



Law Society
of Scotland

Call for Evidence

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

21 October 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee has considered the Overseas Operations (Service Personnel and Veterans) Bill 2019-21 (the Bill) that was introduced to Parliament on 18 March 2020.

The Bill's provisions extend to Scotland. As the Bill refers to matters that are reserved under the Schedule 5 Paragraph 9 of the Scotland Act 1998,¹ no legislative consent motion in the Scottish Parliament is required.

As the Bill has reached the Public Bill Committee's scrutiny stage,² we provide the following comments for consideration.

General

The purpose of the Bill's purpose specifies that it will provide:

- 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.”³

In providing that clarity, Service personnel and veterans should not be disadvantaged as a result of the Bill. If members of the Armed Forces cannot bring claims outside six years, this may place them at a disadvantage compared to the civilians. Though we appreciate that some vexatious claims were previously made, with which the system did not deal effectively, by introducing a timescale, this is not the solution.

Instead we emphasise that “the system of investigations lacks speed, soundness, openness and a duty of care to alleged victims and to the forces personnel”⁴ which the provisions of the Bill should address.

The Bill has three sections.

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

² Due to report to the House by Thursday 22 October 2020

³ Paragraph 1 of the Bill's Explanatory Notes <https://publications.parliament.uk/pa/bills/cbill/58-01/0117/en/20117en.pdf>

⁴ Column 995 Hansard John Healy MP [https://hansard.parliament.uk/Commons/2020-09-23/debates/BE01763F-2480-4C4B-9FAA-E36AC7158566/OverseasOperations\(ServicePersonnelAndVeterans\)Bill](https://hansard.parliament.uk/Commons/2020-09-23/debates/BE01763F-2480-4C4B-9FAA-E36AC7158566/OverseasOperations(ServicePersonnelAndVeterans)Bill)

1. It creates what is described as a “triple lock” on prosecutions

Clause 1 of the Bill refers to the presumption against prosecution regarding alleged conduct committed during overseas operations. This applies where (1) relevant offences are committed by 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 applies and (2) such overseas military operations took place more than five years since the conduct occurred.

For any prosecution, proceedings can only be brought if exceptional.⁵ In making any such decision, prosecutors must give weight to specific factors.⁶ These factors include:

(a) 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) and under subclause (3) there must be regard to the exceptional demands and stresses to which they have been subjected while deployed

(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.

“Adverse effect” is defined under subclause (4) as (a) an adverse effect on their capacity to make sound judgements or exercise self-control, or (b) any other adverse effect on their mental health.

It seems quite apparent how hard it would be to satisfy all these conditions but added on is the requirement for any proceedings that the consent for prosecution must be obtained from the Attorney General.⁷

By including the need for that consent, the final say in any prosecution is left with the Executive.

In order to provide an opportunity for scrutiny, where the Attorney General refuses consent, a report to Parliament should be required outlining their reasons for withholding their consent.

Justification for the Bill is sought on the basis that Service personnel should not be left in uncertainty about whether overseas missions in which they were involved will be subject to prosecution, some considerable time after the events.

There needs to be more public transparency and political accountability for military actions and independence from political influence. The process should be appropriately funded and there should be properly resourced criminal investigations and where relevant, any prosecutions that follow. Without this, we have concerns too that the Bill may act as a deterrent against prompt investigations into alleged crimes committed in the course of overseas operations and affect the outcome of any such investigations.

⁵ Clause 2 of the Bill

⁶ Clause 3 (2)-(4) of the Bill

⁷ Clause 5 (3) of the Bill

We note that Clause 5 of the Bill does not apply to Scotland given the discretion of the Lord Advocate⁸ who is the Senior Scottish Law Officer with responsibility for criminal prosecution and investigations into deaths in the public interest. However, as the scope of the Bill applies to any reserved matters, in practical terms it is perhaps unlikely that any prosecutions would be initiated in Scotland.

The Bill requires that a prosecutor should consider whether any ‘compelling new evidence’ has become available when on prosecution, and if not, the prosecutor must give ‘particular weight’ to the public interest in finality. Clause 3 does not define ‘compelling’. How does this sit with the UK requirements on European Convention on Human Rights Article 2, 6 and 8?⁹

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

We wonder how the proposed introduction of a six-year time limit on bringing civil claims sits with the Armed Forces Covenant.¹⁰ The Covenant pledges that “those who serve or who have served in the armed forces, and their families, should be treated with fairness and respect in the communities, economy and society they serve with their lives.”¹¹

By restricting the time period for claims, service personnel will be prevented from bringing civil claims against the Government. Given the public awareness now of the implications that can arise from conditions such as Post Traumatic Stress Disorder, the effects of which may not manifest themselves for some time, would mean some claims may now be excluded.

2. 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.¹² 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 courts martial.

Though we support improvement in clarity of the law we are not satisfied that there is a need to legislate in relation to the conduct of military personnel on operations overseas as outlined in the Bill.

Currently, Armed Services personnel require to act in accordance with UK Service and civilian law, international humanitarian law and international human rights law. This should remain the position.

⁸ <https://www.gov.scot/about/who-runs-government/cabinet-and-ministers/lord-advocate/#:~:text=The%20Lord%20Advocate%2C%20also%20known%20as%20Her%20Majesty%E2%80%99s,p%20incipal%20legal%20adviser%20to%20the%20Scottish%20Government>

⁹ Article 2 - Right to Life Article 6- Right to a Fair Trial Article 8 Right to Family and Private Life

¹⁰ <https://www.armedforcescovenant.gov.uk/about/>

¹¹ <https://www.armedforcescovenant.gov.uk/about/>

¹² <https://www.armedforcescovenant.gov.uk/about/>

The Bill does not 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.”¹³

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 to be treated differently from others with their operations not open to prosecution on the same basis as for the rest of the public. It should be made clear that the Bill does not mean that the Armed Service Personnel would not be immune from prosecution for offences committed whilst serving on operations overseas and does not provide blanket immunity from prosecution for offences committed during overseas operations.¹⁴

However, as emphasised above, the threshold with the operation of the triple lock provisions will mean that the prosecution of alleged offences will now be so high that the occasions in which any such offences would be capable of being prosecuted would in effect be nearly impossible.

Some 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. That is the wrong approach. Prosecutions should be capable of being considered, albeit that they may with the benefit of hindsight and scrutiny result after all the facts and circumstances are examined in the exercise of a discretion not to prosecute.

It is important that the law should apply equally to all and not seek to differentiate military personnel from the rest of UK citizens. In not having prosecutions, in effect, victims including Armed Service personnel and veterans will be denied from access to justice.

From an international perspective, the offence of torture will also be subject to the triple lock where no prosecutions will result five years after the relevant events. Torture¹⁵ has been prohibited under international law since 1948 which should remain the position with it excluded from the operation of the Bill’s triple lock.

As the Bill is drafted, it appears that it breaches international law. The International Criminal Court (ICC) may still be able to consider prosecutions of such cases that are excluded under the Bill. The terms of the International Criminal Court Act 2001 and the International Criminal Court (Scotland) Act 2001 which ratified the Rome Statute of the International Criminal that established the International Criminal Court should be considered. As the UK’s obligations respectively under these Acts may require assistance to be given to the ICC this may well create other problems as far as the UK is concerned where there has been no prosecution.

Criminal Investigations

Today, our criminal courts are very much focused on historic sexual offending where many such offences do not come to light for many years. They are still be subject to prosecution decisions being taken in the normal way.

¹³ House of Commons Briefing paper 22 September 2020 <https://researchbriefings.files.parliament.uk/documents/CBP-8983/CBP-8983.pdf>

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

¹⁵ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en

To operate a five-year limitation on the prosecution of criminal conduct is very short where the incidents may be complex and require extensive investigation. On many occasions, the routes for effective investigation and reporting processes may be unclear.

The introduction of such arbitrary timescale is at variance with the July 2019 UK Government's consultation. It included a proposal that a statutory presumption against prosecution for alleged offences committed on overseas operations should apply where they were more than ten-years ago (our emphasis). Accordingly, we would suggest that this should be amended to ten years.

There was no consultation on ten years nor any apparent rationale or policy justification for restricting this to five years. That will allow operations conducted in Iraq and Afghanistan, which ended in 2009 and 2014 respectively, to be excluded. 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.

War crimes: Offences that are not excluded under the Bill include war crimes (genocide) and crimes against humanity. This could mean potentially that the Service personnel could be liable to prosecution by the International Criminal Court (ICC).

There is no time limit on war crime' prosecutions which can occur years after the alleged contraventions of the Rome Statute. We agree that this set a dangerous precedent.¹⁶ Article 29 of the Rome Statute of the International Criminal Court¹⁷ prevents crimes that fall within the jurisdiction of the ICC from being subject to domestic statutes of limitation. The operation of the Bill's presumption against prosecution means that the ICC could seek to investigate and prosecute in circumstances rather than instead the UK.

If this provision were implemented, what political view would be taken by other countries of the UK and its attitude and responsibilities to international humanitarian law with specific reference to torture as highlighted above – and to Article 7 of the UN Convention Against Torture and Articles 2 and 3 of the ECHR.

To resolve the issue, we suggest amending the Bill to provide a specific exclusion of the international crimes of genocide, crimes against humanity and war crimes.

Sexual offences:¹⁸ These offences including rape are appropriately excluded under the Bill so that Service personnel can still be prosecuted for such crimes. Sexual offences should never be included within the ambit of the offences from which prosecution is excluded.

Regulatory Powers: 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 to or deleting from the excluded offences in the future.

¹⁶ Liberty Clare Collier, Advocacy Director

¹⁷ Adopted at a diplomatic conference in Rome, Italy on 17 July 1998 and it entered into force on 1 July 2002.

¹⁸ Part 1 Schedule 1 paragraph 2

To an extent, we agree with the future proofing of the Bill. There are offences that should possibly be included in the future. Just how quickly these changes would be made may be a concern in scrutinising what in effect remain very narrow exceptions.

What may be the best approach would be to consider if the categories included as examples meantime for future consideration such as 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 should not now be exceptions.¹⁹

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 under the Prescription and Limitation (Scotland) Act 1973. That provides 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 vexatious claims. The introduction of 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:

“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.”²⁰

Though it is true that the deplorable actions of the former solicitor, Phil Shiner may have provided some basis for complaint over fictitious claims, that isolated does not justify the introduction of these statutory provisions.

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. Clarification should be sought as to what exactly does this mean. Trials are now deemed to start from the time of arrest. This may have implications depending on how much notice is provided of the Bill's relevant commencement provisions.

²⁰ House of Commons Briefing paper 22 September 2020 <https://researchbriefings.files.parliament.uk/documents/CBP-8983/CBP-8983.pdf>

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