CENTRE FOR MILITARY JUSTICE
Justice - Welfare - Law

CENTRE FOR MILITARY JUSTICE
BRIEFING ON THE OVERSEAS OPERATIONS BILL

INTRODUCTION AND SUMMARY

The CMJ is a small, independent legal charity established to advise current and former members of the Armed Forces or their bereaved families who have suffered serious bullying, sexual harassment, sexual violence, racism or other abuse or neglect. The CMJ also undertakes educational and outreach work within the Armed Forces sector, promoting the rule of law, human rights and access to justice. [1]

Summary and reality check:

- There have in fact been hardly any criminal prosecutions brought against service personnel, arising from the wars in Iraq and Afghanistan. Available data suggests there have been just 7 - and no more are likely. The Govt is not able to point to any criminal cases that should not have been brought. In that context, it is hard to understand the need to legislate against a phenomenon of prosecutions that simply does not exist. [2] [3]

- If the real target is the need to stop a so-called 'cycle of investigations' into allegations against soldiers, then it is notable that the Bill would not stop that. [4] But there are lots of practical steps that could have been taken years ago and could be taken now to improve the quality of service policing and service prosecutorial decision-making. Bringing in meaningful and far reaching changes to the service justice system would mean that allegations arising in a future conflict could be properly investigated and resolved within a reasonable period of time. Many of these proposed reforms were extensively examined in the Service Justice System Review which reported in February 2020. However the Bill is completely silent about them. The Govt now says that it is looking at acting on some of the recommendations – but they are not in the Bill, no detail is given, and those with experience of trying to encourage the MoD to open up to greater independent involvement fear they will not go far enough.

- Notwithstanding the lack of criminal prosecutions, there have been civil claims for damages and judicial reviews brought in the civil courts and there have been 2 public inquiries. While we are confident that those responsible are in a small minority, those legal processes have sadly revealed serious human rights violations by some British soldiers. The *Baha Mousa* inquiry revealed torture, unlawful killing and the use of prohibited techniques by British soldiers; and the civil claims selected to be the 'lead' cases in the Iraqi litigation, known as *Alseran* [5], revealed the use of prohibited interrogation techniques, physical assaults and sexually humiliating treatment by

[1] www.centreformilitaryjustice.org.uk
[2] Systemic Issues Identified from Service Police and other investigations: August 2018. MoD. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/737152/20180830-Review_of_systemic_issues_arising_from_military_operations_overseas_Fourth_Report.pdf
[3] The Bill does not cover Northern Ireland. But even in NI there have only been 6 prosecutions brought against soldiers, out of a conflict that lasted 30 years. https://commonslibrary.parliament.uk/research-briefings/cbp-8352/
[4] The Bill deals with *prosecutions*, not the *investigations* that necessarily precede a decision on whether or not to prosecute.
[5] Alseran & Ors v MoD [2017] EWHC 3289 (QB), https://www.judiciary.uk/wp-content/uploads/2017/12/alseran-ministry-of-defence-20171214.pdf

British soldiers against detainees. While the *Al-Sweady* inquiry largely absolved those accused of mistreating detainees, the Govt has relied upon those findings to distract attention from the *Baha Mousa* and *Alseran* findings. On the rare occasions where abuse occurs, the Government should not wish to make it harder to hold those responsible to account.

- The changes that the Govt wants to bring in to deal with civil claims will affect service personnel too, potentially very significantly.

- Prosecutors, the courts and the regulators already have extensive powers – which they exercise all the time - to deal with the issues the Bill purports to address.

THE STATUTORY PRESUMPTION AGAINST PROSECUTION

1. Of the problem of repeat investigations into allegations against British soldiers, Jonny Mercer MP, said: 'one of the biggest problems … was the military's inability to investigate itself and the standard of those investigations … If those investigations were done properly … we probably wouldn't be where we are today.' [6]

2. The CMJ agrees. The litigation that has flowed from the wars in Iraq and Afghanistan and which lies behind the Bill's proposals, was made inevitable because there were insufficient inquiries made into credible allegations of abuse at the relevant time. If there had been independent criminal inquiries within a reasonable period of time of the allegations, then it is reasonable to assume that victims would have got justice and the unfairly accused would have been exonerated long ago.

3. Lots of senior current and former members of the Armed Forces and senior legal figures closely connected to the Armed Forces agree with this position. Judge Advocate General Jeff Blackett has expressed serious concerns about the Bill. The Director of Service Prosecutions recognises that it is the lack of prompt investigations at the time that has lies at the heart of the issue. Senior former military figures are increasingly speaking out publicly against the Bill.

4. It is important to understand the kinds of investigative failings we are talking about, which arose in cases where British soldiers were alleged to have shot civilians or seriously ill-treated detainees. When responding to such allegations, the chain of command had, in some cases, not referred the allegations to the service police at all, or where it had, had nonetheless continued to control the inquiry by shutting down cases or declining to allow cases to be referred to a prosecutor. In other cases, basic investigative steps were not taken at all, such as taking key witness statements, or there was inexplicable delay which meant witnesses and soldiers became untraceable. [7] [8]

[6] Jonny Mercer speaking to the Guardian's Today in Focus podcast in May 2019

[7] For a detailed account of the kinds of flaws involved in the original RMP and chain of command investigations into alleged abuses in Iraq, see at §168-175 of the legal judgment in Al-Skeini & Ors v UK https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-105606%22]}

[8] For a detailed account of the RMP failures to investigate adequately the same allegations that were found proven in the civil litigation of *Alseran*, see in particular §§199-200, 366-367, 482, 527, 567-573, 648 at https://www.judiciary.uk/wp-content/uploads/2017/12/alseran-ministry-of-defence-20171214.pdf

5. Because of these kinds of investigative failures, it was relatively easy for claimants to persuade a court that serious allegations had not been properly investigated and to order fresh investigations and bring claims, sometimes years after the event.

6. You would therefore expect any Bill introduced to address the problem of repeat investigations into the conduct of our armed forces overseas, to have at its heart the need to ensure prompt, independent, competent criminal investigations into future allegations. It is striking and surprising that the Bill proposes nothing that would address that issue.

7. This is doubly surprising, given the recent recommendations of the Service Justice System Review which included important recommendations which would go some way towards addressing this issue. These recommendations included, for example, the need to ensure that service police deployed overseas during operations were seconded for extended periods of time to civilian police units to ensure that they were sufficiently skilled and independent-minded; for civilian police officers to deploy with service police overseas to investigate or assist in the investigation of allegations of serious crimes, bringing their expertise and independence; and measures to improve the quality of prosecutorial decision-making within the service justice system. [9]

8. If these and other measures[10] were properly considered, consulted upon and put in place, current and future service personnel could have confidence that future allegations of criminal conduct would be fairly, independently and rigorously dealt with within a reasonable period of time and, one way or another, put to bed. Such measures would also have the effect of improving the quality of service policing and prosecuting generally, from which *all* service personnel would benefit. [11]

9. However, the Bill is completely silent on this.

Breaching the UK's international obligations and the inexplicable exclusion of sexual crimes from the Bill

10. No serious criminal offence of any kind should be subject to a presumption against prosecution after any period of time and enshrining a law of this nature is unheard of in UK law.

11. Protections against the most serious crimes, including the prohibition on torture, are entirely non-derogable under international human rights law. Obligations in relation to grave breaches, both under international humanitarian and criminal law have no time limit. It can take years for sufficient evidence to come to light and secure a conviction.

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[9] https://www.gov.uk/government/publications/service-justice-system-review; see in particular p 36 & 36 of Part 1 of the SJSR; and recommendations 11 and 12 of the Policing Review: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868270/SJS_Part_1_Policing_Review_for_publication.pdf

[10] Such as, for example, that proposed by Mark Goodwin-Hudson, recently resigned from the British Army after a 27 year career, who has called for the establishment of a 'Civilian Casualty Investigation and Mitigation Team', an independent investigatory body to react to allegations of civilian harm promptly in theatre and to protect victims be they British Army soldiers or overseas civilians who have been harmed.

[11] Including victims of gender based violence, for example, as is being tackled by 3 serving rape survivors at present (https://www.theguardian.com/uk-news/2020/may/03/women-launch-legal-action-to-stop-military-courts-trying-uk-cases https://www.telegraph.co.uk/news/2020/06/07/exclusive-armed-forces-rape-cases-could-heard-civilian-courts/)

The public interest in criminal justice requires that prosecutions should be able to take place years after an event. The UK is obliged to conduct effective investigations into any arguable case of a serious violation of the right to life or the prohibition on torture. International humanitarian law obliges states to criminalise, and where appropriate prosecute or extradite, those suspected of being responsible for grave breaches in international armed conflict whenever they have happened. International criminal law imposes similar obligations in relation to war crimes, crimes against humanity, genocide and the crime of aggression. The 'presumption against prosecution' potentially puts the UK on a collision course with the International Criminal Court on the basis that national courts will be 'unwilling or unable' to prosecute international crimes.

12. As drafted, sexual offences would not 'benefit' from a presumption against prosecution, but other serious criminal offences would, including torture, other war crimes and crimes against humanity. The Bill creates the surprising situation whereby a soldier who beats a detainee may fall to be protected from prosecution once 5 years have elapsed, but a soldier who sexually assaults a detainee may not.

THE LIMITATION PERIOD FOR BRINGING CIVIL & HUMAN RIGHTS ACT CLAIMS

13. The courts already have a very wide set of powers to strike out claims which are out of time. The courts apply these powers all the time and clients are regularly advised that they are too late to bring a claim. Only a relatively small number of claims are able to be issued out of time and it is the courts that are best placed to judge whether out of time claims should be allowed to proceed. Section 33 of the Limitation Act 1980 contains a very detailed set of criteria that more than meet the concerns expressed by the Govt and require the court at the outset to consider the potential prejudice to a Defendant of allowing a claim to proceed out of time. [12]

14. The Courts also already have strong powers to throw out unmeritorious (including vexatious) claims. Indeed, vexatious litigants may be the subject of a court order themselves and can only issue further proceedings with the permission of the court. [13]

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[12] https://www.legislation.gov.uk/ukpga/1980/58: ***s 33 Discretionary exclusion of time limit for actions in respect of personal injuries or death***. *(1)If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which— (a)the provisions of section 11 [or 11A] or 12 of this Act prejudice the plaintiff or any person whom he represents; and (b)any decision of the court under this subsection would prejudice the defendant or any person whom he represents; the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates. … (3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to— (a)the length of, and the reasons for, the delay on the part of the plaintiff; (b)the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 [by section 11A] or (as the case may be) by section 12; (c)the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant; (d)the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action; (e)the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages; (f)the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.*

[13] https://www.gov.uk/guidance/vexatious-litigants

15. The courts also have very strong 'strike out' powers which they can and do exercise. This power (contained in Rule 3.4 of the Civil Procedure Rules (CPR)) enables a court to strike out a claim or part of a claim where it discloses no reasonable grounds.[14]

16. If a case is funded by legal aid, the Legal Aid Agency can revoke funding at any time if it considers the merits of the case no longer warrant funding it.

17. The Solicitors Regulation Authority regulates solicitors in England and Wales; and the Legal Ombudsman manages disputes between solicitors and clients. Both can and do address concerns about solicitors who are not fulfilling their legal obligations or discharging their professional duties. The SRA strikes solicitors off and in other cases, issues decisions which fall short of striking off but which monitor and control the conduct of solicitors about whom there are concerns.[15]

18. The Government has not explained why these powers are not sufficient to address the concerns they have raised about so-called 'vexatious' litigation.

Civil claims for damages – including those brought by soldiers

19. Proponents of the Bill have denied that it will have the effect of restricting access to justice for service personnel and veterans. However, the Bill would limit the ability of the court to enable *any* litigant to issue proceedings out of time where it arises in connection with overseas operations. That self-evidently includes service personnel.

20. The Bill introduces a hard stop of 6 years for both HRA claims (where currently the limitation period is one year but can be extended where the court considers it 'just and equitable' to do so) and personal injury (tort) claims (where the current limitation period is 3 years but can be extended if the court thinks that s33 Limitation Act 1980, see footnote 7, applies).

21. In both sets of proceedings the Government also wants the court to be able to consider the impact on the mental health of a potential Armed Forces witness before granting permission for an out of time claim to proceed.

22. The first thing to say is that the Govt is unable to say how many of the claims brought in relation to Iraq and Afghanistan were actually brought after the primary limitation period had passed, or were brought after 6 years had passed. Although their impact assessment purports to break down the claims according to when they were 'brought', statements in Parliament indicate that the MoD has been proceeding on the basis of the date that the claims were *served*, not when they were *issued*. It is the date that the claims were issued that is the relevant date for purposes of working out whether a claim has been brought in time or not. The CMJ has sought clarification from the MoD and the MoD has declined to provide information about how many claims arising from the wars in Iraq/Afghanistan were issued out of time on the basis that it will cost too much money to work it out. We have asked for a review.

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[14] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03#3.4 The Court may strike out the claim where there is no reasonable grounds for bringing or defending the claim; where the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or where there has been a failure to comply with a rule, practice direction or court order.

[15] https://www.sra.org.uk/consumers/solicitor-check/recent-decisions/

23. In any case, the fact is that sometimes claims need to be brought late – indeed the Govt has confirmed that since 2007, 195 claims were brought by soldiers arising from incidents in Iraq or Afghanistan, after the limitation period had passed.[16] Belatedly, the Govt has published an 'impact assessment' of the proposals on claims such as those and applies some deeply questionable analysis, apparently seeking to minimise the obvious observation that preventing 195 soldiers from bringing meritorious claims would have been a bad thing to do.[17] Mr Mercer's public reassurances that the 6 years hard time limit for bringing a legal claim will not affect soldiers because the key date for them in a PTSD claim will still be date of knowledge or diagnosis misses the point [18] – questions about the date of knowledge and diagnosis are rarely clear cut and there is usually vigorous argument about them, and the MoD can be expected to use every tool at its disposal to dispose of legal claims where an argument can be made that they are out of time.

24. There are often very good reasons why some claims or parts of them need to be issued 6 years after date of knowledge or diagnosis; or where some of the damage would have been caused outside of the 6 year limitation period and some within it. If you are suffering from PTSD you may become aware that there is something seriously wrong within the limitation period, but it may be very hard for you to get help then or even for some time after. Imagine if you are a veteran with undiagnosed PTSD – you are drinking heavily, or having a lot of personal problems (because of what you have been through) - you may know there is something wrong - you may even go to your GP - so that might be said to be your date of knowledge for limitation purposes - but you may not be able to take the next step of getting legal advice. Those are the kinds of cases that need to have the option of applying to the court to extend time and it makes no sense to add a hard 'long stop'. If there are good reasons to extend time, the claimant should be allowed to try and persuade the court and the court should be allowed to apply the existing criteria. Last year, The Times reported the case of Mark Bradshaw, 44, who suffered from post-traumatic stress disorder (PTSD) since he was involved in a friendly fire attack in 2010 while serving with the Royal Artillery. Despite the immediate onset of nightmares and hypervigilance, the veteran was not given a formal diagnosis until 2016. By then he was drinking heavily, had suicidal thoughts and had left the service and become alienated from his family. He was eventually awarded a settlement, but not without a fight, and he fears that the proposed legislation could discriminate against those whose cases cannot be progressed until the former soldier is able to cope with it. He called the plan to impose a time limit on claims "horrendous". The Times reported him saying, "I got *pushed* to the GP. How many people sick with mental health won't go to the GP?"

25. By way of a further example, service personnel that have suffered noise induced hearing loss are likely to be affected by the proposals, given that they have been

[16] Johnny Mercer MP in answer to a question from John Healey MP: 'Data has been provided for Employer's Liability claims brought by current and former service personnel and their families since 1 May 2007 where a date of incident has been recorded and the country of incident has been recorded as either Iraq or Afghanistan. Date of knowledge is not recorded on the claims management systems. 522 civil claims have been identified and of these I can confirm that a) 357 were brought within three years of the date of incident b) 125 were brought between three and six years of the date of incident and c) 70 were brought more than six years after the date of incident.'

[17] The Govt asserts without evidence that, though brought late, the claims were probably not brought late if you take account of 'date of knowledge' rather than date of incident, and extrapolating this questionable analysis to the remainder of the claims - about which it appears to hold no information.

[18] https://old.parliament.uk/business/news/2020/july/urgent-question-civil-liability-claims/

exposed to excessive noise throughout their military careers. Military service commonly lasts up to 22 years, meaning much of this exposure may have taken place more than six years prior. Whilst noise exposure within the UK that occurred more than six years ago would remain subject to the jurisdiction of the court to extend time using s33 Limitation Act, similar exposure that occurred outside the UK before this time would not. It seems illogical that the court would be able to consider s33 discretion factors for UK based noise exposure prior to 6 years, but would have to rule out overseas operations based noise exposure over the same period.

26. In all of these kinds of cases, we would expect the MoD to use the relevant clause, if passed, to aggressively argue that the claims or parts of the claims should not be allowed to proceed. This will be bad for service personnel.[19] [20]

On the impact of requiring a judge to consider the mental health of witnesses before allowing a case to proceed out of time

27. This is deeply problematic in principle.

28. Giving evidence at any inquiry or court proceeding is stressful for a witness. It impacts on lots of people's mental health or well-being in some way or another, as any police officer, GP, nurse, prison officer or social worker whose conduct is called into question at an inquest or in civil proceedings will tell you. A potential witness finding the giving of evidence highly stressful and potentially impacting on their mental health is not a reason to prevent a claim from proceeding at all.

29. There are lots of things that can be done to support and protect a witness and which do not have the effect of preventing access to justice for the claimant. At the relevant time, the organisation that employed the witness (eg. the police force, the NHS, the prison service, the local authority or here, the MoD) should be facilitating appropriate legal advice and support to the witness. More importantly, the Court can exercise its inherent power to set in place measures to protect the most vulnerable witnesses. The criminal courts have long had measures available to manage witnesses who are vulnerable and there are lots of measures that can be put in place to help them, such as giving evidence from behind a screen, or from another room via a video-link. Some of these measures are employed in the civil justice sphere and in inquests these measures are not infrequently employed (for example, our Director has been involved in 3 military inquests in just the last two years where the court has taken great care to protect soldier witnesses: screens were used to protect a soldier, all people other than the key barristers were removed from the court during questioning

[19] The CMJ acts for lots of service women that have suffered sexual trauma at the hands of their colleagues. In response to civil claims for damages on behalf of those women, and our arguing that despite the limitation period having passed, it will be just and equitable to extend time (especially given the trauma involved), the MoD's first line of defence is always a limitation argument. Claims like that will not be affected by this Bill, but they indicate how the MoD approaches claims handling generally - any suggestion that the MoD would not use new limitation rules to aggressively dispose of claims brought by service personnel is terribly naïve.

[20] The Govt points to the Armed Forces Compensation Scheme which provides an alternative route for service personnel seeking compensation as a way of countering concerns about the impact of the Bill on service people. There is insufficient time in this Briefing to address the serious shortcomings of that scheme but they have been widely reported and veterans and solicitors report serious under-compensation for service personnel using the AFCS, as well as delay and extreme frustration for vulnerable veterans trying to navigate it. It is also notable that service personnel have 7 years to make a claim to the AFCS and it is not clear how the Govt would justify allowing 7 years for a person to make a claim to the AFCS, but install a 'hard stop' of 6 years for a civil claim for damages arising from the same injury.

or questions were channelled through one advocate to avoid the witness having to be examined multiple times). We understand that these kinds of measures can be and are used in the civil courts at trial where a witness is vulnerable, although there have been calls to introduce codified rules within the Civil Procedure Rules to deal with the needs of vulnerable witnesses.[21] We suggest that if the Govt is serious about protecting vulnerable witnesses, including service personnel who have to take part in legal proceedings, this is the place to start - not to say to a claimant, 'you should not be allowed to bring this case because it might have a negative impact on a service person's mental health.'

Centre for Military Justice

[21] The Civil Justice Council which advises the Lord Chancellor produced this paper on this topic in February 2020, setting out how vulnerable witnesses could be better supported in the civil justice system: https://www.judiciary.uk/wp-content/uploads/2020/02/VulnerableWitnessesandPartiesFINALFeb2020-1.pdf