

HOUSE OF LORDS

Select Committee on the Constitution

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20th Report of Session 2019–21

# Overseas Operations (Service Personnel and Veterans) Bill

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### *Committee staff*

The current staff of the committee are Matt Korris (Clerk), Ava Mayer (Policy Analyst) and Dan Weedon (Committee Assistant). Professor Stephen Tierney and Professor Jeff King are the legal advisers to the Committee.

### *Contact details*

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# Overseas Operations (Service Personnel and Veterans) Bill

## Introduction

1. The Overseas Operations (Service Personnel and Veterans) Bill was introduced in the House of Commons on 18 March 2020 and passed on 3 November. It was brought to the Lords on 4 November. Second reading has yet to be scheduled.
2. The Bill concerns legal proceedings involving service personnel in relation to overseas operations.

## Restrictions on prosecution

### *Presumption against prosecution*

3. Clauses 1 and 2 provide for a presumption against prosecution of service personnel<sup>1</sup> in respect of conduct on operations outside the British islands where five years have expired since the conduct took place. The five-year period runs from the date of the incident, or the most recent occurrence of the incident if it took place over time.
4. Clause 3 sets out the factors to which a prosecutor must give “particular weight” in making a prosecutorial decision under clause 1. These are:
  - (a) “the adverse effect (or likely adverse effect) on the person of the conditions the person was exposed to during deployment on the operations mentioned in section 1(3)(b) [i.e. overseas 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);
  - (b) in a case where there has been a relevant previous investigation and no compelling new evidence has become available, the public interest in finality (as regards how the person is to be dealt with) being achieved without undue delay.”<sup>2</sup>
5. An “adverse effect” is defined as an adverse effect on a person’s “capacity to make sound judgements or exercise self-control” or “any other adverse effect on their mental health”.<sup>3</sup>
6. In its report on the Bill, the Joint Committee on Human Rights (JCHR) concluded:

“The mental health of a defendant is already borne in mind as part of the prosecutorial decision as to whether it is in the public interest to bring a prosecution. We do not consider that there is any solid basis for including additional requirements that could risk granting de facto

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1 The definition of who Part 1 of the Bill applies to is in clause 1(3)(a): “a member of the regular or reserve forces, or a member of a British overseas territory force to whom section 369(2) of the Armed Forces Act 2006 (persons subject to service law) applies”.

2 Overseas Operations (Service Personnel and Veterans) Bill [HL Bill 147 (2019–21)], [clause 3\(2\)](#)

3 [Clause 3\(4\)](#)

impunity to those who have committed crimes on the grounds that the perpetrator lacked sound judgement, or could not exercise self-control, beyond the threshold already established in criminal law. For this reason, we would recommend deleting clause 3(2)(a), 3(3) and 3(4).<sup>4</sup>

7. **Clause 3 requires prosecutors to consider certain factors that would already be taken into account when deciding whether to prosecute. The House may wish to ask the Government about the extent to which this provision would make a difference to prosecutorial decisions.**

*Excluded offences*

8. Clause 6 defines the offences for which there is a presumption against prosecution. It excludes offences against an individual who, at the time the offence is committed, is a member of the regular or reserve forces, a member of a British overseas territory force, a Crown servant or a defence contractor. This introduces a distinction between potential victims of crime—assaulting a fellow member of service personnel would not give rise to the presumption against prosecution but assaulting a civilian during an overseas operation would.
9. **The Government should explain how clause 6(2) is compatible with the principle of equality before the law.**
10. Schedule 1 lists the offences that are excluded from the presumption against prosecution. The list omits most of the offences defined as war crimes and crimes against humanity under the Statute of the International Criminal Court, such that their commission remains subject to the presumption against prosecution.
11. **The House may wish to seek the reasons for including most war crimes and crimes against humanity in the presumption against prosecution.**

*Access to justice: restrictions on time limits to bring actions*

12. Clause 8(1) gives effect to Part 1 of Schedule 2, which amends the Limitation Act 1980. Under that Act there is a standard three-year time limit for bringing claims for personal injury or death resulting from negligence or other civil wrongs. However, the court has a margin of discretion to extend this where it “appears to the court that it would be equitable to allow an action to proceed.”<sup>5</sup>
13. Part 1 of Schedule 2 limits the court’s discretion to extend the time limit in respect of personal injuries or death which relate to overseas operations of the armed forces. It provides that this period cannot be extended beyond six years after the ‘relevant date’, which is the date from which the limitation period would otherwise run.
14. Part 1 of Schedule 2 specifies additional factors to which a court must have regard in exercising that discretion: the likely impact of the operational context on the ability of members of Her Majesty’s forces to remember relevant events or actions fully or accurately, and the extent of dependence

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4 Joint Committee on Human Rights, *Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill* (Ninth Report, Session 2019–21, HC 665 / HL Paper 155), para 79

5 Limitation Act 1980, [section 33](#)

on the memories of members of Her Majesty's forces, taking into account the effect of the operational context on their ability to record, or to retain records of, relevant events or actions. The court must also have particular regard to the likely impact of the action on the mental health of any witness or potential witness who is a member of Her Majesty's forces.

15. Part 2 of Schedule 2 amends the Foreign Limitation Periods Act 1984 in equivalent ways. The effect is that no claim in relation to overseas operations that is brought in reliance on foreign law can proceed after six years.
16. Clause 11 amends the rules governing the court's discretion to extend the one-year time limit for bringing claims under the Human Rights Act 1998 (HRA) in respect of proceedings in connection with overseas operations. The JCHR concluded: "The introduction of an absolute time limit risks breaching the UK's human rights obligations and preventing access to justice."<sup>6</sup>
17. **The House may wish to question the Government about the compatibility of the restrictions on time limits in Part 2 of the Bill with the principle of access to justice.**
18. **The Government should set out why it is inappropriate for the court to exercise its usual discretion to extend time limits in actions relating to overseas operations.**

#### Potential derogation from the Human Rights Act 1998

19. Clause 12 inserts a new section into the HRA which imposes a duty on the Secretary of State to consider derogation from the European Convention on Human Rights (ECHR) in certain circumstances. This duty arises in relation to overseas operations that the Secretary of State considers "significant".
20. The HRA already sets out the basis on which the Secretary of State may effect a derogation by the United Kingdom from its obligations under the ECHR. That a derogation may be made in respect of significant overseas operations is not in doubt. It is therefore not clear what new purpose clause 12 serves. The JCHR concluded:
 

"Clause 12 appears to do nothing except require the Minister to consider whether it would be appropriate to make a derogation where those conditions are met, and where such a derogation was necessary to ensure that the UK remained in compliance with its international obligations. It is therefore highly questionable as to whether this provision adds much to what the Minister would or indeed should do in any event."<sup>7</sup>
21. **The House may wish to question the Government on the extent to which clause 12 has any substantive effect.**

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6 Joint Committee on Human Rights, *Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill* (Ninth Report, Session 2019–21, HC 665 / HL Paper 155), para 107

7 *Ibid.*, para 130

## APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

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### Members

Lord Beith  
Baroness Corston  
Baroness Drake  
Lord Dunlop  
Lord Faulks  
Baroness Fookes  
Lord Hennessy of Nympsfield  
Lord Howarth of Newport  
Lord Howell of Guildford  
Lord Pannick  
Lord Sherbourne of Didsbury  
Baroness Taylor of Bolton (Chair)  
Lord Wallace of Tankerness

### Declarations of interest

Lord Beith  
*Honorary Bencher of the Middle Temple*  
Baroness Corston  
*No relevant interests*  
Baroness Drake  
*No relevant interests*  
Lord Dunlop  
*No relevant interests*  
Lord Faulks  
*No relevant interests*  
Baroness Fookes  
*No relevant interests*  
Lord Hennessy of Nympsfield  
*No relevant interests*  
Lord Howarth of Newport  
*No relevant interests*  
Lord Howell of Guildford  
*No relevant interests*  
Lord Pannick  
*No relevant interests*  
Lord Sherbourne of Didsbury  
*No relevant interests*  
Baroness Taylor of Bolton (Chair)  
*No relevant interests*  
Lord Wallace of Tankerness  
*No relevant interests*

A full list of members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

Professor Jeff King, University College London, and Professor Stephen Tierney, University of Edinburgh, acted as legal advisers to the Committee. They both declared no relevant interests.