HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence (virtual meeting): The Overseas Operations (Service Personnel and Veterans) Bill, HC 665

Monday 5 October 2020

Watch the meeting

2.30 pm

Members present: Ms Harriet Harman (Chair); Fiona Bruce; Ms Karen Buck; Joanna Cherry; Lord Dubs; Baroness Massey of Darwen; Dean Russell; Lord Singh of Wimbledon; Lord Trimble.

Questions 13-24

Witnesses

I: Johnny Mercer MP, Minister for Defence People and Veterans; Baroness Goldie, Minister of State; Katherine Willerton, Deputy Director, Legal Advisers, Ministry of Defence; Damian Parmenter, Director of the Defence and Security Industrial Strategy, Ministry of Defence.

Examination of witnesses

Johnny Mercer MP, Baroness Goldie, Katherine Willerton and Damian Parmenter.

Q13 **Chair:** Good afternoon and welcome to this evidence session of the Joint Committee on Human Rights. We are, as our name implies, a parliamentary committee concerned with human rights. Half our members are Members of the House of Commons—MPs—and half are Members of the House of Lords.

One of our responsibilities is to scrutinise the human rights implications of legislation which the Government are bringing forward. In this session we are looking at the Overseas Operations (Service Personnel and Veterans) Bill, which is being brought forward by the Minister for Defence People and Veterans.

We have had already the Second Reading in the House of Commons. Last week we had an evidence session in this Select Committee. The Bill will go into its Committee stage in the House of Commons tomorrow.

We are very grateful indeed that we have two Ministers here: Johnny Mercer from the Commons and Baroness Goldie from the Lords. Thank you very much indeed for joining us. You have brought with you Katherine Willerton, deputy director, Legal Advisers, Ministry of Defence—thank you for joining us—and Damian Parmenter, director of the defence and security industrial strategy at the Ministry of Defence. Thank you very much to our witnesses.

Our witnesses will have heard what was said on Second Reading and at our evidence session. The challenges to and allegations against this Bill are: that it denies victims justice, even in very serious crimes where the alleged perpetrator is a member of service personnel; that it usurps the role of the courts to decide what is or is not a vexatious claim; that it interferes with the independence of prosecutors, whose role includes deciding whether a prosecution is in the public interest; and that it undermines the accountability of our service personnel, and thereby undermines our international standing.

It is also said that the genuine problem lies in the underresourcing of military investigations and prosecuting authorities. It is also alleged that it sabre-rattles with a meaningless duty to consider derogating from our human rights obligations.

In summary, it is said that it will not deal with the problem that it is recognised there is, but it will undermine law and justice. We have a series of questions. We would be very grateful if we could put these arguments to you and hear your rebuttal of them.

We start with a question from Dean Russell, who will introduce himself and kick off the questions.

Q14 **Dean Russell:** Thank you, Minister. I am the Member of Parliament for Watford. Thank you for taking time to be here today and thank you for all

the work that you do for veterans.

In May 2019, you said, Minister, to paraphrase you, that one of the biggest problems was the military's inability to investigate itself properly and the standard of those investigations. I have heard arguments that the Bill does little to address the issue of repeat investigations, which often causes distress for all concerned, in particular the balance of funding and resources for investigations. Would you say that there is a failure to tackle the root cause of the problem—funding for the MoD to undertake effective investigations?

Johnny Mercer MP: I would not say it is a funding issue. Let me say from the off that we are dealing with a very complex problem. There is a litany of allegations against the Bill. I understand that. It is a contested piece of legislation and I do not dispute that.

I am clearly the Bill Minister, but lots of other people are involved in getting this Bill through Parliament. I have always been clear that the views I held before I became a Minister are exactly the same as they are now. I am not going to change them simply because I am on the payroll. Yes, there has been a serious generational problem with the standard of investigations that this department has carried out into allegations of lawfare. Over the years that has manifested itself in the fact that a lot of the investigations have not withstood rigour as regards ECHR compliance and things like that. That has been a major problem.

Why is it a problem? Given the way in which military investigations are configured, if you like, often there will not be the broad casework that you might have in a civilian force with very specialised crimes such as shooting incident reports. At times we have struggled to upskill and develop that capability in-house.

That is not in the Bill, because that is not a piece of legislation. That is an internal process that absolutely the MoD has to do. If I had my way, would I have painted the picture, "This is what we're doing to ensure that we are holding our people to account at the same time as bringing this Bill through"? Of course I would, but I have been asked to take this Bill through in the manner in which I have, and I am very clear that what we are talking about are internal processes and ensuring that we get those right, whereas this is legislation and the legislative timetable. I hope people will see even before the end of the week the steps we are taking to address some of the problems that you mention.

Dean Russell: With that in mind, would you accept that the Bill may not have an effect on the number and length of investigations that come forward?

Johnny Mercer MP: The key is where the investigations meet and interfere in veterans' lives. Every single allegation has to be investigated. You cannot have a department like this where people turn up, have an investigation and just say, "We'e not going to investigate it". That would be totally wrong. The challenge is where it interferes with veterans' lives

and you find them being chased 20 years later over something they cannot remember by individuals of the sort you had before your Committee last week.

Of course we have to investigate them. Will it reduce the investigations? It is hard to say, but it will bring integrity and rigour to that process, which means that, unlike Mr Day, who was in front of your Committee last week, going out and paying people for services in Iraq to gather these claims, for example, you will have to prove that it is in the public interest.

There will be a two-part process of prosecuting someone. There will be a presumption not to prosecute. You will require the Attorney-General's consent and things like that.

In my view, this is a really difficult space—I do not dispute that—and nobody, least of all me, wants to limit the human rights of those who have served in our military and come before us. The reality is that we are faced with a really difficult situation of industrial levels of claims being brought against this department and against our people, the vast majority of which—almost all—are found to be baseless. If you look at the al-Sweady inquiry, which destroyed the lives of some of our finest people, you see that all the claims were baseless and made up to generate money, as found by the courts.

We have to do something about that to give ourselves the capability to protect our people, and that is what it is about. I am more than willing to work with Committee members and Members across the House to understand how we can improve this Bill, but ultimately we will get to the space where we protect those who serve, in line with our duties towards them.

Dean Russell: One of the criticisms that has been thrown at this Bill over the past week or so is that, effectively, the Government are simply blaming lawyers and the law for failures to adequately resource the system. I was interested in your point of view on that. Is this just an opportunity to bring in a Bill that means that lawyers will get blamed for bringing cases?

Johnny Mercer MP: Let me be clear. In a way, many different parties are to blame for the situation we are in, one of which is this department: we have a duty to ensure that we do a much better level of investigation and that we are much more resilient to abuses of the legal system. What is beyond dispute is the fact that Phil Shiner has been struck off for his offences and that this process has been abused over the years.

We have to find a path down the middle that is balanced and fair to victims, because nobody, least of all me, wants genuine victims of abuses by the military not to seek justice. There is absolutely no place for those in uniform who break the law. At the same time, we are not willing to stand by and usher through thousands and thousands of claims against service men and women going into old age. The British public would

agree with me that that is not the way you treat your veterans. We have to find a route down the middle. Of course, it will be contentious and of course people will have different views. I welcome that and I am keen to work on a cross-party basis to get this Bill right.

Dean Russell: On the presumption against prosecution, last week—unfortunately, I was not part of the panel—we saw witnesses share concerns that placing time limits on the prosecution for torture is a breach of obligations under the UN convention against torture. We are the Joint Committee on Human Rights and this is one of the key parts that we are looking at. Do you accept that the introduction of a presumption against prosecution is contrary to the UK's international legal obligations?

Johnny Mercer MP: No, not at all, because if someone turns up to this department with evidence of torture we will investigate it and we will hand over cases to prosecutors, irrespective of time passed, should those three very clear bars be met. All the Bill is doing is introducing a degree of rigour and integrity to the evidential process.

I have heard some pretty wild things about this Bill. I realise that this is politics and that people have to say what they have to say. The idea that anyone in this department, least of all me, would legislate to allow torture by our Armed Forces is just absurd. I would urge Members and everybody involved in this debate to leave the extremes to one side and try to deal with what is a very challenging problem for us as legislators, where ultimately if we fail we are letting down the people whom we talk such a good game about over the road in the House when everyone is watching but are very slow to protect in government and in Parliament.

This is a slow walk, a stable walk, a fair and proportionate walk down that line, but we will walk down that line—the Prime Minister is very clear on that.

Dean Russell: I appreciate your clarifying that in your response.

A statute of limitation imposes a time limit for bringing a case, after which the courts can extend the time period if it is equitable to do so. The presumption against prosecution operates in a similar way, if not the same way, and imposes a five-year time limit, after which point the case can proceed only if it is exceptional. Will you explain how this is not a distinction without a difference? What is different here? Will you explain why you think there is a real difference between a statute of limitation and a triple lock against prosecution, please?

Johnny Mercer MP: Yes, a statute of limitation—for example, when the French were dealing with Algeria—is where it is dealt with for a while and then there is a cut-off, an amnesty, if you like.

Similar things have happened with a statute of limitation. A statute of limitation indicates that there is a cut-off for criminal behaviour. There is no cut-off for criminal behaviour in this country, and we are very clear on

that. All we are saying is that after the five-year period has elapsed, the evidence needs to be far better than it has been in the past to proceed with a prosecution. Clearly, it does not prevent that prosecution, but it says, "If you're going to abuse the legal system, you'll find it a lot harder to make money doing these claims". It is very clearly not a statute of limitation. It is simply a triple lock to bring in rigour and integrity to what has been a completely ungoverned space.

Dean Russell: You are saying absolutely 100% rock solidly that there is no breach of the obligations under the UN convention against torture.

Johnny Mercer MP: No. If there was, we would not be able to sign off the legislation and bring it through Parliament. Obviously, people will have opinions. Everyone has an opinion in the House of Commons, as I am sure you are aware, but we take a view that we have not just made up. We will canvass solid professional opinion on whether this deviates from our commitments under torture or our commitments under human rights law, and we have taken that professional opinion.

Dean Russell: Thank you, Minister. I appreciate your full answers.

Q15 **Chair:** Minister, these proceedings are privileged—they are proceedings of Parliament—so no defamation proceedings can be taken under them, but I know that you, as a Minister, would not want to take advantage of that and would not want to say something that is not true and that might be defamatory.

I want to pick you up on what you said about Martyn Day. As I understand it, the allegations that were made and that were amplified by the Government, including the Prime Minister at one point from the Dispatch Box in the Commons, were not borne out in proceedings against Mr Day. I am just wondering why—

Johnny Mercer MP: Which comments in particular do you mean?

Chair: You said that Martyn Day was acting wrongfully by paying people to go and find cases, in breach of the solicitors' rules. That was not found to be the case when proceedings were taken against him. That was the case in respect of Phil Shiner, who has since been struck off and whose firm has been closed down. Action was taken in respect of his actions, but not against Martyn Day.

Will you recognise that the independent Solicitors Regulation Authority, and the regulatory process, has not found those allegations against him of wrongful claims farming to be borne out? You repeated them just now, which again gives rise to the worry that the Government are busier trying to complain about lawyers who are doing their job on behalf of their clients than dealing with the problems that they have with the underinvestment in the criminal investigation authorities within the services and the prosecution authorities within the Armed Forces.

Johnny Mercer MP: Let me read to you an exchange I had on the Defence Committee with Martyn Day: "What did you ..."—

Chair: Perhaps you could just answer my question.

Joanna Cherry: It is a matter of fact.

Chair: Let us have the answer to my question as a matter of fact. It is a matter of fact, is it not, that the accusations that you have just made, Minister, were not borne out by the independent proceedings and by the court?

Johnny Mercer MP: What I said was that Martyn Day had paid individuals a referral fee for some sort of service to collect claims against British soldiers in Iraq. That is what I said, and that is correct.

Chair: But that is a matter for the independent Solicitors Regulation Authority.

Johnny Mercer MP: Those were his own words.

Joanna Cherry: I think what the Chair is asking you to agree, Minister, is that Mr Day has not been found guilty of professional misconduct by his regulatory body. It is a matter of fact.

Johnny Mercer MP: Sorry, did I say that?

Joanna Cherry: Do you want to agree that for the record, Minister?

Johnny Mercer MP: Did I say that?

Joanna Cherry: That is what you implied.

Johnny Mercer MP: That is not what I said.

Chair: But you are accusing him of wrongdoing, and the whole point is that solicitors must be independent legal professionals. It is not for the defendant—in this case, the Government; the Ministry of Defence—to decide that those solicitors are doing the wrong thing. You are the defendant. Of course you do not like what the solicitors are doing when they are acting for claimants, but having been a Minister myself I know that you have to watch what you say when you are talking about an independent professional's reputation.

Johnny Mercer MP: Chair, may I come back on that, because I have just had put to me by another Member something that I implied but did not say? I would say in return that we all need to be careful about what we are saying. I have read out word for word something he said. I did not accuse him of what you are saying I have accused him of. I read out word for word what he said. It applies both ways.

I am very careful with my wording about these issues and about the issue of this particular individual, and of course this whole legislation, because it is very careful. It is not fair for me to say something and another member of the Committee to say, "You didn't say that but you implied it". No, I did not. I said what I meant and I meant what I said. If we can

stick to what was actually said and read out, and what we are talking about, I think that would be helpful.

Chair: Minister, do not worry. I will decide what we stick to in this Committee hearing and I will not need any advice from you at all on that. I would like to bring in Joanna Cherry for her next question.

Q16 **Joanna Cherry:** Good afternoon. Thank you for joining us, panel of witnesses. I am the Member of Parliament for Edinburgh South West.

May I ask the Minister a question about the data on criminal prosecutions of service personnel and veterans? I will focus on criminal prosecutions. Can you tell us, in total, how many prosecutions of service personnel and veterans have arisen from Iraq and Afghanistan?

Johnny Mercer MP: May I bring in Damian at this stage, who has the work in front of him? Damian, are you on the line?

Damian Parmenter: Yes, I am, Minister. In relation to the Bill, where we are looking at criminal offences against local nationals in Afghanistan and Iraq—it is quite important to note that we are looking at local nationals as opposed to service personnel, contractors or civil servants—we have the database provided by the Service Prosecuting Authority, which was established in 2009. We rely on its database or the earlier data held by the single service prosecuting authorities, which the Service Prosecuting Authority replaced. However, it should be noted up front that this dataset may be incomplete, largely because much of that early data is paper based and not digitised and is therefore not easily interrogated.

To help understanding of the data in relation to the Bill, we split that data into two sets: first, cases since 2000 where the service prosecutor decided to bring a charge against a serviceperson for a criminal offence or an offence committed against a local national in Afghanistan or Iraq; and, secondly, cases passed for referral to the Service Prosecuting Authority after 2009 where the service prosecutor chose not to charge the individuals concerned. In the first class, 27 individuals—

Chair: May I interrupt you there, because I thought the question was about prosecutions, not about charges? There are many charges for which prosecutors decide that the evidence does not meet the threshold, or that it is not in the public interest, and those prosecutions do not proceed. That is the normal course of events. I think what Joanna Cherry was asking about was prosecutions. Is that right?

Joanna Cherry: That is correct. I am interested in prosecutions that have been brought as opposed to investigations into allegations. I want to know whether you have data on how many prosecutions there have been of service personnel and veterans in Iraq and Afghanistan.

Damian Parmenter: Some 27 individuals were charged since 2000, of whom eight were convicted in a court martial.

Joanna Cherry: How many of those charges proceeded to a

prosecution?

Damian Parmenter: Twenty-seven.

Joanna Cherry: How many of those charges went to a prosecution?

Damian Parmenter: Twenty-seven.

Joanna Cherry: How many convictions were there?

Damian Parmenter: Eight.

Joanna Cherry: About a quarter proceeded to a prosecution.

Chair: To be clear, I think the witness is saying that 27 were prosecuted, of which prosecutions eight resulted in a conviction.

Joanna Cherry: Eight out of 27, so about a third.

Chair: This is since 2000.

Damian Parmenter: This is since 2000, yes, Chair.

Joanna Cherry: In the past 20 years we have had 27 prosecutions and eight convictions.

Damian Parmenter: From Afghanistan and Iraq against local nationals, yes.

Joanna Cherry: That is quite a small number, is it not? Is the introduction of a presumption against prosecution something of a red herring, perhaps to distract from the underlying failures of the MoD to investigate these things expeditiously?

Damian Parmenter: I do not believe that is the case. Again, some of the evidence there is that all those cases were brought within two years and two months of the alleged incidents occurring. They were investigated and taken to criminal prosecution under court martial and eight resulted in a court martial.

Joanna Cherry: Can you give us an example of any of the other 27 cases that were found to have been vexatious or unmeritorious?

Damian Parmenter: I cannot say whether they were vexatious or not. They were investigated. These were criminal prosecutions. The word "vexatious" has normally been brought against claims as against prosecutions.

Joanna Cherry: In any of those 27 prosecutions were there any comments from the judicial authorities that they were lacking in merit or in some way vexatious? I am talking about prosecutions. I know we are talking about crime here, but that is what I want to know.

Damian Parmenter: Not that I am aware of, no. As you will be aware, it goes back over a number of years, and I do not have all the details here; and a lot of the detail, I am afraid, is on paper copy.

Joanna Cherry: In your consultation, you originally proposed a presumption against prosecution after 10 years. It has been halved in the Bill to five years. You say that the Bill is intended to prevent the prosecution of what are described as historic events. Last week our witnesses pointed out that timely investigations in war zones can be challenging and that, where there is an ongoing war-type situation, five years is not a terribly long period. Indeed, the UN rapporteur on torture has made exactly that point. What do you say to that?

Damian Parmenter: The evidence is that all these events have been investigated—

Chair: May we go back to the Minister for that answer, please, as this is a policy issue?

Johnny Mercer MP: Could I come back on the point about vexatious claims, and so on?

Joanna Cherry: We are talking about vexatious prosecutions, Minister. We are talking about prosecutions at the moment, not civil claims.

Johnny Mercer MP: Sure, prosecutions. The al-Sweady inquiry, which looked into these attempted prosecutions, found that they were wholly without foundation and entirely the product of deliberate lies, reckless speculation and ingrained hostility.

Joanna Cherry: Are you contradicting the evidence of Mr Parmenter, Minister?

Johnny Mercer MP: No, not at all. Mr Parmenter was asked clearly the numbers of cases—

Joanna Cherry: Then I asked him—

Johnny Mercer MP: Sorry, if I could finish. I cannot hear you if you talk over the top of me. I do not think the line is broad enough.

Joanna Cherry: I then asked him, Minister, whether any of the 27 prosecutions that had been brought were found to have been in any way vexatious or lacking in merit. That is different from a finding of not guilty. Often the state brings a prosecution and after due process somebody is found to be not guilty. That does not mean to say that the prosecution was wrongful.

We are not talking about politics here. We are talking about law. I want to know whether there is any evidence that you can give this Committee that any of the 27 prosecutions brought in the last 20 years were in any way vexatious or wrongful. That is the question; it is not about civil claims but about 27 criminal prosecutions.

Johnny Mercer MP: I cannot comment on those individual cases. I can tell you that a number of cases have started down that road towards prosecution. A number of allegations have been made of criminal behaviour that, like I said, have been found to be wholly without foundation. The Battle of Danny Boy involved nine or 10 witnesses in the al-Sweady inquiry, which again was found to be entirely the product of deliberate lies.

You will have seen last week that an IFI report by Baroness Hallett looking at the Iraq fatality investigations came to the conclusion that the case against that individual was the product of a desire to make money. Yes, there are plenty of vexatious claims—

Joanna Cherry: [*Inaudible.*]

Johnny Mercer MP: If I may just finish, there are plenty of vexatious examples for you to look at. Someone getting to the prosecutorial stage, where a prosecutor makes a decision, is walking down a pathway that we walk down when there are allegations of things that have gone wrong in our organisation. I am unaware of a finding where the MoD in and of itself has been found to have brought vexatious prosecutions, but there have been many attempts to do so, in the process costing the public purse millions of pounds and ruining the lives of some of our finest people.

Joanna Cherry: Your answer rather suggests that the current system is working, because, whereas there may have been some investigations into events that you consider to have been vexatious or lacking in merit, under the current system they did not result in prosecutions.

Johnny Mercer MP: That is not what I am saying at all.

Joanna Cherry: Let me finish my question, please, Minister. My point is that under the present system these investigations did not result in prosecutions. If the present system is working, why introduce this presumption? It is a presumption against prosecution, not a presumption against investigation.

Johnny Mercer MP: Sure. Given the vast majority of people who are actually involved in the process of trying to ascertain whether wrongdoing has taken place and whether we can prosecute people—or, on the other side of that, being subjected to an industrial level of claims—to suggest that the current system works—

Chair: Sorry, Minister, may I cut in and say that we are not talking about civil claims at this point? We are talking about criminal investigations.

Johnny Mercer MP: No, but civil claims are the start of it, which then come to the prosecutorial side of these things. That was certainly the case that resolved at the weekend with the IFI report. I can see what you are trying to do by separating these things, and it is right to do so, but the reality is that they start at one end with these civil abuse claims, or

whatever it might be, and start to wander down the path of becoming a criminal claim and so on and so forth.

All we are doing is putting up a barrier to try to ensure that if a civil claim proceeds to being a criminal claim, and forwards from that, it has a level of integrity and rigour that it has not had before.

I am afraid I cannot agree with you that the system works currently. There have been many examples of where this has gone wrong. I have read a couple of them to you. This is a problem that has been identified for a number of years and it is absolutely right that we should try to do something about it.

Joanna Cherry: Nevertheless, you or your officials are unable to produce a single example of a prosecution that has proceeded but that has been lacking in merit or a wrongful prosecution. You are simply not able to bring us that evidence despite the fact that you are bringing such a major Bill to the Floor of Parliament.

Baroness Goldie: I wonder whether I may make an observation from my perspective—if you would permit me, Chair—to get back to the underlying policy rationale behind the Bill.

As Mr Parmenter indicated, we know that 27 people were charged and we know that eight of these led to conviction. We do not have detailed information about the circumstances surrounding the 19 who presumably were acquitted, or the case did not proceed to a conviction, but the anguish, anxiety and worry occasioned to those who were accused would be significant. It is important to remember that this legislation is founded on the Government's belief that when we ask men and women to enter into a situation of conflict, and engage in circumstances that I have never had to experience and perhaps very few of us have ever had to experience, we place them in an extraordinary position. We ask them to risk their lives and expose themselves to injury. We ask them to take action in the interests of national security, to have regard to the well-being and the lives of their colleagues and to do whatever they consider necessary to ensure that the conflict in which they are engaged is pursued appropriately.

It seems to me that with prosecutions that may not be founded soundly on evidence or raised timeously, and as a consequence memories may have faded and recollections may be vague and at worst may be founded on completely misconceived beliefs or on fabricated accounts given by certain witnesses, we have a duty to protect our Armed Forces personnel and our veterans from that very alarming scenario unfolding.

I want to make it crystal clear that this Bill is not about barring prosecutions, and it is not about stopping prosecutions. Indeed, going back to the earlier question from Mr Russell, who quite rightly asked a very important question about whether this legislation is compliant with our international legal obligations, were we under this Bill eradicating, eliminating or abolishing the right to prosecute, yes, it would run foul of

international law, but the Bill is not doing that. The Bill is saying that after five years, if a prosecution is to proceed, certain criteria have to be satisfied.

As my friend the Minister, Mr Mercer, has indicated, of course a judgment will always have to be proffered as to what is reasonable. I noticed at the very beginning of your remarks, Chair, that you conceded that there is an issue to be addressed, and I am grateful to you for conceding that. We have to deal with what is a proportionate response to that. To say that no form of protection for our Armed Forces personnel and veterans is necessary in relation to prosecutions is misconceived.

Joanna Cherry: They are already protected by the same due process as everyone else, Baroness Goldie. You have given as one of your reasons the fact that Armed Forces personnel find it stressful being prosecuted. Everybody finds it stressful being prosecuted. Are you aware of any precedent in either Scots law or English law for creating a special class of defendant?

Baroness Goldie: It is the environment in which we ask these men and women to serve.

Joanna Cherry: Is there any precedent in Scots or English law for creating a special class of defendant?

Baroness Goldie: I think it is more an acceptance of what is common sense and what is self-evident.

Chair: Baroness Goldie, can you try to answer the question for us?

Joanna Cherry: I think you will agree with me—we are both Scots lawyers—that it is without precedent in Scots law, and indeed in English law, for a special class of defendant to be created. What the Government are seeking to do here is unprecedented. That is a matter of fact, is it not?

Baroness Goldie: Your argument would mean that no Government ever changed any law, because it would mean we are stuck in the absence of precedent. If I may say so, Chair—

Chair: Baroness Goldie, instead of anticipating her argument, could you answer her question?

Baroness Goldie: That is what I am endeavouring to do. I am saying to Joanna Cherry that if, according to her proposition, there were never any precedent for anything, no law would ever change. What the Government had—

Chair: Joanna Cherry is not making a proposition: she is asking a question. Will you please answer the question: is there anywhere else in Scottish or English and Welsh law that creates a special class of defendant, who is protected over and above the protections of the court and the protections of prosecutors' duties, which are about the threshold

of evidence and the public interest? Are there any other areas where there is a special class of defendant that is protected? Would you answer that?

Baroness Goldie: I am ill qualified to respond to that question, but I have on the panel Katherine, who is a legal expert and I am sure is qualified to respond to that question.

Katherine Willerton: Thank you, Minister. We are not aware of any precedents equivalent to the measures in Part 1 of the Bill. However, we have found examples of where the code for Crown prosecutors requires a prosecutor in deciding whether to bring a prosecution to consider the particular characteristics of a suspect in relation to minors. It is not quite—

Joanna Cherry: I am very grateful to you, Ms Willerton, for confirming what I think those of us who are lawyers know to be the case: that there is no precedent for a special class of defendant in Scots law or English and Welsh law.

That brings me on to something the Minister said about statutes of limitation. Minister, I will read from pages 23 to 24 of the House of Commons Library briefing on the Bill. It says: "Even countries such as France or the United States of America, which operate statutes of limitations for criminal offences, have never introduced provisions giving military personnel special status in their criminal law, and their statutes of limitations have exceptions for the most serious offences such as crimes against humanity". Do you dispute that?

Johnny Mercer MP: I think you are reading it to me directly from the papers, so, no, I do not dispute that, but what I would say on this point is that, yes, we are doing something unprecedented, and we are proud to be doing something unprecedented. There is nothing wrong with the fact that it has not been done before. The nature and character of warfare changes so fast that you have to do things that are unprecedented to protect our people from the abuses of the legal system that we have seen over the years.

All I would say to Ms Cherry is that, if my honourable Friend thinks there is nothing wrong with the system at the moment, it is absolutely okay to have a different view. That is not the Government's view and is not my view. I have seen some people have their lives totally destroyed by this process. To ask a prosecutor to consider the circumstances in which that alleged incident took place, to consider the public interest properly and to seek the Attorney-General's consent are three very reasonable, fair and proportionate conditions against which to test that prosecution, when viewed against the backdrop of the industrial level of claims we have had our people subjected to over the years.

Chair: May we please divide the issue of the civil and criminal claims? Are not those first two duties already the duties of the prosecution authorities: to consider the evidence in all its complexity and to consider

the public interest in all the circumstances? That is already the case, is it not?

Johnny Mercer MP: I will again defer to our legal experts on the panel for this.

Katherine Willerton: The measures in Part 1 of the Bill will bite only after the sufficiency of evidence test has been done by the prosecutor. Only when the prosecutor is convinced that there is sufficient evidence to move to prosecution will they consider the statutory presumption and the matters to be given particular weight in Clause 3 of the Bill. The two elements in Clauses 2 and 3 are additional to what the prosecutor would do at the moment. You are right to say, Chair, that considering the evidence and considering the public interest are already things that prosecutors would do. We are just asking them to do some additional things.

Joanna Cherry: The prosecutor already considers sufficiency and the public interest. On top of that there are three other factors they have to consider under this Bill. Again, my question is directed to the politicians, the Ministers. Do you agree that you do not create a triple lock against prosecutions if you are expecting to encourage them or to allow them to proceed?

Johnny Mercer MP: I do not agree with the premise of your question at all. This is not a question of preventing prosecutions. This is a question of preventing abuse of the system that destroys the lives of our people, cognisant of the fact that lawfare, which no one has mentioned yet, is a new, contemporary, challenging form of the extension of warfare.

Chair: We are dealing with criminal prosecutions.

Joanna Cherry: We are not talking about civil claims, Minister. We are talking about criminal claims. Lawfare is a term of art—

Johnny Mercer MP: I am talking about criminal claims.

Joanna Cherry: Criminal prosecution in the United Kingdom is in the hands of the state, albeit at arm's length through the Crown Office in Scotland and through the CPS in England. We have a DPP in England.

Chair: Although there are military prosecutors.

Joanna Cherry: All right, they are military prosecutions, but prosecutions are not taken by individuals; they are taken by an arm of the state. This term of art "lawfare" cannot be used to apply to the current situation where it is the state that is taking the decisions.

Let us get back to the triple lock. The Bill requires that any such prosecutions after five years must be exceptional. How are the Government defining exceptional? Can one of the Ministers tell us what you mean by exceptional circumstances?

Johnny Mercer MP: We have left it to the courts to explore and to define those exceptional circumstances. We simply wanted to put in there that they must be considered so that this process is fair on the individuals against whom these allegations are made. We have left it very deliberately to the court to define what is exceptional.

Joanna Cherry: Would you not agree with me that all cases of torture, war crimes and genocide are exceptional?

Johnny Mercer MP: I would agree with you that any allegation made against individuals who work for this department should be investigated.

Joanna Cherry: But do you not agree with me that any allegation of torture or genocide or murder of a civilian is an exceptional allegation?

Johnny Mercer MP: Around 3,500 such allegations of abuse were made against our service men and women in Iraq. They would have to be looked at on a case-by-case basis. I am afraid there have been many cases where allegations like that have been made and they have been found to be wholly without foundation.

Joanna Cherry: But your legal adviser has already told the Committee that you do not get to the stage of applying the three-stage test and the exceptional circumstances test until you have a sufficiency of evidence and it is in the public interest to proceed, so you may take it as read, Minister, that your triple lock is not being applied until there is sufficient evidence of torture and it is in the public interest to proceed.

So what I am asking is whether you are suggesting that there are occasions when the offence of torture or genocide is not exceptional.

Johnny Mercer MP: What I am suggesting to you is that over the last 15 years there have been many incidents where an allegation of torture, for example, has been used as a tool of lawfare to try to continue that conflict by other means through the courts, whether that be criminal or civil. That has happened on a number of occasions.

Chair: Could you please confine your answers? The Bill deals in part with the criminal law. We are entitled to ask you discretely about the criminal law, and that is what Joanna Cherry is doing. Can you please answer in respect of the criminal law, which is in the hands of army prosecutors and the courts, and not in relation to civil claims? That is what she is asking you about, but you are answering in relation to civil claims, and we will come on to that in due course.

Johnny Mercer MP: Sorry, Chair, I thought I said specifically in both criminal and civil. I specifically mentioned criminal.

Joanna Cherry: Let us come at it in a slightly different way. You have excluded sexual offences from the scope of the Bill, but you have not excluded other serious offences such as murder, torture and genocide. Why did you exclude sexual offences but not murder, torture or

genocide?

Johnny Mercer MP: Because for a long time in this country we have had a strong, unwavering commitment to sexual violence not being used as a tool of war. The reality of modern operations is that, in the conduct of our duties relating to detention and the application of violence, you can expect to have to deal with a number of allegations concerning things such as torture and murder. There is no scenario in which, in the discharge of duties that we ask our people to do, they can be accused in the same way of sexual violence, and that is why that is written into the Bill.

Joanna Cherry: I noticed during the debate on the Floor of the Commons that the Secretary of State differentiated torture from sexual offences on the basis of saying that sexual offences are never a part of war. Do you think genocide is a legitimate part of war that should not be prosecuted?

Johnny Mercer MP: I am not going to—

Joanna Cherry: Minister, it is a legitimate question—

Johnny Mercer MP: I cannot hear your question if you talk when I am talking.

Joanna Cherry: It is a legitimate question, because you have excluded sexual offences from the Bill but not genocide. Do you consider that genocide is a legitimate tool of war? It is a very simple question.

Johnny Mercer MP: Do I accept that genocide is a legitimate part of war? Of course it is not.

Joanna Cherry: Okay, so why is it not an offence under the Bill? Why have you excluded sexual offences but not genocide?

Johnny Mercer MP: Because it is a very clear policy direction to exclude sexual offences for the very reasons I have outlined to you.

Joanna Cherry: I am looking at the reason given by the Secretary of State. He said, "Sexual offences are never a part of war". Unfortunately, they seem to be sometimes, but I think he meant they should not be. My question, which I consider to be a legitimate question, is that you have excluded sexual offences but not genocide or torture, which seems to imply that the Government think that there are circumstances in which genocide or torture can be a legitimate part of war after five years have passed.

Johnny Mercer MP: It does not imply that in any way at all. This Bill is very clearly designed to deal with the challenges, both criminal—criminal—and civil that we have found in the maturing of lawfare over the years. In the discharge of the duties that we expect our people to do, we have seen that they can be legitimately accused of violence, of unlawful killing, of torture, but there is no scenario whereby in the discharge of

our servicepeople's duties they can be accused of sexual violence in the same way. That is why we have made the exception.

There is no inference from that that some of the other criminal behaviour you have mentioned is acceptable in war—of course it is not—but we are trying to deal with the very clear challenge of lawfare, both criminal and civil, and that is why that exception has been made.

Chair: What we are missing here is that we are not clear whether what you are talking about is lawfare in relation to criminal law, because criminal law investigations are in the hands of military prosecutors and military investigators. How can they be accused of lawfare? Are you saying that they carry out investigations that are without merit, in which case should you not sort out the military investigating authorities? If they are bringing forward prosecutions that are without merit—although it does not look like that from the figures—should you not be sorting out the prosecution authorities rather than imposing a time limit that could see injustice to victims in preventing cases being brought after a certain time?

Johnny Mercer MP: I have already accepted that there are real challenges and real improvements that need to be made in the way we protect ourselves as a department from lawfare, both civil and criminal, which is what you are talking about now, and how we deal with those allegations. I have already accepted that, but that is not legislation. That is an internal process that we have talked about before.

We have talked about how criminal prosecutions are often at the end of a pathway that starts at civil claims and continues down the pathway until we get to a potential criminal prosecution. I think that asking prosecutors to meet those extra conditions, when viewed against what we ask our people to do in the reality of conflict, is a fair balance.

Joanna Cherry: Chair, I do not want to hold the floor for too long because I am conscious of the time constraints and I do not think we will make much more progress on this, so perhaps I should hand back to you to hand over to somebody else.

Chair: Thank you. May we have the next question, from Lord Singh?

Q17 **Lord Singh of Wimbledon:** Good afternoon. I am a Cross-Bench Peer in the House of Lords.

The Bill also removes from its scope offences committed against other service personnel, meaning that prosecutions can take place unhindered where the victim is a member of the British Armed Forces, but not where the victim is a foreign national or, say, a British civilian such as an aid worker.

Johnny Mercer MP: Could I correct an aspect of that last point before I hand over to Katherine? The same rules and regulations will apply to those whom we deploy on these operations, whether they are civilian or

in uniform. This Bill provides protection for those who need it, whether they are civilian or military.

Katherine, may I defer to you on why we are not applying this to another serviceperson? I think I know the answer, but you can put it better than me.

Chair: This is where the victim is a member of the armed services.

Johnny Mercer MP: I have got that 100%.

Chair: This is a key policy question. Could you attempt to answer it, Minister? Why does this Bill restrict prosecutions where the alleged victim is an ordinary foreign national, but if the alleged victim of an offence by a member of the armed services is another member of the armed services, those restrictions do not apply?

Johnny Mercer MP: Chair, it is a legal question. It is a question of the legal framework within which our services operate. That is why I would like to defer to Katherine on it. It is not a policy question. It is a legal question.

Katherine Willerton: The policy was drafted in this way because the feeling was that there were no circumstances in which service personnel could commit offences against their colleagues while on overseas operations and it be in any way understandable. The test within the Bill is overseas operations where you face the threat of violence. The circumstance envisaged is that that threat of violence is coming at you from foreign nationals, not from your colleagues who are working alongside you in the camp. That is the distinction. It was not intended to be about nationality. It is about the circumstance in which we think the serviceperson is more likely accidentally to commit an offence and where they need greater protection.

Lord Singh of Wimbledon: That does not really answer the question. It is where offences have been committed by British service personnel against British service personnel and against aid workers, for example.

Katherine Willerton: The three measures in Part 1 of the Bill will not apply where the offence is allegedly committed against another member of service personnel, a civil servant or a defence contractor. That is the design of policy in the Bill: to draw a distinction because of the circumstances in which service personnel will engage with those different communities.

Lord Singh of Wimbledon: I am asking a question about the circumstances. Why is it framed in that way? This appears to show prejudice against foreigners and protection for us, the British.

Johnny Mercer MP: I will answer that, Katherine, if you like. I do not accept that, with respect, because we are trying to deal with the nature of lawfare. We are not trying to stop prosecutions or to bring in a statute

of limitations. We are simply dealing with lawfare. Lawfare is the abuse of systems, whether criminal or civil, to change or seek to change the outcomes of a conflict. That is what this policy is dealing with. It is not dealing with allegations of intra-service or service-on-aid-worker criminal conduct. That is covered by British law where we are operating. That falls under the safeguards we already have. That is why the distinction has been made: because we are dealing with lawfare, not because we are trying to change how we hold our people to account.

Lord Singh of Wimbledon: It seems that emotive words like lawfare are being used to justify something that seems indefensible.

However, because of time pressures, may we move on to the very title of this Bill, which includes "Overseas Operations". In their evidence the Quakers have suggested in their very mild way that the title is tinged with racism, because it is suggesting that different standards apply when we are dealing with people overseas compared to people of the British Isles.

Johnny Mercer MP: I can assure you that there is absolutely no intent there. It is simply about where the operations take place. You will understand that there is a huge body of opinion, of thought, about this process concerning Northern Ireland. We are very clear that we have made a distinction in this Bill, and that is where the word "overseas" has come from. It is nothing more and nothing less than that.

Lord Singh of Wimbledon: Referring to Northern Ireland suggests that there is greater protection for British forces.

Johnny Mercer MP: It is designed to deal with lawfare against British forces, but the delineation and segregation was made because of the challenge we face in Northern Ireland, which clearly needs to be legislated for by those in Northern Ireland and by the Northern Ireland Office. That is outwith the remit of the Ministry of Defence. This was clearly to deal with overseas operations, and that is why that phrase is in the Bill.

Lord Singh of Wimbledon: So people in Northern Ireland get greater protection than foreigners abroad.

Baroness Goldie: The legislation for Northern Ireland is still to be drafted and presented to Parliament. Northern Ireland, because it concerns operations conducted within the United Kingdom, is a different territorial issue to be dealt with, and that is why it will be the subject of a separate Bill currently being dealt with by the Northern Ireland Office. We cannot enlighten you about the content of that Bill and what the provisions are at the moment because we have no information about it.

As my honourable Friend Mr Mercer, the Minister, was saying, this Bill covers activity engaged in by our Armed Forces on behalf of the United Kingdom, and that activity is not within the United Kingdom, so by definition it is overseas; it is elsewhere. There is absolutely no suggestion

whatever of any intention to be racist or to discriminate against residents or citizens of other countries. It is simply the de facto recognition that, when we ask on behalf of the United Kingdom our Armed Forces to engage in service outwith the United Kingdom, they are doing that in territory that is described as overseas.

Q18 **Lord Singh of Wimbledon:** Are you simply saying that in future we may have different standards for operations in Northern Ireland compared to those overseas—in other words, different standards of human rights? I feel that because of the time constraints I ought not to pursue this.

My next question is this. The Bill provides that, in addition to the barriers already mentioned, the Attorney-General, who will most likely have advised the Armed Forces on the conduct of the armed conflict, will make the final decision on whether to prosecute after five years. If an independent prosecutor determines that the case is exceptional and meets the public interest standards, and there is compelling evidence on that, why should the Attorney-General have the power to block the prosecution when he is already involved in deciding the conduct of the operation?

Johnny Mercer MP: The Attorney-General's consent is there simply as another safety valve to ensure that the abuses of the system that we have seen over the years are not forthcoming, and to give an added degree and an added layer of protection to our service men and women. That decision is made on the very clear legal case. It is nothing to do with the politics of the situation. It is simply ensuring that those tests are met and that the continuance of that prosecution is fair. It is the Government's view that that is a fair ask.

Lord Singh of Wimbledon: If the Attorney-General is involved in the operation, it is most unlikely that he will go against his earlier advice.

Baroness Goldie: That is a very legitimate question. If that question were apprehensive about or anticipated a conflict of interest in the role of the Attorney-General in the discharge of his or her responsibilities, that would undoubtedly be a matter for concern, but when the Attorney-General is asked to rule on the legitimacy of this country going into an arena of war, that is a broad generic issue of international law on which the Attorney-General has to advise the Government.

If you come to the specific instance arising out of an alleged crime or offence while the operation was taking place overseas, and whether it is therefore right after five years that the triple lock should be applied and the Attorney-General should be asked to give his consent, I would submit that is an entirely different arena of legal judgment that has to be exercised by the Attorney-General. It has nothing do with whether the original conflict was lawful.

What I would say to reassure the noble Lord is that requiring Attorney-General consent is not unusual. There are other consent functions which the Attorney-General is required to discharge at the moment and these

normally relate to prosecutions for war crimes or crimes against humanity. The Attorney-General being required to act as anticipated by the Bill is completely independent of government. The Attorney-General is acting as a law officer. I hope that reassures the noble Lord and explains the context of the structure behind the section.

Chair: Is it not the case that the Attorney-General has as his or her client the Ministry of Defence when it comes to all aspects of taking forward armed conflict? The Government and their Armed Forces are the Attorney-General's client. They are also put in the position of deciding whether to prosecute part of the armed services that they have been collectively advising.

Is that not putting the Attorney-General in an invidious position? Why is it needed? Army prosecution officers are independent, are they not? Can they not make the decision independently? They have not been involved in advising on how the conflict is going forward.

Baroness Goldie: Chair, may I respond to your first point? I would dispute the description of the Attorney-General as having a client in the form of a Government. The Attorney-General is a constitutional law officer and the Attorney-General is required to operate independently in the formulation of legal opinion and discharge of advice. It is quite correct that, by the nature of the office, the Attorney-General will usually be required to advise the Government of the day.

In the context of the Bill, and the specific responsibility placed on the Attorney-General if the triple lock is to be invoked, I would suggest that it is to provide reassurance to possible accused and to victims that the matter has been considered at the very highest levels of the British justice system. That is not to be opaque or obstructive; it is to provide reassurance.

Chair: As there have only been 27 prosecutions in the last 20 years, it does not sound as if it will be too onerous a burden on the Attorney-General.

With that, may we leave behind the issue of criminal prosecutions and move to civil claims?

Q19 **Ms Karen Buck:** Thank you, Chair and Minister. I am the MP for Westminster North.

Claims under the Human Rights Act are currently subject to a time limit of a year, with a potential extension if it is found that it would be equitable in all the circumstances to extend. This Bill introduces an absolute limit of six years. In your 2019 document, you said, "We are not proposing to restrict ... the time limits for bringing claims relating to human rights violations". Do you accept that the Bill undermines the commitment to human rights by imposing an absolute maximum time limit?

Johnny Mercer MP: I do not think it undermines it. It brings to it a sense of rigour and integrity. We undertook a public consultation on where we should draw the line. We wanted to bring it into line with other tort claim timelines that are there already. Crucially—and what has been lost in all this—this policy is being run alongside a serious piece of education within the military to ensure that people know what their timelines, rights and responsibilities are. Crucially, if you get it in within that timeline, your chances of preserving the evidence and getting a better case, and so on, are much higher. In fact, 94% of claims came within that six-year period.

I accept that losing the ability indeterminately to bring European human rights claims ad infinitum against the Ministry of Defence is a new law, and it is different, but it has to be viewed against the balance of the need to protect our people from the abuses of the system, and that is why we drew the line where we have.

Ms Karen Buck: You choose to express it as being cases that can be brought ad infinitum, which is quite a value-laden way of expressing it. It may not be the generality, but there will be cases where there are good grounds for falling outside that maximum time limit, which I will come back to you on. Is not the critical point that there will be people—you accept this in the figures that you quote—who will have their ability to enforce their human rights restricted or removed, in fact, by an absolute cut-off?

Johnny Mercer MP: Our manifesto commitment was to amend human rights legislation to prevent some of the abuses that we have seen, and that is what this legislation does. It does it with the very clear purpose of making it fairer and making access to justice easier for our people by ensuring that they are brought within that timeframe, and that that clock starts at the point of knowledge, or the point of diagnosis. I accept what you are saying, but, viewed in the round, I think this is a very small and very fair amendment to our European human rights obligations to ensure that we are protected from abuses of the system.

Ms Karen Buck: But your argument rests upon the fact that there is a correlation between cases taking longer to bring, thus falling outside what would now be your limit, and those that are vexatious or have no basis. Do you have evidence to sustain the belief that those two things fit together rather than being quite distinct?

Johnny Mercer MP: Do I understand your question correctly?

Ms Karen Buck: Your argument is that, by definition, cases that are not brought within the time limit are cases that are likely to be vexatious and be part of pursuing cases ad infinitum.

Johnny Mercer MP: That is not what I am saying. I am not saying that the time elapsing means that, by determination, these things are vexatious. They are just less likely to get a positive outcome that

claimants would want. No, I am not labelling anybody's claim as vexatious simply based on the time it takes.

Ms Karen Buck: But did your impact assessment of the Bill not find that 95% of all civil and human rights claims brought by Iraqi civilians in that conflict were outside the normal time limit and that 62% were brought after six years? They included the case of Alseran, which looked at the degrading conditions of detainees, and of Rahmatullah, which revealed the United Kingdom's involvement in rendition and torture. Do you accept that, if the Bill had been in place when those cases were brought, those individuals would not have had an opportunity to pursue them?

Johnny Mercer MP: I am not going to comment on those individual cases. What I will say is that had this Bill been in place we would have seen a significant reduction—in the region of 70%—in some of the thousands of claims that were brought against this country. I reiterate again that where there is evidence of lawbreaking, people will be held to account and prosecuted, irrespective of the time that has passed.

Ms Karen Buck: But you have an absolute time limit for human rights cases being imposed, so I am not sure that that can be wholly true. Do you agree that there are a number of circumstances where the possibility for someone to bring a case will be limited through no fault of their own—through their being illegally detained, through circumstances of an ongoing conflict—and that, therefore, an absolute time limit of this kind will mean that cases with merit, cases that should be heard, cases that go to the heart of human rights will not be able to be brought if your Bill is in place?

Baroness Goldie: I think at the heart of your question, Karen, is the concept of a time limit. You are correct that, if there is a time limit, it is not possible to pursue a case outwith that time limit, but, as my honourable Friend has said, there are two important provisions here. One is whether that time limit of six years is reasonable or whether it was just plucked out of the air. The second point is that what is important is the date of manifestation of whatever the wrong is that is being founded upon as a claim.

It is a perfectly legitimate question for the Committee to ask where the choice of six years came from. In the consultation, various views were proffered, but it was thought that six years was a reasonable timeframe and that it struck a balance.

Chair: Baroness Goldie, with respect, I think that Karen was asking about the absolute time limit, not the particular number of years. Injustice might arise because there is no discretion to take cases. She put to you and your colleagues a particular case where the courts held that there had been inhuman and degrading treatment of detainees, and service personnel were held to account. Had this been the law, that would not have been able to happen. Surely that is a matter for regret, Baroness Goldie.

Baroness Goldie: I was merely going to expand on the concept of a time limit, Chair, and say that if you introduce a time limit, which the Government have done for now well-rehearsed reasons in connection with policy and the desire to protect our Armed Forces personnel from vexatious, spurious or frivolous claims, of course some people may, ultimately, fall outwith the time limit. However, we think that is most unlikely.

We have been able to ascertain an estimate that the vast majority of relevant claims by service personnel and veterans are already brought within six years—something like 94% of them. Again, there will always be a difference of opinion on this, but the balance of the policy underpinned by the Bill is to strike fairness to victims and fairness to Armed Forces personnel.

Ms Karen Buck: Do neither of you accept that there will be a number of circumstances—sometimes it is the most challenging circumstances that an individual will have gone through—that will have made it more likely that there is a longer period before bringing a case, such as the ongoing nature of a conflict, and the fact that someone has been the victim of torture that has caused deep and lasting psychological damage? I have dealt with many victims of torture as a constituency MP and I know how difficult it can be for people to be in a position to be able to bring forward a case.

Do you accept that there are circumstances that would mean that entirely valid—indeed, serious and challenging—cases would fall outside a time limit, whether it is five, six or seven years, if that time limit is absolute?

Baroness Goldie: If there had been no intimation whatever of the individual thinking that he or she had been wronged and therefore was entitled to civil redress under law, it is possible that six years would elapse without such a case being considered. I have given you such evidence as I can of the extremely high proportion of cases that are brought within six years—as I said, 94%.

What I am saying to you, Karen, is that in legislation such as this there will always have to be a judgment about balance: what is fair, what is proportionate, what is excessive. The Government would argue that the provisions in the Bill are fair to victims, fair to Armed Forces personnel, and proportionate.

Q20 **Ms Karen Buck:** Let me ask a last question. The High Court says that it is a state's duty to undertake a clear investigation into deaths and that the corresponding limitation period be extended for as long as the authorities can be reasonably expected to explore how the death occurred and who is responsible. Does the restriction on the time limit not risk breaching the Government's investigative duties under Article 2 of the EHCR, which covers the right to life, and the prohibition of torture?

Baroness Goldie: I will defer to my honourable Friend Johnny Mercer, because he has experience of serving in the Armed Forces, which I do

not, but I would imagine in situations that gave rise to the death of any individual in the course of a conflict operation there would immediately be an inquiry. There would be a need to ascertain the facts as best as possible in that hostile conflict arena. I imagine that would then give an indication of whether a wrong had been committed, a civil obligation had been breached or even whether criminal activity had taken place. However, Johnny Mercer is better able than I am to comment on the practice of what happens if a death occurs during an operation.

Johnny Mercer MP: Any allegation the nature of which you are referring to such as torture or unlawful killing, irrespective of the time passed, will be investigated. On the idea that these things can happen and no one hears about it for six years and a case cannot be brought, first, criminally that is not the case, because they will always be investigated; and, secondly, whenever these deaths occur, there is a rigorous process of trying to understand what has happened so that we can hold our people to account.

Baroness Goldie: Importantly, Karen, there is a question of evidence, which I know Joanna Cherry will sympathise with. The most likely route of success for victims is to ensure that evidence is preserved as best as possible as near to the time of commission of the incident as can be managed. That is another reason why the sooner the investigation can be commenced the better, because there will be a better chance of preservation of evidence, and that will assist the victim in the pursuit of whatever course of action he or she thinks is appropriate.

Q21 **Chair:** Thank you, Baroness Goldie. I am aware that Minister Mercer needs to go off to another appointment shortly, so I want to ask one question following up what Karen has asked, and what you have said before, Minister Mercer.

Some 75% of civil claims brought against the Ministry of Defence in respect of activities by the armed services are brought by service personnel themselves. If you are looking at civil claims as a whole, would you regard those 75% as lawfare, or, because the claimants are themselves service personnel, do they not count as lawfare? Is it lawfare only where the person who feels they have been wronged is not a soldier, but if they are a member of the armed services they can claim but it is not lawfare?

Johnny Mercer MP: An operational period and a non-operational period are not comparable. I do not recognise at all the figure of 75% being the percentage of claims that we deal with on operations being from our own people. The vast majority are from those who we are engaged with. There are no two tiers of justice here. It is simply not the case that 75% of the claims we deal with in operation are brought by our own people. I have never seen that figure before and I would like to interrogate where it comes from. I imagine that it is UK-based claims and things like that, which are clearly outwith the remit of this Bill.

Chair: If a serviceperson or a former member of the armed services

makes a claim against the MoD, whether on overseas operations or here at home—obviously there are unlikely to be foreign nationals bringing cases against the Armed Forces here, because they are not exposed to them—which is 75% of all the claims in total, that is not considered with suspicion and regarded as lawfare, but if it is by a foreign person encountering our troops, that is treated with suspicion, and there have to be all these time limits. Why are there no time limits in the same way? Why are you not regarding these 75% of claims as lawfare when they are bought by service personnel themselves?

Johnny Mercer MP: Because the nature of what we are trying to deal with is the abuse of lawfare by people who are trying to change the outcome of a conflict, not those who want to sue the UK military, or whatever it may be, for wrongdoing. With respect, Chair, I do not feel that the right things are being compared here. Seventy-five per cent of the claims that we are trying to deal with operationally in dealing with this challenge of lawfare do not come from our service personnel. The vast majority come from those whom we are operating against.

When you talk about claims in this country that can be brought by those who are overseas, and you start talking about time limits of six years and things like that, that is from the point of knowledge. That is from when you become aware of the issue. We have taken scope of challenges like hearing loss, PTSD and mental health problems to ensure that we are not discriminating against these people. It is comparing apples and pears to suggest that this Bill is trying to address the totality of claims the MoD deals with. It is not. It is very clearly configured to deal with lawfare and the abuse of our service personnel.

Q22 **Baroness Massey of Darwen:** I am a Labour Member of the House of Lords. I have a couple of questions about the ECHR.

There is a clear legal test in Article 15 of the ECHR that governs when a state may seek to derogate from the ECHR. The introduction of a duty to consider derogation has no meaningful legal effect, although it may open up the MoD to increased litigation. Is this just window dressing?

Johnny Mercer MP: With respect, I do not think it is window dressing. It is requiring future Governments, whoever is in power, not to derogate but to consider whether we should derogate from the ECHR on operations. Again, when viewed against the challenge that we have tried to tackle in this piece of legislation, it is a fair ask of our political leaders to consider—and that is it—whether or not we should derogate. It is meaningful and it matters. Had it been done before, I think we would be in a different position now, and it is an important part of the Bill.

Baroness Massey of Darwen: Let me go on to my second question. The derogations under Article 15 can be used only in case of "war or other public emergency threatening the life of the nation". Do you interpret this as being capable of covering non-international armed conflicts? What about special operations overseas?

Johnny Mercer MP: I am not going to comment on the way we conduct special forces operations. We have some of the most robust oversight of those operations of any of our peers globally. Clearly, the intention of this piece of the Bill is to make those who are considering using our forces abroad in the manner in which they have been used previously—for example, in Iraq and Afghanistan—to consider whether they should derogate from the ECHR. They may take a view that we should not. All we want to do is ensure that they take that as a consideration, as many of our peers already do who are operating today. We need to ensure of course that the thread of justice and what is right are enabled to continue, but at the same time we need to ensure that the abuses that we have seen over the last 15 years, which have destroyed some of our finest people, are brought to a close.

Baroness Massey of Darwen: What might they take as considerations?

Johnny Mercer MP: If you are conducting an operation, for example, and you need to make dynamic decisions about things like detention, but the conflict is not mature enough to have ECHR detention facilities, you look to restore the primacy of things like the law of armed conflict and the Geneva convention in these scenarios.

It is not a question of reducing standards or people's rights. It is simply about the correct legal framework for operations. From the start, this Government have been very clear about restoring the primacy of the law of armed conflict and the Geneva convention—very strong legislation that we are absolutely committed to so that we can protect the things that we want to protect in conflict.

Baroness Goldie: This is not a derogation—an obligation—that will be taken lightly. I reassure the Committee that there are safeguards. Parliament is able to review. If that power were to be deployed by a Secretary of State, Parliament would have a role to perform and there are processes that mean that the matter is not done covertly or continues indefinitely. Parliament has a role to perform.

Q23 **Fiona Bruce:** I am the Member of Parliament for Congleton.

Minister, I have been listening to what you have been saying quite carefully, but I am still not clear in what circumstances derogation could occur. You referred to detention, but, if I am right, under Article 5, which states that everyone has the right to liberty, and no one should be deprived of their liberty except in certain cases, derogation is not possible. Will you give a little more information about how you would apply that in circumstances that are described in Clause 12 of the Bill? We have struggled to find out from MoD officials quite how they see derogation applying.

Johnny Mercer MP: You can derogate from Article 5, and indeed, some of our international partners are doing that today. When I was engaged in the development of this Bill with the French Foreign Ministers and French Armed Forces Ministers, they deployed something very similar in Mali.

Detention is a very good example of the dynamic scenarios that you will encounter when you are involved in detention operations, often at very short notice, and often in a very chaotic environment.

As a Government, we should consider whether derogation is the right thing to do to ensure that we are protected as a nation and that our people, who ultimately are doing our bidding, are protected from claims under the ECHR where it may not be appropriate. That does not mean that there is in any way derogation from things like the Geneva convention or the law of armed conflict, which prevent abuses in those scenarios.

The retrospective application of the ECHR to the battle space is very difficult and, in many circumstances, inappropriate. It is not possible to correlate that with a downgrading of standards. We are simply intending to restore the primacy of law of armed conflict, the Geneva convention, and things like that.

Fiona Bruce: That is very helpful. You mentioned the battle space. The clause in the Bill talks about operations where forces "may come under attack or face the threat of attack or violent resistance". Basically, you are saying that this would apply in a battle scenario and not otherwise.

Johnny Mercer MP: Exactly. What we are very clearly trying to do is give ourselves the freedom of manoeuvre to operate and to do what is necessary, while staying within the boundaries of the law of armed conflict and the Geneva convention. It is simply that retrospective application of the ECHR that has proved very difficult since we have been involved, particularly in recent conflicts in Iraq and Afghanistan.

Fiona Bruce: I do not mean this to be a test, but what other articles do you think it is likely that you might derogate from, bearing in mind that no derogation is possible from: Article 2, the right to life, other than in respect of lawful acts of war; Article 3, freedom from torture and inhuman or degrading treatment; Article 4, freedom from slavery; or Article 7, no punishment without law? There are a lot of articles there that are relevant to conflict situations. Where do you see that derogation may be needed other than the one that you have quoted?

Johnny Mercer MP: May I ask Katherine to give us a couple of examples that she gave me earlier?

Katherine Willerton: I will pass the buck. I think Damian is best placed to answer as he has been looking at potential scenarios.

Damian Parmenter: It is fair to say that the Minister has already outlined the main scenario for where cases to date have put impositions on our Armed Forces operating in the field. They tend to be around detention operations. Even the Strasbourg court in some of its judgments has rather implied that because we have not derogated, which possibly implies that we could have derogated, we do not have an obligation on us to detain people.

If you look at many of the cases, detention is the area where we have had operational problems. There is a very strange situation you could find yourself in where the ECHR says that you cannot detain people, yet international humanitarian law allows you to kill people, which I think is a slightly ridiculous position to find ourselves in, and one that the courts have recognised and struggled with. In the Hassan case, there is recognition that international humanitarian law can affect the application of the ECHR, particularly when it comes to detention-type operations.

The exact circumstances and articles we would want to derogate from will depend on the operation we are looking at and the actual events we are anticipating on the ground. From experience, it would be fair to say that it is detention cases. I seem to recall that in an early case the right to family life was awarded to a known facilitator of terrorist supplies in Iraq, so again some of these things are bound up, but the exact derogations that we would look for would depend on the facts of the operation and the armed conflict.

Fiona Bruce: May I press you on this? It is very much heat-of-battle conflict that you consider this duty should be applicable to.

Damian Parmenter: As we have said, it is where you are engaged in operations.

Fiona Bruce: I have one final point. No other member state of the European convention has sought to derogate from convention rights during an overseas military operation. Do you think this sends out a signal to other states that perhaps we are downgrading our view of human rights when it comes to military conduct overseas?

Johnny Mercer MP: I do not think it does. All it does is make us consider as a nation, and as a Government, whether it is appropriate to continue to apply it in very dynamic combat situations. Ensuring that we adhere clearly to all our obligations, and all the things that we have talked about, while at the same time protecting those who do these operations on our behalf, is a very difficult line to tread but is achieved with this clause.

Q24 **Chair:** May I ask one final general question of you, Minister, before you go? Do you believe, as we all would, that the high esteem in which our Armed Forces are held internationally is in part attributable to their high levels of accountability? Do you fear that restricting their accountability by restricting claims in this way might undermine the high esteem in which they are held internationally?

Johnny Mercer MP: I think our Armed Forces are held in high esteem internationally for a number of different reasons, one of which is the values, ethos and standards to which we hold our people. That is a completely separate question from the way in which we develop a capability in this country to deal with the changing and dynamic nature of warfare.

Let me give you an example. When I was with the French and I asked them what they did to protect themselves from this sort of thing, they said, "The complete opposite to what you do". It is not true that this in some way denudes that standing. If anything, we were previously viewed as a little naive when it came to protecting ourselves legally when taking part in these operations.

What I would say in closing, Chair—and thank you for having us today—is that I am entirely open at every stage to changing parts of this Bill to make it better. I am in no way precious about certain parts of it that are up for debate.

However, this Government have made a commitment to be the first one to right the balance, if you like. I am committed to the strategic end state of protecting our people from lawfare. I am very keen to work with Members on how we get there. I know that the debate got a bit contentious last week, but I would ask Members to understand that I cannot deal in falsehoods. No one has mentioned it today, but I cannot deal with the legalisation of torture and things like that, which are not in this Bill.

What I would welcome, and I will read your report with interest, is suggestions on general improvements that we can make, because some of the experiences of our people over the last 15 to 20 years have been totally unacceptable. I am afraid that in this place, in the House of Commons, in government and in Whitehall, that has been unseen for most of that period. I understand that it is contentious and I understand that people have strong feelings, but the way in which we have done this historically is not right. We have to find a way forward and I hope that we can all work together to do so.

Chair: Thank you very much indeed, Minister, and your colleagues. I think it is fair to say that we have all recognised that there is a problem, and our questions have probed whether this Bill is the solution to the problem or whether it will just create other problems. We all recognise that there are problems that need to be addressed.

We wish you well with your work in your ministry. Good luck for the Committee stage. We will issue a report that I hope will help the debate as the Bill proceeds through the House of Commons, and, crucially, when it gets to the House of Lords.