

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

30th Report of Session 2019–21

Overseas Operations (Service Personnel and Veterans) Bill

Ordered to be printed 25 November 2020 and published 30 November 2020

Published by the Authority of the House of Lords

HL Paper 178

The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

- (i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
- (ii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
 - (b) section 7(2) or section 19 of the Localism Act 2011, or
 - (c) section 5E(2) of the Fire and Rescue Services Act 2004;and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and
- (iii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) section 85 of the Northern Ireland Act 1998,
 - (b) section 17 of the Local Government Act 1999,
 - (c) section 9 of the Local Government Act 2000,
 - (d) section 98 of the Local Government Act 2003, or
 - (e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee who agreed this report are:

[Baroness Andrews](#)

[Lord Blencathra](#) (Chair)

[Baroness Browning](#)

[Lord Goddard of Stockport](#)

[Lord Haselhurst](#)

[Lord Haskel](#)

[Baroness Meacher](#)

[Lord Rowlands](#)

[Lord Thurlow](#)

[Lord Tope](#)

Registered Interests

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <https://www.parliament.uk/hlregister>. The Register may also be inspected in the Parliamentary Archives.

Publications

The Committee's reports are published by Order of the House in hard copy and on the internet at www.parliament.uk/hldprcpublications.

General Information

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at <http://www.parliament.uk/business/lords/>.

Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103. The Committee's email address is hldellegatedpowers@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

Thirtieth Report

OVERSEAS OPERATIONS (SERVICE PERSONNEL AND VETERANS) BILL

1. This Bill was passed by the House of Commons on 3 November 2020. It was read a first time in the House of Lords on 4 November. The date of its Second Reading is yet to be announced.
 2. According to the Explanatory Notes to the Bill, it “aims to provide greater certainty for Service personnel and veterans in relation to claims and potential prosecution for historical events that occurred in the complex environment of armed conflict overseas”.¹
 3. The measures in the Bill include—
 - restrictions on the criminal prosecution of serving or former members of the armed forces for certain offences allegedly committed during overseas operations;
 - restrictions on judicial discretion to allow civil claims in respect of overseas operations;
 - restrictions on judicial discretion to allow claims under the Human Rights Act 1998 in respect of overseas operations;
 - a new absolute limitation longstop of six years for civil claims in respect of overseas operations;
 - changes to private international law rules for personal injury and death claims;
 - a new absolute limitation longstop of six years for claims under the Human Rights Act 1998 in relation to overseas operations;
 - a duty to consider derogating from certain rights in the European Convention on Human Rights in relation to significant overseas operations.
 4. The Ministry of Defence has provided a Delegated Powers Memorandum (“the Memorandum”).²
 5. We draw the attention of the House to the delegated power in clause 6(6) of the Bill, which relates to the first of the measures listed in paragraph 3 above (restrictions on the criminal prosecution of serving or former members of the armed forces for certain offences allegedly committed during overseas operations).
- Clause 6(6): power to amend Schedule 1 (excluded offences)**
6. Part 1 of, and Schedule 1 to, the Bill contain measures which place restrictions on the prosecution of serving or former members of the armed

¹ See para 2 of the Explanatory Notes to the Bill.

² [Delegated Powers Memorandum](#) from the Ministry of Defence, dated 9 November 2020.

forces for “relevant offences” allegedly committed on “overseas operations”³ where more than five years have passed since the date on which the alleged offences were committed:

- clauses 2 and 3 raise the threshold to be applied by prosecutors when considering whether serving or former members of the armed forces should be prosecuted:
 - clause 2 creates a statutory presumption against such prosecutions: it is to be “exceptional for a ... prosecutor ... to determine that proceedings should be brought ... or, as the case may be ... continued”;
 - clause 3 sets out matters to which a prosecutor “must give particular weight” when deciding whether or not a prosecution should be brought: these include, “the adverse effect (or likely adverse effect) on the person of the conditions the person was exposed to during deployment on the operations ... including their experiences and responsibilities (for example, being exposed to unexpected or continuous threats, being in command of others who were so exposed, or being deployed alongside others who were killed or severely wounded in action)”;
- clause 5 sets out a requirement that, if a prosecutor determines that it is appropriate to prosecute—notwithstanding the presumption against prosecution (at clause 2) and the requirement to give particular weight to specified matters (at clause 3)—the consent of the Attorney General for England and Wales or, where appropriate, the Advocate General for Northern Ireland must be obtained before a prosecution can proceed.⁴

These measures would appear to make prosecutions for “relevant offences” much less likely.

7. Clause 6 and Schedule 1 define “relevant offence”. It means:

- any service offence under section 42 of the Armed Forces Act 2006 (“the 2006 Act”);⁵ and
- any other offence under the criminal law in any part of the UK,

but this is subject to the exceptions specified in clause 6(2) to (5).

8. The exceptions specified in clause 6(2) to (5) are as follows—

- any offence committed against a member of the armed forces, a member of a British overseas territory force, a Crown servant or a defence contractor; and

3 “Overseas operations” is defined in broad terms: it means “any operations outside the British Islands, including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious public disorder, in the course of which members of Her Majesty’s forces come under attack or face the threat of attack or violent resistance” (see clause 1(6)).

4 There is no equivalent requirement in the case of an offence under the criminal law of Scotland.

5 Or any service offence under the equivalent provisions in the three Acts which the 2006 Act replaced: the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957. Section 42 of the 2006 Act makes it a service offence for a member of the armed forces to do something anywhere in the world which would be a criminal offence under the law of England and Wales if it were done in England or Wales: broadly speaking, it provides so that the criminal law of England and Wales ‘travels with’ members of the armed forces wherever in the world they are serving.

- any offence listed in Schedule 1 (“excluded offences”). As currently drafted, Schedule 1 lists only sexual offences.⁶

The measures in Part 1 of the Bill to restrict prosecutions do not apply to offences falling within these exceptions.

9. Clause 6(6) gives the Secretary of State a Henry VIII power to amend Schedule 1 by affirmative procedure regulations.
10. The Memorandum gives the following justification for this power:⁷

“The Department anticipates that it may be necessary from time to time to expand or retract the list of offences that are excluded from the presumption and other measures. It may be that in the future certain offences not currently included in Schedule 1 become the focus of wider public concern; and it would, consequently, be inappropriate for individuals accused of committing them to continue to benefit from a protective provision like the presumption. The offences currently listed in Schedule 1, for example, reflect the Government’s clear concern and stated position against the use of sexual violence and sexual exploitation in the context of conflict, and other overseas operations. It may be that in the future, other policies are introduced that will target other subsets of offences (e.g. financial offences, or offences relating to the wellbeing of children or animals).

Delegating this power to the Secretary of State will ensure the alignment of the application of the presumption (and the other measures) with broader Government policy, without having to resort to primary legislation.

The power may also be necessary for the purpose of including offences in Schedule 1 that may be developed in the future under common law.”

11. This justification focuses on one aspect of the power: the power to add an offence to the list of “excluded offences” in Schedule 1. The effect of adding an offence to that list is that prosecutions for the offence are excluded from the measures in Part 1 of the Bill that place restrictions on prosecutions.
12. However, the power to amend Schedule 1 could also be used to remove an “excluded offence” from that Schedule, making prosecutions for that offence subject to the restrictions in Part 1 of the Bill from which they were previously expressly excluded. It could also be used to impose conditions limiting the circumstances in which an offence listed in Schedule 1 is an “excluded offence”. The Memorandum does not address this.
13. On the one hand, it is not unusual for an Act to confer a Henry VIII power to amend a list contained in a Schedule to the Act—and any exercise of the power to amend Schedule 1 would be subject to the affirmative procedure.
14. However, the power in clause 6(6) can be distinguished—and is of particular significance—because it would allow changes which affect liability for criminal offences (and indeed liability for the most serious criminal offences).

6 The list is a comprehensive one and includes sexual offences under the International Criminal Court Act 2001 and the International Criminal Court (Scotland) Act 2001.

7 See paras 4 to 6 of the Memorandum.

15. We note that Part 1 of the Bill has attracted some controversy both inside and outside Parliament. This was evident during the debates on the Bill in the House of Commons. The issue of which offences should be included in Schedule 1 (and thereby excluded from the effect of Part 1 of the Bill) is one on which there were significant differences of opinion. A number of Members of Parliament expressed concern that, as torture is not listed in Schedule 1, the measures in Part 1 of the Bill—including the presumption against prosecution—would apply in relation to allegations of torture. Others argued passionately for keeping that offence and others out of Schedule 1 to protect serving and former members of the armed forces. This suggests that changes to Schedule 1 have the potential to generate significant interest inside and outside Parliament—and torture is just one example of a serious offence that could be added to, or removed from, Schedule 1 by regulations under clause 6(6).
16. **We consider that—**
- **the issue of which offences Part 1 of the Bill applies to is so fundamental to the effect of that Part of the Bill—and is of such significance in terms of the application of the criminal law—that it should not be determined by regulations but instead merits the fuller scrutiny to which primary legislation is subject; and**
 - **accordingly, clause 6(6) contains an inappropriate delegation of power.**

APPENDIX 1: MEMBERS' INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <https://www.parliament.uk/hlregister>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 25 November 2020 Members declared no interests.

Attendance

The meeting was attended by Baroness Andrews, Lord Blencathra, Baroness Browning, Lord Goddard of Stockport, Lord Haselhurst, Lord Haskel, Baroness Meacher, Lord Rowlands, Lord Thurlow and Lord Tope.