Ten Ways to Improve the Overseas Operations Bill

Richard Ekins and John Larkin QC

Foreword by Lt Gen Sir Graeme Lamb KBE, CMG, DSO

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Policy Exchange

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Foreword

Lt Gen Sir Graeme Lamb KBE, CMG, DSO
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The Overseas Operations Bill has been challenged at every stage and so it should, as legislation that bears on the way we fight to defend our nation, its values and its people needs to be most carefully considered. But those challenges must be fair and thoughtful – some parliamentary opposition to this legislation has in my view been overstated and wrongly asserts that the Bill somehow decriminalises torture.

The Government is right to want to change the law to protect our troops from the all too common approach nowadays which seeks to disarm them in a court of law, the threat of which unavoidably and damagingly will affect the state of mind of our troops when deployed on operations. The Bill rightly aims to reform the law under which our troops serve abroad.

But good intentions are not enough as the Bill as it stands may fail to protect our troops adequately. In particular, it does nothing to address the problem of repeat investigations and it does little to address the application of human rights law, or negligence law, to the battlefield.

This new Policy Exchange paper shows how the Bill can be put back on track. The amendments proposed by Richard Ekins and John Larkin would improve the Bill, helping it restore clarity, simplicity and accessibility to the law that defends the reputation of the servicemen and women we send abroad to fight our wars today, will protect them in the future and defend those who fought them yesterday.

Duly amended, the Bill promises to define the limits we impose upon ourselves, to act responsibly, upholding our national reputation, in the extraordinary stress of military operations. It would if so amended provide welcome assurances to UK troops, especially in relation to the spectre of never-ending investigations, without at any stage compromising the rule of law.

Ineffective legislation, which is open to being misread, or at worst case to being wilfully twisted in its meaning, serves no one well. This paper outlines how the Bill can be made to succeed, to meet its original aim and provide enduring guidance in these changing circumstances.

Ten Ways to Improve the Overseas Operations Bill

The Overseas Operations (Service Personnel and Veterans) Bill is soon to be considered by the House of Lords.[1] The merits of the Bill have caused sharp division within the House of Commons. The Government argues that the Bill is necessary to protect UK forces from unfair treatment, thereby honouring its manifesto commitment to "introduce new legislation to tackle the vexatious legal claims that undermine our Armed Forces".[2] Inside and outside Parliament, the Bill has been criticised on a range of grounds, including that it violates the rule of law, extending impunity for torture, and/or that it will fail on its own terms, making it more likely that UK forces will later be hauled before the International Criminal Court (ICC).

In a paper published in September,[3] one of us argued that the charge that the Bill amounted to de facto decriminalisation of torture was wholly unfounded. Nothing in the Bill prevents the authorities from investigating allegations of torture, or other serious crimes, or from concluding that prosecutions should be brought, even after five years have elapsed and taking into account the difficult conditions under which overseas operations are carried out. In October, in evidence to the Public Bill Committee, we argued that while the Bill was unusual in making special provision for decisions about whether to prosecute UK forces on service abroad, it did not amount to impunity. However, the Bill is at least open to being misunderstood and the way in which it is understood internationally is important. Further, the Bill is likely to be ineffective in addressing the problem at which it is expressly directed. The Bill's focus on decisions to prosecute rather than the obligation to investigate fails to address the repeated and prolonged processes that many service personnel and veterans have undergone. The Bill also does little to address the wider problem of human rights or tort law litigation in relation to overseas operations.

This short paper sets out ten ways in which the Bill could be amended to improve its effectiveness and to minimise the risk of unintended consequences. None of the proposed changes are wrecking amendments. Like many parliamentarians, we share the concern about the way in which the law has been applied to UK forces and about the risks that litigation may pose to the UK's capacity to defend itself. But legislation to correct these problems must be carefully framed. The ten changes we propose for Parliament's consideration (the first two of which are alternatives to

1. The second reading debate is scheduled for 20 January 2021.
2. Conservative Party Manifesto, 2019, p.52
3. John Larkin, *Overseas Operations Bill: A Policy Exchange Research Note* (23 September 2020)

each other) would, in our view, help to minimise the objections that have been made to the Bill while improving the Bill's effectiveness as a means to secure the Government's intended policy.

1. Remove the exceptionality test and the five-year threshold

Part 1 of the Bill introduces a new legal regime in relation to decisions about prosecution of alleged offences committed by service personnel in the course of an overseas operation. By clause 1(4), that regime only applies once five years have elapsed from the day on which the alleged conduct took place; the regime includes a rule, set out in clause 2, that it is to be exceptional for a prosecuting authority to decide to bring a prosecution. This provision does *not* amount to an assurance that no prosecution will be initiated. The argument that it somehow confers impunity is misconceived. But as other provisions in Part 1 specify the conditions that the prosecutor should take into account when deciding whether to prosecute an offence, including the very difficult conditions under which UK forces operate abroad, the rule seem unnecessary. These considerations should be taken into account by prosecutors even *before* five years have elapsed.

The combination of the five-year threshold and the exceptionality test helps to foster the misunderstanding that the Bill amounts to a statute of limitation in all but name. This may in turn encourage the ICC wrongly to conclude that the UK is failing to discipline its own forces. Again, this would be a misunderstanding, but it can be avoided, or at least minimised, by removing the five-year threshold and the exceptionality test, neither of which are necessary to ensure that prosecutors only initiate proceedings when they have taken seriously the conditions, and pressures, under which UK forces operate when on overseas operations. Importantly, these conditions include the important public interest in finality and the difficulties of securing a fair trial when too much time has elapsed since the alleged conduct took place.

In effect, Part 1 of the Bill attempts to frame how prosecutors will exercise their discretion in relation to UK forces serving on overseas operations. This is a reasonable exercise of Parliament's authority and does not violate the equality of all persons before the law. The problem with the Bill as it is presently framed is that it encourages the misperception that after five years has elapsed, service personnel are somehow in the clear. This is not what the Bill does and its wording should be changed better to reflect how the Bill, in fact, is to operate.

2. In the alternative, exclude war crimes from the scope of the Bill

The Bill does not apply to all offences, but excludes certain sexual offences from its scope. The reason for the exclusion is that the considerations about operating under pressure, the likely insufficiency of evidence and the public interest in finality do not apply to alleged sexual offences in the way that they do apply to allegations of use of excessive force or similar. However, this does mean that the Bill excludes sexual offences that constitute war crimes from its scope but does apply to other war crimes. This obviously encourages the perception that the Bill is designed to provide de facto immunity to UK forces who commit war crimes – other than sexual war crimes. The Bill is better understood, as its operative terms make clear, as a framework for the exercise of prosecutorial discretion in relation to allegations of criminal wrongdoing on overseas operations. The Bill extends to allegations that, if proven, may constitute war crimes presumably on the grounds that many vexatious allegations will be framed in these terms and/or that some conduct that might, if proven, constitute a war crime should nonetheless not be prosecuted in view of the balance of public interest.

That the Bill applies to war crimes, sexual offences aside, will invite ICC attention. It might be better to exclude all war crimes from the scope of the Bill, which would make it much more difficult to misrepresent the Bill as a vehicle for impunity. The Bill's operative provisions would provide assurances to service personnel in relation to a range of alleged offences, falling short of allegations of war crimes as such. Parliament may be reluctant to amend the Bill in this way, reasoning that UK forces serving abroad in future operations may well be targeted by unfounded allegations of war crimes, allegations which may be tactically astute on the part of enemy combatants and those supporting them.

The better way to address the risk of misrepresentation, it seems to us, is to adopt our first recommendation: remove the exceptionality test *and* the five-year threshold, reframe clauses 1-3 around considerations that the relevant prosecutor should take into account, and rely also on the need for law officer consent before a prosecution is initiated. If the regime is amended in this way, its application to all alleged offences, including war crimes, would not be irrational, although of course many of the considerations relevant to whether to prosecute would apply differently in relation to split-second judgements in combat as opposed to, say, deliberate, planned targeting of civilians. However, if Parliament does not adopt our first recommendation, then excluding war crimes from the scope of the Bill would be a reasonable way to minimise the ICC risk.

3. Extend the requirement for Attorney General's consent

Clause 5 of the Bill provides that proceedings may not be instituted (or continued) against service personnel without the consent the Attorney General of England and Wales. The Attorney's consent is required before proceedings may be instituted in relation to a service offence under the Armed Forces Act 2006 or an offence punishable under the law of England and Wales. In relation to offences punishable under the law of Northern Ireland, the clause requires the consent of the Advocate General for Northern Ireland, which is an office held by the Attorney General of England and Wales. The clause does not address proceedings in relation to offences under the law of Scotland. The Bill would seem to permit prosecuting authorities in Scotland to initiate proceedings without the Attorney's consent and it would seem necessary that there be a centralised approach to what is an issue that affects the UK as a whole.

Requiring the Attorney General's consent before proceedings are initiated is a rational and reasonable protection for UK forces. In line with Part 1 more generally, the requirement only applies once five years has passed since the alleged conduct took place. This temporal condition should be removed from the Bill such that the Attorney's consent is required whenever proceedings are initiated. This would not be anomalous: quite apart from service matters and personnel, there are many offences that cannot be prosecuted unless and until the consent of a relevant law officer has been signified. Effectively, the provision would enable the Attorney to exercise a supervisory jurisdiction over prosecutorial decisions. The provision should be extended in relation to offences punishable under the law of Scotland, to avoid forum-shopping and the policy of the Bill being defeated.

Neither in its current form nor if extended as proposed, does this clause confer impunity on UK forces. It is a procedural change that provides some assurance to UK forces that decisions will be made fairly and at the highest possible level of public accountability. This procedural change is no panacea and the Attorney's decision not to consent to prosecution in future cases is open to challenge by way of judicial review proceedings. Claimants may argue that section 3 of the Human Rights Act 1998 requires and permits the courts to interpret clause 5 restrictively, effectively requiring the Attorney to give consent whenever a failure to give consent would be an arguable breach of the procedural obligation in Article 2 of the ECHR right to life. Our seventh recommendation, to amend the Human Rights Act, would address this problem in part. But even if the Human Rights Act is not amended, extending the requirement for Attorney General's consent, or making other explicit provision for UK law officer involvement, would improve the Bill.

4. Tidy up the factors relevant to the prosecutor's public interest analysis, so that the Bill more clearly and simply frames that familiar exercise

The key operative provision in Part 1, it seems to us, is clause 3, which requires prosecutors to give particular weight to the considerations set out in subsection (2), taken together with subsections (3) and (4) and clause 4. Subsection (2) notes two types of consideration. The first is the adverse effect on the person against whom charges might otherwise be brought of the conditions to which they were exposed with serving on operations abroad. The second is the public interest in finality in a case where there has been a previous investigation and no compelling new evidence has come to light. Subsection (1) makes these considerations relevant insofar as they tend to reduce a person's culpability or otherwise tend against prosecution.

The public interest in finality, especially when a previous investigation has taken place, is obviously relevant to decisions about whether to prosecute. If our first recommendation is accepted, and the five-year threshold is removed, the public interest in finality would be relevant as soon as an investigation had been completed, provided no compelling new evidence has arisen. It would be reasonable for Parliament to adapt the policy behind clause 2 to specify in clause 3 that when, say, five years has elapsed, and no new compelling evidence has come to light, the need for finality will *generally* mean that there is no public interest in prosecution. It would be reasonable also for Parliament to amend clause 3, again adapting the policy choice behind clause 2, to require prosecutors to take into account the importance of the time that has passed since the alleged conduct in considering the public interest in finality and fairness of proceedings.

The relevance of "adverse effects" is not straightforward. Subsection (2)(a) specifies that the conditions to which a person is exposed on active deployment include their experiences and responsibilities, and specifies further that this includes exposure to unexpected or continuous threats, being in command of others who were so exposed, or being deployed alongside others who were killed or severely wounded in action. Subsection (3) requires the prosecutor, in considering subsection (2)(a), to have regard to the exceptional demands and stresses to which UK forces are likely to be subject, regardless of their length of service, rank or personal resilience. Subsection (4) then defines an adverse effect on a person to mean an adverse effect on his capacity to make sound judgments or to exercise self-control, or any other adverse effect on his mental health, provided that this is an effect at the time of the alleged conduct. (That is, mental health problems arising *after* alleged conduct do not constitute "adverse effects" for the purposes of this clause: note, however, that the mental health condition of any person may be relevant to the public interest evaluation by a prosecutor.)

It is not entirely clear whether this matter of adverse effects on a person

is one that should inform the prosecutor's determination of whether there is sufficient evidence to prosecute, or is one about whether there is a public interest in prosecuting. Both questions are relevant to the exercise of prosecutorial discretion and Parliament is free to frame how prosecutors exercise this discretion. However, clause 1, subsection (2) provides that clause 3 applies in relation to a decision whether to bring proceedings but does *not* apply to whether there is sufficient evidence to justify prosecution.

But the way in which adverse effects are defined equivocates between factors that suggest the relevant person did not commit an offence (because he lacked the relevant state of mind or mental capacity) and factors that suggest that a prosecution would not be in the public interest (because the alleged offending was committed in very difficult circumstances and is less serious – the person is less culpable – than would be the case if those conditions were absent). If the very demanding conditions of service abroad (including exposure to threats, responsibilities of command, and seeing one's comrades killed or seriously wounded) undermined the person's capacity to make sound judgments or exercise self-control, or otherwise affected their mental health at the time of the alleged offending, this would seem relevant both to whether an offence was committed and to the relative seriousness of the offence that was committed, as well perhaps as to whether the person has an arguable defence. The clause should be amended to disentangle these possibilities, as well as to clarify whether adverse effects are relevant to prosecutorial assessment of the sufficiency of evidence.

Subsection (3) risks introducing an artificiality. It requires the prosecutor to consider the exceptional stresses and demands to which UK forces are likely to be subject, regardless of their length of service, rank or personal resilience. It is reasonable for Parliament to require prosecutors to think carefully about the likely stresses and demands to which UK forces are generally subject, but the prosecutor's focus must remain on the actual adverse effect on a particular person, to which length of service, rank and personal resilience may all be highly relevant. Read closely, the clause does focus, we think, on actual adverse effect, but subsection (3) may obscure this.

In defining adverse effects in relation to the capacity to make sound judgments or exercise self-control, or to mental health more generally, clause 3 arguably understates the extent to which prosecutors should consider the stresses and demands of service abroad in determining whether there is a public interest in prosecution. This could be avoided by amending subsection (4) so that adverse effect "includes", rather than "means", an adverse effect on the person's capacity to make sound judgments or exercise self-control or on their mental health.

Clause 3 could usefully be reframed to specify that the prosecutor must consider the adverse effects on a person of service abroad: (a) in determining a person's culpability and thus whether there is sufficient evidence to prosecute for a particular offence, or for some other offence,

and (b) in determining whether, if the former test is satisfied, the public interest would favour prosecution.

5. Permit prosecutors to determine whether there is a public interest in prosecuting alleged conduct before determining whether there is sufficient evidence to prosecute and if there is no public interest in prosecuting to discontinue further investigation

If there would clearly be no public interest in prosecuting for some offence, the Bill should permit prosecutors to determine that there should be no proceedings even before the evidential consideration is complete. There will be cases in which, because of the circumstances in which an offence was allegedly committed (including the pressures to which the person was subject), the time that has elapsed since the alleged conduct, or other counterweighing factors of a personal or general nature in which the public interest would stand in the way of proceedings. In such cases there is good reason not to continue to investigate merely to determine whether there is sufficient evidence to prosecute. The Bill should authorise prosecutors to identify such cases and to determine whether the public interest test is met. If the test is not met, then there is no need to continue to consider the sufficiency of evidence and further investigation need not take place.

6. Introduce a rule forbidding further investigations after a decision not to prosecute has been made unless cogent new evidence has arisen

Nothing in the Bill as it stands addresses the question of whether, when, and to what extent allegations should be investigated, or reinvestigated. Yet this is the main mischief calling for the Bill: subjection of UK forces to repeated investigations. If or when prosecutors decide not to initiate proceedings in relation to some alleged conduct, whether because of public interest considerations or sufficiency of evidence, the Bill should forbid further investigation unless compelling new evidence has arisen – and has been certified by a senior prosecutor to have arisen. This rule would help secure finality and protect UK forces from the prospect that allegations will be reopened years later and/or that a decision not to prosecute cannot be relied upon because investigations will simply continue regardless. Again, while it is reasonable for Parliament to frame how prosecutors exercise their discretion, it is the unfairness of exposure to never-ending investigation that the Bill should address.

7. Amend the Human Rights Act 1998 to limit sharply its extraterritorial application

The processes to which UK forces have been subject in recent years have been driven in large part by the extraterritorial application of the Human Rights Act to military action abroad. The procedural obligation to investigate, which the European Court of Human Rights has read into the Article 2 right to life and the Article 3 prohibition on torture, together with an expansive approach to jurisdiction under Article 1, have resulted in a cycle of investigations into allegations in Iraq and Afghanistan. UK forces are subject to the rule of law and serious allegations should be investigated in accordance with service law and the law of armed conflict. But applying the Human Rights Act 1998 to operations abroad invites litigation challenging the adequacy of investigations, requiring allegations to be investigated subject to domestic judicial supervision and without adequate allowance for relevant conditions.

In 2007, the House of Lords, then the UK's highest court, took it to be highly problematic to apply the Human Rights Act 1998, and thus convention rights, to UK forces abroad, save in certain limited circumstances, including on military bases. Lord Bingham, the leading judge of his generation, rejected extraterritorial application of the Human Rights Act altogether. But the European Court of Human Rights in 2011 took a very different view and UK courts have duly followed, increasingly applying convention rights (via the Human Rights Act 1998) whenever UK forces deploy force abroad. Senior UK judges have expressed doubts about the merits of this state of affairs, but have taken themselves to be powerless to avert it.

The Bill should be amended to specify that the Human Rights Act either does not apply outside the territory of the UK, or to specify that it only applies extraterritorially in limited circumstances, corresponding to the scope of the European Convention on Human Rights as it was authoritatively understood by the European Court of Human Rights in 2001 and followed by our courts until the Strasbourg Court changed the law in 2011. The Bill might amend the scope of the Human Rights Act, either by amending section 22 of the Act to limit the Act's territorial scope, as one of us has recommended in submissions to the Defence Committee of the House of Commons and other work, or by amending section 6 of the Act, which governs acts of public authorities, to specify that it does not apply to UK forces on active deployment abroad. Neither change would unwind the Strasbourg Court's extension of the European Convention on Human Rights outside the territory of member states. But either change would ensure that that the Government was not obliged by the Human Rights Act, enforced by litigation in our courts, to continue investigations beyond the limits otherwise set by our domestic law.

8. Prevent tort law actions in relation to military action abroad, whether from (the families of) service personnel or enemy combatants or others

Part 2 of the Bill amends legislation governing limitation periods in relation to overseas operations. Clause 11 would introduce a new section 7A into the Human Rights Act, requiring the court or tribunal to consider the effect of delay on the cogency of evidence likely to be adduced by the parties and the likely impact of proceedings on the mental health of (potential) witnesses who are or were members of UK forces. These are important considerations, but are better addressed, we suggest by our recommended amendment to the scope of the Human Rights Act 1998. Section 7A would impose a six-year maximum time limit, which is an improvement on the status quo but would still permit much inappropriate human rights litigation.

Clauses 8-10 limit the court's discretion to disapply time limits in relation to personal injuries or deaths arising in the course of overseas operations. The better course of action, we suggest, would be for the Bill to be amended to prohibit actions in tort or contract against the Crown in relation to overseas operations. In 2013, the Supreme Court, by narrow majority, opened the door to proceedings in the law of negligence against the Crown in relation to the deaths of UK forces on deployment abroad. The minority, in dissent, reasoned that this was to judicialise war and that negligence liability should not apply in relation to deaths in combat. Enemy combatants have also made use of the domestic courts, and the law of tort, to challenge operational decisions. The Bill should be amended to improve the legal regime under which UK forces fight abroad, minimising the risk that tort law (or European human rights law) is weaponised against UK forces.

9. Require no-fault compensation at tort level (or at least much more generous level) for service personnel injured or killed on overseas operations

The point of our eighth recommendation – that the Bill be amended to restore the law as it stood until the Supreme Court's 2013 judgment, in relation to the law of negligence in particular – is not to prevent compensation to the families of fallen soldiers. On the contrary, the point is to maintain, or restore, a legal regime that is suitable and avoids judicialisation of war and damage to the UK's capacity to defend itself. Part of the reason why families of UK forces killed in action have brought negligence proceedings is to recover adequate compensation. We recommend that the Bill be amended to require award of no-fault compensation either at the same level of award as in relevant tort actions or at least more generously than the status quo.

10. Require derogation from the ECHR in relation to overseas operations or a statement be made to the Commons explaining why not

Clause 12 of the Bill amends the Human Rights Act to impose a duty on the Secretary of State, in relation to any overseas operations that he or she considers significant, to keep under consideration whether it would be appropriate for the UK to make a derogation under Article 15 of the European Convention on Human Rights. This clause has understandably attracted criticism on the grounds that it seems to impose no real duty. There is good reason for the UK to derogate from the Convention when it is undertaking overseas operations. Derogation may help improve the UK's position in relation to the Strasbourg Court, even if it is, again, no panacea. It is understandable that the Government has not proposed a duty to derogate in relation to every overseas operation, as this would tie its hands in foreign policy. However, clause 12 might usefully be strengthened by requiring the Secretary of State to derogate or, in the alternative, to make a statement to the House of Commons within sixty days explaining why the Government has decided not to derogate. This would help facilitate the Government's accountability to Parliament for its decisions in relation to the legal regime under which UK forces fight.

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