



Overseas Operations (Service Personnel and Veterans) Bill HL Bill 147 of 2019–21

On 18 March 2020, the Government introduced the Overseas Operations (Service Personnel and Veterans) Bill in the House of Commons. It completed report stage and third reading in the Commons on 3 November 2020. Second reading in the House of Lords is scheduled to take place on 20 January 2021.

Background

The conduct of the UK's armed forces has traditionally been regulated by international humanitarian law, also called the law of armed conflict, and UK domestic law. Over the last two decades, there have been a number of rulings which have expanded the territorial application of the European Convention on Human Rights. There has also been an increase in the number of legal proceedings brought against the armed forces and the Ministry of Defence relating to the conduct of military personnel on operation overseas. The Government has argued that action needs to be taken to provide greater certainty for service personnel and veterans on what it describes as vexatious claims concerning the prosecution of historical events.

Overseas Operations Bill provisions

Part 1 of the Overseas Operations (Service Personnel and Veterans) Bill establishes new restrictions on bringing proceedings against current and former members of the armed forces, including: a presumption against prosecution after five years; and a requirement to take into consideration the conditions members of the armed forces are under during overseas operations. Part 2 of the bill would introduce time limits on some civil claims and claims made under the Human Rights Act 1998. It would also require the secretary of state to consider derogating from the European Convention on Human Rights regarding future overseas operations.

Scrutiny of the bill

The bill has been criticised by the Joint Committee on Human Rights, which has argued it could undermine the UK's obligations under international humanitarian law, international human rights law and international criminal law. Several amendments to the bill were tabled during committee stage and report stage by members of the Opposition and other parties, and by some Conservative MPs. MPs voted on several of these amendments, but they were all defeated.

Edward Scott | 14 January 2021

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I. Background

The conduct of parties during armed conflict has traditionally been regulated by international humanitarian law, also called the law of armed conflict. This is based on a large number of treaties, in particular the [Geneva Conventions of 1949 and their Additional Protocols](#), and a series of other conventions and protocols covering specific aspects of the law of armed conflict.

In the UK, standards of military behaviour are also regulated by domestic rules and legislation, namely the Armed Forces Act 2006, which created a single disciplinary system governing all members of the armed forces.

In the last two decades, there have been a number of rulings which have expanded the territorial application of the European Convention on Human Rights (ECHR). It has been argued that this has created tension with international humanitarian law.¹ During the same period, there has been an increasing number of legal proceedings brought against the armed forces and the Ministry of Defence (MoD) which relate to the conduct of military personnel on operations overseas. Further background information on these legal developments and the various investigations that have been conducted is provided in the House of Commons Library briefing, [Overseas Operations \(Service Personnel and Veterans\) Bill 2019–21](#).

In 2013, the Policy Exchange think tank published a report entitled [The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power](#). This was written by Laura Croft, a lawyer and retired US army lieutenant colonel and Thomas (Tom) Tugendhat, a lieutenant colonel in the territorial army and current Conservative MP for Tonbridge and Malling (first elected in 2015). The report argued members of the British armed forces had come under threat of “sustained legal assault” which it said risked paralysing the effectiveness of the military. Further information on the Policy Exchange report is provided in the House of Lords Library briefing, [The Armed Forces and Legal Challenge](#).²

Government policy since 2016

Article 15 of the ECHR allows a state to derogate from certain obligations under the Convention in a time of emergency.³ In October 2016, the then Government announced it intended to derogate from the ECHR in future conflicts.⁴ The Government argued this was necessary to ensure that members of the armed forces were protected from persistent legal claims. The then Prime Minister, Theresa May, also said the Government would “put an end to the industry of vexatious claims that has pursued those who served in previous conflicts”.⁵ Further information on the Government’s 2016 announcement and the reaction to it is provided in the House of Lords Library briefing, [Armed Forces: Legal Challenges and Derogation from the European Convention on Human Rights](#).⁶

¹ Claire Landais and Léa Bass, ‘[Reconciling the rules of international humanitarian law with the rules of European human rights law](#)’, *International Review of the Red Cross*, 2015, no 97, vol 900, pp 1295–311.

² House of Lords Library, [The Armed Forces and Legal Challenge](#), 1 November 2013.

³ European Convention on Human Rights, article 15.

⁴ Ministry of Defence, ‘[Government to protect Armed Forces from persistent legal claims in future overseas operations](#)’, 4 October 2016.

⁵ *ibid.*

⁶ House of Lords Library, [Armed Forces: Legal Challenges and Derogation from the European Convention on Human Rights](#), 16 November 2016.

In July 2019, the House of Commons Defence Committee published a report that recommended service personnel should be protected from repeated investigation and prosecution through the introduction of a qualified statute of limitations.⁷ In the same month, the Government launched a consultation on changes to the legal protections for armed forces personnel serving in operations outside the UK. The consultation included proposals to create:⁸

- A statutory presumption against prosecutions for alleged criminal offences which occurred more than ten years ago.
- A new partial defence to murder.
- A time limit for bringing common law compensation claims for personal injury and/or death in relation to historical events.

A presumption to derogate from the ECHR in future conflicts was not included in this consultation. However, the Government repeated its October 2016 commitment on derogation in the foreword to the consultation document.⁹

The Conservative Party manifesto for the 2019 general election included a commitment to “introduce new legislation to tackle the vexatious legal claims that undermine our armed forces”.¹⁰

2. Overseas Operations (Service Personnel and Veterans) Bill

The [Overseas Operations \(Service Personnel and Veterans\) Bill](#) received first reading in the House of Commons on 18 March 2020. In the explanatory notes, the Government said the bill would provide “greater certainty for service personnel and veterans in relation to vexatious claims and prosecution of historical events”.¹¹ The explanatory notes also said that the purpose of the bill was to combat ‘lawfare’, which it described as the “judicialisation of armed conflict”.¹² The explanatory notes argued UK service personnel and veterans:

[...] have had to endure a wave of vexatious claims—including those that were ultimately discredited, or have been brought in multiple jurisdictions, or were found to have been encouraged by lawyers pursuing financial gain—that has created an industry of litigation.¹³

The bill includes the following provisions:

⁷ House of Commons Defence Committee, [Drawing a Line: Protecting Veterans by a Statute of Limitations](#), 22 July 2019, HC 1224 of session 2017–19, p 4.

⁸ Ministry of Defence, [Legal Protections for Armed Forces Personnel and Veterans Serving in Operations Outside the United Kingdom](#), July 2019.

⁹ *ibid*, p 3.

¹⁰ Conservative Party, [Manifesto 2019](#), November 2019, p 52.

¹¹ [Explanatory Notes to the Bill](#), as introduced in the House of Commons, p 3.

¹² *ibid*, p 5.

¹³ *ibid*.

'Triple Lock' on prosecutions

Part I of the bill would establish new restrictions on bringing proceedings against current and former members of the armed forces. These restrictions would only apply to alleged offences committed while serving in overseas operations.

The so-called 'triple lock' restrictions in the bill are as follows:

- There would be a presumption against prosecution if the alleged offence took place over five years ago. This would also apply to a decision to continue with proceedings. This is shorter than the ten-year period proposed in the 2019 consultation. Proceedings should only take place in "exceptional" cases.¹⁴
- When making these decisions, the prosecutor would need to take into account the adverse conditions the person was exposed to during their deployment overseas, including their experiences or responsibilities.¹⁵ The prosecutor would also need to take into account the "exceptional demands and stress" members of the armed forces are likely to be subject to, "regardless of their length of service, rank or personal resilience".¹⁶

In instances where there had been a previous investigation and no "compelling new evidence" had become available, the prosecutor would also have to take into account "the public interest in finality (as regards how the person is to be dealt with) being achieved without undue delay".¹⁷

- The prosecutor would also need to gain the consent of the attorney general to proceed with prosecution once five years had elapsed following an alleged offence.¹⁸

The bill states these requirements would apply to prosecutions against members of both regular and reserve forces or members of a British overseas territorial force.¹⁹ Overseas operations are defined as follows:

[...] any operations outside the British Islands, including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious public disorder, in the course of which members of Her Majesty's forces come under attack or face the threat of attack or violent resistance.²⁰

The bill would also establish an exception to the triple lock in part I. Schedule I of the bill says that part I would not apply to the investigation of alleged sexual offences.

¹⁴ Clause 2.

¹⁵ Clause 3(2)(a).

¹⁶ Clause 3(3).

¹⁷ Clause 3(2)(b).

¹⁸ Clause 5.

¹⁹ Clauses 1(3) and 5(4).

²⁰ Clause 1(6).

Civil action: changes to time limits

Currently, courts in England and Wales, Scotland and Northern Ireland have discretion to extend time limits in civil actions. Part 2 of the bill would introduce a new six-year deadline on the extension of actions and put in place restrictions on the ability of the courts to extend certain actions beyond three years.

Under the Limitation Act 1980, any action for damages for personal injury or death resulting from negligence, nuisance or breach of duty in England and Wales must be brought within three years. However, courts in England and Wales have discretion to extend this.²¹ The courts are required to consider several factors when making the decision whether to extend, including the effect of the delay on the cogency of the evidence.²²

Clause 8 of the bill would require the courts in England and Wales to consider the following additional factors when deciding whether to extend a case beyond three years if it relates to overseas armed forces action. The courts would have to have “particular regard to”:

- The effect of the operational context on the ability of members of the armed forces to remember relevant events or actions fully or accurately.
- The extent to which members of the armed forces are more dependent on their memories rather than records, given their operational context.
- The likely impact on the mental health of witnesses or potential witnesses who are members of the armed forces.²³

Clause 8 would also limit the ability of the courts to extend such actions up to a maximum of six years (referred to as a ‘longstop’).²⁴ This clause applies to actions against the Ministry of Defence, the Secretary of State for Defence or members of the armed forces.²⁵

Clause 8 also amends the Foreign Limitation Periods Act 1984.²⁶ Under the 1984 Act, where courts in England and Wales are required to take into account the law of another jurisdiction, the limitation period of that jurisdiction should apply. Clause 8 would require all cases involving armed forces overseas to be completed within six years, regardless of the requirements of other jurisdictions.

Clauses 9 and 10 have an equivalent effect to clause 8 in Scotland and Northern Ireland.

New time limits: human rights law cases

Part 2 of the bill introduces new time limits to human rights cases, which are similar to those introduced in civil cases. Currently, under the Human Rights Act 1998, proceedings against a public

²¹ Limitation Act 1980, s33.

²² Limitation Act 1980, s33(3)(b).

²³ Schedule 2(4).

²⁴ Clause 8(1)(a) and schedule 2.

²⁵ Schedule 2(2).

²⁶ Clause 8(2) and schedule 2(2).

authority must be brought within a year of the act complained of taking place.²⁷ However, the courts have discretion to extend cases beyond this one-year time limit.²⁸ Clause 11 of the bill amends the Human Rights Act 1998 to require the courts to consider additional factors when deciding whether to extend cases involving overseas operations beyond a year. These additional factors are the same as those the courts would have to consider in civil cases, outlined above.

Clause 11 would further amend the Human Rights Act 1998 by introducing an absolute time limit, requiring proceedings to be brought before six years following the act complained of taking place. In situations where the “date of knowledge” of the act was after six years of it taking place, proceedings may be brought within twelve months of that date.²⁹ The date of knowledge is the date on which the person bringing proceedings became aware of the act.

Duty to consider derogation from European Convention on Human Rights

Part 2 of the bill also includes provisions regarding derogation from the ECHR. Clause 12 would further amend the Human Rights Act 1998 to require the secretary of state to “keep under consideration” derogating from the ECHR.³⁰ This would apply to any overseas operations which the secretary of state considered were significant or would become significant. Overseas operations in this clause are defined as:

[...] operations of Her Majesty’s forces outside the British Islands in the course of which members of those forces may come under attack or face the threat of attack or violent resistance.³¹

Northern Ireland

The bill does not cover armed forces operations in Northern Ireland. The Government has stated it will introduce separate legislation covering these operations.³² Further information on the investigations concerning armed forces operations in Northern Ireland is provided in the House of Commons Library briefing, [Investigation of Former Armed Forces Personnel Who Served in Northern Ireland](#).³³

3. Reaction to the bill

Following the publication of the bill, several organisations raised concerns regarding the bill’s impact on human rights. Concerns have also been raised regarding the potential impact on the ability of current and former members of the armed forces, and their families, to take legal action against the Ministry of Defence (MoD).

²⁷ Human Rights Act 1998, section 7(5)(a).

²⁸ *ibid*, section 7(5)(b).

²⁹ Clause 11.

³⁰ Clause 12.

³¹ Clause 12.

³² [Explanatory Notes to the Bill](#), as introduced in the House of Commons, p 5.

³³ House of Commons Library, [Investigation of Former Armed Forces Personnel Who Served in Northern Ireland](#), 1 April 2020.

The Law Society of England and Wales has argued the bill would go beyond the Government's stated aim of reducing spurious claims against service personnel and veterans.³⁴ It argued the bill could bar legitimate claims. It also argued the bill risked undermining the UK's obligations under international law to investigate and prosecute alleged offences such as torture and unlawful killing.

The Equality and Human Rights Commission has also criticised various aspects of the bill, including that the presumptions against prosecution in part I were "akin to a statute of limitations". It said statutes of limitations were "widely seen as incompatible with the international human rights framework and customary international law".³⁵ The Equality and Human Rights Commission argued that clause 12 of the bill, concerning derogations from the ECHR, did not contain enough detail on the circumstances in which it would apply. It also said this clause was likely to have an impact on the collective enforcement of the ECHR.

Professor Michael Clarke, the former Director General of the Royal United Services Institute for Defence and Security Studies (RUSI), has also expressed concerns, arguing the bill could put the UK at odds with the Geneva Conventions and the International Criminal Court (ICC).³⁶ While he described the aims of the bill as "laudable", he argued the triple lock in part I of the bill might lead to the following unintended consequences:

[...] the ICC can only claim jurisdiction [over individuals whose own government is deemed 'unable or unwilling' to prosecute against serious allegations of war crimes. If the idea gains any international traction that the UK operates a 'quasi-statute of limitations' for [serious crimes] then there is the prospect that individual British military personnel, covered in the UK by the blanket of an Overseas Operations Act, might be indicted by the ICC on war crimes charges and even face an arrest warrant outside the UK.

4. Bill stages

4.1 Second reading

Second reading in the House of Commons took place on 23 September 2020.³⁷

During second reading, Ben Wallace, the Secretary of State for Defence, argued that the bill would prevent members of the armed forces who have served abroad from being subject to repeated investigation and multiple legal claims.³⁸ He also said the bill would ensure that the "unique pressure" placed on members of the armed forces serving overseas would be taken into account in decisions on whether to prosecute for alleged historical offences.³⁹ On the provisions in clause 12 regarding

³⁴ Law Society, [Parliamentary briefing: Overseas Operations \(Service Personnel and Veterans\) Bill—House of Commons second reading](#), 23 September 2020.

³⁵ Equality and Human Rights Commission, [Britain and the Convention against Torture: Follow-up submission to the UN Committee against Torture](#), 27 August 2020, pp 5–6.

³⁶ Royal United Services Institute for Defence and Security Studies, ['The UK's Overseas Operations Bill: Good Questions, Wrong Answers'](#), 7 October 2020.

³⁷ [HC Hansard, 23 September 2020, cols 984–1054](#).

³⁸ *ibid*, col 985.

³⁹ *ibid*, col 986.

derogation from the ECHR, Mr Wallace argued that derogation would only be used if the secretary of state believed it was necessary.⁴⁰ He argued these powers were needed in response to the “encroachment” of the ECHR into areas of combat.⁴¹

John Healey, the Shadow Secretary of State for Defence, criticised the bill. He argued that it called into question the UK’s commitment to international law and could result in members of the armed forces being “dragged to the Hague”.⁴² Mr Healey said changes needed to be made to ensure the bill achieved the Government’s stated aims.⁴³ He also argued the bill would make it more difficult for members of the armed forces to bring legal action against the MoD, breaching the armed forces covenant.⁴⁴ He said he agreed with the Government that vexatious claims had been lodged against members of the armed forces. However, he argued the bill did not do enough to improve the system of investigations, which he said lacked “speed, soundness, openness and a duty of care to alleged victims and to the forces personnel who may be in the frame”.⁴⁵

The House divided on whether to give the bill a second reading. The motion was approved by 331 votes to 77.⁴⁶

4.2 Committee stage

House of Commons public bill committee considered the bill over the course of ten sittings between 6 and 22 October 2020. No changes were made to the bill at this stage. However, nearly 100 amendments and ten new clauses were tabled.⁴⁷ Of these, the following went to division:

- Amendments 25 and 26, tabled by Labour, which would have extended the time frame of the presumption against prosecution from five to ten years.
- Amendment 14, tabled by the Scottish National Party (SNP), which would have extended the point at which the presumption against prosecution would begin from the date on which the alleged conduct took place to the date on which the first investigation began.
- Amendments 10 and 22, also tabled by the SNP, which would have introduced judicial oversight on decisions to prosecute historical offences.

All of these were defeated by ten votes to six.

The committee also voted on retaining clause 1 of the bill, which establishes the circumstances in which the triple lock should apply. The committee voted in favour of retaining this clause by ten votes to two.

⁴⁰ [HC Hansard, 23 September 2020, col 990.](#)

⁴¹ *ibid.*

⁴² *ibid.*, cols 992 and 997. The Hague in the Netherlands is the seat of the International Court of Justice.

⁴³ *ibid.*, col 994.

⁴⁴ *ibid.*

⁴⁵ *ibid.*, col 995.

⁴⁶ *ibid.*, cols 1051–4.

⁴⁷ A list of these amendments is provided in [Overseas Operations \(Service Personnel and Veterans\) Bill \[First to Tenth Sittings\]](#), 22 October 2020.

The committee heard evidence from witnesses including Judge Jeff Blackett, the former Judge Advocate General, the judicial head of the service courts. Judge Jeff Blackett argued the Government needed to do more to improve the way investigations were carried out.⁴⁸ He said that without measures to reform investigations, he believed the bill did “not do what it is trying to do”.⁴⁹

The committee also heard evidence from Charles Byrne, the director general of the Royal British Legion. Mr Byrne said that, while he supported the intention behind the bill, the six year “longstop” on civil claims would prevent members of the armed forces from bringing a civil claim against their employer.⁵⁰ He believed this breached the armed forces covenant. In his questions to Mr Byrne, Johnny Mercer, the Minister for Defence People and Veterans, argued that the bill did not breach the armed forces covenant, because civilians and members of the armed forces would be treated the same under the bill.⁵¹

Further information on the committee stage in the House of Commons is provided in the House of Commons Library briefing, [Has Anything Changed in the Overseas Operations Bill?: Committee Stage Report](#).⁵²

4.3 Joint Committee on Human Rights report

The Joint Committee on Human Rights (JCHR) published a report on the bill on 29 October 2020, following the end of committee stage in the House of Commons.⁵³ The report criticised the bill and argued that several changes needed to be made.

The joint committee argued there was “little to no evidence” that cases with no case to answer were being allowed to proceed in the courts.⁵⁴ It said the statutory presumptions against prosecution in the bill were unjustified. It also said it was concerned it could breach the UK’s obligations under international humanitarian law, international human rights law and international criminal law. The report included a recommendation that clauses 1–7 should be removed from the bill. The joint committee also criticised the introduction of a time-limit to human rights and civil litigation, arguing this risked breaching the UK’s human rights obligations and preventing access to justice.

The joint committee argued that the more important problem was long-running and flawed investigations. It said the MoD needs to improve the way investigations were conducted. It also said the bill could reduce the incentive for the military hierarchy to protect and remove from operational duties members of the armed forces who were unable to make sound judgments, exercise self-control or whose mental health has been severely affected.

⁴⁸ [Public Bill Committee, Overseas Operations \(Service Personnel and Veterans\) Bill, 8 October 2020, session 2019–21, fourth sitting.](#)

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² House of Commons Library, [Has Anything Changed in the Overseas Operations Bill?: Committee Stage Report](#), 2 November 2020.

⁵³ Joint Committee on Human Rights, [Legislative Scrutiny: Overseas Operations \(Service Personnel and Veterans\) Bill](#), 29 October 2020, HC 665 and HL Paper 155 of session 2019–21.

⁵⁴ *ibid.*, p 3.

On the issue of derogation from the ECHR, the joint committee argued the provisions in clause 12 “would seem to do nothing beyond what the minister would do in any event”.⁵⁵ Instead, the joint committee argued clause 12 would increase the risk of judicial review proceedings or requests for information under the Freedom of Information Act 2000.⁵⁶ The report recommended the Government should give an undertaking to consult with the JCHR in advance of any proposed derogation.⁵⁷ It also recommended the Government should provide a detailed memorandum as to whether the criteria for derogation set out in article 15 of the ECHR have been met.

Government response to the joint committee report

The Government responded to the joint committee on 29 December 2020 and the JCHR published this response on 14 January 2021.⁵⁸

Overall, the Government defended the provisions in the bill, arguing they were compatible with the UK’s international obligations, including those under the European Convention on Human Rights.⁵⁹

In respect of the JCHR’s criticism of the triple lock on prosecutions contained in clauses 1–7 of the bill, the response argued:

The measures in part 1 of the Overseas Operations Bill are intended to provide reassurance to our service personnel and veterans that, where an investigation into historical allegations of wrongdoing is referred to the prosecutor for a decision on whether to prosecute, the unique circumstances of overseas operations will be taken into account in their considerations.⁶⁰

In addition, the Government defended the time limits on compensation claims in part 2 of the bill, saying:

The introduction of six-year time limits for compensation claims in part 2 of the bill will help to ensure that we will not be calling on service personnel indefinitely to give evidence in relation to incidents that occurred during historical overseas operations.⁶¹

It also said the new duty for the secretary of state to consider derogation from the ECHR was necessary to “ensure that derogation is considered in the round alongside all other aspects of any significant overseas operation”.⁶²

⁵⁵ Joint Committee on Human Rights, [Legislative Scrutiny: Overseas Operations \(Service Personnel and Veterans\) Bill](#), 29 October 2020, HC 665 and HL Paper 155 of session 2019–21, p 5.

⁵⁶ *ibid*, p 41.

⁵⁷ *ibid*, p 45.

⁵⁸ Joint Committee on Human Rights, [Legislative Scrutiny: Overseas Operations \(Service Personnel and Veterans\) Bill: Government Response to the Committee’s Ninth Report of Session 2019–21](#), 14 January 2021, HC 1120 of session 2019–21.

⁵⁹ *ibid*, p 1.

⁶⁰ *ibid*, p 5.

⁶¹ *ibid*.

⁶² *ibid*, p 14.

4.4 Report stage

Further amendments to the bill were debated at report stage in the House of Commons, which took place on 3 November 2020.⁶³ These included proposed changes tabled by the Opposition and other parties concerning prosecutions for alleged torture and the measures in the bill to limit the time period for investigations.

Three amendments were voted on and defeated by Government majorities. No changes were made to the bill at this stage.

Changes to triple lock

Several amendments were tabled concerning part 1 and schedule 1 of the bill. These included:

- Amendments 1–10, tabled by David Davis (Conservative MP for Haltemprice and Howden) and Dan Jarvis (Labour MP for Barnsley Central). These would have amended schedule 1 to add additional exemptions from the triple lock for allegations concerning torture and related offences.
- Amendment 32, tabled by Martin Docherty-Hughes (SNP MP for West Dunbartonshire) and Carol Monaghan (SNP MP for Glasgow North West). This would have exempted from the triple lock any offences where prosecution was required under the UK's international treaty obligations.
- Amendments 11 and 13–17, tabled by Harriet Harman, chair of the Joint Committee on Human Rights, and other members of the committee. These would have removed part 1 from the bill.
- New clause 4, tabled by the Shadow Secretary of Defence, John Healey. This would have replaced the first of the three components of the triple lock in clause 2: the presumption against prosecutions after five years. The new clause would have required the prosecutor to consider instead whether the passage of time would make a material impact on the chance of the defendant receiving a fair trial.

Speaking in support of his amendments, Dan Jarvis argued the bill in its current form would lead to the UK reneging on its international commitments by weakening its stance on torture.⁶⁴ He argued that in addition to the existing exclusion of sexual offences from the presumption against prosecution, the Government should exclude the crimes of torture, war crimes, crimes against humanity and genocide, as recommended by the Joint Committee on Human Rights. David Davis also argued that, if the Government believed it was right to exclude sexual offences, it should exclude torture on the same grounds.⁶⁵

⁶³ [HC Hansard, 3 November 2020, cols 201–74.](#)

⁶⁴ *ibid*, col 223.

⁶⁵ *ibid*, col 227.

John Healey spoke in support of amendments 1–10 and his new clause 4.⁶⁶ He argued the bill placed torture and other offences on a lower level to sexual offences by not excluding them from the presumption against prosecution. He said the bill therefore undermined the UK’s commitment to upholding international law.

Stewart Malcolm McDonald (SNP MP for Glasgow South) spoke in support of amendment 32, noting the criticism of the bill by witnesses who appeared before the public bill committee, including Judge Jeff Blackett.⁶⁷

The measures in the bill were defended by Tom Tugendhat (Conservative MP for Tonbridge and Malling).⁶⁸ Mr Tugendhat argued the measures were necessary to ensure the law did not inappropriately interfere with the way in which the UK’s combat forces operate and did not damage their ability to defend the country.⁶⁹ Jack Lopresti (Conservative MP for Filton and Bradley Stoke) also spoke in defence of part 1 of the bill, arguing the bill would not make it impossible to bring prosecutions concerning allegations of torture. He also said the presumption against prosecution after five years, except in exceptional circumstances, would prevent members of the armed forces being “seen as fair game by some lawyers”.⁷⁰

Speaking at the end of the debate, Johnny Mercer argued that part 1 of the bill struck an “appropriate balance between victims’ rights and access to justice”.⁷¹ He said measures in part 1 of the bill did not constitute a statute of limitations. He also argued that, because part 1 of the bill still allowed prosecutors to take decisions on whether to prosecute, the bill was consistent with the UK’s international obligations.⁷²

The House of Commons divided on amendments 1 and 32. Amendment 1 was defeated by 334 votes to 269. Amendment 32 was defeated by 335 votes to 262. The other amendments concerning part 1 were not called.

Legal action brought by service personnel

The following two amendments, tabled by John Healey, concerned the ability of service personnel to bring legal action against the MoD:

- New clause 3 would have required the secretary of state to undertake a review of the impact of the provisions in the bill on the ability of service personnel to gain access to justice. The new clause would have required this review to be carried out within twelve months of the legislation coming into force.
- New clause 5 would have excluded actions brought by serving or former service personnel against the Crown from the provisions in part 2 of the bill.

⁶⁶ [HC Hansard, 3 November 2020, col 255.](#)

⁶⁷ *ibid*, col 251.

⁶⁸ *ibid*, cols 221–2.

⁶⁹ *ibid*, col 221.

⁷⁰ *ibid*, col 231.

⁷¹ *ibid*, col 257.

⁷² *ibid*, col 258.

Speaking in favour of the amendments, Kevan Jones (Labour MP for North Durham) argued that part 2 of the bill would take rights away from veterans, noting comments made by Charles Byrne during his evidence to the public bill committee. Mr Jones also cited a projection, included in the Government's impact assessment for the bill, that approximately 94% of the claims brought on behalf of current and former service personnel would have fallen within the proposed six-year longstop period had it been in force.⁷³ Mr Jones said this would have denied justice to the 6% of cases which would have fallen outside the time limit.⁷⁴

Defending the provisions, Tom Tugendhat said decisions concerning the risks to members of the armed forces operating overseas should be made by Parliament, government ministers and the military, rather than lawyers.⁷⁵ Citing the 2013 *Fog of War* report, which he co-authored, he said measures in the bill were necessary to prevent military decisions being affected by legal action.

Speaking at the end of report stage, Johnny Mercer argued against new clause 5, saying nothing in part 2 of the bill would prevent current or former service personnel or their families from bringing action against the MoD within a "reasonable timeframe".⁷⁶

The Commons divided on new clause 5, and it was defeated by 336 votes to 266. New clause 3 was not called.

Derogations from the European Convention of Human Rights

Amendments were also tabled concerning clause 12 of the bill, including:

- Amendment 37, tabled by John Healey, which would have required the secretary of state to seek parliamentary approval before making a derogation from the ECHR.
- Amendment 40, tabled by Jamie Stone, the Liberal Democrat defence spokesperson, which would have removed clause 12 from the bill.

Kevan Jones, speaking in support of amendment 37, argued derogation from the ECHR could prevent claims being made against the MoD under the Human Rights Act 1998.⁷⁷ Jack Lopresti, speaking against the amendment, argued that other NATO allies, such as France, had sought derogation from the ECHR before deploying their armed forces.⁷⁸

These amendments were not addressed by Jonny Mercer in his closing remarks at report stage. Neither of these amendments were called.

⁷³ Ministry of Defence, [Overseas Operations \(Service Personnel and Veterans\) Bill: Impact Assessment](#), 25 August 2020, p 13.

⁷⁴ [HC Hansard, 3 November 2020, col 217.](#)

⁷⁵ *ibid*, col 221.

⁷⁶ *ibid*, col 258.

⁷⁷ *ibid*, col 220.

⁷⁸ *ibid*, col 232.

Conduct of investigations

John Healey tabled three new clauses to the bill regarding the conduct of investigations:

- New clause 1 would have established a timetable for police investigations of alleged offences concerning operations overseas. It would have required a police force to present their preliminary findings before a judge advocate within six months of the alleged offence being brought to their attention. The judge advocate would then decide on the merits of the complaint and establish whether the investigation should continue and what the timetable for the rest of the investigation should be.
- New clause 2 would impose a time limit on proceedings against a person for a minor offence, similar to that which exists for summary-only matters in magistrates' courts.
- New clause 6 would have created a new duty for the MoD to establish standards for the legal, pastoral and mental health support provided to service personnel involved in investigation and litigation arising from actions overseas.

John Healey argued the bill did not do enough to reform the way investigations are conducted. He argued:

The serious, consistent problems lie in a system of investigation that has proved to be lacking in speed, in soundness, in openness, and in a duty of care to alleged victims or to the troops involved.⁷⁹

Speaking in support of new clause 6, John Healey said that members of the armed forces and their families “felt cut adrift from their chain of command and from the MoD” during the course of the investigations which have taken place.⁸⁰

On 13 October 2020, Ben Wallace, the Secretary of State for Defence, had announced there would be a judge-led review of the investigation of alleged offences which occurred on overseas operations.⁸¹ Mr Healey criticised this decision, arguing that the Government should implement the findings of earlier reviews, such as the Sir Richard Henriques review of the Metropolitan Police’s handling of investigations into alleged non-recent sexual offences, published in 2019.⁸²

Kevan Jones also spoke in support of the proposed new clauses. He argued that the MoD were ignoring issues around investigations.⁸³ He said that new clause 2 would speed-up the way in which minor offences are dealt with, arguing that some of the cases being considered in previous inquiries involved assault and other offences that might normally be dealt with in a magistrates court.

⁷⁹ [HC Hansard, 3 November 2020, col 254.](#)

⁸⁰ *ibid*, col 256.

⁸¹ House of Commons, ‘[Written Statement: Overseas Operations](#)’, 13 October 2020, HCWS507.

⁸² [HC Hansard, 3 November 2020, col 255.](#) Metropolitan Police, [The Independent Review of the Metropolitan Police Service’s Handling of Non-recent Sexual Offence Investigations Alleged Against Persons of Public Prominence](#), 4 October 2020.

⁸³ [HC Hansard, 3 November 2020, col 215.](#)

New clause 1 received the support of MPs from other parties, including David Davis and Alistair Carmichael, the Liberal Democrat spokesperson for Home Affairs.⁸⁴ Alistair Carmichael described the amendment as sensible. He said he supported judicial oversight of the investigations processes, stating that investigations are undertaken in a “context where [...] it is difficult to come by evidence, because it has to come from a theatre of conflict”.⁸⁵

In his closing speech at report stage, Jonny Mercer acknowledged there had been “often inordinate difficulty in delivering timely justice in relation to investigations of alleged historical offences”.⁸⁶ He argued this was why the recently announced review of investigations was being carried out. He also said that the issue of investigations would be addressed in the forthcoming armed forces bill.

New clause 1 was withdrawn at the end of the debate. New clauses 2 and 6 were not called.

4.5 Third reading

Speaking at third reading, Ben Wallace commended the bill, saying it was:

[...] a necessary and overdue strengthening of the legal framework for dealing with the vexatious claims and repeated investigations that have arisen from recent overseas military operations.⁸⁷

He also said that because the bill raised the threshold for prosecutions, this would reduce the likelihood of members of the armed forces being subject to “vexatious claims and repeated investigations”.⁸⁸

In his speech, John Healey criticised the bill and argued the Government should have been more willing to accept amendments. He said:

[...] this is a dishonest and damaging bill that does not do what it says on the tin. It entirely fails to deal with the main problem, which is baseless and repeated investigations and, worse, it breaches the armed forces covenant, it risks British troops being dragged before the International Criminal Court, and it does more to protect the MoD than it does our armed forces personnel.⁸⁹

The SNP’s Stewart Malcolm McDonald also criticised the Government’s handling of the bill and its refusal to accept amendments.⁹⁰

The House of Commons divided on whether to give the bill third reading, with it passing by 345 votes to 260.

⁸⁴ [HC Hansard, 3 November 2020, cols 224 and 226.](#)

⁸⁵ *ibid*, col 235.

⁸⁶ *ibid*, col 257.

⁸⁷ *ibid*, col 275.

⁸⁸ *ibid*.

⁸⁹ *ibid*, col 277.

⁹⁰ *ibid*, cols 277–8.

5. House of Lords committee reports

The bill received first reading in the House of Lords on 4 November 2020. Second reading is scheduled to take place on 20 January 2021. Two House of Lords committees have published reports on the bill ahead of the second reading debate. The Government has yet to publish a response to these two reports.

5.1 Delegated Powers and Regulatory Reform Committee report

The House of Lords Delegated Powers and Regulatory Reform Committee published its report on 30 November 2020.⁹¹ The report raised concerns regarding clause 6(6) of the bill. This would give the secretary of state the power to change which offences are exempt from the triple lock on prosecution by amending schedule 1 through delegated legislation. The committee argued this was an inappropriate delegation of power because it would involve a fundamental change to the effect of the bill.⁹² It argued that changes should be made through amending primary legislation instead.

5.2 Constitution Committee report

The House of Lords Constitution Committee published its report on 3 December 2020.⁹³ The Constitution Committee raised similar concerns to those previously raised by the Joint Committee on Human Rights (JCHR) concerning the bill. The Constitution Committee report included the following points:

- Regarding clause 3 of the bill, the committee echoed the conclusion of the JCHR that the new requirement for prosecutors to give weight to the effects of conditions service personnel may have been exposed to could risk granting “de facto impunity” to those who had committed crimes.⁹⁴ It also argued a defendant’s mental health would already be taken into account when deciding whether to prosecute.
- Clause 6(2) of the bill would exempt from the triple lock against prosecution offences committed against the following: members of the regular or reserve forces; members of a British overseas territory force; crown servants; and defence contractors. The committee argued the Government needed to explain how this was compatible with the principle of equality before the law.⁹⁵
- The committee questioned why most war crimes and crimes against humanity were not exempt from the presumption against prosecution.⁹⁶

⁹¹ House of Lords Delegated Powers and Regulatory Reform Committee, [Overseas Operations \(Service Personnel and Veterans\) Bill](#), 30 November 2020, HL Paper 178 of session 2019–21.

⁹² *ibid*, p 4.

⁹³ House of Lords Constitution Committee, [Overseas Operations \(Service Personnel and Veterans\) Bill](#), 3 December 2020, HL Paper 186 of session 2019–21.

⁹⁴ *ibid*, p 2; Joint Committee on Human Rights, [Legislative Scrutiny: Overseas Operations \(Service Personnel and Veterans\) Bill](#), 29 October 2020, HC 665 and HL Paper 155 of session 2019–21, p 28.

⁹⁵ House of Lords Constitution Committee, [Overseas Operations \(Service Personnel and Veterans\) Bill](#), 3 December 2020, HL Paper 186 of session 2019–21, p 2.

⁹⁶ *ibid*.

- The committee raised concerns regarding measures in clause 8 of the bill requiring the courts to consider additional factors when deciding whether to extend a case. It argued this would have implications for access to justice.⁹⁷
- Finally, further to the requirement in clause 12 for the secretary of state to consider derogation from ECHR, the committee questioned the extent to which this new requirement would have any substantive effect.⁹⁸

⁹⁷ House of Lords Constitution Committee, [Overseas Operations \(Service Personnel and Veterans\) Bill](#), 3 December 2020, HL Paper 186 of session 2019–21, p 3.

⁹⁸ *ibid.*