

PARLIAMENTARY DEBATES

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GENERAL COMMITTEES

Public Bill Committee

OVERSEAS OPERATIONS (SERVICE PERSONNEL AND VETERANS) BILL

Sixth Sitting

Wednesday 14 October 2020

(Afternoon)

CONTENTS

CLAUSES 1 AND 2 agreed to.

CLAUSE 3 under consideration when the Committee adjourned till Tuesday
20 October at Twenty-five minutes past Nine o'clock.

Written evidence reported to the House.

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

not later than

Sunday 18 October 2020

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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 (*Ishwyn*) (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**

Public Bill Committee

Wednesday 14 October 2020

(Afternoon)

[GRAHAM STRINGER *in the Chair*]

Overseas Operations (Service Personnel and Veterans) Bill

Clause 1

PROSECUTORIAL DECISION REGARDING ALLEGED
CONDUCT DURING OVERSEAS OPERATIONS

Question (this day) again proposed, That the clause stand part of the Bill.

2 pm

Mr Kevan Jones (North Durham) (Lab): I hope everyone had an enjoyable lunch. When we left off, I was still talking about investigations and what came through in the evidence we took. Mr Stringer, you and I are old enough to remember when Public Bill Committees did not hold evidence sessions. The process is far better now, because it informs the debate and our progress. Certainly, our witnesses gave valuable evidence, and from a variety of different positions. The one thing that did come through, however, was the lack of any reference in the Bill to investigation.

This morning I referred to Nick Parker's comment that

"part 1 of the Bill focuses entirely on the process of prosecution, whereas for me the big issue here is the process of investigation"—[*Official Report, Overseas Operations (Service Personnel and Veterans) Public Bill Committee*, 8 October 2020; c. 94, Q188.]—

and of reinvestigation. Major Campbell gave some very good evidence—I think everyone had sympathy—about how he had spent 17 years under investigation and reinvestigation.

Last Thursday we had the Judge Advocate General before us. I was amazed that he had not even been consulted on the Bill before it was introduced. I would have thought that he, as the leading judge in the service justice system, would be a good starting point to run things by. He said in evidence:

"My concern relates to investigations, not prosecutions; but there are a number of issues"—[*Official Report, Overseas Operations (Service Personnel and Veterans) Public Bill Committee*, 8 October 2020; c. 115, Q231.]—

that need addressing. He also accused the Government of

"looking at the wrong end of the telescope"—[*Official Report, Overseas Operations (Service Personnel and Veterans) Public Bill Committee*, 8 October 2020; c. 116, Q246.],

which is a good analogy for how they have approached the subject. We have been blindsided by the disgraceful case of Phil Shiner, which concentrated on the number of vexatious claims. I will put on the record again that I thoroughly condemn that individual, but I think that the process that we had did deal with him, in terms of regulation.

I will now turn to the two amendments that stand in my name, amendment 2 and new clause 6. We did not get a chance to talk about amendment 2, which is also about investigations. It seeks to insert into clause 3:

"the thoroughness, promptness and efficacy of any ongoing investigation into the alleged conduct or any relevant previous investigation, and the reasons for any delays in such investigations".

The purpose of that is to ensure that we get timely investigation. I will move on shortly to new clause 6, which talks about judicial oversight, because that is important, but we do not want to get into a situation in which the service military police or other people simply say, "Well, we're not going to investigate because it's too difficult." We need oversight, but amendment 2 puts the focus on looking at the investigation, not only to ensure an adequate investigational process, but to give particular weight to the prosecution. In considering a case, therefore, a prosecutor should be able to consider the efficiency of the process and previous investigations that have taken place.

As a statement of principle, I would like the Bill to consider more effectively the way in which the investigation function in the military justice system can be amended. I am sorry that the Government do not seem to accept that that should be part of the Bill. I think I referred to it this morning. At least I know why the civil servants are not accepting that. The obvious thing to have done with the Bill would have been to have put it with the armed forces Bill that will be coming through next year. If there is one thing that I know from my experience of civil servants, it is that they like tidiness, and this process is not tidy. That would have been a better way of doing it.

Liz Twist (Blaydon) (Lab): Does my right hon. Friend agree that witness after witness in the evidence sessions pointed to the centrality of good-quality investigation in removing the problem of vexatious and pluralistic claims?

Mr Jones: Yes, and in a moment or two I will cover the important point that my hon. Friend raises. It is about efficiency in dealing with claims through an early process, so that when the evidence is not going to go anywhere, a claim can be dropped. As the hon. Member for West Dunbartonshire said this morning, that is good for the efficiency of the system as well as for the individual. As Lieutenant Colonel Parker said, it is not just the prosecution case, but the mental torture that people go through when waiting for that. It would help servicemen and women going through that process to have an early resolution.

We did not get to discuss new clauses 6 and 7, so I will speak to them now. I understand, Mr Stringer, that they will be voted on at the end of this process. Is that correct?

The Chair: We are debating clause 1 stand part and we will vote on clause 1 stand part at the end of the debate.

Mr Kevan Jones: One of the important things about the process is that we have judicial oversight of whatever happens. That is important for making the system robust and fair, both for those complaining and for those accused, as well as in relation to our international obligations. We have been a beacon of light in ensuring that we have an independent judiciary in this country,

and it is important that we have oversight of that. Judge Blackett suggested things that could do that, and that could also make the system more efficient.

New clause 6 proposes to bring in judicial oversight of investigations. It would allow the judge advocate, once an investigation has come to its preliminary conclusions, to look at the evidence in the allegation as soon as possible, but no later than 6 months, and the judge, not the Ministry of Defence or the chain of command, would then make an assessment. It is important that the assessment is made by the judge advocate, who is part of the judiciary. The judge advocate would have

“the power to determine—

- (a) that no serious, permanent or lasting psychological or physical injury has been caused; and order that the investigation should cease”.

If, at that stage, an indication was taken that the case was going nowhere, that would knock out all the vexatious cases, which is what we are trying to get at here. It would allow the individual who has been accused to move on. It would have the strength of having a judge make that decision. The clause moved this morning takes away more minor offences, allowing us to get down to the serious cases that need to be investigated and prosecuted.

Chris Evans (Islwyn) (Lab/Co-op): My right hon. Friend is rightly seen as an expert on defence matters, having been in this House for a number of years. I wonder whether we could have the benefit of his experience. In his experience, both as a Minister and as a member of the Bill Committee, is he open to the suggestion that a number of these investigations are taking so long because of failures within the Ministry of Defence, and that that is why we have arrived where we are?

Mr Jones: Yes. That is the problem. How do we get at it? Is it about a lack of resource? I think it is. Going back to Iraq and Afghanistan, as I said this morning, there was huge pressure from all sides, including the Conservative Opposition at the time, that these things had to be seen to be investigated to the nth degree. There was a culture, which led to a resistance to say in some cases, “There is no evidence to stand those.” If that was done politically, I understand why people have issues with that.

However, if there were a judicial process, which new clause 6 provides for, overseen by a judge, that would give confidence to the public and the international community, in relation to our obligations, that this was being done not for political reasons but because a judge had determined independently what the facts are. It would certainly help.

Martin Docherty-Hughes (West Dunbartonshire) (SNP): In response to a question the right hon. Gentleman raised last week, Judge Blackett said, in relation to the Magistrates’ Court Act 1980, that

“a great raft of those allegations in IHAT and Northmoor would have gone with that.”—[*Official Report, Overseas Operations (Service Personnel and Veterans) Public Bill Committee*, 8 October 2020; c. 122, Q254.]

Is that not the right hon. Gentleman’s point? Much of what the Bill seeks to do could easily have been dealt with through existing legislation.

Mr Jones: Well it could, but I am a defender of the service justice system, because I think it is unique. There are those who want to abolish the service justice system, who ask, “Why aren’t these tried in the civil courts?” I am against that, and I always have been, because of the unique nature of the circumstances and the way the system works. It is an independent judiciary, not part of the MOD, so it has respect. Courts martial understand not only the special nature of service, but the circumstances that people are in.

My fear is that this Bill will strengthen those who want to sweep away what they see as giving special privilege to the armed forces. I do not see it that way at all. It gives those men and women who go before it the chance to be judged by an informed judiciary, which deals with certain cases. That is the important point. Again, it comes back to judicial oversight.

New clause 6 states, in subsection (3)(b), that a judge can determine

“that the evidence is of a tenuous character because of weakness or vagueness or because of inconsistencies with other evidence, and that it is not in the interests of justice to continue an investigation”.

The judge would look at the evidence and make a judgment about the validity of the original claim, as well as what the investigation has thrown up. If the judge were subsequently to decide that the case should go no further, that is defensible, because it would be the judge’s decision.

Subsection (3)(c) presents the other side, where the judge may decide

“that there is merit in the complaint; and make directions as to the timetable and extent of further investigation.”

Clearly, if the judge looks at the evidence after six months and says, “Actually, there is a case here, and further leads from the investigation need to be taken forward,” it is important that that is allowed to happen. That is not stopping prosecutions or interfering in any way with the investigative process; it is reviewing the evidence and whether it will go forward. It would also give directions to set a timescale for that investigation to be completed.

2.15 pm

In the Colonel Campbell case, he was investigated not only once, but a few times, for the same thing. Had this system been before a judge earlier, it would have stopped that type of reinvestigation of the same offence. It would also have given a judgment early, regardless of whether the original complaint was warranted. As the hon. Member for West Dunbartonshire said this morning, that is about making the system more efficient in the way it works, but it is also about being fair to the individual.

Let us take the example of an individual who has been accused of some type of crime, an allegation having been made. If that is reviewed by a judge after six months and the individual then knows either that it will be kicked out and go no further—that is the end of it—or that further investigation is deemed necessary, there is also a time limit or some indication of time. There would have to be a re-examination, so we might want to have a time limit whereby a judge says, “Right, come back within the next six months to complete the thing.” We all know the nature of investigations—they

might take longer than that, but at least we would have regular judicial oversight of the system, which we do not have today. That would be important.

I do not want to criticise the service police, because in some cases they have a hugely difficult job to do. It is not like going and investigating a house burglary in west London; it is often going on overseas operations to very difficult terrain. In some cases it is dangerous to gather evidence. In many cases we are dealing with different cultures and people for whom English is not their first language, so I am not criticising the service police. However, it would give them some rigour to know that, by a certain date, they at least have to come back before a judge to say what they have done in a certain case. In the cases that we have seen, a lot would have been fished out of this pool way before they got to the prosecution stage.

Martin Docherty-Hughes: Again, the hon. Member asked Judge Blackett question last week in relation to Marine A. Judge Blackett responded that

“a number of the issues here were raised by Marine A subsequently through the Criminal Cases Review Commission and back to the Court of Appeal, and they were never raised at first instance. Had he”—

Marine A—

“raised them at first instance—had all the psychiatric evidence that came out eventually appeared at the start—he probably would have been charged with manslaughter rather than murder”, —[*Official Report, Overseas Operations (Service Personnel and Veterans) Public Bill Committee*, 8 October 2020; c. 124, Q262.]

which is what he was charged with. It was actually on the second appeal that it was overturned and the prosecution was for manslaughter. Does the right hon. Member agree that the process is at fault and that, to improve that, the Government need to make substantial changes and investments in the process, rather than with the Bill?

Mr Jones: It is the process. I am glad that the hon. Member has mentioned the case of Marine A, because the way it was dealt with worries me. People might not be familiar with it. It was an individual who was on operations in Afghanistan and shot, on camera, a wounded Taliban fighter. That case did not come about through an ambulance-chasing lawyer; it came about because somebody filmed the shooting and was so horrified by it that they handed in the video. That was not an ambulance-chasing lawyer saying, “This man’s killed somebody in cold blood.” That case is important.

The process being adopted concerns me for two reasons. My first concern, on the point we raised last week, is about the support that servicemen and women are getting while they are going through the process. Clearly, in that case, the individual did something that goes against everything that members of the armed forces are trained to do. But when we look at the overall envelope of what he had been up to—the psychological trauma and the other things he had been through—we could explain it not as murder, but as manslaughter. Again, if that case had gone through this type of system, it would have led to those issues around the individual’s mental health, which do not excuse his actions but obviously had an impact on what happened, and to the first issue being seen as manslaughter, which would have been a fairer way of dealing with it.

My second concern about the Bill is that if that happened more than five years after that case, the presumption would have been not to prosecute. There

would then have been a political decision, because the Attorney General would be deciding on prosecution. That individual could then end up before the International Criminal Court, because we would deem that we had not prosecuted.

There was a media maelstrom around the case. As with many such cases that we have all dealt with, it got a nice headline in the *Daily Mail* or *The Sun*, but there were obviously more details to it. If we have a similar case in future on which there is to be a political decision, it will be a strong politician or Attorney General who will turn around and say, “Yes, I want to prosecute this person.” There would then be the danger of the International Criminal Court picking up the case. Whereas in the process that I am proposing in new clause 6, the judge would review all the evidence, including, in that case, whether he should have been charged with murder in the first place when it went to court or to appeal—and no, he should not have been.

As many Committee members have said, and certainly, having spoken to members of the armed forces and veterans, they do not want to be above the law; they want to be treated fairly. That is what we are here to ensure. I have spoken to the individuals involved in the Marine A case, who explained the reasons why it happened, which I understand. It did not fulfil the high standards that are expected of the armed forces. In that case, it is about being fair to members of our armed forces, and ensuring that we are doing the right thing. Again, the combination of new clause 8, which we debated this morning, and new clause 6 would start to reduce that pile of potential litigants, even if they came from vexatious lawyers or elsewhere.

The other issue, which I can never get my head around, is the idea that the same case can be reinvestigated, as in the Campbell case. That is just ridiculous. There must come a time when we have to say, “Well, it has been looked at in detail. There has been evidence.” There might be a delay to trawl for witnesses and other evidence, but in effect what that says is, “Basically, we will do a fishing exercise until we get the answers that we want.” That cannot be right.

My new clause 7 addresses some of the limitations around investigations. I think we on this Committee all want thorough investigations, and so do members of the armed forces; what they do not want is endless reinvestigations that go on for, in the Campbell case, 17 years. New clause 7 would put limitations on reinvestigation. The section applies where

“(a) a person has been acquitted of an offence relating to conduct on overseas operations,”

so it would apply to those individuals.

I know this is not within the scope of this Bill, and I am sure you would pull me up, Mr Stringer, if I mentioned other areas, but that is the problem with the title of the Bill: some of the things in here should apply to members of the armed forces if the offence was committed on the UK mainland, but they do not. That is why I come back to the point that it would be better to do these things in the Armed Forces Bill next year and to take a holistic approach. Obviously, there are political reasons why this Bill is being rushed forward, to meet a manifesto 100-day commitment. However, I think some of these

things should apply in the UK, but they will not with this Bill, and no doubt they will have to be picked up in the Armed Forces Bill.

The section also applies where

“(b) a determination has been made that an investigation into an offence relating to such conduct should cease under section (*Judicial oversight of investigations*).

(2) No further investigation into the alleged conduct shall be commenced unless—

(a) compelling new evidence has become available”.

Again, this is about trying to stop that reinvestigation, but having judicial oversight. The judge advocate determines “the totality of the evidence against the accused”,

and sees whether it is strong enough such that

“there is a real possibility that it would support a conviction.”

Let us go to the Campbell case: if that case came forward again, the judge would have to look at the evidence and see whether the material circumstances had changed since the last time the offence was looked at. The strength of doing it this way, rather than as proposed in this Bill, is that it is not about limitations of time and the presumption against prosecution; a judge will look at the evidence and there will be a process. That would avoid the reinvestigation of such complaints.

If there is compelling new evidence, I think we would all agree—not just in the military justice system, but in a civil case—that we would want it to be looked at again. That links to the time limits on investigations, which for the individual concerned would not then stretch out for an indeterminate length of time.

Martin Docherty-Hughes: Regarding proposed new subsection (a) on new evidence, in evidence to the Committee last Thursday, in response to the hon. Member for Wrexham, the judge advocate gave as an example the six Royal Military Police who were sadly killed at Majar al-Kabir in 2003. Would this not allow us parity of esteem in the international judicial system? If new evidence came out in Iraq, we would demand that the Iraqi Government prosecute the individuals responsible for the murder of those six Royal Military Police.

Mr Jones: Yes, I remember that case—it was awful, if you read the background to it. The Bill is basically saying, “We are going to do something different from what we expect of other people.” I am sorry, but that is just not acceptable. We have a high standard in this country of judicial law and the rule of law and, as I said earlier, we should be a beacon. We should say, “This is something we are proud of.” Anything that changes that would be detrimental, and not only to the armed forces, for the reasons that have been raised. It is just logic that, if new evidence comes forward in a case, it must be looked at; just to say that the reason it cannot be looked at is that it has gone past a certain time period is wrong. If we dismiss new evidence without looking at it and having any judicial oversight of it, that would be a mistake.

2.30 pm

In terms of whether this is something novel and new, it is not, because we already have it in the UK. The Criminal Cases Review Commission can review prosecutions, look at the evidence and, if it finds a flaw, refer them to the Court of Appeal. I wondered whether we could have something similar in this area, but that

would be cumbersome. What we need is to put cases before a judge, as at the Court of Appeal. I have had quite a lot to do with the Criminal Cases Review Commission—obviously not personally—regarding the Horizon scandal at the Post Office. Thankfully, last week it was announced that 44 convictions will be overturned. That is judicial oversight, and that is what is lacking in the Bill.

I do not doubt the Bill’s good intentions, but there are problems with how it has been done. Under new clause 7, new evidence would have to be compelling. It would not be a question of, “Can we have another trial of this case? or, as with the Shiner cases, where one case has been dismissed and a related one comes in, that previous case has to be reinvestigated all over again. The important point—I cannot reiterate this strongly enough—is that that limitation would be defensible in any international system because the scrutiny of the three stages mentioned in new clause 6, and as Judge Blackett said last week, would be done by judges and not, as the Bill proposes, by an Attorney General, who is a political appointment, with a presumption against prosecution.

As I look at the Bill, I think those things could be done now. The new clauses would certainly improve the Bill and get to the root of stopping vexatious prosecutions and investigations more effectively. I think there is a misunderstanding—I include the Minister in this—that the Bill will stop investigations within those five-year periods.

It is also important that we do not do anything to damage our international reputation. I looked at a tweet the Minister put out earlier this week. The linked article said:

“War crimes under international law in the Nuremberg sense, together with sex offences, are excluded from”

the effects of the Bill. The Minister’s tweet said:

“Perhaps worth reading this before going off on one about the Overseas Bill... Committee stage continues tomorrow, and I actually get a chance to counter some of the ridiculous narrative around it.”

We have not heard much from the Minister apart from his civil service brief.

The Minister for Defence People and Veterans (Johnny Mercer): Let’s not be personal, Kevan.

Mr Jones: I am not being personal, but a Minister usually does more than read what is in front of him; he takes notes and engages. My proposals should be looked at seriously, because they would improve the Bill. The Minister says he wants to work with everybody, but he seems to have deaf ears when people make suggestions that would not harm but improve the Bill. It is not just me saying that, as someone who is passionate about protecting the armed forces; that is the evidence we have taken through this process. As I said earlier, that is the good thing about the process.

What would be the argument against accepting the new clauses? The only one I can see is that the Government want to deal with this next year in the Armed Forces Bill. Fair enough, but put them in now. They can be done now. We will not end up with any additional costs of process—in fact, that will save money. I know we do not have a money resolution with this Bill, so we cannot propose things that cost money, but I doubt whether those proposals will. As the hon. Member for West Dunbartonshire said this morning, it is about making

[Mr Kevan Jones]

things efficient, and there are two wins here: one win with the process being slicker and quicker; and another win with the accused individual being dealt with fairly and robustly.

Turning to other parts of the clause, this morning we asked why five years, rather than 10, 15, 20 or whatever. I asked the Minister to justify that and I also asked about the numbers for who said what. He said they were in the impact assessment, but I could not find them when I looked at it at lunchtime in the Library, or where they are referred to. I would like the Minister to do what I thought he would do when he responded to my hon. Friend the Member for Portsmouth South, which is to say, “Well, five years has been put forward for X reasons and 10 years was seen as too long”—or something like that—“and these were the people who argued for each.”

On balance, I agree, that some such things are at the end of the day political decisions, but we did not get that sort of response. I would still like an explanation for the decision of five years. I do not think that is in the impact assessment, on which, likewise—I have raised this with the Minister on the Floor of the House—there is confusion on the number of claims and the potential of those claims. The figures vary from 900 to 1,000, but there is no breakdown at all of whether those claims are from civilians or from members of the armed forces making claims against the MOD.

The other thing that concerns me is the presumption not to prosecute. I know of no other system where the presumption is written into a Bill to state, before anything is done, that someone will not be prosecuted. Again, my fear about that is that it will be seen as interfering with process. I am sure some people in Committee are old enough to remember the time before the Crown Prosecution Service, many years ago—this is the reason why we had that in this country—when police investigated and did the prosecution as well. Anyone who wants to know the reasons why that system failed—for example, in the Horizon case to which I referred earlier—should read last week’s excellent report of the Justice Committee, which criticised the arrangement whereby someone was both investigator and prosecutor.

The presumption in this Bill is worse than that, because we are saying, “We will presume that we are not going to prosecute.” I know that Ministers have said, “This does not mean that cases will not be prosecuted”, and I accept that, but the decision on whether a case should be prosecuted should be down to an independent judicial process; it should not be in the hands of the Attorney General, a Minister or anyone else to decide whether a case goes forward.

Chris Evans: My right hon. Friend has touched on this before. The issue is not prosecutions but the actual investigations. The question to ask is, how do we square proper and prompt investigations, where there is justice at the end, with this limitation on prosecution? Do the Government have this the wrong way around?

Mr Jones: I agree with Judge Blackett and General Nick Parker. What the Government have done is looked at the prosecution end of it, rather than at the investigation end of it. As I have said, Blackett referred to it as looking through the wrong end of a telescope. We all know what happened when we were kids—we looked

through telescopes, which were quite good for seeing things that were far away. It is as though somehow we would not pick up on the detail of what can be seen. With the Bill, however, we can see the detail.

As I have just outlined, what is needed is proper investigation. No one is suggesting shortcuts in investigations. We need a proper system that has judicial oversight, which will ensure that it is fair on all sides, and that it is efficient. The next bit of it is prosecution, which has to be independent of Government. I have never seen it written into a Bill that, before there is an investigation, there is a presumption in law that there will be no prosecution. How would we do that? What is the purpose of investigating a case and going through details if, from the outset, there is a presumption that it will not be prosecuted? That is very difficult. It would be like you, Mr Stringer, burgling somebody’s house—I am not suggesting for one minute that you would do that. The authorities would then say, “We are going to investigate you, but the presumption”—not the decision, because I accept that you could still get prosecuted—“is that you are innocent and that you haven’t done it.” That is just nonsense and will not stand up. It will end up with judicial reviews, so we will not be free from the ambulance-chasing lawyers or the legal aid system, because if they can see that there is a buck to be made in that way, they will do it.

Likewise, on international comparisons, it comes down to the point that the Judge Advocate General made in his excellent letter to the Defence Secretary, to which I referred last week in evidence: he was not consulted on the Bill. When these cases go to the International Criminal Court for investigation, it will say, “Wait a minute. At the outset you had a presumption that you were not going to prosecute in these cases.” If we had a situation in which a case went forward, there would be a presumption against prosecution and there would be an investigation. If the Attorney General were to decide that the case did not go to prosecution, the International Criminal Court would have a field day. It would say, “Well, wait a minute. You’ve had a presumption against prosecution. You’ve had political interference, with the Attorney General making the final decision about whether a prosecution should take place.” I do not think that is compatible with our treaty obligations to the ICC.

I know that reference is often made to the Human Rights Act 1998 and that there is a tendency—not with you, Mr Stringer, because I know you are an expert on European matters—to think that somehow it is something to do with the European Union. It has nothing at all to do with the EU. It has a proud history, and we should be proud to have helped develop the idea of human rights after the second world war in order to ensure that we have the highest standards. My fear is that we will end up with servicemen and women before the International Criminal Court. I am sorry, but I do not want to see that. What I want to see is their being dealt with in our judicial legal system, which will end up with their getting better justice. It will be very difficult to explain to the public why servicemen and women end up in the International Criminal Court. If that happens, the next step is that we withdraw from the International Criminal Court and everything else. If we do that, it will affect our reputation in the world as a country that wants to uphold the rule of law and to tell China and other nations, “Look, these are the basic standards that you should adhere to.” It will be a godsend to them.

There are serious issues to do with clause 1, which I do not think the Minister has addressed. If we end up with fairness and justice for our servicemen and women but we do not have an efficient system, that needs to be changed. I repeat to the Minister that the Bill can be changed on Report in this place, and I am happy to work on the investigation issues with him. If new clauses to that effect were not perfectly written according to the Ministry of Defence, I would be quite happy to work on getting a form of words that we could all accept. I am a mild-mannered individual, as many people know, and I would quite happily let the Government table them and claim the credit. I am not looking for plaudits. What I want above everything is a good Bill, and the Bill as it stands is not a good one.

2.45 pm

Chris Evans: I thank my right hon. Friend for a rather long, in-depth speech. I am sure that I will repeat some of the points that he raised, but I want to focus particularly on the measures that apply to events that occurred more than five years ago. The starting point for covering that time period is the date that the alleged conduct occurred. When an alleged offence continued over more than one day, the starting point for the five-year time period would be the last day on which the alleged conduct occurred. I believe that that needs a bit more probing and explanation.

As we know, the Defence Committee report “Protecting veterans by a Statute of Limitations” was supported on the presumption against prosecution for allegations that were more than 10 years old. I was extremely concerned that the proposals would not cover soldiers who had served in Northern Ireland through the troubles. It is said that the Ministry of Defence should ensure that sufficient resources are made available for educating the armed forces more regularly about their legal obligations.

Far be it from me to be personal, but when the Minister replies, I would like him to give further explanation of why he moved from the 10-year period agreed by the Defence Committee to the five-year period. The real issue here, as my hon. Friend said—sorry, my right hon. Friend; he is a member of the Privy Council and I should acknowledge that—is not so much the prosecution but the investigation. All soldiers who make the great commitment to serve our country in the armed forces need a prompt, fair, efficient and effective investigation before we reach prosecution.

I would like to cite the example of how alleged crimes in Iraq were investigated and how we have arrived at the current position. As many of us know, UK military operations in Iraq lasted from the start of the invasion on 20 March 2003 to the withdrawal of the last remaining British forces on 22 May 2011—an eight-year period. Alleged crimes by UK forces in Iraq have formed the subject of two public inquiries initiated by the Ministry of Defence between 2008 and 2009 to examine the death in custody of an Iraqi civilian, Baha Mousa, in September 2003, and allegations of unlawful killings in a street arising from the so-called battle of Danny Boy in May 2004.

In March 2010, the MOD established the Iraq Historic Allegations Team, to ensure that credible claims were properly investigated. The IHAT received a total of around 3,400 allegations of unlawful killings and ill treatment between 2010 and 2017—a period of seven

years. However, in February 2017, the Defence Committee published its IHAT inquiry report, which notably criticised the team for alleged inefficiency and lack of professionalism. It called on the MOD to close it down and to provide financial and other support to UK servicemen under investigation. On the same day as the release of the inquiry’s report, the Defence Secretary announced the closure of the IHAT, ahead of the original schedule, citing IHAT’s own forecasts that the team’s caseload was expected to reduce to about 20 investigations by the summer of 2017. The IHAT was permanently shut down on 30 June.

The MOD said that military operations in Iraq have resulted in nearly 1,000 compensation claims for unlawful detention, personal injury and death, and about 1,400 judicial review claims, seeking investigations and compensation for alleged human rights violations. An investigation by the BBC “Panorama” programme and *The Sunday Times* found that the UK Government and the armed forces might have covered up the killing of civilians by British troops in Afghanistan and Iraq. The MOD has strongly rejected the allegations of cover-ups. I bring that up because it was a MOD investigation into a conflict that lasted eight years, and then seven years into that investigation it was shut down because of what it was doing.

The real problem we have is that the Bill does not stop the cycle of investigations. Restrictions apply solely to prosecutions. If we were to ask most people who have been investigated time and again, they would say it is the investigation that has caused the problems. Unless we resolve that, the Bill does not ensure that allegations are properly investigated and resolved—this is the point, Mr Stringer—within a reasonable period. As I have said, service personnel would benefit from a focus on prompt and thorough investigations, rather than simply a limitation on prosecutions. That is why the amendments are so important. The investigations have to be judge led.

I agree that we have to resolve concerns about uncertainty and the delay for soldiers and litigants. On the other side, there are the victims. Some claims may have to go over five years for sound reasons. Injury may become problematic only after five years of post-traumatic stress disorder. Luckily, we live in a world where we have a better understanding of mental health and we are far more sympathetic to problems. In another life—14 years ago—I worked for Lord Touhig, who was involved when he was a Defence Minister with the shot-at-dawns. I am very proud that the last Labour Government granted them a pardon. I hope we never see a return to the bad old days when people were shot for alleged cowardice, when really they were suffering from terrible mental health problems.

That is what we have to guide ourselves with in this Bill. We face a mental health crisis. I was encouraged earlier when I moved the motion about UAVs, as the Minister accepted there was an issue of post-traumatic stress disorder and the need for more research. I know he has worked very hard in that area and I look forward to some of the outcomes of the work he is doing. I pay tribute to him for his work on that.

We have to accept that many of these claims will take longer. In some of these cases, it may take a long time for evidence to be gathered and to come to light, especially when we are dealing with complicated areas of law or complicated parts of operations in theatre. The Minister

[Chris Evans]

should look again at the five-year rule and make it 10 years, but it is more important that, alongside that, we look at how the investigations are conducted.

We should consider any time limit on prosecutions to be an intolerable barrier to justice. It is notable that the proposed five-year period halves the time period for prosecutions from the proposal of 10 years consulted on by the Ministry of Defence last year. A five-year limit makes it likely that the relevant overseas operation will still be in progress—I used the example of Iraq and Afghanistan at the beginning of my speech. That means investigations may have to be limited to while we are active in hostilities. That, again, is a barrier to justice.

The Judge Advocate General of the armed forces, Jeff Blackett, warned the Defence Secretary that this provision

“would encourage an accused person to frustrate the progress of investigation past the five-year point to engage a high bar for prosecution”.

When the Minister responds, I hope that he can lay out some guidelines on how we can stop anybody frustrating justice in that way.

Mr Jones: Is not an obvious way of doing that to adopt the new clause I spoke to, which would give judicial oversight?

Chris Evans: I alluded earlier to our good friend Lord Touhig, who advised me to always be careful of taking interventions, because they can ruin the end of your speech. I feel that that has happened here.

It is important to remember that the overwhelming majority of repeat investigations or delayed prosecutions in recent years have, as my right hon. Friend said, been the direct result of failures by the MOD itself. It is an issue within the MOD that needs to be resolved—whether it is a cultural issue or a rules-based issue, it needs to be resolved. I agree with what the Minister is trying to do because there are too many veterans, ex-servicemen and women, who are living in fear of repeat investigations. If they are living in fear of that, we must ask why these investigations are repeated over and over again, causing not only stress to their mental health but putting intolerable strain on their families.

Rather than measures that tackle the real reason behind the investigations that delay prosecutions, the Bill proposes unprecedented legal protections that will create a legal regime that mandates impunity for serious offences and, above all, inequality in law for the victims of abuse in our forces. Severely restricting the application of criminal law for certain categories of people accused of having committed offences including international crimes would violate the principle of equal application of the law, which is what our legal system is based on.

A multitude of sources suggest that crimes were committed on a large scale in Afghanistan and Iraq. That happened at least partly due to systemic issues—for instance, in 2013, in *R. v. the Secretary of State for Defence*, the UK High Court held that

“there might have been systemic abuses and that such abuses may have been attributable to a lack of appropriate training.”

If the problem is appropriate training, it is not a legislative solution that we need but a systemic solution from

within the Ministry of Defence. In its 2018 report, the Ministry of Defence working group on systemic issues said that it considered:

“there was sufficient evidence to conclude that assaults in detention had occurred, and may have been systemic.”

International law imposes certain obligations on the UK, including the obligation not to put in place a legal framework that severely restricts or makes impossible the investigation and prosecution of serious crimes under international law committed in armed conflict, irrespective of where those crimes were committed. The proposed legislation severely limits the possibility of opening a full investigation in respect of Iraq or Afghanistan. Any measure that significantly limits the possibility of prosecuting international crimes, whether referred to as a statute of limitations or a statute of presumption against prosecution, risks undermining the UK’s hard-won role as a champion of the international rule of law and hence its ability to advance its agenda.

Mr Jones: The hon. Member for Wolverhampton South West made the point, in respect of the lack of training, that the real pressure is not on the chain of command but on the men and women in the frontline. Does my hon. Friend agree that, unfortunately, it is they who find themselves in these cases rather than those higher up in the chain of command who have equal responsibility for some of the actions?

Chris Evans: I agree; it is often ordinary squaddies or ratings who find themselves in these circumstances simply because they were following orders. If we are talking about training, we do live in a different world, a modern world. I have already spoken about our shot-at-dawn campaign, which my right hon. Friend is involved in. We have to realise that our modern armed forces are constantly evolving in a changing world, and our training should reflect that, whether it is for an ordinary rating or top brass in the armed forces. It is important that we focus on training. The Government have the numbers and they will pass the Bill, but the way to change the culture of ongoing prosecutions is to start with the training of our troops, whether in command or on the front line.

To return to the point I was making, the code for Crown prosecutors already has ample criteria to provide guidance on whether prosecution should take place. This includes an evidential stage, followed by a public interest stage. The evidential stage concerns an independent prosecutor’s assessment of whether there is a realistic prospect of conviction. The public interest stage guidance involves considerations such as the seriousness of the alleged offence, the level of capability of the offender, the circumstances of and the harm caused to the victim, the suspect’s age and maturity at the time of the offence, the impact of the offending on the community, whether prosecution is a proportionate response and whether sources of information require protecting.

3 pm

The Ministry of Defence and the Government more broadly should ensure that adequate legal safeguards are in place for service personnel and veterans, including access to legal counsel, and other internationally recognised due process and fair trial standards. The legal protection of current and former service personnel is best served by a framework that facilitates prompt—this is the third time I have said this—and adequate investigation, which

would clear anyone wrongly suspected of having committed the crime without risk of undue reinvestigation and at the same time ensure accountability for those guilty of crimes.

No one is above the law. If crimes are committed, they should be prosecuted and the full weight of the law should come down on those responsible. Many investigations—this is the key point about the clause—have been so weak and ineffective that they resulted in judicial findings which led to the need for them to be reopened or restarted, or for more robust procedures to be put in place. It is not appropriate to impose a limit for bringing claims in relation to personal injury or death where people are seeking damages in respect of sorrowful events that took place outside the UK; to do so breaches the rights of the victims.

The Government have sought to claim that these reforms are needed to stop legal cases relating to UK actions where that is not appropriate, but the Bill's definition of overseas operations, to which these provisions apply, is too broad, as it covers

“peacekeeping operations and operations dealing with terrorism, civil unrest or serious public disorder, during the course of which members of Her Majesty's forces come under attack or face the threat of attack or violent resistance.”

The Minister referred to my amendment dealing with that point. It is striking that the Bill's presumption against prosecutions would appear to apply to any and all operations that deal in terrorism. The provision would cover a wide range of covert activities that are subject to little or no public or parliamentary scrutiny, and of which MPs may have no knowledge at all. This could include so-called training SIS operations carried out with a range of foreign security forces, or indeed operations of the kind that UK became involved in during the war on terror, when Parliament's Intelligence and Security Committee found the UK maintained a corporate policy of facilitating rendition of detainees and was involved in hundreds of cases of torture and mistreatment.

In our evidence session, Clive Baldwin of Human Rights Watch said that

“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.”—[*Official Report, Overseas Operations (Service Personnel and Veterans) Public Bill Committee*, 6 October 2020; c. 67, Q135.]

I support my right hon. Friend the Member for North Durham in his amendments and I hope that the Minister will think on what has been said this afternoon, and answer some of the questions that we have put to him.

Johnny Mercer: I am delighted to answer some of the questions that have been laid out. I have spoken at length about the “five to 10 years” issue in dealing with previous amendments, but I will look to answer some of the questions raised and then speak to clause 1 in general.

We ask a huge amount of our service police. Investigations on overseas operations are inherently dangerous, and the risk of gathering evidence on operations must always be balanced with the risk to the lives of our investigators. To suggest that the service police pursue unmeritorious or vexatious investigations in those circumstances is to do a huge injustice to those brave men and women who do this dangerous work, and we do not.

To understand new clause 6, it is necessary to go through it line by line. Proposed new subsection (1) seeks to apply the clause to,

“any investigation by a police force into alleged conduct as described in subsection 3 of section 1.”

Clause 1(3) applies—

The Chair: Order. I asked hon. Members at the beginning of the meeting to respect social distancing. I am sorry, Minister; please continue.

Johnny Mercer: Clause 1(3) applies where, “the alleged conduct took place (outside the British Islands)”, at a time when the person was “subject to service law” under the Armed Forces Act 2006, and “deployed on overseas operations.” There is no further limit on the remaining provisions of the proposed new clause, which means they must therefore apply to all investigations on overseas operations committed by service personnel. For context, there were in the region of 3,000 service police investigations in Iraq and 1,000 in Afghanistan. The majority of those will have been committed by persons subject to service law. It is not considered feasible for such numbers of investigations to be brought in front of a judge, and to do so would undoubtedly add further delays to the process.

Proposed new subsection (2) states:

“The police force investigating the conduct must place their preliminary findings before an allocated judge advocate as soon as possible, but no later than 6 months after the alleged offence was brought to their attention.”

The service police are independent. That independence is enshrined in law in section 115A of the Armed Forces Act 2006. It is common practice for them to consult prosecutors in the course of an investigation and for that discourse to shape an investigation, but this is discourse, not direction. Any obligation on the service police to police their investigation before a person who has control over the final determination of that matter seriously compromises the independence and is therefore contrary to section 115A.

New clause 6 states that the allocated judge advocate may order an investigation to cease should it be determined, “that no serious, permanent or lasting psychological or physical injury has been caused”—

presumably by the alleged conduct. Again, it would be hard to determine whether that was the case without investigation, a matter complicated by being on overseas operations. Proposed new subsection (3)(b) gives the judge advocate the power to order that an investigation should cease if it is determined,

“that the evidence is of a tenuous character because of weakness or vagueness or because of inconsistencies with other evidence, and that it is not in the interests of justice to continue an investigation”.

That proposed new paragraph is equally problematic; only in the most clear-cut cases can the police produce evidence entirely without some area of weakness or

[Johnny Mercer]

vagueness. Difficult operational investigations are particularly prone to those problems, but the relationship with the prosecutor will allow them to be explored and the progression of the investigation adapted accordingly. Furthermore, inconsistency with other evidence is a factor in all investigations and is what the trial process is created to explore. For a judge advocate to be placed into such a process, rather than relying on the relationship between police and prosecutor, risks adding delay to the investigation, and for a judge to order the cessation of an investigation risks cutting it short where evidence has not yet been gathered due to the complex nature of operational inquiries.

Finally, proposed new subsection (3)(c) seeks to give the judge advocate the power to direct the timetable and extent of further investigation if it is determined that there is merit in the complaint. However, the clause does not specify whether the judge advocate would have continued oversight, or some ability to enforce the timetable and direction. Again, that would place an additional burden on police who, in an operational theatre, responding to operational events, would now have an added layer of bureaucracy placed on them by someone who is not deployed and cannot possibly understand the unique pressures experienced by the deployed police officer. That would remove the discretion that all police officers must have to carry out prompt, independent and effective investigations, and hamper their decision making. That is not the same as the police relationship with the prosecutor, and here I return to my point about discourse versus direction. Discourse allows the police to retain the discretion so vital to acting in response to events; direction fetters their decision making.

The proposed clause is based on the false premise that police carry out unmeritorious or vexatious investigations. It would undermine the relationship between the police and prosecutors and fetter the police in the conduct of investigations in difficult circumstances. It would place an additional and unnecessary cog in a system that does not need it.

New clause 7 fails to take account of the processes involved in investigations. It fails to make clear the difference between an investigation and a reinvestigation and it fails to understand the processes involved in gathering evidence. The proposed clause applies where a person has been acquitted of an offence relating to conduct on overseas operations. It is assumed that this envisages a situation in which a person is acquitted at court martial, but it should be noted that it could also apply to a matter that is heard at a summary hearing in front of a commanding officer, following on from an investigation that did not involve the police. It also applies where a determination has been made by a judge advocate that an investigation into an offence should cease, which, as I have already stated, risks prematurely cutting short an investigation whose progress is impacted by its being an operational investigation.

The new clause proposes that there be no further investigation into the alleged conduct unless compelling new evidence becomes available and an allocated judge advocate determines that the totality of the evidence against the accused is sufficiently strong that there is a real possibility that it would support a conviction. I will take this step by step.

An investigation is a hard thing to define in law. It starts when inquiries begin, and its purpose is to determine whether what little information there is to start with is credible, and to gather more evidence in support of that. The process of finding out whether evidence is compelling is called an “investigation”. It is hard to see how, people having been told to cease an investigation, no further investigation—whether new or a continuation of the earlier investigation—can be commenced unless some form of compelling new evidence becomes available. The only way the police can determine whether the new evidence is compelling is by carrying out the investigation that they are not allowed to carry out. This becomes a circular issue.

Additionally, no further investigation into the alleged conduct may be carried out unless the allocated judge advocate determines that the totality of the evidence against an accused, which presumably has had to come from some sort of investigation that the police are not allowed to conduct, is sufficiently strong that there is a real possibility that it would support a conviction.

Mr Jones: Will the Minister give way?

Johnny Mercer: Not at this stage.

Where a person has been acquitted and new evidence comes to light, it would be necessary for there to be a further investigation before a prosecutor could determine whether a new prosecution could and should be brought. That is not a decision for the police; it is a decision for the prosecutor. To prevent the investigation would prevent a prosecutor from having the information that they need to make that determination.

Unfortunately, new clause 7 is not clear enough to allow a real debate on what it is seeking to achieve. The only way the police can determine whether new information is “compelling” or “sufficiently strong” to “support a conviction” is to carry out an investigation. A thorough investigation is important. As I said earlier, it can serve to exculpate, which is a good thing for the reputation of our armed forces, as well as to incriminate. The Bill should not, and does not, seek to fetter the police from carrying out investigations. It seeks to ensure that prosecutors are in a position to make prosecutorial decisions based on information that can be gleaned only through thorough investigations.

With the discourse between prosecutor and investigator, a balance must be struck between further investigation and the realistic prospect of conviction, and this includes the measures in the Bill that the prosecutor must take account of.

Mr Jones: Will the Minister give way?

Johnny Mercer: Not at this stage.

However, this does not need further clauses that seek to fetter that discourse. It needs the lightest touch, which is achieved through the balanced and established relationship between police and prosecutor.

Mrs Emma Lewell-Buck (South Shields) (Lab): Obviously, the Minister is probably more familiar with the Bill than I am. I just getting a little bit lost on his comments here. Is he saying that the only time that new evidence comes to light is through an investigation? That is just not the case. Sometimes evidence appears when there is not an ongoing investigation. Also, is he saying that, in

that case, when new evidence comes to light, an investigation should not happen? For my benefit and perhaps that of other members of the Committee who are not as familiar with the Bill as he is, could he please explain where in the Bill there is a limit on reinvestigation at this moment?

Johnny Mercer: I am happy to address the point about reinvestigation, because there are no circumstances in which anybody could arrive at the Ministry of Defence with an allegation of criminality or whatever it might be and we could not investigate it. There is a difference between investigations and where those investigations start impacting the lives of veterans, which is what the Bill seeks to deal with and which is why we have drawn the line where we have. We are not saying that new evidence comes only from investigation, but, as I have outlined, new clause 7 introduces an element of oversight that is simply not practicable to what we are trying to do. I have outlined that the 3,500 cases in Iraq and 1,000 in Afghanistan, and it is not practicable to do that and to ensure there is a speedy resolution, that evidence is preserved, that if people have done wrong we can prosecute them in a timely manner and so on. I am happy to have a further conversation with the hon. Lady about that later.

3.15 pm

In summing up the clause stand part debate, the Government do not consider the armed forces to be above the law. Whenever they embark on operations overseas, our armed forces must abide by the criminal law of England and Wales, as well as international humanitarian law, including as set out in the Geneva convention. Our personnel serve with great dignity, courage and commitment. The vast majority undertake the difficult and often dangerous tasks we ask of them in accordance with domestic and international law. However, in the circumstances where our service personnel fall short of the high standards of personal behaviour and conduct that is required and expected of them, it is vital they are held to account. That is one of the reasons we are not proposing an amnesty or a statute of limitations for service personnel and veterans as part of the measures. Of course, alleged misconduct by service personnel is dealt with most effectively if individuals are investigated and, where appropriate, subject to disciplinary or criminal proceedings at the time of the conduct. However, that is not always possible in the circumstances of overseas operations.

Chris Evans: I fully appreciate what the Minister says about being bound by criminal law in England and Wales. However, having gone through the process himself, is he confident that when someone is recruited into the armed forces, they are fully aware of their legal obligations and that the training meets those needs?

Johnny Mercer: I thank the hon. Gentleman for that pertinent question. Extensive efforts have gone down over the years to make sure our people understand the rules within which they should operate. There clearly have been challenges in some of the training regarding detentions and so on, as has been found out through various court cases. I have always talked, on Second Reading and even before the legislation came to the House, about how the it is one of a series of measures. One such measure is about investigatory standards, another is about education and how individuals' lives

are affected, because it is not in anybody's interests for us to do the legislation and for people not to understand. I am more than happy to share with the hon. Gentleman how much work we have done in that space.

Martin Docherty-Hughes: Go on, give way.

Johnny Mercer: I will not. Repeat investigations of alleged historical offences or the emergence of new allegations of criminal offences relating to operations many years ago can make the delivery of timely justice extremely difficult. It can also leave our service personnel with the stress and mental strain of the threat of potential prosecution hanging over them for far too long. The measures in part 1 of the Bill are key to providing reassurance to our service personnel and veterans about the threat of repeated criminal investigations and potential prosecution for alleged offences occurring many years ago on overseas operations. The purpose and effect of clause 1 is to set the conditions for when the measures in clause 2 and 3 must be applied by a prosecutor in deciding whether to prosecute a criminal case or to continue with the proceedings in a case. It should be noted with reference to clause 1(2) that the measures do not affect the prosecutor's decision as to whether there is sufficient evidence to justify prosecution. The first stage of the prosecutorial test will therefore remain unchanged. Clause 1 therefore details to whom and in what circumstances the measures will apply.

Martin Docherty-Hughes: I am very grateful to the Minister for giving way. When we consider his summing up, critically with reference to new clause 7(2)(a), does he not recognise that some of the evidence given by Judge Becket in response to his hon Friend the Member for Wrexham creates an ambiguity in terms of our partners in military activity? For example, Judge Becket referred to the murder of six Royal Military Police in Iraq and noted that if new evidence was brought forward, and the Government of Iraq had the same legislation, there is every possibility that the people responsible would not be prosecuted.

Johnny Mercer: I assume that the hon. Gentleman is talking about Judge Blackett, who is the Judge Advocate General. He made some keen points. I have met Judge Blackett and we have tried to incorporate his work in the Bill, where appropriate. The idea that new evidence is presented and we do not prosecute is simply not the case. With reference to the six individuals killed at Majar al-Kabir in 2003, if new evidence is presented in that case, we would expect the Iraqis to prosecute. If new evidence emerges in cases against servicemen and women, they can still be prosecuted beyond these timelines. The legislation is simply bringing integrity and rigour to the process.

Mr Jones: Will the Minister give way?

Johnny Mercer: No, I am going to make some progress.

Under the Bill, the first condition establishes that the measures will only apply to members of the armed forces, both regulars and reserves, and to members of British overseas territory forces operating as part of UK forces when deployed on operations outside the British Islands, as defined in clause 7. Although we do deploy other Crown servants and contractors on overseas operations, those individuals are not deployed on front-line

[Johnny Mercer]

military operations and are not ordinarily exposed to the same risks and dangers as service personnel. It is not therefore appropriate to extend the protection provided by the measures in part 1 for our service personnel and veterans to other Crown servants or contractors.

The first condition in the legislation also requires that the alleged conduct occurred while the person was deployed on an overseas operation during which personnel came under attack or faced the threat of attack or violent resistance. Operations conducted outside the UK are vastly different from those conducted inside the UK. Within the UK, the military only ever operate in support of the civil authorities. With the exception of Operation Banner, which was an absolutely unique circumstance, UK operations rarely, if ever, require our personnel to operate in the same sort of hostile, high-threat environments they face on overseas operations. Excluding Northern Ireland, there are no outstanding historical allegations relating to operations in the UK.

Be assured that we have not forgotten our Northern Ireland veterans. The Secretary of State for Northern Ireland will be bringing forward separate legislation to address the legacy of the past in a manner that focuses on reconciliation, delivers for victims and ends the cycle of re-investigations into the troubles in Northern Ireland, which has failed victims and veterans alike. That will deliver on our commitment to Northern Ireland veterans.

The second condition for the measures to apply is that the alleged offence must have occurred over five years ago, with the start date being the date of the offence. Where an alleged offence occurred over a period of days, the start date will be the last day of that period. It is vital that investigations into historical allegations are brought to resolution without undue delay. To provide greater assurance to our brave servicemen and women, we consider five years to be the most appropriate start point for the presumption.

The Chair: Just before I collect the voices of Members as they vote, if the clause is voted for, it means that the first clause is agreed to and then becomes part of the Bill to report to the House. The other new clauses and amendments that were grouped with it will be voted on when they are reached. I hope that is clear.

Question put, That the clause stand part of the Bill.

The Committee divided: Ayes 10, Noes 2.

Division No. 4]

AYES

Anderson, Stuart	Eastwood, Mark
Atherton, Sarah	Gibson, Peter
Brereton, Jack	Lopresti, Jack
Dines, Miss Sarah	Mercer, Johnny
Docherty, Leo	Morrissey, Joy

NOES

Docherty-Hughes, Martin	Jones, rh Mr Kevan
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Question accordingly agreed to.

Clause 1 ordered to stand part of the Bill.

The Chair: It is not an important point—it is a difference without real meaning—but the normal procedure is not to abstain but to have no vote.

Clause 2

PRESUMPTION AGAINST PROSECUTION

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss new clause 1—*Ability to conduct a fair trial*—

“The principle referred to in section 1(1) is that a relevant prosecutor making a decision to which that section applies may determine that proceedings should be brought against the person for the offence, or, as the case may be, that the proceedings against the person for the offence should be continued, only if the prosecutor has reasonable grounds for believing that the fair trial of the person has not been materially prejudiced by the time elapsed since the alleged conduct took place.”

This new clause replaces the presumption against prosecution with a requirement on a prosecutor deciding whether to bring or continue a prosecution to consider whether the passage of time has materially prejudiced the prospective defendant's chance of a fair trial.

Both clause 2 and new clause 1 can be debated. We will not vote on new clause 1 until the end of the Bill when the new clauses are considered. At the end of this debate, I will collect voices for a vote on clause 2. The Minister has moved clause 2 formally. If there is any debate, he can respond. The new clauses will be moved formally when we get to them, but they can be debated now.

Mr Jones: Clause 2 is quite an important part of the Bill. I am sorry that the Minister did not allow me to ask him about his investigation point, because it has an impact on this clause. He said that there is no similar system of judicial oversight for investigations, but I have to say that there is. For example, the police will often refer cases to the Crown Prosecution Service prior to the conclusion of an investigation for advice on whether more information is needed to meet the threshold for a prosecution. That is one of the points that I was going to make if he had allowed me to intervene. Whatever his civil servants have written to him, I suggest that they look at that comparison and what that would have done.

It is interesting that the Minister said that he met the Judge Advocate General and tried to incorporate things. I would like to know what in the Bill was changed after his meeting with Judge Blackett. I cannot see anything, but if the Minister wants to give us that, either now or later, that would be fine.

The presumption in clause 2 is for it to be exceptional for a prosecutor to determine that proceedings should be brought in relation to an offence committed by members of the armed forces when deployed on operations abroad. On that presumption against prosecution, I think we will have real problems, as we have referred to already, with regard to our international standing. I ask for your guidance, Mr Stringer: am I allowed to speak to new clause 1, even though it is not being moved?

3.30 pm

The Chair: New clause 1 is before us for debate. The Shadow Minister may or may not wish to press it when we get to the new clauses, but it is before us for debate now.

Mr Jones: New clause 1 states:

“The principle referred to in section 1(1) is that a relevant prosecutor makes a decision to which that section applies may determine that proceedings should be brought against the person for the offence or, as the case may be, that the proceedings against the person for the offence should be continued, only if the prosecutor has reasonable grounds for believing that the fair trial of the person has not been materially prejudiced by the time elapsed since the alleged conduct took place.”

We have already discussed this, but if a material time difference were to prevent someone from getting a fair trial, I do not think that anyone would deem it fair to prosecute them for a crime. That has been an issue in civil law. For instance, certain historical sexual abuse cases have been very difficult to determine. There is a balance between the case for the prosecution to, quite rightly, get justice for the victim, and for the accused to receive a fair trial given the lapse in time. The new clause makes a fair suggestion.

In the case of Major Campbell, the circumstances were very difficult. The differences between service justice and civilian life include the unique circumstances in which individuals operate and, as I have said, the fact that they serve overseas, where evidence and witnesses must be gathered. We must ensure that the accused gets a fair trial. I want this Bill to make the process fairer and more just for accused individuals in those unique circumstances. I keep coming back to that point: the circumstances are unique and very different.

I support new clause 1. I accept that it might not be expertly drafted, but if the Minister is sympathetic towards it, I urge him to at least ask a civil servant to redraft it so that it can be brought back as a Government amendment, or to suggest another way in which the proposal can be brought into effect. Judging by his attitude, I doubt he will do that for any of the proposed amendments.

Johnny Mercer: He’s a fan, isn’t he?

Mr Jones: I am not bad, actually. I am just trying to be helpful and to improve the Bill, but the Minister seems determined to push it through unamended. He might not like it, but this is the purpose of Parliament: it is about scrutinising legislation. I have tabled amendments that I do not necessarily agree with, but I have done so because we need to demonstrate to the public that all opinions have been aired in Committee. That is an important part of our democracy. Even with a Government majority of 80, a Minister cannot simply determine that their proposals go through on the nod. Likewise, just because something comes out of his lips, that does not necessarily make it right. Perhaps I can give the Minister some advice: he might be in a stronger position if he was prepared to stand up and argue, in a friendly way, some of the points made in the Bill. All he seems to be doing, however, is reading out a pre-prepared civil service brief. This is the first time I have seen that done in a Bill Committee.

On the presumption against prosecution, we have got things the wrong way around. As Judge Blackett said, by looking at prosecutions we are looking through the wrong end of the telescope. I think there are ways in which we can ensure that people do not have to face lengthy reinvestigations or an inordinately long wait before being taken trial, and, if they meet the threshold for prosecution, that they are not disadvantaged by the passage of time. It is worth exploring those issues. My hon. Friend the Member for Portsmouth

South asks, through the new clause, a reasonable question about time limits. If this is not the way to do it, what is?

Stephen Morgan (Portsmouth South) (Lab): I rise to support new clause 1. I have said many times throughout this process that the Opposition will work constructively with the Government to get the Bill right, to protect armed forces personnel and their families. We believe that the intent of the Bill is well placed, but it has been poorly executed to achieve what Members on both sides of the House want—an end to vexatious claims that are misplaced, that are drawn out for years longer than they should be, and that place our troops and their families under incredible amounts of stress and pressure that they simply should not have to expect.

Our world-class personnel and their families deserve so much better. That is why it is so important that we get the Bill right. However, the presumption against prosecution does not resolve the issue that we all recognise. It does not afford our armed forces personnel the protection that they deserve. That is why, where the Opposition see an opportunity to improve the Bill, we will seek to highlight it. It is why we have tabled new clause 1, which we believe is fair. Crucially, it tackles the key issues of bringing to an end many of the vexatious claims against our armed services personnel—we want to make that commonplace—and of ensuring that decisions to prosecute are brought to a swifter conclusion. For that to happen, clause 2 in part 1 of the Bill must be removed and replaced by a new clause that replaces the presumption against prosecution with a requirement for a prosecutor who is deciding whether to bring or to continue a prosecution to consider whether the passage of time has materially prejudiced the prospective defendant’s chance of a fair trial.

The principle of a fair trial and consideration of the length of time that has passed during an investigation of our armed forces personnel is important for two reasons. First, it focuses on fairness. It ensures that our world-renowned legal system’s reputation remains intact. It does not undermine our international reputation and avoids the potential repercussions of our armed forces personnel being dragged to The Hague for violating international law. Secondly, it tackles the issue of lengthy investigations, which, sadly, some of our armed forces personnel have experienced and still are experiencing. More specifically, it requires the prosecutor to consider whether the passage of time in such investigations has materially prejudiced the chance of a fair trial for our armed forces service personnel and veterans.

It is not just the Opposition who have identified the flaws in clause 2 and where it could be improved. The International Committee of the Red Cross has raised these concerns, submitting them in written evidence. For context, and for those who are not aware, the ICRC is an impartial, neutral and independent organisation whose mission is to protect the lives and dignity of victims of armed conflict and others in situations of violence and to provide them with assistance. The ICRC is also the origin of the Geneva conventions, an international agreement of which our country is a proud original signatory.

In its evidence, the ICRC acknowledges that there are occasions on which discretion has developed to address cases in which prosecutions are not taken forward. At international level, article 53 of the International Criminal Court statute sets out a procedure to follow if,

[Stephen Morgan]

“upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because...A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime”.

The written evidence goes on to say, however, that the ICC Office of the Prosecutor said that

“only in exceptional circumstances will the Prosecutor of the ICC conclude that an investigation or a prosecution may not serve the interests of justice”.

Finally, under the heading, “The presumption in favour of investigation or prosecution”, the OTP notes:

“Many developments in the last ten or fifteen years point to a consistent trend imposing a duty on States to prosecute crimes of international concern committed within their jurisdiction”.

The written evidence gives rise to a number of considerations. Clause 2 states that there should be exceptional circumstances for a prosecutor to determine whether proceedings should be taken against armed forces personnel. However, as outlined in the ICRC submission, does the prosecution in the interests of justice, including the gravity of the crime, the interests of victims and the age and infirmity of the alleged perpetrator, sound like an exception to the rule of when proceedings should be brought forward? Indeed, it seems more likely to be exceptional for such a case to not be progressed and brought forward. The OTP compounds that point by stating that

“only in exceptional circumstances will the Prosecutor of the ICC conclude that an investigation or a prosecution may not serve the interests of justice.”

Under the Bill as drafted, it will not be exceptional to not prosecute such cases. Indeed, it risks undermining our international reputation and legal obligations, and, as a consequence, risks our armed forces personnel being tried at the International Criminal Court instead of in British courts. That gives rise to the question: why are the Government so intent on taking this risk, undermining our reputation and legal obligations, and leaving our armed forces personnel exposed? Why have the Government included a clause that risks undermining a historic, momentous international convention in which our country played a key role and of which it is an original signatory? That is something that our country and armed forces are proud of, and it is a reason for the high regard in which we are held across the world. Why risk breaching it, particularly when this clause could put our armed forces personnel at greater risk of vexatious claims? The Bill would not protect them, as it intends to do.

Furthermore, according to the evidence submitted by ICRC, the OTP also notes that many developments

“in the last ten or fifteen years point to a consistent trend imposing a duty on States to prosecute crimes of international concern committed within their jurisdiction”.

Why would we wish to deviate from our colleagues and international security partners on such an important issue? What is the Government’s reasoning for this?

That is not the only evidence received by the Committee that underlines the issue of clause 2. During last week’s evidence sessions, we heard from Judge Blackett, the former Judge Advocate General, the most senior military judge in the country, who said:

“I have three concerns about the Bill. One is the presumption against prosecution”.—[*Official Report, Overseas Operations (Service Personnel and Veterans) Public Bill Committee*, 8 October 2020; c. 116-17, Q234.]

He went on to say:

“I do not think that there should be a presumption against prosecution”.—[*Official Report, Overseas Operations (Service Personnel and Veterans) Public Bill Committee*, 8 October 2020; c. 121, Q248.]

Quite simply, if the most senior military judge in the country has clearly outlined that there should not be a presumption against prosecution in the Bill, what more do the Government need to understand that clause 2 should be removed? What advice and evidence have the Government taken to support their approach? Was the Judge Advocate General consulted? If not, why not? In summary, I hope the Government will listen to the points raised, remove clause 2, uphold our international reputation and obligations, and work with us to protect our troops and get this Bill right.

Finally, I ask the Minister to clarify what advice and evidence have the Government taken to support clause 2? Why do the Government wish to deviate from our colleagues and international security partners on such an important issue? What is the Government’s reasoning for this? Why have they included a clause that risks undermining a historic and momentous international convention in which our country played a key role and of which it is a key signatory? Why are the Government so intent on risking undermining our reputation and legal obligations and leaving our armed forces personnel exposed? I hope the Committee will get some answers from the Minister.

Miss Sarah Dines (Derbyshire Dales) (Con): I rise to speak briefly to new clause 1. As a new Member, I find the quality of the new clause disappointing. It does a disservice to the intentions of those who tabled it, so I invite them to withdraw it. The wording is far too vague and subjective. It is without guidelines and substance. Its incredible vagueness would make for a very unworkable piece of legislation. I believe in proper scrutiny in Committee, and the quality of the new clause is not good. It is a lawyer’s gift and would be subject to countless legal challenges and much litigation, which is exactly what the Bill is meant to stop.

Mrs Lewell-Buck: Will the hon. Lady give way?

Miss Dines: I am just finishing. I respectfully ask for the new clause to be withdrawn.

3.45 pm

Johnny Mercer: I will answer the point about the Judge Advocate General first. He is able to comment on all areas of policy that have a direct impact on his role within the service justice system and the management of the military court system, but the measures in part 1 of the Bill impact on the prosecutorial process. As such, we felt it was more important to focus on engagement with the independent prosecutors, the Crown Prosecution Service and the Service Prosecuting Authority, which were all engaged in the process.

As I have said already, I have met the JAG and have looked at his recommendations, and we continue to look at how we can take forward his suggestions in order to improve the process of service justice. More will come on that in due course.

Mr Jones: Will the Minister give way?

Johnny Mercer: I would absolutely love to.

Mr Jones: The Minister has referred to who he consulted when drawing the Bill. Can he expand on their comments, and is it possible to produce them as evidence for the Committee?

Johnny Mercer: We have already published a response to our consultation, which was widely available for everybody to see. We have also published a response that contains a lot of the conversations around this. As I have indicated, we have engaged with a number of different parties and have arrived at the decision that this was a fair and proportionate line to tread in order to achieve the effects that we are trying to achieve.

Mrs Lewell-Buck: Will the Minister give way?

Johnny Mercer: I am going to speak to new clause 1, and then I will happily give way.

Our intention with the measures that we have introduced in part 1 of the Bill was to ensure that we could provide the utmost reassurance to our service personnel and veterans in relation to the threat of repeated scrutiny and potential prosecution for alleged offences occurring many years ago on overseas operations. This has meant seeking to have a balance in introducing protective measures that would set a high threshold for a prosecutor to determine that a case should be prosecuted, as well as ensuring that the adverse impact of overseas operations would be given particular weight in favour of the service person or veteran, but which would not act as an amnesty or statute of limitations, would not fetter the prosecutor's discretion in making a decision to prosecute, and would be compliant with international law. We have achieved that balance in the combination of clauses 2 and 3. We are providing the additional protection that our service personnel and veterans so greatly deserve, while ensuring that, in exceptional circumstances, individuals can still be prosecuted for alleged offences.

New clause 1 would effectively replace the presumption against prosecution with a requirement in clause 1 that the prosecutor should consider only whether the passage of time has materially prejudiced the prospective defendant's chance of a fair trial when coming to a decision on whether to prosecute. This not only removes the high threshold of the presumption, but seeks to replace it with a consideration—whether the passage of time would prejudice the chance of a fair trial—which is likely to already be considered by the prosecutor when applying the existing public interest test. We have never suggested that service personnel or veterans have been subject to unfair trials. We have sought instead to highlight not only the difficulties, but the adverse impacts on our personnel, of pursuing allegations of historical criminal offences. Justice delayed is often justice denied, for defendants and for victims. I believe that clauses 2 and 3 provide the appropriate balance between victims' rights and access to justice, and the requirement to provide a fair and deserved level of protection for our service personnel and veterans. Removing the presumption in the way the new clause proposes would simply remove that balance.

Liz Twist: I am sorry to interrupt the Minister's flow, but clearly, ensuring that justice and fairness are done is crucial. We heard a number of comments from Judge

Blackett on the process. I know the Minister has met Judge Blackett, but was that before or after the legislation was prepared?

Johnny Mercer: I did not meet Judge Blackett before the legislation was prepared, for the reasons I have outlined. We thought it far more important to focus on engagement with the independent prosecutors, the Service Prosecuting Authority and the Crown Prosecution Service. Like I said, I have met him and heard what he has to say, and we heard his evidence last week.

Liz Twist: Having subsequently met Judge Blackett and heard his evidence, did the Minister make any changes to the legislation as drafted, or does he propose to make any such changes?

Johnny Mercer: No, because that would be to pre-empt the judge-led review of how we protect the Department, configure ourselves and develop the capability to deal with lawfare. Judge Blackett gave his view, but in our judgment it was better to engage the independent prosecutors, the Crown Prosecution Service and the Service Prosecuting Authority. That is what we have done—we engaged in a wide public consultation—and I believe that where we have arrived is fair and proportionate.

Martin Docherty-Hughes: If the Bill were not legislation relating to the armed forces, it would have been given prior oversight by either the Attorney General for England and Wales, the Attorney General for Northern Ireland or, for Scotland, the Lord Advocate or the Advocate General. Will the Minister tell the Committee why the Judge Advocate General was excluded from that process for this legislation?

Johnny Mercer: The Secretary of State wrote to the Judge Advocate General on 14 May 2020 acknowledging that, because of the 100-day election commitment to introduce the Bill, it was not possible for the legal protections team to complete the usual level of stakeholder engagement that we would usually seek to undertake post-public consultation.

Martin Docherty-Hughes *rose*—

Johnny Mercer: I am answering the hon. Gentleman's question. However, we welcomed the Judge Advocate General's interest in the Bill: an offer was made for the project team to engage with him at a convenient time, and I subsequently met him. I respect the hon. Gentleman's views on who would be consulted if the Bill were drafted in a civilian context, but I am entirely comfortable that the Department spoke to the right people to gauge their views on how we should deal with the current system, which is difficult and ultimately unfair to veterans.

I respect all the views that we heard last week—of course I do—but I am allowed to disagree with them. Having worked on this for seven years, it is possible to hear other people's views on the matter and disagree with them. The Department has taken a balanced and proportionate view, and indeed, it has incorporated a lot of views from other stakeholders throughout the process.

Mrs Lewell-Buck: Will the Minister give way?

Johnny Mercer: I will not give way at the moment, because I have addressed that point a number of times.

Clause 2, which the new clause would replace, sets out the principle of the presumption against prosecution, but it is to be exceptional for a prosecutor to determine that proceedings should be brought for an alleged offence that occurred in operations more than five years ago, as set out in clause 1. We have not sought to define “exceptional”, as we do not think it necessary or possible to provide an exhaustive definition. We intend, however, that the effect of clause 2 will be that when a prosecutor considers whether criminal proceedings should be brought or continued in relevant cases, there will be a presumption against prosecution, and that the threshold for rebutting that presumption will be high.

We also expect that the concept of “exceptional” will develop over time as cases are considered by prosecutors. I reinforce the point in clause 1(2): the presumption against prosecution does not impact on the prosecutor’s assessment as to whether there is sufficient evidence to justify a prosecution. It focuses instead on setting a high threshold for a prosecutor to determine that it is in the public interest to bring or to continue criminal proceedings in respect of offences committed by service personnel on operations more than five years ago.

Although the presumption will not directly impact on investigations, allegations of wrongdoing must, and will, continue to be investigated. We accept that, over time, this is likely to have an indirect impact. As prosecutors become familiar with the presumption, they should be able to advise investigators earlier in the process on whether the higher threshold of the new statutory requirement would be met in a particular case.

Mr Jones: Will the Minister give way on that point?

Johnny Mercer: Not at the moment. Although that should therefore help to reduce the likelihood of investigations being reopened without new and compelling evidence, it does not create an absolute bar to investigations or prosecutions, as a statute of limitations or an amnesty would. Rather, the presumption is rebuttal, with the prosecutor retaining the discretion to prosecute where they determine that it would be appropriate to do so. That may include cases in which there is evidence that a serious offence has been committed.

In contrast, an amnesty or a statute of limitations for service personnel would be a breach of our international legal obligations and would pose significant challenges and risks. That includes the risk that, in the absence of a domestic system for the prosecution of international criminal offences, the International Criminal Court would assert its jurisdiction and bring prosecutions against members of the UK armed forces. The presumption against prosecution, however, is consistent with our international legal obligations, as it would not affect the UK’s willingness or ability to investigate or prosecute alleged offences committed by our service personnel.

Finally, the statutory presumption and the measures in clauses 3 and 5 will apply only to proceedings that start after the Bill has become law. Although alleged criminal offences relating to operations in Iraq and Afghanistan occurred more than five years ago, meaning that the presumption could be applied in any relevant prosecutorial decisions, it is likely that any remaining investigations of those allegations will be complete before the Bill becomes law. If any new credible allegations

relating to Iraq and Afghanistan should arise, however, they will obviously be subject to investigation and, where appropriate, consideration by a prosecutor. Any decision to prosecute such a case after the Bill has become law must, in accordance with the presumption, be exceptional.

Mrs Lewell-Buck: I thank the Minister for giving way—*[Interruption.]*

The Chair: Order. The Committee is suspended for 15 minutes.

3.57 pm

Sitting suspended for a Division in the House.

4.12 pm

On resuming—

The Chair: Mrs Lewell-Buck was intervening on the Minister.

Mrs Lewell-Buck: It was remiss of me not to mention what a pleasure it is to serve under your chairmanship, Mr Stringer. It has been a pleasure all day, and hopefully all week.

Has clause 2 been given approval by the CPS? The Minister mentioned that it does not breach international humanitarian law. Can he explain which organisations and professionals have said that? I give him some gentle advice, which I hope he will take in the way that it is intended: legislation made purely on one’s own views, against the advice of experts and others who know exactly what they are talking about, is not the right way to go. It is playing fast and loose with our armed forces and is going to have serious, unintended consequences.

Johnny Mercer: On the idea that the Department does anything other than seek the views of experts to bring through this difficult legislation, in evidence the hon. Lady has seen a set of views given by campaign groups, but those are not the only views available. This is difficult legislation that, of course, will be contested, but the idea that we have just come up with some idea after a public consultation lasting many months—*[Interruption.]*

The Chair: Order.

Question put and agreed to.

Clause 2 accordingly ordered to stand part of the Bill.

Clause 3

MATTERS TO BE GIVEN PARTICULAR WEIGHT

Mr Jones: I beg to move amendment 1, in clause 3, page 2, line 20, leave out

“(so far as they tend to reduce the person’s culpability or otherwise tend against prosecution)”.

This amendment would ensure that, in giving particular weight to the matters in subsection (2), a prosecutor may consider whether any matter tends to reduce or increase culpability, tending against or in favour of prosecution respectively.

The Chair: With this it will be convenient to discuss the following:

Amendment 3, in clause 3, page 2, line 33, at end insert—

“(bb) the public interest in maintaining public trust in the criminal justice system and upholding the principle of accountability of the Armed Forces;”

This amendment would ensure that a relevant prosecutor gives particular weight to maintaining public trust in the criminal justice system and upholding the principle of accountability of the Armed Forces.

Amendment 4, in clause 3, page 2, line 33, at end insert—

“(bc) the nature of the alleged conduct, in particular whether it engaged the obligations of the United Kingdom under Articles 2, 3, 4 or 5 of the European Convention on Human Rights;”

This amendment would ensure that particular weight is given by a prosecutor where the alleged conduct engages the UK’s obligations under Article 2 (right to life), Article 3 (prohibition on torture and inhuman or degrading treatment, Article 4 (prohibition of slavery and forced labour) or Article 5 (prohibition of arbitrary detention) ECHR.

Amendment 5, in clause 3, page 2, line 33, at end insert—

“(bd) whether the person had command responsibility for the alleged conduct, and to what extent;”

This amendment would ensure that particular weight is given by a relevant prosecutor where the person had command responsibility for the alleged conduct.

Amendment 13, in clause 6, page 4, line 13, at end insert—

“(3A) A service offence is not a ‘relevant offence’ if it is an offence whose prosecution is required under the United Kingdom’s international treaty obligations.”

This amendment would exclude the prosecution of serious international crimes (such as torture, genocide, crimes against humanity, and certain war crimes) from the limitations otherwise imposed by the Bill.

Amendment 58, in schedule 1, page 12, line 6, at end insert—

“13A An offence under section 1 of the Geneva Conventions Act 1957 (grave breaches of the Geneva Conventions).

13B An offence under section 134 of the Criminal Justice Act 1988 (torture).”

This amendment adds to Schedule 1 specific reference to existing domestic offences in relation to torture, genocide, crimes against humanity, and grave breaches of the Geneva Conventions, in a similar way to the treatment of sexual offences.

Amendment 6, in schedule 1, page 12, line 38, leave out paragraph 17 and insert—

“17 An offence under Part 5 (Offences under domestic law) of the International Criminal Court Act 2001 as it relates to the law of England and Wales.”

This amendment would mean that all offences listed in Part 1 of the International Criminal Courts Act 2001 as they related to the law of England and Wales would be excluded offences, without restriction.

Amendment 59, in schedule 1, page 12, line 39, at end insert—

“(za) an act of genocide under article 6, or”

This amendment would ensure that acts of genocide are also excluded from the Bill, alongside sexual offences.

Amendment 60, in schedule 1, page 12, line 40, leave out

“a crime against humanity within article 7.1(g)”

and insert

“a crime against humanity within article 7.1(a)-(k)”.

This amendment would ensure that crimes against humanity are also excluded from the Bill, alongside sexual offences.

Amendment 61, in schedule 1, page 12, line 41, leave out from beginning to end of line 2 on page 13 and insert—

“(b) a war crime within article 8.2(a) (which relates to grave breaches of the Geneva Conventions).”

This amendment would ensure that grave breaches of the Geneva Conventions are also excluded from the Bill, alongside sexual offences.

Amendment 7, in schedule 1, page 13, line 12, leave out paragraph 20 and insert—

“20 An offence under Part 5 (Offences under domestic law) of the International Criminal Court Act 2001 as it relates to the law of Northern Ireland.”

This amendment would mean that all offences listed in Part 1 of the International Criminal Courts Act 2001 as they related to the law of Northern Ireland would be excluded offences, without restriction.

Amendment 62, in schedule 1, page 13, line 13, at end insert—

“(za) an act of genocide under article 6, or”

This amendment would ensure that acts of genocide are also excluded from the Bill, alongside sexual offences.

Amendment 63, in schedule 1, page 13, line 14, leave out

“a crime against humanity within article 7.1(g)”

and insert

“a crime against humanity within article 7.1(a)-(k)”.

This amendment would ensure that crimes against humanity are also excluded from the Bill, alongside sexual offences.

Amendment 64, in schedule 1, page 13, leave out lines 15 to 18 and insert—

“(b) a war crime within article 8.2(a) (which relates to grave breaches of the Geneva Conventions).”

This amendment would ensure that grave breaches of the Geneva Conventions are also excluded from the Bill, alongside sexual offences.

Amendment 8, in schedule 1, page 13, line 28, leave out paragraph 23.

This amendment is consequential on amendments 6 and 7.

Amendment 9, in schedule 1, page 14, line 5, leave out paragraphs 27 to 30 and insert—

“27 An offence under Part 1 (Offences) of the International Criminal Court (Scotland) Act 2001.”

This amendment would mean that all offences listed in Part 1 of the International Criminal Courts Act (Scotland) 2001 would be excluded offences, without restriction.

Amendment 65, in schedule 1, page 14, line 7, at end insert—

“(za) an act of genocide under article 6, or”

This amendment would ensure that acts of genocide are also excluded from the Bill, alongside sexual offences.

Amendment 66, in schedule 1, page 14, line 8, leave out

“a crime against humanity within article 7.1(g)”

and insert

“a crime against humanity within article 7.1(a)-(k)”.

This amendment would ensure that crimes against humanity are also excluded from the Bill, alongside sexual offences.

Amendment 67, in schedule 1, page 14, leave out lines 9 to 12 and insert—

“(b) a war crime within article 8.2(a) (which relates to grave breaches of the Geneva Conventions).”

This amendment would ensure that grave breaches of the Geneva Conventions are also excluded from the Bill, alongside sexual offences.

Amendment 12, in schedule 1, clause 15, page 9, line 21, at end insert

“subject to subsection (2A).

- (2A) Before making regulations under subsection (2), the Secretary of State or Lord Chancellor must lay before Parliament the report of an independent review confirming that the Act is in full compliance with the United Kingdom's international treaty obligations with respect to the prosecution of war crimes and other crimes committed during overseas operations.
- (2B) This Act shall cease to have effect at the end of the period of five years beginning with the day on which it is brought into force, unless the Secretary of State or Lord Chancellor has, not fewer than four years after this Act has come into force, laid before Parliament the report of a further independent review confirming that the Act remains in full compliance with the United Kingdom's international treaty obligations with respect to the prosecution of war crimes and other crimes committed during overseas operations."

4.15 pm

Mr Jones: The amendments we are debating relate to clause 3. I will first refer to amendment 3, which stands in my name. At the outset, I make clear that these are probing amendments; I am not going to push them to a vote, but they mean that the issues are at least going to get some scrutiny by the Committee, although based on the answers we have had so far, I am not sure we are going to get much response.

Particularly during the last bit on prosecutions, it would have been interesting to know whether, for example, the Crown Prosecution Service had agreed to clause 2 and what its thoughts on it were, because even though the Minister said it was consulted, I very much doubt it would agree with clause 2.

There is a difference between being consulted and agreeing with what comes out of the sausage machine at the end of the consultation. We want the public to have confidence not only in the Bill, but in the process. The Minister is right: the Government can consult who they like, but at the end of the day, they have to make decisions. What if those decisions fly in the face of what the Minister referred to as "campaign groups"? I do not consider the International Criminal Court and others "campaign groups". These are obligations under international treaty, and, like my hon. Friend the Member for Portsmouth South, I am concerned about our international reputation.

Amendment 3, which would amend page 2, line 33 of the Bill, relates to the public interest test in maintaining trust in the criminal justice system and upholding the principle of accountability of the armed forces. I have no problem with the accountability of the armed forces, because as I say, I am a supporter of the service justice system. I have no problem with the oversight we have in Parliament and the way that system operates. However, there was a time when many families had direct connections to the armed forces: going back to the second world war or national service, people knew people in the armed forces, so they understood the culture. That is becoming increasingly distant. We no longer have national service, so we do not have a culture where most citizens go through that system. It is therefore important that we work extra hard to maintain public confidence in the principle of accountability of the armed forces.

Again, I am a supporter of our armed forces, and have been for the 19 years I have been in this House. I am not uncritical if they get things wrong, and I am pleased that I played my part, for example, in the

activities of the Select Committee on Defence back in 2005, which led to the creation of the office of the Service Complaints Commissioner for the Armed Forces, now the Service Complaints Ombudsman. We are asking people to do unique things, and we do need to protect them, but this probing amendment is to see whether we can get the weight of public trust when it comes to prosecutions—in other words, if we are going to take forward a prosecution, that is taken into account.

I know for certain that our service prosecution system is fair, and it is one that I support. It is also one that includes the test of whether a prosecution is in the public interest, which is in civil law as well. That is controversial in civil law because there are cases in which you and I, Mr Stringer, and the average person on the famous Clapham omnibus, might think someone should be prosecuted. There is the evidential test and then there is the question of whether prosecution would be in the public interest, and sometimes it is difficult to explain that to the public.

I see no purpose whatsoever in prosecuting an 80-year-old veteran in Northern Ireland. I accept that the legislation does not cover Northern Ireland, but the Government have made huge promises about what they are going to do to replicate the Bill to cover Northern Ireland—having dealt with Northern Ireland as a Minister, I would say, "Best of luck with that, mate." There are ways of translating the Bill to do that, but this goes to the heart of it, because the issue in Northern Ireland is public trust on both sides of the community divide.

This probing amendment is trying to see whether the prosecution can take some account of the perception of our armed forces in the public eye. As I said earlier, many people do not understand the service justice system. Indeed, some people campaign against it, saying that members of the armed forces should not have a separate judicial system. I am sorry, but I disagree, because we ask unique things of them. I think that what we have at the moment strikes the right balance, having judicial oversight while also ensuring that the unique circumstances in which they serve are considered.

The public interest test—whether it is in the public interest to sue somebody—is already there. The question is whether we can have a system in which some weight is given to how it will look and how the armed forces would be perceived. I am not quite sure how that would be done in practice. The prosecutors and members of the armed forces who I have met have this in their DNA, because they are all conscious of the importance of maintaining public trust. We are a democracy and it is important that public trust is maintained in all aspects of Government and the armed forces. I think that the current Government are trying the public's patience in relation to that trust element, but I will not go down that route now.

Am I proud of our armed forces? Yes, I am. It is important to say that. My constituency is a recruiting ground for many young servicemen and women, and the armed forces give them opportunities that they would never get in civilian life. We often concentrate on the negative aspects of service life, but I have always advocated that service life is not only positive for those young people but good for the nation, because those life experiences and skills are transferable once those individuals return to civilian life. We should be proud of that and celebrate it more than we do.

I am not sure how amendment 3 would reflect that, but it is worth putting it to the Committee, so that Members understand that public trust in our armed forces is going to be important. My fear is that the Bill will do a lot to undermine that trust. As I told the Committee last week, I am also concerned that the Bill will give weight to those people who want to do away with the service justice system, which I certainly do not want to see.

Amendment 4, which stands in my name, is about the alleged conduct, with particular reference to our obligations under articles 2, 3, 4 and 5 of the European convention on human rights. I know that, for some Conservative Members, any mention of Europe has a Pavlov's dog effect—it sets them off. However, it is important to remember that the European convention on human rights is nothing to do with the EU or those nasty foreigners who, in the eyes of certain people, have been persecuting us from Brussels. It was set up after the second world war so that there would be a basic, decent standard.

I am proud that this country was part of that convention. I am also proud that we have been seen as a force for good around the world, because we have argued for basic human rights—rights that we take for granted in this country, but that many people do not. We have seen recently in Ukraine and Belarus what happens when those rights are not maintained. Under amendment 4, the prosecution would give weight to whether the alleged conduct would engage the UK's obligations under article 2, on the right to life, or under the articles prohibiting torture and inhuman or degrading treatment, slavery and forced labour, and arbitrary detention.

There is something that I find strange about the Bill. The Government specified certain categories of crimes that will not be covered by it—murder and sexual offences—and I totally agree about that. What I have difficulty with, however, despite the assertion of compliance with the Human Rights Act, is the issue of torture. I do not think that anyone in the Committee Room would condone torture. It was a given after the second world war that torture was something that we would not engage in, that was not acceptable, and that would lead to the condemnation of any nation that participated in it. Credit is due to the Foreign Office, under all Governments, including the present one, because it does a lot to raise the issue when torture is instigated against countries' citizens, and to push back and argue against it. I do not know why the issue is not specified in the Bill. It might help to reassure people who do not understand the justice system. People ask why it is needed, so I shall explain.

I did not think that we would get to a point where nations from which we would expect better would engage in torture. As a member of the Intelligence and Security Committee, I saw a lot of intelligence during the investigation of rendition. It is a fact that the United States, under the Bush Administration, engaged in state torture, which is not acceptable. Did that put members of our security services and some of our armed forces personnel in a difficult position? Yes, I think it did.

As to being open to prosecution, although I have seen no evidence that members of the British armed forces or security services took part in any type of torture, there is credible evidence to show that they were present when it was taking place. That is not acceptable, either.

It would be helpful if the Bill took into account and gave the weight in prosecutions to the European convention on human rights, and explicitly included reference to torture and inhumane treatment, to ensure that people can take comfort in the Bill. Let me dispel the myth that members of our armed forces or our Government would want to be involved in torture—they would not. To ensure we can have that protection, it should be in the Bill.

4.30 pm

The other factor is the right to life, which I know is controversial in armed conflict. There has been a concern raised in the excellent report of the Defence Committee, which looked at the creeping nature of the European Commission into the battle space. I do not see that there is a problem. As I see it, the convention does not cover the idea that the right to life will be one's enemy in any conflict, because otherwise it would make it impossible for any state to use lethal force when necessary. We all know that there are examples where lethal force must be used by our armed forces.

It is important that during prosecution those factors are in the back of the mind. We must accept that, in terms of the prosecution process, conduct should be covered by that. If sexual offences and murder are in the Bill, we should be able to put other things in, too.

Amendment 5 is about

“whether the person had command responsibility for the alleged conduct, and to what extent”.

This relates to the question, raised previously by the hon. Member for Wolverhampton South-west, about people's responsibilities in relation to the orders they have been given. That is no excuse for their actions, but weight should be given to whether one is a senior officer. Again, this is a probing amendment. It is difficult to disaggregate, because all members of the armed forces are covered by the same basic rules. In terms of relevance to the prosecutor, it is a matter of the position that person was in to have changed their actions. That is different for a senior officer and a private, for example.

Martin Docherty-Hughes: The right hon. Gentleman gets to a point that many of us find disconcerting, especially when reflecting on the second part of the Bill. The chain of command needs to take responsibility for its decision making. I know this is only a probing amendment, but the Government need to consider the fact that the chain of command has responsibility within the decision-making process.

Mr Jones: That is important. It is about taking responsibility of the chain of command. I remember when we first introduced the Service Complaints Commissioner for the Armed Forces, there was a huge fear, as there was when we introduced the armed forces ombudsman, that they would interfere with the chain of command. I do not want for one minute to do that, and neither should a prosecutor, but the actions and freedoms that someone has is a relevant factor that needs to be taken into consideration. As we discussed this morning, these people are in very difficult situations—I am sure that neither you, Mr Stringer, nor I could imagine what it would be like, although I am sure that the Minister can—and that needs to be taken into account.

Having made those comments, I shall leave it there.

Martin Docherty-Hughes: I want to speak to amendment 3, the probing amendment tabled by the right hon. Member for North Durham, and to reflect on several issues that he has raised about trust and accountability. That is because there is a sense, at least among Scottish National party Members, that if this type of amendment were to be considered at a future time by the Government, it would allow the criminal justice system, and specifically the military judicial system, to retain some element of trust within civilian oversight.

I recognise that the Minister and the Government have a passion for this issue, and that there is a commitment to do this within 100 days. I hear that, but I have some concerns that need to be answered. First, to enable accountability and trust, can the Minister tell us whether the Crown Prosecution Service for England and Wales gave a positive response to the Bill? Secondly, in relation to the 100 days, there is also a commitment to have a similar Bill for Northern Ireland, so would he consider it appropriate for the Public Prosecution Service for Northern Ireland to be engaged in any future Bill-building on that Bill, given the fact that he excluded from this process the Judge Advocate General, who is a coherent part of the military judicial system, and engagement with whom enables trust to be built across the House?

I wonder whether the Minister can answer those questions: did the Crown Prosecution Service for England and Wales say that the Bill was a good piece of legislation; and will he instigate discussions with the Public Prosecution Service for Northern Ireland if he is going to introduce another piece of legislation for Northern Ireland, and again exclude the Judge Advocate General?

Stephen Morgan: I rise to speak in support of the amendments to clause 3. When I became a Member of Parliament, in the nation regarded as the birthplace of modern parliamentary democracy, I never once thought that I would have to argue the case for retaining Great Britain's commitments against war crimes. This country was built upon principles of fairness, equality and justice. We have stood against torture and other war crimes, with a proud tradition of taking direct action when we see violations against human rights being committed. From world war two and the Nuremberg trials to Bosnia and The Hague, this country has a reputation for standing against torture and crimes against humanity. It is part of our identity and is part of what makes us British, which is why it is so concerning that this Bill in its current form, as my right hon. Friend the Member for North Durham said earlier, puts all of that at risk.

Schedule 1 to the Bill sets out what constitutes excluded offences for the purposes of presumption against prosecution. Torture is not included and neither are other war crimes listed in article 7 of the Rome statute, apart from sexual crimes. That is morally wrong. It breaks our commitments to international law, it risks dragging our troops in front of the International Criminal Court, and it is entirely avoidable with some common-sense amendments to the Bill.

Let us consider that first point. I know that everyone in this room would agree that it is morally wrong in any situation to commit an act of torture—it is the most serious of crimes and has no moral justification in any circumstances. When we look at schedule 1, we see that the offences excluded from legal protection are sexual offences. Labour agrees that these offences should be utterly condemned and are inexcusable, and that they

should be excluded from any presumption against prosecution. However, schedule 1 fails to exclude terrible crimes such as torture and genocide. The Government have provided no good explanation or justification whatever for excluding only sexual offences from the scope of protection under the Bill, particularly as no service personnel in Iraq or Afghanistan have been accused of genocide, yet it is not excluded as an offence in the Bill. As a former Attorney General, Dominic Grieve, put it:

“This could create the bizarre outcome that an allegation of torture or murder would not be prosecuted when a sexual offence arising out of the same incident could be.”

As the Minister wrote the Bill, can he take us through sub-paragraphs (a) to (k) of article 7(1) of the Rome statute and explain why each provision is legally needed? What is the legal necessity of including each of those provisions?

That brings me to Labour's second ground for objection to the Bill's exclusion of torture and other war crimes. Britain has always had an unwavering commitment to the law of armed conflict. The Geneva conventions are known in most households in Britain, and the Bill tramples on our commitments to them. We have heard from judges and generals, witnesses who have trained our armed forces and provided them with independent legal advice, and ex-service personnel. We have received written evidence from the International Committee of the Red Cross. All those individuals and organisations have said two things in common. First, they are clear in their duty to uphold the law of armed conflict and instruct others to do so. Secondly, they are clear that the Bill risks eroding our commitment to those laws and have expressed grave warnings on the consequences. First, it would irreparably damage the moral credibility and authority of the UK to call out human rights abuses worldwide. Secondly, it would undermine the hard-won reputation of UK forces as responsible and reliable actors. Thirdly, it risks reprisals against British troops, particularly service personnel who may be captured and detained on operations.

I am reminded of the evidence last week of the Judge Advocate General, who said:

“You will remember that six Royal Military Police were killed...in 2003. If those responsible were identified today, would we accept that there would be a presumption against their prosecution? Would we expect the factors in clause 3(2)(a) to be taken into account? Would we be content that a member of the Iraqi Government's consent would be needed to prosecute? Would we accept a decision by that person not to prosecute? In my view, there would be outrage in this country if that occurred. In all areas of law, you have to be even-handed.”—[*Official Report, Overseas Operations (Service Personnel and Veterans) Public Bill Committee*, 8 October 2020; c. 128, Q278.]

It is hard to disagree with those words. To demand justice from others when our men and women on the frontline need it, Britain must be at the forefront of defending that system, underpinned by international laws and the principle of equality under the law.

Labour is deeply concerned that the Bill sets the UK on a collision course with the International Criminal Court and that the Bill risks our troops being dragged to The Hague. Last week, we heard from a witness who represents and is the voice for thousands of veterans, who said that

“there is without a doubt greater fear of a non-British legal action coming against people than of anything British.”—[*Official Report, Overseas Operations (Service Personnel and Veterans) Public Bill Committee*, 8 October 2020; c. 110, Q219.]

Going back on our commitments to the Geneva conventions risks our forces personnel being dragged in front of the International Criminal Court, only confirming the worst fears among veterans discussed by Lieutenant Colonel Parker. Why would the Minister not prefer to have trials for British troops in British courts rather than The Hague?

The Bill as it stands is flawed. It is fundamentally at odds with British values by failing to offer an absolute rejection of torture. It tramples on our commitments to international doctrines that we helped to write, and it fails our troops by risking action by the international courts.

There is a way out. Protecting troops from vexatious claims does not need to be at odds with our commitments to international humanitarian law. There does not need to be a trade-off between safeguarding our armed forces and standing against torture. That is why we have tabled these amendments, which will address those imbalances.

First, the amendments would ensure that, under schedule 1, the forms of crime listed in the Rome statute, such as torture, genocide and crimes against humanity, were—alongside sexual offences—excluded from the presumption against prosecution. Further amendments would ensure that any breach of the Geneva conventions and other international laws also fell outside the scope of that. Labour's amendments, by bringing the Bill in line with international law and doubling down on our commitments against torture, would protect our troops from international courts and protect our nation's reputation.

The Minister said at the witness stage, "Don't let the perfect be the enemy of the good."

Mr Jones: What my hon. Friend proposes in no way changes the Bill in effect; it strengthens the Bill. Does he agree that it is a simple thing which might assuage a lot of the critics of the Bill?

4.45 pm

Stephen Morgan: My right hon. Friend is absolutely right. I hope that the Minister has heard our commitment to get the Bill right. It can be better for our armed forces, if he is willing to engage in the arguments being made.

I put it to the Minister, do not let party politics get in the way of making this Bill worthy of the troops it is set to serve. There is still time for him to work with the Opposition to get this right. He has made half of the argument for me. By already excluding sexual crimes, he recognises that some crimes are so serious they should be excluded from the Bill. He should now go the full way and exclude war crimes.

Labour stand four-square behind our troops, and we want to work with the Government to build the broadest consensus possible on the Bill, tailored to supporting our forces and safeguarding human rights. I urge the Minister to work with us and vote in favour of amendments that would strengthen the Bill for our troops and for our commitments to human rights.

Finally, I ask the Minister to clarify, on the case of those responsible for the six Royal Military Police who were killed in 2003—raised by the former Judge Advocate General last week—would he accept presumption against prosecution? Would we expect the factors in clause 3(2)(a) to be taken into account? Would we be content for a

member of the Iraqi Government's consent to be needed to prosecute, and would he accept a decision not to prosecute? Why would the Minister not prefer to have trials for British troops in British courts, rather than in The Hague? Finally, will he take us through paragraph 1(a) to (k) of article 7 the Rome statute and explain the legal need of those sub-paragraphs within the Bill? What is the legal necessity of including each of those sub-paragraphs?

Liz Twist: I want to speak briefly on torture, which is one of the issues that my constituents have brought to me. That is relevant, because it is about public perception of the legislation proposed.

Britain has a fine history with our armed forces of acting legally, morally and in the best interests and traditions of the armed forces. I believe that the Minister should consider the amendment that ensures that torture, war crimes and crimes against humanity are excluded from the Bill. Last Thursday, a number of witnesses said to us that they could see no reason why torture and war crimes should not be excluded too, as sexual offences rightly are. I urge the Government to consider the good name of our country and put those elements outside the scope of the Bill.

Johnny Mercer: We ask a huge amount of our service personnel. We send them to undertake high-threat and high-risk operations in defence of our country and its people. They do their duty in the clear knowledge that they may be injured, maimed or even killed.

This Government believe, therefore, that it is absolutely right and reasonable to require that in return we ensure that, in addition to the existing public interest test, a prosecutor has to give particular weight to the unique circumstances of overseas operations and the adverse impacts that those may have on a serviceperson's capacity to make sound judgments and on their mental health at the time of an alleged offence when coming to a decision on whether to prosecute. That is not intended to excuse bad behaviour by service personnel, but to ensure that prosecutors give full recognition to the significant difference in the circumstances surrounding an alleged offence committed on operations overseas as compared, for example, to situations where the alleged criminal conduct occurs in a domestic civilian setting.

The prosecutor must consider the presumption against prosecution under clause 2 to determine whether a case meets the exceptional threshold. The prosecutor, as required by clause 3, must also give particular weight to matters that may, in effect, tip the balance in favour of not prosecuting. Clause 3 is therefore integral to supporting the high threshold set in clause 2 for a prosecutor to make a decision to prosecute.

There was a lot of discussion last week about the concerns over the impact on our personnel of repeated scrutiny and the mental burden placed on them by the threat of criminal prosecution occurring long after the events in question, particularly where there is no compelling new evidence to be considered. Clause 3 requires that prosecutors must also consider where there has been a previous investigation in relation to the alleged criminal conduct and no compelling new evidence has arisen. The public interest is in cases coming to a timely and final resolution.

In the responses to our public consultation, many service personnel expressed a lack of trust in prosecutors

[Johnny Mercer]

and others in the justice system. They were particularly concerned about whether prosecutors are able to understand the operational context in which the offence occurred and to adequately reflect this in determining the public interest. We fully accept that prosecutors may already take such matters into account. However, making that a statutory requirement provides greater certainty for service personnel that the unique context of overseas operations will be given particular and appropriate weight in the prosecutor's deliberation.

By seeking to remove the benefit of the matters in clause 3 that tend towards reducing the culpability of a serviceperson and tend against prosecution, the amendments are designed to ensure that the prosecutor can also consider whether such matters increase the culpability of an individual and support a prosecution. The amendments undermine our reassurance to our service personnel that the operational context of an alleged offence will be taken into account, and in their favour, by the prosecutor. It would be a slap in the face for our armed forces personnel to suggest that the context of an overseas operation will be considered as a factor in support of their prosecution.

Mr Jones: At present, the service justice system understands the context and the public interest test is already there—whether it is in the public interest to prosecute. The service justice system is designed to take into account special circumstances, so what is the need for clause 3?

Johnny Mercer: The need is very clear. The fact is that the service justice system as it stands has facilitated an industrial level of claims against our people that has absolutely destroyed their lives.

Mr Jones: No, it has not.

Johnny Mercer: The right hon. Gentleman can sit there and say no, this did not happen and that did not happen. The rest of us live in the factual world, where these things actually did happen. They destroyed some of our finest people, which is why we are introducing this legislation. I have heard a lot from the right hon. Gentleman, and the vast majority is not correct. I respect him immensely, but it is not correct. I will therefore push on at this stage.

Amendments 3 to 5 seek to add additional factors to clause 3. In the light of amendment 1, I can assume only that the intention is somehow to bring in factors that would be seen by the prosecutor to increase a serviceperson's culpability and make a prosecution more likely. I have already set out my arguments as to why amendment 1 should be withdrawn. Furthermore, I do not believe that amendments 3 to 5 are appropriate or needed.

Amendment 3 is designed to

“ensure that a relevant prosecutor gives particular weight to maintaining public trust in the criminal justice system and upholding the principle of accountability of the Armed Forces.”

The independent prosecutor's responsibility is to follow the principle set out in the code for crown prosecutors. That includes the principle that they will work

“to maintain public trust and to provide an efficient criminal justice system.”

The Bill does not place service personnel above the law or make them somehow less accountable. Allegations of offences must and will continue to be investigated. Where appropriate, a prosecutor can still make a decision to prosecute. On that basis, I do not believe that amendment 3 is warranted.

Amendment 4 is designed to

“ensure that particular weight is given by a prosecutor where the alleged conduct engages the UK's obligations”

under articles 2, 3, 4 and 5 of the European convention on human rights. The prosecutor already has to apply the principles of the ECHR, in accordance with the Human Rights Act 1998, at each stage of the case, so amendment 4's additional requirement would be totally unnecessary.

Amendment 5 is designed to

“ensure that particular weight is given by a relevant prosecutor where the person had command responsibility for the alleged conduct.”

I can assume only that the amendment is meant to address the concerns raised last week about the chain of command being held accountable as well as individuals, but it misses the point. A decision taken by a serviceperson to use force during an overseas operation is an individual decision for which they, and not their commanding officer, may then be held personally accountable if their decision is deemed to have been in breach of criminal law. The circumstances of an incident would determine whether the involvement of a commander in the activities of their subordinates also merited a criminal prosecution. Separately, it should be noted that under the Armed Forces Act 2006, commanding officers may be investigated and prosecuted, including at court martial, for non-criminal conduct offences in relation to serious allegations of wrongdoing by personnel under their command. Non-criminal conduct offences are not covered by the Overseas Operations Bill.

On the proposed amendments to schedule 1, the Government are committed to providing reassurance to service personnel and veterans in relation to the threat of prosecution for alleged offences on overseas operations more than five years ago. The measures in part 1 of the Bill are key to delivering that reassurance. The fact that we have only excluded sexual offences in schedule 1 does not mean that we will not continue to take other offences, such as war crimes and torture, extremely seriously.

The presumption against prosecution will allow the prosecutor to continue to take decisions to prosecute these offences, and the severity of the crime and the circumstances in which it was allegedly committed will always be factors in their considerations. On a case-by-case basis, a prosecutor can determine that a case against an individual in relation to war crimes, torture or genocide is “exceptional”, and that a prosecution is therefore appropriate, subject to the approval of the Attorney General or the Advocate General in Northern Ireland. The decision to exclude only sexual offences reflects the Government's strong stated belief that the use of sexual violence or sexual exploitation during overseas operations is never acceptable in any circumstances.

We have not excluded other offences, including torture, because in the course of their duties on overseas operations, we expect our service personnel to undertake activities that are intrinsically violent in nature. These activities can expose service personnel to the possibility that their

actions may result in allegations of torture war crimes. By contrast, although allegations of sexual offences can still arise, the activities that we expect our service personnel to undertake on operations cannot possibly include those of a sexual nature.

We do not therefore believe it is appropriate to afford personnel the additional protection of the presumption in relation to allegations of sexual offences after five years. I am aware that many people have misinterpreted this decision, and have suggested that it somehow undermines the UK's continuing commitment to upholding international humanitarian and human rights law, including the UN convention against torture. That is completely untrue. The UK does not participate in, solicit, encourage or condone the use of torture for any purpose, and we remain committed to maintaining our leading role in the promotion and protection of human rights, democracy and the rule of law.

Liz Twist: Will the Minister give way?

Johnny Mercer: I will not, as I do not have time.

These amendments seek to ensure that all offences contained within the International Criminal Court Act 2001, as it applies in England, Wales, Northern Ireland and Scotland, should be excluded offences in schedule 1. Amendment 8 is consequential on amendments 6 and 7. These amendments would amount to such a comprehensive list of offences that they would considerably undermine the effectiveness and value of the measures in part 1 of

the Bill. In doing so, they would prevent the Government from delivering on their commitment to provide reassurance to our service personnel and veterans in relation to the threat of prosecution for alleged historical offences, something that they so greatly deserve.

Liz Twist: Will the Minister give way on the issue of torture?

Johnny Mercer: I will not. Amendment 12 seeks to introduce a sunset clause where the Act will cease to have effect after five years unless the Secretary of State or Lord Chancellor lays before Parliament a report of an independent review confirming that the Act complies with the UK's international obligations. I can assure the Committee that such a review is not required, as the measures in this Bill are consistent with our international legal obligations and do not undermine international humanitarian law as set out in the Geneva conventions.

Liz Twist: Will the Minister give way?

Johnny Mercer: I will not give way.

I therefore ask that these amendments be withdrawn.

Ordered, That the debate be now adjourned.—(*Leo Docherty.*)

4.59 pm

Adjourned till Tuesday 20 October at Twenty-five minutes past Nine o'clock.

Written evidence reported to the House

OOB05 Reverend Nicholas Mercer, Rector of Bolton Abbey, The Priory Church of St Mary and St Cuthbert, Bolton Abbey, and former Military Lawyer and the Command Legal Adviser for the Iraq War 2003

OOB06 Assistant Professor Samuel Beswick, Peter A. Allard School of Law, The University of British Columbia in Vancouver, Canada

OOB07 Equality and Human Rights Commission (EHRC)

OOB08 Reprieve

