

MILITARY JUSTICE

SECOND-RATE JUSTICE

LIBERTY

A close-up photograph of a military uniform jacket, likely made of desert camouflage fabric. The jacket features two visible metal buttons on the left side. The fabric has a distinct camouflage pattern with large, irregular shapes of tan, brown, and white. The lighting highlights the texture of the fabric and the metallic sheen of the buttons.

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Criminal justice, complaints and human rights myths in the armed forces

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INTRODUCTION



INTRODUCTION

IN THE SUMMER OF 2013, LIBERTY LAUNCHED OUR MILITARY JUSTICE CAMPAIGN.

The campaign had its roots in a number of legal cases that we had brought on behalf of various soldiers or their bereaved families, mainly in the context of sexual violence, bullying and/or sudden death. These cases had revealed serious and fundamental problems in the way in which service personnel or their bereaved families were being treated by the armed forces and the Ministry of Defence. The experiences of our clients made a mockery of the Armed Forces Covenant, the promise from the nation that those who serve or have served in the armed forces, and their families, will be treated fairly.¹

This was coming at a time when attacks on the rule of law and human rights in the context of the armed forces were gathering political and media momentum. These attacks were presented as made in the interests of our armed forces.²

But it was the Human Rights Act that, in all of those cases in which Liberty was acting, was giving these soldiers or their bereaved

families any hope or semblance of justice. Such achievements as have been made, have been as a direct consequence of the very piece of legislation from which the Secretary of State for Defence and the present Government wish to derogate in future wars, or repeal in its entirety. This hostility towards the Human Rights Act is no coincidence. It has led to some terrible abuses or serious failings being revealed that would otherwise have remained hidden or for which there would have been no investigation or accountability whatsoever.

Such political attacks on the Act continue today. Brexit has taken some of the pressure off for the time being, but there is little doubt that they will resume. Indeed, in September 2018, General Petraeus, retired general of the US Army and former Director of the CIA, speaking during a visit to London, derided the European Convention on Human Rights for its impact upon military effectiveness (an assertion for which he offered little evidence)³. He was supported, in the days that followed, by the former Chief of the General Staff, Lord General Dannatt. It is a self-serving narrative and the legal analysis and evidence underpinning it is poor, but the spectre of our armed forces being impeded by human rights laws has proved attractive in some quarters and is hard to shift.

We continued with our work and the more we investigated the way in which service personnel were being treated, the more we discovered that some of the most basic principles of fairness that civilians took for granted, did not necessarily apply to them and in ways that could not be justified.

We understand that when a person joins the armed forces, the way they must live their life must change – it is different to a civilian

¹ See Annex 1: the Armed Forces Covenant.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/578212/20161215-The-Armed-Forces-Covenant.pdf
An Enduring Covenant Between The People of the United Kingdom Her Majesty's Government and all those who serve or have served in the Armed Forces of the Crown And their Families

² See, for example, "Armed forces could be given immunity from human rights laws", Daily Telegraph, 17 March 2014: <https://www.telegraph.co.uk/news/uknews/defence/10704073/Armed-forces-could-be-given-immunity-from-human-rights-laws.html>; Legal claims 'could paralyse' armed forces, BBC, 18 October 2013: <https://www.bbc.co.uk/news/uk-24576547>

³ Human rights law is harming Britain's armed forces: David Petraeus <https://www.thetimes.co.uk/article/human-rights-law-is-harming-britain-s-armed-forces-dls1ts7rj>

life. That is unavoidable and is accepted by service personnel. But acceptance of that principle has expanded into areas where it ought to have no place: for example, in the sphere of criminal justice, or in relation to the prevalence of bullying and sexual harassment and the measures needed to tackle it. We learned that, for our clients, when things went wrong, those differences became very pronounced – and were unjustifiable. We learned that a Commanding Officer could investigate sexual assaults for him/herself and was not legally obliged to report them to the police; we learned that there was no reliable data on rates of sexual offending in the armed forces; or that victims of rape were not being told of their right to seek support from expert civilian sources of help. We learned that conviction rates for rape in the Court Martial paled in comparison to civilian conviction rates and that the Service Police were not subject to the same kind of independent oversight as civilian police. This all painted a picture of second-rate justice for service personnel.

In relation to some of these matters, we have made good progress. In relation to others, we have not. Where progress has been made, it is because of the Human Rights Act and the extraordinary commitment and tenacity of our clients who, in the midst of their own personal trauma or loss, were determined to uncover the truth, identify failings and ensure that lessons are learned for current and future service men and women and the people that love them.

We continue to act for a number of service personnel and bereaved families. We represent them at inquests and in other legal or administrative proceedings. We advise them about the problems they are experiencing in their day-to-day service life. We have met and consulted with many in confidence. We try to help as many of them as we can within our very limited resources.

It is also important to acknowledge that we have also had a series of very good conversations with senior members of the armed forces, many of whom want to engage with these issues, are genuinely trying to improve things for their people and want to get things right.

But there remains, running through all of the challenges we identify in this report, a common thread of hostility or suspicion towards any independent oversight or outside involvement in how the armed forces operates or governs aspects of itself. The message received from many quarters is: let us deal with our people, we know what is best for them.

On the contrary, Liberty believes that the rights of service men and women are just as deserving of protection as those of civilians.

Through our work, we have identified a number of ongoing challenges for the armed forces, which we have decided to bring together into this, our second Military Justice report. Our first was published in July 2014 and made a number of recommendations, three of which have been achieved and three of which have not, including, shockingly, the recommendation that allegations of rape should always be investigated by civilian police, not Service Police.⁴

⁴ The following has been achieved, from the first Liberty report "Military Justice: Proposals for a Fair and Independent Military Justice System": Recommendation 1 (service police forces should collect and publish annually anonymised statistics on the number of allegations of sexual assault and rape); Recommendation 2 (Parliament should amend Schedule 2 of the Armed Forces Act 2006 so that sexual assault, exposure and voyeurism are not excluded from the mandatory service police referral process); Recommendation 6 (the service complaints ombudsman's powers should be strengthened to give her office powers to investigate the merits of a complaint as well as claims of maladministration). The following have not: Recommendation 3 (Circular 28/2008 should be amended to add rape to the category of "very serious crimes" that must always be referred to the civilian police); Recommendation 4 (arrangements for the investigation of serious crimes investigated abroad should be revisited to reflect the principle that an independent police force should investigate); and Recommendation 5 (the 3 service police forces should be brought within the civilian system of oversight).

<https://www.libertyhumanrights.org.uk/sites/default/files/Military%20Justice%20-%20Proposals%20for%20a%20fair%20and%20independent%20military%20justice%20system.pdf>

A summary of our current recommendations is contained in the Executive Summaries section of this report in the pages that follow.

The main report is in three parts.

Part 1 looks at some current aspects of the armed forces own system of criminal justice (more commonly referred to as the Service Justice System), that are in need of attention, discussion and reform.

Part 2 looks at the system whereby service personnel can raise complaints about their treatment in the armed forces (also referred to as the service complaints system), and the experiences of some of our clients.

Part 3 addresses some of the myths that abound about the impact of the rule of law and human rights on the battlefield and what the series of measured, restrained court judgments that have come out of the wars in Iraq and Afghanistan really mean for our armed forces and civilians. Inevitably, the latter chapter has to explore some of the recent case-law in this area, in order to demonstrate how those judgments have been so unfairly misrepresented by some.

It is our hope that this report, and, more importantly, the experiences of our clients, demonstrates the indisputable value of the Human Rights Act for serving men and women. Attacks on the Human Rights Act are never made in their interests and are, at heart, fundamentally about little more than wanting to turn a blind eye. Our armed forces deserve better.

Emma Norton
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Liberty
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ACKNOWLEDGEMENTS

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EXECUTIVE SUMMARIES

PART 1

CRIMINAL JUSTICE AND THE ARMED FORCES

There are around 190,000 serving in the armed forces. They serve in the Naval Service, the Army, the Royal Air Force and the Reserves. They are based in the UK and abroad. This means that any system of law that applies to them has to be portable - i.e. the armed forces need to be able to take it with them wherever they go in the world.

Service personnel are also subject to two different criminal legal jurisdictions: civilian law and service law. Civilian law includes the same criminal laws that all of us are bound by. Service law includes all the military offences that would not normally apply to a civilian, like assisting an enemy or committing an act of mutiny or failing to obey an order. But, if accused of a crime that would constitute a crime under both service and civilian law (such as, e.g. rape or sexual assault) or if they become the victim of such a crime, service personnel may be dealt with either by the civilian justice system or the Service Justice System. As we shall see, there is a considerable lack of clarity about which system should apply in any given situation.

As a general principle, the civilian justice system is supposed to take precedence over the Service Justice System. But if an offence is alleged to have occurred abroad, our civilian system of justice will not apply and there needs to be a way of dealing with this. The portable Service Justice System addresses this problem through its system of Service Police, service prosecutors and Court Martials which can work anywhere in the world. But all too often, including

when service personnel are in the UK and the system of civilian criminal law is available, it is not being used. Instead, Service Police are investigating a considerable number of serious UK-based criminal cases when they ought not to be, suggesting a significant degree of mission creep. The various policies and protocols in place that are supposed to deliver clarity in terms of which jurisdiction ought to apply in what circumstances are at best opaque or worse, have the effect of excluding the civilian justice system entirely. Offences short of murder, no matter how serious (and which may include rape or other serious sexual assaults), can be and are being dealt with by the Service Justice System and not the civilian system. This should not be happening and the repercussions can be very serious indeed. The quality of Service Police investigations, both in relation to the people that have approached Liberty and also as indicated in some notable remarks by some of the Judge Advocates overseeing criminal proceedings, can be poor.⁵ Outcomes at Court Martial for victims of alleged rape are extremely poor, paling even in comparison with civilian conviction rates, with just 2 of the 48 rape cases that got to trial in Court Martial in 2017 resulting in a conviction.

The true extent of sexual offending in our armed forces is not known: the MOD does not appear to obtain or publish any data about serving personnel who are dealt with in the civilian system, publishing only data that it has collected from the Service Justice System.

⁵ At the collapse of the trial of a number of Army instructors at the Army Foundation College at Harrogate in March 2018, the Judge Advocate, dismissing the case, took the opportunity to fiercely criticise the conduct of the Royal Military Police that had investigated the allegations, describing the investigation as 'seriously flawed'. Scathing about the way the RMP had handled the investigation, the Judge Advocate noted the long delays in taking statements and that evidence had been lost or ignored. The Judge Advocate concluded that the RMP had carried out the case "in direct breach of their duty to investigate fairly and objectively". <https://www.bbc.co.uk/news/uk-england-york-north-yorkshire-43458416>. Such criticisms are familiar to a number of clients of ours, including a complainant in a sexual assault case whose alleged assailant was acquitted in the context of critical remarks by the Judge Advocate about the conduct of the RMP; and the family of the late Cpl Anne-Marie Ellement who were provided with a formal apology from the RMP for their handling of her complaint of rape. The RMP were criticised by the JAG at the end of that trial, too.

The MOD further limits the usefulness of this data by excluding any sexual offences that are not found within the Sexual Offences Act 2003 and which are located in a range of other statutes. There is also evidence to suggest that sexual offences have been downgraded so that they become a non-sexual offence and therefore can be dealt with by a Commanding Officer and not have to go to court at all.

These problems arise from both culture and expertise. In an environment where women are already a significant minority, very particular care will need to be taken to ensure that unhealthy and predatory attitudes do not prevail. Unhealthy attitudes towards women remain a significant problem across all walks of life, both within the armed forces and beyond. But there is something special about the armed forces and the fact that women are in such a stark minority, that creates a heightened risk of unacceptable behaviour. Steps are being taken to address this⁶, but it is still a significant problem. And then there is the matter of expertise. The investigation of serious sexual crime requires very particular skill and expertise which the Service Police are likely to lack, certainly when compared to specialist civilian police teams with far greater experience of investigating sexual offences. Part of the problem is that they simply are not dealing with these kinds of cases in sufficient volumes or with sufficient regularity, when compared to civilian police, so they do not build up the necessary experience. We propose a number of potential solutions, all of which will have the effect of embedding greater independence and expertise, both in the UK and abroad, in the way serious crimes in the armed forces are dealt with.

⁶ See, for example, “British army chiefs pledge action on sexual harassment”, *Financial Times*, dated 8 September 2018: <https://www.ft.com/content/ab4f3760-b27b-11e8-99ca-68cf89602132>

RECOMMENDATIONS

All of the recommendations that follow are essentially about bringing Service Law into line with the most basic tenets of natural justice, so that the system is not only fair but seen to be fair to service people and their families.

Rape offences in the UK

1. Immediately and as a matter of the utmost urgency, for the offence of rape be added to the list of “very serious offences” listed in Home Office Circular 028/2008 as an offence that must always be investigated by the civilian police, prosecuted by the Crown Prosecution Service and sent to trial at Crown Court. This recommendation remains outstanding from Liberty’s previous report.

All serious offences including sexual assault in the UK

2. In any event, for all serious offences (which should include sexual assault and grievous bodily harm offences) to be investigated by the civilian police and not the Service Police, prosecuted by the Crown Prosecution Service and sent to trial at Crown Court.
3. That any decision to downgrade an allegation of sexual assault from an indictable (equivalent) offence to a summary offence (which may as a consequence be dealt with by a Commanding Officer sitting alone) be subject to an independent review by the CPS.
4. That the sexual offences of creating or possessing indecent images of children, possession of extreme pornographic images, revenge porn offences, and sexual communications

with a child and criminal harassment offences, be added to the MoD published annual bulletin of sexual offences in the Service Justice System.⁷

Create a single Service Police force

5. For the remaining offences that ought to be dealt with by Service Police (non-serious criminal offences, military offences and, potentially, serious offences committed abroad see below), abolish the 3 separate branches of the Service Police and create a single Service Police body.

Embed Service Police in UK civilian police forces

6. Embed those single Service Police officers within UK-based civilian police forces, with secondments to the Services to maintain their military skills and so that they can deploy with forces abroad.

Offences outside the UK

7. In relation to allegations of serious criminal offending involving members of the armed forces outside the UK, that the principle of civilian involvement in criminal investigations be accepted and options explored which may include:
 - a. Service Police (as a single force) being trained and embedded within civilian forces, available to deploy as needed;
 - b. using local systems of criminal justice (in Germany, for example);
 - c. co-working within teams comprising both Service Police and civilian police (as occurred in the investigation into the

allegation of rape against 2 former soldiers by the late Cpl Anne-Marie Ellement); and/or

- d. Service Police operating locally but under the direction of UK-based civilian police supervising and directing remotely.

Oversight of the Service Police

8. That the Independent Office of Police Conduct (IOPC) or other wholly independent, expert and appropriately funded body be provided with the powers and resources to fully investigate complaints and to undertake meaningful oversight of the Service Police.

In the Court Martial

9. Boards (juries) at the Court Martial are permitted to include "Other Ranks".
10. The number of members summonsed to sit on a Board to be increased and that unanimous verdicts be requested in the first instance.
11. The role of President of the Board be abolished and replaced with a system akin to that of jury foreman in the civilian jury system.

Powers of a Commanding Officer

12. That the power of a Commanding Officer to keep an accused person in custody pursuant to s99 AFA or to order the release of an accused person pursuant to s108 AFA be subject to review, with the objective of ensuring such powers vest in a qualified police officer of appropriate seniority or the Court.

⁷ *S1 Protection of Children Act 1978 (as amended); s160(10) Criminal Justice Act 1988; s63(1) Criminal Justice and Immigration Act 2008; s33(1) Criminal Justice and Courts Act 2015; s67 Serious Crime Act 2015; ss1, 2A, 4, 4A Protection from Harassment Act 1997, respectively.*

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PART 2

THE SERVICE COMPLAINTS SYSTEM

Any serving or former serving members of the UK armed forces, in regular or reserve service, can make a complaint if they feel they have been wronged in any matter relating to their service including bullying, harassment, discrimination and biased or improper behaviour. However, despite reforms introduced in 2016, the present system is still not working in the interests of service personnel, particularly those who have suffered bullying, harassment or discrimination. The Service Complaints Ombudsman (and her predecessor) has repeatedly declared that the service complaints system is neither efficient, effective nor fair for service personnel. As our clients' experiences demonstrate, the service complaints process for those who have suffered sexual violence and harassment can be re-traumatising. The length of time it takes to complete a service complaint investigation is excessive. Outcomes can be very poor indeed. For someone who wishes to complain about the conduct of a member of the Service Police there is, inexplicably, twice the number of stages of appeal to go through before they get to the independent Ombudsman. The process is deeply bureaucratic and riven with delay. The experiences of Liberty's clients are reflected in various other surveys, which indicate very poor outcomes and low rates of satisfaction for those who have lodged complaints of harassment, with three-quarters of those who made a formal complaint saying that they had suffered negative consequences as a result, and nine in ten considering leaving the Army.

RECOMMENDATIONS

13. In cases involving sexual and racial harassment, the Ombudsman ought to be available to complainants as a first appeal stage.
14. As recommended by the Ombudsman, the MoD should commission independent research into the reasons why so many women and BAME people are complaining of bullying, harassment and discrimination.
15. That those who wish to lodge a complaint should be encouraged and helped to receive independent advice and support for their service complaints.
16. For all staff involved in the complaints process to be informed that if a complainant has the help of an independent person (such as a solicitor or other form of advocate) that they are to send all communications via that person unless requested otherwise.
17. That sufficient numbers of female assisting officers be set in place to assist female (or male) complainants where requested.
18. That a single point of contact be arranged for sensitive or complex service complaints (such as complaints arising in the context of an allegation of sexual assault, sexual harassment, other serious discriminatory conduct or bullying), so the complainant does not have to deal with unsettling staff changes.

19. That where a complaint arises in the context of an alleged sexual assault, there will be a presumption that the complainant will not be required to be re-interviewed about his/her allegation where a statement has already been prepared (either in writing as part of the complaint, as part of the criminal proceedings, or a combination of both).
20. That family members (including partners) of a service person who has cause to complain, be given standing to lodge a complaint (including to the Ombudsman), including where the service person is deceased.

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PART 3

HUMAN RIGHTS IN ARMED CONFLICT

The case law that has flowed from the wars in Iraq and Afghanistan has established that war is difficult and different - but it is not a legal black hole.

The European Convention on Human Rights requires the accountable use of lethal force, with effective and realisable safeguards, which include investigations into credible allegations of abuse. Combatants and civilians taken into custody are entitled to certain minimum procedural protections. The Convention requires that victims and soldiers have a means of redress, where fundamental human rights and the laws of war are breached.

Despite hyperbole from the MoD and others, the implications of these judgments are measured, limited, reasonable and essentially amount to the propositions: don't kill unless it's a lawful act of war, don't torture and ill-treat civilians or combatants under your control - ever - and enable some minimum procedural standards to ensure people are not held in indefinite extra-judicial detention.

Far from creating uncertainty, the Convention clarifies and structures the military's use of lethal force and its powers of detention in ways the Army itself ought to recognise is to their benefit. Attacks on the Human Rights Act and deliberate misrepresentations as to what our courts have actually said are not made in the interests of soldiers or their families but rather are in the interests only of the powers that be. Upholding the Human Rights Act and the European Convention on Human Rights is entirely consistent with the reasons given for our intervention in these conflicts in the first place.

The Government's stated intention to derogate from the Convention in future armed conflict would fundamentally undermine such principles and safeguards, would not address the issue that appears to be of principal concern to the Government (namely the ability of civilians and detainees to bring claims founded upon violations of Articles 3 and 2 of the Convention) and would send a terrible message to rights-abusing regimes around the world.

RECOMMENDATIONS

21. The Government should undertake not to derogate from the European Convention on Human Rights in future armed conflicts.

GLOSSARY AND DEFINITIONS

Armed Forces Act 2006 (AFA) - an Act of Parliament. It came into force on 31 October 2006

Assisting Officer (AO) - a person who is appointed by the chain of command (or chosen by the complainant/respondent) to provide help and support to a complainant or a respondent during the service complaints process

Commanding Officer – a person in charge of a defined group of service personnel who has responsibility for their employment, administration and welfare. This includes dealing with alleged indiscipline and misconduct using powers similar to those of a magistrate. A Commanding Officer has to be formally appointed. Normally, s/he is the equivalent of NATO Code OF-4 (i.e. a Lt Commander (Navy), a Lt Colonel (Army), or a Wing Commander (RAF))

Court Martial – the military court. It has global jurisdiction over all service personnel and civilians subject to service discipline and hears all types of criminal case including murder and serious sexual offences

Crown Prosecution Service (CPS) - the CPS prosecutes criminal cases that have been investigated by the police and other investigative organisations in England and Wales

Director of Public Prosecutions (DPP) – the head of the CPS

Director of Service Prosecutions (DSP) – the head of the Service Prosecution Authority

European Convention on Human Rights (ECHR) – an international human rights treaty of the Council of Europe which was brought into force in the UK by the Human Rights Act

INTRODUCTION

EU Charter on Fundamental Rights & Freedoms – an international human rights charter of the European Union

Geneva Conventions – the rules of international humanitarian law comprising 4 conventions and 3 additional protocols that regulate the conduct of armed conflict and seek to limit its effects, in particular in relation to the treatment of those who are or are no longer taking an active part in hostilities

Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) – an independent inspectorate that assesses the effectiveness and efficiency of police forces and fire services

Human Rights Act 1998 (HRA) – in force since 1 October 2000, the Act enshrined the European Convention on Human Rights (ECHR) into UK law

Independent Office of Police Conduct (IOPC) - oversees the police complaints system in England and Wales. The IOPC investigates the most serious matters, including deaths following police contact and sets the standards by which the police should handle complaints

International Covenant on Civil and Political Rights (ICCPR) – an international human rights treaty which was adopted by the UN General Assembly in 1966. It was ratified by and came into force in the UK in 1976

Judge Advocate – a judge of the Court Martial

Judge Advocate General – the head of the Service Justice System

Ministry of Defence Police (MDP) - a civilian police force, which is part of the Ministry of Defence. The MDP are not part of the Service Police

Non-Commissioned Officer - a designated officer, as a consequence of their seniority and experience

Office of the Service Complaints Ombudsman (OSCO) - the Ombudsman provides independent and impartial oversight of the

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Service complaints system for members of the Armed Forces

Officer - a member of the armed forces who holds a position of authority. In its broadest sense, it may include non-commissioned officers and warrant officers. However, it usually refers to commissioned officers, those in the armed forces who derive their authority from a commission

Other Ranks - a general term used to describe those in the armed forces who are not commissioned officers

Provost Marshal – the head of an individual Service Police force

Service Complaints Commissioner (SCC) - the SCC was the predecessor to the Office of the Service Complaints Ombudsman

Service Justice System – the system of investigating, prosecuting and trying alleged offences within the Armed Forces

Service Police - a generic term to describe the 3 Service Police forces, the Royal Naval Police (RNP), the Royal Military Police (RMP) and the Royal Air Force Police (RAFP)

Service Prosecuting Authority (SPA) - the role of the SPA is to review cases referred to it by the Service Police or Chain of Command and to prosecute appropriate cases at Court Martial or Service Civilian Court. It was formed on the 1st January 2009 (incorporating the Navy Prosecution Authority, Army Prosecuting Authority and Royal Air Force Prosecuting Authority)

Royal Air Force Police (RAFP) – the Service Police for the Royal Air Force

Royal Military Police (RMP) – the Service Police force for the British Army

Royal Naval Police (RNP) – the Service Police force for the British Navy

Warrant Officer - an officer designated as such by warrant (as distinguished from a commissioned officer or a non-commissioned officer).



PART ONE

CRIMINAL JUSTICE

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CRIMINAL JUSTICE

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ARMED FORCES

The Legal Framework

1. As at 1 April 2018, there were 194,140 people serving in the UK armed forces. This comprised all full-time service personnel in the Naval Service, British Army and the Royal Air Force as well as the very significant numbers of personnel serving in the Reserves.⁸
2. These service men and women are stationed in military bases at home and abroad in Cyprus, Germany, Gibraltar, Kenya, Canada or the USA. They may be sent to train in a range of other countries such as Kenya, Canada, Brunei, Germany or the Baltic states. They may be deployed on military operations in Afghanistan and Iraq, which can include active combat, training local forces, undertaking

peace-keeping duties or helping with humanitarian relief.⁹ Wherever they are, service men and women still have to deal with the same day-to-day tasks as civilians – dealing with the everyday aspects of employment, socialising and handling personal relationships. The legal framework governing the behaviour of members of the armed forces has to reflect both the mundane and the distinct elements of service life.

3. In England and Wales, a range of statutes and common law sets out the criminal law. Local police forces investigate allegations of criminal behaviour by civilians and the Crown Prosecution Service (CPS) decides whether to prosecute. For indictable criminal offences, the Crown Court will have jurisdiction with a jury deciding whether the individual was guilty and a judge deciding what sentence is appropriate. For summary offences (i.e. an offence which may be tried in court without a jury), both functions are undertaken by a magistrate.
4. However, the Service Justice System is different. It places a larger set of legal obligations on members of the armed forces and uses different mechanisms for investigating, prosecuting and trying both criminal and military offences. It also addresses the practical challenges that arise given the fact that members of the armed forces will not always be stationed within the jurisdiction of the United Kingdom.

⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/707538/20180401_SPS.pdf

⁹ *The most recent MoD published statistical bulletin is from 2016. It gives a breakdown of the numbers of UK armed forces deployments around the world and including the UK. At that point, there was a total of 151,000 "UK regular personnel", of which 13,850 were deployed outside of the UK. Document here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/564757/UK_Armed_Forces_Personnel_Deployments_and_Military_Presence_of_UK-Regular_Personnel.pdf*

5. Members of the armed forces are, in addition to civilian law, subject to service law, which is set out in the Armed Forces Act 2006 (AFA)¹⁰. The AFA imposes on those who are subject to service law the usual obligations of the criminal law of England and Wales (via s42 AFA). It also creates specific offences for those in the armed forces that would not apply to a civilian living a civilian life, such as misconduct, communicating with the enemy, insubordination or mutiny. These offences are all listed in Part 1 of the AFA.
6. Ordinarily, an individual will only be subject to the criminal law of England and Wales while within the territory of England and Wales. However, under s367 AFA, every member of the regular forces is subject to service law at all times. In this way, service law is portable. This means that members of the armed forces are subject to service law – which includes domestic criminal law – both at home and when overseas.
7. Each branch of the armed forces has its own police force – the Royal Navy Police for the Naval Service, the Royal Military Police for the Army, and the RAF Police for the Royal Air Force (collectively, the “Service Police”). The Ministry of Defence Police is a civilian police force that protects defence assets.
8. The Service Police all have similar powers to those of civilian police forces – such as powers of arrest, search powers and the ability to use reasonable force in certain

circumstances. In broad terms, both the Service Police and civilian police forces have jurisdiction to investigate criminal conduct by members of the armed forces, whereas only the Service Police have jurisdiction to investigate military offences. The way in which the Service Police and civilian police are supposed to work out which force should take on what case is set out in protocols, but there is and always has been a presumption that civilian police forces should have primacy. We say more about this, below (see “the Jurisdiction Problem” at paragraph 11).

9. A Commanding Officer also has broad powers of investigation and can decide whether to investigate certain matters him or herself, or whether to refer it to a Service Police force.
10. There is a single Service Prosecuting Authority (the SPA) for all three armed forces services, which performs a similar role to that of the Crown Prosecution Service (CPS) within the civilian system. The head of the SPA is the Director of Service Prosecutions. Both the CPS and the SPA have jurisdiction to prosecute criminal offences. If the CPS prosecutes the case, it may go to Crown Court (although CPS lawyers can and do prosecute cases within the Court Martial). A case prosecuted by the SPA will go to the Court Martial. The Court Martial, a military court, has jurisdiction to try offences listed in the AFA, including criminal offences. A Commanding Officer can hear summary offences, including criminal offences, much like a magistrate.

¹⁰ Armed Forces Act 2006. <http://www.legislation.gov.uk/ukpga/2006/52/contents>

The jurisdiction problem

11. Service personnel are essentially subject to two criminal justice systems. It is a system of concurrent jurisdiction. If accused of a crime, or if the victim of an offence, the matter may be dealt with either by the civilian system (i.e. it can be investigated by the local civilian police force and prosecuted at a magistrates or Crown Court), or within the Service Justice System (i.e. it can be investigated by the Service Police and prosecuted by the SPA at the Court Martial). However, it is an established and important principle that where there are overlapping civilian and service jurisdictions and authorities within the United Kingdom, civilian jurisdiction and the civilian authorities should take precedence.
12. This principle is reflected in a number of different documents, including the Protocol on the exercise of criminal jurisdiction in England and Wales that was agreed between the Director of Service Prosecutions (the head of the SPA), the Director of Public Prosecutions (the head of the CPS) and the Ministry of Defence in 2011 then updated in November 2016 (the Prosecutor's Protocol). The principle may also be found in the Home Office Circular 028/2008, which governs the relationship between the Service Police and civilian police forces (the Police Circular). Copies of both are included as annexes at the back of this report.¹¹

¹¹ Annex 2: *Protocol on the Exercise of Criminal Jurisdiction, 2016 (the Prosecutor's Protocol); and Annex 3: Home Office Circular 028/2008 (the Police Circular).*

The Prosecutor's Protocol

13. Despite the clarity of the stated principle that civilian jurisdiction takes precedence, the Protocol immediately subjects it to a number of caveats, which include the following:
“Offences alleged only against persons subject to Service law which do not affect the person or property of civilians should normally be dealt with in Service proceedings and not by a civilian court”.
14. This means that criminal cases, no matter how serious, where both the victim and accused are serving members of the armed forces are most likely to be dealt with within the Service Justice System and not the civilian justice system. This completely contradicts the presumption that civilian jurisdiction should take precedence.
15. The Prosecutor's Protocol also requires that:
“Where there is an issue as to the appropriate jurisdiction in which to deal with a suspect who is subject to Service law, the Director of Public Prosecutions and the Director of Service Prosecutions should consult in relation to the appropriate jurisdiction to deal with the case, acknowledging that the final decision rests with the Director of Public Prosecutions.”
16. It appears that little, if any, consultation actually takes place. Liberty submitted a Freedom of Information Act request to the Director of Public Prosecutions on 15 August 2017. We enquired as to how many occasions since the signing of the Protocol in 2011 had the DPP been called upon to make a final decision of this nature and, in those cases, how many

times had the DPP concluded that the civilian authorities had jurisdiction. The Crown Prosecution Service confirmed on 15 September 2017 that it “holds no record of any case since 2011 in which the Director of Public Prosecutions has been asked to make a final decision on the (relevant) paragraph ... of the Protocol”.

17. It appears that the Service police and prosecutors are being left to deal with matters as they see fit.

The Police Circular

18. The Police Circular (more on which below, in the particular context of rape and sexual assault), similarly starts with an apparently clear assertion that “general responsibility for the maintenance and enforcement of the criminal law throughout England and Wales rests with local, civilian police forces”. However, the Circular goes on to create a number of rather vague exceptions to this general rule.
19. The Circular directs that if Service Police or Ministry of Defence (MoD) Police are the first on the scene at an incident where they do not have jurisdiction, they will do what is immediately necessary but no more. The Circular directs that guidance on the initial action to be provided to non-police staff will rest with the local civilian police force, unless the MoD Police or Service Police “agree that it lies within their respective jurisdiction and criteria for criminal investigation”. There is no definition of what this “criteria for criminal investigation” is, although there are some vague assertions that “in some cases it will be more appropriate for the Ministry of Defence Police to deal with defence-related crime” and “a flexible approach, based on

consultation and agreement at local level, is encouraged where the respective police forces discuss who is best placed to take action based on availability of resources, jurisdiction and public interest”.

20. The first and most obvious point to note is that, given the existence of a dual system of jurisdiction and the lack of clarity in this document, it will not be necessarily apparent at that early stage who has jurisdiction. Service Police on the ground at the earliest stage therefore are unlikely to know if this is a case where they will be investigating or not. This makes it hard for them to know if all they are required to do is take steps to secure the scene, or whether they should start investigating the offence. But it is absolutely crucial that clarity is brought to bear on who has responsibility in this first ‘golden hour’.¹²
21. The damage that may be done to evidence within the first minutes and hours of a criminal offence being committed may be very serious indeed. One only has to reflect upon what happened in the case of the late Cpl Anne-Marie Ellement to understand the very serious problems that can arise if independent and sufficiently experienced police are not in charge right from the outset of a case. In her case, there was a series of failings, which included: basic and fundamental police failures in dealing with the suspects in the immediate aftermath of the report of rape; failures in

¹² *The golden hour is the term used for the period immediately after an offence has been committed, when material is readily available in high volumes to the police: <https://www.app.college.police.uk/app-content/investigations/investigation-process/#golden-hour>*

the police interviews of the suspects; errors in the taking and testing of crucial samples and early independent medical advice not being sought.¹³

22. In a more recent example in a case in which Liberty is representing the female soldier concerned, her report of sexual assault (which took place in the UK) to her chain of command resulted in the Service Police being called out. It does not appear to have occurred to the chain of command in that case to call the civilian police. The RMP attending at no point consulted with the civilian police nor is there evidence that they considered whether the matter would be better dealt with by them. The soldier concerned did not know that she could have, had she so wished, contacted the civilian police herself, trusting that the RMP would investigate adequately. She states that they did not do so by - amongst other things - failing to take her statement by video-recorded interview, not ensuring that specially trained Sexual Offence Investigations Trained (SOIT) officers took her statement, by failing to take a sufficiently detailed account from her at the outset and by failing to interview all potentially relevant witnesses.¹⁴ Her alleged assailant was acquitted at Court Martial.

13 The RMP and the Director of Service Prosecutions issued official apologies to the family for the conduct of the case. Judge Advocate General Blackett criticised the culture of the RMP and the length of time it had taken for the case to reach court. Addressing Ellement's family directly, he said: "This case should have been heard five years ago and I apologise to you that it has taken so long to resolve this issue. The extreme delay ... prejudiced the defendants, Anne-Marie and Justice generally."

Press release: <https://www.libertyhumanrights.org.uk/news/press-releases-and-statements/royal-military-police-formally-apologises-family-late-corporal>

RMP formal apology to the family of the late Sgt Anne-Marie Ellement: <https://www.libertyhumanrights.org.uk/news/press-releases-and-statements/royal-military-police-formally-apologises-family-late-corporal>

14 <https://www.thetimes.co.uk/article/military-police-unfit-to-run-sex-assault-cases-50j56mtrn>

23. A further recent example known to Liberty suggests a similar approach. A soldier reported a sexual assault (in the UK) and it was the RMP that investigated. She too has reported a string of blunders which she is confident is the reason for her alleged assailant's acquittal at Court Martial. These included the fundamental failure to take witness statements from a number of potential witnesses to the actual assault itself. At acquittal, the Judge Advocate expressed his concern in open court about the conduct of the RMP. This matter is presently the subject of a formal complaint.

24. The older cases of Pte Sean Benton and Pte Cheryl James, two of the four young trainees to die at Deepcut barracks in Surrey in 1995, also demonstrate what is potentially at stake. It was following those catastrophic failings that the civilian and Service Police forces agreed to memorialise the position now reflected in the Police Circular, that in all cases of sudden deaths on military property, the civilian police must have conduct of the investigation. In those Deepcut cases, scenes were not cordoned off properly, untrained staff were used to search for missing bullet casings, soldiers trampled over potential evidence, trainee soldiers were used to clear up one of the scenes, basic checks on weaponry were not undertaken, the bodies were moved, the weapons were moved, some soldiers attended the scene for no reason other than to satisfy their curiosity and there was little clarity as to who had attended the scene and when, and no accurate logs were kept. This meant that the subsequent police investigation was fundamentally compromised, leading HHJ Rook QC, the Crown Court judge appointed to hear the fresh inquest into the death of Pte Benton, to observe that

no investigation could subsequently 'replace that which has now been permanently lost'.¹⁵

25. In some cases, where a serious incident has occurred on barracks or overseas, it will inevitably be the Service Police that will be first on the scene, simply because they may be closest by or because they are the only available force. In relation to all UK-based cases of serious crime, we suggest that civilian police must be notified at the same time as Service Police and called to attend urgently. In such circumstances it is likely that it would only be a matter of some minutes if at all where Service Police are likely to be in attendance and civilian police not. As soon as civilian police are in attendance the presumption must be that they will have conduct of the investigation. If there are reasons why that may not be appropriate or necessary, there needs to be a formal and recorded process whereby this is discussed and agreed and/or a final decision made, by the civilian authorities. This vaguely worded Protocol is unlikely to be within the immediate toolkit of information and guidance available to staff on the ground and manifestly does not fulfil the function of assisting to determine who ought to have jurisdiction and conduct of a case. Liberty has not been able to locate any other guidance or criteria that would assist

¹⁵ *HHJ Rook QC: "3.12 The forensic evidence that would have assisted to illuminate what happened on 9 June 1995 was not gathered at the time. Successive Chief Constables of Surrey Police have frankly acknowledged that Surrey Police should have but did not retain primacy for the original investigation into Sean's death. An apology to Sean's family for this failure to retain primacy was made in 2003 and reiterated at this inquest; but an apology cannot replace that which has now been permanently lost. 3.13. Even by the contemporary standards of 1995 the incident was neither controlled nor investigated in the way that one might have expected of a sudden and violent death. Early assumptions made at the scene led to an absence of contemporary ballistics evidence, a paucity of scene investigation and only very brief contemporary witness accounts being recorded. Dr Cary, an independent forensic pathology expert, identified as many as nine fundamental failings in the quality of the original scene investigation. Consequently, the forensic evidence that has been available in 2018 is woefully lacking. Despite the efforts of the doctors and scientists who have assisted me as expert witnesses, Surrey Police's shortcomings in 1995 means that all have been hampered in coming to their opinions by incomplete information." www.libertyhumanrights.org.uk/bentonfindings*

staff on the ground to make decisions in individual cases. If such criteria exist, they should be published and reviewed urgently.

26. We say more about the situation abroad, below.

The Tri-Services Investigations Policy¹⁶

27. One relatively recent arrangement that was introduced after the case of Cpl Anne-Marie Ellement was an agreement that, where a member of one branch of the Service Police is him/herself implicated in a serious criminal offence, it is presumed that another branch of the Service Police should investigate it. In that case, both victim and alleged rapists were Royal Military Police soldiers. Yet it was the RMP that investigated, fundamentally compromising the independence of the investigation.¹⁷ In future cases of this nature (whether they take place at home or abroad) it is a different branch of the Service Police that should now investigate.

28. But this Tri-Services Investigations Policy is very limited in its application. First of all, it applies only where Service Police themselves are suspected of committing a criminal offence¹⁸ (which will hopefully be very rare); or where their conduct may have entailed a violation of Articles 2 (the right to life) and/or 3 (the right not to be subjected to torture or inhuman or degrading treatment) of the European Convention on Human Rights. Where such conduct is suspected, an alternative service police branch is supposed to investigate it.

¹⁶ Annex 4: *Tri Services Investigations Policy, 21 May 2015*

¹⁷ *The Ministry of Defence repeatedly declined to refer the alleged rape for reinvestigation notwithstanding the serious flaws in the original investigation that had been shown to them. The family threatened to bring a judicial review of the MOD's failure to refer the matter to police. Following that threat of judicial review proceedings, a fresh joint investigation was conducted by the RAF Police with Bedfordshire constabulary (a civilian force).*

¹⁸ *i.e. an offence listed in Schedule 2 of the AFA 06, which is an extensive list of criminal and military offences.*

29. The Tri-Services Policy does not address wider concerns about a general lack of competence, independence and impartiality within the branches of the service police and their suitability to investigate their own service. Further, the best judge of whether Articles 2 and 3 of the ECHR are engaged will not be the Service Police themselves and no guidance appears to exist to assist the Service Police to understand what this might mean. The policy is worded in very general terms and offers no practical examples of how it ought to apply in practice. And Liberty is concerned that the Tri-Services Policy may not be being put into practice anyway. FOIA requests submitted by Liberty to check the extent to which it is being applied have been declined on grounds of cost. It is clear that the Ministry of Defence is not monitoring the extent to which the Tri-Services Policy is being applied, if it is being applied at all.¹⁹

A lack of clarity

30. In the absence of clarity and in light of the limited application of the Tri-Services Investigations Policy, there appears to be a risk that the military authorities are investigating far more offences (and more serious offences) than the Prosecutor's Protocol and Police Circular had originally envisaged they should. For example, the last published data on the extent of sexual offending in the armed forces indicated that there were, in 2017, 123 investigations by the RMP into allegations of offences arising from the Sexual Offences Act 2003.²⁰

19 FOIA response from MoD to Liberty dated 14 June 2018. We asked: "Since the coming into force of the Tri-Services Policy dated 7 November 2012 (updated 21 May 2015), on how many occasions has the policy been invoked? (i.e on how many occasions has a Provost Marshal of a service police force referred a matter to an alternative service police force for investigation?)" The reply stated: "this request is exempt under s12 of the FOI Act because it has been calculated that action to determine if MOD holds any information in relation in scope of the request, and extracting the relevant information, where held, would exceed the cost limit set by the FOI Act".

20 See page 4 of the MoD's statistics on sexual offences in the service justice system 2017, published 29 March 2018: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/694466/20180326-Sexual_Offences_in_the_SJS_Official_Stats_2017_FINAL.pdf

The vast majority of these incidents took place within the UK.²¹ Given the presumption of jurisdictional primacy, this should not be happening.

31. The exception to the presumption of civilian jurisdictional precedence, where the perpetrator and victim are both serving members of the armed forces, is further reflected in ministerial statements (and in ministerial correspondence with Liberty). In a written ministerial statement of 2013, it was explained that the Police Circular sets out the arrangements between the various police forces and defines investigative jurisdiction, with primacy resting with the civilian police, "although the RMP may take the lead in an investigation if both the suspect and the victim in a particular case are serving members of the Armed Forces."²²
32. Liberty's view is that this kind of situation – where the perpetrator and victim are both serving and where the incident takes place on military property - is precisely that which should require there to be a process that is completely and rigorously independent. This is an important point of principle, and is particularly important in the context of the armed forces where lives are so intertwined. A situation where both victim and perpetrator of the crime are service personnel, often based on the same base or in relatively close geographical proximity to each other, significantly increases the chances that they will be known to one another in an employment, social or other context.

21 Ibid, pg 6

22 Hansard, 25 April 2013, written answer from Mark Francois to Madeleine Moon, Column 1250W

Where crimes are alleged to take place in such a context, it is absolutely vital that investigations are conducted by a police force that is, and is seen to be, genuinely independent.

33. Liberty has also received anecdotal evidence that commanding officers have been known to request the RMP delay in arresting a suspect for reasons unconnected to the criminal investigation. This should not come as a surprise given how the AFA specifically envisages the Commanding Officer playing an important role in decisions being made about suspects, e.g., whether or not a suspect ought to be granted bail. We say more about this below (see “Certain aspects of the Role of the Commanding Officer in the Service Justice System” at paragraph 105). And in its report dated July 2015 entitled “An Inspection of the Leadership of the Royal Military Police in relation to its investigation” at paragraph 105, Her Majesty’s Inspectorate of Constabulary (HMICFRS) noted that the RMP considered themselves to be “soldiers first” and police officers second.²³ HMICFRS noted that this principle was central to the strategy of the Provost Marshal and noted that the message had been interpreted by some junior and senior officers that soldiering duties and training ought to be more of a priority than policing duties and training.

As a consequence, the policing element was neglected. To some extent, this criticism was acknowledged by the Provost Marshal.²⁴

²³ <https://www.justiceinspectories.gov.uk/hmicfrs/publications/an-inspection-of-the-leadership-of-the-rmp-in-relation-to-its-investigation/>, see pp 4 and 21.

²⁴ *Ibid* page 21: “The Provost Marshal acknowledged there was some misinterpretation by some RMP officers of his commitment to “soldier first” and we found that he had reinforced his expectation in (a) training video...”

34. This is cause enough for concern and we return to the matter of whether Service Police have adequate training and experience to investigate serious offences shortly. But we suggest that the characterisation that Service Police see themselves as “soldiers first” and police officers second carries further implications than those identified by the HMIC and may indicate an ingrained lack of independence (or certainly a risk of the same) within the Service Police, who may be inclined to protect what they see the interests of the armed forces rather than to discharge their functions as police officers, wholly and truly independently of any outside pressure or influence. The risk of conflicting loyalties or a vested interest in the outcome amongst those with a strong commitment and loyalty to the armed forces is obvious. In all cases where both suspect and victim are members of the armed forces, there is greater rather than less need for independence and it is, in our opinion, perverse to have standard criteria advocating the reverse of this principle.

35. Liberty is also concerned by the reference in the Police Circular to “flexible” arrangements when determining which police force should exercise jurisdiction. Serious criminal offences, in particular rape and sexual assault must be dealt with by independent, trained and experienced officers. We anticipate that, in a situation where hard-pressed civilian police forces have the option of agreeing to matters being investigated by the Service Police, they are likely to do so. This will inevitably lead to cases being taken by whichever force is less busy rather than most qualified and appropriate to deliver an effective investigation.

36. It appears that serving personnel are not as a matter of course encouraged to approach civilian police. The vast majority of the internal guidance we have seen directs a member of the armed forces to the Service Police, not the civilian police, if they are the victim of a crime. This state of affairs was initially denied then later accepted by the Army at the inquest into the death of Pte Sean Benton (Deepcut) when the Director of Army Personal Support Group (APSG), conceded that trainee soldiers were not in fact being informed as a matter of course that they could approach civilian police. In July 2018, Director of APSG confirmed that from now on, trainee soldiers would be informed as part of their induction that they may approach civilian police and are not required to go through the military police in the event that they are the victim of crime. It is a small but significant step in the right direction. It is important that it is carried into effect, and rolled out to the wider armed forces.

37. Our fundamental position therefore is that all serious offences (the definition of which is something that can be the subject of further discussion but ought, in our view, to include serious physical and sexual assaults (including rape), as a minimum) should always be investigated by civilian, not military police.

38. Below, we focus on the position in relation to serious sexual offences, in particular.

Rape and other serious sexual offences

The extent of the problem

39. Liberty's last major report on this subject had as its first recommendation that the MoD should collect and publish annually anonymised statistics on the number of allegations of sexual assault and rape made by or against a member of the armed forces. We explained how difficult it was to come by reliable evidence of the extent of rape and sexual assault within the armed forces because the data was not being reliably or comprehensively collected.²⁵

40. Later that same year, the MoD announced that they would be publishing the data. For the third year in a row now, the MoD has released statistics on all offences arising from the Sexual Offences Act 2003 (SOA 03) and historic sexual offences that are dealt with wholly within the Service Justice System (SJS).

41. When considering the sexual offences bulletin as a barometer of the extent of the problem of sexual offending within the armed forces, two very important qualifications need to be noted:

41.1. The statistics do not include offences that are dealt with within the civilian system (as the majority ought to be, applying the presumptive rules around jurisdiction). This means the scale of sexual offending is likely to be significantly higher than these statistics indicate; and

²⁵ Proposals for a Fair and Independent Military Justice System, Sara Ogilvie and Emma Norton, June 2014: <https://www.libertyhumanrights.org.uk/sites/default/files/Military%20Justice%20-%20Proposals%20for%20a%20fair%20and%20independent%20military%20justice%20system.pdf>, page19

41.2. The figures do not include the large number of important sexual offences that are not found in the Sexual Offences Act 2003: such offences include the offences of creating or possessing indecent images of children, possession of extreme pornographic images, ‘revenge porn’ offences, sexual communications with a child and criminal harassment offences.²⁶

42. The published figures therefore do not accurately reflect the true scale of sexual offending in the armed forces. However, there are still useful pieces of information within these statistics and the figures published for 2017 warrant closer examination.²⁷

43. In 2017, there were 123 investigations conducted by the Service Police into allegations of offences contrary to the SOA 03.

44. The first thing to note is that of those, 75 were “referred to the suspect’s Commanding Officer or the Director of Service Prosecutions (DSP, the head of the SPA)”²⁸ (our emphasis). It is an important distinction. It suggests that some matters that start out as an allegation of sexual assault are being reduced to a lesser charge to enable them to be dealt with by a Commanding Officer and not

the DSP (because an offence under the SOA 03 cannot be dealt with summarily by a Commanding Officer). For example, an allegation of sexual assault (which a Commanding Officer may no longer deal with him/herself as of April 2018)²⁹ may be reduced to a battery (which a Commanding Officer may deal with). This is clearly happening because the bulletin confirms (buried in a footnote), that “investigations that were reported as sexual offences but then reclassified to a non-sexual offence have not been included” in the statistics.³⁰

45. An example may be instructive. A female service person assisted by Liberty alleged that she was sexually assaulted when a soldier lunged at her from behind, grabbing between her legs, and pulling her vagina aggressively backwards towards him. The Service Police in that case suggested to the victim (via a text message) that the allegation be reduced to a ‘battery’ to which, apparently, her assailant was prepared to admit. This would have enabled the matter to be dealt with by a Commanding Officer and to not be referred to the Director of Service Prosecutions for a decision on charge. It would also mean that the outcome would not have been recorded as a sexual offence. This matter is presently the subject of a complaint.

26 S1 Protection of Children Act 1978 (as amended); s160(10) Criminal Justice Act 1988; s63(1) Criminal Justice and Immigration Act 2008; s33(1) Criminal Justice and Courts Act 2015; s67 Serious Crime Act 2015; ss1, 2A, 4, 4A Protection from Harassment Act 1997 respectively

27 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/694466/20180326-Sexual_Offences_in_the_SJS_Official_Stats_2017_FINAL.pdf

28 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/694466/20180326-Sexual_Offences_in_the_SJS_Official_Stats_2017_FINAL.pdf, at bullet point 1, page 1.

29 The need to amend Sch 2 of the AFA 03 has been the focus of Liberty’s work since 2014. The provision (AFA 06, Sch 2(12)(at)) exempted sexual assault from the list of sexual offences which it was mandatory for a CO to refer to Service Police. It was raised in the context of the Ellement case, the Deepcut case of Pte Cheryl James and has been the subject of sustained lobbying and campaigning efforts. In October 2017, Liberty threatened judicial review proceedings against the MoD if they did not amend the law on behalf of a client, a victim of an alleged sexual offence in the armed forces. The following spring, the provision was amended to require a CO to refer all sexual assault matters to Service Police, by the Armed Forces Act 2006 (Amendment of Schedule 2) Order 2018/149 art.2(2) (March 1, 2018).

30 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/694466/20180326-Sexual_Offences_in_the_SJS_Official_Stats_2017_FINAL.pdf, page 4, footnote 1

46. The statistics remain internally inconsistent. On page 1 of the bulletin it is stated that of the 123 investigations, 75 cases led to the referral of charges against the suspect (to either the Commanding Officer or DSP); but on page 5 it is stated that of the 123 investigations, 68 cases led to the referral of charges against the suspect. This may be explained by the observation in the paragraph above (namely that the offence, after recording, has been reclassified as a non-sexual offence and disposed of via the Commanding Officer), but it is not clear.

47. The overwhelming proportion of suspects were male (115 out of 118).³¹ The vast majority of victims were female (100 of 133).³²

48. The biggest increase in sexual offences investigated by the Service Police was that of rape being investigated by the RMP.³³

49. The vast majority of suspects and victims were in the Army as opposed to the other branches.³⁴

50. The vast majority of sexual offences were investigated by the Service Police in the UK, not abroad.³⁵ This is important because the strongest argument that favours the need to retain a Service Police force for the armed forces is so that it can be taken on overseas operations when service people deploy. This evidence shows that this is not happening – they

are investigating offences in the UK.

51. In the last 3 years, in 97 of the 99 rape allegations reported, the victims were female.

52. Of the 48 rape cases that got to court martial, just 2 resulted in conviction. This is a conviction rate of 4.2%. This compares very unfavourably to the civilian justice system, which is bad enough. Recent statistics reported as a consequence of a Freedom of Information Act request by Ann Coffey MP indicate that the conviction rate in the civilian system is 32% for men aged 18-24; and 46% for men aged 25-59.³⁶

53. These figures indicate that there is something very badly wrong with the way in which the armed forces investigate and prosecute sexual crime.³⁷ The source of the problem is likely to be manifold: women are already a very significant minority in an environment where sexual harassment continues and is a serious and pressing problem – this creates an environment where attitudes towards women and their bodies can become at best disrespectful and at worst predatory. Criminal investigations are then conducted by the Service Police who lack the necessary experience and expertise to conduct investigations to a high and consistent standard. Sexist attitudes may be reflected in the very narrow range of persons who are able to be summonsed to sit on court martial boards. It appears that the court martial is not able to deliver justice for a victim of rape.

³¹ Pg 6, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/694466/20180326-Sexual_Offences_in_the_SJS_Official_Stats_2017_FINAL.pdf

³² Pg 6, *ibid*

³³ Pg 4, *ibid*

³⁴ It is important to note, when viewing these statistics, that the overwhelming majority of personnel in the services are male; and the RMP is much larger than the RNP and RAFF.

³⁵ Pg 6, *ibid*

³⁶ "Less than a third (32 per cent) of prosecutions brought against men aged 18 to 24 in England and Wales resulted in a conviction in 2017/18, the figures showed. By comparison, successful prosecutions against men aged 25 to 59 were significantly higher at 46 per cent": *The Independent*, 22 November 2018. <https://www.independent.co.uk/news/uk/politics/major-review-jury-system-date-rape-ann-coffey-labour-mp-a8645856.html>

³⁷ See also the Armed Forces Sexual Harassment Survey https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736177/20180821_Sexual_harassment_report_2018_OS.PDF and our comments upon its findings: <https://www.libertyhumanrights.org.uk/news/blog/latest-army-sexual-harassment-report-shows-drastic-changes-are-urgently-needed>

Options

Add the offences of ‘rape’ and other serious violent offences to the list of ‘very serious crimes’ that must always be investigated by civilian police.

54. The first and most urgent action (and simplest to achieve) should be to ensure that all rape allegations must always be investigated by civilian, not Service Police. This will embed institutional independence in the investigation and enable civilian police officers, specially trained in sexual crime, to take on these cases, as would happen in the civilian system. (We address the issues that arise if an incident occurs abroad, below).
55. This can be done quickly and easily and the principle already appears to be accepted, in relation to what the MoD refers to as “very serious crimes”.

Paragraph 14 of the Police Circular states:

“Very Serious Crimes: At any incident involving death or serious injury likely to lead to death or the investigation of terrorism, murder or manslaughter in the UK and National Security cases, the Ministry of Defence Police and the Service Police will take immediate action necessary at the scene only. They will simultaneously inform the local Home Office Police Force who will lead the investigation”.³⁸

56. The Police Circular reflects the principle of jurisdictional primacy described above. As can be seen, all deaths on military property in the UK are now investigated by civilian police as a matter of policy and practice. This was not

always the case. The sudden deaths of 4 young trainee soldiers at Deepcut barracks in Surrey between 1995 and 2002 and the years of suspicion and public concern that followed, flowed in large part from the fact that it had been the Royal Military Police (Special Investigations Branch), not the civilian police, that had assumed responsibility for the scenes and the extremely poor “investigations” that followed.

57. The Police Circular appears to reflect the recognition that, in matters of serious crime, it is vitally important to be able to demonstrate complete independence and impartiality.
58. With that in mind, the omission of the offences of rape from the mandatory referrals process for what the MoD defines as “very serious crimes” is, to say the least, surprising. If the principle of civilian police responsibility is accepted for the “very” serious offences of terrorism, murder or manslaughter then it is hard to see what reason there could be for rape to be excluded, particularly given the very particular skill and training required in the investigation of these kinds of offences. And given that a disproportionate number of victims of rape are likely to be women³⁹, the exclusion of these offences from the Circular is discriminatory on grounds of gender.⁴⁰

³⁸ A ‘Home Office Police Force’ means a civilian police force. Annex 3.

³⁹ According to joint research conducted in 2013 by the MoJ and the ONS, An Overview of Sexual Offending, approximately 85,000 women and 12,000 men are raped in England and Wales alone every year. These figures include assaults by penetration and attempted rapes. The disproportionate impact of this particular type of crime on women is plain to see. <https://www.gov.uk/government/statistics/an-overview-of-sexual-offending-in-england-and-wales>

⁴⁰ In particular Article 14 ECHR (read with Article 3). See e.g. *Opuz v Turkey* (2009) 27 BHRC 159 [185]-[202] and *MA v SSWP* [2016] 1 WLR 4550 per Lady Hale at [73]-[74] regarding these duties. The fundamental nature of this obligation has been recently affirmed in the case of *Commissioner of Police of the Metropolis v DSD & Anr* UKSC 2015/0166; for summary see <https://www.supremecourt.uk/cases/uksc-2015-0166.html>

59. It is important to remember that until 2006, Service Police were barred from investigating the offence of rape at all. That appears to have been the consequence of a considered decision that the most serious offences which were deemed to comprise murder, manslaughter and rape ought always to be the preserve of the civilian authorities.⁴¹ In 2006, Service Police acquired the ability to investigate such offences including rape, (although after taking the immediate action necessary to preserve the scene, it was directed via the Prosecutor's Protocol that the civilian police would assume conduct of murder and manslaughter cases). It is understood that the change was brought about in recognition of the need to enable the investigation of historic offences that had taken place abroad and over which civilian police had no jurisdiction. This was a progressive step but did not anticipate the mission creep that has followed nor the wider problems now addressed in this report concerning the need for independence and expertise.

60. The investigation of rape requires very particular and special skill. It is perhaps inevitable, given the lower overall volume of criminal offences generally within the armed forces, as opposed to those encountered by civilian police officers working in civilian police forces, that Service Police soldiers tasked with investigating such offences will have fewer opportunities overall to practice their skills and develop experience. They are not embedded full-time within

specialist sexual assault investigation units and do not benefit from being part of that wider environment. We also note the findings of HMICFRS, which expressed particular concern that the RMP were bound by the policy of the Army that all personnel should move posts every 2 to 3 years. While it was explained to HMICFRS that this was a way of keeping staff fresh and providing continuing professional development, HMICFRS found evidence that this could lead to a loss of experience that created gaps in capability. In relation to the investigation of sexual crime, this gap is absolutely critical. Civilian police officers specialise in sexual crime and work within specialist sexual crime units. They build entire careers working in this field and their experiences and training build upon and reinforce each other to improve expertise as well as organisational knowledge and capability. We understand that the Service Police has made efforts to improve its soldiers' access to specialist training including continuing professional development training, however this can never compensate for the lack of full-time specialist ongoing experience and expertise that would be available from a civilian police team that works all the time on sexual crime in far higher volumes.

61. In fact, Liberty would go further and argue that not only should the offence of rape be added to the list of "very serious offences" that ought always to be referred to civilian police for investigation, but that this must be extended to apply to all serious offences including other serious sexual offences and serious physical violence. The principles outlined above, concerning the need to embed institutional independence in the policing of serious criminal offences within the armed forces, apply to such offences in exactly the same way.

⁴¹ Army Act 1955, s70(4). A person shall not be charged with an offence against this section committed in the United Kingdom if the corresponding civil offence is treason, murder, manslaughter, treason-felony or rape or an offence under section 1 of the Geneva Conventions Act 1957 or an offence under section 1 of the Biological Weapons Act 1974 or an offence under section 2 or 11 of the Chemical Weapons Act 1996 or an offence under section 51 or 52 of the International Criminal Court Act 2001. (i.e. the only way a person could be charged with such an offence was via the civilian system).

62. The collapse of the trial of a number of Army instructors at the Army Foundation College at Harrogate in March 2018 was an example of another occasion where the Judge Advocate, dismissing the case, took the opportunity to fiercely criticise the conduct of the Royal Military Police that had investigated the allegations, describing the investigation as ‘seriously flawed’.⁴² Scathing about the way the RMP had handled the investigation, the Judge Advocate noted the long delays in taking statements and that evidence had been lost or ignored. The Judge Advocate concluded that the RMP had carried out the case “in direct breach of their duty to investigate fairly and objectively”. Liberty is aware of another case of a sexual assault trial at Court Martial in 2018 (which resulted in an acquittal) following which the Judge Advocate made similarly critical remarks about the conduct of the Royal Military Police. The conduct of the RMP in that case is presently the subject of a complaint.

63. Whatever the rationale for referring the “very serious crimes” of death, serious injury likely to lead to death, murder, manslaughter and terrorist offences to the civilian police, this surely applies also to rape, sexual assault, grievous bodily harm and other serious offences as well. Yet such offences are, according to this policy, treated differently to other types of very serious offences in that it is not required as a matter of law or policy that they should be investigated by civilian police.

64. If the answer from the Ministry of Defence to this proposal is that the Service Police and Service Prosecution Authority are genuinely independent of the services containing the

suspects under investigation, then it is not understood why the MoD considered the Protocol necessary in the first place in respect of any kind of offence.

Create a single Service Police force

65. If Service Police are to be maintained (as is accepted they must be in some form for dealing with low level and military-only offences), a greater degree of independence would be engendered by abolishing service-specific policing (RMP, RNP and RAFP) and creating instead a single Service Police force. This would have the effect of reducing the risk and perception that there is a lack of independence where one branch of the forces is policed by their own police force.

Embed the Service Police in UK-based civilian police forces

66. Embedding Service Police officers within UK-based civilian police forces, with secondments to the Services would be a way of maintaining their military skills so that they can deploy with forces abroad.

67. This way the Service Police would be trained within and benefit from civilian police training, supervision and oversight. Those skills would be maintained. Their independence from the Services would be more demonstrable than the present model because they would no longer be tied to an individual branch of the Services and because they would spend the majority of their training and time in civilian forces. Extended secondments with the forces would enable those skills to be utilised whenever the forces deployed abroad.

⁴² <https://www.bbc.co.uk/news/uk-england-york-north-yorkshire-43458416>

Investigation of offences abroad involving soldiers

68. Service Police are undoubtedly needed in order to provide a deployable level of basic police support when on overseas operations: for example, to perform certain basic policing roles such as acting as coroner's officers for overseas fatalities, providing crime prevention education, undertaking traffic control for overseas garrisons and deployments and dealing with non-serious criminal investigations.
69. But for serious criminal allegations, principles of independent and experienced policing by civilian police must apply. We appreciate that developing solutions to work abroad will entail a number of practical obstacles and may require different approaches in different locations but given the imperative of independence and expertise in the investigation of serious offences including rape and sexual assault, it is difficult to justify a different approach.
70. As set out above, one option would be to maintain a single Service Police force (i.e. to abolish the need for service-specific police) but embed them instead within UK-based civilian police forces, with secondments to the Services to maintain their military skills so that they can deploy with forces abroad.
71. Another model might involve a unit of Service Police soldiers deployed abroad being directed and controlled in the immediate steps to be taken in the aftermath of a serious incident, by a civilian unit based in a civilian police force until such time as senior civilian police can be deployed to the field.

72. The case of the late Cpl Anne-Marie Ellement may also be instructive. The deceased had reported an allegation of rape against two Royal Military Police soldiers, which was investigated by the Royal Military Police themselves. This happened in Germany. Following threat of judicial review proceedings against the MoD, the matter was remitted for a fresh investigation, this time under the auspices of both the RAF Police and the civilian police (Bedfordshire constabulary). The investigation resulted in 2 soldiers being charged (and later acquitted) of rape. This kind of co-working between service and civilian police may present an interesting model for a way forward in investigating offences against serving personnel abroad.
73. Finally, in some situations, there might be very good reasons for arrangements to be made with the local civilian force in the country concerned which would enable that civilian force to investigate. Where a local civilian force has demonstrable independence and resources, this will often be the best and fairest option. It was a matter of enormous regret to the family of the late Cpl Ellement, for example, that the German civilian police did not investigate her allegation of rape.
74. There are many potential models, which would significantly improve the present situation. We suggest that, once the principle of the need for civilian policing of serious crimes in the armed forces is accepted, the current system for investigating serious crimes committed abroad should be subject to a full review and public consultation. Some of the above options could be considered. The principle that civilian police should investigate should remain at the heart of all proposals.

The lack of independent oversight of the Service Police by the Independent Office of Police Complaints (IOPC, formerly the Independent Police Complaints Commission)

75. The current position is that the Service Police conduct a large number and wide range of criminal investigations each year across the forces including investigations into serious (including sexual) offences, both at home and abroad. We have set out above why that must change. However, as long as there exists a Service Police system, there must be a rigorous and independent system for overseeing it and for dealing with Service Police complaints. But, as of 2018, there is no accessible, effective or meaningful complaints system for service personnel wishing to complain about the Service Police.

76. To understand how severely lacking the present system is, it is important to understand how the civilian system works. A civilian who wishes to make a complaint about the conduct of a civilian police officer may complain to the force concerned and thereafter enjoys certain rights of appeal depending upon the nature of the complaint. If the complaint, if proved, would lead to criminal or misconduct proceedings against the officer concerned, or engages Articles 2 or 3 of the ECHR, then any appeal in relation to the complaint must be dealt with by the Independent Office of Police Conduct (IOPC). The IOPC is a statutorily independent body whose sole purpose is to regulate the conduct of police officers and handle police complaints. The IOPC has the power to institute misconduct proceedings against police officers which can result in proceedings before the independent Police Disciplinary Tribunal and their being struck off.

77. A complaint about a Service Police force is investigated by an internal professional standards department of the Service Police force. Thereafter a complainant may appeal to the Provost Marshal (the head of the Service Police concerned). Thereafter they may lodge a service complaint. If that is unsuccessful, they may appeal using the Service Complaints Appeal Process. Therefore, the complaints process for a service person wishing to complain about the conduct of a Service Police officer is, inexplicably, twice as long as for a service person wishing to lodge a service complaint about any other matter. If they remain unsatisfied with the outcome, there is, according to the MoD, the right to apply to the Service Complaints Ombudsman. However, as of the time of publication, we are not aware of the Ombudsman having investigated a single complaint involving the Service Police.⁴³

78. The IOPC does not have jurisdiction to consider complaints made about a Service Police force at all. Independent oversight has been called for several times, notably by the Service Complaints Commissioner in 2013 and the Defence Select Committee in 2014. The Defence Select Committee said that:

“We have serious concerns that complaints regarding the Service Police are made to the chain of command which could lead complainants to have a lack of confidence in making such a complaint and in the independence and

⁴³ In a FOIA response dated 5 April 2018, the Service Complaints Ombudsman informed Liberty that in the 3 years since her appointment she was not aware of her office having signed off any military police complaints.

fairness of its investigation. We recommend that the chain of command should be required to notify the Ombudsman when it receives a complaint regarding the Service Police...we call on the MoD to set out a timescale for when it is intended that the Service Police should come under the auspices of the IPCC system".⁴⁴

79. More recently, HMICFRS has also recommended that the then Independent Police Complaints Commission (IPCC, the predecessor to the IOPC) should have oversight of complaints made about the RMP.⁴⁵ It is notable that the 2015 report records that the Provost Marshal acknowledged to HMICFRS that inadequate independent oversight was a strategic risk for the RMP. HMICFRS recommended that the Provost Marshal should establish whether the Home Office could put in place procedures to allow IPCC oversight of RMP complaints by 31 July 2015, and if it could, it should introduce those procedures by 31 December 2015. This did not happen.
80. More recently, an amendment to the Policing and Crime Bill (now the Policing and Crime Act 2017) was proposed, the effect of which would have been to bring the Service Police within the IPCC's jurisdiction. However, that amendment was withdrawn.⁴⁶

⁴⁴ Available online at: <https://publications.parliament.uk/pa/cm201415/cmselect/cmdefence/508/508.pdf>

⁴⁵ *Ibid*, pg 8. The Independent Police Complaints Commission was the predecessor to the IOPC.

⁴⁶ House of Lords Committee, 2nd sitting (part 1), 26 October 2016. The full debate can also be found here: <https://hansard.parliament.uk/Lords/2016-10-26/debates/9F46707C-F38F-4D45-887A-ADEA-2419B99A/PolicingAndCrimeBill>. Baroness Chisolm of Owlpen appears to have suggested incorrectly that the Tri-Services Investigation Policy could be activated in relation to complaints about Service Police officers. However, that is not correct because the policy clearly refers to a criminal offence involving a Service Police officer, not a mere complaint.

81. Her Majesty's Inspectorate of Constabulary (HMICFRS) independently assesses and reports on the efficiency and effectiveness of police forces and policing. It has reported on the Service Police in the past but only in a thematic sense.⁴⁷ It does not have powers of intervention, direction and enforcement. Instead, it is limited to being able to secure information. It cannot investigate individual complaints or consider appeals from internal complaints investigations arising from individual cases.
82. The Service Complaints Ombudsman (the Ombudsman) succeeded the Service Complaints Commissioner on 1 January 2016. The MoD's position is that it is under no legal obligation to provide an independent oversight scheme for the Service Police anyway but that, in any case, the Ombudsman provides such adequate independent oversight of the Service Police as is required. That is not correct.

Role of the Ombudsman in Service Police complaints

83. The Ombudsman's role, while certainly improved from that of the Commissioner, her predecessor, is limited. Her role does not compare to that of the IOPC.

⁴⁷ Her Majesty's Inspectorate of Constabulary reports on the military police are here: <https://www.justiceinspectorates.gov.uk/hmicfrs/publications/inspection-royal-military-police-investigations-into-overseas-deaths/>; <https://www.justiceinspectorates.gov.uk/hmicfrs/publications/an-inspection-of-the-leadership-of-the-rmp-in-relation-to-its-investigation/>; <https://www.justiceinspectorates.gov.uk/hmicfrs/news/news-feed/inspection-of-the-royal-military-police/>; <https://www.justiceinspectorates.gov.uk/hmicfrs/publications/royal-military-police-special-investigations-branch/>

84. The Ombudsman's role, in her own words, is to oversee the entire service complaints system, which she correctly describes as an "internal workplace grievance system".⁴⁸ Reviewing the work of the Service Police is not a core part of her function but is at most merely part of her overall responsibilities which include overseeing complaints arising from terms and conditions of service, pay, pensions and allowances, dental issues, housing matters and bullying and discrimination. By contrast, the entire purpose of the IOPC is to oversee the police complaints system and investigate the most serious incidents and complaints involving the police. The Police Reform Act 2002 gives the IOPC a specialist, hands-on role in complaints about police misconduct and associated powers, which extends to issuing statutory guidance.

85. The Ombudsman can only become involved after the very lengthy internal complaints process has concluded. Her independent power of investigation may only be exercised after a complainant has exhausted the 4 preceding stages, (1) initial complaint 2) appeal to Provost Martial 3) service complaint 4) service complaint appeal. Only then does the complainant get to the Ombudsman. By contrast, the IOPC has more direct and hands-on involvement in categories of more serious matters right from the outset and, in cases initially dealt with by the force itself, becomes involved through its appeal function, much earlier.

86. The IOPC may also manage or supervise investigations carried out by the local force. There is no power for the Ombudsman to do this.

48 <https://www.servicecomplaintsombudsman.org.uk/service-complaints-ombudsman/about-us/what-the-ombudsman-does/>

87. The IOPC may independently investigate more serious cases from the outset. There is no power for the Ombudsman to do this.

88. At the conclusion of any investigation into the merits of a complaint – which, in the case of the Ombudsman, would only be an investigation after any final determination of a complaint through the Army's internal procedure – both the IOPC and the Ombudsman are required to prepare a report and may make recommendations. However, the effect of these reports and recommendations varies significantly in terms of their scope and consequences. The Defence Council may reject any recommendation made by the Ombudsman. Her recommendations in relation to a substantive complaint are not binding.

89. In any case, this is entirely academic because the Ombudsman has confirmed that she has not dealt with a single military police complaint since the establishment of her office. So even if these (severely deficient) powers are in fact available to her, they are not being used. It is completely unacceptable that there is no scheme equivalent to the IOPC for service personnel to complain about the Service Police.

The Court Martial

90. It is beyond the scope of this report to address the entirety of the Court Martial system. However, we make the following observations about the operation of Boards (juries) in Court Martial proceedings.

Boards (Juries) in Court Martial Proceedings

91. The observations that follow are premised upon the assumption that there will continue to exist a court martial system for those charged with service offences. These observations are made without prejudice to Liberty's position that the vast majority of offences ought to be dealt with within the civilian justice system.

92. The right to trial by a jury of one's peers ('peers' being very broadly construed) is a fundamental part of the English legal system. Juries are comprised of ordinary members of the public with no connection to the defendant or victim and with no interest in the outcome of the proceedings other than the fair and independent administration of justice. They are not required to have any professional or other special knowledge of the defendant's circumstances or the circumstances of the alleged offence. So, for example, bankers are not tried by jurors working in the financial sector, lawyers are not tried by a jury of barristers and solicitors and police officers are not tried by a jury of people employed by a police force. Anyone aged between 18 and 76 may be called to sit on a jury and the presumption is that all must answer the summons, no matter what their profession, unless there is a medical or criminal law reason which excludes them. Self-evidently, there is no expectation that a person's profession or seniority is relevant to their ability to sit as a juror. Indeed, in April 2004, the previous ban on certain professions serving on juries was removed in the civil system, introducing almost universal mandatory jury attendance for criminal, inquest and civil trials by jury.

93. In the civilian system, 12 members make up a jury. The presumption is that a unanimous verdict should be reached, however the presiding judge has the power to allow a majority verdict of ten to two in cases where a unanimous verdict cannot be reached.

94. The Court Martial is different. Part 7 of the Armed Forces Act 2006 and the Armed Forces (Court Martial) Rules 2009 (the "2009 Rules") deal with the composition of boards in court martial proceedings.

95. Boards must contain a minimum of just 3 and no more than 7 'lay' members. Save for certain limited circumstances, all lay members must be either warrant officers or officers. A simple majority verdict is required. At least one member of the board must be an officer who is qualified to be the President of the board. The President of the board⁴⁹ must be of or above the rank of lieutenant commander; and of or above superior rank to every person to which the proceedings relate.⁵⁰ There are only very limited circumstances in which civilians (i.e. persons not subject to service law) may be appointed as lay members of a board.⁵¹

96. In addition to convicting or acquitting the defendant, these boards join the Judge Advocate in the determination of the sentence (except in limited circumstances and the judge has the casting vote).^{52 53}

⁴⁹ Rule 34(1) 2009 Rules.

⁵⁰ Rule 34(3) 2009 Rules.

⁵¹ Where any defendant in trial proceedings is not subject to service law at the commencement of the proceedings; where an offender in sentencing proceedings is not subject to service law when convicted; and appellate proceedings (Rule 33(5), 2009 Rules)

⁵² Rule 27(3)(b) 2009 Rules.

⁵³ S.160 AFA 2006.

97. A number of obvious and potentially serious concerns arise. Because of the smaller numbers involved, members of a board can deliver a verdict on the basis of a very small majority. This obviously compares very unfavourably to the position in the civilian system. Judge Advocate General Jeff Blackett⁵⁴, speaking to Law In Action in 2013, expressed his concerns that a defendant could be convicted by a military court with such a small majority.⁵⁵ He expressed particular concern in respect of the operation of such a system in relation to more serious offences such as murder, manslaughter and rape. He also observed that changes had recently been introduced to the New Zealand service justice system, which required unanimous verdicts.

98. Liberty endorses the Judge Advocate General's concerns. Liberty's view is that the same approach to the convening and functioning of a jury (including in relation to the number of people required to sit on a board) should be taken within the Service Justice System as to the civilian justice system.

99. The majority required by Court Martial boards was also discussed by the Parliamentary Select Committee in the drafting stages of the Armed Forces Act 2006 (AFA). JUSTICE argued for parity with the civilian justice system, and the then Judge Advocate General argued that judge advocates should be able to direct boards to seek unanimity in serious cases. However, the Select Committee backed the then Minister's view that it was not desirable for the AFA 2006 to require

⁵⁴ The Judge Advocate General is the most senior judge in the court martial system and is the head of the Service Justice System. <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/judge-advocate-general/>

⁵⁵ <https://www.bbc.co.uk/programmes/b02ykrdy>; <https://www.navynet.co.uk/community/threads/law-in-action-an-interview-with-the-judge-advocate-general.71794/>; <http://www.bbc.co.uk/news/uk-23003483>

unanimous decisions, because the risk of re-trials would not, apparently, be acceptable in a service environment.⁵⁶

100. Liberty is also concerned about the statutory requirement that members of the board should consist of a prescribed number of officers and warrant officers.⁵⁷ Other Ranks are excluded (with the exception of warrant officers)⁵⁸. By and large, the rules require that the board be constituted of members senior in rank to the defendant. Further, the normal rule is that the board will be made up of service personnel from the defendant's own service.⁵⁹ A President of the Board must be appointed.⁶⁰ We can see no legal or practical reason to have a President of the Board, who is likely to (inadvertently or otherwise) influence the views of others on the board, particularly given the small numbers involved, simply by virtue of his/her seniority. The role should be reduced to that of jury foreman in the same way as exists in the civilian justice system and the rank of the person performing the function of jury foreman should be irrelevant.

101. The composition of court martial boards was discussed by the Parliamentary Select Committee in the drafting stages of the AFA 2006. It was pointed out to the Select Committee that 'most soldiers like to be in front of their own' (i.e. members of their own division of the Armed Forces) and the Select Committee recognised that there are a number of highly

⁵⁶ <https://publications.parliament.uk/pa/cm200506/cmselect/cmarmed/828/82807.htm> at paragraphs 87-92.

⁵⁷ ss.156-157 AFA 2006. A board summonsed to hear a case involving service personnel comprises between 3 and 7 commissioned officers or Warrant Officers depending on the seriousness of the case.

⁵⁸ The term "Other Ranks" may be used to refer to all ranks below officers (abbreviated "ORs") s.156(1) AFA 2006 states that "an officer or warrant officer is qualified for membership of the Court Martial if he is subject to service law". This implicitly excludes ORs.

⁵⁹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/249331/Ch28.pdf; p2-28-6

⁶⁰ <https://www.judiciary.uk/wp-content/uploads/2015/05/procedure-guide-vol-2.pdf>

service-specific offences, e.g. navigation offences, that are best judged by members of the relevant service.⁶¹

102. There appears to be no official rationale as to why such restrictions should apply to board membership in the Court Martial and certainly there has been no recent attempt to publicly justify why such qualifications should render those members better equipped to judge on the guilt or innocence of a defendant than junior service personnel or civilians. The reasons given historically appear to be that service members are simply better placed to judge an accused service member of the same service as themselves due to their understanding of the specific challenges faced. This is echoed by judicial guidance on sentencing in Court Martial proceedings, which notes that 'the differences between the service and civilian systems of justice exist only to reinforce and support the operational effectiveness of the Armed Forces and are necessary because of the link between the maintenance of discipline and the administration of justice and the need to be able to hold trials anywhere in the world'.⁶²

103. More worryingly, the Courts and Tribunals Judiciary website explicitly observes, while purporting to explain the Court Martial system, that "almost all defendants in the Court Martial are serving military personnel of good character and the consequences of these sentences upon them and their families can be very significant".⁶³ Liberty does not accept that operational effectiveness should have any bearing on whether a person is guilty or innocent of a potentially serious

offence. Indeed, introducing such considerations inevitably risks impeding the board's ability to decide fairly, independently and free of extraneous factors on guilt or innocence. And reminding them of the potential implications of a heavy sentence for defendants "almost all" of whom are "of good character" seems potentially prejudicial.

104. The reasons given to date by the armed forces in favour of retaining boards in their current form ought instead to weigh in favour of reform. The rationale that informs how juries should be constituted within the civilian justice system should apply equally here and soldiers are just as entitled to be judged by their peers - drawn from the wider service or civilian community - as civilians.

Certain aspects of the Role of the Commanding Officer in the Service Justice system

105. The Commanding Officer (CO) has a vital role in upholding discipline in his/her unit to ensure operational effectiveness. The CO's ability to do so should not be constrained in a way that prevents their ability to perform this fundamental function. This role must and should include the ability to deal with particular service offences.

106. But the Armed Forces Act 2006 (AFA) grants very broad powers which enable a CO to become involved in too many areas of the criminal law when the circumstances do not justify or require it. Here are some examples.

107. Until as recently as April 2018, it was possible, as a matter of law, for a CO to decline to refer an allegation of sexual assault, indecent exposure and/or voyeurism, to the police. That meant that a commanding officer could deal with

61 <https://publications.parliament.uk/pa/cm200506/cmselect/cmarmed/828/82807.htm> at paragraphs 85-86.

62 <https://www.judiciary.gov.uk/wp-content/uploads/2015/05/guidance-sentencing-court-martial.pdf> at paragraph 1.2.

63 <https://www.judiciary.uk/about-the-judiciary/the-justice-system/jurisdictions/military-jurisdiction/>

that matter him/herself. Following years of lobbying and campaigning by the families of servicewomen who had been affected by alleged sexual misconduct within the armed forces, the Army agreed to issue a policy direction that commanding officers should always refer such matters to the Service Police (although they did not want to change the law).⁶⁴ It was only following receipt of a letter before action brought by a current service woman who had reported being the victim of a serious sexual assault, that the Minister finally agreed to lay amending legislation before Parliament that brought to an end the ability of a CO to investigate a sexual assault allegation for him/herself (and not be required as a matter of law to refer it to the Service Police).⁶⁵ This is a good example of the MoD eventually accepting the need for a degree of independence in relation to the investigation of serious offences (we say “a degree of” because the amending legislation does not go far enough, requiring only that the CO refer a matter to the Service Police, not the civilian police, see above).

108. There remain other aspects of a CO’s involvement in the prosecution of criminal offences, which remain cause for concern.
109. For example, the general rule is that a person arrested under s.67 AFA 2006 (for a service offence) may not be kept in custody without being charged with a service offence,

⁶⁴ *This policy direction was announced in 2016 at the inquest touching the death of Pte Cheryl James who died at Deepcut barracks in 1995, amid concerns about a toxic and sexualised environment. It was maintained publicly at that hearing by a senior Army witness that there was no need to change the law.*

⁶⁵ *Statutory Instrument, Armed Forces Act 2006 (Amendment of Schedule 2) Order 2017. The SI amends Sch 2 to the AFA 06, which lists those serious service offences to which s113 and s116 apply, which require a CO to notify a Service Police force if he becomes aware that an offence may have been committed. Sexual assaults had been excluded from that mandatory referrals process. They are now included.*

except in accordance with ss.99-102 AFA 2006.⁶⁶ When someone is arrested, their CO must be informed of: a) the arrest; and b) any grounds on which they are being kept in service custody without charge as soon as possible.⁶⁷ That is not objectionable. But once the CO has received the report (from the arresting officer or Service Police), s/he then accrues additional powers. The CO him/herself must as soon as practically possible determine whether they (the CO) have reasonable grounds for believing: a) that keeping the person in service custody without charge is necessary to secure or preserve evidence relating to the offence, or to obtain evidence by questioning them; and b) that the investigation is being conducted diligently and expeditiously.⁶⁸ If they are able to satisfy both of these limbs, then the CO can exercise his/her powers to authorise keeping that person in service custody.⁶⁹

110. Similarly, where a Judge Advocate has decided, post-charge, that a person should be kept in custody pending trial, a CO has the power, according to s.108 AFA, if s/he decides that the grounds on which such a decision was made have ceased to exist, to order that person’s release from custody (or request a review by the Judge Advocate).
111. These powers are very broadly drafted and are without substantive qualification. They apply to ‘pure’ criminal offences (rape, sexual assault) just as they do to ‘military’ offences (such as failing to obey an order). It will be necessary for such powers to exist for military offences, which cannot be managed or prosecuted by civilian authorities. But for serious

⁶⁶ *S.98(1) AFA 2006.*

⁶⁷ *S.99(1) AFA 2006.*

⁶⁸ *S.99(4) AFA 2006.*

⁶⁹ *S.99(3) AFA 2006.*

criminal offences (which ought to be dealt with by the civilian authorities anyway), Liberty does not think that a CO should have the inherent power to hold someone in custody where they have been arrested (or express a view on whether they ought to be released) or order a defendant's release from custody where a Judge Advocate has decided otherwise, except in exceptional circumstances.

112. There are serious and legitimate concerns about whether commanding officers have the necessary training or experience to perform such an important criminal legal role. Indeed, the involvement of a CO may inadvertently have the consequence of causing a police investigation to become compromised. The CO ought not to be provided with the kind of detailed information and evidence that would be needed in order to make such a decision (even assuming the CO were qualified to make it). The CO is not the investigating officer and is not trained to make such decisions. MoD guidance on the operation of this power is no substitute for the specialist training and guidance that would inform a decision of this nature that would be taken in the civilian system by an experienced custody sergeant or above. There should be a substantive power to hold someone in custody pre-charge and in appropriate circumstances, but that ought as a matter of principle to mirror the system that exists within the civilian system and ought to be a decision taken by an independent and qualified police officer of appropriate seniority. And in circumstances where a qualified Judge Advocate, having applied the law and considered the relevant conditions, has determined that bail is not appropriate, it is not appropriate that a CO, unqualified to adjudicate upon such matters, should be able to interfere in such a way.

113. Therefore, as a matter of principle, Liberty would suggest:

- a. The principle that such decisions ought to be taken by independent police and prosecutors should be accepted. While there may be occasions and situations when these kinds of powers are needed (such as in dealing with military offences), they should never be needed when dealing with alleged serious criminal offending in the UK. Yet the AFA powers apply just as readily to those situations. There can be no need for such powers in the UK if independent police and prosecutors are dealing with the criminal matter. Matters of bail and evidence are matters for the police and prosecuting authorities. In relation to serious offences, e.g. rape or sexual assault, we fail to understand what possible argument there can be to involve the CO in any matters other than being informed that an arrest has been made and that an investigation is ongoing. We have received anecdotal evidence that commanding officers can and do interfere with Service Police investigations and we think it likely that this will be in part as a consequence of broadly drafted powers such as these, which do not distinguish between different types of situation.⁷⁰
- b. If that principle is accepted, then ways can be explored of securing greater independence in policing overseas. We have touched on some of these ideas at paragraph 68 above.
- c. Once that is accepted, then consultation and discussion can be had about the circumstances in which these residual powers may be necessary and in what circumstances.

⁷⁰ For example, a soldier Liberty has advised reported a sexual assault against another soldier. The complainant's CO was also the CO for the alleged assailant. The CO reportedly informed the Service Police that the CO did not want the accused arrested for some weeks (for extraneous reasons unconnected to the complainant but relating to the accused). It is not hard to see how, with broadly drafted powers such as those outlined above, this approach is encouraged and facilitated.

RECOMMENDATIONS

Rape offences in the UK

1. Immediately and as a matter of the utmost urgency, for the offence of rape to be added to the list of “very serious offences” listed in Home Office Circular 028/2008 as an offence that must always be investigated by the civilian police, prosecuted by the Crown Prosecution Service and sent to trial at Crown Court.

All serious offences including sexual assault in the UK

2. In any event, for all serious offences (which should include sexual assault and grievous and actual bodily harm offences) to be investigated by the civilian police and not the Service Police, prosecuted by the Crown Prosecution Service and sent to trial at Crown Court.
3. That any decision to downgrade an allegation of sexual assault from an indictable (equivalent) offence to a summary offence (which may as a consequence be dealt with by a Commanding Officer sitting alone) be subject to an independent review by the CPS or another independent body.
4. That the sexual offences of creating or possessing indecent images of children, possession of extreme pornographic images, revenge porn offences, sexual communications with a child and criminal harassment offences, be added to the MoD published annual bulletin of sexual offences in the service justice system.⁷¹

⁷¹ *S1 Protection of Children Act 1978 (as amended); s160(10) Criminal Justice Act 1988; s63(1) Criminal Justice and Immigration Act 2008; s33(1) Criminal Justice and Courts Act 2015; s67 Serious Crime Act 2015; ss1, 2A, 4, 4A Protection from Harassment Act 1997*

Create a single Service Police force

5. For the remaining offences that ought to be dealt with by Service Police (non-serious criminal offences, military offences and, potentially, serious offences committed abroad see below), abolish the 3 separate branches of the Service Police and create a single body.

Embed Service Police in UK civilian police forces

6. Embed single Service Police officers within UK-based civilian police forces, with secondments to the Services to maintain their military skills and so that they can deploy with forces abroad.

Offences outside the UK

7. In relation to allegations of criminal offending involving members of the armed forces outside the UK, that the principle of civilian involvement in criminal investigations be accepted and options explored which may include:
 - a. Service Police (as a single force) being trained and embedded within civilian forces, available to deploy as needed;
 - b. using local systems of criminal justice (in Germany, for example);
 - c. co-working within teams comprising both Service Police and civilian police (as occurred in the investigation into the allegation of rape against 2 former soldiers by the late Cpl Anne-Marie Ellement); and
 - d. Service Police operating locally but under the direction of UK-based civilian police supervising and directing remotely.

Oversight of the Service Police

8. That the Independent Office of Police Conduct (IOPC) or other wholly independent, expert and appropriately funded body be provided with the powers and resources to fully investigate complaints and to undertake oversight of the Service Police and that the scheme be identical to that which applies to the civilian police.

In the Court Martial

9. Boards (juries) at the Court Martial be permitted to include Other Ranks.
10. The number of members summonsed to sit on a Board to be increased and that unanimous verdicts be requested in the first instance.
11. The role of President of the Board be abolished and replaced with a system akin to that of jury foreman in the civilian jury system.

Powers of a Commanding Officer

12. That the power of a Commanding Officer to keep an accused person in custody pursuant to s99 AFA or to order the release of an accused person pursuant to s108 AFA be subject to review, with the objective of ensuring such powers vest in a qualified police officer of appropriate seniority or the Court.



PART TWO

THE ARMED FORCES

COMPLAINTS SYSTEM

PART TWO

THE SERVICE COMPLAINTS SYSTEM

Introduction

- 114. Any serving or former serving members of the UK armed forces, in regular or reserve service, can make a complaint if they feel they have been wronged in any matter relating to their service including bullying, harassment, discrimination and biased or improper behaviour.
- 115. It is self-evidently not a scheme that is designed to deal with criminal complaints - complaints that are criminal in nature (for example, harassment (including sexual harassment) that meets the definition of criminal harassment is a police matter and should not be dealt with internally).⁷²
- 116. A number of changes were brought about in January 2016 to the service complaints process. A new Service Complaints Ombudsman was appointed to replace the

⁷² E.g. The Protection from Harassment Act 1997 creates a range of criminal offences which include harassment (defined as a course of conduct in which one person has harassed another on at least two occasions), stalking, putting someone in fear of violence, stalking involving a fear of violence, alarm or distress: see ss 1, 2A, 4, & 4A PHA 1997 respectively.

former Service Complaints Commissioner. The number of internal appeals stages was reduced from two to one, and the Ombudsman has greater powers of investigation to address delay (see more on this, below).

- 117. Matters are certainly improved but there remain serious problems with the scheme. Delay and reports of unsatisfactory outcomes remain endemic. Both the Commissioner and, now, the Ombudsman, have repeatedly stated that the service complaints process is neither fair, effective nor efficient for armed forces personnel. Most complainants that contact Liberty report finding the process unbearable, especially those that have been the victim of sexual harassment.

General information and the process⁷³

- 118. The service complaints process involves making a formal statement of complaint, requested to be on a specific template.⁷⁴ The policy suggests that a service person should send their complaint to the 'Specified Officer' (SO) within their chain of command, who will usually be the person's Commanding Officer (CO). If the CO or the CO's immediate superior are implicated in any way in the complaint, the service person is directed to their single service secretariat for advice on who to send the complaint to.⁷⁵ Alternatively,

⁷³ The service complaints guidance is lengthy, at 135 pages, and comprises: 1) JSP 831, Redress of Individual Grievances: Service Complaints Directive, Part 1 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/493915/20160119-JSP_831-Final_Part_1_Directive_for_Publishing-0.pdf) 2) JSP 831, Redress of Individual Grievances" Service Complaints, Guidance, Part 2 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/)

⁷⁴ Annex F to JSP 831 Part 2: Guidance, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/493917/20160119-JSP_831-Final_Part_2_Guidance_for_Publishing-0.pdf

⁷⁵ The complaints process is facilitated by a secretariat, which has two main components: a central secretariat and the secretariats of the three single services. The central secretariat is part of the central staff. The single service secretariats are embedded within their single service chains of command in their separate locations.

they can contact the Ombudsman's Office who has the power to direct that a SO other than the person's CO be appointed to consider the complaint.

119. A complaint must be lodged within three months of the date of the act complained of. If the act complained of is a continuing act, the person ought to complain as soon as they reasonably can and/or within three months of the act or series of acts coming to an end. The time limit is the same for former service personnel.
120. In most circumstances, if a complaint is submitted beyond the required time limit of three months, it will be ruled out of time. However, the SO is able to consider whether it would be "just and equitable" to rule a complaint in time and so allow it to proceed even if it is technically out of time.
121. Once the complaint is acknowledged, an Assisting Officer (AO) should be appointed (or the person can request a named person to be appointed as AO) to help and support the service person understand the complaints process. It is important to note that an AO is not an advocate. An AO (if not chosen by the complainant) is appointed by the chain of command.⁷⁶

⁷⁶ An AO is a person who is appointed by the chain of command to provide help and support to a complainant or a respondent during the service complaints process. A complainant or respondent can also nominate someone to act as their AO. JSP 831, Directive, pg 25.

122. The possibility of resolving the complaint informally in the first instance will be discussed. The SO will then decide whether the complaint will be investigated further and notify that decision in writing. If the SO decides that the service complaint will be investigated, it will be sent to the single service secretariat. The secretariat will appoint someone to investigate and decide the complaint and what redress (if any) is appropriate.
123. The policy is that 90% of complaints should be investigated and resolved within 24 weeks.⁷⁷
124. If the service person does not agree with the outcome of the service complaint, there is a right of appeal. This must be lodged within 6 weeks of being notified of the decision.
125. Thereafter, a service complaints appeal will be arranged, assuming the Defence Council agrees that it may proceed. If they do, it will convene an appeal body. In certain types of case, an "independent" person must be appointed to the appeal body.⁷⁸
126. It is not possible for the complainant to appeal only part of the complaint – the entire complaint must be appealed.⁷⁹

⁷⁷ JSP 831, Guidance, pg 21

⁷⁸ The "independent" person is someone who is not a member of the Armed Forces or the Civil Service, who has been recruited by the MOD on a fee earning basis to provide an independent view on appointment to complaints of a specific type. The types of complaint which require an independent panel member are set out at paragraph 20 of Chapter 1 of JSP 831 Part 1: Directive (available at <https://www.gov.uk/government/publications/jsp-831-redress-of-individual-grievances-service-complaints>) and include: (i) discrimination; (ii) harassment; (iii) bullying; (iv) dishonest or biased behaviour; (v) a failure of the MoD to provide medical, dental or nursing care for which the MoD was responsible; and (vi) allegations concerning the improper exercise by a service policeman of his statutory powers as a service policeman.

⁷⁹ Paragraph 55 of Chapter 1 of JSP 831 Part 2: Guidance

127. The appeal body will notify the complainant of the outcome of the appeal.

128. Thereafter there is a right of appeal to the Ombudsman.⁸⁰

The Service Police Complaints process

129. If a service person wishes to complain about the conduct of a Service Police officer, the process is, inexplicably, twice as long.

130. Each Service Police force has its own internal complaints process. In the first instance, a complainant should complain to the professional standards unit of the Service Police force itself. If the complaint is not upheld, an appeal lies to the Provost Marshal of the relevant force. If the complainant is dissatisfied with that outcome, then he or she may then lodge a service complaint and the process outlined above starts all over again with all the attendant levels of appeal. It is only after that process has been exhausted that the complainant may appeal to the independent Ombudsman.

131. Liberty is acting for a serving soldier who was the victim of an alleged serious sexual assault. On her behalf, judicial review proceedings have been threatened against the MOD and pre-action correspondence is ongoing. The MOD has, in that correspondence, explained that the process facing a complainant who wishes to complain about a Service Police soldier is as above (i.e. five different stages). Liberty is arguing in those proposed proceedings that the process and failure to have in place an independent body tasked,

resource and expert to deal with Service Police (such as, for example, the Independent Office of Police Conduct, IOPC) constitutes discrimination against service people because civilian complainants have the benefit of an independent body and can access it far more quickly. The Government has agreed to conduct a review of the situation and the outcome of the review is awaited at the time of writing.

What role does the Service Complaints Ombudsman play in this process?

132. The purpose of the Ombudsman is to provide independent and impartial scrutiny of the handling of service complaints. As a general rule however, it is fair to say that she will only become substantively involved at the end of the above, long, internal process. Prior to that point, her powers are very limited.

133. Anyone who is serving in the regular or reserve Forces, or has recently left (i.e. within three months), can contact the Ombudsman about matters to do with their service life. The Ombudsman can:

- a. Refer the intention to make a service complaint to the complainant's CO and appoint someone other than the CO as SO;
- b. Review a decision by the CO not to accept a complaint for investigation;
- c. Investigate allegations of undue delay in the handling of a service complaint;

⁸⁰ See flowchart at Annex 5.

- d. Investigate allegations that a service complaint was handled incorrectly;
- e. At the end of the internal complaints process, she can investigate the substance of a service complaint if the complainant thinks the wrong decision was reached.

134. The Ombudsman's findings are not binding, although it is stated that any recommendations made by the Ombudsman will not be rejected without explanation.

135. There are particular limitations in respect of the Ombudsman's role in the context of the Service Police which are set out above and which we will not repeat here.

Problems with the complaints system

136. The following observations are made as a consequence of the reported experiences of service men and women who have contacted Liberty for help in relation to their service complaints.

Complaints about sexual and other forms of harassment:

137. The service complaints system appears to have great difficulty dealing fairly with sexual harassment and abuse matters. Allegations of sexual assault must of course always be dealt with as criminal matters, not as service complaints. But a victim of a sexual offence may wish to lodge a service complaint to address matters surrounding the offence itself but which could not form part of the criminal case other than by way of background. For example, if there was a pattern of sexual harassment prior to an alleged criminal sexual assault, this might form the legitimate subject of a service

complaint. Or if a CO sought to interfere with the process of investigating the alleged assailant, or failed to ensure welfare support to a victim, this might form the legitimate subject of a service complaint.

138. In one example, a female soldier wished to complain about various matters consequent to a report of alleged rape. She reported that someone in her chain of command had been sexually harassing her for some considerable time prior to the assault; and that having reported the assault, the complainant herself was transferred far from her base and the support of her family and friends, while the accused remained in situ. The accused was later acquitted of rape but the complainant wished to proceed with the complaint about the surrounding issues. In attempting to support her throughout this process, we encountered the following:

- a. A significant amount of (wasted) time over a period of some months was spent persuading the service complaints team that the complaint matter ought not to be progressed until the criminal trial was over (because the allegations that formed the subject of the complaint and those which formed the subject of the trial were so closely linked);
- b. Repeated requests were made by the service complaints team to the complainant asking her to set out repeatedly what had happened to her (after a detailed statement had already been provided both within the criminal proceedings (consent had been provided to enable the complaints team to obtain that statement) and at the lodging of her service complaint), which was re-traumatising for her - there appeared to be little to no understanding of this;

- c. Staff changes meant that the same person was not involved in her case for very long and there were multiple staff changes throughout the life of the case;
- d. For a significant period of time, and despite having been provided with the appropriate authority, the service complaints team refused to deal with the solicitor acting on behalf of the complainant and insisted instead upon repeatedly contacting the complainant herself, which caused a great deal of upset. Even after it was agreed that the service complaints team should contact the complainant via her solicitor, this did not happen and multiple requests were made for written authorities to this effect from the complainant;
- e. When the complaint was finally not upheld at the first stage (after two and a half years), the tone and content of the decision letter was manifestly inappropriate, suggesting that the complainant was in part responsible for the state of affairs about which she now complained because she had not raised her concerns with her chain of command at the time (and before the alleged assault).

139. The outcome of the first-stage complaint had a dreadful impact on the complainant. As a consequence of her experiences, she left the Army.⁸¹ With Liberty's help, she appealed her complaint and the Appeal Body has recently upheld the complaint almost in its entirety, acknowledging that the complainant suffered bullying, harassment and intimidation and offering a series of unreserved apologies

⁸¹ *This individual had received consistently excellent reports and was in the process of being considered for officer training. Her progress in her career had been exemplary. The alleged sexual harassment, alleged sexual assault and the inability of the services to support her in the aftermath of her allegation caused her to resign. The complaint believes that the complaints process has continued to cause a great deal of psychological harm.*

and compensation. This appeal was finally concluded more than 3 and a half years after the complaint was originally lodged.

- 140. In another example, a female soldier reported being raped on the base in a Company office administration building by a fellow male soldier (who was also in her chain of command). She reported the matter to her local civilian police force who decided that no further action ought to be taken.
- 141. The female soldier's chain of command then asked for all of the civilian police information concerning the incident which the civilian police, in error, disclosed. The information was highly sensitive. This information was then used by the chain of command to investigate whether the female soldier ought to be made the subject of internal disciplinary action as a consequence of her own conduct (Breach of the Army's Values and Standards, i.e. having sex in one of the Company offices on military property). The serious breach of the Data Protection Act was eventually admitted by the civilian police and the complaint against them upheld.
- 142. The complaint against the conduct of the chain of command for its treatment of the female soldier was lodged in autumn 2013. By May 2016, the complaint had still not been resolved. The complainant has since left the Army and, according to her, the complaint was never satisfactorily resolved and she gave up. In attempting to assist the complainant, we identified that:
 - a. The approach of the chain of command appeared to be: the police declined to charge the accused with rape, therefore the incident must have been consensual, therefore the complainant must have breached the

Army's Values and Standards, therefore the soldier must be disciplined;

- b. As with the other example given above, despite numerous requests, the complaints team repeatedly insisted on corresponding with the complainant directly and refusing to communicate via her solicitor. The matter had to be taken up with the Director of Army Personal Services at the time;
- c. A huge amount of time was wasted on the complaints team insisting that the complainant re-lodge her original complaint (having agreed that one ground, prepared without the benefit of legal advice, was not able to proceed), only for the SO to then undergo the pointless process of deciding if the re-lodged complaint was now out of time.

143. This soldier also left the Army as consequence of these experiences.

144. The experience of these complainants does not seem unusual and is reflected in a number of wider pieces of research. The Army's own 2018 Sexual Harassment Survey⁸² recorded that people who complained of sexual harassment reported very poor outcomes. Targeted sexualised behaviours that had caused respondents to feel particularly upset had increased since the last survey in 2015, for women. 18% of respondent service women reported this. Such behaviours ranged from unwelcome comments, sexual touching, trying to speak about sexual matters, to

sexual assaults: 12% of the women who responded said they had been victim of intentional sexual touching; 7% of attempted sexual assault; 5% of serious sexual assault; and most shocking of all, 3% reported being the victim of rape.

145. Quite apart from the personally potentially devastating impact of this kind of event on the victim, it is notable that there were very high rates of dissatisfaction recorded with the outcome of the complaints investigation, where the victim had lodged a complaint, both in terms of how well it was communicated to the complainant, whether follow up action was taken against those responsible and the amount of time taken to resolve the complaint. Three-quarters of those who made a formal complaint said that they had suffered negative consequences as a result; and nine in ten service personnel had thought about leaving the Army.

146. The Ombudsman made a similar point in her annual report for 2017 (published in 2018)⁸³. Female and Black, Asian and Minority Ethnic (BAME) service personnel are still unacceptably over-represented in the complaints system. They account for 20 per cent and 10 per cent of complaints, respectively, but make up just 11 per cent and 7 per cent of the Armed Forces, respectively. More alarming was the nature of the complaints being made by these groups. Bullying, harassment and discrimination constituted around 45 per cent of complaints from women and around 55 per cent of complaints from BAME people.⁸⁴ The Ombudsman was concerned about continued reports from personnel

⁸² Chapter 14 of the Army's Sexual Harassment Report 2018, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736177/20180821_Sexual_harassment_report_2018_OS.PDF

⁸³ Annual Report 2017 of the Service Complaints Ombudsman for the Armed Forces, available at <https://www.servicecomplaintsombudsman.org.uk/annual-reports/>
⁸⁴ *Ibid*, page 37

that they have been discouraged from complaining by service complaint handlers, or even advised that doing so could harm their careers.

147. And the Armed Forces Continuous Attitude Survey (AFCAS) 2017 also showed the real impact on soldiers – with 13 per cent reporting experiencing bullying, harassment or discrimination in the preceding 12 months.⁸⁵ Of these, only 10 per cent of those bothered making a formal complaint at all. The most common reasons given for not complaining were feeling that “nothing would be done” (59 per cent) and that complaining would adversely affect their career (52 per cent). That survey also indicated limited knowledge of the complaints system.

148. Liberty has also observed that there is an absence of female Assisting Officers (AO) generally to support women (or anyone who would prefer to confide in a female AO) through the process. We note that the Ombudsman’s recommendation that specialist harassment investigators be appointed has been accepted and acted upon and that is very welcome.⁸⁶ With specialist harassment investigators on the teams then maybe some of the matters described above can be addressed. However, the service person themselves still needs support and help and this remains lacking. That will not be addressed by the appointment of greater numbers of specialist harassment investigators.

⁸⁵ Section 10 of the UK Regular Armed Forces Continuous Attitude Survey Results 2017, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/709491/AF-CAS_2017_Main_Report_Revised_24_May_2018.pdf

⁸⁶ Following the Commissioner’s 2009 Annual Report, new arrangements for the investigation of prescribed complaints of bullying and harassment were introduced in 2012. Specially selected and trained fee-earning Harassment Investigation Officers (HIOs) would be available to all three Services and the MoD, to investigate such complaints. The new HIOs who are from outside the MoD, and do not work for the Commissioner, are engaged to undertake investigations on an ad hoc basis.

. 149. Liberty proposes that, in cases involving sexual and racial harassment, the Ombudsman ought to be available to complainants as a first appeal stage.

‘Bureaucratisation’:

150. More generally, Liberty has observed a tendency within the service complaints teams to ‘over-bureaucratise’ the entire process. The complaints policy alone comes to 135 pages. If a person has part of their complaint upheld, but part of it not upheld, they have no choice but to appeal the entire complaint - so the whole process effectively starts all over again. This has the effect of wearing the service person down and of wholly failing to get to the heart of the problem. It means that even if the heart of the complaint may be upheld, it is packed around so many other smaller matters that have been deemed not upheld as to be considered of less value. This is in part a consequence of the absence of independent, practical support and advice to the service person at the outset. Such an approach leads to vast banks of evidence being obtained to cover all aspects of the complaint, rather than a more sensible, focussed, proportionate investigation from being conducted. This approach is in the interests of neither the services themselves nor the complainant.

Delay:

151. Despite the clear directions set by the Ombudsman, service complaints are still beset by delay. In her 2017 Annual Report, the Ombudsman expressed her continued concern about the level of delay in the system. At the end of 2017, there were 214 open service complaints that had been made in 2016 or earlier. One of these complaints dates back to 2011 and a total of 47 complaints remained open from the old system. In the cases referred to her for investigation on the grounds of undue delay, the Ombudsman found delay in 79% of cases.⁸⁷
152. On any analysis, further meaningful reform is needed. These matters are absolutely fundamental to operational effectiveness – if you don't look after your people, and help and support them if and when things go wrong, they will leave.

RECOMMENDATIONS

1. In cases involving sexual and racial harassment, the Ombudsman ought to be available to complainants as a first appeal stage.
2. In her 2016 Annual Report, the Ombudsman's called for the MoD to commission research into the reasons why so many women and BAME people were complaining. It was obvious to anyone reading the Ombudsman's report that she intended that this research should be conducted independently of the MoD. Purporting to respond to her recommendation however, the MoD has arranged to conduct only an internal review. This was disingenuous and was manifestly not what the Ombudsman had required. Liberty supports the Ombudsman's original recommendation.
3. That those who wish to lodge a complaint should be encouraged to seek independent advice and support and an assurance should be given that service complaints staff will co-operate with and recognise the value of such independent advocacy. With suitably skilled advice and support, this will enable a well-prepared focused complaint to be lodged right from the outset and will save all parties time and stress.
4. For all staff involved in the complaints process to be informed that if a complainant has the help of an independent person (such as a solicitor or other form of advocate) that they are to send all communications via that person unless requested otherwise.

⁸⁷ See page 16 of the Annual Report 2017 of the Service Complaints Ombudsman for the Armed Forces

THE ARMED FORCES COMPLAINTS SYSTEM

5. That sufficient numbers of female assisting officers be appointed to assist female (or male) complainants where requested.
6. That a single point of contact be arranged for sensitive or complex complaints that lasts throughout the life of the case, so the complainant does not have to deal with unnecessary staff changes.
7. That where a complaint arises in the context of an alleged sexual assault, there will be a presumption that the complainant will not be required to be re-interviewed about the sexual assault itself where a statement has already been prepared (either in writing as part of the complaint, as part of the criminal proceedings, or a combination of both).
8. That family members (including partners) of a service person who has cause to complain, be given standing to lodge a complaint (including to the Ombudsman), including where the service person is deceased. Incredibly, this remains outstanding, even after the case of Cpl Anne-Marie Ellement, whose family attempted to lodge a complaint about the bullying she had disclosed to them prior to her death and who were informed by the then Service Complaints Commissioner that, while she wished she could assist them, she was not able to do so because the regulations did not permit a family member to complain on behalf of a deceased person. This remains the case as does the wider restriction on a family member lodging a complaint on behalf of a living service person.



PART THREE

HUMAN RIGHTS IN

ARMED CONFLICT

PART THREE

HUMAN RIGHTS IN ARMED CONFLICT⁸⁸

Introduction

153. There has been a slew of public statements and reports in recent years around the concept of something that has become known as the ‘Fog of Law’, ‘Lawfare’, or ‘judicial imperialism’.⁸⁹ These criticisms arise from a series of cases that have arisen in the context of the wars in Iraq and Afghanistan. In reality, what critics are objecting to is the fact that soldiers, detainees and/or the bereaved have brought civil claims for damages following certain events and that serious allegations of wrong-doing have been required to be investigated.

154. The authors of these reports often misunderstand or

deliberately misrepresent the law.⁹⁰ They also refer, without a great deal of evidence, to the impact of recent case-law on the ‘war-fighting ethos’, suggesting that it will lead to an ‘excessive degree of caution’ on the part of our commanding officers.

155. It is important to actually read the judgments. They are measured and restrained. The case-law that has flowed from these wars has established, essentially, that war is difficult and different - but it is not a legal black hole. The Convention requires the accountable use of lethal force, with effective and realisable safeguards, which include investigations into credible allegations of abuse. It requires that civilians and soldiers have a means of redress, where fundamental human rights and the laws of war are breached.

156. Despite hyperbole from the MoD, the implications of these judgments are limited and reasonable and essentially amount to the propositions: don’t kill unless it’s a lawful act of war, don’t torture and ill-treat civilians or combatants under your control -ever- and enable some minimum procedural standards to ensure people are not held in indefinite extra judicial detention. Far from creating uncertainty, the Convention clarifies and structures the military’s use of lethal force and its powers of detention in ways the Army itself ought to recognise and to honour. They are entirely consistent with

⁸⁸ This chapter first appeared as an article on the Law of Nations website in October 2018: <https://lawofnationsblog.com/2018/10/02/limiting-the-uks-human-rights-obligations-in-overseas-military-operations-part-one/>; <https://lawofnationsblog.com/2018/10/04/the-legal-black-hole-of-derogation-the-governments-proposals-to-derogate-from-the-echr-part-2/>

⁸⁹ The Policy Exchange, *The Fog of Law*, 2013: <https://policyexchange.org.uk/wp-content/uploads/2016/09/the-fog-of-law.pdf>; *Clearing the Fog of Law*, 2015: <https://policyexchange.org.uk/wp-content/uploads/2016/09/clearing-the-fog-of-law.pdf>

⁹⁰ For example, in “Clearing the Fog of Law”, a report dated 17 May 2015 by the Policy Exchange the authors state that in the Supreme Court case of *Smith v Ministry of Defence* (2013), the “court established for the first time that soldiers injured in battle or the families of those killed in action may sue the Government for negligence in tort law” (pg 7). That is simply wrong. The court did not do that. On the contrary, the Court upheld the principle of combat immunity, which is the long-standing principle whereby a soldier may not sue his/her commanding officer or the Army or the MoD for acts/omissions/errors committed on the battlefield. All it did was refuse to accept the MoD argument that the principle of combat immunity should be extended to cover a situation that had never applied before, namely procurement decisions. We say more about this below. The error is repeated in “White Flag: an examination of the UK’s defence capability”, by Michael Ashcroft and Isobel Oakeshott, at page 345.

the reasons given for our involvement in these conflicts in the first place: establishing the rule of law and upholding and protecting human rights.

157. Myth-making inside the MoD and misreporting about these judgments has produced a commitment by our Government to derogate from the ECHR in future wars. In October 2016, in a joint announcement with the Prime Minister, the then Secretary of State for Defence Sir Michael Fallon MP announced this Government's presumption to derogate from the European Convention on Human Rights (the Convention) in future military overseas operations. Sir Michael Fallon resigned the following year, succeeded by Gavin Williamson MP. Nothing Mr Fallon's successor has said has indicated that the Government's position has changed. On the contrary, it has been reported that the present Secretary of State for Defence would support the extra-judicial killing of British ISIS fighters abroad. Mr Williamson may be labouring under the misapprehension that derogation from the Convention would enable him to do this.⁹¹

158. Understanding the Government's position on derogation is fundamental to understanding the extent of its commitment towards its international human rights obligations. For years, it had been Conservative party policy to repeal the Human Rights Act. Then Brexit happened. The European Union (Withdrawal) Act 2018 now ensures the removal of the EU Charter of Fundamental Freedoms from UK law. As

a consequence, plans to repeal and replace the Human Rights Act are enjoying a reprieve for now – it presumably being perceived as too difficult to sell the need for a further assault on rights in the UK so soon after the Charter has been disposed of.⁹² The reprieve will be short-lived. The Conservative Party has pledged to review the situation after the UK has left the EU. As long as we remain within the Council of Europe however, the option of derogation is likely to remain an attractive one to a Government that was never committed to the development of a culture of human rights in the first place, preferring instead to pander to widespread public misunderstanding as to the true nature of the legal rights and responsibilities created by the Convention. In that context, the role of the MoD is absolutely crucial, providing an apparent steady stream of examples of human rights madness, dishonest claimants, shoddy lawyers and the unwelcome 'judicialisation' of war. Very few of these examples stand up to scrutiny, but they are compelling and have caught the imagination of many politicians as well as the general public.

159. This chapter will review the law on derogation, examine the Government's stated reasons for the need to derogate from the Convention and explain why the Government's arguments in support of it are unlikely to succeed. It will explain firstly, the strict confines in which derogation can occur; secondly, it will look at some of the cases that have been brought against UK which have arisen from the wars in Iraq and Afghanistan; and thirdly, it will show that

91 <https://www.bbc.co.uk/news/uk-42260814>

92 "We will not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes." Conservative Party manifesto 2017.

derogation, as currently proposed, is unlikely to succeed and unlikely to stop the very cases that have so infuriated the MoD.

Article 15 European Convention on Human Rights

160. Article 15 of the European Convention on Human Rights sets out when a state may derogate from the Convention.

Entitled “Derogation in time of emergency”, the Article provides:

“In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (1) and 7 shall be made under this provision.

Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall so inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”

161. As can be seen, the circumstances when derogation is permitted under the Convention are tightly circumscribed. Derogation should be temporary, limited and supervised.⁹³

The UK Government’s present position

162. It is instructive to set the Government’s stated reasons for intending to derogate from the Convention against the wording of Article 15.

163. The Secretary of State explained that “where appropriate” and “in the precise circumstances of the operation in question, before embarking on significant future military operations”, the Government intended to derogate from the Convention. He acknowledged that “any derogation would need to be justified and could only be made from certain articles”. In the event of derogation, he reassured the Chair of the Joint Committee on Human Rights (JCHR), the Armed Forces would “continue to operate to the highest standards and be subject to the rule of law, remaining at all times subject to UK Service Law” as well as international humanitarian law.⁹⁴

164. The Government proposes to take this step because of what it describes as “concerns about the impact of recent judicial developments particularly in the European Court of Human Rights”.

⁹³ Certain Convention rights do not permit of any derogation: Article 15 § 2 prohibits any derogation in respect of the right to life (A2) save for as permitted in the Convention, as a lawful act of war; torture (A3); the prohibition of slavery and servitude (A4); and the rule of “no punishment without law” (A7); similarly, there can be no derogation from Article 1 of Protocol No. 6 (abolishing the death penalty in peacetime) to the Convention, Article 1 of Protocol No. 13 (abolishing the death penalty in all circumstances) to the Convention and Article 4 (the right not to be tried or punished twice) of Protocol No. 7 to the Convention. Reproduced as Annex 6 to this report: https://www.parliament.uk/documents/joint-committees/human-rights/correspondence/2016-17/HH_to_MF_re_derogation.pdf

165. The Secretary of State went on to list a number of concerns, which included that:

- a) The framers of the Convention had not intended that it should apply to overseas armed conflicts governed by international humanitarian law;
- b) There was a concern about recent “discovery and assertion by the courts, and in particular the European Court of Human Rights, of a jurisdictional reach both extraterritoriality and into overseas armed conflicts governed by international humanitarian law”;
- c) Some of that case law has caused the gravest concern in terms of its potential impact “on fighting effectiveness, the proper conduct of military operations and the sheer litigation and procedural burden”. There was a particular concern about the power to detain insurgents;
- d) There is serious uncertainty about how international humanitarian law and the Convention interact in armed conflicts. The Government believes that international humanitarian law “represents the bespoke and internationally agreed set of principles governing armed conflicts.”
- e) There has been a flood of litigation arising from the wars in Iraq and Afghanistan, which has involved “thousands of claims being made and having to be defended and dealt with involved claims for money and claims in public law seeking investigations or declarations.”

f) The Iraq Historic Allegations Team (IHAT) has had to consider thousands of claims and “is operating on the scale of a police force in its own right and has to be funded accordingly”.

g) Costly public enquiries “including Al-Sweady” have cost millions of pounds “both in litigation and then in the public enquiry itself, only to conclude that the allegations were based on lies.”

166. It is notable that there is no reference to the Baha Mousa inquiry nor to the fact that, as of January 2016, the Government had chosen to settle 326 cases to the value of around £20 million.

167. This long list of reasons essentially amounts to the following proposition: the litigation that has been brought following the wars in Iraq and Afghanistan has established that the jurisdictional reach of the Convention is not limited territorially and governs the conduct of (and the Government’s obligations towards its) soldiers overseas whenever UK forces have occupied an area or where its forces have physical power and control over individuals during the course of their operations. This has resulted in investigations having to be established, findings of some violations being made and compensation being ordered.

168. It is not immediately apparent how such reasons would fit within the limited scope of Article 15, nor why the Secretary of State thinks that they would provide a legal basis to derogate from the European Convention.

What has the European Court of Human Rights said about Article 15:

On the meaning of “war or other public emergency threatening the life of the nation”:

169. *Lawless v Ireland* was an application arising from the detention without trial of the applicant following his arrest in Ireland on suspicion of terrorist offences and in connection with his membership of the IRA. The European Court of Human Rights (the Court) concluded that the natural and customary meaning of the words “other public emergency threatening the life of the nation” was sufficiently clear: it is “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed” (§28). The Government in that case was justified in declaring that there was a public emergency threatening the life of the nation. Derogation was a step it was entitled to take.

170. This is consistent with a whole line of cases arising from the Northern Ireland conflict in which the Court has repeatedly found that the political and military situation giving rise to the decision to derogate from the European Convention on Human Rights amounted to a public emergency threatening the life of the nation.⁹⁵

171. Compare that with the case of *Denmark, Norway, Sweden*

⁹⁵ *Lawless v Ireland* (no. 3) (Application No 332/57), 1 July 1961; *Ireland v. the United Kingdom*, 18 January 1978 (judgment); *Brannigan and McBride v. the United Kingdom*, 26 May 1993 (judgment)

and the Netherlands v. Greece (“The Greek Case”)⁹⁶ where the Commission found that the conditions for the application of Article 15 had not been met. It observed that the public emergency threatening the life of the nation invoked by Greece did not in fact exist. It found that the legislative measures and administrative practices of the Greek government (which was a military junta) had breached a number of Convention provisions and that those measures and practices had not been justified on the basis of Article 15.

172. But by and large, a significant margin of appreciation has been afforded to governments and a good deal of deference shown to a state party’s discretion to decide what amounts to a public emergency threatening the life of the nation. In *Aksoy v Turkey* the Court stated that the national authorities were better placed than the Court to decide both on the presence of an emergency and on the nature and scope of the derogations necessary to deal with it.⁹⁷ Nonetheless, the Court has been careful to make clear that states do not enjoy an unlimited discretion. It was for the Court to rule whether governments had gone beyond the “extent strictly required by the exigencies” of the crisis.

173. In *A. & Ors v UK*, a UK case that followed the attacks of 11 September 2001 and which arose from the indefinite

⁹⁶ 5 November 1969 (report of the European Commission of Human Rights) file:///GOVERNMENT%20OF%20DENMARK%20v.%20THE%20GOVERNMENT%20OF%20GREECE%20%3B%20GOVERNMENT%20OF%20NORWAY%20v.%20THE%20GOVERNMENT%20OF%20GREECE%20%3B%20GOVERNMENT%20OF%20SWEDEN%20v.%20THE%20GOVERNMENT%20OF%20GREECE%20%3B%20GOVERNMENT%20OF%20THE%20NETHERLANDS%20v.%20THE%20GOVERNMENT%20OF%20GREECE.pdf

⁹⁷ *Aksoy v Turkey*, 18 December 1996, Application no. 21987/93, §68

detention without charge of foreign nationals in the UK who could not be deported, the Court accepted that there had been a public emergency threatening the life of the nation.⁹⁸ The Secretary of State had provided evidence to show the existence of a threat of serious terrorist attacks planned against the UK. Closed evidence material had been relied upon.⁹⁹ All the national judges except one had concluded the threat to have been credible. Although no al-Qaeda attack had actually taken place in the UK at the time when the derogation notice had been given, the Court concluded that the national authorities could not be criticised for having feared such an attack to be imminent. A state could not be expected to wait for disaster to strike before taking measures to deal with it. The national authorities enjoyed a wide margin of appreciation in assessing the threat. Weight had to be attached to the judgment of the executive, Parliament and the views of the national courts, which were better placed to assess the evidence relating to the existence of an emergency. (On whether the measures then taken were strictly necessary, the position was different, see below).

On the meaning of “to the extent strictly required by the exigencies of the situation”:

174. In the Northern Ireland line of cases, the Court has repeatedly found that the measures taken following derogation were strictly confined to the exigencies of the situation and were within the margin of appreciation.

175. But in *A. and Ors v UK*, while the House of Lords had previously ruled that although there was an emergency threatening the life of the nation, it was held that the detention scheme did not rationally address the threat. The domestic court found that there was evidence that United Kingdom nationals were also involved in terrorist networks linked to al-Qaeda but the detention scheme did not apply to them and discriminated unjustifiably against foreign nationals. It therefore made a declaration of incompatibility and quashed the derogation order. But the impugned measure¹⁰⁰ remained in force until it was repealed. The case was appealed to the European Court of Human Rights.

176. The Court found that the decision by Government and Parliament to adopt an immigration measure to address what had essentially been a security challenge had resulted in a failure adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. The Court found that there had been a violation of Article 5 because the derogating measures had been disproportionate in that they had discriminated unjustifiably between nationals and non-nationals.

177. The cases of *Alpay v. Turkey* and *Altan v. Turkey*,¹⁰¹ concerned complaints by two journalists who had been arrested and detained following the attempted military coup of 15 July 2016. The Turkish Government argued that there had been a public emergency threatening the life of the nation on account of the risks caused by the attempted military coup and that the measures taken

⁹⁸ *A. and Ors v UK*, 19 February 2009, Application No 3455/05

⁹⁹ *Before the domestic Special Immigration Appeals Commission (SIAC)*

¹⁰⁰ *Part 4, Anti-Terrorism, Crime and Security Act 2001*

¹⁰¹ *20 March 2018 (Chamber judgments)*

by the national authorities in response to the emergency had been strictly required by the exigencies of the situation.

178. The Court noted that the domestic Turkish Constitutional Court had already expressed concerns about the applicability of Article 15, holding that the guarantees of the right to liberty and security would be meaningless if it were accepted that people could be placed in pre-trial detention without any strong evidence that they had committed an offence. The European Court found that the deprivations of liberty had been disproportionate to the strict exigencies of the situation. The Court also noted that the Government had not provided it with any evidence that could persuade it to depart from the conclusion reached by Turkey's own Constitutional Court. There had been a violation.

179. On 24 November 2015, France filed a formal notice of derogation with the Council of Europe, following the Paris attacks of earlier that month. The derogation notice has been criticised in some quarters for being imprecise and liable to lead to a dilution of rights protection in areas outside of addressing terrorism.¹⁰² In the event that litigation progresses to the European Court, it seems reasonable to expect the Court to find that there had been a public emergency threatening the life of the nation, given the extent and ferocity of the attacks. But it will be interesting to see if all of the measures taken as a consequence will be found to have been "strictly required", particularly given criticisms that the measures have been used to target, among

other people, climate change activists.¹⁰³ If the measures designed to enable the state to address the risk of terrorism were in fact used to deal with non-terrorist groups, this raises doubts about the extent to which France's measures were strictly required according to the exigencies of the situation.

Cases brought against the UK arising from the wars in Iraq and Afghanistan.

Where does all this leave the UK?

180. It is clear that the Government's concerns which have led it to call for derogation in future conflicts come from a number of high-profile cases that have arisen from the wars in Iraq and Afghanistan. It is beyond the scope of this chapter to undertake a comprehensive review of all the key cases in that context but a narrative of some of the main developments is set down here so that the Government's position on derogation can be placed within its proper context.

181. The extent to which the Convention applies to acts done by a state party outside its own territory is governed by Article 1 of the Convention, which requires the contracting parties to secure to everyone "within their jurisdiction" the rights and freedoms defined in the Convention.

182. The key question became, what was meant by the words "within their jurisdiction"? This was answered in *Al-Skeini v United Kingdom*.¹⁰⁴ The Court interpreted this phrase more

102 See Human Rights Watch, <https://www.hrw.org/news/2015/11/24/france-new-emergency-powers-threaten-rights> "France uses sweeping powers to curb climate protests, but clashes erupt", New York Times, 29/11/15: https://www.nytimes.com/2015/11/30/world/europe/france-uses-sweeping-powers-to-curb-climate-protests-but-clashes-erupt.html?_r=0

104 (2011) 53 EHRR 18, paras 130++.

broadly than previous case law had indicated and held that Article 1 applies not only where a contracting state exercises effective control over foreign territory, but also where the state exercises physical power and control over an individual situated on foreign territory. The Court held that where a state exercises control over an individual, the state is required to secure Convention rights to that individual which are relevant to his/her situation.

183. As a consequence, jurisdiction was found in the case of Baha Mousa, the Iraqi hotel receptionist who was detained, tortured and killed while held by British soldiers in September 2003. It is important to recall (particularly in light of the Secretary of State's assurances that in the event of future derogation, Service Law will still apply) that it was in large part the failure of the UK's own service justice system to investigate and account for Baha Mousa's death (and the 5 other deaths pleaded in the litigation) that led to the case being brought in the first place, on the grounds of a breach of the investigative obligation under Articles 2 and 3.

184. The judgment in Al-Skeini led the Supreme Court to overturn its previous ruling on whether Article 1 of the Convention applied to service people overseas. In a 2010 case, the Supreme Court had ruled that British troops operating on foreign soil were not within the jurisdiction of Article 1. Jurisdiction was then found to be essentially territorial, subject to a few exceptions, which did not apply in that case (where a soldier had collapsed and died of heat exhaustion while on operations but off-base).¹⁰⁵ This

judgment was overturned in the cases of *Smith & Ors v Secretary of State for Defence*.¹⁰⁶ The claimants, including those related to servicemen killed in an IED explosion beside their vehicles, argued that the MoD had breached the positive obligation under Article 2 of the Convention to take preventive measures to protect life in light of the real and immediate risk to the lives of soldiers who were required to patrol in Snatch Land Rovers which, they argued, were inappropriately procured and armoured for the purposes for which they were deployed.

185. The Supreme Court held that the soldiers had come within Article 1 of the Convention, just like the Iraqi civilians who had been the subject of the Al-Skeini litigation. Extra-territorial jurisdiction could exist whenever a state, through its agents, exercised authority and control over an individual. Convention rights could be "divided and tailored" to the particular circumstances of the extra-territorial act in question, as opposed to being an indivisible package. A state's extra-territorial jurisdiction over local inhabitants existed because of the authority and control that is exercised over them by virtue of the authority and control that the state has over its own armed forces. They were all - the civilians who were under the control of the soldiers and the soldiers themselves - within the jurisdiction of the Convention. Whether Article 2 had in fact been violated was a matter that ought to go to trial and the claims would

¹⁰⁵ *R (on the application of Smith) (Respondent) v The Secretary of State for Defence and another (Appellants)* [2010] UKSC 29.

¹⁰⁶ *Smith and others (Appellants) v The Ministry of Defence (Respondent), Ellis (Respondent) v The Ministry of Defence (Appellant), Allbutt and others (Respondents) v The Ministry of Defence (Appellant)* [2013] UKSC 41

not be struck out on the basis that there was simply no jurisdiction at all, which was the MoD's argument.¹⁰⁷

186. It is also very important to note that the Supreme Court in this case firmly upheld the principle of combat immunity which is the principle whereby a soldier may not sue their commanding officer or the Army/MOD for negligent acts committed on the battlefield. The Court made clear that the principle of combat immunity was unchanged and sound. The MOD had argued that it ought to be extended to cover situations that it had never covered before - namely procurement decisions taken in Whitehall, long before the start of hostilities. The Court declined to do that, saying:

*"to apply the doctrine of combat immunity to these claims would involve an extension of that doctrine beyond the cases to which it had previously been applied. That in itself suggests that it should not be permitted. I can find nothing in these cases to suggest that the doctrine extends that far."*¹⁰⁸

The case of Smith has been the subject of a great deal of misrepresentation.

187. Key cases that followed *Al-Skeini* and *Smith & Ors* have focused on the application of Article 5 of the Convention to decisions to detain combatants and/or civilians during overseas operations. The upshot of the recent string of cases is as follows:

188. Article 1 of the Convention applies to detainees, so detention needs to be in accordance with the Convention and in particular Article 5, which protects the right to liberty and security.

189. Article 5 reads as follows:

Article 5

1. Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- a) the lawful detention of a person after conviction by a competent court;
- b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

¹⁰⁷ The claims have, it has been reported, subsequently settled by the MoD and will not proceed to trial: <https://www.bbc.co.uk/news/uk-40958686>

¹⁰⁸ *Smith & Ors v Ministry of Defence* [2013] UKSC 41 para 92

- e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

190. But Article 5 does not provide for internment or other form of administrative or preventative detention outside the exhaustive list contained within the article. There was

therefore an issue about whether those suspected of being combatants and/or civilians caught up in the conflict, could be detained by British forces fighting overseas at all and if they could, what the procedural safeguards should be.

191. This issue was comprehensively examined in the case of *Hassan v UK*.¹⁰⁹ The case concerned the capture and detention at Camp Bucca of an Iraqi national by British armed forces, in southeastern Iraq in 2003. It was claimed on behalf of the detainee that his arrest and detention was arbitrary, unlawful and lacking in procedural safeguards. No request to derogate had been made by the Government during the relevant period (or at all). Instead, the Government requested the Court to disapply UKs obligations under Article 5 or in some other way interpret them in the light of the powers of detention available to it under international humanitarian law (the Geneva Conventions).¹¹⁰

192. In *Hassan*, the Court noted that it was not the practice of the Contracting States to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts. That practice was mirrored by State practice in relation to the International Covenant for the Protection of Civil and Political Rights.¹¹¹ In light of these considerations, the Court accepted the Government's

¹⁰⁹ 16 September 2014 (Grand Chamber) (Application no. 29750/09)
¹¹⁰ There are 4 Geneva Conventions of 12 August 1949. The third and fourth were relevant. The third is the Geneva Convention relative to the Treatment of Prisoners of War (see in particular Article 21, restriction on liberty of movement), http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.32_GC-III-EN.pdf; and the fourth is the Geneva Convention relative to the Protection of Civilian Persons in Time of War (see in particular Articles 42 (grounds for internment) and 78 (security measures including internment)) http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf

¹¹¹ Article 4, ICCPR contains the derogation provisions which mirror almost exactly Convention Article 15.

argument that the lack of a formal derogation under Article 15 did not prevent the Court from taking account of the context and provisions of international humanitarian law when interpreting and applying Article 5. The Court considered that, even in situations of international armed conflict, the safeguards under the Convention should continue to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out under Article 5 should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. The Court was mindful of the fact that internment in peacetime did not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15. It could only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security were accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.

193. In the circumstances of the case, the Court found that the capture and detention had been consistent with the powers available to the United Kingdom under the Third and Fourth Geneva Conventions, and had not been arbitrary. It therefore held that there had been no violation of Article 5.

194. So essentially, the Court read down (some would say diluted) Article 5 to accommodate the realities of armed conflict. The authority to detain would be found, as in *Hassan* and in a situation of international armed conflict, within the Geneva Conventions (and in particular the provisions on detention and/or internment of POWs and civilians).

195. In a situation of non-international armed conflict (where the Geneva Conventions do not apply), the UN Security Council Resolutions authorising certain security (including detaining) measures to be taken by the detaining armed forces would provide the authority to detain. This was examined in the case of *Mohammed No 2* where the Supreme Court held that, for the purposes of Article 5(1) of the Convention, UK armed forces had the legal power to detain the claimants pursuant to UN Security Council Resolution 1546, where the detention was necessary for imperative reasons of security.¹¹² There, the Supreme Court went on to find that as a consequence of Article 5 applying, there would need to be an initial review of the appropriateness of detention, followed by regular reviews thereafter, and that the reviews should be conducted by an impartial body in accordance with a fair procedure. The initial detention and authorisation had been appropriate, but after a period of time it had become unlawful according to these criteria and this led to the finding of a violation.

196. This analysis was followed in the civil claims considered

¹¹² *Mohammed (No 2) v Ministry of Defence [2017] UKSC 2, [2017] AC 821*. The Supreme Court held that in a non-international armed conflict context article 5(1) should be read so as to accommodate, as a permissible ground, detention in accordance with a power of internment in international law conferred by a resolution of the UN Security Council. Hence, article 5(1) permitted UK forces to detain if this was necessary for imperative reasons of security.

by Mr Justice Leggatt in *Alseran, Waheed, MRE & KSU v Secretary of State for the Home Department* on 14 December 2017.¹¹³ In a lengthy, detailed judgment which displayed considerable deference to the need to enable soldiers on the ground to make split-second decisions that should not be second-guessed by the courts, Leggatt J concluded that the initial detentions, screenings and authorisations were lawful but there came a point when the detention had become arbitrary. Ten days without a review to establish the lawfulness of the basis of detention would cross that line, there had been no effective opportunity for the detainee to challenge his detention and make representations and the detaining panel had applied an incorrect test for deciding whether or not to release. Further, during their detention, some of the claimants had been subjected to inhuman and degrading treatment, which violated Article 3 and which included hooding, being made to lie down on their front on the ground while soldiers ran across their backs as well as sexually humiliating treatment.¹¹⁴

197. The experiences of these detainees demonstrate the need to have in place some kind of protective system to guard against abuses committed by what is no doubt a tiny but important minority of British soldiers.

What would derogation mean in practical terms?

198. Article 15 makes clear that is not possible to derogate from Articles 2 and 3. Both articles comprise substantive and

investigative obligations, which are indivisible. It will not be possible to argue that the State should be bound by the substantive part of Article 2 (no killing outside the narrow confines of what is permitted by Article 2 (which includes lawful acts of war)) or the prohibition on torture, but not by the investigative obligations that attach to those articles. Yet that appears to be the logical consequence of the Government's objection to having been compelled to set up the numerous investigations that have flowed from allegations of killing and serious ill-treatment by some British soldiers.

199. Thus, derogation would not have prevented the courts from examining and ruling that the deaths that were the subject of the Al-Skeini litigation were required to be properly investigated. Nor would it have prevented the Al-Sweady inquiry from being founded - the fact that the most serious allegations were not made out following the investigation has no bearing on the lawfulness of the original decision that an independent investigation was required.¹¹⁵ It would not have prevented Article 2 and 3 violations from being found in those

¹¹³ *Alseran, Waheed, MRE & KSU v Secretary of State for the Home Department* [2017] EWHC 3289 (QB) *Ibid*, §s 9 (iii), 482, 499, 9(iii), 233, 951

¹¹⁵ *Al-Sweady was the uncle of a man killed during a battle with British soldiers. Various allegations were made including that captured fighters had been killed or ill-treated in custody. The claimant claimed that there had been an insufficient investigation into the allegations. In originally ordering the inquiry, the High Court condemned the MoD's failure to disclose relevant documents and held that the Army's own investigation was "not thorough or proficient". The inquiry eventually reported that although aspects of the Army's detention of Iraqi detainees "amounted to actual or possible ill-treatment", the most serious allegations of torture and unlawful killing were "wholly and entirely without merit or justification". The then Secretary of State indicated regret at the "instances of ill-treatment" but blamed the Iraqi complainants and 2 law firms that had represented them, highlighting an alleged failure to disclose a single document which, the MoD believed, would have prevented the inquiry from progressing. He made no reference to the circumstances in which the inquiry had originally been established and the failures of disclosure within his own department. At the time of writing, the Secretary of State has not responded to the dismissal of the regulatory proceedings that were being brought against one of the law firms involved, Leigh Day. The findings of the Al-Sweady inquiry, as Professor Andrew Williams has noted in his article, "The Iraq abuse allegations and the limits of UK law" (Public Law, 2018, Jul, 461-481), "allowed the Government's assumptions that the Iraq allegations were generally spurious and the product of malice and greed to become the dominant narrative." Following the decision, it was announced that IHAT would be closed down.*

civil claims such as *Alseran, Waheed, MRE & KSY v Secretary of State* where the evidence, following investigation, supported it.

200. The Government of course has to accept that it will not be able to derogate from Article 2 or 3 of the Convention. Bearing that in mind, it is interesting to note the MoD's arguments in the recent trial of Alseran, Waheed et al. It was their case that hooding would not necessarily constitute a violation of Article 3. If they had succeeded in this argument, and hooding had been found not to constitute a violation of Article 3, they would have been able to continue to engage in the hooding of detainees. Leggatt J dealt with this argument robustly:

“Despite its unequivocal published policy, the MOD felt able to submit at the trial of MRE and KSU that the hooding of captured persons does not amount to inhuman and degrading treatment under article 3 of the European Convention where it is done for short periods of time during transit for reasons of operational security... As the lessons of Northern Ireland, the Baha Mousa inquiry and the Al-Bazzouni case do not seem to have been fully absorbed by the MOD, I consider that the court should now make it clear in unequivocal terms that putting sandbags (or other hoods) over the heads of prisoners at any time and for whatever purpose is a form of degrading treatment which insults human dignity and violates article 3 of the European Convention. It is also, in the context of an international armed conflict, a violation of article 13 of Geneva III, which requires prisoners to be humanely treated at all times. An incantation of “operational security” cannot justify treating prisoners in a degrading manner.”¹¹⁶

201. The principle consequence of derogation would be that Article 5 would no longer apply. But in circumstances where the Government has successfully argued that Article 5 should, in effect, be read down so that the strict procedural requirements of Article 5 are not applied during international armed conflict, it is hard to see what the problem is. All that has been held to be required is, in essence, that there should be a fair process. The courts have displayed a great deal of deference and recognise the risks of judicialising war. The judgments have enabled the armed forces to detain insurgents, combatants and civilians in the particular and difficult circumstances of armed conflict, subject to certain minimum safeguards. These safeguards are not onerous and comprise the need for independent review and the right of the detained person to participate in that review. (In Mr Waheed's case, those deciding on whether he ought to be maintained in detention were within the detaining authority's chain of command at all times, assisted by an MoD official whose job was, in part, to ensure the reputation of the British Army was protected. Unsurprisingly, the court found such a process to lack independence). In addition, the detainee himself ought to be informed (without divulging secret information) the gist of why he was being held, the procedure should be explained to him, he should be allowed to contact the outside world and he should be allowed to make representations¹¹⁷. There was no such fair process in place for Mr Waheed and a violation was found.

¹¹⁶ *Alseran, Al-Waheed, MRE, KSU v Ministry of Defence [2017] EWHC 3289 (QB), paras 494-495.*

¹¹⁷ *Mohammed (No 2) Lord Sumption (at para 107) University Press, 2014, pp. 149-68, p. 158*

202. Given what we know about what happened to Baha Mousa and the other civilians who were unlawfully detained (and given what we now know about British involvement and assistance in the mistreatment of suspects during the War on Terror)¹¹⁸, it is surprising and deeply troubling that the Government wishes to argue that it ought not to be held to Convention-compliant standards. The reassurances that we should not be concerned because Service Law will still apply ring hollow indeed. When British soldiers took Baha Mousa into their custody, they may not have thought that the Convention applied but they can have been in no doubt that Service Law did. Service Law did nothing to protect him or the others who died. The Army's own internal investigation that followed was flawed and all efforts to compel an independent investigation vigorously opposed by the MoD. If the basic Article 5 protections no longer apply to armed conflicts overseas, serious concerns arise about what will happen to those detainees who risk disappearing into the legal black hole of derogation. As Lt Col Nicholas Mercer, the Army's former senior legal adviser to the British land forces during the invasion and initial stabilisation observed of his experiences in Iraq, "it became clear that when a lesser standard was applied, there was room for legal debate, then there was the potential for abuse - with tragic

consequences in the case of Baha Mousa."¹¹⁹

203. To summarise: the case-law that has flowed from the wars in Iraq and Afghanistan has established, essentially, that war is difficult and different - but it is not a legal black hole. The Convention requires the accountable use of lethal force, with effective and realisable safeguards, which include investigations into credible allegations of abuse. It requires that victims and soldiers have a means of redress, where fundamental human rights and the laws of war are breached. From some quarters, the implications of these judgments are measured, limited and reasonable and essentially amount to the propositions: don't kill unless it's a lawful act of war, don't torture and ill-treat civilians or combatants under your control -ever- and enable some minimum procedural standards to ensure people are not held in indefinite extra judicial detention. Far from creating uncertainty, the Convention clarifies and structures the military's use of lethal force and its powers of detention in ways the Army itself ought to recognise and to honour. Attacks on the Human Rights Act are not made in the interests of soldiers or their families but rather are in the interests only of the powers that be. Upholding the Human Rights Act and the European Convention on Human Rights is entirely consistent with the reasons given for our intervention in these conflicts in the first place. Presumed derogations would fundamentally undermine such principles and safeguards and send a terrible message to rights-abusing regimes around the world.

¹¹⁸ https://www.independent.co.uk/voices/editorials/iraq-war-torture-rendition-jack-straw-tony-blair-us-intelligence-agencies-a8421636.html;https://b1cba9b3-a-5e6631fd-s-sites.googlegroups.com/a/independent.gov.uk/isc/files/20180628_HC1113_Report_Detainee_Mistreatment_and_Rendition_2001_10.pdf?attachauth=ANoY7coFe5Nl7H9laF4rOclDm3rPxRryQYXc2BuAEZdSVrTAP86pED2XEOWP7vmt7rUC-FR4x2GW0pdCBrKw978ouE3ig13MDg!D0LsbBj8_LQJCCS80l6prD7fMA4lAEn7JUPSDTJAIX5c5eMm30N-Nls27wHcalGCCli9XOA1xN7bfT2wVvM1AQUS8SWxO4aoW3TTkepcuN3-inQP7uS_mZ-FVN7mkG5L88pu-5HbSwEHnflEH6rpru7ZMq2Zf3QuCQHU7D66UdZr8SouWpkX-kfTEXNI_jTIGycuVDCsOG3lqlnUoel%3D&attre-directs=0

¹¹⁹ Mercer, N., 'The future of Article 5 tribunals in the light of experiences in the Iraq War 2003', in *Contemporary Challenges to the Laws of War*, Harvey, C., Summers, J., and White, N. (eds.), Cambridge: Cambridge University Press 2014, pp 149-68; 158

204. In any event, it is hard to envisage a situation which derogation is likely to be appropriate, on the Government's analysis. The reasons offered by the Government would not meet the stringent requirements of Article 15. It is hard to see how the armed conflicts in Iraq and Afghanistan could have possibly "threatened the life of the UK". On the contrary, these wars were justified as being fought in the service of human rights, democracy and the rule of law.

205. Lord Hoffman encapsulated the situation perfectly, in *A & Ors*:

"What is meant by "threatening the life of the nation"? The "nation" is a social organism, living in its territory (in this case, the United Kingdom) under its own form of government and subject to a system of laws which expresses its own political and moral values. When one speaks of a threat to the "life" of the nation, the word life is being used in a metaphorical sense. The life of the nation is not coterminous with the lives of its people. The nation, its institutions and values, endure through generations. In many important respects, England is the same nation as it was at the time of the first Elizabeth or the Glorious Revolution. The Armada threatened to destroy the life of the nation, not by loss of life in battle, but by subjecting English institutions to the rule of Spain and the Inquisition. The same was true of the threat posed to the United Kingdom by Nazi Germany in the Second World War. This country, more than any other in the world, has an unbroken history of living for centuries under institutions and in accordance with values which show a recognisable continuity... This is a nation which has been

tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community... The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these."¹²⁰

RECOMMENDATIONS

The Government should commit not to derogate from the European Convention on Human Rights in future armed conflicts.



ANNEXES

ANNEX 1

The Armed Forces Covenant

An Enduring Covenant Between

The People of the United Kingdom

Her Majesty's Government

– and –

All those who serve or have served in the Armed Forces of the Crown

And their Families

The first duty of Government is the defence of the realm. Our Armed Forces fulfil that responsibility on behalf of the Government, sacrificing some civilian freedoms, facing danger and, sometimes, suffering serious injury or death as a result of their duty.

Families also play a vital role in supporting the operational effectiveness of our Armed Forces. In return, the whole nation has a moral obligation to the members of the Naval Service, the Army and the Royal Air Force, together with their families.

They deserve our respect and support, and fair treatment.

Those who serve in the Armed Forces, whether regular or Reserve, those who have served in the past, and their families, should face no disadvantage compared to other citizens in the provision of public and commercial services. Special consideration is appropriate in some cases, especially for those who have given most such as the injured and the bereaved.

This obligation involves the whole of society: it includes voluntary and charitable bodies, private organisations, and the actions of individuals in supporting the Armed Forces. Recognising those who have performed military duty unites the country and demonstrates the value of their contribution. This has no greater expression than in upholding this Covenant.

ANNEX 2

Protocol on the exercise of criminal jurisdiction in England and Wales

BETWEEN

The Director of Service Prosecutions

and

The Director of Public Prosecutions

and

The Ministry of Defence

1. Introduction and scope of this protocol

- 1.1. This document is intended as an agreement between the above signatories as to the principles governing the issue of concurrent jurisdiction where a criminal offence is alleged to have been committed by a person subject to Service law¹. This document is intended to update and replace the Protocol on the exercise of criminal jurisdiction in England and Wales completed 26 September 2011². The signatories to this protocol note that the Prosecutors Convention 2009 (updated 2012)³ also includes useful guidance for cases where there are overlapping interests.
- 1.2. The Director of Public Prosecutions and Director of Service Prosecutions have concurrent powers to bring a charge with respect to any person subject to Service law in relation to alleged criminal conduct within England and Wales⁴. This protocol only deals with offences committed in England and Wales.
- 1.3. Cases which fall to be prosecuted within the Service jurisdiction may be dealt with by the Commanding Officer and/or the Court Martial ("Service proceedings"). The Commanding Officer may only deal with a very limited range of criminal offences. Under section 42 of the Armed Forces Act 2006 ("the 2006 Act") the Court Martial has jurisdiction with respect to any conduct:
 - a) that is punishable under the law of England and Wales, or
 - b) that, if done in England and Wales, would be so punishable.
- 1.4. Section 42 of the 2006 Act extended the jurisdiction of the Court Martial, which formerly could not deal with certain criminal offences such as murder, manslaughter and rape (if committed in the United Kingdom) but now has jurisdiction to do so.
- 1.5. It is recognised that in practice the effectiveness of this protocol and the appropriate determination of whether proceedings are to be brought within the civilian or Service jurisdiction depends in part on appropriate decisions being made as to which police force(s) (Home Office, Ministry of Defence or Service Police) undertake(s) the

¹ "Subject to service law" is defined in sections 367 to 369 of the Armed Forces Act 2006 (the "2006 Act"). Broadly speaking, the term covers any member of Her Majesty's regular forces and any member of her reserve forces while on duty.

² The 2011 protocol updated and replaced the guiding principles set out in paragraphs 12.17 – 12.25 of Home Office Circular 36/1986.

³ Available at <https://www.gov.uk/the-prosecutors-convention-2009-updated-2012>

⁴ The power of the MoD is, strictly speaking, the power of the Commanding Officers to charge (explained in paragraph 1.3).

investigation. It is also recognised that agreement on the taking of these decisions is necessary, but it is not the subject of this protocol.⁵ However, because there is no legal mechanism to transfer a case between jurisdictions after charge, it is extremely important that the case is allocated to the most appropriate prosecuting authority at the earliest stage in the proceedings⁶. Although it is usually the case that a police force will consult and pass cases to the aligned prosecuting authority for charge (for example Home Office police to the Crown Prosecution Service (CPS)), it is possible to transfer a case between jurisdictions before charge by going through a relevant police force. Therefore, the signatories agree to draw this protocol to the attention of police forces and will seek the agreement of those forces:

- a) to bear in mind the principles contained in this document;
- b) where any issue arises under this protocol as to appropriate jurisdiction, to consult other interested police forces as early as possible, as well as the CPS or SPA as appropriate, in order to ascertain the most appropriate jurisdiction in which the suspect should be charged.

1.6. The principles contained in this protocol have been approved by the Attorney General for England and Wales and by the Ministry of Justice.

2. Decision as to the most appropriate tribunal for proceedings

2.1. It is an established principle that where there are overlapping civilian and Service jurisdictions and authorities within England and Wales, the civilian jurisdictions and authorities have precedence, such that if there is an issue between either the Ministry of Defence or the Service Prosecuting Authority (SPA) and the CPS as to the application of paragraph 2.2 to the case, it will be for the Director of Public Prosecutions to decide whether a suspect who is subject to Service law should be charged and subsequently tried in the civilian or Service jurisdiction.

2.2 The overriding principle is the requirement of fair and efficient justice. Subject to that, the main principles which will be applied by the signatories to this protocol when considering the appropriate jurisdiction (Service or civilian) in which to charge and subsequently try a suspect who is subject to Service law are as follows:

- a) offences alleged only against persons subject to Service law which affect the person or property of civilians⁷ should normally be dealt with by a civilian court and not in Service proceedings;
- b) offences alleged only against persons subject to Service law which do not affect the person or property of civilians should normally be dealt with in Service proceedings and not by a civilian court; and
- c) offences alleged jointly against persons subject to Service law and civilians should normally be dealt with by a civilian court.⁸

⁵ The 2008 protocol between the Association of Chief Police Officers; the Ministry of Defence Police and the Service Police determines which police force will assume responsibility for the investigation of an alleged offence in situations where there is concurrent jurisdiction.

⁶ The commencement of a second set of proceedings in the Service jurisdiction and the discontinuance of criminal proceedings in the civilian jurisdiction (and vice versa) would require careful consideration of the legal risks and procedural issues involved and therefore to be avoided if at all possible.

⁷ A civilian is a person who is not a member of the armed forces.

⁸ Service proceedings generally have no jurisdiction to try persons who are not subject to Service law for offences committed in England and Wales, although there are exceptions, such as former members of the armed forces for offences committed while in the armed forces.

2.3. Where there is an issue as to the appropriate jurisdiction in which to deal with a suspect who is subject to Service law, the Director of Public Prosecutions and the Director of Service Prosecutions should consult in relation to the appropriate jurisdiction to deal with the case, acknowledging that the final decision rests with the Director of Public Prosecutions. Either Director may consult the Attorney General to seek his view on the appropriate jurisdiction where either of them considers it appropriate to do so.

2.4. The overriding principle of fair and efficient justice allows the signatories to take into account other factors which may affect the application of the principles in paragraph 2.2 when considering the appropriate jurisdiction in which to charge and try a suspect subject to Service law. Examples of factors which the signatories may take into account could be:

- a) where there are linked cases (for example, where an offence is linked to a series of other similar offences which have been or are being dealt with in either a Service or civilian context);
- b) practical matters, such as the availability of witnesses to participate in the proceedings, or where the person charged is about to be sent overseas (in which case it may be more efficient for the case to be dealt with in the Service jurisdiction);
- c) where there is a strong Service disciplinary context (for example, where an offence is more serious because of a Service factor, or where the location of the offence or the fact that the accused was on duty at the time makes it important for the disciplinary aspects of the misconduct to be fully understood and taken into account). This is linked to the related power of Service proceedings to have regard to the maintenance of discipline as one of the statutory purposes of sentencing – see section 237 of the 2006 Act;
- d) the appropriateness of available sentencing powers (including powers in the 2006 Act of Service detention (which involves retraining), reduction in rank and dismissal, and the fact that certain orders e.g. under the Road Traffic Acts and Proceeds of Crime Act 2002 are only available to civilian courts).

3. Review of this protocol

3.1. The signatories will aim to review this protocol not later than two years from the date upon which it is signed.

Signatories

Signed on behalf of the
Ministry of Defence

Andrew Cayley CMG QC
Director of Service
Prosecutions



Alison Saunders CB
Director of Public
Prosecutions



Mark Lancaster MP
Minister for Defence Personnel
Welfare and Veterans



Dated 7 November 2016 Dated 11 November
2016

Dated 29/11/16

ANNEX 3

Issue Date: 05/12/2008
Implementation Date: 06/12/2008

Home Office Circular 028 / 2008

A Protocol Between Police Forces And The Ministry Of Defence Police

From: Crime Reduction and Community Safety Group (CRCRG), Police Reform and Resources

FOR MORE INFORMATION CONTACT:
Oscar Ramudo 0207 035 3660,
Email:

This Circular Replaces Circular No 024/2002 : A PROTOCOL BETWEEN THE MINISTRY OF DEFENCE POLICE AND HOME OFFICE POLICE FORCES ;

THIS CIRCULAR IS ADDRESSED TO:
Home Office Police Forces, Police Authorities, MOD Police

COPIES ARE BEING SENT TO :

Broad Subject: Police Service

Sub Category: Operational Policing

MOU between ACPO and the MOD & Service Police

Status: This Protocol relates to arrangements solely in England and Wales and associated territorial waters and provides for an efficient and effective working relationship between the MDP, the Service Police, and the HOPFs outlining where necessary areas of responsibility and accountability. It makes provision for consultation and co-operation between the signatories, with the aim of delivering the best policing on the ground and in particular for the reporting and investigation of crime.

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Section

1. Preface
2. Guidance, advice and procedures

SECTION 1 - PREFACE

A protocol has existed between the MDP and other ACPO forces since 1987, with various revisions, the last being in 2002. The protocols, including the current new draft, cover the range of areas and issues where the MDP and other forces are likely to come into contact, and are generally pragmatic and non-contentious in nature.

The current draft is intended by the MOD to consolidate, update and replace the 2002 version. Again, in almost all respects it is straight forward and non- contentious – but there are two changes that are of some significance.

The first change is that the protocol now includes the Service Police – i.e. the Royal Military Police, RAF Police and Royal Navy Provost. This has been done to recognise and put onto an appropriate footing, the fact that in some places, the Service Police do, within their jurisdiction for service personnel, deal with some crimes. This is not likely to be a contentious issue, so it is intended by the MOD to be no more than recognition in the protocol of the existence of local arrangements in some force areas.

The second difference is a change in the MOD's requirement of the Ministry of Defence Police. The 2002 version of the protocol contained a commitment that the MDP would deal with all crime on the Defence estate. In practice this was not implemented nor achievable: the MDP are not present on much of the defence estate, nor funded for a widespread general crime role. The new draft links the MDP involvement in crime to the types of crime and locations which are prioritised to meeting the MOD's needs.

The MDP are maintained and funded by the Ministry of Defence to provide policing support to Defence objectives and priorities. The force is not funded by the Home Office, Local Authorities or Council Tax and MDP resources in any area are always additional to local police resources. The primary task of the MDP is armed protective security policing of critical defence assets, in accordance with the MOD's funded tasking requirements, and accordingly the MDP are present only on those parts of the Defence estate where the MOD provides funded tasks.

The MDP do have a Criminal Investigation Department comprising some 200 police officers and staff. The CID is maintained and funded to provide a Special Branch, intelligence in relation to protest and disruption of Defence business, deal with Defence crime, and in particular to investigate fraud and corruption. In 2006/07 the MDP dealt with 3640 crimes in the UK. Geographically, the MDP dealt with less than 10 crimes in 16 force areas, and less than 100 in 33 force areas.

The effect of the new protocol would be that the MDP would not deal with crimes on the Defence estate at locations where there are no MDP officers available. The MDP

would continue to deal with crimes where they are present and available, and would increase their focus on crimes which cause significant harm to the Defence capability. Our best estimate is that this would involve a reduction by a few hundred in the number of crimes dealt with by the MDP, with a minimal impact on most forces. However there will be some locations within some forces where the impact may be noticeable. We have identified the forces in question as North Yorkshire; Essex; Thames Valley; Devon & Cornwall; Wiltshire; Suffolk and Hampshire. I have written to the Chief Constables concerned, to identify our assessment of those locations with the invitation to engage with us on analysis, impact and mitigation.

This change will not represent any reduction in the MDP's overall contribution to and commitment to crime – it is only a necessary (and MOD required) shift in priorities towards the more serious end of crime which has the potential to cause significant harm to the Defence capability.

SECTION 2 - GUIDANCE, ADVICE AND PROCEDURES

POLICING PROTOCOL BETWEEN THE MINISTRY OF DEFENCE POLICE, THE SERVICE POLICE AND THE HOME OFFICE POLICE FORCES IN ENGLAND AND WALES

INTRODUCTION

1. This Protocol replaces HOC 24/2002 dated 3 May 2002 which was a bilateral agreement between the Ministry of Defence Police (MDP) and the Home Office Police Forces (HOPFs). The scope of the Protocol has been expanded to include the Service Police forces. The participants to this Protocol are the Chief Constable of the MDP, Single Service Police Provost Marshals, and the Chief Constables of the HOPFs in England and Wales operating under the Police Act 1996.

AIM

2. General responsibility for the maintenance and enforcement of the criminal law throughout England and Wales rests with the chief officers of the "1996 Act" police forces (hereinafter described as 'local Chief Constables'¹¹ and 'local police forces'). This Protocol relates to arrangements solely in England and Wales and associated territorial waters and provides for an efficient and effective working relationship between the MDP, the Service Police, the BTP and the HOPFs outlining where necessary areas of responsibility and accountability. It makes provision for consultation and co-operation between the signatories, with the aim of delivering the best policing on the ground and in particular for the reporting and investigation of crime.

SCOPE

3. This Protocol outlines the roles, responsibilities and jurisdiction (including first response) of the participants to the Protocol. It also outlines arrangements for the policing of Service Families Accommodation (SFA); armed deployment; traffic control and escorts; mutual aid between MDP and HOPF; and how the MDP and HOPFs in England and Wales intend that the extended jurisdiction given to the MDP (in the Anti-terrorism, Crime and Security Act 2001) to act in support to the HOPFs, including in immediate and urgent circumstances, will be exercised. Finally, the Protocol addresses complaints against the police and consultation, exchange of information

and mutual support between participants

4. The Protocol will not have any impact or bearing on the existing agreements between the civil authorities and the MOD under the "Civil Authorities and the Military Aid to the Civil Authorities."[\[2\]](#)

5. This Protocol sets out the principles to be followed when dealing with the handling of national security cases[\[3\]](#) in the MOD and deaths on MOD establishments[\[4\]](#). The detail of how these matters are dealt with is covered in separate agreements. The carriage and use of firearms by the MDP, Service Police and other Service Personnel outside the Defence Estate will be the subject of a separate national MOD/ACPO protocol.

ROLES AND RESPONSIBILITIES

HOPFs

6. Policing in England and Wales is regulated by the Home Office which is responsible for setting out national priorities in the National Policing Plan (NPP). Each local police force is geographically sited to police the local population for that area, and is complemented accordingly, or to meet any national commitments within their boundary. Each local police force works to its own local policing authority and produces local policing plans that reflect the NPP for the maintenance of law, crime reduction and the keeping of good public order.

MDP

7. The Ministry of Defence Police (MDP) is a civilian police force within the MOD and was given statutory recognition by the MDP Act 1987. The primary role of the MDP is to combat the main crime and security risks faced by the MOD which are: terrorist attack and the threat of it; disruption and disorder caused by protestors; theft of key assets; and major financial fraud. This role is carried out by providing armed security, uniform policing and the investigation of serious crime.

8. MDP officers are civil police with full UK constabulary powers, and jurisdiction to exercise these powers as set out in Section 2 MDP Act 1987, which includes:

a. **Places.** Any land, vehicles, vessels and aircraft used for defence purposes and any land under an agreement for provision of MOD services as published in the London Gazette.

b. Any other place in the UK which relates to:

(i). **Crown Property.** Crown, international defence and dockyard property, including the free passage of such property; and

(ii). Members of the Armed Forces, visiting forces, those employed by or for the MOD or Defence Council, and defence contractors (in respect of those contracts).

9. Although MDP officers have jurisdiction as constables throughout the MOD estate within the UK, they do not have a permanent presence at all MOD locations, and are deployed primarily at designated defence establishments. However, the MDP have limited centrally provided specialist resources (both uniform and CID) which are tasked to deal with certain police related issues concerning MOD property or

personnel anywhere in the UK, when appropriate. Due to the dispersed geographic distribution of the Force and limited investigative resources, the MDP will give priority to crime which impacts significantly upon defence capability.

10. The Chief Officers of the MDP are members of the Association of Chief Police Officers (ACPO), and whilst the force operates within the context of MOD strategic policy, operational policing is generally carried out in accordance with ACPO doctrine, standards and procedures.

Service Police

11. The Service Police consist of the Royal Navy Police, the Royal Military Police and the Royal Air Force Police. The Chief Officers of the Service Police are known as Provost Marshals. The role of the Service Police is to support operational effectiveness and wider military capability in the UK and overseas, in both hostile and benign environments, by contributing to the:

- Prevention and investigation of crime by persons subject to the Service Discipline Acts (SDA)[\[5\]](#).
- Maintenance and enforcement of Service discipline and good order.
- Protection and safe deployment of Service personnel and assets.

The Service Police exercise jurisdiction over personnel subject to the SDA, legislation applied by statutory instrument, e.g. Part V of the Police and Criminal Evidence Act (PACE) 1984 and other primary legislation, e.g. RIPA 2000. The Service Police do not have civil constabulary powers. Service Police powers are derived from the SDA which allow the Service Police to exercise lawful authority over Service personnel. Outside of the UK, the Service Police provide a full policing service for service personnel and civilians and families, who are subject to the SDA. Service Police also retain historic jurisdiction for offences committed outside the UK by former members of HM Forces and any civilians who were at that time under military jurisdiction.

INVESTIGATION OF CRIMES

12. **Introduction.** As previously stated, general responsibility for the maintenance and enforcement of the criminal law throughout England and Wales (and associated territorial waters) rests with the local police forces. However, the Service Police have a concurrent jurisdiction over all persons subject to the SDA. The MDP also have a concurrent jurisdiction (under the MDP Act 1987, over what may very broadly be described as defence property and defence personnel). In some cases it will be more appropriate for the MDP or Service Police to deal with defence-related crime. A flexible approach, based on consultation and agreement at local level, is encouraged, where the respective police forces discuss who is best placed to take action based on availability of resources, jurisdiction and the public interest.

13. **Jurisdiction Including First Response to an Incident.** It is in the interest of all participants to the Protocol that they respond to crimes reported to them as quickly as possible to save life and to secure and preserve evidence. Inter-agency tasking is encouraged where geographical or resource limitations exist. Where a participant has a crime reported to them or discovers one during the course of their normal duties and the matter is found to be within the concurrent jurisdiction of another, they undertake to inform that participant immediately. In addition, there

are cases in which either the Service Police or MDP will not have, or will not exercise jurisdiction, but they happen, in practice, to be first on the scene. In such cases the MDP and the Service Police will only take immediate action necessary at the scene, whilst simultaneously informing the local police force, but may provide appropriate assistance to such an investigation carried out by a local police force. Guidance on initial action to be taken on discovering a serious incident by duty/off duty staff at military sites has also been provided for non-police personnel. It is understood by all parties that the local HDPF is responsible for the investigation of any crime, unless the MDP or Service Police agree that it lies within their respective jurisdiction and criteria for criminal investigation.

14. **Very Serious Crimes.** At any incident involving death or serious injury likely to lead to death or the investigation of terrorism, murder or manslaughter in the UK and National Security cases, the MDP and the Service Police will take immediate action necessary at the scene only. They will simultaneously inform the local HOPF who will lead the investigation.

15. **Significant Defence Crime.** While the local police service have jurisdiction to investigate all crimes in its area, where a 'significant defence crime' has been committed, the MDP or Service Police may request that the Local Police code jurisdiction. It is possible that, and notwithstanding the following guidelines, the chief of one of the 4 Defence Police organisations may feel that it would be more appropriate for his force to lead on an enquiry than the force to which the relevant HDPF has ceded the said enquiry. That being the case, the chiefs of the Defence Police organisations concerned should decide which organisation is best placed to lead and advise the local police accordingly. For those cases where it is difficult to clearly identify a clear lead responsibility from the outset, a joint investigation may be the best way forward.

16. **Mutual Support and Cooperation.** The importance of continued liaison, mutual support and co-operation at all levels is recognised and encouraged as an important facet of these arrangements. For example, it is recognised that in a minority of cases the MDP or Service Police may not have the appropriate resources to deal comprehensively with a particular crime. It is also the case that no participants would wish to circumvent established multi-agency approaches to some serious offences e.g. child protection. In these cases it is essential that dialogue between all participants is maintained. When investigative responsibility lies with the MDP or the Service Police they will act in concert to best achieve the needs of the victim and the Department.

17. **Prosecution of Accused persons subject to the SDA.** Civilian criminal courts and service tribunals have concurrent jurisdiction to deal with accused persons who are subject to the SDA. The decision on which jurisdiction prosecutes a person subject to Service Discipline is a matter of consultation between all police agencies involved in the investigation in consultation with the Crown Prosecution Service and Service Prosecuting Authorities.

18. **National Intelligence Model (NIM).** In order to support the NIM, all participants to this protocol agree to share such information as appropriate to their jurisdiction.

DEMONSTRATIONS AND HOSTAGE INCIDENTS IN THE VICINITY OF MOD ESTABLISHMENTS

19. **Demonsntrations.** The policing of anti-nuclear, anti-defence and

environmental demonstrations and other occurrences requiring a police response in the vicinity of a MOD Establishment, or a convoy escorted by MDP (as described in paragraphs 24 and 26-27) will be primarily the responsibility of the local chief constable. Where the MDP is employed at an MOD establishment, consultation will take place between the local chief constable and the Chief Constable MDP as to the policing arrangements for such events. The MDP will usually provide the primary police response inside the establishment and the Local Chief Constable will have operational command outside any MOD Land or premises.

20. **Hostage Incidents.** The local police force will assume primacy at any hostage incident that occurs on MOD property.

POLICING OF SFA

21. As general responsibility for the maintenance and enforcement of the criminal law throughout England and Wales rests with local chief constables, any off-base community policing of Service personnel and their families should be provided by them. However, MDP officers and the Service Police may police SFAs. Heads of MOD Establishments, in consultation with the local chief constable, will assess the appropriate level of security to be afforded to SFA and, if appropriate, the nature and frequency of police activity. This consultation will reflect advice from the MDP, the Service Police and other experts as appropriate.

22. If the Head of Establishment considers that the security situation requires armed patrols of off-base SFA, to which the general public have access, this will be carried out by MDP officers if available. Before conducting armed patrols the Chief Constable MDP will obtain the prior agreement of the local chief constable. The terms of this agreement will be contained in the national protocol to be agreed under paragraph 5 or existing local written protocol.

23. If armed MDP officers are not available the Head of Establishment may seek the written agreement of the local chief constable for armed patrols of off-base SFA by Service Personnel in line with an agreed national protocol. The terms and conditions of this authority, including the types of weapons and method in which firearms are carried, must be specified for each new deployment and must be reviewed periodically. Until this national protocol is available then local protocols should be used. If the chief constable does not agree to arming, the responsibility for providing adequate protection for off-base SFA will remain solely with the local police force until this disagreement is resolved. It follows that good liaison with local police forces should be a high priority for all Heads of MOD Establishments.

ARMED DEPLOYMENT

24. Apart from nuclear convoy escort duties (see paragraph 27 below), MDP officers will only be deployed on armed duties on public roads after prior agreement between the Chief Constable MDP and the local chief constable. In such circumstances, the types of weapon and method in which firearms are carried will be specified in the agreement. MDP officers engaged on armed duties will not use the powers summarised in the 'extended jurisdiction' of paragraphs 31 – 35 below, unless all their weapons are first secured within a locked gun-safe. Detailed arrangements for the deployment of armed MDP officers will be defined in a separate protocol document.

25. The Service Police (including other Service personnel) will not be deployed on armed patrols outside MOD property except with the prior written authority of the local chief constable, and then only under the terms set out in the national protocol as described in paragraph 5.

TRAFFIC CONTROL AND ESCORTS

26. Primary responsibility for the control of traffic on public roads rests with local chief constables. However, MDP officers also have the power to direct traffic on public roads within the terms of their jurisdiction. Whenever an escort is to be provided by the MDP or Service Police of any vehicle carrying a dangerous or sensitive load, any exceptionally sized vehicle, or any convoy of vehicles on public roads, the local chief constable will be provided with advance notification of the route to be taken.

27. Arrangements for the escort of nuclear materials should be made in accordance with the ACPO Manual of Guidance on the Police Use of Firearms and the Report of the ACPO Terrorism and Allied Matters Committee's Working Group on the Transportation of Nuclear Materials.

MUTUAL AID BETWEEN MDP AND HOPF

28. Under section 2A of the MDP Act as inserted by section 99 of the Anti-terrorism, Crime and Security Act 2001, the Chief Constable MDP may, at the request of a local chief constable, provide mutual aid and/or police assistance to that particular force for the purposes of enabling that local police force to meet operational demands. Extensions of the jurisdiction of the MDP will be undertaken in accordance with the provisions of the protocol outlined below or, if those circumstances do not apply, in consultation with the Home Office and the Chief Constable of the local HDPF.

29. This is most likely to be in support of defence-related tasks, major civil emergencies or the provision of specialist policing capabilities, such as marine policing. Where such assistance is provided, MDP officers will be under the operational control of the local chief constable from the requesting force, and will have the same police powers as officers of that force.

30. During any period of mutual aid, MDP officers will be deployed under the overall command of the senior officer of the local police force responsible for policing the operation. Prior to each operation, the local police force concerned will ensure that the MDP officers on mutual aid are fully briefed regarding intelligence, risk assessments, operational deployments and tactics.

EXTENDED JURISDICTION OF THE MDP

31. Generally, jurisdictional requirements mean that the powers available to MDP officers are restricted to MOD land and property within the United Kingdom or to those areas and circumstances detailed within Section 2 of the MDP Act 1987 (see paragraph 8 above). However, section 2 of the MDP Act 1987 has been amended by section 98 of the Anti-terrorism, Crime and Security Act 2001 extends the jurisdiction of MDP officers, giving authority for the exercise of constabulary powers outside these restrictions in the following circumstances:

a. If requested by a constable of a local police force to assist them in the

execution of their duties in relation to a particular incident, investigation or operation.

b. When they suspect on reasonable grounds a person of having committed, being in the course of committing or about to commit an offence, or that they need the powers and privileges of a constable in order to save life or to prevent or minimise personal injury. MDP officers can only act in these circumstances if they are in uniform or have documentary evidence that they are members of the MDP and they believe on reasonable grounds that they should exercise these powers without securing the attendance of, or a request for assistance from, another constable under sub-paragraph (a) above, as this would frustrate or severely prejudice the purpose for which they believe the power should be exercised.

These circumstances are in addition to the provisions of "Mutual Aid" as set out in paragraphs 28 – 30 above.

32. It is envisaged that requests for assistance from local police forces should normally arise from incidents, investigations or operations that have an impact on MDP or their policing jurisdiction. They should not be routinely requested to exercise powers outside their normal jurisdiction on policing tasks unrelated to Defence. However, this should not prevent requests for MDP assistance in any case where there is a real risk to life or where police officers require urgent assistance.

33. The primary role of the MDP continues to be to provide law and order policing services to the MOD estate and community. Other than in the circumstances set out under "Mutual Aid" above, MDP officers will not normally seek to exercise powers in their extended jurisdiction to deal with other matters unless they come across an incident requiring police action in the course of their normal duties.

34. Whenever MDP officers exercise police powers under this "Extended Jurisdiction" the Chief Constable MDP will ensure the local chief constable is notified as soon as possible.

ANTI-TERRORISM POWERS – SUPERINTENDING AND CHIEF OFFICER RANKS

35. The Anti-terrorism, Crime and Security Act 2001 amends the Terrorism Act 2000, so as to grant MDP officers powers to erect cordons and to stop and search under the Terrorism Act 2000. MDP officers of the rank of superintendent and above have the powers to authorise the erection of cordons on MOD land; or at the request of a local police force, within the area of the requesting police force. In the case of the latter, the Chief Constable MDP should consult with the appropriate local chief constable(s) before such an authorisation is made, unless the power is required urgently. In this event, contact will be made with the local chief constable(s) as soon as possible. Officers of ACPO rank can authorise stop and search powers under the Terrorism Act 2000 on MOD land.

ACCOUNTABILITY AND LIABILITY OF MDP OFFICERS EXERCISING POWERS IN EXTENDED JURISDICTION

36. The following is intended to clarify the question of the accountability and vicarious liability of MDP officers when exercising powers in their extended jurisdiction, in line with the general principles of vicarious liabilities of chief constables.

37. Where MDP officers exercise policing powers outside their normal jurisdiction in circumstances set out under "Extended Jurisdiction", Chief Constable MDP remains vicariously liable for all the actions of those officers and for dealing with any consequential claims or actions. This includes those cases where those officers were responding to a specific incident without prior formal "Mutual Aid" arrangements between forces.

38. As a general principle, the Chief Constable MDP and the local chief constable will each assume a sole and individual responsibility for damages and costs arising out of any civil liability or injury occurring as a result of the actions of their own officers whilst engaged in "Mutual Aid" duties. This is regardless as to whether the incident takes place whilst the officer(s) are under the overall supervision of an officer from the other force, unless there is specific legal advice placing sole liability on a single chief constable for all actions, or that liability should be jointly shared between each of them.

39. Costs and damages arising directly from the operational strategy will be met by the local police force. The MOD will indemnify the MDP officer(s) against accidental personal injury whilst engaged on formal "Mutual Aid" duties away from the MOD estate.

40. In prescribing the policies and procedures to be followed by MDP officers when exercising police powers under the extended jurisdiction provided under the Anti-terrorism, Crime and Security Act 2001, the Chief Constable MDP will pay due regard to the policing policies of ACPO.

COMPLAINTS AGAINST POLICE

41. Nothing in this protocol over-rides the responsibility placed on Chief Constables to record and investigate complaints made about the conduct of their officers. However, where a complaint against the police connected with the deployment of mutual aid officers is made, the preferred method of dealing with this is as follows:

a. The geographical location of the incident from which an individual complaint or allegation arises will inform the decision as to which force will conduct the investigation but it will not be the sole determinant. In this section the local police force in whose area the incident is geographically located is referred to as the home force.

b. If officers from both MDP and the home force to whom aid is being provided are involved in the complaint or allegation then the home force will normally investigate all officers provided the respective chief constable agrees. If only officers from the home force are involved, the investigation remains with that force.

c. If only officers from the MDP are involved, that force will normally carry out the investigation. However, if the Chief Constable MDP agrees, the home force may undertake the investigation.

d. Where the identity of the officer(s) complained against is unclear, the home force will be responsible for initiating an investigation. If the identity of the officer(s) is established, subsequent investigations will be dealt with as outlined above.

e. In the event that one or more of the forces involved considers any complaints to qualify for voluntary referral to the IPCC, the other affected force will be consulted before any such voluntary referral is initiated.

f. The Service Police are not subject to the Police Discipline Regulations or to review by the IPCC. Complaints against members of the Service Police are dealt with under single Service procedures and should be referred to the Provost Marshal of the Service Police concerned.

CHARGES FOR POLICING SERVICES PROVIDED BY MDP

42. When an MDP officer is acting under the remit of the "Extended Jurisdiction" of paragraphs 31 to 35, no charge will be made against the requesting local police force. Where the police assistance is provided by MDP in response to a formal request for mutual aid, the charges for those services will be agreed between the Chief Constable of the MDP and the requesting local police force.

CONSULTATION, EXCHANGE OF INFORMATION AND MUTUAL SUPPORT

43. Recognising the mutuality of this protocol, the participants shall endeavour to ensure regular consultation and timely exchange of information and intelligence, using the NIM. Particular priority should be given to information or intelligence relating to policing and security matters that come to the attention of one or more participants, where either this protocol has recognised these as the responsibility of another participant, or where they are likely to impact on those responsibilities.

44. Except in respect of "Mutual Aid" (which will be dealt with at chief officer level), where, in any of these above paragraphs, an undertaking has been given by any of the parties to this protocol, this may be delegated to appropriate local officers within each organisation for day to day operational matters.

45. This protocol should be reviewed annually or at any time specifically requested by one of the signatories.

¹¹ References within this Protocol to a local Chief Constable include the Commissioner, Deputy Commissioner and Assistant Commissioner of the Metropolitan Police Service and the City of London Police where appropriate. This protocol does not include the British Transport Police and the Civil Nuclear Constabulary as they have separate responsibilities, but the MDP and Service Police will clearly extend to them the collaborative and supportive principles that underpin this protocol.

¹² Military Aid to the Civil Authorities includes Military Aid to other Government Departments, Military Aid to the Civil Power and Military Aid to the Civil Community.

¹³ Protocol between the Ministry of Defence and the Metropolitan Police Special Branch on the handling of national security cases involving MOD information, assets and/or personnel.

¹⁴ MOD/ACPO Protocol on the Investigation of Deaths on Land or Premises Owned, Occupied or Under the Control of the Ministry of Defence.

¹⁵ The Service Discipline Acts comprise the Naval Discipline Act 1957, the Army Act 1955 and the Air Force Act 1955 (these will be replaced by the Armed Forces Act 2006 on 1 Jan 09).

ANNEX 4



TRI-SERVICE INVESTIGATIONS POLICY

Investigations

1. The Provost Marshals of the Royal Navy, Army and the Royal Air Force wish to ensure and increase confidence and transparency in the Service Police system, and maintain high standards and good policing practice.

2. The Provost Marshals agree that cases which may indicate the commission of (i) a Schedule 2 or prescribed circumstances offence, or (ii) any other offence which indicates that Articles 2 or 3 of the European Convention on Human Rights may have been breached, by a member of the Service Police or a member of the Provost Branch, ought to be referred by that member's Provost Marshal to an alternative Service Police Force or Provost Marshal for investigation. However, for those offences that do not engage Articles 2 or 3 the presumption of referral can be rebutted if there are cogent reasons, supported by legal advice (where appropriate), as to why a referral is not required.

The referral will normally take place at the outset of the investigation, albeit if the necessity for this only becomes apparent after an investigation has commenced, then the referral will occur at that point.

3. The Provost Marshals agree that cases which may indicate the commission of one of the service offences set out in this paragraph, by a member of the Service Police or a member of the Provost Branch, should generally be referred by that member's Provost Marshal to an alternative Service Police Force or alternative Provost Marshal for investigation. This referral will normally take place at the outset of the investigation, albeit a referral can also be made once an investigation has commenced.

The Provost Marshals will discuss the handling of such cases, and whether there are good reasons why a referral may not be necessary or appropriate in any particular case.

The Service offences falling within this paragraph are as follows:

- (1) any offence under section 42 of the Armed Forces Act 2006 ("the Act") ('criminal conduct') which amounts to an indictable offence;
- (2) any other Service offence which may not be dealt with at a summary hearing by a Commanding Officer;
- (3) any service offence whose commission is intended or likely to have any of the serious consequences listed at section 84(5) of the Armed Forces Act 2006¹;
- (4) any offence under section 11(1) of the Act (using violence against a superior officer);
- (5) any offence under section 18(3) or (4) of the Act (offences in relation to official documents and records with intent to deceive);
- (6) any offence under section 24(1) of the Act (intentional or reckless damage to or loss of public or service property);
- (7) any offence under section 39 of the Act of attempting to commit an offence within sub-paragraphs (4), (5) or (6) above;
- (8) any offence under section 40 of the Act of encouraging or assisting the commission of an offence within sub-paragraphs (4), (5) or (6) above; or,
- (9) any other Service offence committed during a detention process or within a detention facility where the alleged victim is a detainee.

4. The Provost Marshals agree that all other cases which may indicate the commission of an offence by a member of the Service Police or a member of the Provost Branch should be considered by the respective Professional Standards Department to establish the most appropriate course of action.

Management and Reviews

5. It may be impracticable because of serious resource, timeliness or environmental factors, for an alternative Service Police Force to undertake the substantive investigation

¹ Serious harm to the security of the State or to public order; serious interference with the administration of justice or with the investigation of offences or of a particular offence; the death of any person; serious injury to any person; substantial financial gain to any person; serious financial loss to any person; or, the undermining of discipline or morale among members of any of Her Majesty's forces.

into a case that indicates the commission of an offence by a member of another Service Police Force or a member of the Provost Branch (a member of "the first Service Police Force"). If so, the alternative Provost Marshals agree to independently review any investigations into such cases that were carried out by first Service Police Force and, if they consider there are grounds to do so, will carry out a fresh investigation.

Process

6. The Provost Marshal who seeks to refer a case will direct this requirement to the Provost Marshals of the other Services who between them will determine which Service Police Force will undertake the investigation or review. The referral should be accompanied by a written note, supported by legal advice where appropriate, that sets out the reasons why an investigation should be carried out by an alternative Service Police Force.

7. The investigation will be undertaken in accordance with the Armed Forces Act 2006 and relevant Codes of Practice that are current at the time of the investigation. At the conclusion of the investigation, and in accordance with section 116 of the Act, if there is sufficient evidence to charge a person with an offence(s), the case(s) will be referred directly to either the suspect(s) Commanding Officer or to the Director of Service Prosecutions dependent upon the case(s) referred.

Steps to safeguard integrity of investigation

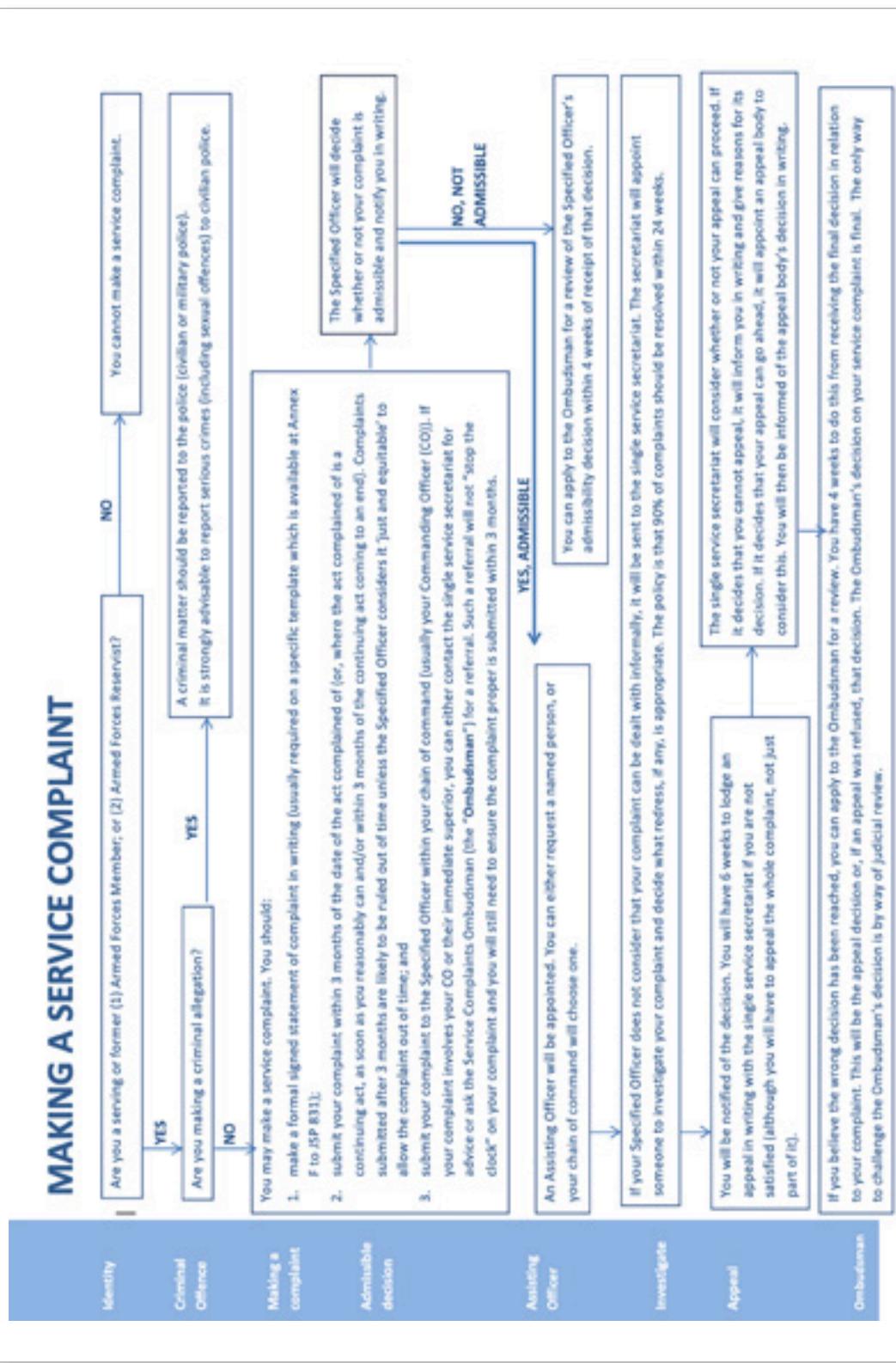
8. This Protocol does not prevent the first Service Police Force from carrying out tasks that are essential to safeguard the integrity of the investigation, such as steps to preserve evidence or secure a crime scene. Such tasks that are carried out should be referred as quickly as possible to the alternative Service Police Force that undertakes the investigation.

9. The protocol shall be reviewed annually or at any such time as is deemed appropriate by the signatories.

C Moran	R W Warren MBE	M Sexton
Commander RN	Brigadier	Group Captain
Provost Marshal (Navy)	Provost Marshal (Army)	Provost Marshal (Royal Air Force)

Dated: 7 November 2012

ANNEX 5



ANNEX 6



Joint Committee on Human Rights

Committee Office - House of Commons - London - SW1A 0AA
Tel 020 7219 2797 Email JCHR@parliament.uk Website www.parliament.uk



From Rt Hon Harriet Harman MP, Chair

Rt Hon Michael Fallon MP
Secretary of State for Defence
Ministry of Defence
Whitehall
London SW1A 2HB

13 October 2016

Dear Michael,

The Government's proposed derogation from the ECHR

I am writing to you about your joint announcement with the Prime Minister on 4 October that the Government propose to protect the Armed Forces from persistent legal claims by introducing a presumption to derogate from the European Convention on Human Rights in future overseas operations.

Derogating from the UK's international human rights obligations is a very serious matter. I am sure you will agree that Parliament has a very important role in scrutinising the reasons for any proposed derogation and the precise terms of the derogating measures, to satisfy itself that the proposed derogation is justified and the strict conditions for the exercise of this exceptional power are met. The need for such rigorous independent scrutiny is all the greater when the case for the derogation is promoted by the very Government department which is effectively seeking immunity from certain legal claims. You will also be aware that certain rights in the Convention cannot be derogated from, including the right not to be subjected to torture or to inhuman or degrading treatment, or the right to life except in respect of deaths resulting from lawful acts of war. Parliament will therefore want to be satisfied that the scope of any proposed derogation does not go further than the ECHR permits.

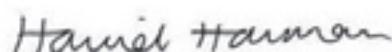
The last time the UK derogated from the ECHR, in the immediate aftermath of 9/11 in 2001, it was to enable the detention of foreign nationals who were suspected terrorists but could not be deported. That derogation was subsequently found by both the Judicial Committee of the House of Lords and the European Court of Human Rights to be incompatible with the Convention because, although both courts accepted that there was a public emergency threatening the life of the nation, the measures taken were disproportionate in that they discriminated unjustifiably between nationals and non-nationals (the threat from terrorism came from both). There was little parliamentary scrutiny of the 2001 derogation and therefore only a very limited opportunity for Parliament to explore such potential compatibility issues. It is important to ensure that this time any proposed derogation is properly scrutinised by Parliament, and that Parliament has the opportunity to reach its own considered assessment of whether the derogation is justified.

My Committee, as Parliament's specialist human rights committee, intends to help Parliament to make this assessment. The early provision of information and explanation is crucial to enable Parliament to arrive at a considered view. We would therefore be grateful if you could provide us with a detailed Memorandum setting out the reasons why a derogation from the ECHR is considered by the Government to be necessary, including the evidence which demonstrates the nature and extent of the problem to which derogation is the solution; why in the Government's view the substantive requirements of Article 15 ECHR are met; the wider implications of the derogation for the European system of human rights protection; and your plans to facilitate parliamentary scrutiny of the proposed derogation.

The Committee would be grateful if the memorandum could address the specific questions contained in the Annex to this letter, which arise from the Committee's first consideration of the issues raised by your announcement. These questions are intended to establish some basic factual and legal matters at the outset, to help the Committee begin its scrutiny of the proposed derogation. The Committee may write again with further specific questions as its consideration of the matter progresses, and may invite you, and possibly other Ministers, to give oral evidence on the subject in due course.

It would be helpful if we could receive your reply to these questions by **Friday 4 November 2016**. I would also be grateful if your officials could provide the Committee secretariat with a copy of your response in Word format, to aid publication. I look forward to hearing from you.

I am copying this letter to the Prime Minister, in view of your joint announcement, and to the Attorney General, Foreign Secretary and Secretary of State for Justice in view of their obvious interest in the subject matter.



Rt Hon Harriet Harman MP
Chair

Cc: Prime Minister
Attorney General
Foreign Secretary
Secretary of State for Justice

ANNEX

Reasons for derogating

Q1: What is the evidence relied on as demonstrating that "our legal system has been abused to level false charges against our troops on an industrial scale"?

Q2: Please provide as detailed a breakdown as possible of the civil claims which have been brought against the MoD arising out of military operations in Iraq and Afghanistan, including:

- The total number of claims arising from operations in Iraq and Afghanistan
- The total number of claims which have been settled by the MoD
- The total number of claims in which the claim has been upheld by a court
- The total number of claims which have been thrown out by a court on the ground that the claim is "vexatious"
- The total number of claims which have been dismissed (but not on the ground that the claim is vexatious)
- The total amount of compensation that has been paid out by the MoD
- The total amount of legal aid payments made in relation to such claims

Q3: Please provide as detailed a breakdown as possible of the cases which have been dealt with by the Service Justice system arising out of military operations in Iraq and Afghanistan, including:

- The total number of cases
- The nature of the cases
- The outcomes

Q4: What is the evidence relied on as demonstrating that the extra-territorial applicability of the ECHR undermines the operational effectiveness of the Armed Forces?

Q5: Have any of the other 46 Member States of the Council of Europe derogated from the extra-territorial application of the ECHR in armed conflicts?

- If not, what is so particular about the situation of the UK?

Q6: Do the UK's NATO allies which are members of the Council of Europe also consider there to be a problem that needs addressing?

- What discussions has the Government had within NATO about the issue?

Substantive requirements of Article 15 ECHR

Q7: Is a “presumption of derogation” compatible with the requirement that the State must be satisfied that the conditions in Article 15 ECHR are met in the particular circumstances existing at the time it seeks to take derogating measures?

(1) “War or other public emergency threatening the life of the nation”

Q8: What sorts of war/conflict is the presumed derogation intended to cover?

- International armed conflicts?
- Non-international armed conflicts?
- Any use of military force abroad on which Parliament has been consulted?
- Any “overseas operations” (to use the language of the Government’s announcement)?

Q9: In the Government’s view does Article 15 ECHR require there to be a war “threatening the life of the nation” for a derogation to be valid?

(2) “Strictly required by the exigencies of the situation”

Q10: What derogating measures does the Government envisage?

Q11: What alternatives to such derogating measures has the Government considered?

Q12: Why are the other measures being proposed by the Government (e.g. shorter time limits for future claims, tougher penalties for firms who bring vexatious claims and restrictions on “no-win no fee deals”) not sufficient to meet the Government’s objective of protecting the armed forces against vexatious legal claims?

Q13: Will the effect of the derogation be that soldiers themselves (or their families) cannot rely on Convention rights in relation to conflicts abroad (e.g. in relation to the adequacy of their equipment or the adequacy of an investigation into a soldier’s death)?

- If so, why is that necessary in order to achieve the Government’s avowed objective?

(3) Consistency with other international obligations

Q14: What assessment has the Government made of whether the proposed derogating measures are consistent with the UK’s other obligations under international law?

- In particular, please explain why the proposed derogating measures will be consistent with the UK’s obligations under the International Covenant on Civil and Political Rights.

(4) Rights which cannot be derogated from

Q15: Please identify precisely which obligations under the Convention the Government intends to derogate from.

Q16: Of the total number of claims brought against the MoD arising out of Iraq and Afghanistan, please provide an approximate indication of the proportion based on

- Article 2 ECHR (the right to life)
- Article 3 ECHR (the right not to be subjected to torture or to inhuman or degrading treatment)
- Article 5 (the right to liberty)

Wider implications

Q17: What consideration has the Government given to the wider implications of its proposed derogation for the European system for the collective enforcement of the rights protected by the European Convention?

Q18: What discussions has the Government had with (a) the Secretary General of the Council of Europe and (b) the Council of Europe’s Commissioner for Human Rights about its proposed derogation?

- If none, will the Government undertake to consult the Secretary General and the Commissioner and report back to Parliament on the result of those consultations in time to inform Parliament’s scrutiny of the proposed derogation?

Parliamentary scrutiny of the proposed derogation

Q19: When and how will Parliament be consulted about the Government’s proposal?

Q20: Will the proposed “presumption to derogate from the ECHR in future conflicts” be contained in legislation?

- If so, when is such legislation likely to be introduced?

Q21: Will the derogating measures themselves be contained in legislation?

- If so, when is such legislation likely to be introduced?

Q22: Will the Government undertake to lay in draft the designated derogation order required by the Human Rights Act, to give Parliament the opportunity to scrutinise and debate the proposed derogation before it comes into effect?

Judicial scrutiny of the derogation

Q23: Does the Government agree that the principle of subsidiarity requires that the validity of any derogation from the ECHR should be determined by UK courts before it is considered by the European Court of Human Rights?

Q24: In the Government's view does the legal framework already provide for such judicial scrutiny, or will it be necessary for the derogating measures to make such provision?

Lead responsibility in Government

Q25: What discussions have you had about the proposed derogation with the Attorney General, the Foreign Secretary and the Secretary of State for Justice?

- Given that the purpose of the proposed derogation is to protect the MoD from legal claims, would it be more appropriate for one of those Ministers to have lead responsibility for the proposed derogation?



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4.7.7

22 November 2016

Dear Harriet

PROPOSED UNITED KINGDOM DEROGATION FROM THE ECHR

Thank you for your letter of 13 October and your questions on the Government's announced policy that there will in future be a presumption that the UK will derogate from the relevant articles of the European Convention on Human Rights (ECHR) in respect of military operations overseas in circumstances when it is appropriate to do so. I was grateful also for your willingness to extend the period for our response.

It is important to be clear at the outset about the nature of that policy. It was set out in a Written Ministerial Statement on 10 October 2016. That is the correct source therefore when considering the policy. It stated as follows:

"... before embarking on significant future military operations, this government intends derogating from the European Convention on Human Rights, where this is appropriate in the precise circumstances of the operation in question. Any derogation would need to be justified and could only be made from certain Articles of the Convention.

In the event of such a derogation, our Armed Forces will continue to operate to the highest standards and be subject to the rule of law. They remain at all times subject to UK Service Law, which incorporates the criminal law of England and Wales, and International Humanitarian Law (the law of armed conflict including the Geneva Conventions) wherever in the world they are serving. Therefore any credible allegations of criminal wrongdoing by members of the Armed Forces will continue to be investigated, and prosecuted within the Service Justice System".

As that passage makes clear, given the concerns about the impact of recent judicial developments particularly in the European Court of Human Rights (ECHR), the Government intends to derogate. However, that intention is deliberately and carefully conditioned:

- No decision has been taken about whether in the context of any particular military future operation it would or would not be appropriate to derogate.

The Rt Hon Harriet Harman MP
Chair of the Joint Committee on Human Rights
House of Commons
London
SW1A 0AA

- b. Such a decision would only be taken if appropriate in all the circumstances.
- c. Such a decision would and could only be taken if legally justified, and from certain ECHR articles, in accordance with the applicable legal principles and structures that existed at that future time.

Many of the questions you have raised cannot therefore be answered (either fully or at all) at this time; and the Government will, for obvious reasons, be highly reluctant to engage in hypothetical debate, and taking positions whether policy or legal, in advance of a concrete issue arising in the particular circumstances.

You ask for "the reasons why a derogation from the ECHR is considered by the government to be necessary". No such conclusion has been reached – as the WMS made entirely clear. A conclusion as to the necessity for a derogation would and could only be made having regard to the circumstances at the time of a future military operation. However, the purpose of our announcement was to make clear that we consider that it may well be right and proper to make use of the provision for derogation contained in Article 15 in future operations overseas.

The nature and basis for the Government's concerns are well known. In summary and without seeking to provide a comprehensive statement, they are as follows:

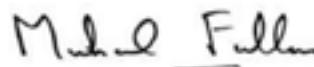
- The framers of the ECHR did not intend that it should apply to overseas armed conflicts governed by International Humanitarian Law (IHL).
- The reach of the ECHR into this sphere has involved the recent discovery and assertion by the courts, and in particular the ECHR, of a jurisdictional reach of the ECHR both extraterritorially and into such overseas armed conflicts governed by IHL.
- The basis on which that reach is to operate and the principles which govern it have not been fully developed.
- However, some of the consequences of that case law have caused and continue to cause the gravest concerns in terms of their potential impact on fighting effectiveness, the proper conduct of military operations and the sheer litigation and procedural burden attached to that extension of jurisdictional reach.

Some notable examples include (and it is fully recognised that the principles have not all been finally set) the following:

- Concerns about matters as basic as the power to detain insurgents in Afghanistan. A case currently before the English courts has led to judgments with the result that there would have been no power to detain (beyond a very short period) a person who was a local Taliban commander, detained after a fire-fight and subsequently discovered to have traces of improvised explosive devices on his person. That is a wholly unacceptable way in which to conduct military operations, protect British servicemen and accomplish the mission set up by the UN.

- The same case even raised serious questions about whether British servicemen had greater powers to use lethal force than a local Afghan citizen. Again, that cannot sensibly form the basis for the conduct of military operations.
- There is serious uncertainty about how IHL and ECHR interact in armed conflict. The IHL represents the bespoke and internationally agreed set of principles governing armed conflicts. Any uncertainty is damaging in a context in which clear rules are at a real premium.
- The Iraq and Afghan contexts have led to a flood of litigation – litigation about those detained; litigation about those killed; litigation about the existence, nature and extent of an obligation under the ECHR to investigate large numbers of deaths and other incidents. The litigation has involved thousands of claims being made and having to be defended and dealt with: involving claims for money and claims in public law seeking investigations or declarations.
- One way in which that flood of claims has had to be dealt with is the setting up of the Iraq Historic Allegations Team (IHAT). It has had to consider and investigate thousands of claims, sometimes many years after the event (the claims in many cases being collected by a local agent working with an English firm of solicitors). It is operating on the scale of a police force in its own right and has to be funded accordingly. Another way is the setting up of costly public inquiries – one of which (Al-Sweady) cost millions of pounds both in litigation and then in the public inquiry itself, only to conclude that the allegations were based on lies.

The Annex to this letter gives answers to your specific questions.



THE RT HON SIR MICHAEL FALLON KCB MP

GOVERNMENT RESPONSE TO THE QUESTIONS POSED IN THE JOINT
COMMITTEE ON HUMAN RIGHTS' LETTER DATED 13 OCTOBER 2016

Q1 What is the evidence relied on as demonstrating that "our legal system has been abused to level false charges against our troops on an industrial scale"?

We have received nearly 1,200 civil compensation claims relating to the Iraq conflict and around 1,400 judicial review applications. Many of these claims have been unaccompanied by evidence. Furthermore, it is the view of the Government, based on the findings of the Al-Sweady public inquiry and other evidence, that a large number of these claims is likely to be exaggerated or spurious. We expect further that very few indeed will be the subject of any action as a result of the investigations of the Iraq Historic Allegations Team (IHAT).

Q2 Please provide as detailed a breakdown as possible of the civil claims which have been brought against the MoD arising out of military operations in Iraq and Afghanistan, including

- *The total number of claims arising from operations in Iraq and Afghanistan*
- *The total number of claims which have been settled by the MoD*
- *The total number of claims in which the claim has been upheld by a court*
- *The total number of claims which have been thrown out by a court on the ground that the claim is "vexatious"*
- *The total amount of compensation that has been paid out by the MoD*
- *The total amount of legal aid payments made in relation to such claims*

MOD records indicate that the total number of common law compensation claims arising from operations in Iraq is 1,191 and that the corresponding figure for Afghanistan is 99, giving a total figure of 1,290. Of these, 324 Iraqi claims and 1 Afghan claim have been settled by the MOD. Virtually none of the other cases has yet been determined by the Courts as they are queued behind a small number of lead cases. The MOD has made compensation payments totalling £19.8 million in the cases that were settled. It should be noted that the vast majority of these payments were made as a result of an ECtHR finding that Iraqi claimants had been detained illegally, which has now been called in question by a subsequent judgment. The MOD has been told that it is not possible to state the total amount of legal aid payments made in respect of these claims.

Q3 Please provide as detailed a breakdown as possible of the cases which have been dealt with by the Service Justice System, including i) total number of cases, ii) the nature of the cases, and iii) the outcomes.

IHAT has received 3,388 allegations concerning UK Forces in Iraq, ranging from unlawful killing to common assault. Of these, 1,686 allegations have already been sifted out, mainly on the basis that they were duplicates or would not amount to an offence even if true. A further 690 (113 allegations of unlawful killing and 577 allegations of ill-treatment) have been closed, or are in the process of being closed. We expect the IHAT caseload to be down to about 60 investigations in July 2017 and for its work to be completed in 2019.

Operation NORTHMOOR investigates allegations against UK Forces in Afghanistan. It has received 646 allegations, ranging from common assault to unlawful killing. This includes 318 allegations of criminal behaviour, and 328 non-criminal allegations (such as cultural insensitivity). To date 89 cases have been discontinued or recommended for discontinuation by the investigators.

Q4 What is the evidence relied on as demonstrating that the extra-territorial applicability of the ECHR undermines the operational effectiveness of the armed forces?

It is not simply its extra-territorial application. It is that and its extension importing Articles designed for peacetime into the sphere of armed conflict. This approach has resulted in decisions that will have a significant impact upon the operational effectiveness of the Armed Forces, for example, their ability to detain those suspected of involvement in insurgent activity, including the manufacture of Improvised Explosive Devices that are used against our troops.

Q5 Have any of the other 46 member states of the Council of Europe derogated from the extra-territorial application of the ECHR in armed conflicts?

No.

Q6 Do the UK's NATO allies which are members of the Council of Europe also consider there to be a problem which needs addressing? What discussions has the government had within NATO about this issue?

As far as we are aware, others in the Council of Europe have not faced legal challenges on the same scale that we have received here.

Q7 Is a "presumption of derogation" compatible with the requirement that the state must be satisfied that the conditions in Article 15 ECHR are met in the particular circumstances existing at the time it seeks to take derogating measures?

Yes.

Q8 What sorts of war/conflict is the presumed derogation intended to cover?

Article 15 may apply to any significant military operation capable of falling within the concepts used in that Article.

Q9 In the Government's view does Article 15 ECHR require there to be a war "threatening the life of the nation" for a derogation to be valid?

Article 15 refers to a "war or other public emergency threatening the life of the nation". We are not aware of any definitive interpretation.

Q10 What derogating measures does the Government envisage?

This would depend entirely on the circumstances existing at the time at which the decision was being considered. Some ECHR Articles cannot be derogated from. The Articles which, to date, have caused particular concern are Articles 2 and 5.

Q11 What alternatives to such derogating measures has the Government considered?

The Government continues to work on a variety of measures, such as advancing arguments in litigation before the European Court of Human Rights that IHL should be better accommodated when judgments relate to combat situations; and working with international organisations to strengthen international commitment to IHL.

Q12 Why are the other measures being proposed by the Government (e.g. shorter time limits for future claims, tougher penalties for firms who bring vexatious claims and restrictions on "no win no fee deals") not sufficient to meet the Government's objective of protecting the armed forces against vexatious legal claims?

The full set of measures which the Government will be proposing has not yet been announced. All of them will be beneficial. The question whether derogation is appropriate and justified in particular future circumstances will take into account the full set of measures in place at that time.

Q13 Will the effect of the derogation be that soldiers themselves (or their families) cannot rely on Convention rights in relation to conflicts abroad (e.g. in relation to the adequacy of their equipment or the adequacy of an investigation into a soldier's death)?

Derogating from the ECHR will not affect the rights of our Armed Forces in matters such as ensuring Article 6 compliant trials within the Service Justice System. There may be some impact upon the type of investigation needed in relation to Article 2, should the UK derogate from that Article in the future (although some form of investigation would be needed to decide whether the death was indeed a "lawful act of war".)

Q14 What assessment has the Government made of whether the proposed derogating measures are consistent with the UK's other obligations under international law? In particular, please explain why the proposed derogating measures will be consistent with the UK's obligations under the International Covenant on Civil and Political Rights.

Article 4 of the International Covenant on Civil and Political Rights also permits States to derogate from certain rights, provided the conditions set out are met. If and when the UK does derogate, care will be taken to ensure that it is wholly consistent with our other international legal obligations as required by Article 15 of the ECHR.

Q15 Please identify precisely which obligations under the Convention the government intends to derogate from.

No decision has yet been taken to derogate.

Q16 Of the total number of claims brought against the MOD arising out of Iraq and Afghanistan, please provide an approximate indication of the proportion based on Article 2 (the right to life), Article 3 (the right not to be subjected to torture or to inhuman and degrading treatment), and Article 5 (the right to liberty)?

Many of the claims allege breaches of multiple Articles: the vast majority of the claims notified allege violations of Articles 2, 3 and 5.

Q17 What consideration has the Government given to the wider implications of its proposed derogation for the European system for the collective enforcement of the rights protected by the European Convention?

We have identified no such implications and would not expect any. The Convention explicitly provides for derogation subject to specific conditions.

Q18 What discussions has the Government had with (a) the Secretary General of the Council of Europe and (b) the Council of Europe's Commissioner for Human Rights about its proposed derogation?

We have informed the Secretary General and the Commissioner for Human Rights of our policy.

Q19 When and how will Parliament be consulted about the Government's proposal?

The procedure is laid out in section 14 of the Human Rights Act. A designation order can be made by the Defence Secretary, which could come into force from the date made. A designation order under the Act must be subsequently approved by each House of Parliament within 40 days from that date if the derogation remains in force that long.

Q20 Will the proposed "presumption to derogate from the ECHR in future conflicts" be contained in legislation?

No.

Q21 Will the derogating measures themselves be contained in legislation?

Derogation is effected by notification to the Secretary-General of the Council of Europe, and the Human Rights Act already contains provision for Parliamentary approval of any derogation in effect for longer than forty days.

Q22 Will the Government undertake to lay in draft the designated derogation order required by the Human Rights Act, to give Parliament the opportunity to scrutinise and debate the proposed legislation before it comes into effect?

The procedure is set out in the Human Rights Act, which recognises that in emergency circumstances derogation may need to be made immediately and therefore requires Parliamentary approval if the derogation is to last longer than forty days. Everything will be done to facilitate early Parliamentary scrutiny if and when we do derogate.

Q23 Does the Government agree that the principle of subsidiarity requires that the validity of any derogation from the ECHR should be determined by the UK courts before it is considered by the European Court of Human Rights?

The forum in which any challenge would take place would depend on the circumstances. As seen in the case of *A & others 2004 [UKHL 56]*, challenges have been brought in relation to previous UK derogations from the ECHR and determined by the UK courts.

Q24 In the Government's view does the legal framework already provide for such judicial scrutiny, or will it be necessary for the derogating measures to make such provision?

The current legal framework provides adequate and appropriate judicial scrutiny, and that there is no requirement to make any additional provision in the derogating measure.

Q25 What discussions have you had about the proposed derogation with the Attorney General, the Foreign Secretary, and the Secretary of State for Justice? Given that the purpose of the derogation is to protect the MoD from legal claims, would it be more appropriate for one of those ministers to have lead responsibility for the proposed derogation?

All relevant Ministers, including the Secretaries of State named, have been fully consulted (the Government does not by convention disclose whether the Attorney-General has been consulted). Responsibility for any given derogation to be made in future will remain with the Defence Secretary, who is in the best position to decide

whether the conditions which must be in place before a derogation is possible are satisfied in the circumstances of the particular military operation concerned.

DEDICATION

This report is dedicated to the families of Pte Sean Benton, Pte Cheryl James, Pte James Collinson, Pte Geoff Gray and Cpl Anne-Marie Ellement and to all our clients and their families who have been affected by or let down by an unfair Service Justice System.



ABOUT LIBERTY

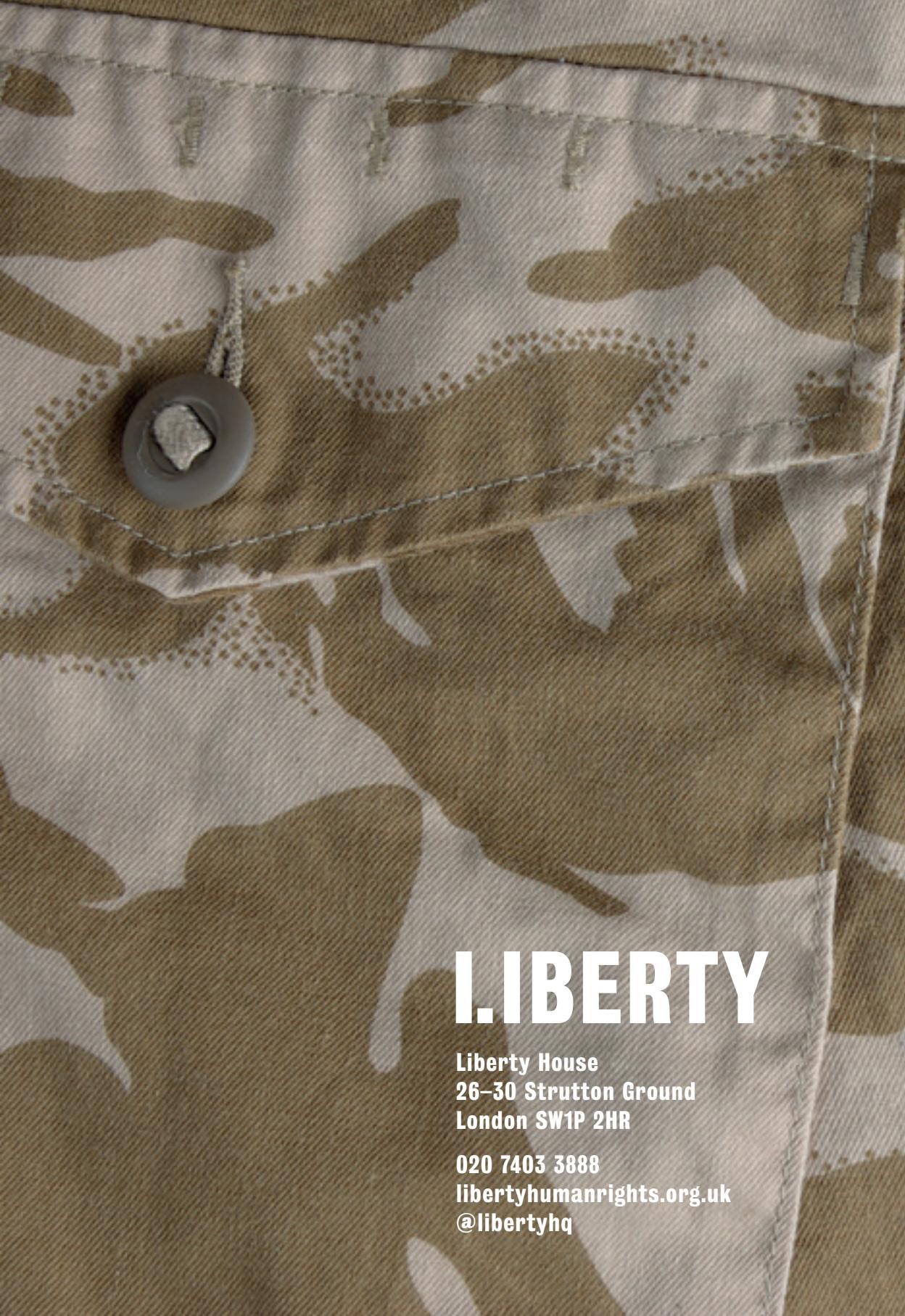
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