Law Society response to the Ministry of Defence consultation on Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom

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Introduction

1. The Law Society of England and Wales ("The Society") is the professional body for the solicitors' profession in England and Wales. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law.

2. The Society welcomes the opportunity to respond to this consultation. This response has been prepared on the Society's behalf by members of its specialist Criminal Law Committee, Civil Justice Committee and Human Rights Committee, and other key members.

3. In responding to the proposals, the Society recognises the government's intentions to ensure that armed forces personnel are not subjected to spurious legal claims and that the reality of combat situations they face are taken into account. The armed forces do a difficult and intensely stressful job - both physically and mentally - and it is important that they are able to go about their duties properly, within the limits of the law.

4. Our answers to the specific proposals in the consultation paper are given below. However, we find it necessary to say at the outset that we have profound concerns at some of the language that appears in the foreword, and particularly the use of the term “lawfare”. The former Secretary of State defines this term as meaning “the judicialisation of war”, which is itself striking in that it appears to suggest that judges, courts and the rule of law have no place in military matters, in contrast to the assurance given in an earlier paragraph that “the armed forces are not above the law”.

5. We are particularly concerned that the government has chosen to use a term that is generally used to describe the deliberate use of the law as a weapon against an enemy country: “lawfare” as an alternative to “warfare”. This could be seen as implying that solicitors bringing legitimate claims in accordance with their professional duties to their clients are acting as enemy combatants. The importance of not ascribing bad faith motives to lawyers is recognised in the UN Basic Principles on the Role of Lawyers, of which principle 18 states: “Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions." We look forward to an unequivocal clarification from the Government in its decision following this consultation that they did not intend any such implication.

6. The Society urges the government to end the use of this damaging and inaccurate term in any future proposals relating to this important area of policy.

7. The assertion that “Military operations in Iraq resulted in litigation against the Ministry of Defence on an industrial scale” is also worthy of comment. The consultation refers to nearly 1000 compensation claims, but gives no information on how many of these proceeded despite being issued out of time, which is the problem that the “longstop” proposal is apparently intended to resolve. There is also no detail on how many settled, how many were issued by armed forces personnel themselves, or how many led to public awareness of abuses and instances of systemic malpractice. No numbers are given for criminal prosecutions at all.
8. In addition, although the current consultation does not invite views on its stated intention of derogating from the European Convention on Human Rights (“ECHR”) before “significant future military operations”, the Society wishes to reiterate its strong opposition to such a step. This would undermine not only our own international standing and ability to hold other states to account for abuses in war, but also the hard-won normalisation of cooperation across Europe as a whole. It may also place our own soldiers at enhanced risk of being subjected to treatment outside the ECHR.

9. Any proposed derogation would also inevitably block many meritorious claims. This would of course include claims by British soldiers and their families themselves, who would be unable to hold the Government to account for any treatment that violated their human rights.

10. Furthermore, the Society would point out that the Government has yet to publish a response to its ‘Better Combat Compensation’ consultation from 2017. If the Ministry of Defence (“MoD”) is committed to establishing a no-fault scheme of compensation for those injured or killed on combat operations then such a scheme should be transparent, independent and robust. Service personnel and their families should be free to choose between using the courts to pursue a negligence claim against the MoD or using a new ‘Enhanced Compensation Scheme’ as promised.

Proposals for criminal cases

Statutory presumption against prosecution

Question 1: Do you agree with this view? [that “armed forces personnel and veterans should not be left with threat of prosecution hanging over their heads for years to come in circumstances where their actions have been investigated at the time?”]

Question 2: Please tell us why you think this.

11. We do not agree. It is proposed there be a statutory presumption against the prosecution of current or former armed forces personnel for alleged offences committed in the course of duty outside the UK more than ten years ago. Two different ways of enacting this measure are proposed. The first option would have the presumption only apply where there had been a previous investigation and would only be able to be overridden where there were ‘exceptional circumstances’ that would make a prosecution in the public interest. The second option would be to legislate that it would generally not be in the public interest to prosecute service personnel for an offence more than ten years old, regardless of whether there had been an investigation, with the presumption able to be overridden with regard to a number of listed factors.

12. The proposal that there should be a statutory presumption against the prosecution of current or former armed forces personnel for an alleged offence committed in the course of duty outside the UK more than ten years ago would create a quasi-statute of limitations in respect of serious criminal offences which is otherwise unknown to the criminal law in all UK jurisdictions.
13. We do not agree that there should be such a provision for a special category of criminal matters. The proposal would create an exception to the normal law by creating a limitation period in relation to serious crimes allegedly committed by a select group of persons, i.e. armed forces personnel, and for select cases, i.e. those committed overseas. The law does not generally have a limitation period for any other type or category of crime; and we do not think that it is appropriate in these cases.

14. It is also important to note that the lengthy and expensive investigations into allegations involving British soldiers during active operations, cited in the foreword to this consultation, has, in large part, been a consequence of the government’s own failure to investigate such allegations as needed within a reasonable period of time. In that context it seems deeply undesirable that a quasi-statute of limitations ought to be considered.

15. We are also troubled that it is proposed only to apply to alleged crimes committed overseas. We query the justification for this distinction, which would exclude the conflict that has occurred in the context of Northern Ireland, and the fact that service personnel located in the UK will not benefit from the same limitation period as a fellow service person overseas when they are alleged to have committed the same offence. Such arbitrary distinctions should have no place in the criminal law.

16. Since we are opposed to the proposed measure, we have nothing to add in response to questions 3-18.

New partial defence

Question 19: Do you support enacting this measure? [i.e. a new partial defence to murder]

Question 20: Please tell us why you think this.

17. It is proposed that a new partial defence to murder be created for future offences, available to current and former armed forces personnel who cause a death in the course of their duty outside the UK through using more force than strictly necessary for the purposes of self-defence, provided that the initial decision to use force was justified. If successful, the defence would reduce a conviction for murder to manslaughter. On this proposal, the Society was not able to reach a settled view.

18. It is easy to have sympathy for someone in the position of a soldier who may be facing what they perceive as an immediate threat to their life, who may have been engaged on an operation for several months and living in conditions of heightened tension. They have been placed in that position by the state to protect the interests of the state and its people. They are required to make immediate decisions about the levels of threat posed to them and others. A recognition of the unique situation of serving members of the armed forces and the difficulties of making split-second decisions might be considered a proper justification for this proposed change in the law.

19. The proposed partial defence would only apply where the member of the armed forces’ initial actions are lawful, i.e. where their actions start as self-defence, but where their use of force then goes beyond what is strictly necessary. Should this proposal be introduced, this limitation would be reasonable in our view.
20. Two recent cases illustrate how this new defence could apply in practice. As in the example given in the consultation, Paratrooper Lee Clegg was initially convicted\(^1\) of the murder in Belfast in 1990 of a young joyrider killed by the last shot he fired at the rear of the speeding car, which he had initially fired on lawfully fearing for the safety of his fellow soldiers as it sped towards them. If the defence were available, he may have been convicted of manslaughter instead of murder in such circumstances.

21. However, such a defence would not assist a member of the armed forces where their actions were unlawful from the outset, such as the killing by shooting committed by Sergeant Blackman in 2011 in Afghanistan of an unarmed and defenceless Taliban prisoner\(^2\).

22. As the consultation paper acknowledges, this would in any event be difficult legislation to draft. Should the government choose to progress with the proposal, the Society strongly recommends that the Law Commission be asked to examine the need for and scope of a new partial defence applicable to combat situations. Given the sensitive nature and potential for far-reaching impact, it is vital that any change be properly scrutinised and evidenced, with due regard to possible unforeseen consequences.

23. There are, however, also arguments against the proposal. First, we are not aware of any recent cases where a member of the armed forces has been convicted of murder where, had they had available to them the partial defence proposed, they might have been convicted of manslaughter. The case of \(R\ v\ Clegg\), referenced above, appears to present a similar set of circumstances to that envisaged. However, that case occurred a significant time (over two decades) ago, in Northern Ireland (which is expressly excluded from these proposals), and resulted in the defendant's acquittal. Given the scarcity of cases where the proposed partial defence would be applicable, it is not clear why a change in the law is necessary. If there is case law evidence on this point, then we ask the Government to set this out in detail, with examples.

24. It can be argued that the proposed partial defence is unnecessary, as the courts already apply self-defence and the accompanying rules of what constitutes unreasonable, excessive or disproportionate force in a manner which takes account of the motives and situation of the accused. In the case of \(Palmer\ v\ the\ Queen\), the Court observed that “\textit{a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action.” If, in defending themselves, the person “\textit{had only done what he honestly and instinctively thought was necessary}” in that situation, then the defence of self-defence will apply and it will be for the prosecution to disprove this.

25. The importance of this approach has also been set down in statute, in Section 76(7) of the Criminal Justice & Immigration Act 2008. This statute also makes it clear that other considerations may be taken into account, where relevant. These provisions give a defendant sufficient opportunity to convince a court that what they did was reasonable in the circumstances.

26. Furthermore, there are obvious and unfair potential outcomes. The partial defence would apply only to armed forces personnel overseas. It would not apply to armed forces personnel in the UK, including Northern Ireland. This creates a difference in treatment between the categories of service personnel that is hard to justify either as a matter of principle or law.

\(^1\) \(R\ v\ Clegg\) [1995] 1 AC 482
\(^2\) \(R\ v\ Blackman\) [2014] EWCA Crim 1029; \(R\ v\ Blackman\) [2017] EWCA Crim 190
\(^3\) \(Palmer\ v\ the\ Queen\) [1971] A C814
Similarly, victims overseas would not have their rights upheld in the same way as a victim in the UK. It is arguable that the differences created violate the English common law principle of treating like cases alike.

27. There are further doubts as to the compatibility of the proposal with international law in some circumstances, particularly with regard to Article 2 (the right to life) and Article 14 (the provision against discrimination) of the ECHR. Under these articles, the European Court of Human Rights (“the Court”) requires states to have an “effective deterrence against threats to the right to life”\(^4\), requiring adequate and effective safeguards in relation to the use of firearms\(^5\) and restrictions on the use of firearms to shoot fugitives who did not heed warnings.\(^6\) The Court has also relied on the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials in interpreting the duties under Article 2 and 14. Given this jurisprudence and the arbitrary distinctions created between like cases, it is not clear the proposal would withstand a challenge by a victim of a shooting, for example, brought under Article 2 and 14.

28. There are also reservations as to whether such a change would pose any problems with regard to international law requiring a change to the current International Criminal Court (“ICC”) Statute to prevent any conflict with this proposal.

29. Any amendment to UK law reducing culpability for an act that would previously have constituted murder would have to be consistent with the principles of international criminal law, and in particular with the ICC Statute, to whose jurisdiction the UK is subject.

30. The ICC Statute recognises murder as a crime against humanity. Whilst any act envisaged as being caught by the proposed change to provide a partial defence to murder is highly unlikely to be capable of being a crime against humanity, it is nonetheless important not to have our domestic law at variance with international law. The constituent elements of murder as applicable to the ICC Statute appear to follow the case law from the International Criminal Tribunal for the former Yugoslavia (ICTY) case of Prosecutor v Tihomir Blaskic\(^7\), namely death of the victim as a result of an act or omission of the accused or his subordinate where the accused or his subordinate had the intention to kill the victim or to cause grievous bodily harm which could reasonably be foreseen to be likely to cause his death. Defences of diminished responsibility, insanity, intoxication, self-defence and duress are recognised and specifically provided for in Article 31. The new defence could therefore, on the face of it, be at variance with the ICC Statute.

31. Separately, the proposal does not address how the legislation will determine what constitutes a single event for the purposes of the proposed partial defence. One can envisage situations where only modest force is used initially, with subsequent lethal force forming part of the same event (e.g. lawfully pushing someone backwards, followed up by shooting them).

32. There are also concerns that the proposal could undermine the professional and high standards we rightly expect of our armed forces. Armed forces personnel are undoubtedly exposed to situations which are far more stressful, difficult and frightening than those

\(^{4}\) Oneryildiz v Turkey [2005] 41 EHRR 20, paras. 89-90

\(^{5}\) Giuliani and Gaggio v Italy [2011] ECHR 513, para. 209

\(^{6}\) Nachova and Others v Bulgaria [2005] ECHR 465, paras. 99-102

\(^{7}\) Prosecutor v Tihomir Blaskic, ICTY-IT-95-14-T, T. CH I (3 March 2000)
experienced by civilians. However, they do so following substantial training, including on using reasonable force, justifying the high standards to which they are held.

33. Finally, there are concerns that the proposal risks opening the way for argument that the partial defence ought to include other circumstances in which force is used in self-defence. It might be suggested that armed police are faced with similar situations, or home-owners in a ‘home invasion’ scenario. This could create an entirely new category of defence which would greatly alter the balance between the rights of the accused and those of the victim.

**Question 21: Please give us your views on whether the measure should apply across the UK**

34. As stated above, it has not been possible for the Society to reach consensus on whether the proposal should be introduced.

35. Our understanding is that the measure, if introduced, would apply to offences allegedly committed by armed forces personnel in the course of duties outside the UK. There should be no distinction in the applicability of the defence between the constituent countries of the UK.

36. As the consultation paper acknowledges, the fact that murder is a common law offence in each of the three jurisdictions where these prosecutions could happen will make the practicalities of legislating for a defence that covers all jurisdictions challenging.

**Question 22: Are there any other legal protections measures for armed forces personnel and veterans, in this context, which you think the Ministry of Defence should be considering?**

**Question 23: If yes, please provide details.**

37. We are aware of none.

**Proposal for non-criminal cases**

**Civil litigation longstop**

**Question 24: Whether it would be appropriate to impose an absolute limit (or “longstop”) for bringing claims for personal injury and/or death seeking damages in respect of historical events which took place outside the UK? This would prevent claims being brought beyond that point, while still leaving the Courts with discretion to allow claims that are brought outside the normal time limit but before the absolute limit.**

38. The wording of this question is ambiguous and the Society requests clarification around the extent of the proposal. Any attempt to change the statute of limitations for civil cases
should be clear in its scope so those consulted are able to provide an accurate and informed response.

39. Although implied, there is nothing explicit in the questions posed under section 3 of the consultation which limits the proposal to military claims. Furthermore, if the proposals are only aimed at military claims, it is not clear whether they would apply only to third parties claiming against the MoD, or also British service personnel and veterans claiming against the MoD.

40. For the purposes of this response, the Society has made the following assumptions:

- this proposal would be restricted to claims against the MoD only, and
- this proposal applies both to those employed by the MoD as well as third parties to the MoD, and
- this proposal applies to all events outside of the UK, regardless of the reason for the MoD operating in that location.

41. The MoD should release a quantified impact assessment so it is clear, from historical data, how many cases could be affected by this proposal each year. Current data released by the MoD does not distinguish between personal injury claims arising from events that occurred inside or outside of the UK.

42. Based on the assumptions above, the Society does not support the imposition of a 'longstop' for personal injury claims seeking damages in respect of historical events which took place outside of the UK.

43. We would be concerned if the government were to restrict access to justice for British military personnel and veterans by limiting their ability to bring a claim in the civil courts based purely on their profession, when their injury occurred or where their injury occurred. Service personnel or others employed by the MoD should not be denied the same civil legal rights as everybody else. A soldier injured due to MoD negligence outside of the UK eleven years ago should have the same rights as a civilian injured due to negligence either within or outside of the UK eleven years ago. It is unclear how the proposal would be "protecting armed forces personnel and veterans". It is inappropriate for the government to legislate to put themselves above the law that applies to everyone else.

44. In addition, the proposal is a restraint on the ability of courts to assess the merits of the individual case before it. Section 33 of the Limitation Act 1980 already imposes a strict test which must be satisfied in order for courts to exercise their discretion when a case is brought out of time. The status quo is satisfactory, and the reasons listed in the consultation for imposing a longstop (such as that memories fade and records may be insufficient) are already considered by the court in deciding whether there would be a fair trial.

45. The practical implications of enforcing such a proposal may also be difficult. There is a danger of adding too many layers of complexity when altering the statute of limitations for personal injury claims. For example, how would certain cases that may develop over a period of years (for instance for post-traumatic stress disorder, or noise induced hearing loss) be pinpointed as a 'historical event' falling inside or outside of the UK? These sorts of cases may fall under numerous geographical areas.
Question 25: Whether the “longstop” should be set at ten years, or some shorter or longer period?

46. It is not clear why the ‘longstop’ proposed is ten years. For latent injury, the Limitation Act 1980 allows for an action to be brought within 15 years from the date on which the negligent act or omission occurred. If there is to be a longstop, then in order to avoid unnecessary complexity in the law, it should also be 15 years.

Question 26: Whether there should be any exceptions to a "longstop"?

47. As set out above, the Society does not support the imposition of a ‘longstop’ for personal injury claims seeking damages in respect of historical events which took place outside of the UK, and therefore has nothing to add in response to this question.