



Foreign &  
Commonwealth  
Office

**Public Consultation on Promoting High  
Standards of Conduct by Private Military and  
Security Companies (PMSCs) Internationally:  
Summary of Responses**

Foreign & Commonwealth Office, 16 December 2009

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## I. Introduction

### Background

1. Private Military and Security Companies (PMSCs) provide security abroad for private sector industries, governments and other bodies, including aid agencies and NGOs. They carry out a variety of duties, from close protection of personnel and static protection of premises such as ministries and embassies, to risk and security consultancy. They provide a vital and necessary role in hostile environments, and enable the Government to fulfill its policy objectives in Iraq and Afghanistan by providing essential security services, as well as ensuring operational NGOs are able to carry out important humanitarian work.
2. Many of the services offered by security companies are not contentious. Others, such as armed security, weapons training and even unarmed military and police training, could have direct lethal consequence. There is a risk that, however unintentionally, PMSC activity might give rise to human rights or international humanitarian law concerns, assist internal repression, or provoke or prolong internal or regional tension. The UK-based industry has a largely favourable reputation, but the Government also needs to mitigate the risk that a company registered in the UK or elsewhere might behave in a way that brings the reputation of the whole industry into question.
3. The Foreign & Commonwealth Office launched a public consultation on the Government's proposed policy to promote high standards of conduct in the PMSC industry internationally on 24 April 2009. Our preferred option includes self-regulation by the industry in the UK based on a Code of Conduct, agreed with and monitored by the Government, using our leverage as a key buyer to raise standards, together with an international agreement on standards covering all aspects of PMSC operation and organisation worldwide.
4. The objectives of our policy are:
  - a. to promote high standards of conduct by PMSCs internationally; and
  - b. to reduce the risk that the activities of PMSCs might give rise to human rights or international humanitarian law concerns, assist internal repression, or provoke or prolong internal or regional tensions.

### History

5. In 2002, the British Government published a Green Paper exploring options for regulating PMSC activities in response to concern at the increased use of PMSCs in areas of conflict and instability. This Green Paper formed the basis of a six-month consultation. A large number of responses favoured some form of regulation, including self-regulation and a licensing regime. Other responses emphasised the concern that we should not adversely affect legitimate business activities with blanket legislation.

6. Drawing on these responses, officials across Whitehall carried out a more detailed review of the options for regulation in 2005, including: self-regulation through a monitoring body; national regulation based on export controls; and national regulation based on a company licensing system alongside a Government register of approved companies. This review highlighted significant difficulties with regard to implementation or enforcement for each of the options.
7. Officials subsequently held extensive discussions across Whitehall and with key stakeholders on the best way forward. We drew heavily on our direct operational experience of the industry in Iraq and Afghanistan. Officials concluded that a licensing regime would not meet the Governments' policy objectives, and that self-regulation through an industry association in conjunction with international cooperation to raise standards was more likely to achieve the desired outcome.
8. The consultation launched in April this year sought views on proposals to introduce a package of measures to improve standards in the PMSC industry in the UK and worldwide.
9. The consultation was conducted in line with the criteria of the Department for Business, Innovation and Skills' (BIS) Code of Practice on Consultations. It closed on 17 July 2009.

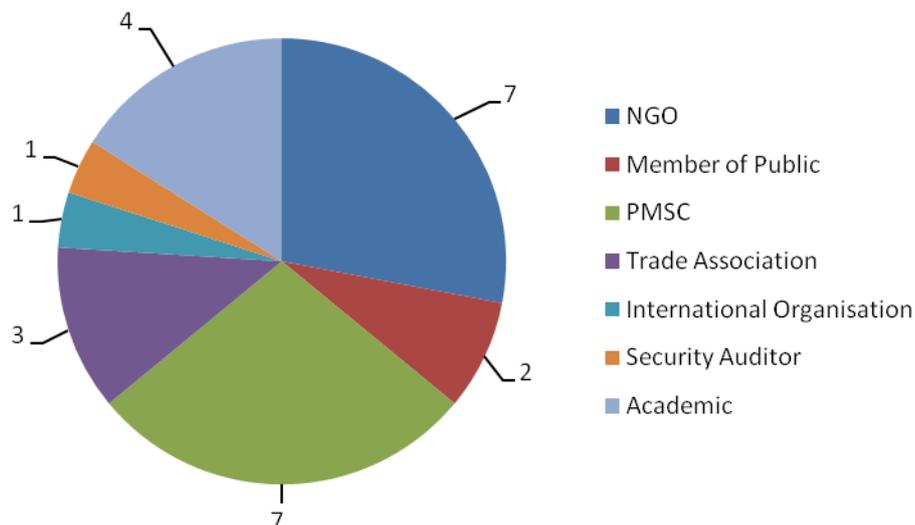
## II. Conducting the Consultation Exercise

### Process

10. The Foreign & Commonwealth Office launched the Public Consultation on 24 April 2009 in a Written Ministerial Statement to Parliament. The FCO published this Written Ministerial Statement, a Public Consultation document and an Impact Assessment on the FCO website immediately after the announcement.
11. On the day of the launch, Lord Malloch Brown held meetings with representatives of the PMSC industry, the British Association of Private Security Companies (BAPSC) and NGOs. FCO officials also held meetings with key stakeholders individually during the 12-week consultation period.

### Summary of responses

12. We received 25 written external responses to the Consultation on our preferred option, which had been agreed across the Government. The pie chart below indicates the breakdown of responses by sector:



### Our Analysis

13. Responses were first summarised by each contribution and then analysed against each of the 11 questions contained in the Consultation document. The analysis by question, together with the detailed responses, is set out in section IV. The key findings of the exercise are set out in section III. All information and responses were dealt with in accordance with the Freedom of Information Act and the Data Protection Act.

### III. Key Findings and Future Actions

14. No conclusive evidence was provided to demonstrate that the Government's preferred option of a three part package of a domestic code of conduct agreed with the Government, using our leverage as a key buyer to raise standards and an international approach was not the best way of meeting the objective of promoting high standards of conduct by the PMSC industry internationally.
15. However, we did receive a number of contributions questioning the capacity and appropriateness of the BAPSC to combine its existing trade promotion activities with the compliance, auditing and monitoring of a code of conduct, including the enforcement of disciplinary measures. **The Government therefore intends to set up a multi-stakeholder working group comprising representatives of Government, BAPSC, the industry and civil society to explore these concerns further and to determine how best to provide for effective audit compliance and monitoring of the code of conduct, including enforcement.** This working group will report by March 2010. If the working group were to determine that the BAPSC was the most appropriate body to audit compliance and monitor the code, it would also consider how best to increase its capacity to undertake this enhanced role and how this capacity should be funded. As a result, we refer, throughout this document, generically to a 'trade association/monitoring body'. In parallel, officials will pursue discussions with the Security Industry Authority (SIA) to consider whether, and how, any best practice generated by the implementation of the Approved Contractor Scheme (ACS) could inform the development of the Government's PMSC policy and whether the SIA could have a role in its delivery.
16. A number of respondents continued to prefer a legislative route such as licensing and/or a register of approved companies, rather than regulation through a trade association and a code of conduct. **But, none of these responses provided sufficient evidence to show how a legislative option would meet the Government's objective of promoting high standards internationally and be enforceable. As a result, we continue to believe that legislation, in the form of a licensing regime, is not a viable option.** The Government will, however, consider the extent to which the relevant provisions of the Armed Forces Act (AFA) (2006) might be applied to encourage high standards of PMSCs working for the British Government in conflict theatres such as Afghanistan. The AFA (2006) can be used only in locations and circumstances where there is a significant UK military presence and its application would need to be considered on a case-by-case basis.
17. Finally the Government will incorporate into its policy many of the other recommendations made by respondents during the consultation, for example drawing on best practice from existing codes of conduct and FCO contracting, incorporating specific standards into the code, and ensuring compliance with the Professor Ruggie's (UN's Special Representative to the Secretary General for Business and Human rights) 'Protect, Respect and Remedy' framework.

## IV. Summary of Contributions by Question and Government Response

**Do you think the issues listed in this document are the right ones to be included in a Code of Conduct? Can you think of any other areas that should be covered?**

### Respondents' Views

18. *Legislation.* Ten respondents suggested that the Government include legislation as an option. Ideas for legislative regulation included: governance of non-governmental military formations through a version of British military law; an Additional Forces Act; scrutiny of the current Armed Forces Act to see if it would stand up to dealing with any abuses committed by contractors working for the UK abroad; making more effective and/or greater use of section 5 of UK's 1968 Firearms Act as well as robust enforcement and control of the Export Control Order 2008; and legislation to enable PMSCs to be tried in the UK for violations committed abroad via the introduction of licensing.
19. *Insurance.* Two respondents thought that we should consider insurance as an issue and that PMSCs should take out, as standard, insurance for Public Liability, Professional indemnity, Employer's Liability and Personal Accident. Only companies with the highest standards would then gain access to the best premiums.
20. *Human Rights.* One respondent proposed a commitment to the protection of basic rights and ethical treatment of third country national workers should be written into the code of conduct and into UK Government contracts.
21. *Protect, Respect and Remedy framework.* Three respondents suggested adherence to Professor John Ruggie's 'Protect, Respect and Remedy: a Framework for Business and Human Rights' report. (Professor Ruggie is the UN Secretary-General's Special Representative on the issue of human rights and transnational corporations and other business enterprises.)
22. *Difficulties.* One respondent, while agreeing with the emphasis on incidents and accountability and respect for international humanitarian law and human rights law, expressed concern about how these aspirations could be turned into concrete effect. Another respondent noted that the lack of legislation could mean that the Government might be unable to act while a company pursued a course contrary to the public interest.

### Government Response

23. *The Government continues to believe that any legislative solution – such as a licensing regime and Government register of approved companies – would be very difficult to enforce. The Government has not received any convincing evidence during the consultation period to suggest that a legislative approach would successfully meet its objectives. There are serious obstacles to enforcement. PMSCs work overseas, often in remote locations and countries whose legal systems do not function effectively. Any*

*breach of UK legislation would take place outside the UK placing formidable obstacles in the way of gathering reliable evidence and enforcement. An inability to prosecute would undermine the legislation and would not achieve our objective of promoting high standards. The Government will consider the extent to which the provisions of the Armed Forces Act (2006) might be applied to those PMSCs working for the Government. There are a number of practical and legal problems involved in attempting to apply AFA (2006) including the requirement for a military Commanding Officer and the need for investigations by service police. The Act was established to place under military jurisdiction people who are (at least temporarily) working within the military community. The wider issue also remains that PMSCs often work for the private sector, and this Act would not cover their activities.*

*The Export Control Order 2008 is the national secondary legislation under which the UK operates and controls the export of military goods from the UK. The order also forms the basis for UK Trade Controls, which governs the movement of controlled military goods , which are not located in the UK between two third countries. Exports and Trade Licences issued under the Export Control Order are already rigorously policed. However, the Export Control Act 2002, under which the Order was made, does not contain adequate powers to regulate fully the activities of PMSCs and the Government believes that amending the Act would not achieve our policy objectives. The Government therefore does not accept that we need more robust enforcement of the Order.*

- 24. The Government notes the arguments about including a requirement to have appropriate insurance in any proposed code of conduct. We will pursue discussions with representatives of the insurance industry to consider how this element could be appropriately incorporated. It is clear that lower premiums would act as a powerful incentive to drive up standards within the industry.*
- 25. The Government also agrees that a commitment to the basic rights and ethical treatment of third country nationals employed by a British PMSC is an important standard for the PMSC industry to abide by. We will investigate how this can be introduced into the code of conduct. The Government is already an active supporter of the Voluntary Principles on Security and Human Rights, which provide guidance to the extractive industries on ensuring the safety of their personnel and the security of their installations, whilst at the same time respecting human rights.*
- 26. The Government has welcomed the work of Professor John Ruggie, the UN Special representative of the Secretary General for Business and Human Rights. It is broadly compatible with our preferred option for raising standards of PMSCs internationally. The framework comprises three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies. We are considering in detail how far the 'Protect, Respect and Remedy' framework would fit with our preferred option. While the Government agrees that the State has a duty to protect against its own human rights violations, we will also bear in mind that private individuals or companies are not parties to human rights treaties and do not have their own human rights obligations under international law. However, PMSCs are of course obliged to*

*obey the laws that States enact to implement their human rights obligations or to prevent human rights abuses. They do not operate in a “legal vacuum” and as set out in the explanation of the Montreux Document, (an initiative of the Swiss Government and International Committee of the Red Cross (ICRC)), “well established rules and principles” do apply to PMSCs in situations of armed conflict, under international humanitarian law. As explained in paragraph 59, there is also legislation in place penalising grave breaches of the Geneva Conventions, as well as torture, genocide, war crimes and crimes against humanity.*

27. *We consider that the Respect tenet of Professor Ruggie’s framework may help to encourage responsible corporate citizenship. We are also considering how possible grievance mechanisms, incorporated into a code of conduct/international standard, could contribute to the Remedy tenet of Professor Ruggie’s framework.*

### **What requirements should the Code of Conduct stipulate in each of the areas set out?**

#### **Respondents’ Views**

28. *Founding ethics.* One respondent thought companies should be required to base their modus operandi upon a strong set of ethical values, such as integrity, transparency and a sense of fairness, reflected by performance.
29. *Specific requirements.* One respondent suggested that the code should cover PMSC processes for dealing with incidents and accountability, including assistance to complainants, translation services, appeals procedures, raising public awareness of the grievance mechanism, dissemination of its decisions or conciliation, mediation or arbitration services. Three respondents suggested the following standards: compliance with contracts (selecting and assessing performance); general training, as well as training in human rights law and international humanitarian law; uniforms and identification; general management practices; a complaints procedure; incidents and accountability; recruitment and human resource management; accountability for use of subcontractors and their adherence to the code; equipment management; anti-corruption measures; personnel treatment and health and life insurance issues; resource management; responsible behaviour by PMSC personnel; and respect for international law and British standards. Three respondents suggested that any regulatory system/code of conduct should explicitly hold sub-contractors accountable to the full range of standards and obligations.
30. *Government Backing.* One respondent suggested that the code of conduct should be agreed with the Government to lay down mandatory standards to be complied with in order to remain in the trade association/monitoring body. Four respondents suggested adherence to the code of conduct should be a minimum requisite for any Government contracts.
31. *Existing codes.* Two respondents recommended that the codes of conduct of the British Association of Private Security Companies (BAPSC), International Peace Operations Association, Pan Africa Security Association and proposals by the Swiss Government might be suitable sources for an industry code.

32. *Stages*. One respondent suggested the code of conduct would need to address PMSC behaviour at each stage of a contract.
33. *Montreux Document on pertinent international legal obligations*. Five respondents suggested that specific requirements a code of conduct might cover are provided by the Montreux document. (In 2005, the Swiss government and the International Committee of the Red Cross (ICRC) launched an initiative to promote respect for international humanitarian law and human rights law on the part of PMSCs operating in situations of armed conflict or post-conflict. This multi-stakeholder initiative included States (including the UK), NGOs, industry, and academia, and culminated in the Montreux Document. It has achieved its two initial objectives: to reaffirm and, where necessary, clarify existing legal obligations of States and other international actors under international law; and to identify good practices and regulatory options to assist States in promoting respect for international law by PMSCs. These good practices are non-binding guidelines on regulation that States may choose to follow).
34. *Law enforcement*. Two respondents suggested PMSCs cooperate with appropriate law enforcement authorities, especially State authorities, to ensure effective accountability.
35. *Use of force*. Four respondents suggested rules on the use and type of force, including which firearms to use and when to use them, which should be regulated as precisely as possible. PMSCs should not be put in a position where they would need to use force beyond these limitations.
36. *International Humanitarian Law*. Eleven respondents suggested that a code should respect international humanitarian law. Two respondents suggested that PMSCs should not accept contracts requiring them to carry out activities that international humanitarian law explicitly assigns to a State agent or authority, or that encourage them to carry out, or assist in carrying out, any violations of international humanitarian law. One respondent recommended that the UK implement the Geneva Conventions by actively pursuing serious violations of international humanitarian law committed by PMSC personnel. Another respondent noted a concern that whilst personnel of armed forces are agents of the State and therefore liable for human rights violations committed, this would not be the case for PMSCs who are corporate entities and not State agents. There might, therefore, be an incentive for unscrupulous States to use PMSCs to avoid State liability for human rights violations. In addition the same respondent commented that where there is commercial accountability it may not be feasible for victims to pursue domestic law remedies, and criminal accountability is not a matter that can be dealt with by a code of conduct since it is a State responsibility.
37. *Previous services*. One respondent suggested that PMSCs should publicise past services; provide references from previous clients; publicise ownership and structure of their organisation; conduct background checks on PMSC personnel taking into account relations with subcontractors, subsidiary corporations and ventures; guarantee that they have no reliably attested record of involvement in serious crime; and show they had dealt with previous incidents of unlawful conduct.

## Government Response

38. *The objective of the Government's preferred option is to promote high standards of the PMSC industry. We therefore agree that companies should base their modus operandi upon a strong set of ethical values. These values would underpin any domestic code of conduct. A considerable amount of work has already taken place at both the international and domestic level on what these ethical standards should be. For example, the BAPSC draft standard begins with an overarching code of principles.*
39. *The Government would monitor the overall effectiveness of the code's implementation. Companies would have to meet the minimum requirement of standards in order to remain in the association. However, we could not mandate that only companies who are members of a UK trade association/monitoring body would be eligible to bid for Government contracts, as under our obligations under EU law, we have to ensure that all companies registered in EU Member States can bid for our contracts. This should not act as a barrier to promoting high standards. For example, the Government could stipulate that any company that wished to secure a Government contract would have to show adherence to either the agreed standards set out in the domestic code of conduct or equivalent standards.*
40. *The Government agrees that the code of conduct could usefully stipulate required standards of compliance at various stages of a contract. The FCO works with partners across Government to assess costs and benefits of PMSC services, as with all contractor services during the tendering process of a contract, during the contract's lifetime and on completion of that contract. The Government ensures that all contracts are subject to a rigorous selection process so that we obtain best value for money. Any company engaged by the Government needs to pass through a stringent and transparent procurement process in line with Public Procurement Guidelines and best practice. All PMSC contracts are subject to ongoing performance monitoring and contract management by the FCO and other government departments concerned, both in country and from the UK, in respect of all aspects of the delivery and operation of these contracts. FCO monitors performance by a mixture of Key Performance Indicators, regular visits by the Overseas Security Advisors to FCO Posts who review and report on the PMSCs' performance, regular review meetings in London with PMSCs, and monitoring expenditure against a fully profiled budget. In addition, the FCO reviews requirements on completion of the contract and prior to re-tendering in order to highlight any improvements that could be made because of experience or lessons learned. The Government would ensure that the code of conduct follows FCO best practice in this area.*
41. *The Government agrees that existing codes/agreements already provide a potential source of best practice, which could be drawn from. For example, the Montreux Document is intended to serve as a guide on the legal and practical issues raised by PMSCs and it usefully highlights a range of good practice to be considered by States. As mentioned above, the BAPSC has already produced a draft code and other organisations such as the International Peace Operations Association (IPOA) have an established code that has been in use for some years. All of these would be considered should the Government pursue a domestic code of conduct.*

42. *The Government agrees that any code of conduct should promote respect for international humanitarian law and human rights law. The agreed code would provide guidance on what functions PMSCs should or should not perform, to mitigate the risk of states using the UK industry to avoid their human rights obligations. The code would clearly state that PMSCs should only act in a defensive rather than an offensive capacity. It is important to note that States could not use PMSCs to avoid their liability for human rights violations because States are already accountable for human rights violations, as well as for breaches of international humanitarian law under the Geneva Conventions. Any allegation that personnel of a PMSC have committed an offence under the Geneva Conventions Act 1957 can, and should, be passed to the police for investigation.*
43. *As regards commercial accountability, it would be a claimant's decision whether to bring proceedings for compensation by pursuing domestic law remedies in the relevant jurisdiction.*
44. *The Government can confirm that the domestic code of conduct would set specific standards on compliance in accepting contracts, training, (including on human rights law and international humanitarian law), cooperation with appropriate law enforcement authorities, management practice, recruitment and human resource management including of any subcontractors, handling of complaints, processes for dealing with incidents and accountability, identification, equipment management, anti-corruption measures and responsible behaviour by PMSC personnel. Rules on the use of force would be dependent on the theatre in which a PMSC operates and the needs of the client. However, we would ensure the code sets out the general legal framework for the use of force as required by international humanitarian law and human rights law.*
45. *The Government's objective is to increase transparency of the industry and the code would include appropriate provisions to this end. In drawing up the code, it will be important to consult further with industry on issues such as client confidentiality. Criminal record checks of PMSC personnel would be covered under recruitment and vetting standards.*

**How could the trade association monitor the behaviour of its members to ensure they comply with the code?**

**Respondents' Views**

46. *Transparency/reporting.* One respondent recommended that UK regulation should encourage transparency through a system of annual reports, which could be publicised in order to foster greater confidence with outside stakeholders and concerned actors. We received seven other specific suggestions about possible reporting mechanisms: All serious incidents should be reported to the trade association/monitoring body, who would be responsible for monitoring any remedial action; a system of annual reports might be introduced for companies contracted under UK-based regulation to report on measures taken to abide by the code of conduct; the trade association/monitoring body could be required to report any incident to Government authorities that might be considered to involve criminal conduct by PMSC personnel; in the event of an incident, the PMSC

concerned should provide a full report; and the quarterly report on Strategic Export Controls should make it clear when equipment is being exported to a PMSC which should be named.

47. *Assessment.* One respondent suggested that the trade association/monitoring body should have an assessment team who have the right to attend training sessions noting any deficiencies and reporting them to the company responsible.
48. *Audit.* One respondent suggested that compliance with the code should be audited independently. A UK Accredited Service might ensure that the independent body carries out its duties effectively. The assessment body could issue an assessment of areas for improvement. If not met, the company might be suspended from the trade association/monitoring body if it is a member. One respondent suggested the trade association/monitoring body could also undertake spot inspections or reviews of PMSC conduct.
49. *Certification.* One respondent suggested that the trade association/monitoring body could certify PMSCs as compliant with the code, to audit that compliance and/or to provide compliance-rating scores.
50. *Watchdog and whistle blowing.* Two respondents suggested that the trade association/monitoring body could have 'watchdog' powers over those PMSCs that agree to comply with the code. Six respondents suggested adherence to the code of conduct might be monitored by whistle blowing including by other trade association/monitoring body members, by external parties through a dedicated e-mail address, a formal complaints mechanism, or a periodic survey or audit of clients.
51. *Dialogue.* One respondent suggested that an ongoing dialogue between the UK trade association/monitoring body and regional monitoring bodies of Afghanistan and Iraq would increase monitoring.
52. *Government involvement.* One respondent suggested UK Government secondees with end user or direct operational experience of PMSCs within deployed theatres, an understanding of commercial security industry dynamics, and an understanding of the international human rights dimension of the PMSC industry could also be used to monitor the industry.
53. *Current Practice.* One respondent suggested that monitoring would depend on an agreed mandate but could replicate a system such as UK Government contract compliance monitoring of PMSCs in Iraq.
54. *International Standards Organisation.* Two respondents suggested that due diligence could be facilitated by an international standard such as ISO 9001:2000/2008. ISO 9000 is a family of standards for quality management systems, maintained by ISO, administered by accreditation and certification bodies. The rules are updated as requirements change over time.

55. *Difficulties.* Six respondents stressed the following difficulties of monitoring accurately: It could only be done on an international basis by an independent body (an alternative might be to set up a national regulatory authority); any national body would have a limited ability to monitor developments outside the jurisdiction of the United Kingdom; and an official website naming transgressors might not prove possible in practice, as it would be difficult in terms of fair trial rights of the company and its employees. One respondent commented that while the convenience of using an established trade association/monitoring body is appreciated, the main purpose of such a body is to benefit members and to represent their views. Such a role is not compatible with a policing requirement so there is likely to be a considerable conflict of interest between the two functions. Funding would present another potential area of conflict of interest. The judgement of the policing body must be transparent and this could be prejudiced if the policing body has to source income from those it is required to police.

### **Government Response**

56. *As noted above a robust code of conduct agreed with and monitored by the Government would ensure greater transparency of the industry. A significant aspect of this would be the reporting mechanisms agreed as part of the code. Reporting could be broken down into two broad categories. The Government would require detailed reporting from the trade association/monitoring body into members' compliance with the standards of the code such as on training, recruitment and vetting. The Government would also require reporting from the trade association/monitoring body of any incidents that a member of the association was directly involved in. The code would also require members to provide full reporting of any incident to national or international investigations.*

57. *The Government is aware that for the domestic code of conduct to be robust it will be necessary for members to be subject to an audit and inspection regime with 'watchdog' powers to ensure compliance with the standards set out in the code. Certification/compliance rating scores appear to be a sensible method of measuring/acknowledging compliance. The code would also need an independent capacity/audit function to investigate alleged incidents and draw conclusions on accountability. The code would contain a procedure for confidential 'whistle blowing' and we would also encourage the trade association/monitoring body to develop close links with associations such as those in Afghanistan and Iraq, to provide further information on the performance of PMSCs 'in country'.*

58. *Further analysis and feedback from respondents has clearly indicated that the trade association/monitoring body would need to have a separate audit/compliance function to avoid a conflict of interest. The Government has noted the argument that a trade association/monitoring body that relies upon membership fees to function could be reluctant to take action against a member who it is in part financially dependent upon. In the working group, which we are establishing to look at these issues, the Government will explore a range of compliance/audit organisations currently available in both the public and private sectors to assess who would be best suited to perform this function. The Government will consider making available expert Government secondees to undertake this role.*

59. *The implementation of effective monitoring is a key challenge. The focus of the trade association/monitoring body would primarily be preventative. It would therefore focus on setting high standards on recruitment, vetting and training etc. to ensure a commensurate improvement of performance in the field. The investigation of incidents overseas would be a key focus of the working group proposed by the Government, which will be set up following the consultation. Best practice would be drawn from Government PMSC contract compliance monitoring in insecure environments such as Iraq.*

*The Government envisages that the international accountability mechanism (described in more detail in paragraph 69) would investigate incidents where PMSCs are alleged to have breached the international code of conduct. In addition, if it is alleged that a criminal offence has been committed, the position would generally be that the host State's authorities would carry out the investigation where possible (recognising that the host State's capacity to enforce the rule of law within its territory may be weak) and in most cases the personnel in question would be subject to local law. Furthermore, there is UK legislation penalising grave breaches of the Geneva Conventions, as well as torture, genocide, war crimes and crimes against humanity. This applies to acts committed by United Kingdom nationals overseas, ensuring that they can be prosecuted for these acts even if they take place overseas. We are also able to prosecute British citizens for murder committed overseas.*

*The Government acknowledges there are limitations. As regards the domestic code of conduct, the trade association/monitoring body would foster close relations with international organisations, diplomatic missions present in the field and host state Governments to inform any investigation, and draw upon available open source reporting. However, we do not accept that an official website publicising compliance/non-compliance would be impossible in practice. There are already examples of self regulation/voluntary regimes in other industries that use websites to achieve this purpose.*

## **How should the Government monitor the implementation of the code?**

### **Respondents' Views**

60. *Ensuring accountability.* Three respondents suggested that accountability is under the sole control of the Government, who should ensure reporting mechanisms imposed both by and on the trade association/monitoring body are effective. The Government's official point of contact might maintain links with the Association and encourage organisations such as the International Committee of the Red Cross and the United Nations High Commissioner for Refugees to report any alleged breaches of the code of conduct/laws.
61. *Reports.* We received the following suggestions from five respondents on establishing reporting mechanisms: The trade association/monitoring body submits an annual report to Government outlining statistically the amount of training carried out in international humanitarian law and human rights; PMSCs write a bi-annual report acknowledging compliance and providing signatures of personnel's acknowledgement to the code of conduct; the Government requests its own independent audit of compliance with the

code, in addition to the assessments provided by the trade association/monitoring body and industry; Government engages with key stakeholders, including NGOs, to ensure all relevant information is received.

62. *Annual meetings.* One respondent suggested the Government should be represented at the trade association/monitoring body's Annual General Meeting and that a detailed feedback session should be held with members to ensure adequate oversight/compliance with the code.
63. *Monitoring.* One respondent suggested an independent monitoring agency or that an international arrangement might provide monitoring through a small secretariat, and a light international (compliance) inspectorate. Further, that the UK should disseminate the code to UK diplomatic missions along with formal engagement and co-operation with other diplomatic missions and international organisations. One respondent suggested that an ombudsperson in any conflict area where there are a number of companies operating would give local populations, NGOs, and international organisations a point of contact. Another respondent pointed out that the Bar Council and the General Medical Council have mechanisms for oversight and sanctions, and are backed up by legislation.
64. *Licensing.* One respondent suggested the Government might establish a licensing system and make the licence or registrations dependant on adherence to the code of conduct, while one other suggested that PMSC services should be open to individual licensing requirements and open to prior parliamentary and public scrutiny.
65. *Inspector General:* Two respondents recommended the establishment of a full time post of 'Inspector-General' to be responsible for verifications and investigations, appointed by the Government, failing which funding should be provided to the BAPSC to enable them to provide that service.
66. *Difficulties.* One respondent saw problems with how the Government could monitor implementation of a code effectively, suggesting the Government does not currently monitor the behaviour of British multinationals overseas in terms of compliance with international and national codes as regards bribery and corruption. They suggested it is hard to see how the Government could monitor implementation of a code other than at a very cursory level within its own jurisdiction.

## **Government Response**

67. *The Government accepts that it has overall responsibilities such as enforcement of UK criminal law, but the trade association/monitoring body would be responsible for the detailed implementation and monitoring of the code of conduct under our preferred option. We can confirm that this would involve an annual report from the trade association/monitoring body to the Government. The audit and compliance function's findings would form the basis of this report. Consult with the NGO community would be important to ensure all necessary information is received. Government officials would remain the official point of contact.*

68. *The Government agrees that the trade association/monitoring body should hold annual meetings to discuss and evaluate members' compliance with the code, with Government officials in attendance. The Government believes that members of civil society should also be invited to these meetings.*
69. *The suggestion for an international arrangement providing monitoring possibly through a small secretariat and an international compliance inspectorate is in line with the third part of the Government's preferred option to create an international standard. The Swiss Government are currently leading efforts to establish an international code and the UK is actively participating. There is already agreement that should this code be instituted there would need to be an International Accountability Mechanism to oversee its application. It is important to harmonise any domestic code of conduct with an international standard.*
70. *The Government has carefully considered further arguments offered by respondents in favour of a licensing regime. We remain convinced that such a regime remains impractical and disproportionate. Despite a couple of recent individual cases, the UK based industry retains a largely favourable reputation and operates to high standards. Considering the global nature of the industry, regulating the UK industry could have little or no effect on non-UK companies and would not prevent international companies being involved in incidents that could call into question the reputation of the UK industry. There is also a risk that legislation would drive the industry offshore. This option would also place an unwarranted strain on a legitimate industry and would be disproportionately costly to small businesses.*
71. *The Government does not accept the recommendation of the establishment of a full time post of a Government appointed or funded 'Inspector-General', responsible for verifications and investigations. The post holder would have no legal powers and this would not be an appropriate use of Government resources. We also believe that the appointing of ombudsmen in conflict zones is both impractical and disproportionately expensive. Our preferred option that the industry and its trade association/monitoring body take primary responsibility for the domestic code of conduct (albeit with a separation of functions, so that its trade promotion activities are separate from its compliance auditing and monitoring/enforcement functions) and that the Government should monitor/review the effectiveness of its implementation, remains the most practical and proportionate solution.*
72. *The Government has formal structures in place to facilitate the monitoring and reporting of UK corporate involvement in foreign bribery. Following criminalisation of bribery conducted wholly overseas by UK nationals and UK-registered companies in February 2002, annual instructions to Overseas Missions have made clear that staff who become aware of, or receive information relating to, acts of bribery committed by UK nationals, companies or other bodies incorporated in the UK should report the details to the Serious Fraud Office. These reporting structures have contributed to an increasing number of live investigations, civil fines and successful convictions, including the first conviction of a UK company for foreign bribery on 25 September 2009.*

## **What sanctions are available to the trade association both to encourage compliance and penalise non-compliance with the code?**

### **Respondents' Views**

73. *Existing codes.* One respondent suggested that existing codes already satisfied the need for a code and that IPOA's current internal monitoring and complaints procedures already fulfil the FCO's requirements for accountability and oversight.
74. *Systems for sanctions.* We received two suggestions regarding the range of sanctions available. One proposed a graded star based membership hierarchy so that a 1-star rating would indicate little or no training of security staff and poor but functioning management systems, whilst a 5-star rating would indicate sophisticated management systems and complete training packages. While another proposed that grade infringements might also be seen in terms of severity, so that a minor infringement could constitute a lack of Health and Safety Executive training plans, and a major incident might constitute a clear infringement of international humanitarian law. See also paragraph 112 below on the Montreux document and non-criminal accountability mechanisms.
75. *Sanctions.* The range of sanctions suggested included: an informal warning with some advice upon corrective action; a formal warning that would be published on website; a system of fines; suspension; expulsion and a prohibition from bidding on future UK Government contracts. Please also see paragraph 112 for the Montreux Document's good practice on accountability mechanisms.
76. *Legislative sanctions.* One respondent suggested legislating to allow implementation of the following sanctions: criminal bankruptcy orders; 'civil' criminal offence (murder, manslaughter); prohibiting personnel from being directors of a PMSC; misfeasance and malfeasance; and criminal damage. One respondent suggested that court-martials and potential prison sentences were the only sanctions available to ensure adherence to international humanitarian law.
77. *Difficulties.* Two respondents saw difficulties with enforcing any sanctions and commented that no trade association/monitoring body has the power to impose criminal sanctions, and that no sanctions proposed in the consultation document would work or be immune from legal challenge.

### **Government Response**

78. *The Government can confirm that, as a general principle, we would seek to incorporate best practice wherever possible within the domestic code of conduct.*
79. *The PMSC industry strongly values its reputation. A company's reputation directly affects its competitiveness. A star-based rating system with appropriate grade infringements would act as a strong incentive for companies to meet the standards set out in the code. In developing the code of conduct we would discuss the practicalities of such an incentive/sanction with industry members and the trade association/monitoring body.*

80. *The suggestions on the range of non-legislative sanctions that could be used by the trade association/monitoring body are all in line with the proposed sanctions in the consultation document with the exception of a prohibition on bidding for future UK Government contracts. We doubt this would be practical as companies could simply change their name in order to reapply for Government contracts. In any event, those PMSCs that did not demonstrate integrity of conduct would find it difficult to secure contracts in the future from Government or other reputable contractors.*
81. *The Government has not received any evidence during the consultation period to suggest that a legislative approach would successfully meet its objectives. There are serious obstacles to enforcement, as set out in paragraph 23 above.*
82. *The trade association/monitoring body would not be administering criminal sanctions, and the Government does not accept the arguments about the difficulty of enforcing 'non criminal' sanctions. PMSCs would voluntarily sign up to an agreed code in order to enhance their commercial reputation. By signing up to the code they would have to accept the terms and conditions of membership which would include disciplinary procedures.*

**What extra incentives could be introduced to attract up to 90% of the industry to sign up to the trade association's Code of Conduct?**

**Respondents' Views**

83. *Government incentives.* Seven respondents thought that Government incentives might include: Acknowledging the trade association/monitoring body as a partner in any regulatory process, including their due process and sanctions; supporting investigation and sanctions on non-members claiming to be members; promoting association members to other Government departments and trade partners via a website; using dialogue with key buyers to ensure membership conveys respectability; lobbying other governments to give preference to members or to bar non-members operating in their territory; advocating extension of the Voluntary Principles on Security and Human Rights beyond the extractive industries; advocating corporations and Governments insisting on adherence to an (international) code; and the Government to award contracts to trade association/monitoring body members only and to work with international partners to encourage a similar approach.
84. *Financial incentives.* Six respondents suggested that PMSCs may be able to gain access to increased profits through Government contracts; PMSCs would improve their performance and procedures to improve their competitive position; access to reduced insurance premiums; linking code-compliance, or certain compliance rating scores, to access future public or private tenders and reduced capital costs; and increased business opportunities and an unsullied reputation.
85. *Insurance.* One respondent recommended cancelling insurance policies of members violating the code of conduct or raising insurance premiums for violators of the code.

86. *Difficulties.* One respondent commented that membership of the trade association/monitoring body is not commercially attractive and a 90% membership target would risk placing downward pressure on standards. Two respondents suggested that while the proposals may encourage membership by companies interested in securing Government contracts, it does little to encourage membership amongst companies with less interest in such contracts.

## **Government Response**

87. *The Government notes the contributions about possible incentives it could provide to attract a high level of industry membership. As set out in the consultation document, the Government would require a regime that sets high standards of transparency and accountability and would seek to ensure that these are upheld. Adherence to the code would signal to prospective buyers the companies that meet the highest standards. The Government therefore contends that this would be a powerful commercial incentive for the industry to sign up. Trade promotion would remain the responsibility of the trade association. Any PMSC misrepresenting itself as a member could be dealt with through existing legal remedies, such as the Trade Descriptions Act. We could not mandate that only companies who are members of the Trade Association would be eligible for Government contracts. Under our obligations under EU law, we would have to ensure our contracts were advertised to all EU member states. The Government would explore whether it could enforce the code of conduct by incorporating the code's standards into any future contracts, and in turn stipulate that any company that wished to secure a Government contract would have to show adherence to either the agreed standards in this code or an equivalent.*
88. *As set out in paragraph 57, the Government would explore whether the code might incorporate the concept of compliance rating scores.*
89. *There are strong potential linkages between the Government's preferred PMSCs option and the Voluntary Principles on Security and Human Rights. Representatives from the BAPSC attended the Voluntary Principles Oslo Plenary in March 2009. The Voluntary Principles Secretariat has been looking to promote its work with the private security industry and co-presented at the BAPSC's annual conference in London in October 2009. In addition, the Voluntary Principles Steering Committee is also considering if it can increase representation of the industry through giving the BAPSC observer status at the annual Plenary in London in March 2010.*
90. *The cancelling of insurance policies and raising of premiums would be a matter for the insurance industry but, as noted in paragraph 24, the Government recognises the commercial incentive/attractiveness of lower insurance costs and will continue discussions with the insurance industry on this point.*
91. *The Government accepts that achieving 90% membership of the trade association/monitoring body would be a considerable challenge but does not accept that this would necessarily place a downward pressure on standards. A robust and independent auditing/compliance function would safeguard the standards proposed. Clearly, the formation of such a function would have significant implications for the*

*relevant trade association/monitoring body in its current form. This will be one of the issues to be considered in the follow-up phase of work we envisage. The Government will engage closely with the industry, the Director General of the association and other key stakeholders to agree how it could be re-configured so that it is a capable delivery partner. This should address the value for money concerns expressed by one respondent.*

## **How could accountability and monitoring of the industry through the international initiative be increased?**

### **Respondents' Views**

92. *Accountability.* One respondent suggested criminal accountability could be applied so that UK residents would be liable under the International Criminal Court Act 2001, but not persons in transit or temporarily present in the country.
93. *Benchmarks.* Three respondents suggested benchmarks and establishment of key point indicators with relevant domestic trade association/monitoring bodies to measure performance. Linking compliance with international benchmarks to access global markets could also increase accountability.
94. *Point of Contact.* One respondent suggested the Government designate an official point of contact. International organisations, Governments, and victims of alleged breaches could then report alleged breaches of codes of conduct/laws to this point of contact.
95. *Feedback.* One respondent suggested that the international initiative might include client and host nation feedback of contracts as part of an annual audit.
96. *Montreux.* One respondent suggested an international code of conduct would have greater utility than a national one as the industry's market and suppliers are global. One respondent suggested PMSCs bidding for Government contracts could provide evidence of compliance with the principles enshrined in the Montreux document. Another respondent welcomed the Governments' intention to extend international cooperation on the issue but thought that, without effective Government regulation, this was insufficient. In addition, it set a poor example if the Government of a country with a significant PMSC industry appeared to abdicate responsibility.
97. *Corporate Social Responsibility.* One respondent suggested that regulation of PMSCs should take the form of a 'top down- bottom up' hybrid approach to mirror some of the existing international Corporate Social Responsibility (CSR) initiatives. By looking at the UN's Global Compact (GC) and the implementation of the OECD's Guidelines on Multinational Enterprises with its attendant National Contact Points, a number of common and positive and negative approaches can be identified which will be of guidance for regulating PMSCs.

## Government Response

98. *Offences of genocide, war crimes and crime against humanity are applicable to persons resident in the UK. Therefore, persons employed by PMSCs who are resident in the UK can be prosecuted under the International Criminal Court Act 2001. The Coroners and Justice Act 2009 amended the ICC Act to provide more certainty over the term 'resident' by setting out some specific categories of people to be treated as 'resident' for the purposes of the Act irrespective of whether that would otherwise be the case, and by providing some criteria for the courts to take into account in assessing whether someone was resident. The Act also extended the ICC Act to cover offences committed from 1991, to the full extent permissible under the legal principles applying to retrospection. However, as stated previously in paragraph 23, the difficulties with regard to enforcement of any legislation remain.*
99. *The Government agrees that benchmarks (and international benchmarks) and key point indicators would be a useful way to measure performance and increase accountability. They could be used in conjunction with a star-based rating system with appropriate grade infringements, as mentioned in paragraph 79 for the domestic code of conduct. The Government's ambition is to maintain/raise the high standards of UK companies while promoting high standards internationally. Therefore, the Government intends to create strong links between the domestic and international standards. Both at national and international level, measures could then be taken against companies failing to meet the standards.*
100. *The Government would have a designated point of contact for both the UK trade association/monitoring body and the international accountability mechanism. Contact details would be published, including on an official website. However, as set out in the consultation document, the Government's intention is to agree the domestic code of conduct with the relevant trade association/monitoring body and monitor its implementation. The trade association/monitoring body would therefore be the primary point of contact for international organisations, governments, and victims of alleged breaches to report such allegations against UK companies.*
101. *The Government does not accept that an international code would necessarily have more utility than a national one. We consider the domestic code and international initiative would be mutually supportive. The Foreign Secretary noted in the foreword to the consultation document that our policy proposals would be based on international cooperation as this is a global issue that requires a global response. Any international standard would be based on the principles enshrined in the Montreux document. As mentioned in paragraph 118, any agreed international initiative would not be a substitute for State's responsibility to act in response to criminal conduct.*
102. *The Government will look closely at existing international Corporate Social Responsibility initiatives including the UN Global Compact and the OECD's Guidelines on Multinational Enterprises (and their complaint procedures), and the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones to see if any best practice generated by these initiatives can be incorporated into the preferred option for raising standards.*

**If you run a PMSC, would your organisation be prepared to provide funds to ensure that standards were raised in the industry? What would be an acceptable amount to pay?**

### **Respondents' Views**

103. Seven representatives of the industry in total contributed to this question.
104. *Not willing to provide funds.* Two respondents indicated that they were not willing to provide funds, suggesting instead that they were committed to support through provision of expertise and time.
105. *Willing to pay.* Two respondents suggested £5,000 was a reasonable sum to pay. Another thought £10,000 was a reasonable sum.
106. *Percentage of contract.* One respondent suggested costs should be covered through a percentage of contract value.
107. *Percentage of turnover.* One respondent showed a preference to contribute a sum proportionate to turnover to the Government directly. One respondent suggested that industry contributions to pay for the international secretariat should relate to the size of the company.
108. *Return on investment not sustainable.* Three respondents suggested the present fee level of the BAPSC, the trade association/monitoring body for the PMSC industry, was unsustainable and not consistent with return on investment, and that the performance of the BAPSC has not matched the outlay in terms of start up costs, annual subscriptions and capital support.
109. *Government funding.* Two respondents suggested that only Government policy would ensure sustainability. One respondent suggested the Government contributes £150,000 to the trade association/monitoring body for the first three years.
110. *Cost models.* Two respondents suggested UK PMSCs might have compulsory membership to the trade association/monitoring body and have their membership linked to a sub-group of an existing, larger association.

### **Government Response**

111. *We welcome the commitment to support the initiative through the provision of expertise and time and the feedback received about levels of funding certain PMSCs would be willing to pay. The working group that will be formed by the Government following this consultation will consider this question further as well as the feasibility of the alternative funding models suggested. However, as the Government is not proposing to introduce legislation, it would be unable to insist upon compulsory membership of the trade association/monitoring body and in any event does not believe it to be necessary. Membership of the association/monitoring body would signal to prospective buyers that*

*companies adhere to the highest standards. Operators who could not meet these standards would risk a significant reduction in market competitiveness. Market forces would therefore drive membership and ultimately raise standards through compliance with the trade association/monitoring body's code.*

112. *The Government notes the arguments about the BAPSC and will consider these points when drafting its final policy proposal. The Government will consider a contribution towards the funding of the trade association/monitoring body to ensure sustainability dependent upon further consideration of a robust business case. The Government envisages that the domestic code and international standard would be primarily funded by membership fees from PMSCs as it would be in their commercial interests to participate. The challenge would be to ensure both aspects of our preferred option deliver value for money for industry members.*

**Do you think the international sanctions listed would be fair and effective, and if not, what sanctions would you propose?**

### **Respondents' Views**

113. *Sanctions.* We received a range of suggestions regarding international sanctions, and the processes needed to support them, from six respondents, including:
- > The suspension or eventual removal of a PMSC from the global security benchmark initiative in circumstances where their conduct falls significantly short of the requirements of membership.
  - > A financial penalty might be used for minor infringements. Penalties should be focussed on either a reduction of a star rating or removal from the association, but might also incorporate a point based system and bonus for no breaches being adopted.
  - > A proper appeals process would need to be included in the rules and procedures of an international secretariat. A similar right of appeal would need to be included in a UK self-regulation system.
  - > Any international sanction would need to include the means to investigate with due legal process; publicising any lethal incident through the international secretariat; publishing a list of companies that adhere to the international code; and circulation of details of any non-compliant companies plus reports of any incidents.
114. *Montreux document:* One respondent pointed out that the Montreux document recommends as a good practice that home states of PMSCs provide for non-criminal accountability mechanisms for improper and unlawful conduct of PMSCs and their personnel. The UK might also explore to what extent its own judicial system would allow victims of violations of international humanitarian law to obtain relief from companies.
115. *Sign off.* One respondent suggested members should be required to sign the code and affirm that if found in breach they would be disqualified from bidding for Government contracts for a period of time. While another suggested the Government might advocate other governments bar non-Association members from operating in their countries.

116. *Difficulties.* Others saw difficulties in the use of international sanctions: Two respondents thought that the international sanctions described in the consultation document were inadequate; another respondent suggested that placing additional conditions on contracts would require full-time Government/international initiative oversight of the relevant trade association/monitoring body and many doubted its likely effectiveness; and one respondent suggested issuing the company with an official warning would require full time Government/international initiative oversight as well as a disciplinary process and judgment of conduct by mechanisms outside prevailing law, which might be unworkable; one respondent suggested financial sanctions would be difficult to negotiate at the international level.

## **Government Response**

117. *The Government welcomes the range of sanctions suggested by respondents and notes that they are similar in scale and scope to the proposed sanctions set out in the consultation document. The Government envisages the audit/compliance function of the trade association/monitoring body as the primary non-criminal accountability mechanism for improper conduct of PMSCs and their personnel. As regards the scope of the UK judicial system to allow victims of violations of international humanitarian law to obtain relief from companies, there already exist relevant provisions of UK law such as the ordinary principles of civil law to obtain redress.*

118. *As stated in paragraph 75, the Government will be unable to disqualify PMSCs from bidding for Government contracts for a period if they are found in breach of the international standard. However, the Government would contract only those companies that follow regulatory, humanitarian and ethical standards consistent with the UK trade association/monitoring body's code of conduct/international standard, or can show adherence to (or have taken steps to bring their practices into line with) other equivalent standards. This policy stance will achieve the same objective of raising standards in the industry both domestically and internationally.*

119. *The Government does not accept the arguments that the proposed international sanctions are inadequate, ineffective or unworkable. Other industries have made voluntary international initiatives work that have 'non-criminal' sanctions and we aim to follow this model.*

120. *The sanctions proposed are not intended to replace or in any way dilute the State's ultimate responsibility to hold individuals to account for criminal behaviour. The domestic code and international initiative would focus on raising standards of the industry and if necessary hold PMSCs to account should they fail to meet them.*

**Please share with us your views on the Impact Assessment. What additional evidence can you provide us to improve our understanding of the costs and benefits of the approaches analysed?**

## **Respondents' Views**

121. *Positive responses.* Three respondents accepted the balance of arguments in the Impact Assessment.
122. *Negative responses.* Five respondents criticised the Impact Assessment. One questioned whether full information was available to the authors during the assessment. One respondent doubted its coherence and suggested that it was used as a pretext for rejecting the licensing option. One criticised decisions that appeared to balance costs against potential loss of lives. One respondent stated it was unclear what attempts have been made to adapt existing licensing regimes to regulate the sector.
123. *Concern at perceived lack of joined up thinking.* One respondent noted that the Impact Assessment showed a lack of joined-up thinking within the Government concerning export controls. This respondent suggested that conclusions reached by the Government on export controls differ from those presented in the Impact Assessment, such as greater legal controls on the export of strategic goods, including extraterritorial controls on UK nationals operating overseas.
124. *Criticism of the pace of work.* Two responses expressed disappointment that after a significant delay the proposal did not recommend legislation.
125. *Views on Option 1.* Option 1 – a contract-licensing scheme. Two respondents thought it was unclear on what basis the claim that 30 companies would generate some 1200 individual licence applications per year had been obtained, and that the figure seemed high given the UK defence manufacturing base runs at around 10,000 licence applications per year. One respondent thought that the non-monetised cost of decreased human rights abuses/deaths/injury to citizens should be included since this is a fundamental aim of regulating the industry. One respondent rejected the argument that some companies might move operations offshore if licensing were introduced, suggesting the same might be said of those trading in military equipment, but this had not stopped the Government strengthening controls on trafficking and brokering.
126. *Views on Option 2.* Option 2 – a contract-licensing scheme coupled with a register of approved contractors. Two respondents raised objections to the assumption that having an approved list of PMSCs might expose Government to the risk of judicial review, and argued that it is not beyond the Government to set down clear conditions that companies must meet for inclusion. One respondent suggested that a register of approved companies could be created based on SIA's criteria for inclusion onto the Approved Contractors Scheme list. In addition, they argued that there is risk of legal action against Government failure to prevent human rights violations perpetrated by PMSCs. One respondent argued this option would incur considerable additional costs to protect commercially sensitive information. One respondent stated that there was no mention of any additional costs for criminal accountability and any expansion of jurisdiction, military or civilian, would have a cost impact in terms of extra court time/investigation costs, which would fall to the Government.
127. *Views on Option 3.* Option 3 – our preferred option – a three part composite package of regulation through the trade association/monitoring body, the use of our leverage as a key buyer to raise standards and an international initiative to raise standards globally.

One respondent suggested that the impact assessment cites the identification of which companies would be 'legitimate' as one potential difficulty for government regulation and did not understand how the trade association/monitoring body would be better placed to identify which companies make up the 'legitimate industry'. Thus, difficulties in licensing also applied to self-regulation and the proposed trade association/monitoring body has a limited capacity to respond to these challenges. One respondent argued that the Impact Assessment assumes that ethical corporate employers would prefer trade association/monitoring body and the Global Security Benchmark compliant companies and that, given the high costs of security and variety of employers of the industry, this would include an inadequate section of the industry. One respondent suggested the impact assessment appeared to be accurate for the self-regulation of existing PMSCs, provided new companies are restricted in their operations. One respondent suggested the Government is not receiving value for money from PMSCs contracted in Iraq and Afghanistan. One respondent thought that the cost of implementing Option 3 may have been underestimated. The relevant trade association/monitoring body may not be equipped in terms of staff and/or facilities to undertake this work and disciplinary proceedings would need a further independent tribunal. The cost of running and maintaining such a system was suggested to be in excess of £250,000 per annum. One respondent suggested the Government might provide the trade association/monitoring body with additional resources to ensure it enforces the code effectively. One respondent suggested an international secretariat funded by industry, Governments and clients would have more chance of success than one funded by the industry alone. One respondent noted that voluntary codes are only meaningful if regarded as a step towards Government regulation, and cited the Sarajevo Process as an example. The Sarajevo Process gives guidelines on procurement of local private security companies in the Balkans.

## Government Response

128. *The Government rejects the suggestion that the Impact Assessment was used as a pretext for rejecting a licensing option. Licensing was considered in detail and discounted for the reasons set out in both the consultation document and impact assessment. Officials also did not draft the impact assessment with the objective of balancing costs against potential loss of lives but rather to balance costs against the potential benefits of each option. The key benefit taken into account was how much impact each proposal would have raising standards of the industry. The Government's intention is to implement a practical effective policy.*
129. *FCO officials explored the option of adapting existing licensing regimes when formulating the preferred option and it has been the subject of Whitehall discussion. Following the consultation process, there has been further cross- Whitehall consideration of all the options, and we remain firmly of the view that a licensing option is not viable. Any suggestion that Government thinking is not joined up on export controls is unfounded.*
130. *The Export Control Act 2002 does not contain adequate powers to regulate the activities of PMSCs, when those activities (as is the case now) are not linked to the provisions of goods, software and technology. The Government has examined the*

*options carefully and does not believe that a legislative approach would work, as set out in paragraph 22 above.*

131. *The Government notes the comments about the length of time it has taken to consult on a preferred option. However, this is an important area of policy which has involved consulting extensively across Whitehall, with the industry, and with the academic and NGO communities. We have also taken into account our own operational experience of PMSCs in Iraq and Afghanistan. The industry is dynamic and has changed dramatically over recent years. Our policy approach has had to adapt to keep pace with these changes. The emphasis on securing an international consensus on standards reflects this policy response. The Government is also opposed to legislating where it believes an alternative, less burdensome approach would be more practical.*
132. *As regards comments on option 1 – a contract-licensing scheme, the estimate for the number of individual licence applications companies might be likely to generate was obtained from industry sources. It remains the Government's view that some companies could move their headquarters overseas if licensing were introduced in the UK since they would find it easier to operate in countries with less strict legislative regimes.*
133. *The Government notes the comments on option 2 of the Impact Assessment regarding the utility of a register of approved companies but still contends the risks set out in the impact assessment remain valid.*
134. *We do not believe that there is risk of legal action against Government failure to prevent human rights violations perpetrated by PMSCs because as stated in paragraph 26 we do not agree that States have a duty to protect against human rights violations by any entities other than the State itself. The impact assessment did include additional costs for criminal accountability with its associated costs of extra court time/investigations. The Government did not investigate the cost of expanding extraterritorial jurisdiction, as we did not consider this as a viable option.*
135. *Option 3: The Government does not accept the argument that the trade association/monitoring body would not be well placed to identify which companies make up the 'legitimate industry'. This underestimates the industry knowledge of the association and the value of the knowledge its current members/associate members have. However, as mentioned in paragraph 15 the Government accepts that the trade association/monitoring body has capacity constraints. Hence the proposal to form a working party comprised of Government, industry and NGO representatives.*
136. *The Government remains convinced that ethical corporate employers would prefer to employ PMSCs who comply with the domestic code/international standard rather than seek alternative, cheaper service providers. The Government also believes that the industry will seek to drive up its own standards. It has become a commercial imperative, following a number of high profile cases involving extractive companies over recent years. Because of such occurrences, the extractive industry decided to work with the UK and other Governments to agree the Voluntary Principles, an initiative which seeks to provide guidance to the extractives industries on ensuring the safety of their personnel and the security of their installations, whilst at the same time respecting human rights. It*

*is also important to note that the UK industry also comprises a number of small to medium size PMSCs who have proven high standards.*

137. *The Government rejects the comment that it is receiving ‘very dubious’ value for money from PMSCs in Iraq and Afghanistan. All our contracts are subject to regular retendering, with the intention of ensuring continued value for money throughout their lifetime, especially given the changing market conditions in both Iraq and Afghanistan since 2003, and increased competition for such business. All such FCO contracts are subject to ongoing performance monitoring and contract management by the FCO, both in country and from the UK, in respect of all aspects of the delivery and operation of these contracts. The FCO monitors performance by a mixture of key performance indicators, regular visits by overseas security advisors to FCO posts, who review and report on PMSCs performance, regular review meetings in London with PMSCs, and monitoring expenditure against a fully profiled budget. The Government uses five PMSCs in both Iraq and Afghanistan to fulfil a number of roles including close protection, static guarding and police mentoring. Our current contracts provide a rigorous framework to ensure the highest standards of conduct from the PMSCs we employ. There have been no substantiated instances of serious misconduct by any company contracted to the UK Government throughout the duration of its contract, and their conduct has given us no cause for concern to date.*

#### **Do you have any other comments you wish to make?**

#### **Respondents’ Views**

138. *Activities.* Three respondents encouraged the Government to state which activities PMSCs can legitimately take part in, and which should be discouraged. Two respondents thought the Government might identify where the lines between public and private provision of force are drawn.
139. *Legal framework.* We received one comment relating to the current legal framework. The Government should outline what steps it is taking to ensure that UK criminal jurisdiction is applied to the operations of UK companies overseas, including what provisions are now being placed within the Government’s own contracting procedures. UK PMSCs could be made responsible under UK law for any breaches of human rights or the laws of war that may be committed by their employees overseas.
140. *Self-regulation.* Seven respondents were not in favour of a self-regulation mechanism. Arguments included that the decision to reject all forms of regulation is a dereliction of duty on the part of the Government, and is out of step with positive action being taken by other states to crack down on PMSCs.
141. *Licensing regime.* Of the seven respondents not in favour of self-regulation, six supported a licensing regime. Some supported export licensing, transparency and parliamentary oversight, as currently occurs for the export of arms, police, security and related equipment. However, one respondent highlighted that it was important that a UK regulatory system does not impede swift deployments of PMSCs to respond to emergency needs highlighted it. Others suggested PMSC services should be open to

individual licensing requirements and subject to prior parliamentary and public scrutiny complemented by an open register of PMSCs. One respondent argued that the Montreux Document, to which the UK actively contributed and which it welcomed, proposed that it is good practice for home states of PMSCs to establish licensing or registration systems therefore the UK should do the same.

142. *Respect for international humanitarian law.* One respondent noted that international humanitarian law does not impose a specific type of measure to ensure its respect, (except for grave breaches to the Geneva Conventions, which require criminal legislation). It is for each state to decide on which measures are most appropriate, but that licensing provides the best way of ensuring respect for international humanitarian law. One respondent stated that a licensing system is not necessarily an alternative to self-regulation but could be complementary to it. One respondent stated that a licensing system would be wholly inappropriate to deal with the off-shore PMSC industry.
143. *International approach.* Five respondents supported an international approach to the issue. One respondent highlighted that the Government should continue, consistent with its stated policy priority for the development of the international Arms Trade Treaty, to develop international cooperation in developing tough and robust international standards for the regulation of PMSCs.
144. *Human rights.* Three respondents replied citing an inconsistency with Government human rights policy. One agreed that there need to be safeguards against PMSCs contributing to human rights abuses but did not agree that self-regulation would provide these safeguards. Another suggested that since the activities of PMSCs can violate human rights, the Government would default in its duty if it passed the burden for upholding human rights to business. Finally, one respondent argued that UK PMSCs are held accountable under UK law for any breaches of human rights or international humanitarian law committed by those they employ wherever these breaches occur.
145. *Government strategy.* One respondent commented that major strategic questions about how PMSCs ought to operate alongside state militaries remain, and co-ordinating with the MOD's doctrine on PMSCs and considering the issue in strategic terms is important in this process.
146. *High standards.* One respondent suggested the UK's high standards of military conduct stem from effective training, military professionalism, and effective sanctions.

### **Government Response**

147. *The Government believes that any domestic code of conduct should include which activities a PMSC should be discouraged from participating in. This should reflect the principles set out in international humanitarian law and human rights law and indicate where the line between public and private provision of force is drawn.*
148. *As regards the legal framework, we will ensure that the domestic code of conduct and international standards set out the framework for the use of force as required by international humanitarian law and human rights law. The code will make clear what*

*rules and principles apply in situations of armed conflict. As regards the Government's own contracting procedures, all Government contracts are governed by, and interpreted in accordance with English law and subject to the exclusive jurisdiction of the courts of England and Wales.*

149. *The Government does not accept the argument that the decision to reject all forms of regulation is a dereliction of duty and is out of step with positive action being taken by other states to regulate the behaviour of PMSCs. Officials have carefully reviewed the evidence received during the consultation and have concluded that the preferred option set out in the consultation document, if implemented, would achieve the objective of promoting high standards of the industry internationally. The Foreign Secretary has stated that the Government views the industry as essential, inevitable and international and that any proposal should recognise the industry's positive and legitimate role. The Government participated fully in securing the success of the Montreux Document, and has been an active driver in securing international standards. We will continue to participate in these positive international fora.*
150. *The Government has not received any evidence during the consultation period that convincingly explains/demonstrates how a licensing regime could be made viable (see paragraph 70). The Montreux document highlights a range of good practices to be considered by states, including export authorisation licensing, self-regulation and international cooperation. The document does not seek to prescribe or recommend one mode of regulation over another, and says explicitly that regulation through trade association and international cooperation are equally viable. It says specifically in Part II: "It is recognised that other good practices for regulation - such as regulation of standards through trade association and through international cooperation - will also provide guidance for regulating PMSCs, but have not been elaborated here."*
151. *FCO officials continue to work with partners to develop international cooperation on PMSCs, and the Government welcomes the continued efforts of the Swiss Government in this field. We aim to agree an international code of conduct and a model for an international accountability mechanism with States, the industry and civil society during the course of next two years. We are also currently seeking to develop and agree a legally binding international Arms Trade Treaty to regulate the international trade in conventional arms. However, these are distinct issues and as set out in paragraph 23 we don't believe that a legislative approach would be appropriate to deal with PMSCs.*
152. *The Government does not accept that its preferred option is inconsistent with its human rights obligations. The Government would ensure that any code of conduct/international standard policy agreed is fully compliant with international humanitarian law and human rights law. There is no question of the Government abrogating its responsibility for upholding human rights to business.*
153. *The Government notes the comments about the strategic questions of how PMSCs should operate alongside state militaries and the need to ensure coordination with the Ministry of Defence. The preferred option was agreed by the Secretary of State for Defence and developed with input from Ministry of Defence officials. We recognise that this is a dynamic industry and that the armed forces relationship with the private sector in*

*conflict theatres is evolving. As new developments emerge, the Government would, if necessary, adapt its policy accordingly.*

154. *The Government agrees with the view that high standards of British military conduct stem from effective training, professionalism and the effective use of sanctions. When developing the domestic code and international standard, officials will seek out best practice from the British military e.g. on training and consider whether it could be reflected in our approach.*