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OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

OVERSEAS OPERATIONS (SERVICE PERSONNEL AND VETERANS) BILL

Fourth Sitting

Thursday 8 October 2020

(Afternoon)

CONTENTS

Examination of witnesses.

Adjourned till Wednesday 14 October at twenty-five minutes past

Nine o'clock.

Written evidence reported to the House.

No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor’s Room, House of Commons,

not later than

Monday 12 October 2020

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The Committee consisted of the following Members:

Chairs: DAVID MUNDELL, † GRAHAM STRINGER

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| † Anderson, Stuart (<i>Wolverhampton South West</i>) (Con) | † Lewell-Buck, Mrs Emma (<i>South Shields</i>) (Lab) |
| † Atherton, Sarah (<i>Wrexham</i>) (Con) | Lopresti, Jack (<i>Filton and Bradley Stoke</i>) (Con) |
| † Brereton, Jack (<i>Stoke-on-Trent South</i>) (Con) | † Mercer, Johnny (<i>Minister for Defence People and Veterans</i>) |
| Dines, Miss Sarah (<i>Derbyshire Dales</i>) (Con) | † Monaghan, Carol (<i>Glasgow North West</i>) (SNP) |
| Docherty, Leo (<i>Aldershot</i>) (Con) | † Morgan, Stephen (<i>Portsmouth South</i>) (Lab) |
| † Docherty-Hughes, Martin (<i>West Dunbartonshire</i>) (SNP) | † Morrissey, Joy (<i>Beaconsfield</i>) (Con) |
| † Eastwood, Mark (<i>Dewsbury</i>) (Con) | † Twist, Liz (<i>Blaydon</i>) (Lab) |
| Evans, Chris (<i>Islwyn</i>) (Lab/Co-op) | Steven Mark, Sarah Thatcher, <i>Committee Clerks</i> |
| † Gibson, Peter (<i>Darlington</i>) (Con) | |
| † Jones, Mr Kevan (<i>North Durham</i>) (Lab) | † attended the Committee |

Witnesses

Lieutenant Colonel (Retd) Chris Parker MBE, Chair, Princess of Wales's Royal Regiment Association

Judge Jeff Blackett, Judge Advocate General (Retd)

Public Bill Committee

Thursday 8 October 2020

Afternoon

[GRAHAM STRINGER *in the Chair*]

Overseas Operations (Service Personnel and Veterans) Bill

Examination of Witness

Lieutenant Colonel (Retd) Chris Parker gave evidence.

2.30 pm

Q209 The Chair: We will now hear from Colonel Chris Parker, chair of the Princess of Wales's Royal Regiment Association, who is joining us remotely. We have until 3.15 pm for this session. Welcome, Colonel Parker. Will you please introduce yourself formally for the record?

Lieutenant Colonel Parker: My name is Lieutenant Colonel (Retired) Chris Parker. I am the chairman of the Princess of Wales's Royal Regiment Association and I am an infantry veteran of nine combat and operational tours.

The Chair: Thank you. We will move straight to questions. I call the Minister.

Q210 The Minister for Defence People and Veterans (Johnny Mercer): Chris, good afternoon. Thank you for coming along. Your regiment has been through this process a number of times. Can you outline why the legislation we are considering today is necessary? The PWRR has had a pretty on-the-coalface experience of repeat investigations over many years. I have two questions for you. Can you outline the effect of legislation such as that which we are considering today, and what it will mean to those who have served on operations?

Lieutenant Colonel Parker: The effect of the legislation on people would be to remove quite a large amount of pain and misery, which I have experienced not only with individuals but with their families. We must remember that when people's lives go on hold for several years due to investigations, whether they are right or wrong, that can have a very damaging effect on families and individuals. This legislation certainly will remove most of that pain and misery, which I have witnessed, as many have.

From our regiment's point of view, few things have been harder for our men—our infantry are primarily male—who are often from the most vulnerable places in our society and often very tough backgrounds, who do their bit and then find that they are exposed. This legislation is broadly going to remove that risk and pain—in broad terms. I know you might want to talk about the smaller aspects.

In terms of the effects on operations, I can only speak from a subjective point of view about the impact on me, but also on all the people I speak to. There is an increasing concern among very young junior commanders—I have been one of them on operations, where you have to make decisions. Going forwards, without this sort of legislation, there is the increased risk to life of people not being able to take decisions, as I had to, such as: do you bring in a

precision airstrike or not and take 10 lives with some risk of collateral damage on the spot, to save lives, without some form of legal concern, because you are doing the right thing and you are following drills?

I think your Bill's effect on operations will be to remove a large amount of that concern. I think that is probably the bigger professional concern—that it would cost more British lives because people would be hesitant.

Q211 Johnny Mercer: I think that there is a temptation in this place to let the perfect be the enemy of the good in a lot of the legislation that we pass. Of course, legislation is not going to be all things to all men, but within the art of what is possible—I have asked everybody this question—what would you do to improve the Bill? There are things that people want to do. For example, they want to separate classes of claimants, so that the six-year limitation on human rights claims is unlimited for armed forces personnel but limited for those we go against. That is not legal under European human rights law. We heard that from the British Legion this morning. There are plenty of ideas coming forward that are not possible. What, within the art of what is possible, would you do to improve the Bill?

Lieutenant Colonel Parker: That is a difficult question, because of the stretch of my understanding of what is and is not legally possible. If I may add value in this way, I think there is a concern about the six-year time limit. There is a perception—maybe it is my misunderstanding—that the six-year time limit would apply to service personnel themselves bringing claims against the armed forces, or against people. Is that correct?

Q212 Johnny Mercer: That is correct. What I was saying is that we cannot differentiate between different classes of claimants. That is illegal under European human rights law. If you are going to draw a line to stop people bringing European human rights cases against this country, it has to apply to anyone. The calculation that is then made is where to draw the line. Given that 94% of those claims came before that, and that the six years will give a better level of evidence and people will be helped going through the process—the whole thing in the round—that is why the six years were taken. But what would you do to improve that?

Lieutenant Colonel Parker: I think there has to be some form of recognition and qualification that the major concern—I see it as a volunteer—is that we are getting close to 100 cases, in a body of about 5,000 people, of severe mental distress, and those are rising by the week, primarily out of Afghanistan. On the timeline of those cases appearing—we are in the category of post-traumatic stress disorder in about 90% of cases—we are talking about 10 years.

Bear in mind that there are proven facts that the bell curve of PTSD cases is 28 years. My own personal experiences was 24 years after the event, out of the blue, and then being treated for it. If cases were to be brought—and I think it is quite reasonable to allow soldiers, sailors and airmen to bring cases for mental duress that could have been caused by a mistake, an error or incorrect equipment, or some form of claim—to put a six-year time limit does not help. It may help legal reasons for other purposes, but it certainly does not help the mental duress, because the facts and evidence point to a 28-year bell curve, with 14 years therefore being the mean.

Q213 Johnny Mercer: Of course, and that that is why we have built in there that it is the point of knowledge, rather than when the incident took place. Therefore, if you had PTSD 24 years later, your six-year clock would start from that 24-year point.

Lieutenant Colonel Parker: Understood. It is great to hear that clarification.

Mr Kevan Jones (North Durham) (Lab): No, it would not.

Johnny Mercer: Yes, it would. You have no idea what you are talking about.

Lieutenant Colonel Parker: You can understand the problem that the military community have. It is hard enough for someone like me, as a master's graduate, to understand it, but also trying to get this understood by a large body of quite unqualified people who fought bravely is difficult enough.

The only other qualification that I would add is to do not with the question that you have directly asked but with a broader question, which you may want to touch on later. It is very difficult to separate, in the view of the veteran, operations from one theatre and operations from another theatre. Obviously, you probably know straight away that I am referring to Northern Ireland. I understand, and we understand, that it is not part of this Bill, but I think there has to be a measure by the Government to say—and I think they have—that other measures will be taken ahead to deal with that. That is something that I know is a concern, and it is something that is of prime concern.

Broadly—I have to say this broadly because, again, we have to remember that we do not get people scrutinising the Bill itself; they hear the broad terms of it—it is welcomed by the community and there is no major feedback of negativity other than the points we have registered about claims, which you have clarified very helpfully.

Q214 Mrs Emma Lewell-Buck (South Shields) (Lab): Good afternoon, colonel. Just a quick question from me. How could the Ministry of Defence better exercise its duty towards soldiers who are accused of crimes?

Lieutenant Colonel Parker: The problem came, in a lot of our cases—certainly with some of the earlier ones with the Iraq Historic Allegations Team and others—that, because it was done in a very legal and correct fashion, sometimes we can forget that the care is needed, because they still are people. It was often very difficult for people to get facts and information about what was likely happening. I would say that we have come quite a long way with that. We have an independent ombudsman and others. Personally I think that has been a huge step forward, and I met Nicola the other day. We must remember that we have to think about whether there is a resource capability gap or not, to allow some form of funded or additional care for the families, and also potentially for people's loss of earnings and loss of promotion.

One of the biggest fears and concerns that people had is that their career was on hold and their career was affected. Like it or not, that comes down to the financial burden that people feel they have suffered unduly. I can think of several cases where it is pretty hard to explain why certain people were not promoted for a few years when these investigations were going on. Obviously, it was a difficult position for everyone.

There are two things there: a broad duty of care with some resourcing for the impact on families and the individuals themselves, whether that is more information or some sort of independent helpline. Perhaps it could be done through a body such as the ombudsman or something in addition to that. Secondly, it is the ability to explain and understand those pieces.

Q215 Mrs Lewell-Buck: Is there anything in the Bill that improves the duty of care?

Lieutenant Colonel Parker: I have not found it because I think it is a softer thing—it is beyond the Bill. It is something that the MOD would have to bring in. It is a chain of command issue. It is very difficult for people. The chain of command is uniquely allied to the same thing as the duty of care chain, because it is the officers, and therefore there has to be perhaps support outside of the chain of command: somebody to care, outside the direct chain of command, for those individuals. People have made the best effort to get by, but we have a unique problem where the officer chain of command, the line between [*Inaudible*] and courts martial, cannot be compromised, and therefore other people have to be involved.

The Chair: I call Stuart Anderson.

Q216 Stuart Anderson (Wolverhampton South West) (Con): Sorry for the delay, Chris: I have to stand up because there are not enough microphones for social distancing. Thank you for everything you have done and for your service. It is hard to hear what you have been through. You said that you have 5,000 members in the association. When did the association hear that there was going to be a Bill to protect servicemen and veterans? What was their initial response?

Lieutenant Colonel Parker: Thank you very much. The 5,000 I referred to are our Iraq and Afghanistan veterans. They were a large regiment. You can see the numbers because the throughput is quite large and significant, and that is just in one regiment. We have about 20,000 in total, including right down to the oldest. Some of them are second world war veterans.

In terms of when we first heard, I have to be honest that I cannot recall a date or time, but we are informed through our regimental headquarters, which is a very small Ministry of Defence-funded element. It is very small. It has been cut right down to the bare basics now. They inform us of those things, but you must remember that the association people like me are volunteers, and for us to spend time trawling through things and looking at emails to with things can be difficult, so we get prompts and help, and then they provide, effectively, a staff capability. When we heard through them, which was very helpful, the initial reaction—we serve using social media platforms, with groups of several thousand of our veterans, and those are quite active, to care for people—and the mood was very positive. It was seen as a weeping sore in the minds of many that they had done their service and they would not be looked after. We know that the Government put this in the manifesto late last year, and it came into being very soon after the general election in late 2019. It was welcomed, but it was not a political point for the veterans; it was more about the Government doing something to address what they had seen as an injustice. Their feelings were certainly very positive.

Q217 Stuart Anderson: Based on your contacts—those 5,000 to 20,000 veterans—what would the veteran community feel now if this Bill were stopped?

Lieutenant Colonel Parker: I do not think they would understand why. We must remember that among the base we address, look after and care for, the understanding of things like how the machinery of government works is quite low. They just see a very clear sense of right and wrong, partly because we instilled it in them. They have that very simple view of life, so I think there would be acute distress. There would certainly be an increase in mental duress, and I think that for those people who hover around the distressed level, rather than getting into specific, incident-related PTSD—we deal with a lot of those—there would be a lot of hands being thrown up in the air. Allied with the current conditions, which obviously include the environmental factors of covid, separation and people being isolated, I would see that as a very big risk. However, the country seems to be behind this, and certainly the veteran body is. It seems to be something that is apolitical at the moment, notwithstanding the need for good scrutiny.

Stuart Anderson: That is brilliant. Those are all my questions. Thank you very much.

Q218 Mr Jones: Hi, Chris. In terms of the cases you have dealt with, we have already heard from other witnesses that the real issue is the length of time these investigations take. We took evidence on Tuesday from Major Campbell—frankly, the way that individual has been treated is disgraceful. This Bill does not cover investigations, and I wonder whether you think there should be some way in which investigations could be speeded up, or a way to prevent people from being reinvestigated for the same thing on several occasions, which certainly happened in Major Campbell's case.

Lieutenant Colonel Parker: That is a very fair point, and it is an excellent question, because the time has been a big factor. I am not aware of any way in which military law should be seen to be rushed along or pushed along. However, I think this comes back to the duty of care. I know there is provision in the Bill for certain time restrictions, so if there were a time restriction on an investigation, unless there was a good reason to extend it, that might be something that would allow a positive factor of, "Yes, there is some definite evidence brewing here." That could be positive.

We are talking about several years in which people are on hold. That was certainly the case for people involved in the Danny Boy incident in al-Amarah, with the public inquiry and the many cases to do with that particular incident, which was a real travesty. That affected some people for eight or nine years, so that was quite a long wait, and of course some of those people were already in distress because of the very tough fighting in that incident.

Q219 Mr Jones: I agree with you on that, but the Bill does not stop potential prosecutions by the International Criminal Court. The problem with this legislation as it is drafted is that it includes a presumption not to prosecute even before investigation, which seems very odd. The Minister is looking bemused, but it is actually in the Bill. Are you not concerned that if we are not seen to investigate these things to a certain level, we

could end up with individuals being placed before the International Criminal Court? That is certainly something I would not want to see.

Lieutenant Colonel Parker: That is a good question, because it is something I have heard from chats on veteran social media and other discussions. You must remember that our face-to-face contact with our people has been limited from the summer onwards, but in a lot of the discussions that happen on this, sometimes weekly, there is without a doubt greater fear of a non-British legal action coming against people than of anything British. Even though soldiers, sailors and airmen might grumble about the prosecutions, I think they would all, to a man and woman, admit that British justice would be the preferable place to go to every time. There have been many times when people have been investigated but then there has been no case to answer and justice has been seen to be done—there has been no prosecution, and certainly no conviction, in the majority of cases—so I would agree with you.

Again, we must remember that I, let alone the body of the kirk, if you like—the association members—would not understand the nuances of what might cause an International Criminal Court action. If there seemed to be a risk of that, it would need to be closed on behalf of the veterans, who would see that as a far greater risk to themselves than facing British justice. I think that is a fair question to ask.

Q220 Mr Jones: Can I turn to the issues around investigations? You talk about the duty of care and the chain of command—I know it well, and how it works sometimes and does not work at other times. Do you think there should be an obligation on the Ministry of Defence to provide legal assistance to individuals who are being investigated or are accused of crimes?

Lieutenant Colonel Parker: When I was involved in a public inquiry—it was the Baha Mousa public inquiry—there were five separate teams of lawyers and barristers, of which two were consulting me as a person giving evidence, not in any accusatory sense, but for contextual evidence. I was amazed by how much effort and money was going into that. The accepted norm is that a lot of people are left to their own devices and are not able to access the same level or scale of funded assistance when they are accused by military investigations such as IHAT and others.

Q221 Mr Jones: I raise that because if you were in civilian life and were accused of something in line with your employment, you could go, for example, to a trade union, which would provide you with legal assistance. We have not got that for individual soldiers. I am just thinking about trying to level the playing field, in the sense that members of the armed forces should at least have some recourse to legal assistance. As you say, the other side could perhaps spend a fortune on very expensive barristers and others. Leaving it to associations such as you and others to provide legal support that is a bit hit and miss, isn't it? I know that some associations do.

Lieutenant Colonel Parker: It is, and I understand that. As an association, we have our own private funds and we raise funds. We have had need to use them, and we have a regimental advocate or lawyer who helps us, often on a gratis arrangement. But that is a poor reflection on the way it should be.

I agree with you. If this can add any context, after my 17 years of service and a lot of frontline tours, often the biggest point of failure that caused the most damage was when there was a point of failure in the chain of command. If a commanding officer or a senior officer—a major or a brigadier perhaps—was the person causing the problem, they are also in the discipline chain, so the whole thing grinds to a halt and becomes an impasse. That is a very difficult situation.

The second-order question is: why do we not have a Police Federation equivalent or a trade union? I have seen a number of failures—not a large number, but it has happened—in the chain of command by officers behaving improperly, and that says to me that the only way you can stop that sort of thing affecting the people beneath them is by having, if not a trade union or federation, then an independent place to go. Personally, I think we have that with the independent Service Complaints Ombudsman, which is available as a pressure release valve. The good work that has been done to bring that in, although that small body is not widely known at the moment, has removed some of the risk.

Q222 Mr Jones: That is one of the things I argued very strongly for when we did the Deepcut inquiry—it came out of that in the early 2000s. The problem with the ombudsman is that he or she can only look backwards. What I am trying to get to is that people need legal support and so on in these cases when they are going through it. I will come on to the ombudsman in a minute, because you raised another issue with it earlier.

I am trying to think whether there is a mechanism we could get for those accused. I accept the point that you make about the chain of command, but I am trying to understand whether there is anything we can do to even up the playing field, in terms of ensuring that people are not left on their own? Most people do not have access to independent funds, and most people have perhaps never been involved with the law before, so when they are it is obviously quite a daunting experience. If we could come up with some system that actually allowed recourse to legal support, would that be something that you would support?

Lieutenant Colonel Parker: Yes, I would, but I would qualify that support. As a veteran leader, I constantly tell our people that they must not consider themselves to be a special case when there are also blue light services and other people who are equally well deserving and who also sometimes face legal complaints.

Q223 Mr Jones: But they are slightly different, in the sense that they have recourse to, for example, in the ambulance service, a trade union, or the Police Federation.

Lieutenant Colonel Parker: Correct. I understand why you ask that question. It is something, certainly for the veteran part of it, that I have proposed. I am in discussion with our excellent friend the Minister about innovative ideas such as having an inspector for veterans, like the inspector for prisons. Beyond that, there could possibly be someone who would be an independent body. Wherever that independent body sits, it cannot sit in the MOD. That is the problem—it must not sit there; it should sit outside.

Mr Jones: Can I—

The Chair: May I turn to Sarah Atherton. If there is time, I will come back to you.

Mr Jones: Can I just ask one question about the ombudsman?

Sarah Atherton (Wrexham) (Con): I don't mind, Mr Stringer.

The Chair: Okay. Just one. There might be time for further questions, because only Sarah is indicating that she would like to ask one at the moment.

Q224 Mr Jones: The ombudsman can look backwards. We heard Major Campbell the other day; even though he had been completely exonerated, there was no ability to investigate why he was treated the way he was. Do you think it would help those individuals who have gone through very poor service—in his case, it was 17 years of hell, by the sound of it—to have recourse to the ombudsman to have that investigated, to at least get some answers as to why things were actually happening?

Lieutenant Colonel Parker: I would say a strong yes, because in all the incidents I have seen where it has gone wrong, if the individual concerned knew that there was some way that an independent person would be able to investigate them, they may have been less likely to think that they could get away with it; it is often individuals acting fully in the knowledge of what they are doing because they can get away with it. Personally, based on my experience, I would say yes to that.

Q225 Sarah Atherton: Princess of Wales's Royal Regiment, the Tigers, was caught up in the battle of Danny Boy. As an association representative, can you give the Committee a sense of what the soldiers and families went through during those vexatious claims? There have been high-profile cases of Brian Wood and Scott Hoolin, whom I assume you know all about. Can you give us a sense of what they went through during these vexatious investigations?

Lieutenant Colonel Parker: I will, and if it helps you, I would prefer to answer that in the broadest terms, rather than focusing on individual cases, to avoid causing them any further distress. Obviously, a lot of the things we talk about are very confidential, and a lot of them are very tearful.

With that incident and the aftermath, once it started to break out that there was going to be some sort of investigations, and the manner of those investigations, there was certainly a feeling of horror and almost terror that swept through people, because they realised, "When will this stop?" It was a particularly brutal engagement, and it was cited, as the Committee probably knows, as being along the lines of second world war bayonet fighting-type engagement—incredible bravery but also incredible stress. One of the individuals I know—a large, strong, tough individual—was in tears in my arms, explaining that he had enough to deal with coping with having had to kill several people, and now he would have to deal with the fact that he might be court martialled for it. He just could not understand it.

We have to remember, again, that the individuals concerned are not people who are able to sit and pick through legal documents, nor understand them. Whether we ask the most vulnerable or tough people in our society to go forward and do these extremely tough and brave point-of-the-spear jobs, such as combat roles, we

[Sarah Atherton]

must remember that we have a duty of care to protect them from anything—intellectual or otherwise—that might affect them later in their distress.

In answer to your question about the families, that whole inquiry, and certainly that incident, were the largest single point of family distress that I have witnessed in my entire military service or veteran chairmanship of five years. That amount of distress was not only for those who were being prosecuted, but for their spouses, partners, mothers, fathers, others, and children in some cases—those who knew that the veteran had been involved not only in that incident but in others—because there was immediate presumption that there would soon be a knock on the door or a letter popping through the door for some sort of summons, so the stress levels, the distress and the impact snowballed to quite a large level. It was very hard to put a lid on that stress because that is what happened: letters did start to arrive and people did get knocks on the door, so it became a very distressing time.

Q226 Sarah Atherton: Thank you for talking in general terms. How would the Bill have changed their experiences?

Lieutenant Colonel Parker: There are two parts to that. First, we would have at least had something to be able to say back, “No, no. There is protection here.” Whether it was a six-year limit or inside that is, of course, a different point. At least there would have been something there to say that.

We must remember that in parliamentary terms, it can be easy to understand it as a Bill about legal process. In the veterans sense, it is much more simple than that. It is simply understood as: the people, the public, the nation, does not want to do this to people who have stood on the wall and had to fight for freedom. They do feel that a Bill like this would allow those of us who are able to soothe and reassure to say as a result, “It’s okay. The country does care; Parliament does care.” Therefore, every effort is being made, which is why we admire what you are trying to do to close the gaps that have allowed those things to happen.

The Chair: I cut you off Kevan. Do you have another question?

Q227 Mr Jones: I have, but I just want to pick up on that point. The Bill would not stop the agony that you have just talked about, because in the five or six-year period, you would still be investigated. Is the root of this not that if accusations are made, they should be investigated and dealt with speedily and efficiently and, frankly, thrown out? That is what is missing from the Bill. A time-limit can be put on it, but six years is a long time for a family to go through that, as you have described. We cannot put ourselves in those people’s shoes; for anybody accused of something that they have not done, it must be awful.

Lieutenant Colonel Parker: I agree with you, but I propose that in the whole of defence—let alone the MOD, lawyers, investigators, military police investigators—everyone went through a learning process. That was an unprecedented time. Now, everything—the procedures, the understanding, the channels of complaint, the channels of the chain of command acting to look after people, the care for families—has improved, so we must be careful not to look at those past incidents when we were

going through extreme learning pains with the existing legislation, but think about how we might cope not only with new legislation, but with the great leaps forward and lessons that have been learned about investigative timescale and accuracy, and the ability and the need for statements to be taken after patrols and suchlike.

Those things sound very easy. Sometimes they are difficult out in the dust and the heat, with the extreme exhaustion that goes on out there. We are in a much better place; I genuinely offer that from a very lucky perspective, because I can speak without any official man here, but I get the chance to speak to everyone who is in officialdom, as well as the soldiers from my regiment and their families.

Q228 Mr Jones: Can I now turn to part 2 of the Bill? I accept that you and others have perhaps not read the Bill line by line, but part 2 would put a six-year limit on section 33 of the Limitation Act 1980, which means that veterans will not be able to bring claims outside that time limit. As one witness explained the other day, that would mean that prisoners would have more rights than members of the armed forces. That cannot be right, can it?

Lieutenant Colonel Parker: No, but it would not be the first time. We are in a gradual process as a country, and we must not be too hard on ourselves. We are closing gaps and are doing the best we can, but nothing will be done in a week or two. Everyone is pretty realistic—you will not get a bunch of people who are more realistic than military veterans about how long things take. There might be some concerns about the six-year rule, but I am sure people would welcome being part of that discussion. I can certainly help that process by getting my people to be part of that discussion, survey or whatever it might be, to get the feeling about whether this would be something that could sit happily with them. This process alone—my being here—is part of that. The six-year part, and the potential that other parts of society could be better off, is still countered by the fact that I have never met a military person who feels that we should be outside the law and that we should not obey the agreed principles.

Q229 Mr Jones: But what this is doing is putting veterans at disadvantage by comparison with what I or you can do as a civilian, in terms of taking a case outside the Limitation Act 1980. It does not sit comfortably with me that veterans should not have the same rights as everybody else. It is possibly one of those things that we get in legislation sometimes—an unintended consequence. Personally, I think it should be taken out of the Bill, because it will limit the ability of veterans to bring civil claims outside those time limits. Knowing the MOD lawyers as I do, they will use it as an excuse for why claims should be discontinued.

Lieutenant Colonel Parker: Understood, and I partially agree with you. Again, I would say that most people would be surprised, as would I, that no mechanism could be thought of to allow someone after the six years, if they felt that there was a strong enough case and it was sound in British justice, to bring a claim via appeal, the High Court or whatever it might be, to a judge, and that would be allowed to be waived. I am not a legal expert, but I would have thought that would be the situation if there was a particularly compelling case. I cannot think of any.

Mr Jones: It is there already in section 33 of the Limitation Act 1980. The Bill is carving veterans out of it, which I certainly do not agree with at all.

The Chair: If there are no more questions, may I thank you, Colonel Parker, for your valuable evidence this afternoon? I am sure the Committee will find it useful and informative when we come to discuss the Bill on a line-by-line basis.

Examination of Witness

Judge Jeff Blackett gave evidence.

3.8 pm

Q230 The Chair: We will now hear from His Honour Judge Jeff Blackett, who very recently retired as Judge Advocate General. We have until 4 o'clock for this session. Welcome, Judge. Would you care to introduce yourself for the benefit of the Committee?

Judge Blackett: I am His Honour Judge Jeff Blackett. I was the Judge Advocate General for 16 years. I had 31 years' service in the Royal Navy before that. I retired as Advocate General last week, on 30 September, so that I could go and become president of the Rugby Football Union.

Q231 Johnny Mercer: Hi, Judge Blackett. Thank you for coming in today. We have had broad discussions along this issue already, so I will not reheat any of those. What would you do within the art of what is possible? There are plenty of ideas—taking out the six-year limit, applying it to one set of claimants and so on—but within the art of the possible and the strategic aim of the Bill, what would you do to improve it?

Judge Blackett: That has gone to the end of where I was going to speak, because I was going to start off by saying that I think the Bill does not do what it is trying to do. My concern relates to investigations, not prosecutions; but there are a number of issues, and I think you and I have discussed some of them.

The first thing I would do is apply section 127 of the Magistrates' Courts Act 1980 to the military. That puts a six-month time limit on summary matters, and I would extend that to be matters that were *de minimis*—there would have to be a test of *de minimis*. Interestingly enough, halfway through my time as the Judge Advocate General, I issued a practice memorandum, which effectively incorporated that into the court martial. Following Danny Boy, the only offences that could be brought to trial were common assaults, and they were not, because the Army Prosecuting Authority followed my practice memorandum. The Ministry of Defence at the time were not in favour of that, and they challenged. Unfortunately I had to withdraw that practice memorandum.

That would deal with minor cases, and there are lots of minor cases. The sorts of things that IHAT was dealing with were that there would be a complaint that appeared to fall at the upper end of the spectrum. There would be an investigation. It would find that the allegations had been wildly exaggerated and end up finding that the most serious offence might have been an attempted actual bodily harm. In cases like that there should be a limitation period. So that is my first thing.

The second thing is that I would have judicial oversight of investigations. I introduced something called "Better Case Management in the Court Martial", towards the end of my time as the Judge Advocate General. That puts time limits on investigations. The most important thing about it is that a case, early on, goes before a judge, and a judge then sets out a timetable of what various things should do. If section 127 of the MCA was brought into force, and the case dealt with *de minimis*, he could then say, "This is *de minimis*; stop the investigation." So you need some mechanism, and judicial oversight. In my opinion, you could do that.

Thirdly, I would look at legal aid and funding. We have to remember that Northmoor and IHAT were set up by the British Government, and were funded by the British Government. The ambulance-chasing solicitors—people like Phil Shiner—used public money to pursue the means. I think you need to look at how legal aid is approved in those matters, and whether complainants should be funded, and the bar for funding them and their solicitors should be set higher.

So those are three areas. Finally, I would raise the bar for reinvestigation, or investigation. Having said that, there were only two courts martial where people were acquitted where there was a reinvestigation, but I would raise the bar for reinvestigation as well. So those are four practical matters that I think the Bill should concentrate on, rather than prosecution.

Q232 Johnny Mercer: One of the difficulties I think people like me face is that we have had General Parker, x-Armed Forces Ministers and others, saying that this and that should happen; why, over the last 10 or 15 years have none of these things been done?

Judge Blackett: You would have to ask them. I am an independent judge, who was the judicial head of the service justice system.

Q233 Johnny Mercer: Why do you think the MOD has not taken on your advice?

Judge Blackett: I think in terms of the six-month time limit, there were lawyers in the MOD who said that we did not put that in the Armed Forces Act 2006. There are commanding officers who do not want to be limited, because sometimes they need more time. In terms of better case management, I think that the MOD thinks that is a good idea, but I did not come to it until quite late in my time.

I will say one thing, though. In terms of IHAT and Northmoor, as the Judge Advocate General I wanted to be more involved, but I was kept out—properly, I suppose, because I might have to try the cases in the end. We expected a lot of cases to come out of those two matters, and as you know, not a single case came out of them, which tells its own story.

Q234 Stephen Morgan (Portsmouth South) (Lab): Thank you, Judge Blackett, for being so willing to come before the Committee to hear our concerns and to help us improve the Bill. You described the Bill as ill conceived. Can you explain why you had that view?

Judge Blackett: Yes. Perhaps I can say this. I wondered why, in the face of all the opposition—there is huge opposition, from various bodies—the Government seemed intent to pursue this particular issue. I have three concerns

[Stephen Morgan]

about the Bill. One is the presumption against prosecution, one is the wording in clause 3(2)(a), and the other is the requirement for Attorney General consent.

I listened very carefully to what Johnny Mercer said to the Joint Committee on Human Rights a couple of days ago. He described a pathway that goes from civil claims for compensation. That becomes allegations of criminal behaviour. That leads to investigation. That leads to re-investigation. I think that is the pathway you described, Mr Mercer. He said the lock was a presumption against prosecution, and Attorney General consent. I can understand, looking back, how you might get to that, but I think that logic is flawed, because actually he agreed that the issue of concern is investigations, which is my concern as well, and the length of time they take. He accepted, as he would, that all allegations must be investigated. That acceptance and a presumption against prosecution just do not equate, in my terms.

Let us look at some statistics. In my time as JAG, we have had eight trials involving overseas operations, with 27 defendants, of whom 10 were convicted. There were obviously trials. I did the two murder trials. The first murder trial was about the murder of a chap called Nadhem Abdullah by 3 Para. That was a case called Evans. The events took place in 2003; the trial was in 2005. In the case of Blackman, Marine A, the unlawful killing took place in 2011; he and two others were tried in 2013. So the system worked and due process went along. There were eight trials.

At the same time, there were 3,400 allegations in IHAT and 675 allegations in Northmoor. We all know how long they took, and nothing came out of them. So I agree wholeheartedly with what the Minister is trying to do. I am absolutely behind protecting service personnel. I simply do not believe this Bill does it, because I cannot see that a bar on prosecution or—sorry—a presumption against prosecution is going to stop the ambulance chasing that the Government are so worried about.

My second concern, of course, was the International Criminal Court. Take a case like Blackman, for instance, where there was a video of him shooting somebody. Had that come to light over five years later and there was a presumption against prosecution, first of all, the investigation would have taken place. The prosecutor could have said, “The presumption exists. Therefore I am not going to prosecute.” That would lead to a victim right of review, perhaps. More importantly, it would lead the International Criminal Court to say, “You are unable or unwilling—article 17 of the Rome statute—to prosecute. Therefore we’ll take this and we’ll put him to The Hague.” That is a real concern of mine.

The prosecutor could decide there is a case to answer, but he would send it to the Attorney General, and the Attorney General says either, “Prosecute”—in which case, so what?—or no, and you have exactly the same thing: judicial review of his decision by all sorts of people, and the International Criminal Court saying, again, “You are unable or unwilling.”

In my view, what this Bill does is exactly the opposite of what it is trying to do. What it is trying to do is to stop ambulance-chasing solicitors and vexatious and unmeritorious claims. The Minister quite rightly said we want rigour and integrity. What it actually does is

increase the risk of service personnel appearing before the International Criminal Court. That is why I said it was ill conceived.

Q235 Stephen Morgan: Thank you for that thorough and comprehensive answer. You mentioned earlier being kept out of discussions. One theme that has come out from the witnesses over the last few days has been about more engagement and consultation on what the Bill is trying to do and its contents. Is it unusual for someone in your position not to be formally consulted on the Bill’s contents?

Judge Blackett: No. My office is nearly always consulted on legislation, particularly when I went through the 2006 Act. I was heavily involved in that and, subsequently, with the other quinquennial reviews. I do not understand why my office was not consulted. There have been occasions in the past where paperwork has got lost when we have been consulted. I personally was not, but my office dealt with it. That was not the case here—we simply were not consulted.

Q236 Stephen Morgan: So it was quite unusual?

Judge Blackett: It was unusual. Whether it was pressure of time or whether officials wondered what I was going to say and did not want to hear it, I do not know.

Q237 Stephen Morgan: What difference would that formal consultation have made?

Judge Blackett: I would have hoped that we could have influenced the Bill, because I think a Bill is a good idea, but it has to have the right contents. Had I been able to have an input, perhaps on the format as I have just described, I do not know whether it would all have made it into the Bill, but at least it could have been discussed.

Q238 Stuart Anderson: On a point of clarification, you said it is very unusual for you not to be consulted, but you started off by saying you were not consulted on any of the other investigations when they were set up. Is that correct?

Judge Blackett: That is a different matter. That is apples and pears. I am consulted on policy development, even though I am an independent judge. In terms of individual cases then clearly—and properly, at the time—I was not consulted. I was going to have to deal with the serious matters that came out of it, so I was not consulted. I was told that there might be a case—“There is possibly a case. Can you clear seven weeks in the diary to sit in a case, sometime in the future?”—but I was not consulted about how the investigations were going on.

Q239 Stuart Anderson: Thank you for clarifying that. You mentioned some practical steps that you wanted to put in the Bill. I am by no means a legal expert, so for clarity could you explain, are they steps that you have the power to put in or would they require an Act of Parliament to go through for them to be put into place?

Judge Blackett: Section 127 of the Magistrates’ Courts Act would require legislation to apply to the armed forces. As I told you, I issued a practice memorandum many years ago to try to do that, which the MOD objected to and it had to be withdrawn. Legal aid funding for victims and ambulance-chasing lawyers, to use the expression that has been used, would need some legislation.

On raising the bar for the investigation, the wording in the Bill might do that, but perhaps it would require legislation. Judicial oversight of investigations, particularly overseas operations, would require legislation.

Q240 Stuart Anderson: I am trying to understand the process for someone with your influence and experience. Have you ever taken forward discussions with the MOD to say, “I believe this legislation, this Bill or this Act, if brought through Parliament, will solve A, B and C”?

Judge Blackett: The process that you describe goes on all the time, but not in particular for overseas operations. There is a quinquennial review of the Armed Forces Act. I am consulted and have the ability to input issues. For example, I have been concerned for a long time about service personnel who are convicted in the court martial of causing death by dangerous driving. We had a number of those with servicemen overseas. The court martial had no power to disqualify them from driving, and I had a real concern that they would come back, serve their time, go straight on the road and kill somebody else. I have been trying to get something like that into the Armed Forces Act.

The process takes ages. I would start off 15 years ago saying, “I don’t think this should be in the Act.” It is not agreed by the policy people within the MOD, for all sorts of reasons. We go round and round in circles, miss one Act and then another Act. Hopefully, it is going to be in the 2021 Act. That goes on all the time. I am proactive in dealing with matters around trial process.

Q241 Stuart Anderson: I am certainly not knocking your work ethic or your proactive approach, but was anything formally put into the MOD with recommendations for overseas operations that ended with Ministers?

Judge Blackett: No, because I was not consulted.

Q242 Stuart Anderson: You were the only person in that time who could have done that—is that correct?

Judge Blackett: No. I am sure other people have similar ideas—I have not got all the good ideas—but I was not asked, so I did not put anything in. That was until I became aware of the Bill—too late, but probably my fault—and at that stage I wrote to the Secretary of State and raised my concerns.

Q243 Stuart Anderson: I am on the Defence Committee, so I saw that letter. How long have you been in the position of Judge Advocate General?

Judge Blackett: Sixteen years.

Q244 Stuart Anderson: Has any Minister come to you or consulted you about putting such a Bill through Parliament?

Judge Blackett: No. I have had exchanges and we have had meetings with Ministers, but for this particular Bill nobody came to me and said, “We are going to put this through Parliament. What do you think?”.

Q245 Stuart Anderson: I get that. I came into Parliament at the end of 2019 as a veteran, wondering why soldiers have been prosecuted and gone through everything they have. I understand your points, and there are a lot of good ideas here, but Parliament has been going for many years and I wonder why it has taken till now to get to this situation. I have a fear, as we heard from the

veteran community, that the Bill would get stopped. What I really want to find out is whether anybody has thought of this before. It is without a doubt a hard subject to address. Is it too hard? Has anyone sat down and said, “We want to put this through”?

Judge Blackett: Not to my knowledge. It needs political will, of course, and if you go back to IHAT and Northmoor, you start with the Baha Mousa concerns where we had a court martial where seven people were tried, one pleaded guilty to an ICC Act offence and all the rest were acquitted when clearly the British Army had been responsible for killing an individual over a three-day period. The court martial did not resolve in a conviction.

Following that, we had all the cases from a solicitor who in those days was well respected, so nobody questioned his motivation on the allegations he was raising. That subsequently turned out to be wrong. I think the issue then was the British Government thinking, “If we have got systemic abuse by the British forces overseas, we have got to do something about it.” Hence they set up Northmoor. That was really the focus.

Q246 Stuart Anderson: Do you think the Bill is needed?

Judge Blackett: Not in its present form, no. The court martial system demonstrates that we have, to use the Minister’s words, “rigour and integrity”. We have got to move faster and we have got to investigate quicker. The issue is not the court martial system; the issue is IHAT and Northmoor, and that is nothing to do with the court martial system.

The Bill is effectively looking at the wrong end of the telescope. It is looking at the prosecution end, and you have got to remember that you do not prosecute until you investigate—and you have got to investigate. This will not stop people being investigated and it will not stop people being re-investigated and investigated again. Lots of investigations do not go anywhere, but the people who are investigated do not see that.

The fact is that, as you know, of the 3,400 cases, or whatever it was, at IHAT, not a single one has been prosecuted—not one. But the issue for those being investigated is dreadful. That is their complaint. Now, I understand that with high-profile cases like Blackman—Marine A—there are a lot of veterans who think we should not even prosecute that because they say he was doing his job and it is wrong to prosecute him. That is clearly wrong. When you have an offence as blatant as that, it must be prosecuted; otherwise we are undermining the rule of law and what we stand for in Britain.

Q247 Stuart Anderson: I slightly disagree. I do not believe that veterans want amnesty—perhaps a small percentage. If something has gone wrong, professional soldiers, men and women, would expect or want that to be followed through.

Finally—I am not sure whether you heard the last witness—

Judge Blackett: I heard some, yes.

Stuart Anderson: I asked him how the 5,000 Iraq and Afghanistan veterans and the 20,000 overall veterans he has contact with would feel if the Bill were stopped. I do not know whether you heard his answer.

Judge Blackett: Yes, I did.

Stuart Anderson: What would you say to that, then, with your recommendation that the Bill be stopped?

Judge Blackett: I have not recommended that it be stopped.

Stuart Anderson: Sorry, I do not want to put words into your mouth. First, do you think that this Bill should be stopped?

Judge Blackett: Yes, but—

Stuart Anderson: Okay. So now you have said that, what would your words to him be?

Judge Blackett: I believe in a Bill with some of the items that I have suggested. What I would say is that the Bill should be stopped, rewritten and, when it addresses the problem, brought back. What would I say to those 5,000 veterans? I would explain that the Bill as it stands will make life worse, not better, and therefore we will look at it again, trying to bring something back that would satisfy your concerns.

Q248 Carol Monaghan (Glasgow North West) (SNP): Judge Blackett, did you support the exclusion of sexual offences from the Bill?

Judge Blackett: No. I cannot see the differentiation between any offences but, since I do not think that there should be a presumption against prosecution anyway, that is just an academic question.

Q249 Carol Monaghan: How do you feel about the inclusion of torture and war crimes?

Judge Blackett: It is the same answer—this is an academic discussion that you and I are having, because I do not believe that there should be a presumption against prosecution at all. If there is an offence, whether sexual, torture or anything else, it should be prosecuted.

Q250 Carol Monaghan: The Minister asked you why advice over the past 15 or 16 years had not been heeded. Are you confident that your advice, and the evidence that you have given to the Committee today, will be heeded?

Judge Blackett: You are asking me what is probably a loaded political question. I would hope so, and when I met the Minister, Johnny Mercer—not in this forum, but in a more discursive one—he was very interested in some of my options, and I think he asked staff to look at them. I do not know how far that has gone, and I do not know whether any will be brought back, but I hope that, given my experience—

Q251 Carol Monaghan: How long ago was that meeting?

Judge Blackett: About a month ago—something like that.

Carol Monaghan: Before Second Reading.

Judge Blackett: It was.

Q252 Carol Monaghan: So were you surprised not to see any change, or any of this within the Bill that was presented?

Judge Blackett: To be fair to the Minister, he said to everybody, “I want to fix this problem, and I am open to any suggestion”—

Carol Monaghan: We have heard that many times, but we are slightly concerned.

Judge Blackett: I take the Minister at his word—if he says that he is open to any suggestion, he or his staff must look at it on its merits and, if they see any merits, they will take it forward.

Q253 Carol Monaghan: I was going to ask about the re-investigations, but we have already covered that, so I will move on. Do you have any concerns about part 2 of the Bill?

Judge Blackett: The six-year time limit on civil claims.

Carol Monaghan: Yes.

Judge Blackett: The previous witness talked about the inability of service personnel to sue, because of the six years. It is rather like going back to section 10 of the Crown Proceedings Act 1947. That is not really my area of law, so perhaps I am not the right witness to deal with it. I said to the Secretary of State that I thought it was injudicious, but there are better minds than mine who can apply that.

One bizarre thing is that, if this Bill becomes law, there is a six-year time limit but the Attorney General may give consent to a prosecution. Then, clearly, one of the things that the criminal court would be doing is awarding compensation, if there was a conviction. There would still be issues in relation to personal injury claims, which would come through the criminal court rather than the civil court, if it got to prosecution. However, I do not think I am the right person to answer those questions.

Q254 Mr Jones: In your letter to the Secretary of State you said:

“The bill as drafted is not the answer.”

You have been very clear on that today. You have made four suggestions there. I can see a problem with the legal aid one, but the other three relate to procedure for criminal trials in the service justice system. Could they be incorporated into the Bill?

Judge Blackett: Yes. If you need legislation, you can use any legislative vehicle, can you not? Certainly, I would have thought that applying the Magistrates’ Court Act 1980 one, which is applying a six-month time limit to summary-only matters, would be extended. It would need more wording because I believe that should be extended to what should be called *de minimis*. *De minimis* claims probably need to be taken before the judge who is overseeing it so he can say, “This is *de minimis*.” Then, a great raft of those allegations in IHAT and Northmoor would have gone with that.

Q255 Mr Jones: That would clear out a lot of frivolous and vexatious cases, the difference being that it would not be about a presumption not to prosecute. An independent legal body—a judge or a magistrate—would make that decision. That is the important thing there. It is not the chain of command or the MOD making that decision, or the Attorney General. It is independent legal—

Judge Blackett: Yes.

Q256 Mr Jones: On raising the bar, how would that work in effect?

Judge Blackett: The way I described it when we had our meeting with the Minister was relating to the Criminal Cases Review Commission. They can look at what is a miscarriage of justice and put it back to the Court of Appeal, but they have a very high bar. It was extracting that sort of test and applying it on the other side in relation to investigations. Having said that, there have been only two reinvestigations following acquittals in my time, and both of those determined that there was no further evidence and therefore it did not come back to court. However, the individual accused, who had been acquitted, had to go through all the problems that we heard the last witness talk about.

Q257 Mr Jones: I am aware of the criminal case review because I have just been involved with the Post Office Horizon cases that are going before that. It is a high test to get them there, but it does give that. I will come on to one of your third points in a minute, but the issue that has come out throughout all the evidence that we have taken so far is around investigation and—I think this came through from the last witness—the trauma, not only for individuals but for families, because things are taking too long, although the two cases you mentioned were done quite quickly. In terms of judicial oversight, can you explain how that would work?

Judge Blackett: In my view, you have an allocated judge—probably a judge advocate—who the investigators can come to and say, “This is what we have. We have one person saying ‘He raped me 10 years ago.’ We have no other evidence. We have interviewed her and we think”—she is lying, she is telling the truth, or whatever. The judge can then take a view, rather than the current system at IHAT. It became rather like a fishing expedition, where an allegation came in and they spent ages fishing for more evidence around the allegation. It needs, I think, judicial oversight to say, “Stop fishing, you have had enough time. This clearly will not get anywhere near a conviction and therefore stop the investigation now.”

Q258 Mr Jones: Would the judge have the ability, if he or she were not satisfied with the evidence put forward, to say, “You should investigate it further”?

Judge Blackett: Absolutely, yes.

Q259 Mr Jones: So it would not be an automatic cut-off.

Judge Blackett: No, no. It is basically judicial supervision. It comes back to what I was saying about better case management in the court martial, which is the system we introduced not that long ago, where early on in the investigation, before the investigation is complete, the case is put before a judge. It may be that at that stage the defendant says, “I plead guilty and therefore let’s stop the investigation.” That is one way of dealing with these matters. It stops the time taken on an investigation.

Q260 Mr Jones: On the issue around the International Criminal Court, in that case, you could argue to them that it would be judicially independent oversight, and that is the important point.

Judge Blackett: Absolutely.

Q261 Mr Jones: Can I turn to clause 3? I think it is a very strange one. It refers to “exceptional demands”, but I think your letter to the Secretary of State outlines that the service justice system already takes that into account. That is certainly why I am a big supporter of it, in the sense that it recognises the nature of military service, which of course civil courts cannot take into account. Can you talk us through your concerns about clause 3?

Judge Blackett: Clause 3 is engaged after five years. It seems bizarre to me that in deciding whether to prosecute, you have a post-five-year test, but not a pre-five-year test. All these matters are taken into account anyway when the service prosecutor decides whether it is in the service and public interest to prosecute. As you know, there has to be evidential sufficiency and public interest. This is effectively designing or describing what the service interest test or public interest test should be. Now, prosecutions may take place, even though a serviceman were suffering from battle fatigue, diminished responsibility—all of those things. There is still a proper prosecution and the offence or the sentence will reflect all those matters, but not the actual prosecution. This therefore seems to me unnecessary, because the service prosecuting authority exists separate from the Crown Prosecution Service because it applies the service interest test. That was my concern.

Q262 Mr Jones: In your letter, you give the example of Marine A. Could you talk the Committee through how that worked in practice in that case?

Judge Blackett: Interestingly, a number of the issues here were raised by Marine A subsequently through the Criminal Cases Review Commission and back to the Court of Appeal, and they were never raised at first instance. Had he raised them at first instance—had all the psychiatric evidence that came out eventually appeared at the start—he probably would have been charged with manslaughter rather than murder, for example. So that can assist the prosecutor in the way he moves forward.

Q263 Mr Jones: In that case, he was charged with murder and convicted of murder and then, on appeal, that new evidence came in and it was reduced to manslaughter. Is that correct?

Judge Blackett: That is correct—on the second appeal.

Q264 Mr Jones: Do you have concerns—I certainly do—that there is a danger that the way in which the Bill is constructed could give credence to some of those who are advocating the abolition of the service justice system? I am not one of those who want to do away with the service justice system, because I think it is a system that protects its unique nature.

Judge Blackett: I think if the Bill becomes law as it stands, then clearly there is a concern. We have seen it from all the responses to you, from Liberty and others such as Liberty, who are very concerned. Their perception is that you are protecting people from wrongdoing. I am sure their view will be that if you are protecting people from wrongdoing, you are not capable of being independent and therefore we should take all this away from you.

Q265 Mr Jones: You have already mentioned the presumption to prosecute. I have said this before and I will say it again, but in my opinion, the Bill fails the

[Mr Kevan Jones]

Ronseal test: it does not do what it says on the tin. I find the presumption not to prosecute remarkable—the idea that you can investigate someone, but start the process with a presumption that you are not going to prosecute them. The argument made is that this will mean that people will not face courts later on. However, is it not true that this will open up an entire system of judicial reviews, not only of decisions to not prosecute, but where the Attorney General decides to?

Judge Blackett: Sorry, I am not quite sure what the question is.

Q266 Mr Jones: Well, in terms of the way judicial review is done, if you have a presumption at the start to not prosecute and somebody then says, “We are not going to prosecute you even when we have done the investigation,” could that not lead to other court action coming in through judicial review?

Judge Blackett: I do not read the Bill as you have suggested—that you do not investigate because there is a presumption against prosecution.

Q267 Mr Jones: No, you do investigate, but you have the presumption at the back of your mind that you are not going to prosecute at the end of it.

Judge Blackett: You investigate on the basis that if there is sufficient evidence, it will go to the prosecuting authority and he will say either yes or no, or it will go to the Attorney General. As I said earlier, if the Director Service Prosecutions decides not to prosecute, there is a victim right of review, so there is a further process—that is, if it does not go to the International Criminal Court—and if it gets to the Attorney General, there is the option of judicial review of his decision. Yes, there is a lot of potential litigation around the Bill.

The Chair: I call Liz Twist.

Judge Blackett: Can I add a rider to what I have just said? The Attorney General has to consent in a number of offences. As far as the court martial is concerned, the Attorney General has to consent to prosecuting any International Criminal Court Act 2001 offence—that is, genocide, crimes against humanity or war crimes. Under section 1A(3) of the Geneva Conventions Act 1957, he has to consent to prosecuting any grave breaches of that Act, and under section 61 of the Armed Forces Act 2006, he has to consent if a prosecution is to be brought outside of time limits. That is in relation to service personnel who have left and are no longer subject to that jurisdiction. A consent function is there in any event, and funnily enough, given that ICC Act offences and Geneva Conventions Act offences are covered by the Attorney General, a lot of this will have to go to the Attorney General anyway, without the Overseas Operations Bill.

My concern about the Attorney General’s consent is that it undermines the Director Service Prosecutions. If I were he, I would be most upset that I could not make a decision in these circumstances.

Q268 Liz Twist (Blaydon) (Lab): I wanted to follow up on a couple of points. Ms Monaghan asked you about the exclusion of the issue of torture. Are you satisfied by the Government’s assurances that torture and other war crimes will always be prosecuted under this Bill?

Judge Blackett: I think all Governments would want torture and other war crimes to be prosecuted, and if they give that indication, it is not for me to say anything else. I am satisfied by that assurance, but on the face of the Bill, there is a chance that it would not be prosecuted. That is the point.

Q269 Liz Twist: So in your view, it is a weakness that it is not written on the face of the Bill. Would that be right?

Judge Blackett: Yes.

Q270 Liz Twist: Finally, would you agree that the definition of overseas operations contained in the Bill goes beyond its “on the battlefield” refrain, covering not just armed conflict but peacekeeping and overseas policing activities?

Judge Blackett: I would have to read the Bill again. It says in clause 1 what “overseas operations” means, doesn’t it? I cannot put my hand straight on it, but I am sure there is a section that describes what overseas operations are. Sorry, this is not really answering your question, but the eight cases that have come to court martial include ones that were not necessarily on the battlefield. The Breadbasket case, for instance, where soldiers were alleged—they were found guilty—to have abused civilians by stripping them naked, making them simulate sex, urinating on them, et cetera, was not on the battlefield, but it was in operations shortly after the war fighting. That does not answer the question, does it?

Q271 Liz Twist: Not really. Is there a concern about grey areas, would you say?

Judge Blackett: Yes. The way I read the Bill is that anybody on an operational tour in an operational area is covered, so the case I just described would be captured by this. That would be my interpretation.

Q272 Liz Twist: And that is not on the battlefield.

Judge Blackett: It does not talk about the battlefield; it talks about overseas operations. I went on a number of overseas operations in the Royal Navy, which were not a battlefield. It was never in the face of the enemy; I cannot say more than that. I would have considered myself on an operational tour when we were sailing round the West Indies, for instance, but I do not think that would be covered by the Bill. Any activity where there is effectively war fighting is what this Bill is about. That is my interpretation. It is not just about what is happening when you are firing bullets at each other; it is what is happening around it.

Q273 Liz Twist: It is in the wider sphere of operations.

Judge Blackett: Yes.

Q274 Stuart Anderson: I have a supplementary question, following Kevan Jones’s question about the five-year presumption against prosecution. We do not know what we are going to come up against next year. We could go into a conflict that lasts 20, 30 or 40 years. If this Bill was introduced in 1969—the start of the Northern Ireland conflict—would veterans who are in their 80s now be getting those knocks at the door, and would they be going through the same thing?

Judge Blackett: Yes, because they are being investigated.

Q275 Stuart Anderson: Not all of those were investigated.

Judge Blackett: What I am saying is that the fact that there is a presumption against prosecution would not stop the knock on the door and the investigation. That is the whole point. The presumption against prosecution does not stop the investigation; the investigation happens. The 80-year-old who is alleged to have done whatever he has done would still get the knock on the door. He would still be investigated. Once there was sufficient evidence against him, it goes to the prosecutor. If there is not sufficient evidence, the investigation stops. If there is sufficient evidence, it goes to the prosecutor, who then has the five-year presumption against prosecution. The 80-year-old is still going through all the trauma, and it may be that the police say, “This is such a serious case that it is exceptional, and therefore we should waive the presumption against prosecution.” This Bill will not address that question. That is the whole point.

Q276 Sarah Atherton: Given that you were the Judge Advocate General in 2010 when IHAT and Operation Northmoor were established, were you consulted or involved? Did you have any jurisdiction on their functioning?

Judge Blackett: No, because that was very much an investigation function. It has changed a bit because of what I have done with the system, but at that time I was effectively waiting for the investigation to happen and the prosecution to come to us. The judge becomes involved when the case first steps into the courtroom. That may take another two years, even after it has stepped into the courtroom, because of whatever has to happen. I was not consulted, no, and nor should I have been at that stage.

Q277 Sarah Atherton: Do you not think you would have had the responsibility—perhaps moral if not professional—to raise any alarms or concerns you may have had?

Judge Blackett: I constantly raised concerns with the DSP that this was all taking too long and that they ought either to get rid of it or get to court. I did that.

Q278 Sarah Atherton: And you were ignored, I take it.

Judge Blackett: I was reassured that the investigations were taking time, more evidence was needed, some cases were coming, and I needed to keep out of it so that when the cases came I could deal with them.

There was one other point that I wanted to make, which is about complementarity—not with the ICC. I would pose some questions, particularly to the Minister. You will remember that six Royal Military Police were killed at Majar al-Kabir in 2003. If those responsible were identified today, would we accept that there would be a presumption against their prosecution? Would we expect the factors in clause 3(2)(a) to be taken into account? Would we be content that a member of the Iraqi Government’s consent would be needed to prosecute? Would we accept a decision by that person not to prosecute? In my view, there would be outrage in this country if that occurred. In all areas of law, you have to be even-handed. If, in that same battle, it turned out that one of our soldiers killed one of the Iraqis unlawfully and we said, “Well, he should be protected, because it was a long time ago, but we not protecting these Iraqis,” that is just not right. I fundamentally think the Bill is wrong, and I really believe it needs to be revised before it passes into law.

The Chair: Thank you, Judge. That neatly turned around the normal procedure—instead of the Committee asking you questions, you are asking the Committee questions. The Committee has come to the end of its questions. May I thank you on behalf of the Committee for the very interesting and valuable evidence that you have given to us? That brings us to the complete end of our oral evidence sessions with different witnesses. We will meet again on Wednesday next week to commence line-by-line consideration of the Bill. We will be meeting at 9.25 am in Committee Room 10.

Ordered, That further consideration be now adjourned.
—(*Leo Docherty.*)

3.57 pm

Adjourned till Wednesday 14 October at twenty-five past Nine o'clock.

Written evidence reported to the House

OOB04 International Committee of the Red Cross

OOB02 JUSTICE

OOB03 John Cubbon