

FOREWORD BY THE SECRETARY OF STATE FOR DEFENCE, THE RT HON SIR MICHAEL FALLON KCB MP

Our Armed Forces defend the UK and its people, and in doing so they risk their lives, sometimes suffering serious injury or death as a result of their duty. The nation owes a moral obligation to those who currently serve, whether Regular or Reserve, those who have served in the past, and their families. As the Armed Forces Covenant sets out, this means that we must look after them, and special consideration should be given to those who have given most, such as the injured and the bereaved. We believe the introduction of an enhanced compensation scheme for injuries or deaths which have occurred in the course of combat embodies our commitment and obligation to the brave men and women who have risked their lives for our country.

The Government is proud of the Armed Forces Compensation Scheme, which provides compensation on a tariff basis to Service personnel who have suffered illness or injury attributable to their service in the Armed Forces (or to their families, in the case of those who have died) – whether or not anyone was legally at fault. Separately, where the Ministry of Defence has been found to be at fault, the Courts may award damages that are determined by common law principles which take account, as appropriate, of an individual's pain and suffering, degree of injury, property losses, past and future losses and level of care required. Levels of compensation including such elements may exceed the levels awarded for the same incident under the Armed Forces Compensation Scheme.

Only a minority of such claims arise out of combat: the rest relate to training and other aspects of service life. But when claims which do arise in combat come before the Courts they give rise to a number of issues:

- Service and ex-Service personnel who were wounded in combat, and the families of those who died, can be caught up in long and frustrating legal cases;
- The legal costs of such cases, which are borne by the taxpayer, can far outstrip any damages which are eventually awarded; and
- Judges are required to second-guess military decisions using criteria, appropriate in civilian life, to decide whether there was negligence or not in a battlefield situation. Our military advisers warn that this “judicialisation of war” could weaken the Armed Forces’ readiness to take the rapid and high risk decisions essential to operational effectiveness, with consequent risk to lives.

There is, therefore, an urgent need to reform the current system for dealing with compensation claims brought before the Courts and provide clarity in law on issues of negligence which may contribute to deaths and injuries suffered by members of our Armed Forces in combat.

The Government intends to solve this problem with two measures that are inextricably linked:

- Former or serving personnel who are injured in the course of combat will be awarded compensation by the Government equal to that which a Court would have awarded if the Government had been negligent. In cases where a service person is killed on operations, their family will receive a compensation payment equal to what a Court would have awarded if it had found that the Government had been negligent.
- We will legislate to enshrine the Government's position that Combat Immunity should apply to deaths or injuries which occur in the course of combat. This will remove the requirement to take legal action against the Government in such cases, which in turn will remove the often stressful process of litigation that can take many years to resolve.

In addition to providing for fair compensation, the judicial process will continue to play an important role in highlighting possible mistakes by the Ministry of Defence. I want to take this opportunity to emphasise our continuing commitment to supporting Coroners in conducting full and transparent investigations and inquests.

The Report of the Iraq Inquiry has reminded us that many aspects of our military operations in Iraq were not planned well enough. While Sir John Chilcot and his colleagues made no specific recommendations on the doctrine of combat immunity, many of his findings throw a harsh light on the circumstances in which deaths and injuries are sustained on the battlefield. The Ministry of Defence takes Sir John's criticisms very seriously: some have already been addressed, and some provide an agenda for continuous improvement.

What is essential is that we learn the lessons from our military campaigns constructively and with a proper sense of humility. The changes we propose should be seen in that context.

The combined measures I hope will provide welcome relief for families and individuals who might otherwise find themselves having to pursue lengthy and stressful claims in the courts, which in future would no longer be necessary. This would also ensure that our Armed

Forces will be freed from increasing judicial constraints whilst on operations, thereby allowing them to do their duty.

This consultation paper set outs our proposals to deliver better and faster compensation by introducing an enhanced compensation scheme for death or injury in combat. This scheme will be made using existing powers in the Armed Forces (Pensions and Compensation Scheme) Act 2004. Primary legislation will be required to exclude liability. The new enhanced compensation scheme will work in parallel to the existing Armed Forces Compensation Scheme. There are many decisions to be made about exactly who the new enhanced compensation scheme will cover and how it will work. We would like to hear your views about these questions.

SECTION 1 – COMBAT IMMUNITY: THE NEED FOR LEGISLATION

- 1.1. In 1947, the Crown Proceedings Act was passed, enabling the Crown to be sued for acts of negligence. Section 10 of that Act, however, allowed Ministers to prevent, on a case by case basis, claims for damages by Service personnel or their families against the Crown or against other Service personnel. This remained the position until 1987 when the Crown Proceedings (Armed Forces) Act repealed Section 10 of the Act. Since then there has been no statutory limitation on the right of Service personnel, like others, to sue the Ministry of Defence for damages where they have suffered as a result of the Department's negligence.
- 1.2. Combat Immunity is a legal principle which provides an exemption from legal liability for members of the Armed Forces and the Government within the context of combat in armed conflict. So a soldier does not owe a fellow soldier a duty of care where a personal injury has resulted when either one or both of them is engaged with an enemy in the course of combat, and the Ministry of Defence is not under the normal duty to maintain a safe system of work for Service personnel engaged with an enemy in the course of combat.
- 1.3. Cases arising from the conflicts in Iraq and Afghanistan have tested the scope of this principle and have led to extensive litigation. To simplify a very complex set of arguments, there are outstanding questions as to whether the immunity should apply only in cases of actual conflict or to failures during the earlier stages of planning and preparation for combat operations, and whether it should be limited to combat operations against an enemy or other military activities such as peacekeeping operations. The circumstances in which this principle applies are now subject to considerable uncertainty for Judges and for those wishing to bring claims.
- 1.4. The Government is very concerned about the implications of this legal uncertainty and the negative impact this has on those who have been injured or bereaved, and on Service personnel who work hard and show courage to deliver military success. There are also a number of independent experts and authoritative observers who have expressed concerns including: former senior military commanders who have spoken on these matters in the House of Lords, and the House of Commons Defence Committee in its 26 March 2014 report on *UK Armed Forces Personnel and the Legal Framework for Future Operations*. Tom Tugendhat (now MP for Tonbridge and Malling) and Laura Croft (retired senior US army lawyer) also authored the paper *The*

*Fog of Law*¹ on this issue. They all broadly agree with the Government's view that military decisions should be taken by members of the Armed Forces or by Ministers acting on their professional military advice and should not be subject to overturning by Courts applying principles which were developed with the very different circumstances of civilian life in mind. It is of paramount importance that the work that the Armed Forces do in the national interest should not be impeded by having to prepare for, or conduct combat operations, under the threat of litigation should things go wrong.

- 1.5. For these reasons the Government intends to introduce legislation which would prevent the Courts from adjudicating on allegations that injuries or deaths in the course of combat were the result of negligence. **Section 2 of this paper seeks views on the precise scope of this immunity.**
- 1.6. The Government recognises that this measure taken in isolation would have an adverse and discriminatory effect on members and former members of the Armed Forces and their families, since in practice they are the ones most likely to be affected by this exclusion. This would be inconsistent with our commitment to the Armed Forces Covenant.
- 1.7. Members of the Armed Forces who are injured on duty, and the entitled family members of those who are killed on duty, will normally receive payments on a tariff basis from the Armed Forces Compensation Scheme (AFCS). The level of payment is unaffected by the question of whether the Ministry of Defence was at fault when the incident occurred. Nonetheless, many claims for negligence are pursued in the Courts every year by Armed Forces personnel and their families who claim that the Government's negligence was responsible for the injury or death. If a Court does find negligence, it will award damages that are determined by common law principles, which can vary greatly depending on an individual's circumstances. This may mean that the court will award a higher sum in respect of the same incident than the AFCS, thus creating an incentive for the victim or victim's family to take legal action. In such cases any amount paid by the AFCS is deducted from the damages awarded by the Court, but the difference between the two sums can still be substantial, particularly in cases where life-changing injuries have been sustained and ongoing care is required.

¹ Published by Policy Exchange 2013

- 1.8. The Government will therefore balance the proposed statutory exclusion of liability with a commitment to ensure that in future any member or former member of the Armed Forces, or entitled family member of such a person, who is prevented from suing the Government as a result of this exclusion will be compensated at the same level as a Court would have been likely to award if it had confirmed that the Government had been negligent. This process, in most cases, should take considerably less time than if an individual pursued a claim through the courts. **Section 3 of this paper seeks views on how this enhanced compensation scheme should work.**
- 1.9. This consultation paper asks for your views on the scope of the proposed exclusion of liability (Section 2) and the way in which the enhanced compensation scheme would work (Section 3).

SECTION 2: THE FUTURE SCOPE OF COMBAT LIABILITY

- 2.1 As the name implies, the common law principle of Combat Immunity is only relevant to events which occur in combat. Even during times of heightened military activity, such as the recent operations in Iraq and Afghanistan, most claims by Service personnel and their families against the Ministry of Defence do not arise from combat but from other activities, particularly training. Our proposals do not affect any case which does not arise out of combat, and Service personnel who believe that they have suffered harm as a result of the Ministry of Defence's negligence in those circumstances will still be able to sue the Department, in addition to making a claim on the AFCS, should they wish to do so.
- 2.2 Our proposals will also not affect any case where the harm in question occurred before the legislation comes into force. This is in accordance with the principle that legislation should not apply retrospectively.
- 2.3 The concept of combat will however require definition. We believe that the test should be 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.
- 2.4 In this definition of “combat” a “military operation” should mean an operation involving participation in (a) an armed conflict; or (b) peacekeeping operation. **Do you agree with this approach to the definition of “combat”?**
- 2.5 Combat immunity currently applies, in theory, both within the UK and outside it, though the Government is not aware of any occasion in which it has been claimed in a case arising out of events in the UK. Our initial view is that the new provision should not be limited in scope to events outside the UK. **Do you agree that the new scope should apply to claims arising both in the UK and outside it?**
- 2.6 We propose that the immunity should apply to claims brought by persons participating directly in the combat. Under International Humanitarian Law (IHL) enemy combatants would not have any standing to claim for injuries suffered as a result of combat. For conflicts not covered by IHL, we recognise that the definition of combatant will require careful consideration. It should not operate so as to exclude claims for negligence by anyone not participating in the combat: for instance, a

person injured by unexploded munitions, if they can show that the injury was the result of negligence on the part of the UK Government. We recognise that “participation” is likely to require careful definition. **Do you agree that the exclusion of liability should apply only to those directly participating in combat?**

- 2.7 For example, a death or injury from an enemy gunshot would be covered by the exclusion, but so too would death or injury from a blast caused by a mine left some time before the combat in question. Also covered would be deaths or injuries caused by road accidents which are attributable to the driver’s attempts to avoid hostile action.
- 2.8 Psychological injury directly attributable to any of the causes mentioned above would also be included in the exclusion. Suicide during or after a conflict would not however be included unless directly attributable to a psychological injury resulting from enemy action. Nor would most illnesses contracted, or accidents occurring, in the course of operations unless directly caused by hostile action.
- 2.9 Claims that physical or psychological injury had been exacerbated by poor treatment would not however be covered by the exclusion, and could continue to be the basis of court action – and resisted if appropriate by the Government. **Do you agree with this approach to the scope of injuries and deaths to be covered by the exclusion?**
- 2.10 The proposed exclusion would cover deaths or injuries suffered in the specified circumstances by any person directly participating in the conflict, whether or not a member of the UK Armed Forces, even though the Compensation Scheme discussed in the next section would not be open to people who were not members or ex-members of the UK Armed Forces or their entitled family members. No person, participating directly in the conflict, would be able to sue the Government for negligence as a result of such deaths or injuries. This would remove any possibility that enemy combatants could claim that the Armed Forces had taken insufficient care to avoid injuring them (we are admittedly aware of no such cases at present).

SECTION 3: THE ENHANCED COMPENSATION SCHEME

- 3.1. This section deals with the proposed enhanced compensation scheme which will be set up for the benefit of those current and former members of the Armed Forces and their entitled family members who will be precluded from suing the Government for negligence under the terms of the proposed exclusion of liability discussed in the last section. This would be a statutory scheme, set up under the Armed Forces (Pension and Compensation) Act 2004 (the same legislation that provides the powers for the Armed Forces Compensation Scheme, which will continue as now as a separate Scheme).
- 3.2. The new scheme will be available to all current and former members of the UK Armed Forces, including reservists, and to their dependents after death. No other people will be able to apply under the Scheme. It will not be available to any other persons who may have their claims excluded. For example, members of overseas Armed Forces working with their UK counterparts would not be covered, nor members of Allied forces, nor civilian employees of the Government or its contractors.
- 3.3. It is anticipated that the new scheme would work as follows: a person who wished to make a claim under the Scheme would notify the Ministry of Defence of their claim. One option is that the Ministry of Defence would decide whether the claim qualified: in other words, it would have to be satisfied that the claim is one which would be barred from consideration by the courts under the new exclusion; and that the person suffering the injury or death in question was a member of UK Armed Forces at the time. If the Ministry of Defence rejects the claim then the claimant would be able to challenge that decision by way of judicial review, or to pursue a claim for negligence in the Courts. In difficult or contentious cases (for instance, if there is doubt as to whether a physical condition is the result of a combat injury) the Ministry of Defence would be able to seek independent advice. Alternatively, an independent assessor, qualified as set out in paragraph 3.6 below, would be appointed to consider whether a claim satisfied the criteria above, and would similarly be able to seek independent advice where necessary to make a decision. **Do you think the initial decision on eligibility should be made by the Ministry of Defence or by an independent assessor?**
- 3.4. If the Ministry of Defence accepts that a claim is within the scope of the Scheme, it will be passed to an independent assessor to determine the level of award. The assessor will take into consideration all the information which a Court would take into

account when determining the appropriate level of damages in a case where it had found the Ministry of Defence to be negligent. There would be no requirement on the part of the assessor to find the Ministry of Defence negligent in order to award damages. This would include, as appropriate, medical reports (including reports on care requirements) and reports on employment prospects, which would avoid conflicting reports provided by the claimant and the Ministry of Defence.

- 3.5. This will not be an adversarial procedure. It will be the job of the independent assessor to decide on the level of compensation a Court would have awarded. The presumption is that a claimant will not need legal representation because the assessor will help him or her to bring forward all the information which needs to be considered. Claimants would however be free to seek legal representation if they wished, but this would be at their own cost. **Do you agree that the presumption should be that claimants will not need legal representation?**
- 3.6. The assessor will be legally qualified. He or she will be either a retired judge or a practising lawyer. This could be a Queen's Counsel or a very senior solicitor for a complex or difficult case, or someone more junior for a relatively straightforward set of circumstances. All however would be expected to have extensive experience of the process of assessing compensation for injury or death. If there were a number of such cases arising out of a future conflict the Ministry of Defence would seek to create a group of such independent assessors who could be assigned specific cases at short notice. **Do you agree with this approach to the selection of an assessor?**
- 3.7. When the assessor has decided on the appropriate amount of compensation, he or she will make a recommendation accordingly to the Ministry of Defence. The Ministry of Defence will normally accept this recommendation and make arrangements for payment.
- 3.8. If the claimant disagrees with the level of the award, there will need to be an avenue for review. We propose to make provision for this using the Pensions Appeal Tribunals Act 1943. These Tribunals are independent of the Government; they can hear and decide appeals against decisions of the Secretary of State in connection with applications for compensation by former and serving members of the Armed Forces. **Do you agree that a tribunal is an appropriate route for appeal?**

3.9. There would be a time limit within which claims for enhanced compensation would need to be made. We propose that this should be set at seven years, which is consistent with the current Armed Forces Compensation Scheme. There would however be provision for exceptions in cases of latent injury or illness after that time period had expired. It would be unusual for a payment to have been made for the same incident under the AFCS before compensation was awarded under this Scheme, but if it had been the earlier award would be deducted. **Do you agree that there should be a time limit for claiming compensation, with allowances for cases of latent injury or illness?**

SECTION 4: CONSULTATION DETAILS

Scope of this consultation

- 4.1 We welcome views from any individual, group or institution on the questions raised in this paper. The formal consultation will be conducted in accordance with the guidance on Government's Consultation principles².

How to Respond

- 4.2 You may respond using any of the following means:
- Online:** <https://surveys.mod.uk/index.php/644576?lang=en>
- Email:** DJEP-CombatCompensation@mod.uk
- Post:** DJEP – Combat Compensation Consultation, Ministry of Defence, Floor 3
Zones H Main Building, Horse Guards Avenue, Whitehall, London, SW1A 2HB

Disclosure

- 4.3 You should be aware that the information provided in response to this consultation, including any personal information, may be published or disclosed in accordance with the law governing access to information, primarily the Freedom of Information Act 2014 (FOIA) and the Data Protection Act 1998 (DPA).
- 4.4 If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you consider the information you have provided to be confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your email system will not be regarded as binding on the department.

² <https://www.gov.uk/government/publications/consultation-principles-guidance>

4.5 The department will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Enquiries

4.6 If you have any enquiries about the consultation process please e-mail:

DJEP-CombatCompensation@mod.uk

Or you may write to:

Combat Compensation Consultation Enquiries

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