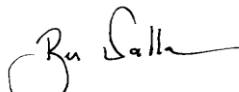


<b>Title:</b> Overseas Operations (Service Personnel and Veterans) Bill  <b>IA No:</b>  <b>RPC Reference No:</b> N/A  <b>Lead department or agency:</b> Ministry of Defence  <b>Other departments or agencies:</b> N/A			<b>Impact Assessment (IA)</b> <b>Date:</b> 25/08/2020 <b>Stage:</b> Final <b>Source of intervention:</b> Domestic <b>Type of measure:</b> Primary legislation <b>Contact for enquiries:</b>			
<b>Summary: Intervention and Options</b>			<b>RPC Opinion:</b> Not Applicable			
<b>Cost of Preferred (or more likely) Option (in 2019 prices)</b>						
<b>Total Net Present Social Value</b> Not Quantified	<b>Business Net Present Value</b> N/Q	<b>Net cost to business per year</b> N/Q	<b>Business Impact Target Status</b> Non qualifying position			
<b>What is the problem under consideration? Why is government action or intervention necessary?</b> <p>The Government is opposed to our 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. Following the campaigns in Afghanistan and Iraq, the MOD was subjected to an unprecedented number of legal claims for compensation. Claims made against the MoD can result in Service personnel and veterans being asked to provide evidence, often long after the events in question. Government intervention is required to take forward the necessary legislation needed to address the problem under consideration.</p>						
<b>What are the policy objectives of the action or intervention and the intended effects?</b> <p>The objective of this Bill is to provide a better legal framework for dealing with allegations or claims from any overseas military operations, that recognises the unique circumstances and the adverse effects that deployment on such operations can have on Service personnel. Part One of the Bill will provide Service personnel and veterans with greater certainty that the unique pressures placed on them during overseas operations (for example being exposed to unexpected or continuous threats, being in command of others who were also exposed, or being deployed alongside others who were killed or severely wounded in action) will be taken into account when deciding whether to prosecute for alleged historical offences. Part Two of the Bill will help ensure that claims arising from overseas operations are brought promptly, enabling them to be assessed in a fair and proportionate manner.</p>						
<b>What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)</b> <p>Non-legislative options have not been explored, as there are only a small number of options available to address the problem under consideration, all of which would require legislative change. A 12-week public consultation was launched in July 2019. This set out proposals for reforms to the way in which criminal prosecutions are considered and brought forward in relation to historical incidents occurring during overseas operations, as well as proposals for dealing with the challenge of litigation arising from historical events on operations outside the UK. There were over 4,200 responses to the consultation, which helped to shape the measures in the Bill.</p> <p>However, the measures in the Bill are not the only work being undertaken in this policy area. The MoD has established a Service Complaints and Justice Transformation team to take forward the work on the recommendations to come out of the Service Justice System (SJS) Review, along with implementing changes from the Wigston report on Inappropriate Behaviours and wider changes to Service Complaints. The MoD will also be taking forward a number of the recommendations from the SJS review that require legislation for possible inclusion in the upcoming Armed Forces Bill.</p>						
<b>Will the policy be reviewed?</b> It will be reviewed. <b>If applicable, set review date:</b> To be determined						
Does implementation go beyond minimum EU requirements?			N/A			
Is this measure likely to impact on international trade and investment?			No			
Are any of these organisations in scope?		<b>Micro</b> No	<b>Small</b> Yes	<b>Medium</b> Yes	<b>Large</b> No	
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			<b>Traded:</b> N/A		<b>Non-traded:</b> N/A	

***I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.***

Signed by the responsible Minister:



Date:

25/08/2020

# Summary: Analysis & Evidence

## Policy Option 1

Description:

### FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: N/A	High: N/A	Best Estimate: N/Q
COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)	
Low					
High					
Best Estimate	Not Quantified		N/Q	N/Q	
Description and scale of key monetised costs by ‘main affected groups’					
It has not been possible to identify and monetise the majority of the costs associated with this Bill.					
Other key non-monetised costs by ‘main affected groups’					
It is possible there will be a reduction in the number of cases taken by legal firms, which could result in a loss of income for some legal firms. However, given the intent of this legislation is to prevent vexatious claims, it is arguable that the cases, if unmeritorious, should not be pursued (and thus profited from) in the first place. Additionally, as the proposed legislation includes ‘longstops’, claims can still be made if brought before that deadline and legal firms will continue to be able to make profits against legitimate claims.					
BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)	
Low					
High					
Best Estimate	N/Q		N/Q	N/Q	
Description and scale of key monetised benefits by ‘main affected groups’					
It has not been possible to identify and monetise the majority of the benefits associated with this Bill.					
Other key non-monetised benefits by ‘main affected groups’					
The main benefits of the measures in the Bill are intended to provide greater certainty to Service personnel and veterans in relation to how allegations and claims from overseas operations are dealt with. Other non-monetised benefits include reducing the risk of lawfare potentially undermining the Armed Forces operational effectiveness in overseas operations and ensuring military decisions are not negatively impacted by the uncertainty caused by vexatious claims and the threat of historic prosecutions.					
Key assumptions/sensitivities/risks				Discount rate (%)	
Historical evidence has been used to show the likely impact the measures in the Bill would have had, had they been in place during the 2003-09 operations in Iraq. However, there are a number of limitations with the evidence being used and to mitigate this, certain assumptions have been used e.g. the date of knowledge is not recorded on the MoD’s claims management system, so it is assumed that the date of knowledge is the same as the date of incident due to the nature of the claims i.e. the majority of claims relate to alleged unlawful detention and mistreatment of captured persons. In addition, the evidence used takes no account of the changes to doctrine and training since 2003-09, which should result in fewer claims in relation to future operations.					

### BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs: N/A	Benefits: N/A	Net: N/A	
			N/A

# Evidence Base

## A. Background

1. This document covers the measures contained in the Overseas Operations (Service Personnel and Veterans) Bill that was introduced into the Commons on 18 March 2020. A formal impact assessment is not required for Better Regulation purposes. This is because there will be limited impact at the point the provisions in the Bill first come into force as the majority of compensation claims from Iraq and Afghanistan have now been concluded. The full impact of the Bill will not be known until our Armed Forces become involved in future overseas operations, and as we do not know what future operations these might be, an accurate estimate of the future impact of the Bill is not possible.
2. The approach taken for this impact assessment is to use historical evidence to hypothesise what likely impact the Bill would have had, had the measures been in place during the 2003-09 operations in Iraq. The evidence used is appropriate to the problem under consideration, as the Iraq operation is where the problems associated with lawfare became most prevalent.
3. However, it should be noted that the real world impact could vary significantly to that outlined in this impact assessment, as the number of cases brought against MoD in relation to operations in Iraq was considerably different to those brought in relation to operations in Afghanistan (MoD faced approximately 1,400 judicial review claims and over 1,000 civil claims for compensation arising from the operations in Iraq, while around 100 claims arose from operations in Afghanistan).
4. The specific measures in the Bill are as follows:
  - Statutory presumption against prosecution of current or former Service personnel for alleged offences committed on operations outside the British islands more than 5 years ago. These provisions will raise the threshold to be applied by prosecutors when considering whether a Service person or veteran should be prosecuted in such cases by stipulating that it is to be exceptional for a prosecutor to determine that a prosecution should be brought. In addition, the prosecutor must give particular weight to the adverse impact of the particular conditions the person was exposed to and the exceptional demands and stresses of overseas operations on a Service person (including on their ability to make sound judgments and on their mental health) and, in cases where there have been previous investigations and no compelling new evidence has emerged, the public interest in finality. The presumption applies to all offences save for the sexual offences listed in Schedule 1. If a prosecutor determines that, notwithstanding the presumption, it is appropriate for a prosecution to be brought, the consent of the Attorney General for England and Wales or the Advocate General for Northern Ireland will then be required for the prosecution to proceed. This measure may over time have an indirect impact on repeat criminal investigations, as police investigations may not be continued if, in consultation with prosecutors, it is assessed that cases will not meet the 'exceptional' threshold.
  - Duty to consider derogating from certain rights in the European Convention on Human Rights (ECHR) in relation to significant overseas operations. This provision will introduce a requirement for the Secretary of State to consider whether it is appropriate to derogate in light of the situation at the time.
  - Restriction of judicial discretion to allow civil claims in respect of overseas operations. This will further restrict the court's discretion to extend the normal time limit of three years for bringing civil claims for personal injury and/or death in relation to historical

events outside the UK by requiring the court to take into account additional factors (in addition to those that already exist) when deciding whether to allow a claim outside the three-year limitation period. Those additional factors include, for example, particular regard to the likely impact of the operational context on the ability to remember events and the likely impact of any legal action on the mental health of any Service personnel witness.

- Restriction of judicial discretion to allow claims under the Human Rights Act 1998 (HRA) in respect of overseas operations. This will require the court to take into account various factors (as set out in the bullet point above for civil claims) when considering whether to extend the primary limitation period of one year.
- Limitation longstop for civil claims in respect of operations overseas. There is also a new absolute limitation longstop of six years. These measures 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. Beyond six years, witnesses' recollections can fade, making it difficult for the claimant to pursue a claim and for the defendant properly to defend the claim. Even though record keeping has improved considerably, the unique nature of military operations involving multiple engagements can mean, and it has been shown to be, extremely hard to record the perfect version of events. Often the pace and speed of operations means that to do so would have a significant impact on operations. As such, the Ministry of Defence is often forced to rely on the memories of individual Service personnel, many of whom struggle to recall details of traumatic events after a lengthy passage of time.
- Changes to private international law rules for personal injury and death claims. The Bill amends existing legislation to provide that when the limitation periods of another country are applied to these claims, there will also be an absolute limitation longstop of six years.
- Limitation longstop for claims under the HRA in respect of overseas operations. This similarly imposes a new absolute limitation longstop of six years for bringing HRA claims in relation to overseas operations. The same points apply as in the above bullet point to this measure; the upshot will be a consistent approach to limitation for both personal injury and death claims and for HRA claims. The time limit will be calculated as six years from the date of the act or 12 months from the date of knowledge if this arises more than six years after the date of the act. This is similar to the approach taken for personal injury and death claims. This ensures victims will not be disadvantaged.

## **B. Problem under consideration**

5. The Government is committed to providing greater certainty to veterans in relation to the threat of repeat criminal investigations and possible prosecution for events which happened on overseas operations many years ago. The Government also recognises that military personnel are not above the law and that investigations should go forward where there is clear evidence of alleged wrongdoing. Part 1 of the Bill, which introduces the statutory presumption against prosecution measure, is assessed as the most appropriate way of meeting both these commitments.
6. Part 2 of the Bill seeks to address the problem to come out of operations including the recent Operations in Iraq in 2003-2009 (Operation Telic) and Afghanistan in 2002-2017 (Operation Herrick), which gave rise to an unprecedented number of legal claims for personal injury and for non-compliance with the UK's obligations under the HRA and ECHR.

7. International humanitarian law was developed to regulate the conduct of combat operations and recognises the inherent risks and dangers both for Service personnel and for the local population. It imposes obligations that are realistic and reasonable to expect the Armed Forces to meet even when operating in hostile conditions overseas. However, judgments in Strasbourg and the UK's domestic courts in relation to operations in Iraq and Afghanistan confirmed the applicability of the ECHR and HRA to overseas military operations, and the actions of the MoD and UK Service personnel.
8. MoD records show that the number of compensation claims in relation to Iraq were approximately 1130<sup>1</sup>. This figure includes 188 claims brought by Public Interest Lawyers which were struck out by order of the High Court after the law firm collapsed in August 2016. A total of £19.8m has been paid in compensation in respect of 330 claims to date. Of the remaining 612 claims they have either been withdrawn, struck out, or remain subject of a confidentiality agreement.<sup>2</sup>
9. A number of allegations and claims were ultimately discredited, or have been brought in multiple jurisdictions, or were found to have been encouraged by lawyers pursuing financial gain, creating an industry of litigation. This goes to the heart of what is known as 'lawfare' – the judicialisation of war.
10. The impacts of lawfare include financial costs but, more importantly, the human costs of Service personnel and veterans living with the stress and strain of the threat of reinvestigation and being called to give evidence for various claims. The risks of lawfare also include the potential to undermine future operational effectiveness, by potentially hindering the ability of commanders on the ground to make immediate and potentially life or death decisions.

### **C. Rationale for intervention**

11. Legislative change is required to address the problems associated with lawfare.
12. As announced in the then Defence Secretary's Written Ministerial Statements of 21 May<sup>3</sup> and 22 July 2019,<sup>4</sup> a 12-week public consultation on proposed legal protections measures for Service personnel and veterans who served in operations outside the UK was launched on 22 July 2019.<sup>5</sup>
13. The consultation set out proposals for reforms to the way in which criminal prosecutions are considered and brought forward for historical incidents occurring during overseas operations and proposals for dealing with the challenge of litigation arising from historical events outside the UK. There were over 4,200 responses to the consultation, which helped to shape the measures in the Bill.

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<sup>1</sup> Note that there are some limitations in relation to data availability. Although this figure includes the vast majority of claims brought against the MoD in relation to Iraq – there are slight anomalies due to the different databases used to collate the data. In addition, data not captured include a number of claims that were not pursued beyond letter of claim.

<sup>2</sup> Discussions between the claimants' solicitors and departmental officials with regard to the resolution of the outstanding remaining claims in the Iraqi Civilian Litigation (ICL) have continued since early 2018, but the terms of these discussions and any outcomes remain the subject of a confidentiality agreement endorsed by Orders of the Court and therefore cannot be provided at this time. However, although the confidentiality agreement remains extant, it is hoped that the MoD will be in a position to provide further information in relation to the remaining outstanding claims in the ICL in the near future.

<sup>3</sup> <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-05-21/HCWS1575/>

<sup>4</sup> <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-07-22/HCWS1784/>

<sup>5</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/819101/20190718-MOD\\_consultation\\_document-FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819101/20190718-MOD_consultation_document-FINAL.pdf)

## **D. Risks, assumptions and limitations**

14. There is limited available data to determine the impact of the presumption against prosecution measure, but in the event that such data were available it would not be appropriate for the Government to “play prosecutor” and opine whether an historical case would not have been prosecuted if the presumption measure had been in place when the independent prosecutor was making their decision.
15. Similarly, there is no available evidence in relation to the duty to consider derogation. The UK Government did not derogate from the ECHR in relation to Iraq. Under the new duty to consider derogation, the Secretary of State would consider the circumstances of the operation, and the appropriateness of derogation. The duty is also an ongoing one, and the Government will have to consider the issue not only at the outset of the operation but also if the operational paradigms change. As was the case with Iraq and Afghanistan, the operational paradigm may evolve over time.
16. The data on the civil compensation cases to come out of the 2003-09 Iraq operations is the best available evidence in relation to the other measures in Part 2 of the Bill, although it is not without its limitations.
17. The MoD’s claims management systems do not contain all details needed to show the full impact of the measures contained in the Bill. In addition, the information that would provide some of this detail is not held centrally and to locate, retrieve, and extract the information needed would involve wide-ranging searches for a variety of documents. Where evidence is unavailable or where there is uncertainty in the evidence, we have explained the approach taken or assumptions used in relation to any gaps or limitations in the evidence used.
18. There is also a level of uncertainty around the extent to which changes made since the Iraq operations would have impacted these figures. There have been substantive changes to operational policies as a result of lessons identified from operations, and there have also been changes in our approach to litigation as a response to the risks of lawfare. These changes include:
  - The MoD has continued to improve its processes to ensure that all Service personnel, at all levels, fully understand the obligations placed upon them by both UK law and applicable international law. Every member of the Armed Forces receives annual training which is reinforced ahead of any deployment on overseas operations. This training is under constant review and lessons identified from post-conflict litigation and public inquiries are built into these reviews. Better training as well as improved detention policies will reduce the likely number of claims being made in future overseas operations especially in claims relating to the detention and treatment of captured persons.
  - The MoD provided evidence to the Solicitors Regulation Authority (SRA) of professional misconduct which contributed to the decision of the independent Solicitors’ Disciplinary Tribunal to strike off Mr Phil Shiner as a solicitor. The SRA stated that more than £30m of public funds had been spent investigating what proved to be false and dishonest allegations. An assumed outcome of Mr Shiner being struck off the Roll of Solicitors, is that it will reduce the opportunistic behaviour of some law firms, thus reducing the number of vexatious claims.
  - The MoD has improved its overall ability to resist speculative compensation claims and demonstrated a resolve to resist these wherever appropriate. This has been due to learning lessons and improving processes through dealing with the vast number of claims that have been made in relation to Iraq and Afghanistan.

## **E. Costs and benefits**

19. Where possible an impact assessment will identify both monetised and non-monetised costs and benefits. It is usual for impact assessments to have a strong emphasis on the monetisation of costs and benefits, but there are often important impacts that cannot sensibly be monetised. These might include how the proposal impacts differently on different groups in society or changes in equity and fairness, either positive or negative.
20. It has not been possible to monetise the measures in the Bill, but a description of the costs and benefits for each measure is provided below.
21. An impact assessment will also identify the impacts on individuals, groups and businesses in the UK, to help understand what the overall impact on society might be.
22. The main groups that will be affected by the measures in the Bill are:
- Service personnel, veterans, and their families;
  - The Ministry of Defence and the Armed Forces;
  - Claimants making a civil claim or a claim under the HRA in respect of overseas operations;
  - Legal service providers;
  - The Crown Prosecution Service, the Public Prosecutions Service Northern Ireland, the Crown Office and Procurator Fiscal Service, and the Service Prosecuting Authority;
  - The Attorney General's Office; and
  - Her Majesty's Courts and Tribunals Service (HMCTS) and the judiciary.

### Statutory presumption against prosecution of current or former Service personnel for alleged offences committed on operations outside the UK more than 5 years ago

23. It is not possible to estimate how many potential future prosecutions will not proceed as a result of the statutory presumption against prosecution measure. As stated above, this is because it would not be appropriate for the Government to "play prosecutor" in relation to historical cases.
24. The principle of the presumption against prosecution measure is that it is to be 'exceptional' for a prosecutor to determine that proceedings should be brought, or continued, for an alleged offence occurring on overseas operations more than 5 years ago. As such, there could be a potential impact on the justice system if fewer prosecutions are brought.
25. This measure adds no additional costs in the prosecutorial decision-making process, other than some small familiarisation costs and for those instances where a prosecutor determines that it an appropriate case is 'exceptional' and needs to obtain the consent of the Attorney General for England and Wales, or the Advocate General for Northern Ireland. Such costs are expected to be relatively small as there are already a small number of offences for which the Attorney General's consent for prosecution is required.



26. The main benefit (non-monetised) is that the measure will provide greater certainty to Service personnel and veterans in relation to the threat of repeat investigations and potential prosecution in connection with historical operations many years after the events in question.
27. While the presumption may help to reduce the likelihood of investigations being reopened without new and compelling evidence, the measure does not create an absolute bar to investigations or prosecutions.
28. However, prosecutors must take into account whether there has been a previous investigation or investigations in relation to the alleged criminal conduct and consider whether any compelling new evidence has arisen since any such investigation(s). This requirement is aimed at addressing concerns over the impact on Service personnel of repeat investigations and the mental burden of the threat of criminal prosecution occurring long after the events in question, in particular where there is no compelling new evidence to be considered. The measure highlights the public interest in cases coming to a timely and final resolution.
29. Over time, as prosecutors become familiar with the measure, they should be able to advise investigators earlier in the process as to whether this new statutory requirement (that it is to be exceptional for a decision to be made to prosecute for an alleged offence) would be met in a particular case. The importance of investigations being conducted as expeditiously as possible, as investigations into "historical" alleged offences are inherently difficult is recognised, as is the fact that victims may not always be able to report an offence quickly.

#### Duty to consider derogating from certain rights in the ECHR in relation to significant overseas operations

30. The UK Government did not derogate from the ECHR in relation to Iraq in 2003, but this measure will impose an obligation on future Governments to give active consideration to derogating ahead of any significant overseas operations. This 'active consideration' may lead to the Government deciding to derogate from the ECHR in future overseas operations<sup>6</sup>.
31. If the UK Government did decide to derogate in relation to a specific future overseas operation, then there may be a reduction in the number of future legal claims in relation to the Articles from which the UK has derogated.
32. However, it should be noted that derogation will not stop tort claims, so even if the Government did derogate from Article 5 (*Right to liberty security*), a victim may still be able bring claims for false imprisonment. There were also a number of Iraqi claimants alleging violations of their rights under Article 5 and Article 8 (*Right to respect for private and family life*), where they also alleged violations of their rights under Article 3 (*Prohibition of torture*), which signatories to the ECHR cannot derogate from.<sup>7</sup> This means that this measure would not likely result in a significant reduction in the number of claimants in relation to Iraq, although there could have been a reduction in the overall amount of compensation paid depending on what particular parts of the claims resulted in the award.<sup>8</sup>
33. One of the potential benefits of derogation is that it could allow the UK to maintain operational effectiveness, which cannot be sensibly monetised but could have significant implications.

<sup>6</sup> A future Government may seek to derogate from certain provisions of the ECHR, in accordance with Article 15, as a result of the judgments from Strasbourg, which confirmed the applicability of the ECHR to overseas military operations in certain circumstances. The potential application of the ECHR to overseas military operations in the future was assumed when the then Defence Secretary made the following statement of intent on 10 October 2016: "*before embarking on significant future military operations, this government intends derogating from the European Convention on Human Rights, where this is appropriate in the precise circumstances of the operation in question.*" <https://questions-statements.parliament.uk/written-statements/detail/2016-10-10/HCWS168>

<sup>7</sup> Signatories to the ECHR cannot derogate from: Article 2 (right to life) – except in respect of deaths resulting from lawful acts of war; Article 3 (prohibition of torture); Article 4(1) (prohibition of slavery); or Article 7 (no punishment without law).

<sup>8</sup> The MoD claims management system does not provide information of what aspects of the claim damages were awarded in relation to Iraq.

34. Although the HRA already makes provision for the Defence Secretary to make a derogation order to reflect a decision to derogate from ECHR obligations in accordance with Article 15 of the ECHR, there may be some minor additional costs in terms of advice given both before and during an overseas operation.

#### Restrictions on time limits to bring actions

35. This measure introduces changes to the applicable time periods for bringing claims in tort for personal injury or death that occur in the context of overseas military operations.

36. There are three parts to this measure. The first part introduces additional factors that the court (whether in England and Wales, Scotland, or Northern Ireland) must consider when deciding whether to allow claims relating to overseas operations to be brought after the normal three-year time limit. The second part sets the maximum limit for such claims at six years. The third part amends the private international law rules so that if a foreign limitation period applies, the time limit for such claims will still be six years.

37. The table below shows the number of civil claims broken down by those that were brought within the usual three-year limitation; those that were brought between three and six years; and those that were brought six years or more after the date of incident.<sup>9</sup>

38. There were approximately 1130 claims brought by law firms on behalf of Iraqi nationals arising from incidents alleged to have occurred between 2003 and 2009. With the closure of Public Interest Lawyers in August 2016, some 188 claims were struck out by order of the High Court. As there is limited information available in relation to these claims, they have been removed from the analysis.

39. Of the remaining 942 claims, the date of incident has not been recorded for 12 claims. Again, these have been removed from the analysis below.

40. It should be noted that the vast majority of the claims contain both allegations of tort and alleged breaches of HRA articles. Therefore, for the purposes of this impact assessment the data used for this table is the same as that used to analyse the measure that will restrict the court's discretion to extend time for bringing HRA claims in relation to overseas operations.

Total number civil claims brought by law firms on behalf of Iraqis	Within 3 years	Between 3 and 6 years	Over 6 years
Number of claims	45	302	583
Percentage of claims	4.8	32.4	62.7

41. The table shows that of the 930 claims (where a date of incident has been recorded), 885 (or 95.1%) were brought beyond the normal time limit of three years.

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<sup>9</sup> As the 'date of knowledge' has not been recorded on the MoD's claims management systems, it is assumed that the date of knowledge will be the same as the date of incident. This assumption is based on the fact that the vast majority of these claims were for alleged unlawful detention and mistreatment. For the majority of cases the date of incidence, or start date, has been calculated from the date of release from detention by coalition forces.

42. Sections 11 and 12 of the Limitation Act 1980 set out a three-year limit for claims for personal injury or death, but it is not an absolute limit as section 33 allows for claims to be brought beyond the expiry of the limitation period if the court considers it equitable (i.e. fair) to do so. Section 33 sets out six factors to which the court should have particular regard when assessing fairness.<sup>10</sup> The Bill introduces three additional factors that recognise the unique challenges of overseas operations, that the court must consider when deciding whether to allow a claim beyond the three-year limitation period. These factors are the extent to which assessment of the claim will depend on the memories of Service personnel and veterans; the impact of the operational context on their ability to recall the specific incident; and the impact of doing so on their mental health. These factors will not apply in all such claims because often the claim will be determined using foreign tort law. In these cases, the changes to the private international law rules in the UK will mean that the claims cannot be brought after six years.
43. Using Iraq as a case study, only a handful of the claims, which had both tort and human rights elements, were tried as lead cases. The court found that the tort claims in those cases were not brought in time and as such were not awarded damages (while the human rights claims were permitted to proceed even though the primary one-year time limit had expired and were subsequently awarded damages under the HRA).
44. It is not known whether the majority of the tort claims (those not forming part of the lead cases) would have been permitted to proceed beyond the primary three-year time limit or not, as the court noted that it could not be assumed that the circumstances of the lead cases were typical or representative of others. It is possible that if other claims had been chosen as lead cases, the outcome may have been different. It should also be noted that the decisions in relation to these lead cases are not binding on other courts.
45. It can therefore be assumed that in any claims arising from future overseas operations that are similar to the 2003-2009 Iraq operations, there could be a different outcome. Although it is not possible to provide a realistic estimate as to how many of these claims would be impacted by this measure, it can reasonably be assumed that a proportion of any future claims would not be able to proceed beyond the three-year time limit, if the claims went to trial, as the additional factors (if the claims were determined under English tort law), as well as the absolute limitation period, would have a bearing on the court's decision-making.
46. This measure will not incur any additional costs for the judiciary, as the court already has to consider various factors when deciding on whether to allow claims outside the existing time limit.
47. There could be an overall reduction in the amount of compensation and legal fees paid where claims have not been allowed to proceed out of time, but the monetisation of these 'costs' to legal firms and claimants has not been possible. It should be noted that any 'costs' would be off-set by the fact that the measure does not prevent claims being made, as the measure is only intended to ensure claims are made in a more reasonable timeframe. As such, law firms are likely to bring claims sooner to avoid running out of time.

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<sup>10</sup> Section 33(3) of the Limitation Act 1980 sets out the following circumstances that the court shall have particular regard to:

- (a) the length of, and the reasons for, the delay on the part of the plaintiff;
- (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11, by section 11A or (as the case may be) by section 12;
- (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
- (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
- (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
- (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

48. The table shows that 583 claims (or 62.7%) were brought six years after the date of incident. However, it cannot be assumed that this number of claims would simply fall away with the introduction of an absolute limitation longstop of six years, because we might assume that in the future claims will be brought sooner to avoid running out of time. However, there will be an expected reduction in HMCTS' administrative and judicial resource costs and an overall reduction in the amount of compensation and legal fees paid, where claims cannot be brought beyond six years. The monetisation of these savings has not been possible as it is unclear how these additional factors would have influenced the outcome of previous judicial decisions in historic cases.
49. The measure does not affect the way in which the time period is calculated and is consistent with court rulings that claimants do not need to be provided with an indefinite opportunity to obtain a remedy. Six years is considered to be a reasonable timeframe for claimants to gather the necessary evidence to bring a claim; beyond this point, witnesses' recollections can fade, making it difficult for the claimant to pursue a claim and for the defendant properly to defend the claim. In addition, the longer the passage of time, the harder it is to determine the validity of the claim, which risks an influx of potential vexatious claims entering the legal system.
50. The benefits of this measure are that it will ensure claims are brought promptly, enabling them to be assessed in a fair and proportionate manner, which will help achieve a fair outcome for victims, and for the Service personnel and veterans called upon to give evidence in relation to incidents that happened a long time ago. Another benefit is a reduction in the risk of lawfare potentially undermining the Armed Forces operational effectiveness in overseas operations and ensuring military decisions are not negatively impacted by the uncertainty caused by vexatious claims.
51. Finally, the measure would also apply to claims brought by Service personnel and veterans. Unlike claims alleging unlawful detention and mistreatment, claims brought by service personnel often relate to clinical negligence cases, where the date of incident is not necessarily the same as the date of knowledge. The majority of the cases identified as being brought by Service personnel and veterans later than six years from the date of incident are clinical negligence cases, which includes cases where there has been a failure to diagnose and treat post-traumatic stress disorder (PTSD). It can be many years before signs of PTSD manifest themselves and more years again before the link between symptoms and service is made. In such cases, the date of knowledge is used to calculate time limits rather than the date of incident.
52. The following table shows the data<sup>11</sup> on Employer's Liability claims brought by current and former service personnel and their families since 1 May 2007<sup>12</sup> where a date of incident has been recorded and the country of incident has been recorded as either Iraq or Afghanistan.

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<sup>11</sup> The data held does not always include country or location of claim and therefore the figures need to be treated as a minimum as there may be cases that have not been picked up in the analysis. In addition, a number of cases for example, noise-induced hearing loss claims, have the country of incident listed as various as these conditions are a result of the culminative effect of multiple deployments both in UK and overseas – as such, these cases have been excluded from the analysis.

<sup>12</sup> The database for claims held prior to 1 May 2007 does not contain a country of incident field.

Total number of civil claims brought by or on behalf of service personnel	Within 3 years	Between 3 and 6 years	Over 6 years
Number of claims	357	125	70
Percentage of claims	64.7	22.6	12.7

53. Of the 552 claims brought by current and former service personnel and their families, 70 claims (or 12.7%) were six years after the date of incident.<sup>13</sup> An analysis of 39 of those 70 claims<sup>14</sup> showed that 20 claims would have been within six years based on the date of knowledge rather than the date of incident.

54. If an assumption can be made that there is a similar split of the 31 remaining claims i.e. 16 also being within the six years based on date of knowledge, then the analysis indicates that 93.8% of claims brought on behalf of current and former service personnel would fall within the proposed absolute limitation longstop of six years. Of the 34 claims (or 6.1%) that would fall outside the six-year limitation period, it is assumed that in the future a proportion of these claims would be brought forward sooner to avoid the operation of the longstop.

#### Court's discretion to extend time in certain Human Rights Act proceedings

55. This measure introduces changes to the applicable time periods for bringing claims under the HRA in respect to overseas military operations.

56. This measure introduces new factors that the court (whether in England and Wales, Scotland, or Northern Ireland) must consider when deciding whether to allow human rights claims relating to overseas operations to be brought after the normal one-year time limit. Again, these factors are the extent to which assessment of the claim will depend on the memories of Service personnel and veterans; the impact of the operational context on their ability to recall the specific incident; and the impact of doing so on their mental health.

57. These new factors reflect the reality of overseas military operations: the fact that opportunities to make detailed records at the time may be limited; that increased reliance may have to be placed on the memories of the personnel involved; and that, as some of them will have mental health problems due to their service, there is a human cost in doing so.

58. The measure also sets the maximum time limit for such claims at six years.

59. As stated in the previous section, the vast majority of the claims brought in relation to Iraq contained allegations of tort and alleged breaches of HRA articles. As such the same 930 claims are used in the following table, but will show the number of claims brought under the

<sup>13</sup> These figures were released in answering a written question in Parliament. The figures relate only to the date of incident (see <https://questions-statements.parliament.uk/written-questions/detail/2020-07-07/70308>).

<sup>14</sup> The information relating to the date of knowledge is not held on the MoD's claims management system. Information that provides the necessary detail is not held centrally and there are difficulties in locating, retrieving, and extracting this information. As such, information relating to only 39 of the 70 claims were able to be retrieved.

HRA within the existing one-year limitation period<sup>15</sup>; those that were brought between one and six years;<sup>16</sup> and those that were brought six years after the date of incident.

Total number human rights claims brought by law firms on behalf of Iraqis	Within 1 year	Between 1 and 6 years	Over 6 years
Number of claims	4	343	583
Percentage of claims	0.4	36.9	62.7

60. The table shows that 926 human rights claims (or 99.6%) were brought beyond the usual one-year limitation period. Unlike section 33 of the Limitation Act 1980, section 7 of the HRA does not specify any factors to which the court must have particular regard when deciding whether to allow a late claim to proceed but gives the court discretion to allow claims after this point, if it equitable (i.e. fair) to do so.
61. Although it is unclear how the new factors would have influenced the outcome of previous judicial decisions in historic cases, it is assumed that this measure should result in less cases being permitted to proceed beyond the one-year limit.
62. One of the reasons for this assumption is that the lessons from Iraq-related litigation shows that the courts have generally granted permission for human rights claims beyond the existing one-year limit, even in joint personal injury and human rights claims. Courts have allowed the human rights elements of the claims while at the same time ruling that the tort-based elements of the claim (for which there is a three-year time limit) should be refused as they were brought late. By introducing new factors that must be considered by the court when deciding whether to allow HRA claims to be brought beyond the primary one-year limitation period, the measure should help ensure a more consistent approach between tort and human rights claims.
63. This measure should not incur any additional costs for the judiciary (other than some small familiarisation costs) as the court already has discretion to allow late claims to proceed if it considers that it would be fair to do so. However, it is assumed that there will be some savings in relation to HMCTS' administrative and judicial resource costs, where claims have not been permitted to continue due to introduction of these additional factors, as well as an overall reduction in the amount of compensation and legal fees paid. The monetisation of these savings has not been possible as it is unclear how these additional factors would have influenced the outcome of previous judicial decisions in historic cases.
64. Of those claims brought six years beyond the date of incident, some may be brought sooner to avoid running out of time. As such, it is expected that there would be a reduction in HMCTS' administrative and judicial resource costs, and an overall reduction in the amount of compensation and legal fees paid, where claims cannot be brought beyond six years.

<sup>15</sup> Section 7 of the Human Rights Act sets a time limit of 12 months for bringing claims.

<sup>16</sup> Only some of the claims brought were tried as lead cases and in those cases the court permitted the human rights elements of the claims to proceed even though the one-year primary limitation period had expired. However, the court noted that it could not be assumed that these cases were typical or representative of other claims. For the purposes of this impact assessment it is assumed a significant proportion of the HRA claims would have been permitted to continue had they been pursued, as section 7 of the HRA does not specify any factors to which the court must have particular regard when deciding whether to allow a late claim to proceed. Experience of the litigation arising from military operations in Iraq shows that the Courts have generally granted permission for human rights claims beyond the primary one-year limit.