



Advice Paper from WAVE Trauma Centre to the Northern Ireland Office regarding a proposal for a pension for those severely and permanently injured as a result of the Troubles

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## Foreword

It is estimated that there are around 500 people in Northern Ireland who are classified as severely physically injured as a direct result of the Troubles. Clearly there will also be people who have suffered psychological trauma as a result of the Troubles.

The figures come from the Victims and Survivors Service (VSS) which is the statutory body that manages services for victims and survivors.

The physical injuries are permanent and are at the very top of the scale: bilateral amputees, paraplegic, those blinded.

The psychological injured may carry their pain inside but it is no less real.

All the injuries are life changing and permanent.

In many ways the men and women who were severely injured during the Troubles in Northern Ireland feel that they are the forgotten victims and survivors of the conflict.

The mechanisms to deal with the legacy of Northern Ireland's violent past from the Eames/ Bradley Report through Haass/O'Sullivan to Stormont House barely mention those whose suffering is not consigned to the past but is in the here and now.

Perhaps there was an assumption that they must have been looked after with levels of compensation that would allow them to make the best of a difficult lot.

For too many of them that has not been the case.

The vast majority were injured before disability discrimination legislation was even thought of.

Some were able to find work but most were unable to work again and had no opportunity to build up occupational pensions and as a result have to survive on welfare benefits.

Those men and women need practical help but all of the severely injured need recognition and acknowledgement.

They come from diverse backgrounds, women, men, Catholic, Protestant, working class, middle class.

These were not people 'in the wrong place at the wrong time'.

They were at work.

They were at home with their family.

They were having a coffee in a cafe.

They were walking home after an evening at the cinema.

They were in the right place where they should have expected to be safe and secure.

Frankly they were not expected to live beyond a few years.

But they have surpassed all expectations and survived the predicted prognosis of hard lives and early deaths.

And the passage of time has compounded their problems and many still suffer increasing physical distress, as a result of deteriorating health and chronic pain.

They are survivors.

They have reconstructed their lives.

They have 'moved on' but what they cannot be asked to do is to move aside.

The WAVE Injured Group have been campaigning for recognition for the forgotten victims of the Troubles and for practical support in the form of a pension for the severely injured.

Peace is being built upon the suffering of those victims and survivors and so it is only right that the injured are looked after financially going forward.

All they want is a degree of financial security so that they can live the rest of their lives with as much independence and dignity as possible.

They deserve no less.

This paper seeks to make a positive and constructive contribution to achieving that.

## WHAT IS THE PURPOSE OF THE PROPOSED SCHEME?

The purpose of a pension for those severely injured in the Troubles is multi-faceted. The previous research outlines the rationale for the proposed scheme in detail, but in summary, the reasons for implementing the proposed scheme are<sup>1</sup>:

- i) A recognition of the suffering of those seriously injured in the conflict
- ii) The lack of occupational pension rights accrued by those injured in the conflict as a result of their injuries
- iii) The overwhelming reliance on the social security system of those injured in the conflict
- iv) The impact of welfare reform on those injured in the conflict
- v) The lack of disability discrimination legislation prior to 1995 (a period when a substantial number of the injured sustained their injuries)<sup>2</sup>
- vi) The chronic ill health endured by the injured as a result of their injuries
- vii) The increased life expectancy of the cohort over previous estimates (for example, at the time compensation payments were made)
- viii) The double injustice of the need for members of an injured person's family to cease work to care for those injured in the conflict (who also were unable to work)

Whilst emphasis amongst the various groups and stakeholders who have contributed to the research on this issue has varied, there is unanimity in respect of the fact that part of the purpose of any pension scheme is to address a current pressing need to alleviate the suffering of those who were injured. The proposal for a pension is evidence-based and victim and survivor led, and time is of the essence in the matter. There is also unanimity on the position that every victim and survivor's injury is different with their injuries affecting their lives in different ways. Therefore, in consultation with the Injured Group at WAVE, the following characteristics of any pension were identified to match the need said scheme is proposed to address:

1. Any Pension should be non-contributory
2. Any Pension should be non-means tested

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<sup>1</sup> See "The needs of individuals and their families injured as a result of the Troubles in Northern Ireland", Breen-Smyth, M, 2012 at page 23; "Exploring models for the proposal of special pension provision for those injured in the Northern Ireland "Troubles", WAVE Injured Group, 2013, at page 1-2 ; "A Pension for people severely injured in the Troubles", Commission Advice Paper, Commission for Victims and Survivors, June 2014, at page 1; "A pension for injured victims of the Troubles", Moffett, L, Northern Ireland Legal Quarterly 66(4): 297-319 at 311

<sup>2</sup> The Disability Discrimination Act 1995 received Royal Assent on 8<sup>th</sup> November 1995

3. Any Pension should be disregarded for the purposes of calculating means tested benefit entitlement
4. Any Pension should be graded to reflect the differing levels of disablement experienced by the injured
5. Any Pension should continue beyond State Retirement Age<sup>3</sup>

Those characteristics are designed to make any scheme as cost-effective to administer as possible. They are also designed to ensure that the scheme is as effective as possible in addressing its stated purpose. For example, the reason the scheme is non-contributory is that the scheme is designed to ensure that those who have lost the ability to accrue occupational pension rights do not lose out in the proposed scheme from lack of national insurance contributions.

The reason the scheme should be non-means tested is that the scheme is partly designed as a recognition of the suffering endured by the injured. Additionally, this means that the scheme is simple to operate and does not have to operate under complex legislation on income and capital (as is the case for Universal Credit and other means tested benefits)<sup>4</sup>.

The pension would be disregarded for means-tested benefits to ensure that the scheme had the maximum benefit for those injured in the conflict. Part of the purpose of the scheme is to lift those reliant on the social security benefits beyond the subsistence level allowed by that system in consideration of the special circumstances that apply to those injured in the conflict against other members of the population.

The scheme would continue beyond State Retirement Age precisely like an occupational pension, to ensure that those entitled to it would not be reliant on means tested benefits into their old age. Lastly, an award under the scheme should be made to the Injured regardless of their age at the time of their claim (provided they meet the other qualifying criteria of the scheme).

## **WHAT ARE THE PROPOSED QUALIFYING CRITERIA FOR THE SCHEME?**

### **The physically injured**

To a large extent, the previous research has settled the issue in relation to the basic qualifying criteria for any scheme in respect of those who were physically injured in the Troubles. The first is in relation to establishing a qualifying injury (sustained as a

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<sup>3</sup> See WAVE Injured Group (n 1) 2-3 and CVS (n1) at page 6

<sup>4</sup> See Universal Credit Regulations (Northern Ireland) 2016 inter alia

result of a Troubles related incident) and the second would measure the extent of disablement flowing from that injury (or injuries).

The previous research on the ways in which an injury could be assessed has identified a number of different approaches that might be taken to assess the extent of any claimant's level of disablement under the proposed scheme. Those approaches fall into the following broad categories:

- i) Using an existing benefit entitlement to passport claimants onto the scheme
- ii) Using a pre-existing assessment method to assess claimants
- iii) Creating an entirely new assessment scale to assess claimants

Previous research has found the first option (using an existing benefit to passport claimants onto any injured pension) to be deeply unsatisfactory.<sup>5</sup> Whilst potentially the most cost-effective approach (in relation to start up administration costs), it has the potential to create substantial injustice within any scheme. Added to this, are the inherent difficulties for many potentially beneficiaries with the disability benefits system and welfare reform in general.

In particular, the previous research has indicated that Employment and Support Allowance (ESA) is not an appropriate passport benefit for the following reasons:

- i) ESA can only be received by claimants who are not in receipt of State Retirement Pension – as the proposed scheme is designed to be paid in addition to any State Retirement Pension, this would preclude anyone over working age from receiving it (a sizeable cohort of those injured in the Troubles)
- ii) Historically, there have been issues with the way in which the Work Capability Assessment has addressed those injured in the Troubles and the assessment has become more stringent as the programme of welfare reform has progressed
- iii) There is no way of assessing the causal link between ESA entitlement and any Troubles related injury.
- iv) The scope for gradation of the proposed scheme's award is greatly reduced as a result of passporting (ESA only has two groups into which claimants are assessed)

The issues in relation to using Disability Living Allowance (DLA) or Personal Independence Payment (PIP) as a passport benefit are similar to those identified above for Employment and Support Allowance. In addition, the following factors have been identified as rendering DLA/PIP unsuitable for passport entitlement model for an Injured Pension

- i) Using DLA/PIP as a passport for an injured pension would place increased emphasis on the migration programme currently moving DLA claimants onto

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<sup>5</sup> WAVE Injured Group (n1) 6-12

PIP. This is likely to increase the distress of those injured in the conflict who are being migrated

- ii) PIP operates a more stringent test for entitlement than that of DLA<sup>6</sup> and therefore it is possible that some of those injured in the conflict may experience withdrawal or reduction of awards (with a knock-on effect on entitlement to the proposed scheme)
- iii) The purpose of PIP/DLA is to assess daily-living/care and mobility needs. Whilst this is part of the purpose of the injured pension it is not the sole purpose
- iv) The same issue with causation exists, as it does with ESA

The problems with utilising the above benefits as a method of assessing the extent of any disablement suffered by an individual as a result of a troubles-related incident, led to the identification of the Prescribed degrees of disablement as a potential compromise between a blunt passport-type model and developing a completely new assessment method *ab initio*. The assessment scale is reproduced in Appendix 1 below and the key terms are covered in detail in the original WAVE research<sup>7</sup>.

The reason this scale was recommended for the purposes of assessing the extent of any disablement for the following reasons:

- i) It has the potential to address the difficulties with causation that arise from a simple passport-benefit exercise
- ii) It allows for assessment to be graded, reflecting various levels of injury in the injured cohort
- iii) It provides a way of assessing multiple injuries
- iv) The scale is well established, still in use and the legal principles applicable are well established as a consequence
- v) The scheme assesses the same type of injuries commonly found in the injured population
- vi) There is precedent for the assessment being used in a scheme other than Industrial Injuries (the War Pensions scheme)

There are, however, some disadvantages to using the recommended scheme:

- i) It would require a medical assessment where a passport-type scheme would not
- ii) It is primarily designed for industrial accidents, not conflict related injuries

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<sup>6</sup> Personal Independence Payment Experimental Statistics, Department for Communities, August 2018, indicates that 78% of claimants who had been in receipt of DLA were eligible for PIP

<sup>7</sup> WAVE Injured Group (n1), 12-14

- iii) It does not specifically address psychological injury in its tariffs (though these are assessed in comparison with the scale in other schemes that use the scale)

The Prescribed degrees of disablement have therefore been adopted by research conducted after WAVE's initial paper, as the preferred model for any Pension<sup>8</sup>. There are some additional issues that arise from the subsequent research/proposals:

- i) There have been attempts to define a "serious injury" with reference to the scale (for example – 40% as a minimum disablement level attracting an award)<sup>9</sup>. This creates some issues as it is impossible to predict how many individuals would be brought outside any scheme using such a threshold, without research being done on this point. It is not known how many of those currently receiving support from VSS based on physical/psychological injury would be brought outside the scheme by a threshold at this level. By way of example, such a threshold would preclude a hypothetical claimant who had lost one foot in a Troubles-related incident which to the Injured Group is a threshold that is self-evidently set at too high a level and would preclude individuals from the scheme who ought to benefit from it.
- ii) WAVE's research has previously illustrated the threshold operated in other schemes that make use of the prescribed degrees of disablement. The threshold in these schemes is set at 14% on the scale. An individual assessed at this level is paid at the 20% rate. For individuals who are assessed as having disablement greater than 20%, their percentage disablement is rounded to the nearest 10% and their award paid at that level (e.g. an assessment of 66% would be paid at the 70% rate)<sup>10</sup>. It is respectfully submitted that this an appropriate threshold for the proposed scheme. Any departure from this threshold needs to be justified and evidence based (no research justifying such a departure exists).
- iii) There is a level of payment currently attached to the scale which could be adjusted up to reflect the level of payment intended to be distributed to those eligible under the proposed scheme (it is suggested that the current rates are the minimum that should be considered)

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<sup>8</sup> See CVS (n1) at page 6

<sup>9</sup> Victims Reparations Bill (Draft), Moffett, L, 14<sup>th</sup> September 2016

<sup>10</sup> WAVE Injured Group (n1) at 13



## **The psychologically injured**

The original research on models for a pension for those severely injured in the Northern Ireland Troubles was conducted by the WAVE Injured Group following academic research on the needs of those physically injured in the Troubles by Professor Breen-Smyth. As such, WAVE's research was focused on the same eligibility criteria of Professor Breen-Smyth's study, that being:

*“An examination of the needs of individuals injured in the Troubles and those of their families, particularly carers who are usually family members”*

*The working definition as the primary inclusion criteria for participants was “life threatening or disfiguring physical injury”*

*Psychological injuries were also included but only when suffered by those meeting primary inclusion”<sup>11</sup>*

Therefore, the original recommendation of WAVE's research was limited to that cohort. This is because, at that time, the same research did not exist on the necessity of a pension for those who had suffered or were still suffering from psychological injury only (as a result of a Troubles related incident) as the research that existed for those physically injured.

However, subsequent research has identified significant legal issues with discriminating between those suffering physical and psychological injuries<sup>12</sup>. WAVE would actively welcome the inclusion of those suffering from psychological injury within the scope of an injured pension and WAVE would make the following observations in taking that position:

- i) Research does not exist on the potential numbers of recipients of such a pension on psychological injury grounds alone.
- ii) In line with the proposal for those physically injured, this would require an individual to have suffered a psychological injury as a result of a Troubles related incident and to continue to suffer that psychological injury at present.
- iii) There is precedent for such assessments to be carried out<sup>13</sup>, but such assessments are required to be carried out by a clinical psychologist or psychiatrist<sup>14</sup> which would increase the costs of the scheme.
- iv) Psychological injuries may be prone to fluctuate in a way that physical injuries do not.

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<sup>11</sup> Breen-Smyth (n1), at 17

<sup>12</sup> UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985); the Council of Europe Committee of Ministers definition of a victim (under Recommendation No. R (87) 21 2006); Criminal Injuries Compensation Scheme 2009; and Disability Discrimination Act 1995 as identified by CVS (n1) at 8-9

<sup>13</sup> See A Guide to the Northern Ireland Criminal Injuries Compensation Scheme (2009), notes 4-6

<sup>14</sup> See Hoy [2008] NIQB 85 as per Morgan J

- v) It is difficult to quantify how many individuals would qualify under such criteria as VSS do not use this criterion for assessing health and well-being support and services. However, what we do know is 1200 individuals are registered with VSS as psychologically injured. But it is important to note that these referrals are based only on a single GP's letter.
- vi) The Prescribed degrees of disablement are not designed to assess psychological injury alone, but are used to do this on other schemes.

The WAVE Injured Group fully accept that defining psychological injury will not be as straight forward to do as it is in the case of physical injury.

But there must be broadly the same criteria of which permanence must be paramount.

We do not believe that the numbers who would qualify for a pension on the basis of psychological injury in the terms of the proposal would be excessive.

## **OVERLAPPING ENTITLEMENTS**

An issue identified with the proposed scheme is the potential scope for an individual to receive an award for the same injury under different analogous schemes. As such, it is respectfully submitted that consideration be given to whether there are any such overlapping schemes, such as Industrial Injuries Disablement Awards and/or security force pensions that should be taken into account when making an award under the proposed scheme. It is suggested that if such payments are taken into account, then it would be equitable to "top up" any such payment, with an award under the proposed scheme to the level of award an individual would have received if they had claimed under the proposed scheme alone.

## **WHEN SHOULD AN INJURY HAVE BEEN SUSTAINED TO QUALIFY FOR THE PROPOSED SCHEME?**

It is difficult to precisely identify a date by which any injury must have occurred in order to give rise to entitlement under any proposed scheme. The starting position must be the purpose of the scheme, which is to address the factors identified above. Therefore, it is respectfully submitted that anyone affected by those factors should be included.

The various possible approaches to cut off dates, by which an injury must have been sustained to attract an award under the proposed scheme, are as follows:

- i) The Good Friday/Belfast Agreement (10<sup>th</sup> April 1998)
- ii) Stormont House Agreement (23 December 2014)
- iii) The present

The difficulty with identifying a cut-off date in relation to injury giving rise to entitlement under the proposed scheme is that by its nature any such date will be arbitrary. Paramilitary organisations continue to be a significant feature of policing and justice in Northern Ireland and attacks by paramilitaries on members of the community are on the rise<sup>15</sup>.

Any deadline before which an injury must have been sustained to qualify for an award under the proposed scheme has the potential to cause injustice. It is therefore submitted that one way to alleviate any concerns amongst victims and survivors in relation to cases falling outside any deadline that is selected but are nonetheless “Troubles-related” is to include a mechanism by which discretion can be exercised to include a claimant who has suffered injury in a Troubles-related incident after that deadline. This could be achieved by a decision-maker exercising discretion, or by an independent panel process. For example, if the deadline by which injury was required to have been sustained was set as the Good Friday Agreement, such a discretion would need to be availed of to include any individual who had sustained injury in an incident such as the Omagh bombing (15<sup>th</sup> August 1998).

## **BACKDATING OF THE PENSION**

It is respectfully submitted that any award under the proposed scheme should be backdated to reflect the delay in implementing the scheme by government and the additional suffering this has caused to the Injured as a consequence. It had initially been anticipated that such an award should be backdated to the date of the Good Friday Agreement<sup>16</sup>, however, this may not be realistic given financial implications inherent in such a step. However, as a minimum, the Injured Group at WAVE would propose that any awards under the proposed scheme should be backdated to 23<sup>rd</sup> December 2014 the date of the Stormont House Agreement, the first agreement between the political parties in Northern Ireland to stipulate that work would be undertaken to seek an acceptable way forward on the proposal for a pension for the Injured<sup>17</sup>.

## **APPEALS MECHANISM**

The Injured Group at WAVE has also envisaged throughout their campaign that decisions in respect of the two eligibility criteria for an award under the proposed scheme would be as follows:

1. Whether a claimant has suffered a troubles-related injury

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<sup>15</sup> “Northern Ireland “punishment” attacks rise 60% in four years”, The Guardian, 12 March 2018 available at: <https://www.theguardian.com/uk-news/2018/mar/12/northern-ireland-punishment-attacks-rise-60-in-four-years> ; “I was shot in the knee as a punishment” BBC News, 20<sup>th</sup> November 2017, available at: <https://www.bbc.co.uk/news/uk-42014557>

<sup>16</sup> Breen-Smyth, M (n1) at p 11

<sup>17</sup> The Stormont House Agreement, 23<sup>rd</sup> December 2014 at paragraph 28

## 2. The level of disablement that the injury or injuries has resulted in

Given the importance of these decision it has also been envisaged throughout the campaign for the proposed scheme that a person who disagreed with the decision of the administering authority of the scheme in relation to either of these issues, should have a right of appeal to an independent appeals body. It is envisaged that like the Social Security Appeals Tribunals or the Criminal Injuries Compensation Appeals Panel, this would include the option of an oral hearing and the ability to provide alternative evidence to any such panel. Such a mechanism would be required to ensure independent oversight of decisions on entitlement within the scheme. A proposed route of appeal is outlined in WAVE's previous research<sup>18</sup>.

### **THE INCLUSION OF INJURED VICTIMS AND SURVIVORS OF THE TROUBLES WHO ARE NOW DECEASED**

It is more difficult in some cases to assess the extent of any injury suffered by any victims and survivors who are now deceased in the same way as a live applicant to the scheme. It is accepted that many individuals who would have been entitled to payments proposed under the scheme, have passed away during the period of inaction that has afflicted the political system in Northern Ireland on this subject. A number of those individuals were members of the WAVE Injured Group, who suffered all the injustices identified as being the purpose behind the scheme proposed.

In such circumstances, if possible, there should be a payment to their estate or to their carer (if they had one). Such a payment to a person's estate could be lump sum as could a payment to a surviving carer.

It is recognised that there are practical issues with any such proposal, as the records upon which a decision can be made in respect of potential claimants who are living, may not exist for those who are deceased. In particular, medical and social security records are only retained for a defined period of time after death<sup>19</sup> after which they are destroyed.

Like an occupational pension, it may be desirable for any award assigned to a carer or family member of an injured person on their death be reduced and paid at a lesser amount, e.g. 50% of the award payable to the injured person during their lifetime. This would serve to mitigate any concerns about run on costs for the scheme. Consultation would be required on any such measure.

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<sup>18</sup> WAVE Injured Group (n1), at p 6

<sup>19</sup> 10 years in the case of GP Medical Records – see G49, Disposal Schedule – Section G, Part 1, Department of Health, available at:

<https://www.health-ni.gov.uk/articles/disposal-schedule-section-g-part-1>

## CHARACTER AS AN ISSUE WITHIN THE PROPOSED SCHEME

The single biggest issue that has delayed progress in implementation of the proposed scheme is the issue of those who suffered injuries in a conflict related incident who are deemed in some way to have been responsible for said incident<sup>20</sup>. Such iterations of this issue include<sup>21</sup>:

- i. Those who were injured whilst participating in the commission of a Troubles related criminal offence
- ii. Those who were injured in a Troubles related incident but have previous criminal convictions for Troubles related offences
- iii. Those who were injured in a Troubles related incident but who have previous criminal convictions

This was not an issue that WAVE addressed when the Injured Group originally conducted research on models for an Injured Pension because the group felt and still feel that it is unfair to ask them to make decisions on who should or should not receive a pension. However, given the inability of the political system in Northern Ireland to produce an agreement on the issue, or at least an agreement to allow those who are not affected by this issue (the vast majority of potential recipients of any scheme)<sup>22</sup> to be assessed pending resolution, it is necessary to point out a number of principles to inform the decision in relation to whether any such limitation is placed on those who fall into one of the above categories:

### 1. The existing law on Rehabilitation of Offenders

This is set out in the Rehabilitation of Offenders (NI) Order 1979 (produced at Appendix 2). It is submitted that any limitation on eligibility for the proposed scheme should comply with the relevant principles therein. Those are (non-exhaustive):

- i. Spent convictions should not be considered<sup>23</sup>
- ii. Offences committed as a child should be treated differently to those committed as an adult<sup>24</sup>

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<sup>20</sup> See Moffett, L (n1), at 312

<sup>21</sup> "Policy Consultation Document on a Proposed Pension for Severely Physically Disabled Victims – Private Members Bill to be introduced in the Northern Ireland Assembly", Democratic Unionist Party, May 2014; and Victims Reparations Bill (Draft), Moffett, L, 14<sup>th</sup> September 2016 at section 12

<sup>22</sup> "Paramilitaries and pensions: BBC Spotlight looks at controversy over victims", BBC News, 2<sup>nd</sup> June 2015, available at:

<https://www.bbc.co.uk/news/uk-northern-ireland-32969571>

<sup>23</sup> Rehabilitation of Offenders (Northern Ireland) Order 1978

<sup>24</sup> Ibid, Article 6

- iii. The determination of the effect of a conviction should consider the sentence imposed in relation to the offence as the predominate factor<sup>25</sup>

The way in which convictions become spent is reproduced at Appendix 3 of this paper. In effect, any sentence of less than 30 months' imprisonment, as an adult, becomes spent under the legislation, whilst sentences in excess of 30 months' imprisonment will never be spent under the scheme. Additionally, such a sentence will have the effect of extending the rehabilitation period for any offence that is unspent at the time of the commission of the offence that attracted a sentence in excess of 30 months' imprisonment. Any subsequent offence to a sentence in excess of 30 months' imprisonment will also never become spent.

Any scheme which seeks to consider character by way of previous convictions to reduce an award inherently has the potential to cause significant injustice. Therefore, it is incumbent on those proposing such a measure to ensure that there is independent oversight of such decision-making, the ability to appeal to an independent authority in respect of adverse decisions, and a measure of discretion for decision-makers to exercise when reviewing such decisions.

## 2. The Criminal Injuries Compensation Scheme

Public policy does place limitations on compensation available to victims of crime. Paragraph 14(1)(e) of the Criminal Injuries Compensation Scheme 2009 requires that a person's character, as demonstrated by their criminal record, be considered when determining whether to make a criminal injuries award under that scheme. No account is taken of spent convictions under the Rehabilitation of Offenders (NI) Order 1978.

The Guide to the Scheme sets out the public policy behind this ability to reduce or nullify and award in the following terms:

*“the impact of unspent criminal convictions MUST be reflected in the assessment of character under paragraph 14(1)(e) of the 2009 Scheme. This is because a person who has committed criminal offences has probably caused distress and loss and injury to other persons, and has certainly caused considerable expense to society by reason of court appearances and the cost of supervising sentences, even when they have been non-custodial, and the victims may themselves have sought compensation, which is another charge on society. Even though a victim may be blameless in the incident in which the injury was sustained, Parliament has provided in the Scheme that convictions which are not spent under the Rehabilitation of Offenders (NI) Order 1978 should be taken into account.”<sup>26</sup>*

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<sup>25</sup> Ibid

<sup>26</sup> A Guide to Northern Ireland Criminal Injuries Compensation Scheme (2009), Department of Justice, Compensation Services at 8.15

The way in which such unspent criminal convictions affect an award is set out in Appendix 4 of this paper. The guide goes on to state:

*“the scale of penalty points is not binding at any stage whether on decisions made by Compensation Services or a determination made by the Criminal Injuries Compensation Appeals Panel for Northern Ireland. It is intended to provide a readily understood guide to the significance of the claimant’s criminal record. The convictions recorded in any individual case and the points attributable to them will be assessed within the context of the particular circumstances of the claim and other related factors. For example, a points total which indicates a reduction or refusal of an award may be mitigated where the injury resulted from the applicant’s assistance to the police in upholding the law or from genuinely helping someone under attack. Or there may be evidence of rehabilitation not otherwise indicated by the points system which may be taken into account. Conversely, a low points score is no guarantee that an award will be made where, for example, the record contains offences of violence or sexual offences, or certain drug related offences.”<sup>27</sup>*

Therefore, the method of dealing with convictions in the guide is flexible. However, there are still shortcomings in the penalty points system as included in the guide. For example, it is respectfully submitted that the principle of totality<sup>28</sup> is not reflected in the calculation of points, nor whether a person pleaded guilty to an offence or was convicted following trial. Lastly, all criminal offences are considered, including offences such as failing to have a television license and low-level driving offences. This is clearly undesirable, and it is submitted that features such as this should be addressed if a character type reduction is proposed for any pension for the severely injured.

We note that while there are numerous international precedents for providing a pension to those injured, there are none in relation to including those injured at their own hand in conflict related incidents.

Pablo De Greiff the UN Rapporteur on Truth Justice, Reparations and Guarantees of Non Reoccurrence and Amnesty International<sup>29</sup> concur that if someone was injured in the course of carrying out an act which would have the effect of depriving someone else of their human rights e.g. the right to life then that person could not rely on a

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<sup>27</sup> Ibid at 8.17

<sup>28</sup> “all courts, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate. This is so whether the sentences are structured as concurrent or consecutive. Therefore, concurrent sentences will ordinarily be longer than a single sentence for a single offence.... It is usually possible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address the offending behaviour, together with the factors personal to the offender as a whole.” Totality, Definitive Guideline, Sentencing Guidelines, Sentencing Guidelines Council of England and Wales

<sup>29</sup> Pablo De Greiff (2015) in a Roundtable discussion with VSS, CVS and Victims Forum in preparation for his 2016 Report: Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.

[https://www.ohchr.org/Documents/Issues/Truth/A\\_HRC\\_34\\_62\\_Add\\_1\\_en.docx](https://www.ohchr.org/Documents/Issues/Truth/A_HRC_34_62_Add_1_en.docx)

human rights argument in any reparative process for a pension or other financial assistance.

## **HOW WOULD APPLICANTS BE ASSESSED?**

If the recommendations of this paper are followed, any assessment on the grounds of eligibility identified would consist of a paper application which would seek to establish that the claimant had been injured in a Troubles related incident. This could be determined with reference to information held by VSS or any other information provided by the claimant. The second aspect of the proposed assessment is medical in nature and would therefore require an assessment conducted by a doctor, clinical psychologist or psychiatrist, depending on the nature of injury alleged.

Given the nature of the injuries that give rise to entitlement under the proposed scheme, and the length of time that has elapsed for many potential recipients, between sustaining those injuries and the present, it is submitted that once eligibility has been established by a claimant, it is highly unlikely to fluctuate. Therefore, it is not envisaged that those who would receive an award under the proposed scheme would be required to undergo periodic reviews or further medical examinations. This position gives a predictability to the scheme, but also means that once the initial assessments are completed at the outset of the scheme, there would be no further need for medical assessments thereafter, reducing medical and administrative costs to the scheme.

The pension should be processed and funded by the Department for Communities in the same way as other benefits and the state retirement pension.

As with the proposed Legacy funding from Her Majesty's Government, the pension should be funded directly from Westminster rather than taken from the Block Grant.

## **HOW WOULD CONTINUITY OF THE SCHEME FOR CARERS AND FAMILY MEMBERS BE ACHIEVED?**

It is respectfully submitted that previous research has demonstrated that allowing an injured person's pension rights under the proposed scheme to be transferred to their carer and/or immediate family member is equitable, given the impact that the injuries suffered by proposed claimants had on their and their families' earnings.

The simplest way to achieve such a mechanism is to have a claimant (i.e. the injured claimant) nominate and countersign the identity of the person who is proposed to receive the Injured Pension on the claimant's death when making their claim to the proposed scheme. This is the method utilised in the Carer's Allowance scheme and



is a simple and cost-effective way of ensuring that those caring for the injured are not left destitute upon the death of that injured person.

## **HOW WOULD AN AWARD UNDER THE SCHEME BE DELIVERED?**

Given the description of the scheme as a “pension” and given that part of the purpose of the scheme is to replace lost opportunities to build occupational pension rights, it has always been envisaged that payments under the scheme would be payable like an occupational pension (i.e. monthly). That method of delivering the scheme has always been the preferred option of the Injured Group at WAVE, and the advantage of this is that it provides a degree of financial certainty to claimants, which addresses the need envisaged for the scheme by Professor Breen-Smyth when she made her initial recommendation. A periodic payment also reduces capital cost at the outset of the scheme. The costs of the scheme could also be offset by replacing existing financial support administered by the VSS, insofar as the proposed scheme would give rise to greater awards than are currently achievable by claimants under VSS financial assistance. This means self-directed (cash) payments could cease but the needs-based support and services including; disability aids; persistent pain; education and training; and psychological therapies would continue.

Given the age of the cohort likely to be eligible for the proposed scheme, the Injured Group would respectfully submit that consideration should be given as to whether recipients of the proposed pension who have reached the age of 70 or 75 should be paid a lump sum under the scheme instead of periodic payments. This is in consideration of the average life expectancy of the population in Northern Ireland (78.5 years for males and 82.3 years for females<sup>30</sup>) and the fact that for some claimants, if paid a periodic payment until death, this will represent a modest payment for a short period of time.

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<sup>30</sup> Public Health NI – Fact Sheet 2018, Department of Health, December 2018 available at: <https://www.health-ni.gov.uk/sites/default/files/publications/health/ph-fact-sheet-2018.pdf>

## HOW MANY PEOPLE WOULD QUALIFY FOR THE SCHEME AND HOW MUCH WOULD IT COST?

The original research conducted by the WAVE Injured Group in relation to the potential number of beneficiaries of any Injured Pension was based on Northern Ireland Memorial Fund Statistics which are reproduced below:

<b>Grounds for eligibility</b>	27
<b>Bereaved and Injured</b>	2
<b>Injured</b>	974
<b>Bereaved, Injured and Carer</b>	4

Those figures gave a total number of potentially eligible individuals who were availing of the NIMF Financial Support of 1007<sup>31</sup>. In 2013, the NI Memorial Fund ceased providing support to Victims and Survivors and the Victims & Survivors Service took over funding and support for victims and survivors on behalf of the Executive Office (then OFMdFM).

The VSS assists all victims and survivors identified under the definition contained in Article 3 of the Victims and Survivors (Northern Ireland) Order 2006, that is:

- someone who is or has been physically or psychologically<sup>32</sup> injured as a result of or in consequence of a conflict-related incident;
- someone who provides a substantial amount of care on a regular basis to someone who has been physically or psychologically injured
- someone who has been bereaved as a result of or in consequence of a conflict-related incident

From April 2017 onwards the Victims and Survivors Service, in addition to offering funding to groups, has offered direct assistance to victims and survivors through the Individual Needs Programme. For those injured in the Troubles, this was reflected with

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<sup>31</sup>Award Report, Northern Ireland Memorial Fund, Oct 2012

<sup>32</sup> "Psychologically injured" is further sub defined as a result or in consequence of witnessing a conflict-related incident or the consequences of such an incident; or providing medical or other emergency assistance to an individual in connection with a conflict-related incident

a £500 Self Directed Assistance Payment for all eligible clients and a £500 Additional Needs Payment to those identified as seriously injured under the 2016-2017 criteria managed by the VSS<sup>33</sup>.

At the time that statistics were made available to the author by VSS (March 2019), there were 849 physically injured victims and survivors registered with VSS. The breakdown of their injuries (as reported) by number is as follows:

Injury Type	Number registered with VSS
Visual Impairment	10
Groin	4
Head Injury	47
Hearing Impairment	38
Loss of eye	18
Loss of limb	41
Paralysis	18
Skin Condition	2
Respiratory	2
Scarring	23
Shrapnel	13
Punishment Shooting	38
Spinal	41
Gunshot wound	296
Other	258
TOTAL	849

These are serious injuries of the type within the contemplation of the proposed scheme. However, there is a significant number of the overall group (260) that are not categorised. It is therefore difficult to predict how many of this subset would be eligible and to what extent they would receive an award under the proposed scheme. The group is split 16/84% female/male.

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<sup>33</sup> The VSS cannot offer direct financial payments to new individuals coming forward from 3 April 2017

In relation to the ages of those assessed by the VSS, the following can be seen:

Age range	Number
35 and under	44
36-45	107
46-55	199
56-59	98
60-64	157
65-79	218
80+	26
TOTAL	849

Therefore, 82% of the group assessed by the VSS are over the age of 46, with 47% being over the age of 60. Closely related to this is the decade in which the injury causing incident occurred:

Decade	Number
No data	5
1960-69	9
1970-79	260
1980-89	210
1990-99	222
2000-09	96
2010-present	47
TOTAL	849

It can be seen from the above table that only 16.84% of those assessed as injured by the VSS were injured this century which means that 83.16% of the cohort are still seeking support for injuries they sustained more than eighteen years ago, and in a small number of cases, up to 50 years ago.

Unsurprisingly, and as predicted by the WAVE Injured Group as surmised in its original research, the overwhelming majority of the cohort are in receipt of disability benefit, and in particular, Disability Living Allowance (96%)<sup>34</sup>. Of the group in receipt of DLA, 45.54% are in receipt of the High rate care component whilst 54.46% are in receipt of the middle rate care component.

In terms of the cost of any scheme the previous research conducted indicated that the costs would be as follows<sup>35</sup>:

<b>Costs in relation to eligible numbers</b>	<b>Overall Estimated Costs per annum (£)</b>
Variations in the numbers of VASPA recipients	
355 recipients	£2,173,333
200 recipients	£1,223,333
500 recipients	£3,060,000
750 recipients	£4,590,000
1000 recipients	£6,123,333

If every person receiving assistance from the VSS were to receive an award on the average identified above, the annual expenditure on awards would amount to £5.20 million. The true figure is likely to be much lower, given that assessments conducted by VSS are not as targeted in relation to causation as that proposed above and has been suggested at 500 recipients, based on VSS risk analysis<sup>36</sup>. The above figures do not include administrative costs of the scheme, but it is submitted that if the most efficient model for the scheme is adopted, these would only really arise at the commencement of the scheme as opposed to amounting to an ongoing issue.

### **Psychologically Injured**

VSS have a record of 1200 individuals accessing assistance for psychological injury, on the basis of a single GP letter rather than a full psychiatric or psychological assessment. In our view the numbers accessing a pension may be significantly lower based on the assessment criteria used.

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<sup>34</sup> There is a small cohort on those assessed who receive support in respect of chronic pain attributable to their injury but either choose not to claim Disability Living Allowance or are not eligible

<sup>35</sup> Assuming the model proposed by WAVE and CVS is used

<sup>36</sup> Victims and Survivors Service, March 2019

