



Ministry  
of Defence

Public consultation on Legal Protections for  
Armed Forces Personnel and Veterans serving in  
operations outside the United Kingdom  
**Ministry of Defence Analysis and Response**

# Overview

## Introduction

The Government has the utmost admiration and respect for the commitment and courage of all those who have served, or who are currently serving, in Her Majesty's Armed Forces.

The Government is also strongly opposed to Service personnel and veterans being subject to the threat of repeated investigations and potential prosecution in connection with historical operations many years after the events in question, the vast majority of whom have served this country with courage and distinction.

The then Secretary of State for Defence, Penny Mordaunt, announced on 21 May 2019 the intention to hold a public consultation on proposals for enhanced legal protections measures for Armed Forces personnel and veterans in relation to overseas operations. While the consultation would only apply to events occurring outside the United Kingdom, the Ministry of Defence would continue to work with the Northern Ireland Office to ensure that Op Banner veterans would be treated fairly in the proposals to address NI legacy issues. This approach would ensure that all Service personnel and veterans, wherever they served, would be provided with protections from repeat and vexatious investigations.

The 12-week public consultation "Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom" was launched on 22 July 2019, and contained two proposals focused on criminal cases, and one focused on non-criminal cases:

- 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. Two different options were set out in the consultation document for how this measure could be enacted.
- the creation of a new partial defence to murder to ensure that going forward, the law reflects the unique pressures faced by Armed Forces personnel while deployed on operations outside the UK. 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. If convicted, the defence would reduce a conviction for murder to manslaughter.
- a proposal for a 10-year limitation on 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 outside of the UK.

In the Foreword, the then Secretary of State also noted the intention to derogate from the European Convention on Human Rights ("ECHR") before the Armed Forces 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 ECHR.

There was also a commitment to legislate for delivering better compensation for those injured, or the families of those killed on combat operations. This would seek to establish a no-fault scheme that would pay the same level of compensation as a court would award, thus avoiding the need for Service personnel and their families to have to pursue lengthy and stressful claims in the court.

## Structure of the consultation

The consultation document was set out in five sections:

### **The Foreword**

By the (then) Secretary of State for Defence, the Rt Hon Penny Mordaunt MP.

### **Section 1**

The Executive Summary, and a brief overview of the contents of the document and its purpose.

### **Section 2 (Questions 1 to 23)**

The two proposed measures for criminal cases - a statutory presumption against prosecution and a new partial defence to murder. Views were sought on a number of key aspects of the measures, including the scope of the 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 (Questions 24 to 26)**

The non-criminal case proposal for dealing with the challenge of litigation arising from historical events outside the UK - a "longstop" or hard time limit for bringing certain tort claims. Again, views were sought on a number of aspects, including the proper length for such a time limit and the appropriate scope of the measure.

### **Section 4**

Further information about the consultation, including in respect of Freedom of Information and Data Protection.

## Responses to the consultation

Respondents were invited to use the online survey system, which was accessible from the [www.gov.uk/government/consultations](http://www.gov.uk/government/consultations) page, or to respond by email or in hard copy to the Legal Protections Review Team.

Respondents were also invited to confirm:

- if they were a current serving member of the Armed Forces, or a relative of a current serving member of the Armed Forces.
- if they were a veteran, or a relative of a veteran.
- where they lived - in England, Wales, Scotland, Northern Ireland or outside of the UK.

- whether they were responding as an individual or on behalf of an organisation (and which organisation).

(These questions were numbered ES1 to ES4 in the online survey system.)

## Respondent numbers

Number of respondents who used the online survey system	4173
Number of respondents by email	47
Number of respondents in hard copy	3
<b>Total number of respondents</b>	<b>4223</b>

## Analysis of the responses to the Consultation

The online survey system captured the number of responses to each of the "Yes or No" (or similar) questions, and the textual comments. Responses by email or in hard copy have then been manually incorporated.

We have identified the key themes in the textual comments provided by respondents. Wherever possible, we have captured themes which are directly related to each specific question. A MOD response is provided against each question set to explain how we have reflected on the comments received and key themes arising from them.

Where respondents made more general comments, we have captured these separately (see "B - General comments included in consultation responses").

## Outcome of the public consultation

The Conservative Party's manifesto 2019 included the commitment to legislate to prevent vexatious claims being brought against the Armed Forces. In line with this commitment, and the Conservative election commitment to legislate within the first 100 days, the Overseas Operations (Service Personnel and Veterans) Bill was introduced to the House of Commons on 18 March 2020. The MOD's analysis of the responses to the public consultation helped to guide the Government's thinking and to shape the measures contained in this Bill.

On the same day that the Bill was introduced, the Secretary of State for Northern Ireland laid a written statement in the House setting out that the legacy of the past in Northern Ireland will be addressed in a way that focuses on reconciliation, delivers for victims, and ends the cycle of reinvestigations into the Troubles in NI that has failed victims and veterans alike - ensuring equal treatment of NI veterans and those who served overseas.

The Overseas Operations (Service Personnel and Veterans) Bill includes a 'triple lock' of protections that will give Service personnel and veterans greater certainty that the unique pressures placed on them during overseas operations will be taken into account when

prosecutors are deciding whether to prosecute for alleged historical offences. This ‘triple lock’ consists of:

- a presumption that once five years have elapsed from the date of an incident, it is to be exceptional for a prosecutor to determine that a Service person or veteran should be prosecuted for alleged offences that occurred on operations outside the British Isles;
- a requirement that when deciding whether proceedings should be brought or continued, a prosecutor must give particular weight to certain matters, including the public interest in finality in cases where there has been a previous investigation and no compelling new evidence has become available; and,
- a requirement that the consent of the Attorney General or, in the case of Northern Ireland, the Advocate General, must be obtained before a prosecution can proceed. In these cases, the Attorney General or Advocate General will be acting independently of Government, as guardian of the public interest. This does not extend to Scotland given that all criminal prosecution decisions in Scotland are taken by or on behalf of the Lord Advocate in the public interest.

The Bill also includes an absolute 6-year limitation longstop for personal injury and death claims in respect of overseas military operations, and further factors for the court to consider when exercising its discretion to extend the normal time limit of three years for bringing such claims.

In addition, and while not consulted on, the Bill also includes measures for:

- a requirement for the Secretary of State to consider, in the case of significant military operations, whether it is appropriate to derogate from certain rights in the ECHR in light of the situation at the time; and,
- an absolute 6-year limitation longstop for claims under the HRA in respect of overseas military operations, and factors for the court to consider when exercising its discretion to extend the normal time limit of one year for bringing such claims.

The Better Combat Compensation Scheme, noted in the Foreword of the consultation document, is not being taken forward in legislation at this time. Claims in relation to Armed Forces personnel injured or killed can still be brought either through the Armed Forces Compensation Scheme or (except where they are barred under the principle of combat immunity) through the courts.

With regard to the proposed new partial defence to murder, we recognise that this is a very complex area of law. We are working through all the possible options to determine the most appropriate and effective way of understanding and addressing this particular concern.

# Contents

A. Detail of consultation responses .....	6
Section 1 - Executive summary .....	6
Section 2 – Legal protections for Armed Forces personnel and veterans – proposals for criminal cases.....	7
Section 3 – Proposal for non-criminal cases .....	20
B. General comments included in consultation responses.....	25

# A. Detail of consultation responses

## Section 1 - Executive Summary

ES1. Are you a current serving member of the Armed Forces, or a relative of a current serving member of the Armed Forces?

Number of respondents to question	3271
Responded Yes	1488 (46%)
Responded No	1783

ES2. Are you a veteran, or a relative of a veteran?

Number of respondents to question	3279
Responded Yes	2261 (69%)
Responded No	1018

3749 out of a total of 4173 survey respondents (90%) identified themselves as either serving military or a veteran, or as a relation of either.

In order to determine whether this number has been inflated as a result of possible double-counting, 10% of the responses to ES1 and ES2 were (randomly) checked to see how many respondents had answered "yes" to both questions (i.e. that they were serving personnel and a relative of a veteran) - and 12% had done so. Taking this as a percentage of the total number of respondents to these questions, would suggest that approximately 450 responses out of 3749 could fall into this category.

ES3. Where do you live?

Number of respondents to question	3305
Responded England	2455 (74%)
Responded Wales	132 (4%)
Responded Scotland	365 (11%)
Responded Northern Ireland	182 (6%)
Responded Outside of the UK	171 (5%)

Respondents overwhelmingly lived in England, followed by Scotland, NI, overseas and Wales.

ES4. Are you responding as an individual or on behalf of an organisation, and which organisation that is?

Number of respondents to question	3303
Responded as an individual	3218 (97%)
Responded on behalf of an organisation	85 (3%)

318 (10%) of the respondents to this question also chose to provide further comments. Organisations represented by respondents included: Royal Dragoon Guards Regimental Association, Doncaster Council, The Queen's Regimental Association, Royal British Legion, The Royal Welch Fusiliers Comrades Association, and a number of branches of the Parachute Regimental Association. Where respondents chose to enter more general comments about legal protections and the consultation in this text box, these responses were included with the responses to Question 2 (which sought general views on legal protections).

## Section 2 – Legal protections for Armed Forces personnel and veterans – proposals for criminal cases

Q1. Do you agree with this view [that 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]?

Number of respondents to question	2745
Responded Yes:	2438 (89%)
Responded No:	189
Responded Don't Know	118

Q2. Please tell us why you think this.

1863 respondents chose to provide comments online, with a further 23 responses received by email. 100 general comments entered under ES4 have also been included here for analysis purposes. The most frequently occurring comments were around a perceived failure to 'draw a line' on historical allegations, and in particular:

- that it is unfair for the threat of prosecution to be left hanging over the heads of serving personnel and veterans for years after an operation, given the nature of the environment in which they operate, where split-second decisions need to be made;
- the threat of repeat investigations and historic/recurring allegations can have a detrimental impact on wellbeing;
- investigations/prosecutions should take place as close to the offence as possible, not years later when memories have faded; evidence has been lost; and societal 'norms'/context has changed, making what was tolerable at the time intolerable by

current standards. Judgement should also not be made by an individual who has no understanding of the operational context in which the offence occurred;

- the potential for unproven allegations, which hang over members of the Armed Forces and veterans for an extended period of time, to impact on recruitment, retention and operational effectiveness; and
- if not resolved, 'ambulance chasing' lawyers will continue to hound Service personnel and veterans.

There were also many comments in support of the notion that once a Service person has been investigated, the conclusions drawn by that investigation should be treated as being final unless there are compelling reasons for revisiting the case, such as new evidence emerging. However, there were more comments stating that after the first investigation, that should be the end of the matter, with some explicitly saying that if no charges were brought, that should be it.

Of the respondents who disagreed with the view that the Armed Forces should be afforded greater protection from the threat of prosecution for alleged historical offences, the most frequently occurring concerns were:

- The policy is one-sided and creates a different law for one small group of people; it was queried how would this relate to other services such as the Police.
- UK Armed Forces personnel should not be above the law or given special status in law; and they must be answerable to the law like everyone else.
- UK Armed Forces must be seen to act with integrity and be held to account; any lowering of standards is contrary to the professionalism of the British Army; UK Armed Forces have a moral responsibility to operate within the law.
- Protection may embolden individuals to act unlawfully knowing that there are constraints which will hinder future legal processes.
- Better investigations are required.

### **MOD response**

We welcome the overwhelming support for the proposal to provide greater protection for our Service personnel and veterans in relation to allegations arising from historical overseas operations.

We will continue to expect the highest standards of our Service personnel. None of the measures in the Overseas Operations (Service Personnel and Veterans) Bill erode the rule of law or prevent military personnel who break the law from being held to account. Neither do the measures seek to excuse poor behaviour by Service personnel, and credible allegations of wrongdoing will continue to be investigated and, where appropriate, prosecuted.

We are not suggesting that our Armed Forces should be above the law. Members of the Armed Forces are subject to both civil law and Service law and have a duty to uphold both, wherever they are serving in the world.

**MOD response (continued)**

The Armed Forces rely on the maintenance of discipline to ensure that they can operate effectively, and we do not consider that the measures in the Bill will lead to a culture of impunity or undermine military discipline.

*Statutory presumption against prosecution*

Q3. Do you agree with our proposals for who should be covered by this [presumption against prosecution] measure?

Number of respondents to question	1567
Responded Yes:	1293 (82%)
Responded No:	274

Q4. Do you agree that the measure should not cover alleged offences committed against members of the UK Armed Forces, or against UK Crown Servants?

Number of respondents to question	1544
Responded Yes:	1086 (70%)
Responded No:	458 (30%)

Q5. Please tell us why you think this.

While high percentages of respondents agreed with the proposals at both Q3 and Q4, 86 of the 897 respondents who chose to provide comments disagreed with the proposal that the presumption would not apply to alleged offences committed by other Crown Servants or by Defence Contractors, and felt that the measure should apply to these parties if their role is in support of the Crown.

There also appeared to be some confusion concerning the proposal that the measure should not apply to offences committed by Armed Forces personnel against fellow personnel. While there was some reference to "blue on blue" incidents, other comments focused on offences against UK forces by terrorist organisations and enemy combatants, as well as incidents between UK personnel such as bullying, harassment, drunken behaviour etc.

**MOD response**

The presumption against prosecution measure contained in the Overseas Operations (Service Personnel and Veterans) Bill applies to members of the regular or reserve forces and members of a British Overseas Territory Force (when operating as part of UK Forces). It does not apply to other Crown Servants or Defence Contractors, because although we do deploy them in support of our Armed Forces during overseas operations, they are not generally deployed on front line military operations and are not ordinarily exposed to the same risks and dangers as Service personnel.

The measure does not apply to alleged offences against fellow Service personnel (including members of a British Overseas Territory Force when serving with UK Forces) or Crown Servants because it is highly unlikely that Service personnel would face attack by their own colleagues or Crown Servants (who are often in a theatre of operations in support of the Armed Forces). As a result, the justification for the additional protection provided by the statutory presumption would not be present in such cases.

Q6. Do you agree with our proposals for the circumstances in which the measure should apply?

Number of respondents to question	1518
Responded Yes:	1139 (75%)
Responded No:	379

Q7. 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 [military operations overseas more than 10 years ago, but not when personnel are "off duty"]?

831 respondents chose to provide comments. The majority of comments were supportive of retrospective application, but others had concerns that the measure could be seen as an attempt to cover up the past. The majority of comments concerning the qualifying time period supported the need for it but suggested it should be less than 10 years

Concerns were also expressed as to how "off-duty" would be defined, that Service personnel are never truly "off-duty" when they are on operations, and that there is the potential for individuals to find themselves in an active combat situation when they are "off duty". A number of respondents commented that the measure should apply in the UK, and to Northern Ireland in particular.

**MOD response**

The presumption against prosecution measure contained in the Overseas Operations (Service Personnel and Veterans) Bill applies only to alleged offences committed by Service personnel when deployed on operations overseas (outside of the British Islands).

The measures in the Bill are not an attempt to cover up events in the past. The presumption against prosecution is not an amnesty or a statute of limitations. It does not prevent an investigation into credible allegations of wrongdoing in the past, nor does it prevent the independent prosecutor from determining that a case should go forward to prosecution (subject to the consent of the Attorney General, acting independently of government, as the guardian of the public interest).

We have not sought to narrow the measure to "on duty", as we recognise that Service personnel are generally not "off duty" during an overseas operation.

Q8. Do you agree that ten years is an appropriate qualifying time?

Number of respondents to question	1510
Responded Yes:	911 (60%)
Responded No:	599

Q9. Do you agree that the measure should apply regardless of how long ago the relevant events occurred?

Number of respondents to question	1517
Responded Yes:	912 (60%)
Responded No:	605

Q10. Please provide further explanatory comments, as necessary.

708 respondents chose to provide comments. As for Q7, many comments were not supportive of the 10-year timeframe, with concerns that a 10-year period was too long, as memories can fade, evidence tends to deteriorate and the context of events changes. It was also felt to be too long to have the threat of prosecution hanging over a Service person's head. Many felt that 10 years was an arbitrary figure. Time periods of less than 10 years were suggested, with the most popular suggested alternative being 5 years.

**MOD response**

We have considered carefully the responses to these questions. While there was strong support for a ten-year timeframe (Q8), there was equally strong support for the measure to apply regardless of how long ago the relevant incident occurred (Q9). We also took note of the strong views in the explanatory comments that ten years was too long a period to wait for the measure to apply, given the impact that historical allegations can have on a Service person's/veteran's mental health and wellbeing.

As the issue we are seeking to address relates to historical alleged offences, we did not feel able to apply the presumption without a timeframe; but given the strength of the views expressed, we felt that a timeframe of less than ten years would be more appropriate. The presumption measure within the Bill therefore applies five years after the alleged offence/event.

Q11. Do you agree with our proposal that the presumption should apply to all offences?

Number of respondents to question	1511
Responded Yes:	1052 (70%)
Responded No:	459

Q12. Are there any offences which you think should be excluded from the measure?

Number of respondents to question	1504
Responded Yes:	570
Responded No:	934 (62%)

Q13. Please tell us why you think this.

While Q11 is strongly supportive of the presumption applying to all offences, 38% of respondents to Q12 considered that some offences should be excluded from the measure. 879 respondents chose to provide explanatory comments, many of which suggested that sexual offences (including rape and paedophilia) should be excluded from the presumption. Torture, breaches of the Geneva Convention, war crimes, and murder were also suggested as offences that should be excluded.

Some respondents were concerned that the exclusion of offences could lead to a legal loophole that could be exploited by lawyers (i.e. trying to make an allegation 'fit' one of the excluded offences). Some legal groups commented that the presumption should not include serious offences as a matter of principle and argued that the measure should exclude all alleged offences the underlying conduct of which would constitute a serious violation of the law of

armed conflict, torture, a crime against humanity or the crime of genocide, whether or not the conduct is charged as such.

**MOD response**

As set out in the Bill, the statutory presumption does not apply to the sexual offences listed in Schedule 1. This decision reflects the Government’s strong and stated belief that the use of sexual violence or sexual exploitation during conflict is never acceptable in any circumstances.

The statutory presumption allows for a prosecutor to determine that the circumstances of a case are "exceptional" and therefore the presumption is rebutted and a prosecution can be taken forward; this could include cases where there is evidence that a serious offence has been committed.

Q14. 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)?

Number of respondents to question	1487
Responded Option 1	464 (31%)
Responded Option 2	686 (46%)
Responded Neither	337 (23%)

Q15. Please tell us why you think this.

While for Q14, Option 2 was the most supported option, Option 1 received a good level of support, and the "neither" option also received some support. 765 respondents chose to provide explanatory comments.

Comments in relation to Option 1 - Some felt that a police investigation should not be a factor in determining whether the presumption applies. Some respondents said that the original investigation might not have been effective or thorough, and some were concerned that the presumption might not apply if there was no investigation at the time it occurred (because it wasn't reported until years later). Concerns were also expressed about prosecutors determining "exceptional circumstances", due a perception of a lack of independence, political bias and lack of operational experience/understanding. There were also concerns that determining what amounts to be 'exceptional circumstances' would be subjective if it is not clearly defined.

Comments in relation to Option 2 - There were concerns about prosecutors determining what is in the 'public interest' - again due to perceptions of lack of independence, political bias and lack of operational experience.

Comments in relation to "neither" - It was difficult to identify an overriding pattern of reasons, but a few responses described the options as being "too loose".

### MOD response

In effect, the inclusion in the Bill of the presumption (clause 2) and the requirement for the prosecutor to give weight to certain matters when deciding whether it is appropriate to prosecute (clause 3), reflects a combination of elements of both Option 1 and Option 2.

We note the concerns expressed about how a prosecutor would determine what was meant by "exceptional circumstances", but we concluded that "exceptional" was the right test because it sets the high bar that the Government considers the presumption should have.

We decided against defining the term "exceptional" in order to safeguard prosecutorial independence and also because it would be very difficult to set out all the circumstances in which an alleged offence could be considered "exceptional". However, we are confident that prosecutors will recognise the high bar it introduces, and that they will be able to effectively and accurately apply it to their decision-making.

We also reflected on the value of having additional factors that the prosecutor would have to take into account when making a decision to prosecute (as was proposed in Option 2). See further comment in relation to Questions 16 and 17.

Q16. 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?

Number of respondents to question	1369
Responded Yes	501
Responded No	868 (63%)

Q17. Please provide further explanatory comments, as necessary.

541 respondents chose to provide comments. Most of the comments received were in relation to evidence - and the need for it to be compelling, sound, overwhelming, beyond reasonable doubt, and factual.

There were also comments on the passage of time, with most of the comments questioning whether the timeframe for the measure should be 5 years. Some respondents had also apparently misunderstood "more than 10 years ago" for the qualifying time for the presumption measure as a time limit. Others were concerned that some explanation/justification should be given as to why alleged offences would not have been reported and investigated before 10 years had passed. A handful of responses were unsupportive, stating that time should not be a factor, and that a crime should be punished regardless of the time that has passed since the offence.

Some respondents also identified context as a potential factor for consideration, notably the circumstances in which the offence occurred (situation; facts; orders; self-defence etc), and defendant wellbeing - both at the time the offence occurred and the present day.

### **MOD response**

In relation to factors to which a prosecutor should have regard, we have noted the importance that many respondents attached to the quality of evidence, to the context/circumstances in which an alleged offence occurred, and to the defendant's wellbeing (at the time and subsequently).

The Overseas Operations (Service Personnel and Veterans) Bill therefore includes specific matters to which a prosecutor must give particular weight when a prosecutor is deciding whether or not to bring proceedings in a particular case. These matters include:

- The unique circumstances and demands of overseas military operations, and the adverse effects that had, or are likely to have, on a Service person, including on their capacity to make sound decisions and their mental health. This is intended to highlight the unique circumstances of operations overseas, compared to alleged criminal conduct occurring in a domestic/civilian setting, and to ensure that full recognition is given to these differences when prosecutors make decisions on whether to bring proceedings in these cases.
- Where there has been a previous investigation or investigations in relation to alleged criminal conduct and no compelling new evidence has arisen since any such investigation(s). This is aimed at addressing concerns over the impact on personnel of the threat of legal proceedings hanging over them, long after the events in question, and in particular where there is no compelling new evidence to be considered. It also highlights the public interest in these cases coming to a timely and final resolution. Where there is compelling new evidence, the prosecutor could determine that it would be appropriate to proceed to prosecution.

Giving weight to these matters may lead the prosecutor to decide not to bring prosecution proceedings.

**MOD response (continued)**

In addition, we noted that some respondents (to both Questions 15 and 17) expressed a lack of confidence in the fairness and impartiality of prosecutors, or their ability to fully appreciate the unique context of military operations. We do not share those concerns. The Government has full confidence in the independence and capability of the prosecutors. In addition, the proposed new requirement for prosecutors to give particular weight to specific matters will provide reassurance to service personnel and veterans that the unique circumstances of overseas operations must be taken into account.

The Bill contains a further requirement (the third part of what is referred to as the "triple lock") that where a prosecutor determines that a case should proceed to trial, notwithstanding the presumption and the circumstances of the case, then the consent of the Attorney General, in the case of England and Wales, or the Advocate General, in the case of Northern Ireland, consent must be obtained before a prosecution can proceed. In these cases, the Attorney General or Advocate General will be acting independently of Government, as guardian of the public interest.

Q18. Please give us your views on this [the consideration that the measures should apply to prosecutors in Northern Ireland and Scotland, as well as in England and Wales, for prosecutions for alleged offences on overseas operations, and that the intention is to engage on this with UK prosecutors and the Devolved Administrations].

869 respondents chose to provide comments. The comments were supportive of the need to consult with the Devolved Administrations, and for the application of the measure across the UK. Some responses raised concerns about how the measure would apply to veterans living overseas.

**MOD response**

The Overseas Operations (Service Personnel and Veterans) Bill extends to England and Wales, Scotland and Northern Ireland. The effects of the measures are substantively the same throughout the UK, but as amendments are needed to different pieces of legislation in the different nations, some provisions of the Bill apply to England and Wales only, some to Scotland, and others to Northern Ireland.

The Government considers all matters within the Bill to fall outside devolved competence on the basis that they relate to the Defence reservation.

The requirement to deliver the new Government's manifesto commitment to "introduce new legislation to tackle the vexatious legal claims that undermine our Armed Forces" within 100 days, prevented us from being able to share policy thinking and development of the measures, as we would usually seek to do with the Devolved Administrations.

**MOD response (continued)**

However, once approval was given for the measures to be taken forward in the Overseas Operations Bill, officials within the Devolved Administrations were notified. In addition, the Secretary of State wrote to the Cabinet Secretary for Justice in the Scottish Government, the Lord Advocate, the Leader of the House of the National Assembly of Wales, and the First Minister of Northern Ireland to announce the introduction of the Overseas Operations Bill in the House of Commons.

*New partial defence*

Q19. Do you support enacting this (new partial defence) measure?

Number of respondents to question	1374
Responded Yes	1151 (84%)
Responded No	223

Q20. Please tell us why you think this.

815 respondents chose to provide comments with a further 6 submitted by email. The majority of the comments were supportive of the measure, stating that it reflected the unique circumstances faced by Service personnel in the ‘heat of battle’ and that the understanding of that context is vital, with some respondents expressing concern about whether the jury and prosecutors could truly understand that context. Respondents cited the example in the Consultation Document as a demonstration of how difficult it can be to determine when a threat has ceased: how and by whom would the distinction be made between ‘normal’ and ‘excessive’ force? Some responses felt that the measure should apply equally across and to operations within the UK, and while it was recognised that Service personnel are not the police, it was suggested that Service personnel should receive the same protections and legal training as them. A very small number of comments stated that the measure didn't go far enough and that there should be Crown Immunity.

112 comments were unsupportive of the measure. Some stated that Service personnel should not be considered to be above the law and should not be treated differently, and that training should be provided to help facilitate effective-decision making in the ‘heat of battle’. A number of respondents from legal groups felt that a new partial defence to murder was unnecessary, given existing law, and that courts already apply self-defence and accompanying rules of what constitutes unreasonable, excessive or disproportionate force in a manner which takes account of the motives and situation of the accused.

Other comments included the following suggestions: that there should be an exemption from prosecution; the law as it stands is enough; and, that civilian law should not be used to judge operational offences. Comparisons with the police were also made: some respondents felt that if a partial defence exists for Service personnel then it should also apply to the police.

### MOD response

We recognise that this is a very complex area of law, and we are working through possible options to determine the most appropriate and effective way of addressing this particular proposal.

Q21. Please give us your views on whether the measure should apply across the UK.

916 respondents chose to provide comments in the survey, with a further seven comments provided by email.

The majority of the comments were supportive of the measure applying across the UK, with the main themes being the criticality of parity in the application of the measure: Service personnel are recruited from across the UK and the level of protection should not be determined by a post-code. In addition, Defence is not a devolved issue: Service personnel are part of the Armed Forces of the United Kingdom, not the Armed Forces of England, Scotland etc.

32 comments were unsupportive, stating that no-one should be considered to be above the law and that Service personnel should not be treated differently.

Others believed there should be exemption from prosecution, or Crown Immunity.

Some comments demonstrated the possibility that some respondents may have misunderstood the question. The comments indicated that they agreed that the measure should apply **inside the UK**, but the question asked whether it should apply **across the UK**. There is therefore the possibility that some of the respondents who selected 'Yes', without providing any justification, may also have misinterpreted the question.

### MOD response

As noted above, we are working through possible options to determine the most appropriate and effective way of addressing this particular proposal, including how a measure of this kind might operate under the different systems of criminal law in England and Wales, Scotland and Northern Ireland.

*Other measures?*

Q22. 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?

Number of respondents to question	1328
Responded Yes	573
Responded No	755 (57%)

Q23. If yes, please provide details.

567 respondents chose to provide comments in the survey, with a further four comments provided by email.

While most respondents answered "no" to Question 22, of those who took the opportunity to provide further comments at Q23, most supported the consideration of other legal protections measures. The most frequently proposed were:

- there should be anonymity for the accused, with some suggesting this should only be lifted after successful prosecution;
- legal support should be provided at no cost to Service personnel and veterans;
- a human factors 'clause' should be included, such as the impact of operations on mental health/PTSD diagnosis/age/general health;
- trial in the UK only with no charges to be brought by a foreign government, or extradition to another country;
- Crown Immunity or exemption from prosecution.

A handful of comments were unsupportive stating that: Service personnel should not be considered to be above the law; the law goes far enough; or simply that no further measures are needed.

**MOD response**

We did not consider that anonymity for the accused was a necessary measure to be taken forward in legislation, as there are already processes in place to provide for this, where appropriate.

**MOD response (continued)**

We are very mindful of the impact that historical investigations can have on those affected by them. Where serving or former members of the Armed Forces face allegations arising from activities carried out as part of their duties, they receive full legal support and representation at departmental expense, for as long as is necessary. This is the case regardless of the individual's length of service, the duration of any proceedings, and the length of time that has passed since the incident in question.

The Overseas Operations Bill includes the requirement for prosecutors to consider, when determining whether to prosecute a case, the adverse impact on individuals of overseas operations, including the exceptional demands and stresses to which Armed Forces personnel are likely to be subject (regardless of length of service, rank or personal resilience), the impact on their capacity to make sound judgements or exercise self-control, and other adverse effects on their mental health.

It is highly improbable that Armed Forces personnel would be extradited to or prosecuted by a foreign government, as the Service Justice System (SJS) has global jurisdiction over all Service personnel. Status of Forces Agreements (SOFA) exist for when UK Armed Forces operate outside the UK, and when in place these ensure that personnel alleged to have committed offences are dealt with through the Service Justice System, rather than through the local justice system.

As noted in the Foreword of the consultation document, the Armed Forces are not above the law. It is right that when members of the Armed Forces fall short of the required high standards of personal behaviour and conduct, they must be held to account. Unlike the application of an amnesty or immunity from prosecution, the statutory presumption in the Overseas Operations (Service Personnel and Veterans) Bill is not an absolute bar to prosecution; Service personnel can still be held to account.

## Section 3 – Proposal for non-criminal cases

### *Civil litigation longstop*

Q24. 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.

990 respondents chose to provide comments, with 678 of the comments supportive of a limitation or a "longstop".

The comments of 123 respondents focused specifically on the time period for the “longstop”, ranging from 6 months to 30 years. The most frequently quoted were:

- 3 years - 46 respondents
- 10 years - 29 respondents
- 5 years – 21 respondents
- 1 year – 15 respondents

Other responses included: concerns around the court’s discretion to allow cases after the time limit, and how courts determine whether cases can be considered; false claims; the length of time that it takes for a claim to be raised risks reliance on fading or false memories of events; and, that legal aid should not be given to claimants.

115 comments were against a limitation or “longstop”. Legal groups expressed concerns that a longstop would prevent or limit genuine claims from being brought and, in particular, could disadvantage Service personnel making claims. In addition, some argued that it would give MOD enhanced protection which is neither justified nor extended to any other employer.

### **MOD response**

The Overseas Operations (Service Personnel and Veterans) Bill includes a six-year limitation longstop for personal injury and/or death claims in respect of overseas military operations. It also further restricts the court’s discretion to extend the normal time limit of three years for bringing claims for personal injury and/or death in relation to operations outside the UK by introducing further factors to which the court must have particular regard when exercising its discretion.

The Bill also includes a six-year limitation longstop for claims under the Human Rights Act 1998 (“HRA”) in respect of overseas military operations (this measure was not included in the Consultation). It also further restricts the court’s discretion to extend the normal time limit of 1 year for bringing such claims by introducing factors to which the court must have particular regard when exercising its discretion.

By introducing absolute limitation periods, we can be more confident that the MOD will not be calling upon Service personnel and veterans indefinitely to give evidence about incidents during historical overseas operations.

These measures will not prevent genuine claims from being brought, but they will require such claims to be brought in a timely manner. It will also bring the time limit for death and personal injury claims into line with other tort claims, for example assault and false imprisonment.

**MOD response (continued)**

The Bill does not change how the time limit for death and personal injury claims is calculated; this will still be either the date of the incident, or from the date of knowledge. This means that for conditions like PTSD that may not be diagnosed until much later, the six years would start from the date of diagnosis. In the event of a late diagnosis, Service personnel and veterans will be able to bring claims against the MOD even if it is more than six years from the date of the incident.

Service personnel and veterans also benefit from the Armed Forces Compensation Scheme, which has a 7-year time limit for bringing claims

The unique circumstances of overseas operations, as set out below, mean that it is appropriate to introduce this measure for claims against the MOD; other organisations are not in an equivalent position:

- The Armed Forces and MOD personnel are deployed on overseas military operations in order to carry out functions that are specific to military and defence personnel.
- Whilst private contractors and NGO workers may be operating in the same hostile environments as the Armed Forces, they will not be in the same frontline roles as them and will not therefore face the same pressures as military personnel do in terms of making split-second decisions that could have extensive repercussions. This context has a unique effect on the ability of military and defence personnel to keep accurate records and correctly recall the details of incidents.

Q25. Whether the "longstop" should be set at ten years, or some shorter or longer period?

993 respondents chose to provide comments in the survey. 221 respondents were supportive of the ten year "longstop" period. 524 respondents were supportive of a time period of less than ten years, with the most popular periods being 5 years (201 responses); 3 years (99 responses); and, less than ten years but no specific time-frame (113 responses).

A further 28 comments supported a "longstop" in excess of 10 years. Half of these didn't provide a specific time period, while six suggested a period of 15 years. 49 comments were unsupportive of any "longstop" or time limit.

### MOD response

We noted the strong support for a time limit of less than 10 years. A time limit of six years is considered to be a reasonable timeframe for claimants overseas to gather the necessary evidence to bring a claim. The longer it takes for a claim to be made, the greater the risk of witnesses' recollections fading, making it difficult for the claimant to pursue a claim and for the defendant properly to defend the claim.

In *Stubbings v UK*, a judgment that has been repeatedly confirmed, the European Court of Human Rights upheld the UK's absolute six-year limitation period for intentional torts<sup>1</sup>. The court noted the need in civil litigation for limitation periods because they ensure legal certainty and finality, the avoidance of stale claims, and prevent injustice where events in the distant past involved unreliable and incomplete evidence because of the passage of time.

The Bill therefore introduces six-year time limits for death and personal injury claims relating to overseas military operations - bringing it into line with other tort claims (e.g. assault and false imprisonment) - and for claims under the HRA relating to overseas military operations.

### Q26. Whether there should be any exceptions to a "longstop"?

920 respondents chose to provide comments in the survey. 254 comments were supportive of exceptions to the "longstop", with 465 unsupportive. A further 19 comments were unsupportive of the need for a "longstop".

Supportive comments focused on exceptions for sexual offences and Human Rights/International Law breaches; new and/or compelling evidence; exceptional circumstances; incapacity of the claimant (physical/mental); manifestation of injuries after the cut-off point; inability of the claimant to raise a claim due to lack of education/incarceration/ongoing hostilities.

Few comments were provided by those who were unsupportive of exceptions, but where they were, they focused on the period of the "longstop"; and the potential for legal loopholes arising from exceptions.

### **MOD response**

The existing legislation on limitation periods for personal injury and death claims enables claimants to bring claims that would normally be out of time if the claimant did not know until later that they were able to bring a claim. The Bill preserves the date of knowledge provision in the Limitation Act 1980 for claims relating to overseas military operations, meaning that claimants will have up to six years after their date of knowledge to bring a claim.

The Bill introduces a similar date of knowledge provision for HRA claims relating to overseas military operations. This will allow claims outside the six-year time limit to be brought up to 12 months from the date on which the claimant knew, or first ought to have known, of the act complained of and that it was in connection with UK Armed Forces on overseas operations.

Service personnel and veterans will still have the benefit of the Armed Forces Compensation Scheme which has a time limit of seven years to make a claim. For those with Post Traumatic Stress Disorder (PTSD), the time limit to bring personal injury claims would run from the date of diagnosis.

## B. General comments included in consultation responses

In addition to providing comments in relation to specific questions, respondents also took the opportunity to comment more broadly on issues in relation to legal protections for Armed Forces personnel. Rather than list these issues against each question, they have been summarised below:

- The measures should be extended to include operations in Northern Ireland/UK.
- (In the context of Northern Ireland) concerns over 'letters of comfort' for terrorists, while veterans are 'hounded'.

### **MOD response**

The Consultation applied solely to overseas operations, with the Executive Summary noting that addressing Northern Ireland legacy issues had been the subject of a separate consultation by the Northern Ireland Office.

Veterans who served in Northern Ireland are not covered by the Overseas Operations Bill, which focuses on improving the legal framework for overseas military operations and does not apply to operations within the UK. However, the Government will be introducing separate legislation to address the legacy of the past in Northern Ireland in a way that focuses on reconciliation, delivers for victims, and ends the cycle of reinvestigations into events that took place in NI during the Troubles that has failed victims and veterans alike - ensuring equal treatment of NI veterans and those who served overseas.

- Fairness in justice: Service personnel are not above the law and that the law should be applied equally and fairly. Some legal respondents expressed concerns that the measures would contribute to a culture of impunity and behaviour counterproductive to effective military discipline, as well as a lack of transparency/information disclosure and failure to keep proper records.

### **MOD response**

We are clear that military personnel are not above the law. Investigations should go forward where there is alleged wrongdoing; allegations of serious offences, including of grave breaches of the Geneva Conventions, must and will continue to be investigated and, where appropriate, prosecuted.

### **MOD response (continued)**

We do not consider that the measures will lead to a culture of impunity, undermine Service Discipline, or impact on transparency or record keeping. Members of the Armed Forces are subject to both to the criminal law of England and Wales through Service Law and have a duty to uphold both, wherever they are serving in the world.

Criminal offences created by the law of England and Wales are incorporated into Service law. Although the Armed Forces Act 2006 includes offences under the criminal law of England and Wales, Service law creates additional offences that are exclusively of a Service nature. Service disciplinary offences, such as failing to attend for duty and ill-treatment of subordinates, are subject to the same procedures and the same sort of penalties as criminal offences. This reflects the unique circumstances and ethos that exist in the Services.

In order that the Armed Forces can operate effectively a necessary reliance is placed on the maintenance of discipline.

- Concern was expressed by legal groups about the compatibility of the criminal law measures with the UK's international obligations and the potential for the measures to undermine the UK's international standing and our legitimacy on human rights matters and the rule of law.

### **MOD response**

The measures in the Overseas Operations Bill are compatible with international law. We will continue to abide by our obligations in domestic and international law, including those under the European Convention on Human Rights, and fully intend to maintain our leading role in the promotion and protection of human rights, democracy, and the rule of law.

- Concerns over repeat prosecutions. Drawing a line after one investigation rather than reinvestigation in the light of new/compelling evidence. In addition, some legal groups argued that the proposals are a response not to flaws in the law, but to ineffective and inadequate investigations into allegations made in relation to the conduct of members of the UK Armed Forces.

### **MOD response**

Over time, as prosecutors become familiar with the presumption against prosecution measure, they should be able to advise investigators earlier in the process as to whether the "exceptional" threshold would be met in a particular case.

### MOD response (continued)

When making a decision, the prosecutor must give particular weight to the public interest in finality where there has been a previous investigation and no compelling new evidence has become available.

Having learned lessons from Iraq and Afghanistan, we will take the necessary steps to try to ensure that any future incidents occurring on operations overseas are reported and appropriately investigated at the time, benefiting victims and reducing the risk for our personnel of historical investigations and particularly reinvestigations.

- Malicious claims - various negative comments about "ambulance-chasing" lawyers, the malice of those bringing allegations, and financial compensation / lawyers' fees as a motivator rather than justice. Separately, some lawyers criticised the Government's uncritical adoption of the lawfare narrative and it was suggested that use of this language reflected badly on the UK, as a State that claimed to support international humanitarian law and the rule of law. Respondents asserted that that war does not take place in a legal vacuum and argued that the lawfare terminology was confusing.

### MOD response

Operations in Iraq and Afghanistan gave rise to an unprecedented number of legal claims for damages and non-compliance with the UK's obligations under the ECHR.

While many of these were valid (and were dealt with appropriately), our Service personnel and veterans have also had to endure vexatious claims – those that were fundamentally dishonest, or were brought in multiple jurisdictions, or were encouraged by unscrupulous lawyers, such as Phil Shiner, pursuing financial gain.

- ~~The appropriate balance between victims~~  
The primacy of Military Law on operations.

### MOD response

All Service personnel are subject to Service Law when on operations, which makes conduct that would be a criminal offence under the law of England and Wales if committed in England and Wales a Service offence, and also imposes upon them additional standards of behaviour and conduct specific to the Armed Forces. In addition, they must comply with international humanitarian law, including the Geneva Conventions, and will be investigated and prosecuted where they do not so comply, in accordance with the UK's international obligations including under the Rome Statute of the International Criminal Court.

- Chain of Command should also be held accountable, not just individuals.

### MOD response

Where Service personnel are deployed on an operation, they are given training and directions as to the circumstances in which it might be appropriate for them to use force, including where this may involve causing serious injury or death; it is a significant responsibility. Any decision that a soldier may then take during the operation to use force is an individual decision for which they, and not their Commanding Officer, may then be held personally accountable if their actions are deemed to have been in breach of the criminal law of England and Wales, or international humanitarian law as set out in the Geneva Conventions. Commanding Officers may also be subject to disciplinary action, including Court Martial, in relation to serious allegations of wrongdoing by personnel under their command.

- The welfare of Service personnel and veterans, and concerns that repeat investigations have a negative impact on mental wellbeing.

### MOD response

We ensure that Service personnel and veterans are properly supported when they are affected by legal proceedings. We have a comprehensive package of support in place, which covers legal, welfare and pastoral support.

The MOD funds full and independent legal support and representation for as long as necessary for any individual who is accused of, or charged with, a criminal offence arising from their service on operations. We provide legal advice for people called to be witnesses at inquests and public inquiries.

We also provide logistical and financial support for those who need it to attend court and inquest hearings, and seek to provide welfare support to Service personnel and veterans through Veterans UK, Service charities and Regimental Associations.

- Despite it not being a measure included in the Consultation, some legal groups also took the opportunity to provide comments in relation to the reference in the Foreword to the intention to derogate from the ECHR before we embark on significant future military operations, where this is appropriate in the precise circumstances of the operation in question. They argued that it would lead to the perception that the UK is retreating from a full and unequivocal commitment to international rules-based systems, including the ECHR.

**MOD response**

The Overseas Operations Bill includes a measure requiring the Secretary of State to consider derogation in relation to significant overseas operations.

The recognition and protection of rights are fundamental values of the UK. Our human rights framework offers comprehensive, well-established, and effective protections within a clear constitutional and legal system.

As a signatory to the ECHR, there are certain rights which we must always remain bound by, such as the rights prohibiting torture and slavery. We will only consider derogating from those articles which allow derogation in specific circumstances, and on a case by case basis, where certain criteria are met.

