Ministry of Defence

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THE RT HON BARONESS GOLDIE DL
MINISTER OF STATE IN THE HOUSE OF LORDS

MSU/4/8/2/3/ap

16 November 2021

Dear Lord Thomas,

During the debate in Grand Committee on the Armed Forces Bill 2021 on Wednesday 27 October, I undertook to write to provide you with a response on two issues that you raised in the debate.

The first issue was in relation to the risk of judicial review of jurisdictional decisions made using guidance in the protocols if they are not approved by Parliament. You considered that jurisdictional decisions by civilian and service prosecutors were less susceptible to attack if the principles in the guidance were approved by Parliament.

The Government notes that we are dealing with circumstances in which Parliament has provided for concurrent jurisdiction. In other words, Parliament has expressly provided that any criminal conduct which could be tried in the civilian systems in the United Kingdom can in broad terms also be tried in the service justice system. The Government also considers that decisions about where such cases are allocated are best taken by civilian and service police and prosecutors on a case-by-case basis. Clause 7 of the Bill will ensure that there is clear guidance contained in the protocol between the civilian and service prosecutors on such decisions.

Before agreeing the protocol, the Bill provides that the civilian and service prosecutors must consult widely with interested parties. The Government considers that this is an appropriate process for this type of protocol and that parliamentary approval is not necessary. By way of comparison, the Code for Crown Prosecutors in England and Wales which sets out the important principles for whether a case should be prosecuted is issued by the Director of Public Prosecutions and there is no parliamentary procedure for approval. The Delegated Powers and Regulatory Reform Committee published its report on the Bill on 18 October and did not recommend additional parliamentary scrutiny or approval of the protocol. As I noted in the debate, the report does have other observations to make, and we are of course listening with care to its concerns on these matters.

The Lord Thomas of Cwmgiedd
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In terms of the risk of judicial review, the Government accepts that both the protocol when published and decisions in individual cases could in theory be challenged in legal proceedings. This could be by way of judicial review or, in relation to a decision in an individual case, as an issue in the service justice proceedings. However, the Government does not accept that the absence of a parliamentary approval mechanism creates an unacceptable level of legal risk. At present, the civilian and service prosecutors operate a non-statutory protocol concerning concurrent jurisdiction for offences committed in England and Wales which is not subject to parliamentary approval. The Government is not aware of widespread legal challenges to the operation of the current non-statutory arrangements. While the issue of jurisdiction was challenged in the *Blackman* case, it was in the overseas context where the non-statutory protocol does not apply, the Court Martial Appeal Court rejected the jurisdiction challenge.[1]

Even were the protocol to have been approved by a parliamentary mechanism, the Government considers that this would not prevent the terms of the published protocol being challenged. The fact of parliamentary approval may be relevant in those legal proceedings. However, it would remain possible for someone to challenge whether the protocol, for example, was reasonable, lawful and compliant with human rights law. By way of comparison, statutory instruments which are made under the affirmative procedure – and so approved by Parliament – remain susceptible to judicial review despite that approval. In terms of the way the protocol is applied in a particular case, this is likely to turn on how the principles have been applied on the facts of that case; and this exercise of discretion by civilian and service prosecutors would remain open to challenge.

Accordingly, the Government considers that – based on the experience of the operation of the non-statutory protocol – the risks of litigation over the operation of the protocol under clause 7 are not likely to be significant. The Government does not consider that a parliamentary approval process alone would appreciably reduce those legal risks.

The second issue you raised was in relation to the concurrent jurisdiction for serious crime, in particular murder, when committed overseas. It is important to distinguish between offences committed in the United Kingdom and those committed overseas. Some UK offences – such as murder – have extraterritorial jurisdiction and so can be tried in the civilian system in addition to the service justice system. However, in practice, the UK civilian system is rarely able effectively to investigate such matters overseas. The civilian police do not have the corresponding investigatory powers overseas and must rely on cooperation with local forces to carry out their investigations as they are not able to formally interview, carry out searches and gather evidence etc. In contrast, the service police do have the necessary powers to conduct investigations overseas under the Armed Forces Act 2006, as Sir Richard Henriques states in his report the service police *"must be capable of operating equally well in the jungle, on submarines, or in*

Ames.

[1] *R v Blackman* [2014] EWCA Crim 1029. In this case, the individual ("B") appealed against his conviction by Court Martial on the basis that, amongst other things, serious criminal charges should be tried before a civilian jury. B argued that he was afforded less protection before the Court Martial than a civilian in the civilian courts and so this violated his rights under the European Convention on Human Rights; Article 14 (prohibition of discrimination) when read with Article 6 (right to fair trial). The Court Martial Appeal Court rejected this argument.

Woolwich Barracks". Overseas, there is also the local criminal justice system to consider. This is generally subject to memorandums of understanding or Status of Forces Agreements. A different approach to that in the UK must be applied overseas as we cannot, of course, place any enforceable duty on another State. It is for this reason that the protocols created under clause 7 extend only to conduct which occurs in England and Wales, Scotland, or Northern Ireland.

I am placing a copy of this letter in the Library of the House.

Yours sincerely,

Baroness Goldie.

BARONESS GOLDIE DL