

LIBERTY

LIBERTY'S SUBMISSION TO THE JOINT COMMITTEE ON HUMAN RIGHTS' INQUIRY INTO THE OVERSEAS OPERATIONS (SERVICE PERSONNEL AND VETERANS) BILL

SEPTEMBER 2020

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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INTRODUCTION

1. Liberty welcomes the opportunity to provide evidence to the Joint Committee on Human Rights' (JCHR) inquiry into the Overseas Operations (Service Personnel and Veterans) Bill ('the Bill'), which gives rise to a host of serious human rights issues.
2. The rule of law and accountability for human rights violations are critical in a rights-respecting democracy. Accountability is vital as a matter of justice for victims, as a deterrent against future human rights violations, and in order to uphold the rule of law and public trust in the justice system. Conversely, impunity is antithetical to these fundamental principles. Impunity creates an environment in which gross human rights violations can thrive.
3. The UK has a proud history as a global defender of human rights and a leader in the fight for international criminal justice. This Bill calls that reputation into question by fundamentally undermining the principle of accountability of the UK's Armed Forces.
4. Liberty therefore opposes this Bill in its entirety.

THE STATUTORY PRESUMPTION AGAINST PROSECUTION

LACK OF JUSTIFICATION FOR THE PRESUMPTION

5. The introduction of a presumption against prosecution is not justified, and the five-year limit is a recipe for human rights abuse.
6. Clauses 2, 3 and 5, referred to as the 'triple lock', will have the effect of a statute of limitations, making it next to impossible for the overwhelming majority of prosecutions caught by the Bill to proceed after five years. The proposed five-year period halves the timeframe for prosecution from the previously proposed ten years consulted upon by the MoD last year, without explanation.¹ The original proposal of a ten-year time limit on prosecutions was heavily criticised as unjust and unworkable by Liberty and other human rights groups in response to the consultation.²

¹ Ministry of Defence (2019).

² Liberty's response to the Ministry of Defence consultation (October 2019) <http://www.libertyhumanrights.org.uk/wp-content/uploads/2020/01/Libertys-response-to-the-Ministry-of-Defence-Consultation-on-legal-protections-for-Armed-Forces-Personnell-and-Veterans-serving-in-operations-outside-the-UK.pdf>.

7. Concerns about injustice caused to potential defendants due to time elapsed between any alleged conduct and prosecution is already accounted for by the Full Code Test, which is applied by prosecutors when deciding whether to proceed with a prosecution.³ 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 considered by a prosecutor when deciding whether to prosecute. There is therefore no justification for a statutory presumption against prosecution after any time period, whether five or ten years, as concerns about delay can already be factored into the prosecutorial decision.
8. Laying the Bill, the Government referenced the need to protect members of the Armed Forces from investigations in connection with “historical operations many years after the original events”.⁴ It is highly questionable as to whether five years can be understood as ‘many years’ after the event. It is quite possible that the relevant overseas operation could still be active five or even ten years after the event. The challenge of properly investigating allegations of misconduct while hostilities are active are patent. Moreover, as examples from the conflicts in Iraq, Afghanistan and Northern Ireland have shown, it is often the state’s failure to properly investigate at the time or at all that results in a significant time lapse between an alleged offence and prosecution.⁵ Imposing a time limit that prevents – in all but the most exceptional circumstances – a prosecution proceeding after a fixed period, will inevitably result in the prevention of justice being served and those responsible not being held to account. It builds in an incentive for the state to do as little as possible until the relevant time period expires.
9. Liberty is equally concerned about the ‘matters to be given particular weight’ in Clause 3 and the requirement to obtain the Attorney General’s consent in Clause 5. Clause 3 of the Bill undermines the notions of fairness and equality by placing one group of people above another in the eyes of the law. There is no requirement on the prosecutor to consider the public or service interest and benefit in maintaining an absolute prohibition on torture or other serious and international crimes. There is no requirement on the prosecutor to consider the public interest in the rights of victims and their families to justice and accountability. The only public interest of concern to the

³ Crown Prosecution Service, The Code for Crown Prosecutors (26 October 2018) <https://www.cps.gov.uk/publication/code-crown-prosecutors>.

⁴ Ministry of Defence, Guidance: Overseas Operations (Service Personnel and Veterans) Bill (18 March 2020) <https://www.gov.uk/government/publications/overseas-operations-service-personnel-and-veterans-bill>.

⁵ Sunday Times Insight, War crimes scandal: Army ‘covered up torture and child murder’ in the Middle East, Sunday Times (17 November 2019) <https://www.thetimes.co.uk/article/army-covered-up-torture-and-child-murder-bfdc5rsmw>; Ian Cobain, British army’s investigations into Iraq deaths to be reopened, The Guardian, (30 January 2013) <https://www.theguardian.com/world/2013/jan/30/iraq-torture-allegations-uk-military-investigations-reopened>; and House of Commons Library, Investigation of Former Armed Forces Personnel Who Served in Northern Ireland (1 April 2020) <https://commonslibrary.parliament.uk/research-briefings/cbp-8352/>.

prosecutor is that of ‘finality’ for the service person. There is not a single factor which tends in favour of prosecution, irrespective of the circumstances. This is an unjustified imbalance which creates a preferential legal regime that treats members of the Armed Forces as above the law, at the expense of vital public interests.

10. The third ‘lock’ on prosecutorial decisions is set out in Clause 5 of the Bill. The first two ‘locks’ on prosecution under the Bill set an unreasonably high threshold for a prosecution to proceed in circumstances that come within the scope of the Bill. A case which makes it through these significant hurdles is likely to be one with compelling facts, a strong body of evidence and an overwhelming public interest in proceeding. For such compelling cases to then be subject to the discretionary consent of the Attorney General is both inappropriate and creates a disproportionate barrier to prosecution by creating a political veto power on politically controversial decisions.
11. The Government’s argument in putting forward this Bill is that it will tackle what it terms ‘vexatious’ prosecutions and civil claims against service personnel and the Ministry of Defence (MoD), which it claims have been brought on an industrial scale. This argument does not stand up to scrutiny. Both in the context of overseas operations and in relation to legacy matters in Northern Ireland, the number of prosecutions brought, never mind ‘vexatious’ ones, is vanishingly small. In relation to Iraq, only a handful of prosecutions have been brought, and none against senior ranking officials.⁶ In the context of legacy proceedings relating to the Troubles, just six military personnel have faced prosecution out of a total of 26 prosecutorial decisions.⁷ In relation to civil claims, while the Government argues that the MoD has been inundated by litigation arising from recent conflicts, again the stats don’t match up. Of recent private law claims

⁶ European Center for Constitutional and Human Rights, War crimes by UK forces in Iraq: Follow-up communication by the European Center for Constitutional and Human Rights to the Office of the Prosecutor of the International Criminal Court (31 July 2019)

https://www.ecchr.eu/fileadmin/Juristische_Dokumente/ECCHR_Follow_Up_Communication_to_OTP_War_crimes_by_UK_forces_in_Iraq_July_2019.pdf.

⁷ ‘The perception that investigators are unfairly targeting cases involving military personnel has been confounded by decisions over the last few years by the Director of Public Prosecutions for Northern Ireland to bring prosecutions against a number of former Army personnel. To date, six former military personnel have been charged with offences relating to the Troubles, including the events of Bloody Sunday. The most recent prosecution case was announced in April 2019. However, the PPS for Northern Ireland has also sought to make clear that of the 26 prosecution cases brought since 2011 in relation to legacy issues, 21 of those cases have involved republican and loyalist paramilitaries and that five of those cases are ongoing.’ See House of Commons Library, Investigation of Former Armed Forces Personnel Who Served in Northern Ireland, 1 April 2020, <https://commonslibrary.parliament.uk/research-briefings/cbp-8352/>.

against the MoD (between 2014 and 2019), just 0.8% of the total arose from the Iraq war.

12. Further, most repeat investigations or delayed prosecutions in recent years have been the direct result of failures by the MoD itself.⁸ Rather than put forward proposals which tackle the real reason behind any repeat investigations or delayed prosecutions, this Bill instead proposes unprecedented and dangerous legal protections which will create a legal regime that mandates impunity for serious offences and inequality before the law for victims of abuse and Armed Forces personnel.

APPLICATION OF THE PRESUMPTION TO CERTAIN OFFENCES

13. Liberty does not believe there should be a presumption against prosecution as envisaged by the Bill in any circumstance. However, if there is to be a presumption against prosecution, it should not cover serious offences and especially not international crimes. It is particularly alarming that the presumption against prosecution would apply to torture given the absolute nature of the prohibition and the fact that the MoD in the consultation which preceded this Bill expressly noted that: "...there may be particular considerations relating to certain types of offence (e.g. sexual offences or torture), which means that the presumption should not apply in respect of such offences".⁹

14. By excluding sexual offences under Schedule 1 of the Bill, the drafters recognise that a presumption against prosecution is inappropriate for certain types of crime. It is therefore inexplicable that serious offences like torture and murder, as well as other war crimes and crimes against humanity are not similarly excluded. The prohibition on torture is absolute: it allows no exceptions.¹⁰ The prohibition on torture contains a positive obligation on the Government to investigate and where appropriate prosecute acts of torture. This obligation permits no time limit. Failing to exclude torture from the presumption against prosecution is not only likely unlawful but also raises deep and concerning

⁸ 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.

⁹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819101/20190718-MOD_consultation_document-FINAL.pdf, p. 11.

¹⁰ For 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.

questions about the UK's commitment to international norms and basic morality. The same applies to conduct which amounts to a war crime or crime against humanity.

HUMAN RIGHTS IMPLICATIONS OF THE PRESUMPTION

15. The presumption against prosecution (Clause 2) and 'triple lock' on prosecutions proceeding (Clauses 2-5) give rise to issues with respect to the UK's procedural obligations under the ECHR, as incorporated by the Human Rights Act (HRA) 1998, and other international human rights instruments.
16. Article 2 ECHR (the right to life) contains a procedural obligation to carry out an effective investigation into alleged breaches of the substantive limb.¹¹ There is no right to obtain a prosecution or conviction with a particular sentence and the fact that an investigation ends without concrete, or with only limited, results is not indicative of any failings as such.¹² However, if the investigation has led to the institution of proceedings in the national courts, then the proceedings as a whole – including the trial stage – must satisfy the requirements of the positive obligation to protect lives through the law and national courts “should not under any circumstances be prepared to allow life-endangering offences to go unpunished”.¹³ Further, ‘institutional deficiencies’ in the criminal justice or prosecutorial system may breach Article 2 ECHR.¹⁴
17. Similarly, Article 3 ECHR (the absolute prohibition on torture or other ill-treatment) gives rise to both ‘negative’ obligations – i.e. not to engage in acts of torture or other ill-treatment – and ‘positive’ obligations involving prevention, investigation and prosecution. The Strasbourg Court has held that a State’s obligation under Article 3 ECHR includes an obligation to enact criminal-law provisions which effectively punish the relevant offences, and to apply them in practice through effective investigation and prosecution.¹⁵
18. The systematic limitation of accountability for violations of both Articles 2 and 3 ECHR under the bill will therefore undermine the effectiveness of the UK’s procedural obligations and may not be in accordance with the Convention.

¹¹ *Armani Da Silva v the United Kingdom* (2016) 63 EHRR 12, [229]

¹² *Giuliani and Gaggio v Italy* (App. No. 23458/02) GC (2011) [306].

¹³ *Armani Da Silva* [239].

¹⁴ *Ibid* [261]

¹⁵ *MC v Bulgaria* (App. No. 39272/98) (2004) [151]-[153]; *Beganovic v Croatia* (App. No. 46423/06) (2009) [71]; and *MGC v Romania* (App. No. 61495/11) (2016) [57] and [59].

IMPLICATIONS FOR COMPLIANCE WITH INTERNATIONAL OBLIGATIONS

19. With respect to international crimes, including war crimes and crimes against humanity, the Bill as drafted may put the UK on collision course with the International Criminal Court (ICC) in its decision on whether to open a formal investigation into allegations of war crimes committed by British troops in Iraq. The ICC will only open an investigation where national courts are ‘unwilling or unable’ to prosecute international crimes.¹⁶ The legal regime proposed in this Bill could see alleged offences for which there has been no contemporaneous or adequate investigation shielded from prosecution after just five years, including torture, war crimes and crimes against humanity. The likelihood of the ICC opening a full investigation is already heightened following revelations of alleged war crimes coverups following a Panorama/Sunday Times exposé.¹⁷ And such malpractice is not limited to Iraq, with revelations of a “rogue” SAS unit accused of executing civilians in Afghanistan.¹⁸ This Bill would further increase the likelihood of the ICC opening a full investigation in response of the situation in Iraq (and potentially elsewhere) not only because the law would permit it but also because the adoption of a presumption against prosecution sends the strong signal that the Government is not committed to the principle of accountability.

THE LIMITATION PERIOD FOR BRINGING CIVIL AND HRA CLAIMS

20. Part 2 of the Bill, read with Schedules 2-4, would introduce hard time limits of six years into the Limitation Act 1980 and the HRA. These ‘longstops’ of six years mean that if a claim is brought out of time, for whatever reason, however compelling, the most a court can extend time to is six years from the date of the act complained of. In Liberty’s view, this constitutes an unjustified and unfair fettering of judicial discretion.

21. Under the current regime, the courts can only extend time in certain circumstances where the court considers it equitable to do so, taking account of a range of factors. As noted by the Law Society, there is no evidence to suggest

¹⁶ 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>.

¹⁷ BBC News, International Criminal Court may investigate UK ‘war crimes cover-up’ (18 November 2019) <https://www.bbc.co.uk/news/uk-50455077>.

¹⁸ <https://www.thetimes.co.uk/article/rogue-sas-afghanistan-execution-squad-exposed-by-email-trail-7pg3dkdww>.

that the courts are not already carrying out this exercise appropriately.¹⁹ It can be difficult to persuade a court to extend time and it is by no means an easy hurdle to overcome for claimants. Nevertheless, this is an important safeguard to ensure that justice can be served out of time where the court considers it equitable to do so. Curtailing the court's discretion as proposed will make it harder for anyone – soldier or civilian – to bring claims against the MoD.

22. Liberty is particularly concerned about the fettering of judicial discretion with respect of HRA claims due to the extensive public interest considerations. First, the factors to be considered favour members of the Armed Forces with no consideration given to civilians whose rights may have been violated. Second, setting a firm time limit on human rights claims will undoubtedly result in situations where people's rights are violated with no redress – including soldiers who wish to pursue claims against the MoD. Finally, given the position of power and use of lethal force, the rights violations that the Armed Forces can commit are among the most severe imaginable – including unlawful killing, torture and other ill-treatment and unlawful detention. Curtailing judicial discretion in this matter is a dereliction of the UK's human rights obligations of which the MoD and the Secretary of State for Defence would be the main beneficiaries.

THE DUTY TO CONSIDER DEROGATING FROM THE ECHR

23. Clause 12 of the Bill would insert a new section 14A into the HRA which would impose a duty on the Secretary of State to consider, on an ongoing basis, derogating from the ECHR under Article 15 in any overseas operations that are considered to be significant.

24. In short, as a duty to *consider* derogating rather than a duty to derogate, Clause 12 of the Bill is of limited legal effect. This is because it does not *require* the Secretary of State to derogate, only to consider doing so. It should be noted that consideration of derogation in future operations has been MoD policy in some form since 2016.²⁰

25. While Clause 12 does not *compel* the Secretary of State to derogate, the duty to consider derogation may unduly influence the decision-making process. It is

¹⁹ Law Society, Overseas Operations (Service Personnel and Veterans) Bill, Law Society, (8 June 2020), [https://www.lawsociety.org.uk/policy-campaigns/articles/overseas-operations-\(service-personnel-and-veterans\)-bill/](https://www.lawsociety.org.uk/policy-campaigns/articles/overseas-operations-(service-personnel-and-veterans)-bill/).

²⁰ Michael Fallon, Military Operations–European Convention on Human Rights Derogation: Written statement – HCWS168 (10 October 2016) <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-10-10/HCWS168/>.

always open to a State to consider derogating under Article 15 ECHR when faced with a public emergency. However, this decision must never be considered or arrived at lightly and must be in accordance with the strict requirements set out in the text of Article 15.²¹ Placing an obligation on the Secretary of State to consider derogating in every significant overseas operation may make the decision maker more likely to reach a decision favouring derogation in order to be seen to be meeting the duty to consider in Clause 12. This Clause is therefore at best unnecessary and at worst could lead the Secretary of State to unjustifiably dilute human rights obligations.

26. A legal question which cannot be readily answered however is whether a derogation in relation to an overseas, i.e. extraterritorial, operation would be valid under Article 15 ECHR. The evidence submitted to the discontinued JCHR inquiry into the Government's proposed derogation from the ECHR is instructive in this respect.²² In short, given that no State has ever attempted to derogate in an extraterritorial context and the attendant lack of Strasbourg jurisprudence on the matter, it is not clear whether or not the Court would accept an overseas operation as a 'war or other emergency threatening the life of the nation' for which derogation is 'strictly required by the exigencies of the situation'. An answer to this question is neither sought by this inquiry nor strictly required on the face of this Bill, however it is an important consideration to bear in mind when approaching Clause 12.

CONCLUSION

27. There can be no time limit on justice. This statement is nowhere truer than in the context of torture and international crimes, which this Bill shields from prosecution and civil claims. This Bill seeks to address legitimate concerns of poor-quality military investigations with a wrongheaded and dangerous legal regime. The answer is not a presumption against prosecution or a longstop on litigation. The answer is to investigate allegations of wrongdoing by members of

²¹ See: Council of Europe, 'Guide on Article 15 of the Convention – Derogation in time of emergency' https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf.

²² JCHR, 'The Government's proposed derogation from the ECHR inquiry' (2016) <https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/government-proposed-echr-derogation-16-17/>.

the Armed Forces properly the first time around. The Government should listen to its military figures and scrap this Bill.²³

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²³ <https://www.thetimes.co.uk/article/judge-jeffrey-blackett-warns-law-to-protect-soldiers-is-ill-conceived-mcqnkd96s>; https://theconversation.com/proposals-by-the-uk-government-will-effectively-sanction-war-crimes-by-british-troops-144382?utm_source=twitter&utm_medium=bylinetwitterbutton; <https://www.middleeasteye.net/news/uk-military-iraq-war-crimes-torture-amnesty>; and <https://www.thetimes.co.uk/article/letters-to-the-editor-eu-double-standard-on-trade-deal-talks-b3p2tkgq6>.