LIBERTY’S RESPONSE TO THE MINISTRY OF DEFENCE CONSULTATION ON ‘LEGAL PROTECTIONS FOR ARMED FORCES PERSONNEL AND VETERANS SERVING IN OPERATIONS OUTSIDE THE UNITED KINGDOM’

OCTOBER 2019
ABOUT LIBERTY

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent, funded research.

Liberty’s policy papers are available at libertyhumanrights.org.uk/policy.

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EXECUTIVE SUMMARY

Since 2013, Liberty has actively campaigned on Military Justice issues. We have brought a number of legal cases on behalf of various soldiers or their bereaved families, mainly in the context of sexual violence, bullying and/or sudden death. These cases revealed serious and fundamental problems in the way in which service personnel or their families were being treated by the Armed Forces and the Ministry of Defence (MoD). Liberty's work has revealed that some of the most basic principles of fairness that civilians take for granted do not necessarily apply to Armed Forces personnel and in ways that cannot be justified.

It is with this expertise and experience that we approach the proposals in this consultation. In summary, we oppose the proposals wholesale. They ignore completely the litany of past and ongoing failures by the MoD to carry out effective and independent investigations into alleged wrongdoing. Instead they propose unprecedented and dangerous legal protections which will create a legal regime that risks endorsing impunity and inequality before the law for both victims of abuse and different categories of Armed Forces personnel, depending on where in the world they are when an incident occurs.

PRESUMPTION AGAINST PROSECUTION

The proposal to introduce a statutory presumption against prosecution in certain cases:

- Undermines the rule of law, elevating one class of individuals beyond the reach of the criminal law.

- Would impose a legal barrier that prevents – in all but the most exceptional circumstances – a prosecution proceeding after a fixed period of time, with the inevitable result of preventing justice from being served and those responsible being held to account.

- Completely ignores the fact that there are sufficient protections in place already to ensure that prosecutions are only brought in the right circumstances.
PARTIAL DEFENCE TO MURDER

- The law on self-defence already accounts for the motives and situation of the accused when determining what force is reasonable. Using excessive or disproportionate force that one knows to be unnecessary in the circumstances is murder. The law should continue to reflect this, whoever the accused.

- The proposal is unfair and unworkable, creating different treatment for different categories of accused and victim while failing to address how legislation will distinguish between lawful and unlawful force for these purposes.

- Both a presumption against prosecution and a partial defence to murder risk putting the UK in contravention of its international obligations, engaging the principle of complementarity and increasing the likelihood of further investigation by the International Criminal Court.

CIVIL LITIGATION LONGSTOP

The civil litigation ‘longstop’ proposal is deeply flawed and the latest in a long line of proposals that would have the effect of shielding the MoD from public scrutiny and legal accountability at the expense of vital transparency, lesson learning and the protection of Armed Forces personnel and affected civilians.
INTRODUCTION

1. Liberty welcomes the opportunity to respond to the Ministry of Defence (MoD) consultation on ‘Legal Protections for Armed Forces Personnel and Veterans Serving in Operations outside the United Kingdom’. However, Liberty is disappointed that the MoD has put forward such proposals at all and disagrees with them entirely, from a place of principle and because they are unworkable, reckless and ignore the MoD’s own myriad failings with respect to investigations into alleged wrongdoing, whether departmental or carried out by individual personnel. The proposals in this consultation will not resolve the issues it seeks to problematise. The proposals pose a profound threat to the rule of law and run roughshod over the fundamental principle of accountability.

2. The consultation contains 26 questions which specifically address the proposals put forward by the MoD in sections 2 and 3 of the document. We will address individual questions in turn however, prior to doing so, it is appropriate to set out a number of general observations about the broader context of the consultation and our concerns about the framing of the consultation overall. Without such background, it is impossible to assess the merits of the proposals and the justifications made by the MoD for their introduction.

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1 The Government intends to engage directly with legal practitioners and academics regarding the proposals. We would like to offer to suggest names of expert academics and practitioners that would be suitable for this task. We would request that consideration be given to publishing in due course the names of all academics and practitioners who have been consulted by the MoD (in addition to the usual practice of publishing the names of all respondents to the consultation).
GENERAL OBSERVATIONS AND CONCERNS

CONTEXT OF THE MOD'S PROPOSALS

3. Introducing its proposals, the MoD argues that its aim is to ‘draw a line’ on investigations of historic allegations, citing problems with the Iraq Historic Allegations Team (IHAT), delays with investigations into alleged offences in Afghanistan, and what it terms ‘industrial scale’ civil litigation against the MoD arising out of military operations in Iraq. It adds that “none of these proposals are intended to “erode the rule of law” nor “prevent Armed Forces personnel or the Ministry of Defence from being held to account”.

4. At no point in the consultation document does the MoD acknowledge the pivotal role which it has played in producing the kind of delays and repeat investigations for which this consultation purports to provide a remedy. This is remarkable when one considers the fact that there is broad agreement from both those who support and those who oppose the proposed measures that the investigatory processes for alleged wrongdoing by members of the Armed Forces have been, to date, deeply unsatisfactory. The newly appointed Minister for Military Personnel and Veterans, Johnny Mercer recently said:

“One of the biggest problems with this was the military’s inability to investigate itself properly and the standard of those investigations ... and it is that precise point that is being challenged by other lawyers and I totally understand that ... the military has a role to play in this and it cannot just blame everybody else. If those investigations were done properly and self-regulation had occurred we probably wouldn’t be here today”.

5. And yet, blaming everybody else is what the MoD persists in doing. Rather than face up to the litany of past and ongoing failures to carry out effective, independent investigations into alleged wrongdoing, the MoD has instead chosen to scapegoat what it terms ‘lawfare’, which it says is carried out by ‘activist left

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2 In a May 2019 letter to the Prime Minister, Johnny Mercer MP clearly stated: “those that break the law on operations should be prosecuted” https://twitter.com/JohnnyMercerUK/status/11262306130000904706/photo/2.


4 For a comprehensive overview of the problems identified with the way the military conducted early investigations, and the lack of independence and competence, see: Al-Skeini and Others v the United Kingdom (GC) 55721/07, paras 168-175.
wing lawyers’. Instead of ensuring that, in future, credible allegations of abuse are independently and effectively investigated within a reasonable period of time, the Government proposes unnecessarily complex, unworkable legislative changes that will not only set up a roadblock to justice for victims of historic wrongdoing, both civilians and troops, but creates a dangerous legal regime for the future; a legal regime that risks endorsing impunity and inequality before the law for both victims of abuse and different categories of Armed Forces personnel depending on where in the world they are when an incident occurs.

6. The target of much of the recent furor over investigations into members of the Armed Forces has been the Iraq Historic Allegations Team (IHAT), set up in 2010 and closed down in 2017. It was only due to allegations of systematic abuse against detainees in Iraq that IHAT was established, as an alternative to a full public inquiry.\(^5\) From the outset, there were questions about whether IHAT was appropriately structured and sufficiently independent.\(^6\) In the end, IHAT did not result in any prosecutions by the time it was closed down, with a few cases transferred to another residual entity for further investigation, the Service Police Legacy Investigations (SPLI).\(^7\) To date, only one British soldier has received a prison sentence – of one year – for war crimes relating to Iraq. There has been no criminal responsibility for any senior figures in relation to abuse by UK forces in Iraq.\(^8\)

7. Along with IHAT, years of litigation arising from the lack of independent investigations compelled the Government to carry out two public inquiries relating to allegations of ill-treatment and unlawful killing by British troops in Iraq. The first, the Baha Mousa\(^9\) inquiry in 2008, identified “corporate failure” by the British Army to prevent the use of prohibited interrogation techniques and made a number of important recommendations.\(^10\) However, only one soldier (already

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\(^8\) HRW ‘Pressure Point’ report.

\(^9\) The inquiry concerned Baha Mousa, a hotel receptionist who died in British custody in Basra following sustained and serious abuse.

referred to above) was prosecuted under the International Criminal Court Act and was sentenced to one year in prison.\textsuperscript{11} The second public inquiry, the Al Sweady Inquiry, investigated allegations of torture and unlawful killing of Iraqis following a gunfight between UK troops and fighters for the Mahdi Army in 2004.\textsuperscript{12} The report of the inquiry rejected the most serious allegations of murder of Iraqi detainees, finding the core of the allegations to be “wholly without merit”.\textsuperscript{13} Nevertheless, it also found evidence of mistreatment of Iraqi detainees, including the deliberate deprivation of food and sleep for the purposes of interrogation.

8. The MoD press release announcing the closure of IHAT cited the Solicitors Disciplinary Tribunal (SDT) proceedings against Phil Shiner and Public Interest Lawyers.\textsuperscript{14} The SDT proceedings against Shiner further fed the prevailing Government narrative that cases relating to Iraq were a product of an “industry of vexatious allegations”.\textsuperscript{15} But the failings of one individual solicitor do not absolve the MoD from the consequences of its own serious failure to ensure such allegations were properly investigated from the start. It ignores important positive outcomes from IHAT such as the establishment of a ‘systemic issues working group’ which produced a large number of recommendations which flowed from IHAT which, if they had been in place at the time, in the MoD’s own words, “might otherwise have contributed to the prevention of such incidents”.\textsuperscript{16}

\footnotesize
\begin{itemize}
  \item \textsuperscript{12} The Al-Sweady Inquiry was launched to investigate allegations of torture and unlawful killing made in another judicial review proceeding after judges held that the defence secretary’s approach to the disclosure of documents in the case had been “lamentable.” See Al-Sweady and Others v. Secretary of State for the Defence, [2009] EWHC 2387 (Admin), http://www.bailii.org/ew/cases/EWHC/Admin/2009/2387.html (accessed December 20, 2017), paras. 8, 13.
  \item \textsuperscript{15} See, for example, Jessica Elgot, “Theresa May Will Oppose Vexatious Allegations Against Iraq UK Troops,” Guardian, September 21, 2016, https://www.theguardian.com/world/2016/sep/21/theresa-may-will-oppose-vexatious-allegations-against-iraq-uk-troops.
\end{itemize}
THE NEED FOR EFFECTIVE INVESTIGATIONS

9. Investigations into allegations concerning wrongful deaths, torture and other forms of ill-treatment must be effective. The European Court of Human Rights (ECtHR) makes this clear in its jurisprudence on Articles 2 and 3 of the European Convention on Human Rights (ECHR). Effective investigations are critical for two reasons: (i) getting to the bottom of individual instances of wrongdoing to secure justice for the victim and remedy malpractice; and (ii) effective investigations can uncover systemic issues to learn from past practice and institute the changes required to avoid recurrence.\(^{17}\)

10. Where investigations are effective at the outset, the risk of repeat investigations or lengthy delays and uncertainty is mitigated. An effective investigation has the following elements:\(^{18}\)

(i) **Independence and impartiality:** Hierarchical, institutional and practical independence are crucial to carrying out an effective investigation which is itself crucial to comply with the positive obligation to protect individuals from serious crimes, particularly unlawful killing, torture and other ill-treatment.\(^{19}\)

(ii) **Robust investigations:** Investigations must be sufficiently rigorous so as to be capable of leading to the truth and where appropriate, the prosecution of the suspects.\(^{20}\)

(iii) **Prompt investigations:** Investigations must be reasonably prompt. Prompt investigations are important to preserve evidence, and also for both the suspect who requires legal certainty and the victims and their families who have a right to know the truth of what happened and, where appropriate, obtain reparations.

(iv) **Transparent investigations:** The transparency of investigations – whether criminal investigations, inquiries or other forms of processes – is important so that lessons can be learned and faulty practices rectified, as well as to give proper public oversight of governmental activity, necessary in any democracy.

\(^{17}\) See, R (Ali Zaki Mousa and others) v SSD (No. 1) [2011] EWCA Civ 1334 and R (Ali Zaki Mousa and others) v SSD (No. 2) [2013] EWHC 1412.


\(^{19}\) Bati and Others v Turkey, ECtHR, Appl. nos. 33097/96 and 67834/00, 5 September 2004, para. 135; McCann v UK, ECtHR (GC), App No. 18984/9127, September 1995, para. 147.

\(^{20}\) Oğur v Turkey, ECtHR, Appl. no. 21594/93, 20 May 1999, para. 88.
Transparency is also critical for both suspects and complainants. Open justice is necessary for the rule of law.

11. Rather than upholding these fundamental principles, the MoD has instead consistently dug its heels in, failing to effectively investigate wrongdoing and refusing to acknowledge its own responsibility for claims of unfairness regarding ongoing investigations or prosecutions into current or former members of the Armed Forces. Three key issues arise from this failure, none of which are remedied by the proposals in this consultation paper:21

(i) **Limited outcome despite long-lasting investigations:** Despite multiple, lengthy investigations in the UK, hobbled by the early failure to arrange for independent, effective investigations, there has been next to no success in holding to account those responsible for alleged crimes in Iraq;

(ii) **Lack of attention to systemic issues:** Investigations in the UK have not been structured so as to effectively address systemic issues underpinning wrongdoing allegedly committed in Iraq, with those higher up the chain of command never facing scrutiny. Without addressing root causes of systemic issues, there is an inherent risk of repeating past mistakes;

(iii) **Political interference and a lack of a commitment to accountability:** There has been reluctance from political actors to support investigations.

12. Therefore while the Government’s proposals in this consultation might ‘draw a line’ it would “do very little in the way of ensuring that sufficiently robust accountability processes are in place that are capable of resulting in criminal convictions (where the evidence so supports)” as required by the ECHR and may “inadvertently shield those individuals who perpetrate international crimes from prosecution, which would not be in the long-term interests of the military or the Government as a whole”.22

13. What is required to prevent this state of affairs from recurring is rather, to:

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21 These challenges are adapted from the argument set out by T Obel Hansen in “Complementarity (in)action in the UK?” available from EJIL Talk! (7 December 2018) https://www.ejiltalk.org/complementarity-inactionin-the-uk/.

• Ensure that credible allegations of crimes committed by Armed Forces personnel abroad are referred, right at the outset, to an independent police force for investigation into whether a crime has been committed;

• Ensure that such a force involves the civilian police, as well as the Service Police;

• To the extent that the Service Police are involved, ensure that it is a different branch than the service under investigation;

• To the extent that Service Police are involved, ensure that only staff that have received sufficient training and who have deployed with civilian forces should be used; and

• Ensure that prosecutors from the independent bar advise on the investigations from a very early stage and as they progress and are responsible for all charging decisions.

14. None of these options are proposed by the Government. Instead, we are directed straight to the proposal that there ought to be a presumption against prosecution for soldiers and a new partial defence for murder.

**LEGAL FRAMEWORK: HUMAN RIGHTS LAW**

15. Throughout the consultation document, reference is made to the fact that “the Armed Forces are not above the law”. However, there seems to be a lack of clarity as to what laws apply – specifically, there is no mention that the Armed Forces are subject to the UK’s obligations under international human rights law (IHRL).

16. For the avoidance of doubt:

(i) It has long been acknowledged that IHRL continues to apply to armed forces during armed conflict.\(^{23}\) The International Court of Justice has clarified that human rights law applies concurrently with the law of armed conflict (IHL) even in cases of international armed conflict.\(^{24}\)


(ii) The European Convention on Human Rights applies abroad whenever the UK or its forces exercise effective physical power or control over an area or a person overseas. Thus when the Armed Forces are engaged in military operations there will be many instances where they are both bound by and protected by the ECHR and the Human Rights Act 1998 (HRA).  

(iii) The Government keeps stating its intention to derogate from the Convention in future wars. Derogation is not the subject of this consultation (albeit the former Secretary of State for Defence refers to it in her Forward) but it is important to clarify that 1) the Government could never derogate from Articles 2 or 3 ECHR in any event, so this would do nothing to address their concerns about investigating alleged serious violations, within any timeframe whatsoever and 2) it seems highly unlikely that the legal grounds for derogation would be made out in the kinds of circumstances envisaged anyway.

**TERRITORIAL SCOPE OF THE PROPOSALS**

17. The territorial scope of the proposals in this consultation is limited to operations ‘overseas’. Liberty would reject these proposals entirely irrespective of their territorial scope, for the reasons elucidated below. However, in proposing a legal regime of asymmetrical application at home and abroad, the MoD makes a disturbing distinction in the value it ascribes to different lives. Where the UK’s human rights obligations are engaged, whether at home or overseas, there can be no inequality of treatment between victims. As a matter of constitutional principle, the rule of law prescribes equal treatment before the law and that no one is above the law. As a matter of basic morality, the life of someone in Iraq or Afghanistan is of equal value to a person in the UK.

18. While this consultation paper excludes Northern Ireland, it cannot be left out of the picture when assessing the broader context in which these proposals are being brought and in looking to the future. Much of the furore about historical prosecutions has related to Northern Ireland. The prospect of such a statutory regime as proposed in this consultation document, if brought into force, being extended to Northern Ireland in

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25 *Al-Skeini and others v the United Kingdom*, Judgment, App. no. 55721/07 (ECHR, 7 July 2011, paras 133-40).


27 A state may only derogate from the ECHR “in time of war or other public emergency threatening the life of the nation” and only “to the extent strictly required by the exigencies of the situation”. No derogation is possible for Articles 2, 3, 4(1) and 7.
the future should not be discounted. Among the most outspoken on the issue of historic prosecutions in Northern Ireland has been Johnny Mercer MP who in May 2019 wrote to then Prime Minister Theresa May calling for the end to prosecutions for Troubles-related incidents in Northern Ireland.\(^{28}\) Tabled by Mercer, former Defence Secretary Michael Fallon and Julian Lewis, an amendment was passed to the Northern Ireland (Executive Formation) Bill that requires the Government to produce a report on “progress made towards protecting veterans ... from repeated investigation for Troubles-related incidents by introducing a presumption of non-prosecution...”\(^{29}\) As of July 2019, Mercer was appointed the Minister for Military Personnel and Veterans. It is therefore not beyond the realms of possibility that attempts may later be made to extend similar proposals as those in this consultation paper to Northern Ireland, a situation that would be extremely detrimental to the peace process. It is very important to note that such a step would appear to be contrary to the wishes of the people of Northern Ireland. A “clear majority” of those who responded to a recent consultation on the legacy of the Troubles felt that a statute of limitations or amnesty for Troubles-related matters would be inappropriate.\(^{30}\)

19. Finally, it is remarkable that the clamour of political and other outrage concerning the appropriateness of historical prosecutions is rooted largely in cases coming from the Northern Ireland conflict, yet Northern Ireland is expressly excluded from this consultation.\(^{31}\) The MoD therefore appears to be responding to calls for reform in relation to alleged abuses in a domestic conflict by reforming how the UK may respond to alleged historic abuses overseas. As a consequence, the position appears confused and those responding to the consultation are prevented from tackling head-on the analysis underpinning those who would oppose the prosecution of former members of the Armed Forces in Northern Ireland, which wholly fails to acknowledge the reasons

\(^{28}\) https://twitter.com/JohnnyMercerUK/status/112623061300080704706/photo/1

\(^{29}\) S. 3(8), Northern Ireland (Executive Formation etc) Act 2019


\(^{31}\) https://www.bbc.co.uk/news/uk-northern-ireland-42247092; https://www.bbc.co.uk/news/uk-politics-48209591; Four MPs called for legislation to prevent anyone accused of crimes linked to the Troubles in Northern Ireland from being prosecuted. Johnny Mercer MP withdrew his support for Theresa May’s government over the historical prosecution of servicemen who were “being dragged back to Northern Ireland” to face possible prosecution.
why it is only now, years later, that prosecutions are finally being brought (albeit in tiny numbers).  

32 Examples of deaths in Northern Ireland that were investigated badly or inadequately and/or which have only been progressed in recent years include the case of ‘Soldier F’, whose trial for two murders on Bloody Sunday 1972 started in September 2019. The decision to bring charges against Soldier F followed the findings of the Saville Inquiry https://www.theguardian.com/uk-news/2019/sep/18/bloody-sunday-soldier-f-case-reaches-court; and Dennis Hutchings who stands trial for fatally shooting John Pat Cunningham, a 27 year old man with learning difficulties, in 1974. https://www.bbc.co.uk/news/uk-northern-ireland-44054776. Further evidence of historic failures to investigate in Northern Ireland include the fact of a fresh inquest into the death of 15-year old Daniel Hegarty who was shot and killed in Londonderry in July 1972. https://www.bbc.co.uk/news/uk-northern-ireland-44054776 and the recent Supreme Court judgment in the case of Geraldine Finucane which revealed the repeated failure on the part of the State to conduct an effective and independent investigation into the killing of Pat Finucane https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKSC/2019/7.html&query=(finucane).
SECTION 2 RESPONSE

PROPOSALS FOR CRIMINAL CASES

QUESTION 1

20. Liberty does not agree with the MoD view set out in Section 2 of the consultation document with respect to criminal cases.

QUESTION 2

21. This section starts with a clear statement of principle:

“All allegations of crimes committed by Armed Forces personnel are obviously very serious matters. It is right that they are properly investigated ... allegations of serious offences... must be investigated and where appropriate prosecuted”.

The statement continues, “...but the conclusion of those investigations should draw a line” (page 8).

The statement appears to pre-suppose that:

i. The investigations that have been conducted into allegations of crime against members of the Armed Forces abroad have been properly conducted, to the requisite standard of independence and competence;

ii. Armed Forces personnel have been unfairly treated in the number of investigations to which they have been subjected; and

iii. Criminal prosecutions against former Armed Forces personnel outside of Northern Ireland are at risk of being brought, many years after the event and should therefore be restricted.

All these suppositions are problematic.

22. First of all, the MoD, by this consultation, wants to address the perceived problem of prosecutions being brought against Armed Forces personnel, and devises options that would avert prosecutions being brought in certain circumstances. However, as we have already set out, the MoD’s problem is not actually with prosecutions (outside of Northern Ireland) of which there have been a tiny number; it is with the investigations into allegations of crime against Armed Forces personnel.
23. As a matter of logic, a prosecutor will not be able to decide whether the proposed presumption against prosecution should apply without there having been some form of police investigation beforehand. They will need the information produced by an investigation in order to apply the necessary tests. Therefore, even on the MoD’s own case, the proposal does not resolve the problem it is designed to address because the MoD does not propose to legislate to stop investigations to be conducted, just prosecutions. To the extent that the MoD is concerned largely with preventing those who have already been subject to an investigation from being reinvestigated and prosecuted, this can be addressed through independent prosecutors applying the usual tests and guidance. It is not necessary to build an entirely new statutory scheme.

24. However, as set out in the opening section of this submission, it is the lack of competence and independence in the early investigations into allegations of abuse arising from the wars in Iraq and Afghanistan (and Northern Ireland) that is the source of all the problems the MoD purportedly seeks to address by this part of the consultation. If the MoD wants to ensure, in the future, that members of the Armed Forces are not “left with the threat of prosecution hanging over their heads for years to come”, then the solution is simple: it needs to ensure that effective, independent investigations are carried out at the time of an allegation, or within a reasonable period of time of it. Liberty does not underestimate the challenges of conducting a police investigation during the course of an overseas operation, but it is entirely possible and achievable.

25. Instead, the MoD has historically attempted to keep these kinds of investigations inside the chain of command and has had to be compelled to conduct further investigations years later – always only doing the bare minimum that it thinks it can get away with. Unsurprisingly, such an approach being unlawful, it has had to be told, time and time again, to do a better job. That is why some Armed Forces personnel may have been asked to give evidence about the same incident multiple times and why there is a concern that some may face further investigation in the future over matters that took place a considerable time in the past.33

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33 There is a notable lack of data or evidence to support the Government’s various assertions in the consultation document, but the assertion that soldiers are being required to be investigated multiple times is a common feature of those who support changes to the law in this area. It is a theme from which Johnny Mercer MP draws regularly and, in reply to questioning from Mr Mercer, Secretary of State for Defence, Gavin Williamson told the Defence Committee: “I don’t think we are wanting to put any of our armed forces through (a) constant treadmill where they are having inquiry or investigation after investigation.” Defence Committee, Oral evidence: Departmental priorities, 21 February 2018, HC 814, Q132
STATUTORY PRESCRIPTION AGAINST PROSECUTION

QUESTIONS 3, 4 AND 5

26. The MoD proposes to legislate for a presumption against prosecution of current or former Armed Forces personnel for historic offences. The MoD does not propose that these measures should apply to offences alleged to have been committed by members of the Armed Forces against their fellow Armed Forces personnel, or against other Crown Servants.

27. In simple terms, what the MoD is saying is that the committal of a criminal act by a member of the Armed Forces warrants special treatment through a presumption that they will not face criminal prosecution so long as the alleged offence was committed against someone far away and who is not ‘one of us’.

28. This raises not only legal concerns with respect to equal treatment before the law and the UK’s international obligations for conduct within its jurisdiction, but profound moral questions about how the MoD values the life and experiences of those outside its territorial borders.

QUESTIONS 6-10

29. Liberty opposes the introduction of the proposals set out under the heading ‘Statutory presumption against prosecution’.

30. In the UK, with the exception of some minor summary and regulatory offences, criminal offences have no statute of limitations. The MoD proposes to radically change that for the benefit of just one group of people, the Armed Forces.

31. The rule of law is a foundational doctrine of our democratic system, and a defining principle of the UK’s unwritten constitution. The rule of law requires that the law must apply equally to everyone. The rule of law means that no one shall be above the law. The MoD accepts this and expressly acknowledges it in the foreword to this consultation document and in its public statements on this and related issues.\(^\text{34}\) However the effect of this proposal will be to elevate one class of individuals beyond the reach of the criminal law.

WHY A PRESUMPTION AGAINST PROSECUTION IS A BAD IDEA

32. The consultation proposes that a prosecution should not be brought where there has been a previous ‘police investigation’ and (it seems, though the consultation is not entirely clear), ten years have elapsed; or in the alternative, when there has been no police investigation at all but ten years have elapsed.

33. While alleged abuses in the Northern Ireland context are expressly excluded from the consultation, case studies from that conflict clearly demonstrate that justice will often not be achieved within an arbitrary ten-year period – often because of the failings of the Government to ensure an investigation in the first place. In Northern Ireland it has taken a significant period of time for any progress to be made on some of the most serious allegations. For example, the 1971 killings at Ballymurphy have never been the subject of a comprehensive investigation and are only now being examined by an independent Coroner. The ongoing inquest is a consequence of that failure, over 48 years, to investigate allegations of unlawful killing by the Armed Forces. The original investigation into the incident was conducted by the Armed Forces themselves and was manifestly not independent. The inquest is ongoing but it is not unreasonable to expect that, if evidence is uncovered that would indicate a criminal offence had been committed, an investigation and prosecution might follow should the prosecutor assess that the standard for proceeding is met.

34. Examples like this demonstrate how different factors – including failings on the part of the State – can result in a significant time lapse between an alleged criminal offence being committed and a prosecution. To impose a legal barrier that prevents – in all but the most exceptional circumstances – a prosecution proceeding after a fixed period of time, whether ten years or any other arbitrary timeframe, will inevitably have the result of preventing justice from being served and those responsible being held to account. It essentially builds in an incentive for the state to do as little as possible until the relevant period expires.

35. What’s more, as set out in the following section, the consultation document completely ignores the fact that there are sufficient protections in place already to ensure that

35 Ballymurphy Inquest: Inquest into Deaths at Ballymurphy 9th-11th August 1971  

prosecutions are only brought in the right circumstances – where there is sufficient evidence and where prosecution is in the public interest. In this way, the kinds of factors that the MoD proposes should be included in a statutory list (p. 12 of the consultation document) would be considered in any event, through the normal course of events.

PROSECUTORIAL DISCRETION

36. The proposals in this consultation document seek to bind or severely constrain prosecutorial decision making in a manner that is neither sensible nor desirable and which gives rise to a very substantial risk of injustice. They misunderstand or fail to accurately represent the role of the prosecutor and the standards a prosecutor applies.

37. A prosecution does not follow automatically whenever an offence is believed to have been committed. The Crown Prosecution Service (CPS) and Service Prosecuting Authority (SPA) will only proceed with a prosecution where the Full Code Test is met. The Full Code Test has two stages. The first is consideration of the evidence and whether that gives rise to a realistic prospect of conviction. The second is whether it is in the public interest to prosecute. For a SPA prosecutor, the question is whether the prosecution is needed in the service interest.

38. The Full Code Test is itself the subject of very detailed guidance, the Code for Crown Prosecutors. Both CPS prosecutors and SPA prosecutors are required to apply it. The Code assists prosecutors to reach their decision and addresses the risk of prosecutions being brought in inappropriate circumstances. It is designed to ensure consistency, to prevent abuse of process and to enable account to be taken of mitigating factors.

39. The Code is regarded as forming part of the law. It is a detailed, practical and vitally important guide which ensures that decisions on prosecutions are made fairly and proportionately. The Code tells prosecutors that they must balance factors for and against prosecution carefully and fairly and that the factors that apply will depend on the facts in each case. For example, in considering the public interest, a prosecutor is required to judge the impact on the community and the proportionality of bringing a

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38 Ibid.
40 R (Purdy) v DPP [2009] UKHL 45 [47].
prosecution. Substantial delay, the fact that communities have moved on or the fact that it took place on active deployment are all matters that can be taken into account by a prosecutor when deciding whether to charge.

40. As far as we are aware, this would be the first time in English legal history that a presumption against prosecution was enshrined in statute. Indeed, the common law presumption against prosecution of 10-14 year olds was abolished in 1998. However, the MoD has failed to make the case – nor could there be a case - for why the Armed Forces should be the only group in society that ought to benefit from such an exceptional measure.

**QUESTIONS 11-13**

**SCOPE OF THE PROPOSAL – OFFENCES**

41. The Government’s proposal is that the presumption against prosecution should apply where a prosecution for “any type of offence” is being considered, where the alleged offence was committed during the exercise of operational duties. The proposal goes on to caveat this by acknowledging “there may be particular considerations relating to certain types of offence” which mean the presumption ought not apply, citing torture and sexual offences. The consultation document then goes on to “invite views” on this issue. The Government’s position is somewhat ambiguous from the drafting.

There are two options; either the Government is saying:

a. That it thinks a presumption against prosecution should apply irrespective of the nature of the offence, but is open to the possibility that some offences should be excluded; or

b. That it would prefer a presumption against prosecution to apply irrespective of the nature of the offence while acknowledging that some offences may need to be excluded, but that it invites views on the matter one way or the other.

42. Both options are shocking and are deeply unacceptable positions to be held by a Government which claims to understand that members of its Armed Forces are not above the law and to uphold its legal obligations. It is unacceptable that the MoD is seeking to consult on whether a presumption against prosecution ought to apply to torture. It therefore bears reminding the MoD of its international obligations:
TORTURE AND CIDT:41

(i) The prohibition on torture is absolute under international humanitarian law42; international human rights law43; and international criminal law44. Torture constitutes a grave breach of the Geneva Conventions and is a war crime. Article 3 ECHR is a non-derogable right under Article 15 ECHR and no circumstances whatsoever can justify non-compliance. Further, the prohibition on torture is a *jus cogens* norm of customary international law from which no derogation is permissible.

(ii) The nature of the prohibition of cruel, inhumane or degrading treatment (CIDT) is identical to that of torture in international law — it is absolute.45

(iii) So, even if the MoD wanted to include allegations of torture in the presumption against prosecution (assuming the proposal overcame all the other objections to it), it could not do so. It is a total fiction to suggest otherwise.

SEXUAL OFFENCES

(i) International humanitarian law and human rights law absolutely prohibits all forms of sexual violence at all times and against anyone; international law moreover provides for the individual criminal responsibility of sexual crimes’ perpetrators.46 Rape is expressly prohibited in international and non-international armed conflict under the Geneva Conventions and the

42See, Common Article 3 to the Geneva Conventions; Article 12 of the First and Second Geneva Conventions; Article 17 and 18 of the Third Convention; Article 32 of the Fourth Convention; Article 75 (2a & e) of Additional Protocol I (AP I) and Article 4 (2a & h) of Additional Protocol II and Articles 50, 51, 130 and 147 of the Conventions; Article 85 AP I.
43For example see, Article 5 of the Universal Declaration of Human Rights; Article 7 of the International Covenant on Civil and Political Rights; the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 3 ECHR.
44The Rome Statute of the International Criminal Court (ICC) defines torture as a war crime under Article 8 and as a crime against humanity under Article 7.
45Under IHL, Common Article 3 to the Geneva Conventions, Article 75(2b & e) of AP I and Article 4 (2a & h) of AP II prohibit “outrages upon personal, in particular humiliating and degrading treatment”. In international armed conflict these acts constitute grave breaches. In non-international armed conflict, they constitute serious violations. The prohibition on both torture and CIDT are recognised as a customary rule (Rule 90) of the ICRC’s study of Customary International Humanitarian Law. The Rome Statute of the ICC defines both torture and CIDT as war crimes under Article 8 and as crimes against humanity under Article 7. In human rights law, the prohibition on torture and CIDT is identical and it is absolute.
Additional Protocols. Other forms of serious sexual violence are also explicitly or implicitly prohibited. When committed by a state agent (such as the military forces of the state), rape and sexual violence constitute torture or cruel, inhuman and degrading treatment and as such are prohibited under human rights law. Rape and sexual violence in conflict can also be prosecuted under international criminal law.

(ii) So the same principle applies – even if the MoD wanted to include sexual offences from the presumption, they could not do so.

WAR CRIMES AND THE PRINCIPLE OF COMPLEMENTARITY

43. Even if the MoD decides that some offences are excluded, its position remains that the majority of alleged offences committed during the exercise of operational duties ought to benefit from a presumption against prosecution. It is assumed from the context of the paper that murder and manslaughter, for example, would both fall within the presumption against prosecution. In essence, the MoD is proposing that a tranche of offences which when committed in the exercise of operational duties may constitute war crimes as set out in Article 8(2) of the Rome Statute, should be shielded from prosecution after a ten-year period.

44. It therefore bears briefly reminding the MoD of the principle of complementarity, the role of the ICC and the critical importance of preventing impunity for serious crimes. The principle of complementarity is the basis of the relationship between the ICC and national courts in relation to the application of international criminal law. It means that the ICC has secondary jurisdiction after national courts, and can only act in a given situation if the relevant states are unwilling or unable to prosecute the crimes within their jurisdiction.

49 The leading cases under European Human Rights Law are: Aydin v Turkey (Application No. 23178/94), 25 September 1997 (state forces) and MC v Bulgaria (Application No. 39272/98), 4 December 2003 (non-state actors).
45. The introduction of a presumption against prosecution which covers offences that could amount to war crimes and other crimes under international law would contravene the UK’s obligations under international law by in certain circumstances making it impossible for the UK to investigate or prosecute international crimes.\textsuperscript{52} This would increase the likelihood of the ICC opening a full investigation in respect of the situation in Iraq (and potentially elsewhere) “not only because the law so permits but also because the adoption of a [presumption against prosecution] covering international crimes sends the signal that the UK Government is not committed to principles of accountability”.\textsuperscript{53} This situation also doesn’t make sense from a strategic perspective: these proposals are likely to have the opposite outcome to what the MoD intends by generating further protracted investigations and litigation.

**NEW PARTIAL DEFENCE TO MURDER**

**QUESTION 19**

46. Liberty opposes the proposal to legislate for a new partial defence to murder.

**QUESTION 20**

**DOMESTIC CRIMINAL LAW**

**SUFFICIENT PROTECTIONS DERIVED FROM LAW ON SELF-DEFENCE**

47. As a matter of UK domestic criminal law, killing in self-defence is not murder where the degree of force used was objectively reasonable in the circumstances as the defendant genuinely believed them to be.

48. The law already allows for a very limited number of partial defences to murder which have the effect of reducing the offence of murder to manslaughter: diminished responsibility; provocation; and killing in pursuance of a suicide pact. The Government now wishes to create a new partial defence to murder, which would be available to current and former Armed Forces personnel only, who caused a death in the course of duty, outside the UK, through using more force than is strictly necessary for the purposes of self-defence, providing that the initial decision to use force was justified.

\textsuperscript{52} For a comprehensive legal analysis as to how a presumption against prosecution might fall foul of the UK’s international obligations and the non-applicability of statutes of limitation covering core international crimes, see: Written evidence submitted by Dr Carla Ferstman and Dr Thomas Obel Hansen (SOL0005), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-committee/statute-of-limitations-veterans-protection/written/87024.pdf.

\textsuperscript{53} Ibid. paras 7-8.
49. Liberty believes that the law should continue to find that using more force than is necessary, where one intends to kill or cause grievous bodily harm and which results in death, is murder. It is unreasonable to use force that one knows to be unnecessary and if a person uses excessive or disproportionate force, they are deprived of the defence of self-defence.

50. Although this may appear harsh on an accused who has, on the Government’s description, only genuinely tried to use a reasonable degree of force but then overreacted, the fact is that the courts already apply the rule in a manner which takes account of the motives and situation of the accused. In the case of Palmer v the Queen (1971) A C814, the Court observed:

“it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary, that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence”.

51. The importance of this approach has been set out in statute and can be found in the Criminal Justice & Immigration Act 2008, section 76(7) of which states:

“... the following considerations are to be taken into account (so far as relevant in the circumstances...)

(a) a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action and;

(b) that evidence of a person’s only having done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose”.

52. These provisions give a defendant sufficient opportunity to convince a court that what they did was reasonable in the circumstances.

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55 The CJIA 2008 also makes it clear that other considerations may also be taken into account, where relevant.
OTHER CONCERNS WITH THE PROPOSAL

53. The proposal suffers from a number of other problems:

(i) Presumably both the lawful force and unlawful force will have to form part of the same event in order for a defendant to seek to rely upon the partial defence. The proposal fails to address how legislation will determine what constitutes a single event for these purposes. One can envisage situations where only moderate force is used initially, with subsequent lethal force forming part of the same event. For example, lawfully pushing someone backwards, followed by shooting them. The partial defence would potentially appear to apply to such a scenario.

(ii) Armed Forces personnel are specially and carefully trained only to use reasonable force. In our experience, they take their responsibilities extremely seriously. They are exposed to situations which are much more stressful, difficult and frightening than civilians, but they are in that position voluntarily (we do not have a system of conscription in this country) and following substantial training. The proposal undermines the professional and high standards we rightly expect of our Armed Forces.

54. Finally, there are obvious and unfair outcomes:

(i) The partial defence would apply only to Armed Forces personnel overseas. It would not apply to Armed Forces personnel in the UK, including Northern Ireland. This creates a difference in treatment between the categories of service personnel that is impossible to justify either as a matter of principle or law. It would almost certainly be open to a defendant in the UK to argue that they were being treated unfairly, when compared with a defendant in the same situation but overseas.

(ii) Similarly, a victim (or their bereaved family) of excessive force (that started lawfully) overseas would not enjoy the same remedy (namely, the conviction of the perpetrator) as a victim in the UK. This creates a difference in treatment between the categories of victim that is hard to justify either as a matter of principle or law.
INTERNATIONAL CRIMINAL LAW

55. As with the introduction of a presumption against prosecution, a partial defence to murder may put the UK in contravention of its international obligations and again increase the likelihood of further investigation by the ICC.

56. Subject to the rules and requirements of IHL, the application of lethal force is of course permissible during armed conflict. Limitations are set by international law and Article 8(2) of the Rome Statute (and as a general reflection of customary international law) lists wilful killing/murder as war crimes. Article 31(1)(c) of the Rome Statute erases criminal responsibility where a person has acted in the lawful defence of oneself and others. The test applied is comparable to that in domestic criminal law:

“The person acts reasonably to defend himself or herself or another person ... against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person ...”

57. War crimes constitute acts which are contrary to IHL which give rise to penal accountability for the responsible party. Only select, serious violations of IHL are stigmatized as war crimes. As already noted above, this includes wilful killing/murder. Nowhere in ICL is there such a partial defence as that proposed by the MoD in this consultation document. IHL is, to use the MoD’s words, the body of law that “reflects the unique pressures” faced by the Armed Forces. And yet, the use of excessive and unreasonable force in the “heat of the moment” is neither a defence to a grave breach under the Geneva Conventions, nor to the war crimes of wilful killing/murder under the Rome Statute.

The argument set forth by the MoD for a partial defence to murder set out in this consultation document is therefore wholly unsustainable and unjustifiable.

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56 Rome Statute, Articles 8(2)(a)(i) and (c)(i).
SECTION 3 RESPONSE:

PROPOSAL FOR NON-CRIMINAL CASES

CIVIL LITIGATION LONGSTOP

QUESTIONS 24, 25 AND 26

58. Liberty disagrees with the proposal set out in Section 3 of the consultation document in its entirety (“legislating to restrict the Court’s discretion to extend the normal time limit for bringing compensation claims for personal injury and/or death in relation to historical events outside the UK”).

THE CURRENT POSITION

59. As set out in the consultation document, under s. 11 of the Limitation Act 1980, the normal limitation period for a soldier or civilian to issue a civil claim for damages arising from death or personal injury is three years. If a claim has been issued out of time, the MoD can raise limitation as a complete defence to the claim.

60. Under s. 33 of the 1980 Act, that limitation period can be extended by the Court in certain circumstances where it considers it equitable to do so, taking into account such factors as: the length of and reason for the delay; the effect of the delay on the cogency of the evidence; the conduct of the MoD; the duration of any disability suffered by the claimant; and the extent to which the claimant acted promptly once they became aware that they had a claim. It can be difficult to persuade a court to extend limitation and it is by no means an easy hurdle to overcome for claimants.69

THE PROPOSED ‘CIVIL LITIGATION LONGSTOP’

61. The MoD is proposing to legislate to restrict the Court’s discretion to extend the normal time limit for bringing compensation claims for personal injury and/or death in relation to historical events outside the UK. It appears that it would apply to both Armed Forces personnel and civilians. The MoD claims this is necessary because it is difficult to assess compensation claims fairly when they are brought years after the normal time limit expires, meaning the MoD must, it says, choose between settling a claim that may not have merit or calling upon Armed Forces personnel to give evidence.

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69 As was seen in the cases of Alseran, Waheed, MRE & KSU v Secretary of State for the Home Department [2017] EWHC 3289 (QB) where the tort claims for personal injury were not allowed to proceed because they were brought outside the three year limitation period (albeit in that case it was Iraqi law that applied).
THE REALITY

62. In reality, this is not what happens. The MoD will frequently settle a claim for the same reasons that any other defendant will settle a claim – on the basis that the claim is founded on good evidence that the MoD is liable for breaking the law, has caused harm and ought to pay damages.

63. Settling claims is not a bad thing to do. It is disingenuous of the MoD to give the impression that they are settling claims which, but for their concern about the impact on their personnel who may have to give evidence, they would be prepared to fight to trial. We suggest that this is not why the MoD settles claims. To allow a strong claim to proceed to trial, from the defendant’s perspective, is high risk and in those circumstances, they will always be advised to settle. This reduces the legal costs on both sides and avoids anyone from either side having to give evidence. Particularly in the context of this consultation, these are notable benefits. For the MoD to pursue a claim to trial that they are unlikely to win, they risk significant cost to the public purse. What’s more, settling a strong case prevents personnel from needing to give evidence – something the MoD claims to be very concerned about.

64. A great many claims issued by soldiers or civilians against the MoD result in either the claim being dismissed for being out of time, withdrawn or settled without the need to go to trial. Where there are a significant number of similar cases, a test case of a wider set of circumstances will be selected to go forward to trial, all other similar cases being stayed behind it, in a way of managing the cases sensibly and proportionately. In such cases, once full judgment is delivered, the stayed cases can then be settled.

65. The reality is that all civil claims – those in the military field and outside of it – can be stressful, uncertain and expensive. It is an unfortunate but unremarkable state of affairs.

66. It is troubling that the MoD has provided so little evidence to support the assertions made in the consultation document. It is stated that nearly 1000 claims for compensation against the MoD arising out of operations in Iraq have been issued but does not state:

- How many of these were issued out of time,
• How many were granted permission to proceed notwithstanding that they were out of time,

• How many settled and how many were issued by Armed Forces personnel or by civilians,

• In how many cases that got to trial were individual Armed Forces personnel personally required to give evidence.

If the Government had provided this information, respondents would be better able to assess the proportionality of this proposal.

**THE TYPE OF CLAIMS THAT WOULD BE AFFECTED**

67. The kinds of cases affected by this proposal would include, from the perspective of Armed Forces personnel, claims arising from accidents while serving, medical negligence on the part of service medical practitioners, faulty work equipment and procedures, training errors or catastrophes, bullying, harassment, discrimination and assault including sexual assaults. For civilians, affected claims would be claims for personal injury or death as a consequence of alleged failures by the services. In almost all cases, the claim would be brought against the Ministry of Defence, not any individual person.

68. There may be very good reasons why a claim has not been issued within three years. If there are good reasons, the Court ought to be able to consider those and decide whether to extend time on the usual basis. If the reasons are not good, then the Court can find accordingly and the claim will be struck out. An extra layer of complexity is not required. The proposal wholly fails to take into account the fact that, for many, serious mental health issues caused by traumatic experiences on the battlefield can take many years to materialise and diagnose giving rise to difficult arguments about from what period of time limitation ought to run.\(^{61}\)

69. It is also unclear how an event giving rise to a claim would be designated ‘historical’ and so give rise to the longstop in any event. How would cases that may develop over a

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\(^{61}\) For example, *The Times* reported the case of Mark Bradshaw, aged 44, who suffered post-traumatic stress disorder consequent to a friendly fire attack in 2010 while serving with the Royal Artillery. Despite the immediate onset of nightmares and hypervigilance, he was only given a diagnosis in 2016. By then, he was drinking heavily, suffered suicidal ideation, had left the service and become estranged from his family. He was awarded a very significant sum in settlement and has expressed concerns that the proposed legislation will discriminate against those who only develop or are diagnosed with PTSD years after the event. [https://www.thetimes.co.uk/article/outcry-over-plan-to-curb-compensation-for-injured-troops-vrq81cp8](https://www.thetimes.co.uk/article/outcry-over-plan-to-curb-compensation-for-injured-troops-vrq81cp8)
period of years (for instance for Post-Traumatic Stress Disorder or Noise Induced Hearing Loss) fit within this scheme? Such claims are already likely to give rise to difficult arguments about limitation and Liberty would not support any measure that would make it harder for Armed Forces personnel to recover compensation for their injuries.

70. No reference is made to the value that civil compensation claims may have in highlighting failures and fixing them, by holding the MoD to account. This was specifically noted by the then head of legislation at the Ministry of Defence, Humphrey Morrison, in evidence before the Commons Defence Committee in 2016:

“There are various ways in which the MoD can be held to account as a body, probably the most common of which is through claims in negligence. It is a relatively simple idea, but if there has been negligence for which the MoD was responsible, at whatever level, there is a capacity to take it before the courts, to have that negligence exposed and for a remedy to be provided.”

71. This is reflected in the motives of many Armed Forces personnel or their families when they take cases to court. They are often looking for more than compensation. They want an admission or confirmation of negligence or liability, public scrutiny of the MoD and improvements in processes so that deaths or injuries do not occur in similar circumstances in the future. Such transparency contributes to the effectiveness of the Armed Forces because it leads to lesson-learning which is crucial to improving training, equipment and welfare systems.

EXCLUSION OF HUMAN RIGHTS CLAIMS

72. The MoD proposes to exclude human rights claims from the ‘longstop’. This means that claimants would find themselves in the curious position of being able to progress with one element of a claim but not another, with no discernible impact on the resources involved. For example, a soldier’s family who feared that their son may have been killed as a consequence of defective equipment might be prevented from bringing a negligence claim because it fell outside of the “longstop”, but would be able to plead a violation of the right to life under Article 2 ECHR. The facts underpinning both heads of claim in both cases are likely to be very similar if not identical. The substantive work to

62 HC 598 2 March 2016 pg. 13.
63 A very good example is the lessons learned from the procurement failings in the Smith case and the improvements in equipment and transport introduced as a consequence of it, see: Smith and others v Ministry of Defence [2015] UKSC 41.
be undertaken by the solicitor will be identical. But only one part of the claim could proceed.

**CONCLUDING REMARKS ON CIVIL LITIGATION ‘LONGSTOP’**

73. The civil litigation ‘longstop’ proposal set out in this consultation document is deeply flawed and is just the latest in a long line of proposals which would have the effect of limiting the ability of Armed Forces personnel to access justice on an equal footing with others.

74. Most recently in 2016/17 the MoD consulted on proposals to amend the Armed Forces compensation scheme in such a way as to prevent Armed Forces personnel from being able to take their civil claims to court; and to extend the principle of combat immunity to cover potential claims that combat immunity had never applied to before. The MoD has, at the time of writing, not published the results of this consultation. However, responses to the consultation appear to have been overwhelmingly negative.

75. In Liberty’s response to the ‘Better combat compensation’ consultation, we described the MoD’s proposals as “nakedly self-serving”. The motivation behind the proposal in this consultation document is no different. It is clear that with this consultation and preceding proposals, the object is to protect the MoD from public scrutiny and legal accountability, at the expense of vital transparency, lesson learning and the protection of the rights of Armed Forces personnel and affected civilians.

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CONCLUSION

76. Liberty strongly disagrees with all of the proposals put forward by the MoD. In these proposals, the MoD seeks to erect a legal smokescreen in order to evade accountability both for individual members of the Armed Forces and for the MoD itself. Rather than tackling why investigations were “judged to be so weak and ineffective and consequently resulted in judicial findings which saw the need for many to be reopened or restarted or for more robust procedures to be in place” the MoD instead prefers to propose a series of blunt one-sided instruments that would reduce protections for Armed Forces personnel, put the UK in breach of its international obligations, and undermine the UK’s role on the international stage while all the while failing to achieve the aims these measures purport to address.66 This is profoundly disappointing. The Government must stop running away from its domestic and international obligations – including under human rights law – and address the need for effective investigations into alleged wrongdoing at the outset. Anything short risks the MoD doing exactly what it claims it does not want to do – eroding the rule of law and evading accountability.


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