

Written evidence submitted by the All-Party Parliamentary Group on Drones (OObII)

Public Bill Committee Submission: Overseas Operations Bill (Service Personnel and Veterans) Bill

About Us:

The [All-Party Parliamentary Group on Drones](#) is a cross-party, cross-house group of parliamentarians that works on upholding parliamentary scrutiny of the UK's use of drones and military force, its military assistance and partnerships, the protection of civilians in conflict and upholding the international rules-based order.

Purpose of bill: does it solve the problem at hand?

Expert testimony given both in the Joint Committee on Human Rights (JCHR)¹ and the dedicated Public Bill Committee² has consistently shown that the logic, scope and intentions underpinning the Bill is deeply flawed and overall does not solve the aim of ending cycles of repeated investigations and cases against service personnel and veterans.³

The Bill addresses the wrong problem in 'vexatious claims and prosecutions': The stated aim of the Overseas Operations Bill in countering 'vexatious claims and prosecutions' is based on a flawed premise and does not require any legislative change. Not a single expert witness across both inquiries could name a *prosecution* that has been 'vexatious'. Instead, multiple experts underlined the efficacy of the existing prosecutorial system in striking out unmeritorious claims and acting fairly in the public interest. 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.⁴ In addition, as outlined by [Gen Sir John McColl](#) and echoed by [Charles Byrne](#) of the Royal British Legion and [Gen. Sir Nicholas Parker](#) - retired Commander-in-Chief for the Land Forces - in their evidence, training of service personnel to handle stresses of deployment is adequate, and already taken into account by prosecutors.

The problem of 'vexatious prosecutions' and 'lawfare' is one that seems to be based on speculation rather than any significance in the statistics available.⁵ This is because the total number of prosecutions brought forward for

¹Oral evidence given by Martyn Day, Senior Partner, Leigh Day, Reverend Nicholas Mercer, former Command Legal Advisor in Iraq, Mark Goodwin-Hudson, former British Army Officer and Elizabeth Wilmshurst CMG, Chatham House, 28 September 2020, <https://bit.ly/3dvlwYY>

²Oral evidence given by Johnny Mercer MP, Minister for Defence People and Veterans, Baroness Goldie, Minister of State, Katherine Willerton, Deputy Director, Legal Advisers, Ministry of Defence and Damian Parmenter, Director of the Defence and Security Industrial Strategy, Ministry of Defence, 5 October 2020, <https://bit.ly/3dlRlID>

³Oral evidence given by: Douglas Young, the former chairman of the British Armed Forces Federation and Michael Sutcliff, Chairman, the Armed Forces Support Group, 6 October 2020, <https://bit.ly/313fsSf>; Hilary Meredith, Hilary Meredith solicitors, 6 October 2020, <https://bit.ly/34Qfwpl>; Major Robert Campbell, 6 October 2020, <https://bit.ly/2SQ1VsT>; Professor Richard Ekins, Head of Policy Exchange's Judicial Power Project and Professor of Law and Constitutional Government at the University of Oxford, John Larkin QC, former Attorney General of Northern Ireland and Dr Jonathan Morgan, Reader in English law at the University of Cambridge and a fellow of Corpus Christi College, 6 October 2020, <https://bit.ly/31M6Szz>; Ahmed Al-Nahhas, Representative of the Association of Personal Injury Lawyers and Emma Norton, Director, Centre for Military Justice, 6 October 2020, <https://bit.ly/372H2TK>; Martha Spurrier, Director for human rights, Liberty and Clive Baldwin, legal adviser, Human Rights Watch, 6 October 2020, <https://bit.ly/31joVYZ>; Charles Byrne, Director General of the Royal British Legion, General Sir John McColl, Chairman, the Confederation of Service Charities and General (Retd) Sir Nick Parker, 8 October 2020, <https://bit.ly/3iWcHse>; Lieutenant Colonel (Retd) Chris Parker, Chairman, the Princess of Wales's Royal Regiment Association, 8 October 2020, <https://bit.ly/3nIE3FM>; His Honour Judge Jeff Blackett, Judge Advocate General (Retd)(2004- 30/09/2020), 8 October 2020, <https://bit.ly/3nMA4rO>

⁴The Bill's stated purpose is to "to provide greater certainty for Service personnel and veterans in relation to vexatious claims and prosecution of historical events, that occurred in the uniquely complex environment of armed conflict overseas" and "represents one strand of the Government's approach to addressing the problem of "Lawfare" (the judicialisation of armed conflict) and to ending the cycle of reinvestigation of historic events".

⁵Witness: Emma Norton
⁵ Witness: Martha Spurrier

overseas operations are incredibly few; since 2000, there have been only twenty-seven prosecutions and eight convictions.⁶ In addition, witnesses confirmed the time in which allegations have been reported was adequate and largely within the time limits proposed by the Bill meaning the new proposals would have had no impact.⁷ Crucially, as acknowledged by the Joint Committee on Human Rights, cases were and are not vexatious by default⁸ and so cannot be dealt with by a blanket presumption against prosecution. Overall the new powers proposed by the Bill were thus seen by Committee witnesses to be both unnecessary and ineffective.

The Bill does not ‘end the cycle of reinvestigation’: Experts across both legislative inquiries warned that the Bill as it stands will not solve the problem of protracted reinvestigations as it fails to address the deeper problem: flawed, ineffective and compromised investigations. [Gen. Sir Nick Parker warned](#) “it appears as if Part I of the Bill focuses entirely on the process of prosecution, whereas for me the big issue here is the process of investigation and, critically in that process, ensuring that the chain of command is deeply connected with what goes on from the very outset.” To address the problem of repeat investigations into the conduct of armed forces overseas, the Bill must have at its heart the need to ensure prompt, independent, competent criminal investigations into future allegations.⁹ Repeated cases involving Iraq and Afghanistan happened because insufficient independent criminal inquiries were made into credible allegations of abuse at the relevant time. These cases involved serious investigative failings including allegations of shooting civilians or seriously ill-treating detainees.¹⁰ If there had been adequate investigations, then victims would have obtained justice and the unfairly accused would have been exonerated long ago.¹²

Retired Judge Advocate General for the Armed Forces, [Judge Blackett explained](#) that had a proper investigation been conducted into the case of Marine A, the prosecutor would have called for manslaughter not murder because all facts would have been on the table to make the relevant considerations. The Bill, however, deals with *prosecutions*, not the *investigations* that necessarily precede a decision on whether or not to prosecute. Therefore, for service personnel and veterans concerned about repeat investigations and fearing ‘the knock on the door,’¹³ the Bill offers little.

The Bill does not ‘provide greater certainty for service personnel and veterans’: The Bill actively weakens protections for soldiers and limits their access to redress. The Bill is unable to reduce soldiers’

⁶ Oral evidence to the Joint Committee on Human Rights Legislative Scrutiny Inquiry given by Johnny Mercer MP, Minister for Defence People and Veterans, Baroness Goldie, Minister of State, Katherine Willerton, Deputy Director, Legal Advisers, Ministry of Defence and Damian Parmenter, Director of the Defence and Security Industrial Strategy. Ministry of Defence, 5 October 2020, <https://bit.ly/3dlRID>

⁷ Witness: Hilary Meredith: “I am against any cut-off, to be honest. I think the reason why the cases became historic is not the date of the accusation—any of the criminal accusations under human rights law, for example, came within 12 months of the incident taking place. It was the prolonged procedure that was bungled afterwards that made those cases historic. It is the procedure and investigation in the UK that need to be reviewed and overhauled, and not necessarily a time limit placed on criminal or civil prosecutions.”

⁸ [Joint Committee on Human Rights Evidence Session](#): Joanna Cherry: In any of those 27 prosecutions were there any comments from the judicial authorities that they were lacking in merit or in some way vexatious? I am talking about prosecutions. I know we are talking about crime here, but that is what I want to know. Damian Parmenter: Not that I am aware of, no. As you will be aware, it goes back over a number of years, and I do not have all the details here; and a lot of the detail, I am afraid, is on paper copy.

⁹ Witnesses: Judge Blackett, Gen. Sir Nick Parker, Clive Baldwin, Martha Spurrier, Emma Norton, see also testimonials given to the JCHR’s Legislative Scrutiny Inquiry by Martyn Day, Senior Partner, Leigh Day, Reverend Nicholas Mercer, former Command Legal Advisor in Iraq, Mark Goodwin-Hudson, former British Army Officer and Elizabeth Wilmschurst CMG, Chatham House, 28 September 2020, <https://bit.ly/3dvlwYY>

¹⁰ 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#%7B%22itemid%22:%5B%22001-105606%22%5D%7D>

¹¹ 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>

¹² Centre for Military Justice, [Briefing on Overseas Operations Bill](#), 2020

¹³ Witness: Emma Norton: “Looking at the number of prosecutions that have actually been brought, let alone the number of convictions, it is quite stark. It is a very small number, and it is not reflected in the level of fear and anxiety in the veteran community. I do not underestimate that, but I think the question becomes: what do we do to meet that fear and anxiety? How do we reduce it? We reduce it by being honest with them about the real extent of the problem and by addressing the causes of the problem, which were the failures, early in the day, which the Minister acknowledged—the early failures to investigate these allegations. Had that happened, the unfairly accused would have been exonerated years ago and the victims would have had justice as well.”

uncertainties about the prospect of re-investigation and prosecution because the UK is legally obliged to investigate alleged war crimes under a number of treaties.¹⁴ The Bill assumes that all previous investigations which have not resulted in criminal charges were lawful and complete. However, the European Court of Human Rights has found the UK in breach of its investigatory obligations in several cases in Northern Ireland and Iraq. Similarly, the International Criminal Court (ICC) is conducting a preliminary examination into the quality of UK investigations into alleged war crimes in Iraq.¹⁵ Far from providing soldiers peace of mind, if enacted, this bill may cause the ICC to “determine that the UK is unable or unwilling to prosecute”, triggering a full investigation and personnel being tried before the ICC or in other jurisdictions.¹⁶ Furthermore, if the time limits are copied by other states, the laws of war will be weakened and the protection of all soldiers on the battlefield will be undermined.¹⁷ Finally, the absolute time-limit on bringing civil claims against the MOD will significantly limit soldiers’ access to redress, opening up greater uncertainty in terms of personnel’s rights as employees of the MOD.¹⁸

Costs versus benefits

Throughout the Bill Committee’s evidence sessions, witnesses expressed support for the intent of the Bill. However, the overwhelming majority caveated this by raising significant concerns about the Bill as drafted, and called for it to be paused and rewritten.¹⁹ [Judge Blackett told](#) the Committee: I fundamentally think the Bill is wrong, and I really believe it needs to be revised before it passes into law.” Witnesses stated that the Bill would have significant negative impacts on soldiers, victims and the public, as well as to the international rules-based order and the military’s ability to conduct operations overseas.²⁰

Costs:

The most significant costs of the Bill were presented by witnesses across the military, legal and veteran sectors.

It (1) **undermines the fundamental legal principle of fairness and equality before the law**, as set out by Judge Blackett and Gen. Sir Nick Parker. It creates an unjust imbalance between troops’ and victims’ rights by requiring prosecutors to take into account certain factors that all bias non-prosecution, a number of which²¹ are already factored into any prosecutorial decision²². [Gen. Sir Nick Parker, told the Committee](#) that UK Armed Forces can and should “uphold the rule of law in the way that it is presented to everyone else.” In addition, Part two (related to civil claims) of the Bill creates an imbalance in considerations that the Court is required to give ‘particular regard’ to in deciding whether to allow a claim to proceed beyond the standard limitation period but before the six year mark. All of the considerations imposed by the Bill tend against allowing the claim to proceed and thus in favour of the MOD. This is **discriminatory** against the potential claimant and also subordinates their interest in securing their rights. Further, many of these considerations are **disproportionate**, such as requiring

¹⁴ This includes the Geneva Conventions, Additional Protocol I, the Convention Against Torture and customary international law. See Wallace, Stubbins Bates and Quenivet, Legal Protections for Armed Forces Personnel and Veterans Serving in Operations Outside the United Kingdom: Response to Public Consultation Questionnaire, October 1, 2019, p. 6

¹⁵ The International Criminal Court, Preliminary Examination: Iraq/UK, <https://www.icc-cpi.int/iraq>

¹⁶ Lucy Fisher, Law to protect soldiers ‘could leave them facing war crimes tribunal’, The Times, 4 June 2020, <https://bit.ly/3dvvidC>

¹⁷ Nicholas Mercer, British Army’s Chief Legal Advisor in Iraq in 2003.

¹⁸ Witnesses: Charles Byrne, Director General, Royal British Legion, Ahmed Al-Nahhas, solicitor and representative of the Association of Personal Injury Lawyers and Emma Norton, Director Centre for Military Justice.

¹⁹ Witnesses: Judge Blackett, Sir Nick Parker, Clive Baldwin Human Rights Watch, Martha Spurrier (Liberty), Emma Norton (Centre for Military Justice), Ahmed Al-Nahhas (solicitor and representative of the Association of Personal Injury Lawyers)

²⁰ Witnesses: Gen. Sir Nick Parker, Judge Blackett, Clive Baldwin Human Rights Watch, Martha Spurrier Liberty.

²¹ These factors for consideration already include concerns about delay and public interest

²² Witness: Martha Spurrier

the court to consider the likely impact on the mental health of armed forces witnesses. This is because there are far better ways to protect vulnerable witnesses without preventing access to justice for potential claimants.²³

The (2) **Bill undermines the UK's international legitimacy**, [argued Gen. Sir Nick Parker](#). Referencing “eminent legal opinion that I trust,” he voiced (3) **considerable concern for the operational effect of this Bill on UK partnerships** and the enemy. International law ensures that partners behave consistently and undermining these frameworks would make partnerships “[extremely challenging](#)”.

In practice the Bill would also (4) **increase the risk of torture and war crimes going unpunished**.²⁴ Numerous witnesses testifying before the Committee expressed that the most serious crimes under international law should be excluded from the law.²⁵ The Bill sets out that ‘exceptional’ cases will proceed, however it does not provide a sufficient definition of ‘exceptional’ and it is not clear whether allegations of war crimes or torture would be brought after five years. The failure to bring cases that would otherwise have been brought would put the UK at odds with its international obligations.

The Bill may (5) **encourage copycat behaviour** which would erode overall international standards, and lower those of other states’ troops.²⁶ This could increase impunity against detained UK troops.²⁷ Furthermore, the knowledge that UK soldiers are not held to account for crimes they have committed on the battlefield may make enemy combatants less likely to hand themselves over as prisoners, increasing the level of violence and length of battles and (6) **put troops overseas in physical danger**.²⁸

Near (if not) all witnesses objected to the absolute civil claims long-stop after six years as excessive. Director General at the Royal British Legion, [Charles Byrne said](#), the (7) “**longstop does not protect the armed forces personnel**”, it protects the MOD.

Finally, the Bill's overly broad scope inhibits Parliamentarians' ability to scrutinise and evaluate military operations overseas (8). Parliament's ability to scrutinise military action has already been undermined by contemporary military actions, and this bill would only serve to exacerbate these gaps in oversight.²⁹ Government statements claim the Bill is focussed on actions taken “on the battlefield”. However, as highlighted by Martha Spurrier and Clive Baldwin in Committee, its definition of “overseas operations” is unduly broad including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious public disorder. This provision would cover an incredibly wide range of activities across operational contexts where the UK is not at war, including partnered drone operations, embedding of UK soldiers in partners’ forces and training and advice missions. Crucially, these activities are currently not reported to, or voted on by Parliament.³⁰

Benefits:

²³ See amendment section below: Increase overall protection for vulnerable witnesses (covering both service personnel and civilians) in civil proceedings

²⁴ Witnesses: Martha Spurrier, Clive Baldwin, Judge Blackett and Gen. Sir Nick Parker. In addition, JCHR scrutiny inquiry: Elizabeth Wilmshurst, Martyn Day and Revd. Nicholas Mercer

²⁵ Witnesses: Judge Blackett, Martha Spurrier, Clive Baldwin In addition, JCHR scrutiny inquiry: Johnny Mercer, Martyn Day, Elizabeth Wilmshurst

²⁶ Revd. Nicholas Mercer, former Command Legal Advisor, UK 1st Armoured Division, Iraq War

²⁷ Ibid.

²⁸ Ibid.

²⁹ [The Role of Parliament in the UK Constitution: Authorising the Use of Military Force](#), Public and Administrative Affairs Committee Inquiry Report, 2019.

³⁰ Witness: Clive Baldwin: “The artificial distinction of an overseas operation with a clear beginning, a clear theatre and a clear end is one that is very much breaking down. The distinction of when an armed conflict begins and ends is becoming murkier in many ways, especially non-international armed conflict. The idea of having one rule for overseas operations and one for domestic operations will be increasingly artificial, and that lack of clarity about the real application of such situations and such laws will be another danger of this Bill.”

The Bill as drafted provides two limited benefits: First, it will **outlaw protracted prosecutorial decisions**. According to HMG, only twenty-seven people have been prosecuted, none of which were considered vexatious.³¹ **However, the Bill would not prevent cases from being reopened and investigated**, as highlighted by John Larkin QC, former Attorney General of Northern Ireland, Judge Blackett and Gen Sir Nick Parker, among others. This benefit is therefore limited to providing protection for a very small group of people.

Second, **the Bill protects the MOD as an institution from civil claims brought by service personnel, veterans and overseas victims**. As [summed up by Ahmed Al-Nahhas](#), “What you are giving veterans with one hand, you are taking away with the other. That is a confused approach to legislation, and I am very concerned about it.” Civil claims, set out in Part 2 of the Bill, are only brought against the MOD - not individual people - either for its failure to protect its employees, or systemic or policy flaws that harm civilians. During the evidence sessions, the Minister for Defence People and Veterans explained that Part 2 - including limiting troops’ rights to make a claim against the MOD - was necessary to protect the MOD.³² To this, [Charles Byrne’s response](#) was clear: “What happens if this Bill goes through is that it protects the Ministry of Defence from civil action—from someone bringing a case. That longstop does not protect the armed forces personnel.” This most clearly articulates the problem that the majority of witnesses had with the Bill, namely that its primary effect will be to protect the MOD.

The central contestation of the evidence sessions bore out of Part 2 and the question: **why do veterans support the Bill, but lawyers and civil liberties organisations, including those representing soldiers, do not?** Minimal attention has been paid to Part 2 of the Bill; unsurprisingly, only legal experts have conducted a comprehensive analysis of its implications. Ahmed Al-Nahhas, a personal injury lawyer who has exclusively represented soldiers and veterans in cases against the MOD for the past decade, [told the Committee](#) that the MOD consistently fails to inform - and even misinforms - its serving employees of their rights. In fact, most troops do not know their rights.³³

Ahmed Al-Nahhas and Charles [Byrne](#) both also questioned the weight given to the government impact assessment’s finding that only 6% of claims by troops were brought after six years. The figure is based on a small sample and does not provide insight into the number of people that approach lawyers for assistance with out-of-time claims. Anecdotally, [Al-Nahhas estimated](#) that about 70-80% of out-of-time claims brought to lawyers are not taken on, [saying](#): “the vast majority of the inquiries we get are from people who are frankly out of time.” Existing government data on Employer’s Liability claims concerning Iraq and Afghanistan where the date and country of incident has been recorded indicate 13% of employment claims by service personnel were brought after six years – and 24% brought after three years (the standard limitation period for personal injury claims).³⁴

This, combined with the failure to inform troops about the rights this Bill would take from them, provides an explanation as to why more service personnel and veterans have not spoken out against the Bill. Furthermore, it is unsurprising that military personnel that have spoken out are either legal experts, or senior figures with access

³¹ According to testimonials provided by the Ministers Johnny Mercer MP and Baroness Goldie to the JCHR scrutiny inquiry

³² The Minister for Armed Forces explained that because it would be unlawful to discriminate against one group of claimants - those living overseas - by limiting their rights to bring a claim against the MOD, it was necessary to apply the same absolute time-limit to service personnel and veterans too, in order to protect the MOD.

³³ Witnesses: Emma Norton; Ahmed Al-Nahhas.

³⁴ [UJIN 70308](#): ‘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.’

to legal experts. If veterans and armed forces personnel were informed of the Bill's "potential for limiting" their ability to bring claims, this "would not be welcome," [said Byrne](#).

Recommendations

In agreement with the majority of expert testimonials provided to the Committee, the APPG on Drones recommends that the Bill is paused and redrafted to address the root cause of the problem: flawed investigations.³⁵³⁶

What should the Bill cover that currently is not included?

As drafted, the **Bill neither identifies nor addresses the flaws in the current system**, including the policy and doctrinal problems that led to investigations and litigations emanating from the wars in Afghanistan and Iraq. The MOD must improve its ability to learn from its mistakes, including rectifying faulty policy and improve internal structures to ensure mistakes are not repeated in future operations. Its failure to do so is clearly illustrated when looking at the repeated use of the 'five techniques' by troops. First in Northern Ireland, after which they were found to be illegal under domestic law (1972)³⁷ and to amount to inhuman treatment and torture by the European Commission on Human Rights (1976).³⁸ Yet, detainees in Iraq were also subject to the same techniques and mistreatment, as were detainees in Afghanistan³⁹, and more recently allegations of abuse by Special Forces have surfaced.⁴⁰ Breaches of the Geneva Conventions and international law in Afghanistan and Iraq were sanctioned by the MOD's own policy and lack of training and guidance.⁴¹ In response to the revelations from Iraq and Afghanistan, Reverend Nicholas Mercer has recommended that all future interrogations and detentions be overseen by a UK judge at the Ministry of Justice, and that Special Forces operations be subject to independent judicial oversight.

Is the Bill the best vehicle for solving this problem?

An effective Bill would address the system of flawed investigations, not just a symptom, Judge Blackett, Gen Sir Nick Parker, Emma Norton, Clive Baldwin and Martha Spurrier told the Committee. This Bill does not do this, as set out by John Larkin QC and aforementioned expert witnesses. The prosecutorial system works, [Gen. Sir Nick Parker](#) said. "I do not think it [the Bill] will solve the problem. I think we need to address the way we hold the chain of command accountable and conduct our investigations. Those are the two key things. [With a chain of command, effective information and an effective investigating system](#), you will stamp out the malicious claim because you will see it very quickly for what it is."

The Bill further entrenches the MOD's failure to protect soldiers. The MOD's own data on compensation claims issued and settled against it, shows that between 2014 and 2019 75% of claims related to allegations that it has breached its duty of care towards soldiers.⁴² The MOD's disregard for individual soldiers was emphasised by Major Campbell in his testimonial. As [stated by Charles Byrne](#) of the Royal British Legion, this Bill, through the

³⁵ Witnesses: Judge Blackett, Gen Sir Nick Parker, Charles Byrne, Martha Spurrier, Clive Baldwin, Emma Norton, Ahmed Al-Nahhas

³⁶ Mrs Lewell-Buck: "Would either of you advocate a pause on the Bill going through right now until some of the issues can be ironed out properly?" Emma Norton: "I am happy to say that I would, personally. That would have been a sensible way to go about it—to have a consultation that would really hear from individuals who had been directly affected by investigations, as well as victims, and to speak to experts who can talk to the challenges of building a really good system of investigations overseas, because it is really difficult and we do not underestimate that. There are lots of things that could be done and could be done better...It would have been more sensible to have those discussions first and then look at what was needed by way of amendments to the criminal law. It feels very much—we have heard this a couple of times today—that this is a cart before the horse situation".

³⁷ Iulia Padeanu, [Why the ECHR Decided not to Revise its Judgment in the Ireland v. The United Kingdom Case](#)

³⁸ Ibid

³⁹ [Written evidence from Reverend Nicholas Mercer \(OOB0012\)](#) to Joint Committee on Human Rights Inquiry on Overseas Operations Bill

⁴⁰ ['Rogue SAS Afghanistan execution squad' exposed by email trail](#), The Times, 1 August 2020.

⁴¹ [Written evidence from Reverend Nicholas Mercer \(OOB0012\)](#) to Joint Committee on Human Rights Inquiry on Overseas Operations Bill

⁴² Liberty Briefing on the Overseas Operations (Service Personnel and Veterans) Bill for Second Reading, see footnote 23, p.12

inclusion of Part 2, “is protecting the MOD, rather than the service personnel.” If this Bill is passed, it will introduce a limit to soldiers’ rights “that does not exist today.”⁴³

Opportunity to bring together disjointed parallel processes on investigations, prosecutions and protecting civilians

A number of overlapping and parallel processes addressing different aspects of investigations, prosecutions and identifying, preventing and remedying civilian harm are ongoing - or have been recently concluded - across Parliament and Government. These include the Overseas Operations Bill, [Services Justice System Review](#) (SJSR), UK Strategy on Protection of Civilians, efforts within the MOD to implement Chilcot 17 ([on civilian casualties](#)) and most recently the announcement of a [judge-led inquiry into investigations of troops](#). In addition, the Integrated Security, Defence and Foreign Policy Review is underway and the Armed Forces Bill is due next year.

The APPG on Drones welcomes the Defence Secretary’s [announcement](#) of the Judge-led inquiry on 12 October. However, this should have preceded any legislation and many questions remain as to the inquiry’s scope and mandate. The inquiry should not be understood as a complementary exercise that neutralises the concerns experts have about this Bill. There is no guarantee that the inquiry will rectify the problems highlighted by witnesses across both legislative inquiries. A number of the recommendations regarding investigations and accountability of military operations have been set out following similar exercises. These include the Chilcot Inquiry and the SJSR, published in 2016, and March 2018 and 2019, respectively; most have yet to be implemented by the government. This is because the government is not legally required to take on inquiry recommendations.⁴⁴ Furthermore, Parliament is not provided with detailed information and there is no “overall oversight across government monitoring and tracking whether inquiries have achieved their intended impact and whether recommendations, where made, have been implemented,” [according to the National Audit Office](#).

Considering this, the introduction of this inquiry is yet another reason to pause the legislation to ensure that its findings - addressing the root cause of the problem; flawed investigations - are included in any legislation. To avoid repeating the mistakes of the consultation and impact assessment of this Bill, the Government must ensure that the inquiry’s scope is broad, its assessments comprehensive and that all relevant stakeholders are consulted, as recommended by Emma Norton. Instead of attempting to address prosecutions and investigations in isolation, these issues could be more holistically and comprehensively assessed alongside interrelated issues as part of the Armed Forces Bill next year and incorporated into the Integrated Security, Defence and Foreign Policy Review.

Conclusion: doing something is not always better than doing nothing

As a champion of the rules-based order, the UK sets precedents that the rest of the world will follow. As neatly articulated by Judge Blackett, a fundamental element of this is universal application and adherence of international laws and norms; if passed in current form, the Bill fatally undermines this:

Judge Blackett: *“You will remember that six Royal Military Police were killed at Majar al-Kabir in 2003. If those responsible were identified today, would we accept that there would be a presumption against their prosecution? Would we expect the factors in clause 3(2)(a) to be taken into account? Would we be content that a member of the Iraqi Government’s*

⁴³ Charles Byrne, Director General of the Royal British Legion, <https://bit.ly/2GRAnjW>

⁴⁴ BBC News, Call for greater oversight of recommendations of public inquiries, 23 May 2018, <https://www.bbc.co.uk/news/uk-politics-44215981>

consent would be needed to prosecute? Would we accept a decision by that person not to prosecute? In my view, there would be outrage in this country if that occurred. In all areas of law, you have to be even-handed. If, in that same battle, it turned out that one of our soldiers killed one of the Iraqis unlawfully and we said, "Well, he should be protected, because it was a long time ago, but we are not protecting these Iraqis," that is just not right. I fundamentally think the Bill is wrong, and I really believe it needs to be revised before it passes into law."

Whilst the intention behind the Bill is admirable and requires urgent action, it is important not to rush through legislation that will ultimately cause more problems than it solves. It is not enough to merely 'do' something if it ultimately gives with one hand, and takes away with another. As outlined above, the Bill as drafted will only provide partial benefits - mainly to the MOD rather than to service personnel and veterans - with the costs far outweighing any positive impact. We urge the government and Bill Committee to think again and redraft in conjunction with the recommendations of the new judge-led inquiry, focussing holistically and meaningfully on the problem at hand.

Annex I: APPG on Drones Expert Network Amendments

The APPG on Drones' primary recommendation is to pause the Bill and reconsider its aims and scope as outlined above. However, to cater to the request of the Bill Committee for amendments of the Bill as it stands, the Group is able to communicate and echo the following categories of changes that have been put forward via the Group's extensive expert network.⁴⁵

Recommitment to and upholding of international law

- The exceptions to the presumption against prosecution outlined in Schedule 1 should be broadened to include offences under domestic law as outlined by the International Criminal Court Act 2001.
- In applying the presumption, the relevant prosecutor must have in mind whether in so doing it would open up the offence to the jurisdiction of the International Criminal Court or a potential exercise of jurisdiction by other states, in which case the presumption should be disavowed.
- With reference to Clause 3(3) in considering the matter in subsection (2)(a), the prosecutor must have regard to all the circumstances established under international criminal law for deciding whether a prosecution is in the interests of justice and to the grounds for excluding criminal responsibility established under international criminal law.
- Ensure the scope of the Bill would not apply if the offence in question requires prosecution under the UK's international treaty obligations.
- Within matters to be given weight by the prosecutor, include consideration of whether the alleged crime breaches international treaties including the European Convention on Human Rights (and in particular

⁴⁵ The APPG on Drones has consulted widely across stakeholder groups with a 50+ expert network including Former Officer and Head of NATO Civilian Casualty Mitigation, Afghanistan, Mark Goodwin-Hudson; Dr. Elizabeth Stubbins Bates, Oxford University, Centre for Ethics and Law of Armed Conflict; Liberty; Kolbassia Haoussou MBE, Freedom from Torture; Prof. Noam Lubell, joint author of the [ICRC/Geneva Academy Guidelines on Investigating Violations of International Humanitarian Law](#), REDRESS, Emma Norton Centre for Military Justice, the International Committee of the Red Cross, Prof. Carla Ferstman and Rights and Security International.

Article 2 (right to life), Article 3 (prohibition on torture and inhuman or degrading treatment, Article 4 (prohibition of slavery and forced labour) or Article 5 (prohibition of arbitrary detention as these are serious crimes).

Maintain judicial discretion for allowing claims to proceed out of time for Human Rights and Civil cases.

- Remove the hard stop of six years entirely but still amend s33 of the Limitation Act to require a court to consider the listed factors in all ‘overseas armed forces proceedings’ beyond the standard limitation period (one year in an HRA claim and 3 years in a Personal Injury claim) as a matter of course. That way, in any application to allow a claim to proceed out of time, the MOD could be assured that the factors identified by the Bill are taken into account by the court, but the court’s ultimate discretion to have regard to whether a claim should be allowed to proceed out of time at all is preserved;
- Ensure that the court may allow a case to proceed beyond six years where it appears to the court that it would be equitable to do so having regard to legitimate reasons for the delay, in particular whether the delay resulted from a) the nature of the injuries; b) logistical difficulties in securing the services required to bring a claim, so long as the claimant was making all reasonable attempts to secure such services, or; c) any other reasons outside the control of the person bringing the claim.

Matters that are to be given particular weight should be balanced to ensure equality before the law in relation to both prosecutions and civil claims.

- Section 3 outlines a number of matters that prosecutors need to give ‘particular weight’ to when deciding whether to bring a prosecution. Section 3 should include clauses that require the prosecutor to also give particular consideration to:
 - The impact on survivors and/or victim’s family members and any particular vulnerabilities of the victim;
 - The importance of the claim proceeding for the claimant to vindicate their rights, alongside the other considerations it introduces. This is to ensure that the claimant’s interests are put on an equal footing with the considerations favouring the MOD;
 - The Bill should also be amended so that the prosecutor may consider whether the matters given weight tend against or in favour of prosecution;
 - Ensure public interest issues beyond only finality given equal consideration such as the public interest in truth, accountability, trust in the criminal justice system and accountability of the armed forces;
 - Widen the consideration of “the likely impact of the operational context on the ability of individuals who are members of Her Majesty’s forces to remember relevant events or actions fully or accurately” to apply to all individuals and to require a consideration of the “likely impact of the context in which the act occurred” on their ability to remember relevant events fully or accurately.

Increase overall protection for vulnerable witnesses (covering both service personnel and civilians) in civil proceedings. In place of the requirements for courts to have regard to the mental health of service personnel in Human Rights Act or personal injury proceedings, implement the 2020 recommendations of the Civil Justice Council concerning “vulnerable witnesses and parties to civil proceedings” that apply across the board.

Increased protection for service personnel, veterans and civilians from existing flaws in the investigations process and hierarchy

- Include consideration by the Prosecutor of the quality of investigation as part of prosecutor’s decision including the thoroughness, promptness and efficacy of any ongoing investigation into the alleged conduct or any relevant previous investigation, and the reasons for any delays in such investigations;
- Include consideration of whether the person alleged of a crime had command responsibility for the alleged conduct; and to what extent;
- Ensure the “date of knowledge” definition is expansive enough to address the lack of understanding and awareness of the legal system across service personnel and civilians when bringing a claim against the Ministry of Defence. The “date of knowledge” needs to encompass the date on which the person bringing the proceedings first knew, or first ought to have known a) of the act complained of b) that it was an act of the MOD or the Secretary of State for Defence; c) of the manifestation of the harm resulting from that act which is the subject of the claim; and d) that they were eligible to bring a claim against the MOD or Secretary of State for Defence in the courts of the United Kingdom.

Improvement of the process and structures by which investigations are conducted:

- **Establishment of a Civilian Investigation and Mitigation Team with commensurate mandate and resources.** This body would enable prompt, legal, transparent, decisive and clear responses to allegations of civilian harm. Mark Goodwin Hudson outlines the need for and value of this mechanism in [his submission](#) to the Joint Committee on Human Rights’ Inquiry on the Bill.
- **Institutionalise strong mandate and commensurate resources to take forward the reforms and recommendations to improve the investigations process put forward by Judge Lyons in the Service Justice Review.** The Minister for Defence People and Veterans has recently pledged to set up a Defence Serious Crimes Unit and establish an independent oversight body separate to the Bill. However, this will not necessarily address all of the SJSR recommendations that are relevant to this issue as HHJ Lyon’s recommendations go a lot further than this. In addition, the Vice Chief of Defence Staff warned in 2015 that despite previous commissioned reviews, none had received appropriate support and mandate to deliver on recommendations. In order to monitor and ensure progress, the regular reporting requirements to Parliament should be incorporated into the Bill.