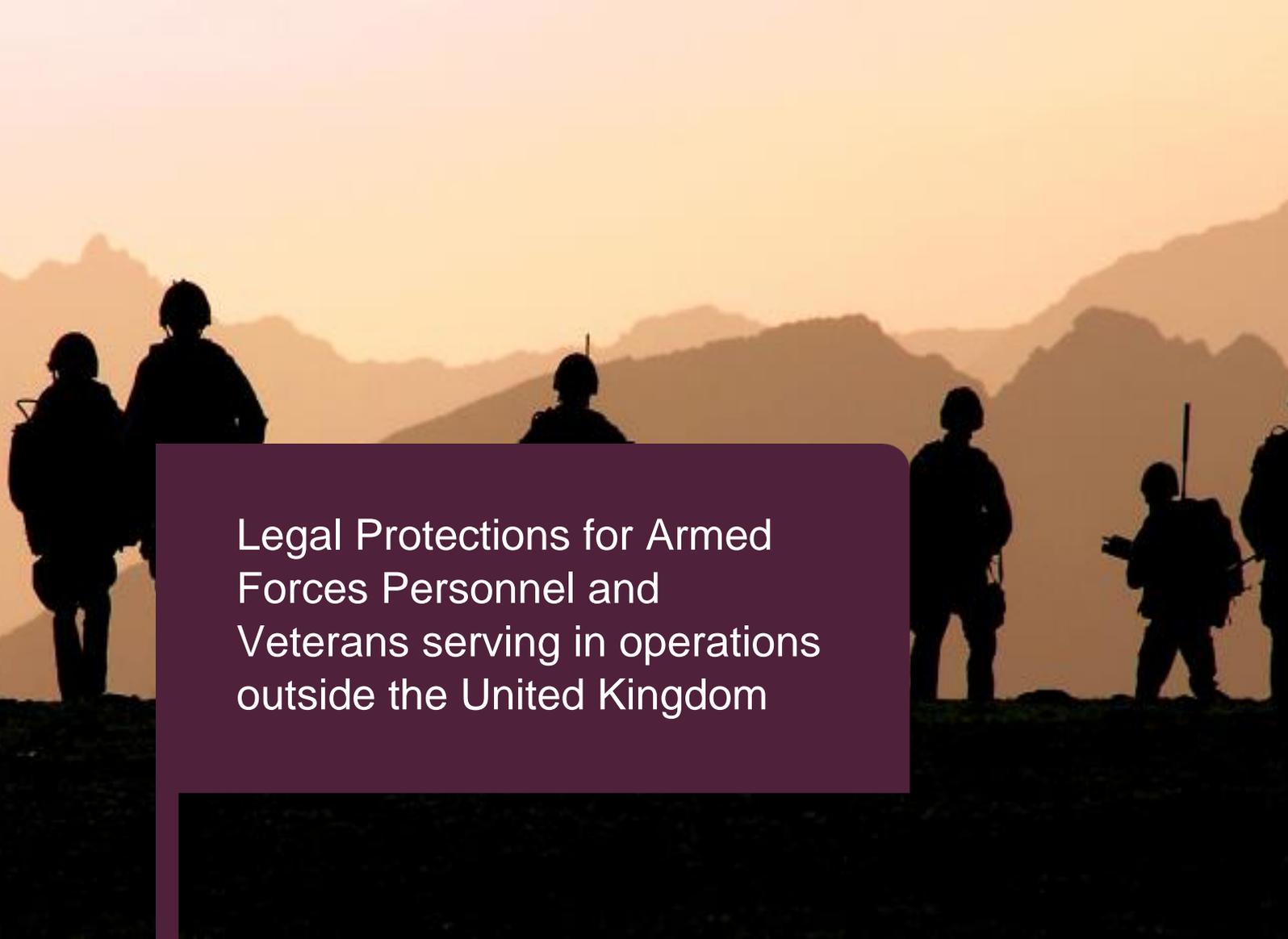




Ministry
of Defence

A photograph showing the silhouettes of several soldiers standing on a ridge, looking out over a mountainous landscape at sunset. The sky is a warm orange and yellow, and the mountains are dark against the light. The soldiers are wearing helmets and carrying equipment.

Legal Protections for Armed
Forces Personnel and
Veterans serving in operations
outside the United Kingdom

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FOREWORD BY THE SECRETARY OF STATE FOR DEFENCE



Rt Hon Penny Mordaunt MP

Our Armed Forces do an incredible job to protect us and our nation. They endure great hardships and separation from their loved ones. They place themselves in harm's way and bear the physical and mental scars of traumatic experiences. They are prepared to risk their lives for us. We owe them a huge debt. We also owe them justice and fairness.

The Government is clear that the Armed Forces are not above the law. It is right that whenever the Armed Forces embark on operations overseas our people and their chain of command are bound to abide by the criminal law of England and Wales, as well as international humanitarian law as set out in the Geneva Conventions. Our service men and women are required to conform to the highest standards of personal behaviour and conduct. And when they fall short they must be held to account. Justice must be served.

The Iraq Historic Allegations Team (IHAT) was established with honourable intentions. To get justice for the victims of alleged crimes, to identify any serious wrongdoing by British military personnel, to grip cases within our domestic criminal justice systems and avoid any need for action by the International Criminal Court. But its workload was corrupted by a huge and largely unjustified increase in the number of allegations. A projected two-year investigation into around 100 allegations became an eight-year attempt to cope with more than 3,500 allegations. Costs spiralled tenfold from £6M to some £60M. And although the IHAT has now rightly been closed, the Service Police are still in the process of completing their final investigations – ten years after Operation TELIC concluded and sixteen years after it began. Similarly, the investigation into alleged offences committed by British forces

in Afghanistan is only now concluding – five years after Operation HERRICK concluded and seventeen years after it began.

The conclusion of those investigations should draw a line: largely ending the uncertainty for Armed Forces personnel who have faced allegations arising from these operations. But without reform, the law as it stands cannot allow that line to be drawn with any confidence.

Similar issues arise in relation to civil litigation. Military operations in Iraq resulted in litigation against the Ministry of Defence on an industrial scale: nearly 1,000 claims seeking compensation for personal injury or death (most of which also sought compensation for human rights violations), and approximately 1,400 judicial review claims seeking an ECHR-compliant investigation and compensation. Although the law does provide for a time limit in such cases, the Courts are currently given broad discretion as to whether to enforce that limit. The effect is that claims have routinely been brought late, with huge numbers of compensation claims permitted to proceed long after the relevant time limit.

The later a claim is brought, especially in respect of allegations emanating from a war zone, the harder it is to assess in a fair and proportionate manner. Records may no longer be sufficiently detailed to be able to prove or disprove specific allegations, and the memories of those involved in incidents fade over time. In such circumstances, the Government may have to choose between settling claims – the merits of which have not been established – or putting Armed Forces personnel and veterans through the ordeal of giving evidence on the Ministry of Defence's behalf. This is unfair to our personnel and to the taxpayer, who must pay the associated legal costs.

All of this goes to the heart of what is known as 'lawfare' – the judicialisation of war. And the risks and impacts of lawfare are clear: in terms of the financial costs; the stress and strain placed on veterans; the potential impact on the morale of serving personnel and our ability to recruit future Armed Forces personnel; and the risk that decisions taken on operations may be corrupted in order to avoid the possibility of legal proceedings many years in the future – the "chilling effect" feared by military commanders.

The Government has already responded to the risks of lawfare in a number of ways, building on wider reforms to the legal system to deter opportunistic lawyers. For example:

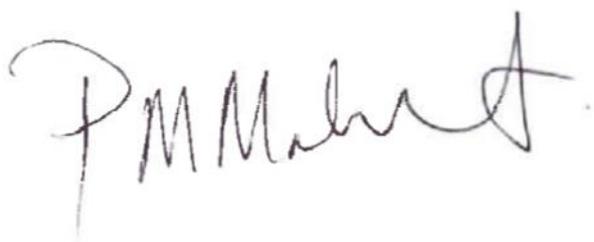
- We intend to derogate from the European Convention on Human Rights before we embark on significant future military operations, where this is appropriate in the precise circumstances of the operation in question. Any derogation would need to be justified and could only be made from certain Articles of the Convention. In the event of such a derogation, our Armed Forces will continue to operate to the highest standards and be subject to the rule of law.

- We provided evidence to the Solicitors Regulation Authority of professional misconduct which contributed to the decision of the independent Solicitors' Disciplinary Tribunal to strike off Mr Phil Shiner as a solicitor; and
- We have improved significantly our ability to resist speculative compensation claims and demonstrated our resolve to resist these wherever appropriate.

We are also committed to improving our support for the Armed Forces. We will be taking forward work to improve the compensation arrangements for those injured, or the families of those killed, on combat operations. Specifically, to make sure that Armed Forces personnel and their families no longer have to endure the stress of pursuing lengthy claims in court, the Government has committed to establishing a no-fault scheme that will pay the same level of compensation as a court would award. Following an extensive consultation exercise, we will bring forward legislation when Parliamentary time allows.

But there remains more to do.

We hope that the proposals set out in this document will help ensure that our Armed Forces receive the justice and fairness that they are owed. Through this consultation, we hope to test and refine what is proposed with the aim of bringing forward legislation as soon as possible.

A handwritten signature in black ink, appearing to read 'P. M. Marshall', is centered on the page. The signature is written in a cursive, flowing style.

22 July 2019

SECTION 1

EXECUTIVE SUMMARY

Content

Work on proposals for legal protections for Armed Forces personnel and veterans has been ongoing for almost two years. During this period, we have considered a wide range of proposed measures to afford serving personnel and veterans with greater protection under the law. However, options for providing our personnel with greater protection, while remaining compliant with our obligations under domestic and international law, are limited.

Only those proposed measures which we believe can be enacted in a manner which is consistent with our obligations under domestic and international law, while providing genuine benefits to our personnel, have been included in this consultation.

We are also seeking views on a proposal to restrict the Court's discretion to extend the normal time limit for bringing civil claims for personal injury and/or death in relation to historical events overseas. While civil claims are brought against the Ministry of Defence (and other government departments) rather than against individuals, the Government may have to choose between settling claims – the merits of which have not been established – or putting Armed Forces personnel and veterans through the ordeal of giving evidence on its behalf.

None of these proposals are intended to erode the rule of law, or to prevent Armed Forces personnel or the Ministry of Defence from being held to account. Rather, they are aimed at enhancing the legal mechanisms for holding individuals and the Government to account to ensure that they are applied consistently, promptly and fairly, and truly deliver justice for all concerned.

Aim

The aim of this consultation is to seek broad public views on the Government's proposals, to inform the development of measures to be taken forward in legislation when Parliamentary time allows.

We would welcome views from any interested individuals or organisations, current serving members of the Armed Forces and their families, veterans, regimental and veterans' groups, military charities, and those with particular legal expertise in these matters.

In addition, we intend to engage directly with legal practitioners and academics regarding our proposals, including to discuss the responses to this consultation, before bringing forward legislation.

Application to operations within the United Kingdom

Each of the proposals set out in this consultation applies solely to events outside the UK and we do not intend to extend the provisions to cover the actions of Armed Forces personnel while deployed on operations within the United Kingdom. Addressing Northern Ireland legacy issues was the subject of a separate consultation by the Northern Ireland Office.

Structure of the consultation

This **Executive Summary** forms **Section 1** of the consultation, providing a brief overview of the contents of the document and its purpose.

Section 2 sets out our proposals for reforms to the way in which criminal prosecutions are considered and brought forward for historical incidents occurring during military operations involving the Armed Forces outside the UK. This includes our proposal for a statutory presumption against prosecution in such cases. Views are sought on a number of key questions, including the scope of such a presumption, the length of time which should pass before the presumption would apply, as well as in what circumstances the presumption should not apply.

Section 3 sets out our proposal for dealing with the challenge of litigation arising from historical events outside the UK: a 'longstop' or hard time limit for bringing common law compensation claims (but not for bringing claims for human rights violations). Views are again sought on a number of questions, including the proper length for such a time limit and the appropriate scope of the measure.

Finally, **Section 4** includes further information about this consultation, including in respect of Freedom of Information and Data Protection.

How to Respond

This consultation document contains 26 questions, including the opportunity to comment on, or provide further information to support your answers. You do not need to answer all questions and may choose only to respond to those which you feel informed about.

You are encouraged to respond using the online survey - the link to which can be found on www.gov.uk/government/consultations.

If you would prefer to respond to the questions in this consultation document by email or post, please ensure you include the following information at the beginning of your response:

- Whether you are a current serving member of the Armed Forces, or a relative of a current serving member of the Armed Forces.
- Whether you are a veteran, or a relative of a veteran.
- Whether you live in England, Wales, Scotland, Northern Ireland or outside of the UK.

- Whether you are responding as an individual or on behalf of an organisation (and which organisation that is).

By email to: People-LegalProtectionsReview@mod.gov.uk

By post to:

**Legal Protections Review Team
Armed Forces Personnel Policy
6th Floor, Zone N
Ministry of Defence Main Building
Whitehall
LONDON
SW1A 2HB**

The consultation will be open for 12 weeks. **The closing date for responses will be 14/10/2019.**

Reporting on the consultation findings

All responses to this consultation document will be analysed and a government report will be published on the Government website (www.gov.uk). We will not respond to individual responses.

SECTION 2

LEGAL PROTECTIONS FOR ARMED FORCES PERSONNEL AND VETERANS - PROPOSALS FOR CRIMINAL CASES

Allegations of crimes committed by Armed Forces personnel are obviously very serious matters. It is right that they are properly investigated; and that where prosecutions are appropriate they are commenced promptly.

However, the Government recognises that we often place Armed Forces personnel in situations which require them to make snap decisions in exceptionally difficult, often life-threatening, situations. The Government believes that where a Service person has been investigated and charges have not been brought, then, absent compelling reasons (such as the emergence of new evidence), that position ought to be final.

Whenever the Armed Forces embark on operations outside the UK, our people and their chain of command are bound to abide by the criminal law of England and Wales, as well as international humanitarian law as set out in the Geneva Conventions. It follows that allegations of serious offences, including of grave breaches of the Geneva Conventions, must be investigated and where appropriate prosecuted. We will continue to honour our obligations under the Rome Statute.

But the conclusion of those investigations should draw a line – addressing the uncertainty faced by Armed Forces personnel concerned about the prospect of re-investigation and prosecution many years after the event. The law as it stands cannot allow that line to be drawn with any confidence. That is why the Government believes change is needed to afford Armed Forces personnel and veterans greater protection from the threat of prosecution for alleged historical offences committed in the course of duty outside the UK. Armed Forces personnel and veterans should not be left with the threat of prosecution hanging over their heads for years to come, in circumstances where their actions have been investigated at the time.

Question 1: Do you agree with this view?

- Yes
- No
- Don't know

Question 2: Please tell us why you think this.

Statutory presumption against prosecution

We propose to legislate for a presumption against prosecution of current or former Armed Forces personnel for alleged offences committed in the course of duty outside the UK more than ten years ago. This measure would in effect raise the threshold to be applied by prosecutors when considering whether a prosecution is genuinely in the public interest in such cases.

We are considering two different ways of enacting this measure.

The first option would be for the legislation to state that the presumption would only apply where the alleged wrongdoing had previously been the subject of a police investigation. The presumption could then be overridden where a prosecutor considered that there were 'exceptional circumstances' in a particular case, such that, notwithstanding the presumption, it would be in the public interest for a prosecution to be brought.

The legislation would not set out what could constitute 'exceptional circumstances'; this would be a matter for a prosecutor, although we would intend this to be a high threshold.

A second possible option would be for the legislation to indicate that it is generally not to be considered in the public interest for a prosecution to be brought for an alleged offence committed in the course of duty outside the UK more than ten years ago – regardless of whether there has been a previous police investigation.

However, the legislation would then go on to indicate that a prosecutor could override the presumption and bring a prosecution wherever they considered it genuinely in the public interest to do so, having regard to all the circumstances of the case including (but not limited to) certain factors specified in the legislation. What these factors might be is discussed further below, in relation to Questions 14-17.

To whom would this measure apply?

The presumption measure would apply in respect of alleged offences committed by current or former members of the UK Armed Forces, including Reserves during the exercise of operational duties outside the UK. It would not apply to alleged offences committed by other Crown Servants, or by Defence Contractors deployed in support of the UK Armed Forces.

We do not currently propose that the measure should apply to offences alleged to have been committed by members of the Armed Forces against their fellow Armed Forces personnel, or against other Crown Servants.

Question 3: Do you agree with our proposals for who should be covered by this measure?

- Yes
- No

Question 4: Do you agree that the measure should not cover alleged offences committed against members of the UK Armed Forces, or against UK Crown Servants?

- Yes
- No

Question 5: Please tell us why you think this.

In what circumstances would the presumption measure apply?

The measure is aimed at offering support and reassurance to current and former members of the Armed Forces alleged to have committed offences in the course of duty, while deployed on operations outside the UK more than ten years ago.

We propose that it should apply to alleged offences committed during any military operation outside the UK in the course of which members of the UK Armed Forces came under attack, or faced the threat of attack or violent resistance. This would include combat operations, but also peacekeeping operations and operations for dealing with terrorism or civil unrest.

However, our current intention is that the measure would only apply to alleged offences committed during the exercise of operational duties (i.e. it would not apply to alleged offences committed while 'off duty'); we recognise that drafting the legislative provisions will require careful and in-depth consideration.

The measure's application would not be limited to alleged offences committed after it was enacted; rather, it would apply in relation to all alleged offences which met the criteria set out above, regardless of how long ago the relevant events occurred.

Question 6: Do you agree with our proposals for the circumstances in which the measure should apply?

- Yes
- No

Question 7: Please tell us why you think this, and in particular whether you have any alternative suggestions for the circumstances in which the measure should apply?

Question 8: Do you agree that ten years is an appropriate qualifying time?

- Yes
- No

Question 9: Do you agree that the measure should apply regardless of how long ago the relevant events occurred?

- Yes
- No

Question 10: Please provide further explanatory comments, as necessary.

Which offences would be covered by the presumption measure?

We propose that the presumption should apply where a prosecution for any type of offence is being considered (although, as set out above, it would be a requirement that the alleged offence was committed during the exercise of operational duties).

However, there may be particular considerations relating to certain types of offence (e.g. sexual offences or torture), which mean that the presumption should not apply in respect of such offences. We invite views on this issue below.

Question 11: Do you agree with our proposal that the presumption should apply to all offences?

- Yes
- No

Question 12: Are there any offences which you think should be excluded from the measure?

- Yes
- No

Question 13: Please tell us why you think this.

Factors which could justify a prosecution, notwithstanding the presumption

As set out above, we are considering two different ways that the presumption measure could operate. Crucially, under either approach, the decision on whether a prosecution should be brought in a particular case – notwithstanding the presumption – would continue to be taken by an independent prosecutor.

Option 1 - The first option would be for the presumption to apply only where the alleged wrongdoing has previously been the subject of a police investigation (but no charges have been brought), and to be capable of being overridden only where a prosecutor determined that there were ‘exceptional circumstances’ in a particular case justifying a prosecution. We would not set out what could constitute ‘exceptional circumstances’ in the legislation; this would be a matter for a prosecutor, although we would intend this to be a high threshold.

Option 2 - The second option would be for the presumption to apply regardless of whether there had been any previous police investigation, and to be capable of being overridden wherever a prosecutor considered it genuinely in the public interest for a prosecution to be brought, having regard to all the circumstances of the case including (but not limited to) certain factors specified in the legislation. Precisely what factors should be specified would require careful consideration, but might include:

- The seriousness of the alleged offence;
- The passage of time since the alleged offence;
- Whether the alleged wrongdoing has been the subject of a previous police investigation;
- Whether any compelling new evidence has emerged which was not considered as part of a previous investigation; and
- Whether a decision not to prosecute might undermine public confidence in the criminal justice system.

The second option set out above would avoid the need for prosecutors to take difficult, unguided decisions on whether a particular case is sufficiently ‘exceptional’ to justify overriding the presumption. It would also enable Parliament – through a non-exhaustive list of factors set out in the legislation - to provide a steer as to the circumstances in which it should be considered appropriate for a prosecution to be brought in connection with an alleged historical offence.

Question 14: Do you support the option of only allowing the presumption to be overridden where a prosecutor considers that there are 'exceptional circumstances' in a particular case (Option 1), or the option of allowing a prosecutor to bring a prosecution notwithstanding the presumption wherever they consider it in the public interest to do so, having regard to all the circumstances of the case including (but not limited to) certain factors specified in legislation (Option 2)?

- Option 1
- Option 2
- Neither

Question 15: Please tell us why you think this.

Question 16: If we proceed with the second option set out above, are there any other specific factors to which you think a prosecutor should be required to have regard in determining whether to override the presumption and bring a prosecution, beyond those listed above?

- Yes
- No

Question 17: Please provide further explanatory comments, as necessary.

Where will the presumption measure apply?

The measure will apply where prosecutions for alleged offences meeting the criteria set out above are being considered by the Service Prosecuting Authority. It will also apply where the Crown Prosecution Service in England and Wales are considering prosecutions for alleged offences meeting these criteria.

We consider that the presumption should also apply where prosecutors in Scotland and Northern Ireland are considering prosecutions for alleged offences meeting the relevant criteria (i.e. it should apply in the highly unlikely scenario that a civilian prosecutor in one of these jurisdictions was considering a prosecution relating to historical military operations outside the UK).

We believe that providing legal protections to Armed Forces personnel and veterans is a reserved matter, as it relates to the actions of members of the UK Armed Forces while deployed outside the UK at the behest of the UK Government. Further, we consider that there is an overwhelming imperative to ensure that any legal protections we introduce should apply equally to current and former Armed Forces personnel across the UK – Armed Forces personnel and veterans living in Scotland and Northern Ireland should clearly not be disadvantaged compared to their counterparts in England and Wales.

However, we recognise that it is important to engage with the Devolved Administrations and prosecutors across the UK regarding the application of this measure; we intend to seek their views and will consider these carefully.

Question 18: Please give us your views on this.

New partial defence

In addition to affording Armed Forces personnel greater protection from the threat of prosecution in connection with historical incidents outside the UK, we are considering a proposal to ensure that going forward, the law reflects the unique pressures faced by Armed Forces personnel while deployed on operations outside the UK.

Currently, if a member of the Armed Forces causes a death in the course of duty in circumstances where their actions start as self-defence, but where their use of force then goes beyond what is strictly necessary (e.g. where a Service person begins firing at a moving vehicle as it comes towards them at speed, but then in the heat of the moment continues to do so once it has passed them), there may be no choice but to find them guilty of murder.

We consider that this fails to take account of the unique pressures faced by Armed Forces personnel in the course of their duties outside the UK. We suggest that the law could account for these pressures through the creation of a new partial defence to murder. This would be available to current and former Armed Forces personnel who caused a death in the course of duty outside the UK through using more force than strictly necessary for the purposes of self-defence, providing that the initial decision to use force was justified.

The defence would reduce a conviction for murder to manslaughter (or in Scotland, culpable homicide). It would acknowledge that Armed Forces personnel are routinely called upon to make snap decisions in exceptionally difficult, often life-threatening, situations, while still holding them accountable under the law.

We recognise that there will be particular complexities associated with legislating for a partial defence that would be available to any Service person being prosecuted in connection with a death caused in the course of duty outside of the UK, regardless of whether they are prosecuted in England and Wales, Scotland or Northern Ireland.

Murder is a common law offence in each of these three jurisdictions. The practicalities of legislating on a UK-wide basis for a statutory defence that would be available to a Service person being prosecuted for a common law offence in any one of these three jurisdictions will require careful consideration. We therefore intend to engage with the Devolved Administrations and prosecutors across the UK regarding the application of this measure and will consider their views carefully.

However, we would reiterate that the Government's view is that any legal protections we introduce for our Armed Forces personnel should apply equally across the UK.

Question 19: Do you support enacting this measure?

- Yes
- No

Question 20: Please tell us why you think this.

Question 21: Please give us your views on whether the measure should apply across the UK.

Other measures?

Question 22: Are there any other legal protections measures for Armed Forces personnel and veterans, in this context, which you think the Ministry of Defence should be considering?

- Yes
- No

Question 23: If yes, please provide details.

SECTION 3

PROPOSAL FOR NON-CRIMINAL CASES

Civil litigation longstop

Military operations in Iraq resulted in litigation against the Ministry of Defence on an industrial scale: nearly 1,000 claims seeking compensation for personal injury or death.

Under section 11 of the Limitation Act 1980, personal injury claims must normally be brought within three years of the date of the incident, or the date on which an individual became aware of a cause of action. Section 33 of the 1980 Act allows courts to extend the three-year period if it would be equitable to allow a claim to proceed, and prescribes a range of factors for the court to take into consideration in reaching such a decision.

The wording of this legislation leaves the Courts with broad discretion as to whether to allow claims to proceed, even when they have been brought many years after the normal limit.

It is very difficult to assess such compensation claims in a fair and proportionate manner. Records are rarely sufficiently detailed to be able to disprove specific allegations, and the memories of those involved in incidents fade over time. In such circumstances, the Government must often choose between settling claims (with all of the associated legal costs) – the merits of which have not been established – or calling upon current and former Armed Forces personnel to give evidence on its behalf.

We are therefore considering legislating to restrict the Court's discretion to extend the normal time limit for bringing compensation claims for personal injury and/or death in relation to historical events outside the UK. This proposal is not intended to avoid the Government being held accountable for injuries or deaths occurring outside the UK. It should ensure that claims are brought promptly, enabling them to be assessed in a fair and proportionate manner, and ensuring lessons are learned and applied.

In line with our commitments to continue to safeguard human rights, we are not proposing to restrict the Court's discretion to extend the time limits for bringing claims relating to human rights violations.

We intend to engage with the Devolved Administrations to seek their views on this proposal and will consider these carefully.

We would be interested in hearing your views on:

Question 24: Whether it would be appropriate to impose an absolute limit (or “longstop”) for bringing claims for personal injury and/or death seeking damages in respect of historical events which took place outside the UK? This would prevent claims being brought beyond that point, while still leaving the Courts with discretion to allow claims that are brought outside the normal time limit but before the absolute limit.

Question 25: Whether the “longstop” should be set at ten years, or some shorter or longer period?

Question 26: Whether there should be any exceptions to a "longstop"?

SECTION 4

INFORMATION ABOUT THIS CONSULTATION

How we consult

This consultation is being conducted in line with the Cabinet Office consultation principles published in March 2018. These principles give clear guidance to government departments on conducting public consultations. If you have any comments about the consultation process (as opposed to comments about the issues we are consulting on), including if you feel that the consultation does not adhere to the values expressed in the consultation principles or that the process could be improved, please respond to the address provided (in the Executive Summary).

Freedom of Information

Information provided during this consultation, including personal information, may be published or disclosed in accordance with access to information regimes, primarily the Freedom of Information Act 2000 and the Data Protection Act 2018. If you want the information you provide to be treated confidentially, please be aware that, in accordance with the Freedom of Information Act, public authorities are required to comply with a statutory code of practice which deals, amongst other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you wish that information to be treated confidentially. If we receive a request for disclosure of that information, we will take account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.

We will process your personal data in accordance with the Data Protection Act 2018 (and the General Data Protection Regulation) and, in most circumstances, this will mean that your personal data will not be disclosed to third parties. Details of the Ministry of Defence's Personal Information Charter can be found at: <https://www.gov.uk/government/organisations/ministry-of-defence/about/personal-information-charter>

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