CENTRE FOR MILITARY JUSTICE
Justice - Welfare - Law

THE BILL OF RIGHTS

Tipping the scales of justice against service personnel

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EXECUTIVE SUMMARY

The Centre for Military Justice

The CMJ is a small, independent legal charity established in 2019 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. The CMJ also undertakes educational and outreach work within the armed forces, promoting the rule of law, human rights and access to justice.[1]

The Bill of Rights

In 2000, the Human Rights Act brought the European Convention on Human Rights into our domestic law.

The Government proposes to repeal the Human Rights Act and replace it with a Bill of Rights. If this happens, rights protection in this country will be considerably weaker.

The Bill of Rights is a badly flawed piece of legislation that delivers nothing for service personnel, veterans or their families. We will not repeat the numerous and well-evidenced criticisms of the Bill by others. We endorse them. [2]

In this short briefing we will focus upon some of the key provisions that we think are most likely to affect the armed forces and we provide examples of how the Human Rights Act has been vital for service personnel and their families.

Clause 5 – positive obligations

We highlight how Clause 5 of the Bill of Rights will, through the restrictions it introduces to the European Convention on Human Rights' so-called 'positive obligations', have a serious impact on the experiences and lives of service personnel and their families. It is the positive obligations in the Convention that have been used in various ways to undertake robust investigations, expose abuse, and bring about real tangible policy reform which improves military life and save lives.

Clause 1(2)(b) – repealing section 3 of the Human Rights Act

We show how the proposal to repeal section 3 of the Human Rights Act – the part of the HRA that means that public bodies making decisions about the lives of service personnel and veterans, must apply other laws and policies in a way that upholds rights so far as possible – is likely to have a negative impact on rights protection in the UK, and on service personnel in particular. We provide a compelling recent example of how section 3 works in practice, which is a far cry from the kinds of examples put forward by the Government.

Clause 14 – human rights claims in overseas military operations

We analyse Clause 14, the part of the Bill that would end the ability of anyone to bring a human rights claim arising from an overseas military operation. We caution that our ability to address many of the human rights challenges arising overseas will already be severely curtailed by Clause 5, above, regardless of Clause 14. We make the point that Clause 14, as drafted, is almost certainly unlawful. It creates a whole class of person that will now fall outside the scope of human rights protection and that

[1] The CMJ is staffed by one full-time solicitor, supported by a part-time paralegal, with a non-executive trustee board of 5 and an advisory panel .www.centreformilitaryjustice.org.uk

[2] LIBERTY: https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/12/Libertys-briefing-on-the-Bill-of-Rights-Bill-for-second-reading-HoC-July-2022.pdf END VIOLENCE AGAINST WOMEN CAMPAIGN: https://www.endviolenceagainstwomen.org.uk/british-bill-of-rights-major-step-back-for-women-and-survivors/; BRITISH INSTITUTE FOR HUMAN RIGHTS: https://www.bihr.org.uk/human-rights-act-reform-briefings; PROF STUART WALLACE: https://ohrh.law.ox.ac.uk/one-step-forward-and-two-steps-back-the-bill-of-rights-bill-and-overseas-military-operations/

will include soldiers suffering human rights violations overseas (such as botched rape investigations, for example).

Clause 4 – freedom of expression

Finally we make some observations about the Government's stated commitment to freedom of expression. It is clear that service personnel will not benefit from these provisions, even where they seek only to draw to the public's attention matters of obvious public and service interest and which entail no risk of sensitive defence or third party disclosures. The clause will be of no use to service personnel with legitimate public or service concerns.

Military Human Rights Stories

The CMJ has been running a series of 'Military Human Rights Stories', written by service personnel or their families themselves, that explain how the HRA helped them: [3]

1. The sister of the late Cpl Anne-Marie Ellement explains how her family used the Human Rights Act multiple times to ensure that all the circumstances of Anne-Marie's report of rape by colleagues, bullying and suicide were revealed, resulting in important policy changes in the Army's handling of sexual assault allegations, in mental health provision for soldiers and the creation of the first ever independent Service Complaints Ombudsman for the Armed Forces;
2. An Army veteran explains how she and two other rape survivors used the Human Rights Act to bring a judicial review of the Ministry of Defence's handling of military rape cases, resulting in the issue of rape in the military being placed before Parliament, a review being undertaken of all MoD sexual assault policies and other important policy changes, improving the armed forces response to rape;
3. Jo Jukes, who used the Human Rights Act to persuade a coroner to conclude that her veteran husband's suicide was caused by his military service;
4. Deepcut families, Des James and Tracy Lewis, who explained how they used the Human Rights Act to force disclosure of material held by the authorities about their loved ones to ensure that there was a full investigation into the deaths, resulting in the exposure of widespread incidents of abuse and bullying of young Army trainees, and leading to important policy changes in Army training and for pathologists, in the conduct of post-mortem examinations;
5. Craig Jones from the charity Fighting With Pride, who explains how a number of LGBT service personnel used the Human Rights Act to end the so-called "gay ban" which prevented LGBT people from serving in our armed forces;
6. Susan Smith who used the Human Rights Act to force the Ministry of Defence (MoD) to accept that they had a duty to protect her son while fighting overseas and exposed the MoD's failure to provide reasonably safe equipment to him and other soldiers;
7. 'T', who successfully used Section 3 of the Human Rights Act to fix a loophole in legislation which was enabling the MoD to discriminate against disabled veterans;
8. Joe Ousalice, who used the Human Rights Act to force the Ministry of Defence to return the medal they had taken from him when they dismissed him from the Navy due to his sexuality, and to change the MoD's medals policy so that other veterans could get their medals back, too;
9. 'Q', a soldier, a survivor of a serious sexual assault used the Human Rights Act to threaten judicial review proceedings against the MoD for its continued failure to introduce legislation that would compel commanding officers to refer all allegations of military sexual assault to the police; and its failure to introduce a system for investigating complaints against the military police, resulting in both measures being introduced; and
10. 'Alicia' who used the Human Rights Act to address and obtain compensation for the serious failings on the part of the military prosecutor handling her serious sexual assault case at court martial which resulted in the case being thrown out and her perpetrator acquitted.

[3] All the stories can be accessed here: https://centreformilitaryjustice.org.uk/guide/military-human-rights-stories/

Nowhere do stories like these feature in the Government's narrative around the Human Rights Act.

The Bill of Rights would make cases like these much harder to bring in the future.

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1. No more positive obligations – CLAUSE 5

What are positive obligations?

The Bill defines a positive obligation as 'an obligation to do any act'. In simple terms, the Human Rights Act (HRA) requires state bodies such as the police, a local authority, prisons, state hospitals and the military, in some limited circumstances, not merely *to refrain from violating* human rights, but *to take positive steps to protect* human rights.

Examples of positive obligations found by the courts to exist, under the European Convention on Human Rights (the Convention) or HRA, include:

- an obligation to carry out an effective and independent investigation into life-threatening injury, inhuman or degrading treatment, or death, such as a police investigation into a report of murder or rape, for example; [4]
- a positive obligation on the part of the police to take reasonable steps to protect someone they know or ought to know is at serious risk of harm (such as, for example, a victim of domestic violence that has called the police for help); [5]
- a positive obligation to protect a psychiatric patient on an NHS ward from a risk of self-harm;[6] and
- a positive obligation on the part of the military to protect conscripted soldiers from a risk of suicide.[7]

The Bill of Rights stops the courts from developing any new positive obligations in the future. [8] It also restricts the future power and beneficial impact of positive obligations identified by the courts to date, by making them subject to other considerations.

Positive obligations and the military

***The deaths at Deepcut barracks* – where the positive obligation to investigate sudden and violent deaths, and the positive obligation to protect young trainees, led to the exposure of serious abuse, important policy changes in the Army, reforms to the conduct of post-mortems and a criminal investigation**

The Army routinely engages in potentially harmful activities – that is part of its essential function. Some military activities are inherently dangerous but nonetheless are still an ordinary and acceptable part of military duties.

[4] The victims of London cab rapist John Worboys relied on the positive obligation to investigate allegations of rape, when they sued the Metropolitan Police for their failure to effectively investigate his crimes: Commissioner of Police of the Metropolis v DSD & Anor [2018] UKSC 11

[5] Joanna Michael was murdered in her home after being threatened by her former partner and after she called the local police for help and her family successfully argued that there was a positive obligation on the police under the Convention to protect her in those circumstances: Michael v Chief Constable of South Wales Police [2015] UKSC 2; https://www.itv.com/news/wales/2015-01-28/family-of-murdered-mum-win-human-rights-appeal-against-police;

[6] Rabone v Pennine Care NHS Trust (Rabone & Anor v Pennine Care NHS Trust [2012] UKSC 2): Miss Rabone's parents successfully argued that the NHS trust entrusted to care for their daughter when she was admitted to hospital to protect her from the risk of harm she posed to herself, violated her right to life when it failed to protect her from suicide.

[7] In the context of individuals carrying out military service, the European Court of Human Rights has underlined that, as with persons in custody, conscripts and contractual military servicemen, whose conditions of life and service correspond to those of conscripts, are within the exclusive control of the authorities of the State and that the authorities are under a duty to protect them (Beker v. Turkey, *27866/03*; Mosendz v. Ukraine, *52013/08*; Boychenko v. Russia, *8663/08*).

[8] Clause 5(1)

The positive obligations contained in the Human Rights Act mean that whenever the Army undertakes, organises or authorises dangerous activities, it must ensure that the risk is reduced to a reasonable minimum through a system of rules and control.

Not all accidents resulting in a loss to life or which cause serious harm will amount to a breach of the state's positive obligation to protect life. There will only be a breach of the state's positive obligation to protect, if harm was caused as a consequence of unreasonable or insufficient regulations or control (and not, for example, just because someone made a mistake, or because of a one-off accident).

Four young Army trainees died suddenly between 1995 and 2001 at Deepcut Army camp, amid allegations of serious bullying, assaults and abuse. All four died from gunshot wounds while on guard duty. Their families were stonewalled by the authorities (including the MoD and police) and for decades were unable to achieve adequate and independent investigations into the deaths.

In circumstances where the Army had undertaken or organised the potentially dangerous activity of allowing trainee soldiers – many of them still children, being under the age of 18 - to be on armed guard duty, in possession of a rifle and ammunition while unsupervised and alone - all of the coroners hearing the second inquests into the deaths of the young soldiers Pte Cheryl James, Pte Sean Benton and Pte Geoff Gray at Deepcut barracks, concluded that there was an 'arguable case' that there had been a violation of the positive obligation to protect those young soldiers from a risk to life, protected by Article 2 of the Convention. As a consequence, a there was a positive obligation to conduct a much wider investigation into the deaths (a so-called 'Article 2 inquest') than the more common, brief inquest.

Those wider investigations – which satisfied the state's positive obligation to investigate sudden and violent deaths - then revealed a culture of bullying, assaults, abuse, sexual harassment and intimidation that led – even two decades after the deaths – to important policy changes and improvements that make the Army safer for children and young people today. In particular, the Benton inquest led to the Army admitting that even 20 years after the deaths, young trainees were still not being informed of their right to report crimes to the civilian (not military) police and agreed to amend their training instructions accordingly; and the James and Gray inquests led to important recommendations as to the kind of post-mortem examinations that should take place in the event of a sudden firearms death. One of the inquests led to a serious criminal investigation being opened by the civilian police into the abuse that had been revealed through the Article 2 inquest, which remains ongoing at the time of writing.

The families co-authored this blog about how they used the HRA in their loved ones' cases: https://centreformilitaryjustice.org.uk/human-rights-stories-no-4-deepcut-how-the-families-used-the-human-rights-act-to-get-access-to-the-states-evidence-about-their-children-and-to-get-fresh-inquests-exposing-abuse-ill-treat/

***The death of Cpl Anne-Marie Ellement* – where the positive obligation led to the exposure of the impact of alleged rape and bullying on a young female soldier, to policy changes on the handling of sexual assaults in the Army, to mental health policy changes on the assessment of risk, and the creation of an independent Service Complaints Ombudsman for the Armed Forces**

Cpl Anne-Marie Ellement was a soldier in the Royal Military Police that reported being raped by two fellow soldiers, being badly bullied, left unsupported, and she took her own life in 2011.

In this case, the family argued that there was a positive obligation on the Army to have an adequate system for the protection of soldiers from serious harm including bullying and other abuse and for the protection of soldiers from a risk of harm as a consequence of poor mental health.

Following a successful legal challenge on this basis, the Coroner agreed to undertake a very wide-ranging investigation (through an Article 2 inquest) and made a series of very critical findings and important recommendations to the Army that were accepted. The case directly led to the Army setting up important changes to the policy and support to be provided to sexual assault survivors across all three services, to changes in the provision of mental health support for vulnerable soldiers, and to the establishment of an independent Ombudsman to oversee complaints from service personnel.

The family also used the positive obligation on the state to conduct an effective independent investigation into a rape allegation, to force the MoD to re-open their late sister's rape case, after she had died. The family argued that because the two soldiers charged with rape had been Royal Military Police, the fact that the original investigation was conducted by the RMP meant that it lacked independence (as well as competence). As a consequence of the challenge, civilian and RAF police were appointed to re-investigate. This led to two former soldiers being charged, and later acquitted, of rape at court martial.

The sister of Cpl Ellement, Sharon Hardy, wrote this blog which explains how the family used the HRA: https://centreformilitaryjustice.org.uk/human-rights-stories-no-1-cpl-anne-marie-ellement/

***Baha Mousa and others* – where the positive obligation to investigate alleged abuses of detainees exposed the fact that the MoD was still using banned interrogation techniques that amounted to inhuman or degrading treatment; and serious flaws in the military's ability to investigate serious crimes perpetrated against detainees**

The positive obligation to investigate alleged violations of human rights (such as alleged torture or rape) applies to combatants or civilians taken into British Army custody during an overseas military operation. Where there is evidence of serious abuse, the state is under an obligation to investigate.

Baha Mousa was an Iraqi civilian working as a hotel receptionist in an area of Iraq then under the control UK forces during the Iraq war. He was detained by a group of British soldiers and taken to a military detention centre in Basra. In detention he was hooded, tortured and beaten to death.[9]

His family, and the families of a number of other detainees that had died in British Army custody during the Iraq War, argued that there needed to be a sufficiently independent and robust investigation into what had happened to their loved ones. But instead of ensuring that the allegations were investigated thoroughly and independently, the chain of command had attempted to retain control of them. Both the UK's domestic courts and the European Court of Human Rights expressed serious concerns about the lack of independence in these investigations, pointing out that the investigating authority remained operationally within the chain of command at all times. Even in cases where the RMP were involved (which they were not, in all cases), the commanding officer of a unit could still overrule the RMP and shut a case down. In some cases, witness statements were only taken from the soldiers themselves and key witnesses were overlooked. There were unacceptably long delays in interviewing some witnesses. Evidence risked being badly contaminated. Some of those involved in incidents became untraceable because of the delays.

It was the positive obligation to investigate under Articles 2 and 3 that allowed these failings to be addressed, leading to, in the case of Baha Mousa, a public inquiry that revealed systematic failings in the Army's handling of detainees, the use of prohibited interrogation techniques and dreadful abuse of Baha Mousa; and to further independent investigations into the other serious allegations against soldiers.

Other military activities

The same approach can be taken in relation to any other dangerous military activity, such as, for example, Army diving training, SAS selection exercises or parachuting. The positive obligation does not mean that these kinds of activities cannot take place or that they must be made excessively difficult – just that there needs to be a sufficiently safe framework or system in place to ensure that risk is reduced to a reasonable level.

[9] A number of other cases were grouped with the Mousa case which included such allegations as: civilians being shot by British soldiers while on patrol or carrying out checks, civilians getting caught in a firefight between British soldiers and other gunmen and British soldiers allegedly forcing a teenager into a canal where he drowned. For example, see the allegations in *Al-Skeini and Others v. the United Kingdom* [GC] - 55721/07. Legal Summary here: https://hudoc.echr.coe.int/eng#{"itemid":["002-428"]}; also see the allegations of violence, ill-treatment and abusive interrogation techniques referred to in *A (on the application of Mousa) v Secretary of State for Defence* [2011] EWCA Civ 1334.

So, for example, a manifestly inadequate risk assessment being conducted prior to a training session for trainee divers in the Army could amount to a breach of the positive obligation to protect life. Serious breaches of Army policy (as well as defective policy) on the planning and operation of SAS selection exercises might amount to the breach of the positive obligation to provide a reasonable level of protection to those soldiers, if they collapsed and died as a result of those failures. And following a catastrophic parachuting accident during military training, an activity that was found to be inherently dangerous (though accepted to be an ordinary part of military activity), the European Court of Human Rights found there was a positive obligation on the part of the state to ensure that the risk entailed was reasonably reduced as far as possible. Where there was an arguable case that that had not happened, there was an obligation on the state to investigate what had gone wrong so that if there was a problem, it could be fixed.

***The Smith case* – where the MoD was told it had a positive duty to take reasonable steps to protect the soldiers it sent to fight and die overseas**

A positive obligation can require the provision of reasonably safe equipment to soldiers. This issue was most famously brought to court by the families of a number of British soldiers who were killed on duty in Iraq when their vehicles – Challenger II tanks and Snatch Land Rovers – exploded following shell fire or the detonation of an IED. The families argued that the vehicles – which the soldiers had referred to as "mobile coffins" – were manifestly inadequate, having been designed for the streets of Belfast, not Iraq. These failures, the families argued, violated the MoD's positive obligation to protect the lives of the soldiers by giving them reasonably safe equipment. In that case, the MoD had tried to argue that it was under no positive obligation to protect the soldiers at all under the Convention. The Supreme Court agreed with the families and refused the MoD's attempts to have the case struck out. The Court said, '*The Court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate. But it must give effect to those obligations where it would be reasonable to expect the individual to be afforded the protection of the Convention'.*

As a result, all the Court did was allow the claims to proceed to trial. In doing so, the Court specifically warned the families that they were facing an uphill struggle. Before the claims could get to trial however, the MoD settled the claims by paying damages to the families.

The future for positive obligations

It is hard to see what is possibly objectionable about these developments in the law which have only benefited vulnerable or injured and hurt people, who have been failed by the state, and which have led to investigations which have exposed state failures, led to vital policy changes, important improvements and have saved lives. [10]

Yet the Bill of Rights will stop any further development of rights protections in response to changing conditions and strip back existing rights by subordinating them to public bodies' resources and priorities.

We can speculate about what this might look like for the armed forces. What about a future *Deepcut*-type case, involving vulnerable young recruits that may be struggling with their mental health, a lack of welfare support or information about where to report abuse and who, as a consequence, are a risk to themselves or commit suicide? Or the recent revelation that girls and young women at the Army Training Centre in Harrogate are not being adequately protected, suffering unprecedented levels of sexual assaults and harassment? Or a future *Smith*-type case involving seriously defective equipment, as a direct result of which soldiers are killed?

It will be far easier, under the Bill of Rights, for the MoD to argue that cases brought by victims in these kinds of scenarios, or their bereaved families, seeking to argue that the MoD has failed to discharge its

[10] End Violence Against Women coalition, 'British Bill of Rights is a major step back for women and survivors' (21 June 2022) https://www.endviolenceagainstwomen.org.uk/british-bill-of-rights-major-step-back-for-women-and-survivors.

positive obligation to protect those soldiers, should be dismissed, given the 'great weight' the Bill now requires to be given to a public authority's own judgment on how best to perform its functions, to its own expertise, and its own decisions on how to deploy resources.[11] Similarly, the Bill limits the investigatory standard into a potential violation, to no more than is 'reasonable in the circumstances'.[12] It will be easier now for the MoD to argue that their poor investigations into incidents like these were 'reasonable in the circumstances', taking into account their own financial and other resources, and taking into account their own perceived expertise and judgment on how best to manage the situation.[13]

2. Repealing the law that requires legislation to be interpreted in a rights-compliant way - CLAUSE 1(2)(b) (repealing s3 Human Rights Act).

Section 3 of the Human Rights Act means that the Government and the public bodies making decisions about the lives of service personnel and veterans, such as the Ministry of Defence, the Army, the Royal Navy or the RAF, must apply other laws and policies in a way that upholds rights so far as possible. They must interpret legislation in a rights-compatible way. The Government proposes to repeal it entirely and not replace it. The Government also wants the Secretary of State for Justice to have the extraordinary power to overturn – without any further Parliamentary scrutiny – all previous judgments that have relied on s3 HRA, rendering all of those judgments entirely at the whim of the Minister. [14]

A good example is the case brought by T, a Royal Naval veteran that relied upon s3 HRA to ensure that the MoD could no longer discriminate against her on the grounds of her disability, after she had left the Navy. T argued that the Navy's four-year delay in resolving her very serious complaint of sustained sexual harassment during her time in the Navy (which had caused her to develop serious mental health problems amounting to a disability) breached discrimination laws. The MoD wanted to rely upon a part of the Equality Act 2010 that gave them a complete exclusion from the law banning discrimination against disabled people. The MoD asserted that it was entitled to discriminate against disabled veterans.

T relied on s3 to argue that it had never been the intention of Parliament to exclude veterans from the disability protections of the Equality Act in relation to their dealings with the MoD. The Employment Tribunal agreed and relied upon s3 to interpret the Equality Act in a way that gave effect to what had been the true intention of Parliament: ie. to allow the MoD to be exempted from the same non-discrimination disability laws that applied to all other public bodies on the grounds that service personnel might need to be deployed at a moment's notice, but not at the expense of veterans who – by definition – could not be deployed and who Parliament had not intended should be excluded from the law's protection.

Since this case was brought, the CMJ has provided legal advice to a number of veterans that have reported the MoD is not making the necessary adjustments for their disability, explaining how the case might help them and suggesting that veterans are using the case to improve their day to day dealings with the MoD.

Cases like this will no longer be able to proceed. And the Government can undo cases like T's that have been hard fought for and won.

T wrote a blog about her case that you can read, here: https://centreformilitaryjustice.org.uk/human-rights-stories-no-7-changing-the-law-for-disabled-veterans/

[11] Clause 5(2)

[12] Clause 5(2)(d)

[13] Clause 5(2)(c) The Bill now specifically allows public authorities to use their own expertise when deciding how to allocate the financial and other resources available to them, including in particular the professional judgment of those involved in operational matters.

[14] Clause 40 enables the SSJ – by statutory instrument - to wield a vast discretionary power to overturn any judgment made in reliance on s3, or other primary legislation. This power has been described by one academic in conversation with CMJ as 'Henry VIII on steroids'.

3. Military operations overseas – CLAUSE 14

The first point to make about the impact of the Bill of Rights on overseas military operations is that Clause 5 alone (on positive obligations) is already likely to have a serious impact on this area, even without Clause 14. That is important because, as we explain below, the Government does not propose to introduce Clause 14 imminently. However, the damage has to a large extent already been done by Clause 5.

What does Clause 14 say?

The Bill prevents human rights claims being brought for acts done during the course of an overseas military operation.[15] While the UK authorities will remain under an obligation not to violate human rights overseas, victims will be prevented from taking their cases to court, thus making any right completely illusory.[16] 'Military operations' are also defined very widely in the bill as 'where Her Majesty's forces are under attack or face the threat of attack or violent resistance'.[17] This goes far beyond 'active hostilities'. The clause amounts to a huge and unprecedent exclusion.

The explanatory notes add, for good measure, 'decisions on the battlefield overseas are included within the exclusion, and so a claim cannot be brought under the Bill in relation to such decisions.' [18] This is deeply misleading. It is already not possible to bring legal proceedings in relation to decisions on the battlefield either under the HRA or in negligence. There has not been a single court decision that has second-guessed a commander's battlefield decisions. If there was ever any doubt about this, it was recently addressed by the ECtHR decision in *Georgia v Russia II* which has confirmed that, save for with respect to detained individuals and the need to investigate alleged breaches of the ECHR, the ECHR does not apply outside of the territory of a state during the 'active phase of hostilities' in an international armed conflict.[19]

The exclusion applies both to acts actually done overseas and acts done in the UK, but done 'for the purposes of an overseas military operation'. The explanatory notes state that this rule is 'not intended' to capture procurement decisions affecting service personnel. The notes explain that it is 'intended' to capture decisions made in the UK to make a drone strike.

Criminal proceedings are not included in the carve out, meaning that those accused of criminal offences can still rely on the protection of the Convention.

Family members are prevented from bringing claims where the primary victim is deceased.

Victims and families of victims are prevented from challenging investigations into alleged violations.

Clause 39(3)

In an embarrassingly clumsy bit of drafting, the Government clearly knows this because it immediately adds to the Bill a clause confirming that the overseas military operations clause will not actually be brought into effect unless and until some magical legislative event occurs in the future whereby the Minister can be satisfied that the clause renders what would be unlawful, lawful.[20] It is hard to know what this might be. Whatever it is, to be compliant with the UKs obligations under the Convention, it would have to ensure that adequate investigations could take place into alleged violations overseas, that some sort of meaningful compensation scheme was available for victims and their families, and

[15] Clause 14
[16] Clause 14(1)
[17] [clause 14(6)(a)]
[18] §123 Explanatory Notes
[19] Georgia v Russia II, App. No 38263/08: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Georgia%20v%20Russia%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-207757%22]}
[20] Clause 39(3)

ensure that there was a sufficient framework in place for the prevention, detection and punishment of Article 2 and 3 violations. No details are provided and so we are left to ponder. The HRA of course already meets all these requirements.

Clause 14 may never enter into force because of Clause 39(3).

The inclusion on the face of the Bill of a clause that the proponents know is unlawful – thus necessitating a clause immediately confirming it will not actually come into effect – is unprecedented and appears to reflect the Government's prevailing attitude towards the rule of law.

Serious flaws in Clause 14

Assuming for the moment that at some stage the provision is brought into force, which we must assume is the Government's intention, the following immediate concerns arise.

1. There is no remedy for victims of serious violations overseas.

The clause appears to be unlawful because:

- it denies to victims of violations any domestic remedy at all; [21]
- it denies to the family members of victims of violations any domestic remedy at all; and
- it prevents victims or their families from challenging botched investigations into alleged violations overseas (investigations that are already going to be constrained by the implications of Clause 5, see above).

2. The assurances that the exclusion will not apply to military equipment/procurement claims are not credible.

The explanatory notes have no binding legal force, though they are an aid to statutory interpretation. What really matters is what the Act says. The reassurance in the explanatory notes that the Bill is not intended to apply to procurement/equipment decisions needs to bear that in mind. If the exclusion is not intended to apply to military equipment cases, the Government should be prepared to put that in the legislation itself (though see above, this issue is already very negatively affected by the proposals on positive obligations).

However in any case, a procurement or equipment decision that relates exclusively to an overseas military operation, where the person affected is overseas at the time, *would* appear to fall within the clause. For example, a decision to poorly and inadequately retro-fit military vehicles for use in a military operation would fall within the clause and so anyone overseas at the time who is maimed as a result of that decision – or their family if they are killed - would be prevented from bringing a claim. They would also be prevented from challenging a poor or biased investigation into how such equipment came to be used.

3. Victims of botched rape investigations overseas will have no recourse.

Critically, service personnel that are a victim of rape overseas that was the subject of a botched military police investigation – already likely to be negatively affected by the arrangements for positive obligations - would no longer be able to rely upon the protection of the HRA to compel a re-investigation or to seek an apology and compensation under this clause.

Civilian victims of sexual abuse by soldiers overseas would be similarly left without a remedy. In light of the serious allegations of rape and murder made against a British soldier(s) during overseas

[21] Contrary to Article 13 of the European Convention on Human Rights

operations in Kenya, such a clause seems deeply suspect.[22] While the clause expressly retains Convention rights for those accused of offences, it does not appear to preserve them for victims. [23]

We know that service police investigations into allegations of rape and sexual assault in the military are poor.[24] The quality of service police overseas investigations are worse. The CMJ has advised several individuals that have been sexually assaulted overseas and who, in the future would appear to be without any legal remedy if this clause were enacted. The only piece of legislation that victims of serious crime such as rape have at their disposal when the military police fail to investigate or do so very badly, is Article 3 of the ECHR. This clause, if enacted, would immediately remove that avenue of justice for service personnel and civilians.

4. Freedom of speech – CLAUSE 4

The Bill emphasises that a court must give great weight to the importance of protecting the right to freedom of speech.

Members of the armed forces are subject to a policy that the CMJ considers to be unlawful in that it amounts to an undue interference with individual rights to freedom of expression. A legal challenge has been brought by two service women that wished to speak out publicly about their experiences as victims of rape going through the court martial process. No sensitive personal or security information was proposed to be revealed, the women simply wished to speak to the press or Parliament about their experiences and perspectives as victims of sexual crime in the armed forces. The CMJ has similarly been approached by service personnel of colour who wished to speak out about their experiences of racism while serving.

MoD policy prevents all service personnel from speaking to the press or Parliament about any defence matter, without first seeking the permission of the very institution they wish to criticise, (the Army, Navy, RAF and/or Ministry of Defence). That amounts to an unlawful interference with their right to freedom of expression because no exceptions are permitted. In response to the threat of judicial review, the MoD has agreed to review its policy which remains ongoing at the time of writing.

The Government has made much of its commitment to freedom of speech, so the CMJ considered Clause 4 and whether it might assist the service women and service personnel of colour in this situation. However, the Bill excludes cases involving the disclosure of information which would be in breach of an obligation of confidence arising as a result of a professional relationship. We anticipate the MoD will rely upon that provision as a means of ensuring that service personal remain gagged from sharing with Parliament or the press legitimate observations about their experiences of service life.

In this way, the clause purporting to provide enhanced protection to people exercising their free speech rights is immediately undermined by a long list of carve-outs that effectively disapply this protection in many circumstances, including to service personnel.

CENTRE FOR MILITARY JUSTICE
30 August 2022

[22] https://centreformilitaryjustice.org.uk/reports-of-murder-and-cover-up-by-the-british-army-in-kenya/

[23] Clause 14(5) states that the section does not prevent 'any person from relying on a Convention right in any criminal proceedings'. This is clearly designed to protect defendants, not victims/witnesses who are not subject to criminal proceedings and would not be 'involved in any criminal proceedings', even as a witness, by the time they were bringing (or would have brought, had the Bill of Rights not made it impossible) their HRA claim.

[24] https://www.gov.uk/government/publications/service-justice-system-review