

# OVERSEAS OPERATIONS (SERVICE PERSONNEL AND VETERANS) BILL

## EUROPEAN CONVENTION ON HUMAN RIGHTS

### MEMORANDUM BY THE MINISTRY OF DEFENCE

#### Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Overseas Operations (Service Personnel and Veterans) Bill. The Bill contains a range of different measures to address concerns around the prosecution of Service Personnel and veterans for alleged historic offences and vexatious civil claims that undermine the armed forces. The Bill also makes provision requiring consideration of derogation from the ECHR in relation to significant overseas operations.
2. The Secretary of State has made a statement under section 19(1)(a) of the Human Rights Act 1998 that in his view the provisions of the Bill are compatible with the Convention rights.
3. The memorandum has been prepared by the Ministry of Defence and deals only with those parts of the Bill which raise ECHR issues

#### Part 1 – Restrictions on prosecution for certain offences

#### **Presumption against prosecution, matters to be given particular weight, and requirement of consent to prosecute**

4. Part 1 of the Bill contains three measures relating to criminal prosecutions:
  - a. **Presumption against prosecution.** Clause 2 establishes the principle that, in making a prosecution decision to which the measure applies, it will be exceptional for a relevant prosecutor to determine that proceedings should be brought against the service person for the offence.

- b. **Matters to be given particular weight.** Clause 3 establishes the principle that, in making a prosecution decision to which the measure applies, the prosecutor must give particular weight to certain matters set out in the legislation, so far as they tend to reduce the person's culpability or otherwise tend against prosecution.
  - c. **Requirement for consent.** Clause 5 creates the additional requirement for a relevant prosecutor to obtain the consent of the Attorney General (and the Advocate General, in the case of Northern Ireland) to institute criminal proceedings in a case where the presumption measure applies.
5. Articles 2, 3, 6, and 14 are engaged by the provisions contained in Part 1 of the Bill.

#### *Article 2*

6. Article 2 includes a general positive obligation to put in place a framework of laws, procedures and means of enforcement that will, to the greatest extent reasonably practicable, protect life. This duty requires the State to establish an effective judicial system capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim (*Ciechonzska v Poland* 19766/04, 14 June 2011). In certain circumstances, a death or near death will also give rise to a more onerous procedural duty under article 2. This duty requires States to, amongst other things, ensure that effective, independent investigations are conducted in response to credible allegations that a Crown servant has taken life unlawfully and the investigation must be capable of leading to criminal prosecution. As the criminal law measures in the Bill impact on prosecutorial decision-making, article 2 is relevant.
7. MOD considers that the measures in clauses 2, 3 and 5 do not breach the obligations in article 2.
8. Following the commencement of the measures, investigations will still take place and will still be capable of leading to a prosecution. Prosecutors will remain independent and free to exercise their discretion and make decisions to prosecute. Similarly, the requirement in clause 5 to obtain consent does not prevent investigations from leading to prosecutions. MOD notes that there are already examples of requirements in legislation to obtain consent from the Attorney General in relation to alleged killings by State actors (see section 53 of the International Criminal Court Act 2001). When taking

a decision whether to consent to a prosecution, the Attorney General acts quasi-judicially and independently of government, applying well established prosecution principles of evidential sufficiency and public interest.<sup>1</sup>

### *Article 3*

9. In so far as a broadly similar investigative duty may arise under article 3 as under article 2 (and does not go further than the requirements of that article), the measures in clauses 2, 3 and 5 do not interfere with the obligations in article 3 for the reasons set out above in relation to article 2.

### *Article 6*

10. Article 6 applies when criminal charges are being determined and, as the criminal law measures in the Bill relate to prosecution decisions, article 6 is arguably engaged.
11. There is no interference with article 6 because the criminal measures in the Bill do not constrain the rights contained in article 6 in any way and, in particular, the requirements set out in article 6(2) remain satisfied. The proposed measures in fact provide additional protections for a specific class of people in relation to prosecution decisions.

### *Article 14 (article 6), difference in treatment of defendants*

12. Article 14 prohibits discrimination as to the enjoyment of any of the other rights and freedoms in the ECHR on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (this list is not exhaustive).
13. Article 14 is engaged, in conjunction with article 6, because the effect of the measures in clauses 2, 3 and 5 is to treat preferentially Service Personnel who allegedly commit criminal conduct overseas as compared with other persons prosecuted for the same

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<sup>1</sup> Framework agreement between the Law Officers and the Director of Public Prosecutions, paragraph 50.

offences. The preferential treatment is the availability of additional legal protections to a certain class of persons in the context of prosecution for criminal or service offences.

14. MOD considers that any difference in treatment arising from the application of measures contained in clauses 2, 3 and 5 is justified.
15. In as much as being part of Service Personnel not deployed overseas can amount to a relevant status for the purposes of Article 14, the difference in treatment is justified because when Service Personnel deploy on operations overseas, they do so in very different circumstances than those they experience when deployed in support of civil authorities in the UK. On overseas operations, Service Personnel act in the heat of the moment under unique pressures and they face a high degree of hostility and threat of violence. These uniquely challenging circumstances justify the introduction of legal protections against the risk of historic and repeated prosecutions in relation to actions taken during operations overseas. MOD believes that the requirements contained in clauses 2, 3 and 5 are a proportionate means for protecting this group.
16. In as much as being non-Service Personnel involved in operations overseas (or any other person to whom the presumption cannot apply) can amount to a relevant status for the purposes of Article 14, the difference in treatment is justified because of the unique position of Service Personnel as set out above.
17. For these reasons, there is no violation of article 14 in this context.

*Article 14 (article 6), difference in treatment of defendants (seniority in armed forces)*

18. Article 14 is further engaged, in conjunction with article 6, because the effect of the measures contained in clauses 2, 3 and 5 may in practice be to treat Service Personnel differently depending on their rank and, indirectly, their age.
19. The definition of “relevant prosecutor” under the Act does not include Commanding Officers (“COs”), who under the Armed Forces Act 2006 (“AFA 2006”) have the power to charge for any service offence that is capable of being heard summarily (which are dealt with in section 53 AFA 2006). Under section 52(3) of the AFA 2006, one of the conditions determining whether an offence may be heard summarily is whether the accused is “(a) an officer of or below the rank of commander, lieutenant-colonel or wing commander; or (b) a person of or below the rank or rate of warrant officer”. Consequently, if the offence may be dealt with summarily and the accused falls within

the ranks described at section 52(3), he or she will be charged by a CO and will not benefit from the measures in clauses 2 and 3. On the other hand, if the accused is a more senior member of the armed forces then he or she will be dealt with by the Service Prosecuting Authority in the Court Martial and will benefit from the measures. This could potentially constitute a difference of treatment based on rank/seniority, and, indirectly, age, on the basis that junior Service Personnel are more likely to be younger.

20. However, there is in fact no differential treatment because under section 129 of the AFA 2006 a Service Person accused of an offence that may be summarily heard has the right to elect a Court Martial of the charge. As such, Service Personnel being charged by COs (without the benefit of clauses 2, 3 or 5) may elect to be tried in the Court Martial in which case the Director of Service Prosecutions would bring the proceedings and the measures contained in clauses 2, 3 and 5 will apply. There is therefore no breach of Article 14 read with Article 6.

## **Part 2 – Limitation periods and human rights**

### **Limitation**

21. Clauses 8 – 10 and Schedules 2 – 4 contain provisions amending the law on limitation for claims in tort for personal injury or death against the Ministry of Defence (“MOD”), the Secretary of State for Defence or any member of the armed forces in relation to overseas operations.
22. They amend existing legislation to provide that any court or tribunal in the UK, when considering exercising its discretion to extend the primary limitation period of three years applicable to such claims, will be able to do so up to a maximum of six years after the cause of action accrued or an individual became aware that a cause of action had accrued.
23. The clauses also make changes to private international law rules to provide that where the law on limitation of another country falls to be applied in proceedings for such claims, there shall be a complete defence available if the proceedings were commenced more than six years after the limitation period began to run or more than six years after the first date on which the action could have been brought.
24. These provisions will be referred to collectively as the “personal injury longstop”.

25. In addition, these provisions amend existing legislation to provide that, in deciding whether to exercise its discretion to extend the primary limitation period in such cases, the court or tribunal must have particular regard to the effect of the delay in bringing proceedings on the cogency of the evidence, with particular reference to the likely impact of the operational context on the ability of individuals to remember relevant events and to record events, and have particular regard to the likely impact of the proceedings on the mental health of current or former Service Personnel who are called to give evidence.
26. Clause 11 amends the law on limitation for claims under section 7(1)(a) of the Human Rights Act 1998 (“HRA”) against the MOD or the Secretary of State for Defence in relation to overseas operations.
27. It amends the HRA to provide that any court or tribunal in the UK, when considering exercising its discretion to extend the primary limitation period of one year applicable to such claims, will be able to do so up to a maximum of six years after the act complained of took place or 12 months after the claimant became aware of the act and the role of the MOD or the Secretary of State for Defence, whichever is the later.
28. This provision will be referred to as the “human rights longstop”.
29. Clause 11 also provides that, in deciding whether to exercise its discretion to extend the primary limitation period in such cases, the court or tribunal must have particular regard to the effect of the delay in bringing proceedings on the cogency of the evidence, with particular reference to the likely impact of the operational context on the ability of individuals to remember relevant events and to record events, and have particular regard to the likely impact of the proceedings on the mental health of current or former Service Personnel who are called to give evidence.
30. Articles 6, 13 and 14, and Article 1, Protocol 1 are engaged by the provisions contained in clauses 8 – 11 and Schedules 2 – 4 of the Bill.

#### *Article 6*

31. Any limitation period prevents a person vindicating their civil rights after a particular period of time. As a result, article 6 is relevant to both the personal injury longstop and the human rights longstop.

32. MOD considers that there is no breach of article 6.
33. Statutory limitation periods are generally considered to be legitimate restrictions on the right of access to a court, which is not absolute, and the European Court of Human Rights ("ECtHR") has usually upheld the compatibility of limitation periods, even if they are absolute, including the absolute six-year limitation period for claims resulting from intentional torts in England and Wales (see *Stubbings v United Kingdom* (1996) 23 EHRR 213). Limitation periods do not impair the essence of the right of access to a court. Such periods ensure legal certainty and finality, the avoidance of stale claims and prevent injustice where events in the distant past involved unreliable and incomplete evidence because of the passage of time.
34. Significantly, personal injury and human rights claims are already subject to limitation periods and the personal injury longstop and the human rights longstop do not alter the primary limitation periods applicable in relation to those claims (they remain 3 years and 1 year, respectively). The longstops simply provide an absolute limit, beyond which the court may not exercise its discretion to extend the primary limitation period.
35. The provisions requiring a court or tribunal to have particular regard to certain factors when considering exercising their discretion to extend the primary limitation period do not change the analysis under article 6. This is because the requirement to have particular regard does not interfere with the court or tribunal's discretion; they remain free to exercise their discretion and extend the primary limitation period where it would be equitable to do so.
36. It is important to note that when deciding whether to exercise discretion to extend the primary limitation period applicable to personal injury claims, a court or tribunal must already have particular regard to six factors set out in section 33(3) of the Limitation Act 1980. Although no equivalent provisions exist in the HRA, the case law indicates that courts do already have regard to the factors set out in section 33(3) when considering whether to exercise discretion to extend the primary limitation period (see *Rabone v Pennine Care NHS Trust* [2012] UKSC 2).
37. It is MOD's view that none of the new factors set unduly high thresholds for claimants to overcome but rather they are tailored to the unique circumstances presented by cases arising from overseas operations. When deployed, the overseas operational context in which the armed forces and MOD personnel find themselves is unlike any other and serves to compound the difficulties in obtaining accurate and detailed

evidence, particularly after a lengthy period of time has elapsed since the events in question. The armed forces are in a unique situation when on overseas operations and these unique circumstances can make it difficult to have certainty over events and to capture the level of detailed information that will be needed to help determine such a claim. Such claims are heavily reliant on the memories of current and former Service Personnel who frequently interact with hundreds of people during a single deployment and may deploy multiple times. Most importantly, the new factors do not impair the essence of the right of access to court.

### *Article 13*

38. Article 13 is engaged because the human rights longstop will have an impact on the availability of domestic remedies for breaches of ECHR rights by preventing applicants from bringing claims under the HRA after six years where the claim is in connection with an overseas operation.
39. It is MOD's view that the operation of an absolute limitation period does not entirely prevent a claimant from bringing an HRA claim because it only "bites" after a reasonable period of time within which a claimant could have been expected to bring a claim. The period of time provided by the human rights longstop is sufficient to ensure that individuals still have an effective domestic remedy for the purposes of article 13.
40. In addition to the absolute limitation period of six years, a separate "date of knowledge" provision is also inserted into the HRA. This provision applies to claims covered by new section 7A of the HRA and ensures that, where a claimant was not aware before the end of the absolute six year limitation period that the act took place and that it was an act of the MOD or the Secretary of State for Defence, that claimant has one year from their date of knowledge in which to bring a claim (see new section 7A(4) and (5)). This alternative longstop ensures that an article 13 effective remedy remains available in any cases where a claimant does not acquire the requisite knowledge within the six-year absolute limitation period.
41. We consider that a period of one year from the date of knowledge is reasonable because it provides sufficient time for a claimant who is aware of the key elements of their claim (the act complained of and the public authority responsible) to bring proceedings. MOD notes that this period of one year aligns with the existing time limit in section 7(5)(a) of the HRA, where a claim must be brought within one year beginning

with the date on which the act complained of took place. It is also important to note that a claimant will likely still be able to bring a tort claim even if they can no longer bring an HRA claim, and the ECtHR has held that this is relevant for article 13 purposes (see *Klass v Federal Republic of Germany* (1979-80) 2 EHRR 214 and *Al-Nashif v Bulgaria* (2003) 35 EHRR 27).

42. It is also MOD's view that the introduction of certain factors to which a court, in deciding whether to exercise its discretion to extend the primary limitation period up to the longstop, should have particular regard do not affect the availability of an effective domestic remedy for the purposes of article 13.

43. MOD therefore considers that there is no breach of article 13.

#### *Article 14, difference in treatment of defendants*

44. The personal injury longstop and the requirement for courts and tribunals to have particular regard to certain factors when considering extending the primary limitation period for personal injury claims may engage article 14, in conjunction with another right, because they will arguably provide the MOD with an advantage over other defendants, for example charities or private contractors working in the context of overseas operations, which may amount to a discriminatory advantage.

45. If the ambit of another right were engaged in this context such that article 14 was relevant, MOD considers that defendants who would not benefit from the personal injury longstop would not have a qualifying status for the purposes of article 14 and therefore could not demonstrate an interference with article 14.

46. In any event, MOD considers that there is an objective and reasonable justification for any difference in treatment of defendants. The circumstances of claims arising out of overseas military operations are limited and unusual. When deployed, the armed forces are in a unique situation and these unique circumstances can make it difficult to have certainty over events and to capture the level of detailed information that will be needed to help determine such a claim. Such claims are heavily reliant on the memories of current and former Service Personnel who frequently interact with hundreds of people during a single deployment and may deploy multiple times. Decisions in operational contexts must be taken extremely quickly and under great stress.

47. In particular, armed forces personnel are deployed on overseas military operations in an exercise of State authority within the confines of specific rules of engagement which comply with, for example, the Geneva Conventions, in order to carry out functions that are specific to military and defence personnel. Private contractors and NGOs, by contrast have very different roles and are not subject to the same rules of engagement and parameters of international humanitarian law as the armed forces, and therefore the concerns about subjecting such scenarios to unfair scrutiny in a sterile judicial environment operating with hindsight do not apply to claims against them.

*Article 14 (with article 6), difference in treatment of claimants*

48. The provisions on the personal injury longstop, the human rights longstop, and the requirements to consider particular factors engage article 14, in conjunction with article 6, in respect of claimants. Whilst they will apply equally to potential claims by both British and foreign nationals against the MOD, as the provisions relate only to claims in connection with overseas operations, it is likely that foreign nationals will be disproportionately affected, which may amount (indirectly) to a difference in treatment on the basis of nationality. However, the MOD do not consider that the measures give rise to disproportionately prejudicial effects because, as set out above, the longstops do not prevent any claims from being brought and merely provide for a reasonable time limit in which they must be brought.

49. Further, for the reasons set out above, MOD considers that there is an objective and reasonable justification for any difference in treatment given the unique position of the armed forces involved in operations overseas.

*Article 1, Protocol 1*

50. Arguably the personal injury longstop and human rights longstop may engage Article 1, Protocol 1 because they remove the ability to obtain a judgment after six years. However, whilst an enforceable judgment will constitute a possession for the purposes of Article 1, Protocol 1, prior to obtaining a judgment a potential claimant can only have, at best, a legitimate expectation of a particular outcome in accordance with the law. The limitation longstops only act to remove the possibility that a court would exercise discretion in favour of a claimant after six years, rather than remove their cause of

action entirely. Our view is that the claims excluded by operation of the longstops are unlikely to be considered sufficiently certain to be regarded as possessions for the purposes of Article 1, Protocol 1 and therefore Article 1, Protocol 1 is not engaged.

51. Even if the measures do engage Article 1, Protocol 1, MOD's view is that both longstops would be a justified interference with the right.

## **Derogation**

52. Clause 12 inserts a new section 14A into the Human Rights Act 1998, which places a new duty on the Secretary of State to consider whether derogation from the ECHR is appropriate in relation to significant operations overseas. Clause 12 does not require derogation nor does it make a decision to derogate more or less likely; derogation is still entirely dependent on the particular circumstances under consideration at the time.

53. Clause 12 does not itself engage any ECHR provisions. However, any future decision to derogate following consideration pursuant to new section 14A of the HRA will do so.