House of Commons
House of Lords

Joint Committee on Human Rights

Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill: Government Response to the Committee's Ninth Report of Session 2019–21

Third Special Report of Session 2019–21

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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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Third Special Report of Session 2019–21

The Joint Committee on Human Rights published its Ninth Report of Session 2019–21, Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill (HC 665/HL 155) on 29 October 2020. The Government response was received on 29 December 2020 and is appended below.

Appendix: Government Response

The Government welcomes the JCHR's interest in and scrutiny of the Overseas Operations (Service Personnel and Veterans) Bill. We have given careful consideration to the Conclusions and Recommendations contained in their report of 29 October 2020. This is the Government's formal response to their report. We have responded to each of the JCHR's conclusions and recommendations in turn. However, we would like to say at the outset, that in respect of both the criminal and civil matters that are dealt with in this Bill, we have complied with our international obligations, including those under the European Convention on Human Rights.

The Minister for Defence in the Lords, Baroness Goldie, will continue to engage with Committee Peers during the Bill's passage through the House of Lords.

Conclusions and Recommendations

The adequacy of Ministry of Defence (MOD) 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)

We agree with the Committee. Forums of inquiry are important to establish the facts in complex operational environments. Such inquiries must be carried out, but it is also important to recognise the difficulties of operating in these environments and consequently the challenges faced.

Following the campaigns in Afghanistan and Iraq, the MOD has received an unprecedented number of legal claims for compensation that also contained allegations of criminal actions. Civil claims brought against the MOD can result in Service personnel and veterans being investigated (where those claims contain criminal allegations) or asked to provide evidence in relation to the claim, often long after the events in question. The Government

is committed to reducing the uncertainty facing our Service personnel and veterans in relation to the threat of repeated investigations and potential prosecution in connection with historical operations many years after the events in question.

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)

The Service Police had not previously carried out the type and volume of investigations required in Iraq and Afghanistan. It is probably true to say that no modern police force had ever done what was being asked of the Service Police in those early days of operations in Iraq, most of which fell to the Royal Military Police.

The Royal Military Police are a small organisation, who for a significant period were operating in both Iraq and Afghanistan as well as being deployed across the UK and rest of the world as they would be in peacetime. In those war zones, with very limited numbers, investigators were competing for scarce resources, such as helicopters, to visit scenes and troops to provide Force Protection. These investigations were taking place in the most complex and hostile of environments and, unsurprisingly given the operational tempo, despite their importance, it was not always possible to prioritise them. In these circumstances, some investigations took place that were later reviewed and identified as having shortcomings. Where appropriate these matters were subsequently reinvestigated.

Much was learned from these experiences. All branches of our Armed Forces, including the Service Police, have taken the lessons identified from the years of investigating criminal allegations on operations and adapted their policies, practices, procedures, training and education to improve how they operate. Importantly, the Armed Forces Acts 2006 and 2011 introduced significant changes to the relationship between the chain of command and the Service Police in respect of investigative decision-making, strengthening the investigative independence of the latter.

Under Part 5 of the Armed Forces Act 2006 (as amended), if Commanding Officers become aware of serious allegations or allegations of offences committed in specific prescribed circumstances, they are under a duty to make the Service Police aware. There are obligations on the Service Police to consult with the Director of Service Prosecutions where a decision is taken not to refer in certain types of investigations. Where the investigation reveals sufficient evidence of a serious offence, the Service Police are obliged to refer the case to the prosecutors. The Provost Marshals of the Service Police have a legal duty to ensure that all investigations are carried out free from improper interference.

In addition, the aim of the review to be led by Sir Richard Henriques, announced on 13 October 2020, is to help provide greater certainty for Service personnel being investigated and for potential victims while ensuring that allegations are addressed without undue delay. To that end, one of the focuses of the review is on setting the context for the future so that we can be sure that, for any complex and serious allegations of wrongdoing against any of our forces that may occur on overseas operations, the most up to date and future-proof framework, skills and processes are in place. Particular attention will be paid to how

the Armed Forces will facilitate timely consideration of serious and credible allegations of criminal misconduct and, where appropriate, their swift and effective investigation. The review will be 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.

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)

We agree with the Committee that investigations will continue to be required, and we have been clear that none of the measures in the Overseas Operations Bill are intended to prevent investigations from taking place. Of course, alleged misconduct by Service personnel is dealt with most effectively if individuals are investigated and, where appropriate, subject to disciplinary or criminal proceedings, as soon as possible after the event. However, this is not always possible in the circumstances of overseas operations even for investigations taking place at the time of the event. Allegations made years after the event are even more challenging and can make the delivery of timely justice extremely difficult.

It is not, however, accurate to say that the Bill does nothing to address the issue of repeat investigations. We expect that the high threshold of the presumption against prosecution may have an indirect impact on reinvestigations over time. As prosecutors become more familiar with the presumption, they may be able to advise investigators earlier in the process as to whether the high threshold would be met in a particular case. The Service Police may then make a decision as to the resourcing of any further investigation.

It should also be noted that one of the factors that prosecutors are to bear in mind (and give particular weight to) when deciding whether to prosecute in a case where there has been a previous investigation and where no compelling new evidence has become available is the public interest in finality being achieved without undue delay (clause 3(2)(b)). This should therefore help to reduce the likelihood of investigations being reopened without new and compelling evidence. However, importantly, it does not create a bar to investigations or prosecutions.

Further, many civil claims against the MOD in relation to incidents involving Service personnel in Iraq contained criminal allegations, which then generated investigations. Nothing in the legislation will prevent investigations taking place where there is evidence of wrongdoing, but the limitation longstops in Part 2 of the Bill should encourage those with valid claims to bring them earlier - thereby bringing criminal allegations to the attention of the Service Police at an earlier stage when there is a more realistic opportunity to fully investigate.

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)

The independence of the Service Police is enshrined in law under section 115A of the Armed Forces Act 2006. This imposes a duty on the Provost Marshal of each force (Royal

Navy, Army, and Air Force) to seek to ensure that all investigations carried out by the force are free from improper interference. This independence, in relation to Article 2 ECHR, was affirmed in 2013 in the Ali-Zaki Mousa (No2)[1] case.

The professionalisation of the Service Police continues, including working alongside civilian police counterparts to develop education, training, policy and practices. Lessons learned through the Iraq Historical Allegations Team (IHAT), and in the investigations that followed, have been applied to subsequent investigations to ensure appropriate support and resourcing; meanwhile, the Service Police continue to review how they operate.

In parallel with the Overseas Operations Bill, and as indicated above, the Secretary of State announced on 13 October 2020 a judge-led review of how allegations of wrongdoing on overseas operations are raised and investigated. This will help to ensure that we build on the lessons learned to ensure that allegations are taken forward in a timely manner, providing reassurance to victims, witnesses and suspects alike: the risk of "justice delayed, justice denied" applies to those who are the subject of complaints, in addition to those who make them.

Presumption against prosecution for offences after a five-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)

The measures in Part 1 of the Bill have been introduced to provide reassurance to our Service personnel and veterans that, where an investigation into historical allegations of wrongdoing is referred to the prosecutor for a decision on whether to prosecute, the unique circumstances of overseas operations will be taken into account in their considerations.

They have not been introduced because the Department has concerns that prosecutions brought by the Service Prosecuting Authority (SPA) have been vexatious. The SPA is independent of the military chain of command. It acts in accordance with the Crown Prosecution Service (CPS) Code for Prosecutors and other CPS guidance, together with SPA-specific guidance that accounts for the unique nature of the Service Justice System. The Bill simply provides prosecutors with additional factors that they must take into account when coming to a decision as to whether or not to prosecute; they must also seek the consent of the Attorney General for a prosecution to proceed.

6. ***There has been no suggestion that the Service Prosecuting Authority is bringing excessive or unjustified prosecutions of members [sic] 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)

1 R (Ali Zaki Mousa and others) v Secretary of State for Defence No 2. [2013] EWHC 1412 (Admin)

The Overseas Operations Bill is one part of a wider "package" of Service Justice improvements. It is intended to provide a better legal framework for dealing with allegations or claims arising from any future overseas operations, recognising the unique burden and pressures placed on our personnel.

Work is already in hand to take forward some of the key recommendations from the 2019 Service Justice System Review. This includes Sir Jon Murphy's recommendation for the establishment of a tri-Service Defence Serious Crime Unit (DSCU), and for an oversight body for complaints against the Service Police. These measures are intended to deliver a stronger, more collaborative and effective role for the Service Police within the Service Justice System. And, as noted above, the recently announced review led by Judge Henriques will focus on the processes of overseas operations investigations and prosecutions.

The measures in Part 1 of the Overseas Operations Bill are intended to provide reassurance to our Service personnel and veterans that, where an investigation into historical allegations of wrongdoing is referred to the prosecutor for a decision on whether to prosecute, the unique circumstances of overseas operations will be taken into account in their considerations. The introduction of six-year time limits for compensation claims in Part 2 of the Bill will help to ensure that we will not be calling on Service personnel indefinitely to give evidence in relation to incidents that occurred during historical overseas operations.

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)

The measures in Part 1 of the Bill do not have an impact on how the prosecutor applies the Code for Crown Prosecutors. We anticipate that the presumption and the matters to be given particular weight in the Bill will be considered by prosecutors as part of the Full Code test.

In addition to those matters which are already in the Full Code Test, therefore, the prosecutor will be required, when coming to a decision as to whether to prosecute for alleged offences on overseas operations more than five years ago, to consider whether the case reaches the "exceptional" threshold of the presumption in Clause 2, and to give particular weight to the matters in Clause 3. These additional requirements will ensure that the prosecutor takes into account the unique circumstances in which alleged offences have occurred on an overseas operation. If, having done so, a prosecutor determines that proceedings should be brought, then the Bill does not prevent them being brought (subject to the consent of the Attorney General).

We note the Committee's concerns, but we do not accept the Committee's recommendation to delete Clauses 1 to 7.

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)

The MOD considers that any difference in the treatment of defendants arising from the application of measures contained in Clauses 2, 3 and 5 is justified. This is because when Service personnel deploy on operations overseas, they do so in very different circumstances to those not on operations or when deployed in support of civil authorities in the UK. On overseas operations, Service personnel act under unique pressures and they often face a high degree of hostility and the threat of violence. The sustained physical, mental and emotional stress inflicted upon Service personnel during an overseas operation is an exceptional situation that we believe is deserving of particular treatment and protection in legislation.

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

The measures do not seek to prevent victims of alleged offences by Service personnel from bringing forward their allegations, which will be investigated and, where appropriate, prosecuted. The measures do not allow members of our Armed Forces to act with impunity; prosecutors will continue to have discretion on whether to prosecute, following an investigation, on the basis of their assessment of the sufficiency of evidence, and whether a prosecution would be in the public interest.

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)

The Minister for Defence People and Veterans is clear that it is for the independent prosecutor to determine whether an allegation of a serious offence, such as war crimes or torture, should be prosecuted in the particular circumstances of a case. In respect of war crimes, the consent of the Attorney General would already be required for a case to be prosecuted.

The measures in Part 1 of the Bill do not change this position. On a case-by-case basis, the prosecutor will be able to determine that the case against an individual is "exceptional", and that a prosecution is therefore appropriate. The severity of the crime and the circumstances in which it was allegedly committed will always be factors in their considerations.

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)

The MOD considers that the presumption against prosecution is consistent with all our international legal obligations, including those mentioned by the Committee. It does not undermine in any way the UK's continuing commitment to upholding those obligations. Military operations will continue to be governed by our obligations under domestic and international law, and allegations of serious offences (as noted above), will continue to be investigated and, where appropriate, prosecuted.

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)

We note the Committee's concerns over the presumption against prosecution. As we have emphasised above, the severity of the crime and the circumstances in which it was allegedly committed will always be factors in a prosecutor's consideration. On a case-by-case basis, the prosecutor will be able to determine that the case against an individual is "exceptional", and that a prosecution is therefore appropriate.

We do not therefore accept the Committee's recommendation that the presumption against prosecution should be amended to exclude torture, war crimes, crimes against humanity and genocide.

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)

We note the Committee's concerns that the presumption against prosecution may give rise to the risk of UK Armed Forces personnel being prosecuted in the International Criminal Court (ICC) or by another State (as a result of universal jurisdiction). However, we do not agree that this is the case. Article 17 of the Rome Statute makes provision for cases to be admissible to the ICC in circumstances where the State is unwilling or unable to carry out the investigation or prosecution. That is not the case under the Bill. The presumption is neither an amnesty nor a statute of limitations: as such, it allows for the investigation and prosecution of cases and does not constitute an unwillingness or inability on the part of the UK to investigate or prosecute.

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)

The Bill will have no impact whatsoever on deployment decisions. All Service personnel are categorised with a Medical Deployment Standard that describes their medical capacity for deployment. Those who are graded 'Medically Not Deployable' may not deploy on operations. Those who are graded 'Medically Limited Deployability' require a

risk assessment to be carried out for deployment. The decision on that deployment will depend on the medical condition (which includes mental health), individual function, the proposed employment, length of deployment and the medical support available.

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)

The potential impact of operations on a Service person's mental health is well recognised and there are policy and procedures in place to help manage and mitigate these impacts as far as possible.

Despite the clear processes for categorising personnel as medically suitable for deployment, the MOD recognises that an operational deployment can result in the development of a medical or psychiatric condition.

Specific policy and mandated processes exist for the management of mental health and wellbeing before, during and after deployment. This provides overarching direction on the provision of deployment-related mental health and wellbeing briefings. These are designed to provide enough information about deployment-related mental ill-health to allow individuals, peers and family members to take steps to avoid mental ill-health (PREVENT), to recognise the early signs of mental ill-health (DETECT) and to facilitate help-seeking from the right source at the right time (TREAT).

The medical components of larger-scale deployments include mental health practitioners. These specialist personnel offer a liaison service to unit medical officers and commanders and can assess and manage Service personnel with suspected mental health problems.

While we are confident that there are adequate systems in place, we believe that it is also appropriate for the matters to be given particular weight in Clause 3 to include reference to the adverse effect (or likely adverse effect) of operations on an individual's mental health. Clause 3 ensures that the prosecutor must take into account the unique context of operations and the adverse effect they may have had on a particular Service person's actions, when coming to a decision on whether to prosecute.

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)

We welcome the Committee's agreement that the complexity of combat operations should be taken into account by the prosecutor. However, we do not agree that the presumption against prosecution after five years sets a deadline on prosecutions, nor does it act as an absolute barrier to prosecution. As we have already commented, on a case-by-case basis a prosecutor can determine that a case is "exceptional" and should be prosecuted (subject to the consent of the Attorney General).

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)

We accept that prosecutors may already take matters like mental health into account as part of the public interest assessment, but Clause 3 ensures that this consideration is put on a statutory footing within the unique context of an overseas operation.

The matters to be given particular weight in Clause 3 will not grant "de facto impunity" to individuals who have been accused of committing criminal offences. Clause 3 simply requires that, alongside consideration of the evidence and whether there is a realistic prospect of conviction, the public (and service) interest test, and the presumption against prosecution, the prosecutor must give particular weight to the matters set out in Clause 3(2) "so far as they tend to reduce the person's culpability or otherwise tend against prosecution". This still leaves the prosecutor with the discretion to determine that a case should be prosecuted.

We note the Committee's concerns, but we do not accept the Committee's recommendation to delete Clause 3(2)(a), 3(3) and 3(4).

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)

We have already commented on the adequacy and standard of investigations from the early part of operations in Iraq and Afghanistan, and on the independence of the Service Police.

Investigations on overseas operations are inherently difficult due to the complexity and danger of that environment. If the Service Police conclude that there is sufficient evidence to charge a person with a serious offence, in accordance with the accepted low threshold set out in the Armed Forces Act 006, then they must refer the case to the Director of

Service Prosecutions. The SPA must then consider whether there is sufficient evidence to provide a realistic prospect of conviction and whether a prosecution is in the public (and service) interest.

The Service Police and the SPA liaise regularly during the investigative stages of serious cases–such discourse between investigator and prosecutor, and the consideration of the prosecutorial tests, may impact on what further investigation the Service Police undertake. It should be noted that there is a statutory obligation (contained in section 116(4A) of the Armed Forces Act 2006) on the Service Police to consult the SPA before deciding not to refer certain serious cases.

In the case of alleged offences occurring on overseas operations more than five years ago, the prosecutor will also have to apply the requirements in Clauses 2 and 3 of the Bill.

There is nothing in the Bill that seeks to use the quality of investigations as a barrier to bringing prosecutions. Clause 3(2)(b) simply requires the prosecutor to give weight to the public interest in cases coming to a timely resolution, where there has been a previous investigation and no compelling new evidence has become available; this does not prevent the prosecutor from determining that a case should be prosecuted, even when there is no compelling new evidence.

We do not accept the Committee's recommendation to delete Clauses 3(2)(b) and 4.

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)

We do not agree that requiring the consent of the Attorney General is a "veto" on prosecutions. The Attorney General already has numerous other consent functions - including for war crimes and for the prosecution of veterans through the Service Justice System (if they have left service more than six months previously). In deciding whether to grant consent to prosecution, the Attorney General will act quasi-judicially and independently of Government, applying the well-established prosecution principles of evidential sufficiency and public interest.

The Attorney General's role in advising on the lawfulness of any aspects of an overseas operation involving UK Armed Forces would be unrelated to any exercise of a consent function in relation to criminal prosecutions. Such a role does not bring into question the propriety of the Attorney General having a consent function for prosecutions in relation to alleged offences on those operations.

We do not accept that there is any potential for conflict of interests in this particular circumstance, but we note for completeness that there are general processes in place for dealing with any conflict of interests that might arise in respect of the role of the Attorney General.

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)

We note the Committee's concerns, but we absolutely reject the allegation that the Bill has "racist overtones".

As indicated earlier in our response, an aim of the Bill is to provide reassurance to Service personnel and veterans that, where an investigation into historical allegations is referred to the prosecutor, the unique circumstances of overseas operations will be taken into account in exercising prosecutorial discretion.

Part 1 of the Bill excludes offences committed by Armed Forces personnel against their colleagues, or against fellow Crown Servants or Defence Contractors (who are both deployed in support of the Armed Forces). This reflects the fact that the Bill was intended to cover the type of situation where Service personnel come under attack or face the threat of attack or violent resistance. Alleged victims of the actions of our Armed Forces in these circumstances will continue to be able to report allegations of wrongdoing, and these will be investigated, and where appropriate, prosecuted.

It was not intended that the Bill should deal with the type of situation, for example, where Service personnel commit a crime (e.g. an assault) against their own colleagues in a military base. As a matter of policy, it was not perceived that this would merit the need for the unique circumstances of overseas operations to be taken into account; their colleagues do not pose a potential threat in the same way as envisaged in the Bill.

Similarly, the measures in Part 1 of the Bill do not provide protections for Crown Servants or Defence Contractors, because they are not generally deployed on front line military operations, do not undertake the tasks and duties of Service personnel (including the legitimate use of force), and are not therefore ordinarily exposed to the same stresses, risks and dangers.

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)

We disagree with the Committee that absolute time limits for bringing claims are unfair and in breach of the UK's human rights obligations. In Stubbings v UK, a judgment that has been repeatedly confirmed, the European Court of Human Rights upheld the absolute six-year limitation period for intentional torts in England & Wales. In their judgment, the court noted the need in civil litigation for limitation periods because they

ensure legal certainty and finality, the avoidance of stale claims, and prevent injustice where adjudicating upon events in the distant past involves unreliable and incomplete evidence because of the passage of time. The MOD considers that it is in the interests of legal certainty and finality to introduce absolute time limits for Human Rights Act (HRA) and personal injury/death claims in tort. These limitation measures mean that claims will still be able to be brought against the MOD within a reasonable timeframe.

Additionally, the introduction of a date of knowledge provision for HRA claims relating to overseas operations will mitigate any unfairness that might otherwise arise as a result of the absolute limitation period for those claims. Date of knowledge provisions already exist in UK legislation for personal injury/death claims in tort and are untouched by this Bill.

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 wrongdoing had occurred. As frustrating as that may be, that can be normal in litigation**. (Paragraph 117)

We agree that there are cases brought against the MOD that have merit. However, a number of allegations were fabricated or exaggerated or were brought in multiple jurisdictions, often encouraged by unscrupulous lawyers such as Phil Shiner of Public Interest Lawyers pursuing financial gain.

As the report of the Al Sweady Public Inquiry said, "all the most serious allegations… were wholly and entirely without merit or justification" and "very many of those baseless allegations were the product of deliberate and calculated lies on the part of those who made them and who then gave evidence to [the] inquiry in order to support and perpetuate them".

Public Interest Lawyers also brought other cases that were unfounded and damaged the reputation of brave Service personnel. For example, one claim by Public Interest Lawyers was brought despite the Danish government having already accepted liability and compensating the claimant. In another case, Public Interest Lawyers brought a claim despite the claimant having a death certificate stating that the death was attributable to US Forces.

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)

We agree with the Committee that it is for the independent Solicitors Regulation Authority to deal with any professional misconduct by solicitors.

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)

The Minister's language reflects his strongly and deeply held views about the behaviour of a particular lawyer who brought unfounded claims against the MOD in relation to our Armed Forces, which then impugned and damaged the reputation of brave Service personnel.

The Minister does, of course, recognise the right of individuals - including members of our Armed Forces - to bring civil claims against the Department, and for independent legal professionals to act on behalf of those claimants.

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)

The Government supports the independence of the legal profession and the independent regulation of it.

27. **Lawfare refers to the strategy of 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)

The MOD does not believe that "the 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".

However, the phenomenon of lawfare does exist. Defence's Integrated Operating Concept[2] recognises the evolution of the threat against the UK; it acknowledges that adversaries use an array of capabilities below the threshold of war and in ways outside our legal and political norms, and have proven themselves willing and increasingly able to confront us at home as well as overseas.

The intent of the Overseas Operations Bill is to provide a better legal framework for dealing with claims from any future overseas conflicts; one that recognises the unique burden and pressures placed on our personnel, while still allowing for claims to be brought within a reasonable timeframe.

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[3] 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)

The measure to compel the Government of the day to consider derogation for significant overseas operations in future will ensure that derogation is considered in the round alongside all other aspects of any significant overseas operation. Freedom of Information Act requests can already be made to enquire whether Ministers have considered derogation and the MOD will continue to respond appropriately to those - as it would to any judicial review.

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)

We see no need to align the meaning of "war" in Article 15 ECHR with the meaning given to "significant operations overseas" in the Bill.

The Government will still only be able to derogate when the conditions of Article 15 of the ECHR are met. The conditions of Article 15 indicate that a valid derogation must be "in time of war or other public emergency threatening the life of the nation". We also note

2 The Integrated Operating Concept 2025 was published in September 2020. It sets out a new approach to the utility of armed force, recognising that the UK faces diversifying, intensifying, persistent and proliferating threats from resurgent and developing powers and from non-state actors such as violent extremists.

3 We have assumed that the committee means Clause 12 here, which is the clause that requires the Secretary of State to consider derogation in future significant conflicts. All the answers relating to derogation have made this assumption.

paragraph 7 of the European Court of Human Rights' Guide on Article 15 (updated 31 August 2020), which states that "The Court has not been required to interpret the meaning of "war" in Article 15(1); in any case, any substantial violence or unrest short of war is likely to fall within the scope of the second limb of Article 15(1), a "public emergency threatening the life of the nation".

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)

Article 15 of the ECHR clearly establishes the conditions for derogation and those Articles from which derogation is not possible. Should the Government of the day decide to derogate, our Armed Forces would still be subject to domestic and International Humanitarian Law and any other relevant international laws.

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)

Article 15 of the ECHR clearly establishes the conditions for derogation and those Articles from which derogation is not possible. Any derogation made by a UK Government would need to comply with such conditions and restrictions. Given the clarity provided by Article 15 in this regard, we do not consider it necessary to restrict the provision within the Bill as the Committee has suggested.

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)

The Bill does not change any of the existing processes that the Government must follow once it has made a decision to derogate from the ECHR. Derogation is only possible if strict criteria are met. These are necessarily context-specific, and the specific circumstances around each operation would first have to be considered on a case-by-case basis.

As set out in the Human Rights Act 1998, the Government is already obliged to inform both Parliament and, as set out in the ECHR, the Council of Europe, of any decisions to derogate. Any designated derogation order receives sufficient Parliamentary scrutiny under the existing processes and, unless approved by Parliament, will cease to be law after 40 days. We do not believe that it would be appropriate to seek prior approval from Parliament before taking a decision to derogate, as this could have an impact on operational effectiveness.

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)

We do not believe that the Bill damages the reputation of the United Kingdom or our Armed Forces. The Government remains committed to upholding and strengthening the rule of law, and we intend to maintain our leading role in the promotion and protection of human rights, democracy and the rule of law.

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)

Whenever our Armed Forces embark on operations outside the UK, our people and their chain of command are bound to abide by the criminal law of England and Wales, as well as international humanitarian law as set out in the Geneva Conventions: they have a duty to uphold both. Additionally, all Service personnel must abide by those provisions of the Armed Forces Act 2006 that ensure the maintenance of discipline in an operational context.

We acknowledge that war fighting is a last resort, before which comes conflict prevention, building stability and gaining influence. Building a relationship with local populations whilst deployed overseas is critical to conflict prevention, and the conduct of our troops is key to this. It is therefore to the benefit of both the alleged victims and the accused that where wrongdoing has occurred, it is brought to the attention of the military authorities as soon as possible so that matters can be dealt with in a timely way. This approach should serve to enhance trust and accountability rather than undermine it. Nothing in the Bill changes this; Service personnel can still be held to account for wrongdoing, and we continue to expect the highest standards of our personnel.