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The Armed Forces Compensation Scheme: A Sheep in Wolf's Clothing?

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Summary

This article addresses issues that arise out of a state's undertaking to compensate, from public funds, citizens it has placed in harm's way through its policy- and decision-making. In the past decade, many western liberal democratic states have been required to place a value on their citizens through the provision of compensation to troops injured as a result of their deployment to Afghanistan and Iraq. Here we examine the UK's much criticised Armed Forces Compensation Scheme (AFCS), charting its development and analysing its strengths and its flaws, in order to assess whether it places adequate value upon the sacrifices of the citizens for which it was created. We investigate whether, in its attempts to create a compensatory framework that mimics Tort, the legislature has ultimately promised an equivalence that the AFCS fails to deliver in substance and we examine the idea that the AFCS represents an uneasy and unnecessary collapse of the distinction between corrective and distributive justice.

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Introduction

In considering forms of compensation, Hensler argues that

> [n]orms establishing the *amount* of money … paid in different circumstances … convey meaning about *how large an obligation* one set of people has to another … Whenever money changes hands it Carries with it multiple messages about personal and social relationships and personal and social worth. (Hensler 2003, p452)

When those norms emerge as a result of legislative rather than administrative or judicial decision-making, and the amounts are funded from the public purse, the opportunity arises to gauge the weight of the obligation to which Hensler refers and the degree to which it is fulfilled by a state's compensatory initiatives.

Over the course of the past decade, successive governments have been called upon to put a price on the UK's obligation to those on military deployment in Afghanistan and Iraq through the need to rehabilitate and compensate members of the armed forces who have suffered damage as a result of being placed in harm's way. Advances in warfare and in-theatre medical backup mean that active service personnel survive injuries that would previously have proved fatal (Gawande 2004, p2472). This, in combination with the enemy combatants' unconventional tactics, use of weaponry designed to inflict maximum damage (Buckham and Tucker 2007, p1558), the duration of troops' engagement and a public and media determined to see that those injured get what they 'deserve', has increased pressure on both state coffers and those holding the purse strings. In light of Hensler's observation, here we examine the unique and evolving manifestation of a form of state compensation that is the Armed Forces Compensation Scheme (AFCS) in an attempt to assess whether it values adequately the citizens it was created for.

The Armed Forces Compensation Scheme

The AFCS came into being on 6 April 2005 through an exercise of powers conferred by s.1(2) of the Armed Forces (Pensions and Compensation) Act 2004. It replaced the system of disablement pensions contained in the War Pensions Scheme and Armed Forces Pension Scheme 1975, and provides no-fault compensation to regular and reservist military personnel for illness, injury or death attributable to service on or

after 6 April 2005. Delivered by the Service Personnel and Veterans Agency (SPVA), the AFCS is tariff-based. In its current form it specifies a lump sum for each injury suffered and awards a life-long, tax-free, index-linked Guaranteed Income Payment (GIP) to the more severely debilitated as a means of offsetting loss of earning capacity. Compensation calculations are based on a set of nine tables, each of which refers to a different category of injury, covering physical, psychological and sensory damage in its seemingly infinite variety. Within each table awards range across a 15-point scale, from a high of £570,000 (Tariff Level 1) for the most severe damage of its type, to a low of £1,155 (Tariff Level 15) for the least severe.

The GIP is also calibrated by severity of injury, with payment being awarded only to those victims who qualify from points 1 to 11 on the 15-point scale applicable to their injuries, an approach intended to reflect realistically an individual's shortfall in earnings as a result of damage sustained on active service. Those eligible at Tariff Levels 1 to 4 receive the full, 'Band A', GIP payment, along with the full lump sum at the relevant tariff for each compensatable injury. Those suffering injuries at Levels 5 and 6 (Band B) have their GIP reduced by 50 per cent, at Levels 7 and 8 (Band C) by 50 per cent and at Levels 9 to 11 by 70 per cent. Where a reduced GIP is awarded, any lump sum is correspondingly decreased such that the recipient does not receive the full amount for each of his injuries. The most serious condition is awarded at 100 per cent of the tariff level, the second most serious at 30 per cent and the third most serious at 15 per cent, with further damage or conditions contributing nothing to the award.

To date 16,405 injury claims have been registered under the AFCS of which 13,270 have been cleared. Compensation has been awarded in 6,760 cases whilst 5,455 claims were rejected and 1,060 withdrawn. Of the 6,760 awards made, 93 per cent (6,280) consisted of a lump sum only, with the remaining 7 per cent (480) comprising a lump sum and GIP payment. Of the 480 service personnel in receipt of both a lump sum and GIP, 85 (1.3 per cent) have been awarded at the fullest amount, namely 100 per cent of both the GIP and tariff level for each injury. Between 2005 and 2009 disbursements under the Scheme rose from £1.3m to £33.5m and the value of future disbursements from £7.2 million to £352.4 million (DASA 2010).

To all intents and purposes, the AFCS demonstrates what Culhane identifies as the "hallmarks" of compensation schemes, namely "the elimination of fault, relative speed of claim resolution, and limited damages" resulting in "smaller and more predictable" payouts (Culhane 2003, p1085). That a compensation scheme, as opposed to the litigation process, bears observable hallmarks and may demand some degree of quantitative trade off to be made for the sake of certainty and predictably, has not prevented the AFCS from being roundly criticised as "at best inadequately thought through and at worst fundamentally flawed" (HC666, Summary) because of its apparent undervaluing of the sacrifices made by armed forces personnel.

The AFCS Under Fire

Although Hensler makes reference chiefly to *amounts* of money involved in obligation fulfilment, it is clear that, insofar as the AFCS is concerned, quantity is not the sole measurement of significance. In addition to criticism of the amount of compensation paid out to individuals, two other types of concern arise routinely. The first is qualitative, attaching to how claims are assessed, processed and awards calculated. Measured by the qualitative yardstick, the major problems exhibited by the AFCS are that "the formulaic way in which compensation is pegged ignores the

fact that a broken body is so much more than the sum of constituent injuries" (Andrew Murrison 2007, col789), that the Scheme makes "illogical" (HC96-1, para80) distinctions between types of injury, that it "addresses quality of life forgone in the most bludgeonly way imaginable" (Andrew Murrison 2007, col789) and that, in administering the Scheme, the SPVA moves "at the speed of a striking sloth" (Colonel Bob Stewart, Daily Telegraph 29.06.09). Thus, where the AFCS had been billed as an initiative which it was hoped would provide "generous help for the most seriously injured" military personnel through its commitment to "quick, consistent and equitable" (Veterans Agency 2005) decision-making, it is decried as "a victory for bureaucracy over bravery" (Daily Telegraph 03.08.09).

The second kind of concern expressed is at the AFCS's mimicry of the civil claims system, an apparent result of the MoD's desire to "reduce the number of civil negligence cases brought … by Service personnel" (HC666, para 150) and, "like an insurance company loss adjuster intent on minimising its liability" (Buckham and Tucker, p1558) save money. In identifying the sheep-in-wolf's-clothing characteristics of the AFCS, attention initially focussed on the use of the Judicial Studies Board *Guidelines for the Assessment of General Damages in Personal Injury Cases* as the basis for the AFCS 15-tier tariff. In the Scheme's consultation stages, the Defence Select Committee was highly critical of the MoD's attempt "to emulate the civil claims system for calculating awards", arguing that it amounted to "forcing the compensation arrangements into a format which clearly does not work" (HC666, para 150), which was "unhelpfully mechanistic" (HC96-1, para 74), which ignored "the fact that similar injuries will affect the employment prospects of different personnel in different ways" and could "cause radically different levels of pain and suffering to different people", which would "continue to be the CAse, no matter how tariff boundaries are drawn and redrawn" (HC96-1, paras 80-82).

A further element of the Scheme deemed unworkable, and burdensome for hard-pressed and debilitated claimants, was the adaptation of the burden of proof from the 'reasonable doubt' standard employed under previous arrangements to the civil 'balance of probabilities' standard under the AFCS. The MoD maintained that this was the right course of action because it reflected the general approach in occupational schemes and in modern civil court practice: the seeking of "evidence-based decisions using a balance of probabilities standard of proof" (MoD 2003, p6). It was argued, however, that this would be detrimental to claimants whose ability to secure a favourable outcome was dependent upon the record-keeping of the employer against whom the claim was being brought: "Armed Forces personnel are … in an unusual position by the fact that their medical records are in the hands of the employer against whom any claim for compensation will be made" (Kennedy 2010, p8). This difficulty did not only affect claimants but also army medical staff, it being deemed "wrong in principle" that they should be "creating the documents on which compensation claims will be based while at the same time relying for employment on the very employer against whom those compensation claims will be made" (Kennedy 2010, p8). In addition, it was felt that

> because of the special risks that Armed Forces personnel are required to run, and because they are likely to be involved in situations of great uncertainty, with uncertain effects on their health … the onus should remain on the Government to prove that service was not responsible for causing or worsening a condition for which a compensation claim is made. (HC96-1, para 69)

Further issue was taken with the time limits imposed by the AFCS. Within the regulatory framework, any initial claim must be made within five years either of the occurrence of the injury or medi CAl treatment being sought for the injury where, previously, under the War and Armed Forces Pension schemes, no time limit existed. Initially, the MoD had proposed a three year deadline but it was argued that this was not sufficiently open-ended to embrace complex or late-onset conditions, particularly in light of the fact that 70 per cent of claims already fell outside that time limit (HC666, para 92). Five years therefore represented a compromise but not a happy one as it appeared that many claimants would struggle to meet its demands. To illustrate the point, that the introduction of the balance of probabilities test and the five year time limit would be detrimental to claimants, the Royal British Legion applied the criteria to the 5,000 claims it processed during 2002/3. The experiment demonstrated that up to 60 per cent of those claims would have failed (Kennedy 2010, p7) tending, perhaps, to support Culhane's view that where a given compensatory framework exhibits a quasi-civil flavour, it is unmasked as a mere "bureaucratic mechanism" designed to "displace" (Culhane 2003, p1055) Tort law or provide a "bent" (Culhane 2003, p1027) version of it that promises an equivalence that it fails to deliver in substance.

The final, overriding, concern is quantitative, relating to the amount of compensation paid by the AFCS when compared with damages paid out in Tort. The AFCS is said to demonstrate that the law "places a higher value on civilian casualties than on military ones" (Julian Brazier 2007, col 749) because, routinely, the amount of compensation awarded under the scheme is less than that awarded in civil proceedings meaning that "many service personnel are still getting much less than civilians for the same kind of disability." (Lord Ashley of Stoke 2008, col 652). Meredith has noted that AFCS awards are between 30 and 40 per cent less than they would be at common law (Meredith 2006, p172). As a result, it is claimed that it is difficult to see the AFCS "as anything other than a second-rate deal … which uniquely attempts to swim against the tide of society's prevailing compensation culture" (Andrew Murrison 2007, col 789). The issue has been taken up by an enraged and highly motivated media which, by way of campaigning to close the gap between the AFCS and the civil litigation system, relentlessly records the disparities in awards, along with criticisms of the AFCS made by families of those injured, military organisations and the public at large.

The Media's War of Attrition

Bartrip claims that, in order for a no-fault compensation scheme to become established, four conditions need to be met. Firstly, there must be a coherent class of victims who, secondly, find themselves in a distinctive position with, thirdly, a degree of public support and, finally, an electorally or politically attractive 'package' on offer. The first two conditions are easily met. "It is" Bartrip indicates

> widely accepted that members of the armed forces constitute a coherent group that deserves special treatment in terms of compensation by virtue of the fact that they have volunteered or been conscripted with the prospect of facing extreme danger in the service of their country. (Bartrip 2010, p284)

The unique position of the armed forces is also recognised by their political masters who note that "[t]he essential difference between the armed services and almost all other employment is that … personnel can be asked to put themselves in harm's way, indeed to die for their country" which "makes compensation for injury a rather

different issue for the Armed Forces than for civilians" (HC96-1, para68). The third requirement is also met in that modifications to the AFCS have not faltered for the want of a "powerful interest group or surge of public opinion demonstrat[ing] a commitment to changing the law" (Bartrip 2010, p285). The media has proved most influential in this regard and seeking a more robust form of obligation fulfilment from the state has produced frequent headlines.

Needless to say, the fact of Bartrip's third requirement being met in the manner described below implies that satisfaction of the fourth condition – the need for a politically attractive package – relied upon the realisation and success of the third. It may, however, be argued that the closer the 2010 General Election loomed, the more politically attractive a series of amendments to the AFCS became, an argument supported by the assertion that

> the decision to pay is made by the government in order to maximize political benefits to decision-makers. To put it simply, there are cases when payment of compensation brings high political benefits at relatively low political costs. In such cases, the government will voluntarily pay compensation. (Bell and Parchomovsky 2006, p1441)

In campaigning for an AFCS more generously tilted towards claimants, amongst others the media turned its gaze on former Lance Bombardier Kerry Fletcher who, in 2008, was awarded £186,895.52 by an Employment Tribunal in her claim against the MoD for sex discrimination, victimisation and sexual harassment and who commented that she was "disgusted" at and "embarrassed by" (The Guardian 27.08.09) the meagre compensation offered to those injured in service, particularly in light of the extent to which the MoD appeared to be channelling significant resources towards compensating not only herself but other, less deserving, kinds of claimant. For example, the MoD paid out £117,000 to the owners of a racehorse which injured itself after being scared by aircraft, £42,000 to a poultry farmer whose hens suffered diminished egg production due to the fright induced by the Red Arrows display team flying overhead and £52,000 to a claimant who suffered Post Traumatic Stress Disorder due to jets undertaking low-flying exercises over Devon (Daily Telegraph, 13.01.10).

These were not isolated instances. Ms Fletcher's expression of her views had been preceded by media and public outrage at an RAF data entry clerk's award of £484,000 in compensation for a Repetitive Strain Injury (The Guardian, 30.11.08) when compared with the £57,587 lump sum and annual payment of £9,000 for life awarded to Private Jamie Cooper who suffered a broken pelvis, stomach wounds, nerve damage to a leg and a shattered right hand in a mortar blast (Daily Telegraph, 12.02.08) or the £161,000 offered to double amputee marine, Ben McBean (The Guardian, 30.11.08), or the £152,150 initially offered to Paratrooper Ben Parkinson who spent months in a coma after losing both legs to a landmine and sustaining grievous damage to his spine, skull, brain, pelvis, hands, spleen and rib cage (Daily Mail, 28.08.07). After a sustained campaign by his family, a supportive media, armed forces associations and the general public, Ben Parkinson's award was increased to £285,000 and then £540,000, albeit as a result of the appeals process and amendments to the AFCS rather than the moral strength of his individual case.

Both Ministers and the judiciary deemed the simple comparison between civilian awards and awards under the AFCS "inappropriate" (Lord Tunnicliffe 2008, col 652) and "illegitimate" on the basis that compensation rather than fault-finding constituted

the goal of the AFCS: "negligence is not taken into account" (*AD and MM* (a), para 42) because the Scheme is not based on the claimant having to prove negligence or breach of the health and safety regulations by the MoD. The distinction between fault and no-fault liability was lost on the AFCS's detractors as it became increasingly clear that, in its original, 2005 incarnation, the AFCS provided inadequate satisfaction, either to claimants or to wider society. As a result, two major changes were made to the Scheme. From February 2008 anyone suffering more than one injury in a single incident, who was also awarded a GIP, would receive, on the relevant tariff, the full award for each injury, with a backdated award being made to those paid out before the introduction of the new rules (*The Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2008* SI 2008/39). In terms of amounts payable, the aggregated lump sum remained subject to a cap of £285,000 but the July 2008 publication of the Service Personnel Command Paper saw lump sum payments being lifted by between 10 and 100 per cent depending on the severity of the injury. The maximum award was now set at £540,000 which change became effective on 15 December 2008. *The Armed Forces and Reserve Forces (Compensation Scheme) (Amendment No. 3) Order 2008*; SI 2008/2942) again applied to those claims already processed. If, however, the review of and amendments to the AFCS seemed to demonstrate a government committed to its obligations under the military covenant, the MoD's subsequent actions caused a sharp intake of breath.

Advance: *Duncan and McWilliams*

Corporal Anthony Duncan of the Light Dragoons and Royal Marine Matthew McWilliams were both injured in 2005. Whilst on foot patrol in Iraq, the former was shot in the thigh by a high velocity bullet, which fractured his left femur. The latter fractured his right femur during a training exercise. Under the AFCS they were awarded £9,250 and £8,250 respectively for their injuries. As a result of complications ensuing from their injuries, the War Pensions and Armed Forces Compensation Tribunal increased these awards to £46,000 and £28,750, with each man also entitled to a GIP on leaving the armed forces. With "breathtaking clumsiness" motivated by "unseemly penny pinching" (The Economist, 08.01.09) the increased award was immediately subjected to legal challenge by the MoD, which argued that payments should be limited to the soldier's initial injuries and not take account of subsequent disabilities, especially those which emerged as a result of medical treatment.

The initial ruling, by the Administrative Appeals Chamber of the Upper Tribunal, found

> no substance in the submission made for the Secretary of State … that the results of medical treatment are not to be taken into account in the assessment of the injury for the purposes of benefit unless medical treatment is expressly referred to in the [AFCS's] chosen descriptor

and deemed it "entirely artificial and absurd… to exclude the effects of medical treatment that would not have been carried out if the service incident or circumstance had not occurred" (*Secretary of State for Defence v AD and MM* [2009] UKUT 10 (AAC) para 26). For the Tribunal, the issue was "one of causation" such that where a claimant received

> appropriate medical treatment for any initiating injury predominantly caused by service, the injury … does not cease to have been predominantly caused by service … But for the initiating injury caused by service, there would be no

> requirement for the treatment. (*Secretary of State for Defence v AD and MM* [2009] UKUT 10 (AAC) para 32)

The enhanced awards would, therefore, stand, being

> consistent with the apparent and undisputed purpose of the AFCS, which is to provide compensation to members and former members of the armed forces whose physical and mental health has been adversely affected by their service at levels related to the extent of those adverse effects. (*Secretary of State for Defence v AD and MM* [2009] UKUT 10 (AAC) para 26)

The MoD was given leave to appeal.

The Court of Appeal, delivering its judgment in the context of what it somewhat understatedly called the "adverse publicity" (*Secretary of State for Defence v Dun CAn and McWilliams* [2009] EW CA Civ 1043 para 116) accompanying the case, adjudged that "the mere application of proper and appropriate medical treatment …cannot of itself constitute an independent injury [n]or … render more severe the initiating injury" (*Secretary of State for Defence v Duncan and McWilliams* [2009] EWCA Civ 1043 para 67). That being the case, the Upper Tribunal was

> wrong to say that … a perfectly proper and appropriate treatment … was of itself capable of converting the initial injury … into a more serious one, solely on the grounds that it extended the range of the initial injury. The cure did not compound the injury. (*Secretary of State for Defence v Duncan and McWilliams* [2009] EWCA Civ 1043 para 68)

This did not, however, mean that the Court accepted the MoD's submission that it was solely the original injury which should form the basis for compensation. In the Court of Appeal's view,

> the fact that an injury results from medical treatment does not of itself necessarily break the chain of causation so as to prevent compensation being payable with respect to it. The need for medical treatment is inextricably linked with the original injury, and at least where the treatment is appropriate, any injury resulting from the treatment must be treated as having been causally connected to the original injury. (*Secretary of State for Defence v Duncan and McWilliams* [2009] EWCA Civ 1043 para para 63)

It was patently clear that

> not all medical treatment is risk free. Frequently, there are risks that quite independent illness or injury may result from carrying out perfectly proper medical treatment. If the risk materialises … the consequential injury is referable to the original injury in service and there is no break in the chain of CAusation. (*Secretary of State for Defence v Duncan and McWilliams* [2009] EWCA Civ 1043 para 69)

As such

> where the appropriate medical treatment carries a risk of further distinct injuries, or the exacerbation of existing injuries, and the risk materialises,

> these can properly be treated as grounds for increasing the compensation which would have been awarded for the initiating injury itself

since there could be "no justification for failing to compensate separately for such injuries" (*Secretary of State for Defence v Duncan and McWilliams* [2009] EWCA Civ 1043 para 69).

The Court of Appeal remanded the two Court of Appeal cases to the First Tier Tribunal which would undertake a thorough, fact-sensitive assessment in light of the senior court's somewhat circular advice since, whilst the MoD was "entirely justified … at least from a legal point of view" in bringing the case, it was not for the Court of Appeal to "to distort the framework of the scheme in order to fill apparent gaps, or to reconcile apparent inconsistencies" (*Secretary of State for Defence v Duncan and McWilliams* [2009] EWCA Civ 1043 para 126). In making its judgment in the *Duncan and McWilliams* case, the Court of Appeal stated that it was to be hoped that the AFCS could "gradually be improved in a way which better meets the laudable objectives" (*Secretary of State for Defence v Duncan and McWilliams* [2009] EWCA Civ 1043 para 126) of "fairness, simplicity and affordability" (*Secretary of State for Defence v Duncan and McWilliams* [2009] EWCA Civ 1043 para 119).

Retreat: The Boyce Review

On 16 July 2009, seemingly in an attempt to deflect the heat generated by the *Duncan and McWilliams* appeals, the MoD brought forward by a year its planned review of the AFCS. The Green Paper (Cm7674) which ushered in a three-month consultation period in relation to the support afforded to service personnel stated that the aim of the review was to build on the nation's 'renewed commitment' to its armed forces expressed in the Service Personnel Command Paper of 12 months before (Cm7424). Two principles drove that renewed commitment. Firstly, the government aimed to "end any disadvantage that armed service imposes" and, secondly, wished to "better support and recognise those who have been wounded in the service of their country" (Cm7424, para 6). It was questionable whether, thus far, either commitment had been sufficiently met.

On 17 September 2009 former Chief of the Defence Staff, Admiral The Lord Boyce, was announced as the Chair of the Review and of the independent scrutiny group of stakeholders (service organisations, service families' representatives, AFCS claimants, medical experts, legal experts) set up to support its inquiries. The Boyce Review reported on 10 February 2010 and, whilst it found the AFCS to be "fundamentally sound" and based on "broadly sound" (Boyce, p13) principles, proposed a series of amendments aimed at enhancing its fitness for purpose. The proposed amendments met a number of the criticisms identified above (though the balance of probabilities test would remain), were accepted in full by the Labour government and subsequently endorsed by the coalition administration which adopted a two-stage legislative programme to introduce the necessary changes. The first stage made effective from 3 August 2010 the extension of time limits for injury claims from 5 to 7 years and, for claiming for late onset conditions, from one to 3 years from the date that medical help was first sought. This first tranche of amendments also included increases in payments for hearing loss and an inflationary increase to the bereavement grant, from £20,000 to £25,000. This tinkering will give way to altogether more fundamental changes in February 2011. Then, all lump sum amounts from Levels 2 to 15 will increase. The increase is not uniform across all Levels but is intended better to reflect the impact of the injuries specified at each. For example, injuries at Level 15 will

receive a relatively small uplift of £45, whereas injuries at Level 3 are awarded an additional £150,000. The top award of £470,000 at Level 15 remains unchanged, it being deemed an appropriately calibrated payment. Alongside these modifications, compensation will be payable for each injury sustained in a single incident rather than the three worst injuries, and the maximum award for mental illness will be increased from Tariff Level 8 to Tariff Level 6.

In addition to amendments to lump sums payable, in February 2011 the GIP will undergo a couple of important changes. Firstly, it will be increased to take account of promotion prospects affected by the claimant's injuries. This will be done by factoring in the average number of promotions that would have been achieved by a claimant of that age but for his or her injuries. Secondly, the impact of injuries will be assessed on earnings calculated to age 65, rather than the current 55. Thirdly, the time limit for requesting reconsideration of a compensation decision will be increased from 3 months to one year. All of the changes will be backdated to the start of the AFCS and, as such, some 10,000 claims will be reviewed by the SPVA, which must complete its task by June 2012 (Defence Internal Brief 2010, p1).

Largely, the amendments were well received, with the Review being hailed as a "welcome victory" and triumph resulting from the "tidal wave support that the Government simply couldn't ignore" (Royal British Legion 2010, Press Release). Currently, however, issues remain. Two of them are practical, and one is theoretical. On the level of practicalities, the first issue is that the new and more generous arrangements apply only to those compensated under the AFCS. That is, those injured in service since 6 April 2005. This means that service personnel may wind up being treated unequally and arbitrarily despite, in essence, fighting in the same conflict in the same location: the mobilisation of forces in the War on Terror has, after all, claimed victims on either side of that dateline without discrimination. The second practical concern is how the improvements to the Scheme will be paid for since it has been made abundantly clear that "costs will be met from existing provision" (Defence Internal Brief 2010, p9) and that nothing else may be cut to pay for the improvements. In the prevailing economic climate, resolving that issue will doubtless prove an unenviable task.

From a theoretical perspective, it appears that, in the pursuit of a Tort-like system of compensation, the important distinction between distributive and corrective justice collapsed. The traditional adoption of distinctive approaches in the private and public spheres of compensatory practice may partially be attributed to the maintenance of the difference between corrective and distributive justice since, as Culhane notes, "the two concepts serve different goals" (Culhane 2003, p1033). In the private sphere, Tort law, as corrective justice, is "concerned with repairing an inequality between parties that wrongful conduct has created" (Culhane 2003, p1027) whereas, in the public sphere, distributive justice "considers broader questions about the proper and just allocation of goods within a society" (Culhane 2003, p1027). In short, therefore, a respectable level of compensation under the AFCS should have be possible from the outset without the need for the assimilatory frolic that saw the MoD attempting to import both procedure and payouts in Tort, and falling short. The 'right' outcome – a decent level of compensation - could have been achieved simply by raising the level of AFCS awards in order to channel additional monies to injured service personnel. Government need not have "chipped away at the wall between the two kinds of justice" (Culhane 2003, p1064).

Usually, the trade in justice runs from the distributive to the corrective since "the idea of tort law as a non-instrumental mechanism is out of fashion" (Culhane 2003, p1077). In this instance, however, the reverse appears to be true with the AFCS being invested with the form and process, if not the full substance, of corrective justice. This brings us "to an uneasy place somewhere between corrective and distributive justice" (Culhane 2003, p1079) where it may be argued that, to the extent that the AFCS mimics Tort, it undercuts one of the important functions of distributive justice which is to ascribe fair and proper value to the actions of citizens. As El Menyawi observes, "when compensation becomes the central goal, we are … shifting away from a fault based system towards a no-fault system based on collective support" and, as such, "[t]hese alternative compensation schemes … exist independently from liability law" (El Menyawi 2002, p45). As things currently stand, military personnel may well be argued to be receiving more appropriate levels of compensation but they are receiving it for the wrong reasons.

Conclusion

Whatever the strength of the criticisms of the AFCS, what should not be overlooked is that it is funded from the public purse. Culhane argues that where "the source is general revenue … [I]n as much as it is taxpayers … who are paying … government cannot consider the needs of the victims … in isolation. Instead, it has a responsibility for ensuring that the needs of all citizens are considered" (Culhane 2003, p1027) In the setting up of a state-funded compensation scheme, therefore, the making of "a distributional decision to expend taxpayer money" (Culhane 2003, p1033) is never neutral but is always, and necessarily, infected with additional considerations and coloured by competing demands. In the case of the AFCS, the factoring in of such considerations should not have meant that injured members of the armed forces were denied adequate compensation on the basis that to pay what their sacrifices were truly worth would create an unacceptable drain on public resources. Quite the opposite. The difficulty for many citizens is that "[p]atriotism and appreciation for soldiers doing the dirty work wrestle … with anger over official mishandling of conflicts seen by many as an illegal and costly mistake … or an unwinnable misadventure" (The Economist, 08.01.09). As Dandeker et al note, "a significant feature of civil-military relations is the way in which states recognize the sacrifices that the men and women of the armed forces have given to their country" (Dandeker 2006, p161). The state should not, therefore, have read any element of choice into whether it spent public money on providing service personnel with sufficient compensation since the need of citizens, in "formidable coalition" (The Economist, 08.01.09), is that, in the context of the "combustible topic" (The Economist, 08.01.09) of the UK's deployment of troops in Iraq and Afghanistan, the efforts and sacrifices of service personnel are properly rewarded.

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