



Overseas Operations (Service Personnel and Veterans) Bill 2019-21

Briefing

Background to the Bill

The Law Society of Scotland is the professional body for almost 12,000 Scottish solicitors. We seek to influence the creation of a fairer and more just society and are strongly committed to our statutory duty to work in the public interest and to both protect and promote the rule of law. Our Criminal Law Committee has considered the Overseas Operations (Service Personnel and Veterans) Bill 2019-2021 (the Bill) which was introduced to Parliament on 18 March 2020.

The Bill's provisions extend to Scotland. Since they are not within the legislative competence of the Scottish Parliament being reserved matters under the Schedule 5 Paragraph 9 of the Scotland Act 1998,¹ no legislative consent motion is required.

The Committee Stage of the Bill is due in the House of Commons on 6 October 2020.

Purpose of the Bill

This Bill's purpose is quite specific as it aims at providing "greater certainty for Service personnel and veterans in relation to vexatious claims and prosecution of historical events, that occurred in the uniquely complex environment of armed conflict overseas."² There are three specific sections of the Bill:

1. The creation of what is described as a "triple lock" on prosecutions

This relates to a presumption against prosecution in respect of relevant offences committed on overseas military operations more than five years³ since the conduct occurred. For a prosecution, proceedings can only be brought if exceptional.⁴ In making such a decision, prosecutors must give weight to specific factors⁵. There is also a requirement for consent for prosecution to be obtained from the Attorney General.⁶ By including the need for that consent further power is vested in giving that final say in prosecution to the Executive and removes this from independent scrutiny.

Clause 5 of the Bill does not apply to Scotland given the discretion of the Lord Advocate in criminal prosecution and death investigation in the public interest.

2. The introduction of a maximum period of 6 years as the time limit for bringing civil claims for personal injury or death and for bringing European Convention on Human Rights (ECHR) claims in connection with overseas operations

There is concern that the introduction of this six- year time limit for bringing civil claims would breach the Armed Forces Covenant.

¹ Paragraphs 11 and 12 of the Bill Explanatory Notes <https://publications.parliament.uk/pa/bills/cbill/58-01/0117/en/20117en.pdf>

² Paragraph 1 of the Bill's Explanatory Notes <https://publications.parliament.uk/pa/bills/cbill/58-01/0117/en/20117en.pdf>

³ Clause 1(4) of the Bill

⁴ Clause 2 of the Bill

⁵ Clause 3(2)-(4) of the Bill

⁶ Clause 5 of the Bill



3. Derogation from the ECHR in relation to significant overseas military operations.

Scope of the Bill

The Bill does not apply to operations in the United Kingdom,⁷ Currently, criminal or Service disciplinary jurisdiction lies with the UK authorities where any charges relating to Schedule 2 offences and decisions to prosecute are taken and heard within the military justice system by means of court martials.

From a Scottish perspective, on a practical basis, the Crown Office and Procurator Fiscal Service Scotland is not responsible for trying offences committed outside the UK. Though we support clarity in the law where there exists a “myriad of law”, we are not satisfied that there is a need to legislate in relation to the conduct of military personnel on operations overseas as proposed in the Bill.

Armed Services personnel currently require to act in accordance with UK Service and civilian law, international humanitarian law and international human rights law. This should remain the position. We do not agree that provisions in the Bill represent a “proportionate solution to the problem and strike an appropriate balance between victims’ rights and access to justice on the one hand, and fairness to those who defend this country on the other.”⁸

From the perspective of transparency, accountability and the effective rule of law, we are concerned that the Bill sends out a message that Armed Service Personnel are as a specific group above the law and its operations. The Bill’s contentions are correct that:

- Armed Service Personnel would not be immune from prosecution for offences committed whilst serving on operations overseas and
- It does not provide blanket immunity from prosecution for offences committed during overseas operations.

However, the threshold for the prosecution of alleged offences will be so high that the occasions in which any such offences would be capable of being prosecuted would in effect be nearly impossible. A number of countries have statutes of limitation with respect to the investigation and prosecution of offences but significantly, none of these set out a statutory presumption against prosecution.⁹ The law should apply equally and not seek to differentiate military personnel from the rest of UK citizens. It will deny denials prosecutions being brought, in effect victims including Armed Service personnel and veterans from access to justice.

Criminal Investigations

Today, our criminal courts are very much focused on historic sexual offending where such offences have not come to light for many years but will still be subject to prosecution decisions being taken in the normal way. To operate a five-year limitation on the prosecution of criminal conduct is very short where the incidents may be complex and the routes of effective reporting and investigation processes unclear.

The introduction of such arbitrary timescale is at variance with the July 2019 UK Government’s consultation included a proposal that a statutory presumption against prosecution for alleged offences committed on

⁷ including events that occurred in Northern Ireland during The Troubles

⁸ House of Commons Briefing paper 22 September 2020 <https://researchbriefings.files.parliament.uk/documents/CBP-8983/CBP-8983.pdf>

⁹ House of Commons Briefing paper 22 September 2020 <https://researchbriefings.files.parliament.uk/documents/CBP-8983/CBP-8983.pdf>



overseas operations should apply where they were more than ten years ago. There seems no rationale for restricting this to five years since that will exclude operations conducted in Iraq and Afghanistan, which ended in 2009 and 2014 respectively. They will fall outside of the time limit unless the exceptional circumstances for prosecuting as outlined above.

Offences

Relevant offence is defined in Clause 6 of the Bill.

Offences that are not excluded under the Bill include war crimes (genocide) and crimes against humanity. This means potentially that the Armed Forces personnel could be liable to prosecution by the International Criminal Court (ICC). There is no time limit which stops something amounting to a war crime years later. We agree that this set a dangerous precedent.¹⁰ Article 29 of the Rome Statute of the International Criminal Court prevents crimes that fall within the jurisdiction of the ICC from being subject to domestic statutes of limitation domestically. This presumption against prosecution in the Bill would mean that the ICC may seek to investigate and prosecute instead of the UK. There is a perception that the UK would be seeking not to act in accordance international law, specifically Article 7 of the UN Convention Against Torture and Articles 2 and 3 of the ECHR.

Sexual offences¹¹ are excluded. However, it was suggested that during an evidence session with the Secretary of State in April 2020, by Mark Francois¹² that there was a risk that allegations of sexual offences could be made to avoid the protections in the Bill. Since there was a suggestion that the Secretary of State would examine the issue, again, we have significant concerns that in no way should sexual offences ever come into the context of the Bill.

Under Clause 13 of the Bill, regulatory powers are reserved to the Secretary of State to amend the offences set out under Schedule 1 by adding or deleting to the excluded offences in the future. To an extent, we agree with the future proofing of the Bill as there may be offences that should be included in the future. Just how quickly these changes would be made may be a concern in scrutinising what are in effect remain very narrow exceptions. There may be a need to consider if the categories included as examples meantime should not now be exceptions.¹³

Introduction of Time-limits in civil proceedings

Schedule 3, Part 1 of the Bill amends the rules governing the court's discretion to override the three-year time limit for bringing claims for personal injuries and deaths in the Prescription and Limitation (Scotland) Act 1973. It provides that the limitation period cannot be extended beyond six years setting out in section 19AA (3) the factors to which the court must have regard when exercising its discretion. These are intended to ensure that the court takes proper account of the operational context as defined in section 19AA (4), including the likely impact of giving evidence on the mental health of the Service personnel or veterans involved.

These provisions do not appear to be justified in that the courts currently have ample provision to exclude any claims and to introduce these provisions fetters the courts' discretion. The Bill presents little by way of an evidential basis in which to introduce such provisions as Liberty noted:

¹⁰ Liberty Clare Collier, Advocacy Director

¹¹ Part 1 Schedule 1 paragraph 2

¹² A Committee member

¹³ financial offences, or offences relating to the wellbeing of children and animals, or any other offences that may develop in the future under common law



“less than one per cent of the claims brought against the MoD between 2014 and 2019 related to Iraq, and that nearly half were brought by service personnel themselves against the MOD as an employer for injuries sustained while on active Service.”¹⁴

Though it is true that the deplorable actions of the former solicitor Phil Shiner may have provided some basis for complaint, this does not the introduction of such statutory provisions. Instead these may provide barriers to those servicemen seeking redress through conditions such as PDST.

Retrospectivity

The Bill’s provisions are not applied retrospectively to legal proceedings that are already underway. Clause 15 (6) of the Bill refers to “proceedings instituted” regarding actions applying before the Bill comes into force. This may have implications deadening on how much notice is provided of the Bill’s relevant commencement provisions.

¹⁴ House of Commons Briefing paper 22 September 2020 <https://researchbriefings.files.parliament.uk/documents/CBP-8983/CBP-8983.pdf>