

DEFENCE COMMITTEE REPEATS CALL FOR STATUTE OF LIMITATIONS FOR VETERANS IN NORTHERN IRELAND AND LAUNCHES FRESH INQUIRY JUNE 2018

Summary

In recent times the military have been exposed to individual prosecutions as never before. In particular, in historic cases from Iraq, Afghanistan and Northern Ireland. Whilst each set of circumstances and reasons behind these potential prosecutions differ, the intention of the changes I have proposed below to the law, is to encompass all circumstances and future conflicts.

Whilst there are current proposals to a change in the statute of limitations, as a standalone concept there are difficulties in enacting this as a broad brush stroke, but proposed alongside additional changes in the law relating to armed conflict, these proposals would be a unique set of circumstances to protect our armed services.

In particular transcribing the civil doctrine of combat immunity, “where in the heat of battle thinking is impaired,” into the criminal law would assist time limits to be imposed in these unique circumstances.

In addition, the shifting of blame from those serving men and women, to the Ministry of Defence (MOD,) as a corporate responsibility, in such circumstance as a failure to train, advise or adequate equip, men and women for deployment or to act in the service of their country which leads to breaches of conventions or humanity and subsequent prosecution. [Aitken report and 5 banned techniques written out of all MOD policy and directives pre Iraq.] Is long overdue and not compatible with modern society, (see recommendations Select Defence Committee, Beyond Endurance.)

Parliament has requested answers to;-

1. What are the reasons for investigations into former service personnel?

Different arenas of war and conflict create differing reason for accusations and blame.

The development of the Human Rights Act 1998, whilst well intended has unfortunately fuelled abuse of that Act by some, to bring spurious claims with evidence gathered in a very questionable way funded unwittingly or otherwise by the State.

In some cases [Baha Mousa] those claims have been founded and quite rightly brought.

In NI political issues and the memories of those affected on both sides and still living manifest themselves in continued calls for justice at any price.

Following Iraq and Northern Ireland, which previous campaigns are likely to be the next target of investigations?

There will always be “Men on the ground” in warfare and where ever there is there will be the likelihood of accusations whether real or spurious. Parliament’s task is to make changes to the existing law to protect those serving their country, when following orders, in the line of duty.

What are the steps that the Government should take to protect service personnel from investigations and prosecution for historic allegations?

A statute of limitations has legal and evidential problems in being passed as law however if these are annexed to certain “on duty” activates, whilst following orders, in these scenarios a reduction in the limitation Act in certain circumstances may be a workable solution and enacted as law.

I have coupled limitation with a partial defence of acting “in combat, in the heat of battle” when thinking is impaired.

In addition the MOD itself and not the men on the ground, must bear corporate responsibility when failing to give proper instructions, training and guidance, to reduce the likelihood of individual prosecutions in these circumstances.

The proposed changes are;

Proposed Private Members Bill

The HMS (Hilary Meredith Solicitors) Military Bill

Short title – Meredith Bill

The Protection of Members of our Armed Forces from Prosecution in the Line of Duty

“Members of the armed forces, their families and veterans should not be placed at a disadvantage.... by serving their country.”

Armed Forces Covenant

Three propositions:-

1. The common law doctrine of “combat immunity” to be enshrined in criminal law as a partial defence to prosecution.
2. Ministry of Defence (MOD) immunity to the Corporate Homicide and Manslaughter Act 2007 be removed in such circumstances where there is a reckless disregard to life (Parliament's Select Defence Committee recommendation in “Beyond Endurance,” enquiry.)
3. Time limits to be imposed on historic cases where the accused was clearly acting in the line of duty and under orders, and where there have been other or additional independent judicial inquiries.

DEFINITIONS

The line of duty to include: On manoeuvres, at war or conflict, following orders, anything material to the carrying out of effective service to the country.

Prosecution includes for this Act: Criminal prosecution, war crimes, civil claims, Court Martials and disciplinary action.

Reckless disregard for life includes: In rare circumstances where there are proved to be corporate systematic failures, failures in training, advice, procedures, directives, leadership or inadequate equipment or failures so serious as to be reckless..

Combat immunity includes: Where in the heat of battle in direct contact with the enemy, in the immediate pre-, or aftermath of, battle, thinking is impaired.

Summary

1. In recent times the military have been exposed to individual prosecutions as never before, in particular, in historic cases from Iraq, Afghanistan and Northern Ireland. Whilst each set of circumstances and reasons behind these potential prosecutions differ, the intention of the proposed changes to the law is to encompass all circumstances.
2. The reasoning behind this proposed Bill is to protect our serving soldiers in the line of duty and following orders, when, in the heat of battle, mistakes can be made and judgement impaired. In such circumstances, mitigation could be put forward, with reduced time limits of 10 years becoming available to the court when considering sentencing.

3. It is not intended to assist those who act outside of the line of duty on a violent frolic of their own.
4. In addition the MOD bear corporate responsibility for systemic failings in training, leadership and directives in such circumstances that lead to a reckless disregard for life.

Corporate Manslaughter and Corporate Act 2007

5. Military activities are specifically excluded from the Act under paragraph 4 as a “duty of care owed.”
6. The proposition is that this should be removed in such rare circumstances that, through lack of training, leadership, or systemic failures etc. as listed above, the MOD has, as a corporate body, shown a reckless disregard for life.
7. There are only four examples in the 30 year career (assisting the armed forces and their families) of those preparing this submission, where this may have applied.
8. These comprise: three fatal accident cases, *Dickinson v MOD*, *McLellan v MOD*, and the Brecon Beacon cases (subject of Parliamentary Select Defence enquiry, "Beyond Endurance"), and the alleged Iraqi historic abuse cases.

Iraqi historic abuse cases

9. Whilst there were alleged incidents amounting to inhumane treatment of prisoners that potentially have shamed the British military, it is quite possible that the MOD should have borne some corporate responsibility for lack of training, leadership and systemic failures.
10. Reference is made to the Aitken report of 25th January 2008.
11. It was apparent pre-Iraq that the MOD had completely underestimated the lack of infrastructure in Iraq at the time of the conflict, particularly the number of detainees the British military were likely to capture with no facilities to hold them.
12. The MOD had, for unknown reasons, totally written out of all training directives and manuals the five “banned techniques” in capture and detention of prisoners which were set out in statements by the then government in 1972 and restated by the Attorney General in 1977: "*the Government ... now give this unqualified undertaking that the five banned techniques will not in any circumstances be reintroduced as an aid to interrogations.*"

13. The reasons why the MOD had written out, or forgotten over time, these banned techniques, which included the hooding of detainees, from every manual and training procedures, has never been explained and it was suggested in the Aitken report that this should be the cause for investigation. To date no investigation has taken place.

Example 1.

14. When an incoming regiment is alleged to have seen the outgoing regiment hooding prisoners when moving them outside from one compound to another, this was presumed to be normal procedure, and it was not made clear that this was not the case.
15. If the MOD has, through systemic failings, not provided advice on training on banned techniques, should the individual soldier be subject to prosecution or should the MOD not bear corporate responsibility for this?

Example 2

16. A widow and her small children were told [by the MoD] that their husband and father was killed in a flash flood in a gorge whilst abseiling on a military course and that this was an “Act of God” and unavoidable, thereby giving rise to the strict liability defence.
17. It later transpired that the gorge was owned and controlled by a hydro-power station, which refused the military permission to climb in the gorge due to the high risk and dangers of the reservoir at the top tripping in high rainfall, with the possibility of emitting 96,000 gallons of water a minute.
18. The MOD, insistent on using the gorge for training, signed an indemnity release by the Secretary of State for Wales, confirming that they, the MOD, would take full responsibility for any injury or death which might occur. They later declined to take such responsibility when the fatality occurred. Would this amount to a reckless disregard for life where the Corporate Manslaughter Act should not provide immunity for prosecution? (*Dickenson v MOD*)

Example 3

19. A wife was told that her husband, a military diver, had drowned in a fast-flowing river in Germany due to the fault of the two British officers in charge of the training exercise.

20. The MOD then court martialled the two officers, knowing that a full six month audit had also been commissioned at taxpayers' expense by Parliament to investigate the alarming number of deaths in military diving.
21. That report (The Pelly Report) recommended the diving suit used by the military (the SABA) was unfit for purpose without a secondary breathing system and should be taken out of commission immediately and a new diving suit procured.
22. The Pelly Report and its recommendations failed to be actioned for a further two years, causing two more fatalities.
23. This gave rise to the question of whether the MOD in such circumstances should proceed to court martial those allegedly at fault or should they accept corporate responsibility for their failings? (*McClellan v MOD*)

Example 4

24. The Brecon Beacon SAS selection case has been widely publicised. Fourteen participants came close to becoming fatalities in this one exercise; to have come so close to losing so many service personnel in one exercise is, it is submitted, reckless.
25. The three deceased lost their lives due to internal organ failure as a result of severe dehydration.
26. Evidence was given to the subsequent Parliamentary enquiry calling for the immunity currently enjoyed by MOD under the Corporate Manslaughter Act be removed in such circumstances.
27. Those Members of Parliament carrying out the enquiry agreed with these submissions and their report "Beyond Endurance" made this recommendation.
28. The circumstances where the MOD would be caught by this Bill would be rare but the threat of heavy fines and sanctions may encourage lessons to be learned, improvements in future, and deaths avoided. In addition this would remove criminal liability from the individual soldier where they are merely following orders from above whilst acting in the line of duty.
29. In today's society of transparency and corporate responsibility, the principle of immunity is archaic and wrong. For too long the MOD have hidden behind crown censures under health and safety legislation and immunity from prosecution.

COMBAT IMMUNITY

30. The common law doctrine of combat immunity was a civil defence concept brought to the forefront in the first Gulf War when the repeal of Section 10 of the Armed Forces Crown Proceedings Act in 1987 led to consequences in war or conflict which had not been contemplated.
31. Therefore the MOD in the case of *Mulchay v MOD* mooted the first basis of immunity in combat.
32. The judicious and sensible view is that, if in direct combat with the enemy, in the heat of battle, thinking is impaired, there should be no liability on one soldier to another or on one soldier against the MOD if mistakes are made. .
33. It is submitted that this doctrine should be enshrined in criminal law in such circumstances where thinking is impaired in the heat of battle.
34. The obvious example is the Blackman case where, in the heated and immediate aftermath of battle, he was accused of breaching the rules of engagement.
35. It is emphasised that this Bill would not provide an absolute escape from prosecution, but merely a partial defence to be brought if charged, or for a lesser charge to be brought. As in the Blackman case, the charge would, it is envisaged, be reduced under a partial defence of Combat Immunity from a murder charge to manslaughter from the outset.
36. If the doctrine is applied retrospectively (and it is submitted that it should be), those who served in Northern Ireland, Iraq and Afghanistan would be offered some protection if prosecuted for incidents which occurred whilst they were serving in the line of duty.
37. There will always be exceptions and the *Baha Musa* case is one such example. Those who were alleged to have been involved were not in the line of duty, they were not following orders, nor were they in the heat of battle. They were alleged to have been acting violently outside the scope envisaged in this Bill, and in these circumstances there would be no lesser charge or partial defence. Circumstances of combat immunity were not applicable in these circumstances, so reduced time limits would not apply, and there would be no protection under this proposed Bill.
38. One point to note here is that the detainee, Baha Musa, was hooded, which, it is submitted, may have been a result of the MOD's failure to provide proper directives and training to UK service personnel on the capture and detaining of prisoners.

39. Had the five banned activities been known to those serving in Iraq, Baha Musa might not have been hooded, and his death might have been avoided.
40. It is submitted that a degree of responsibility therefore lies with the MOD.

Historic Time limits

41. It is recognised that placing a time limit on historic cases will be problematic. Developments in forensic evidence mean that sometimes only years later a victim is made aware of who their abuser was.
42. Many of the historic war crimes of the past (WW11) took many years to identify and locate the perpetrators and to gather the full extent of the evidence to prosecute.
43. The question is where a time limit would be drawn.
44. In certain cases by shifting the blame by making the MOD, rather than the serving soldier, responsible for systemic failures in training and leadership from above under the principle of corporate responsibility, it would remove or reduce the vulnerability of former soldiers, being prosecuted individually, decades after an event is alleged to have taken place.
45. It is submitted that the recommendations contained in a Bill set out in this paper would cover the majority of cases in Northern Ireland, Iraq and Afghanistan and any future conflicts.
46. It is emphasised that those acting outside of the line of duty or the heat of battle where corporate responsibility does not apply, would not be eligible for assistance under this proposed Bill

END

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