PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

OVERSEAS OPERATIONS (SERVICE PERSONNEL AND VETERANS) BILL

Second Sitting

Tuesday 6 October 2020

(Afternoon)

CONTENTS

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

Saturday 10 October 2020

The Committee consisted of the following Members:

Chairs: † David Mundell, Graham Stringer

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

Steven Mark, Sarah Thatcher, *Committee Clerks*

† attended the Committee

Witnesses

Professor Richard Ekins, Head of Judicial Power Project, Policy Exchange

Dr Jonathan Morgan, Fellow, Reader in Law at Corpus Christi College, Cambridge, and one of the authors of the Policy Exchange Report, Clearing the Fog of Law: Saving our armed forces from defeat by judicial diktat (2005)

John Larkin QC, former Attorney General for Northern Ireland from 2010 to 2020, and author of the Policy Exchange Research Note on the Overseas Operations Bill (September 2020)

Ahmed Al-Nahhas, Secretary, Military Special Interest Group, Association of Personal Injury Lawyers

Emma Norton, Director and Lead Lawyer, Centre for Military Justice

Martha Spurrier, Director, Liberty

Clive Baldwin, Senior Legal Advisor, Human Rights Watch

Public Bill Committee

Tuesday 6 October 2020

(Afternoon)

[David Mundell *in the Chair*]

Overseas Operations (Service Personnel and Veterans) Bill

2 pm

The Committee deliberated in private.

Examination of Witnesses

Professor Richard Ekins, Dr Jonathan Morgan and John Larkin QC gave evidence.

2.2 pm

The Chair: I hope that Professor Ekins can now hear proceedings. Will witnesses say for the record their name and designation, so that we may confirm that we can hear you?

Professor Ekins: I am Professor Richard Ekins. I am head of Policy Exchange's Judicial Power Project and Professor of Law and Constitutional Government at the University of Oxford.

John Larkin: I am John Larkin QC. I am in private practice now in Belfast—*[Inaudible.]*

The Chair: Your sound is not very clear, Mr Larkin, so I am going to see whether we can have that adjusted. Will you repeat what you have just said?

John Larkin: I am John Larkin QC. I am counsel at the Bar of Northern Ireland, and practising there.

The Chair: Please try to get as close to your microphone and to speak as robustly as you can.

John Larkin: I apologise in advance, Chair. I am afraid that you have the alarming choice of seeing me leering forward or perhaps not hearing me. We will sacrifice aesthetics in favour of audibility.

The Chair: We will take hearing you—that is our priority. If our two witnesses online will bear with us on the logistics, we are joined in the room by Dr Jonathan Morgan. Dr Morgan, will you introduce yourself for the record?

Dr Morgan: Hello. I am a reader in English law at the University of Cambridge and a fellow of Corpus Christi College. As you might be aware, I co-authored with Richard Ekins a paper called "Clearing the Fog of Law" for Policy Exchange in 2015. I imagine that that is why I am here, but you might be able to tell me better.

The Chair: Excellent. I am going to call Kevan Jones to start the questions, and I would ask that he and others indicate whether they are addressing a question to a specific witness or to all the witnesses.

Q60 Mr Kevan Jones (North Durham) (Lab): This is a general point for everyone. There is a five-year cut-off period in the Bill as outlined. Could you each consider the justification for that and why it should not be higher?

The Chair: Perhaps, if the question is to everyone, we will start with you, Dr Morgan, in the room, and then go to Professor Ekins and Mr Larkin.

Dr Morgan: My expertise is in private law—so, tort law—and I imagine that we will come on to that later. There, you have time limits of three years, six years, one year. In my view, there is no ultimate principled way of defending a particular time limit. Five years is obviously some kind of compromise. Ten years was originally proposed; that has been reduced to five. There seems to be no logical answer, certainly, as to that particular time period. It is a balancing act.

Professor Ekins: I agree with everything that Dr Morgan has just said. All I would add is that I presume five years has been chosen with a view to allowing a sizeable period of time to pass during which—*[Inaudible]*—can be brought in the customary fashion. After five years, a somewhat different regime obviously applies, although it might be too strong to call this a cut-off period. There is always something somewhat arbitrary about procedural time limits. As Dr Morgan said, three years and six years are used in civil law; the criminal law does not tend to do this so often, so I do not think this is a salient number—to my knowledge.

John Larkin: I agree. There is no magic in the number five; that is a matter of policy choice.

Q61 Mr Jones: Thank you for that, but the difference here is that, unlike with other time limits, there is a presumption that someone will not be prosecuted. There are two things to say on that. One is, are there any other examples of where we have that in law? Also, would it not lead, possibly, to the decisions of the Attorney General not to prosecute—because you have pre-empted that, in effect, in the Bill—opening the cases up to the UK courts for judicial reviews and other things?

Dr Morgan: On the second of those questions, which is whether the Attorney General's decision not to prosecute could be challenged in court, I think that, yes, absolutely there is a risk of that, and I think the Minister, in a letter that he wrote to the Defence Committee, accepted that that was the case, but expressed the view that the courts would have to take account of the context that it is a quasi-judicial decision, and that they should respect the Attorney General's decision. But I suspect that it is very strongly likely that it would be reviewed. How successful that would be is hard to say in the abstract, but it could be challenged, in my view.

Q62 Mr Jones: Are there any other instances where you have in law a presumption not to prosecute before you have actually done the investigation?

Dr Morgan: Criminal procedure is not my area, but I am not aware of any others in UK law. There are references to limitation statutes in other jurisdictions. I think that the example given is that, in French law, there is a 30-year period, which is very much longer and which apparently does not apply to war crimes, so that is almost the mirror image of what is in the Bill.

Q63 Mr Jones: Yes, but the unique thing about this is not the time limit. I accept that there are time limits for various things in civil law as well as criminal. The difference here is that we are setting off on a presumption even before investigation that someone is not going to be prosecuted. Is that not putting the cart before the horse? You are making the judgment well before you have even looked at the actual case.

Dr Morgan: It says that only exceptionally will there be a prosecution, so it is not a total amnesty after the five years. But even having the presumption after a time period is, as far as I am aware, unique in English criminal law. When we are talking about tort law, which is much more my area, limitation periods are absolutely standard, but in criminal procedure it is much more exceptional. I think that is why this has received so much more attention, media attention and public criticism than the civil law proposals.

Professor Ekins: As Jonathan Morgan says, there are precedents elsewhere for statutes of limitation in the criminal sphere in other jurisdictions, but they have not been a feature of English law, although, of course, this is quite a soft statute of limitations in so far as it provides no obstacle or bar to prosecutions after the five years. It certainly does not stop investigations. In fact, if one were to make a criticism of the Bill, one might say that it places no obstacle on continuing investigations, which might be thought to be one of the main mischiefs motivating of the Bill. If there has been no investigation, the fact that there is an investigation, and cogent evidence arises of a crime, will tend to beat back the presumption against prosecution, if one wants to call it the presumption against prosecution. So it is not quite right to my mind to say this is putting the cart before the horse and deciding against prosecution before one investigates.

In relation to the Attorney General and consent to prosecute, there are two stages. One is the prosecuting authority deciding whether or not the prosecution is warranted, and the Bill looks at some of the factors that should be taken into account in making that decision. That might be one way to think about part 1 of the Bill—it is framing the determination by the prosecuting authority. In addition to that, the Attorney General's consent is required. They are not necessarily the same stage or the same act.

As to whether the Attorney General giving or withholding consent—more likely the withholding, although I suppose either—will be challenged in the courts, I think, very likely, yes. How much risk is there? I think that is an open question. I think there must be some risk that there will be a Human Rights Act challenge arguing for a narrow and restrictive reading of the Attorney General's power to give or withhold consent, and that might end up requiring the Attorney General to give consent in circumstances where one might not otherwise expect it. It is possible the courts will not take that course, but I think it is a risk that parliamentarians should be aware of.

John Larkin: Yes. I am in agreement with Professor Ekins. Classically, the decision of an Attorney General to give consent to prosecution has been subject to very light-touch review. Here, although it is described in the clause heading as "Presumption against prosecution", it is really more the establishment of an exceptionality test, and that of course gives a handle to anybody seeking to challenge the Attorney General, because what is or is not exceptional will be a matter ultimately for judicial determination. I think that challenges are almost inevitable, but they are by no means to be regarded as inevitably successful. I think the approach of the courts—one can see that in the Supreme Court challenge a year or so back to the certification by the Director of Public Prosecutions for Northern Ireland in the Dennis Hutchings case—tends to be associated with the bestowal of a good deal of latitude to the responsible law officer.

Q64 Mr Jones: Can I follow up one last point? Dr Morgan has already answered it, but I would be interested to know what you two think. The presumption at the outset that you are not going to prosecute—is that a unique situation or is it something that is covered in other, similar types of cases?

John Larkin: The law is full of operative presumptions, from time to time, but the precise model here is something that I have not seen either in the UK or elsewhere.

Professor Ekins: I do not think the UK has tended to legislate about the decision to prosecute. There are a great many statutory requirements for Attorney General's consent before prosecuting, so that is by no means unique, but the legislating to frame the prosecutor's decision as to whether to initiate the prosecution is unusual.

Q65 Mr Jones: The difference here is that this will actually be on the face of the Bill, in the sense that, at the beginning, the presumption will be not to prosecute. Putting the time limits aside, this is a major change. I wanted to know whether there are any other precedents in other pieces of law in the UK or other types of jurisdictions.

Professor Ekins: Not to my knowledge, but it is difficult to sever it from the point about time. There is a difference between a Bill that does what you see in part 1 from day one and a Bill that does so after a certain period of time has passed, which is why the Bill refers, understandably, to the importance of finality if you have an investigation and further evidence has arisen. Those are all considerations that a prosecutor might well take into account anyway; it is just that Parliament is requiring them to be taken into account, framing when and how—*[Inaudible.]*

Mr Jones: It is slightly different from that, I would argue, because it is presuming that you will not prosecute at the outset, which I think is difficult. Thank you very much.

Q66 Stuart Anderson (Wolverhampton South West) (Con): Do you think the Bill will have a positive impact and protect armed forces personnel who serve on overseas operations? I will ask Mr Larkin first.

John Larkin: I possess no qualifications to judge the reputational effectiveness of the Bill and its impact on military operations. What I have said to Policy Exchange is that many of the criticisms of the Bill are quite misplaced. It is not a blanket amnesty; in fact, it might be regarded as a fairly modest, proportionate measure.

Stuart Anderson: Mr Ekins?

Professor Ekins: I suppose the best case one can make for the positive benefit of the Bill is that it may provide some assurance to personnel. If no application has been made after five years, they are unlikely to be prosecuted. However, in one sense that is too strong, because if cogent evidence arises, it can be investigated. It probably will be—there is no bar to it in the Bill—and it may well result in a decision to prosecute.

Having said that, prosecution is the major risk for people who have been serving on operations abroad. It is a major problem in relation to Northern Ireland—we have been getting prosecutions 40 or 50 years after the fact, which are very difficult to conduct fairly, and which understandably cause an enormous amount of stress. In recent years, the problem in relation to people who have been serving abroad has been, in a sense, a seemingly never-ending cycle of investigation and reinvestigation. The Bill does not really do anything about that, so in that sense it will not provide much help.

Stuart Anderson: I should have referred to as "professor"—sorry, I did not want you to feel left out. Doctor Morgan?

Dr Morgan: The answer is, up to a point. It really depends on what kind of allegations we want to defend service personnel against. In the Second Reading debate, there were many references to Phil Shiner—we can take him as shorthand for spurious claims being brought. But you might say that if spurious claims are brought within six years, if it is a tort action, or within five years, if it is leading to a criminal prosecution, the Bill is not doing anything about those. It is not doing anything about promptly brought spurious claims. Indeed, it seems to me that the Shiner claims were actually brought promptly. There were many problems with them—namely, that people were making up the evidence—but they were not being brought many years later.

The Bill addresses one particular problem: very old and stale allegations being revived after a long period, which are either brought as a tort damages claim—that is part 2 of the Bill—or lead to criminal prosecutions, which is part 1. It seems to me to be part of a solution to what is actually quite a big and complex problem with a number of different strands in it. It is not the total solution, but it addresses that aspect of it.

Q67 Stuart Anderson: Mr Larkin, you did touch on it, but do any of you believe that the Bill provides a blanket amnesty in any way, shape or form for armed forces personnel?

John Larkin: I have given my view on that. The short answer is that it does not.

Professor Ekins: I agree with John.

Dr Morgan: I think "blanket amnesty" is a very overblown way of putting it, if we are talking of criminal prosecutions after the five years. It is establishing presumption, and that is what should be referred to. Having said that, the stronger the presumption is against prosecution, the closer it approaches that. The weaker the presumption is, the less protection it gives to the service personnel in question. So there is obviously a balancing act, but, as it stands, I do not see it as an amnesty; that is a misdescription.

Q68 Peter Gibson (Darlington) (Con): If the Bill's intent is to protect service personnel, what steps should be taken to improve the Bill as drafted?

Professor Ekins: To my mind, the major problem of the Bill—this is a major absence, but it would be quite a substantial policy change to introduce it—is that it does not really address the extraterritorial application of the Human Rights Act. That is the main driver behind some of the difficulties we have seen in the last 10 or more years in a whole range of ways. That includes requiring continued investigation and litigation—sometimes from enemy combatants relying on the Human Rights Act while UK forces have been in the field. The Bill could be improved—although, as I say, it would be a major change—by limiting the extraterritorial application of the Human Rights Act.

That would be, in a sense, restating the position that our senior judges understood before the European Court of Human Rights extended how jurisdiction was understood. I think that would also be much more consistent with the way in which Parliament understood the Human Rights Act when it was enacted in 1998. The ECHR and the Human Rights Act really have been extended by a series of problematic judgments, and a Bill on this subject could usefully roll that back. That might mean that the Human Rights Act simply applies in the United Kingdom, or alternatively—this may be more plausible as a prospect for enactment—it might allow for limited extraterritorial application, in the limited way that was understood to be possible in 2003 when the European Court of Human Rights gave a significant judgment on the point, as well as by the House of Lords and the Supreme Court in the years to follow. That would address the problem of being unable to stop investigations and being exposed to litigation that requires the continuation of investigations, when the Government think that that is unfair to the personnel. The Bill does not address that—save, perhaps, by encouraging Ministers to derogate from the ECHR.

John Larkin: There is a lack conceptual clarity in part 1—*[Inaudible.]*

The Chair: Mr Larkin, we are sorry but we are not hearing you very well. Do you want to try to speak a bit closer to your microphone?

John Larkin: There is a lack of conceptual clarity in part 1 of the Bill with respect to the prosecutorial task. As the Committee will know, the prosecutor's task breaks down into two parts. First, they ask themselves whether the evidential test is met. If it is, they consider whether a prosecution would be in the public interest. That is the approach taken in all three UK jurisdiction—*[Inaudible.]*

The Chair: We are still struggling, I am afraid.

John Larkin: Clause 1 of the Bill puts no time limit on assessment of the evidential test. But then, when one looks at clause 3, subsections (1) and (2) tend to reduce the person's culpability. Culpability is at the core of criminal liability—it is synonymous with criminal liability. There may be value in amending the Bill to permit the prosecutor to take a global view.

The Public Prosecution Service for Northern Ireland, in its code for prosecutors, permits the public prosecutor to take a view based on the public interest test, sometimes—exceptionally—in advance of full consideration of the evidential tests, so if one has a sense from the beginning that the case is going nowhere, one should

not have to go through what might seem to be a very empty exercise of none the less carrying out the evidential test in full. There could be an expressed power, by amendment, given to prosecutors to determine in advance of consideration of the full evidential tests. As you rightly note, clause 3(1) sits ill with clause 1's exception of the evidential consideration.

Q69 Peter Gibson: Can the witness write to us with his answer to that? It was not entirely audible to us here in the room.

The Chair: Are you happy to do that, Mr Larkin? We did not hear all of what you said. Members may have got the general thrust of what you were saying, but we did not get the detail.

John Larkin: I am happy to do that. It is a technical point, so it might be of assistance to Committee members if it were reduced to writing.

The Chair: Thank you for that.

Q70 Peter Gibson: Thank you, Mr Larkin. I will ask the same question to Dr Morgan.

Dr Morgan: I would approach the question in two ways. One would be, "How would I improve this Bill?" and the other would be, "What would I do if I was starting with a blank sheet of paper?" You would get two quite different answers, but I will start with the second one.

Peter Gibson: Let us have both approaches.

Dr Morgan: Okay. To start with the second one, it seems to me that the problem in this area is lawfare or the judicialisation of war—whatever you want to call it. The extension of the European convention on human rights into this area as a result of the European Court's decision in Al-Skeini, and the decision of our Supreme Court in Smith *v.* Ministry of Defence, which confirmed that and extended the law of tort into the battlefield, led to the erosion of combat immunity. To me, that should be the priority for any legislation on this difficult and multifaceted problem.

The section of the Bill that partly deals with the issue is the derogation provision and the duty on the Minister to consider derogation. It is not a duty to derogate; it is a duty to consider doing it, which is putting into statute the Government's policy. It seems to me that that is valuable, although it does not change very much.

In its consultation paper published in June 2019, the Ministry of Defence said it was going to look at restatement of combat immunity, hand in hand with a no-fault compensation scheme for service personnel to pay damages on the full tort measure. Those two things should go together. I regret that last month, in reply to the consultation, it said that legislation on the issue is

"not being taken forward…at this time."

I think it should be. The priority should be to restate combat immunity and, hand in hand with that, to have no-fault compensation for service personnel on the full compensation measure that you get if you bring a claim in law.

If that were done, it would help with the problem about the shorter limitation periods for tort claims—damages claims—that was raised several times at Second Reading. The British Legion has been quoted several times saying that that breaches the armed forces covenant. I do not want to get into that particular debate, but there is no question that service personnel might, in some fairly unusual situations, find their ability to bring damages claims caught by the proposals in part 2 of the Bill as it stands.

If the Ministry of Defence took forward the proposal that it called "Better combat compensation," to have full compensation through the armed forces compensation scheme, those worries would fall away. If there was full compensation available without the need to bring a tort claim or negligence action against the Government, any limitations on the time periods for bringing tort claims would be an irrelevant question for service personnel.

Those are two reasons why I would revive what seems to have been the Ministry of Defence's approach at one point, which was restating combat immunity and ensuring full, no-fault compensation. If you want me to give more detailed comments on the provisions of the Bill I can do that, but I would approach the issues in a quite different way than in the Bill that we have.

Q71 Mr Jones: In the case of no-fault compensation, would that then be within the existing armed forces compensation scheme? How would you change that?

Dr Morgan: The proposal to make that switch is in the joint paper produced by Richard Ekins, Tom Tugendhat and myself that I mentioned at the start. We said in that paper that that there is a case for having a more generous strand within the armed forces compensation scheme applying to those soldiers who cannot bring tort claims at law. In other words, if Crown immunity in warfare were to be revived—the Government already have the statutory power to do that, they do not need an Act of Parliament—and it was decided that you cannot bring claims at all, there would be a case for having a more generous approach within the armed forces compensation scheme to those people. I would not necessarily say the whole armed forces compensation scheme should be upgraded—I am aware of how expensive that would be. If we are going to restrict tort claims of a certain sub-category of injuries to service people, then it would be a good idea to balance that out by having full compensation.

Q72 Mr Jones: When I was a Minister, I extended the issues around mental health in 2009, I think it was. You would not have to have a limitation time and it would be automatic for that person to be considered, is that right?

Dr Morgan: Yes. I confess that I have not looked at the limitation rules of the armed forces compensation scheme. It certainly does ensure cover.

Q73 Mr Jones: Would it extend to, for example, mental health grounds? The original 2000 Act was quite limited in terms of date of knowledge and other things around mental health. The Lord Boyce review was implemented in 2009. So what you are saying is that the presumption that there be no fault, basically, is accepted. That would perhaps get round the time limitations altogether.

Dr Morgan: It also gets away from what we see in Smith *v.* Ministry of Defence: the allegation that the Land Rovers were not the right ones. Once you go to court investigating that in a negligence claim, it is getting into areas that should not be dealt with by a

court in a negligence claim, it seems to me. If you are going to stop people from bringing such claims, you had better give them at least as good a compensation scheme without them needing to prove fault. That was our argument in the paper five years ago.

Q74 Carol Monaghan (Glasgow North West) (SNP): This morning we heard from Major Bob Campbell who talked about the MOD—in a brilliant quote to get on the record—"fannying about with repeated investigations". He talked about 17 years of this carry-on. What part of the Bill do you see addressing the MOD's failures in terms of these repeated investigations?

Dr Morgan: I was going to comment on Major Campbell; I read about him in the newspaper on Saturday. It seems to me that his case would not have been addressed by these proposals. He was prosecuted in 2006 about an alleged offence in 2003, so that would have been within the five-year period for bringing the prosecution. It is only in 2020, after 17 years, that he has finally been cleared. The point was made in the Second Reading debate by a number of Members that perhaps the real vice is not so much very late prosecutions but the continued investigations by the Ministry of Defence without necessarily leading to a criminal prosecution at all. If I have understood the facts of Major Campbell's case, it rather shows how a five-year soft cut-off for prosecutions is not going to solve that kind of problem at all.

Q75 Carol Monaghan: Would you support calls for some sort of independence in the investigative processes?

Dr Morgan: There is a rule in criminal law that if you have been tried in a criminal court for an offence and you are either acquitted or convicted, you cannot be tried again. That is double jeopardy. What I do not understand is why the double jeopardy rule is not applying, by analogy, to these repeated investigations within the Ministry of Defence. That needs to be urgently addressed, and it is not within the Bill. Maybe the Bill cannot do everything, but the Campbell case shows that there is a gap.

Q76 Carol Monaghan: Would it make sense for that type of legislation on the way investigations are carried out to be developed alongside the Bill?

Dr Morgan: Yes. Whether this needs fresh legislation or whether it can simply be done by changing the rules, I do not know. I know what Professor Ekins will say, which is that because the Human Rights Act requires investigations into deaths, we are currently limited in what we can do. Perhaps he will comment on that.

Professor Ekins: I am sure the Ministry of Defence has had many failings across the years, but in one sense it needs to keep investigations going and to be open and avoid plodding along. It has done a lot under the threat of litigation—sorry, the reality of litigation—where it is exposed to a duty to investigate in accordance with changing standards over time. Something similar has happened in Northern Ireland, which John Larkin knows much more about than I do. It has been a particular feature of the legacy and the legal cases around Afghanistan. Those conflicts were fought on a pretty sound legal position and on the understanding that the European convention did not apply. The ordinary rules of the law around conflict and service law applied, yet subsequent decisions about investigation or not investigating have been challenged in the domestic courts by way of the Human Rights Act. I cannot see how we deal with that prospect recurring over time without addressing the territorial reach of the Human Rights Act.

The Bill deals with the issue incidentally and in part in so far as derogation, if there is derogation, in advance of future conflicts might help, and in so far as there are time limits on Human Rights Act applications or proceedings. That might deal with some of the risk of historical allegations being made and investigations rolling on. In terms of the problem of people being investigated repeatedly and a prosecution never being mounted, that is not a problem the Bill deals with directly, although I think it probably is the main mischief.

John Larkin: I agree with Professor Ekins that the Bill is somewhat silent on the duration and repetition of investigations. In some cases, that leads to real mischief. It is not much fun for anyone to be finally vindicated after 10 or 12 years have elapsed. They would much rather be vindicated promptly—this applies both in terms of ordinary criminal civil justice as well as in the issue of service personnel—after a thorough and expeditious investigation.

Q77 Carol Monaghan: Finally, having heard what the three of you have said about how we carry out investigations, do you understand that some people would have concerns that the Bill will not solve the issues of people like Major Campbell and the difficulties that he has had over the past 17 years?

Dr Morgan: It is the point I made, so I agree that it will not solve all of the problems as it stands.

Professor Ekins: Yes, it is a real concern.

John Larkin: I think it is wrong to see a so-called independent investigation as the answer. The issue is not the independence or otherwise of the investigation. In fact, investigations are substantially independent at present. The issue is efficiency and the fairness of what is investigated.

Q78 Joy Morrissey (Beaconsfield) (Con): I have two questions on the point raised earlier about the territorial reach of the Human Rights Act. How would you limit that within the Bill? What would you suggest?

The Chair: Who are you addressing the question to?

Joy Morrissey: I would welcome feedback from each of the witnesses. How would you limit the territorial reach of the Human Rights Act within this legislation? You mentioned it as a point, and I wanted to hear how you would do that.

Dr Morgan: The Human Rights Act would have to be amended to say that the Act itself did not apply extraterritorially. Parliament could do that; what Parliament cannot do is of itself reverse the decision of the European Court of Human Rights. The nearest thing to do is for the Government to derogate using the process in the European convention. Those powers are already there in the Human Rights Act.

Q79 Joy Morrissey: My question in response to that would be, why are we confusing the two things? The European Court of Justice ruled that it had supremacy over the ruling of the ECHR, and we opted out of the

Lisbon treaty in terms of the acceptance of certain aspects of the Home Office and Justice type of rules—we opted out of that. Within the EU structure, they sort of opted out of accepting the ECHR in terms of jurisdiction within their own court systems. I feel that there is a bit of muddying of the waters in terms of what exactly is the jurisdiction of what. Could there be a review of that?

Dr Morgan: In my view, this is nothing to do with the European Union. This is purely a European convention matter, so Brexit, thankfully, is out of the picture on this particular issue. It is purely a decision of the European Court of Human Rights in Strasbourg, which extended the extraterritorial reach of the convention in the Al-Skeini case.

There are two things that one could do about it. One is to derogate in future conflicts, which the Government have said they will consider doing. Another thing is for the Government vigorously to fight cases, such as Hassan *v*. United Kingdom, where the Government rather successfully argued that the European convention should be interpreted in line with the law of armed conflict or international humanitarian law.

Those are two things that one could do. A third thing, which would require fresh primary legislation, would be to amend the Human Rights Act so that domestic UK courts may only hear claims relating to things that happen within the territory of the UK. That will not stop the Strasbourg Court from hearing claims against the UK. Parliament cannot unilaterally change the meaning of the European convention on human rights, but it can change the meaning of the Human Rights Act. Richard Ekins is more expert than I, so I would like him to answer.

Q80 Joy Morrissey: It just gives me pause for thought about why we have decided to do it, when the Court of Justice held that the EU could not accept the ECHR under the draft agreement and held that the agreement was incompatible with the TEU article 6.2, for the reason that the draft agreement undermined the Court of Justice's autonomy. It allowed for the dispute resolution mechanisms. I am just curious why we have gone down this road. Perhaps the witnesses can clarify.

John Larkin: May I come in on that point? The Member is referring, I think, to decision 2/15 of the Court of Justice of the European Union—*[Inaudible.]*—incompatible with the European treaty. Many of us smiled at that decision, because it showed the Court of Justice of the European Union was not particularly enthusiastic about being subject to the jurisdiction of the Strasbourg Court—*[Inaudible.]*—

The Chair: Were you able to hear that answer, Joy?

Joy Morrissey: No.

The Chair: When you write to us on the previous point, Mr Larkin, will you also set out your thoughts on the question that has just been asked? We come to you, Professor Ekins.

Professor Ekins: It was a surprising decision of the Court of Justice of the European Union, holding that the EU was not really able to make a treaty commitment to join the ECHR. It shows that the EU legal order guards its legal autonomy jealously, but I do not think that it helps in this context.

In answer to the question about how one limits the territorial reach of the Human Rights Act, one thing would be to include a clause in the Bill that amends the Human Rights Act to specify its territorial reach. That could be the more limited reach of only applying in the United Kingdom, or it could effectively restate the position as it was held by the European courts in 2003 and accepted by our senior judges for many years thereafter, that the convention applies in the United Kingdom and in some very limited extraterritorial circumstances. I drafted a provision to that effect, if anyone is interested, in submissions to the Defence Committee and in other papers to the Policy Exchange. It is open to question, obviously, but it is certainly possible to frame a limitation in a clause that could be adopted in the Bill. It is not impossible; it depends on whether Parliament wishes to do so.

As Dr Morgan says, though, that would not change the UK's position in relation to Strasbourg, the European Court of Human Rights. Derogation is an important addition to the meaning of the Human Rights Act. If you want to deal with the prospect of continuing litigation, investigations and reinvestigations, you have to address the scope of the Human Rights Act. The same thing is true in relation to Northern Ireland and those historic allegations as well. The intention is that that should be dealt with in a separate Bill.

The Chair: Does any other Member wish to question the witnesses?

Q81 Mark Eastwood (Dewsbury) (Con): Yes, Mr Mundell.

Thank you for coming to this session. We referred to Major Bob Campbell previously, and I wanted to follow on from the point made by Carole Monaghan and the evidence given by Major Campbell. He said that he gave evidence after several years of being investigated and reinvestigated, and he wrote to the International Criminal Court to ask them to prosecute him. The ICC actually refused that request. On Second Reading—I am sure you all witnessed the debate—a number of concerns were raised relating to veterans being hauled before the International Criminal Court as a result of the Bill being passed. Do you expect any veterans to be put before the International Criminal Court if the Bill goes ahead?

Dr Morgan: There is a risk that it could happen. I have read the Government's comments on this, and they point out that prosecutors will remain independent, that it is not an absolute bar, and that it is not an absolute amnesty. All of that is true; but if, in a particular case, a war crime is alleged against a person and it is after five years, and the prosecutor decides not to bring a case because it is not sufficiently exceptional, then in that situation there must be a risk either that the International Criminal Court would seize jurisdiction, or that another member state could apply for extradition of that veteran.

Professor Ekins: I am not an expert on the International Criminal Court, but it is probably correct to stay that there is a risk. That said, prosecutors have a discretion as to whether to bring prosecutions even without the Bill. If a decision is taken not to prosecute in a particular case, then there is a risk that the ICC may take a

different view. The ICC should not be taking over prosecutions if the UK—as I think it will even if the Bill were enacted—remains a country that does take its obligations seriously, that does investigate credible cases promptly and that does retain a system of deciding which cases to prosecute, rather than having a rule that they will all be prosecuted regardless of strength of evidence or other considerations such as the passage of time. There have, however, been types of cases in which the ICC has proved to be somewhat political in its decision making. It might turn on who the prosecutor is at the relevant time. It probably does increase the risk. If you ask me whether I expect there to be prosecutions before the ICC, I would say, "Not really," but that is amateur speculation and not bankable.

John Larkin: I think the risk is modest because, as the Committee knows, offences that are excepted from the reach of clause 1 include genocide, crimes against humanity and war crimes as defined in articles 6, 7 and 8 of the Rome statute respectively. Given that those are not subject to the five-year exceptionality rule, I think it is quite likely that those more serious offences would be prosecuted domestically, because they would benefit from the five-year exceptionality filter.

Q82 Mark Eastwood: You said that there was an element of risk there, but when you look at what the International Criminal Court is prosecuting at the moment, and at cases it has done in the past, they generally relate to large-scale war crimes, genocide and that type of thing. Are we really suggesting that the International Criminal Court will get involved in cases that involve veterans? I have no option to expect the level of case, but are we expecting the International Criminal Court to get involved in, as Major Bob Campbell said, manslaughter and those types of incidents? Is that a realistic prospect?

Dr Morgan: It would have to fall within the definition of war crimes, so one hopes that it is unthinkable that credible evidence of this would ever be laid but, if it were—this is a hypothetical situation—if such evidence existed, because it related to events a long time before, perhaps long before five years, and if the sole reason for not prosecuting was the change that the Bill is making, namely that it was after the five years, then the risk is there. It is probably quite small because, as you say, the kind of situation that will trigger the ICC jurisdiction we all hope would never happen anyway, but that does not mean it cannot.

Q83 Mark Eastwood: Are they not looking at commanding officers, high-ranking soldiers, dictators and the higher level, rather than at the lower ranks as such?

Dr Morgan: The only point that I would add is that the fact that what is being proposed is internationally unusual I think increases the risk. I probably agree with Mr Larkin that the risk is modest, but I think the fact that it is a five-year time period, which to my knowledge is not visible in any other signatory state of the ICC, increases the risk.

Professor Ekins: The ICC should be focusing on allegations of atrocities, widespread wrongs and so on, rather than on what you might call manslaughter or questions of where the allegations are much more fine-grained, such as excessive force and so on, but there is a risk that the ICC does not always observe the limits that we apply in law to its jurisdiction. There have been instances of somewhat politically motivated decision making. There might still be a modest risk of the ICC going into the kinds of case that are likely to arrive at a place where a decision is made that it is not worth prosecuting because of particular circumstances, a lack of evidence and so on. The risk is probably quite—*[Inaudible.]* This will only arise if after five years a prosecutor decides that the public interest in prosecuting is not really there. I think it would only be possible for the ICC to justify intervention if there is a sufficiently strong case that would result in a conviction, and disagree about the public interest. That would sound like a surprising ground on which to debate a disagreement on whether a prosecution is warranted. I think it is possible but not very likely.

John Larkin: My point is that genocide, war crimes and crimes against humanity are not subject to the five-year time limit, so if the evidence emerges at eight years, for example, the process envisaged by this Bill—exceptionality assessment—simply does not apply; it will be determined as if it had occurred last week. That is an important point that is lost in legal—*[Inaudible]*—the international—*[Inaudible]*—of the Bill, but it has not been sufficiently appreciated that part 2 of the statute of Rome makes an exception for genocide, war crimes and crimes against humanity. They will be prosecuted if the evidence exists domestically, and therefore the risk of a lance corporal being hauled in front of the International Criminal Court seems to me to be fairly minimal.

Q84 Mr Jones: The Government have announced that they are going to bring similar legislation with reference to Northern Ireland, although the Northern Ireland situation would be retrospective. This is not retrospective; even though it is being pumped out in propaganda as being a thing that will protect all veterans from Iraq and Afghanistan, it clearly is not. If the Government are going to make the Northern Ireland one retrospective, is there not a case to be made for making these things retrospective?

Dr Morgan: *indicated assent.*

The Chair: I think you have to speak as an answer, Dr Morgan, because we cannot otherwise hear what it is.

Dr Morgan: Retrospection is obviously going to add a further layer of controversy on top of this. The question really is whether it should apply to Iraq and Afghanistan after this lapse of time. If you believe that the Bill is the right solution to the problem, then it seems to me odd that that is not being proposed, but I am not convinced it is the right solution to the problem, so I am not going to argue for it to be retrospective.

Q85 Mr Jones: No, I am not either; I just wanted to know what your views are. This Bill is being portrayed as if it will draw a line under Afghanistan and Iraq, which it clearly will not, as it is framed. If legislation is going to be brought forward on Northern Ireland, as we have been promised, that would have to be retrospective, because we are dealing in those cases with things that happened perhaps 40 years ago. I am playing devil's advocate in saying that, if it is going to be retrospective for Northern Ireland, would it not be the obvious thing to do here to make this retrospective, to protect the veterans who served in Afghanistan and Iraq? I hasten

to add that I will wait to see the legislation on Northern Ireland to make it retrospective and how that will be done.

Dr Morgan: We have to wait and see what it says. It would be curious if the Northern Ireland situation and the Iraqi and Afghan situations were dealt with in a different way on that issue of retrospection, so I agree with your point.

Professor Ekins: I would question the premise of the question, because as I read the Bill, it does apply to actions taken in the past. It will not foreclose prosecutions or proceedings already under way. It is a procedural change; if the Bill were enacted, say, tomorrow, a prosecution brought the day after that, more than five years after the events in question, would be subject to the regime in the Bill. I think it will apply to Iraq and Afghanistan, save insofar as there are prosecutions that have been initiated or proceedings that are under way. It will not apply to ongoing legal proceedings, but it will be a question sometimes, if I wanted to continue proceedings, where it might apply.

John Larkin: The Bill is, as Professor Ekins has said, significantly retrospective. If one looks at clause 15(6), it says:

"None of the provisions of Part 1 applies to proceedings instituted before the day on which the provision comes into force."

As *[Inaudible.]*—

The Chair: Sorry, I think you were looking away from the microphone when you answered.

John Larkin: Clause 15 makes it clear that the Bill does not apply where proceedings have begun or are under way before the day it comes into force, but if they are not under way—*[Inaudible]*—clearly defined rules can crystallise shortly thereafter, and—*[Inaudible]*—subject to the exceptionality—*[Inaudible.]*

The Chair: I think we are going to ask for that answer in writing, as well. The Minister has a very quick question—

The Minister for Defence People and Veterans (Johnny Mercer): I am happy to pass on it; it has been answered by Dr Ekins.

The Chair: Thank you very much indeed. If no one else has any further questions, we have reached the end of the time allocated. I thank each of the witnesses for their evidence and for being with us in the technical circumstances. Mr Larkin, I am very sorry that we were not able to hear some of your responses; if you are able to write to the Committee on the matters we have come back to you on, that would be very helpful indeed.

John Larkin: I am happy to do that, Chair.

Examination of Witnesses

Ahmed Al-Nahhas and Emma Norton gave evidence.

3 pm

The Chair: Before we move to our next set of witnesses, I should say that in the event that there is a Division in the House during this session, which there could be—this is for the information of the witnesses as well—we would initially suspend the sitting for 15 minutes. If the vote takes longer than that and Members cannot get back, we will deal with that pragmatically.

We are now joined by Ahmed Al-Nahhas and Emma Norton. Mr Al-Nahhas, perhaps you could say who you are so that we can confirm that we can hear you. I know from my mispronunciation of your name that you can hear me.

Ahmed Al-Nahhas: My name is Ahmed Al-Nahhas. I am a representative of the Association of Personal Injury Lawyers, which is a not-for-profit organisation that campaigns for victims of injuries and negligence. I am also a solicitor advocate.

Emma Norton: My name is Emma Norton. I am the director and lawyer at the Centre for Military Justice. I have developed a dry cough in the last two days, which is why I am appearing virtually—I apologise in advance for any coughing that I may do.

The Chair: Thank you very much in advance for giving evidence today. I will ask Emma Lewell-Buck to start the evidence session.

Q86 Mrs Emma Lewell-Buck (South Shields) (Lab): Good afternoon to both of you. As you are aware, the main purpose of the Bill is to provide greater legal protections to forces and veterans. In your opinion, does it fully do that?

Ahmed Al-Nahhas: No, APIL's position is that the Bill does not afford that. We acknowledge the good intentions behind the Bill. However, in respect of part 2 of the Bill, which I am here to discuss—the civil claims aspect—we believe that it strips service personnel and veterans of certain rights in relation to civil claims and their rights under the European convention on human rights.

Emma Norton: I would agree with that and I will not repeat it. I would say that one of the major flaws in the Bill is that it does not address the issue of the investigations that gave rise to all the problems that we are dealing with today. I think you heard that in the previous evidence; it has been a thread that has been running throughout the evidence that the Committee has heard today.

Q87 Mrs Lewell-Buck: Bearing in mind your answers, I think I know the answer to the next question. Do either of you feel that it will reduce the number of investigations and reinvestigations or not?

Ahmed Al-Nahhas: I may pass that question to Emma, who is here primarily to deal with those issues in respect of investigations. My remit is in respect of civil claims.

Emma Norton: I think there were very serious problems with the original investigations that took place into the allegations of harm in Iraq and Afghanistan. That is what made it relatively easy for courts to find that, time and again, fresh investigations needed to be conducted, which then gave rise to further litigation. The responses from the Ministry of Defence to those adverse findings did not go far enough. The investigations that we had had time and again never got to the bottom of what had happened.

As witnesses have said, the longer period of time that you get between the event and the investigation, the harder it is to get to the bottom of what happened. If we were serious about really addressing the issues that

Mr Campbell and other veterans have described, we would be looking at what kinds of systems and structures that we could build now and that would ensure that this does not happen again. What kinds of investigations could we set up and design that could function in the context of overseas operations? I am afraid that until that happens, these problems are going to recur and I do not think the Bill addresses them.

Q88 Mrs Lewell-Buck: Would either of you advocate a pause on the Bill going through right now until some of the issues can be ironed out properly?

Emma Norton: I am happy to say that I would, personally. That would have been a sensible way to go about it—to have a consultation that would really hear from individuals who had been directly affected by investigations, as well as victims, and to speak to experts who can talk to the challenges of building a really good system of investigations overseas, because it is really difficult and we do not underestimate that. There are lots of things that could be done and could be done better.

There was a service justice review, and I know we are expecting some further responses to the recommendations in that review, but that was published in February and it had taken two years to get to. That contained some really interesting ideas about how we could improve service policing and the quality of prosecutorial decision making. I know that there are lots of other ideas—ideas about maybe getting greater degrees of civilian oversight and input into military policing overseas, or possibly having judicial oversight of decisions to detain insurgents and reviews of those kinds of decisions. It would have been more sensible to have those discussions first and then look at what was needed by way of amendments to the criminal law. It feels very much—we have heard this a couple of times today—that this is a cart before the horse situation.

Ahmed Al-Nahhas: I would add my agreement to that. APIL's concern is that the impact assessment does not go far enough and is not clear. I would welcome a pause so that a proper impact assessment can be taken and further expert evidence explored.

Mrs Lewell-Buck: Thank you both. My colleague, Kevan Jones, wants to come in quickly on investigations as well.

Q89 Mr Jones: On investigations, a theme has come out in the reading and in this morning's session. We have time limits here for bringing prosecutions. Would you suggest time limits for investigations? The Human Rights Act says, I think, you have got to have speedy investigations. Even without time limits, is there a role for judicial oversight of those investigations as they are ongoing—an investigation could get to a point where independent judicial oversight could say, "Nothing further is going to be gained from taking this prosecution any further"? What are your thoughts on that?

Emma Norton: I do not think you can have a set time limit for an investigation. I think an investigation needs to take as long as it takes, as long as it is being conducted expeditiously. The problem with the original responses to allegations of really serious abuse overseas was that those allegations were not responded to sufficiently, certainly in accordance with our convention-compliant obligations, which are that they needed to be sufficiently independent, sufficiently well-resourced, sufficiently prompt, adequate—all those kinds of things. I do not think that setting an arbitrary time limit on what would be criminal investigations is necessarily helpful. If we think about how police conduct criminal investigations domestically, although there are time limits in terms of issues around police bail and things like that, there are no hard and fast time limits within which police need to complete those investigations, although obviously they should do them as quickly as possible, because otherwise the defendant is prejudiced.

Q90 Mr Jones: What about actually having a review of the investigation—an independent review of those investigations?

Emma Norton: In terms of how that would function overseas, I can see the benefit. It may be that when you have sufficient levels of civilian input into those investigations or oversight into those investigations, or judicial oversight into decisions to detain in theatre, then that may not be necessary; you could inject that level of requisite independence in those ways. This is something that would really benefit from a wider consultation with experts in criminal law and procedure, who are experienced in criminal law and procedure but also in the challenges of having investigations overseas. We have not had that.

Q91 Mrs Lewell-Buck: Going back to my earlier question, does the Bill open up the possibility of more prosecutions in the ICC?

Ahmed Al-Nahhas: I am sorry, I cannot comment on criminal matters.

Emma Norton: I am not an expert in international criminal law, but if an otherwise credible allegation of a war crime was not proceeded with because of the Bill, that by definition increases the risk that those matters would be taken up by the ICC. That is something, of course, that our Judge Advocate General Jeff Blackett has very real concerns about and has spoken about. I know a lot of others also have very serious concerns about that.

We have heard a lot about veterans and their understandable fear and anxiety. We have heard less from very senior and formerw members of the armed forces who are really concerned about these provisions—the criminal side of the Bill as well as the civil side—and feel they are not in accordance with the Army's values and standards. The message the Bill will project to the rest of the world about how the Army wishes to conduct itself is really serious, and they feel quite despairing about it. I was speaking to a former brigadier this morning who served 36 years, and he said that he was really ashamed of the Bill. So I think there is a real concern.

Mrs Lewell-Buck: Thank you both very much.

Q92 Sarah Atherton (Wrexham) (Con): Hello, Emma. It is good to see you again. I am intrigued with what you just said. A blunt question to you: do you feel that the Bill is necessary?

Emma Norton: What is necessary is for what happened in the past never to happen again—definitely. I just do not think that the Bill will fix it, for the reasons I have

given. I will not go over them again, but they go to the lack of willingness inside the MOD to look at those allegations at the time.

I think we are in a different place now. The MOD has learned a huge amount from all those errors. I would say that the MOD has learned from some of the litigation; there have been some very positive outcomes from that, and that is missing from the debate. I just do not think that the Bill fixes those problems sufficiently.

Q93 Sarah Atherton: Are you concerned about the interface between the service justice system and, perhaps, the service complaints ombudsman and what role they could play—if you feel that the Bill could be improved?

Emma Norton: Hilary Meredith mentioned this morning that the ombudsman could have a role here. I think she was looking at whether some sort of compensation or ex gratia payment scheme could be made or some form of redress could be given to the soldiers subjected to this cycle of investigation. That was a really interesting idea. I know that, separately, the ombudsman is very under-resourced, so that would need a whole separate discussion as well.

The interplay with the service justice system is something you should ask the Judge Advocate General about when you speak to him later, because—obviously—he has huge amounts of experience of issues arising where somebody is not convicted of the main charge but is perhaps convicted of a lesser charge under the court martial.

Q94 Liz Twist (Blaydon) (Lab): Mr Al-Nahhas, how aware are troops that they can privately claim for their injuries?

Ahmed Al-Nahhas: Good afternoon. I think it is a feature of military claims that service personnel are largely unaware of their legal rights to bring a civil claim. I often find in my own practice—many of our members have also reported this—that they will, in fact, be misinformed of their legal rights. This may be because there is confusion in their chain of command. Indeed, we have heard of many cases in which the chain of command will misinform them and say that they should wait until the end of their service before bringing a civil claim, which usually means that they are out of time by the time they bring a claim. In other cases there is confusion between civil claims and the armed forces compensation scheme, which is a separate, no-fault scheme, which has a much longer period of time in which to apply—normally seven years. In answer to your direct question, I think they are very unaware and, in fact, a lot of the time they are misinformed.

Q95 Liz Twist: I see that you are nodding, Emma. Is there anything that you would like to add?

Emma Norton: Just that that is entirely my experience as well. I have not advised people about overseas claims, but I advise them about claims arising in other respects, and that is a very, very common observation, yes.

Q96 Liz Twist: Returning to Mr Al-Nahhas, after what period of time will troops usually be aware of the fact that they can claim for injuries? You said that there is often a delay.

Ahmed Al-Nahhas: There is often a delay. In fact, I have dealt with many hundreds of inquiries, or at least many of the lawyers who APIL and I work with have dealt with many hundreds of inquiries, that are many, many years out of time. You will have calls from service personnel who have just finished their 22 years in service, and they will call up and inquire about the opportunity to bring a civil claim, and you have to tell them that actually they are about a decade out. So, it does vary, but more often than not they are quite a few years out of time.

Q97 Liz Twist: Could the Ministry of Defence do more to make troops aware of that route to compensation, in your view?

Ahmed Al-Nahhas: Absolutely—forgive me for interrupting you, but absolutely I think they could. In fact, at the moment I do not think that they do anything to inform service personnel of their rights to bring a civil claim. I am not suggesting that as an organisation they should be shouting from the rooftops and saying to service personnel, "You should really explore your opportunity to sue us". However, I think that the Ministry of Defence has an obligation under the armed forces covenant to be fair to service personnel. They do provide them with information about the AFCS, but, as I said, there is a much longer period of time to claim under that scheme.

I think that we also need to bear it in mind that service personnel are quite unique legal creatures in a way. For example, they are not allowed, if we are comparing them to civilians, to join a trade union. So, if you were a civilian and you were injured, you might speak to your trade union and get some advice about what claims you might bring. They may even point you in the direction of a solicitor. That often does not happen with service personnel. So, yes, I think the MOD needs to address this and be fairer with service personnel about the information available to them.

Q98 Liz Twist: You mentioned the armed forces covenant. What do you think could be the impact of this Bill on the armed forces covenant?

Ahmed Al-Nahhas: I think that the Bill, as drafted, is potentially in danger of breaching the armed forces covenant, and I will explain why. As I mentioned earlier, service personnel are quite unique legal creatures. They do not actually have the same legal rights as civilians. So, just to take an example, service personnel have very limited rights to bring a claim in the employment tribunal, save for issues such as discrimination. However, if this Bill were to be passed, they would not—beyond the six-year longstop—be able to rely on section 33 of the Limitation Act 1980 in respect of civil claims. They would not be able to bring those claims, which may be worthy but are actually brought very late in the day, whereas civilians might have the opportunity to use section 33 of the 1980 Act.

Of course, the other aspect of the Bill is the stripping away of reliance on the European convention of human rights. So, in many senses, if this Bill were to pass, service personnel would have less civil rights and less human rights. By analogy, they will have less rights than a prisoner, so I do not see how that squares with the armed forces covenant. I am very concerned about that.

Q99 Liz Twist: You mentioned the time limits. Can I ask you about the difference between the point of knowledge, as written in the Bill, and the point of

[Liz Twist]

diagnosis, which is when the Government have referred to the six-year longstop as starting? How clear cut are the questions about those dates of knowledge and diagnosis in your view?

Ahmed Al-Nahhas: If I may, I will answer your question in two answers, because I think that there are two parts to it. The first is the difference between the date of knowledge and the date of diagnosis. The date of knowledge is the date when the courts will infer that a claimant realises that they have a significant injury and makes the connection between that injury and the person whose fault it was. The three-year time limit in civil claims starts from that date of knowledge. A date of diagnosis is a factor that may be taken into account when the court considers the date of knowledge. The court may assume that, if somebody is diagnosed with a condition and is told by a doctor what they have, that will move them a long way toward obtaining their date of knowledge. I think that there has been some confusion about that in some aspects of discussions.

Could I ask you to repeat the second part of your question, please?

Liz Twist: How clear cut are those questions about the date of knowledge and the date of diagnosis?

Ahmed Al-Nahhas: They are not clear cut at all. In fact, they are incredibly complex, because it is about the date of knowledge relating to a particular claim by that particular service person in their circumstances. The facts will change from case to case. You cannot prepare arguments for this sort of thing. You have to assess their merits on a case-by-case basis. They are very complex arguments, and they may well lead to satellite litigation within civil claims.

I wish not to take up too much time on this question, but I will just explain that normally in civil claims you issue a claim and it will proceed on the way. It will take a certain amount of time, evidence will be exchanged and you will end up in trial. When you have date-of-knowledge arguments or limitation arguments, it may well encourage the courts to order a split trial, or indeed the parties to apply for one, so that this issue of the deadline is determined first. That invariably leads to increased costs, in my experience.

Q100 Liz Twist: Following on from that, in the experience of your members, does the MOD contest evidence given by service personnel about the nature and timeframe of their injuries?

Ahmed Al-Nahhas: Invariably. The MOD has very robust lawyers who do a good job. Like any lawyer, they look to take advantage of the law and to act in their client's best interests. I am certainly not suggesting that they are doing anything wrong by using these arguments. However, I have never had a case—never—in almost a decade of litigating exclusively against the Ministry of Defence in which limitation is an issue and the lawyers have not raised it or sought to take advantage of that argument in order to either strike out my client's case or to negotiate a settlement downwards. My answer to your question is: invariably.

Q101 Liz Twist: In summary, how do you think the Bill will impact the number of personnel claiming privately for their injuries?

Ahmed Al-Nahhas: That is a difficult question to answer. I think it will definitely have an impact. I do not think that the impact statement that has been released really explores it fully, because it ignores a large proportion of civil claims brought against the Ministry of Defence, which may include elements of overseas operations.

If I can give you just a quick example, the impact study does not take into account noise-induced hearing loss claims. These are complex claims that may involve exposure to harmful noise at any point of the serviceperson's service, and at different points of overseas operations in different countries. The impact study that has been released ignores all of those claims. In the last year alone, I think the figures released by the Ministry of Defence suggested that 1,810 claims relating to noise-induced hearing loss were brought against the MOD.

My answer to your question is that I think there will be an impact, but we do not know the extent of that impact, and that needs to be explored further.

Liz Twist: Thank you. I want to ask Ms Norton a few more detailed questions. Are you okay? You look as if you are suffering.

Emma Norton: I am okay. I am muting myself, but I am okay.

Q102 Liz Twist: Further to the questions that my colleague Emma Lewell-Buck asked you, what is the evidence that courts cannot strike out baseless legal claims?

Emma Norton: We are talking about civil claims. I am not aware of any evidence that the courts cannot do that. They do it all the time; it is a fairly standard part of civil law procedure. Civil procedure rule 3.4—I think—says that if a claim discloses no reasonable prospect of success, the defendant can apply for strike-out, and the strike-out can be given. There are some really good examples of that happening where the MOD has been the beneficiary. A good example was the second batch of the Kenya litigants' claims, which were thrown out a few years ago now. Something like 40,000 claims were dismissed on the basis that they were too old and it would be unfair on the defendant, which was the Ministry of Defence, to defend the claims because it no longer had the evidence available to have any reasonable prospect of defending them. The courts are perfectly capable of striking out stale claims and they do it all the time.

I want to pick up on a couple of Ahmed's points, which were excellent. The point about the Limitation Act is really important. The Limitation Act contains a range of different criteria that, in my opinion, are duplicated by the new criteria that are set down in the Bill. Section 33 of the Limitation Act enables the court to consider whether allowing the claim out of time is going to prejudice the defendant, in particular, or anybody else. It requires the court to have regard to all the circumstances of the case, which would include the fact that the claim arose from overseas operations, and all the difficulties and complexities of that environment. I think the courts have more than enough powers.

Q103 Liz Twist: Do the courts have an unfettered legal route into matters of combat decision making?

Emma Norton: No, they do not, and I respectfully disagree with the previous witnesses on that issue.

In the Smith case, which Dr Morgan cited, the Supreme Court made it very clear that the principle of combat immunity is absolutely sound. In that case, the Ministry of Defence was trying to expand combat immunity to cover a range of factors that the court said were never intended to be covered by that. It was just heat of battle, in theatre. The families of the deceased—remember, they were young soldiers who got into those Land Rovers, or other vehicles that had been procured, and suffered dreadful injuries and death—wanted to challenge the decisions made by individuals back here in Whitehall, behind a desk, to procure that equipment for use in Iraq. That was the decision that they wanted to challenge. All the court said was that combat immunity did not go that far. It has not been chipped away or reduced. So no, I do not agree with that.

Q104 Liz Twist: That picks up on my next question, which was about the principle of combat immunity. That is all my questions. Thank you very much.

Q105 Stuart Anderson: When we have listened to evidence today we have heard from veterans and from legal representatives like yourself. There is a disparity between veterans, who really want this Bill and say how let down they will be if it does not go through, and legal representatives, who say, "Stop." As legal representatives are there to defend or to represent our troops, as you have done, where is that breakdown happening and why, Mr Al-Nahhas?

Ahmed Al-Nahhas: I am not going to comment on the criminal aspect, but from my perspective there is a need to protect service personnel from spurious criminal claims, which we are looking into. That brings forward a lot of people who want this Act in place. I am not sure whether that is the incentive behind part 2 of the Bill, which is the civil aspect.

I can share with you, as a representative of APIL, that many of our members have many hundreds of clients who are service personnel. I have been doing this for a long time. The people we act for come to us seriously injured and needing compensation. The tools that are available to us as lawyers are the civil claim route and the Human Rights Act. If you start taking those rights away from veterans and service personnel then you will be, in my view, doing them an injustice.

I do not envy you. I can see that this a fierce debate and there are different sides to the argument. I would caution that that should be a sign to all of us that there should be a pause to the Bill and further exploration. I wonder to what extent the confusion is caused by the fact that the Bill tries to do two things. It tries to resolve the issues in respect of criminal law and it also addresses civil issues, which are incredibly different. That is a cautionary word that I would pass to you.

Emma Norton: We heard some compelling and moving testimony this morning. I was particularly struck by the gentleman from the British Armed Forces Federation—in fact, both witnesses spoke about the fear in the veteran community about being dragged off to court and having knocks on the door at 3 o'clock in the morning. Both of them indicated that they felt that that fear was ill founded and based on misunderstandings of what is actually happening.

Looking at the number of prosecutions that have actually been brought, let alone the number of convictions, it is quite stark. It is a very small number, and it is not reflected in the level of fear and anxiety in the veteran community. I do not underestimate that, but I think the question becomes: what do we do to meet that fear and anxiety? How do we reduce it? We reduce it by being honest with them about the real extent of the problem and by addressing the causes of the problem, which were the failures, early in the day, which the Minister acknowledged—the early failures to investigate these allegations. Had that happened, the unfairly accused would have been exonerated years ago and the victims would have had justice as well.

That is my concern about the Bill: veterans think that they want it, and I understand that, but I am not entirely sure. Indeed, the previous witnesses all agreed that it does not address the issue of investigations—the Attorney General for Northern Ireland has said it does not address the issues of investigations.

Q106 Stuart Anderson: We are where we are now, and we need to protect troops moving forward. They will be serving in our overseas operations this year, next year and so on. We can keep saying it does not protect veterans from Northern Ireland. I served in Northern Ireland, and I know many hundreds of veterans who have served in such environments, and there is separate legislation for that. We need to put that to one side with this, but we need to do something moving forward.

You say these things amplify the fear. The veteran community is very small, so we all know someone who is expecting a knock on the door. That is really amplified, because there is a brotherhood and sisterhood that has gone through the forces. When one person is affected, everybody is affected. Nothing has been brought in so far, and now we are at the start point. A major fear I have is that I keep hearing people saying stop. It has taken decades to get here. I do not know how long I will be a politician, but if I have a long career, we could still be saying stop, because people will never find a perfect Bill.

I hear what you are saying, but I think it goes against what the veteran community wants and is crying out for. As you have heard today, and with the greatest respect—I value what you are saying—every person we are seeing has a different view on this. As politicians, we need to find the best way to get the Bill through. If the Bill were to be stopped, I know the absolute lack of trust and heartbreak that the veteran community would feel. We have to use what we have and move that forward. I respect what you have said, but I felt that it was important to express how the heart of the veteran community is feeling about this.

Emma Norton: I do understand that. You say that every person that has appeared before you has a different view; in fact, it has been a running thread throughout all of this. Everybody seems to agree that the problem is the lack of independence in those early investigations, and we still have a lot of questions, and need to have discussions, about how to improve that. If we addressed that, it would be a much safer basis to proceed and face the future. It would also be litigation-proof for the MOD; if you have investigations that are solid, independent and secure, they would be litigation-proof. That would be good for the victims, and it would be excellent for the soldiers.

Q107 Carol Monaghan: May I ask, following those last questions, whether part 2 has been brought in stealthily off the back of part 1?

Ahmed Al-Nahhas: Yes, I believe so. What you are giving veterans with one hand, you are taking away with the other. That is a confused approach to legislation, and I am very concerned about it. Does that answer your question?

Q108 Carol Monaghan: Yes, thank you. Emma Norton, do you have any comments?

Emma Norton: I do not have much to add to that, except to say that I agree and that it is quite extraordinary that part 2 will only benefit the Ministry of Defence, and the Ministry of Defence is the defendant in all those claims. That is quite extraordinary.

Q109 Carol Monaghan: Is there a danger that the hard stop of six years could prevent things such as inefficiencies in equipment from coming to light?

Ahmed Al-Nahhas: There is definitely a risk with any hard stop. APIL's main concern is that taking away the flexibility of section 33 is a real danger. You are touching on accountability here; I heard your question to the previous academics about that, and it is important.

May I share an example from a case of mine? It was the wife of a serviceperson who died in Iraq in 2005. At the time he died—he died in a Snatch Land Rover due to an improvised explosive device—she had no idea whatsoever that the Ministry of Defence was culpable in any way. It was not until more than a decade later, when the Chilcot report came out, that fingers started to be pointed towards the Ministry of Defence. That report stated that the provision of Snatch Land Rovers was woeful and put service personnel's lives at risk.

The wife later sought to bring a civil claim for her and her children. At that stage, 10 years after the death, her claim was already technically out of time. We had further delays because she was dealing with cancer and going through treatment. That sounds like quite an exceptional case, but we have had similar situations—I brought a claim that technically was out of time, and if this Bill had been in place, that claim could not have proceeded. The claim was settled for several hundred thousand pounds, and brought her some justice and some compensation.

I mention that example for two reasons. First, you are talking about the accountability of these investigations that take so long; secondly, adding to that the complexity and problems of a Bill that introduces a longstop is opening the doors to some real problems here.

Emma Norton: May I make a quick point on that? Another thing that is overlooked is the benefit of some of this litigation that we are discussing now to soldiers and the MOD more widely. The Snatch Land Rovers are a good example of that, because those Land Rovers are no longer used in those kinds of conflict. If those families had not brought those claims, we would not be in this much-improved situation. That is an example of the positive outcomes of litigation, and that is worth reminding you of.

Q110 Carol Monaghan: Could part 2 of the Bill be seen, then, as harmful to serving personnel and veterans?

Ahmed Al-Nahhas: Yes, potentially. It would not encourage people to come forward and bring claims. It is normally a very brave lawyer who takes on a case that is out of time in the first instance; the reason section 33 is there is that it allows flexibility only in the most exceptional of cases. If you were to take that away and introduce this Bill, you would see less litigation on these issues. Emma raises an important point; it is certainly my experience and the experience of our members that it is primarily through litigation that organisations such as the MOD listen and change. That is one of the aspects of removing those protections that causes us great concern.

Q111 Carol Monaghan: I am not sure whether it was you, Ahmed, or Emma who mentioned the issue of hearing loss earlier. I am wondering what happens if veterans or serving personnel have suffered an injury that cannot be attributed to a single event—for example, a number of things could contribute to PTSD. I am not a lawyer, so how does it work under this legislation if there is some dubiety over which particular event caused the injury?

Ahmed Al-Nahhas: That is one of the big problems with this Bill: it will encourage a great deal more argument. As I said in my answer to the previous question, I think the Ministry of Defence will seek to use this Bill to strike out claims. Using noise-induced hearing loss as an example, as you did, that is a very typical injury that service personnel suffer. They normally get compensated through the AFCS, but where there is negligence, they can get significant compensation. By "negligence", I mean where the Ministry of Defence has, for example, not provided sufficient training or sufficient equipment to protect that serviceperson's ears.

Those exposures to harmful noise can happen throughout a career. It becomes very complex, because as a lawyer you are investigating the entirety of someone's career, with their medical records in one hand and their personnel file in the other. You are looking at overseas operations, maybe in Iraq or Afghanistan, and you have to explore whether they were exposed to a certain level of noise that may have been harmful. If I can put it simply, they are complicated enough as they are. Introducing this Bill will only do two things: it will increase the challenge to service personnel in bringing claims, and it will complicate claims unnecessarily.

Q112 Carol Monaghan: Thank you. I do not know whether you have any additional comments on that, Emma.

Emma Norton: No, I do not have anything to add on that. I was just going to say that there are often references to the armed forces compensation scheme, and it might be worth briefly mentioning on behalf of service personnel how dreadful they find it to try to operate that scheme. Ahmed has more experience of this than I do, but a lot of my clients have described to me how bureaucratic, difficult, slow and stressful it is, and it is true to say that the awards you would generally expect to recover from that scheme are significantly lower than those you would expect to recover if you succeeded in court. Ahmed will correct me if I am wrong about that, but I think it is a point worth making.

Q113 Carol Monaghan: My final question, playing devil's advocate I suppose, is, what benefit is there to veterans from part 2 of the Bill?

Ahmed Al-Nahhas: I am struggling, to be honest with you. As Emma pointed out, this is all about civil claims that are brought against the Ministry of Defence; it is not about civil claims that are brought against service personnel, so I am really struggling to find any advantage for service personnel. When you are stripping away their access to section 33 of the Limitation Act, you are ignoring those exceptional cases in which a judge may think, "You know what? This case is out of time, but there are really good reasons why we should proceed with it." It may be for reasons of accountability, which we have touched on, or it may be because that particular claimant deserves some justice. When you start stripping that away and then start stripping away the protections under the Human Rights Act, service personnel are left vulnerable—more vulnerable than civilians, more vulnerable than prisoners. I do not understand what advantage they are getting out of this.

Emma Norton: I agree with that. I do not have anything to add to that.

Q114 Mr Jones: I struggle to find consistent statistics about civilian claims against the MOD, and some people have clearly given the impression that all civilian claims are by Phil Shiner-type claimants. As a former Minister, I know that a lot of them are from serving personnel, veterans and family members. Are there any statistics on how many claims armed forces personnel, family members and veterans bring against the MOD each year?

Ahmed Al-Nahhas: There are, sir. They are published by the MOD on an annual basis. The MOD split the figures according to the type of claim that is being brought. What you are looking for is what they term employer's liability claims. The figures are available online. I am happy to provide them, but I am sure you have quicker access to them than I do.

Q115 Mr Jones: In terms of your experience of those claims and claims by individuals who are not from the MOD—low-flying claims and other negligence claims that are not to do with operations or the MOD, but related activities—have you any idea of how many we are talking about? Are they published anywhere?

Ahmed Al-Nahhas: They do split them. I do not have them to hand, unfortunately, but they separate them out, so maybe you will glean more from that. I am sorry that I cannot assist further. My understanding is that the Bill will affect the vast majority of the civil claims that are brought against the Ministry of Defence, which are the employer's liability claims. The main provisions that the MOD break them down into are non-freezing cold injury claims, which are a mainstay of civil claims that are brought, and are in relation to negligent cold exposures, and noise-induced hearing loss, in relation to negligent exposure to loud noises. The others relate to industrial disease—things like asbestos—and then they have a quota that is defined as "other". With a freedom of information request, we may be able to dive a bit more into those statistics. I hope that helps.

Q116 Sarah Atherton: Mr Al-Nahhas, you are talking to the uninitiated here. I absolutely agree that litigation is a strong conduit for change. For families who feel that they have been unjustly treated, how do they fund claiming and who funds the litigators?

Ahmed Al-Nahhas: That is a very good question. It depends on what they agree with their lawyer. In the industry, the norm is to provide something called a conditional fee agreement. Where you can establish that a claim has good prospects of success, you may, as a lawyer, offer a service person's family, in relation to your example, a CFA, where you do not charge them unless you win. It is conditional on certain terms. These days, there are a lot of rules that regulate how much lawyers can charge. Normally, for example, and taking a rule of thumb, they cannot exceed the damages that you recover for the individual. In the past, there were fewer constraints on the extent of lawyers' fees.

There are lots of lawyers out there who are specialists and who offer no win, no fee agreements to service personnel and their families. The only way that service personnel or their families may be required to pay legal costs normally is that they sometimes have to pay a chunk of their costs, related to what lawyers would define as unrecovered costs, which are things that they cannot recover from the Ministry of Defence, but as long as the claim is successful, in this context, it would be the Ministry of Defence that pays the lawyer's bill. I hope that answers your question.

Sarah Atherton: Yes, thank you.

Q117 Stuart Anderson: If they are successful, what percentage is taken from the soldier's claim, on average, for the solicitors?

Ahmed Al-Nahhas: It depends on the terms offered by the lawyers. They can vary, typically between 15% and 25% of the damages that are recovered. There are certain caps, but that is typically what you might find in the industry.

Q118 Peter Gibson: I have two quick questions for Ahmed. In terms of the claims that you have brought for veterans, how many times have you had to use the dispensation of limitation under section 33? And are you able to share with us your success rate in terms of the claims that you win and those that you lose for veterans?

Ahmed Al-Nahhas: As I am representing APIL, I would not be able to share specific numbers, but I am very happy to share my experiences on section 33. I would say that it is a small fraction of cases that are pursued that will have to rely on section 33.

Q119 Peter Gibson: Just to put some data on that, how many claims does a small fraction look like in practice, over a period of 15 years?

Ahmed Al-Nahhas: To give you an idea, it may be that two out of 100 cases that we manage would be at risk of being out of time—maybe 5% at most. On whether or not you succeed with a section 33 argument, well, the only time I went to court on a section 33 argument, I lost. I took it to the Court of Appeal, and I lost there, too. I think that might indicate to you how difficult it is to succeed there. The judges really do not engage in a liberal application of section 33.

As a lawyer, if you are partaking on a case that is out of time, you need to be brave, and it is very rare. Often or not, in some of these cases where there is a section 33 argument, they may be settled along the way, but the

fact that the claim is out of time might be a factor that affects the settlement figure. I hope that answers your question.

Q120 Peter Gibson: Thank you. So it is incredibly rare that you would need to use section 33.

Ahmed Al-Nahhas: In answer to your direct question, yes, it is incredibly rare that you use it, but that is dependent on the lawyer and whether they are willing to take on riskier cases. On the whole, it is not something that lawyers engage in easily. But the key about section 33 is that you will come across those cases, like the one I explained earlier involving the widow of the serviceperson, where they are demanding justice. They are worthy cases, and you use section 33 because that is the flexibility in the system. That is the conduit through which judges can achieve justice, even if you are out of time.

Q121 Peter Gibson: My second question is about success and failure. How many cases do you win and how many do you lose?

Ahmed Al-Nahhas: That depends on the definition of win. What is interesting is that most of the claims—civil claims in this area—will tend to settle. The MOD will publish, with the same document I mentioned earlier, the figures in respect of settlements that it pays out. I think that last year it spent £131 million in respect of compensation and legal costs. I do not think it has separated what is legal costs—

Q122 Peter Gibson: I am trying to establish in how many cases you succeed in recovering compensation and in how many you do not. Obviously, one subsidises the other. Are you able to share those percentages with us?

Ahmed Al-Nahhas: I could not give you an accurate estimate here. I am a representative of APIL, representing hundreds of solicitors across the country in this field. It may be that I can provide written evidence, if that would assist the Committee.

Peter Gibson: That would be welcome, thank you.

Ahmed Al-Nahhas: Of course. I am sorry that I could not assist you immediately.

Q123 Stuart Anderson: I have a supplementary question about a no win, no fee where a young rifleman has a previous injury. If you or the other solicitors do not deem it to have a good chance of success—those were your words—how would a young rifleman fund his legal case?

Ahmed Al-Nahhas: I have no idea. They may need to rely on charity. They may need to rely on family. They have very limited options. Actually, they often have a big challenge: they need to find a specialist in this field to begin with, because it is not easy to sue the Ministry of Defence and it is not easy to understand the specialties and complexities of such cases. They will often go to another lawyer for a second opinion, and one hopes that that lawyer would take on their case, but there are no guarantees, and particularly on cases that are out of time. You may be going around the houses to tens of lawyers who will all say to you, "I'm really sorry, but you are out of time. There is nothing I can do for you." That is one of my concerns with the Bill.

Q124 Stuart Anderson: How many cases have you turned down that have been over six years?

Ahmed Al-Nahhas: I would say, on average, in my own practice, probably between 70% and 80% of inquiries that come in will be rejected because they are out of time. Forgive me, that is anecdotal and off the top of my head. I was not expecting that question but, if it gives you an idea, the vast majority of the inquiries we get are from people who are frankly out of time.

Q125 Mr Jones: Does that not demonstrate the point made earlier about people being aware of their rights, in terms of taking cases forward? To answer Stuart's point about cases, charities take test cases and cases that might not be seen as winners. Section 33, which this takes away from veterans, applies to me if I want to sue someone and it applies, as you said, to a prisoner wanting to sue the Ministry of Justice. Why should it be different for a prisoner and for a veteran?

Ahmed Al-Nahhas: It should not—it definitely should not. You are taking away legal rights from service personnel who already have fewer legal rights as it is. You really are stripping the tree there.

The Chair: If no other Member wishes to ask a question, I thank both our witnesses for their contributions to the Committee this afternoon. Thank you very much indeed.

Examination of Witnesses

Martha Spurrier and Clive Baldwin gave evidence.

4 pm

Q126 The Chair: As we were hoping, Martha Spurrier from Liberty has appeared on the screen. Can you and Mr Baldwin please introduce yourselves?

Martha Spurrier: Hi, everyone. I am Martha Spurrier and I am a lawyer and the director of the human rights organisation Liberty.

Clive Baldwin: I am Clive Baldwin, senior legal adviser with the international organisation Human Rights Watch. It is perhaps also relevant to the Committee that I was previously involved in training the UK armed forces and other armed forces on detention practices and international law.

The Chair: Thank you. We are expecting a vote in the House imminently; I will have to suspend proceedings for about 15 minutes in that event. We will begin the questioning with Chris Evans.

Q127 Chris Evans (Islwyn) (Lab/Co-op): Welcome to you both. Mr Baldwin can answer first and Ms Spurrier second, so that you are not crossing over each other, but I will address questions to both of you. The reason I have picked Mr Baldwin is that he is a sitting above you on my screen, Ms Spurrier—there is no discrimination, I promise you.

Given that the Government have managed to exclude sexual offences from the Bill, do you see any reason why torture should not similarly be excluded?

Clive Baldwin: No, there should be no reason. Not just torture but other international crimes should not be excluded, particularly war crimes, crimes against humanity

and, indeed, any other international crimes, such as enforced disappearances that the UK is obliged to investigate and prosecute. For the reasons given by the Secretary of State, sexual offences have no place in armed conflict, and neither does torture or war crimes. The exemption should be very clear. Even in international crimes, particularly war crimes, it is a very clear principle of international armed conflict law that there should be no statute of limitations on war crimes, because of the difficulties in investigating them. Anything that starts to look like a statute of limitations on war crimes risks the UK violating its international obligations.

Martha Spurrier: I entirely agree. I cannot see any legal or moral justification for not including torture and other war crimes in that schedule.

Q128 Chris Evans: Could we talk a bit about the triple lock? Obviously, the Bill would apply the same triple lock against prosecutions for war crimes or crimes against humanity that took place more than five years ago. I have had a number of lobby groups write to me about this situation. What is your view on the triple lock? Does it need to state intent?

Clive Baldwin: The triple lock, as it is set out, is quite worrying, particularly for those international crimes, because it seems to be creating a block to prosecution. The first element is the five-year limit, together with the presumption against prosecution, which is quite unique. I am not aware of any other country having something similar, especially for those international crimes.

The third part of it—the increase in the powers of the Attorney General—is a position that we at Human Rights Watch have objected to for some time. The Attorney General is an unreformed legal position that essentially remains a member of the Government and should therefore have no role in determining individual decisions on prosecutions, although of course the Attorney General still has some of those powers. The increase in the power to effectively block prosecutions gives the risk of all this appearing to be a political attempt to make it extremely difficult in an exceptional situation—as the draft Bill says—for war crimes, torture and other international crimes to be prosecuted.

The second element in the triple lock is the taking of facts into account. Those are relevant factors—the situation on the ground and the situation of forces personnel—but those are situations that should be taken into account anyway, particularly when prosecuting war crimes, as war crimes are designed to be crimes that apply on the battlefield and in situations of armed occupation. There are many other issues that should be taken into account as well, not least the need for justice, the seriousness of the offence and the seniority of the person responsible.

Martha Spurrier: On the stated intent and whether the triple lock is a rational answer to that stated intent, as far as I understand it the stated intent of this Bill as a whole is to deal with so-called vexatious claims. It is clear from the statistics that it is not a significant number of civil claims that are, in fact, properly termed as vexatious. Of course, it is also important not to conflate civil and criminal cases. There is not really such a thing as a vexatious criminal case. That would bring suggestion that the state was abusing its powers in prosecuting something, and I do not understand that that is being suggested.

The way to meet that stated intent is to deal with the inefficacy of investigations as they currently stand; it is not to impose a triple lock on dealing with very serious crimes committed by military personnel. That deals with an entirely different proposition, one that we say is deeply problematic—that there is no justification for the five-year time limit, no justification for a list of factors to be taken into account by a prosecutor, which exclude things like the public interest in upholding the accountability of the military and the public interest in victims having their voices heard, and there is no public interest in there being an Attorney General's veto in what is often a very highly politicised context.

The triple lock does not meet the stated intent, but in and of itself it is not something that Liberty and other organisations can stand by, because it amounts to a chilling effect on prosecutions for serious crimes and effectively a culture of impunity in the armed forces.

Q129 Chris Evans: Ms Spurrier, can I follow that up? Are you saying that this Bill could deny justice to victims of serious crimes?

Martha Spurrier: Absolutely. If you have a triple lock on prosecution, it must be right that your intention is to make prosecutions harder to bring. If you have been the victim of an injustice, whether that is because you are a civilian victim abroad or you are a serving man or woman who has been the victim of an abuse of justice by the UK military, those three locks on you getting justice could very easily act as a bar. They are an additional three hurdles that an ordinary, if you like, victim of crime would not have to cross in order to seek justice, accountability and punishment for what they have suffered.

Q130 Chris Evans: What is your view, Mr Baldwin?

Clive Baldwin: Absolutely. Particularly in the situation of crimes that may have been committed overseas, it is very difficult for victims to achieve justice, for many understandable reasons, in those cases. This makes it even more difficult, in that after five years it becomes the exception rather than the rule to prosecute. This is just focusing on part 1, the criminal side. It does run the serious risk of creating injustice.

Q131 Mr Jones: In the Bill, there is a presumption against prosecution, which I think is very odd, in the sense that you are basically presuming that you are not going to prosecute even before you have done the investigation. Are you aware of any other international comparisons that have that in law? Basically, it presumes that you will not prosecute even before you have done the investigation.

Clive Baldwin: No, I am not aware of any international law or even system that has something like that. Some countries have statutes of limitations—absolute time limits for the prosecution of minor offences, or relatively minor offences. Certainly, when it comes to war crimes, as I have said, there is a very strong international law, under the law of armed conflict, that there should be no limitation period for war crimes.

As you say, this is quite a strange law. It would create a very strange situation and I think, as Martha was saying, that it will have a very chilling effect, not just on prosecutions but even on criminal investigations, because those doing the investigation will know that there will be a presumption against prosecution.

Q132 Mr Jones: May I add a supplementary question to that? You mentioned the role of the Attorney General, which is a political appointment. Again, are there any international comparisons where the decision to prosecute in these cases is actually vested in a politician? Clearly, the pressure on that person not to prosecute, for example, could become quite intense. I remember the big campaign against Marine A. I am sure that a political appointment in that situation may have had undue influence, in terms of making a decision not prosecute in that case.

Clive Baldwin: Internationally, there are standards, as with the independence of the judiciary, that prosecutors should be independent and not subject to interference by politicians or Ministers on individual cases. Of course, Ministers may be at the head of the prosecution system. Some countries do this better than others, and there are very different types of systems. In the United States, for example, Attorneys General are elected, which creates its own political problems. However, the move has generally been very much towards making prosecutors, and that prosecutorial decision to prosecute or not, as robustly independent as possible.

One country that had a similar system to the UK was Kenya. When it had a major constitutional reform, it made sure that the Attorney General became a very apolitical, non-political position, because of the importance of the Attorney General in making these decisions about prosecutions.

Q133 Chris Evans: There has been a lot of talk this afternoon about the danger that armed service personnel and veterans could find themselves being prosecuted in the International Criminal Court. Are you of the view, like many others, that this Bill, unamended, could see more of our service personnel and veterans being prosecuted in the International Criminal Court?

Clive Baldwin: Yes. As an organisation that works very closely on international criminal justice, including with the International Criminal Court, I would say that this Bill, unamended, would probably significantly increase the risk of UK service personnel and others facing investigations from the International Criminal Court, or perhaps in other countries, on the principle of universal jurisdiction for international crimes such as war crimes and torture—universal jurisdiction being that principle that a crime like torture should be prosecuted anywhere. There is a duty under international law that countries have to criminalise, or make it possible to prosecute, or extradite, anyone suspected of torture found in their territory.

The Bill, unamended, would increase that risk because it does not exclude all forms of international crimes—war crimes and torture. The International Criminal Court and others will consider whether the UK is willing and able to genuinely prosecute such offences, and given that the Bill would include those offences, would create this triple lock and would create effectively a presumption against prosecution after five years for those offences, it creates the serious risk that the UK would not be considered willing to prosecute offences after five years. That would increase the risk that the ICC or other countries would seek to prosecute such offences.

Martha Spurrier: I agree. The phrase to remember is that, when looking at whether to prosecute, the ICC will think about whether the home country is willing and able to bring forward a prosecution. If you have a stated legislative intention from Parliament, with a triple lock and with a schedule that you have said you are not going to include torture and war crimes in, that telegraphs pretty clearly to the ICC and others that the UK Government and UK prosecutors are unwilling and unable, and therefore that those prosecutions would have to take place elsewhere.

Q134 Chris Evans: As my right hon. Friend the Member for North Durham (Mr Jones) said, the Attorney General is obviously a political appointment. Equally, the Secretary of State is a political appointment. The Bill gives the Secretary of State the power to make regulations in order to amend schedule 1 and to add or delete excluded offences at any date in the future. Do you envisage a situation where this could be used, and what sort of offences do you envisage?

The Bill obviously extends beyond the traditional battlefield. Are you thinking of areas where we have deployed UK troops on peacekeeping missions and they may or may not have committed offences there? That is just an example.

Clive Baldwin: It is difficult to say; I have not seen any indication from the Government of where they would intend this. Of course, if the Government made a very specific commitment to exclude all international crimes, they could exclude new international crimes. Enforced disappearances would be one, and perhaps others that might arise and that the UK may sign up to. However, I worked for several years in Kosovo on justice issues during the peacekeeping operations and, as you mentioned, in situations of peacekeeping many issues arise about day-to-day crimes—traffic offences, even, and elsewhere—that the Government may or may not choose to exclude, depending on the nature of the peacekeeping mission.

If a peacekeeping force is part of building a justice system and there is a functioning justice system in the country, it may be that the Government may choose to make some of those crimes part of it. On a wider picture, giving that power to the Secretary of State, when it is done on an ad hoc basis, mission by mission, will produce uncertainty and lack of clarity about what crimes will be prosecuted. That is something it is quite important to be really clear on, because if anything is amended in the Bill now, it is a very clear and simple statement that no international crimes are part of this Bill; they are all excluded.

Martha Spurrier: The danger of secondary legislation for lawyers is, of course, that, as the Committee will be aware, it simply does not receive the parliamentary scrutiny that primary legislation would. The very real concern with this delegated power is that, as Clive said, you could end up taking away or adding really serious international crimes; you could also conceivably say that the Minister might, by secondary legislation, make changes to the Human Rights Act. That would be pretty unprecedented in parliamentary terms. We have seen over the past few months with the coronavirus regulations how much the state can do without parliamentary authority. We are deeply concerned about the extension of the use of secondary legislation to make such substantive changes that will impact on people's rights.

Q135 Chris Evans: Before I move from the criminal to the civil side, I want to talk about the definition in clause 1 of the Bill. Do you think that is a sufficient

definition of "overseas operations"? To explain my thinking, technology is moving at such a pace that we already read reports that future warfare will not include boots on the ground; it might be drones or other technology fighting that, and that leaves open a whole new area of potential laws that could be broken or crimes that could be committed. Do you think there is enough detail in that for overseas operations to be covered by the Bill, Mr Baldwin?

Clive Baldwin: No, for the reasons you say. My organisation works a lot on these situations of violent conflict and the intersect between human rights law and the law of armed conflict, and we are seeing a breakdown in what is the beginning and the end of an armed conflict, what is the battlefield and what decisions are made in which country—you mentioned drones, but there are other decisions made within a country, and cyber-warfare is coming.

The artificial distinction of an overseas operation with a clear beginning, a clear theatre and a clear end is one that is very much breaking down. The distinction of when an armed conflict begins and ends is becoming murkier in many ways, especially non-international armed conflict. The idea of having one rule for overseas operations and one for domestic operations will be increasingly artificial, and that lack of clarity about the real application of such situations and such laws will be another danger of this Bill.

Martha Spurrier: The definition, as Clive says, is unclear but it is also over-broad. In my mind, there is no justification for including in that definition things such as peacekeeping missions. What the definition should be focused on is restricting those powers to active hostilities, which could then include, as you say, a future-looking way of envisaging modern warfare, but should still be restricted only to active hostilities. There is simply no justification for taking these extraordinary powers any wider.

Q136 Mr Jones: How would this interface with United Nations peacekeeping operations? In those situations, you often have UK military personnel under the command of non-UK personnel. Do they have separate laws governing specific UN operations? How does it work in practice?

Clive Baldwin: Speaking from personal experience in Kosovo and Bosnia, and from the experience of my organisation, the rules and laws that apply to overseas armed forces in these operations vary very much from time to time. You may have formal peacekeeping operations, where the armed forces have to act as domestic police officers and do domestic policing work, or you may have a strange and unclear overlap. To some degree, that was the situation in Iraq in the last decade, especially as the occupation formally ended after one year in 2004, although British forces remained for four or five years after that with special powers. Sometimes you have stated forces agreements between countries, and sometimes you do not, so it is very unclear. The actual criminal law, and crimes that have been committed by forces or that are alleged to be committed by forces also vary from war crimes in the battlefield to war crimes in occupation, but if you—*[Interruption.]*

The Chair: We cannot hear you, Mr Baldwin, because we have a Division in the House of Commons that requires the bell to ring. I am suspending the sitting for 15 minutes and we will come back to your answer to that question. The Clerks will remain in the room, so if there are any unexpected issues they will remain in contact with you.

4.21 pm

Sitting suspended for a Division in the House.

4.36 pm

On resuming—

The Chair: We are formally resuming proceedings. I ask Chris Evans to continue his line of questioning. When Mr Jones comes back, I will ask him whether he wants to resubmit the question that he asked before the suspension.

Q137 Chris Evans: As I said before we left for the vote, I want to finish off with a few more questions about the criminal side, and then move on to the civil side. As the Bill stands, it affects future conflicts. Is there a case to make it retrospective to protect veterans from other foreign conflicts, such as Iraq and Afghanistan?

Clive Baldwin: If the Bill were made retrospective, and I think it is not quite clear whether it would be for existing investigations that have not proceeded to prosecutions, but even if it were, I think that creates even more problems. With the ICC, there is currently a preliminary examination, which might then proceed to an investigation, for the reasons previously stated. More broadly, we would say that the Bill does not fix any of the problems about criminal investigations, because part 1 is trying to limit prosecutions, and there have been so few prosecutions in any event. We would say the problem recently in Iraq and Afghanistan lies with the lack of prosecutions dealing with the evidence that some more crimes—limited, but some—were committed. That has been the problem.

Martha Spurrier: I agree with Clive. The Bill is a huge barrier to victims, as I have said, whether they are civilian or service personnel seeking justice. It has no bearing on the problem that it is purporting to solve and it will make accountability for human rights violations and serious crimes harder. To make it retrospective would simply enlarge the scope of what is already going to be a bad law.

Q138 Chris Evans: The huge issue for veterans groups is that repeat investigations are placing a huge strain on our service personnel. I think that is really the intention of the Bill—to remove the stress and tension that they feel, once they have served the country. In your view, is the Bill getting to the heart of that problem?

Clive Baldwin: Not at all. We have been following and looking at the issues in Iraq, particularly, and in Afghanistan, and not just with the UK, but also with other countries. The problem on the criminal side is that the military criminal justice system has not shown itself fit for purpose in these particular situations of overseas investigations, which are very complex. We need a system that is fair, speedy for size, transparent, effective and independent. We would say that you start with trying to look at the problem and fixing that, so that there are investigations on the criminal side first that are as speedy as possible and fair. Once you fix that, you can

look at what other measures might be needed. This problem starts with the prosecution side, which, as I said, has not in itself been the issue, because there have been so few prosecutions.

Martha Spurrier: That is absolutely right. The answer to the stress faced by service personnel is to deal with investigations: to make them thorough, to make them independent, to make them fast, to get them done to a high standard, and also to offer proper support to service personnel and victims. You heard from Major Campbell today, and he has been clear in his public statements that he does not feel that the Ministry of Defence supported him through the repeated investigations he faced. Presenting the Bill as a solution to what people like Major Campbell have faced is, frankly, offensive to the trials he has been through. It is not an answer to that problem. Nowhere on the face of the Bill does it deal with investigations.

Q139 Chris Evans: There are two questions that come up there: first, in the light of what you just said, how could the Bill be improved? Secondly, as the likelihood of a prosecution is, as you said, not very high anyway but is now less likely with the Bill, what are the chances that the rule of the law of armed conflict could be pushed to the limit with the Bill?

Clive Baldwin: To answer the second question on the law of armed conflict, you say "pushed to the limit", and, as I said on one particular element, if it starts to look like or resemble a statute of limitations on war crimes, that does violate a basic principle of the law of armed conflict. If you are suggesting that anyone would then feel that they could push any other crimes, or commit crimes with impunity, that may or may not be the case, but it would certainly encourage people to delay investigations to cover up, which is something that we have seen in Iraq and Afghanistan.

Also, the UK has a fairly poor record in actually prosecuting crimes committed overseas, despite there being public inquiries and investigations. Only when you have some of the clear cases of torture being prosecuted do people become aware of what is or what is not torture. One example from Iraq relates to torture practices, such as sensory deprivation and hooding, that the UK said in Northern Ireland 40—then 40, now 50—years ago were unacceptable, and should not recur. They started recurring in Iraq. You might say that that was because there has not been a clear prosecution of such cases as torture. It took an English judge in one of those civil claims in the past few years to say that these practices should have no place in the 21st century. That is why you need some litigation. Of course, the innocent and the accused who have not committed any crimes also get tarred with the same brush if these investigations go on and nobody gets prosecuted. You need a prosecution to clearly identify the few people responsible for war crimes, and to make sure that those individuals are held responsible and not the armed forces as a whole.

Martha Spurrier: Clive has covered the second question, so I will take the first one. When you start with a Bill that does not deal with the problem you are trying to solve, it is quite difficult to answer the question of how to make it deal with that problem. There are lots of practical things that the Government could do to try to make investigations better. The recommendations from the Service Justice System review would be a good place to start: issues about things such as independence and fast pace, and doing basic investigative things like taking witness statements promptly, gathering forensic evidence effectively, and so on. All of those things can and should be done, and they should be a matter of priority. The Bill cannot and will not do any of those things.

You could amend the Bill to knock off some of its most egregious aspects. You could include torture, war crimes and crimes against humanity in the schedules. You could remove the triple lock by taking away Attorney General consent, by removing the presumption against prosecution in relation to the time limit, and by balancing out the factors that a prosecutor would have to consider before proceeding with a prosecution. That would not cure the Bill and would not make it a good piece of legislation, either from the perspective of accountability, justice and human rights, or from the perspective of trying to solve the problem that the Government purport to be wanting to solve.

Q140 Stuart Anderson: Mr Baldwin, you said that the legislation could encourage soldiers to commit crime with impunity. Will you clarify that it is a piece of legislation that you think will then encourage soldiers on operations to commit crimes?

Clive Baldwin: To clarify, I was not saying that it would encourage it. I am responding to the question that seemed to be saying, "Would it lead to anyone trying to stretch the law of armed conflict?". If a law creates impunity for offences and makes sure no one gets prosecuted, it may make those offences more likely. I would repeat that torture was admitted but never prosecuted in Northern Ireland in the 1970s, and the same techniques—the same type of torture—was repeated in Iraq in the 2000s. That is because you need prosecutions. You need people to be aware that they will face prosecutions for an offence. If they perceive that an offence will not be prosecuted after five years, it will make it more likely even for the investigations to be delayed to that moment and for offences not to be seen as, very clearly, "This is criminalised. This is unacceptable. These are crimes that will be prosecuted."

Q141 Stuart Anderson: That is the bit I want to challenge. Every soldier going on operations knows the rules of engagement and knows the law—what they can and cannot do. That will be crystal clear. If you are saying that because of the Bill we would brief people to say "It's five years and then you're okay"—nothing in any military teaching or doctrine would say that that is the case. I think you could be doing what we would call in the military making the ground fit the map. You are taking something and adjusting it to fit a discussion. I cannot see any military personnel being briefed that they are immune from prosecution because of the Bill. Would you agree with that, or do you still think that they would be briefed that there is impunity?

Clive Baldwin: I do not think anyone would be briefed. When I was involved in training the armed forces in detention we were very clear, and everyone was very clear—these are the crimes. What has been interesting, as well, though, is that there are some elements which are just, traditionally, not being prosecuted in the United Kingdom. One of the keys is that senior people do not get prosecuted for war crimes in the United Kingdom—senior military people, even Government Ministers—under

the principle of command responsibility, which is an international element of war crimes. It was put into the International Criminal Court Act 2001 in the UK, but to my knowledge and others' no one has even been investigated under that.

It was only when I used to brief people in this country and other countries about that element, people sit up and take notice, because it makes people aware that as a commander you could be criminally liable if you fail to prevent war crimes or if you fail to prosecute them. It is elements like that—you only become aware of that when you actually see people being prosecuted for it and know that it is liable. Again, if it comes after five years it is much more difficult and there is a presumption against prosecution: that is why the words matter. Something like a presumption against prosecution—it sounds like it would be very difficult, it would be exceptional, to prosecute. That would send a very difficult message, both internally and externally in the rest of the world.

Q142 Stuart Anderson: Thank you. Ms Spurrier, to continue on your point, you have raised quite a lot of things that you would like to take out of the Bill, which would leave pretty much nothing in it, so my question to you is would you support any Bill that protected our service personnel overseas, and what would that look like?

Martha Spurrier: I absolutely would support a Bill that protected service personnel, because, as I am sure you know, Liberty has done a lot of work supporting military personnel and their families to find justice. What I think about this Bill, as I have said, is first that it is setting up a solution to a problem that is often mis-stated; and then the solution does not fit the actual problem.

In my view what service personnel need, to be protected, is to have an absolute assurance that any investigation that they face will be dealt with fairly and independently, and to an extremely high standard. One would hope, therefore, that that would mean that they do not have repeat investigations hanging over their heads for many years, which obviously is an unenviable and miserable situation for any human being to find themselves in—but that Bill will not deal with this.

I appreciate the lens of saying that it will create a culture of impunity, in the sense that I do not think anyone is suggesting that you would go out to the battlefield and commit a crime in the hope that you could delay being noticed for five years; but the fact is that there are plenty of reasons why five years might elapse before an effective independent investigation can be undertaken, either to exonerate someone who has wrongfully been accused, or to convict them. That could go for torture survivors, for example, who are often not able to come forward for a number of years because of the trauma they have faced, and for serving military personnel, who often do not feel able to come forward, including if active hostilities have been continuing for that whole period of time.

I do not think it is about saying, "Well, let's just bin the Bill, and then do nothing." There are plenty of constructive things that one can and should do in order to support military personnel. I just do not think that this Bill achieves those things.

Q143 Mr Jones: A theme that has come out throughout today's discussions is around timely and proper investigations. Is there anything you could put into the Bill, in terms of investigations, that would at least be a move in the right direction and improve the situation?

Clive Baldwin: It is important to distinguish between the three types of investigation that the MOD and service personnel have faced in the last 20 years. One is public inquiries, which should be about the general situation and general problems. They should be for learning lessons and to find out the truth about what went on. There are then civil claims that are brought against the Ministry of Defence, sometimes by service personnel and sometimes by others who have claimed to be victims, some of which have been upheld and some of which have not. Then there are criminal investigations.

I am not sure about this Bill. Improving investigations would be better done in a wholescale reform of the military criminal justice system, which we hope will happen in the next armed forces Act and has been promised for many years, that is based on rights, fairness to the accused, those investigated and alleged or real victims, and some basic human rights principles, such as double jeopardy, which has already been mentioned. Generally, no one should be prosecuted twice, once finally acquitted or convicted for the same offence, and they should not face repeat investigations for the same offence.

Strengthening of those conditions and some fundamental principles, not just of human rights law but of English tradition, such as habeas corpus, having judges control detention and having every detainee brought before a judge, not only deters abuse but protects those doing the detention, because they can say, "We had a record and the judge controlled the detention." Records made at the time make it much easier to investigate afterwards. There are a lot of recommendations for the justice system. They are probably better done in a military justice reform Act rather than in this Bill.

Martha Spurrier: I agree with Clive. There are plenty of good and constructive things that one could do to the military justice system in order to make it fairer for all concerned. This Bill does not do that.

There is a danger in saying that the way to cure the deficiencies in the Bill is to effectively add a section on investigations. That would deal with the fact that investigations are missing, but it would not deal with the fact that what you have in the rest of the Bill is a system being set up that creates a culture of impunity in the armed forces. It means that bringing criminal prosecutions for the most serious offences imaginable will become much harder. That is why I think both Clive and I are now saying that this simply is not the vehicle.

This Bill cannot be cured by adding things in about investigations. That is something that will have to be done separately. There is a real danger of losing focus on the egregious parts of this Bill, which will damage the standing of the armed forces abroad and damage the UK's reputation as a leader in human rights. That is why you have seen many people, including people from the military, coming out with grave concerns about this Bill, whether you take Lord Guthrie or the Judge Advocate General. These are people with high standing in the

military who have real concerns about what this piece of legislation could do to the integrity of the British armed forces.

Q144 Chris Evans: This morning we heard that there were deep concerns about the six-year limit for bringing civil cases against the Ministry of Defence. How do you see the problems we heard about? Many medical conditions take years to come to the fore and be seen as damaging. There are cases where people have been locked up abroad under the Terrorism Act 2000, unfairly sometimes, for over a decade. How do you see the time limit developing for civil cases for those who bring claims against the MOD, both as serving personnel and as victims of MOD decisions?

Clive Baldwin: On the international side, which is what my organisation works on—I will be brief, because Liberty's focus is on this—there are many reasons why claims, brought both by members of the armed forces and by others in different parts of the world, may take some time. We have seen them on rendition cases and others in the last year. It is partly because people may not be aware of damages in a case, or because evidence did not come out, as the only people aware of the crimes that may have been committed were those who suffered them and the persons who were responsible, or because other types of claims could be made. There are many reasons why, particularly for overseas operations, flexibility around time limits would be vital in order to secure justice.

On an international level, particularly when it comes to torture, there are quite a lot of international standards that say countries need to give an effective remedy to people who suffer torture allegations. It needs to be a fair system. Sometimes it is not possible to have trials—this has been mentioned about the Kenya cases from 70 years ago—but it still needs to be a fair system that has a degree of flexibility. Something that looks like a very hard time stop perhaps risks creating some severe injustice.

Martha Spurrier: As someone who has practised law and argued these kinds of cases before judges, equitable is the watchword. Bright-line rules, in the context of what are often extremely complicated textured cases, very rarely give out justice or achieve something equitable for either victims or perpetrators. The courts have a whole range of powers available to them, in *[Inaudible]* and beyond, to prevent cases from being brought—be it before or after a time limit—if those cases are unmeritorious or are being brought for abusive reasons. For example, you can have your legal aid certificate removed, or your claim can be struck out. You can have your funding withdrawn if any dishonesty offences are proven. There are a whole array of tools that judges can and do use routinely to make sure that justice is done, and that includes justice being done in a timely fashion.

The danger of putting a hard stop is that the kinds of cases that you have alluded to—whether you are talking about noise-induced hearing loss, some other complicated medical issue or an issue entirely beyond the control of any of the parties to the litigation. That case, falling three days the wrong side of that rule, would not be heard even it was a meritorious case. That seems to me to be arbitrary injustice. What should instead continue is judicial discretion over what is equitable for both parties. Of course, both parties will be represented and they can—and, believe me, they do—argue very forcefully on both sides, either to extend or not extend time limits. Again, it feels to me as though people speculate that this is a problem that exists in the justice system, but it is certainly not one that is statistically significant or that I have ever experienced as a lawyer.

Q145 Chris Evans: Would it be fair to say a civilian has more rights than a veteran or service personnel if they want to bring civil cases against the Ministry of Defence?

Martha Spurrier: Sorry, could you say that again?

Q146 Chris Evans: I have a very thick accent, as you can tell. Would you say it is fair to say that a civilian has more rights, because of the six-year time limit, than a member of the forces in bringing a civil case against the Ministry of Defence?

Martha Spurrier: Yes, in the sense that at the moment, everyone is equal before the law, and that is how it works. You can pitch up and argue that a case should be struck out because it is out of time, or that it should not be struck out because it is out of time. There is no weighting according to whether you are a civilian, a claimant, a defendant or a member of the armed forces. Of course, the proposal in the Bill is that civilians will be disadvantaged more greatly than service personnel by the longstop. That is an unjustifiable weighting in favour of service personnel, in the same way that the weighting works on the criminal side, where presumption goes all in favour of military personnel and all against victims of military crimes.

Chris Evans: Mr Baldwin, do you have a view on that?

Clive Baldwin: I have nothing to add to what Martha said.

Q147 Chris Evans: Who does the six-year time limit benefit, then, in your view, Ms Spurrier?

Martha Spurrier: If the six-year time limit came in, it would benefit the Ministry of Defence and the Government, because these claims are, by and large, being brought against the Ministry of Defence, either as an employer or as a detaining official, or against the Government as a policy maker. It is absolutely critical that the forces of the state—again, I have acted for countless individuals and families where bringing a claim against the state is no mean feat. You are usually against a range of senior and powerful lawyers, and any additional disadvantage that you face makes it incredibly difficult to seek justice. So, unquestionably, this is a power that plays in favour of the state, and state agencies, and plays against individuals, whether those individuals are service personnel or civilians.

Clive Baldwin: To add to that, it is so clear, when it comes to civil claims, because they are public claims, that the beneficiary of any limit to those powers would be the British Government and normally the Ministry of Defence, because that is what the claims are made against. That includes service personnel bringing claims; it includes people in other countries bringing claims who in some cases have been the subject of abuses. That is the beneficiary. Of course, you still have to have a fair trial, but in most cases it is going to be the MOD.

When it comes to the investigations, the Government, when it is a civil claim, which is not against individual personnel, have a duty of care towards their personnel and ex-personnel. Those are not investigations and claims against those individuals; they may have to give evidence and that has its own degree of severe stress,

but it is not a claim against individuals. That is why it is so important to separate the public law issues, the civil claim issues, and the criminal law issues.

Q148 Chris Evans: Mr Mundell has indulged me somewhat—I think over-indulged me—so this will be my final question. Clause 12 of the Bill seeks to amend the Human Rights Act 1998 to require the Secretary of State to consider derogation from the European Court of Human Rights. What is your view on that clause in particular, given your background? We will hear from Mr Baldwin and then Ms Spurrier.

Clive Baldwin: On the broader issue of derogation from human rights, that is part of human rights law; that is part of the European convention. It is actually something I proposed in Kosovo 20 years ago—that there would be a derogation then to reflect the realities of the situation and still be able to detain people according to the law. It is also important to realise that derogation is not exempting anyone from human rights law; it is just modifying it to deal with emergency situations. That is the case particularly on detention: it does not remove the need for detention according to law. It does not remove the need for habeas corpus, to bring someone before a judge. It could mean that someone is before a judge within weeks rather than days, perhaps. This does not mean that human rights law does not apply.

Chris Evans: Could I just—

Clive Baldwin: Sorry, it is extremely complex.

Q149 Chris Evans: Could I just come in with one word there? The phrase is "consider" derogation. Do you think it is significant that that has been written into the Bill? Sorry to interrupt there; I could see that you were in full flow.

Clive Baldwin: Effectively, Governments always have to consider derogation, so I do not think that legally it changes anything. Human Rights Watch proposed some years ago to Government that they should consider this when dealing with the issue of detention overseas. You have to prepare it—I do not know of any situation where a Government has actively declared a state of emergency, which is what you need for derogation, in another country, and a lot of these situations are multinational peacekeeping and other operations, so you cannot really have one rule for the UK armed forces and one for others, normally.

So it is quite a complex situation. Also, derogation changes the law; it changes the law that applies, so again, it should not be done by just a secondary declaration by a Minister or Secretary of State. It would need a change in law. But we would say that preparing for these situations, preparing for detention in armed conflict or peacekeeping, and having a law that is clear is something that people have been saying that the armed forces need for the last 20 years. The armed forces I know say that they want clarity when they go to detain, which means knowing what law they should apply, how they detain and to whom they should apply. Giving them that clarity in advance would be of great interest. Derogation, when applied properly, is a strengthening of human rights law. It is not an exclusion of human rights law, but only when it is applied carefully, properly and not by just some ministerial fiat, as it could risk becoming.

Martha Spurrier: As Clive says, the power to derogate is a really critical part of the human rights framework; it is the power to suspend rights or to restore rights, and that is why it is tied to a state of emergency. Writing that requirement to consider into the Bill, on a narrow view, changes very little in relation to the legal position.

The concern, of course, is when you take a wider view and look at this Bill as a whole, which very much signals the desire to water down the human rights arrangements; and then you look at the wider agenda more generally, which is a Government with a manifesto commitment to update the Human Rights Act and an ongoing process to look at access to judicial review, and whether certain Government decisions should be shielded from that mechanism of accountability.

So, our concern is not so much about the narrow wording of that clause, but about a culture of watering down Executive accountability that crops up manifestly in this Bill but also in other places in the Government's agenda, which we would say overall will make it very much more difficult for ordinary people—be they soldiers or civilians—to hold powerful people to account.

Chris Evans: Thank you both. No further questions from me, Mr Mundell.

The Chair: I will call Carol Monaghan, because we can go on until 5.15 pm, and I want Carol to have the opportunity of asking her questions.

Q150 Carol Monaghan: Thank you, Mr Mundell. A lot of my questions have already been asked, so I will not be too long.

I just want to ask a few questions about part 2 of the Bill. In the briefing sent by Liberty and Human Rights Watch, Amnesty International and I think a few other organisations, one thing it says is,

> "It is notable that by far the largest proportion of claims against the MOD between 2014 and 2019 were brought by service personnel seeking compensation for injuries."

I asked the last witnesses about this, as well. Have we got a Trojan horse situation, where part 2 of the Bill has been snuck in off the back of part 1, so veterans and personnel think this Bill is about helping them, but in actual fact it is putting barriers in their way?

Clive Baldwin: The submission was actually from Liberty and Amnesty; I will not have Human Rights Watch take credit for that. However, in some ways, absolutely, by removing the power of anyone, or by having this backstop, to take action against the Ministry of Defence, it will definitely affect members of the armed forces. So, for some it will be removing protection.

Q151 Carol Monaghan: Martha, do you agree with those comments?

Martha Spurrier: This Bill protects the MOD and the Government much more than it protects anybody else.

Q152 Carol Monaghan: We have been told that the six-year limit is actually to encourage prompt claims, which might be one line of argument. Are there any circumstances in which you can see that personnel would not make a claim within those six years? Martha, do you want to start with that one?

Martha Spurrier: Yes, I think there are plenty of circumstances in which there would be entirely fair and honest reasons for not starting a claim promptly. The one example that I have already alluded to is the case of noise-induced hearing loss, where an injury may develop over a matter of decades of service, and the date of knowledge may occur after the six-year time limit has already elapsed, and then you may be prohibited from bringing a claim for really no good reason.

That is why you need to be able to have flexibility in the hands of the judiciary when considering these claims. That is not to say that claims that could have been brought promptly but were not should be allowed to proceed; maybe they should not be allowed to proceed. However, that is not what this longstop will do. This longstop will just create a bright line that creates injustice for people who fall the wrong side of it, even though they may have perfectly good reasons for doing so.

Q153 Carol Monaghan: Thank you. Mr Baldwin, do you have any additional comments to make?

Clive Baldwin: Just to add that, although some time limits on civil claims are quite common in systems, there needs to be that element of flexibility or fairness. Can we imagine situations in which there are good reasons not to bring claims within that time limit? Quite a few, particularly for overseas operations in which, as we said, the situations are complex and people may not even be aware of their rights, or rights to bring a claim, until later, or even until they have left the armed forces. That is why the overriding principle has to be one of fairness. People may need to justify why they are bringing a claim later than they could have done, but they may have good reasons to do so, and the judiciary needs that element of flexibility to respond to those situations.

Q154 Carol Monaghan: This is my final question to both of you. Do you feel that veterans are being misled by the Government spin around the Bill, particularly with regard to part 2?

Clive Baldwin: Quite possibly. You would have to ask the veterans. The idea is that the Bill will protect veterans, but as we said, on the civil side, it will clearly take away some rights, and on the criminal side, it will not stop investigations; it may stop prosecutions, but very few have been happening anyway. It increases the risk of international criminal investigations against members of the armed forces and others if the UK does not appear to have a credible system of prosecution of international crimes. Yes, the Bill, in its current state, does not seem to strongly protect veterans and other members of the armed forces from some of the real injustices that some of them have suffered.

Martha Spurrier: I agree with that proposition. The Bill does nothing to deal with slow, ineffective or unfair investigations, which is what service personnel are complaining about. Certainly, the families and the people who Liberty has represented are often bringing cases against the Ministry of Justice or against the Government after years of banging their head against the wall of institutional power. The Bill will do nothing to help those people seek justice and accountability.

The Chair: If there are no further questions, I thank our witnesses, on behalf of the Committee, for their evidence this afternoon. That brings us to the end of our oral evidence session today. The Committee will meet again in this room at 11.30 am on Thursday to take further evidence.

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

5.12 pm

Adjourned till Thursday 8 October at half-past Eleven o'clock.

Written evidence reported to the House

OOB 01 David Lloyd Roberts, MBE, LLM and Charlotte Harford, PhD