To whom it may concern,

Written submission on the Overseas Operations Bill, by Prof. James A. Sweeney LL.B, PhD.

1. Executive Summary

2. This analysis expresses three concerns about the abovementioned Bill. It unfairly limits the ability of service personnel to gain justice if and when they are failed by the state. Second, its attempt to shield service personnel from criminal prosecution is only conditional and, were it not so, would put the UK in violation of some of the most important and uncontested international law. Third, the concept of, and jurisprudence concerning, the issue of derogations within the Bill is misunderstood.

3. Brief Biography

4. I am a professor of international law at Lancaster University (UK). I research and teach in the fields of human rights, refugee law and international criminal law. I have on occasion provided expert advice to Council of Europe and United Nations. My research has been cited at the highest levels of the UK judiciary. I am a regular contributor to the print and broadcast media. I submit these observations in my personal capacity. My MP is Mr Ben Wallace MP.

5. Limitations on civil and HRA 1998 claims

6. It is said that the Bill is intended to protect members of the armed forces from what the government believes to be vexatious legal action. However, it also severely limits the ability of members of the armed forces to hold the government to account when it fails to provide adequate equipment or fails to protect them while they are serving.

7. The new rules would prohibit anyone from suing for negligence more than six years after an incident or six years after gaining knowledge about, for example, a medical condition. The Bill also seeks to ban claims under the Human Rights Act 1998 more than six years after a particular event, or just 12 months after gaining knowledge about the event (or condition). Most importantly the Bill makes no exception for claims by members of the armed forces themselves. This would drastically limit the options for bereaved families such as those who complained about the fatally inappropriate deployment of lightly armoured "Snatch" Land Rovers in very hostile settings.

8. It is presented as an attempt to shield, "military personnel and veterans from vexatious claims" pursued by unscrupulous lawyers. But this is nonsense, because such claims – vexatious or otherwise – are not brought against individual soldiers: they are brought against the Ministry of Defence or relevant Secretary of State. And it is

abundantly clear that while British armed forces operate to the highest legal standards, not all claims are "vexatious".

9. In July, Mr Johnny Mercer MP failed, in my view, to dispel the similar concerns to mine expressed in an urgent question by Mr John Healey MP. Mr Mercer stated that, "This [Bill] restricts to an absolute maximum of six years the time limit for bringing civil claims or Human Rights Act claims for personal injury or death in connection with overseas operations".

10. He continued that "the issue around limitation is, I am afraid, misunderstood, because it is not from the point of when the injury happened or the incident that caused the injury; it is from the point of awareness or the point of diagnosis".

11. There are two major problems with these statements. First, on a close reading of the Bill the six-year time limit is only in relation to claims for negligence: there is a much shorter time limit for human rights claims in respect of claims (as already noted). According to clause 11(2), introducing a new section 7A(4)(b) HRA 1998), they should be brought

> "before the later of
>
> (a)the end of the period of 6 years beginning with the date on which the act complained of took place
>
> (b)the end of the period of 12 months beginning with the date of knowledge."

12. In plain English, this means that where a condition emerges more than six years since the triggering event, the claimant would have only another 12 months to make their claim under the HRA 1998 – not a further 6 years. Civil actions and human rights claims have different conditions for "winning", and they provide different remedies. That is why it is so important that *both* are available.

13. Second, we know that there are very good reasons why people may take longer than six years to come forward after knowledge of an event or condition. That is particularly true if it means speaking out against superiors or employers, for example in relation to harassment.

14. Inhibition of the prosecution of certain offences

15. The Bill also purports to discourage judges from allowing members of the armed forces to be prosecuted under criminal law for historical offences more than five years after they are alleged to have taken place (clauses 1 to 4). It would also require the Attorney General to consent to a prosecution (clause 5). These measures really *are* about legal action against individual members of the armed

forces. However, unlike with the claims against the MoD, this is not an absolute time limit (a "statute of limitations"). Instead, the Bill states that the prosecution of historical offences should be "exceptional" and gives judges a list of factors that they must consider. The Bill *cannot* provide an absolute time limit for prosecutions or it would breach our international legal obligations to prosecute genocide, torture, and war crimes. The role of the Attorney General in the process is also questionable.

16. The declaration on the Bill that it is compatible with the European Convention on Human Rights is also clearly incorrect: if there were no impact upon Convention rights then there would be no need to consider derogation. The various duties to investigate emanating from the procedural aspect of various Convention rights would seem to be particularly affected. These are addressed in my 2018 article in *the International and Comparative Law Quarterly* on the so-called 'Right to Truth':

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17. Derogations

18. Finally, as to the proposed duty to consider derogation, there is a significant misunderstanding of the case of *Hassan v UK* (2014) (Application no. 29750/09) (which the UK 'won'). The judgment explains that consistent subsequent practice of Contracting Parties to the ECHR has in effect altered its content so that derogation in respect of overseas operations is not required in order for provisions of the Convention to be interpreted in the light of the law of armed conflict (international humanitarian law), when they are impacted during deployment. The judgment permitted preventive detention that would, on the face of it, be incompatible with Article 5 ECHR (but is permitted in the law of international armed conflict). If the UK does begin derogating as proposed, then it would actually disrupt that consistent subsequent practice. Moreover, according to Article 15 ECHR derogation in respect of the right to life is only possible in respect of 'lawful acts of war' and, by definition, war crimes are not lawful.

19. I commend Mr Mercer for his own service, and his stated intention to work in the best interests of those currently serving. However, for the reasons given here I would urge him to reconsider this Bill.

20. A version of this letter previously appeared as an article in The Conversation: https://theconversation.com/proposed-changes-to-british-law-could-prevent-armed-forces-from-taking-legal-action-against-the-government-146588

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