

# The Review of the Armed Forces Compensation Scheme

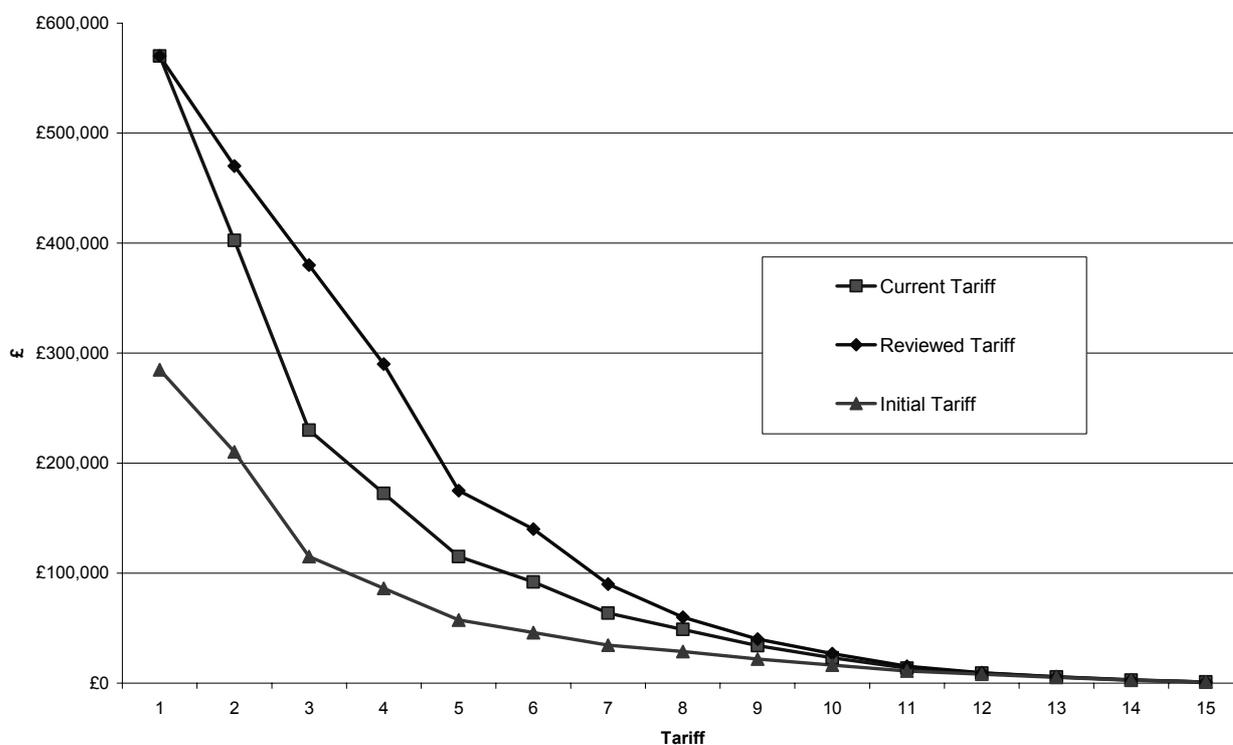
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## Correction made to page 40, paragraph 2.56

A point should be inserted on the graph to denote a proposed level of £470,000 at tariff level 2.



**Correction made to page 65, paragraph 2.63**

"1 \_" should read "1.5"

**Correction made to page 65, paragraph 2.202**

"Orbis Insurance" should read "Chartis"



MINISTRY OF DEFENCE

Ministry of Defence

# The Review of the Armed Forces Compensation Scheme





# The Review of the Armed Forces Compensation Scheme

Presented to Parliament  
by the Secretary of State for Defence  
By Command of Her Majesty

February 2010

**Cm 7798**

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## **Finding your way around the Review of the Armed Forces Compensation Scheme Report**

The Report is split into a number of sections:

- 1) An Overview of the Report can be found at the front;
- 2) Lord Boyce's Summary of Recommendations on Page 13 contains the Review's key conclusions;
- 3) The main Report is grouped into 12 issues. For each issue it contains:
  - the Background
  - the detailed Options and Analysis
  - Recommendations



# Foreword

**Rt Hon Bob Ainsworth MP**  
**The Secretary of State for Defence**

All around the world, every single day, the men and women of the Armed Forces demonstrate their courage, dedication and professionalism in the service of their country. In Afghanistan in particular they are risking injury and death to help keep us safe.

As a Government and as a Nation, we have a responsibility to look after our Armed Forces. They must have confidence that when they are injured due to their Service, that they and their family will be fully cared for, right through from their initial treatment to their long term convalescence. And they must have confidence that we will provide them with a fair and just compensation scheme as part of that support.

Last year I asked Lord Boyce to independently chair a review of the Armed Forces Compensation Scheme. Today we are announcing that the government will implement in full all of the recommendations from Lord Boyce's Review.

Lord Boyce's report is forensic and thorough. It draws on the views of serving members of all three Armed Services. It examines all aspects of the compensation scheme. He has concluded that we are providing broadly the right compensation package. However Lord Boyce is clear that there are a number of improvements we can, and must, make. I am extremely grateful for his efforts, and for those who formed the Independent Scrutiny Group that supported him

The main changes that we will implement are:

- We will increase the Guaranteed Income Payment to reflect the lasting effect of more serious injuries; likely promotions; and extending retirement ages.
- The top tariff level, which had already been doubled in 2008, will remain at £570,000, with all other tariff levels to be increased.
- The maximum award for mental illness will be increased.
- A new expert medical body will be created to advise on compensation for particular illnesses, and injuries such as hearing loss, mental health and genital injury.
- The burden of proof will remain largely as it, with the exception of where records have not been properly maintained.
- We will increase the time periods for making claims.
- A new fast interim payment will be introduced so those injured can receive some compensation before the entire claims process is complete.
- We will improve the way in which we communicate the scheme to service personnel and their families focusing on how the scheme works, what payments they might be entitled to, and the calculations behind them.

I have been particularly concerned that the youngest soldiers who suffer life changing injuries in Afghanistan are properly supported for the rest of their lives. Increasing the

Guaranteed Income Payment they receive for the rest of their lives by over 35% will make a real difference to their quality of life.

Together all these changes will ensure that the most seriously injured receive the highest compensation, and that there is clarity in the system. Crucially we will also have a compensation scheme with flexibility and the ability to adapt when changing circumstances require it.

Implementation will involve legislation, which will take time. Changes however will exceptionally apply to all those who have received compensation under this Scheme, going back to 2005.

I believe these improvements will create a compensation scheme that will meet the needs of our Armed Forces and fulfil our obligation as a nation to the brave, determined, self-less men and women who serve to keep us safe.

A handwritten signature in black ink, appearing to read 'Bob Ainsworth', with a stylized flourish at the end.

**Rt Hon Bob Ainsworth MP**  
**Secretary of State for Defence**

# Armed Forces Compensation Scheme Review Overview

1. On 29 July 2009, the Secretary of State for Defence brought forward a planned review of the Armed Forces Compensation Scheme. Given the importance of ensuring the Armed Forces were receiving the right compensation, he asked Admiral the Lord Boyce to lead the review as independent chairman. Lord Boyce has been supported by a mixed military and civilian MOD team, and has also chaired an Independent Scrutiny Group (ISG) made up of medical and legal experts in injury<sup>1</sup> and compensation matters. The ISG also included representatives of the Confederation of British Service and ex-Service Organisations, the Royal British Legion, Service Family Federations, War Widows and an injured soldier who has claimed under the Armed Forces Compensation Scheme.
  2. Overall the Review Team spoke to or received comments from over 200 individuals and groups including serving members of the Armed Forces, their families, reservists, veterans, and the general public. Lord Boyce and his team visited serving Royal Navy, Army and RAF personnel in their bases and at Headley Court. Lord Boyce also spoke to Ministers, the Chief of the Defence Staff and the heads of the three Services and the judiciary.
  3. The Review was asked to look at the entirety of the Scheme: its principles, the compensation it provides injured Service men and women, and how the Scheme evaluates claims. On the whole, the Review concluded that the basic principles of the AFCS were right. It is an improvement on the War Pension Scheme that preceded it, and has been further enhanced over the last 3 years. However, it also found areas where further improvements need to be made. All members of the Independent Scrutiny Group have agreed the Review findings. Defence Ministers have agreed to implement all the recommendations. Key recommendations that will be taken forward include:
    - The Guaranteed Income Payment will be increased to reflect the lasting effect of more serious injuries on likely promotions and on the ability to work up to age 65.
    - The top tariff level, already doubled in 2008, will remain at £570,000.
    - All other tariff levels will be increased.
    - The maximum award for mental illness will be increased.
    - A new expert medical body will be created to advise on compensation for particular illnesses, and injuries such as hearing loss, mental health and injury to genitalia.
    - The burden of proof will remain largely as it is but improvements will be made in cases of illness and where records have not been properly maintained.
    - The time limits by which claims must be made or appealed will be increased.
    - A new fast interim payment will be introduced so those injured can receive
- 
- <sup>1</sup> In this context, the term “injury” or “injured” also incorporates those who suffer illness or die as a result of their service in the Armed Forces.

some compensation before the entire claim process is complete.

- The way in which we communicate the scheme to Service personnel and their families will be improved, focusing on how the scheme works, what payments individuals might be entitled to, and the calculations behind them.

## **Background To The Armed Forces Compensation Scheme**

4. Those who serve in the Armed Forces do so knowing that they may be injured or die as a result of their service. They rightly expect that if they are injured they will be properly cared for by the Government through initial treatment, convalescence and for the rest of their lives.
5. In 2005, the Armed Forces Compensation Scheme came into effect replacing the War Pension Scheme. For the first time, it enabled injured Service men and women to claim compensation without having to wait until they left Service. The AFCS provided a tax free lump sum for pain and suffering caused by the injury. All anticipated injuries were listed against a tariff level ranging from 1 to 15. The most serious injuries (tariff level 1) corresponded to an award of £285,000.
6. From the beginning, the more serious injuries – those in tariff levels 1 to 11 – were also compensated by regular tax-free and index-linked payments for life to be made once the individual left the Armed Forces (the Guaranteed Income Payment or GIP). This was designed to compensate them for the earnings and pensions they were now less likely to earn.

## **Changes To The Scheme Between 2005 and 2009**

7. Service men and women on operations in Iraq and Afghanistan have survived injuries which would previously have been fatal. This is a direct result of the enormous advances made in the medical treatment provided in theatre.
8. As a result we have made a number of changes, including adjustments to the

multiple injury rule and, most importantly, increasing lump sum payments. In July 2008, the Ministry of Defence published the “The Nation’s Commitment: Cross-Government Support to our Armed Forces, their families and Veterans”. This set out the principle that the Armed Forces should not be disadvantaged by their service, and looked at how we could better support those injured in service of this Nation. One of the measures we took as a result was to double the lump sum payment for the most serious injuries. The top payment was therefore doubled to £570,000. All awards were increased by between 10 and 100%. The beneficial effects of both these subsequent changes were given to everyone who had claimed since the scheme was introduced in 2005.

## **Findings Of Lord Boyce’s Review**

9. Despite these key changes, further reform was required. As a result, the Defence Secretary brought forward the complete review of the Scheme, previously scheduled for late 2010. The key findings of the Review are as follows.

### **Underlying principles**

10. AFCS was originally based on the principles of fairness, simplicity, modernity, security, employability, human rights and affordability. The Review considered whether these were the right principles on which to build a compensation scheme. It also looked at the wider support available to the injured, and how AFCS fitted within the care allowances, housing and other welfare grants available from other parts of the state.
11. Overall the review concluded that while the principles remained broadly right, they have not been put into words that are easily understood and communicated. They need to reflect more clearly the key principles that the most seriously injured should receive the highest awards; that individuals should be able to easily understand why their award is at a particular level; and that the compensation scheme fits within the wider context of other Government support available.

## The Size of the Lump Sum

12. In 2008, the Government increased the top level of tax-free lump sum award to £570,000, a level that the Review found was commensurate with the life-changing nature of the injuries involved. However, the Review found that the other tariffs should be increased, with the awards for the most seriously injured below the top two levels increasing by over 50%. This will give award levels of:

Tariffs	Current Award	Proposed Award	Proposed Increase
1	£570,000	£570,000	No change – the Review found this to be an appropriate highest payment.
2	£402,500	£470,000	£67,500
3	£230,000	£380,000	£150,000
4	£172,500	£290,000	£117,500
5	£115,000	£175,000	£60,000
6	£92,000	£140,000	£48,000
7	£63,825	£90,000	£26,175
8	£48,875	£60,000	£11,125
9	£34,100	£40,000	£5,900
10	£23,100	£27,000	£3,900
11	£13,750	£15,500	£1,750
12	£9,075	£10,000	£925
13	£5,775	£6,000	£225
14	£2,888	£3,000	£112
15	£1,155	£1,200	£45

13. The Review proposes the creation of a new independent expert medical group to provide specialist advice on the Scheme, drawing on the example of the Industrial Injuries Advisory Council. As one of their first tasks, the new group will look at a number of specific types of injury to make sure that awards are adequate and fair (including hearing loss, mental health and

injuries to genitalia). They will also draw up a list of recognised diseases to make it clearer to individuals which illnesses are likely to be due to service and therefore covered by the Scheme.

14. The Review also looked at mental illness. It proposes increasing the highest award for mental illness. It also believes that mental illness should be covered in a separate section of the Scheme to physical illness, in recognition of the differences between the two. The new expert medical group will also ensure that the revised Scheme continues to provide the right level of compensation in this very difficult and complex area.

## Guaranteed Income Payment

15. Even after personnel have recovered, serious injuries will often have long term effect, including on their future careers and earnings. The tax-free and index-linked Guaranteed Income Payment is intended to address this by supplementing whatever income and pension they are able to earn. In this way the AFCS does not have a capped total payment – those most seriously injured will continue to receive payment for the rest of their lives. It is paid from the moment that the Service man or woman leaves the Armed Forces. The payment takes into account their age, their salary, the severity of their injuries, the pension an individual might have earned, and the ill health pension they will also be paid.
16. The Review concludes that it is right for the Guaranteed Income Payment to be part of the AFCS. It proposes some changes to how the amount of the monthly payment is calculated and the most significant of these are set out below. But it sees the main challenge as being to greatly improve how we inform and educate both members of the Armed Forces and the general public about how the payment is calculated, what it is intended to compensate for and how much it could be worth.

## Example

Lt Jones is injured on operations and has to have her left leg amputated below the knee. The injury is assessed as level 6. Under current arrangements, Lt Jones will receive (in addition to her GIP) a lump sum of £92,000. Under the proposed changes, she would receive (in addition to her GIP) a lump sum of £140,000, **an increase of £48,000.**

Pte Smith is injured in training and fractures the patella on one knee, causing significant functional limitation which is expected to last for more than 26 weeks. The injury is assessed as level 13. Under current arrangements, Pte Smith will receive a lump sum of £5,775. Under the proposed changes, he would receive a lump sum of £6,000, **an increase of £225.**

## Example

A 21 year old Private infantry soldier joined the Army at age 18. Whilst on foot patrol he is injured in an IED attack and loses both his legs from the knee down. He suffers no other injuries. He is a member of Armed Forces Pension Scheme 2005 (AFPS05). His final salary is £17,605. Under the existing rules for calculating GIP, he will receive £15,616 a year tax free and index-linked from his GIP and ill-health pension.

Under the new rules, he will receive £21,056 a year tax free and index-linked from his GIP and ill-health pension. This represents **an increase of £5,440 a year, or the equivalent of a rise in income of 35%.**

17. The biggest change the Review proposes is that payments should be increased to reflect the average number of promotions someone of a particular age would achieve if they had not been injured. The Review also proposes other changes to reflect that most people work until 65 rather than 55. In real terms, for a 21 year old Private suffering life changing injuries these changes will result in a 35% increase in the monthly payment they receive. These changes will also benefit those who, as a result of a bereavement due to service, are in receipt of Survivor's Guaranteed Income Payment or Child's Payment under the Scheme.
  18. The Review also proposes an increase in the future level of bereavement grant provided when an individual dies due to service. For most people this will rise from £20,000 to £25,000; for some Reservists it will be even more. Finally the Review proposes that all these levels are reviewed periodically.
- ### Multiple Injuries
19. The Review believes that it is right that the most seriously injured receive the highest awards – regardless of whether they have received one or many injuries. But the Review believes it is important to injured personnel that each of his or her injuries have been recognised in the compensation they are awarded.
  20. The new system will mean that injuries will be analysed and grouped according to the five different zones of the body: the head and neck; the torso; upper and lower limbs), impact on the senses; and, mental health. A percentage will then be applied (100, 80, 60, 40 and 20) to each zone by order of severity to form the total award. All injuries will therefore in future receive some compensation.

## Example

A soldier sustained multiple injuries, allocated to the body areas the injuries are:

### A. Head and Neck

<i>skull fracture</i>	<i>Level 13</i>	<i>£5,775</i>
<i>jaw fracture</i>	<i>Level 14</i>	<i>£2,888</i>
<i>severe facial lacerations</i>	<i>Level 8</i>	<i>£48,875</i>

### B. Upper and Lower Limbs

<i>leg injury</i>	<i>Level 9</i>	<i>£34,100</i>
<i>fractured shoulder</i>	<i>Level 11</i>	<i>£13,750</i>
<i>injury to foot</i>	<i>Level 10</i>	<i>£23,10</i>

### C. Torso

<i>Gun shot wound</i>	<i>Level 10</i>	<i>£23,10</i>
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### D. Sensory Impairment

<i>Permanent hearing loss in one ear</i>	<i>Level 11</i>	<i>£13,750</i>
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### E. Mental Health

<i>mental disorder</i>	<i>Level 14</i>	<i>£2,888</i>
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### Total awards for body areas are:

<i>A) Head and Neck</i>	<i>£57,538</i>
<i>B) Upper and Lower Limbs</i>	<i>£70,950</i>
<i>C) Torso</i>	<i>£9,075</i>
<i>D) Sensory Impairment</i>	<i>£13,750</i>
<i>E) Mental Health</i>	<i>£2,888</i>

*Under current rules, where only the three most serious injuries are considered, the total would be:  
100% of £48,875 + 30% of £ 34,100 + 15% of £23,100 = £62,570*

*Under the new rules the total would be:  
100% of £70,950 + 80% of £57,538+ 60% of 13,750 + 40% of £9,075 + 20% of £2,888 = £129,438*

***This represents an increase of £66,868***

### Should personnel injured on operations be compensated differently?

21. The Review also looked at whether the Scheme should provide different compensation to those injured on operations in recognition of the circumstances of their injury. Only some of those the Review spoke to favoured this approach, and the strongest support (including from the ISG) was for the Scheme not to differentiate in this manner. They felt that it would undermine the “all of one company” concept. Serving in the Armed Forces involves our Service men and women being told where and how they will serve. Where this leads to injury it should lead to the same compensation regardless of the location. The Review accepts that this should continue to be the case.

### Making a Claim

22. The Review considered how long individuals had to claim compensation, and whether the Scheme allowed any changes in their injury to be reflected in their compensation. It accepts the advantages in providing a full and final award: it gives the injured person certainty and the chance to move on with their life, as well as making gathering the evidence easier. The Review also recognises that the Scheme already allows for awards to be reconsidered, appealed, and even exceptionally reviewed in some cases.
23. In future, greater use should be made of interim payments where an injury is clear, but its ongoing effect is not. For the more serious injuries, a new form of payment will also be created so that some

compensation can be paid early on, even when a decision on the full extent of the injuries is not possible.

24. Timescales will also be increased to aid decisions being taken once the individual’s medical condition is clear. The time for individuals to make a claim will be increased from 5 to 7 years; the time to request reconsiderations and appeals will be increased to 12 months; and the time to make a claim for a late onset illness (including relevant mental illness) will increase to 3 years after the injury develops. In cases where additional significant and unexpected problems occur a further ability to review an award after 10 years will also be created.
25. The aim in future will be to provide decision-makers with the ability to revise the compensation awarded until the precise nature and effect of the injury is clear. This will ensure individuals receive the right compensation for their injury. The Review does not believe the Scheme should be entirely administered by trained medical officers, but it is important they are involved at the right stage. In particular, it proposes that they have more opportunity to comment prior to Tribunal hearings

### The Burden of Proof

26. The Review has examined the burden of proof arrangements used in the scheme and recommends they are not changed. Most of the work in this area should still fall to the Ministry of Defence so as not to burden the individual. However, two specific elements require some change. Firstly, if key records are incomplete or

### Example

A pilot is involved in a crash and sustains injuries that requires a below-knee amputation. He functions well with a prosthetic limb; however, fifteen years later, due to unforeseen and unexpected complications relating to the original injury and its treatment, the leg needs to be amputated above the knee. Because this deterioration is unforeseen and unexpected, the pilot can have his award re-assessed under the Scheme

have been lost by the Ministry of Defence then the individual will have the benefit of presumption. Secondly, for cases involving disease, the Scheme will in future follow a similar approach to that used by the Industrial Injuries Compensation Scheme. The new expert medical advisory group will create a list of recognised illnesses which, on the balance of probability, are likely to be due to service. This will add greater clarity for those with illnesses.

### **Communication and Awareness**

- 27.** The Review was greatly concerned at the low level of awareness and understanding of the Scheme among service personnel and their families. Substantial improvements are required to the way in which the Scheme is communicated. Information on the Scheme is already provided to new entrants, as part of training before deployment on operations, and at defence medical facilities. The level of support provided to individuals in making claims, understanding what the Scheme is for, and making informed decisions about how to manage the potentially substantial sums involved, must be improved.
- 28.** The Review welcomes the commitment from government and devolved administrations to consider links to AFCS as and when they conduct their own reviews of access to public services and benefits.

## **Key Conclusions**

- 29.** It is crucial that the Armed Forces know that if they are injured due to Service they will be properly supported by the Nation, and this includes that they will receive the right compensation. The Review concludes that the Armed Forces Compensation Scheme already goes a long way to meeting this goal, but makes a number of recommendations about how it should be improved. The Government has accepted all those recommendations. Amongst other things, we will increase award levels below the maximum award of £570,000 and the income stream for the more seriously injured to take account of promotions they might otherwise have achieved. In addition, we will ensure awards take account of all injuries arising from a single incident. The MOD will start to implement the Review's findings as quickly as possible, although some of the legislation to implement the changes will inevitably take time – potentially a year. When they come into effect, however, all those who have received compensation under AFCS will, exceptionally, benefit. As a result of these changes, the Armed Forces will have a scheme with the necessary flexibility to adapt to the future. They can therefore have confidence that if they are injured, as a result of service, they and their families will get the support they deserve.



# Summary of Recommendations

## Admiral the Lord Boyce

I was appointed in September 2009 by the Secretary of State for Defence to be the independent Chairman of the Ministry of Defence (MOD) Review of the Armed Forces Compensation Scheme (AFCS or 'the Scheme'). I have been supported in my role by an Independent Scrutiny Group (ISG) whose members have been drawn from academia, the medical profession, the legal profession, Service and ex-Service organisations and interested stakeholders representing injured personnel, their families, and the bereaved. I am extremely grateful to them for their generous commitment of time and for their thoughtful contributions.

The detailed work of the Review has been undertaken by an internal MOD team and I have been impressed by the open and transparent way in which they have conducted the Review. This approach has ensured that the diverse range of contributions received during the course of the Review have been given careful consideration, even where the views expressed in these contributions have run counter to the approach currently adopted by the Scheme. I am convinced that the Review has benefited substantially from taking proper account of the advice and scrutiny provided by the members of the ISG, who have demonstrated their independence throughout the Review by thoroughly deliberating and debating the issues in question.

I have taken into account the work of the internal Review team, the breadth of contributions from stakeholders, and have considered all the issues raised with the ISG. The Terms of Reference for the Review required me:

- to examine whether the fundamental principles of the Scheme remain valid;
- to evaluate how successfully the Scheme in its current form gives effect to these principles;
- having regard to fairness, feasibility, sustainability and ease of administration, to make recommendations on any modifications that are required to ensure that the Scheme is fit for purpose.

Having explored all the relevant issues, I am content that the Scheme is fundamentally sound. However, a number of significant adjustments should be made to the Scheme to ensure that it is properly fit for purpose to provide appropriate recognition and financial support to those members of the Armed Forces who are injured, made ill or die<sup>1</sup> as a result of their service.

The Review examined a wide range of themes broadly grouped into 12 issues. The detailed recommendations are set out in the body of the Main Report. In summary, I recommend the following steps are taken to improve the Scheme:

### **Issue 1 – The fundamental principles underlying the compensation scheme**

The original principles that guided the design of the AFCS remain broadly appropriate, although greater clarification of the meaning of some of the principles is needed. In particular, some

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<sup>1</sup> Throughout the report the terms injury and injured also refer to illness and death.

adjustment is necessary to draw out more clearly the relationship between the Scheme and other state provision such as access to health and social care and the underlying principle that the most compensation should be paid to those with the most serious injuries. In addition, the principles need to ensure that the Scheme and its operation are transparent.

### **Issue 2 – What the compensation is for and its relationship with other state benefits**

The AFCS, as a no-fault scheme, rightly needs to be considered alongside the full range of care and support available to personnel injured or made ill by their service, or to their survivor(s) if they die as a result of service. The Service Personnel Command Paper, “The Nation’s Commitment: Cross-Government Support to our Armed Forces, their Families and Veterans” (Cm 7424 published in July 2008) acknowledged two important themes: no disadvantage as a result of service, and appropriate recognition for sacrifice. The latter principle led to some further preferential treatment or access to public services, including the NHS, for those injured as a result of service. Further improvements are planned across Government and the Devolved Administrations to the transition of care and support for those being discharged from service.

These arrangements should be kept under review across Government as further adjustments are made in future to the wider public sector provision of support and its funding. A number of avenues are under development, such as proposed in the MOD’s Green Paper “The Nation’s Commitment to the Armed Forces Community: Consistent and Enduring Support – A Consultation Paper” (Cm7674 published July 2009). The first steps of the Welfare Pathway initiative which it described are now being implemented through pilots across the UK, and complemented by the enhanced role of the War Pensions Committees in their new guise of Veterans Advisory and Pensions Committees including advice and support on AFCS matters. Nonetheless, appropriate recourse mechanisms need to be put in place to ensure that injured Service and ex-Service personnel and their families receive the services to which they are entitled.

### **Issue 3 – The overall level of compensation, including for dependants**

Lump sums paid under the AFCS compare well with those found in civil litigation for pain and suffering. The top level of lump sum award of £570,000 should remain, but the tariff amounts for injuries below that level that were increased in 2008 should be adjusted further to reduce the differentials those changes introduced, especially between tariff levels 1-2, 2-3, and 3-4.

The way in which the tax-free, index-linked Guaranteed Income Payment (GIP) and Survivor’s Guaranteed Income Payments (SGIP) are calculated should be adjusted to take account of the earnings potential foregone as a result of injury up to age 65, the current deferred pension age in the Armed Forces Pension Schemes. A factor should be introduced in the GIP calculation to take account of the average range of promotions foregone while still in-service because of the injury. Other technical factors should be updated to take account of developments since they were set as part of the Scheme’s original design.

An additional factor should be included in the Bereavement Grant to cater for the circumstances where a Reservist dies as a result of service, but who remained in their civilian occupational scheme where such a scheme paid out less than the equivalent of 4 times salary Death-In-Service lump sum. This should be implemented for Reservists from the start of the Scheme in 2005.

The principal level of Bereavement Grant should be increased for all future claims to £25,000 for those who were in the Armed Forces Pension Scheme 75, reflecting rises in pay and inflation since the rate was first set in 2005.

The levels of tariff lump sum and Bereavement Grants for the future should be subject to periodic review. No change is required to the annual automatic up-rating of GIP and SGIP levels.

### **Issue 4 – Comparisons with other compensation in the UK and internationally**

Comparisons with other schemes and compensation arrangements nationally and

internationally have not identified in themselves a need to make changes to the Scheme.

### **Issue 5 – Issues raised by the Court of Appeal judgment**

The Court of Appeal case in relation to Cpl Duncan and Mne McWilliams caused this Review to be brought forward. The judgement should be taken further to provide even greater clarity in some aspects of the Scheme, as the Court of Appeal has suggested.

### **Issue 6 – The circumstances of injury, illness or death**

The Scheme should continue to treat injuries, illness or death due to service in the same way, irrespective of the precise circumstances, because it is the act of joining up and signalling willingness to make a sacrifice for the Nation that distinguishes those who serve. For example, the Scheme rightly acknowledges the benefits and risks to the Armed Forces of Service-approved sport and adventurous training and should compensate them in the same way. Any alternative which sought to differentiate between types of duty or service may not only be divisive, but also difficult to define given the wide-ranging nature of military service and operational duties.

### **Issue 7 – The claims and adjudication process**

There is considerable scope for improvement in the currently unsatisfactory way in which the Scheme is communicated to all members of the Armed Forces, their families and interested stakeholders; the level of guidance and support provided to potential claimants in navigating the claims process; being kept informed adequately through the claims process; as well as guidance, information and support once an award has been made on what might be done with the money. This should be pursued across the board, including through the Chain of Command, as this is not just the responsibility of the Service Personnel and Veterans Agency (the SPVA) that administers the Scheme. In my view, the single Services have been too slow to recognise their responsibilities in relation to supporting injured personnel in making claims under the AFCS as this Scheme, unlike its predecessor the War Pensions Scheme, is

predominantly for personnel who may seek to claim while in service.

The Scheme's trained lay decision-makers at the SPVA already have ready access to advice from licensed doctors trained in the Scheme, but should also have greater appropriate military oversight and advice in determining cases. Formal guidance should be developed on circumstances where medical input is mandatory, such as in all claims in tariffs levels 1-6, on reconsideration, and at appeal.

Greater use should be made of the existing Interim award power within the Scheme in appropriate cases. It would be helpful to introduce, in addition, some form of "payment on account" for those with significant injuries likely to require active intervention over a period and where prognosis may be difficult to judge when the claim is made. This could be paid soon after the claim is lodged without the need to go through the entirety of the claim process, in those cases where service is without doubt the cause of injury (for example, those injured in combat situations). Claimants should be allowed to choose this option if they wish, but it would not be imposed upon them. The amount available should be initially set at a level which can be determined from early evidence of the minimum level of award the individual would receive for all their injuries, which would be taken into account when a full assessment of the claim is made. This should be viewed separately from the necessary support that should be provided to families to enable them to visit while the individual is receiving treatment including through rehabilitation, and not just at Selly Oak and Headley Court.

Additional review powers should be available for those who have made a claim while active treatment is still ongoing and so before steady state is achieved or prognosis clear: this will allow proper account to be taken of the developing progress of the injury and its management. In the short-term such provisions might delay the claimant's access to an independent tribunal, but where prognosis is not clear or a steady state reached it seems right that the final determination of the SPVA should be able to take full account of developments during treatment. Review powers should be available to SPVA decision-makers to revise their

decisions where errors have been made or new pertinent evidence is available.

The automatic consideration of “spanning cases” for personnel whose service spans the introduction of the Scheme on 6 April 2005 should be removed. Instead claimants should be able to request for their claim to be considered under the AFCS for such service spanning 6 April 2005, as well as for the SPVA to treat a claim as being made under the War Pension Scheme where appropriate.

### **Issue 8 – The burden and onus of proof**

The standard of proof should remain the balance of probabilities in all cases and the onus on the individual in the majority of cases. Significant modifications should be made where the MOD has genuinely lost relevant records by giving the individual who proves an injury suffered while undertaking an activity in the course of service the benefit of presumption. In these cases, it will be presumed the injury is due to service, unless the MOD proves that, on the balance of probabilities, it is not.

As well as continued opportunity for claims to be made for any physical or mental disorder and for such claims to be determined on their merits, mechanisms should be established to ensure that a recognised list of diseases that can be presumed to be due to service provided that certain published criteria are met is developed promptly and kept up-to-date. This should be through the introduction of an expert medical group as a sub-group of the Central Advisory Committee on Pensions and Compensation (CAC)<sup>2</sup> that advises the Under-Secretary of State and Minister for Veterans.

### **Issue 9 – The time limit on claims and the treatment of deterioration**

Having appropriate time limits reflects important principles in the Scheme around encouraging Service and ex-Service personnel to continue

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<sup>2</sup> The CAC is Chaired by the Under Secretary of State for Defence and its members are drawn from the War Pension Committee network, Service and ex-Service organisations, Service occupational pensions representative, in-Service representatives, and such officials as the Chair deems necessary

life following injury. Nonetheless, significant changes to the principal time limits in the Scheme should be made, as follows:

- Initial period to submit a claim extended from 5 years to 7 years.
- Time available to request reconsiderations extended from 3 to 12 months, given the mobile nature of Service personnel.
- Time available to request appeals extended to a further 12 months beyond reconsideration.
- Time available to claim for late-onset and death-in-retirement claims from 12 months to 3 years from diagnosis or death respectively, to reflect the approach in the civil courts.
- Introduction of a further review beyond the current “10-year exceptional review point” in the circumstances where further significant and unexpected deterioration occurs and where to maintain an award would be manifestly unjust.

All the time limits in the Scheme should be much clearer than at present in all publications and correspondence.

### **Issue 10 – The compensation paid for mental illness**

Consideration should be given to establishing a separate “Chapter” or Part to the Scheme for mental health conditions due to service in acknowledgement of the distinctions between mental and physical conditions, but recognising that, for some individuals, awards will be for a combination of physical and psychological conditions.

The range of mental health tariffs and lump sums should be adjusted in recognition of the fact that potential significant impact of the most serious mental health conditions due to service might be greater than that currently reflected in the Scheme in exceptional circumstances. In particular, the highest award should be increased from the equivalent of tariff level 8 (and 50% GIP Band) to the equivalent of tariff level 6 (and 75% GIP Band).

The level of mental health awards should be kept under review by the proposed expert group to be established to augment the existing

Central Advisory Committee on Pensions and Compensation (the CAC).

### **Issue 11 – The compensation paid to individuals with multiple injuries**

The changes made to the Multiple Injury Rules in early 2008 for those with very significant injuries remains appropriate for that group. Under this change, those in the top 100% Band for GIPs receive the full tariff value for all their injuries up to the maximum level for a single tariff level 1 injury of £570,000.

The current rule for those with significant, but lesser, injuries below that level does not adequately compensate for the impact that multiple injuries have on an individual. The existing rules should be changed to include an element of compensation for each injury sustained. All injuries should not necessarily be paid at their full tariff value, to ensure those with lesser multiple injuries do not receive more than someone with a single more serious injury, and thereby maintaining the principle of fairness.

The approach should be based on an assessment of the injuries received to each principal body zone (head and neck, torso, upper and lower limbs, the senses and mental health). The tariff amounts should then be combined, with the most seriously injured zone compensated at 100% of the total tariff value, and then at 80%, 60%, 40% and 20% for each lesser zone respectively.

### **Issue 12 – Other issues raised**

During the course of the Review, a number of issues were raised as requiring further attention. These include the amount of compensation paid for hearing loss, injuries to genitalia, compensation paid for brain injury, and others.

It was felt strongly by the ISG that these issues are not currently sufficiently addressed by the Scheme. These issues need to be resolved through the new medical expert group set up as a sub-group to the Central Advisory Committee on Pensions and Compensation (CAC). A report following up these actions should be sent to the CAC and implemented where possible within 12 months of the date of this Report.

The Review rightly concludes that the Scheme needs to be considered alongside wider state provision in the UK to support injured personnel after they leave service. The special circumstances of those personnel who might choose to live permanently outside the UK soon after discharge where similar support might not be available should be taken into account in the Scheme on a discretionary basis.

### **Conclusion**

While the Scheme remains fundamentally sound, the steps outlined above would amount to significant improvements to the Scheme in recognition of the unique nature of military service in the UK Armed Forces. If these recommendations are adopted as a package then I judge that the AFCS will be fit for purpose in light of experience to date. While future reviews of particular aspects of the Scheme cannot be ruled out, a more fundamental review of the Scheme should not be required.

I recommend that the CAC, enhanced with an independent medical sub-group, should be charged with advising on the extensive detailed work that will be necessary to turn these high level recommendations into the required legislation and guidance, and with monitoring the implementation of the Review's recommendations. The chairman of the independent medical expert group should become a member of the CAC and this strengthened CAC should be the route through which any further reviews of aspects of the Scheme which might be required are conducted. I would envisage that the CAC could then fulfil a role similar to that undertaken by the ISG that has supported this Review.

The Recommendations I have proposed have been developed with the very close involvement and unanimous support of ISG members who have stressed that the Recommendations should be viewed as a balanced package of measures to be applied in their entirety. I fully endorse their view that these Recommendations should not be subject to any form of "cherry-picking", as to do so would unbalance the overall package, which the ISG would then be unable to support.

This Review has been developed at pace but with rigour. I recognise that considerable

effort will be required to translate the recommendations into the detail that will be required before the necessary amending secondary legislation can be made. The MOD will therefore need to manage expectations accordingly. Not all of the steps proposed in this Review, however, require legislative changes to be in place before changes can be made. This is especially the case in relation to the significantly improved communication, awareness and support that should be made available to Service personnel from the Chain of Command and the SPVA in making claims under the Scheme, which should be implemented as soon as possible. I recommend the MOD provides a report on progress with implementing this Report's Recommendations within 12 months to the CAC.

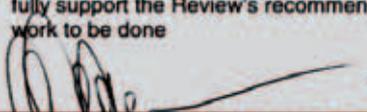
A handwritten signature in black ink, appearing to read 'Boyce', written in a cursive style.

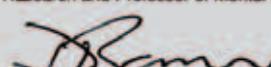
**Admiral the Lord Boyce GCB OBE DL**  
**Independent Chairman of the AFCS Review**

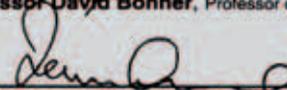
# Comment from the Independent Scrutiny Group

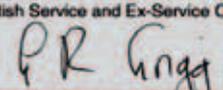
As the Independent Scrutiny Group formed to provide support and challenge to Admiral the Lord Boyce in his role as independent Chairman of the Ministry of Defence's Review of the Armed Forces Compensation Scheme, we confirm that we:

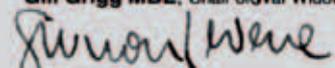
- are in full agreement with the analysis laid out in Lord Boyce's report
- are confident that all substantive input received by the Review team has been appropriately considered
- fully support the Review's recommendations as a package to be implemented in full including the further work to be done

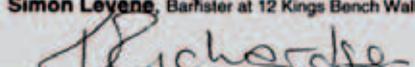
  
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**Professor David Alexander MA (Hons) C.Psychol PhD FBPS FRSM (Hon) FRCPsych**, Director of the Aberdeen Centre for Trauma Research and Professor of Mental Health in the Faculty of Health and Social Care

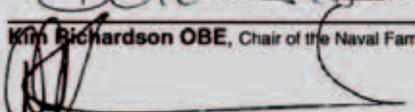
  
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**Professor David Bonner**, Professor of Law at the University of Leicester

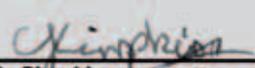
  
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**Lt Col Jerome Church MBE**, General Secretary of the British Limbless Ex-Service Mens Association, representing the Confederation of British Service and Ex-Service Organisations

  
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**Gill Grigg MBE**, Chair of War Widows Association of Great Britain, representing all Widows Associations

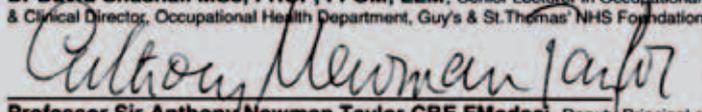
  
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**Simon Levane**, Barrister at 12 Kings Bench Walk Chambers

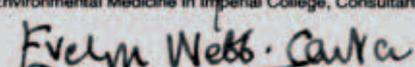
  
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**Kim Richardson OBE**, Chair of the Naval Families Federation, representing all Service Family Federations

  
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**Colonel David Richmond**, a serving member of the armed forces who suffered an AK47 bullet wound that shattered his femur in Afghanistan in June 2008 when Commanding Officer of SSCOTS

  
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**Chris Simpkins**, Director General, the Royal British Legion

  
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**Dr David Snashall MSc, FRCP, FFOM, LLM**, Senior Lecturer in Occupational Medicine, King's College London; Honorary Consultant & Clinical Director, Occupational Health Department, Guy's & St.Thomas' NHS Foundation Trust

  
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**Professor Sir Anthony Newman Taylor CBE FMedsci**, Deputy Principal of the Faculty of Medicine, Professor of Occupational and Environmental Medicine in Imperial College, Consultant Physician at Royal Brompton Hospital

  
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**Major General Sir Evelyn Webb-Carter KCVO OBE DL**, Controller of the Army Benevolent Fund, representing the Confederation of British Service and Ex-Service Organisations

# Armed Forces Compensation Scheme Review: Main Report

## Chapter 1: Introduction

### Background to the Armed Forces Compensation Scheme

- 1.1** This chapter sets out the background to the Armed Forces Compensation Scheme (the AFCS or ‘the Scheme’) and this Review, including its Terms of Reference. It describes how the Review has been structured and the approach used to generate the options that have been considered, how they have been analysed, and the recommendations that have been formulated.
- 1.2** During the 1990s the Ministry of Defence (MOD) and the then Department for Social Security, now Department for Work and Pensions (DWP), started to examine the pensions and compensation arrangements for Service personnel and especially those who are injured, made ill or who die<sup>1</sup> as a result of their military service. A joint review was launched in 1999, and a joint consultation document was published in 2001. The Pension and Compensation arrangements for the Armed Forces became the sole responsibility of the MOD in 2002. That review culminated in the passage of new primary enabling legislation: the Armed Forces Pensions & Compensation Act 2004. The detailed scheme rules were published in secondary legislation and the AFCS came into effect for injuries caused or made worse by service on or after 6 April 2005.

- 1.3** The Scheme introduced a number of significant changes on the previous arrangements under the War Pension Scheme. These changes reflected contemporary best practice in relation to disability, by supporting and encouraging people to look forward in their lives following illness or injury. The Scheme aims to achieve this by making, wherever possible, early full and final awards. For the first time payments were made for injuries while personnel were still in service. Under the previous arrangements, individuals could only bring a claim for a War Pension on leaving the Armed Forces, which might be some years after the injury had occurred. If the injury had healed and left no lasting disablement then no War Pension was payable. In addition, the War Pension Scheme could act as a disincentive to engage in treatment, as payments decreased if an individual’s condition improved. The AFCS was designed to avoid this effect.

### Lump Sums

- 1.4** The AFCS uses a tariff-based approach to determine the amount of lump sum payment to be made to reflect the pain and suffering arising from the injury. These tariff levels are set along the lines of the civil courts in negligence cases and the Criminal Injuries Compensation Scheme in the UK. When first introduced in 2005, the 15 tariff levels ranged from tariff level 15 of £1,050 for minor injuries to tariff level 1 of £285,000 for the most serious.

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<sup>1</sup> throughout this report where references are made to “injured”, “injury” or “injuries”, this includes illness and death

## Income Stream

- 1.5** For the more seriously injured, the Scheme also provides a tax-free index-linked Guaranteed Income Payment (GIP) as an enhancement to any ill-health pension payable under the Armed Forces Pension Scheme. The level of GIP is dependent on the seriousness of the injury and is paid at a rate of 30%, 50%, 75% and 100% reflecting the potential impact of the injuries on an individual's capacity to take up alternative employment after leaving military service.
- 1.6** Unlike many other forms of compensation, AFCS awards are not reduced because of other public sector benefits an individual may receive, though elements of public sector benefits may be reduced as a result of an AFCS award.

## Survivors' Benefits

- 1.7** In the case of death due to service, an index-linked Survivor's GIP (SGIP) is payable to widows<sup>2</sup>, widowers, civil partners, or eligible partners, and Child Payments paid to eligible dependant children. The SGIP is taxable, but is calculated in such a way as to make an element of the award effectively tax free.

## Recent Improvements

- 1.8** In 2008, all lump sum awards were increased. The payments made for the most serious injuries were doubled up to a maximum of £570,000, and the remainder of the lump sums were increased at varying levels down to 10% for the least serious injuries.
- 1.9** Later that year, the rules governing the lump sum amounts payable when a number of injuries are sustained in a single incident were changed so that those in the 100% GIP Band would receive the full

amount for all of their injuries up to the maximum award of £570,000.

- 1.10** As a result of these changes someone with the most serious injuries might receive, by way of tax-free lump sum and tax-free and index-linked GIP, around £1.5 million over a lifetime.

## Genesis of this Review

- 1.11** The MOD planned to conduct a review of the Scheme during 2010 after the first five years of operation of the Scheme. This timeframe had been selected as individuals currently have five years to bring a compensation claim (except in certain circumstances), so complete data for the first year of claims will not be available until that point.
- 1.12** As a result of extensive public interest in the Court of Appeal hearing held in July 2009 in the case of Duncan & McWilliams, the Secretary of State for Defence announced that he was bringing forward the planned five year review to 2009. The judgement in that case was handed down in October 2009 which provided important clarity on how the Scheme should operate. In that judgement, Lord Justice Carnwarth stated:
- 1.13** "[t]he Secretary of State was in my view entirely justified in bringing the appeal. It seeks to clarify some important and difficult issues relating to the construction of the Scheme".
- 1.14** This Review has examined the issues arising from the Court of Appeal judgement, alongside a broader range of issues as set out in the Review Terms of Reference.

## Review Terms of Reference

- 1.15** Parliament was informed of the Terms of Reference of the Review through a Written Ministerial Statement on 22 October (Hansard Column 66 WS), which is reproduced in the box on the right.

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<sup>2</sup> Hereafter, 'widow' or 'widows' refers also to widower(s), civil partner(s) or eligible partner(s).

## Armed Forces Compensation Scheme Review (Hansard Column 66 WS, 22 October 2009)

Today the Ministry of Defence enters the next stage of the review of the Armed Forces Compensation Scheme that was brought forward from 2010, as announced by the Defence Secretary in July of this year.

The terms of reference for the review are as follows:

- to examine whether the fundamental principles of the Scheme remain valid;
- to evaluate how successfully the Scheme in its current form gives effect to these principles;
- having regard to fairness, feasibility, sustainability and ease of administration, to make recommendations on any modifications that are required to ensure that the Scheme is fit for purpose.

The Review will be undertaken by the Ministry of Defence under the leadership of an independent chairman, Admiral the Lord Boyce, who will determine the Review recommendations. It will report to the Defence Secretary and be published by him, with an indication of the steps which he intends to take as a result of the Review.

An Independent Scrutiny Group has been established with representatives of Service and Ex-service Organisations, Service families' representatives, and medical, academic and legal experts, from whom the independent chairman and the Department will take advice as the Review progresses.

The aim is for the Review to report within a few months.

The Review will look at a range of issues including (but not limited to):

1. The fundamental principles underlying the compensation scheme
2. The overall level of compensation, including for dependants
3. What the compensation is for and its relationship with other state benefits

4. Comparisons with other compensation in the UK and internationally
5. Issues raised by the Court of Appeal judgment
6. The circumstances of injury, illness or death
7. The claims and adjudication process
8. The burden and onus of proof
9. The time limit on claims and the treatment of deterioration
10. The compensation paid for mental illness
11. The compensation paid to individuals with multiple injuries

The membership of the Review's Independent Scrutiny Group is as follows:

**Admiral the Lord Boyce GCB OBE DL** (Former Chief of the Defence Staff), **Major General Sir Evelyn Webb-Carter KCVO OBE DL** (Controller of the Army Benevolent Fund, representing the Confederation of British Service and Ex-Service Organisations), **Lt Col Jerome Church MBE** (General Secretary of the British Limbless Ex-Service Men's Association, representing the Confederation of British Service and Ex-Service Organisations), **Chris Simpkins** (Director General, the Royal British Legion), **Colonel David Richmond** (a serving member of the Armed Forces who suffered an AK47 bullet wound that shattered his femur in Afghanistan in June 2008 when Commanding Officer of 5SCOTS), **Kim Richardson OBE** (Chair of the Naval Families Federation, representing all Service Family Federations), **Gill Grigg MBE** (Chair of War Widows Association of Great Britain, representing all Widows Associations), **Professor David Bonner** (Professor of Law at the University of Leicester), **Simon Levene** (Barrister at 12 Kings Bench Walk Chambers), **Professor Sir Anthony Newman Taylor CBE FMedsci** (Deputy Principal of the Faculty of Medicine, Professor of Occupational and Environmental Medicine in Imperial College London, Consultant Physician at Royal Brompton Hospital), **Dr David Snashall MSc, FRCP, FFOM, LLM** (Senior Lecturer in Occupational Medicine, King's College London; Honorary Consultant & Clinical Director, Occupational Health Department, Guy's & St. Thomas' NHS Foundation Trust), and **Professor David Alexander MA (Hons) C.Psychol PhD FBPS FRSM (Hon) FRCPsych** (Director of the Aberdeen Centre for Trauma Research and Professor of Mental Health in the Faculty of Health and Social Care, Robert Gordon University, Aberdeen).

## Structure of the Review and Approach

- 1.16** The Review has been conducted by an internal MOD team under the independent chairmanship of former Chief of the Defence Staff, Admiral the Lord Boyce. The internal MOD team has been led by Mr Peter Davies, the senior civil servant who has had policy responsibility for the AFCS since 2005, supported by team members drawn from the policy staff under the Deputy Chief of Defence Staff (Personnel), from the 3 single Services, from the MOD's Central Legal Services, and from the Service Personnel and Veterans Agency (SPVA) which administers the Scheme. It has also drawn substantially on the expertise of the Senior Medical Policy Adviser to the Deputy Chief of Defence Staff (Personnel).
- 1.17** The independent Chairman and the MOD's internal Review team have benefited from the support, advice and challenge from the members of the Independent Scrutiny Group (ISG). Additional expert advice was sought where necessary to inform the Review's deliberations.
- 1.18** Following the publication of the Review's Terms of Reference on 22 October 2009, the Review team sought comments from a wide range of stakeholders on the existing Scheme and invited contributions through a four-week public engagement phase which ended on 19 November 2009. The Review held Focus Groups with Service personnel and families from the Royal Navy and Royal Marines, the Army and the Royal Air Force, including injured personnel currently undergoing treatment at the Defence Medical Rehabilitation Centre at Headley Court. These Focus Groups were conducted by members of the internal MOD team, with members of the ISG in attendance where possible, to hear at first hand the issues being raised and to observe the approach being taken. Members of the ISG also took their own soundings as required to ensure they were able to properly contribute to the Review. In addition to the Focus Groups, around 200 written responses were submitted to the Review from the public, veterans, Service personnel and their families and carers, organisations which support personnel in making claims for AFCS awards, and from those involved in the independent Tribunals which hears appeals in relation to AFCS awards. The internal Review team ensured that contributions were obtained from both Regular and Reserve personnel and their families and also spoke to Cpl Duncan and Mne McWilliams who were involved in the Court of Appeal case. A summary of the responses received from the public engagement phase can be found at Annex A to this report.
- 1.19** The internal MOD team prepared material and generated a range of options for each of the 11 issues being considered by the Review and published with the Terms of Reference, drawing on the points raised during the public engagement phase. The options were shared with the Chairman and the members of the ISG, and discussed and debated with rigour through seven substantive meetings of the Group, and through correspondence. The options were evaluated against the (revised) Scheme principles to ensure that the Scheme and any proposed amendments to it would deliver the over-arching intent of the Scheme.

# Chapter 2:

## The Issues

**2.1** This chapter sets out for each of the issues considered during the Review:

- the relevant Background
- Options considered and Analysis
- Recommendations

### **Issue 1 – The fundamental principles underlying the compensation scheme**

#### ***Background***

**2.2** The Scheme principles were originally published in March 2001 as part of the joint MOD/DWP compensation review consultation document that ultimately led to the Armed Forces Pensions and Compensation Act 2004. The principles were:

- **Fairness.** The arrangements should guarantee a fair deal for all those who are entitled to compensation, and should in particular give due recognition to the needs of those most seriously disabled.
- **Simplicity.** The arrangements should be simpler to apply and to administer [relative to the old Scheme], and easier for claimants to understand, the aim being that decisions on claims should in most cases be taken within a few weeks of their submission.
- **Modernity.** The arrangements should as far as possible meet the best modern standards for compensation schemes.
- **Security.** Compensation should be fixed at realistic levels, and for those most seriously injured who may be unable to work again should provide lifetime financial support.

- **Employability.** At the same time, awards should not act as a disincentive to those who are able to work. Work for those who can; security for those who can't.
- **Human Rights and Fairness at Work.** The arrangements should be consistent with the Government's commitment to human rights and to being a modern and fair employer.
- **Affordability.** The arrangements should be cost effective, affordable and fair also to the taxpayer.

#### ***Options and Analysis***

**2.3** The Review considered whether these principles remained appropriate. The Review found that some of the intentions behind the principles were not properly conveyed with the current language, especially in relation to "simplicity" and "modernity". Given that any scheme for no-fault compensation for the Armed Forces would need to take in to account a very wide range of circumstances and types of illness and injury, it was felt that the principle of "simplicity" risked an over-emphasis on ease of administration at the expense of appropriate compensation reflecting the diversity of injuries that might arise and their impact on claimants.

**2.4** The current language does not make explicit reference to all of the underlying principles within the Scheme. For example, the Scheme seeks to ensure that most benefit goes to those with the most serious injuries or illness. Further, the purpose of the Scheme is to provide financial compensation to acknowledge the scale of the injury and to provide long

term financial security for those whose injury will mean their capacity to work is totally or partially curtailed.

- 2.5** The Review has considered adding some principles, such as “transparency”. This would indicate that one of the goals is for claimants and others to understand more easily what their overall compensation package is worth, especially in relation to the Guaranteed Income Payment, and for them to have better visibility of the claim process and the progress of their claim through it.
- 2.6** Similarly, the principles do not make explicit the role played by the public sector more widely and the Nation as a whole in supporting those who are injured, made ill or who die as a result of service through provision of health, social care, welfare and housing. As the 2008 Service Personnel Command Paper acknowledged, it is the role of the Nation and not just the MOD to provide appropriate support to all Service personnel, their families, and veterans including those injured as a result of their service in the Armed Forces.
- 2.7** The Review also considered whether an alternative approach was appropriate which moved away from the principle that other parts of the state played their part in supporting those injured or made ill through service. Such an approach would mean funding healthcare and other support through the Scheme once personnel left military service, instead of drawing on the support of the NHS and Local Authorities. The Review recognised that such a change would represent a significant departure from the wider social health and welfare provisions that have been available for all, including veterans, that successive governments have endorsed in the UK since 1948. Those provisions are based on ensuring all citizens have access to best practice medical treatment and care sustained over a lifetime, with equity for all citizens based on need and regardless of background or other factor.

- 2.8** Recognising the unique nature of military service, veterans requiring treatment in England, Wales and Scotland for a condition that a clinician suspects has been caused by service have priority access to secondary care in the NHS, subject to the clinical needs of others. Separate arrangements apply in Northern Ireland to ensure equitable access to all parts of the community there. Those members of the ISG with medical expertise noted that the care provided by the NHS, particularly for serious trauma cases, was more comprehensive than that which would be available in the UK from the private healthcare sector. The Review is aware of the substantial collaboration and coherent working across the public sector, including with the Department of Health and the devolved administrations, to ensure the transition from service to civilian care for affected individuals is as seamless as possible. The Review is aware that this is an evolving area, with further improvements planned.

## **Recommendations**

- 2.9** The original principles that guided the design of the AFCS remain broadly sound. However, greater clarification of the meaning behind some of the principles is needed, and some adjustment necessary to make explicit the relationship between the Scheme and other state provision and to ensure the basis of the Scheme and its operation are transparent. The Review therefore recommends that the Scheme should be designed to:
- **Be Fair.** The arrangements should guarantee a fair deal for all those who are entitled to compensation (i.e. those who have a legitimate expectation that compensation should be paid). The unique nature of military service should be reflected by the Nation’s continuing commitment to those who have been injured, with an appropriate recognition for their sacrifice which the 2008 Service Personnel Command Paper set out. The arrangements should deliver consistent and equitable outcomes, with due recognition to the needs of those most seriously injured who should

receive higher awards than those less seriously injured. It should be clear that consistent and equitable outcomes have been delivered.

- Be Understandable, Accessible and Transparent. Claimants should be able to understand the basic elements of the Scheme and the claims process. Transparency should be a key consideration, with widely available clear information and guidance enabling claimants to successfully access the Scheme. In particular, information concerning claimants' overall package (especially the Guaranteed Income Payment) should be straightforward and comprehensible to all. Decisions on claims will, in the majority of less serious cases, be taken within weeks or a few months of claim submission.
- Be Contemporary and Joined-up. The arrangements should reflect contemporary best practice in relation to disability, by supporting people to look forward in their lives, empowering them and enhancing their capability. Reflecting this ethos, the Scheme is one element in a co-ordinated range of services, benefits and programmes provided by the responsible government departments, devolved administrations and delivery agencies working together to maximise the individual's well-being.
- Provide Security. Compensation should be fixed at realistic and sustainable levels. For those most seriously injured who may be unable to work again after service there should be lifetime financial support and security.
- Encourage Employability. At the same time, as work is generally good for health and well-being, awards should not act as a disincentive to those who are able to work, or to engage in treatment.
- Be Compatible with Human Rights and Fairness at Work. The arrangements should be consistent with the

Government's commitment to human rights and to being a modern and fair employer.

- Be Sustainable. The arrangements should be sustainable, realistic and fair also to the taxpayer. This includes ensuring the arrangements are affordable.

## **Issue 2 - What the compensation is for and its relationship with other state benefits**

### **Background**

- 2.10** The AFCS is a no-fault scheme and therefore differs from a personal injury scheme in a number of ways. Having an AFCS award does not preclude an individual from bringing a negligence claim.
- 2.11** Damages in Personal Injury cases (for example, damages for negligence) are generally divided into two categories – non-pecuniary damages (payment for pain and suffering, and for loss of enjoyment of life) and pecuniary loss (loss of future earning and expenses incurred as a result of the injury).
- 2.12** Non-pecuniary damages are payment for the pain and suffering endured, past, present and future, and for the inconvenience and loss of enjoyment of life (often referred to as loss of amenity). The payment for pain and suffering is reasonable compensation for the claimant's actual and prospective bodily hurt, including that which derives from necessary medical care, surgical operations and rehabilitative treatment. Assessments under this category are objectively fair and, as far as possible, consistent between cases with broadly similar facts. Courts attempt to achieve consistency by applying Judicial Study Board Guidelines and the outcomes from previously reported cases. Damages are not recoverable for human emotions such as grief, distress or fear, but are recoverable in respect of distress associated with the injury.

- 2.13** The lump sum payable under the AFCS has been designed to reflect the pain and suffering element, but the changes made to the Scheme last year to double the highest lump sum awards means that they no longer reflect the equivalent awards available in the courts in a negligence claim. For the most serious injuries, the AFCS tariff levels are now significantly higher than the pain and suffering elements of an equivalent negligence claim (although at the lower end of the tariff, i.e. the amounts paid for less serious injuries, the differences might be small).
- 2.14** In civil awards, the emphasis of the payment for loss of amenity is on the reduction or elimination of ability to enjoy life and pursue enjoyable activities, as opposed to pain and suffering. For example, the courts may award more for a musician's loss of a finger where that individual's ability to play music was affected, rather than to an individual who did not have this hobby. Assessment is objective in so far as the claimant is compensated in respect of the fact of inability to enjoy life rather than specific individual case details or the litigant's perception. Damages under this category take account of age, where damages for an elderly person will generally be less than those payable to a young adult. Loss of amenity has been held to include inability to play sport, dependence on others, inability to offer expected caring services to a dependant, inability to lead the life a person wished to lead before the injury, sexual dysfunction and prejudice to marriage prospects. The AFCS does not provide a payment for loss of amenity and does not take into account factors such as the impact of the injury on an individual's profession or hobby.
- 2.15** Pecuniary loss in civil cases is calculated on the basis of actual financial loss including loss of earnings (both actual and loss of future earnings), medical and nursing expenses, cost of invalid diet, cost of special clothing, employment of extra household help and cost of convalescence. Damages are recoverable for gratuitously provided care and assistance, for example where a spouse has given up work to care for a severely injured partner.
- 2.16** Under the AFCS, all claimants receive a lump sum payment reflecting the scale of injury as a result of service, including associated pain and suffering, and those who are more seriously injured (tariff levels 1-11) receive a guaranteed income payment (GIP) based on the claimant's salary circumstances at the point of service termination. This tax-free index-linked GIP is paid from leaving service and for life to compensate for deemed future reduction or loss of earnings. The payments are not intended to pay for care provided by the public sector in the UK.
- 2.17** In addition to these payments, AFCS recipients can access civilian social security benefits and related programmes and schemes, such as Disability Living Allowance, care and mobility allowances, Employment and Support Allowance and its associated programmes, aids and appliances, and adaptations via Disabled Facilities Grants. Priority access to NHS secondary care is also provided to AFCS recipients for the accepted condition as well as to all veterans where the clinician considers that the condition might be due to service.
- 2.18** In recent years, in recognition of the lack of an obvious dividing line between health and social care needs, local authority social services and health Trusts have been working together using pooled budgets and joint commissioning, with clients needs being jointly assessed. Social care, both residential and in the community, has traditionally been means tested with variation across the country. In October 2008, a single National Framework for NHS continuing health care was introduced in England so that if an individual's primary needs are health needs, their assessed health and social care needs are funded by the NHS. AFCS (and other compensation) is disregarded for NHS continuing healthcare purposes. The Devolved Administrations have similar arrangements, although with their own policies on eligibility.

**2.19** In 1942, Sir William Beveridge made the NHS and local authorities the principal route to health and social care for those injured and made ill by their service to the country. The 2008 Command Paper titled 'The Nation's Commitment: Cross-Government Support to our Armed Forces, their Families and Veterans' reaffirmed that cross-Government commitment and already some easements ("special recognition") have been arranged for certain AFCS recipients, including:

- for very seriously injured medical discharge cases, the Department for Work and Pensions will use MOD evidence for assessment for Employment and Support Allowance.
- A new arrangement is in place for the more seriously injured AFCS award holders whose mobility has been compromised to have life-long automatic renewal of their Blue Badges.
- For those most seriously injured with AFCS awards in tariffs 1-6, AFCS awards are disregarded in relation to the normal means testing used for Disabled Facilities Grants.
- Access to specially adapted social housing.

**2.20** Some veterans may have a need for personal care and support, for some from service termination and for others with ageing. Reform of care and support is a key issue. In July 2009, the Department of Health published the Green Paper *Shaping the Future of Care Together*, which sets out the Government's vision for a National Care Service for all adults in England, which is fair, simple and affordable for everyone, underpinned by national rights and entitlements and personalised to individual needs. The Department of Health has consulted widely on this reform and responses will inform a White Paper to be published this year.

## ***Options and Analysis***

### **Loss of amenity and Loss of future earnings**

**2.21** The Review noted that the lump sum awards in recognition of the severity of injury and associated pain and suffering was substantially higher for the more serious

injuries in the AFCS than that suggested by the Judicial Studies Board Guidelines for pain and suffering in negligence claims.

**2.22** The Review considered whether additional compensation should be available to take account of those additional elements a civil negligence award might also provide, and in particular those elements based on personal characteristics or individual circumstances, such as loss of amenity. The Review examined whether the tariffs for the lump sum and the formula for calculating GIP should be replaced with personal based assessments with, for example, the GIP level being calculated in the same way as loss of earnings in a personal injury negligence claim where there would be a projection of future salary on a personalised basis.

**2.23** In evaluating these options, the Review noted that ensuring consistency of decision-making could be made difficult and possibly deviate or detract from the Scheme principles of fairness and transparency, as it introduces a personal dimension to the calculation. In those circumstances the Scheme could be criticised as it would be difficult to explain why two individuals of the same age, level of injury and salary on leaving the Service would receive different awards because of some other attribute (perhaps a promotion foregone in one example but not the other, or some other attribute not linked to service). The MOD would not be able to disclose the personal factor that created such a difference for confidentiality reasons.

**2.24** The Review considered whether such an approach was compatible with the revised Scheme principles in relation to fairness, transparency and being understandable and concluded that personal based assessments linked to future career potential, or attributes of a personal nature (such as loss of amenity), might cause perceived inequities between individuals. The Review did, however, examine an alternative approach to assessing future loss of earnings through introducing some factors which, while not based on personal circumstances, would take into account some of these factors. In particular, potential promotions foregone while still in service, and future

loss of earnings in a second or third career. This is discussed further under *Issue 3 – the overall level of compensation, including for dependants.*

## Relationship with other state provision

**2.25** The Review has examined how AFCS lump sum and GIP awards (and the ill-health pension from the Armed Forces Pension Schemes) interplay with other state provision especially in relation to housing and care costs. The table below summarises the main inter-relationships:

State provision which is (i) not means tested or (ii) where it is means tested, disregards AFCS	State provision which is means tested and does not disregard AFCS in that means test
<p><b>Disability Living Allowance Personal Care.</b> Paid at three rates.</p> <p><b>Lower: £18.65 pw</b> - if you need help or supervision for some of the day or you are unable to prepare a cooked main meal.</p> <p><b>Middle: 47.10 pw</b> - if you need help with personal care frequently or supervision continually throughout the day only, or help with personal care or someone to watch over you during the night only, or someone with you while on dialysis.</p> <p><b>Higher: £70.35 pw</b> - if you need help or supervision frequently throughout the day and during the night.</p>	<p><b>Income related Employment and Support Allowance</b></p> <p>Paid to those with limited capability for work. Basic benefit varies according to whether single or has partner. No additional sums for children. On the 'needs' side of the balance sheet, if one also has limited capability for work-related activity, one will receive a support component on top of basic benefit. If one does not have limited capability for work-related activity, one will receive a less generous work-related activity component, subject to being involved in a range of activities relevant to equipping one to better move into work in due course. Adds extra weekly amount for carer, or for severe or enhanced disability. Mortgage interest also added in. On the 'resources' side, £10 pw of GIP is disregarded; excess over this amount is taken into account. AFCS lump sum counts as capital if not put in trust. Capital over £16,000 precludes entitlement.</p>

**State provision which is (i) not means tested or (ii) where it is means tested, disregards AFCS**

**Disability Living Allowance Mobility.**

To be eligible for this allowance, your disability must be severe enough for you to have any of the following walking difficulties, even when wearing or using an aid or equipment you normally use:

- you are unable or virtually unable to walk, or you have no feet or legs;
- you are assessed to be both 100% disabled because of loss of eyesight and not less than 80% disabled because of deafness and you need someone with you when you are out of doors;
- you are severely mentally impaired with severe behavioural problems and qualify for the highest rate of Care component;
- the effort of walking could threaten your life or seriously affect your health;
- you need guidance or supervision from another person when walking out of doors in unfamiliar places.

There are two rates of the mobility component depending on how your disability affects you:

- the lower rate, if you need guidance or supervision out of doors;
- the higher rate, if you have any of the other, more severe, walking difficulties.

You are automatically eligible for a Blue Badge if you are over two years old and either:

- receive the higher rate of the mobility component of Disability Living Allowance;
- are registered blind.

**State provision which is means tested and does not disregard AFCS in that means test**

**Income Based Jobseeker's Allowance (IBJSA).**

Availability for work requirement takes account of physical and mental disability in allowing restrictions to be imposed on the claimant's availability for work. Various 'needs' are taken into account: total basic benefit (variable according to age and family circumstances), weekly amount for carer or disabled person in family unit, and mortgage interest. On the resources side £10 pw of GIP is disregarded. Excess over this amount is taken into account. AFCS lump sum counts as capital if not put in trust after 52 weeks. If placed in a Personal Injury trust fund, any income derived from the trust is fully disregarded. Capital over £16,000 precludes entitlement.

**Income Support.**

This is a benefit for those on low incomes who neither have limited capability for work (the province of ESA) nor are required to sign on as unemployed (the province of JSA) e.g. single parents, carers. Income Support is made up of a number of components: the Basic Personal Allowance varies according to whether one is single, has a partner and/or children. A range of premiums (e.g. carer, disability) are payable. Mortgage interest and other eligible housing costs (not rent or council tax) are also payable. On the resources side, £10 pw of GIP is disregarded, excess over this amount is taken into account. AFCS lump sum counts as capital unless put into trust. Capital over £16,000 precludes entitlement.

**Independent Living Fund.**

Pays agency or wages of a privately employed personal assistant up to £450 pw. Means-tested, affected by capital (including that of a partner) over £23,000.

State provision which is (i) not means tested or (ii) where it is means tested, disregards AFCS	State provision which is means tested and does not disregard AFCS in that means test
<p><b>Disabled Facilities Grant.</b> Will pay for adaptations to one's accommodation up to a maximum level of £30,000 in England, although this can be increased at the local council's discretion. Means tested but AFCS awards at levels 1-6 disregarded.</p> <p><b>Motability.</b> Will provide a car with adaptations if necessary for those in receipt of DLA higher rate mobility. The Motability Scheme can help with leasing or buying a car if in receipt of the higher rate of the mobility component of Disability Living Allowance (DLA). Even if one does not drive oneself, one can apply for a car as a passenger and propose two other people as drivers.</p> <p><b>Carer's Allowance.</b> Paid to carer (typically spouse, partner or relative), of £53.10 pw. Not affected by AFCS but subject to means-testing of carer.</p> <p><b>Contributory Employment and Support Allowance (CESA).</b> Paid to those with limited capability for work who meet contribution conditions. No additional sums for partner or children. If one also has limited capability for work-related activity, one will receive a support component. If one does not have limited capability for work-related activity, one will receive a lower work-related activity component, subject to being involved in a range of activities relevant to equipping the person to better move into work in due course. Indefinite awards subject to continuing to have limited capability for work.</p>	<p><b>Housing Benefit.</b> Will pay all or part of net rent. Those entitled to Income Support, income related Employment and Support Allowance or income-based Jobseeker's Allowance are automatically 'passport' to full entitlement (i.e. they don't need to make a separate claim). Otherwise capital of more than £16,000 precludes entitlement. AFCS lump sum ignored if put in trust. GIP in general not disregarded, but there is a £10 pw disregard of GIP. <i>AFCS may be disregarded on a discretionary basis by local councils.</i></p> <p><b>Council Tax Benefit.</b> Will pay all or part of Council Tax. Same rules as Housing Benefit as regards AFCS, i.e. <i>No statutory requirement to disregard, but it may be disregarded on a discretionary basis by local councils.</i></p> <p><b>Personal care at home.</b> Currently means tested in England. Current consultation on provision of personal care at home to be free on the same basis as residential NHS continuing healthcare.</p> <p><b>Cost of attendance for medical treatment.</b> Full travel costs if one has low income. No statutory requirement for AFCS to be disregarded, <i>but AFCS may be disregarded on a discretionary basis by PCTs.</i></p> <p><b>Working Tax Credit.</b> Income-related form of support for those on low wages and working at least a set number of hours per week. AFCS lump sum irrelevant. Survivor's GIP and child's payments under AFCS are not disregarded, subject to a £300 disregard with respect to the total of relevant pension payments (state, occupational, personal). <i>Other GIP payments do not count as income.</i></p>

State provision which is (i) not means tested or (ii) where it is means tested, disregards AFCS	State provision which is means tested and does not disregard AFCS in that means test
<p><b>Contribution-based Jobseeker's Allowance (CBJSA).</b> Availability for work requirement takes account of physical and mental disability in allowing restrictions to be imposed on the claimant's availability for work. GIP payments after a £50 disregard are taken into account. AFCS lump sum counts as capital and is wholly disregarded for CBJSA. If placed in Personal Injury trust fund any income derived from the trust is fully disregarded.</p> <p><b>NHS continuing health care.</b> Health and social care for those with the most severe injuries, where their primary needs are health needs. Both the health and social care services are free to the individual. This applies in England with equivalents in Scotland, Wales and Northern Ireland.</p> <p><b>Free medical prescriptions</b> for medication relating to the injury or illness for which one receives a GIP.</p> <p><b>Priority NHS care</b> for injuries which are the subject of an AFCS award.</p> <p><b>Vocational rehabilitation</b> provided by DH/DWP 'Pathways to Work'.</p> <p><b>Specially adapted housing.</b> Seriously injured veterans are given statutory priority for adapted social housing in England. In Scotland and Wales, guidance has been issued to the effect that a high priority should be given to injured veterans. Lump-sum compensation payments disregarded for purposes of the capital means test for the affordable homes scheme.</p>	<p><b>Child Tax Credit.</b> Income-related form of support for people responsible for a child or a young person under 20 still in non-advanced education or approved training. AFCS lump sum irrelevant. Survivor's GIP and child's payments under AFCS not disregarded, subject to a £300 disregard with respect to the total of relevant pension payments (state, occupational, personal). <i>Other GIP payments do not count as income.</i></p>

- 2.26** As described under *Issue 1 – fundamental principles underlying the compensation scheme*, the Review examined whether separate provision for health and social care should be made for those injured as a result of service. The Review concluded that the cross-Government approach was the most appropriate to ensure that those injured as a result of service, especially as they aged, benefit from sustained mainstream arrangements based on best practice approaches with appropriate governance. Especially for that small absolute number of very severely injured personnel with awards at the highest levels, the medical experts on the Review took the view that private care providers are not well placed to provide the technically advanced interventions and 24 hour high dependency care which may be required. This is especially the case as such care may be necessary into the long-term for the increasingly complex traumatic injuries which are now compatible with survival. For those less severely injured, key elements of modern social welfare, such as vocational rehabilitation programmes where cash benefits are linked to skills and training, support people towards paid work are applicable. The Review has confirmed the relevance of these approaches to AFCS recipients and concluded that it is appropriate to explore the scope for extending further preferential access to these arrangements for certain groups of injured personnel.
- 2.27** The Review’s analysis suggests that there is not an entirely consistent approach in relation to how AFCS awards are taken into account in assessing eligibility to other means-tested public provision. In some instances, the lump sum is disregarded in all circumstances, in others it is disregarded only for the most seriously injured, while in other cases it is disregarded for those who place their lump sum into a trust fund. It should be noted that interest on AFCS lump sums is taxable.
- 2.28** The Review did, however, welcome the steps taken by local authorities in relation to disregarding AFCS payments when providing Housing Benefit and Council Tax support, and by primary care trusts

in relation to the cost of attendance for medical treatment. In these cases, local authorities and primary care trusts largely exercise this disregard as a matter of discretion.

## Recommendations

- 2.29** The AFCS, as a no-fault scheme, rightly needs to be considered alongside the other aspects of care and support available to personnel injured or made ill by their service, or to their survivor if they die as a result of service. The Service Personnel Command Paper published in July 2008 acknowledged two important themes: no disadvantage as a result of service, and an appropriate return for sacrifice. The latter principle led to some further preferential treatment or access for those in receipt of AFCS awards. The Review is aware of further improvements planned across Government and the Devolved Administrations to the transition of care and support for those being discharged from service.
- 2.30** The Review has examined the interplay between AFCS awards and other state provision, including the commitments made in the 2008 Service Personnel Command Paper, and recommends that further steps are taken to reduce the risk of different account being taken across the UK in relation to access to benefits and services. The Review particularly welcomes the commitment by the Department of Health and the Devolved Administrations on funding of personal care in cases of very serious injury or illness where the need arises directly for health reasons. Work to clarify the provisions and to confirm that the associated assessment and allocation process for personal care is covered by NHS priority, as it is for healthcare itself, should continue.
- 2.31** The Review was aware of the Consultation Paper, “The Nation’s Commitment to the Armed Forces Community: Consistent and Enduring Support” (CM7674) published in July 2009 about making the commitments in the Service Personnel Command Paper endure, including appropriate access to recourse mechanisms and an Ombudsmen

where the commitments appeared not to be delivered. These proposals will need to be turned into concrete measures.

- 2.32** As a result of these considerations, the Review recommends that the inter-relationship between AFCS awards and other state benefits and public services should be kept under review for the future and as and when wider provisions are being reviewed or refreshed. The ISG felt strongly that particular consideration should be given to AFCS awards being disregarded more widely than at present.
- 2.33** The Review does not recommend introducing AFCS awards that take account of personal factors, such as loss of amenity. The Review does, however, recommend changes to the way in which the GIP is calculated to take account of average in-service promotion expectations, as well as salary-earning opportunities after leaving the Armed Forces that may be foregone as a result of the injury. This is discussed further under Issue 3 – The overall level of compensation, including for dependants.

### **Issue 3 – The overall level of compensation, including for dependants**

#### ***Background***

- 2.34** No amount of money can ever adequately compensate for the consequences of injury, illness or death due to service. However, the improvements made in July 2008 to the lump sum awards paid under the AFCS were generally welcomed, particularly for the most serious injuries. No-one who has attended the AFCS Review Focus Groups, nor feedback from other sources, has called for the top lump sum award to be increased further, apart from in relation to the cap in multiple injury cases, where the Scheme currently limits awards to a single tariff level 1 award of £570,000. The Review was, however, asked by some contributors to consider whether the amount of lump sum available for significant head injury (especially when no other injuries are present) is adequate to compensate for

the profound changes in personality, double incontinence, sexual dysfunction, and the removal of prospects for marriage or a family life and other profound implications was fair. Other contributors requested that the level of compensation for damage to genitalia be reviewed to ensure that the psychological impact accompanying this injury is properly compensated. Other specific injuries have also been raised and are discussed further in this Report (Under Issue 12 -Other issues raised).

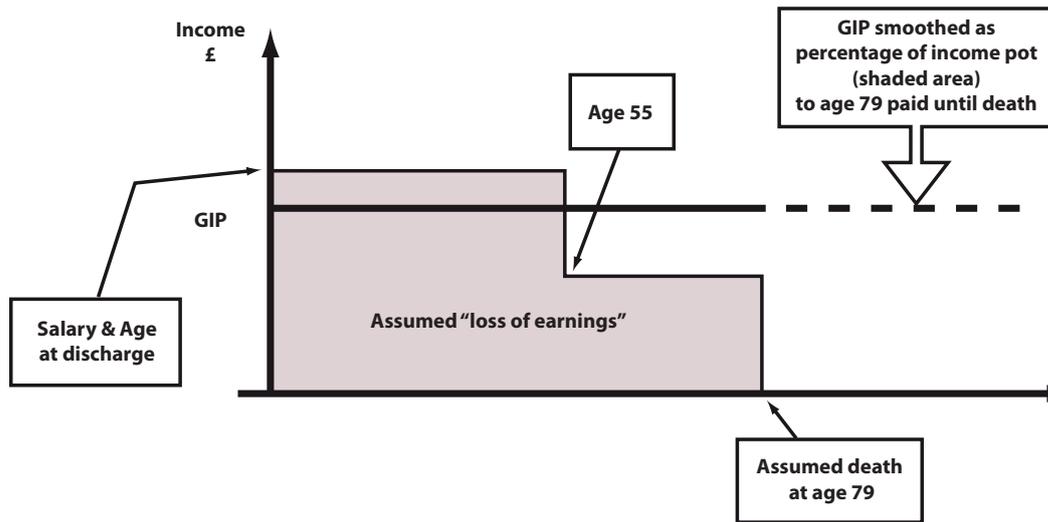
- 2.35** The total value of the compensation available under the Scheme is not well understood by Service personnel, or more generally by the public. The media have routinely ignored the significant value of the tax-free index-linked GIP over a person's lifetime, despite efforts to correct this. For the most seriously injured the total value of their award could amount to around £1.5 million over a lifetime.
- 2.36** Many stakeholders who have contributed to the Review have commented that the way the GIP is calculated is difficult to understand as it takes into account age, level of injury, and salary at service termination, and is adjusted (abated) by the level of ill-health and 'normal' pension the individual receives from the Armed Forces Pension Schemes so as to effectively act as an enhancement to the ordinary ill-health pension. It is further complicated for widows as it depends on their partner's Pension Scheme membership, although widows and eligible partners will continue to receive broadly equivalent benefits if they subsequently re-marry. The Review notes that the AFCS and Armed Forces Pension Scheme 75 (AFPS 75) rules concerning the benefits payable to eligible partners, and widows on re-marriage, where the death is due to service after 5 April 2005 needs to be amended to put the existing policy on eligible partners and widows benefits on re-marriage on a statutory basis.
- 2.37** The Review acknowledges that the GIP calculation is complex. The deemed loss of earnings calculation is based on the salary and age at discharge, the severity

of injury, and a number of factors. The factors are based on the following assumptions, as well as using a 3% discount rate to produce a net present value:

- a. the individual would have served to age 55 within the military, maintaining their level of salary at their current level at discharge; and

- b. the individual would receive a pension at 50% of the salary level up to an average age of death of 79.

**2.38** Taking all these into account, the GIP is then 'smoothed' over the lifetime of the individual so that there is no "cliff-edge" at age 55 when their level of income would otherwise drop by 50% when they move from salary to pension. This is illustrated below:



**2.39** It is important to recognise that the GIP is tax-free and index-linked, and takes into account the ill-health pension the individual will also receive from their Armed Forces Pension Scheme. In effect, the GIP is a top-up to enhance the ill-health pension in recognition that the injury was due to service so that it is above the level that someone leaving on ill-health grounds for an illness or injury not due to service would receive. Taking the ill-health pension into account is currently termed "abatement" in the Scheme and has led to some misunderstanding among those who have contributed to the Review.

(discussed further under Issue 10 – the compensation paid for mental illness), hearing loss, loss of the use of limbs, brain injury, and damage to the genitalia. In doing so the Review has benefited from the expertise of the medical and academic members of the ISG, as well as drawing on wider expertise.

### Options and Analysis

#### Tariff levels for the lump sum element of the AFCS

**2.40** The Review has examined a number of tariff values for a range of injuries that have been raised during the Review, including for the issues raised above, as well as for mental health illness/

**2.41** The Review re-examined the increases made to the tariff levels in 2008 and concluded that the top level of lump sum of £570,000 remained appropriate. The Review considered whether, in the case where an individual was in receipt of an award for multiple injuries caused in a single incident, the total award should be capped at the amount paid for a level 1 injury. The rationale for the 2008 change to the multiple injury rule was that there comes a point where the injuries sustained by an individual are the most profound and awards at that level should be the same in terms of lump sum and GIP. The Review concluded that the tapered effect of the increases

in last year's Service Personnel Command Paper (100% for the level 1-6 awards down to 10% for tariff level 15) was broadly correct, but that the distinctions between tariff 1 (£570,000), tariff 2 (£402,500) and tariff 3 (£230,000) were now too great. It considered whether additional increments should be introduced between tariffs 1-2 and 2-3, but concluded that while arithmetically possible, it would have introduced too fine a distinction between injuries that would be difficult to adjudicate between. Instead the Review concluded that the tariff values between 1-15 be adjusted.

**2.42** A small number of contributors during the public engagement phase of the Review commented that the Scheme should not pay out for minor injuries, and only pay compensation for those in tariffs 1-11. The suggestion was that savings here could be recycled elsewhere in the Scheme for the more seriously injured. The Review concluded that it remained appropriate to award modest levels of compensation for those in tariff levels 12-15, noting that other schemes, such as the Industrial Injuries Benefits Scheme and the Criminal Injuries Compensation Scheme in the UK, also made payments for non-trivial, but less serious, injuries.

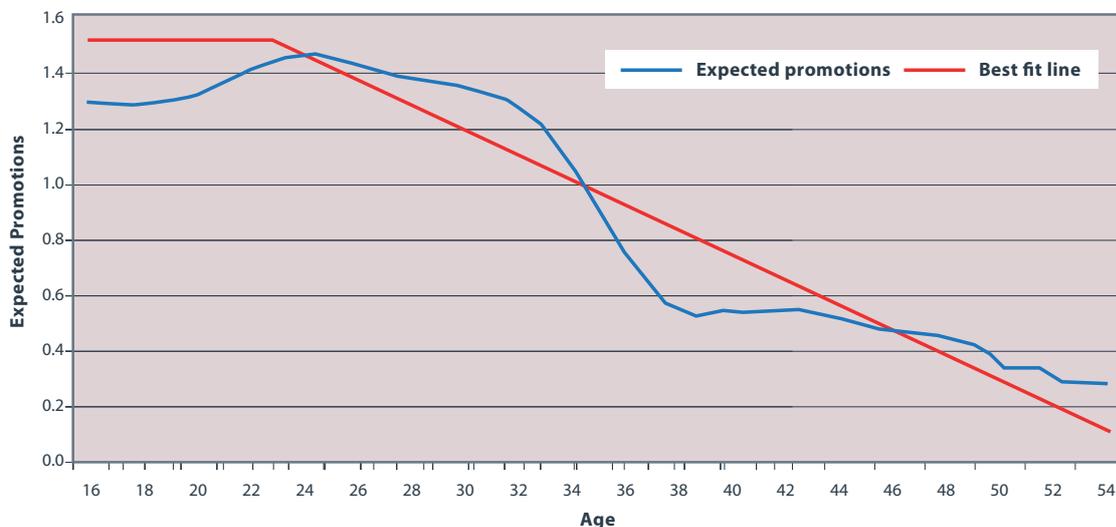
### The level of Guaranteed Income Payments, and Survivors' GIP

**2.43** The Review has examined a range of options to adjust the way in which the GIP is calculated. The GIP does not currently take into account the potential promotions foregone that might otherwise have been

achievable for an average individual, nor does it take into account the fact that had the injury not been sustained, an individual might have gone on to work up to state retirement age in a second or third career.

**2.44** One possibility would be to make a personalised assessment of where an individual would have reached by way of promotion. This approach, as it would be based on individual, private factors, would risk having two individuals of same age, salary and injury receiving different amounts of compensation from the AFCS. The Scheme would not be able to explain publicly why one individual was receiving more than the other because of confidentiality obligations. It could also produce lower values than the current approach as most personnel do not serve for long periods.

**2.45** Alternatively, some broad assumptions could be made to produce an average career progression factor for all individuals. For example, this could assume a "one to two ranks up" for younger personnel tapering to no further progression for those already around age 55 and therefore at the end of their career. Such a factor would be possible to produce, although it would make an already complex calculation even more difficult for individuals to understand. The Review has examined average career progressions in the Armed Forces on the basis of historical data available. The table below shows the number of promotions an individual could expect to reach for each age based on historical data provided by the MOD's Defence Analytical Services and Advice (DASA):



**2.46** Both approaches need to be set against the relatively beneficial assumption used in the current model. Armed forces pensions data shows that only around 13% of officers serve to age 55, and only 2% of Other Ranks reach that point. So while the current model does not cater expressly for promotions foregone while still in service, it assumes all individuals will serve up to age 55, when many personnel do not even have the opportunity to serve that long. For example, Other Ranks may be limited to no more than 22 years of service unless they reach a certain rank which permits them to serve to, or beyond, the 30 year point.

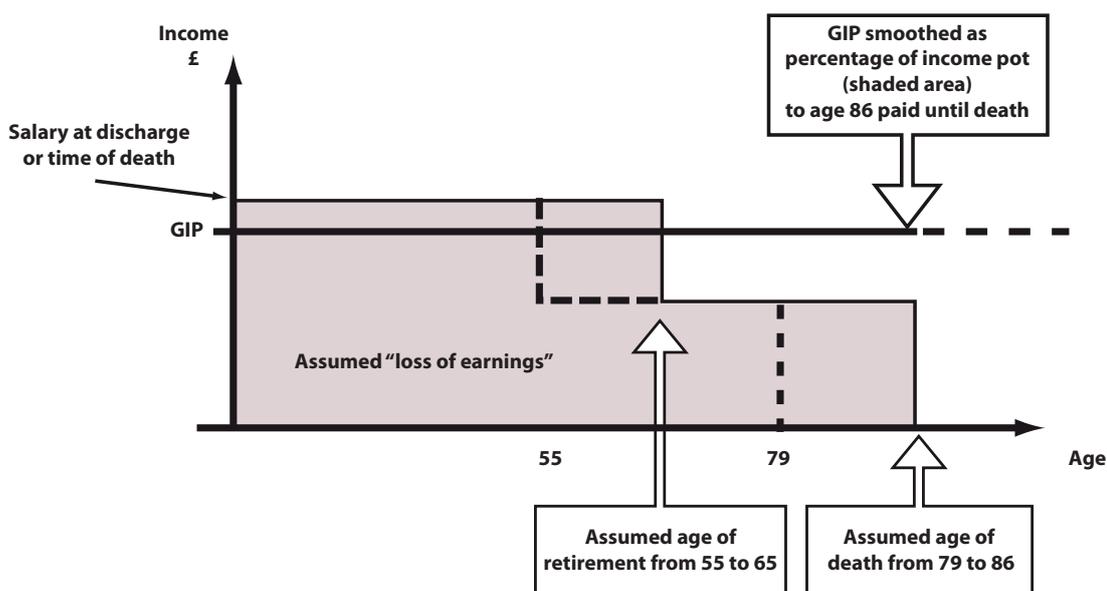
**2.47** It has been argued by many contributors to the public engagement phase of the Review that the assumption about age 55 is unfair, especially for those who are close to that point, as it does not take into account that most personnel, irrespective of age, on leaving the Service expect to work in subsequent careers to around age 65. Moving the assumed point at which the pension element starts from 55 to age 65 (the deferred pension age in the Armed Forces Pension Schemes) would lead to an increase in the level of GIP available to all individuals.

**2.48** As part of the Review, we have examined the basis of the assumptions underlying all the factors used to calculate GIP. The age of 79 for the average age of death was set in 1999. Mortality assumptions used by actuaries have increased significantly since then. For example, the normal mortality

figures in AFPS have increased twice since then and now stand at around age 89. The average age of death for ill-health pensions in AFPS now stands at around age 83. Given that nothing has changed to alter the underlying basis, the Review considers that the average age of death assumption for the AFCS should be increased to age 86 (the mid-point between the two assumptions mentioned above). It is important to note, however, that not all injuries in GIP territory will lead to reduced life expectancy. This element would lead to a small decrease in the GIP factor.

**2.49** The 3% discount rate used to calculate GIP was set at the rate at which the civil courts made assessments for loss of earnings on the future value of money. The courts have moved to using 2.5% for a number of years. Again, as nothing has changed to alter the underlying basis, the Review considers that the discount rate for this calculation should be adjusted to 2.5%. This element would also lead to a small decrease in the GIP factor.

**2.50** Taking together the changes in the assumptions (assumed retirement from 55 to 65, assumed average age of death from 79 to 86, discount rate from 3% to 2.5%, and a factor for promotions foregone) would potentially add more than 30% to the value of an individual's GIP. The changes would, however, have a rational basis and would be easier to explain than a personal-based GIP calculation.



- 2.51** The Review considered whether personnel or survivors should be able to convert (or commute) a proportion of their GIP (or SGIP) into a further lump sum. On the basis that the latest Armed Forces Pension Scheme does not allow ill-health pensions to be commuted, and recognising that the income stream was designed to provide for a reasonable level of income through life and the risk of insufficient income being available for that purpose later in life, the Review concluded that the Scheme should not offer this choice. The Review did, however, note that individuals were able on a personal basis, to convert lump sums into income streams, or income streams into lump sums from the commercial market place.
- 2.52** The Review examined the level of Bereavement Grants paid under the Scheme and noted that the purpose of the Grant was to offset the differential Death-In-Service lump sums available under the AFPS 75 and the Armed Forces Pension Scheme 05 (AFPS 05). Improvements were made in 2005 to increase the AFPS 75 Death-In-Service lump sum from circa 1.5 times pay to 3 times representative pay, and AFPS 05 provides 4 times salary. The Armed Forces Pensions Offer To Transfer exercise made clear that the differential Bereavement Grant was introduced to lessen the impact of the pension choice on dependants where death was due to service. The Review has noted that the Bereavement Grant levels do not take account of the situation of a mobilised Reservist who may have elected to remain in their civilian occupational pension scheme which might only provide a Death-In-Service lump sum of around 2 times salary. The Review has also noted that the levels of Bereavement Grant now need updating to reflect increases in salaries since the rate was set in 2005. Additionally, the Review examined whether a Bereavement Grant should be payable to the estate where there are no dependants to receive a Survivor's GIP. The Review ruled this out, noting in civil litigation, the English courts do not normally make payments to others than surviving dependants.
- 2.53** Some contributors to the Review had commented that the so-called "abatement" rules which take into account the level of occupational pension awarded to the individual was unfair. It is unfortunate that the language used when the Scheme was designed is negative in tone in this respect, as the Guaranteed Income Payment is an enhancement to the pension that the individual has accrued during their service. The Review also examined how the AFCS related to a Reservist who remained in their own civilian occupational pension arrangements.
- 2.54** Other contributors suggested that the hard linkage between tariff level and GIP band should be removed either for all injuries, or for particular injuries such as mental health, with separate decisions reached on each. Such an approach did not, however, draw universal support. The Review concluded that the scale of the injury, and its likely consequences on potential to work post-service, are determinable, certainly by the time the individual has reached the point of maximum medical improvement. It potentially could also lead to unfairness between individuals, and could become a disincentive to attempt to work again. The issues relating to mental health are discussed further under *Issue 10 – The compensation paid for mental illness*.

## **Recommendations**

### **Lump sum levels**

- 2.55** The Review does not recommend any change to the top level tariff 1 lump sum award of £570,000. The Review recommends that the following principles should be used to guide possible adjustments to the tariff:
- a. **The Severity of the Injury/Illness Incurred.** The difference between tariff levels must relate to the severity of the injury/illness incurred.

b. **Differences Between Tariff Levels Banding.** There is a clear difference between the banding of the tariff levels, which relate to the level of GIP awarded.

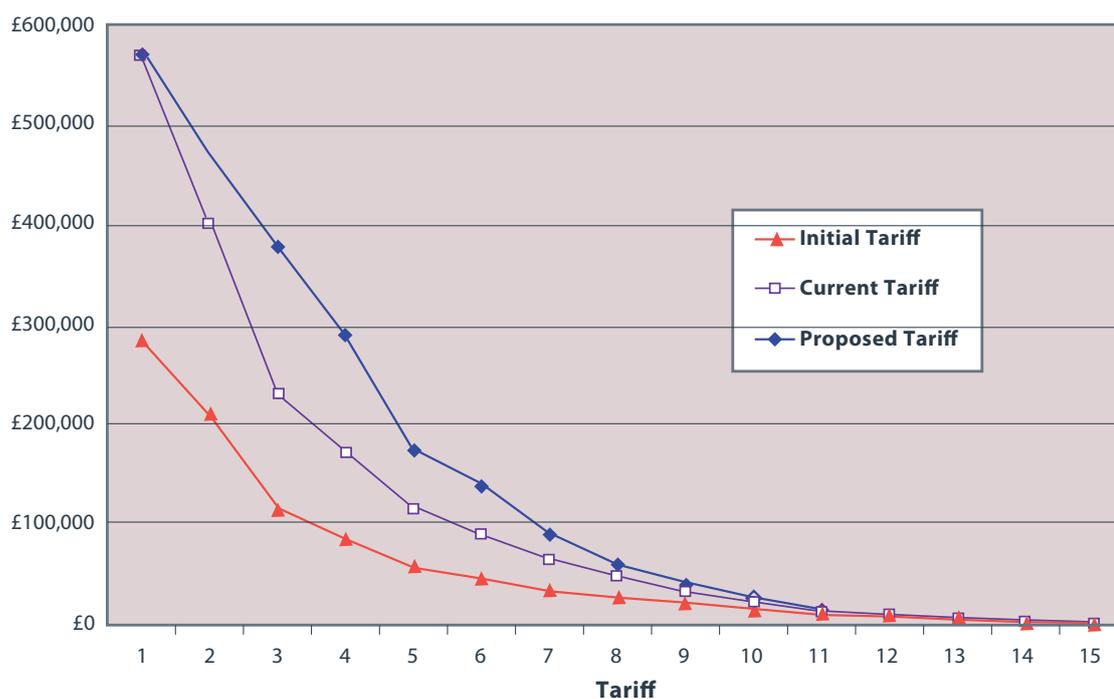
c. **Decreasing Tariff Level differences.** The difference between the tariff levels decreases as the tariff level increases, with the exception of the difference between tariff bands.

d. **Cap on Lump Sum Award.** There is a cap on the total level of award. Currently this cap is set at £570,000.

2.56 Using those principles, the Review recommends that the tariff levels should be adjusted as follows:

Tariffs	Current Level	Proposed Level	%age Change	Difference Between Tariffs	GIP Percentage
1	£570,000	£570,000	-	-	100% GIP
2	£402,500	£470,000	17%	£100,000	
3	£230,000	£380,000	65%	£90,000	
4	£172,500	£290,000	68%	£90,000	
5	£115,000	£175,000	52%	£115,000	75% GIP
6	£92,000	£140,000	52%	£35,000	
7	£63,825	£90,000	41%	£50,000	50% GIP
8	£48,875	£60,000	23%	£30,000	
9	£34,100	£40,000	17%	£20,000	30% GIP
10	£23,100	£27,000	17%	£13,000	
11	£13,750	£15,500	13%	£11,500	
12	£9,075	£10,000	10%	£5,500	No GIP
13	£5,775	£6,000	4%	£4,000	
14	£2,888	£3,000	4%	£3,000	
15	£1,115	£1,200	4%	£1,800	

This is represented graphically below:



- 2.57** In this table it may appear that there is a 'kink' in the reviewed lump sum amount at tariff level 5. This is to reflect the change in GIP band that takes place at this point on the tariff, reflecting bullet point b. in the above principles.

### **Guaranteed Income Payments & Survivor's Guaranteed Income Payments**

- 2.58** While the calculations relating to determining the level of the Guaranteed Income Payments (including Survivors GIP) are complex, including the interplay with any occupational pensions, the broad approach remains appropriate. Nonetheless, being able to explain in simple terms how the arrangements work, with appropriate guidance and support, is essential and needs to be developed. The Review recommends that the various factors should be adjusted to take account of changes since the Scheme was designed. The assumed average age of death should change from 79 to around age 86 to be mid-way between the normal mortality assumption and ill-health mortality assumptions in the Armed Forces Pension Schemes, noting that not all injuries in GIP territory will have an effect on life expectancy. The discount rate should change from 3% to 2.5%, reflecting the change in approach that the civil courts have adopted since the Scheme's original design.
- 2.59** Revising the way in which the GIP (and SGIP) is calculated to have an element for the potential loss of promotions within military service has merit, despite adding to the complexity of the calculation. The Review recommends the factors should be adjusted to acknowledge that for some personnel, promotions will have been foregone because of their injury, and to take account in some way of their potential loss of salary from second or third careers foregone to the deferred pension age of 65 in the Armed Forces Pension Schemes.
- 2.60** Recognising that a number of Armed Forces personnel hold an acting rank at the time of injury, the Review

recommends that when calculating GIP, the higher of (a) salary at time of injury or (b) salary at time of discharge is used to calculate the GIP.

- 2.61** The relevant updated factors to calculate GIP are at Annex B.

### **Bereavement Grant**

- 2.62** The Review recommends that the levels of Bereavement Grant should be revised to take account of salary increases that have occurred since the levels were set in 2005. The level should be set at £25,000 for future deaths arising from service.
- 2.63** A higher figure should be available for those Reservists whose death is due to service and who are not a member of the Reserve Forces Pension Scheme (RFPS). The AFPS 05 and RFPS pay 4 times salary on death in service. As this is more generous than most other pension schemes, Reservists who die as a result of service but are members of other schemes should receive broadly similar lump sum awards. It is recommended this amount is 1 \_ times the Bereavement Grant (£37,500). This increased Reservist element should be available to all eligible deaths that have already arisen since the start of the Scheme.

### **Future Up-rating**

- 2.64** The Review recommends that the tariff levels, GIP factors, and Bereavement Grant levels should be subject to periodic review in the future. The future level of Bereavement Grants should take into account increases in pay, reflecting its original link with salary. The Review is satisfied that the annual up-rating of GIPs in payment by the Retail Prices Index through the link with the Pensions (Increase) Act, is appropriate, given that the purpose of the GIP is to assist with ongoing living expenses.

### **Specific Injuries Raised During the Review**

- 2.65** The proposed increases to tariff levels 2-4 in particular appears to have a more

appropriate basis than the adjustments made in 2008, when viewed against experience. This change, while broadly applicable to all injuries, should go some way to address the concerns of some contributors in relation to brain injuries below tariff level 1. The levels of awards for brain injuries and other injuries (as described under *Issue 12 – Other issues raised*) should be the subject of further expert analysis quickly, and then on an ongoing basis, as the ISG felt strongly that the current level and spectrum of awards might not adequately reflect the nature of injuries in these specific areas.

## **Issue 4 – Comparisons with other compensation in the UK and internationally**

### **Background**

- 2.66** Comparisons with other schemes in the UK such as the War Pension Scheme, with other public sector workers such as the police or fire fighters, or with court settlements, or with the Armed Forces of other countries can be difficult to make accurately because the context within which each scheme operates can be very different.
- 2.67** The principal comparisons that have been made by the media in the UK have been against common law court settlements for negligence. For example, the RAF typist who received a £484,000 settlement in a negligence claim for a very significant repetitive strain condition has been compared with only the lump sum element available under the AFCS. The settlement in a negligence case includes monies for private treatment and care for similar injury. Other comparisons have been made with sports professionals who have received multi-million pound settlements because of the loss of future earnings as their injury prevented them from continuing in their professional career.
- 2.68** Comparisons have occasionally been made with fire fighters or police officers injured as a result of their service. In these cases, the overall employment package has not been taken into account. One significant difference is that of all injury benefit schemes for public sector workers in the UK, only the AFCS makes payments in-service. All other public servants only receive money when they leave service on medical retirement grounds. Some reforms have been made to police and fire service ill-health pension and injury awards to address concerns about the numbers of police officers and fire fighters leaving early on ill-health grounds, including the associated costs.
- 2.69** The Review examined the approach taken in the UK's no-fault Industrial Injuries Disablement Benefit Scheme, which is a benefit available to those employed earners who suffer an accidental injury or prescribed disease as a result of their employment. Its approach to assessment and award is derived from the War Pension Scheme, based on a percentage disablement (100% War Pensions disablement currently attracts a weekly payment of £143.60), as well as supplementary allowances for the most seriously disabled.
- 2.70** Comparisons between the UK Armed Forces and other nations have generally focussed on the health care arrangements for Service personnel and especially veterans, and less so on the amounts of compensation available. Public comparisons have largely been made against the USA where there is no universal health and social care provision so the Department of Veterans' Affairs runs its own hospitals. They have also been made for the different approaches over compensation for legacy health issues, such as the way France, the US or Canada or Australia have made payments for their nuclear test veterans for domestic reasons.
- 2.71** In both the USA and Australia their military compensation systems are being reviewed. The review in the USA is particularly radical and is informed by expert reports from the Institute of Medicine. They comment on the

limitations of the US system, including its reliance on disability rating schedules which in some cases date from the 1950s, and the lack of robust approaches worldwide to the assessment of psychological disablement. They strongly advise that any new system should be predicated on evidence-based decision making reflective of contemporary medical understanding.

### **Options and Analysis**

**2.72** No particular options have been identified as a result of these comparisons, although the Review has looked at some examples for a range of injuries, illness and death to check that there are no significant anomalies or areas of concern. It also noted the different approaches adopted on time limits in making claims.

**2.73** One contributor to the Review commented that for hearing loss the AFCS should adopt the approach of the US in relation to their burden of proof overall, which in effect assumes if an illness or injury arises during service then it is due to service. Hearing loss is discussed further under *Issue 12 – Other issues raised*, and the burden of proof more generally is discussed under *Issue 7 – The burden and onus of proof*.

### **Recommendation**

**2.74** The Review has examined the compensation arrangements for other public servants in the UK, with common law negligence claims and the Industrial Injuries Disablement Benefits Scheme in the UK, and with no-fault schemes for other military forces in some allied countries. Given the very diverse wider social, welfare and healthcare arrangements available in those countries providing a very different context from the one in which the AFCS operates, comparisons are difficult to make. Nonetheless, comparisons with other schemes and compensation arrangements nationally and internationally have not of themselves identified a need to make changes to the Scheme.

**2.75** Adverse comparisons have been made in the media about common law settlements in the UK and the AFCS. These have concentrated on the lump sum awarded and often neglected the considerable additional value of the GIP. The MOD should continue to explain at every opportunity the full value of AFCS awards. Communications and awareness are discussed in detail under *Issue 7 – the Claims and Adjudication Process*.

## **Issue 5 – Issues raised by the Court of Appeal judgment**

### **Background**

**2.76** In July 2009, the Court of Appeal heard the Appeal brought by the MOD in relation to an Upper Tribunal decision on two individual cases concerning injuries to Cpl Duncan and Mne McWilliams. The MOD had brought the case in order to obtain clarity on important issues within the Scheme of general applicability; it was **not** about taking money away from the individuals concerned. The central issues at stake were in relation to how the Scheme operated with respect to illnesses and diseases as opposed to injuries, and how the Scheme should take account of how a condition developed over time, its treatment and any consequences. The Court of Appeal handed down its judgement in October 2009 and its full decision is available at:

[http://www.judiciary.gov.uk/docs/judgments\\_guidance/sec-state-defence-v-duncan-approved-judgment.pdf](http://www.judiciary.gov.uk/docs/judgments_guidance/sec-state-defence-v-duncan-approved-judgment.pdf).

**2.77** The judgment in the Duncan & McWilliams case provides guidance which will be used to amend and supplement operational instructions for decision-makers at the SPVA, which administers the Scheme. It is too early to assess its full impact and wider implications on cases with a very different factual basis to Duncan and McWilliams. It is anticipated that the claims and adjudication process will give rise to potentially difficult medical policy and legal issues in some cases. It will also be necessary to assess how the First-Tier Tribunal and Upper

Tribunal, before which appeals against AFCS award decisions are heard, apply the principles in the judgment.

- 2.78** The principles set out in the judgment in relation to medical evidence raise particular issues. At the hearing, Counsel for the MOD submitted that the decision maker must take account of all available evidence when determining the nature and gravity of the injury. That principle was endorsed by the Court (paragraph 47 of its judgment), but difficult issues arise about new medical evidence presented by the claimant on appeal. Frequently, this first appears at a First Tier Tribunal hearing and comprises reported symptoms, particularly pain and discomfort. Obtaining objective evidence to test consistency at that stage can be difficult and can be at variance with documented earlier evidence on function such as upgrading an individual's medical status or their return to work.

### **Options and Analysis**

- 2.79** The Review considered whether the definition changes made to Scheme in September 2008 (SI 2008/2160) to the terms "covering" and the term "permanent" provide sufficient clarity to take account of the Court of Appeal judgment in the Duncan and McWilliams case, which related to claims brought before those changes were made. The Review has concluded that further change is required. One option would be to amend the Scheme to put beyond doubt that all the descriptors include the effect of proper and appropriate medical treatment and the expected consequential effects of an injury (for example, to state that there is a high risk of osteoarthritis following a long bone fracture near a joint). Another option would be to amend the Scheme to provide for finer distinctions about levels of functional limitation (raised as a possibility in paragraph 93 of the Court of Appeal judgement); and, greater consistency about use of the term "permanence" and to define "permanent significant functional limitation" as an objective test by using as a comparator a person in normal health of the same age and sex as the claimant. A

further option would be to define the term physical disorder in table 4 (as suggested in paragraph 125 of the Court of Appeal judgment).

- 2.80** The Court of Appeal case, and evidence gathering for this Review, confirm much misunderstanding and lack of clarity about Scheme decision-making, its assumptions and intentions, including how to select tariff descriptors and what awards are intended to cover. A further option would be to insert in legislation some explanation of the approach to decision-making, including choice of descriptor, and how consequential injuries and complications of the injury or its treatment are considered.

### **Recommendations**

- 2.81** The Court of Appeal judgement in the case of Duncan and McWilliams has provided important clarity for the Scheme. The Review recommends that this is taken further to provide even greater clarity in some aspects of the Scheme, as the Court of Appeal has suggested. The Review recognises that a balance will need to be struck between greater clarity and introducing too many and too fine a distinction between certain descriptors, and particular care will need to be taken in implementing this recommendation.
- 2.82** Better procedures are required to ensure that SPVA medical advisers have an opportunity to comment on the evidence before the hearing to assist in a more reasoned evaluation of that evidence by the Tribunal.

### **Issue 6 – The circumstances of injury, illness or death**

#### **Background**

- 2.83** The Scheme pays out for injury, illness or death due to service. It pays out the same regardless of whether the injury was due to training, service approved sport, exercise or combat operations. Some contributors to the Review have suggested that more compensation should be paid to those injured on operations.

**2.84** The current position in the AFCS is the same as the old War Pension Scheme, and was re-examined as part of the changes made in 2008. Adjustments then were rejected on two grounds. Firstly, paying the same in all circumstances recognises the principle that Service men and women have no choice about where they are deployed or posted as part of their work; it is therefore appropriate to adopt an “all of one company” approach. Secondly, there would be very real practical difficulties in deciding what definition of “operations” to choose, recognising the different ways in which operations and activities are conducted by all three Services.

### **Options and Analysis**

**2.85** The Review considered again whether it would be appropriate to introduce additional payment for injuries, illness or death sustained on operations. This could be nuanced, with payment made to all those injured on operations or only to those sustaining the most serious injuries, or death, as a result of service on operations. Introducing an additional payment for operations would risk legal challenge on both rationality and discrimination grounds. Attempting to differentiate between ‘on operations’ and ‘not on operations’ would not be straightforward, as the Scheme would need to decide how to deal with travel to and from operational duty, training to deploy, plus those in posts where individuals are predominantly not on operations but travel to operations occasionally.

**2.86** Some contributors to the Review suggested an alternative would be to pay less than the current levels for sporting injuries. Other contributors argued that paying less for a sporting injury would be unfair as the needs of someone receiving the same injury on operations or from participation in a Service-approved sporting activity would be the same. Yet others suggested that those injured in combat might suffer greater trauma in the immediate aftermath of an injury while waiting to be removed from the

area of combat. The Review noted that, in these circumstances, the Scheme already acknowledges psychological trauma as part and parcel of an injury within awards, unless there is a separately diagnosable mental health condition in which case a separate award is payable.

**2.87** The Review recognised that while there would be some who welcomed an operational supplement, there would be criticism from those who would just miss out on the definition of operations, or from those getting a lesser amount for a sporting or training injury.

### **Recommendations**

**2.88** The Review has considered whether the Scheme should draw a distinction between those injured, made ill or who die as a result of operations, and other forms of service, and has carefully examined the wide range of views from contributors to the public engagement phase. The Review recommends that the Scheme should continue without change to treat injuries, illness or death due to service in the same way, irrespective of the precise cause, because it is the act of joining up and signalling willingness to make a sacrifice that distinguishes those who serve. The Scheme rightly acknowledges the benefits and risks to the Armed Forces of Service-approved sport and adventurous training and compensates them in the same way.

## **Issue 7 – The claims and adjudication process**

### **Background**

**2.89** All members of the Armed Forces should be aware that no-fault compensation is available for injuries caused by service. Those personnel serving at the time of the introduction of the Scheme in 2005 were provided with information about the Scheme, as have new entrants to the Armed Forces since then. Briefings are also provided to personnel as part of their pre-deployment preparations. Those injured personnel who go through Selly Oak and Headley Court are also made

aware of the Scheme through the welfare officers and social workers there.

- 2.90** The SPVA, an Executive Agency of the MOD, is responsible for administering the Scheme. It has processed some 11,000 claims since the Scheme was introduced in 2005. While almost all personnel appear to be aware of the private personal accident cover available to them through what is known as PAX, with some 70,000 personnel currently paying premiums for that cover, the Review has discovered that the overall level of awareness of even the existence of the AFCS amongst Service personnel and their families is extremely low, notwithstanding the numbers of claims processed by the SPVA.
- 2.91** Contributors to the Review who have had experience of making claims under the AFCS highlighted a number of areas where significant improvement could be made.

### ***Options and Analysis***

#### **Communication, knowledge, awareness, and support**

- 2.92** It is clear to the Review that substantial improvements need to be made to the way in which the Scheme, including the claims and adjudication process, is communicated with adequate guidance and support. While a number of contributors commented that the claims process was satisfactory, the overwhelming view was that there is scope for significant improvement, including access to financial guidance on how to manage the money received under the AFCS.
- 2.93** There needs to be enhanced awareness of the Scheme through better communication, support and guidance for claimants and potential claimants. SPVA has a clear role in this once claims have been lodged but the single Services also need to implement significantly improved ways to communicate the AFCS through the chain of command,

as well as via medical, welfare and administrative staff. The single Services appear to have been very slow in making the necessary procedural and cultural adjustments to the support provided to serving personnel with the introduction of the Scheme as its predecessor, the War Pension Scheme, was only claimed at discharge and beyond.

- 2.94** Better communication and guidance appears necessary on timing of claims, improved guidance for clients on form completion with up to date information provided at interim contact points during the life of claim. There needs to be better guidance and/or access to independent financial advice so that individuals can make informed decisions on what to do with their awards once received. Claimants also need to be informed of how their AFCS award relates to other state provision, especially in relation to their ongoing care after they leave military service, with health care being provided free at the point of delivery by the NHS.

#### **Decision-making**

- 2.95** Some contributors to the Review have called for a move away from lay i.e. non-medical decision-making combined with medical input to a fully medical process along similar lines to the War Pension Scheme. Since the inception of the AFCS, SPVA lay administrators are now seeking medical advice from within the Agency on around 50% of cases. An examination of the success rates of appeals at independent Tribunal suggests that a combination of lay administrators and suitable medical input is producing fair decisions by SPVA in most cases. Moving to a fully medical process is likely to have significant administrative costs for performing a task that lay administrators can deliver effectively, with medical input. It would also be challenging to recruit and retain sufficient numbers of doctors of suitable calibre willing to undertake this type of work.

**2.96** A number of contributors to the Review have commented that other elements of internal appeals in relation to pay, allowances and pension, have military input or oversight of the process to bring a service perspective and to provide credibility to the process for Service personnel. The AFCS, by contrast, does not have such in-service military involvement. It should be noted, however, that a number of other contributors advocated no such involvement due to perceived risks of bias from the Chain of Command. The independent First-tier Tribunal does contain military input as one of the panel members brings previous service knowledge or experience.

**2.97** One contributor to the Review suggested that even first decisions and reconsiderations should be made by a body entirely independent of the MOD, and not just at the appeal stage. The Review is not aware of any other system in which even the initial decision on entitlement and level of award is taken independently. The independent element is applied at the Appeal stage as with other tribunal systems in the UK (such as the Pensions Ombudsman, Employment Tribunals, or the First Tier Tribunal Chamber dealing with social security benefits and tax credits).

### **An early “payment on account”**

**2.98** The aim of the AFCS is to make awards which are full and final. In doing so, awards take account of the nature of the initiating injury, the effects of appropriate medical and surgical treatment and the likely progress of the treated injury through life, including associated psychosocial adjustment. A trigger to the Scheme was the need for people to claim while still serving. Inevitably that risks claims being lodged before outcomes are reasonably predictable.

**2.99** The Review has considered whether there would be benefit in introducing some sort of “payment on account” for some; an early modest sum of money which might help claimants whilst still

in hospital or during rehabilitation. This could be coupled with greater use of the existing power in the Scheme to make interim awards where prognosis is not settled. This could be a useful power to have, particularly in complex multiple injury cases as it would mitigate many of the legal risks in relation to medical evidence and prognosis which are raised in the Court of Appeal judgment. It would enable front loading of the decision-making process and avoiding delays in at least an initial payment. It could be applied to certain multiple injury cases where causation is accepted, and appeal rights would need to be considered, especially given the likely timescales inherent in the Tribunal process. This would differ from an interim award where it is necessary to identify a descriptor, but rather would be a lump sum payment not linked to a descriptor but paid on account of descriptors to be selected once the injury had reached settled state. When raised at the Focus Groups, this was not considered essential, but could be an additional tool that might be helpful to some.

### **Review Powers**

**2.100** The Review has reflected on the Court of Appeal judgment in the case of *Duncan & McWilliams*, and comments from other contributors in light of it, especially in relation to ensuring that additional review powers need to be considered for the Scheme. This is to ensure that the SPVA final decision fully reflects changes or developments that may occur as the initial injury is treated to steady state or the point of maximum medical improvement. This might be two or even three years after the original incident or event. An internal SPVA review during this process would be more straightforward for the claimant than resorting to the independent Appeal Tribunal route, which of course remains open once a final SPVA decision has been made. Some contributors noted without concern that this might mean introducing some further interim powers that do not immediately have a right of appeal, so long as an individual were able to access

justice through the Tribunal route on final decisions.

- 2.101** The Review also examined whether the current provisions in AFCS legislation afforded adequate opportunity to review and revise decisions where errors have been made or new and pertinent evidence becomes available.

### **So-called “spanning” cases**

- 2.102** The current legislation governing those still in-service but injured by service prior to 6 April 2005 requires SPVA to investigate whether the injury has been made worse by service on or after 6 April 2005, and if so to make an award under the AFCS for this worsening under Article 8 of the Scheme. These cases have been called “spanning” cases as their service spans the introduction of the Scheme. SPVA first considers worsening under the AFCS before considering the claim under the War Pension Scheme which covers injury prior to 6 April 2005. Even where the individual goes on to receive benefits under the War Pension Scheme, SPVA is obliged to issue a rejection letter under the AFCS as this decision to reject the claim under the AFCS has appeal rights associated with it. The vast majority of cases are rejected under this provision with data showing that, between 5 April 05 and 30 Sept 09, 49% of cases considered by AFCS staff were spanning cases. Of these 8,000 cases, only 2 awards have been made under the AFCS for worsening.

- 2.103** In almost all these cases, the individual had not asked for their injury to be considered under the AFCS, but nevertheless received a rejection letter for something for which they had claimed. This leads to confusion and frustration. While the original intention behind the Scheme rules was to ensure that no-one missed out on an award under the AFCS where that was appropriate was laudable, it has not been borne out in practice. Rather than continue with this automatic consideration of these spanning cases under the AFCS, claimants wishing to be

considered under the AFCS could request on an individual basis for their injury to be considered this way.

### **Recommendations**

- 2.104** There is huge scope for more effective communications of the Scheme to all members of the Armed Forces, their families and more broadly to interested stakeholders and the public; for enhanced guidance and support to potential claimants in navigating the claims process; for claimants to be kept up-to-date throughout the claim process, as well as to provide guidance, information and support once an award has been made. The Review recommends that this is pursued across the board including through the Chain of Command as this is not just the responsibility of the SPVA who administer the Scheme. The single Services need to take much greater responsibility for communicating and putting in place mechanisms for providing advice, training, education, guidance and support to their injured personnel in relation to making claims under the Scheme. The MOD policy area and the SPVA will need to enable this effort through timely production of clear and easy-to-understand guidance and information.

- 2.105** The Scheme needs its trained lay decision-makers to have ready access to medical advice, and appropriate military oversight and advice. Formal guidance needs to be developed on situations where medical advice is mandatory, such as in all claims in tariffs levels 1-6, on reconsideration, and at appeal.

- 2.106** The Review recommends all existing guidance, notifications and information material is reviewed for content and accessibility, especially in explaining what the awards are for, taking into account reasonable expected prognosis, for example osteoarthritis as a high risk late consequence following certain fractures. Standard guidance notes on all aspects of making a claim need to be produced that all involved in the Scheme can use,

whether the SPVA, the claimant, those assisting claimants in service, or in the third sector.

**2.107** The Review recommends that access to independent financial advice should be made readily available to AFCS recipients, so that they are both better informed about what their AFCS award covers, including expected consequences, and also how to manage their financial affairs.

**2.108** The Review recommends that greater use of the existing Interim award power within the Scheme is made in appropriate cases. Greater use should also be made of the ability for a claimant to claim for one injury and to make a subsequent claim for other injuries, even if caused in the same incident, when the prognosis might be clearer. In addition, the Review considers it would be helpful, to introduce some form of “payment on account” for those with significant injuries that can be paid early in the person’s treatment and recovery. The Review recommends that claimants are allowed to choose this option if they wish, and that it would not be imposed upon them. The Review recommends that the amount available should be initially set at a level which can be determined from early evidence of the minimum level of award the individual would receive for all their injuries, which would be taken in to account when a full assessment of the claim is made. This “payment on account” should be available to those likely to receive awards in tariff levels 1-8, i.e. at 50% or higher GIP levels. This should be viewed separately from the necessary support that should be provided to families to enable them to visit while the individual is receiving treatment including through rehabilitation.

**2.109** The Review recommends improved arrangements for revisiting claims during the course of treatment and rehabilitation leading up to the point of maximum medical improvement, recognising that this might not immediately have access to the independent appeal process until final decisions have been made. The Review also recommends that sufficient

review powers are available to SPVA decision-makers to change decisions where mistakes have been made and/or new and pertinent evidence is available.

**2.110** The Review recommends removing the automatic consideration of “spanning cases”, so long as a claimant can ask for their claim to be considered under the AFCS for such service spanning 6 April 2005, or for the SPVA to deem claims that span this period to be a claim under the War Pension Scheme when appropriate.

**2.111** The Review recommends that a fully consolidated version of the AFCS legislation incorporating the legislative changes that will result from this Review is made available as soon as is practicably possible. Further, copies of versions of consolidated AFCS legislation following previous legislative changes should also be made available. This will ensure claimants, their advisors and other interested parties have access to the correct version of legislation pertaining to any claim.

## **Issue 8 – The burden and onus of proof**

### **Background**

**2.112** In the AFCS, the normal civil burden of balance of probability applies to causation. This means establishing that service was the predominant cause of injury or illness (and any other matter to be determined). However, unlike cases of civil litigation, where the claimant is required to produce evidence to prove their claim, the Secretary of State is required by the Scheme rules to produce all relevant medical evidence in his or her possession, and as a matter of policy makes enquiries for other relevant evidence, for example hospital case notes and GPs’ reports. Consideration of a claim under the AFCS is analogous to consideration of a claim for social security benefits, where it is a well-established legal principle that establishing entitlement is an inquisitorial process, as opposed to adversarial litigation. So while the legal onus is on the individual,

it is not generally seen as particularly onerous. Feedback from the Review's Focus Groups has confirmed this.

**2.113** Under the earlier War Pension Scheme, where a claim is made within 7 years of termination of service, the Secretary of State has to prove beyond reasonable doubt (to the criminal standard) that disablement is not due to service. For claims made more than 7 years after termination of service, the claimant has to raise a reasonable doubt on reliable evidence. This is an easier burden for the claimant to satisfy than balance of probabilities. The favourable burden of proof applies only to causation. For all other matters (e.g. whether there is disablement) the onus is on the claimant to prove the issue on the balance of probabilities. At its inception in 1917 the War Pension Scheme used the balance of probabilities test, but this was changed in 1943 at the height of claims in World War II as inadequate record keeping at the time was leading large numbers of claimants to miss out on compensation.

**2.114** Some stakeholders have been concerned about this change since it was first proposed during the passage of the AFCS Bill, on the grounds that the special risks faced by the Armed Forces merited a lower hurdle than the normal balance of probabilities used in the civil courts. For example the House of Commons Defence Committee (HCDC) in its report (HC 96-1) of 16 December 2003 on the proposed scheme proposed an alternative approach where the onus was on the Secretary of State that a claim would only fail where:

- (a) the claimant is unable to prove on the balance of probabilities that an injury is due to service;

And

- (b) the MoD is able to prove on the balance of probabilities that the injury is not due to service.

## **Options and Analysis**

**2.115** A range of options have been given very careful consideration as part of the Review, from adopting the War Pension Scheme standard and onus of proof for claims under that scheme brought after 7 years for all claims under the AFCS; to the HCDC proposal; or a two-stage test based on the test in discrimination law where once an employee establishes there has been a prima facie discriminatory set of circumstances, the burden shifts to the employer to prove that he is "not guilty". This latter approach could be along the lines of:

- (a) where an injury arises in the course of service it shall be presumed to be caused by service unless the Secretary of State is satisfied that evidence establishes otherwise;

and

- (b) the burden of proof on the Secretary of State is the balance of probabilities.

**2.116** Since the Scheme's inception the MOD has asked concerned stakeholders to bring forward individual cases which have unfairly failed by the Scheme's burden and onus of proof. While it is the case that most medical discharges under the War Pension Scheme did receive a War Pension even for illness (about 80% of medical discharges received a War Pension), under the AFCS the level is closer to 30%. This is because, on the balance of probabilities, most medical discharges arise for diseases and incidents not due to service (for example, for all illnesses where medical science has no absolutely definitive cause but on the balance of probabilities are not due to service, or for road traffic accidents not due to service, or for conditions arising before 6 April 2005). In many of these cases, especially for sporadic illnesses common in the community, the award follows from the standard of proof, not contemporary medical understanding of causation. For the 21st century it is

generally accepted that defensible public policy and individual decisions should, where possible, be based on evidence. For no-fault compensation that means that decisions follow from case facts, and contemporary medical understanding of causation of the claimed condition. Such decisions are robust and equitable and in the Scheme context, as the key element in triggering the Nation's wider support to those who serve and are injured, ensures there is a solid evidence base to pursue justified preferences in respect of other publicly funded provisions as discussed above.

**2.117** In discussion with the members of the ISG, it became clear that there were two particular circumstances that the current standard and onus of proof created concern among some stakeholders. In the first instance, the fact that the Secretary of State was both responsible for maintaining the records necessary to make a decision, and for the decision itself, could mean that someone might fail in what should be a successful claim because the necessary records had been lost. The second area of concern related to disease having clinical onset in or around service where the onus appeared to weigh too heavily on the individual to provide the medical and scientific evidence that a certain condition was caused by service. It appeared that those stakeholders who shared these areas of concern were proposing changing the burden and onus of proof to address them.

**2.118** In relation to illness and disease, the Review had the benefit of the experience of a number of members of the ISG who had expertise in the UK's Industrial Injuries Disablement Benefit Scheme. In that scheme, significant resources have been expended to weigh the objective evidence to produce a prescribed list of diseases. Where a claimant has a disease on the prescribed list and meets the occupation criteria, for example has worked for a certain duration at a specific trade or been exposed to some agent, it is presumed that the disease is causally related to his or her employment and

an award follows. The Industrial Injuries Disablement Benefit Scheme which was derived from the War Pension Scheme uses a system of prescription and presumption for diseases. To oversee the list, and generally advise the Secretary of State for DWP on matters relating to Industrial Injuries, there is a standing non-governmental expert body, the Industrial Injuries Advisory Council (IIAC), which has members appointed for a defined term from relevant medical specialities, regions of the UK, academia, TUC, CBI and a secretariat provide by DWP officials.

**2.119** One of their functions is to collect and evaluate the evidence on particular disorders to establish whether, in certain circumstances, there is a doubling of risk of the development of the disorder. A referenced report discussing the evidence considered and conclusions reached, and making recommendations on prescription is then published as a Command Paper and presented to the Secretary of State for Work and Pensions.

**2.120** The diseases prescribed in the civilian industrial context are not always relevant to the military population and it is proposed that the MOD establishes a smaller but similar standing group of experts to advise Ministers on a list of recognised diseases in the AFCS and perhaps provide independent validation and oversight on other medical matters such as: the Scheme's approach to hearing loss, new diagnoses, or new issues of concerns such as those that arose after the 1990/1991 Gulf conflict; and the appropriate horizontal or vertical equity of descriptors for different disorders. The medical group chairman could sit on the CAC. The group would be empowered to take evidence from wide sources, including CAC serving and former military members, the Surgeon General's Department, and wider expert sources. The actual group might conduct some business virtually, and might meet say, four times per annum and have a secretariat and specialist support from the MOD. The Scheme's Medical Adviser would be part of the group. The group could also be used to validate

the synopses of causation and other guidance provided to decision-makers and claimants.

**2.121** Inclusion of a disorder in the IIAC prescribed list is always dated and depends on evidence available at the time the IIAC review is undertaken. In the AFCS context of recognised diseases a similar approach would apply. Disorders may “fail” to be listed on first consideration of the evidence but the topic may be revisited at some later date when new evidence may allow inclusion in the list from that later date. In that circumstance, previously rejected claimants could re-apply and awards made would date from the date when the disorder was included in the recognised list. In Industrial Injuries, awards for diseases are limited to those on the prescribed list but, the AFCS is able to accept claims for any disease. In any case where a claimed disorder was not listed, it would still be open for the case to be considered on its individual merits.

**2.122** In relation to lost records, the Review was able to consider the relevant rules in the War Pension Scheme which set out how to consider the case where the appropriate evidence had been lost. In those circumstances, the Scheme gives due consideration to corroborative evidence that the individual is able to provide. It also examined how the Industrial Injuries Scheme changes the burden of proof to the benefit of presumption in these circumstances.

### **Recommendations**

**2.123** The Review has considered the range of contributions provided by stakeholders to the Review. The Review recommends that the onus of proof should remain on the individual and in the vast majority of cases the standard of proof should remain the balance of probabilities, with two important exceptions in relation to lost records and in the case of diseases.

**2.124** Where records which bear on a material issue have genuinely been lost by the MOD, the Review has concluded that

the standard rules and guidance to SPVA decision-makers should be modified so as to assist the individual Serviceperson by affording the benefit of a presumption, transferring the burden of proof to the MOD on the balance of probabilities. In an injury case, this would work in this way:

**2.125** If the individual through appropriate evidence<sup>1</sup> demonstrates on the balance of probabilities that s/he has an injury which was suffered while undertaking an activity in the course of service, it will be presumed that it was due to service, unless the MOD through appropriate evidence proves on the balance of probabilities that it was not.

**2.126** The guidance and/or rules will need to ensure the distinction between lost records and reasonable lack of existence of a record is brought out.

**2.127** In relation to diseases, the Review recommends establishing mechanisms to ensure that a recognised list of diseases can be developed promptly and kept up-to-date through setting up an expert medical group reporting to the existing statutory Central Advisory Committee on Pensions and Compensation that advises the Under-Secretary of State and Minister for Veterans on pension and compensation matters.

## **Issue 9 – The time limit on claims and the treatment of deterioration**

### **Background**

**2.128** Under the AFCS, the time specified for making a first claim is normally 5 years from the day on which the injury occurs or, in the case of an injury not due to service, is made worse by service and for illnesses, from the day the individual first seeks medical advice in relation to that

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**1** In accordance with standard legal principles in courts and tribunals this would include, but is not limited to, the individual’s own consistent and credible evidence and/or consistent and credible corroborative testimony from family members, Service or other colleagues, commanding or superior officer.

illness. There are some qualifications and where a person is physically and mentally incapable of making a claim or instructing someone else to do so for them, time to claim can be extended. There is also an express provision which covers late onset illnesses, illnesses including both physical disorders capable of being caused by occupational exposure more than 5 years before the onset of illness and mental disorders where there is either a delay in onset or presentation.

**2.129** In civil compensation claims, the opportunity to re-open claims is very limited, usually has associated time limits and a requirement to present evidence of material change such that to leave the award would result in palpable injustice.

**2.130** The AFCS makes full and final awards at the outset and aims to take due account of the medically expected progress and prognosis of the injury including, where appropriate, expected deterioration in the award. The intention is that the resultant award provides a degree of financial certainty and allows the person to move forward from the incident and focus on their future, rather than focussing on how the award may be changed in the future.

**2.131** There are 5 routes to review in the current AFCS legislation:

i) Reconsideration under article 44: the Scheme allows reconsideration of the original decision; reconsideration is also the first element of any appeal.

ii) Interim awards under article 4: in some multiple injury and seriously injured cases, the claim may be lodged at a time when it is clear that the person is entitled to an award but the prognosis is not clear and so an interim award set at the likely level of final award may be made. The interim award may be for a defined period when it may be renewed, being made final within two years of the first interim award.

iii) Review on discharge on medical grounds under article 47: if a person is medically discharged for the same injury that led to an in-service award there is a review. Award revision may occur where there is worsening of the invaliding condition, where there is emergence of a consequential injury and the worsening or the development of the condition is exceptional and unexpected.

iv) Review on the grounds of ignorance or mistake under article 49: In certain circumstances, review can be carried out at any time where a decision was made in ignorance of, or based on a mistake as to, a material fact or of the law.

v) Exceptional circumstances review under article 48: there is a provision for exceptional review of a final award where, within 10 years of the date of final decision, the injury has become worse or caused a further injury to develop and again the worsening or the injury are unexpected and exceptional.

**2.132** A further time limit applies in relation to pre-existing conditions on joining the Services, which if made worse during the first six months after enlistment, no compensation is payable. Some contributors considered this rule unfair.

### ***Options and Analysis***

**2.133** The Review considered a wide range of options, which spanned adjusting the existing time limits to removing all time limits to make an initial claim, or introducing a further opportunity at service termination for personnel to submit a claim, even if past the 5 year time limit. The Review also considered whether open gateways for review should be introduced. The Review recognised the benefits of full and final settlement in relation to the (revised) Scheme principles, and the difficulties of obtaining reliable evidence if claims were made a very long time after an

injury had been sustained. The Review also noted that more than half of claims processed by the SPVA under the old War Pension Scheme, which has no time limits, are for reviews of conditions, but only around one third of these result in a modest increase in assessment. The Review also noted that a reason for the War Pensions wide review powers was the limited therapeutic possibilities at the time that the scheme was introduced so that for many war pensioners the outlook was of inevitable inexorable worsening. Today's medical advances and approaches make that much less likely. The aim of most interventions is cure, or at least real and sustained clinical improvement as quickly as possible. From evidence received there remains, however, an underlying concern that in a few cases after a very considerable period a condition might suddenly deteriorate very substantially. To cover this, an option would be to introduce a further review provision beyond the current 10-year time limit. This would apply in very limited circumstances where there was new and compelling evidence making maintenance of the existing award manifestly unjust.

**2.134** The Review explored whether the existing time limits were appropriate:

- Given the low level of awareness of the Scheme, the Review was concerned that the original timescale to bring a claim of 5 years would mean that those injured in April to June 2005 would have less than 6 months left to bring a claim by the time the outcome of the Review is publicised, if no change occurs. The Review considered moving the initial time limit to 7 or 10 years, noting the likelihood that records would not be available beyond 7 years in some circumstances.
- The current time limit of 3 months to request a reconsideration might be missed as Service personnel, including those with injuries, might not pick up their mail within that timeframe because of the nature of Service life. Linked to this, the time limit to bring an

appeal to the independent Tribunal is 6 months.

- The current time limit for deaths-in-retirement and late-onset claims was set at 12 months, when the equivalent date in the civil courts is 3 years.
- Excluding the worsening of pre-existing conditions during the first 6 months of service could mean that individuals would be unable to gain compensation when other arrangements in the UK would pay out in similar circumstances.

## **Recommendations**

**2.135** The Review recommends adjusting the principal time limits in the Scheme as follows:

- Initial period of claim moved from 5 years to 7 years.
- Reconsiderations from 3 to 12 months.
- Appeals to a further 12 months beyond reconsideration, noting that this requires a change in primary legislation and so may take a little longer to deliver than the adjustments to other time limits.
- Late-onset and death-in-retirement claims from 12 months to 3 years from diagnosis or death, respectively.

**2.136** The Review recommends the introduction of a further review beyond the current 10-year review point for cases of further substantial and unexpected deterioration where to maintain an award would be manifestly unjust.

**2.137** The Review recommends adjusting the current six month rule in relation to excluding pre-existing conditions made worse by service so that the timeframe is adjusted. Pre-existing conditions predominantly made worse by service, not simply triggered by service, should be within the scope of the Scheme. The proposed medical expert group should also advise on those pre-existing illnesses or conditions that might be appropriately included within the Scheme, especially in relation to what "predominantly caused by service" would mean.

**2.138** Linked to the recommendations made under Issue 7 – the claims and adjudication process, all the time limits in the Scheme need to be clearer than at present in all publications and correspondence.

## **Issue 10 – The compensation paid for mental illness**

### **Background**

**2.139** Mental health in the community has become a UK Government priority in recent years. This is also the case in the military where both the Chain of Command and personnel and medical staffs aim to adopt best practice measures to promote good mental health. Where problems do arise in-service there is a policy of early detection and expert treatment. In recent years, effective interventions for most common mental health problems, as well as for post-traumatic states, have become available. It is these disorders, anxiety, depression, substance misuse as well as post traumatic stress states which are most common amongst the military community. There is no evidence that actual interventions required for the various diagnoses are different for veterans than for the population as a whole.

**2.140** The AFCS compensates for injury or illness caused on or after 6 April 2005. As a modern scheme, it was introduced at a time when these disorders were capable of being treated to much improved function and sometimes entirely cured. Work is ongoing to address barriers to care, stigma and discrimination in both military and civilian communities. The MOD, the health departments and the ex-Service community are currently piloting a new community based mental health service better attuned to military personnel and veterans. The focus here is on a contextually sensitive treatment service which veterans feel comfortable to access and use.

**2.141** Some people have one episode of disabling mental illness in their lifetime causally associated with a stressor event (eg bereavement, illness etc), but not everyone involved in military operations becomes mentally ill. By their very nature, mental symptoms and illnesses are multi-factorial in origin with some individuals more, and others less, at risk. Just as for asthma, diabetes or high blood pressure there may be no “cure” in terms of elimination of the underlying pathology, but the disorders can be managed/maintained through life by medical and patient interventions, with minimal disruption of function overall. The published peer-reviewed evidence confirms that such an outcome is possible in most cases of common mental health problems. Psychological therapies are usually the treatment of choice for these disorders and are in use both in-service and in the NHS. To increase the numbers of trained practitioners by 3,000 over the next three years, the Department of Health has set up a project titled “Improving Access to Psychological Treatments” for which veterans are a “Special Interest Group”. It will be important to ensure that there are sufficient numbers of such practitioners who understand and have experience of the military context to ensure they understand those they are treating. This project also aims to provide best practice treatment in a contextually-sensitive environment. The Service Personnel Command Paper commits to wider rollout across the UK from 2011.

**2.142** On 11 January 2010, the Department of Health announced that those who develop mental health problems whilst in the service of their country will receive the best possible care from the NHS for the rest of their lives. As a result, all mental health services should make special provision for veterans during 2011-12. In addition, grant funding is available for Combat Stress to work directly with mental health trusts.

- 2.143** Psychological illness is largely a matter of self-report from the patient or report from other close contacts (such as family members, employers or colleagues), other than when there is objective biological evidence. It is often unaccompanied by the objective diagnostic criteria which are usually available to assess physical disease. There is not yet an entirely consensual approach to assessing the disabling effects of non-psychotic psychological illness. As a result, there is risk of wide variance both in diagnosis and evaluation. This is very clearly seen in recent report from both the US and Australia where decisions are determined at disparate locations across both countries.
- 2.144** In the absence of objectively verifiable diagnostic criteria, there is the potential in some cases for substantial compensation awards to act as a disincentive for people to comply with treatment and get back into life and living. This may be exacerbated by wide gateways for review of the compensation award, and schemes designed where to keep ongoing benefits the claimant must remain unwell.
- 2.145** The issues as outlined above, as well as reference to the Judicial Studies Board guidelines and the compensation paid in other UK no-fault compensation schemes, has informed the present AFCS approach. This approach is based on a reasonably optimistic outlook for mental health problems sustained from 2005 onwards and that there is no employment deemed to be intrinsically risky to mental health.
- 2.146** Some stakeholders take a different view of the existing evidence, often drawing heavily on the experience of those they have come across who may have suffered trauma from operations in Northern Ireland in the 1970s/80s or from the Falklands, or even in the Balkans in the 1990s, where the state of understanding, stigma, treatment and other issues were less developed and addressed than they are now.
- 2.147** The current rules in the Scheme acknowledge that mental health conditions might be subject to late-onset or delayed presentation, and with the recommendations proposed at *Issue 9 - The time limit on claims and the treatment of deterioration* above, claimants would now have 3 years to bring a claim after their diagnosis.

### **Options and Analysis**

- 2.148** The Review has sought external expert oversight of the current Scheme arrangements from Professor Alexander on the ISG, and at his suggestion from a number of other UK leading experts who have experience of military mental health. The consensus from that expert advice was that the types of mental health conditions that would be caused by military service, while having the potential to have a significant impact on an individual and their ability to work after leaving the Armed Forces, would only in exceptional circumstances mean that an individual was permanently incapable of any form of employment. The expert advice also acknowledged the positive impact of work on individuals with mental health conditions, and the potential for both relapse and remission from the condition throughout a lifetime. Expert advice suggested that viewing mental health conditions in exactly the same way as physical injuries in some instances could downplay some important distinctions, particularly in relation to the willingness or ability of a patient to seek or engage in treatment. Nonetheless, from a compensation perspective it was important that appropriate parity was achieved between comparable injuries, and that some way of combining awards was also required for the individual who suffered both physical and psychological trauma as a result of an incident due to service.
- 2.149** Some contributors to the Review had expressed concern about the capabilities of someone with a mental health condition to manage effectively their

financial affairs, and had suggested the Scheme only made higher GIP awards in those cases, instead of raising the maximum lump sum element and GIP together. Expert opinion, however, suggested that what all individuals needed, including those with mental health conditions, was access to proper information and guidance on how to manage their financial affairs in relation to the lump sum and GIPs. The Scheme already caters in Article 62 for the circumstances where an injury is so profound that an individual – either permanently or temporarily – is not capable of making decisions.

**2.150** A number of contributors also suggested making a separate decision in relation to the GIP level of someone with a mental health condition. The Review discussed this in the context of whether mental health should be treated differently from physical injuries in relation to compensation awarded and concluded that for all conditions that there was a linkage between scale of injury to determine the lump sum element and its associated potential impact on future loss of earnings compensated through the GIP. The Review also considered that the GIP element was for deemed loss of earnings rather than actual loss of earnings. This was an important distinction given the Scheme’s principles of encouraging employability and providing security. Taking a separate decision, for example at discharge, on actual loss of earnings could act as a disincentive for an individual to seek employment or engage with treatment.

**2.151** The Review also considered the payment of a temporary supplement to those with awards for mental health conditions at or above a certain tariff level when they attend either treatment or vocational rehabilitation. The Review was concerned that such a proposal might be disablement- enhancing if the payment was on an ongoing basis as it could act as a disincentive to make progress with treatment to a successful conclusion. It

could also be seen as unfair to those with physical injuries who would not get this extra money for engaging in their own treatment and rehabilitation.

**2.152** In exploring the background to providing appropriate compensation for mental health conditions, the Review noted that a US National Academy of Science report on PTSD Compensation and Military Service<sup>2</sup> concluded that there was presently no adequate accepted method of assessing mental health disability. Given that a large proportion of those on UK incapacity benefits have common mental health disorders (1 million out of 2.6 million recipients) it could be beneficial to support the development of consistent approaches. It would also reduce disruption and discomfort to claimants as one report would be applicable in a range of circumstances. The Review acknowledged that developing such an approach across UK systems for social security, other benefits and for pensions and compensation would be a major undertaking requiring considerable investment of time, effort and expertise, but might be worth exploring in the longer term in partnership with other government departments.

## **Recommendations**

**2.153** The Review recommends that consideration be given to developing a separate “Chapter”, or “Part,” to the Scheme in acknowledgement of the distinctions between mental and physical conditions, but recognising that some individuals’ awards will be for a combination of physical and psychological conditions. The range of mental health tariffs and lump sums should be adjusted in acknowledgement that the impact of the most serious mental health conditions due to service might be greater than that currently reflected in the Scheme. In particular, the highest award should be increased from the equivalent of tariff level 8 (and

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2 ISBN 978-0-309-10548-4

50% GIP Band) to the equivalent of tariff level 6 (and 75% GIP Band). The Review acknowledged that such an award was likely to be appropriate in only a very small number of cases. In addition, the level of mental health awards should be kept under review by the proposed expert group to be established to augment the CAC.

**2.154** The Review recommends that careful consideration is given to introducing appropriate use of a tailored interim award power for mental health conditions in recognition of the difficulty in determining prognosis for an individual immediately following diagnosis. Such a power would need to recognise that expert medical opinion is that maximum medical improvement is likely to be achieved after up to 18 months of treatment, as well as ensuring that deferred final decisions did not act as a disincentive to actively engage in treatment if successful treatment led to a lower level of compensation. Where an adequate course of effective treatment has been delivered by the date of claim, a final award may be made. Otherwise, an interim award is appropriate with post-treatment review and award-finalisation eighteen months after the interim award.

**2.155** Separately from the Scheme, the Review welcomes the statement by the Department of Health of 11 January 2010 and recommends:

- Mental healthcare services across the UK that are sensitive to the particular needs of the Armed Forces should be available to relevant Service and ex-Service personnel;
- Expert advice should be obtained on the suitability of the mental health pilot approach to assessment for AFCS compensation cases; and
- consideration be given to longer term research on a consistent method of assessing mental health disability, recognising this is a cross-governmental, multi-faceted, multi-professional issue.

## **Issue 11 – The compensation paid to individuals with multiple injuries**

### **Background**

**2.156** The lump sum payments made under the AFCS are provided for pain and suffering, including the shock and trauma of the original incident in which the injury was sustained. The provision for applying “discounted” payments for multiple injuries sustained in a single incident was therefore introduced to avoid duplicated payments for shock, acute pain and suffering. It also sought to reflect the focus on the most seriously injured. In different ways, schemes across the world take account of the impact of multiple injuries in some way; most do not pay for multiple injuries in a purely additive way. In the War Pension Scheme for example, 100% disablement award represents a spectrum of detriment. This is because that scheme is based on composite assessments where a person cannot be more than 100% disabled so if someone has bilateral lower limb amputations and is blinded he will receive the same as he would have done for either one of these disabilities. Where there are several moderate to minor injuries or illnesses likewise, they can sum to a cumulative higher percentage e.g. 40% is common for a number of fairly minor ailments, but this is at the same level as a single below knee amputation.

**2.157** The AFCS was developed over the period prior to recent UK operations in Iraq and Afghanistan. Neither the context nor technology anticipated some of the serious multiple injuries related to IED/blast/fragmentation. In some cases, claims have been made for over 30 injuries sustained in a single incident.

**2.158** When originally conceived, the AFCS paid out 100% of the lump sum value for the most serious injury; 30% for the second most serious injury; 15% for the third most serious injury, and nothing for any other lesser injuries, although the lesser injuries would be accepted as due to service. In 2008 the Scheme was modified for those

whose injuries place them in the 100% GIP Band. In those circumstances the Scheme awards the lump sum elements in full for every injury, up to a maximum of the equivalent of a tariff Level 1 award £570,000 for a single injury.

- 2.159** While the 2008 rule change was welcomed by most stakeholders at the time, many contributors to this Review have continued to express deep concern about the level of awards for those with multiple injuries just below the threshold for receiving the full value for all awards.

### **Options and Analysis**

- 2.160** Before developing options for change, the Review attempted to develop some key principles to guide the design of any revision to the multiple injury rules. Three guiding principles emerged:

- That the more seriously injured (whether in a single injury or multiple injuries) should receive more than someone with lesser injuries (whether in a single injury or multiple injuries).
- That someone with multiple lesser injuries should receive less than someone with a single more serious injury.
- That each injury sustained in a single incident should be acknowledged through an amount of compensation.

- 2.161** The Review also considered whether an alternative to using a tariff-based approach for multiple injuries should be introduced. The Review concluded that this would potentially run counter to the Scheme principles of fairness, accessible and being understandable, especially as comparisons would be drawn between an award for a single injury under the tariff and for multiple injuries assessed differently.

- 2.162** The guiding principles for a multiple injury rule suggested that it would not be appropriate simply to add all the lump sum values for the injuries together in all circumstances, as in those circumstances an individual with a collection of more

minor injuries would receive significantly more than an individual with a single more serious injury. The Review ruled out a number of options that would introduce similar inequalities.

- 2.163** The Review's more detailed analysis focused on the following approaches:

#### **Option A**

For those in the 100% GIP Band, calculate the lump sum as now. For those with one or more injuries in the 75%, 50% or 30% GIP Bands (tariff levels 5-11), an amount of compensation should be paid for each of those injuries in tariff levels 5-11, with an appropriate factor applied to ensure the twin guiding principles are maintained. For those claimants with further injuries in tariff levels 12-15, the highest three injuries in this range would receive an element of compensation for those lesser injuries, with an appropriate factor applied to ensure the twin guiding principles were maintained. For those with injuries only in tariff levels 12-15, the highest three injuries in this range would receive an element of compensation for those lesser injuries, with an appropriate factor applied to ensure the twin guiding principles were maintained (e.g. the 100%, 30%, 15% as now).

#### **Option B**

For those in the 100% GIP Band, calculate the lump sum as now. For all other claimants with multiple injuries, rank the injuries in severity order, dividing each value by its relative position in the list, and then add the elements together. (For example, N injuries would be combined as: Full value of first injury + second injury/2 + third injury/3 ...+Nth injury/N).

#### **Option C**

For those in the 100% GIP Band, award the lump sum as now. For those with lesser multiple injuries, to introduce an assessment that

considers the relative impact of the injuries on each body zone, with an appropriate factor applied to combine awards for each body zone (head and neck, torso, upper and lower limbs, the senses and mental health). The injured zones would be ranked in severity order with the most seriously injured zone receiving 100% of the value of the individual injuries to that zone, 80% for the second most seriously injured zone, 60% for the third zone, 40% for the fourth zone, and 20% for the fifth zone.

**2.164** The Review recognised that Option A did not provide an amount of compensation for every injury, which is seen as particularly unfair with the current rules. Option A, would however, have the effect of providing greater acknowledgement by way of compensation for all significant injuries which in their own right would attract a GIP.

**2.165** The Review recognised that Option B would provide an acknowledgement of compensation for each body zone affected by an injury, but was concerned that the approach remained too mechanistic and based on arithmetic and not the impact an injury would have on an individual.

**2.166** The Review recognised that Option C would provide an acknowledgement of compensation for each body zone affected by an injury. While the approach was complex, the Review was satisfied that such an approach was the most appropriate response to the valid criticisms levelled at the current multiple injury rules.

### **Recommendations**

**2.167** The Review acknowledges the underlying rationale to the existing multiple injury rule (as modified in 2008), but is concerned that the rule does not give proper recognition of the impact of multiple injuries on the individual. Alternative arrangements need to be put in place. The Review recommends:

- Maintaining the current rule for those with injuries that place them in the 100% GIP Band; and
- For those with lesser multiple injuries to introduce an assessment that considers the relative impact of the injuries on each body zone, with an appropriate factor applied to combine awards for each body zone.

**2.168** This revised approach would be used only to determine the level of the lump sum award. The GIP Band level would continue to be set by the most serious individual injury as is currently the case.

**2.169** The Review has also considered Article 18 (injuries to a pair of like parts of the body) and Article 19 (more than one injury to the same part of the body in separate incidents). The Review recommends that these rules are adjusted in light of the proposed changes for the principal rules governing multiple injuries.

## **Issue 12 – Other issues raised**

### **Background**

**2.170** During the course of the Review some other important issues have been raised, which have not been touched on in the analysis and recommendations linked to Issues 1 to 11 above. The other issues raised are:

- A. The Scheme, and any improvements from the Review, should be applicable to injuries/illness/death occurring before 6 April 2005.
- B. Hearing loss is not properly catered for in the Scheme.
- C. Anomalies across the Scheme (not achieving the horizontal and vertical equity the Scheme should deliver).
- D. Payments to Eligible Partners.
- E. Treatment for Foreign and Commonwealth ex-Service personnel.
- F. Home to duty travel definitions.
- G. Relationship with personal accident insurance (PAX).
- H. Relationship with common law claims.

**2.171** Each of the issues are discussed below, together with the Review's recommendations.

**A. The Scheme and any improvements from the Review should be applicable to injuries/illness/death occurring before 6 April 2005.**

**2.172** A number of contributors to the Review have asked for the Scheme's provisions and any improvements to them arising from the Review, to be applicable to those injured before the Scheme's introduction. The Secretary of State for Defence, when he launched this Review, committed to ensuring improvements that flow from the Review would be made available to all those already eligible under the Scheme.

**2.173** Those injured due to service prior to 6 April 2005 qualify for compensation from the War Pension Scheme which makes a tax-free index-linked monthly payment to qualifying individuals from leaving the services for life.

**2.174** Successive governments, across all public sector pension and compensation schemes, have held the general policy of making improvements prospectively with no retrospective element. Given the relative newness of the AFCS and the importance attached by Government to it, this Review will exceptionally adopt the same practice as the two previous reviews of the AFCS.

**2.175** The Review has considered whether any improvements should be made available to those who were injured before the start of the Scheme on 6 April 2005. The Review recognises the difficulties of providing AFCS benefits before the start of the Scheme, and notes that other compensation arrangements exist for injuries before that date and does not recommend extending the provisions to before the start of the AFCS.

**B. Hearing loss is not properly catered for in the scheme**

**2.176** The Scheme currently caters for hearing loss using a range of descriptors from

blast injury to the ears at level 14 to total deafness in both ears at level 6. Some stakeholders have suggested that the current provisions are insufficient and require review. The Review recommends that, at the top end, the awards provided for hearing loss are maintained at their current level (i.e. a level 1 award for total deafness and loss of both eyes, or total deafness and total blindness in both eyes, or total deafness and loss of one eye and total blindness in the other, and a level 6 award for total deafness in both ears); and that the level of compensation awarded for lesser degrees of hearing loss are all increased by one tariff level.

**2.177** The AFCS covers injuries and diseases caused by service on or after 6 April 2005 and it is not expected that hearing loss due to chronic workplace noise damage will be an issue for this Scheme. However, recent operations have been associated with impulse noise related to weapon-firing and associated hearing loss and tinnitus. The Review notes that this matter is being investigated by the MOD, endorses this approach, and recommends that the outcome should be explored from a compensation perspective by the new medical expert group as a matter of urgency.

**2.178** Threshold levels of hearing impairment that warrant award and other issues have been raised during the course of the Review. The ISG shares these concerns. It is recommended that, as well as the above change to tariff levels, the threshold level, and any other related issues, are referred to the expert medical sub-group to the CAC which is set up to advise on medical issues in relation to the Scheme. These changes should be applied to those with previous AFCS claims for hearing loss.

**C. Anomalies across the Scheme**

**2.179** There have been a number of areas of the Scheme's tariff where it has been suggested the Scheme is not operating as intended to deliver the horizontal and vertical equity on which it was founded. These areas include:

- The compensation paid for injury to the genitalia.
- The compensation paid for brain injury.
- The compensation paid for spinal cord injury.
- The compensation paid for non-freezing cold injury.
- The compensation paid for paired injuries.
- The loss of use of a limb.

**2.180** The ISG shares these concerns and the Review recommends that these areas are examined in detail by the proposed new medical sub-group of the CAC to ensure a way forward is found which provides the equity the Scheme should deliver. The benefits as a result of changes should be applied to those who have previously made claims for these conditions under the AFCS.

**2.181** The Review notes that infertility is at level 8 on the tariff and so attracts a 50% GIP. As infertility does not lead to loss of earning potential, this was seen as anomalous. The Review recommends that infertility is treated separately under the Scheme, and a higher lump sum is paid for those who become infertile as a result of service, with no ongoing income stream. Preferential access to IVF treatments without normal limits is also recommended.

**2.182** The Review recommends that the proposed augmentation of the Central Advisory Committee on Pensions & Compensation be used to keep the issues of horizontal and vertical equity (i.e. ensuring the most serious injuries receive the highest levels of compensation) under review so that where further potential anomalies appear to arise, there is a mechanism already in place to consider them and to recommend prospective changes to the descriptors or tariffs to address them.

#### **D. Payments to Eligible Partners**

**2.183** The Scheme sets out in a Schedule to the Scheme how eligibility will be determined to a Survivor's GIP for someone who is

not a spouse or civil partner but is in a substantial relationship. Some next of kin (where there has been no spouse or civil partner) have raised concerns that the making of payments to some partners precludes any payment to the estate in those cases. If there is an eligible partner then the AFPS Death-In-Service lump sum is also paid to the partner; if there is no partner then the lump sum is paid to the estate. The AFCS does not make payments to the estate or parents.

**2.184** The Review has examined the rules for determining eligible partners in the Scheme. The Review recognises the sometimes complex nature of modern relationships, and how those might be affected by the circumstances of service life. The Review considers that the current rules appropriately take these circumstances into account. The Review noted that the current rules are in fact more generous to the claimant and their circumstances than the rules found in a number of other comparator schemes and therefore does not recommend any changes to the Schedule.

#### **E. Treatment for Foreign and Commonwealth ex-Service personnel**

##### ***Background***

**2.185** Some contributors to the Review have suggested that the Scheme's lack of provision to pay for treatment outside of that provided for under other UK legislation might prevent some injured personnel exercising their choice to return to their country of origin on discharge from the Armed Forces.

**2.186** This concern has been raised because the Scheme's predecessor, the War Pension Scheme, does contain a discretion for "necessary expenses in respect of the medical, surgical or rehabilitative treatment of the member of the Armed Forces or appropriate aids or adaptations for disabled living may be defrayed by the Secretary of State under such conditions and up to such amounts as he may determine". There is no power to defray

expenses where the treatment, aids or adaptations are provided for “otherwise than on a payment of a charge under legislation of the UK”. The provision is still used to defray such expenses. This provision in the War Pension Scheme pre-dates the welfare state in the UK when injured personnel might not have been able to access free healthcare across the UK. Following mass emigration after World War II of former UK Service personnel predominantly to Canada and Australia, the provision was used to pay for ongoing treatment arising from their War disabilities. It has also been used for ex-Service personnel who have needed treatment for their injury when temporarily outside the UK, and also for small numbers of injured Commonwealth ex-Service personnel who have chosen to return to their country of origin, when healthcare is not provided free to individuals.

**2.187** The AFCS contains no such provision since the Scheme was designed to fit with wider welfare, social and health care provision in the UK. All former personnel, including Foreign & Commonwealth personnel, who remain lawfully in the UK can access care and treatment as other ex-Service personnel. Some contributors have suggested that the human rights of individuals might be infringed if care costs abroad are not met from the Scheme for injuries caused by their service. The Review notes, however, that those with over 4 years of service are entitled to settle in the UK, and for those seriously injured with less service, the UK Borders Agency has discretionary powers to allow personnel to remain in the UK. If individuals, including Foreign & Commonwealth ex-Service personnel, return to the UK, then they will be able to access priority treatment on the NHS for their injury caused by their service in the UK Armed Forces, free at the point of delivery.

**2.188** All injured ex-Service personnel with ongoing health needs, whether caused by service or not, and irrespective of nationality, in deciding where they choose to live, need to consider how

those health needs will be met. There is considerable variance in the standards of healthcare provision available across the world, and whether individuals need to pay for their care. For some with significant injuries, some countries might not be able to meet the standards of care available free to them on the NHS.

**2.189** In addition to the support available from the state in the UK, the third sector (principally ex-Service organisations) have on occasion chosen to provide, from their own resources, assistance to ex-Service personnel who have left the UK, including returning to their country of origin. Such support reflects the longstanding tradition of the third sector in the UK in providing support on top of state provision. The 2008 Service Personnel Command Paper set out a number of improvements to state provision to support serving personnel, their families and veterans, including those from Foreign and Commonwealth countries. Around 10% of the Army is drawn from Foreign & Commonwealth countries, and they face the same risk and rigour as any other Service personnel. The evidence available suggests that the majority of such personnel do not choose to retire to their country of origin but make the necessary immigration arrangements to be able to remain in the UK.

### ***Options and Analysis***

**2.190** A number of contributors have suggested that separate provision should be made for Foreign and Commonwealth ex-Service personnel to return to their country of origin, with the Scheme covering their care costs.

**2.191** The Review, in developing and analysing options to address this concern, is aware of the MOD’s legal obligations under the Race Relations Act and other anti-discrimination legislation to promote equality. Taken together with the (revised) Scheme principles of fairness and promoting Human Rights, any approach must provide equality to all injured personnel irrespective of race

or nationality. This would rule out the possibility of making special provision just for Foreign and Commonwealth personnel.

**2.192** The Review has also re-affirmed and made explicit that the Scheme should be considered as part of the Nation's wider responsibilities to provide appropriate preferential access to public services in the UK in recognition of the sacrifice that injured personnel have made for the UK. In the vast majority of cases, it would appear that these provisions provide an appropriate response to the needs of all injured personnel, including from Foreign and Commonwealth countries, who choose to remain lawfully in the UK, or to return to the UK for treatment for their injuries caused by their service in the UK Armed Forces.

**2.193** The Review has also considered that ultimately decisions about where an individual chooses to live after discharge from the UK Armed Forces is a private matter for them to determine, taking in to account all their aspirations and needs and the availability of healthcare, support or other arrangements.

**2.194** Nevertheless the Review is concerned that those who are seriously injured as a result of their service in the UK Armed Forces might feel that their options about where to live in the world at the end of their service are constrained in their choice only as a result of their injury caused by their service in the UK, which they would otherwise have chosen to make.

**2.195** The Review has therefore examined how such a policy intent might be lawfully delivered, and the following proposal developed:

For those seriously injured personnel defined as those with an award in tariff levels 1-8, at the point of discharge, they would be given an opportunity to apply to the MOD to exercise a discretionary power to defray certain costs of ongoing treatment needed

for their injury, if they choose to live permanently outside the UK, or countries where reciprocal healthcare arrangements are not in place.

Individuals would need to make and implement their choice within 12 months of discharge otherwise the discretion would lapse. As this would be a discretionary power, it would not attract external appeal rights, but an individual would be able to request the MOD to reconsider its decision.

The rationale for making this a decision at discharge would be to make this available to those who wish to leave the UK at discharge, and to give them a reasonable period of time for them to make necessary arrangements in the chosen country. The intention would be to exclude those who at some later point in life might simply wish to emigrate. The rationale to have this discretionary facility only available to the more seriously injured reflects the Scheme's principle of fairness which includes focusing resources on that group.

The rationale for limiting the discretion to ongoing medical treatment or rehabilitation costs, and to exclude personal care would be to reflect the equivalent application of this provision in the War Pension Scheme. The Review considers it appropriate for the Scheme to exercise this discretion either to pay for the travel and associated costs to the UK to receive treatment on the NHS, or to reimburse expenditure outside the UK.

**2.196** The Review recognises that practical obstacles would need to be overcome in relation to making decisions about defraying future treatment costs, and making decisions with individuals who may choose to live in remote places or with limited facilities. The intention would be that incurring additional significant expenditure would require prior approval.

**2.197** The Review recognises that in some circumstances it would be acceptable to decline to meet expenses, such as if the Scheme decision-maker considered that the chosen country was not capable of meeting ongoing health needs (but might accept that it was available on an acceptable basis in a nearby country).

### **Recommendations**

**2.198** The Review acknowledges the legal obligations on the MOD to promote equality and not to discriminate on the grounds of race or nationality. The Review also accepts that decisions on where to live are ultimately for individuals to make for themselves taking into account all the relevant factors. The Review understands, however, the concerns that have been expressed in relation to the choices about where to live open to those personnel, especially those from or with connections with Foreign and Commonwealth countries, injured as a result of service on their discharge from the Armed Forces, which might be more constrained than would otherwise have been the case had the injury not occurred.

**2.199** In those very special circumstances, the Review recommends that the Scheme should be able on a discretionary basis to defray certain costs associated with ongoing treatment arising from the injury caused by service. The Review recommends that such a power should be necessarily constrained as described above to ensure that the legitimate policy aims are met. The Review recognises the practical challenges to be overcome in making this provision work in practice and for detailed guidance to be drawn up in consultation with stakeholders, then made available to those to whom it might apply, and other interested parties.

**2.200** The Review also recommends that the MOD continues to work with injured personnel, their families, the third sector and other Government Departments to ensure that individuals are provided with sufficient information so that they can make a properly informed choice about

their future living and care arrangements if they choose to live outside the UK after they leave the UK Armed Forces.

### **F. Home to Duty definitions**

**2.201** The Scheme contains certain exclusions, in Article 10, on where normal home to duty travel of personnel is not covered by the Scheme. A number of contributors to the Review have suggested that greater clarity, in either the rules or associated guidance notes, should be provided in certain circumstances, such as when posted overseas, when involved in incidents on MOD property, and for Reservists travelling to training. The Review recommends that such clarity is provided either in the Scheme rules or in appropriate guidance material, which should be widely available to personnel.

### **G. Relationship with PAX**

**2.202** The AFCS is entirely separate from Personal Accident Insurance that Service personnel may have made their own private arrangements. Payouts under Personal Accident Insurance are not taken into account when the Scheme determines the level of award. In those circumstances, such an individual would receive both their AFCS benefits and those from their own Personal Accident cover. Since 1989 the MOD has made available to personnel at their own expense private insurance scheme known as PAX. PAX is currently provided by Orbis Insurance.

**2.203** The Review has noted these separate arrangements and the overlap between them, and that it is an individual's choice whether they take out their own personal accident cover to meet their own personal priorities, taking into account the potential premiums required to provide for cover given the current scale and nature of operations.

### **H. Relationship with common law claims**

**2.204** The AFCS is a no-fault scheme which makes payments when the injury is

due to service. In those cases where negligence is involved, Service personnel or their dependants can bring common law claims against the MOD in addition to a claim from the AFCS. The MOD will seek to settle those cases where there is a proven case of liability without recourse to the courts, unless the defence of Combat Immunity applies.

- 2.205** Where an award has been made under the AFCS and a civil court makes an order for the payment of damages, or an offer of settlement providing for payment of money is made in respect of a claim for damages, or compensation arising out of the same injury or injuries as the award under the AFCS, the MOD may set the full amount payable under the AFCS against the award of damages or sum offered by way of settlement. This reflects the long-standing public policy and common law position that no person is compensated twice for the same injury. As noted earlier in this report under Issue 2 – What the compensation is for and its relationship with other state benefits and Issue 3 – The overall level of compensation, including for dependants, the lump sum element of AFCS awards is for the same purpose as aspects of general damages in common law claims to take account of pain and suffering, and the GIP/Survivor's GIP is for the same purpose as future loss of earnings and pensions elements of a common law claim, although calculated on a different basis.
- 2.206** When the AFCS was introduced it was envisaged that AFCS awards would be in payment before settlement was reached in civil litigation claims, so the AFCS award would be taken in to account in reaching a settlement of a civil personal injury or dependency claim. The Criminal Injuries Compensation Scheme also does this. During the course of the Review it has come to light that the Fatal Accident Act (FAA) 1976 which applies only to dependency claims in England & Wales means that those settlements cannot take in to account AFCS benefits, as a result of a Court case in 2008. The FAA does not apply to personal injury claims in England

& Wales or Scotland, nor to dependency claims in Scotland.

- 2.207** The Review has considered the general policy of abatement in relation to AFCS claims and civil litigation in relation to injury illness and death and has concluded that the policy remains sound. A different practical approach is, therefore, required for dependency claims in England & Wales to ensure that a fair amount of compensation is awarded in total from the AFCS and a common law claim, by taking in to account the awards made from either approach. In most cases, as now, the settled claim would take account of AFCS awards. In dependency claims in England & Wales, it might be necessary for a widow's AFCS award to be revisited once a common law claim has been settled. For the sake of clarity, the Review recommends that this approach is set out explicitly within the Scheme rules, and made clear in communications with claimants.
- 2.208** The Review has also considered the circumstances where the negligence claim may be brought against a third party that is not the MOD, such as when Service personnel might be involved in a road traffic accident where an AFCS award may be appropriate, and the Service person might also receive an award from a third party insurer. In those circumstances the general policy should remain and the third party insurance should be taken in to account in an AFCS award. The Review recognises that obtaining information about third party claims might be difficult to operate in practice, but nonetheless the same policy approach should apply so that compensation is not awarded twice for the same incident, since the purpose of compensation is to attempt through financial means to put individuals in the position they would have been in had the incident not occurred.
- 2.209** In effect, someone leaving the service as a result of an injury, or a dependant because of death, will receive the occupational pension to which they

are entitled as of right. On top of that they will receive additional money from the AFCS in recognition that the injury, illness or death was due to service on a no-fault basis. Further money on top of an AFCS award would be available in the case where MOD accepted liability in a negligence claim. Any additional payments received as a result of personal accident insurance, for which an individual paid their own premiums, such as PAX, is not taken into account in AFCS awards nor in common law claims.

# Chapter 3:

## Implementation

- 3.1** The Review acknowledges that a considerable amount of work will be required to translate these high level recommendations into the necessary detail to enable the appropriate legislation and associated guidance to be produced, as well as time for the SPVA to take the necessary steps to turn the legislation into systems and procedures before claims can be processed under the new legislation.
- 3.2** Arrangements will also need to be put in place to take account of the Secretary of State's intention to ensure that appropriate improvements are made available to those who have already made claims under the Scheme. The Review recognises that the MOD will need to act within the vires of the Scheme's primary legislation and so is likely to confer additional benefits on those whose claims have already been processed under the existing legislation, as it did with the changes made in 2008. Given the need for potentially complex transitional arrangements, those claimants may receive broadly equivalent benefits rather than exactly what the new prospective arrangements will be.
- 3.3** In amending the legislation, care will need to be taken to ensure that the legislation remains in an accessible form to those that need to use it. It may therefore be necessary to consolidate the legislation at this stage with the introduction of new rules as a result of this Review. This may take time to deliver but may be more straightforward (and therefore faster) than attempting to revise the legislation that has been revised a number of times already.
- 3.4** Immediately following the publication of this Review, the MOD will need to draw up a detailed implementation plan and timetable which recognises that appropriate consultation should be undertaken in relation to the details of how the MOD will give effect to the Recommendations.
- 3.5** The existing Central Advisory Committee on Pensions and Compensation (the CAC) would appear to be an appropriate body to continue to engage in the implementation of the Review. Suitably augmented with medical expertise, it also appears to be capable of taking forward the mechanism to produce a recognised list of diseases, and to keep under review potential anomalies across the Scheme. It also appears to be the appropriate body to provide a support and challenge function to the MOD if subsequent issues arise that require review in the future.
- 3.6** Given the considerable undertaking necessary to convert the Review's Recommendations into actionable legislation, the MOD should manage expectations carefully about when the improvements will come into force. The timescale to get extra money to individuals is likely to be of the order of 12 months from the date of publication. Some of the more straightforward prospective changes may be deliverable in a shorter timeframe, where it is possible to do so, particularly where no legislative change is required.

# Annex A

## Engagement and Feedback

Former Chief of the Defence Staff Admiral the Lord Boyce chaired the Review of the Armed Forces Compensation Scheme (AFCS). Lord Boyce is independent of Government and has a thorough understanding of the challenges faced by our Servicemen and women and the impact of injury on them and their families. In taking forward the Review, Lord Boyce was supported by an Independent Scrutiny Group (ISG) made up of medical, legal and academic experts as well as representatives of Service and ex-Service organisations, a Service family representative and a beneficiary of the Scheme. This structure ensured that the Review took a fresh look at the Compensation Scheme and ensured all interested groups had a voice.

To provide visibility of the workings of the Review and the constitution of the ISG, the ISG membership and terms of reference of the Review were published at the outset. During the course of the Review, the ISG met on a number of occasions to consider and debate each issue arising, drawing on their wealth of knowledge and expertise, coming to a final agreed decision at each stage.

As part of the Review, the MOD looked at ways of accessing wider views from both within and beyond the Service community. A number of methods were used to gather comment, with more information on these below. The purpose of seeking this feedback was to explore whether all the issues requiring examination had been covered, as well as to seek suggestions on how the Scheme might be improved.

### Public engagement

In order to seek wider stakeholder and public views, a four week period of public engagement was announced in October 2009 during which

feedback was sought either by email, online or by post. This proved very successful with over 200 responses received. The feedback was analysed and it was interesting to note the majority of areas identified as needing action had already been identified by the MOD as needing consideration, if not in total, certainly in part. Where new or more detailed issues were brought forward, the original list of issues was expanded to take account of these.

Breakdown of feedback groups from the public engagement period:

Serving Members of the Armed Forces	63%
Veterans	15%
Service families	10%
Members of the public	5%
MOD civil servants	3%
People who did not state their group	4%

Examples of feedback:

- Greater compensation received under civil schemes as compared to AFCS.
- Compensation should take into account, or did not currently adequately take into account, the long-term effects of an initial injury.
- The AFCS should make payments as if the injured Service person had served for a full career.

### Focus Groups

In addition to each of the three Single Services issuing a notification from their Service Chief encouraging Serving personnel to take the

opportunity to contribute to the public engagement, the Review Team engaged the Service community directly by conducting a number of Focus Groups. These Focus Groups were set up to gather views from both Serving personnel and their families. Four focus groups were held, one for each Service and one at Headley Court<sup>1</sup>. A member of the ISG attended the Focus Groups where possible, to enable them to also gain an understanding of the views from those who have claimed or may claim under the AFCS. Feedback from each of the Focus Groups was candid and informative and helped to ensure the Review had identified the correct issues to examine. Overall it was felt the attendees welcomed the opportunity to contribute their personal views and comments to the process.

Examples of feedback:

- Lack of knowledge and understanding of the Scheme.
- Tariff anomalies including level of compensation paid for multiple injuries, mental illness and genitalia.
- Financial advice required upon receipt of a lump sum.
- Early payment on account should be introduced.

### **Interest group feedback**

As a part of the public engagement phase, as well as the 200 or so individual responses referred to above, 19 submissions were received by the Review from interested groups. The responses included a number from Service and ex-Service organisations and charities representing and supporting members of the Armed Forces and their families. These included Combat Stress and the RNID, current and past Presidents of the independent Tribunal Service and representatives of individual Service personnel who have claimed under the Scheme.

Examples of feedback:

- Time limits for claiming should be examined.

- Multiple injuries and mental health compensation should be increased.
- Financial advice required when lump sums paid.
- Lack of knowledge of the Scheme.

Individual contact was also made with Marine McWilliams and Corporal Duncan, who were involved in the Court of Appeal case heard in July 2009, to hear their views about the Scheme and the Review.

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<sup>1</sup> Defence Medical Rehabilitation Centre for injured Service personnel

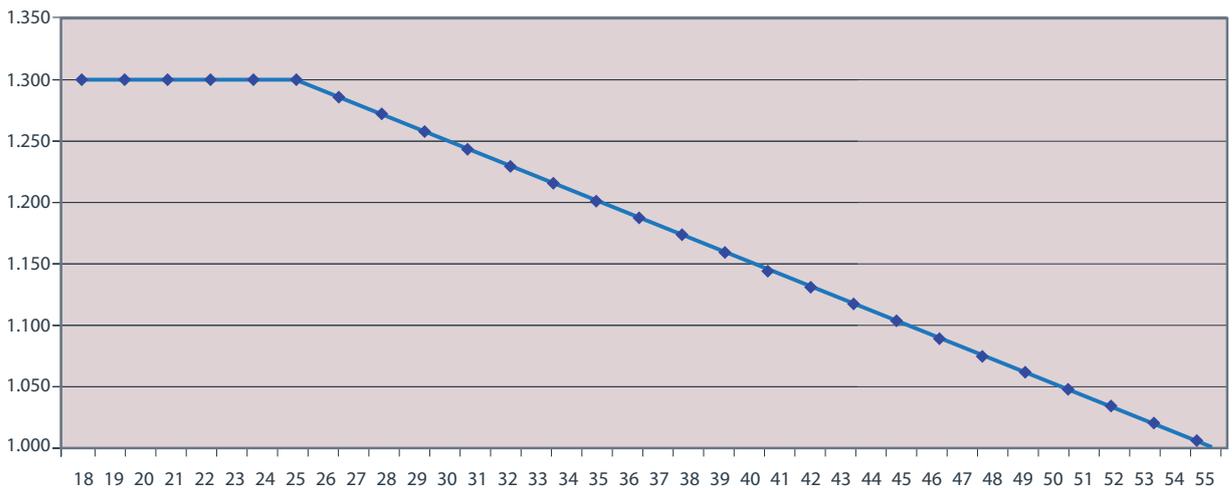
# Annex B

## Updated GIP Factors and Loss of Promotions Factor

GIP Factors					
AGE	Current	Revised	AGE	Current	Revised
16	0.905	<b>0.931</b>	37	0.790	<b>0.864</b>
17	0.902	<b>0.929</b>	38	0.781	<b>0.859</b>
18	0.898	<b>0.927</b>	39	0.772	<b>0.854</b>
19	0.894	<b>0.925</b>	40	0.762	<b>0.849</b>
20	0.891	<b>0.922</b>	41	0.751	<b>0.843</b>
21	0.887	<b>0.920</b>	42	0.740	<b>0.837</b>
22	0.882	<b>0.917</b>	43	0.728	<b>0.831</b>
23	0.878	<b>0.915</b>	44	0.715	<b>0.825</b>
24	0.873	<b>0.912</b>	45	0.702	<b>0.818</b>
25	0.869	<b>0.909</b>	46	0.687	<b>0.811</b>
26	0.864	<b>0.906</b>	47	0.672	<b>0.803</b>
27	0.859	<b>0.903</b>	48	0.656	<b>0.795</b>
28	0.853	<b>0.900</b>	49	0.638	<b>0.786</b>
29	0.847	<b>0.897</b>	50	0.619	<b>0.777</b>
30	0.841	<b>0.893</b>	51	0.599	<b>0.767</b>
31	0.835	<b>0.889</b>	52	0.577	<b>0.757</b>
32	0.829	<b>0.886</b>	53	0.554	<b>0.746</b>
33	0.822	<b>0.882</b>	54	0.528	<b>0.735</b>
34	0.814	<b>0.878</b>	55	0.500	<b>0.722</b>
35	0.807	<b>0.873</b>			
36	0.799	<b>0.869</b>			

Loss of Promotions Factor			
Age	Factor	Age	Factor
18	1.300	37	1.169
19	1.300	38	1.159
20	1.300	39	1.150
21	1.300	40	1.141
22	1.300	41	1.131
23	1.300	42	1.122
24	1.291	43	1.113
25	1.281	44	1.103
26	1.272	45	1.094
27	1.263	46	1.084
28	1.253	47	1.075
29	1.244	48	1.066
30	1.234	49	1.056
31	1.225	50	1.047
32	1.216	51	1.038
33	1.206	52	1.028
34	1.197	53	1.019
35	1.188	54	1.009
36	1.178	55	1.000

**Loss of Promotions Factor**





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