Written evidence from Leigh Day (OOB0031)

Introduction

1. Leigh Day is a UK-based law firm specialising in actions against UK multinational companies and the British government. We have acted in numerous cases against the Ministry of Defence ("**MoD"**) on behalf of service personnel and civilians, both based in the United Kingdom and abroad. We welcome the opportunity to submit the firm's views regarding the Overseas Operations (Service Personnel and Veterans) Bill (the "**Bill**").

The statutory presumption against prosecution ("the PAP")

2. Whilst Leigh Day do not act in criminal cases from our experience on the ground we have some sympathy with the view that service personnel should not be prosecuted for 'minor'[1] offences that are committed on historic rather than current overseas operations.[2] We struggle to see how such prosecutions would meet the public interest test already incorporated in our current procedure[3], especially when the civil courts are available to provide redress to victims through compensatory damages. From our experience in civil claims it is rare that victims of minor offences are particularly interested in the prosecution of the perpetrator.

3. Torture, murder and crimes against humanity are entirely another matter. The United Kingdom's rejection of torture in all its forms is a central part of our unwritten constitution.[4]

4. The PAP introduces a de facto statute of limitations of five years for prosecutions of allegations of unlawful conduct committed on overseas operations. After 5 years prosecutions would only be possible in "exceptional"[5] cases. By choosing to treat torture as routinely unexceptional, the Bill is a fundamental and deeply troubling change to our criminal justice system. It significantly risks the UK breaching its obligations under domestic law and international treaties, such as Articles 2, 3, 6 and 14 of ECHR incorporated into domestic law by the Human Rights Act and Articles 7 and 14 of the Convention Against Torture (CAT). It risks exposing UK service personnel to prosecutions by the International Criminal Court, as the Bill may represent a systemic 'unwillingness' to investigate serious allegations.[6]

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[1] We use this term to refer to offences which would carry custodial sentences of 0-5 years if a person were convicted.

[2] See the evidence of Leigh Day's senior partner Martyn Day to the Defence Select Committee on 8 January 2019 @ Question 178.

[3] 1. Is there a realistic prospect of a prosecution? 2. Will a prosecution be within the public interest? https://www.cps.gov.uk/publication/code-crown-prosecutors#section4. .

[4] Bingham, T. (2010). *The Rule of Law.* Penguin Books. Pp. 14-17.

[5] "Exceptional" is not defined, but it is understood to mean that if the PAP applies then prosecutions will only proceed "rarely".

[6] Article 17(1)(a) Rome Statute. Article 17(1)(b) also provides that the ICC can intervene if a decision not to prosecute resulted from the "*unwillingness or inability*" of the State to investigate properly.

Re-Investigations

5. The Bill would prevent prosecutions being brought in the absence of "compelling new evidence" if an investigation has already taken place. Leigh Day have considerable experience of flawed military investigations and have brought a number of judicial reviews in relation to the failings of those investigations.

6. It can obviously be distressing to see elderly veterans face prosecution for alleged actions committed decades before. It is a failure on the part of the system if an individual has to go through multiple investigations. However, that is primarily the result of poorly resourced, one-sided and laggardly investigations, not always properly insulated from political pressure. If independent, thorough and effective investigations are undertaken promptly after the events in question then there would be no need for further investigations.

7. The Bill does not address these flawed processes. Instead, it creates hurdles for prosecutors who may be seeking to address and overcome flaws in previous investigations.

8. This is significant in relation to future investigations which may arise out of the conflicts in Iraq and Afghanistan. The Minister for Defence People and Veterans, Johnny Mercer, accepted in a debate in January 2020[7] that Royal Military Police investigations during those conflicts were "flawed". He expressed his "deep personal regret" that opportunities to hold those responsible to account may now have been lost. The Bill, however, does nothing to ensure objective, independent, and timely investigatory processes into allegations of misconduct.

9. An example is the ongoing judicial review brought by Saifullah who alleges that during a 'night raid' in February 2011 British special forces shot dead four of his innocent relatives and sought to cover up those wrongful killings by planting weapons and providing a false account of the circumstances in which the killings occurred. The Secretary of State for Defence strenuously opposed the granting of permission in this case but once permission was granted disclosure was provided to Saifullah which showed that the Court had been seriously and repeatedly misled by the Secretary of State and his legal representatives.

10. The material disclosed was a cache of emails which revealed that numerous MoD officials (including senior officers within the special forces) were aware at the time of a possible "*deliberate policy*" by British special forces of executing unarmed Afghan males and using false cover stories to cover up the true circumstances of those "*massacre[s]*". The materials indicate that at the time of the killings there had been

[7] https://hansard.parliament.uk/Commons/2020-01-07/debates/4B913D4B-8058-456B-A485-B56C447DE042/UKSpecialForcesIraqAndAfghanistan

at least 33 suspicious killings of Afghans by British special forces over an 8 month period.[8] It is understood that this is evidence that was reviewed by the Royal Military Police in its investigation.[9]

11. If the Bill were enacted a case like this would not come to light because of the nine year gap between the event and the judicial review. Furthermore, if the Bill becomes law and the current proceedings or any resulting investigation suggest that criminal prosecutions are warranted such prosecutions may well be blocked in light of the PAP and the fact that this incident (and the evidence which has just been made public) have already been the subject of previous investigations. Clarity is required as to whether evidence of (for example) a 'cover up' constitutes "new and compelling" evidence under the Bill.

The limitation period for bringing civil / human rights act claims:

12. The Bill modifies the normal rules of when a judge can exercise discretion to extend limitation. The Bill creates an absolute longstop[10] beyond which claims cannot be brought. It creates a presumption against judicial discretion being exercised for claims brought in the period between the normal time limit and the longstop.

13. The absolute longstop would interfere with victims' access to the courts and their ability to obtain an effective remedy. This is particularly significant in relation to alleged victims of torture.

14. A clear example of this is the "Mau Mau" Claims.[11] The claims were originally brought on behalf of five individuals who alleged they were the victims of appalling and systemic abuse and torture inflicted upon them by British colonial officials and Kenyan "home guards" under British command. In 2011, the British government did not dispute that the victims had been tortured "at the hands of the Colonial Administration".[12] The government relied on a limitation defence, which was defeated in a ruling in October 2012. The colonial powers had kept such meticulous records of what was happening in Kenya that a fair trial was possible.[13]

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[8] https://www.thetimes.co.uk/article/rogue-sas-unit-accused-of-executing-civilians-in-afghanistan-f2bqlc897; ; https://www.independent.co.uk/news/uk/home-news/sas-rogue-unit-afghan-deaths-emails-high-court-a9650561.html

[9] For example, where soldiers claimed they acted in self-defence but the number of bodies was greater than the weapons recovered.

[10] Six years from the date of injury or date of knowledge in personal injury claims; for HRA claims whichever is longer of 6 years from date of action or 1 year from date of knowledge of key facts.

[11] Mutua & Ors v The Foreign and Commonwealth Office [2011] EWHC 1913 (QB) and [2012] EWHC 2678 (QB)

[12] https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/mutua-fco-judgment-05102012.pdf @27.

[13] A second group of Mau Mau claims, *Kimathi v FCO*, failed on limitation grounds. The key difference between these two cases was in *Mutua* the government accepted that the specific claimants had been subject to torture.

15. These records had been locked away in a missing archive in Hanslope Park but were rediscovered during the legal proceedings. They revealed, among other things, minutes of British War Councils where policies on interrogation and "screening" were devised, and the advice given by Kenya's Attorney General, Eric Griffith Jones, to the Governor of Kenya Sir Evelyn Baring: "if we are going to sin, we must sin quietly".[14] Following this, a settlement was reached with the government which included then-foreign secretary William Hague issuing a "statement of regret" in Parliament.[15] The Bill, by introducing an absolute bar after 6 years, would have provided the government with a complete defence to these claims.

16. The current law[16] already provides a high hurdle for claimants wishing to bring cases outside of the primary limitation period. Any practitioners will know that it is a tough ask to convince a judge to exercise his or her discretion. Applications are successful if it is shown that applying the normal rule would result in a real injustice or inequitable hardship. The Bill's longstop provisions would, by definition, only apply to cases where the claimant has already proved that to not exercise discretion would be unjust. If it were fair to time-bar a claim, then the normal rules would already have done so.

17. Claims of just over 600 Iraqis, which were the subject of *Alseran & Ors v Ministry of Defence*[17], were issued in 2010 and 2013, relating to allegations of unlawful detention and mistreatment during the Iraq conflict from 2003-2009. In his seminal judgment of December 2017 – following two fully contested trials in respect of 4 test claims – Mr Justice Leggatt (as he then was) found that it was equitable to permit the claims under the HRA to be brought, notwithstanding the delay (of more than 6 years) in the claimants commencing their claims. Having found that there were good reasons for the delay on the part of the claimants, and that no significant evidential prejudice had been caused to the MoD, Leggatt J observed that a refusal to permit the claims would "*prevent the claimants from obtaining any redress for proven violations of their fundamental human rights not to be subjected to inhuman or degrading treatment and not to be unlawfully and arbitrarily detained*."[18]

18. The Bill would have created an absolute defence for all allegations of unlawful treatment which occurred in the early stages of the conflict, in 2003-2004. Allegations relating to the later stages of the conflict would not be time barred.[19]

19. Further, soldiers could also find themselves at a disadvantage when compared to non-soldiers. An ordinary member of the public has the opportunity to argue that

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[14] https://www.theguardian.com/commentisfree/2013/jun/06/mau-mau-sinning-quietly
[15] https://www.youtube.com/watch?v=oHI5aMOnwVQ
[16] Section 33(1) of the Limitation Act 1980; Section 7(5)(b) Human Rights Act 1998
[17] https://www.bailii.org/ew/cases/EWHC/QB/2017/3289.html [2017] EWHC 3289 (QB)
[18] Judgment, para 869
[19] This is despite various investigations having found (see, inter alia, the Baha Mousa Inquiry, Al Sweady Inquiry or the Aitken Report) there is more cogent evidence of widespread unlawful practices and systematic prisoner abuse in 2003-2004 than later on in the Iraq war, not least in relation to hooding.

judicial discretion would be fair in their case. They might not succeed, but they can try. That avenue would be entirely shut off for service personnel seeking to claim against MoD (their employer) after the longstop. That is unfair.[20]

20. In the 1990s, Leigh Day represented thousands of former British prisoners of war detained in Japanese camps. In November 2000, the British Government agreed to make voluntary payments of £10,000 to each surviving British soldier held prisoner by the Japanese during the Second World War.[21] Over 20,000 former prisoners of war and internees received compensation. These claims would have been time barred by the Bill, and so arguably, the government would have been far less minded to offer compensation.

21. The Bill requires the court to show regard to the mental health of any witness or potential witness who is a member of HM forces. Leigh Day welcome any attempts to improve the experience of witnesses giving evidence in court, which is an acutely stressful experience. Emotionally healthy witnesses give more cogent evidence thereby reducing the length and cost of a trial. However, the Bill's attempts to address this are asymmetrical and open to abuse. Service personnel bringing an action against the MoD could have the action time-barred (against their wishes) if the MoD adduces evidence that to continue the action could be detrimental to the Claimant's mental health. There is a perverse incentive for defendants to call witnesses who are more mentally vulnerable if it increases the chance of a case being rejected.

22. The requirement of the Bill to show regard to "the effect of the operational context" also requires clarity. True "battlefield" cases are extremely rare, as, quite correctly, lawsuits should not require a civilian court to 'second guess' split-second military decisions. The vast majority of negligence claims against MoD are directed at things that the "*claimants say should have been done long before the soldiers crossed the start line at the commencement of hostilities*".[22] An example is the "Friendly Fire" cases brought by Leigh Day which were later join with the "Snatch Land Rover" cases and heard by the Supreme Court.[23] These claims centred around issues such as training, procurement and equipment.

23. Further, the Bill requires a judge to show regard to an individual's ability to recall events. This is also problematic, as highlighted by the case of Baha Mousa, who was killed in British custody in September 2003. He suffered at least 93 injuries before his death. A civil claim was issued in July 2007.[24] In March 2007 Court Martial

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[20] And, potentially, in violation of the Armed Forces Covenant.

[21] https://www.independent.co.uk/news/uk/home-news/blair-confirms-pound10000-payments-to-meet-debt-of-honour-to-pows-622299.html

[22] Smith & Ors v MoD [2013] UKSC 41; https://www.supremecourt.uk/cases/uksc-2012-0249.html at 91

[23] Ibid.

[24] We understand that his lawyers had alerted the MoD of the case within the primary limitation period, but if that were not the case it would seem quite appalling to imagine this case would have been time barred.

proceedings ended with a total acquittal after witnesses claimed "*an almost total inability to remember the events of 14 - 16 September 2003*".[25] The phrase "I don't know" or "cannot remember" was used 667 times by up to 10 members of the Queen's Lancaster Regiment.[26] The judge attributed the acquittals to "a more or less obvious closing of ranks".[27]

24. However, the Bill specifically requires the Court to show regard to "*the ability of individuals… to remember relevant events or actions fully or accurately*". Arguably this would have been sufficient to defeat the tort claims on limitation grounds at a preliminary issue hearing. The chairman of the Baha Mousa Inquiry later found that "*in a number of cases, I have concluded that the soldiers' claims that they were unable to remember were false*".[28] This evidence would not have been available at a limitation hearing.

"Lawfare"

25. Much of the commentary surrounding the Bill focuses on the issue of "lawfare". There is a suggestion that the number of civil claims that arose from the wars in Iraq and Afghanistan show that the system permits "vexatious" (as in "many unfounded claims") litigation against the MoD. The Bill is presented as protection against future "vexatious" claims.

26. The claims by the hundreds of Iraqis who brought actions against the MoD largely resulted from policy decisions made by the British Army during those conflicts, for example:

    a. A detention policy which was found by the High Court to be in breach of the Geneva Conventions and ECHR; and

    b. A widespread use of the "5 Techniques" as a method of 'conditioning' detainees for interrogation. Despite these being banned and declared unlawful following Operation Banner, the army routinely used techniques including hooding, stress positions, sleep deprivation and sensory deprivation as a means of 'softening up' captured persons before interrogation. Unlawful "harshing" was also used during the interrogations themselves.

27. The courts unsurprisingly determined that these actions were illegal and in so doing ensured that the outcome of the majority of the Iraqi claims that are currently in the public domain were resolved in the favour of the claimants. Hardly vexatious litigation.

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[25] https://www.independent.co.uk/news/uk/home-news/soldier-amnesia-over-detainees-death-is-queried-1754586.html

[26] https://www.theguardian.com/uk/2007/mar/18/iraq.military

[27] Baha Mousa Inquiry Report, Vol 1 §1.2

[28] Baha Mousa Inquiry Report, Vol 1 §2.6

28. We understand the Army has now updated its policies to prevent these mistakes happening again. We can but hope that is true. However, this Bill looks to remove the safeguard of ensuring that, if history repeats itself, people impacted are able to access and obtain justice as would be expected in any democratic society committed to fairness and the rule of law.

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