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Public Bill Committee
House of Commons
Parliament of the United Kingdom

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

Written evidence submission by Assistant Professor Samuel Beswick, LL.M & S.J.D (Harvard), LL.B(Hons) & B.Com (Auckland)

1. Executive Summary

- 1.1. The Overseas Operations (Service Personnel and Veterans) Bill (the Bill) creates special immunities from the ordinary law for the Crown and its service personnel, in violation of the long-recognised British constitutional principle of equal subjection of all to the ordinary law.
- 1.2. The proposed amendments to the UK's limitation regime should be rejected.
- 1.3. The proposed abolishment of prosecutorial discretion to prosecute alleged offences committed on overseas operations after more than 5 years should be rejected.
- 1.4. If this Parliament considers limitation law reform a priority, it should revisit the proposal for comprehensive reform recommended by the Law Commission of England and Wales, *Limitation of Actions* (Report No.270, 2001).

2. Introduction

- 2.1. This submission is made in my capacity as a legal academic and not on behalf of my academic institution.
- 2.2. I am an Assistant Professor of Law at the Peter A. Allard School of Law, The University of British Columbia in Vancouver, Canada. I previously resided and practised law in London, England, and taught at the Dickson Poon School of Law, King's College London. I hold a master's and a doctorate of laws from Harvard Law School and degrees in law and economics from The University of Auckland. I am admitted to the roll of Barristers and Solicitors in New Zealand.
- 2.3. My academic specialisations concern civil liability and statutes of limitations. I have

published on these subjects in leading British law journals¹ and other law reviews around the common law world.

3. The British Constitution expects equal subjection of all to the ordinary law

3.1. The Constitution of the United Kingdom is unwritten. But two principles of the rule of law under the British constitution have long been recognised and were formalised in Professor Albert Venn Dicey's *Introduction to the Study of the Law of the Constitution* (1885). They are: Parliamentary Sovereignty and the Equality Principle.

3.2. Parliamentary Sovereignty ensures that everyone is subject to the law of Parliament. The Equality Principle ensures that everyone is *equally* subjected to the ordinary law of the land: that the Crown and government officers do not benefit from more favourable rules than apply to the British people generally. These principles are complementary. Professor Dicey wrote that the rule of law means:²

“equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the ‘rule of law’ in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals;”

3.3. At least since the celebrated case of *Entick v Carrington* (1765) 19 St. Tr. 1030, the British people have proudly boasted that even Her Majesty's officers are subject to the ordinary law of the land and are not meant to receive any special treatment in the law. This is, of course, an ideal that has never been fully realised. But it is one that UK law reform has traditionally strived toward.

3.4. Mr Jacob Rees-Mogg MP spoke to Dicey's rule of law in debates over the European Union (Notification of Withdrawal) Bill, celebrating a day on which, in the Member of Parliament's view, “our constitution has been put back on a proper footing by the wisdom of the British people, and also, as it happens, by the Supreme Court.”³ Mr Rees-Mogg MP proclaimed that:⁴

“... Dicey's constitution has been restored. The Queen in Parliament is the sovereign body of our nation. That is so important because, as Dicey argued, it is Parliament that is the defender of the liberties of the people, of our ancient constitution, and of our freedoms.”

3.5. Regrettably, the Overseas Operations (Service Personnel and Veterans) Bill violates the rule

¹ E.g. S. Beswick, ‘Discoverability Principles and the Law's Mistakes’, [136 L. QUART. REV. 139](#) (2020); S. Beswick, ‘The Discoverability of Mistakes of Law’, [LLOYD'S MAR. & COMM. L.Q. 112](#) (2019).

² A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (3rd ed., MacMillan & Co., London, 1889), 190 (emphasis added). Further: “... the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.” Ibid. Dicey's idea of equality remains the foundation of the leading modern treatise, P.W. Hogg QC, P.J. Monahan & W.K. Wright, *Liability of the Crown* (4th ed., Carswell, Toronto, 2011), 2–3.

³ Second Reading of European Union (Notification of Withdrawal) Bill ([Hansard vol. 620, col. 907](#), 31 January 2017).

⁴ Ibid.

of law under the British constitution as formalised by Professor Dicey.⁵

4. This Bill violates the constitutional principle of equal subjection to the ordinary law

- 4.1. Under current law, the Crown and service personnel are generally subject to the ordinary provisions of the United Kingdom's statutes of limitation.⁶ This Bill creates special immunities that treat the Crown and service personnel (in their capacity as defendants) more favourably under law than ordinary British people are treated. It restricts the courts' jurisdiction, to the benefit of such defendants. The Bill violates the constitutional principle of equal subjection of all to the ordinary law.
- 4.2. The United States of America took the path of carving out significant governmental immunities from the ordinary law. Government officers in America benefit from many special immunities that protect them from the usual rules of civil litigation and criminal prosecution, and as a result some officers conduct themselves like they're above the law. In recent months we have witnessed the resulting frustration of this two-class system spill into civil unrest. Such immunities are insidious, divide society, and violate the rule of law.⁷

5. More restrictive limitation on civil proceedings than applies to ordinary British people

- 5.1. The Bill's Explanatory Note explains that "This Bill amends section 33 of the Limitation Act 1980 (LA), which confers on the court qualified discretion to extend the normal time limit of three years for personal injury and death claims." Part II of the Bill introduces a special ultimate "long-stop" limitation period of 6 years, which does not currently exist in section 33 LA. It creates similar amendments to equivalent provisions in Scotland and Northern Ireland, and under the Human Rights Act 1998.
- 5.2. The stated aim of the Bill is "to provide greater certainty for Service personnel and veterans in relation to vexatious claims and prosecution of historical events." Whether a claim is vexatious, and whether a fair trial over historical events is capable of being conducted, ultimately depend on the circumstances of the case at hand. These are questions of law that section 33 LA leaves to the courts and that should be left to the courts. Lady Hale expressed this sentiment in her speech in *AB v. Ministry of Defence*:⁸

In policy terms, the crucial question is whether a fair trial is still possible in the individual case, coupled with the ability to write off claims after a period of time.

...

⁵ Indeed, chapter IX of Dicey's treatise specifically addresses the constitutional status of "The Army" in the UK. Dicey wrote, at 276–277: "The fixed doctrine of English law is that a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary citizen. ... A soldier by his contract of enlistment undertakes many obligations in addition to the duties incumbent upon a civilian. But he does not escape from any of the duties of an ordinary British subject. ... A soldier is subject to the same criminal liability as a civilian. ... A soldier cannot escape from civil liabilities"

⁶ See e.g. Limitation Act 1980, s.37.

⁷ See W. Baude, 'Is Qualified Immunity Unlawful?', 106 CALIF. L. REV. 45 (2018).

⁸ [\[2012\] UKSC 9](#); [2013] 1 A.C. 78 at [164]–[166].

[T]he introduction of the power to disapply the limitation period in personal injury cases in the Limitation Act 1975 was a radical step. But it was a step more closely linked to the policy aims underlying the limitation legislation. It enables the court to ask whether the defendant deserves to enjoy the windfall of a limitation defence, or the claimant to lose the benefit of a claim, by reference to the crucial questions of whether a fair trial of the action will still be possible and whether there is a good reason for the delay in bringing the claim. In policy terms, the world would be a more sensible and predictable place if we had only the discretion provided by section 33 of the Limitation Act 1980, without the discoverability provisions in sections 11 and 14.

- 5.3. This Bill effects bad policy by introducing a blanket time-bar on certain civil (and criminal) proceedings rather than attending to the crucial question of whether a fair trial remains possible in cases concerning historical events. The words “fair trial” do not appear in the Bill or the Explanatory Note.
 - 5.4. Service personnel who might otherwise have had good civil claims against the Crown arising from personal injuries or deaths overseas will especially lose out under this Bill. Their claims will be curbed by a 6-year long-stop that does not apply to ordinary personal injury claims.
 - 5.5. The concern that section 33 LA provides flexibility at the cost of uncertainty, and exposes defendants to potential civil liability over their historical conduct, is a criticism made by all defendants who are subject to section 33. This Bill does not engage with the balance struck by section 33. It simply shields the Crown from it. The result is that ordinary defendants will remain subject to section 33, whereas the Crown and its service personnel (in their capacity as defendants) will receive special immunity from the ordinary limitation laws.
- 6. More restrictive limitation on criminal prosecution than applies to ordinary British people**
- 6.1. Part I of this Bill effectively introduces a special 5-year limitation period on criminal prosecutions. It replaces prosecutorial discretion and judicial oversight with a requirement that, where an alleged offence is “committed on overseas operations more than 5 years ago, the consent of the Attorney General for England and Wales, or the Advocate General for Northern Ireland, must be obtained before a prosecution can proceed.” This erodes the principles of separation of powers and government independence from the prosecutorial process.
 - 6.2. Unlike the United States, the United Kingdom and other Commonwealth countries do not have general limitation statutes on criminal prosecutions.⁹ The maxim *nullum tempus occurrit regi* (“no lapse of time bars the King”) prevails.¹⁰ Instead, delay is a consideration that weighs upon the Crown’s decision to prosecute a defendant and a court’s assessment of whether a

⁹ D.W. Shuman & A.M. Smith, *Justice and the Prosecution of Old Crimes: Balancing Legal, Psychological, and Moral Concerns* (American Psychological Association, Washington DC, 2000), 62; S. Beswick, *The Discoverability of Mistakes of Law* (Harvard Law School SJD Dissertation, Cambridge MA, 2019), 29–30.

¹⁰ ‘The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution’, 102 U. PENN. L. REV. 630, 630 (1954).

prosecution may fairly proceed. Unreasonable delay is a ground for dismissing a prosecution as an abuse of process.

- 6.3. The concern that prosecutorial and judicial discretion exposes defendants to potential criminal prosecution over their historical conduct is a common complaint of defendants. But victims, and society generally, also have an interest in crime being prosecuted and justice being done.
- 6.4. There is no magic to the 5-year time period prescribed by this Bill. The crucial question should be whether a fair trial can still be held. That decision is ultimately one for presiding judges. The result of the Bill will be that ordinary people will remain subject to potential criminal prosecution for historic offences, whereas the Crown and its service personnel will receive special protections from prosecution.

7. Insufficiently comprehensive limitation law reform; contrary to Law Commission report

- 7.1. This Bill is another ad hoc reform of the UK's hodgepodge limitation regime. Its provisions are also contrary to the recommendations made by the Law Commission of England and Wales following its last comprehensive review of this area of law.
- 7.2. The law of limitation in the UK has not been significantly reformed since 1975 and it is widely thought to be unsatisfactory. This sentiment is one of the driving motivations for the Bill. Another piecemeal reform, however, is not the answer.
- 7.3. In 2001, Law Commission of England and Wales published a comprehensive report on limitation reform and appended a draft bill that was presented to Parliament. Parliament shelved this report and the draft bill in 2009.¹¹ The Law Commission had recommended complete limitation law reform in line with reforms since enacted in Canada, New Zealand, and elsewhere. The Commission recommended enacting a core limitation regime comprised of “a primary limitation period of three years” and “a long-stop limitation period of 10 years.”¹² Contrary to the Bill now before the Committee, the Law Commission rejected any long-stop period applying to personal injury claims, stating that:¹³

“The core regime will be modified in its application to claims in respect of personal injuries. The court should have a discretion to disapply the primary limitation period, and no long-stop limitation period will apply. All personal injury claims will be subject to this modified regime, whether the claim concerned is made in negligence or trespass to the person.”

- 7.4. The Law Commission reaffirmed section 33 LA, for reasons outlined in its report.¹⁴ This Bill effects bad policy by introducing yet another ad hoc reform to the limitation statutes, rather than grappling seriously with the Law Commission's recommendations.

¹¹ Law Commission of England and Wales, *Limitation of Actions: Current Project Status*, lawcom.gov.uk.

¹² Law Commission of England and Wales, *Limitation of Actions* (Report No.270, 2001), iii.

¹³ *Ibid.*

¹⁴ *Ibid.*, 67–70, 91–94.

8. Nonretroactivity

- 8.1. Fortunately, this Bill does not have retroactive effect on active proceedings. It would clearly violate the most basic principles of the rule of law for a statute to abolish or detrimentally alter private rights with retroactive effect. In that regard, it is concerning that clause 15 of the Bill nevertheless provides for retroactive application to causes of action and rights of action that accrued in the past but only become subject to court proceedings in the future. The Bill should give courts discretion to disapply clause 15 in appropriate cases.

9. Recommendations

- 9.1. This submission recommends:

- a. That the Committee reject the proposed amendment to section 33 of the Limitation Act 1980 (and the other equivalent proposed statutory amendments);
- b. That the Committee reject the proposed abolishment of prosecutorial discretion to prosecute alleged offences committed on overseas operations after more than 5 years;
- c. That the Committee reject further ad hoc amendments to the UK's limitation regime and endorse, instead, considering comprehensive reform in light of the recommendations of the Law Commission of England and Wales, *Limitation of Actions* (Report No.270, 2001).

Assistant Professor Samuel Beswick

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