

## **Combat Immunity and Enhanced Compensation Consultation Response**

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### **Executive Summary**

1. The authors of this Consultation Response welcome the introduction of an Enhanced Compensation Scheme, as far as it is an improvement of the current no-fault Armed Forces Compensation Scheme (AFCS), but oppose the introduction of new legislation on Combat Immunity. Our concern is that the Ministry of Defence's (MOD) intention is to introduce new legislation in order to exclude liability, not only for mistakes on the battlefield, but also for mistakes made in the planning and preparation for combat operations. This exclusion would not only bar legitimate claims from the courts, but would nurture a no-accountability military structure to allow necessary restrictions and thresholds to be ignored, in fact amplifying military ineffectiveness.
2. By removing judicial oversight of the MOD, the ability of the aggrieved to claim reparation, aside from monetary compensation, would be abolished. Victims and families of victims do not necessarily initiate claims for the sake of financial gain, but for truth-seeking purposes, guarantees of non-repetition, rehabilitation and satisfaction. Judicial processes not only acknowledge the violation of victims' legal rights, but also address their memory and suffering, as well as acting as a deterrent for future violations.
3. The proposal for Enhanced Compensation could, in itself, be a useful, supportive and pragmatic Scheme. However, when coupled with primary legislation that will put Combat Immunity on a permanent statutory footing, Service and ex-Service personnel and their families will have no other option but to resort to it. This means that the reality of the Enhanced Compensation Scheme is not to 'remove the requirement to take legal action' but to remove the ability to take legal action against the MOD in death or injury cases arising in the course of combat. Further, other types of victims will have no route to bring claims against the MOD due to the effect of the immunity.
4. The Enhanced Compensation Scheme should be offered as an option for Service or ex-Service personnel and their families, but they must still have recourse to the courts. The onus is on the MOD to consult with victims and families who have brought or tried to bring claims by way of the current AFCS and listen to their feedback in order to improve the Scheme. An Enhanced Compensation Scheme must be an attractive alternative to litigation, but it should not be forced upon victims as the only remedial route.
5. The consultation offers no alternatives and lacks detail on critical points to justify the introduction of an Enhanced Compensation Scheme and the legislating of Combat Immunity. The authors submit that neither the rationale nor the necessity for new legislation concerning Combat Immunity has been adequately proven. The consultation document does not include any reliable authority substantiating the claim that the Armed Forces will benefit from an Enhanced Compensation Scheme and that given the option between this and judicial adjudication, individuals would actually opt for the Enhanced Compensation Scheme.

6. It appears that the real motivation of the proposal is to reduce, if not completely prohibit, the 'judicialisation of war' - a misconceived and unhelpful concept which the authors strongly resist for reasons explained below. The authors observe that the Government has been attempting to limit avenues in which it and the MOD can be held accountable for human rights and humanitarian law violations and negligence claims. The types of limitations the Government has been considering clearly intends to significantly curtail all claims by both Service and ex-Service personnel and civilians in all jurisdictions.
7. Experience has shown that the MOD has a tendency to resist and deny claims against it and therefore it is difficult to accept the Secretary of State's reasoning that the MOD wishes to facilitate claims brought by the Armed Forces and their families.
8. It is therefore submitted that the MOD has put forward a weak case on the introduction of further primary legislation. The current common law principle of Combat Immunity and, if necessary, the Government's existing ability to revive legislative Combat Immunity, are more than sufficient measures.

### **Deterrence and Accountability**

9. As well as providing compensation to those who have suffered, tortious litigation provides a deterrent effect in that the threat of judicial consideration and financial compensation acts as a motivating factor for bodies to act properly. The deterrent effect, which the very threat of litigation poses, should serve to motivate the MOD in better preparation, planning and equipment decisions. As such, the authors submit that the deterrent effect is not to be perceived as damaging for the Armed Forces, as argued by the authors of 'The Fog of War' report, but in fact strengthens their capabilities and effectiveness.
10. Tortious litigation also serves a useful public role in allowing for those harmed by negligent actions to receive justice and for relevant bodies to learn lessons. While the Enhanced Compensation Scheme is to be welcomed as an option for victims and their families, it should not be lost on the MOD that many litigants are not financially motivated, but instead may seek justice and the confidence that failures that led to their loved ones' deaths would not be repeated. Alternative avenues for securing public accountability such as parliamentary engagement, the work of the Defence Committee, Public Inquiries and coroner's inquests do not fulfil the dual purpose of securing accountability and deterrence.

### **Criticisms of 'The Fog of Law' and 'Clearing the Fog of Law' Reports**

11. The consultation document refers to the 'Fog of Law' report by Tom Tugendhat and Laura Croft. This report is extremely skewed in its interpretation of the law and should be treated with caution when determining the best approach to reparation for war injury.
12. It should be noted that the authors of both reports are not experts in international law, despite the crux of many of these issues being embedded within quite innately international legal principles. 'The Fog of Law' and later 'Clearing the Fog of Law' reports make vague and ambiguous claims that are not backed up by any real authority,

- data or legitimate sources. Therefore, it is questionable why the MOD appears to be relying heavily upon its contents.
13. The 'Clearing the Fog of Law' report by Jonathan Morgan, Tom Tugendhat et al<sup>iv</sup> also describe legal developments on British military action abroad as a 'new form of judicial imperialism' and the fact that the European Convention of Human Rights (ECHR) should not be applied to wartime. In their minds, it replaces international humanitarian law.
  14. This is an absolutely incorrect application of international human rights law. Notwithstanding the fact that Article 15 ECHR clearly requires a derogation of rights for times of war, evidently demonstrating the inherent applicability of the Convention in both times of war and peace. Courts are within their legal function to adjudicate cases relating to potential human rights violations by the British military both home and away.
  15. The relationship between international human rights law and international humanitarian law is complicated and it is not as clear cut to say that humanitarian law should override the other. There is an intertwinement that must be embraced and respected and is very much dependent on context. The consultation assumes a black and white approach that fails to acknowledge the complexities of human rights, humanitarian law and wartime in general. Due to the complexities that arise with regard to the inevitable interweaving of human rights and humanitarian law issues in wartime, excluding any form of judicial process would undermine the entire nature of these legal systems and would hinder more effective military action, as well as increase the likelihood of injury in the future. Human rights, humanitarian law and their close relationship exist to not only protect non-combatants, but to regulate combat, as well as protect Service personnel in certain contexts. At the same time, this intertwinement in fact demonstrates the versatility of human rights. The two branches of international law are therefore not mutually exclusive.
  16. Excluding any form of judicial due process, as the Government appears to be moving towards in its recent proposals, would also be to the severe detriment of warfare in the long run and would merely exacerbate injuries, as well as violate both humanitarian law and human rights principles, not the other way around, as the consultation document suggests.
  17. The UK Government, academia, think tanks and other relevant parties, have not to this date provided any concrete contextual evidence to suggest that judicial involvement in cases involving the British military have in fact directly or indirectly caused the ineffectiveness of the British military, aside from broad claims stating so. Inadequate procurement processes, bad military decision-making and lack of resources have a more significant basis in the link to military ineffectiveness. There is certainly evidence of this, for example, in *Smith v MOD*<sup>v</sup> and recent findings from the Iraq Inquiry, as detailed below. The same cannot be said for the role of the judiciary where no case can evidently show this causal link. The judiciary are fully aware of the complexities of wartime and the tremendous work that the Armed Forces do in the name of national interest and security. Courts should not and do not reduce military effectiveness. Therefore, excluding judicial involvement would not act as a holy grail to achieving military effectiveness.

## Existing Common Law Defence

18. It is necessary to note that the defence of Combat Immunity exists as a common law principle. The defence was successfully invoked in the case of *Mulcahy v MOD*, where the Court of Appeal struck out a claim from a soldier who had been injured in Saudi Arabia during the Gulf War, on the basis that there was no duty on the state to maintain a safe system of work in battle conditions.<sup>vi</sup> More recently, in the case of *Smith v MOD* the Supreme Court upheld the principle of Combat Immunity in relation to activities within the second Gulf War.<sup>vii</sup>
19. In the case of *Mohamet Bici and Skender Bici v MOD*,<sup>viii</sup> the court stated that when the common law principle was raised there needed to be a distinction between acts that took place for the interests and necessity of combat and those that did not. The court warned that removing the platform to fully investigate different cases would prevent the scrutiny of misconduct that could be prevented in the future, such as soldiers being more diligent in the prevention of accidental firing.

## *Smith* and Battlefield Decision

20. The MOD's consultation document cites the possibility of the judiciary second-guessing military decisions made in battlefield situations as a specific motivating factor for the introduction of new legislation. However, it should be remembered that the leading judgment in this area, the Supreme Court's decision in *Smith*, equally warned against such over-regulation.
21. Speaking specifically to the tort claims in the case, Lord Hope noted that 'it is of paramount importance that the work that the armed services do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong'.<sup>ix</sup> He warned that future courts hearing Combat Immunity claims 'must be especially careful, in their cases, to have regard to the public interest, to the unpredictable nature of armed conflict and to the inevitable risks that it gives rise to when it is striking the balance as to what is fair, just and reasonable'.<sup>x</sup> Elsewhere in the case he commented that '[a] court should be very slow indeed to question operational decisions made on the ground by commanders, whatever their rank or level of seniority'.<sup>xi</sup> Finally, he warned lower courts and other judges who would take up the issue that this 'is a field of human activity which the law should enter with great caution'.<sup>xii</sup> In sum, this was not the *dicta* of a court that was seeking to open the military up to extensive battlefield scrutiny, but instead one which was wary of the implications of its decision and so urged caution.
22. Guided by this desire not to overburden military decision-makers with the threat of litigation, the decision in *Smith* noted that only failings within a 'middle-ground' would receive consideration. Lord Hope considered that decisions would be beyond the scrutiny of the judiciary if they were either taken at a high level of Government or military command and influenced by policy and political judgment, or at a lower-level where decisions were taken by military leaders actively engaged in direct combat with the enemy. Only claimants whose case falls in-between these exceptions - the middle-ground - would be successful in bringing a claim (but they would not necessarily be successful in its outcome). We submit that it will be very difficult for claimants in the

future to demonstrate that the negligent action which has led to their injury is isolated from either issues of policy/political judgment or decisions taken by those in the field.

23. The threat stated in the consultation document that judges are being ‘required to second-guess military decisions using criteria, appropriate in civilian life, to decide whether there was negligence or not in a battlefield situation’ is a threat which has been openly acknowledged by judges in interpreting these issues. As such, the MOD should have greater confidence in the judiciary to interpret the common law defence of Combat Immunity in a manner which does not overburden the Armed Forces.

### **Iraq Inquiry Findings**

24. Instead of opening the military up to extensive scrutiny of decisions taken in the heat of battle by military commanders, the *Smith* decision has merely provided a narrow avenue of litigation, most applicable to those who have suffered as a result of wholly inadequate planning and preparation. In light of recent overseas operations, it is perhaps unsurprising that a court should allow for some latitude in these areas. As the consultation document notes, military decision-making relating to planning, preparation and equipment are three areas where Sir John Chilcot’s Iraq Inquiry was particularly critical. These failings related to equipment shortages,<sup>xiii</sup> asset tracking,<sup>xiv</sup> protected mobility<sup>xv</sup> and the delayed response to emerging threats.<sup>xvi</sup>
25. While the Supreme Court in *Smith* refused to strike-out cases relating to some issues addressed by the Iraq Inquiry, almost four years later these claims have yet to proceed to trial. Indeed, the MOD’s assertion that ‘[c]ases arising from the conflicts in Iraq and Afghanistan have tested the scope of this principle and have led to extensive litigation’ is an exaggeration. Beyond the *Smith* litigation, almost all of the cases brought against the MOD have concerned allegations of human rights violations, not negligence, despite the significance of some of the failings referred to above and identified by the Iraq Inquiry.
26. We submit that the reason why these claims have stalled is largely to do with the narrow middle-ground upon which they now must be advanced. The nature of failings alleged in the *Smith* case and addressed in the Iraq Inquiry mean that claimants will find it very difficult to position their grievance within a middle-ground, which is insulated from both decisions influenced by political judgment and policy, or by decisions taken on the battlefield. The result is that very few claims are ever likely to be brought against the MOD relating to events which the proposed legislation seeks to cover.
27. Finally, as the MOD has confirmed in its consultation document, the findings in the Iraq Inquiry are to be taken ‘very seriously’. However, it would be more appropriate and more reassuring for the Armed Forces if the MOD were instead to introduce new measures to ensure safe systems of work and enhance training to improve safety, as well as training on the application of the ECHR and international humanitarian law so that Service Personnel are not under the false impression that the ECHR undermines Combat Immunity and ‘inhibit[s] their freedom of action’.<sup>xvii</sup>

### **Pre-existing Legislation: The Crown Proceedings Act (CPA) 1947 and The Crown Proceedings (Armed Forces) Act 1987**

- 28 Beyond the adequate interpretation of Combat Immunity provided by the courts, the Government already has the power to invoke legislation concerning Combat Immunity. While the CPA 1947 opened up the possibility for the Crown to be sued for negligence, s.10 of that Act preserved the immunity of the Crown in respect of claims relating to the Armed Forces. This provision was eventually repealed through s.1 of the Crown Proceedings (Armed Forces) Act 1987, yet within the 1987 Act s.2 allows for the revival of the previous act's s.10 exclusion from tortious liability in cases involving the Armed Forces.
- 29 Pursuant to s.2(2), the Secretary of State is empowered to revive the immunity where there is either (a) an imminent national danger or great emergency; or (b) 'any warlike operations in any part of the world outside the United Kingdom or of any other operations which are or are to be carried out in connection with the warlike activity of any persons in any such part of the world'. Section 2(5) of the 1987 Act notes that the Secretary of State would revive the immunity through the enactment of a statutory instrument which could, if necessary, then be annulled by a resolution of either House of Parliament.
- 30 While legislative Combat Immunity under s.10 of the 1947 Act has, to date, not been revived by s.2 of the 1987 Act, there is nothing to prevent the Secretary of State from taking this action in future conflicts if the conditions merited such an introduction.
- 31 The circumstances in which it was foreseen that s.10 could have been revived include a number of the military engagements that the UK has taken part in since 1987. Indeed, during the second reading of the Act's progress through Parliament the Bill's proposer Mr Winston Churchill MP commented that the reactivation of Combat Immunity under s.10 could take place for activities including 'military or peacekeeping operations in a combat area such as the middle east'.<sup>xviii</sup> It is noteworthy that successive governments have decided against reviving that provision in recent conflicts in *inter alia* the first Gulf War, the Afghan conflict or the Iraq invasion of 2003.
- 32 As the possibility to revive s.10 of the 1947 Act, through s.2 of the 1987 Act, remains on the statute book there is currently no need for the Government to introduce new primary legislation regarding Combat Immunity. The great virtue of the 1987 Act is that it has afforded the Government with the flexibility to revive Combat Immunity in exceptional circumstances as and when it may be needed. The MOD's current proposal to introduce legislation on Combat Immunity at all times does not afford such flexibility.

### **Consultation Questions**

#### **Consultation question 1: Do you agree with this approach to the definition of "combat"?**

33. The consultation document states that the test of Combat Immunity is 'whether the harm – injury or death – occurred in the course of a UK military operation as a result of direct or indirect hostile enemy action, or as the direct result of misdirected targeting by friendly forces, or as the direct result of action taken to avoid hostile enemy action. If it did, it should be regarded as occurring in combat. In this definition

- of combat, a military operation should mean an operation involving participation in (a) armed conflict or (b) peacekeeping operation’.
34. The authors submit that this definition consists of certain ambiguities and potential loopholes that must be addressed.
  35. ‘Combat’ includes omissions as well as actions, which extends the scope significantly and would no doubt be integrated into ‘direct and indirect’ action.
  36. We are concerned that when drafting legislation the suggestion from the Fog of Law report will be adopted and the definition will include not only the conduct of military operations, but also ‘the materiel and physical preparation for military operations, and those persons affected by the military on operations’.<sup>xix</sup> The definition of ‘combat’ should not include actions or omissions at an earlier stage. It should be restricted to actual combat and a strict test must be applied with respect to the imminence of combat. ‘Combat’ should not include planning and preparation for combat.
  37. This definition broadens the common law Combat Immunity provisions. The MOD should heed the court’s warning on the scope of the interpretation of Combat Immunity from Mr Justice Moses in *Smith v MOD* that the MOD, in that case, sought ‘to prove too much’ and by the MOD’s interpretation of Combat Immunity and its reach ‘it [was] difficult to see how anything done by the Ministry of Defence falls beyond it’.<sup>xx</sup> The MOD’s proposed definition would have the effect of overturning the Supreme Court’s ruling in *Smith v MOD* that decisions relating to the provisions of protective work equipment and training, and the adequacy of the same, will not be covered by the defence of Combat Immunity.
  38. Of further importance is the Government’s assumption that there is a clear distinction between wartime and peacetime – in the same vein, between what is combat and what is not. Modern warfare is no longer within the realms of a contained battlefield and is typified not only by long transitional processes, but by the constant technological advances involved in the course of combat. Lethal Autonomous Weapons such as drones and cyber warfare, as merely two examples, are widespread and just as injurious, if not more, than an injury caused by standard gunfire. These realities need to be more clearly defined, as these could be deemed ‘hostile action’ under the proposed definition of combat. The MOD need to establish how it is going to handle the legal implications of injury from such technological operations.
  39. There are also further questions on how the proposed definition would apply to occupations, or even interventions on behalf of a foreign government in a non-international armed conflict? For example, the UK was arguably in breach of various international humanitarian laws as an occupying power in South-East Iraq, where civil unrest in many respects worsened, as the Chilcot Report demonstrated. Clarifications are necessary as to how this definition of combat would apply to such situations.

**Consultation question 2: Do you agree that the new scope should apply to claims arising both in the UK and outside it?**

40. No, we do not agree. It appears that the intention to include UK territory within this scope is to form a blanket immunity from the negligent failings that take place within the UK and thus cover inadequate planning, preparation and equipment decisions.

41. It should also be noted that provisions under s.2(2) of the 1987 Act allow for the revival of legislative Combat Immunity in cases of ‘national danger or great emergency’. The flexibility afforded by this legislation in relation to actions within the UK is to be preferred over proposed blanket provisions which intend to limit liability in all cases.
42. Any compensation claims relating to injuries and deaths as a result of armed conflict, which do not bar judicial oversight, should not be limited geographically. Whilst cases have been based around damage occurring outside of the UK, this does not preclude any justiciable issue arising in the UK – common law Combat Immunity would also apply here - whether relating to actual use of force within military operations or to earlier issues of procurement.

**Consultation question 3: Do you agree that the exclusion of liability should apply only to those directly participating in combat?**

43. We would affirm the MOD’s position that claims for negligence should, under no circumstances, be excluded from anyone who is not directly participating in the combat. Civilians, bystanders and other non-combatants should therefore still be allowed to sue for negligent action which has caused them loss or injury.
44. Enemy combatants do not fall within the test as per international humanitarian law.
45. We would further comment that, as the MOD has correctly noted, participation will require careful definition. It is to be regretted that the MOD has not produced its working definition of participation for the purposes of this consultation document. We would advise that participation is interpreted in its narrowest sense so as to afford appropriate accountability avenues for those who are not actively engaged in combat and yet suffer harm as a result of potentially negligent actions.

**Consultation question 4: Do you agree with this approach to the scope of injuries and deaths to be covered by the exclusion?**

46. The consultation document states ‘claims that physical or psychological injury had been exacerbated by poor treatment would not however be covered by the exclusion’.
47. One point to highlight on this relates to PTSD, specifically with regards to the *PTSD Group Actions Case*.<sup>xxi</sup> This is one of the most comprehensive PTSD cases and concerned claims for PTSD experienced as a result of combat exposure in Northern Ireland, Falklands, the Gulf War and Bosnia. Owens LJ held that a soldier does not owe a duty of care to another soldier during combat and that the MOD was not under a higher duty of care to maintain a safe system for the armed forces during combat.
48. It is still unclear as to what level of duty of care would apply here. As the *PTSD Group Actions* case has shown, courts are required to clarify the law. If the MOD rely on this case law, which is inevitable, then one can argue that had it not been for a judicial process, the MOD and wider Government would not have known what their position on the PTSD standard of care was. The fact that it is clearly in the MOD’s favour shows that court processes are needed to delineate and clarify the law for all parties involved and cannot be selectively used in a cherry picking fashion. This



approach is severely harmful for the rule of law, democracy and the fundamentals of the British Constitution.

49. In addition, the Government's basic stance is that warfare cannot be judicialised and military conduct cannot be assessed in the same way as other professions because of the unique nature of the job. Therefore, it cannot assess cases in courts. It is contradictory to then rely on the *PTSD Group Actions* Case, which essentially decided that the MOD should have the same duty of care on PTSD as other employers. In short, as per LJ Owen's remarks, it was decided that the MOD should not have a higher duty of care. The MOD is excluding it from their consultation liability framework because they are aware that the case law on the matter falls in their favour. This appears as a case of double standards and again, undermines the rule of law.
50. Further we urge the MOD to seek expert advice on the cause, aggravation and emergence of psychological injuries before applying any form of exclusion. Psychological injury is complex and it is likely to be extremely difficult for the MOD and its assessors to establish when exactly the injury came about as there are often varying and numerous aggravating factors. The MOD should avoid applying arbitrary rules to establish whether or not a psychological injury falls within or outside the exclusion. For example, would cases such as the series of negligence claims following the administration of anti-malaria drugs, which brought about serious mental health side-effects, be excluded? The MOD needs to provide more detail on this point.

**Consultation question 5: Do you think the initial decision on eligibility should be made by the Ministry of Defence or by an independent assessor?**

51. Although the authors agree in principle that a scheme which aligns the level of compensation awarded by the courts, but in a more accessible and streamlined way, is to be welcomed, we are cautious on how the scheme would operate in practice. In particular, we believe that the system requires some form of judicial oversight.
52. To answer this specific question, if a different system were to be introduced, an independent assessor is the only appropriate body to assess eligibility. The MOD cannot, under any circumstances, entertain the idea of being gate-keepers to Armed Forces' claims, particularly since the MOD tends to resist negligence claims<sup>xxii</sup> and more significantly because the MOD is the party against which negligence is complained of.
53. The scheme would inevitably be of significant benefit for certain injuries and in less disputed circumstances. There will, however, be more complex cases where victims should still have recourse to the courts. The option to bring litigation must remain open to all parties.

**Consultation question 6: Do you agree that the presumption should be that claimants will not need legal representation?**

54. No, we do not agree. Service, ex-Service Personnel and their families must be afforded legal representation whilst their claims are being assessed and damages calculated. This is in compliance with the basic principles of fairness, natural justice

and equality of arms. Further, claimants must be free and able to appoint legal representatives who must be independent of the MOD.

55. The consultation document states the scheme will be consistent ‘with what a court would pay out’. There are no details as to how the MOD or the assessors will be able to calculate awards that match what the courts would award. It seems that as time goes on it will become increasingly difficult for the MOD and the assessors to calculate awards in this way in circumstances where the courts will not be making its own calculations that can be adopted for the purpose of the scheme. As with other schemes (such as the Criminal Injuries Compensation Scheme), a tariff system may be introduced which invariably arbitrarily uses much lower rates to calculate awards than the courts. The problem here is that if such a scenario were to play out, the Combat Immunity legislation would block victims and their families from accessing the courts for higher pay-outs even for the most horrific and debilitating injuries and for deaths caused by gross negligence.

**Consultation question 7: Do you agree with this approach to the selection of an assessor?**

56. No. The MOD should have no part in selecting assessors. If the MOD were to be involved in this selection, there would be no independence. Equally important is that there would be no perception of independence, especially when dealing with vulnerable people who have been physically or psychologically injured or are experiencing grief as a result of the death of a loved one.

**Consultation question 8: Do you agree that a tribunal is an appropriate route for appeal?**

57. An independent tribunal that falls within the Tribunals, Courts and Enforcement Act 2007 could be an appropriate forum for appeals against decisions made by the assessors similar to the current AFCS where appeals proceed through the First-tier Tribunal, the Upper Tribunal and then the Court of Appeal. The MOD must detail the precise avenues of appeal and the grounds on which appeals can be made.
58. Under the MOD’s Enhanced Compensation Scheme, if claims made by the Armed Forces or their families are rejected by a MOD appointed assessor, then the claim would have to be pursued, if it is financially possible to do so, in the courts by way of judicial review or a claim for negligence which would not be an available remedy if the harm falls within the currently broad interpretation of ‘combat’. If the harm fell outside the exclusion then the courts would remain open to claimants.
59. Much of this is speculation which is unfortunately required due to the absence of any detail in the consultation document.

**Consultation question 9: Do you agree that there should be a time limit for claiming compensation, with allowances for cases of latent injury or illness?**

60. Not necessarily. Although the scheme can justify the need to limit the application of weak claims by placing some sort of cap, the MOD must be mindful that an exception

for latent injuries or illnesses needs to be flexible enough to accommodate the complexities that can arise in such cases. The MOD should seek further consultation with professionals in the types of latent injuries and illnesses members of the Armed Forces are likely to suffer from. The MOD should also consult other relevant statutory provisions within the Limitation Act 1980 and the Latent Damages Act 1986 relating to limitations for latent injuries or illnesses to ensure the fairest provision is drafted.

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<sup>iv</sup> Richard Ekins, Jonathan Morgan and Tom Tugendhat, 'Clearing the Fog of Law: Saving Our Armed Forces from Defeat by Judicial Diktat' <https://policyexchange.org.uk/wp-content/uploads/2016/09/clearing-the-fog-of-law.pdf>.

<sup>v</sup> *Smith v Ministry of Defence* [2013] UKSC 41

<sup>vi</sup> *Richard Mulcahy v Ministry of Defence* [1996] EWCA Civ 1323 (COA).

<sup>vii</sup> *Smith v Ministry of Defence* [2013] UKSC 41; [2014] A.C. 52.

<sup>viii</sup> *Mohamet Bici, Skender Bici v Ministry of Defence* [2004] EWHC 786 (QB);

<sup>ix</sup> *Smith v Ministry of Defence* [2013] UKSC 41; [2014] A.C. 52 [100].

<sup>x</sup> *Smith v Ministry of Defence* [2013] UKSC 41; [2014] A.C. 52 [100].

<sup>xi</sup> *Smith v Ministry of Defence* [2013] UKSC 41; [2014] A.C. 52 [64].

<sup>xii</sup> *Smith v Ministry of Defence* [2013] UKSC 41; [2014] A.C. 52 [65].

<sup>xiii</sup> *Report of a Committee of Privy Councillors, The Report of the Iraq Inquiry* (2016), HC 264, Executive Summary [813].

<sup>xiv</sup> *Report of a Committee of Privy Councillors, The Report of the Iraq Inquiry* (2016), HC 264, Executive Summary [813].

<sup>xv</sup> *Report of a Committee of Privy Councillors, The Report of the Iraq Inquiry* (2016), HC 264, Executive Summary [821].

<sup>xvi</sup> *Report of a Committee of Privy Councillors, The Report of the Iraq Inquiry* (2016), HC 264, Executive Summary [821].

<sup>xvii</sup> Written evidence from Professor Michael Clarke, Royal United Services Institute submitted to the Defence Committee, March 2014  
<https://www.publications.parliament.uk/pa/cm201314/cmselect/cmdfence/writev/futureops/law18.htm>.

<sup>xviii</sup> Winston Churchill MP, HC Deb, 13 Feb 1987, vol 110, 571.

<sup>xix</sup> Thomas Tugendhat and Laura Croft, 'The Fog of Law' <https://policyexchange.org.uk/wp-content/uploads/2016/09/the-fog-of-law.pdf> 12.

<sup>xx</sup> *Smith, Redpath and Ellis v Ministry of Defence* [2012] EWCA Civ 1365 [62].

<sup>xxi</sup> *PTSD Group Actions Case – Multiple Claimants v MOD* [2003] EWHC/1134 (QB).

<sup>xxii</sup> Solicitors Journal, 'Better Compensation for the armed forced in 2017?', 22 December 2016  
<https://www.solicitorsjournal.com/comment/201612/better-compensation-armed-forces-2017>.