

In this post former BAFF chair Douglas Young, a retired lawyer and reserve Lt Col, commends Sir David Davis's Military Operations Bill but

queries the media spin that the Bill would "force ministers to own their decisions", and raises further questions in what Young believes is a "discussion worth having".

Sir David Davis MP recently introduced a Military Operations Bill in the House of Commons. At first sight it might be easy to dismiss it as another Private Member's Bill which has little prospect of becoming law. That would, I think, be a mistake.

The Bill was introduced on 7 September by the "Presentation" procedure. Unlike a Ten Minute Rule Bill, there is no introductory speech or debate. It is formally presented, given a First Reading and printed, with a date appointed for Second Reading. In this case that date is 12 March 2027.

There is surely no realistic prospect of legislation of this kind reaching the statute book in the present Parliament. But that does not mean that the ideas behind it are unimportant.

Indeed, there is considerably more behind this particular proposal than I had initially appreciated.

Warfare, not lawfare

Alongside the parliamentary Bill, the Prosperity Institute has published *Warfare, Not Lawfare: A New Legal Framework for Military Operations*, by Alexander Gray, its Director of Sovereignty. It's an impressive piece of work including a detailed 35-clause draft Military Operations Bill and explanatory notes. Sir David Davis contributed the foreword.

Parliament currently records Davis's Presentation Bill and its "long title", but has not published any detailed text. The draft considered here is the Prosperity Institute proposal associated with it. The close relationship between the two is nevertheless clear.

The proposal deserves to be taken seriously. It doesn't demand that veterans should be immune from prosecution, nor does it suggest that members of the Armed Forces should be above the law.

Its central argument is that International Humanitarian Law (IHL) - what we mostly think of as the Law of Armed Conflict - should be the legal framework governing the use of force during authorised military operations. It seeks to protect service personnel against repeated investigations and proceedings, while expressly retaining criminal liability for serious violations of IHL, including war crimes.

There is much more to the proposed legislation than can sensibly be covered in one blog post.

Who should be responsible?

One aspect has featured prominently in the limited publicity so far.

The Sun reported the proposal under the headline that ministers would be forced to “own” decisions to send British troops into battle. Political responsibility is also a central theme of *Under Orders*, a professionally produced video in which Davis explains the thinking behind his Bill.

There is an attractive principle here: authority and responsibility should remain connected. The decision to commit British forces to military operations is ultimately a political decision. Those who make that decision should accept responsibility for it, rather than leaving individual service personnel to carry the consequences years afterwards.

Put like that, there is much to agree with.

But what would the proposed legislation actually change?

Politically, ministers are already responsible for the decisions they make about military operations. A soldier in Helmand did not decide to send British forces to Afghanistan. Soldiers deployed on Operation Banner did not decide that the Army should be used in support of the civil power in Northern Ireland. Those were decisions of government, for which ministers were politically accountable.

Criminal responsibility is rather different.

A minister who unlawfully authorised the commission of an international crime could not avoid responsibility simply because someone further down the chain actually carried it out. But neither should a minister become criminally responsible for an unlawful act committed by an individual simply because that act occurred during an operation which the minister had authorised.

That is not, in fact, what the draft Bill appears to propose.

Davis himself is careful in *Under Orders* to describe appropriate responsibility at different levels. Ministers authorise the operation; commanders exercise command; service personnel act under orders and Rules of Engagement. The draft Bill similarly preserves liability where the use of force amounts to specified serious offences under IHL.

Similarly, Dr Robert Parr, another contributor to the video, rightly speaks of the chain of command; familiar stuff for many BAFF members.

The video ends, however, with a rather questionable proposition:

"Those who send troops to war must answer for the consequence. Ultimately, as the Bill makes its way through Parliament, opponents will need to explain one thing: Why do they not want to take responsibility for their own decisions?"

Although it is that statement which has got the attention so far, it doesn't reflect what the Bill actually says, and it's unfair to parliamentarians who may in due course debate it. What

the Bill would actually do is confer additional powers on ministers, along with the legal duties implied by those powers, but I see nothing which significantly changes the accountability of ministers either politically, or in criminal law.

So there may be some disparity between the attractive headline proposition – putting responsibility back on ministers – and the rather more sophisticated allocation of responsibility contained in the proposal itself.

Perhaps that is as it should be. Responsibility in military operations cannot simply be passed up or down the chain like a parcel. Political responsibility, command responsibility and individual criminal responsibility are different things. More than one can exist at the same time.

The more interesting question may therefore be not whether ministers should be made responsible, but precisely what additional legal responsibility the Bill would place upon them which they do not already bear.

Some larger questions

That is only one of the questions raised by the draft Bill.

Others may be more difficult.

What if this legislation had actually been in force during the Northern Ireland Troubles?

Clause 2 would allow a minister to authorise the use of force where satisfied that it was regulated exclusively by IHL. The draft expressly contemplates operations within the United Kingdom as well as overseas.

Suppose such an authorisation had been issued for Operation Banner. What would that have meant for the legal framework within which British soldiers operated in Northern Ireland?

That is deliberately a different question from whether the legislation should now be applied retrospectively to events during the Troubles. Retrospective protection for veterans is likely to be attractive to some supporters of the proposal. Asking what the legislation would have meant had it actually governed the operation at the time may be a rather more searching test.

What would happen to the present Independent Inquiry relating to Afghanistan?

The Bill contains substantial provisions governing investigations, reinvestigations and public inquiries relating to military operations.

The Afghanistan Inquiry is currently considering grave allegations concerning British Special Forces operations. No conclusions should be anticipated. But the existence of the Inquiry provides an obvious real-world test of the proposed legislation.

If the Bill were already law, could that Inquiry have been established in its present form? Could it continue? What statutory tests and permissions would apply?

And that leads to perhaps the hardest question.

What happens if British forces really have committed a serious violation of IHL?

The draft Bill expressly preserves criminal liability for war crimes and other specified grave offences. That is important. It would be unfair to describe the proposal simply as granting immunity.

But criminal liability on paper is not quite the same thing as an effective possibility of prosecution.

The draft also imposes substantial restrictions upon investigations and particularly upon reinvestigation. Those provisions are intended to protect serving personnel and veterans from speculative, repetitive or unjustified investigations – a horrendous problem which BAFF has often criticised in the past.

But how would the restrictions operate where the allegation was true?

Would investigators still have sufficient powers to discover what had happened, particularly where the evidence only emerged gradually? Would the thresholds intended to prevent fishing expeditions inadvertently make it harder to uncover a genuine war crime? And if a serious offence were eventually established, what practical effect would the legislation have upon the likelihood of a successful prosecution?

There is an important balance somewhere here.

Those who serve the country should not spend decades facing repeated investigation of allegations which have already been properly investigated and for which no significant new evidence exists.

Equally, if there is credible evidence that a serious crime has actually been committed, the legal system must remain capable of finding that out.

A discussion worth having

There are other substantial questions in the Prosperity Institute proposals, including the relationship between IHL and human rights law, the right to life and the corresponding duty to investigate deaths, the role of the courts, inquests and the proposed retrospective provisions.

I won't attempt to answer those questions here.

Nor do I dismiss the proposal because some of them are difficult.

Rather the opposite. *Warfare, Not Lawfare* is a serious attempt to address a genuine and longstanding problem: how the United Kingdom can hold its Armed Forces properly accountable for wrongdoing, without subjecting those who have served lawfully to repeated and sometimes deeply damaging legal processes many years after the event.

Sir David Davis's Bill has so far attracted surprisingly little attention. Whatever its parliamentary prospects, the ideas behind it deserve rather more.

The questions above may provide a starting point. Other BAFF members – including those with relevant operational, command or legal experience – may have different questions, and perhaps different answers. BAFF recently invited contributions about such matters, and I am grateful for this opportunity.

DOUGLAS YOUNG

References

- [Warfare not Lawfare, A New Legal Framework for Military Operations, Alexander Gray, Prosperity Institute](#)
- [When Britain sends its Armed Forces to war, who should answer for the consequences?](#)
- [UK Parliament: Military Operations Bill](#)