LIBERTY

LIBERTY'S BRIEFING ON THE OVERSEAS OPERATIONS (SERVICE PERSONNEL AND VETERANS) BILL FOR SECOND READING IN THE HOUSE OF COMMONS

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 https://www.libertyhumanrights.org.uk/issues/?formats=briefings-reports.

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EXECUTIVE SUMMARY

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 with respect to 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. It erodes the fabric of society and undermines trust in our political system.

The UK has a proud history as a global defender of human rights and a leader in the fight against impunity for international crimes. The Overseas Operations Bill calls that reputation into question.

Liberty opposes this Bill in its entirety. In particular:

- There is no justification for a statutory presumption against prosecutions after any time period, whether five or ten years. Concerns around delay and the public interest in a prosecution proceeding can already be factored into the prosecutorial decision. This presumption builds in an incentive for the state to do as little as possible until the relevant time period expires, and will inevitably result in the prevention of justice being served and those responsible for serious crimes and human rights abuses not being held to account.
- The factors to be taken into account by a prosecutor create an unjustified imbalance between the rights of the Armed Forces and victims, creating a preferential legal regime that treats members of the Armed Forces as above the law, at the expense of vital public interests.
- It is inappropriate for the Attorney General to have a 'veto' over independent prosecutorial decision making in such politically charged circumstances as the prosecution of a soldier.
- The failure to exclude torture, war crimes and crimes against humanity from the scope of the Bill would see Parliament legislate to mandate impunity for some of the most serious criminal offences imaginable.
- The civil litigation longstop for personal injury and human rights claims will make it harder for anyone – civilian or soldier – to hold the Ministry of Defence (MoD) to account for unlawful actions and human rights abuses. This is of benefit only to the Government.
- The Bill seeks to twice amend the Human Rights Act (HRA) 1998. Against the backdrop of the Government's plans to 'update' the HRA and refusal to commit to the UK's ongoing membership of the ECHR, this should be viewed as an unjustified watering down of the UK's commitment to its fundamental human rights obligations.

NO TIME LIMIT ON JUSTICE

1. Liberty has a long history of campaigning on Military Justice issues. We have brought several legal cases on behalf of various soldiers or their bereaved families.[1] 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). It is with this expertise and experience that we approach the Overseas Operations (Service Personnel and Veterans) Bill.

2. The Government's argument in putting forward this Bill is that it will tackle what it terms 'vexatious' prosecutions and civil claims against Armed Forces personnel and the MoD. The Government argues that the Bill is necessary because the legal system has been abused to bring false charges against the Armed Forces on an industrial scale. This Bill also sits in the context of repeat MoD statements since 2016 that the UK will derogate from some of its obligations under the European Convention on Human Rights (ECHR) in future armed conflicts. It also arises as the Government pledges to 'update' the Human Rights Act (HRA) 1998 and bring in changes to limit access to judicial review. The Bill follows an MoD consultation from last year, however the provisions in the Bill go considerably further than those consulted upon.[2]

3. While compelling, the Government's argument justifying this Bill does not stand up to scrutiny. Of course, no one deserves to be investigated and prosecuted for a crime they didn't commit, nor to be repeatedly investigated without good reason. However, the numbers simply do not add up. Both in the context of recent overseas operations and in relation to legacy matters in Northern Ireland, the number of prosecutions brought, never mind 'vexatious' ones, is extremely low. In relation to Iraq, only a handful of prosecutions have been brought, none against senior ranking officials.[3] In the context of legacy proceedings relating to the Troubles, just six military personnel have faced prosecution out of a total of

[1] For example see Liberty report, 'Military Justice: Second-Rate Justice' (2019) http://www.libertyhumanrights.org.uk/wp-content/uploads/2020/01/LIB-10-Military-Justice-Report-20_01_19.pdf.
[2] Ministry of Defence, Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom (22 July 2019) https://www.gov.uk/government/consultations/legal-protections-for-armed-forces-personnel-and-veterans-serving-in-operations-outside-the-united-kingdom.
[3] 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.

26 prosecutorial decisions.[4] 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 against the MoD (between 2014 and 2019), just 0.8% of the total arose from the Iraq war.

4. It is important to understand that the overwhelming majority of repeat investigations or delayed prosecutions in recent years have been the direct result of failures by the MoD itself.[5] As noted by the Minister for Defence People and Veterans, Johnny Mercer:

> *"One of the biggest problems with this was the military's inability to investigate itself properly and the standard of those investigations... If those investigations were done properly and self-regulation had occurred we probably wouldn't be here today".*[6]

5. 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.

6. Indeed, a number of current and former senior military figures have aired their concerns about this Bill.[7] The former professional head of the Armed Forces, Lord Guthrie has said he is "*dismayed*" by the proposals, which in his view "*provides room for a de facto decriminalisation of torture*" that in turn "*would be a stain on Britain's standing in the world*".[8]

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[4] '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/.

[5] 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.

[6] Johnny Mercer MP, speaking on the Guardian's 'Today in Focus' podcast in May 2019 https://www.theguardian.com/news/audio/2019/may/30/historical-war-crimes-an-amnesty-for-british-soldiers.

[7] https://www.thetimes.co.uk/article/letters-to-the-editor-eu-double-standard-on-trade-deal-talks-b3p2tkgq6 and https://theconversation.com/proposals-by-the-uk-government-will-effectively-sanction-war-crimes-by-british-troops-144382.

[8] Letter to the Times,7 June 2020. Available at: https://www.thetimes.co.uk/article/letters-to-the-editor-eu-double-standard-on-trade-deal-talks-b3p2tkgq6.

7. The Judge Advocate General Jeff Blackett – Britain's most senior military judge – described the proposals as "*ill-conceived*" in a letter to the Defence Secretary, the Veterans Minister, the head of the military, and the director of the Service Prosecuting Authority.[9] Blackett raised "*significant concerns*" with the Bill, calling on the Government to "*think again*". A crucial point raised by Blackett is that the effect of the proposed limitation period "*would encourage an accused person to frustrate the progress of investigation past the five-year point*".

8. 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 addresses a legitimate concern with a wrong and dangerous solution. The answer is not a presumption against prosecution or a longstop on litigation. The answer is to investigate allegations of wrongdoing by members of the Armed Forces properly the first time around. The Government should listen to its senior military figures and scrap this Bill.

9. **Liberty opposes this Bill for all the reasons above. The rest of this briefing seeks to add detail to those concerns.**

PRESUMPTION AGAINST PROSECUTION

10. Clause 2 of the Bill requires a prosecutor, when considering whether to bring or continue proceedings which fall under Clause 1, to apply the principle that it is exceptional for a prosecution to proceed.

11. Clause 1 sets out the conditions to be satisfied for the presumption against prosecution in Clause 2 to apply. The first condition is that the alleged conduct took place (outside of the British Islands) at a time when the person was (a) a member of the regular or reserve forces or a member of a British overseas territory force, and (b) deployed on overseas operations (Clause 1(3)). An 'overseas operation' is defined incredibly broadly in Clause 1(6) to mean any operation outside the British Islands, including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious public disorder, in the course of which members of Her Majesty's forces come under attack or face the threat of attack or violent resistance. **This risks scooping up a huge array of conduct committed by a wide range of persons and carried out in operational contexts which cannot properly be understood as constituting active**

[9] Lucy Fisher, Judge Jeffrey Blackett warns law to protect soldiers is 'ill-conceived', The Times, (6 June 2020), https://www.thetimes.co.uk/article/judge-jeffrey-blackett-warns-law-to-protect-soldiers-is-ill-conceived-mcqnkd96s.

hostilities. At a minimum, the Bill should be amended to narrow the definition of 'overseas operations' to be limited to situations where personnel are engaged in active hostilities.

12. The second condition under Clause 1(4) is that a period of 5 years beginning with the day on which the alleged conduct took place has expired. Where the offence is alleged to have continued over a period of days, the 5-year period starts with the last of those days (Clause 1(5)). This halves the timeframe for prosecution from the previously proposed ten years consulted upon by the MoD last year.[10] The original proposal of a ten-year time limit on prosecutions was heavily criticised by Liberty and other human rights groups in response to the consultation.[11] The rule of law dictates that the law applies equally to everyone and that no one is above the law. In the UK, except for some minor and regulatory offences, criminal offences have no statute of limitations. This is in recognition of the fact that it can take many years for enough evidence to come to light to secure a conviction. **The public interest in criminal justice therefore requires that prosecutions can take place years after the event. This Bill seeks to upend that fundamental principle of our justice system.**

13. Concerns about any injustice caused to potential defendants due to the amount of time 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.[12] 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. 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 charge. **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.**

14. 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".[13] It is highly questionable as to whether five years can be

[10] Ministry of Defence (2019).
[11] 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.
[12] Crown Prosecution Service, The Code for Crown Prosecutors (26 October 2018) https://www.cps.gov.uk/publication/code-crown-prosecutors.
[13] 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.

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.[14] **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.**

ONE-SIDED NOTION OF FAIRNESS AND PUBLIC INTEREST

15. Clause 3 sets out the second 'lock' on prosecution; a requirement for prosecutors to give particular weight to certain matters in reaching decisions in cases that fall within the scope of Clause 1 of the Bill.

16. Clause 3(1) requires a prosecutor to give particular weight to certain matters only insofar as they tend to *reduce* the person's culpability or otherwise tend against prosecution. While not stated on the face of this Bill, it can be inferred that if any of the matters listed tend to *increase* culpability or tend *in favour* of prosecution, the prosecutor is not required to attach particular weight to them.

17. The matters to be given particular weight are set out in Clause 3(2) and are split into two categories. The first category under Clause 3(2)(a) deals with adverse effects (or likely adverse effects) on the person of the conditions the person was exposed to during deployment on an overseas operation, including their experiences and responsibilities. An 'adverse effect' is defined in Clause 3(4) as an adverse effect on their capacity to make sound judgments or exercise self-control; or any other adverse effect on their mental health. In making a decision under Clause 3(2)(a), a prosecutor must have regard to the exceptional demands and stresses to which members of Her Majesty's forces are likely to be subject while deployed on overseas operations, regardless of their length of service, rank or personal resilience. **There is no**

[14] 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/.

recognition of the fact that service personnel are specially trained to deal with the kinds of exceptionally difficult and stressful situations anticipated by the Bill. This provision in effect suggests that any member of the Armed Forces should be shielded from prosecution for no other reason than the fact they are a soldier.

18. The second category of matters to be given particular weight is the public interest in finality, as set out in Clause 3(2)(b): in a case where there has already been a relevant previous investigation and no compelling new evidence has become available, particular weight is to be given to the public interest in finality being achieved without undue delay. An investigation is defined in Clause 4(1). The definition does not require there to have been an investigation by civilian police, just an 'investigating authority'. This means that in cases where there has been a previous investigation, a prosecutor can stop a prosecution even where that previous investigation was conducted by the service police. **There is no requirement that a previous investigation would have had to have enjoyed a degree of independence from the military as a whole. This overlooks the fact that it is the service police failures in dealing with serious allegations of abuse in the past that have necessitated further investigations years later, because they were not independent or competent.**

19. Though presented as something other than a statute of limitations on the investigation and prosecution of serious crimes, Liberty considers that Part I of the Bill comes dangerously close to this. It also appears from the drafting of Clause 3(2) that a prosecutor can stop a prosecution even where there has been no 'relevant previous investigation' at all (i.e. where there had not been an investigation at the time or reasonably close in time to the event), as long as they are satisfied that the adverse effect on the accused of the conditions to which they were exposed on deployment is relevant. Clause 3(2)(b) merely states *"in a case where there has been a relevant previous investigation...",* necessarily anticipating that there will be cases before a prosecutor that have not been subject to a relevant previous investigation. This raises the prospect of a prosecutor, after five years have passed, being approached for early advice[15] by an investigating police force and deciding, in a case where there has been no contemporaneous investigation and no substantive subsequent investigation, that a

[15] Police routinely seek informal advice and early investigative advice from prosecutors. In serious cases, this advice is obtained as soon as possible. The Bill raises the prospect of prosecutors making decisions at a very early stage to bring investigations to an end. https://www.cps.gov.uk/legal-guidance/police-and-cps-relations

prosecution should not be brought, merely on the basis of Clause 3(2)(a) (the likely effect the adverse conditions would have had on the accused).

20. Overall, Clause 3 of the Bill undermines notions of fairness and equality before the law 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 that the prosecutor consider the public interest in the Armed Forces operating at the highest possible standards and accountability where they fail to do so. 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 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.**

21. This imbalance is further reinforced by the fact that the Bill only covers offences committed against civilians. Where a victim is a member of the Armed Forces (or a Crown Servant, a Defence Contractor or a member of a British overseas territory force), the provisions do not apply (Clause 6(2)). **This suggests that greater value is placed on the life and the rights of members of the Armed Forces than on civilians outside of this country, a fact that might well render the Bill discriminatory and contrary to the UK's obligations under the European Convention on Human Rights.**

INAPPROPRIATE POLITICAL INVOLVEMENT IN PROSECUTIONS

22. The third 'lock' on prosecutorial decisions is set out in Clause 5 of the Bill. Where the prosecutor has determined that notwithstanding the matters above, a prosecution should be brought, the consent of the Attorney General, or in the case of Northern Ireland the Advocate General, is required before a prosecution can proceed.

23. As set out above, 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. Taken together, the presumption against prosecution (Clause 2) and the matters to be given particular weight (Clause 3) make it highly unlikely that the overwhelming majority of prosecutions will

proceed. 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 wholly inappropriate and creates a disproportionate barrier to prosecution.**

24. Clause 5 provides no test nor relevant factors to be taken into account by the Attorney General when making a decision whether to consent to a prosecution proceeding. In short, it is left completely to the discretion of the Attorney General. The Attorney General is a government minister. While the Attorney General fulfils a number of independent public interest functions, they are not independent from government; they are part of it. They are therefore not immune from political pressure in decision making like any other minister. **It is inappropriate for the Attorney General to have such a 'veto' over independent prosecutorial decision making in such politically charged circumstances as the prosecution of a soldier. For the Attorney General to be able to have a complete discretion in whether to consent is completely unjustified.**

IMPUNITY FOR INTERNATIONAL CRIMES

25. Clause 6 of the Bill sets out what constitutes a 'relevant offence' for the purposes of the presumption against prosecution. An offence is not a 'relevant' offence if it is an excluded offence by virtue of Schedule 1 of the Bill. The offences excluded by Schedule 1 by and large are sexual offences, both in domestic criminal law and international criminal law (paras 2-14). This is welcome to the extent that it would be utterly indefensible for any of the listed offences to fall within the scope of a 'relevant offence' for the purposes of the presumption against prosecution under the Bill.

26. However, Schedule 1 also reveals that other offences which one might assume to be similar to sexual offences in their egregious nature and severity are <u>not</u> excluded. In particular, the following offences are not excluded and are therefore classed as "relevant offences" for the purposes of the Bill:

    - Torture

- Crimes against humanity (other than those within Article 7.1(g) of the Rome Statute)[16]
- War crimes (other than those under Article 8.2(b)(xxii)[17] and Article 8.2(e)(vi)[18] of the Rome Statute).

27. The above listed offences are among the most egregious and serious of which a member of the Armed Forces could be accused. This concern is acknowledged by the Government in its response to the Consultation. However, the Government provides no justification whatsoever for the failure to exclude torture and other offences.[19] The prohibition on torture is absolute: it allows no exceptions.[20] 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 questions about the UK's commitment to international norms and basic morality.**

28. With respect to international crimes, including war crimes and crimes against humanity, the Bill as drafted would 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.[21] As already noted above, the legal regime proposed in this Bill could see alleged offences for which there has been no contemporaneous investigation shielded from prosecution after just five years, including torture, war crimes and crimes against humanity. The likelihood

[16] Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.
[17] Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions (relating to international conflict).
[18] Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other forms of sexual violence also constituting a serious violation of Article 3 Common to the four Geneva Conventions (relating to armed conflicts not of an international character).
[19] Public consultation on Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom: Ministry of Defence Analysis and Response, pp. 12-13 http://qna.files.parliament.uk/ws-attachments/1235259/original/20200907-MOD%20Analysis%20and%20Response-FINAL.pdf.
[20] 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.
[21] 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.

of the ICC opening a full investigation is already heightened following recent revelations of alleged war crimes coverups following a Panorama/Sunday Times exposé.[22] **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.**

29. The Government has provided no explanation or justification whatsoever for only excluding sexual offences from the scope of the Bill. As former Attorney General Dominic Grieve put it:

> *"This could create the bizarre outcome that an allegation of torture or murder would not be prosecuted when a sexual offence arising out of the same incident could be..."*[23]

30. The legal regime as proposed would be profoundly damaging to the UK's international reputation as upholders of the Geneva Conventions and the country's policy of bringing international war criminals to justice. **If passed as drafted, this Bill would see Parliament legislate to mandate impunity for some of the most serious criminal offences imaginable. Parliamentarians must insist that torture and all international crimes are excluded from the scope of the Bill.**

FETTERING OF JUDICIAL DISCRETION

31. Part 2 of the Bill introduces restrictions on time limits to bring civil claims, both in respect of personal injuries or death (Clauses 8-10) and certain Human Rights Act proceedings (Clause 11).

32. Clause 8 amends the Limitation Act 1980 as set out in Part 1 of Schedule 2. Clauses 9 and 10 amend the corresponding legislation in Scotland and Northern Ireland as set out in Part I of Schedules 3 and 4 respectively. The Limitation Act 1980 is amended (a) to limit the court's discretion to disapply time limits for actions in respect of personal injuries or death which relate to overseas

[22] BBC News, International Criminal Court may investigate UK 'war crimes cover-up' (18 November 2019) https://www.bbc.co.uk/news/uk-50455077.
[23] Dominic Grieve, Military prosecutions bill creates more problems than it fixes, The Times, (26 March 2020), https://www.thetimes.co.uk/article/01704004-6edb-11ea-ac40-2259b5e452c2

operations of the Armed Forces, and (b) to specify additional factors to which a court must have regard in exercising that discretion.

33. In short, Schedule 2 introduces a firm time limit into the Limitation Act 1980 where the action was brought after the expiration of the period of six years in relation to an incident taking place in an overseas operation. This 'longstop' of six years means that if a claim if brought out of time, for whatever reason, however compelling, the most a court can extend it to is six years from the date of the act complained of. Under the law as it stands – s. 33 of the Act – the limitation period can be extended in certain circumstances where the court considers it equitable to do so, taking into account a range of factors. As noted by the Law Society, there is no evidence to suggest that the courts are not already carrying out this exercise appropriately.[24] 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 under the Bill will make it harder for anyone – soldier or civilian – to sue the MoD. The largest proportion of claims brought against the MoD arise from claims of negligence and show that the MoD breaches its duty of care toward soldiers repeatedly.[25] The main beneficiary is not the personnel of the Armed Forces but the Government, which is thereby protected from facing what may be wholly deserving late claims.**

34. Schedule 2 also introduces factors which a court must have particular regard to when considering whether to extend time. These include the impact of the operational context on Armed Forces personnel to remember relevant events or actions fully and accurately; the effect of the operational context on personnel's ability to record, or retain records of, relevant events or actions; and the likely impact of the action on the mental health on *any witness* or *potential witness* who is a member of the Armed Forces. These factors constitute an extraordinary fettering of judicial discretion. The reality is that all civil claims can be stressful. It is an unfortunate but unremarkable state of affairs. **Taken together, these**

[24] 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/.
[25] Since 2014, the MoD has been publishing data about the number of compensation claims issued and settled against it. They do not appear to have published data before then. The data available shows that between 2014 and 2019, just 203 claims were issued arising from the Iraq conflict out of a grand total of issued claims of 23,585. This amounts to just 0.86%. By contrast, over this period, claims against the MoD as an *employer* amounted to 46.07% of all claims; and motor liability claims amounted to a further 29.54% (a total of 75.61%). This demonstrates that the overwhelming majority of claims against the MoD relate to allegations that it has breached its duty of care to the soldiers it employs.

amendments to the Limitation Act skew the legal system to give privileged protection of one group. In reality, the benefits will be enjoyed most by the MoD itself rather than individual personnel.

35. Clause 11 introduces a new Section 7A to the HRA which only applies to 'overseas armed forces proceedings', which means proceedings against the MoD or the Secretary of State for Defence and in connection with overseas operations (Clause 11(2)(6)). This provision similarly fetters judicial discretion to extend time as Clauses 8-10. However, fettering judicial discretion with respect to human rights claims has wider public interest considerations. First, the factors to be considered unfairly favour members of the Armed Forces with no consideration given to those whose rights 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. 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, inhuman and degrading treatment and torture, and unlawful detention. Curtailing judicial discretion in the manner of Clause 11 is a dereliction of the UK's human rights obligations of which the Ministry of Defence and the Secretary of State for Defence would be the main beneficiaries.

ERODING THE HUMAN RIGHTS FRAMEWORK

36. Clauses 11 and 12 of the Bill propose substantive amendments to the HRA. If passed, these would be the most significant amendments to the HRA in its history. The HRA, the incorporating legislation for the ECHR in domestic law, is a constitutional statute requiring special treatment on account of its constitutional significance.[26] The proposals in both Clauses 11 and 12 seek to curtail the application of the HRA in certain circumstances. Clause 11 in particular seeks to limit the application of the HRA and unduly fetter the discretion of the courts to hear human rights claims. This provision would in effect shield the MoD from being held to account for violations of the ECHR in certain circumstances. Clause 12, discussed below, risks watering down the UK's commitment to the ECHR and the protections which flow from it. At no point has the Government

[26] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).

acknowledged the significance of the proposed amendments to the HRA nor provided adequate justification for them.

37. Clause 12 of the Bill introduces a duty on the Secretary of State to consider derogating from the European Convention on Human Rights (ECHR) under Article 15(1) in relation to 'significant' overseas military operations. A 'significant' operation is one which the Secretary of State considers is or would be significant. While consideration of derogation in future operations has been MoD policy in some form since 2016,[27] the public consultation which preceded this Bill did not seek views on derogation. **Therefore, the Government's previous statements and apparent understanding of the basis on which derogation may be sought was not subject to any analysis.[28]**

38. Derogation from the ECHR under Article 15 is allowed only in limited circumstances and is subject to several strict requirements.[29] This is for good reason. Derogation means a State's obligations to secure certain human rights will be modified or suspended. It is far from clear that derogation in the circumstances suggested by the Government would be lawful. For instance, no state has ever derogated from the Convention due to a military operation in another State. Furthermore, Article 15(2) prohibits derogation from certain rights in any circumstances, including the right to life (Article 2) and freedom from torture and inhuman and degrading treatment (Article 3).

39. 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 always open to a State to consider derogating when faced with a public emergency. However, this decision must never be considered or arrived at lightly. Placing an obligation on the Secretary of State to consider derogating may inappropriately influence the decision-making process and make the decision maker more likely to reach a decision favouring derogation in order to be seen to be meeting the duty to consider set out in Clause 12. This clause is thus at best unnecessary and at worst could lead the Secretary of State to dilute human

[27] 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/.
[28] Due to the 2017 general election, a JCHR inquiry into the Government's proposed derogation from the ECHR was closed prematurely. However, the inquiry page has a rich body of evidence clearly showing the legal issues with the Government's plans to derogate: https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/government-proposed-echr-derogation-16-17/.
[29] Natasha Holcroft-Emmess, Derogation from the Human Rights Convention – in Plain English, Each Other (13 June 2017) https://eachother.org.uk/derogation-human-rights-convention-plain-english/.

rights commitments. **Against the backdrop of a Government which plans to 'update' the HRA and refuses to commit to the UK's ongoing membership of the ECHR, Clause 12 should be viewed as an unjustified watering down of the UK's commitment to its fundamental human rights obligations.**

40. Clause 13 of the Bill creates a power for the Secretary of State or the Lord Chancellor to make regulations that are consequential to any provision in the Bill. The Henry VIII power contained in Clause 13 permits regulations to be made which may amend, repeal or revoke any provision of or made under primary legislation (Clause 13(2)). While limited by the requirement in Clause 13(1) that the regulations be 'consequential' on any provision made by the Bill and by the oversight of the courts, changes which could be made by regulation could nevertheless have implications for our human rights framework absent proper parliamentary scrutiny. Crucially, the HRA is not excluded from the scope of Clause 13(2). **This could see further amendments to the HRA brought in through the backdoor by means of statutory instrument, with limited Parliamentary oversight. Parliamentarians must insist that the HRA is expressly excluded from the power to amend, repeal or revoke primary legislation.**

41. This Government has repeatedly stated its intention to 'update' the HRA.[30] In the context of negotiations on the future relationship with the EU, the Government has refused to commit to ongoing membership of the ECHR.[31] There is a real risk that the amendments to the HRA proposed in this Bill are not the last that the Government has planned. **It is vital that the integrity of the HRA and the rights it protects are not eroded. The amendments proposed in this Bill must not be viewed in a silo but rather must be scrutinised as part of a broader project to erode the UK's fundamental human rights framework.**

CONCLUSION

42. Civilian or soldier, no one deserves to be subject to a vexatious claim. However, the Government's narrative of an industry of vexatious claims against the military

[30] Matt Honeycombe-Foster, Boris Johnson pledges to amend the Human Rights Act to shield Troubles veterans from prosecution, PoliticsHome (11 November 2019) https://www.politicshome.com/news/article/boris-johnson-pledges-to-amend-the-human-rights-act-to-shield-troubles-veterans-from-prosecution.
[31] Daniel Boffey & Jennifer Rankin, Barnier warns of grave differences between EU and UK in trade talks, The Guardian (5 March 2020) https://www.theguardian.com/politics/2020/mar/05/barnier-warns-of-grave-differences-between-eu-and-uk-in-trade-talks.

does not hold up to scrutiny. It is a smokescreen seeking to hide the fact that the overwhelming majority of repeat investigations and delayed prosecutions are the result of the Ministry of Defence's failure to investigate – either promptly or at all – allegations of wrongdoing in a manner that is independent and competent. Rather than tackling the root cause of the issues complained of, this Bill instead runs counter to the UK's commitment to the absolute prohibition on torture and the importance of bringing international war criminals to justice. If passed, this Bill will severely weaken the UK's global reputation as a leader in justice, accountability and human rights. More importantly, it will leave victims of serious crimes and human rights abuses without redress and compromise the integrity of our criminal justice system. There can be no time limit on justice.

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