

Defence Committee

Oral evidence: Statute of Limitations—Veterans Protection, HC 1224

Tuesday 11 December 2018

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[Watch the meeting](#)

Members present: Dr Julian Lewis (Chair); Leo Docherty; Graham P. Jones; Johnny Mercer; Gavin Robinson; John Spellar.

Questions 85-172

Witnesses

I: General (Rtd) Sir Nick Parker, Hilary Meredith, Chairman, Hilary Meredith Solicitors, and Professor Richard Ekins, Oxford University and Policy Exchange Judicial Power Project.

Written evidence from witnesses:

[General \(Rtd\) Sir Nick Parker](#)

[Hilary Meredith](#)

Examination of witnesses

Witnesses: Sir Nick Parker, Hilary Meredith and Professor Ekins.

Q85 **Chair:** Good morning. Welcome to this session of the Defence Committee's inquiry on veterans protection and the statute of limitations. We have three highly qualified witnesses today; I invite each of you in turn to say a few words of introduction about yourselves and your connection with the issue that we are about to inquire into. Professor Ekins?

Professor Ekins: Thank you. I teach law at the University of Oxford and I lead Policy Exchange's judicial power project. I have written a number of reports with Policy Exchange on the problem of lawfare and the justification of war, which extends in part to the expansion of European human rights law to the battlefield. I have given evidence to this Committee before on protection for veterans and some of the problems arising from recent judgments.

Hilary Meredith: I am Hilary Meredith. I am a solicitor. I have acted for individual members of the armed forces for around 30 years. I am currently instructed by some of those accused under IHAT, and those accused in relation to Northern Ireland.

Sir Nick Parker: I am retired General Sir Nick Parker. I was General Officer Commanding Northern Ireland in 2005-6. I served in Northern Ireland in 1977 to 79 and 1995. I have a lot of experience in Northern Ireland, and feel that I have some residual responsibility for the investigations of servicemen who were in that conflict. I have also been contacted by a number of veterans over the past couple of years who were concerned about events going on around the Iraq inquiries.

Chair: Thank you very much. Johnny Mercer will start off.

Q86 **Johnny Mercer:** May I start with you, Richard? Why are there legacy investigations into Banner, Telic and Herrick at the moment?

Professor Ekins: I think there is a combination of reasons. It is a combination of European human rights law and the obligations that have been foisted on the convention by the European Court of Human Rights since the McCann decision in 1995, which effectively created or conjured a duty on states to investigate deaths arising out of state action. Across subsequent years, there was an increase in the nature of the obligation, which has been applied to a variety of cases, including cases out of Northern Ireland, Iraq and Afghanistan. That has created an overhang whereby a Government is at risk of human rights challenge if it does not maintain investigations. That intersects, I think, with the politics of power sharing; plainly there is an ongoing agenda to keep investigating past cases with a particular focus on the military, because of—well, it may be the availability of records.



Q87 Johnny Mercer: Sir Nick, we have had a couple of witnesses come forward who have criticised a lack of leadership and responsibility at the senior levels in the Army. This has come from senior officers who have served on operations. Do you agree with these criticisms?

Sir Nick Parker: It is difficult to be personally critical. My reaction is that both the state and the chain of command have a responsibility for what happened, which they are not, or don't appear to be, accepting. Consider what happened in the early '70s in Northern Ireland: the state put us there and the chain of command told us what to do, yet now there are some very bewildered 70-year-olds who feel that they are the only people who are being held to account, because neither the chain of command nor the state can be. If I were in that position, I would resent the people who were in charge of me for not standing up for me now; of course, they are all long gone.

I feel a sense of responsibility as a general officer—the last general officer in Northern Ireland. When the Historical Enquiries Team was introduced, I remember questioning it, and having a couple of incidents where they started to investigate people that I felt uncomfortable with.

At the time, my view was that a balance had to be struck between the need to remove the Army gracefully from a conflict to allow enduring peace to exist, and our need to trust that the system would see that our people would be all right as these investigations continued. When I look back on my responsibility, I feel I took a decision at the time that was entirely justified; I am now uncomfortable with the way these things have continued.

Q88 Johnny Mercer: That's interesting. You commanded in Iraq and Afghanistan as well—you were a senior commander in those conflicts—so you would have seen at first hand the investigations taking place, and the effects of those investigations on those who were going through that process. My question to you, as it has been to other service chiefs in this process, is twofold. First, did you ever really stand up and say, "This is unacceptable"? If you did, were Ministers simply deaf to that?

Sir Nick Parker: My personal experience in Iraq and Afghanistan meant that I didn't realise that these things were going on at the time. I was in Iraq in 2005, and the issues of Baha Mousa and those sorts of things weren't on my radar at all. I was Commander Regional Forces when they came to the fore. I was working with an adjutant general, and we judged that the right steps were being taken to make sure that if any bad behaviour took place, it would be found out—and we accepted that.

Challenging the system is something that has become more obvious to me since I have left, because as you step out of it, you see how there does not appear to be a true understanding of the vulnerability of the individuals who are coming under investigation—that the institution does not recognise those vulnerabilities. You only see that when you come out and you live closer to the veteran community. In a way, I don't apologise for that. When I was serving, my job was to fight and to do the forward



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thinking. Now, I believe it's our job to try to represent as much as we can those who I believe are vulnerable as a result of what's going on.

- Q89 **Johnny Mercer:** Richard, we have this line in terms of what sort of conflict we are supposedly involved in, don't we? Northern Ireland, Afghanistan and Iraq were not the conventional state v. state wars, but troops deploying in a counter-insurgency manner. What are the legal implications of this? Did the law of armed conflict apply? Of course it did, but what are the legal connotations of that? Some will struggle to understand why, for example, Northern Ireland was not categorised as war fighting. What is the layman's explanation for that?

Professor Ekins: I think the explanation for Northern Ireland is simply that, as I understand it, it was a fairly significant part of the position of successive Governments that the conflict in Northern Ireland would not be categorised as a non-international armed conflict, so would not be taken to be governed by the laws of war. It was within the United Kingdom and would be dealt with as a domestic matter, if you like, so the Geneva conventions and so forth would not come to bear.

The law around conflict applies differently but somewhat continuously in relation to international armed conflict and non-international armed conflict. Iraq was one and then the other over time. There is a significant difference between the Northern Ireland situation and Iraq and Afghanistan, because they were outside the United Kingdom and were a deployment abroad.

There was always inevitably going to be more exposure of soldiers serving in Northern Ireland to domestic procedures and civilian oversight, and it was a matter of policy as well. That was not the position in relation to Iraq and Afghanistan. In a way, because the European Court of Human Rights changed the rules in 2011 and extended the European convention to the world, more or less, we have had to backdate a kind of civilian control and oversight that was otherwise not anticipated and is highly problematic.

- Q90 **John Spellar:** Following on from that, in your view, Professor Ekins, and in yours, Hilary Meredith, as a practitioner, has that decision turbo-charged, created and encouraged legacy investigations?

Professor Ekins: Yes.

Hilary Meredith: I would say yes, definitely.

Professor Ekins: I think the Government have clearly been acting under the shadow of litigation, knowing that if they do not take certain steps, the High Court will issue orders against them. There has been that dimension in Northern Ireland as well. The European convention plainly applied to Northern Ireland throughout. However, in 2011 the European Court extended the convention to the world, and in a way, successive decisions of the European Court—and of our own courts in response—have extended the European convention back in time.



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In 2004, the House of Lords held that the Human Rights Act did not apply to deaths before the Human Rights Act came into force in October 2000. In 2011, following a Strasbourg Court decision, it abandoned that position. The Government are at risk if they do not observe the Strasbourg Court's understanding of article 2 obligations to investigate and extend those back in time.

Q91 **John Spellar:** At risk of what?

Professor Ekins: At risk of being held to have breached convention rights, of being held to have violated the terms of the Human Rights Act, and of being ordered to carry out an investigation, because if they do not, they will be in breach of the Human Rights Act. It is a domestic legal obligation, but it is one that tracks the European Court's decisions.

Q92 **John Spellar:** What should the Government do about it?

Professor Ekins: They should amend the Human Rights Act, or propose amendments to the Human Rights Act that Parliament would endorse. They should restore the position to what it was unanimously understood to be by the House of Lords Court in 2004. I think the minority had the better of the argument in 2011.

Q93 **John Spellar:** Should they do that by legislation or by derogation for armed conflicts?

Professor Ekins: You could do both, but I think that amending the Human Rights Act is the only way—if it could be backdated in time—to deal with the convention understandings. I do not think you can backdate a derogation; it just wouldn't work. Derogations are also vulnerable to challenge and have been quashed in our courts. You should derogate with a view to trying to persuade the Strasbourg Court that you are not in breach, but amending the legislation is much more secure and should be adopted as the primary course of action.

Q94 **John Spellar:** Hilary, as a practitioner in the courts, how would you see that?

Hilary Meredith: I think it would be quite difficult to do. It would be great if we could do that, because I think that the good that the Human Rights Act was brought in to do has been open to abuse. To stamp out that abuse would be excellent.

One proposal I put forward is that the Ministry of Defence itself should take corporate responsibility for criminal behaviour, rather than the individual soldier being prosecuted publicly in civil courts. The MOD is very good at investigating its own. It has the advantage of visiting the scene very quickly after a reported crime. If anything, they are very over-zealous at court-martialling those who step out of line. If that happened, any civil criminal claim, if I can put it that way, could be made against the MOD, which has a corporate responsibility, without bringing the individual into the public eye and naming them publicly so long down the line, when they have served their country.



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Professor Ekins: Can I come back to the Human Rights Act for a moment? It is true that it would be difficult to amend the Act, but in a way the whole problem that has been going on is that courts do things they shouldn't do, whether European or domestic, and then the Government and Parliament feel helpless in response. It's partly—mainly, even—a problem of political inaction: a failure to respond to the changes.

Amending the Human Rights Act to restore the understanding that our House of Lords had in 2004 in relation to the temporal application of the Act should not be viewed as a revolutionary act. It is not the same as repealing the Act. You are just changing it back to the way it was understood. The same will be true for the scope of the Human Rights Act's application. In 2007, our highest court thought it was basically only territorial, with some limited extraterritorial application. That has been swept away by the al-Skeini decision in the Strasbourg Court.

If we were to amend the Act to restore the understanding that our highest court had in 2007, it would help a great deal. It should not be viewed—I hope it wouldn't be—at the same level of political controversy as proposing to repeal the entire Act, which is obviously a different proposition.

Q95 **John Spellar:** So it would be difficult to amend the Act.

Professor Ekins: I just mean politically difficult. I presume that many people would take the view that the Act—I wouldn't say it's holy writ; I certainly don't think it is—should not be touched.

Q96 **John Spellar:** Do you think that would be the view of the great British public?

Professor Ekins: No, I don't think it would be at all. I hope you do propose amending it and I hope Parliament does amend it.

Q97 **Gavin Robinson:** I want to explore article 2 compliant investigations. Where there has been a satisfactory article 2 compliant investigation, what obligation does the state remain under to reinvestigate something that was dutifully done in line with the overarching obligations?

Hilary Meredith: I don't understand why there are so many reinvestigations. To be honest, if the Ministry of Defence has investigated its own—it has court-martialled them and they have been sentenced or acquitted—I think that should be sufficient. I know there are allegations that if you are investigating your own, it is not independent, but there can be independent audits. I sat on an audit last year where Her Majesty's Inspectorate of Constabulary audited the Royal Military Police. Certain recommendations were made: for example, they don't see enough murder crime scenes, so they should work with the London Met to learn how to preserve a crime scene and investigate it, because they don't see sufficient crime scenes in the Royal Military Police. But I am sure that an audit could be done of internal proceedings of courts martial. In my own view, the MOD is over-zealous in court-martialling people if somebody has done something wrong, so I cannot see anything wrong with it investigating its own.



Q98 Gavin Robinson: With respect, in Northern Ireland the Royal Military Police investigations were struck down in the early '70s and were seen to be deficient. From '73 onwards my understanding is that subsequent investigations were article 2 compliant and the state discharged its obligations. So in those circumstances, from '73 onwards, in Northern Ireland where the state has done what it is required to do under the convention, what necessity is there to do it again and again, applying modern-day standards to historical and legacy investigations?

Professor Ekins: Article 2 compliance in this respect was invented in 1995 by the Court. Article 2 is there in the text, plainly.

Q99 Gavin Robinson: It is, yes, but that was the fundamental vulnerability in the independence of investigations back in the early '70s when the Royal Military Police were seen to be deficient and therefore the RUC or other bodies were asked to investigate. In those circumstances, article 2 was applicable in the '70s and '80s. The investigations were compliant and haven't been struck down as being non-compliant in the '70s and '80s. If that is the case—

Professor Ekins: They couldn't have been struck down in the '70s and '80s because the Strasbourg Court didn't recognise an article 2 procedural obligation. They really did make that up in 1995 and then they layered on further refinements. I cannot give you an authoritative account of the full breadth of requirements, but in a sense it is not just independence; it is the breadth of investigation, how many things you consider and how far you go.

Q100 Gavin Robinson: How retrospective it should be?

Professor Ekins: I don't think they speak to that necessarily. There are cases on this.

Q101 Gavin Robinson: But we are considering retrospective application of what you say is a '95 standard.

Professor Ekins: There is certainly an element of retrospection, because cases from well before 1995 are being judged as having been wrongfully investigated because they were not to article 2 standard. The article 2 standard is a developing and ongoing one, and the Court has refined it over time. I am not sure it would be true to say that all, or even most, investigations from '73 onwards were article 2 compliant. It might mean that they were investigated to their best ability given the resources available, and they were independent and robust, but that is often disputed.

Q102 Gavin Robinson: That brings us into the space of applying modern-day standards to historical and legacy investigations. How fair is that? How just is that for somebody who submitted themselves to an investigation and was ultimately exonerated by our investigatory bodies under the state?

Hilary Meredith: I would say very unfair, and I think any further investigation so long after the event should be directed to the MOD estate,



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not the individual. The individual was cleared at the time, and to reinvestigate and recharge them again cannot be right. If there are procedural problems in the investigation, those should be placed at the table of the MOD, not the individual.

Professor Ekins: I certainly agree it is unfair to keep reopening investigations and have the risk of that investigation and prosecution—and possibly conviction, although that is quite unlikely—hanging over people for decades after the fact. That is very unjust, and something that should be resisted quite strongly. I am not quite so sure that one can disentangle the Government's liability from that of individual soldiers in the way suggested.

Q103 **Leo Docherty:** We should be confident of the Government's desire to resolve this issue, because in black and white in the Conservative party manifesto, page 41 states that "Under a Conservative Government, British troops will in future be subject to the Law of Armed Conflict, which includes the Geneva Convention and UK Service Law, not the European Court of Human Rights." We are committed to ensuring that that manifesto commitment is fulfilled—well, at least I am. That is not just because of justifiable public outrage about this; it is also about the operational impact of the situation. Sir Nick, what do you think the operational impact is on soldiers deploying of knowing that they might face legal pursuit on return? For example, if we were to deploy operationally to the Middle East—or anywhere else—tomorrow, soldiers would deploy knowing that they might face legal pursuit on their return. What is the operational impact of that?

Sir Nick Parker: It is quite obvious. It would make them uncomfortable. It would not be the only factor, but it would be another factor in stiffening their backbone for what they will have to do and the very trying circumstances they are going into, and it is unnecessary. A member of the chain of command has enough challenges anyway without that additional uncertainty, so self-evidently it is not a good thing.

Q104 **Leo Docherty:** In terms of your peer group and those who commanded in Iraq and Afghanistan, what is the attitude towards legal pursuit?

Sir Nick Parker: I won't answer for my peer group. My view is that I am very uncomfortable with it. It is, in my view, unacceptable to send somebody to do their country's duty with that hanging in the background. That is not to be confused with bad behaviour. If people behave illegally, the chain of command should be robust enough to deal with that, but to have this sense that somehow somebody is going to turn the clock back and look at what you did in a forensic environment, when you were doing what you believed was right and reasonable at the time, is unfair.

Q105 **Leo Docherty:** In terms of the chain of command and when we conduct operations, do you think it inhibits our appetite for risk? Do you think it constrains our behaviour operationally in any way?

Sir Nick Parker: I have been out for five and a half years, and my last deep operational experience was in 2010 in Afghanistan. I would say that



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that was not true at that time. Other factors were constraining risks, but I don't think at that stage it was. If it lingers on, and if what appears to be happening continues to happen, then it surely must.

- Q106 **Leo Docherty:** To conclude, Hilary and Professor Ekins, what do you think is the quickest route to resolving this matter? Is it a derogation? What is the most legally viable and quickest route for the Government to address this urgently?

Hilary Meredith: I was proposing that in the civil context there is what is called combat immunity: in the heat of battle, where thinking is impaired, the MOD is immune from one soldier suing another soldier. That is very sensible—in the midst of battle, mistakes are made. I think that should be almost transferred into criminal law, where if someone is following orders—not necessarily even in the heat of battle but just following orders—and mistakes are made, the individual is almost immune and the Ministry of Defence will take corporate responsibility and will stand behind them. If anyone joining the armed forces now knows that the MOD will stand behind them and take corporate responsibility for any historical allegations down the line, a huge weight will be lifted off the shoulders of those serving on the frontline.

- Q107 **John Spellar:** But following orders cannot be a defence—we established that at Nuremberg, quite apart from anything else.

Hilary Meredith: Absolutely.

John Spellar: That is a long-established fact of international law.

Hilary Meredith: Yes. If a criminal act takes place, as I said before, the MOD is very good at investigating its own if they step out of line, robustly court-martialling people and sanctioning them. If there is any argument that that is not independent, it can be audited to show that independence. In my view, it comes down very heavily on those who step out of line in the armed forces, because it is the whole British reputation of the military.

- Q108 **Chair:** Presumably, if the MOD knew that it was going to take responsibility for that, there would be a perverse incentive on the MOD to try to show that it really was the soldier's fault, to avoid responsibility.

Hilary Meredith: Under corporate responsibility, it cannot do that. It would take responsibility. It can court-martial its own internally if mistakes are made, but they will not go through the criminal proceedings and be named publicly many years later. They are dealt with at the time, court-martialled at the time, sent to prison if need be and sanctions are imposed, but many years later, any further investigation is put to the MOD. The MOD could say, "We sanctioned this person, who was prosecuted and went to prison. We have sorted this out." My view is that many of these prosecutions are leading on to civil compensation claims—that is what is behind it. Again, the MOD needs to stand firm and strong, not make commercial payments.

- Q109 **Chair:** I want members of this panel to come up with solutions that will work, but obviously we have to test these things and try to think them



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through. You are talking about the MOD having investigated and possibly punished someone, but a lot of these cases relate to investigations in the past where people were exonerated. Let us suppose that in the past, someone pulled the trigger and somebody died. The MOD knows that it will have to take responsibility. Supposing it was the case—this is what an international court would argue because it would not just consider Britain—that the British MOD had covered up what, in fact, had been a war crime. How would your recommendation accommodate that? How could you expect people to accept that?

Hilary Meredith: Under those circumstances, the MOD would be investigated for a cover-up. I cannot see how after being tried once, even if it was a mistaken trial, many years later that person can be tried again.

Q110 **Chair:** So you are talking about this new procedure working only in the case of attempts to reopen an investigation after a considerable period. When would the cut-off point be?

Hilary Meredith: If someone is acting in the line of duty, there should—

Q111 **Leo Docherty:** This is for future operations as well, is it?

Hilary Meredith: This is moving forward as well, yes, but going back retrospectively, if someone is acting in the line of duty, perhaps you can impose a reduced statute of limitations on them, but that would have to be very carefully considered. Any reduction of the statute of limitations in criminal proceedings is difficult because forensic evidence is advancing so fast; many times it is years later when a victim finds out who the perpetrator was. Reducing the statute of limitations has difficulties.

Q112 **Chair:** We will come on to the statute of limitations later. I am still a bit worried about how this would work. I will come to you, Richard, in a second to ask for your view on this, and I want to come back to the Human Rights Act, too. Let us suppose, for the sake of argument and hypothesis, that somebody did commit a crime—somebody did kill someone—and there was some sort of investigation, but it was decided at the time, for whatever reason, not to punish the person and all the rest of it, so there is an unpunished crime out there. How would this work? Are you really saying that there could be no action taken against the individual—that it would always be some sanction against the MOD? Are you proposing to apply this in the future, as Leo just remarked?

Hilary Meredith: If the MOD has failed to prosecute correctly, it is the MOD who should be investigated on that failure to investigate correctly at the time. It is very difficult to go back retrospectively, though.

Q113 **Chair:** We have been talking about the oppressive effect that the present situation has on a soldier in a battle situation, who might fatally hesitate before pressing the trigger. What about this working the other way? Wouldn't it actually make soldiers feel, "I don't have to think about this too much at all, because even if I make a mistake or I'm wrong to do this, it can't come back on me; it'll come back on the MOD"?

Hilary Meredith: No, because there would still be an investigation by the MOD and a court martial process in place if somebody acted outside the rules of engagement, for example.

Q114 **Leo Docherty:** Chairman, if I may, they are still subject to the law of armed conflict in that scenario. I think that is the premise.

Hilary Meredith: Yes, thank you. The other matter is that the MOD is the only corporation I know that has immunity from the Corporate Manslaughter and Corporate Homicide Act. The “Beyond endurance?” inquiry recommended that that should be removed by Parliament. It is still in place.

Let me give you a good example: the Baha Mousa case. Shocking as that was, the prisoners were hooded, and that is one of the five banned techniques. The MOD had given no instruction or direction to those serving on the ground on how to properly capture and detain prisoners, and they certainly had given no instruction that one of the banned techniques was hooding prisoners.

Q115 **Chair:** We are going to come on to the adequacy of instruction, but I really want to stick with this at the moment. Richard, I want to come back to the thing about the Human Rights Act in a moment, but how do you see the practicality of what Hilary is recommending?

Professor Ekins: I am afraid, with respect, I do not think it is practical. If you are trying to establish the liability of the Ministry of Defence—the Government—for the action, inevitably you will be assessing the actions of the soldiers in question, because they are the agents who carried it out and made the MOD or the Government liable. It might not be that they are exposed to criminal liability or civil liability personally, but often simply having to be investigated and give evidence, and having this as a mark on your career, especially if you are serving, is going to be highly problematic.

Of course, if you did uncover fresh evidence of genuine wrongdoing, there would rightly be prosecutions at that point. I do not think having a two-stage process whereby one allows action against the MOD—against the Crown—years and possibly decades later would protect the individuals in question. It would expose them to a different sort of problematic process. The position should be that if you had a robust investigation at the time, one doesn’t reopen it. Often, allowing civil litigation against the MOD is highly problematic for operational reasons—for reasons of morale and because of the impact on the individuals who are swept up in it. Even if it looks like they are not, in that they are not exposed to paying damages themselves, their actions are being second-guessed in a civilian courtroom.

Hilary Meredith: Of course, if it is shown that the MOD did not properly investigate something, it is open to the MOD to re-prosecute the individual. What I am talking about is removing the individual from the criminal system in the civilian courts, so they are not named and identified

openly in public but they are prosecuted by the MOD internally under the court martial system.

Q116 **Chair:** I want to stick with the Human Rights Act a bit longer. Richard, your argument seems to be that until the intervention of the human rights Court, none of this could really have happened. Is that right?

Professor Ekins: It is not quite right, but I think it is a driver for it, and it makes it very hard to stop it. If you let up on the sequence of investigations, you are exposed to challenge in our courts, and the finding that the Government has acted unlawfully by not proceeding. It hangs over the whole affair and makes it much more likely that investigations and re-investigations will take place. If you don't, the court may order you to do so. That is part of the story of why IHAT ends up the way it does.

Q117 **Chair:** Have you ever tried to draft an amendment to the Human Rights Act that you feel would meet the problem?

Professor Ekins: I haven't drafted it in terms, although I am happy to do so. I think one can do so fairly easily with two aspects—I could do it for you now, I suppose. You could state simply that the Human Rights Act does not apply to deaths that took place before October 2000, which is when the Act came into force. That would re-establish the position as it was authoritatively held to be by our House of Lords in 2004. Likewise, for the territorial scope, you could enact an amendment to provide that the Human Rights Act applies only within the jurisdiction of the United Kingdom, as understood in accordance with the principle in *Banković*, the Strasbourg case from 2002.

Q118 **Chair:** I would personally be very grateful if you drafted something for us to consider including as an appendix to any report that we produce.

Professor Ekins: I would be happy to do so.

Q119 **Chair:** Let us suppose that we were able to persuade the Government to make that change, and that the Human Rights Act were amended as you suggest. What would the ECHR do about that?

Professor Ekins: It might well hold the United Kingdom to be in breach of its obligations. That is a serious possibility. The position in relation to retrospective application to Northern Ireland for cases from decades ago is less clearcut than is sometimes suggested, so in some cases the Strasbourg Court might not hold the UK to be in breach for failing to reopen investigations, but in some cases it probably would. It is a political question whether the United Kingdom is willing to establish and hold a firm line in relation to not endlessly reopening investigations.

In relation to extraterritorial application, it is always possible for the Strasbourg Court to change its mind, as it does from time to time. This would give it an opportunity to do so that we had not otherwise provided to it. The challenge could go through the Strasbourg Court at some point to our legislation in respect of our failure to do what Strasbourg says we have to, and Strasbourg could try to row back, as to some extent it has tried to in other cases. But one should probably not bank on the



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Strasbourg Court abandoning its expansion of the convention, so the United Kingdom would have to be willing to resist it, as it has done in some other cases—prisoner voting being the obvious example.

Q120 **Chair:** Is it such an outrageous situation for a country, having considered the implications of what has happened, to defy the Court in that way? What would happen? Have many other countries done that and remained subject to the ECHR regime?

Professor Ekins: Plenty of countries have failed to conform and been held to be in breach on more than one occasion. The United Kingdom is a very law-abiding nation, of course, and for good reason, but this would be an instance of principled defiance. We would be holding the line on the position that is clearly set out in the European convention, and was undone by the Strasbourg Court's misinterpretation, especially in the al-Skeini case.

This is difficult, but in a sense the ground has been laid. In a case in 2014, our Supreme Court noted the possibility of international tribunals misconstruing their own jurisdiction, going beyond their powers and misunderstanding the source of law that they work with. They had the European Court of Justice in mind, but the same certainly holds for the European Court of Human Rights. But it is a difficult position to be in, unquestionably.

Q121 **Chair:** Is it your professional opinion that unless the Human Rights Act is amended in the way that you have described, this problem cannot be resolved and the commitment that Leo read out from the Conservative party manifesto cannot be fulfilled?

Professor Ekins: To be clear, my profession is academic lawyer rather than practising lawyer, but that is certainly my view. It is very difficult to close the problem down or to address the problem squarely without amending the Human Rights Act.

Q122 **Chair:** So you feel that serving personnel are going to be subject to what has become known as lawfare as long as the Human Rights Act remains unamended.

Professor Ekins: Yes.

Q123 **Chair:** Thank you. Sir Nick, you have been getting off lightly, but I am going to come to you now. What are the main concerns of the veterans who have been in touch with you to discuss legacy investigations?

Sir Nick Parker: May I say something very quickly on the conversation before? The one thing that is not being spoken about and which Mr Mercer mentioned is the position of the chain of command. The chain of command is something that I don't think fits well into a legal bucket. I spent most of my career trying to make the chain of command effective in order to deliver outcomes, yet in this conversation the chain of command is almost held up as if it is failing to do its business—it is failing to stand up for the individuals; it is not positioning itself between the individual and the MOD in as effective a way as it should. That does need to be addressed.



Q124 Johnny Mercer: I think you are absolutely right. The problem I have is this. Throughout this process, for example when we got to the stage of 3,500 potential offences having occurred in Iraq, and now, when we are looking at what has happened in Northern Ireland, yes, the ultimate care of the individual should lie with the MOD and the Ministers, but in this process, we have seen the situation clearly. It's not that they don't care; they don't have the ability to intervene in this, whether because they are just not good enough, or because they just don't get it. It requires some sort of political or civil servant backbone to say, "This is ridiculous", and so on, but the ultimate care of the individual comes down to their commander in the military.

I find this very difficult. I know you well, and I know pretty much most of your peers very well, and I know that you genuinely care. What I can't put together in my head is why the Chief of the General Staff and the Chief of the Defence Staff, over a number of years—10 years or so—did not say to DGEP, to the permanent secretary, to Michael Fallon, to Gavin Williamson and to all the others, "This is insane. We are literally breaking our own people, to the point where these false claims are becoming like a weapon that is being used against the state." But still it didn't change.

Sir Nick Parker: My experience was that there was this habit of separating the operational chain of command—those who were actually in charge of the individuals—from, if you like, the technical chain of command, where the legal stuff was going on. If you sat in a divisional chain of command, this was not your business, because it was being sucked out into the adjutant general's area, into this very complex legal environment. My feeling is that you have to try to overlay this back on the people who are directly responsible for the individuals who are being—

Q125 Johnny Mercer: But what if one of your soldiers comes to you—I know this has happened a number of times—and says, "This is the process that is ongoing; I'm on my fourth or fifth investigation"? Even as a junior commander, you would say, "Hang on a sec. What the hell is going on?" So why have our guys within the military who are paid the most money, at general level, not, over the last 10 or 15 years, at some point been to see someone and said, "Look, I understand this process goes on. It's outwith my control. But if you are affecting my combat effectiveness, it becomes my problem and I'm going to deal with it"?

Sir Nick Parker: I think we have been running scared of the law. I remember distinctly conversations where we were clinging on to the idea of courts martial, because there were these attacks coming in on the way we executed the military aspects of law. I think the generalist became afraid of this and therefore left it to experts, rather in the way that health and safety was brought in in the very early days. It was too complicated and you did not really understand it, so you left it to the experts to do it. Then it landed in your lap a little bit too late for you to be able to influence the outcome. This was not deliberately avoiding it. I think people were afraid of the law, did not understand it and left it to the experts. That has ended up in the situation that you have described.



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Hilary Meredith: I gave evidence to the IHAT inquiry a couple of years ago. It was the biggest debacle ever. Thousands and thousands of fraudulent cases were brought, not one single prosecution resulted, and massive amounts of taxpayers' money was spent. It was not thought out. It was not done properly. That all emanated because the MOD were too scared to investigate their own, so rather than the European Court of Human Rights getting involved, they set up the IHAT—a supposedly independent body. It just backfired completely. All those thousands of soldiers who were wrongly accused, and the fraudulent claims brought, are an absolute disgrace on our history. That can never happen again. If the MOD are confident and stand up, stand behind the individual soldier, and take corporate responsibility—as most corporate people do—that would help considerably.

Q126 **Chair:** Let us move on. Sir Nick, of the main concerns of veterans who have been in touch with you, what would you pick out? I then want to move on to discuss, during your time commanding forces in so many theatres—Northern Ireland, Afghanistan and Iraq—the awareness by commanding officers and troops of the legal framework in which they were operating. In other words, were people in any way prepared for the situations in which they would find themselves, in terms of what the law required them to do and not do?

Sir Nick Parker: On your first question, I have been contacted by a number of people—particularly in relation to the coroner's court that is looking into the 1971 Ballymurphy incident, but there is a more general illustration—who were not clear what they should do. They were getting information from a number of different sources, which, when I was shown it, did not seem to be consistent.

I surmised, first, that there was not a clear, consistent policy on how we looked after those people who were coming under investigation. My second concern was that those people were largely over 70—they are probably breathing down my neck at the moment—and their recollection of what they were about to be questioned about would inevitably have suffered from the passage of time. I will probably get hit over the head, but there is a very different way of perceiving what you did many years ago when somebody suddenly starts to ask you questions for which you have no proper preparation.

There is also a risk that people will group together. My legal friends said to me that it is really important, if you are going to go into this sort of environment, that you take proper legal advice and you do not confer with a whole load of other people to try to clarify your own story—that that is unhelpful—yet none of the advice coming out of the Ministry of Defence allowed people to behave like that.

Q127 **Chair:** I will intervene at that point, because you have sparked a memory of the session we had last week with the CDS. The question arose as to what veterans ought to do if they received what has been described as a fishing letter asking them to write down everything they can recall about their service. The CDS felt obliged to say that they should respond to that



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letter. My instinctive advice to such veterans was that they should put it in the bin. I am sorry to interrupt your flow, but I think we will do this while it is fresh in our minds: what advice would each of you give to a veteran receiving such a letter tomorrow? Starting with you, Sir Nick. I appreciate that you are not a lawyer.

Sir Nick Parker: I would say: go to a lawyer and make sure he is independent.

Q128 **Chair:** What would you say, Hilary?

Hilary Meredith: Ignore it.

Professor Ekins: Who is the letter from?

Chair: The letter would be from a Government lawyer asking them for everything they can remember about whichever campaign they had served in.

Professor Ekins: I agree with Sir Nick. I would ask for legal advice and I would be slow to reply, as my colleague says.

Sir Nick Parker: But I would also recommend that you don't go to the Government Legal Department for that legal advice. I think you must go to independent legal advice, because I believe they are conflicted.

Chair: While you are continuing along your previous point, I am just going to look up the text that I had from a former decorated special services veteran and I will come back to it in a moment. Please carry on.

Sir Nick Parker: The next thing that concerns me is that in the circumstances that we are looking at—the point I have just made—the Ministry of Defence is conflicted in providing support, because it presumably has some sort of responsibility for what was going on at the time. I am talking about the early '70s in Northern Ireland. How can a veteran be given the best possible advice, and defence if he needs it, if the Government Legal Department is conflicted? My experience has been that the lawyers who have then started to help in the cases where people have come to me have found the Ministry of Defence less than helpful in certain areas, and that there has been a need to encourage their support. I am sure they would deny this. My sense is that you need to have independence for each of the people being put in a vulnerable position.

You will have heard this many times before, but if you put a person in front of a clever lawyer—some of the names that I have seen who are in these coroners' courts are clever lawyers, possibly with other intentions than just extracting the truth from these individuals—if you put a guy like that in front of them, they are massively vulnerable. The circumstances they are recalling were over 40 years ago. The circumstances were very different from anything that we can understand today. An Army that had been trained for Germany and Malaya finds itself on the streets of Northern Ireland, where they are trained to do riot drill in a box with a gun as their only tool. There had been some developments by 1971 and 1972,



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but these were not dramatic developments. This was an organisation that was not equipped for what it was placed to do.

Now we are sending a 70-year-old into a court with really clever people around them, to address something that they will have poor recollection of and where the court will not be able to replicate the circumstances that existed at the time. I just think that that is wrong. I believe that we have a responsibility to stop our people from being put in that position.

Q129 **Chair:** I have the text concerned. It mentions a firm of lawyers, which has been appointed by the Northern Ireland coroner, "to do their leg work", as he puts it. He says, "They appear to be paid by the number of veterans' names that they can garner, rather than anything intelligence-led. They seem to be pursuing people in complete ignorance of whether they even served in the theatre or not." My correspondent says that he is "astonished by the sheer number of veterans who have been written to, who were not even in Northern Ireland at the time of the incident concerned in 1971." He describes it as "a fishing expedition". Again, I come back to you all. If someone gets a letter of that sort from the coroner's court, what do you think they should do?

Professor Ekins: It depends on the nature of the communication.

Q130 **Chair:** But if it is not specific to that person, saying, "You are under investigation because we think you did something wrong," and if it is just a scattershot letter saying, "Can you tell us whether you were there, and anything that you remember about it?", what would your advice be then?

Professor Ekins: The entire exercise sounds highly problematic. We should not be out fishing, and we should not be trying to sweep people within a net. Take independent legal advice in order to make sure that you are not misunderstanding the nature of the communication, so that you do not inadvertently end up failing to do your legal duty. If it is a fishing expedition with no basis to compel you to participate, then I would not participate.

Hilary Meredith: They are under no compulsion to answer. I am not a criminal lawyer; I am a civil lawyer. However, I am aware of, and I signpost people to, various criminal lawyers who are advising on this. It is down to the individual soldier trying to make contact with the right people to defend them. If the MOD had corporate responsibility, that would be the first port of call, and would remove the individual soldiers from the frontline of litigation, as it were, or the coroner's court.

Q131 **Chair:** Is there a consensus to say that it is wise to take some initial legal advice in order to check that it is not something that you must reply to, but if it is not something that you must reply to, not to reply to it?

Hilary Meredith: Yes.

Sir Nick Parker: At the moment, I think the advice that is being given is for people to go to their regimental headquarters. That is not the right place to go. Regimental headquarters are wonderful places, but they have had people stripped out of them. The people who are there are not the



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highest-grade people. It is not the place that will know the best thing to do and give you the best advice.

It also risks bringing back the team view. I have been told that introducing this idea that we were all together and we must all stand together is not a sensible view to take when you are suddenly going to find yourself as an individual placed in front of some clever questioning.

Q132 Chair: I have a question about whether in retrospect the guidance and training provided in Northern Ireland and Iraq was sufficient or not. I think we have probably already gathered that it was not. However, could it ever really be sufficient to head off the possibility of these sorts of questions being pursued? As Hilary has indicated, in the al-Sweady case they were baseless anyway, but they were nevertheless pursued to a very considerable extent.

Sir Nick Parker: I would make two points. First, it gets better as a campaign goes on. As you adapt more to the circumstances that you face, so your advice and your understanding of all aspects, including the legal aspects, get better. When you are bunged into somewhere, first off it is extremely difficult to understand exactly what the legal circumstances will be, and you have to trust.

The second point I would make goes back to this business of the chain of command. We need to trust the chain of command to do the right thing. If you do the right thing, you usually end up being able to justify what you have done in any circumstance.

I have a recollection of training for Northern Ireland where we were being briefed on the yellow card. The briefers showed us a video with somebody coming out with a nail bomb from behind a wall. They freeze-framed the video at various stages and asked whether you could shoot at this point. The commanding officer of the day stood up and said, "Stop—this is ridiculous. You can't freeze-frame life. You can't make judgments like that."

You have to make judgments on the basis of a flow and context; yet that was the way we were being taught. You cannot take it to those sorts of extremes. You have to trust the chain of command to do the right thing.

Q133 Chair: Finally, is there any way in which the MOD could improve its practices to give better support, or does the problem go much wider than that? Also, are there conflicts of interest for the MOD in providing legal support to those under investigation?

Hilary Meredith: One of the biggest issues that we had in the IHAT was the lack of support from the MOD. Having spoken to the MOD myself about it, I eventually asked, "For a veteran who has been out of the forces for 20 years, what telephone number does he phone for help?" First of all they suggested the Veterans Agency. I said, "So, he's been arrested, he's in prison and it is midnight. If he phones the Veterans Agency, who comes down to help him?" "Ah, all right, okay. Maybe his commanding



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officer." I said, "His commanding officer is retired and he does not have the phone number anymore. Who does he phone?"

There is nothing; there is no connection with veterans in the Ministry of Defence. I suggest the Ministry of Defence sets up a specialist department for historic allegations and stand behind those accused, rightly or wrongly—supply a support telephone number and accept corporate responsibility for those who have served. There is a dramatic link missing for help for veterans. It is okay for those who are still serving but veterans have nobody to contact.

Professor Ekins: I think they should be funding independent legal advice and support. In some cases there will be a conflict of interest. I can understand why the Ministry is sometimes trying to stay at arm's length, to avoid accusations that it is behind former servicemen, regardless of what they did. If they can provide a way to ensure well-funded support, that would be ideal.

Hilary Meredith: They can fund independent advice, but I think there needs to be an initial contact somewhere to help.

Q134 **Chair:** Whatever they set up, obviously the Veterans' Gateway—the one-stop shop for everything to do with veterans—ought to be linked into it, shouldn't it?

Sir Nick Parker: There should be a point of contact that everybody knows about, that is funded by the Ministry of Defence, and we should be advising people to get independent legal advice.

Q135 **Johnny Mercer:** You talk about doing the right thing; Sir Nick, you mentioned that a couple of times. It appears to me that the wrong thing has been done a number of different times within the Ministry of Defence when these claims have come forward. We talk about a failure of Government, but this is quite extraordinary.

Can you tell me why the Ministry of Defence decides that it is appropriate? Obviously, when we conduct operations in Northern Ireland or wherever it may be, we are going to have patrol records and everything, from changing a battery on a radio to whatever it may be. Terrorist organisations are not going to keep those records.

Therefore, you immediately have this huge advantage for lawyers to be able to pick away at information over years and years. The names of veterans that are being searched come from one place—the MOD. So why on earth are they handing out that information—under what obligation? I fail to understand. With your legal knowledge, which I don't have, I hope you can tell me there is a very good reason, Hilary.

Hilary Meredith: I have no idea why it is being handed out, especially with GDPR coming in. They shouldn't be handing out any information at all.

Q136 **Johnny Mercer:** Medical history, service records—



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Hilary Meredith: I have no idea why. They belong to the individual personnel. Your medical records are yours so why the MOD is handing out personal medical records, I have no idea. You must have a signed consent from the person who owns those medical records, which is the individual soldier.

Q137 **Johnny Mercer:** So, they are breaking the law.

Hilary Meredith: In my view, yes. They should not be handing out private documents, especially medical reports. Those should not be handed out; they belong to the individual soldier.

Professor Ekins: I am not sure who they are being handed to, so I can't speak to that. You have a problematic combination of political commitments to reinvestigate, which generates an asymmetry, because the British Army has much better records that are publicly available to some extent. In a way, many of those records can't be kept secret when you have a commitment to reinvestigate some of what has gone on. Maybe some things are being released too readily but I can't speak to it.

You have a political commitment to some sort of process like that. That is also running into the legal risks of any process that is initiated having to conform to article 2 ECHR requirements, and the risk of challenges as this is going on as to whether this is sufficiently robust, independent and far-reaching enough. This does generate a disproportionate and unfortunate focus on the actions of British forces.

Q138 **Johnny Mercer:** I am sorry but this is not rocket science; this disproportionate focus. Even I can work out that if you have got years and reams of records, you are going to get a focus on that, against a terrorist organisation that was incapable and unprofessional at the best of times, let alone having the ability to record events. Why is this a surprise?

Sir Nick, can I ask you what goes on in that building to arrive at these decisions? In your position you talk about doing the right thing and about the decisions you make, and the decisions we expect our guys to make. How are these decisions made in the MOD? We have seen the setting up of the IHAT, for example, and we have had the permanent secretary come here and say, "Oh, that was an Act of Parliament." It was not an Act of Parliament. It was an MOD decision. What are we supposed to do? How do you make those decisions and be so unaccountable in that Department?

Sir Nick Parker: I don't know. When I am talking about doing the right thing I am talking about a thing called the chain of command. The MOD is not the chain of command. The MOD is the policy head office of a Department of State. I pass the thing back to Government. I don't know why it behaves like that. What I do know is that the chain of command interprets what it has to, from the policy that it is given, and then tries to implement it in the right way, and in doing that it does the right thing. How the bureaucracy works inside the Ministry of Defence, I can't answer to. It sometimes puzzled me.



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Hilary Meredith: In a way, the Ministry of Defence is immune from scrutiny because it is immune from the Health and Safety Executive, it is immune from the Corporate Manslaughter Act, it has been a body unto itself, it is not transparent and it basically does what it wants, because nobody is auditing it or looking at it or checking it.

Professor Ekins: Unfortunately, plenty of people have been happy with the disproportionate focus. The fact it is British soldiers primarily being investigated would be viewed by some, I think, as being a good state of affairs. I think the Government—and this harks back to Sir Nick's point before—have often been scared of the law: "Here's this process and if we step out of line, the lawyers will come at us from various directions." I think it has been a standing problem. The answer, which you are probably going to give right now, is, "Why don't we just be a bit more robust?" It is true. There needs to be more confidence and a willingness to push back, to act and to make sure that you protect yourselves.

Johnny Mercer: I don't think it's a lack of robustness; it is a lack of genuine understanding of what is going on. If we get the most senior civil servant to come to this Committee and he gives us evidence that is not correct, but it is then corrected by two sides of A4 and a letter to us the following day—if that is how they treat the Defence Committee, how do they treat these guys who are going through the system? I think it is very serious point.

Q139 **Gavin Robinson:** Professor, you mentioned the need for independent legal advice. One of the deficits that I see in that is that nobody in the MOD is therefore taking a corporate view as to whether disclosure in one set of circumstances, which may not be injurious to that case, could have significant ramifications for another case, another set of circumstances or another engagement. Do you not feel, drawing on Ms Meredith's point, that there is benefit in having a corporate point of contact and one that takes that panoramic view over every case and how they interlink? Those who are pushing for answers and justice from families in Northern Ireland, who are well funded, take their time to probe various cases and to connect the dots—they do exactly that. Should the MOD not be doing exactly the same thing to protect veterans?

Professor Ekins: I think the MOD and Government more generally need to have a coherent position and certainly should not take these things like the weather that just rolls over them. By all means, they should be aware of all the successive cases and think about how to respond to them coherently and collectively, especially when they are literally involved as parties. I think that is somewhat separate from the point that the particular veteran does need to have independent legal advice that is protecting his or her interests. I do not think those things are incompatible. I think it would be a problem if you tried to dispense with veterans taking, and being supported and funded to have, independent legal advice by conflating it as though there was one single interest.

Q140 **Gavin Robinson:** While somebody can avail of their own legal advice, does the MOD not also need this second tier to make sure that they have



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a corporate overview of the information flowing through each and every case, each and every inquiry, and how they interlink?

Professor Ekins: The MOD by all means should be on top of who is being investigated and charged.

Q141 **Gavin Robinson:** Is there any suggestion that they are?

Professor Ekins: I can't speak to that, I'm afraid.

Hilary Meredith: The only thing I would say is that I do believe in corporate responsibility, I do think there should be a central point of contact and I do think there should be some synergy between the various allegations. The only time there would be a conflict of interest—and the Government Legal Department will know there is a conflict—is if there is a criminal act and someone has gone off on their own on a violent frolic, as in the Baha Mousa case. Then they need separate representation. When the MOD really believes that someone was following orders and there was no criminal act, there is no reason why it cannot stand behind that individual, take corporate responsibility and help defend them.

Q142 **Gavin Robinson:** I hope you don't mind, Sir Nick, but you gave us an example of a lawyer indicating to service personnel what their obligations were with freeze frames, and a commanding officer stopped that process—

Sir Nick Parker: It wasn't a lawyer; it was one of our teachers.

Gavin Robinson: Somebody was giving legal advice apprising folks of their requirements under the law, and a commanding officer stopped that process because they felt that it did not deal with context.

It was clearly wrong for the commanding officer to stop that process, when you think of the Lee Clegg case. Lee Clegg was convicted of murder as a serving soldier, and the basis of the conviction was that although shots 1, 2 and 3 were justified, by lethal shot No. 4 the danger had passed and the shots were no longer justified and it was therefore murder. You gave us a clear example of when a commanding officer felt that they were doing the right thing, but actually stopped the correct legal advice that service personnel needed at the time to protect themselves from prosecution.

Do you think the advice given during a period of time in Northern Ireland was deficient, and how do you reflect on what the Standing Advisory Committee on Human Rights said, which was that the yellow card did not provide adequate insurance or details for service personnel at that time?

Sir Nick Parker: I was the commanding officer. I knew I was doing the right thing. I knew I was being given a mission, and I knew there were challenges and all sorts of legal mumbo jumbo, but my job was to deliver effect, as I was directed by the chain of command. There will always be challenges and things that worry you, but in your heart if you believe you are doing the right thing, you will do it. The point made earlier, which was that we will do it even more conditionally as these things grow in our



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consciousness, is true. I am a firm believer in the goodness that sits in the chain of command if you allow it to operate effectively. People there will want to do the right thing, and notwithstanding retrospective talk about whether the yellow card protected you or not—it wouldn't have changed anything, and would not change anything that I did with the benefit of hindsight.

Where I worry is where this almost academic conversation loses touch with the individual—the individual 70-year-old veteran who is now sitting there thinking, "Oh my God, what's going on?" To me that is a completely different issue, and that is the one really churning around inside me. I don't sit back and think about the yellow card. The yellow card was good enough for me at the time, and good enough for all the people I served with. One or two incidents may produce this sort of reflection, but I think we did quite well.

Q143 Gavin Robinson: With respect, I'm not going to impinge on your service or commitment, but you have given us a circumstance of where a commanding officer stopped the process and said, "That's devoid of context." Yet Lee Clegg was convicted of murder, even though he was following the protocols, the lines and the guidance that were given by commanding officers. Even in circumstances where a commanding officer was there overseeing the advice being given, he stopped the process and stopped the advice that service personnel needed at that time.

Sir Nick Parker: It didn't stop it. You stop it and then you provide context, and then you run the thing again. You're making it sound as if it was stopped with, "This is not right."

Gavin Robinson: I am only drawing on your analogy.

Sir Nick Parker: Yes, but my analogy was about interpreting how you use the yellow card. It was a vignette used to describe the yellow card, which was being done, in my view, out of context. Therefore, we ran it in context and addressed the yellow card in context, not freeze-framing anything. You are drawing conclusions—I am not in a position to say; I don't know anything about the detail of this, but it sounds to me as if there were some quiet interesting—

Q144 Gavin Robinson: That is exactly what they did in court. They freeze-framed every shot, and the first three were legitimate, and the fourth—the lethal shot—led to a murder conviction.

Sir Nick Parker: Which in my opinion is wholly inappropriate. That is not what life's like.

Gavin Robinson: I accept that.

Chair: Johnny has some questions about the specific issue of deliberate and false allegations.

Q145 Johnny Mercer: The question is how vulnerable the investigatory process is to false allegations—if I asked that, I would appear as dull as some of



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the civil servants who say to me, "We had no idea that if we started paying out for claims, this would happen."

What can we actually do to protect ourselves against the sort of boatload of claims that we know are rubbish? What do we actually do to stop these processes coming forward? Do you have Attorney General's consent? Do you have a threshold? Do you have a requirement of new evidence? What are the options that you think about?

Hilary Meredith: Without wanting to repeat myself over and over again, I go back to corporate responsibility. There were thousands of fraudulent claims brought in IHAT. Had there been one central point within the MOD and, instead of the MOD paying for the evidence, they had stood behind the soldier and looked at all those cases independently, they would have very quickly drawn the conclusion that a lot of them were fraudulent. It doesn't take a whizz lawyer to sift through statements of claim to find that they are just simply not true or don't ring true, and for further questions to be asked. It comes back to one point of contact controlling everything. Had there been that, they would have been found out sooner.

Q146 **Chair:** I just want to check this out. You are saying that if they had looked into the cases, they would have found that they were baseless.

Hilary Meredith: Yes.

Q147 **Chair:** But that still implies a process of investigation. The problem is often the process of investigation itself, which is hugely traumatic for all concerned. Even though there is a strong suspicion right at the beginning that the whole thing is bogus, and even though there is a reasonable prospect, as happened in al-Sweady, that at the end of the process the people will be exonerated, they will still have been through the wringer, and it will still have cost an absolute fortune. There will no doubt be those in civil service mode who tend to say it's easier to pay off these people than to contest it.

Surely the answer has to be to limit the jurisdiction, if one can do it appropriately, rather than just have a process that involves oppressive investigations when there is no probable basis that anything will be found.

Hilary Meredith: I think one of the issues was that every individual was separately represented, if they had lawyers. Lots of different lawyers were representing lots of different individuals and there was no co-ordination of this action, so nobody was speaking to each other, because the soldiers were left hung out to dry, on their own, to try to defend this. Had it been looked at corporately by the MOD and had the evidence been gathered en masse, there would have been co-ordination in the review, and some sort of overview of whether this was credible evidence that was being brought. Those statements were put together on basic questionnaires and written up fraudulently by the lawyers dealing with them.

Q148 **Chair:** But had they not been in jurisdiction in the first place, none of this could have happened.

Hilary Meredith: Yes.

Q149 **Chair:** So isn't that the route we ought to be looking at?

Hilary Meredith: If we can look at that, absolutely; definitely. If we can't, or it doesn't happen that way, there definitely needs to be some co-ordination in these claims, at one central point, backing up the individual members of the armed forces.

Q150 **Chair:** Wouldn't the people who defend organisations like IHAT say, "The reason we are setting up these organisations is that it is better that we do an investigation than that others do investigations. That is why we are doing it—to try to clear the decks"? Yet even those investigations turn out to be oppressive once they get under way. Is that not the problem?

Hilary Meredith: No. I think the problem now is that, after IHAT, all credibility has been shot to pieces with regard to the so-called independent investigations. The Red Snapper team that they had investigating those was very oppressive. The way they went about it was wrong. They broke the law by saying they had the powers of arrest when they didn't. The whole thing was shocking. Any internal investigation like that that was ever set up again would not have credibility.

Chair: So once again, one comes back to the question of jurisdiction. Richard, you have heard a lot of this now. You are a professor at Cambridge—

Professor Ekins: Oxford.

Q151 **Chair:** Oxford; I beg your pardon. What is your detached and forensic view of what you have heard so far?

Professor Ekins: If I can speak to the narrower question for a minute, it is important to have political discretion to discontinue investigations when the judgment is that they are frivolous, problematic, going nowhere and oppressive, partly because they have already been investigated and the new wave of allegations seems problematic from a first glance.

Q152 **Chair:** But doesn't that fall foul of the ECHR?

Professor Ekins: Yes, it does.

Q153 **Chair:** So everything that you are recommending comes back to the ECHR.

Professor Ekins: We do have a straitjacket imposed upon us, partly by way of European human rights law, but there is some room to push back within that straitjacket. I think there is a sort of learned helplessness on the part of Government that this is just a process that we have to go through and there is no alternative.

Q154 **Chair:** But in the end, one does not have to quit the whole ECHR regime simply in order to ignore it in specific cases.



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Professor Ekins: No. We spoke very briefly about derogation. The Government said that it would derogate in advance of future conflicts. It should, and if there is a way of making sure it does, that would be ideal.

Q155 **Chair:** Why do you think that that derogation was not done in the past? If it had been done, would we have had no problems, or would we still have had problems?

Professor Ekins: It was not done in the past in relation to Iraq and Afghanistan because no one thought it would apply. It was pretty clear from the authoritative jurisprudence at the time that it would not apply outside the United Kingdom, or possibly particular military bases, so no one thought of derogating—the problem did not exist. If we had derogated, it would have helped, but it would not have solved the problem entirely, partly because quite what you can derogate from in relation to article 2 is not entirely clear. There are some things that you can derogate from and some things that you cannot, so it is not open and shut, but it would help.

I think it is a good policy that the Government has announced—if it follows through—to derogate in advance of future conflicts. If there is a way in which Parliament can ensure, either through pressure or through a legislative requirement, that the Government derogates in advance of future military action, or at least explains why it is not going to, that would be good as well. By all means, let us work within the ECHR system; derogating is a tool provided.

Q156 **Chair:** But you seem to feel that we need to amend the Human Rights Act, so obviously this process of derogation within the terms of the ECHR is inadequate. Where does it fall short? What specifically do we need to change?

Professor Ekins: It is risky to derogate. They are complementary—I think you should amend the Human Rights Act and derogate—but if one derogates alone, the derogation may be quashed by our courts or, effectively, quashed by the Strasbourg Court. We can protect the derogation against our own courts if we legislate to remove their power to second-guess a derogation, but it will be a live question before Strasbourg in due course whether one can derogate if the military conflict is not existential—if it is not world war two.

Q157 **Chair:** So we can derogate only if we are fighting for our lives, as it were—not if we are intervening in an upstream campaign against international terrorism.

Professor Ekins: No, I am not saying that. That is an arguable position, but I think it is the wrong position. I think the United Kingdom should derogate in advance of a conflict like Afghanistan or Iraq, but there is legal risk, because the argument that could be run, and that has been floated by senior and intelligent judges and lawyers, is that the conflict would have to be of a larger magnitude. I think that that is the wrong view, but it is certainly an arguable view that one should not ignore when proceeding.

Q158 **Leo Docherty:** Does that mean we would derogate on a case-by-case basis prior to some sort of operational deployment?

Professor Ekins: Yes, you would derogate in advance of each particular conflict.

Leo Docherty: Politically, that is very difficult.

Johnny Mercer: The Prime Minister said two years ago that she would do that.

Leo Docherty: Yes; it's in the manifesto.

Professor Ekins: If you could support it with a legislative obligation to derogate—well, that might be too strong, but at least a legislative obligation to announce why you are not derogating—it might be helpful, partly because successive Governments may take a different view of whether they should be derogating.

Q159 **Chair:** But if the Government is to follow through on its manifesto commitment that the law of armed conflict will revert to being the relevant regime, it has to amend the Human Rights Act. Is that right?

Professor Ekins: Yes.

Chair: Johnny, do you have any more questions on that?

Q160 **Johnny Mercer:** Briefly, Nick, the effects on recruitment and morale are obvious. You clearly have contact with ongoing operations and so on. As I understand it, this so-called lawfare has a genuine impact on day-to-day security operations and what we try to do to keep this country safe. Do you have a view to add on that? Have you heard or seen that impact yourself, and filtering down from that, an impact on morale and the way people work within the military?

Sir Nick Parker: I'm afraid I can't. I have been out for too long. My focus has very much been on the veteran community. The work I am doing in Ukraine does not have that sort of dimension at all.

Q161 **Johnny Mercer:** Okay. Do you have a view on the effect on recruitment?

Sir Nick Parker: It seems to me common sense that this conversation going on and this sort of uncertainty must have an impact, but I couldn't judge how much.

Q162 **Graham P. Jones:** To be a cynic, we previously had Jorge Mendonça before the Committee, who told us that "the...role of the commanding officer in the legal process has been watered down quite badly" in recent years, to the detriment of service personnel. Is that something that you agree with?

Sir Nick Parker: It is a view I have heard. During my career we changed the way that summary justice was executed, and it became more complicated and more conditional. I go back to a point I made earlier: we in the military are scared of the law. We felt that we had no right to



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challenge some of the changes that came in, on the basis that they were presented to us as the only way that we could keep control of our own destiny through a military legal system. However, I absolutely understand that sentiment.

The only caveat I would give is that people are different. The idea of someone running around a parade square with a shell on their head is an old-fashioned way of dealing with people who have behaved badly. We have to be careful that we do not wish for something that is a rather Victorian demonstration of justice. However, the commanding officer's scope to execute discipline has been limited.

Q163 Graham P. Jones: You say "limited"; he says "watered down quite badly". Can you reconcile those two?

Sir Nick Parker: No, probably not. I am too far away from it. I think it works, but it is harder work. If I am right, there are a lot more complaints running through the system. I think the pressure has been put on, and the counter has been a lot of people complaining about what has happened to them, which indicates to me that the balance is not right. Has it been "watered down"? Yes. To the extent that it does not work? No.

Q164 Chair: One thing we have not really addressed is something mentioned in the title of the inquiry—the statute of limitations. You will be aware that the Committee did a previous investigation specifically into the Northern Ireland situation, where, for example, the International Criminal Court, which is another body we have not referred to today, could not apply, because it all happened before the ICC was set up.

This is a wider inquiry, and we are trying to look at the prospects for other conflicts. Not so long ago, I met a large group of veterans of the Falklands conflict, for example, and they were beginning to ask whether, if this could happen to people so long after the events in Northern Ireland, they would be next, and whether they would start to be approached in relation to individual Argentine service personnel who died in that conflict, for example.

What is your view about the Committee's approach to Northern Ireland, which was trying to operate within the ECHR system? Our approach was that if we went for a statute of limitation—we were advised that that would probably have to be for everybody, not just the British armed forces and security personnel—the requirement to carry out an investigation would be met by having a truth recovery process, on the model of what Mandela did in South Africa. Events could be gone into, but people would know that they could not and would not be prosecuted as a result of revealing, to the best of their memory, what had taken place. How do each of you feel about the statute of limitations approach? How compatible would that be, if coupled with a truth recovery process, with the existing regimes? Should we have been considering the ICC more than we have so far today?

Professor Ekins: A statute of limitations is a very good idea. You need to close down, by legislation, the risk of criminal trials 40 or 50 years later.



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The unfairness is too great. I do not think those trials will often succeed, but a legislative bar is a very good idea.

Q165 **Chair:** Would you be able to do that and still allow for the remote, but nevertheless conceivable, possibility that compelling new evidence might emerge?

Professor Ekins: Certainly. I am not an expert on statutes of limitations, but as you have just said, I think you could frame it so that the emergence of compelling new evidence was a ground to reopen or to bring proceedings that you would not otherwise be able to bring, and you could perhaps have discretion in the court to exceptionally allow such a case to proceed.

You would not, though, as we seem to, have a standing policy of reinvestigating everything and just seeing what turns up. You would need to provide some reason to think that there was some fresh, compelling point that had not been considered, such as a new witness appearing and so forth, which transformed the calculus. It would be a statute of limitations that was permeable.

Q166 **Chair:** How compatible would that be with the ECHR? How necessary would it be for it to apply to everybody, not just the armed forces and security personnel?

Professor Ekins: You set out, correctly, that it would be safer in terms of ECHR compliance if it were a more general application, and if you coupled it with some mode of ongoing investigation by way of a truth and reconciliation commission. It is a political judgment to make as to whether that is a good idea. Does it help the veterans in particular, or is this just another mode of reinvestigation and possible criticism?

Q167 **Chair:** If it were applied only to troops, security personnel, police and so forth—

Professor Ekins: That is risky.

Chair: Is it risky just in terms of the ECHR, or the ICC, or anything else that we have not mentioned?

Professor Ekins: I am not an expert on the ICC. I imagine there may be some risk involved in having a statute of limitations particularly for soldiers. I think you have a pretty good argument for it—namely that a perverse process has developed of investigation and reinvestigation of our service personnel, who were already subject to a robust legal system at the time.

This is an unusual state of affairs. It is not immunity. It is not impunity. It is taking account of the concerns noted by many senior judges and other observers that this is a deeply unfair process that needs correction. There may be a marginal ICC risk. It is a political judgment to make about whether one is willing to entertain it. The same point is true of the ECHR risk. I do not think—I cannot give you an authoritative opinion on how risky it would be—that there being some prospect of challenge should



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disable or disarm Parliament or the Government from contemplating such action.

The question is how bad it would be for that to apply more generally. If that is more secure and more stable, and does not create political difficulty, it may be worth doing, given that the Northern Ireland Act creates particular provisions for the other side.

Hilary Meredith: I would absolutely welcome a reduced statute of limitations for serving members of the armed forces, the police and the fire brigade. I think it is a great idea, especially for those who have been investigated over and over again.

Matters should be brought in a timely manner, when memories are still fresh. The unique situation with the armed forces is that they can visit the scene of the purported crime immediately and gather proper evidence. To do that many years down the line is going to cause problems.

If we gave a reduced statute of limitations to everyone, how would that sit? Do we give it to terrorists? Do we give it to ISIS? Do we give it to the Taliban? How far does that extend, and what precedent do we set by giving it to everybody? That would be a difficulty, in my view and the view of many others. Terrorists clearly do not follow orders. How do we give a reduced statute of limitations to those causing issues and terrorist situations around the world? That would be very difficult.

Q168 **Chair:** But by its very definition, a statute of limitations would kick in only a considerable number of years after the events concerned. We are not exactly talking about—

Hilary Meredith: It depends how far you want to go. There was talk of a seven-year statute of limitations. I do not know what time limit you would put on it. You talk about evidence coming to light; at the moment there is discretion around the Limitation Act in other areas of the law anyway, so you can always apply for discretion if substantial evidence comes to light later on.

Q169 **Chair:** Sir Nick?

Sir Nick Parker: It won't surprise you to hear that I would support anything that removed this unacceptable, vindictive risk that hangs over our veterans of being held to account for something that they did many years ago. The legality of it is rather beyond me. I just think we should do something because it is wrong.

Q170 **Chair:** I will give you all the chance to have a final word, coming back in reverse order. The Defence Secretary has set up a dedicated team in the MoD to examine these issues and make recommendations. Clearly, if things are allowed to go on as they are, the prosecution of any sort of effective military campaign is going to become extremely problematic unless or until we are in such an existential crisis that all this stuff can go out of the window. Therefore, if you could bend the ear of the specialist team in the MOD, what advice would each of you give them?



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Sir Nick Parker: I am uneasy that it is in the MOD. The conversation we have had here indicates that there should be independence in this team. My advice would be: make it as independent as possible and empower it to advise the Secretary of State.

Hilary Meredith: I am quite happy that it is within the MOD, as long as they identify any potential conflicts. I have already spoken to the team and put some of my ideas to them, particularly about corporate responsibility of the MOD. I would welcome that.

Q171 **Chair:** The last word to you, Richard.

Professor Ekins: We have talked about amending the Human Rights Act, which is vital. Derogation has to be undertaken alongside this, and the protection of particular derogations by legislation against judicial challenge is important, too. The statute of limitations is important, as may be some kind of power, beyond what we have at the moment, for Law Officers, with responsibility to Parliament, to block prosecutions—it might be harder to block investigations—that would otherwise be brought. I think that is a particular problem arising out of the politics of Northern Ireland, although others are more knowledgeable than I am about that.

We have not spoken much about civil litigation, but that is a risk. General Sir Frank Kitson is facing civil liability for the tort of negligence, alongside the MOD, I think in relation to a death that occurred while he wasn't even serving in Northern Ireland. That is obviously highly troubling. It is not a criminal trial, but it is as problematic as much of what we have been discussing. There are increasingly large numbers of civil proceedings arising out of historical actions. The Kenyan emergency litigation was dismissed a few weeks ago. That is welcome, given that it was 60 years after the fact and impossible to hold a fair trial, but the Limitation Act should be changed to make it harder to bring civil proceedings so far after the fact.

The Government also needs to restore its immunity from tortious action—from negligence lawsuits—arising out of deaths in combat on military deployment abroad. Exposure to that places serving personnel at risk of being in legal proceedings. Even if they are not personally liable, the exposure to that, and the second guessing of military action in a civilian courtroom, is highly damaging. That could be put right quite easily, and it should be.

Hilary Meredith: Sorry to interrupt. I was just going to add that there is a three-year statute of limitations on civil proceedings in any event. Although there is discretion around it, it is very hard to apply that discretion. Any civil proceedings are against the Ministry of Defence as a corporation, not the individual soldier. That is where the whole idea of corporate entity comes from in criminal proceedings, too.

Chair: I would be very grateful if the two lawyers on our panel consulted one another a little after this hearing and—

Leo Docherty: Can I just ask, Chairman, if you will forgive an



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interruption—

Chair: In a moment. Certainly, it is open to anybody who has given oral evidence to send supplementary written evidence and suggestions. Leo.

Q172 **Leo Docherty:** Thank you, Chairman. Professor Ekins, has the MOD team looking at this issue contacted you or sought your advice?

Professor Ekins: No.

Johnny Mercer: No?

Professor Ekins: No.

Leo Docherty: Perhaps we might make that happen, Chairman.

Chair: Good idea. Thank you all very much indeed. That was a very helpful session.