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BRIEFING PAPER

Number 9041, 2 November 2020

Has anything changed in the Overseas Operations Bill?: Committee Stage report

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The main purpose of the Overseas Operations (Service Personnel and Veterans) Bill is to provide greater legal protections to Armed Forces personnel and veterans serving on military operations overseas.

The Public Bill Committee stage took place between 6 and 22 October 2020. The Committee took evidence from a number of leading stakeholders, including Armed Forces charities, legal representatives, human rights groups, ex-military personnel and the former Judge Advocate General, Judge Jeff Blackett. It also received written evidence.

A significant number of amendments were tabled to Parts 1 and 2 of the Bill but no changes were made. The Bill therefore remains as introduced (Bill 117).

This paper should be read in conjunction with Library Briefing, CBP8983, Overseas Operations (Service Personnel and Veterans) Bill 2019-2021, which was produced prior to the Bill's Second Reading. Section 5 of that paper looks at the arguments surrounding the Bill's provisions, many of which were revisited during the Committee evidence sessions and are likely to be returned to upon Report.

1. Main points of oral evidence

Most witnesses welcomed the intent behind the Bill but felt that the legislation, as introduced, has some serious shortcomings.

Four main themes emerged from the oral evidence sessions:

1 The overriding view was that the failure to include war crimes, crime against humanity and torture in Schedule 1 of the Bill contravenes the UK's international legal obligations and could invite the jurisdiction of the International Criminal Court. Schedule 1 outlines those offences which are exempt from the Bill's provisions. Witnesses largely concurred that there was no legal or moral justification for not excluding torture, war crimes and crimes against humanity from the scope of the Bill.

2 The Bill does not address one of the fundamental problems with historical and vexatious claims, which is the deficiencies within the investigative process for alleged offences, and the cycle of reinvestigation that has developed. A number of witnesses, including the former Judge Advocate General, Judge Jeff Blackett,

suggested that the Bill should be paused to allow these issues to be addressed first. He described the Bill as "looking through the wrong end of the telescope".[1]

3 Some witnesses felt that the role of the Attorney General, in giving consent to any prosecution that exceeds the five-year limit, should be reviewed. They argued that the Attorney General is a political appointment and is responsible for the initial legal advice behind any overseas operation. Several witnesses suggested that the role of consent should be given to an independent judicial figure, such as the Director of Public Prosecutions. Others felt that this would undermine the military justice system. Concerns were also expressed that any decisions not to prosecute could be subject to judicial review.

Yet, as the Judge Advocate General noted, Attorney General consent is already required for the prosecution of any offence under the ICC Act 2001 and the Geneva Conventions Act 1957. He suggested that "given that ICC Act offences and Geneva Conventions Act offences are covered by the Attorney General, a lot of this will have to go to the Attorney General anyway, without the Overseas Operations Bill".[2] Attorney General consent must also be given for the prosecution, outside of the normal time limits, of those individuals who have already left the Service.[3]

4 The limitations on bringing civil claims erodes the rights of Service personnel and veterans and potentially breaches the armed forces covenant. A number of witnesses argued that the MOD is the main beneficiary of Part 2 of the Bill and suggested that the civilian (Part 2) and criminal (Part 1) elements relating to claims and prosecution of offences respectively, should not be addressed in the same piece of legislation.

There was also an appeal for the MOD to take forward its work on placing the concept of combat immunity in statute and return to the proposals on a new compensation scheme for Service personnel. Despite having committed to bringing forward legislation "as soon as parliamentary time allows", these proposals were dropped by the MOD in September 2020.

1.1 MOD review into investigations

On 13 October 2020 the Secretary of State for Defence, Ben Wallace, made a Written Statement announcing that a judge-led review had been commissioned to examine the investigation of alleged offences which occur on overseas operations. The review will not feed into the Overseas Operations Bill but will "complement" its provisions.[4] Any recommendations will be taken forward alongside the recommendations of the Service Justice System Review, which the Department is currently working on. That review was intended to help prepare for the next Armed Forces Bill, which is due in 2021.[5]

In announcing the review Mr Wallace stated:

> The Overseas Operations (Service Personnel and Veterans) Bill currently before this House will provide reassurance to Service personnel that we have taken steps to help protect them from the threat of repeated investigations and potential prosecution in

1 Public Bill Committee, Fourth Sitting, c120
2 Public Bill Committee, Fourth Sitting, c125
3 Under Chapter 2 of Part 2 of the Armed Forces Act 2006 it is possible for individuals who have ceased to be subject to military law (i.e. veterans who have left HM Services, either Regular or Reserve and certain civilians who were subject to Service law), to be charged and tried by court martial for an offence committed by them prior to that date, as long as the case is brought to trial within six months. However, that limitation does not apply to offences committed overseas, provided that the Attorney General consents to a prosecution and subsequent trial (section 61 AFA06).
4 Ministry of Defence press release, 13 October 2020
5 The Armed Forces Act establishes the UK military justice system. The last Act was passed in 2016. A new Act is required every five years.

> connection with historical operations overseas many years after the events in question. However, we are also clear that there should be timely consideration of serious and credible allegations and, where appropriate, a swift and effective investigation followed by prosecution, if warranted. In the rare cases of real wrongdoing, the culprits should be swiftly and appropriately dealt with. In doing so, this will provide greater certainty to all parties that the justice system processes will deliver an appropriate outcome without undue delay.
>
> I am therefore commissioning a review so that we can be sure that, for those complex and serious allegations of wrongdoing against UK forces which occur overseas on operations, we have the most up to date and future-proof framework, skills and processes in place and can make improvements where necessary. The review will be judge-led and forward looking and, whilst drawing on insights from the handling of allegations from recent operations, will not seek to reconsider past investigative or prosecutorial decisions or reopen historical cases. It will consider processes in the service police and Service Prosecuting Authority as well as considering the extent to which such investigations are hampered by potential barriers in the Armed Forces, for example, cultural issues or operational processes. A key part of the review will be its recommendations for any necessary improvements. It will seek to build upon and not reopen the recommendations of the Service Justice System Review by HH Shaun Lyons and Sir Jon Murphy. Work by the Department in response to the Service Justice System Review is continuing to be taken forward separately.
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> I expect the review will report to me in around nine months' time.[6]

2. Committee scrutiny

Line by line scrutiny of the Bill commenced on 14 October (Fifth sitting).

Nearly 100 amendments and ten new clauses were tabled. However, only four amendments, all relating to Part 1 of the Bill, were put to a vote. All were defeated on division. Clause 1 was also put to a vote, which passed by 10 votes to two.[7]

The Bill (Bill 117) was therefore reported to the House without amendment.

2.1 Which amendments and new clauses were defeated on division?

Part 1 – restrictions on prosecution

Amendment 25 and 26 – a 10-year timeframe for presumption against prosecution (Clause 1)

Both amendments were tabled by the Opposition to try and change the timeframe for presumption against prosecution from five to 10 years. The latter was initially proposed in the MOD's 2019 consultation paper on legal protections. Labour spokesperson, Stephen Morgan MP, called the five-year timeframe arbitrary, with "with no clear evidence for why that timeframe has been selected".[8]

In responding to the debate, Minister for Defence People and Veterans, Johnny Mercer MP, stated that the 10-year timeframe set out in the 2019 consultation was not "fixed policy" because the MOD was seeking views:

> In the consultation, we asked the following questions: whether 10 years was appropriate as a qualifying time, and whether the measure should apply regardless of

6 HCWS 507, 13 October 2020
7 Public Bill Committee, Sixth Sitting, c185
8 Public Bill Committee, Fifth Sitting, c143

> how long ago the relevant events occurred. As we set out in our published response to the consultation, there was support for a 10-year timeframe, but equally there was support for presumption to apply without a timeframe at all. We also considered the written responses, which clearly indicated the concerns that a 10-year timeframe was too long—memories can fade, evidence tends to deteriorate and the context of events changes. There were also concerns that 10 years was too long to have the threat of prosecution hanging over a serviceperson's head.
>
> Respondents suggested time periods of less than 10 years, with the most popular timeframe being five years. As the issue that we seek to address relates to historical alleged offences, we did not feel able to apply the presumption without a timeframe. However, given the strength of the views expressed, we felt that a timeframe of less than 10 years would be more appropriate, and five years was the most popular alternative.[9]

Both amendments were defeated by 10 votes to six.[10]

Amendment 14 (clause 1)

As worded, amendment 14 would have extended the point at which the presumption against prosecution would start, from "the day on which the alleged conduct took place" to "the day on which the first investigation relevant to the alleged conduct concluded". In speaking to amendment, Martin Docherty-Hughes MP raised concerns over the use of the word "alleged", which he suggested created ambiguity.

In response, the Minister disagreed, arguing that the amendment would merely create more uncertainty over the point at which the five-year timeframe would start. The amendment was defeated by 10 votes to six.[11]

Amendments 10 and 22 (clause 5) – consent of the Attorney General

The SNP tabled two amendments that sought to introduce independent judicial oversight to the process of prosecuting historical offences. In introducing the amendments Carol Monaghan MP commented:

> Amendments 10, 11 and 22 address the issue of the independence of the decision to grant or withhold consent to prosecution. The Attorney General is, by the nature of the position, a political appointment. Therefore, tying in the prosecution of potentially serious incidents to a politically motivated individual is at least unethical and at worst dangerous […] That role should be carried out in England by the Director of Public Prosecutions and in Scotland by the Lord Advocate.

In response the Minister made the following points:

> Requiring the consent of the Attorney General for a prosecution is not unusual. The Attorney General already has to give consent to prosecute war crimes, as has been said, and for veterans to be prosecuted more than six months after they left service. Who introduced that legislation? The Labour party, in 2001. The Attorney General already has numerous other consent functions, but that does not mean that the Government have any role to play in decisions on consent; it is simply a safety check on fairness.[12]

With respect to Scotland, he noted:

> In relation to amendment 22, the consent function does not need to extend to Scotland, as all prosecution decisions in Scotland are already taken in the public interest by, or on behalf of, the Lord Advocate.

Amendments 10 and 22 were defeated by 10 votes to six.

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9 Public Bill Committee, Fifth Sitting, c150
10 Ibid, c152 and c157
11 Ibid, cc155
12 Public Bill Committee, Seventh Sitting, c230

2.2 Other matters debated

War crimes/ Crimes against humanity

Amendments that sought to place war crimes, torture and crimes against humanity in Schedule 1 (excluded offences), and therefore exempt from the provisions of this Bill, were debated as part of a broader group of amendments but not put to a decision (not called).[13] In responding to the debate on Schedule 1, the Minister commented:

> The reality is that the word "torture" and allegations of torture have been used as a vehicle to generate thousands of claims against our service personnel. There have been arguments around why we have not packed investigations and so on into the Bill, but the Bill is trying to deal with very specific problems, which are the ones we have faced over the last 15 or 20 years relating to claims of this nature. In the discharge of your military duties, you can expect to be accused of assault, unlawful killing, murder and torture when using violence […]
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> No one disputes the seriousness of torture. I reiterate that our commitments against that are not diluted in any way. All we are seeking to do is to restore the primacy of things like the Geneva convention and the law of armed conflict, and to protect our service men and women from the nature of lawfare that has been so pernicious over the years. I understand people's views on it, and at first inspection I understand why people have concerns, but the reality is that we have to deal with the situation with which we have been presented. If we are going to protect our people, this is a difficult part of it. As I have outlined, nobody can in any way be legitimately accused of sexual offences in the discharge of their duties, and that is why it is in the Bill.[14]

Time limits on civil claims

Amendments to Part 2 that sought to change the proposed six-year time limit on bringing civil claims related to overseas operations, and clarify the 'date of knowledge'[15] relating to such claims, were also either withdrawn or not called (debated but not put to a decision).[16]

This included an attempt by the Official Opposition to introduce a new clause (NC2) that would exempt claims by serving and former Armed Forces personnel from the Bill's provisions. In speaking to that new clause, Labour argued that Part 2, unamended, would "leave our veterans with fewer rights than prisoners".[17] In summing up their arguments against Part 2 of the Bill, Stephen Morgan stated that "Labour cannot and will not stand for legislation that breaches our armed forces covenant"[18] and suggested that various amendments relating to Part 2 would be picked up "at a later date".[19]

In reply to concerns over Part 2, the Minister commented:

> none of the measures in part 2 of the Bill will prevent service personnel, veterans or their families from bringing claims against the MOD in connection with overseas operations within a reasonable timeframe, as historically most have done anyway. The purpose of the limitation longstops is to stop historical and often vexatious claims being brought against the military on overseas operations, which put our service

13 Public Bill Committee, Sixth Sitting and Seventh Sitting
14 Public Bill Committee, Seventh Sitting, c233
15 The time limit for bringing a claim would be calculated either from the date of the incident or from the date of knowledge. The latter is important in instances where medical conditions, such as Post Traumatic Stress Disorder (PTSD) are often diagnosed much later.
16 Public Bill Committee, Eighth Sitting, Ninth Sitting
17 Public Bill Committee, Seventh sitting, c236. NC2 was debated but not put to a decision (not called).
18 Public Bill Committee, Eighth Sitting, c268
19 Public Bill Committee, Ninth Sitting, c307

> personnel at the mercy of being called to provide evidence long after the alleged events in question, with all the harm and anxiety that might cause them.
>
> To ensure fairness between claimants, we have not excluded service personnel from those provisions. They will apply equally to service personnel and veterans as they will to any other person bringing a claim against the MOD in connection with overseas operations. I am confident that these measures do not break the armed forces covenant. The new factors and limitation longstops only apply to claims in connection with overseas operations and will apply to all claimants in the same way. The court's discretion to extend the three-year time limit for death or personal injury claims and the one-year time limit for human rights claims remains unchanged in respect of any other claims, that is, those not connected to overseas operations brought against the MOD.
>
> Additionally, our evidence suggests that 94% of those claims from service personnel are already brought within six years. We would expect that figure to rise in future, as we ensure that the armed forces community is made aware of the new measures and the relevant dates for bringing claims, including what is meant by the date of knowledge. That should encourage personnel to bring claims within six years, or earlier if possible, as after the primary time limit of three years for personal injury and death and one year for human rights claims expires, claimants must rely on persuading the courts to exercise their discretion to extend the time limit […]
>
> we are in a position where we have to make choices: either we choose to leave the situation as it is now, letting it continue with no time limit, or we bring forward legislation to give certainty to our veterans.[20]

Derogations from the European Convention on Human Rights

Clause 12 of the Bill would amend the *Human Rights Act 1998* to impose upon the Secretary of State a duty to consider derogation from the European Convention on Human Rights (ECHR) under certain circumstances.[21] Broadly, it would require the Secretary of State to consider derogating from the EHCR based on the significance of the overseas operation and whether or not it would be appropriate to derogate. The Committee considered an amendment that would require the approval of the House before any significant derogations could be made from the ECHR in relation to overseas operations (amendment 57).[22]

Introducing the amendment, Chris Evans MP, argued:

> This House must be consulted on matters as serious as derogating from our key international obligations […]
>
> To set a legal norm for derogation from the European convention on human rights would seriously damage Britain's international standing. It would send a signal that these international conventions and treaties are not taken seriously by our nation, and would have the knock-on effect of harming the integrity of our troops.[23]

In response the Minister stated:

> The measures in this Bill about derogation are not intended to change the existing and very robust processes that the Government and Parliament follow if and when a decision to derogate has been made. The requirement to consider derogation merely ensures that all future Governments are compelled to consider derogating from the ECHR for the purpose of the specific military operation. It is worth saying that the only change that we are bringing about in this Bill is the requirement to consider, rather than leaving it as an option. It is not actually a derogation; it is a requirement to

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20 Public Bill Committee, Eighth Sitting, c260-262
21 Article 15 of the ECHR provides for the possibility of derogation "in time of war or other public emergency threatening the life of the nation"
22 Public Bill Committee, Ninth Sitting and Tenth Sitting
23 Ibid, c317-318

> consider a derogation and prove that it has been considered, not a derogation itself […]
>
> Appropriate parliamentary oversight over derogation is already built into the Human Rights Act 1998.[24]

The amendment was subsequently withdrawn, although Mr Evans indicated an intention to return to this matter at Report Stage.[25]

3. Further commentary on the Bill

3.1 Joint Committee on Human Rights

The Joint Committee on Human Rights (JCHR) has reported on the Bill as part of its legislative scrutiny, after taking evidence from expert witnesses and ministers.[26]

The Committee noted that some of the investigations, inquiries and litigation into incidents arising from the UK's involvement in conflicts in Iraq and Afghanistan had exposed wrongdoing, including the mistreatment of detainees and poor practices on the part of the MoD that have led to the death or injury of service personnel. It concluded that these must be able to continue to ensure that lessons are learned that would prevent both members of the armed forces and civilians being harmed or killed unnecessarily.[27]

The Committee also noted the overwhelming evidence it had received that "investigations into incidents have been inadequate, insufficiently resourced, insufficiently independent and not done in a timely manner".[28] It concluded that it was this inadequacy that had led to repeated investigations, and that the Bill would do nothing to remedy this. The JCHR recommended that the MoD should "establish an independent, skilled and properly funded service for investigations".[29]

The JCHR questioned the premise of Part 1 of the Bill, noting that "There has been no suggestion that the Service Prosecuting Authority is bringing excessive or unjustified prosecutions against members of the Armed Forces".[30]

The Committee expressed concern that the provisions had been introduced on the basis of a misunderstanding of the differences between investigations, prosecutions and civil claims, and recommended that clauses 1-7 should be deleted.[31]

The Committee also expressed concern at the introduction in domestic law of "a special category of defendant (ie members of the Armed Forces) whose victims are seemingly less deserving of justice and who are granted greater impunity for their crimes",[32] and that the presumption against prosecution risks contravening the UK's international legal obligations.[33]

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24 Public Bill Committee, Tenth Sitting, c332
25 Ibid, c334
26 Legislative Scrutiny: The Overseas Operations (Service Personnel and Veterans) Bill, Ninth Report of Session 2019-21, HC 665, HL Paper 155, 29 October 2020 Transcripts of its evidence sessions on 28 September 2020 and 5 October 2020 are available, along with the written evidence received.
27 Para 25
28 Para 35
29 Para 36
30 Para 45
31 Para 46
32 Para 54
33 Para 63

It recommended at a minimum that the Bill be amended so that the presumption would not apply in respect of offences such as torture and war crimes.[34]

With respect to Part 2 of the Bill, the Committee concluded that the introduction of an absolute time limit risks breaching the UK's human rights obligations and preventing access to justice, noting that had this limit existed previously it would have prevented cases that uncovered wrongdoing such as UK complicity in rendition and torture.[35]

The JCHR was critical of MoD Ministers' use of "politicised and inaccurate" language in relation to "vexatious" and "unmeritorious" claims, noting that these terms have been used repeatedly in relation to claims where the MoD did have a case to answer.[36]

The Committee also questioned the Government's use of the term "lawfare" noting that it refers to the strategy of using the law to achieve an operational military objective:

> We wholeheartedly reject the Minister's implication that UK courts, Armed Forces personnel, civilians and legal professionals are all part of some coordinated strategy to use the law as a substitute for traditional military measures to achieve an operational military objective—that is quite simply preposterous.[37]

It called on the Minister to cease using "inflammatory and inaccurate language".[38]

With respect to the duty to consider derogating provided for by clause 12, the JCHR suggested that it was highly questionable whether it added much to what the Minister would do in any event, given that the UK could only lawfully derogate if the conditions under Article 15 of the ECHR were met.[39]

The Committee called on Government to make an undertaking to consult it in advance of any proposed derogation under the ECHR, and to provide Parliament with sufficient time to consider any proposed derogation in advance.[40]

Finally, the Committee considered the wider implications of the Bill on military operations. It expressed regret at the impact the Bill has already had on the reputation of the Armed Forces and UK internationally, and called on the Government to

> … consider very carefully the message that it sends to troops about accountability and compliance with international humanitarian law and international human rights law.[41]

Box 1: Suggested further reading

- Written evidence submitted to the Overseas Operations Bill Public Bill Committee.
- Elizabeth Wilmshurst, "Is Britain's commitment to an international rules-based order wavering?", *Chatham House Expert Comment,* 7 October 2020
- Professor Michael Clarke, "The UK's Overseas Operations Bill: Good questions, wrong answers", RUSI Commentary, 7 October 2020
- "British Legion boss clashes with Minister on Overseas Operations Bill", *The Guardian,* 9 October 2020
- "The UK Overseas Operations Bill: an own goal in the making?", Just Security, 27 October 2020

34 Para 64
35 Para 107
36 Paras 116-117
37 Para 124
38 Para 125
39 Para 130
40 Para 152
41 Para 160

4. Report Stage

Report Stage of the Overseas Operations (Service Personnel and Veterans) Bill has been scheduled for 3 November 2020.

At the time of writing, over 60 amendments and new clauses have been tabled which reflect many of the amendments previously tabled in Committee relating to war crimes, crimes against humanity and torture, the six year limit on civil claims introduced by Part 2, and the investigative process for offences.

Several amendments have also been tabled by the Chair of the Joint Committee on Human Rights, Harriet Harman, that seek to remove Part 1 from the Bill, in its entirety.[42]

[42] The JCHR Report includes an Annex with suggested amendments to the Bill

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