

**Overseas Operations (Service Personnel and Veterans)
Bill**

**Memorandum from the Ministry of Defence to the
Delegated Powers and Regulatory Reform Committee**

A. INTRODUCTION

This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Overseas Operations (Service Personnel and Veterans) Bill (“the Bill”). It has been prepared by the Ministry of Defence (“the Department”). The Bill was introduced in the House of Commons on 18 March 2020 and was introduced in the House of Lords on 4 November 2020.

This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

1. The Bill aims to create protections for members of the armed forces (“Service Personnel”) and the Government relating to the legal consequences of events that occur in the course of military operations overseas. The specific protections are as follows:
 - a. Statutory presumption against prosecution of current or former Service personnel for alleged offences committed on operations outside the British islands more than 5 years ago. These provisions will raise the threshold to be applied by prosecutors when considering whether a service person or veteran should be prosecuted in such cases by stipulating that it is to be exceptional for a prosecutor to determine that a prosecution should be brought. In addition, the prosecutor must give particular weight to the adverse impact of the particular conditions the person was exposed to and the exceptional demands and stresses of overseas operations on a Service person (including on their ability to make sound judgments and on their mental health) and, in cases where there have been previous investigations and no compelling new evidence has emerged, the public interest in finality. The presumption applies to all offences save for the sexual offences listed in Schedule 1. If a prosecutor determines that, notwithstanding the presumption, it is appropriate for a prosecution to be brought, the consent of the Attorney General for England and Wales or the Advocate General for Northern Ireland will then be required for the prosecution to proceed. This measure may over time have an indirect impact on repeat criminal investigations, as police investigations may not be continued if, in consultation with prosecutors, it is assessed that cases will not meet the ‘exceptional’ threshold.
 - b. Restriction of judicial discretion to allow civil claims in respect of overseas operations. This will further restrict the court’s discretion to extend the normal time limit of three years for bringing civil claims for personal injury and/or death in relation to historical events outside the UK by requiring the court to take into account additional factors (in addition to those that already exist) when deciding whether to allow a claim outside the three-year limitation period. Those additional factors include, for example,

particular regard to the likely impact of the operational context on the ability to remember events and the likely impact of any legal action on the mental health of any service personnel witness.

- c. Restriction of judicial discretion to allow claims under the Human Rights Act 1998 (HRA) in respect of overseas operations. This will require the court to take into account various factors (as set out in the bullet point above for civil claims) when considering whether to extend the primary limitation period of one year.
- d. Limitation longstop for civil claims in respect of operations overseas. There is also a new absolute limitation longstop of six years. These measures should ensure that claims are brought promptly, enabling them to be assessed in a fair and proportionate manner, and ensuring lessons are learned and applied. Beyond six years, witnesses' recollections can fade, making it difficult for the claimant to pursue a claim and for the defendant properly to defend the claim. Even though record keeping has improved considerably, the unique nature of military operations involving multiple engagements can mean, and it has been shown to be, extremely hard to record the perfect version of events. Often the pace and speed of operations means that to do so would have a significant impact on operations. As such, the Ministry of Defence is often forced to rely on the memories of individual Service personnel, many of whom struggle to recall details of traumatic events after a lengthy passage of time.
- e. Changes to private international law rules for personal injury and death claims. The Bill amends existing legislation to provide that when the limitation periods of another country are applied to these claims, there will be an absolute limitation longstop of six years.
- f. Limitation longstop for claims under the HRA in respect of overseas operations. This similarly imposes a new absolute limitation longstop of six years for bringing HRA claims in relation to overseas operations. The same points apply as in the above bullet point to this measure; the upshot will be a consistent approach to limitation for both personal injury and death claims and for HRA claims. The time for the longstop on HRA claims will be calculated from the date of the incident occurring. If the date of knowledge is more than five years after the incident, however, claimants will have an additional one year to make a claim which may potentially take them beyond the six years longstop limit. This ensures victims are not disadvantaged.
- g. Duty to consider derogating from certain rights in the European Convention on Human Rights (ECHR) in relation to significant overseas operations. This provision will introduce a requirement for the Secretary of State to consider whether it is appropriate to derogate in light of the situation at the time.

C. DELEGATED POWERS

2. This Bill contains four delegated powers as set out below.

Clause 6(6): Power to amend Schedule 1 (Excluded Offences)

Power conferred on: Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: affirmative

Context and Purpose

3. Clause 6(1) gives the Secretary of State the power to amend Schedule 1. Schedule 1 contains a list of offences which are excluded from the definition of “relevant offences” in clause 6 of the Bill (see clause 6(3)-(5)). Relevant offences may be subject to the presumption against prosecution (clause 2), the requirement to give weight to certain factors (clause 3), and the requirement for the consent to prosecute (clause 5).

Justification for taking the power

4. 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).
5. 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.
6. 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.

Justification for the procedure

7. We consider that (in line with the guidance published by the Delegated Powers and Regulatory Reform Committee) the affirmative scrutiny procedure is the correct scrutiny option for this delegated power as it allows for amendments to be made to primary legislation.

Clause 13(1): Power to make consequential provisions

Power conferred on: Secretary of State and the Lord Chancellor

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: affirmative and negative procedure

Context and Purpose

8. Clause 13(1) confers on the Secretary of State and the Lord Chancellor the power, by regulation, to make consequential provisions that amend, revoke or repeal any enactment passed or made before the end of the Parliamentary session in which the Bill is passed. Such regulations may also make transitional or saving provision.
9. The Bill makes a number of amendments to existing legislation. It is possible, however, that other changes, consequent on the substantive amendments in the Bill, may be required, and the Department considers it sensible for the Bill to confer a power for the Secretary of State or the Lord Chancellor to make such changes through secondary legislation.

Justification

10. The Bill amends a number of complex bodies of existing domestic law. For example, Part 2 of the Bill makes amendments to the limitation regimes of the devolved administrations (and their interactions with private international law). The need for legislative changes may not emerge until after the Bill is enacted. In the event that consequential provisions are required for this purpose we consider that this would be most efficiently done without resorting to primary legislation.

Scrutiny

11. The Department feels that this provision strikes an appropriate balance whereby consequential amendments solely to secondary legislation are subject to the negative resolution procedure, but any amendments to primary legislation, which are by their nature deserving of greater scrutiny, require approval by resolution of both Houses.

Clause 15(2), (4): Power to make commencement and transitional or saving provisions

Powers in section 15(2) and (4) conferred on: Secretary of State and the Lord Chancellor

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: no procedure

Context and Purpose

12. This clause enables the Secretary of State or Lord Chancellor to bring into force by regulations the provisions in the Bill, except for Part 3 of the Bill which automatically comes into force on Royal Assent. It also confers the standard powers to appoint different provision for different days and to make transitional or saving provisions.

Justification for delegation

13. The Department proposes that it is appropriate for the Secretary of State and Lord Chancellor to determine the appropriate time to bring provisions of the Bill into force. It is also considered appropriate for the Secretary of State and the Lord Chancellor to have the power to make transitional or saving provision to ensure smooth commencement of the measures contained in the Bill.

Scrutiny Procedure

14. As is usual with commencement and transitional and saving powers, regulations made under this clause are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at the appropriate time.

Ministry of Defence

9 November 2020