoD and Attorney General in London. Reverend Nicholas Mercer told us:

> "Being the commander legal in the Iraq war, I walked in on one of these interrogation sessions as early as March 2003 and saw 40 Iraqis being subjected to what are known as the five techniques, which, as Lord Trimble will know, came to the fore in Northern Ireland in the 1970s. I made a complaint; other senior officers made a complaint. We were overruled. When it came to the Baha Mousa inquiry in 2011, eight years later, Sir William Gage said there had been a corporate failure by the Ministry of Defence in relation to detention and interrogation. That means that six years of military activity, when it came to interrogation and detention, was in breach of international law."[55]

34. **The evidence indicates overwhelmingly that investigations into incidents have been inadequate, insufficiently resourced, insufficiently independent and not done in a timely manner to gather adequate evidence. This has resulted in repeated investigations to try to remedy the flaws of previous investigations. This creates stress and uncertainty for both those accused of wrong-doing and for victims. It also impedes justice as cases cannot be brought or resolved.**

35. **Investigations will still be required, despite this legislation. And the inadequacy of those investigations will not be addressed by the Bill. Furthermore, the Bill does nothing to address the issue of repeat investigations which causes distress to both alleged victims and alleged perpetrators. It is therefore difficult to reconcile the contents of the Bill with its stated objective.**

36. ***The MoD must, as a priority, establish an independent, skilled and properly funded service for investigations. Investigations must be robust, take place promptly and be sufficiently independent and of high quality so that there is no longer any need for repeated or protracted investigations.***

37. To this end we note with interest the very recent announcement of a review into the processes of the service police and the service prosecuting authority.[56] In the Written Ministerial Statement that announced this review, Ben Wallace MP, the Defence Secretary said:

> I am […] commissioning a review so that we can be sure that, for those complex and serious allegations of wrongdoing against UK forces which occur overseas on operations, we have the most up to date and future-proof framework, skills and processes in place and can make improvements

54 Qq6–7 [Mark Goodwin-Hudson]
55 Q8 [Reverend Nicholas Mercer]
56 HC Deb, 13 October 2020, col 507WS and see letter from Rt Hon Ben Wallace MP, Secretary of State for Defence, regarding the Bill, dated 12 October 2020.

> where necessary. The review will be judge-led and forward looking and, whilst drawing on insights from the handling of allegations from recent operations, will not seek to reconsider past investigative or prosecutorial decisions or reopen historical cases. It will consider processes in the service police and Service Prosecuting Authority as well as considering the extent to which such investigations are hampered by potential barriers in the Armed Forces, for example, cultural issues or operational processes. A key part of the review will be its recommendations for any necessary improvements.

38. We hope that this review and any ensuing actions taken address the core issues impeding timely, independent and adequate investigations. We also look forward to receiving updates on the review and how any recommendations will be taken forward.

3 Presumption against prosecution for offences after a 5-year period: Clauses 1–7

39. The Bill introduces a "triple-lock" against prosecutions of members of the Armed Forces, which will apply to all relevant offences five years after the date of the alleged criminal conduct.[57] The Government states that the intention is to "raise the bar for prosecutions in relation to historic incidents that occur in the context of overseas operations".[58] Taken together this "triple lock" does indeed begin to seem quite onerous. Five years is rather a short period of time given the context of conflict, and the presumption against prosecution could lead to impunity, violate the right to a remedy for genuine victims, and undermine the UK's international obligations to prosecute international crimes.

Is there a problem with prosecutions?

40. The prosecutors who bring prosecutions against Armed Forces Personnel are the UK Service Prosecuting Authority (part of the MoD) following an investigation done internally (also by part of the MoD).[59] A prosecution can only be brought where there is "sufficient evidence" that the accused committed the offence and where it is also "in the public interest" to bring a prosecution. There is therefore a high threshold before a prosecution can be brought. Moreover, there appear to have been relatively few prosecutions brought against service personnel for offences committed during overseas operations.[60]

41. In evidence provided to this Committee, Damian Parmenter CBE, the MoD Director of Defence & Security Industrial Strategy, informed us that since 2000, a total of 27 prosecutions had been brought in relation to Iraq and Afghanistan.[61] The Minister and MoD staff could not name one prosecution that they thought was vexatious.[62] We heard from Reverend Nicholas Mercer, that:

> There will always be exceptional cases, but the vast majority of these have legal merit […] The prosecutor looking at [cases] in the first instance will know when a case is without merit and may close it […] Before I left the army, I gave legal advice on a number of prominent cases, including Camp Breadbasket, which is appalling. I invite you to go back and look at the pictures of abuse that took place. At the same time, I found a case that was without merit and I closed it. It was as simple as that. I do not need legislation to do that. It happens already.[63]

57 The details of this "triple lock" proposal are set out in Chapter 1.

58 Explanatory Notes (EN) to the Overseas Operations (Service Personnel and Veterans) Bill [Bill 117 (2019–21)–EN], para 3

59 Prosecutions can be brought by the Crown Prosecution Service, but this is less common.

60 Dr Stuart Wallace (OOB0009). All-Party Parliamentary Group on Drones, Key Take-Aways: Overseas Operations Bill Second Reading, 29 September 2020

61 Damian Parmenter, Q16 " Some 27 individuals were charged since 2000, of whom eight were convicted in a court martial."

62 Q16 [Damian Parmenter]

63 Q8 [Reverend Nicholas Mercer]

42. We understand that none of the MoD's current historical investigations (as concerns Iraq or Afghanistan) has resulted in a prosecution being brought. It is therefore difficult to understand what the problem is with prosecutions (a separate matter from the quality of investigations).

43. **It is difficult to understand why the MoD is legislating to limit the ability of its own prosecutors to bring prosecutions when so few prosecutions have been brought, and when there is no suggestion that prosecutions brought by the Service Prosecuting Authority have been vexatious.**

44. We asked the Minister what he meant by vexatious prosecutions brought by the MoD against Armed Forces Personnel in a series of questions, but he seemed not to understand the question or not to want to answer the question and talked instead in general terms about matters relating to civil claims.

45. ***There has been no suggestion that the Service Prosecuting Authority is bringing excessive or unjustified prosecutions against members of the Armed Forces, therefore we can see no justification for introducing the statutory presumption against prosecution of Armed Forces personnel. We have significant concerns that clauses 1–7 have been introduced based on a misunderstanding of the difference between (i) investigations; (ii) prosecutions; and (iii) civil claims.***

46. ***We cannot see any justification for introducing a statutory presumption against prosecution in cases where the Service Prosecuting Authority considers that there is sufficient evidence that a member of the Armed Forces committed an offence and has already decided that it is in the public interest to bring a prosecution. For these reasons we consider that clauses 1–7 should be deleted.***

Should certain defendants have special protection from prosecution?

47. Armed Forces personnel are bound to abide by the criminal law of England and Wales as well as international humanitarian law when they embark on operations overseas.[64] As Katherine Willerton, Deputy Director in MoD Legal Advisers confirmed to the Committee, the Government is "not aware of any precedents" for having special class of defendant, who is protected over and above the protections provided by the court and by the prosecutors' duties, to ensure a sufficient threshold of evidence and that a prosecution is in the public interest.[65]

48. At present, in domestic law, there are no time limits applicable to prosecutions except for in respect of the most minor offences.[66] However, a prosecutor will have regard to the cogency of evidence (and witness memories) in deciding whether it is in the public interest to bring a prosecution. International human rights law, including the ECHR, does however allow for time limitations for criminal prosecutions but there are restrictions as to when

64 Ministry of Defence, Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the UK, July 2019.

65 Q16 [Katherine Willerton]. She also added though that "we have found examples of where the code for Crown prosecutors requires a prosecutor in deciding whether to bring a prosecution to consider the particular characteristics of a suspect in relation to minors".

66 Under s.127 of the Magistrates Court Act 1980 a prosecution must be started within 6 months for summary offences that can only be heard in the Magistrates Court; for example, most traffic offences, minor public order offences and failing to pay for a TV licence.

that will be reasonable. Importantly, a limitation period that would prevent prosecutions is unlawful under international law if it prevents investigations and prosecutions in relation to torture, war crimes, crimes against humanity and genocide.

49. The Government argues that the Bill merely introduces a "presumption" against prosecution rather than a statute of limitation.[67] Although it is "merely" a presumption, it is accompanied by further hurdles to bringing a prosecution after five years:

a) the starting point is presumption against prosecution after 5 years;

b) the prosecutor must only prosecute in "exceptional" circumstances;[68]

c) the prosecutor then needs to give "particular weight" to:

i) the "adverse effect"[69] (or likely adverse effect) on the person of the conditions the person was exposed to during deployment on operations overseas (including the "exceptional demands and stresses" to which service personnel are subject);[70] and

ii) the public interest in finality (where a person has been previously investigated and there is no new compelling evidence); and

d) finally, the consent of the Attorney General is required.

50. In the Government's own words, the Bill "raises the bar" for prosecution of service personnel/veterans. The Law Society of England and Wales, in its written evidence to the Committee, concludes that the presumption against prosecution creates a "quasi-statute of limitation" which is "unprecedented" in the criminal law and presents "a significant barrier to justice".[71]

51. Indeed, the proposed presumption against prosecution operates in effectively the same way as a statute of limitation, which is almost unheard of in UK criminal law.[72] However, with the exception of sexual offences, the Bill introduces a statutory presumption against prosecution after five years for all offences committed by Armed Forces personnel, including the most heinous crimes such as murder, torture, war crimes, crimes against humanity and genocide.

52. The MoD consultation in 2019 proposed a presumption against prosecution after 10 years. In the Bill, this has been halved to 5 years, which is very short. Whilst other

67 A statute of limitation is a law that limits the amount of time that is allowed to bring a legal action against a person.

68 Overseas Operations (Service Personnel and Veterans) Bill, Clause 3

69 Meaning the adverse effect on their capacity to make sound judgements or exercise self-control; or on their mental health, at the time of the alleged conduct. Overseas Operations (Service Personnel and Veterans) Bill, Clause 3(4).

70 Overseas Operations (Service Personnel and Veterans) Bill, Clause 3(2)

71 The Law Society of England and Wales (OOB0015), para 3

72 Under s.127 of the Magistrates Court Act 1980 a prosecution must be started within 6 months for summary offences that can only be heard in the Magistrates Court; for example, most traffic offences, minor public order offences and failing to pay for a TV licence.

countries such as France and the US have statutes of limitation for criminal offences, these exclude the most serious offences and do not grant a special status to certain persons such as military personnel.[73]

53. Moreover, the presumption may serve to deny justice to victims. Five years is an extremely short period of time in the context of overseas armed conflict. There are many practical reasons why it may not be possible to bring a prosecution during this time such as the protracted nature of the conflict, the continuing unlawful detention of the victim, or a persisting physical or mental injury. The British Red Cross, in its evidence to the inquiry, stated that the five-year time limit may be too short in some cases, particularly in protracted conflict scenarios where safe access to evidence is notoriously difficult to obtain.[74]

54. **There should not be different classes of defendant or different classes of victim. We are concerned at the introduction, into the domestic laws of the United Kingdom, of a special category of defendant (i.e. members of the Armed Forces) whose victims are seemingly less deserving of justice and who are granted greater impunity for their crimes. We note that a prosecution may only be brought where there is sufficient evidence and where it is in the public interest. *We do not understand why cases should not be brought against this category of defendant (i.e. members of the Armed Forces) where there is sufficient evidence of a crime having been committed by the defendant and where it is in the public interest to prosecute.***

The illegality of a presumption against prosecution for torture, war crimes, crimes against humanity and genocide

55. This presumption against prosecution applies to all criminal offences, excluding sexual offences as listed in Schedule 1. All other crimes including crimes against humanity, war crimes, genocide and torture would be subject to the presumption against prosecution.

56. Whilst it is generally permissible in human rights law to apply a statute of limitation to crimes, there are limits: there are some criminal offences which are so heinous that international law prohibits a statute of limitation applying, such as war crimes.[75] Obligations under specific international human rights treaties and international humanitarian law (the law of armed conflict) place an absolute duty on States to prosecute offenders for certain crimes such as torture, war crimes and crimes against humanity.[76]

57. The UK is bound by international legal obligations to undertake effective investigations, to prosecute various international crimes where there is sufficient evidence, and to refrain from imposing a statute of limitation on certain crimes:

a) Articles 2 and 3 ECHR: the UK is under a procedural obligation to undertake effective investigations into cases where the state has used lethal force (engaging Article 2) or where there are allegations of serious ill-treatment meeting the threshold of Article 3 (torture, inhuman or degrading treatment or punishment).[77]

73 Overseas Operations (Service Personnel and Veterans) Bill 2019–21, Briefing Paper 8983, House of Commons Library, 22 September 2020, pages 23–24

74 Written evidence from the British Red Cross (OOB0023)

75 Ref ICRC CIL Rule 160

76 See, for example, the UN Convention Against Torture; Geneva Conventions; Rome Statute.

77 McCann and Others v UK [1995] App Np 18984/91; Sakir v Greece, App No 48475/09, 24 March 2016

There is nothing in the Bill which prevents investigations taking place. However, the ECtHR has determined that in order for an investigation to be effective, it must be "capable of leading to the establishment of the facts […] and—if appropriate—punishing those responsible."[78] The ECtHR further held that "national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished".[79]

b) Geneva Conventions: the UK is under a duty to "search for persons alleged to have committed […] grave breaches [of the Geneva Conventions i.e. serious war crimes] and shall bring such persons, regardless of their nationality, before its own courts."[80]

c) UN Convention Against Torture (CAT): Article 7 of UNCAT requires that allegations of torture must be submitted to the prosecuting authorities who must decide whether to prosecute "in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."[81] In evidence to this inquiry, the former UN Special Rapporteur, Juan Mendez, notes that under the CAT, states must investigate, prosecute, and punish acts of torture and ill-treatment, including by removing impediments to prosecution. The Bill, he states, "unfairly hinders victims from accessing the courts and adds further logistical hurdles by requiring them to prove their case is "exceptional"".[82]

d) Rome Statute: Article 29 of the Rome Statute, to which the UK is a State Party, states that crimes within the jurisdiction of the ICC (which includes war crimes, crimes against humanity and genocide) shall not be subject to any statute of limitation.[83]

e) Customary international law: Customary international humanitarian law prohibits the application of statutes of limitation to war crimes.[84]

58. We heard from witnesses and in evidence that placing time limits on the prosecution of torture is a breach of our obligations under UNCAT and placing time limits on the prosecution of war crimes, crimes against humanity and genocide is a breach of our obligations under the Geneva Conventions and Rome Statute. As Elizabeth Wilmshurst told us:

> The laws of war in the 1949 Geneva Conventions and the first protocol provide an obligation on the UK to prosecute for grave breaches of the conventions in international armed conflict. The torture convention has an obligation to prosecute. As has been pointed out, that has been interpreted by the UN committee on torture as rendering statutes of limitation, which this presumption effectively is, unlawful under the convention. The genocide convention requires us to prosecute and punish. So, yes, it would

78 Da Silva v UK, 2016, para 233
79 Da Silva v UK, 2016, para 239
80 Article 49, Geneva Convention I, Article 50 Geneva Convention II, Article 129 Geneva Convention III, and Article IV Geneva Convention IV.
81 Article 7 UNCAT
82 American University Washington College of Law, Center for Human Rights & Humanitarian Law (OOB0029), para 10
83 Article 29 of the Rome Statute of the ICC
84 See the opinion of the International Committee of the Red Cross (ICRC), ICRC Customary IHL Study, Rule 160

> be unlawful under our international obligations. Added to that, as we have already mentioned, we are rendering our service personnel liable to prosecution by the International Criminal Court.[85]

59. Those who submitted evidence were surprised that the Bill excluded sexual offences but not war crimes or torture—noting that it would lead to perverse outcomes so that a member of the Armed Forces would be prosecuted ordinarily, say, if he raped or sexually assaulted a woman, but there would be barriers to prosecuting him for murder if he then went on to murder her.[86]

60. We also note the exceptional correspondence that the UK has received from UN Special Rapporteurs on human rights expressing concern that this Bill breaches international law.[87] The UN experts on human rights said

> There can be no excuse for unlawful killings or torture […] The universal prohibition against torture is absolute and non-derogable—it is considered so important that it cannot be limited or suspended under any circumstances. Governments cannot lawfully grant impunity or otherwise decline to investigate and prosecute such crimes.
>
> By introducing a statutory presumption against prosecution and statutes of limitations, this bill undermines the absolute and non-derogable nature of the prohibition of torture and violates human rights law, as well as international criminal and humanitarian law. In the same manner, statutes of limitations should not be applied to acts constituting enforced disappearance, as it is considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified. It is essential that domestic laws comply with international obligations.

61. The presumption against prosecution therefore runs the risk of contravening various international legal obligations. In this light we asked the Minister whether he would accept that war crimes, crimes against humanity, genocide and torture would always be "exceptional" and should be prosecuted where the relevant evidential threshold had been met and where it was in the public interest to do so.[88] We had hoped that he would confirm that, provided the Service Prosecuting Authority was satisfied that they had sufficient evidence to bring a prosecution and that there was a public interest in bringing the prosecution, that such cases should always be brought when they concerned war crimes, crimes against humanity, genocide or torture.

62. **We find it unacceptable that Johnny Mercer MP, the responsible Minister, would not confirm that he thought that members of the Armed Forces should be prosecuted in**

85 Q5 [Elizabeth Wilmshurst]. At Q3, Elizabeth also clarified "international offences—genocide, war crimes, crimes against humanity, and torture—should all be excluded, and not only those offences by name but corresponding offences under our domestic law…Sometimes you can charge either for murder or for the war crime. We want to exclude both of those."

86 See for example, Q3 [Elizabeth Wilmshurst]

87 "*UK Parliament must not introduce impunity for war crimes, say UN experts*", Office of the High Commissioner for Human Rights, 5 October 2020

88 Q16

respect of war crimes, crimes against humanity, genocide or torture where the Service Prosecuting Authorities were satisfied that they had sufficient evidence to bring a prosecution and that there was a public interest in favour of bringing the prosecution.

63. **We have significant concerns that the presumption against prosecution runs the risk of contravening the UK's international legal obligations under international humanitarian law (the law of armed conflict) and international human rights law. In particular, it risks contravening the UK's obligations under the UN Convention Against Torture, the Geneva Conventions, the Rome Statute and international customary law.**

64. ***At a minimum the presumption against prosecution should be amended so that it does not apply to torture, war crimes, crimes against humanity or genocide.***

The Bill risks members of the Armed Forces being prosecuted before the International Criminal Court

65. It is in the interests of the UK to ensure that it has appropriate jurisdiction over its own actors, not only to ensure respect for the rule of law, the laws of armed conflict and human rights law by its own forces, but also in order to avoid the need for foreign states or the International Criminal Court (ICC) to seek to prosecute UK actors, such as Armed Forces personnel, for alleged war crimes.

66. The UK is a state party to the Rome Statute, which is the founding statute of the ICC. The ICC has jurisdiction to investigate and prosecute war crimes, crimes against humanity and genocide perpetrated by UK personnel, if the UK is "unwilling or unable" to do so.[89] In its initial report on the preliminary examination activities, the Office of the Prosecutor warned that if a statutory presumption against prosecution were to be introduced in the UK, "the Office would need to consider its potential impact on the ability of the UK authorities to investigate and/or prosecute crimes allegedly committed by members of the British armed forces in Iraq, against the standards of inactivity and genuineness set out in article 17 of the Statute".[90]

67. As reported by the Times, a leaked letter from Judge Advocate General Jeffrey Blackett, the UK's most senior military judge, to the Defence Secretary noted that the Bill "increases the likelihood of UK service personnel appearing before the ICC", describing the Bill as "bringing the UK armed forces into disrepute".[91] There is, therefore, a risk that cases involving UK service personnel will be tried before the ICC in the Hague rather than in the UK.

68. As Elizabeth Wilmshurst told us:

> If state parties [of the ICC], of which the UK is one, do not prosecute, the individuals concerned are vulnerable to prosecution before the International Criminal Court. That is what we are doing to our service personnel if we exclude them from prosecution under the presumption.[92]

89 Article 17 Rome Statute of the ICC
90 International Criminal Court, Report on Preliminary Examination Activities, December 2019, para 174
91 The Times, Law to Protect Soldiers could leave them facing war crimes tribunal, 4 June 2020
92 Q3 [Elizabeth Wilmshurst]

69. **We are deeply concerned that the introduction of a presumption against prosecution may mean that members of the British Armed Forces are at risk of being prosecuted either in another State or before the International Criminal Court. This is a real risk if it is considered that this presumption (combined with the existing concerns about the inadequacy of MoD investigations) leads other States or the ICC to conclude that the UK is unwilling or unable to investigate and prosecute for war crimes.**

Prosecutor to give weight to the adverse effect of deployment on overseas operations on the ability of the member of the Armed Forces to make sound judgements or exercise self-control

70. Clause 3 provides that in taking any decision to prosecute a person more than 5 years after an event, the prosecutor shall only decide to prosecute in exceptional circumstances. In making that decision the prosecutor must give particular weight to the adverse effect (or likely adverse effect) of the conditions the person was exposed to during deployment on the ability of that member of the Armed Forces to make sound judgements, to exercise self-control, or any other impact on their mental health.[93]

71. In domestic law the prosecution would take into account a person's mental health as part of the decision as to whether a prosecution is in the public interest—and this is a factor that would currently already apply to prosecutions of members of the Armed Forces. Moreover, a person who is not fit to plead at the time of trial would not be assessed for the mens rea (mental element) of an offence. A defendant could raise a plea of insanity as a defence if at the time of the offence their mental condition was so impaired that they were unable to understand the act they were doing or that it was wrong. However, people are not given immunity from prosecution merely because they do not make sound judgements or have problems exercising self-control, or because of any underlying mental health reasons.[94] However, any stress or pressure they were under would be taken into account as mitigating factors in sentencing. As Elizabeth Wilmshurst told the Committee, these factors "are inappropriate for inclusion in a prosecutorial decision."[95]

72. The MoD should not be deploying service personnel in overseas operations if those individuals are unable to make sound judgements or have difficulty in exercising self-control. Moreover, if a member of the Armed Forces develops an inability to make sound judgements or difficulty in exercising self-control whilst they are deployed in operations overseas, the MoD should take them out of that situation as soon as feasible and give them the support they need. That is the correct approach for both the well-being of the service personnel affected as well as those around them, rather than legislating so as to avoid responsibility for the consequences of arming those who are unable to make sound judgements or who have difficulty in exercising self-control. The solution in such cases is to give those individuals the support they need and to remove them from overseas operations. Sadly, this Bill risks disincentivising such steps.

93 Overseas Operations (Service Personnel and Veterans) Bill, Clauses 3(2)(a), 3(3), and 3(4)

94 Q6 As Martyn Day told us: "The fact that people subsequently find being prosecuted stressful is true for all prosecutions. People who are charged with criminal offences will always find that stressful. In my view, that can never be a factor to be taken on board in the decision by the prosecutor."

95 Q6 [Elizabeth Wilmshurst]

73. It is difficult to understand how a factor relating to a lack of sound judgement or a lack of self-control is pertinent to a decision to prosecute after a certain time-period as the effect of conditions during deployment overseas is irrelevant to the amount of time that has passed since the events took place.

74. The MoD argue that this would take into account the unique pressures faced by Armed Forces personnel in the course of their duties outside the UK. Conversely, Armed Forces personnel (as for police forces in the UK) are specifically trained so that they do not use force unjustifiably. Were our security forces (whether police or military) to be allowed to use unjustified force going beyond the force necessary, then this could be a concerning precedent that could ultimately lead to a more cavalier approach to the use of force by our military and police forces.

75. The MoD notes that Armed Forces personnel are routinely called upon to make snap decisions in exceptionally difficult, often life-threatening, situations, while still holding them accountable under the law and this is indeed what they are trained to do. It is difficult to understand why this should mean that prosecutions should not be brought for e.g. the unlawful killing of a non-combatant, or the torture of a detainee.[96] There is also the risk of read across to military and police forces operating in similarly charged situations in the UK.

76. **We are concerned that the Bill does not provide any incentives for the military hierarchy to ensure that members of the Armed Forces who are mentally unfit to be deployed get removed from operational duties and given the support that they need. Instead it includes an impediment to prosecuting a person whose judgement may be impaired, who lacks adequate self-control or whose mental health may have been affected by deployment.**

77. ***The MoD should not be sending Armed Forces personnel on deployment who are unable to make "sound judgements", who cannot "exercise self-control" or whose mental health is so severely affected that the MoD does not consider that they should be responsible for their criminal actions. Moreover, if a member of the Armed Forces becomes unable to make "sound judgements", can no longer "exercise self-control" or where there are significant concerns about their mental health, then there should be adequate systems in place to relieve that person of their operational duties, remove them from the conflict situation (where appropriate) and give them the support that they need.***

78. **The fact that a person has been deployed on operations overseas is irrelevant for considering a deadline on prosecutions. Moreover, we are concerned about the potential read across to the regular application of international humanitarian law, as well as behaviours of security forces more generally. Service personnel are trained to deal with very complex situations. It is only right that due account is taken of the complexity of a combat situation as part of any decision as to whether to bring a**

96 Under the law of armed conflict (international humanitarian law) there are significant restrictions on the use of force—including the principles of humanity, the principle of military necessity, the principle of distinction and the principle of proportionality. These principles prohibit, for example, the use of force against a wounded or captured combatant, or any use of force that is not necessary for the military purpose, such as attacking a person who no longer posed a threat.

prosecution (i.e. is there sufficient evidence that an offence has been committed, and is it in the public interest to prosecute). However, it should not be part of a statutory barrier to bringing prosecutions where they are in the public interest.

79. ***The mental health of a defendant is already borne in mind as part of the prosecutorial decision as to whether it is in the public interest to bring a prosecution. We do not consider that there is any solid basis for including additional requirements that could risk granting de facto impunity to those who have committed crimes on the grounds that the perpetrator lacked sound judgement, or could not exercise self-control, beyond the threshold already established in criminal law. For this reason, we would recommend deleting clause 3(2)(a), 3(3) and 3(4).***

Prosecutor to give weight to the public interest in finality (where a person has been previously investigated and there is no new compelling evidence)

80. Clause 3 provides that in taking any decision to prosecute a person more than 5 years after an event, the prosecutor shall only decide to prosecute in exceptional circumstances and the prosecutor must give particular weight to the public interest in finality being achieved without undue delay, where there has been a previous investigation and where there has been no new compelling evidence.

81. The Government believes that "where a Service person has been investigated and charges have not been brought, then, absent compelling reasons (such as the emergence of new evidence), that position ought to be final". They feel this is necessary "to afford Armed Forces personnel and veterans greater protection from the threat of prosecution for alleged historical offences committed in the course of duty outside the UK".[97]

82. As we explored in Chapter 2 there are well-documented and significant concerns with the standard of MoD investigations. It is not clear what standard of investigation applies in order for the statutory barrier to bringing a prosecution to apply. It also is not clear what happens if the relevance of information or evidence was missed.

83. **There are significant concerns, that the Minister accepts, with the standard and adequacy of MoD investigations of members of the Armed Forces. And yet in this Bill the Government is effectively using the existence of potentially inadequate investigations as a barrier to bringing prosecutions—even where a prosecutor has decided that there is a sufficiency of evidence that the accused committed the offence and that there is a public interest in bringing the prosecution.**

84. ***No prosecution that is in the public interest, should be prevented from being brought because of inadequate or insufficiently independent prior investigations by the MoD. Clauses 3(2)(b) and 4 of the Bill should be removed or at least amended so that they only apply to adequate, expert, independent investigations.***

97 See Ministry of Defence, Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom, 2019

Requirement for the consent of the Attorney General

85. The Bill provides that, in addition to the barriers already mentioned, the Attorney General will make the final decision as to whether or not to prosecute after five years. Witnesses expressed concern at the risk of politicisation by giving the Attorney-General, a Government Minister, a veto in respect of any prosecutorial decision. This was particularly so given the potential conflict of interest as the Attorney General will most likely have advised the Armed Forces on the conduct of that armed conflict—for example, she may well have been involved in advising on any decisions as to the types of interrogation, detention or other practices to be employed by the Armed Forces. As Reverend Nicholas Mercer told us:

> Having taken part in an international armed conflict as the senior legal adviser, my experience was that the Attorney-General was directly involved in military operations. I would propose something for the 1st Armoured Division headquarters, it would be staffed to PJHQ, and if the Ministry of Defence did not like it it would seek advice from the Attorney-General. Certainly in one instance the Attorney-General overruled the advice I was giving about having a judge in theatre to oversee detention. I was overruled by the Attorney-General on that occasion, I am led to believe.
>
> There is a slight irony here, because the Attorney-General has to give consent anyway to a prosecution for breaches of the Geneva Conventions, but the Attorney-General is also involved in military operations. As I said earlier, one of my problems with the whole Iraq business, being the chief lawyer in theatre, was that there were black sites being set up for prisoners. We had a prisoner of war camp and then there were other prison sites. If the Attorney-General was involved in that—I do not know—he or she would be ruling on a potential prosecution that they were involved in. You can see the conflict of interest very clearly there, so I have difficulties with this.[98]

86. We heard from Baroness Goldie, Minister of State in the MoD, that the Attorney would exercise this function in a way that was "completely independent of government".[99]

87. **If an independent prosecution authority determines that it has sufficient evidence to bring a prosecution and that a prosecution is in the public interest (having regard to all the relevant factors), we do not see why the Attorney General should be given a veto over those efforts to bring someone to justice. This is all the more concerning when this may apply where the Attorney has herself previously advised on the alleged unlawful conduct and therefore may have a pronounced conflict of interest.**

The presumption treats victims differently

88. The Bill provides that this presumption applies to alleged offences committed against other British nationals, or nationals of other countries (including civilians), but not to alleged offences committed against fellow Armed Forces personnel or against other

98 Q7 [Reverend Nicholas Mercer]
99 Q17

Crown Servants or defence contractors [Clause 6(2)]. These distinctions could result in prosecutions being brought for e.g. the murder only of Armed Forces personnel (in a group of murders) but not civilians who were killed in the same incident.

89. In her evidence to our Committee Katherine Willterton, Head of the MoD legal adviser's General Law Team, said that offences against civilians would be subject to the statutory presumption against prosecution whereas offences against fellow members of the Armed Forces would not as such offences were not "in any way understandable".[100] The presumption against prosecution would apply to all foreign national victims, including children, civilian populations, aid workers and those taking no part in hostilities—because the "threat of violence is coming […] from foreign nationals".[101] It is concerning to hear that the MoD policy is based on a view that offences committed against civilians can be in some way "understandable", and that references to "foreign nationals" seem to fail to distinguish between civilians and combatants. Such a policy—and indeed such language—does not suggest a culture of compliance with the rule of law. Indeed, it rather suggests a culture that treats civilians as less deserving of protections than members of the Armed Forces. To this end we note concerns raised in evidence about the "racist overtones" of this Bill.[102]

90. **We are deeply concerned at the difference in treatment of victims and we note concerns that have been expressed about the "racist overtones" of this Bill. We do not accept that any offences are "understandable" depending on the nationality or employment status of the victim of an offence.**

100 Q17 [Katherine Willerton]: "The policy was drafted in this way because the feeling was that there were no circumstances in which service personnel could commit offences against their colleagues while on overseas operations and it be in any way understandable."

101 Q17 [Katherine Willerton]: "The circumstance envisaged is that that threat of violence is coming at you from foreign nationals, not from your colleagues who are working alongside you in the camp. That is the distinction."

102 Quaker (OOB0002)

4 Limitation period for Human Rights and civil claims

91. For many civil cases there is a time limit for bringing litigation, referred to as a 'limitation period'. This is because lengthy delays may not be in the interests of justice, for example if witnesses are no longer available or no longer remember details or if evidence has been destroyed. Equally, there may be good reasons for the delay and thus where it would be unjust not to allow a case out of time (see paragraph 103 below).

Limiting the period for claims for personal injury or death of soldiers or civilians in overseas operations: Clauses 8–10

92. The limitation period for personal injury claims is currently set at 3 years from the date of injury or the date of knowledge.[103] However, the Courts are given a discretion to allow claims outside of that period if it would be equitable in all the circumstances (having regard to matters such as fairness, availability of evidence, the reason for the delay, the length of time that has passed and the behaviour of the defendant after the cause of action arose) to allow a claim to proceed.[104]

93. The Bill proposes an absolute time limit of 6 years for bringing claims in tort for personal injury or death that result from overseas operations. This would mean that civilians and members of the Armed Forces alike would not be able to make a claim for compensation against the MoD no matter the circumstances or unfairness. Such a hard limitation period could prevent access to justice for those who have suffered personal injury and who are unable to bring claims within this time period, for example, due to severe injury, incapacity, or protracted conflict.

94. The Bill also introduces factors to which the Court must have regard in exercising any discretion to consider a case before the 6-year absolute time limit. These factors are:

a) The effect of the delay on the likely cogency of any evidence adduced, with particular reference to:

   i) the likely impact of the operational context on the ability of individuals who were serving in the Armed Forces at the time to remember relevant events fully or accurately;

   ii) the extent of dependence on the memories of such individuals, taking into account the effect of the operational context on the ability of such individuals to record relevant events or actions; and

b) the likely impact of the proceedings on the mental health of the witness (or potential witness) who was at the time a member of the Armed Forces.

103 In England and Wales: Limitation Act 1980, section 11. The same limitation period applies in Scotland and NI.
104 Limitation Act 1980, section 33

Limitation period for human rights claims: Clause 11

95. Currently, claims under the Human Rights Act must be brought within one year of the date of the alleged violation.[105] However, the HRA allows for claims to be brought beyond this one-year time limit if the court considers it to be equitable having regard to all the circumstances".[106] This enables the Courts to hear cases so that human rights can be enforced where it is fair in all the circumstances (i.e. having regard to difficulties in accessing evidence, the length of time that has passed, the interests of justice, as well as any reason for delay). This is important to ensure that individuals can enforce their human rights and have an effective remedy for any violations of their human rights, as required by Article 13 ECHR.

96. Clause 11 of the Bill would amend the HRA by inserting a new section 7A which would mean that civilians, soldiers and the families of killed soldiers can only bring a claim against the MoD in the following circumstances:

a) within one year of the date of the alleged violation;

b) between one year and six years after the date of the alleged violation subject to the court's discretion, having regard to:

   i) the effect of the delay on the likely cogency of any evidence adduced, with particular reference to:

      1. the likely impact of the operational context on the ability of individuals who were serving in the Armed Forces at the time to remember relevant events fully or accurately;

      2. the extent of dependence on the memories of such individuals, taking into account the effect of the operational context on the ability of such individuals to record relevant events or actions; and

   ii) the likely impact of the proceedings on the mental health of the witness (or potential witness) who was at the time a member of the Armed Forces.

c) If beyond 6 years from the date of the alleged violation, within one year of the date of knowledge of the alleged violation (i.e. a claim can be brought after 6 years if the victim only knew (or ought to have known) about the alleged violation at a later stage).

Risks of a lack of access to justice and an effective remedy

97. The MoD 2019 consultation said that "in line with our commitments to continue to safeguard human rights, we are not proposing to restrict the Court's discretion to extend the time limits for bringing claims relating to human rights violations".[107] We were therefore disappointed that the Bill nevertheless limits the possibility of judicial discretion and imposes a new absolute limitation period of 6 years on claims under the HRA in respect of overseas military operations (thereby amending section 7 HRA).

105 Human Rights Act 1998, section 7(5)(1)(a)
106 Human Rights Act 1998, section 7(5)(1)(b)
107 See Ministry of Defence, Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom, 2019

98. The MoD, as a party to the litigation to which this part of the Bill relates, is concerned that it hasn't always been able to defend claims as it may have wished due to judges allowing claims where to do so was "equitable in all the circumstances". These amendments introduce restrictions on bringing human rights cases that will result in victims of human rights abuses being unable to seek justice from the MoD even where it would be equitable for the courts to allow the claim.[108]

99. The amendments to limitation periods will affect civilians and soldiers alike. It is noteworthy that the majority of claims (76%) against the MoD between 2014 and 2019 were brought by service personnel seeking compensation for injuries suffered during their service.[109] It is also worth noting that claims brought by service personnel—or their bereaved families have helped to improve practices, standards and equipment to help prevent future unnecessary deaths or injury of members of the Armed Forces, for example in relation to the use of Snatch Land Rovers in deployments overseas, or the inadequacy of technology to prevent fatalities or troops from "friendly fire" during overseas operations.

100. We have received evidence that the motivation behind these parts of the Bill therefore has little to do with protecting service personnel and that the motivation is instead the MoD seeking to avoid paying out compensation and having to adapt procedures and equipment so as to learn lessons to prevent future deaths and injuries.[110]

Compatibility with human rights obligations

101. Victims of serious abuse, amounting to torture, may be denied the right to a remedy under the proposed absolute time limit. Notably, in August 2019, the UN Committee Against Torture determined that States must ensure redress, including compensation, for victims of torture, regardless of statutes of limitations on such claims.[111]

102. The six-year limitation period may also risk incompatibility with Articles 2 and 3 ECHR. In the case of Al Saadoon, the High Court held that a state's duty to undertake effective investigations into deaths "continues throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of the death and establish responsibility for it."[112] Further, the "time limit for bringing proceedings to complain of a breach cannot expire for as long as the duty lasts. If this duty has ceased, a fresh duty may arise if new evidence or information comes to light."[113] The introduction of an absolute time limit on human rights claims risks breaching the Government's procedural duties under Article 2 ECHR (right to life) and the equivalent duty under Article 3 (prohibition on torture).

108 See Q9 for examples where cases can be difficult to be bring in time. Also Q19 and Q20.

109 Liberty briefing on the Bill for the House of Commons, April 2020.

110 See, for example, Q11 where Martyn Day said: " The claims that we bring are against the Ministry of Defence, so this is obviously nothing to do with any prosecution. Any soldier will simply be a witness… The reality is that in only a handful of the 1,000 cases we have resolved has any evidence been given where the person has had to appear in court... This, again, is totally unnecessary."

111 Mrs A v Bosnia and Herzegovina. This decision of the UN Committee on Torture considered that rape and sexual assault during the conflict in Bosnia in the 1990s amounted to torture.

112 R (Al Saadoon) v Secretary of State for Defence [2016] EWCA Civ 881.

113 R (Al Saadoon) v Secretary of State for Defence [2016] EWCA Civ 881.

The hard deadline: No cases for human rights violations, personal injury or death may be brought after 6 years

103. Under the "hard deadline" introduced by clause 11, cases must be brought within a maximum of 6 years or 1 year from knowledge of the facts (whichever is later). These proposed new limitation periods could be problematic for civilians and soldiers alike given the context of overseas military operations. There are many reasons why it might be difficult or impossible to bring a claim within 6 years, for example:

a) The conflict may be protracted such that the victim is living in a war zone for many years;

b) The victim may be internally displaced;

c) The victim may be unlawfully detained for many years;

d) Victims who have been subjected to torture or other forms of abuse may suffer from Post-Traumatic Stress Disorder (PTSD) or other conditions, making it very difficult to initiate litigation;

e) Evidence may be buried or difficult to obtain;

f) Financial and linguistic barriers to accessing justice in the UK;

g) Members of the Armed Forces tend not to make civil claims until after they have left the Armed Forces.

104. A hard limitation period prevents discretion in exceptional cases, which is precisely what judges are best placed to assess. It therefore prevents access to justice and it also prevents access to an effective remedy, contrary to Article 13 ECHR, for a person whose human rights have been abused. Ultimately, however, a litigant could bring such a case to the ECtHR in Strasbourg if they are unable to bring a case in the UK—but this is costly for all involved and acts as a disincentive to seeking justice.

105. It is worth noting that this time limit would also apply to Armed Forces personnel (or their families) who wanted to bring human rights claims against the MoD, for example where members of the Armed Forces had been injured or killed due to faulty equipment or training, such as in Smith v MoD.[114] Therefore, a member of the Armed Forces (or their family if they have died) could find that there is a hard barrier to their bringing a human rights claim. It is worth noting that human rights cases have been brought in relation to poor practices, training and equipment that have led to unnecessary deaths or injury of British troops. Such cases have helped to improve procedures and equipment for the future, thus saving lives. Preventing those rare cases that it is equitable to bring, means that not only will there be no justice for those injured or killed unnecessarily, but importantly, crucial lessons may not be learned to prevent future unnecessary injuries or deaths.

106. It is also worth noting that the Government's impact assessment of the Bill states that 95.1% of civil claims brought by Iraqi civilians were brought beyond the normal time limit of three years, with 62.7% brought after 6 years. Similarly, 99.6% human rights claims were brought out of time, with 62.7% brought after six years. These included the cases of

114 Smith and others v Ministry of Defence [2013] UKSC 41

Alseran,[115] which revealed the inhuman and degrading treatment of detainees, and the case of Rahmatullah,[116] which revealed the UK's complicity in rendition and torture. Had the Bill been in place, these cases would not have been heard, and these unlawful practices would have remained unaddressed. The British Army could then have continued with inhuman and degrading treatment of detainees without accountability.

107. **The introduction of an absolute time limit risks breaching the UK's human rights obligations and preventing access to justice. An absolute time limit of 6 years is unfair in the context of overseas operations, where potential claimants may be embroiled in protracted conflict situations, detained, displaced, or suffering from physical or psychological injuries. Indeed, had an absolute time limit existed previously it would have prevented cases that have uncovered, for example, the inhuman and degrading treatment of detainees by UK Armed Forces, or UK complicity in rendition and torture. Not only would that have prevented justice for the victims of those abuses, but it would also have meant that such practices would have continued unchecked.**

Litigating the mental health of witnesses

108. One of the amendments the Bill would make to the HRA is to add an obligation to have regard to the mental health of Armed Forces witnesses. The purpose of this provision is not entirely clear given that judges would already have due regard to these factors as part of the "equitable in all the circumstances" test and that such matters are dealt with through judicial guidance.

109. The statutory requirement to have regard to the mental health of potential witnesses from one party to litigation is an unusual precedent that could prove both costly and be a barrier to justice. The MoD argue that this is necessary because potential witnesses may suffer from PTSD and may want to move on with their lives without having to recall traumatic events. However, the courts regularly deal with cases where individuals have suffered greatly and where giving evidence will undoubtedly place a strain on the individual and may trigger them, but this does not usually create a barrier to bringing a case. We might think, for example, of witnesses who were torture victims, rape victims, child abuse victims or, say, children who have seen their parents murdered. It is also likely the case that people who have perhaps committed awful acts that they would rather not recall may also suffer from trauma in relation to that incident, but this is not a reason not to allow torture victims, rape victims, child abuse victims or those who have seen loved ones killed from bringing claims.

110. This seems an unusual and unbalanced provision, focussing solely on the well-being on one potential type of witness but not others. This provision could act as a significant bar on access to justice (and may indeed increase the costs of these cases if there is a need to involve costly psychiatric experts in arguing whether one should be able to bring a case).

115 Alseran v Ministry of Defence [2017] EWHC 3289 (QB)

116 Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs [2012] UKSC 48

Existing powers for dealing with unmeritorious or vexatious claims or practices

The powers of the Court to strike out claims which are unmeritorious, vexatious or an abuse of process

111. MoD Ministers have broadly referenced concern about "vexatious claims" being brought by "ambulance-chasing solicitors" and referenced "lawfare". However, there are existing tools within the justice system to prevent vexatious claimants from bringing claims, to strike out unmeritorious claims that would be an abuse of process and to regulate the legal profession.

112. The civil courts have the power to "strike out" claims which are unmeritorious, for example if it is an abuse of process.[117] They also have powers to prevent vexatious claimants from bringing claims.[118] There has been no suggestion that the Courts have failed to use such powers when they should have so as to allow wholly unmeritorious or vexatious claims. Indeed, as we heard from Reverend Nicholas Mercer:

> The term "vexatious claim" has been bandied around […] When I did an analysis of the figures, 77% related to detention and interrogation. I am sorry, but they all have legal merit, so they are not vexatious. Everyone has taken the "vexatious claim" tag as being accurate, but to date no one has told me how many vexatious claims there are […] I have had to make criminal complaints to the IHAT because I am a lawyer and I witnessed it first-hand […] I take grave exception to being told that my allegations are vexatious at the same time. They are not. If we did carry out the five techniques of harshing, which we did, I am sorry but the vast majority of the cases that people are now branding as vexatious are all with legal merit. It means that the vast majority of them are valid claims against the state. I am afraid that no one has so far challenged the "vexatious" narrative tag that has been given to these cases.[119]

113. In respect of a case that is funded through legal aid, there are strict tests that apply in order to meet the threshold for legal aid. The Legal Aid Agency has powers to revoke funding if it considers the merits of the case do not warrant funding.

114. We further heard from Martyn Day:

> Back in 2003, the big mistake made by the Ministry of Defence was saying that the people it arrested would be subject to the five treatments of harshing in their interrogation. That included hooding people, putting them into stress positions before their interview, depriving them of sleep and depriving them of food and water at times […] the Supreme Court […] has said that the treatment the Iraqi prisoners received was not right or appropriate, primarily under the terms of the Human Rights Act but just generally under the Geneva Convention. […] There was no suggestion that

117 Claims can be struck out if the statement of case discloses no reasonable grounds for bringing or defending the claim, or where the case is an abuse of process. CPR Rule 3.4.

118 The courts also have the power to issue a civil restraint order if an individual has been subjected to 2 or more unmeritorious claims by the same person.

119 Q8 [Reverend Nicholas Mercer]

> there were vexatious claims. We acted for around 1,000 claimants. Of the first 400, which have been made public, 300 were compensated and 100 were not. In the second group of just over 600, we have just finished that process. Unfortunately, we are bound by confidentiality, but we understand that the Secretary of State should announce the figures relatively shortly. The position is not dissimilar. The great majority of people were subject to the sorts of treatment which the courts have decided is a totally inappropriate way for the British Army to treat its detainees.[120]

115. It seems that when MoD Ministers refer to "vexatious claims" they do not mean "vexatious" or "unmeritorious" claims where there was no case to answer. In fact, in many cases there has indeed been a case to answer and there have been numerous examples of mistreatment contrary to the prohibitions on torture and on degrading or inhuman treatment or punishment. The MoD do at times refer to some claims where there was a case to answer, but where, on the balance of probability, the judge, having listened to all of the evidence found in favour of the MoD. It is not surprising that the MoD should win some cases; the Government is often successful in litigation and that does not in itself make a case an abuse of process. Sometimes it is because a claimant could not prove their case, sometimes it is because a judge, having listened to all of the evidence, believes the MoD's evidence and does not believe the evidence of civilian (or other Armed Forces) witnesses.[121] However, this does not mean that the claim was repeated or "vexatious", nor does it mean that there was no case to answer and the case should have been struck out. It would be helpful if the Government did not confuse the language in relation to when a case should be struck out, with cases where a judge found in favour of the MoD after having carefully heard evidence from a significant number of witnesses—including, perhaps, conflicting evidence from different members of the Armed Forces.

116. **Powers exist to strike out unmeritorious claims that are an abuse of process and to prevent vexatious litigants bringing repeated litigation. We are not aware of any suggestion that the Courts have allowed wholly unmeritorious or vexatious claims through any failure or reluctance to use these powers. We call on MoD Ministers to desist from using this politicised and inaccurate language in relation to claims where the MoD did have a case to answer.**

117. **If the MoD do have valid examples where claims that should have been struck out are being allowed even when there is no case to answer, then we should properly be discussing that matter and how to minimise such risks. But we should not use the phrases merely to describe situations where there were many, contradicting witness statements (including from different members of the Armed Forces) as to whether wrong-doing had occurred. As frustrating as that may be, that can be normal in litigation.**

120 Q8 [Martyn Day]

121 It is worth noting that the Minister seemed principally to have the Al Sweady case in mind when approaching this entire subject. We can indeed understand that this inquiry was stressful for all involved. And it is true that the judge did not find the civilian witnesses to be credible. But it is also true that, the judge considered that some of the Armed Forces witnesses might have been confused and so did not believe their evidence where that did not align with the evidence of other Armed Forces witnesses, for example as concerns the treatment of detainees when they had surrendered and were being taken back to camp. These cases are not always as obvious (without hearing all of the evidence and weighing it up) as one might hope.

Role of the Solicitors Regulatory Authority in regulating solicitors

118. Solicitors are members of a regulated profession with clear professional and ethical obligations. Where solicitors act unethically, it is the role of the Solicitors Regulatory Authority to investigate and sanction them appropriately.[122] This was indeed what happened to one solicitor, Phil Shiner, who was struck off by the Solicitors Regulatory Authority after a decision by the Solicitors Disciplinary Tribunal. The Minister referred to us in his evidence the actions of Martyn Day, but Martyn Day was not found to have acted unethically or contrary to his professional standards.[123] Importantly, there have been no suggestions of there being any widespread problems with the ethical or regulatory standards of solicitors that would need addressing through changes to the methods or practices of the Solicitors Regulatory Authority.

119. **It is essential that it is for the independent Solicitors Regulatory Authority to deal with professional misconduct not the Government (who is a party to the proceedings about which they complain).**

120. It is not appropriate for Ministers to abuse their positions to criticise professionals whose job it is to represent members of the Armed Forces or civilians in their claims against the MoD. Nor is it appropriate to refer in general terms to lawyers as being "ambulance-chasing lawyers" when they represent service personnel, veterans and civilians in their claims against the MoD—many of which have been well-founded claims against the MoD.

121. **In the UK, solicitors, barristers and advocates are members of a regulated legal profession with clear codes of conduct and ethical standards. Sometimes the client they represent could be the Government. Sometimes that client could be a member of the Armed Forces, a veteran, or a civilian who wishes to bring a claim against the MoD. It is wrong for public office holders such as Ministers to refer generally to lawyers as "ambulance-chasing lawyers" (or other politically charged and inaccurate terms) when they represent members of the Armed Forces, veterans and civilians in their claims against the MoD—many of which claims have been very well founded claims against the MoD. The calculated and repeated use of such derogatory language by Ministers towards legal professionals is unbecoming and undermines democracy and the rule of law.**

122. ***Not only should the Government commit to the independence of the legal profession, but they should support such independence. This includes supporting the independent regulation of the legal profession.***

Use of the term "lawfare"

123. It is well-established that respect for the rule of law is imperative to successful military operations. However, we heard the Minister in evidence to us refer many times to "lawfare" in an angry and rather unhelpful way. The term "lawfare" has been defined as "a method of warfare where law is used as a means of realizing a military objective". The

122 The Bar Standards Boards fulfils a similar role in respect of barristers. In Scotland this role is performed by the Law Society of Scotland in respect of solicitors and the Faculty of Advocates in respect of Advocates.

123 See "*Leigh Day in the clear as High Court throws out SRA appeal*" Law Society Gazette, 19 October 2019

modern definitions include "the strategy of using—or misusing—law as a substitute for traditional military measure to achieve an operational objective".[124] We are also aware of the term being used in reference to China's Three Warfares.[125]

124. **Lawfare refers to the strategy using law to achieve an operational military objective. It is wholly inappropriate to use this term to refer to the application of the rule of law to determine cases where injured civilians or soldiers are seeking justice, or for example, seeking to determine the facts surrounding the death of a loved one. We wholeheartedly reject the Minister's implication that UK courts, Armed Forces personnel, civilians and legal professionals are all part of some coordinated strategy to use the law as a substitute for traditional military measures to achieve an operational military objective—that is quite simply preposterous.**

125. **We call on the Minister to cease using inflammatory and inaccurate language. It is deeply unhelpful for Ministers of the Crown to be using divisive language that suggests the existence of conflicts and military objectives when all that is present is the use of the rule of law so that killed or injured members of the Armed Forces, their families and civilians, can seek justice.**

124 See for example, Lawfare: A Decisive Element of 21st-Century Conflicts?, Charles J. Dunlap, 2009

125 China introduced the concepts of public opinion warfare, psychological warfare, and legal warfare when it revised the "Political Work Guidelines of the People's Liberation Army" in 2003.

5 Duty to consider derogating from the ECHR: Clause 12

126. Clause 12 of the Bill inserts a new section 14A into the Human Rights Act, which provides that the Secretary of State "must keep under consideration" whether, in relation to any overseas operations that the Secretary of State considers are or would be significant, it would be appropriate for the UK to make a derogation under Article 15 ECHR.

The legal framework for derogating under Article 15 ECHR

127. Article 15 ECHR provides:

> "1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligation under [the] Convention to the extent strictly required by the exigences of the situation, provided that such measures are not inconsistent with its other obligations under international law.
>
> 2. No derogation from Article 2 [the right to life], except in respect of deaths resulting from lawful acts of war, or from Articles 3 [torture], 4(1) [slavery] and 7 [retrospective criminal penalties] shall be made under this provision.
>
> 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

128. Derogation from certain Convention rights is therefore possible, but only if the situation meets the threshold required by Article 15 ECHR: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligation under [the] Convention to the extent strictly required by the exigences of the situation, provided that such measures are not inconsistent with its other obligations under international law." Therefore, the obligation to consider derogating does not in any way change the existing situation or obligations of the UK is these circumstances.

129. It is also important to note that the ECHR will only apply extraterritorially where the UK has "effective control". Moreover, when applied in the context of overseas military operations, the ECHR needs to be read in light of the requirements of international humanitarian law, so it is a modified version of the ECHR which would apply on the battlefield (in the limited situations where the UK could be said to have "effective control"), and in a British detention facility. Where the UK is exercising "effective control", the ECHR protects not only civilian victims, but UK service personnel. Recent case law has demonstrated that soldiers/families of soldiers have been able to rely on their rights under the Convention in the context of military operations overseas. Any derogation would also serve to limit their rights.

130. **The UK cannot lawfully make a derogation unless the Article 15 ECHR conditions for derogation are met. Clause 11 appears to do nothing except require the Minister to consider whether it would be appropriate to make a derogation where those conditions are met, and where such a derogation was necessary to ensure that the UK remained in compliance with its international obligations. It is therefore highly questionable as to whether this provision adds much to what the Minister would or indeed should do in any event, but it does arguably increase the risk of judicial review proceedings and requests for information under the Freedom of Information Act, inquiring whether the Minister has made such a determination and on what grounds.**

131. In her Foreword to the 2019 consultation, the then Defence Secretary stated "we intend to derogate from the European Convention on Human Rights before we embark on significant future military operations, 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 highlight standards and be subject to the rule of law".[126]

132. The UK has an international legal obligation to comply with the provisions and protections contained in the ECHR Articles, subject to any valid derogation made. To be valid, such a derogation must meet the criteria in Article 15 and must be notified to the Secretary General. The validity of any derogation may be tested before the ECtHR, which has developed its caselaw on Article 15.[127]

Meaning of "war" and "significant operations overseas"

133. To date, derogations have only been made in respect of domestic measures taken in response to a "public emergency threatening the life of the nation". Contrary to what the Minister told the Committee in evidence, no State has previously derogated from the ECHR in respect of an overseas military operation.

134. It is therefore unclear how the ECtHR would interpret "war" for the purposes of Article 15 ECHR and in particular whether it would cover traditional wars, such as international armed conflict, or also other operations such as non-international armed conflicts, peacekeeping operations, special operations overseas or counter-terrorism operations overseas.

135. It is equally unclear whether the meaning of "significant overseas operation" in clause 11 is intended to be read as meaning the same thing as the meaning of "war" in Article 15 ECHR. It would be unhelpful if the interpretations diverged as it would be unlawful to derogate in respect of a "significant overseas operation" that did not fall within the criteria of Article 15 ECHR. It is unhelpful that there is no suitable cross-reference between the two.

136. We understand from our evidence session with the MoD Ministers and officials that they intend clause 11 to cover international and non-international armed conflicts, but that it probably would not cover other, non-battlefield operations such as peacekeeping

126 Ministry of Defence, Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom, 2019

127 Domestic courts may also review the legality of a derogation. See, for example, A v Secretary of State for the Home Department [2005] UKHL 71.

operations, special operations or counter-terrorism operations. **There is a real risk that the meaning of "war" in Article 15 ECHR may not align with the meaning given to "significant operations overseas" in clause 11 of the Bill.** ***The MoD should avoid any difference in meaning so that this clause is aligned with the meaning in Article 15 ECHR, by amending this clause to make that clear. It should be made clear on the face of the Bill that this would only apply to UK involvement as a belligerent in an international armed conflict or a non-international armed conflict and that it would not apply in respect of peacekeeping operations, counter-terrorism operations or special operations.***

What rights might be derogated from in respect of an overseas operation?

137. We understand that the clause merely intends to cover derogations within the possible limits of derogation under Article 15 ECHR. For example, that it only permits a derogation "to the extent strictly required by the exigences of the situation" (which is the legal test under Article 15 ECHR) and does not permit a derogation in respect of certain rights.

138. Importantly no derogation is possible from Article 2 ECHR (right to life) other than in respect to lawful acts of war, Article 3 ECHR (freedom from torture and inhuman or degrading treatment and punishment), Article 4 ECHR (freedom from slavery) and Article 7 ECHR (no punishment without law). Therefore, many core, inalienable human rights cannot be derogated from in any event even in war.

139. The MoD Ministers and officials informed us that one area where a derogation may be necessary would potentially relate to detention and the right to liberty under Article 5 ECHR.[128] Our witnesses agreed—as Reverend Nicholas Mercer told us:

> As Elizabeth [Wilmshurst] said, you cannot derogate from Articles 2 and 3 anyway, and thank goodness we cannot. When it comes to Article 5, in terms of practical effect, one of my tasks was to resolve the issue of prisoner status within the prisoner of war camps. We had captured so many Iraqis in civilian clothing that we had to resolve whether they were combatants. That is an exceptionally difficult task, not least because the Iraqi military configuration meant that many of them came from the north of Iraq and we were carrying out tribunals in the south. We fell foul of the Human Rights Act when it came to the length of time they were held in detention pending resolution.[129]

140. It is important to note though that the detention of combatants (or indeed non-combatants) will still be governed by International Humanitarian Law relating to the treatment of detainees, the civilian population and those hors de combat. Therefore, any such derogations would only be possible where they were strictly necessary due to the exigencies of the situation and would not result in detainees being deprived of these rights. Moreover, it is worth noting that the ECHR has held that in the context of international armed conflict, the standards of Article 5 ECHR must be read in light of international

128 Qq22–23[Johnny Mercer and Damian Parmenter]
129 Q12 [Reverend Nicholas Mercer]

humanitarian law.[130] This suggests that there will not me many cases where a derogation will be necessary and therefore where the criteria of Article 15 ECHR for derogation will be met.

141. **In respect of the majority of ECHR rights potentially engaged in a conflict situation, no derogation of Convention rights is possible. It is, however, possible, where required by the strict exigencies of the situation, to derogate from certain requirements of Article 5 in relation to detention and Article 8 (right to respect for private and family life). Any such derogations would only be possible where they are necessary due to the strict exigencies of the situation, and adequate safeguards should be in place. Importantly other international human rights and international humanitarian law would still apply to protect detainees, civilians and those hors de combat.**

142. **The Government may wish to consider restricting this provision so as only to apply to those Articles which could be relevant—namely Article 5 and 8 ECHR.**

Parliamentary scrutiny of any derogation

143. In order to derogate from the Convention rights, as applied in the UK by the HRA, not only would the Government need to notify the Secretary General of the Council of Europe in writing, but the Government would also need to make a designated derogation Order under the HRA.

144. Section 1(2) HRA provides that Convention rights have effect "subject to any designated derogation". Therefore, for UK law purposes, a derogation would only have the effect of limiting the application of Convention rights where a designated derogation is in place. These are made through designated derogation Orders, the mechanism for which is set out in sections 14 and 16 HRA. Given the clear wording of section 1(2) HRA, without such an order, the Convention right would still apply (irrespective of any derogation made at the international level).

145. The HRA provides for designated derogation Orders to be made under the affirmative procedure—i.e. to be made, subject to parliamentary approval within 40 days. But that does not necessarily translate into Parliament being informed, consulted or allowed to debate derogations in good time. For example, in 2001 the lack of a statement to Parliament on the derogation and the public emergency situation in relation to the controversial (and ultimately unlawful) derogation to detain foreign terrorist suspects for unlimited periods of time when they could not be deported led to Points of Order critical of the Home Secretary in the Commons Chamber.[131]

146. As the Joint Committee on Human Rights previously said in its 2007–2008 Report on the Counter-Terrorism Bill:

> "The opportunity for both parliamentary and judicial scrutiny of […] derogations from Convention rights is both limited and uncertain.
>
> As far as parliamentary scrutiny is concerned, the HRA itself provides for some but it is of limited scope. There is no obligation on the Government to consult Parliament before it decides to derogate from a Convention right. A

130 See Hassan v UK, App. No. 29750/09, 16 September 2014

131 HC Deb, 12 November 2001, cols 572–3

> derogation order, making the derogation effective in domestic law, is made by order-in-Council and can be made without being laid first in draft, but once made it must be laid before parliament and it will cease to have effect after 40 days unless approved by a resolution of each House. Parliament's ability to scrutinise a derogation is therefore fairly limited."[132]

147. That Report goes on to conclude that there is a strong case for greater clarity as to the parliamentary procedure to be followed in advance of a derogation, seeking legislative backing for certain types of derogation:

> "[…] There is in our view, a positive human rights argument for legislation which would provide in advance a detailed framework for the exercise of the power to derogate […] Such legislation would be positively beneficial in human rights terms by enshrining clearly into law the requirements which must be met in order for such a derogation to be valid, and ensuring that the necessary safeguards against disproportionate exercise of the derogating power are already in place in advance of the power being used.
>
> It could also ensure that there is an opportunity for both houses to satisfy themselves that the conditions for derogating are met and that the extent of the derogation is no greater than is required by the exigencies of the situation, as well as a proper opportunity for judicial scrutiny."[133]

148. **Given recent, well-known, concerns about the lack of timely, adequate information to and consultation of Parliament by the Government, we have little confidence that the Government will consult Parliament in good time without a clear undertaking by the Government.**

149. The principal challenges to effective parliamentary scrutiny of derogations seem to be:

a) There is no provision for parliamentary scrutiny of derogations in advance of a derogation being made.[134]

b) There is no requirement at present for the Government to provide the Committee with a detailed Memorandum explaining how the Article 15 criteria are met in the case of any specific derogation.

150. Ben Wallace, Secretary of State for Defence, stated in his letter to the Chair, "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

132 Joint Committee on Human Rights, Thirteenth Report of Session 2007–08, Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill, HL Paper 172 / HC 1077, paras 95 and 96.

133 Joint Committee on Human Rights, Thirteenth Report of Session 2007–08, Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill, HL Paper 172 / HC 1077, paras 99 and 100.

134 Indeed a predecessor Committee has considered that even a designated derogation Order would follow the notification of a derogation at international level – therefore parliament would be the last to be informed of any intended derogation. See paragraph 106 of Joint Committee on Human Rights, Thirteenth Report of Session 2007–08, Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill, HL Paper 172 / HC 1077. In contrast, in 2016 correspondence between the Chair and the then Defence Secretary, Michael Fallon said that "Everything will be done to facilitate early parliamentary scrutiny if and when we do derogate". See Q22

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 by requiring them to consider whether the criteria for derogation are met in relation to future overseas operations."[135]

151. **Improved transparency in information provided to Parliament and in parliamentary involvement in the derogation process (other than as fait accompli) would hopefully improve transparency, decision-making and compliance with the law.**

152. ***We call on Government to make an undertaking to consult with the Committee in advance of any proposed derogation under the ECHR. They should provide Parliament with sufficient time to consider any proposed derogation in advance of the UK derogating from its international obligations. We also expect to receive from the Secretary of Defence, a detailed Memorandum explaining how the Article 15 ECHR criteria are met in the case of any proposed or actual derogation.***

135 Letter from Rt Hon Ben Wallace MP, Secretary of State for Defence , regarding the Overseas Operations (Service Personnel and Veterans) Bill, dated 15 June 2020

6 Wider implications of the Bill on military operations

Impact on the reputation of the Armed Forces

153. The introduction of this Bill and the message that it sends has already had an impact on the reputation of the Armed Forces. Some have seen this as a cynical effort to remove accountability. The Judge Advocate General, the most senior judge in the Armed Forces, has said that this Bill is "ill-conceived" and "brings the UK armed forces into disrepute".[136]

The impact on the culture of compliance with the law of armed conflict and with international human rights law

154. Firstly, there are questions as to the message it sends to British troops and how that will feed into a culture of compliance (or not) with the laws of war (international humanitarian law) and human rights law. Whilst British Armed Forces have a good reputation generally and have had extensive repeat participation in combat, stabilisation and peacekeeping missions, we heard evidence of violations of the UK's torture obligations in relation to detainees in Iraq (seemingly on direction from HMG in London)[137] and we also heard evidence of directions from a British Army General in Iraq to employ excessive live fire[138] which would ostensibly contravene at least three of the five main principles of the laws of war: in particular failing to respect the principle of military necessity; the principle of proportionality; and the principle of distinction (between civilian and non-civilian objectives). It is therefore clear that a culture of respect for the rule of law cannot be taken for granted.

Impact on the human dimension of warfare and developing trust with local civilian populations

155. The hallmark of recent combat operations has been both prolonged partnership with local forces and extensive engagement with civilian populations. These operating environments have consistently highlighted the central importance of the development of robust relationships in host countries. UK Armed Forces have become increasingly aware of the importance of the human dimension of warfare particularly in conflicts where significant numbers of land forces deploy. As we heard from witnesses, compliance with the rule of law is all the more important where the original purpose of deployment was to uphold the rule of law and enforce human rights in the host nation. We heard from witnesses that it is difficult to see how this Bill will help in that respect as it suggests a

136 In a leaked letter to the Defence Secretary, the veterans Minister, the head of the military and the director of the service prosecuting authority, as reported in the Times article "Judge Jeffrey Blackett warns law to protect soldiers is 'ill-conceived'"

137 See Q8 [Reverend Nicholas Mercer]. "Being the commander legal in the Iraq war, I walked in on one of these interrogation sessions as early as March 2003 and saw 40 Iraqis being subjected to what are known as the five techniques... I made a complaint; other senior officers made a complaint. We were overruled. When it came to the Baha Mousa inquiry in 2011, eight years later, Sir William Gage said there had been a corporate failure by the Ministry of Defence in relation to detention and interrogation. That means that six years of military activity, when it came to interrogation and detention, was in breach of international law."

138 Q6 [Mark Goodwin-Hudson] "When I was in Iraq, for example, my general would run around saying, "Don't use two rounds if you can use 200 rounds. Don't fire twice if you think you can fire 200 times". That is a very provocative and deliberate attempt to increase the violence."

certain double standard when it comes to compliance with the rule of law and human rights.[139] There are therefore risks that this will make it all the more difficult to develop trust with local civilian populations.

Impact on the UK's international reputation

156. Finally, there is the risk to the UK's international reputation. The introduction of this Bill has precipitated concerned discussions amongst those working in international organisations such as the UN, Council of Europe and ICRC as to what this means for the UK's future compliance with IHL and IHRL–something that can only hinder the UK's reputation internationally.

157. In this light it is worth noting the UN human rights experts have also "called on UK Parliament" to reject the OO Bill which they say would "give British soldiers advance immunity for war crimes and crimes against humanity".[140] They said the OO Bill violates the UK's obligations under international humanitarian law, human rights law and international criminal law, and protects British soldiers serving abroad from charges for serious international crimes, including unlawful killing and torture.

158. This followed on from an earlier communication with concerns being raised by the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.[141] In the more recent communication, the UN experts said. "It is of utmost concern that the UK Government is denying the rights to truth, justice and reparations to victims of serious offenses and their families, based on an arbitrary presumption that legal claims against British soldiers are vexatious and fallacious".

159. This is not only a matter for the diplomatic and reputational dimensions of international engagement. When States cooperate internationally militarily, they need to assure themselves that such cooperation will not lead them to be responsible under international law for others' failings (under Article 16 of the ILC draft articles on State Responsibility). The UK undertakes such analysis in respect of partners and partners will undoubtedly do the same as concerns the UK. To date, one can imagine that this analysis is not too taxing in respect of UK compliance, but with the introduction of this Bill and the message it sends about a lessening of accountability for compliance with international standards , there could be questions as to whether international partners need to be undertaking more due diligence before commencing joint operations with the UK.

160. **We regret the impact that the introduction of this Bill has already had on the reputation of the Armed Forces and of the UK internationally. We would further call**

139 See for example, Q12 [Martyn Day] "When we went to war with Iraq in 2003, the Motion passed by Parliament included two important provisions, in that one of the main reasons for us going into Iraq was to bring about the rule of law and the protection of the human rights of the Iraqi people…the politics of [the derogation provision in the Bill] are all wrong. Where we go into a country, I hope it is to bring about the rule of law and the assurance of human rights. The idea that we would derogate from that responsibility in going into those countries seems totally and utterly wrong to me."

140 "*UK Parliament must not introduce impunity for war crimes, say UN experts*", Office of the High Commissioner for Human Rights, 5 October 2020

141 Mandate of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, June 2020

on the Government to consider very carefully the message that it sends to troops about accountability and compliance with international humanitarian law and international human rights law.

161. **In particular we note the importance of the development of robust relationships in host countries as part of the human dimension of warfare particularly in conflicts where significant numbers of land forces deploy. Compliance with the rule of law is all the more important where the original purpose of deployment was to uphold the rule of law and enforce human rights in the host nation. There are risks that the appearance of double standards through the introduction of this Bill will make it all the more difficult to develop trust with local civilian populations.**

Conclusions and recommendations

The adequacy of Ministry of Defence investigations

1. It is clear that some of the investigations, inquiries and litigation into incidents arising from the UK's involvement in the conflicts in Iraq and Afghanistan have exposed wrongdoing, such as mistreatment of detainees, unlawful detention and breaches of the prohibition on torture and inhuman or degrading treatment or punishment (Article 3 ECHR). Cases have also exposed poor practices, procedures and equipment on the part of the MoD that have led to the unnecessary deaths of, and injuries to, members of the Armed Forces. *Such investigations, inquiries and litigation must continue to be allowed to uncover any such poor practices, so that lessons are learned in order to prevent people—whether members of the Armed Forces or civilians—being harmed or killed unnecessarily.* (Paragraph 25)

2. The evidence indicates overwhelmingly that investigations into incidents have been inadequate, insufficiently resourced, insufficiently independent and not done in a timely manner to gather adequate evidence. This has resulted in repeated investigations to try to remedy the flaws of previous investigations. This creates stress and uncertainty for both those accused of wrong-doing and for victims. It also impedes justice as cases cannot be brought or resolved. (Paragraph 34)

3. Investigations will still be required, despite this legislation. And the inadequacy of those investigations will not be addressed by the Bill. Furthermore, the Bill does nothing to address the issue of repeat investigations which causes distress to both alleged victims and alleged perpetrators. It is therefore difficult to reconcile the contents of the Bill with its stated objective. (Paragraph 35)

4. *The MoD must, as a priority, establish an independent, skilled and properly funded service for investigations. Investigations must be robust, take place promptly and be sufficiently independent and of high quality so that there is no longer any need for repeated or protracted investigations.* (Paragraph 36)

Presumption against prosecution for offences after a 5-year period: Clauses 1–7

5. It is difficult to understand why the MoD is legislating to limit the ability of its own prosecutors to bring prosecutions when so few prosecutions have been brought, and when there is no suggestion that prosecutions brought by the Service Prosecuting Authority have been vexatious. (Paragraph 43)

6. *There has been no suggestion that the Service Prosecuting Authority is bringing excessive or unjustified prosecutions of members against the Armed Forces, therefore we can see no justification for introducing the statutory presumption against prosecution of Armed Forces personnel. We have significant concerns that clauses 1–7 have been introduced based on a misunderstanding of the difference between (i) investigations; (ii) prosecutions; and (iii) civil claims.* (Paragraph 45)

7. *We cannot see any justification for introducing a statutory presumption against prosecution in cases where the Service Prosecuting Authority considers that there is sufficient evidence that a member of the Armed Forces committed an offence and has already decided that it is in the public interest to bring a prosecution. For these reasons we consider that clauses 1–7 should be deleted.* (Paragraph 46)

8. There should not be different classes of defendant or different classes of victim. We are concerned at the introduction, into the domestic laws of the United Kingdom, of a special category of defendant (i.e. members of the Armed Forces) whose victims are seemingly less deserving of justice and who are granted greater impunity for their crimes. We note that a prosecution may only be brought where there is sufficient evidence and where it is in the public interest. *We do not understand why cases should not be brought against this category of defendant (i.e. members of the Armed Forces) where there is sufficient evidence of a crime having been committed by the defendant and where it is in the public interest to prosecute.* (Paragraph 54)

9. We find it unacceptable that Johnny Mercer MP, the responsible Minister, would not confirm that he thought that members of the Armed Forces should be prosecuted in respect of war crimes, crimes against humanity, genocide or torture where the Service Prosecuting Authorities were satisfied that they had sufficient evidence to bring a prosecution and that there was a public interest in favour of bringing the prosecution. (Paragraph 62)

10. We have significant concerns that the presumption against prosecution runs the risk of contravening the UK's international legal obligations under international humanitarian law (the law of armed conflict) and international human rights law. In particular, it risks contravening the UK's obligations under the UN Convention Against Torture, the Geneva Conventions, the Rome Statute and international customary law. (Paragraph 63)

11. *At a minimum the presumption against prosecution should be amended so that it does not apply to torture, war crimes, crimes against humanity or genocide.* (Paragraph 64)

12. We are deeply concerned that the introduction of a presumption against prosecution may mean that members of the British Armed Forces are at risk of being prosecuted either in another State or before the International Criminal Court. This is a real risk if it is considered that this presumption (combined with the existing concerns about the inadequacy of MoD investigations) leads other States or the ICC to conclude that the UK is unwilling or unable to investigate and prosecute for war crimes. (Paragraph 69)

13. We are concerned that the Bill does not provide any incentives for the military hierarchy to ensure that members of the Armed Forces who are mentally unfit to be deployed get removed from operational duties and given the support that they need. Instead it includes an impediment to prosecuting a person whose judgement may be impaired, who lacks adequate self-control or whose mental health may have been affected by deployment. (Paragraph 76)

14. *The MoD should not be sending Armed Forces personnel on deployment who are unable to make "sound judgements", who cannot "exercise self-control" or whose mental health is so severely affected that the MoD does not consider that they should*

be responsible for their criminal actions. Moreover, if a member of the Armed Forces becomes unable to make "sound judgements", can no longer "exercise self-control" or where there are significant concerns about their mental health, then there should be adequate systems in place to relieve that person of their operational duties, remove them from the conflict situation (where appropriate) and give them the support that they need. (Paragraph 77)

15. The fact that a person has been deployed on operations overseas is irrelevant for considering a deadline on prosecutions. Moreover, we are concerned about the potential read across to the regular application of international humanitarian law, as well as behaviours of security forces more generally. Service personnel are trained to deal with very complex situations. It is only right that due account is taken of the complexity of a combat situation as part of any decision as to whether to bring a prosecution (i.e. is there sufficient evidence that an offence has been committed, and is it in the public interest to prosecute). However, it should not be part of a statutory barrier to bringing prosecutions where they are in the public interest. (Paragraph 78)

16. *The mental health of a defendant is already borne in mind as part of the prosecutorial decision as to whether it is in the public interest to bring a prosecution. We do not consider that there is any solid basis for including additional requirements that could risk granting de facto impunity to those who have committed crimes on the grounds that the perpetrator lacked sound judgement, or could not exercise self-control, beyond the threshold already established in criminal law. For this reason, we would recommend deleting clause 3(2)(a), 3(3) and 3(4).* (Paragraph 79)

17. There are significant concerns, that the Minister accepts, with the standard and adequacy of MoD investigations of members of the Armed Forces. And yet in this Bill the Government is effectively using the existence of potentially inadequate investigations as a barrier to bringing prosecutions—even where a prosecutor has decided that there is a sufficiency of evidence that the accused committed the offence and that there is a public interest in bringing the prosecution. (Paragraph 83)

18. *No prosecution that is in the public interest, should be prevented from being brought because of inadequate or insufficiently independent prior investigations by the MoD. Clauses 3(2)(b) and 4 of the Bill should be removed or at least amended so that they only apply to adequate, expert, independent investigations.* (Paragraph 84)

19. If an independent prosecution authority determines that it has sufficient evidence to bring a prosecution and that a prosecution is in the public interest (having regard to all the relevant factors), we do not see why the Attorney General should be given a veto over those efforts to bring someone to justice. This is all the more concerning when this may apply where the Attorney has herself previously advised on the alleged unlawful conduct and therefore may have a pronounced conflict of interest. (Paragraph 87)

20. We are deeply concerned at the difference in treatment of victims and we note concerns that have been expressed about the "racist overtones" of this Bill. We do not accept that any offences are "understandable" depending on the nationality or employment status of the victim of an offence. (Paragraph 90)

Limitation period for Human Rights and civil claims

21. The introduction of an absolute time limit risks breaching the UK's human rights obligations and preventing access to justice. An absolute time limit of 6 years is unfair in the context of overseas operations, where potential claimants may be embroiled in protracted conflict situations, detained, displaced, or suffering from physical or psychological injuries. Indeed, had an absolute time limit existed previously it would have prevented cases that have uncovered, for example, the inhuman and degrading treatment of detainees by UK Armed Forces, or UK complicity in rendition and torture. Not only would that have prevented justice for the victims of those abuses, but it would also have meant that such practices would have continued unchecked. (Paragraph 107)

22. Powers exist to strike out unmeritorious claims that are an abuse of process and to prevent vexatious litigants bringing repeated litigation. We are not aware of any suggestion that the Courts have allowed wholly unmeritorious or vexatious claims through any failure or reluctance to use these powers. We call on MoD Ministers to desist from using this politicised and inaccurate language in relation to claims where the MoD did have a case to answer. (Paragraph 116)

23. If the MoD do have valid examples where claims that should have been struck out are being allowed even when there is no case to answer, then we should properly be discussing that matter and how to minimise such risks. But we should not use the phrases merely to describe situations where there were many, contradicting witness statements (including from different members of the Armed Forces) as to whether wrong-doing had occurred. As frustrating as that may be, that can be normal in litigation. (Paragraph 117)

24. It is essential that it is for the independent Solicitors Regulatory Authority to deal with professional misconduct not the Government (who is a party to the proceedings about which they complain). (Paragraph 119)

25. In the UK, solicitors, barristers and advocates are members of a regulated legal profession with clear codes of conduct and ethical standards. Sometimes the client they represent could be the Government. Sometimes that client could be a member of the Armed Forces, a veteran, or a civilian who wishes to bring a claim against the MoD. It is wrong for public office holders such as Ministers to refer generally to lawyers as "ambulance-chasing lawyers" (or other politically charged and inaccurate terms) when they represent members of the Armed Forces, veterans and civilians in their claims against the MoD—many of which claims have been very well founded claims against the MoD. The calculated and repeated use of such derogatory language by Ministers towards legal professionals is unbecoming and undermines democracy and the rule of law. (Paragraph 121)

26. *Not only should the Government commit to the independence of the legal profession, but they should support such independence. This includes supporting the independent regulation of the legal profession.* (Paragraph 122)

27. Lawfare refers to the strategy using law to achieve an operational military objective. It is wholly inappropriate to use this term to refer to the application of the rule of law to determine cases where injured civilians or soldiers are seeking justice,

or for example, seeking to determine the facts surrounding the death of a loved one. We wholeheartedly reject the Minister's implication that UK courts, Armed Forces personnel, civilians and legal professionals are all part of some coordinated strategy to use the law as a substitute for traditional military measures to achieve an operational military objective—that is quite simply preposterous. (Paragraph 124)

28. We call on the Minister to cease using inflammatory and inaccurate language. It is deeply unhelpful for Ministers of the Crown to be using divisive language that suggests the existence of conflicts and military objectives when all that is present is the use of the rule of law so that killed or injured members of the Armed Forces, their families and civilians, can seek justice. (Paragraph 125)

Duty to consider derogating from the ECHR: Clause 12

29. The UK cannot lawfully make a derogation unless the Article 15 ECHR conditions for derogation are met. Clause 11 appears to do nothing except require the Minister to consider whether it would be appropriate to make a derogation where those conditions are met, and where such a derogation was necessary to ensure that the UK remained in compliance with its international obligations. It is therefore highly questionable as to whether this provision adds much to what the Minister would or indeed should do in any event, but it does arguably increase the risk of judicial review proceedings and requests for information under the Freedom of Information Act, inquiring whether the Minister has made such a determination and on what grounds. (Paragraph 130)

30. There is a real risk that the meaning of "war" in Article 15 ECHR may not align with the meaning given to "significant operations overseas" in clause 11 of the Bill. *The MoD should avoid any difference in meaning so that this clause is aligned with the meaning in Article 15 ECHR, by amending this clause to make that clear. It should be made clear on the face of the Bill that this would only apply to UK involvement as a belligerent in an international armed conflict or a non-international armed conflict and that it would not apply in respect of peacekeeping operations, counter-terrorism operations or special operations.* (Paragraph 136)

31. In respect of the majority of ECHR rights potentially engaged in a conflict situation, no derogation of Convention rights is possible. It is, however, possible, where required by the strict exigencies of the situation, to derogate from certain requirements of Article 5 in relation to detention and Article 8 (right to respect for private and family life). Any such derogations would only be possible where they are necessary due to the strict exigencies of the situation, and adequate safeguards should be in place. Importantly other international human rights and international humanitarian law would still apply to protect detainees, civilians and those hors de combat. (Paragraph 141)

32. The Government may wish to consider restricting this provision so as only to apply to those Articles which could be relevant—namely Article 5 and 8 ECHR. (Paragraph 142)

33. Given recent, well-known, concerns about the lack of timely, adequate information to and consultation of Parliament by the Government, we have little confidence that the Government will consult Parliament in good time without a clear undertaking by the Government. (Paragraph 148)

34. Improved transparency in information provided to Parliament and in parliamentary involvement in the derogation process (other than as fait accompli) would hopefully improve transparency, decision-making and compliance with the law. (Paragraph 151)

35. *We call on Government to make an undertaking to consult with the Committee in advance of any proposed derogation under the ECHR. They should provide Parliament with sufficient time to consider any proposed derogation in advance of the UK derogating from its international obligations. We also expect to receive from the Secretary of Defence, a detailed Memorandum explaining how the Article 15 ECHR criteria are met in the case of any proposed or actual derogation.* (Paragraph 152)

Wider implications of the Bill on military operations

36. We regret the impact that the introduction of this Bill has already had on the reputation of the Armed Forces and of the UK internationally. We would further call on the Government to consider very carefully the message that it sends to troops about accountability and compliance with international humanitarian law and international human rights law. (Paragraph 160)

37. In particular we note the importance of the development of robust relationships in host countries as part of the human dimension of warfare particularly in conflicts where significant numbers of land forces deploy. Compliance with the rule of law is all the more important where the original purpose of deployment was to uphold the rule of law and enforce human rights in the host nation. There are risks that the appearance of double standards through the introduction of this Bill will make it all the more difficult to develop trust with local civilian populations. (Paragraph 161)

Annex: Potential amendments

Remove the presumption against prosecution:

Omit: Clauses 1, 2, 3, 4, 5, 6 and 7.

1) This amendment removes the "presumption" against prosecution (clauses 1–7) as it could lead to impunity, violate the right to a remedy for genuine victims, and undermine the UK's international obligations to prosecute international crimes.

Amend the presumption against prosecution so that it only applies after 10 years

In clause 1(4), omit "5" and insert "10".

In clause 1(5), omit "5" and insert "10".

In clause 5(1)(b), omit "5" and insert "10".

In clause 5(5), omit "5" and insert "10".

This amendment provides that the presumption against prosecution only applies after 10 years (instead of 5 years).

Remove war crimes, crimes against humanity, genocide and torture from the scope of the presumption against prosecution

Add a new clause 6(2A) as follows:

(2A) An offence is not a relevant offence if it amounts to—

(a) torture, within the meaning of section 134 Criminal Justice Act 1988; or

(b) genocide, a crime against humanity or a war crime as defined in section 50 of the International Criminal Court Act 2001.

This amendment provides that the presumption against prosecution does not apply to war crimes, crimes against humanity, genocide or torture.

Remove the inability to exercise self-control or exercise sound judgement as a reason not to prosecute

Omit clause 3(2)(a), clause 3(3) and clause 3(4).

This amendment would delete the requirement to give "particular weight" in any prosecution decision after [5] years to a person having an impaired ability to exercise self-control or to exercise sound judgement whilst being deployed on operations overseas.

Remove the requirement to have the consent of the Attorney General where the Service Prosecuting Authority has already determined that there is sufficient evidence and that the prosecution is in the public interest

Omit clause 5.

This amendment removes the requirement that the Attorney General must consent to the prosecution if brought after [5] years, where the Service Prosecuting Authority (or the Crown Prosecution Service) has already determined that there is sufficient evidence to prosecute and that the prosecution is in the public interest.

Limitations on bringing proceedings under the Human Rights Act

Omit clause 11.

This amendment deletes clause 11 (which introduces a hard deadline for human rights claims and also includes some complex provisions around the impact of proceedings on the mental health of Armed Forces witnesses).

Appendix: Available litigation statistics

The published statistics on prosecutions and litigation relevant to this Bill are scarce. The MoD's available statistics, whether those provided in evidence to the Committee or in the impact assessment come with significant caveats as to accuracy and completeness of available information.[142]

Table 1: Number of prosecutions of Armed Forces Personnel in respect of crimes committed against civilians in Iraq and Afghanistan since 2000

Number of Prosecutions	Number of convictions
27	8

Source: Q16

Table 2: Number of civil and human rights claims since 2003 brought by or on behalf of Iraqis or their families[143]

	Number of claims	Percentage of claims
Claims brought within 1 year	4	0.4%
Claims brought between 1 year and 3 years	41	4.4%
Claims brought between 3 and 6 years	302	32.4%
Claims brought over 6 years	583	62.7%
Total claims	930	100%

Source: MoD Impact Statement[144]

142 For example, the MoD's Impact Assessment says " There is limited available data to determine the impact of the presumption against prosecution measure", or "there is no available evidence in relation to the duty to consider derogation". In relation to civil litigation they say "data on the civil compensation cases to come out of the 2003–09 Iraq operations is the best available evidence … although it is not without its limitations", the impact assessment document then contains further information as to assumptions made and information that may be lacking.

143 This excludes the 188 PIL related claims that were struck out and the 12 that were excluded as there was no recorded date of incident.

144 This table combined the statistics in the MoD Impact Assessment that separated civil and human rights claims, as these are the same 930 claims. MoD, Impact Assessment (IA), Overseas Operations (Service Personnel and Veterans) Bill, 25 August 2020

Table 3: Resolution of claims brought by or on behalf of Iraqis since 2003

Total number of claims	Claims where compensation has been paid	Claims struck out[145]	Claims subject to a confidentiality agreement, withdrawn or struck out
1130	330 (total compensation paid: £19.8million)	188	612 (the amount of compensation paid is not disclosed by the MoD)

Source: MoD Impact Assessment[146]

Table 4: Minimum numbers of Employer's Liability claims brought by or on behalf of MoD Personnel or their families since 2007 where the country of incident has been recorded as Iraq or Afghanistan.

	Number of claims	Percentage of claims
Claims brought within 3 years	357	64.7%
Claims brought between 3 and 6 years	125	22.6%
Claims brought over 6 years	70	12.7%
Total claims	552	100%

NB This excludes those where the MoD's information does not state the country or location of the claim. It also excludes those where injuries where from multiple deployments in different countries. Therefore these figures are at the minimum end of relevant claims.

Source: MoD Impact Assessment[147]

145 This relates to claims made by PIL which were struck out following Phil Shiner being struck off the roll of solicitors.

146 MoD, Impact Assessment (IA), Overseas Operations (Service Personnel and Veterans) Bill, 25 August 2020

147 MoD, Impact Assessment (IA), Overseas Operations (Service Personnel and Veterans) Bill, 25 August 2020

Declaration of Interests

Lord Brabazon of Tara

- No Interests declared

Lord Dubs

- No relevant interests to declare

Baroness Ludford

- No Interests declared

Baroness Massey of Darwen

- No relevant interests to declare

Lord Singh of Wimbledon

- No Interests declared

Lord Trimble

- No Interests declared

Formal minutes

Wednesday 21 October 2020

Virtual Meeting

Members present:

Ms Harriet Harman MP, in the Chair

Ms Karen Buck MP	Lord Brabazon
Joanna Cherry MP	Lord Dubs
Dean Russell MP	Baroness Massey of Darwen
	Lord Singh of Wimbledon

Draft Report (*Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill*), proposed by the Chair, brought up and read.

Ordered, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 161 read and agreed to.

Annex and Summary agreed to.

A Paper was appended to the Report.

Resolved, That the Report be the Ninth Report of the Committee.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till 4 November at 2.30pm

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the inquiry publications page of the Committee's website.

Monday 28 September 2020

Martyn Day, Senior Partner, Leigh Day; **Mark Goodwin-Hudson**, former British Army Officer; **Reverend Nicholas Mercer**, former Command Legal Advisor in Iraq; **Elizabeth Wilmshurst CMG** Q1–12

Monday 5 October 2020

Johnny Mercer MP, Minister for Defence People and Veterans; **Baroness Goldie**, Minister of State; **Katherine Willerton**, Deputy Director, Legal Advisers, **Damian Parmenter**, Director of the Defence and Security Industrial Strategy, Ministry of Defence Q13–24

Published written evidence

The following written evidence was received and can be viewed on the inquiry publications page of the Committee's website.

OOB numbers are generated by the evidence processing system and so may not be complete.

1 All-Party Parliamentary Group on Drones (OOB0026)

2 Amos, Professor Merris (OOB0014)

3 American University Washington College of Law, Center for Human Rights & Humanitarian Law (OOB0029)

4 Association of Personal Injury Lawyers (OOB0016)

5 British Red Cross (OOB0023)

6 Bryson, Dr Anna (Senior Lecturer in law) (OOB0008)

7 CEASEFIRE Centre for Civilian Rights (OOB0013)

8 Centre for Military Justice (OOB0017)

9 Chowdhury, Dr Tanzil (Queen Mary University of London Lecturer in Public Law) (OOB0005)

10 Crown Prosecution Service (OOB0032)

11 Cryer, Professor Robert (OOB0021)

12 Cubbon, Mr John (OOB0001)

13 Day, Leigh (OOB0031)

14 Equality and Human Rights Commission (OOB0019)

15 Fowler, Dr Alexandra (OOB0028)

16 Freedom from Torture, and Survivors Speak OUT Network (OOB0020)

17 Goodwin-Hudson, Mark (OOB0022)

18 Gormally, Mr Brian (Director) (OOB0008)

19 Hampson, Francoise (OOB0011)

20 Holder, Mr Daniel (Deputy Director) (OOB0008)

21 International Committee of the Red Cross (OOB0024)

22 Kemp, Susan (OOB0027)

23 Law Society of England and Wales (OOB0015)

24 Liberty (OOB0010)

25 Mallinder, Professor Louise (OOB0008)

26 McKeown, Ms Gemma (Solicitor) (OOB0008)

27 Mercer, Reverend Nicholas (OOB0012)

28 McEvoy, Professor Kieran (Professor of Law and Transitional Justice) (OOB0008)

29 Quaker (OOB0002)

30 Redress (OOB0018)

31 Reprieve (OOB0007)

32 Rights and Security International (OOB0025)

33 Shiner, Bethany (Lecturer in Law Middlesex University ((OOB0005)

34 Wallace, Dr Stuart (OOB0009)

35 Wilmshurst, Elizabeth (OOB0006)

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee's website.

Session 2019–21

First Report	Report Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019: Second Report	HC 149 HL 37
Second Report	Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report	HC 148 HL 41
Third Report	Human Rights and the Government's Response to Covid-19: Digital Contact Tracing	HC 343 HL 59
Fourth Report	Draft Fatal Accidents Act 1976 (Remedial) Order 2020: Second Report	HC 256 HL 62
Fifth Report	Human Rights and the Government's response to COVID-19: The detention of young people who are autistic and/or have learning disabilities	HC 395 HL 72
Sixth Report	Human Rights and the Government's response to COVID-19: children whose mothers are in prison	HC 518 HL 90
Seventh Report	The Government's response to COVID-19: human rights implications	HC 265 HL 125
Eighth Report	Legislative Scrutiny: The United Kingdom Internal Market Bill	HC 901 HL 154
First Special Report	The Right to Privacy (Article 8) and the Digital Revolution: Government Response to the Committee's Third Report of Session 2019	HC 313