# Overseas Operations Bill

## A Policy Exchange Research Note

John Larkin QC

Attorney General for Northern Ireland from 2010 to 2020

On 23 September, the Overseas Operations (Service Personnel and Veterans) Bill is set to receive its second reading. The long title declares it to be a Bill to "Make provision about legal proceedings and consideration of derogation from the European Convention on Human Rights in connection with operations of the armed forces outside the British Islands."

The Bill has attracted considerable controversy, especially in relation to Part 1, which is entitled, not entirely accurately, "Restrictions on prosecutions for certain offences". In our tradition, no person is above the law and UK forces are rightly subject to the rule of law, including service law, criminal law, and the law of armed conflict. It would be a cause for justified alarm if a Bill were to permit UK forces to breach this legal regime with impunity or otherwise to prevent prosecution for serious crimes. It is this concern that seems to animate the widely reported letter of September 16, sent to the Prime Minister by a number of distinguished former military commanders and law officers.

The letter argues that the Bill creates "de facto immunity" for torture and other serious crimes. To similar effect, in an article in *The Times* on September 21, David Davis MP writes that "Under legislation introduced by the Ministry of Defence there would be a "triple lock" against prosecuting personnel for torturing people, no matter how bad the torture or how detailed the evidence."

Faced with these criticisms, the value of Felix Frankfurter's tripartite advice for law students ("1. Read the statute, 2. Read the statute, 3. Read the statute") has seldom seemed clearer. These are criticisms – very serious criticisms – that are refuted by a careful reading of the Bill.

While aspects of the Bill are certainly open to criticism (and from a variety of perspectives) the Bill does not create, or come close to creating, "de facto immunity" for serving or former service personnel in respect of serious crimes. There is no lock, far less a triple lock, that would prevent the prosecution of service personnel "for torturing people, no matter how bad the torture or how detailed the evidence."

What, then, does the Bill do? Broadly, what the Bill does can be broken down into three categories of which the first is the most important for the impunity argument.

First it introduces a new regime in relation to commencing or continuing prosecutions in relation to alleged offences taking place in the course of overseas operations. The regime provides (a) that it shall be exceptional to bring prosecutions and (b) that prosecutors must take into account certain conditions relevant to overseas operations in determining whether there is a public interest in bringing prosecutions. More specifically, prosecutors must take into account the adverse effects, or likely adverse effects, on mental health and/or on the capacity for making sound judgments or exercising self-control of being exposed to unexpected or continuous threats, being in command of others who are so exposed, or being deployed alongside others who are killed or severely wounded in action. In considering these matters, prosecutors must also take into account the exceptional demands and stresses to which UK forces are

likely to be subject while deployed on overseas operations. In addition, (c) the Attorney General's consent is required before prosecutions are brought. The Bill's regime will apply only in relation to certain offences and *only* after five years have elapsed from the time of alleged wrongdoing.

Second, the Bill amends limitation periods in relation to civil proceedings involving overseas operations, including actions in tort law for false imprisonment, negligence, and trespass to the person. In what is a fairly complex mix of changes to limitation statutes throughout the United Kingdom, the Bill essentially imposes a stricter six year limit on proceedings in relation to personal injury, and amends section 7 of the Human Rights Act 1998, which otherwise gives judges a discretion to allow proceedings out of time. The amendment to the Human Rights Act imposes a six year time limit (or a one year limit from the date of knowledge, whichever is later). Third, the Bill imposes a duty on the Secretary of State, in relation to "significant" overseas operations, to keep under consideration whether it would be appropriate to derogate from the ECHR.

This summary, particularly in the first category, should itself dispel any suggestion that the Bill would create immunity or impunity or a lock on prosecutions for relevant offences. Five aspects of the Bill make this even clearer.

First. The Bill, at its height, only creates a test of exceptionality for prosecution (see clause 2) after the period of five years (see clause 1(4)) has expired. Although the section heading is 'Presumption against prosecution', what is provided for is more properly described (as it is in the preceding sentence) as an exceptionality test. What is 'exceptional' need not be rare. There is no merely numerical assessment of 'exceptional'. What is exceptional in this context will be determined by the independent professional judgment of (1) an independent prosecutor and (2) the Attorney General (who, in addition to her professional responsibilities, is answerable to Parliament) without whose consent no prosecution can be instituted or continue (see clause 5).

Two. Nothing in the Bill limits the *investigation* of offences – even outside the period of five years. Whether or not there shall be one or many investigations into allegations that a relevant offence has been committed, and, if so, the identity of the perpetrator or perpetrators is left unaffected by this Bill. The Bill impliedly contemplates the possibility of multiple investigations. The reference in Clause 3(2) to compelling *new* evidence clearly implies that there be the means by which such compelling new evidence can emerge.

Three. Nothing in this Bill limits the freedom of prosecutors to determine whether in any given case the evidential test has been met, i.e. a prosecutor can still determine if the available admissible evidence against a particular person gives rise to a reasonable prospect of conviction before a properly directed tribunal of fact. This is expressly made clear by the bracketed words in clause 1(2).

Four. As a matter of construction, the designation of (1) a previous

relevant investigation, and (2) 'no compelling new evidence' in Clause 3(2) as matters to which particular weight is to be given in a prosecutorial decision mean that where there has been no relevant investigation and/or there is new evidence, then the hurdle facing any prosecution is accordingly reduced.

Five. Taken together, the Bill's provisions constitute an enhanced filter on prosecutions after the lapse of five years. The Bill will be, if enacted, part of a larger rule of law context in which extant standards of professionalism and duty figure strongly. The five year period for unrestricted prosecutorial consideration, combined as it is with the open-ended enhanced filter, with no bar on investigations, falsifies the claim that the Bill creates a formal or de facto immunity or impunity or lock – let alone anything remotely like a "triple lock".

The Bill *does* put hurdles in the way of prosecutions for relevant offences after five years have elapsed. It puts no hurdle in the way of investigations or in the way of prosecutorial consideration of whether sufficient evidence exists to prosecute a particular person for a relevant offence, including torture or other serious crimes. It is clearly wrong to say that the Bill would forbid prosecution of serious allegations of torture supported by evidence.

What the Bill aims to do is to provide some assurance to service personnel that they are unlikely to be prosecuted, once five years have passed from the events in question. The Bill works by requiring prosecutors to take into account the public interest in finality (where there has been a relevant investigation and no new evidence has since emerged) and to think about the difficult conditions to which UK forces are subject while on overseas deployment. One might reasonably object to the Bill on the grounds that these conditions will often be relevant to decisions about whether to prosecute, *even before five years has elapsed*, either because they may be relevant to whether the person in question committed an offence at all (if his mental health was such that he could not form the state of mind necessary to constitute a criminal offence) or, more likely, because they may bear on the public interest in prosecution. What the Bill clearly does not do is guarantee to service personnel that once five years has elapsed no prosecution may be brought against them. Whether a prosecution is warranted will still depend on the relative gravity of the alleged offending, the sufficiency of the evidence that is available, and the prosecutor's overall judgement about whether a prosecution is in the public interest.

Setting aside the overseas service context of this Bill, it is important to recall that the decision to prosecute any person for an offence is a matter of some solemnity and seriousness: it is never a step to be taken lightly. *Many* 'ordinary' offences (for example perjury or offences under electoral law) require the consent of the Director of Public Prosecutions or of the Attorney General before a prosecution may be initiated. In general, it accords with the common experience of lawyers and police officers that it becomes harder either to investigate or to prosecute crime with the passage of time. This is likely to be ever more the case in the

context of overseas operations, when difficulties of evidence gathering are particularly pronounced, as senior British judges have recognised. Against this background – to return to what is for most of us the unimaginably different world of military service overseas – while one might question the Bill in many ways, it is badly mistaken to portray as "impunity" the Bill's attempt to make limited provision for the future peace of mind of those from whom we ask so much.

John Larkin QC
*Attorney General for Northern Ireland from 2010 to 2020*

Policy Exchange
8 – 10 Great George Street
Westminster
London SW1P 3AE

www.policyexchange.org.uk