

The Forum of Complex Injury Solicitors

FOCIS

incorporating the Richard Grand Society



The Forum of Complex Injury Solicitors (FOCIS)

**Response to the Ministry of
Defence's consultation paper on
Legal Protections for Armed
Forces Personnel and Veterans**

About Us

FOCIS members act for seriously injured Claimants with complex personal injury and clinical negligence claims, including group actions. The objectives of FOCIS are to:-

1. Promote high standards of representation of Claimant personal injury and medical negligence clients,
2. Share knowledge and information among members of the Forum,
3. Further better understanding in the wider community of issues which arise for those who suffer serious injury,
4. Use members' expertise to promote improvements to the legal process and to inform debate,
5. Develop fellowship among members.

See further www.focis.org.uk.

Membership of FOCIS is intended to be at the most senior level of the profession, currently standing at 22 members. The only formal requirement for membership of FOCIS is that members should have achieved a pre-eminence in their personal injury field. Seven of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members include:

Anthony Gold	Hugh James
Atherton Godfrey	Irwin Mitchell
Ashtons	Kingsley Napley
Balfour + Manson	Leigh Day
Bolt Burdon Kemp	Osbornes
Dean Wilson	Potter Rees Dolan
Digby Brown	Prince Evans
Fieldfisher	Rix & Kay
Fletchers	Stewarts
Freeths	Thompsons NI
Hodge Jones & Allen	

FOCIS members act for seriously injured Claimants with complex personal injury and clinical negligence claims. In line with the remit of our organisation, we restrict our responses relating to our members experience, practices and procedures relating to complex injury claims only. We will defer to others to respond on the impact relating to other classes of case.

Ministry of Defence Consultation Paper – Legal Protection for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom.

We do not propose to comment on sections 1 and 2 relating to criminal cases.

Section 3

Proposal for non-criminal cases.

Question 24:

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

Question 25:

Whether the “longstop” should be set at 10 years, or some shorter or longer period?

Question 26:

Whether there should be any exceptions to a “longstop”?

We note that the proposal for the civil litigation longstop is set in the context of litigation arising out of Iraq “on an industrial scale”.

However recent commentators (see The Times 16.08.2019 – Outcry Over Planned Curb Compensation For Injured Troops), have rightly pointed out that the proposal would apply to all personal injury claims against the MOD from operations outside the United Kingdom, including litigation brought by service personnel.

We are not indicating that our answer would be any different if confined to the actions referenced in the paper, but we do think it is unfortunate that the wide ranging implications of the proposal are not acknowledged; if the longstop is brought in the MOD would enjoy immunity placing it in a special position, not just as an organisation but as an employer. We do not believe that protection is justified.

The courts were able to deal with legal claims, civilian and otherwise arising out of Iraq and Afghanistan and we see no need for any change to the current burden of proof and balancing of interests; where appropriate, the MOD must be held to account.

As an employer the MOD have been involved in large scale litigation previously such as the actions brought by nuclear veterans relating to testing many years ago outside the United Kingdom. These 1,011 ex-servicemen were defeated on limitation in the Supreme Court (*AB and others v MOD SC 2012*) illustrating the difficulty of bringing claims from many years previously. The trials took place between 1952 and 1958 in the South Pacific.

The paper rightly points out the difficulty in historic litigation due to memories of those involved in incidents fading over time. The difficulties extend to tracing witnesses and tracing documents. However the paper fails to indicate that these difficulties affect the Claimant in the first place as it is the Claimant that has to prove his/her case. This is linked to the fact that the litigation will be on a “no win no fee” basis and the Claimants case must have reasonable prospects of success to obtain the necessary funding and insurance in order to bring a claim.

In addition we would observe that the Ministry of Defence is already in a protected position with regard to historic litigation when compared with other employers. Service personnel who are diagnosed with mesothelioma and other asbestos related diseases cannot sue due to the fact that the

exposure will invariably have been before the removal of Crown immunity in 1987 even though their knowledge of a personal injury has arisen now.

It seems wrong in principle to single out one potential Defendant and to fetter the discretion that section 33 gives to the court for all injury claims, however caused, against the Defendant.

The MOD have an existing mechanism to limit its exposure in the cases through issuing Secretary of State exemption certificates where necessary in the interests of national security.

Limitation is likely to be an issue for service personnel in hearing loss claims, PTSD and disease claim such as solvent exposure.

Whole scale changes to the longstanding legal position cannot be justified and there is little attempt so to do in this short paper.

We do not wish to endorse the change if it is restricted to non- employer claims as claims by civilian resident in the country of deployment as well as claims by civil servants working alongside the MOD and NGOs would all be adversely and unfairly affected.

Our response is:

Question 4:

No.

Question 25:

Not Applicable.

Question 6:

Not Applicable.

We note the paper's comment on human rights.

"In line with other commitments to continue to safeguard human rights, we are not proposing to restrict the courts discretion to extend the limits for bringing claims relating to human rights violations."

Section 33 does not apply to the Human Rights Act (HRA). Section 39 says the Limitation Act 1980 does not apply where another statute sets out its own limitation period.

If the Limitation Act were amended to limit the effects of effects of S11 and S13 by imposing a longstop while in Parliament it could be said "we are not amending the HRA" it could be argued in court that the effect of s 7(5) HRA is to incorporate the long stop as would be a "rule imposing a stricter time limit" This would be an unfortunate unintended consequence.

However we query the commitment stated above due to the Written Statement of the SOS for Defence made 21 May 2019 which reminded the House of the announcement made by the Government in October 2016 of the intention to derogate from the European Convention on Human Rights before embarking on significant future military operations, where this is appropriate in the precise circumstances of the operation in question.