Ministry of Defence

Better Combat Compensation

A response by the Association of Personal Injury Lawyers

February 2017

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain access to justice they need and deserve. We have over 3,500 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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Introduction

Enhanced compensation for those barred from pursuing a negligence claim by the principle of combat immunity should be welcomed. This should not, however, be contingent on widening the scope of the combat immunity principle. The proposed definition of combat immunity in the MoD's consultation paper extends the scope of the principle beyond decisions that are made in the heat of battle. The proposals intend to take away the rights of soldiers and veterans to pursue negligence claims in court, meaning that the MoD will not be held accountable, and lessons will not be learned.

Executive Summary

- We do not accept that there is a need to enshrine combat immunity in legislation. Judges are able to apply the doctrine of combat immunity fairly on a case by case basis. To broaden the scope to apply to non-combat situations, as the MoD's proposals intend to do, will mean that the MoD will escape scrutiny for decisions that were made far away from the pressures of the battle field. If the MoD is not held accountable for these decisions, then lessons will not be learned and further harm will not be prevented.
- A decision to award those who are barred from bringing claims under the principle of combat immunity should be welcomed, provided that the scope of combat immunity remains at it is, as interpreted by the judiciary.
- An enhanced compensation scheme would be unsuitable as an alternative for claims arising out of non-combat decisions because:
  - The MoD as initial assessors would attempt to "capture" claimants, by interpreting the legislation as widely as possible. Claims that involve non-combat decisions would be put through the enhanced scheme. People would be denied their right to be heard in court, and the MoD would not be held accountable.
  - We question how an independent assessor would be able to arrive at a decision on quantum at the same level as a court, when they are not likely to have had access to the same amount of evidence as a court. This would be particularly the case if the claimant does not have access to legal representation. It is usually the role of the claimant solicitor to gather the necessary evidence, and we question how it would be gathered if the claimant was unrepresented.
- The existing Armed Forces Compensation Scheme should be reviewed.
- If an enhanced compensation scheme were to be introduced for cases falling within the existing scope of combat immunity:
  - The claimant must have access to independent legal advice. This will ensure that the proper evidence is gathered to support the claim. They must be properly advised of their choices and how to handle their money.
  - An independent assessor should make decisions on the assessment of the award, and APIL should be involved in selecting independent assessors.
- The Armed Forces Compensation Schemes must be more widely publicised.

Section 1 – combat immunity: the need for legislation

We do not accept that there is a need to enshrine combat immunity in legislation. The concept was first set out in the case of *Mulcahy v Ministry of Defence*[1], and the judiciary understands and applies it fairly. In *Mulcahy,* a private attempted to sue the Ministry of Defence for damage to hearing as a result of a Sergeant's order to fire at the enemy while he was to the front of a gun he was responsible for swabbing out. It was held that "public policy requires that when two or more members of the armed forces of the Crown are *engaged in the course of hostilities*, one is under no duty of care in tort to the other [emphasis added]". "It could be highly detrimental to the conduct of military operations if each soldier had to be conscious that, even in the heat of battle, he owed such a duty to his comrade[2]". We do not agree with the assertion at paragraph 1.4 of the MoD's consultation document that there is a legal uncertainty on those who have been injured or bereaved by the current combat immunity principles. The current principle allows service men and women and their families to exercise their right to be heard in court where appropriate, and for lessons to be learned. We suggest that the Ministry of Defence's own behaviour when conducting litigation has a far more detrimental effect on claimants than any uncertainty surrounding combat immunity. Delays and long drawn out litigation are routinely caused by the Ministry of Defence's own behaviour when defending the claims as demonstrated in the case study below.

Case Study
Revell v MoD

The claimant was first diagnosed with a non-freezing cold injury in November 2009. Subsequent incidents of NFCI followed. The claimant instructed solicitors in March 2012. An informal letter of claim was sent to MoD in September 2012 after medical records, HMRC records, etc had been obtained.
The MoD failed to respond so a formal LoC was sent in January 2013. The MoD did not respond with any decision about liability, despite the claimant agreeing extension of time for the MoD's response. Eventually in July 2013 the MoD responded to the effect that it was unable to trace all the relevant documentation about the claimant or the boots with which he had been issued. Proceedings were issued and served on the MoD in July 2013.
The MoD requested multiple extensions of time in which to serve its defence, to which the claimant agreed, while at the same time inviting the MoD to agree a £10,000 interim payment. This was refused throughout the case and the claimant had been invalided out of service. He suffered mentally as a consequence. A defence was finally served in February 2014, almost six months after proceedings had been served. The MoD completely denied any negligence, breach of duty or injury despite their very own doctors diagnosing the injury, treating the injury and discharging the claimant, with those injuries.

Despite the claimant's best efforts to progress the claim, and offering ADR, the MoD continued to deny the claim and refused to engage with the claimant's solicitors. By the time a CCMC had been listed for 22 September 2014, the MoD eventually (and late) filed its objections to the claimant's budget and turned up at the hearing with counsel, even though the court had directed that only the case handlers should attend. The CCMC was adjourned so that the defendant could consider whether to agree the claimant's costs budget (the claimant had agreed the MoD's budget). The MoD made a split liability offer which was rejected. A trial was listed for June 2015 (notice served in December 2014). More extensions of time were granted to the MoD to file various documents and evidence. The MoD's expert confirmed the NFCI diagnosis in April 2015. Shortly after this, in May 2015, a Joint

[1] [1996] 2 All ER 758
[2] Paragraph 62 of the judgment

Settlement Meeting took place and the MoD paid damages of £165,000. The total settlement was £165,000.

Negligence claims are an important mechanism for holding the MoD to account. When cases highlight issues with equipment or training, lessons can be learnt and changes implemented to ensure that more people are not harmed or killed by defective equipment or bad practices. This is clearly demonstrated in *Smith and others v Ministry of Defence*[3]. Several cases were jointly heard. In the Challenger case, a Sergeant ordered a tank to fire on hot-spots, believing them to be personnel moving in and out of a bunker. In fact, the hot-spots were other British soldiers standing on a tank, and they were killed as a result of the blast. In the Ellis negligence claim, part of the "Snatch Land Rover" set of claims, a soldier was killed by an IED while travelling in a Snatch Land Rover, and it was alleged by the family of the deceased that there had been a failure to provide suitable armoured vehicles for patrolling.

In both cases, the MoD sought to have the negligence claims struck out because they fell under the principle of combat immunity. It was held that both claims could proceed to trial on the ground of falling outside the scope of combat immunity or on the ground that it would be fair, just and reasonable to extend the MoD's duty of care to those cases. It was held, at paragraph 92 of the judgment, that combat immunity should be narrowly construed to apply only to actual or imminent armed conflict. The Challenger negligence claims, for example, were upheld because they fell into the category of training and preparation, sufficiently far removed from the pressures and risks of active operations against the enemy.

It was held that the Ellis negligence claim was less obviously directed to things away from the theatre of battle, and that the issue should be open to further argument in the light of evidence. This demonstrates an important reason why the MoD's proposals will simply not work. Because the principle of combat immunity can be open to interpretation, it should be decided on a case by case basis, examining the facts and hearing the arguments of both sides, with the well-equipped judiciary left to come to a decision based on their knowledge of the well-established body of case law in this area. If, as proposed by the MoD, the Snatch Land Rover claims had simply been barred from the courts because they fell within the legislative scope of combat immunity, the issues arising from the case would have been swept under the carpet.

Instead, as a result of the Snatch Land Rover claims, the ineffectiveness of the vehicles was brought into the public eye, and the MoD was forced to acknowledge that there was an issue. Complaints to the MoD before the claims had gone ignored. If the MoD is permitted to extend the defence of combat immunity as proposed, to provision of equipment for battle and to decisions on training and preparation for battle, mistakes will be made, people will be killed and injured, but the MoD will be permitted to brush these incidents under the carpet, pay a sum of money to the servicemen and women and their families, and continue as before with no lessons learned. This cannot be permitted.

We query whether the MoD should be permitted to legislate itself out of a duty of care to soldiers. It is clear from the Policy Statement by the Secretary of State on Health, Safety and

[3] [2013] UKSC 41

Environmental Protection in Defence 2014[4] that the MoD must comply with health and safety legislation in the same way that an employer would. In *Broni v Ministry of Defence*[5], while it was held that the MoD did not employ soldiers as the soldiers did not operate under a "contract of service", Mr Justice Supperstone stated that "The Ministry of Defence owe a duty of care to servicemen whether they work under a contract of service or not, both at common law and under the Health & Safety at Work Act 1974". It is extremely difficult to see how this duty, recognised by the courts, can be excluded by legislation.

There is a clear conflict of interest at the heart of these proposals. The MoD is the tortfeasor in these cases, and as such it should not be permitted to force though a change in the law to benefit itself. The MoD is the body that is going to benefit directly from these supposed reforms, and it should not be permitted to create legislation that would exclude their common law duties to our service men and women. We are concerned that if the MoD is allowed to do this, other public services may seek to follow suit, such as the police and fire brigade. These bodies could also try to legislate themselves out of their common law duties, creating their own extra-judicial systems where they will be in control of whether a claimant is entitled to claim, how much money is awarded to a claimant, and with the only route to challenge/appeal for a claimant being a costly judicial review. In addition the MoD is already immune from any scrutiny by the Health and Safety Executive and the Corporate Manslaughter and Homicide Act 2007, resulting in no public accountability – it is extremely important that there is accountability through the civil court process.

Section 2 – The Future Scope of Combat Liability

Q1) Do you agree with this approach to the definition of "combat"?

As set out above, we do not believe that there is a need to legislate to define "combat immunity". Whether the situation falls within the scope of "combat" should be decided on a case by case basis, using the established case law in this area.

If combat immunity is defined in legislation, "combat" should cover only those circumstances where the person is firing at the enemy, or there is a threat of enemy attack. Instead, the proposed definition of "combat" at paragraph 2.3 and 2.4, reveals that the government plans to extend combat immunity to situations where there has been time to think and plan – beyond *Mulcahy*. By extending combat immunity in this way, the Ministry of Defence will take away the rights of service men and women to bring negligence claims in the courts.

If the definition within the consultation document is brought in, then the Challenger claim would have fallen within the scope of combat immunity, falling within the scope of "combat" as "the direct result of misdirected targeting by friendly forces". This is despite the clear fact, as the Supreme Court held, that the decisions made in relation to the fitting of equipment to tanks, and the training and preparations to avoid friendly fire incidents, were made when there was time to think things through, time to plan and exercise judgment, away from the pressures of active operations against the enemy. The fatalities were not as a result of decisions made "in the heat of battle". If the MoD's proposals were to come into force, the

[4] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/353935/201408_SofS_Policy_Statement_Fallon.pdf

[5] [2015] EWHC 66 (QB)

families of those that died would not be given answers, and there would have been no scrutiny of the MoD's actions.

We do not see how there can be a blanket inclusion of peace-keeping operations within the meaning of "military operations" in "combat". Combat immunity should be decided on a case-by-case basis, subject to the test of whether the decision is made "in the heat of battle".

Q2) Do you agree that the new scope should apply to claims arising both in the UK and outside it?

For the reasons set out above, we do not believe that it is necessary or desirable to legislate on combat immunity – whether claims arise in the UK or outside it.

Q3) Do you agree that the exclusion of liability should apply only to those directly participating in combat?

For the reasons set out above, we do not agree that it is necessary or desirable to legislate on combat immunity. If the Government does legislate, "participation" will require extremely careful definition.

Q4) Do you agree with this approach to the scope of injuries and deaths to be covered by the exclusion?

As above, we do not believe that there needs to be a statutory provision for combat immunity. Decisions should be made on a case-by-case basis, by an experienced and informed judiciary. If there is statutory provision for combat immunity, the exclusion should only apply to injuries and deaths as a result of decisions made where thinking is impaired in the heat of battle. It would be extremely difficult and confusing to attempt to list injuries and deaths to be covered by the exclusion, because each case turns on its facts. To attempt to define a scope of injuries and deaths to be covered would result in servicemen and women being denied access to the court where their injuries were caused in a non-combat situation.

We agree that claims that physical or psychological injury had been exacerbated by poor treatment should not be covered by the exclusion and would continue to be the basis of a court action.

Section 3 – Enhanced Compensation Scheme

Any decision to award enhanced compensation to those who are injured in combat should be welcomed – enabling those who are barred from bringing a claim in court to obtain an award akin to that which would be awarded in court is good for society – full compensation and access to rehabilitation means that the claimant will not be a strain on the benefits system - and it also meets the requirements of the Armed Forces Covenant. Under the current system, awards for injuries in combat are capped at £570,000, and we would welcome a decision to replace those capped awards with awards that would fully compensate the injured person or bereaved family to the same level that they would have been if their case had been heard in court.

The consultation states, however, that the enhanced compensation scheme will be set up for those who will be precluded from suing the Government in negligence under the terms of the proposed exclusion of liability discussed in section 2. As set out in our response to sections

1 and 2, we oppose the removal of the rights of servicemen and women to make claims in court for non-combat injuries. Taking away the right of a service man or woman to have their case heard by an independent and experienced judge is vastly unjust, and will mean that the MoD will be permitted to no longer be held accountable for decisions made in non-combat situations. The enhanced compensation scheme should not be contingent on a wider definition of combat immunity.

Enhanced scheme cannot be a replacement for the court process in non-combat cases

The consultation sets out that the proposed enhanced compensation scheme will be set up for the benefit of those current and former members of the Armed Forces and their entitled family member who will be precluded from suing the Government for negligence under the terms of the proposed exclusion of liability discussed in the section 2.

We set out above the reasons why combat immunity should not be broadened. If combat immunity is broadened, the system set out in section 3 is wholly inadequate as a replacement for the court system for several reasons.

The initial assessment

An initial assessment on the eligibility of the claim, carried by the Ministry of Defence, would be inappropriate. We envisage that in most cases, regardless of whether the case is combat or non-combat, the MoD will direct the person to the enhanced compensation scheme – espousing the benefits of no legal fees and a quicker settlement than court. Without a signpost or access to legal advice, the veteran is very likely to follow this route, without considering if they would have a claim in court. The MoD has an interest in keeping claims out of the court system, so if in charge of the initial assessment, would be likely to interpret the broader scope of combat immunity as widely as possible, "capturing" claims that should otherwise go to court. It is said in the consultation document at 3.3 that if the Ministry of Defence rejects the claim, then the claimant would be able to challenge this by way of judicial review, or to pursue a claim for negligence in the Courts. There is no mention of what happens if, perhaps the veteran decides to seek legal advice, and then the veteran wishes to challenge the MoD's assessment that the claim should be in the scheme. We assume that the only route to challenge the initial eligibility decision would be a judicial review. This would simply not be financially viable for many veterans, and even if the person manages to obtain the funds to do so, it is a hugely complex process.

Independent assessors

We also have concerns about "independent assessors" making decisions on eligibility and quantum. We fail to see how an independent assessor would be more qualified to make decisions as to whether a claim falls within the principles of combat immunity than the experienced and knowledgeable judiciary. We also query who would pay the independent assessor – presumably it would be the Ministry of Defence, which brings into question the independence of the "independent" assessor.

We also question how the independent assessor would be able to determine the level of award by taking into consideration all the information which a court would take into account when determining the appropriate level of damages in a case where it had found the MoD to be negligent. The consultation document states that reports on employment prospects and

medical reports including those on care requirements will be considered. We question how this information will be gathered if the claimant does not have legal representation, because in a negligence claim, it is the claimant solicitor's role to gather the information necessary to support the claimant's case. If the claimant is left to gather the information by themselves, it is highly likely that they will not know where to begin. It is stated at paragraph 3.5 that "the assessor will help [the claimant] to bring forward all the information which needs to be considered", but this will not be a substitute to access to a legal representative.

We find it difficult to believe that the assessor will have the time to ensure that all of the available information has been gathered, to arrive at a fair assessment of damages. It can take senior lawyers up to three years to gather, review and quantify the relevant medical and non-medical evidence once a final prognosis is reached on recovery. For an assessor to review the amount of evidence and medical reports necessary to arrive at an appropriate quantum on each case would be unworkable.

The case below demonstrates the amount of supporting material, gathered by the claimant solicitor that is often necessary to obtain an admission of liability in a military negligence claim:

Case study
Ryan Bradshaw v Ministry of Defence

During peace time training, the claimant was deployed as an operator of the high calibre and velocity General Purpose Machine Gun (the GPMG) and was regularly exposed to the noise of his own weapon and other similar weapons fired in very close proximity to him. Although provided with Amplivox hearing protectors it was questionable whether they provided sufficient protection against the noise emitted by such high velocity weapons. Furthermore, he was unable to wear the ear defenders on all occasions. The Claimant suffered serious hearing damage and he was medically discharged from the Army in August 2013.

Following analysis of the initial evidence, an advice from Counsel in respect of the merits of a claim was sought and protective court proceedings were issued in October 2013. It was deemed necessary to issue at this time in order to respond to a possible challenge to the statutory 3-year limitation period. An extension was thereafter sought and granted for service of the Claim Form and statements of case, in order to finalise the expert evidence and to enable the Defendant to respond under the provisions of the pre-action protocol.

A Letter of Claim was subsequently served upon the MOD and their Insurer on 9 October 2013. To assist the Defendant in their investigations, the Claimant provided their Insurer with advanced disclosure of his gathered evidence, including early medical report and copies of the Claimant's medical board findings leading to an AFCS payment of £6000 (on appeal). Unfortunately, the Claimant's Solicitors efforts to progress the case efficiently were hindered in the months that followed due to the Defendant's failure to respond to their queries and requests for disclosure with appropriate urgency. This necessitated further Applications for extension of service of the pleadings as well as notable delay in progress of the proceedings and increased costs.

The Defendant eventually served their Letter of Response in October 2014 and opted to ignore evidence submitted by the Claimant in the early disclosure. Liability was denied in full, on the basis that the Claimant was provided with Amplivox ear defenders that he wore whenever on the ranges. It was said that those ear defenders were suitable and adequate and that it was not possible or practicable to do anything more to protect him. The Defendant also put great emphasis on the Claimant's previous medical issues (i.e. that he was born

with a cleft palate and that he required multiple operations throughout his childhood). The Defendant's position was further reconfirmed in their Defence served in February 2015 where alternative submissions were also made in respect of the Claimant's contributory negligence.

The Claimant served a Reply to the Defence in March 2015. In support of his case the Claimant relied on the expert evidence of a Consultant ENT Surgeon (including main, supplementary report and evidence provided in Conference). Following an agreement with the Defendant, the claimant also sought evidence from an Employment Expert (on a joint basis) in support of the losses claimed within the Schedule of Loss. Directions were further agreed between the parties ahead of a Costs and Case Management Conference on 22 July 2015, giving the Defendant permission to rely on written evidence from a Consultant in Audiovestibular and for a Joint Statement by those experts to be prepared by January 2016.

On 9 September 2015, following disclosure, the Defendant finally admitted a breach of duty, subject to medical causation. The case was listed for a 3 day Trial to commence 5th September 2016.

Upon receipt of the joint statement of the medical experts, the Defendant offered to participate in a Joint Settlement Meeting which took place on the 10th May 2016. The case settled in the course of the meeting when the Defendant agreed to pay a lump sum of £185,000 (gross of the £6000 AFCS award).

We query how the client's life expectancy will be quantified, or how the enhanced scheme would deal with someone who, due to lack of understanding and knowledge, applies too early where there is no prognosis.

Also lacking in the MoD's proposals is the opportunity for the claimant and their solicitor to challenge the MoD's assessment of awards. When negligence claims are run through the normal process, there are two sets of calculations for items such as life expectancy, actuary calculations on discount rates for accelerated payments – one from the claimant and one from the MoD. The case is usually settled via negotiation for an amount in between the two figures, and if the case does go to court, the experienced and knowledgeable judge decides an appropriate figure between the two. In the proposed enhanced scheme, there is no room for the claimant to present their own calculations– besides, without provision for legal advice, the claimant would not know where to begin in putting forward their own calculations.

Checks before payment

Legal advice is also vital to ensure that the service man or woman has access to advice on how to invest their money, and to ensure that proper checks are carried out before payment is made to ensure that the money will be secure. Many service men and women will have suffered a head injury and may require a deputy to look after their finances. There is no mention within the consultation of the MoD or assessor ensuring that there are proper checks carried out before a person is awarded potentially millions of pounds.

Appeals process

If the claimant disagrees with the award, it is set out at paragraph 3.8 that a tribunal will provide an avenue for review of the MoD's awards. This is only workable if the rest of the

process is fair. If a claimant is expected to bring a claim under the enhanced scheme without legal representation, they are likely to both be under-compensated and need to appeal. Yet they will most likely be unaware that they have been under-compensated, or where to begin with the appeal process. It will be impossible for the veteran to know whether the sum of money awarded to them is fair. We set out below the issues with the existing AFCS scheme. Without legal advice, any enhanced scheme will suffer exactly the same problems.

An enhanced scheme for those barred by the existing scope of combat immunity

We suggest that there should be an enhanced scheme for those who are barred from claiming through the existing scope of combat immunity, and it should operate in the same way as the Armed Forces Compensation Scheme. Before this is introduced, however, the Ministry of Defence must address the problems within the current Armed Forces Compensation Scheme.

The need to review the existing Armed Forces Compensation Scheme

The existing Armed Forces Scheme is held out to be a system through which claimants can navigate without the help of a legal professional. The MoD, in its annual claims report, states that "members of the Armed Forces themselves are compensated for injuries under the Armed Forces Compensation Scheme without needing to take legal action". This indicates that the scheme is seen as a way to avoid involving legal representatives. Solicitors report that even when they do act for the claimant, Veterans UK – who run the scheme – tend to ignore the acting solicitor and continue to correspond directly with the claimant. Servicemen and women are often extremely vulnerable, and as a result of their injury are likely to be suffering from post-traumatic stress disorder. They will not have the knowledge to gather the necessary evidence to ensure that their injuries are fully considered by Veterans UK, and as the below case studies illustrate, they are awarded a sum which falls far below what they are actually entitled to, or Veterans UK attempts to avoid paying out at all.

Case Study

M

While M was on a combat fitness test, a weapon fell on his arm and crushed his wrist. Treatment started from the time of this accident and continued. He had had a serious operation on his wrist and he was facing medical discharge from the army as a result. M had applied for compensation via the AFCS scheme. Veterans UK refused to pay any compensation on the basis that the claimant's medical records before joining the army noted an injury to his wrist whilst playing football. Veterans UK said that all of the injury was caused by that initial injury. They maintained this stance on appeal, despite claimant solicitors then being instructed, and pointing out he couldn't have passed any fitness test on joining the army if he'd had the injury.

The claimant, with the help of his legal representatives, appealed again by a different article on the basis that Veterans UK had made a decision in ignorance or mistake of the facts. Veterans UK accepted that they had made a mistake. Had they not done so, an appeal to the tribunal would have been necessary. The claimant in this case received a significant award.

The rate of reconsiderations and appeals for awards is also high, indicating that most applicants are unhappy with their first award. The number of reconsideration of awards by Veterans UK has continued to increase year on year since the scheme was introduced, and was 2,136 in 2014/2015. Between 6 April 2005 and 30 September 2016, 55 per cent of cleared injury/illness appeals resulted in a successful outcome. The knock-on effect of appeals and reconsiderations is that there are significant delays in applicants obtaining their final awards – appeals take on average 11 ½ calendar months, or 236 working days to clear[6].

One member reported that they were instructed in September 2015 to request a reconsideration of a decision dated 16th December 2014. The reconsideration was submitted on 23rd September 2015, and at the time of writing (February 2017), a decision is still awaited. Another member reported that they were instructed in May 2015. A reconsideration request was submitted on 3rd November 2015, and reconsideration was completed 29th March 2016, and the original decision was maintained. An appeal was lodged on 14th April 2016, and a tribunal is still awaited.

The following questions are answered on the basis that the enhanced compensation scheme will apply only to those cases falling within the existing scope of combat immunity.

Q5) Do you think the initial decision on eligibility should be made by the Ministry of Defence or by an independent assessor?

The Ministry of Defence should not play any part in the making of awards under the enhanced compensation scheme. A person must be able to seek independent legal advice from the outset, and there should be a funding mechanism in place to allow them to do so. If the combat immunity principles are to remain as they are, in common law, then a solicitor/counsel will be able to advise in clear cut situations whether a person can pursue a civil claim, or go straight to the enhanced compensation scheme. In borderline cases, the case will go before a judge, as is the case now, and it will be for the judge to decide whether the claim falls within the scope of combat immunity. If the judge decides that the case does fall within the scope of combat immunity, the applicant should be eligible for an enhanced compensation scheme award. If a person is claiming for an enhanced compensation scheme award, the applicant's solicitor will be able to help them complete the form to prove eligibility, and provide the necessary information to obtain the correct award. The application process and assessment of the award should be handled by a panel of independent assessors. APIL should be involved in the selection of independent assessors.

Q6) Do you agree that the presumption should be that claimants will not need legal representation?

We do not agree with the presumption that claimants will not need legal representation. If an enhanced scheme is designed to make awards akin to those awarded by the court, legal representation is vital. Veterans are in a vulnerable position, with many of them suffering from post-traumatic stress disorder. Without legal advice and representation, they will not know how to navigate the enhanced compensation scheme. If they do apply, they are likely

[6] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575204/20161205_-_AFCS_National_Statistic_Bulletin_Sep16_-_O.pdf

to be “fobbed off” with a nominal amount which is not reflective of their injuries. The necessary evidence to fully demonstrate the impact of the injuries is unlikely to be gathered if a claimant solicitor is not involved. At present, as demonstrated by the case study above, many claimants are put in the wrong compensation bracket under the existing Armed Forces Compensation Scheme. The claimant will be ill-equipped to know whether their compensation is fair, and so are unlikely to challenge it through an appeal to a tribunal if it is not.

Legal representation is also vital to ensure that proper checks are carried out to protect the vulnerable serviceman or woman’s compensation.

Q7) Do you agree with this approach to the selection of an assessor?

We doubt, for the reasons set out above, that the independent assessor would be equipped to make an award at the same level as a court would. However, an attempt at enhanced compensation for those whose claims are barred by combat immunity is preferable to a poorly calculated tariff award in cases where a combat immunity defence is applied.

We are concerned that the assessor must be independent. APIL should be part of any discussion where assessors are selected.

Q8) Do you agree that a tribunal is an appropriate route for appeal?

If there is provision for the person to have legal representation from the outset, a tribunal will be an appropriate route for appeal.

Q9) Do you agree that there should be a time limit for claiming compensation, with allowances for cases of latent injury or illness?

There needs to be a greater understanding and publicity around the AFCS. Information on the scheme should form part of the training package, and it should also be included in Part One orders. At present, people simply do not know what their rights are. Many claimants approach solicitors at a very late stages, near the end or perhaps after limitation has expired. They are either under the mistaken belief that they cannot claim for injuries or think that they cannot make a claim until they are discharged.

- Ends -

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