



A Legal Framework for a Troubles-related incident Victims Payment Scheme

Implementation of the legal duty under section 10 of the Northern Ireland (Executive Formation etc.) Act 2019

Consultation response by the Injured Group

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1. Do you agree with the broad proposed purpose of the scheme?

The Injured Group welcomes the commendation of its campaign and work on the proposal for a payment scheme for those severely injured in the Troubles within the introduction to this consultation. The Group seeks to ensure its vision of a pension for those severely injured in the conflict in Northern Ireland is realised.

The need for a payment scheme for those severely injured in the Troubles is undeniable. Previous research on the subject outlines the rationale for the proposed scheme in detail, but in summary, the reasons for implementing the proposed scheme are¹:

- 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)²
- vi) The chronic ill health endured by the injured as a result of their injuries
- vii) The effect of long-term use of disability and mobility aids, such as prosthetic limbs and wheelchairs, and complications caused by the type of injuries characteristic in the Group (such as surgery to remove embedded shrapnel)
- viii) The increased life expectancy of the cohort over previous estimates (for example, at the time compensation payments were made)
- ix) 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)

The measure of success for the proposed scheme is whether all of those reasons are addressed, and the general purpose of the proposed scheme, as identified in the consultation, is accepted by the Injured Group.

¹ 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

² The Disability Discrimination Act 1995 received Royal Assent on 8th November 1995

2. Do you agree with the underpinning principles set out above?

The Injured Group has previously identified the following key characteristics the proposed scheme, to ensure it meets the need it is proposed to address:

1. It must be non-contributory
2. It must be non-means tested
3. It must be disregarded for the purposes of calculating means-tested benefit entitlement
4. It must be graded to reflect the differing levels of disablement experienced by the injured
5. It must continue beyond State Pension age³

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 is not burdened with complex legislation on income and capital (as is the case for Universal Credit and other means tested benefits)⁴.

Given the proposed scheme is recognition and acknowledgement of the great harm done to individuals injured in the conflict, it is the Group's view that those who were severely injured, but have managed to work and have accrued some occupational pension rights, should be included in the scheme on the same basis as individuals who have not accrued such rights. This is to reflect the fact that whilst some individuals may have been able to work after suffering a severe Troubles-related injury, they will have suffered loss of potential and faced greater challenges in doing so, because of their injuries.

Payments under the scheme would be disregarded for means-tested benefits to ensure that such payments provide maximum benefit to 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 should continue beyond State Pension 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

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

⁴ See Universal Credit Regulations (Northern Ireland) 2016 inter alia

should be made to applicants regardless of their age at the time of their claim (provided they meet the other qualifying criteria of the scheme).

The Injured Group therefore broadly agrees with the underpinning principles identified in the consultation. The Injured Group recognises that there could be few more difficult circumstances than if those who were bereaved in the conflict were faced with the prospect that those responsible for such incidents were to receive payments under the proposed scheme. This is particularly the case where those bereaved in the conflict suffered much injustice by receiving inadequate compensation from the State and had to endure the consequences of raising a family in the absence of their loved one who was killed.

3. Does the proposed approach to payments – including scaling awards in proportion to the severity of injury, level of awards and adopting degrees of disablement methodology – seem fair and proportionate?

The assessment scale recommended by the Injured Group at WAVE has been adopted in the consultation, which is welcomed by the Group.

That scale was recommended for the purposes of assessing the extent of any disablement in the proposed scheme was 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 to it are well established
- 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)

The Injured Group believes that the proposed sliding scale is the most equitable way to determine awards under the scheme. It further believes that the indicative level of awards in the consultation are sufficient to meet the needs of those who will be eligible for awards under the proposed scheme, and as such, are fair and proportionate.

4. Based on the examples set out, do you consider 14-20% disablement to be an appropriate entry point for the ongoing support to be provided through the scheme?

Yes

5. Do you agree with the proposed approach of backdating initial awards to the date of the Stormont House Agreement?

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 those injured in the conflict. It had initially been anticipated that such an award should be backdated to the date of the Good Friday Agreement⁵, however, this may not be realistic given the financial implications inherent in such a step. However, as a minimum, the Injured Group at WAVE would agree that any awards under the proposed scheme should be backdated to 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 Injured⁶.

6. Do you agree with the proposed approach to providing a lump sum option?

The proposal of the addition of a provision within the proposed scheme for those over the age of 60 to avail of lump sum payments is to be welcomed as providing eligible individuals with choice in receiving awards. Previous figures would suggest that this option would be open to approximately half of those severely physically injured in the conflict. It is imperative that individual applicants, who are eligible for lump sum payments, have the ability to receive independent financial advice before opting for such payments. The impact of lump sum payments on welfare benefit entitlement also falls to be considered and relevant legislation would require amendment to provide appropriate disregards.

7. Do you support the proposed arrangements for the payments to continue for ten years following the death of the injured person, to a nominated spouse, civil partner, cohabiting partner or registered carer?

Previous research has demonstrated that it is equitable to allow an injured person's pension rights under the proposed scheme to transfer to a person nominated by them (a carer or family member), given the impact that the injuries suffered by proposed claimants had on their and their families' earnings. In respect of the proposed eligibility for such nomination, it is suggested that the requirement for a carer to be "registered" be relaxed, given the restrictive nature of the grounds of eligibility for Carer's Allowance. ⁷The Injured Group fears that if such a requirement is included in the proposed

⁵ Breen-Smyth, M (n1) at p 11

⁶ The Stormont House Agreement, 23rd December 2014 at paragraph 28

⁷ Social Security Contributions and Benefits (Northern Ireland) Act 1992, section 70 and The Social Security (Invalid Care Allowance) Regulations (Northern Ireland) 1976, regulations 4 and 8

scheme, many individuals who provide regular and substantial care to those severely injured in the conflict will lose out on payments unfairly.

The suggested nomination mechanism within the proposed scheme is the simplest way to achieve such continuation of payment and is the method utilised in the Carer's Allowance scheme to identify entitlement. The mechanism proposed 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. The Group sees no reason why such a transfer of payments should be time limited to 10 years, as suggested in the consultation, and would advocate that such payments be made until the death of the person they transfer to.

8. Do you support the proposed arrangements for allowing applications from surviving spouses/carers who would have been provided for if the scheme had been established in 2014?

Many individuals who would have been entitled to payments under the proposed scheme, have passed away during the period of inaction that has afflicted the political system in Northern Ireland on this subject. Many of those individuals were members of the WAVE Injured Group, who suffered all the injustices identified as being the purpose behind the scheme proposed. The Injured Group advocates that the family members of those individuals should receive payments under the proposed scheme. It is recognised that 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.

The Group is broadly supportive of the suggested time period (up to ten years payment being accessible in such cases). The Group also recognises that there may be issues with applicants being able to substantiate such claims. For example, medical and social security records are retained for a defined period after death⁸ after which they are destroyed. Such a mechanism will therefore require applicants to have access to advocacy services, and decision makers will have to deal with such claims in a sensitive manner.

9. Should the suggested time frame be those injured 1 January 1966-10 April 1998

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

⁸ 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>

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 (10th 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 the community are on the rise⁹.

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 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 (15th August 1998).¹⁰

If this is not desirable and a cut-off date for eligibility must be identified, the Group would suggest the date of the Stormont House Agreement (23rd December 2014) as the relevant date.

10. Do you agree with the proposed approach to who will benefit from the scheme?

It is noted that at paragraph 57 of the consultation, that both primary and secondary victims will benefit from the proposed scheme. However, the definition of a secondary victim, as outlined in the consultation, is unclear. It is

⁹ “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, 20th November 2017, available at: <https://www.bbc.co.uk/news/uk-42014557>

¹⁰ “Don’t exclude Omagh bomb families from new Troubles pension, says victim’s sister”, The Belfast Telegraph, 28th October 2019, available at: <https://www.belfasttelegraph.co.uk/news/northern-ireland/dont-exclude-omagh-bomb-families-from-new-troubles-pension-says-victims-sister-38635666.html>

considered that the requirement for a secondary victim to demonstrate they were physically present at a relevant incident, at the time of it, or in its immediate aftermath, is a duplication of what should give rise to primary victim status.

Secondary victim status should give those individuals who were not physically present at the scene of a Troubles-related incident, but suffered psychiatric injury as a result of what happened to their loved ones (such as attending them in hospital or learning that they had been abducted), eligibility to receive payments under the proposed scheme if they can demonstrate they sustained a long lasting, medically recognised psychiatric injury. Therefore, it is suggested that the criteria for secondary victimhood would be; proximity of relationship between the applicant and a primary victim; and the applicant had sustained a diagnosable psychiatric injury by shock as a result of injury caused to the relevant primary victim.

It is of deep regret to the Injured Group that the issue of those who are deemed to have contributed to their own injuries sustained in the conflict has delayed progress in implementation of the proposed scheme.

The Group notes the advice of the Northern Ireland Human Rights Commission on the proposed scheme, i.e., that it is permissible to limit eligibility for the proposed scheme where an individual was injured whilst involved in the commission of a Troubles-related incident¹¹. The Injured Group agrees that including such individuals within the scope of the scheme has the potential to re-traumatise victims of such incidents and is therefore in agreement with the proposal that such individuals be excluded from receiving payments. It is envisaged that such cases will be limited in number.

11. Do you agree with the proposed approach based on residency and location of incidents?

It is respectfully submitted that the requirement that someone must have been injured in the UK **and** be ordinarily resident in the UK now or at the time of the injury is too restrictive. The Injured Group is of the view that any person severely injured as a result of the conflict in Northern Ireland should be eligible under the proposed scheme. It is also important to note the wider impact of the conflict beyond the United Kingdom, in Ireland and Europe, and whilst it may be felt that compensating victims and survivors in those areas is not the responsibility of the Government of the United Kingdom, compensation for such victims and survivors should be raised with the appropriate Governments in those areas.

¹¹ Victims' Payments, Advice of the Northern Ireland Human Rights Commission to the Northern Ireland Office in respect of the NI (Executive Formation etc.) Act 2019, NIHRC, September 2019 at 3.8-3.10

12. Do you agree with the proposed approach to evidence and assessment?

It is considered that any assessment on the grounds of eligibility identified for the proposed scheme would consist of a paper application which would seek to establish that the claimant had been injured in a Troubles related incident. It is envisaged that for many applicants, this information will be held by VSS. In respect of the determination of the extent of an applicant's injury, it is welcomed that efforts will be made to reach determinations on paper evidence before face-to-face medical assessments are conducted.

13. Do you agree with the proposed approach of taking account of other compensation/payments

It is considered that the proposal to take account of previous compensation awards in the computation of an individual's award under the proposed scheme, undermines the stated purposes of the scheme. Whilst part of the purpose of the proposed scheme is to address the inadequacies of the Criminal Injuries Compensation Scheme and its predecessors, that is one of many reasons that the Injured Group at WAVE has identified a need for a payment scheme. It is submitted that refusing or reducing awards under the proposed scheme by reason of previous compensation awards will create a second injustice to those adversely affected. Such thresholds also fail to meet the following stated objectives of the scheme (as outlined in the consultation):

- Victim-centered – the proposal to reduce awards based on previous compensation awards fails to place the needs of victims as a high priority and places an arbitrary check on awards
- Transparent – it will be difficult for applicants to know what their entitlement will be under the scheme before they go through the process of assessment, potentially leading to applicants being subjected to medical assessments and being unsuccessful at its conclusion
- Simple to navigate – the proposed measure to consider previous compensation awards introduces an element of means-testing to the scheme, something the Injured Group at WAVE has previously rejected

It is also considered that such a measure would fail to meet the characteristics of the scheme as articulated by the Injured Group i.e. for those applicants to the proposed scheme adversely affected by such a measure, there would be a failure to address:

- The need for recognition of their suffering
- The lack of occupational pension rights accrued by them as a result of their injury (and the equivalent value of such a pension pot)
- The person's reliance on social security benefits
- The impact of welfare reform on those injured in the conflict

- The lack of disability discrimination legislation prior to 1995 (for those injured then)
- The chronic ill health suffered by the injured
- The increased life expectancy of the cohort over previous estimates

Furthermore, it is difficult to envisage the effect of this proposed barrier to eligibility under the proposed scheme, without knowledge of the specific criteria proposed. However, whilst data exists on the numbers of individuals severely injured in the conflict, there is a paucity of data on compensation awards paid to that group during the Troubles¹². Therefore, it is impossible to accurately predict the effect that any thresholds imposed under the proposed measure will have on the overall numbers of individuals who will be eligible for the proposed scheme. In such circumstances, it is submitted that the government should be extremely reluctant to introduce such a measure, particularly given that there is no suggestion that such a measure is a legal requirement of the proposed scheme.

The proposal to introduce a reduction or exclusion on eligibility for the proposed scheme, based on previous compensation payments, also creates difficulty and complexity in the administration of the scheme. Firstly, the period over which individuals received injury is wide ranging, meaning any such provision relating to compensation will be required to make allowances for inflation/cost of living increases, and it is unclear how this would be done in an equitable manner.

Secondly, those who received compensation payments in the later decades of the conflict are more likely to have their awards reduced or excluded altogether, as a direct result of the proposed measure¹³. This cohort is obviously younger than those who received compensation in previous decades. They would therefore expect to receive payments under the proposed scheme for a longer period than those injured earlier in the Troubles, when life expectancy is considered.

This means that the potential loss to these individuals is considerable, as a result of the introduction of the proposed mechanism, and in some cases could be more than previous compensation awards. This has the potential to create significant injustice in the scheme and should not be allowed to occur.

Furthermore, it is inequitable for compensation awards to be considered where such awards have been spent by individuals in meeting their basic needs. If previous compensation payments are to be considered in the proposed scheme, amounts spent on purchasing a home or on disability aids and adaptations should be deducted from the overall amount of compensation as items of essential expenditure. The difficulty with introducing such disregards (the examples provided are not exhaustive) is that it introduces an

¹² Analytical Review of Compensation, RSM McClure Watters, Economic Division, June 2011 at 1.4.2

¹³ The Compensation Agency, Northern Ireland Affairs Committee, Fourth Report of Session 2003-04, 26th April 2004, Appendix F

element of means-testing into the scheme. The Injured Group has consistently argued against such means-testing in the proposed scheme from the inception of their campaign, as it introduces all the difficulties associated with the welfare benefits system including the prospect of overpayments and error/fraud issues.

The proposal to include compensation as a consideration for eligibility under the scheme also ignores the reality that many of those who received compensation during the conflict no longer have recourse to funds from those awards. Given the passage of time since such payments were made, this could include; the loss of money through divorce settlements; investment losses; reduction in the value of the property market; or simply meeting the costs of living over the relevant period. Many of those severely injured in the conflict will also have financed related surgery from the proceeds of compensation payments.

Whatever the amount of money received in compensation, if a person no longer has any of that amount left, they should not be reliant on income-based benefits and as such should be entitled to an award under the proposed scheme. Again, it is submitted that the only way to assess this is to means-test the scheme and rather than embark on such a costly and complex exercise, it is submitted that all interests are served by removing the requirement that previous compensation payments be included as a consideration for qualification for the proposed scheme.

14. Do you agree with the proposed approach to disagreeing with or reviewing decisions?

The Injured Group had 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
2. The level of disablement that the injury or injuries has resulted in

Given the importance of these decisions, 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. Therefore, the mechanism in the proposed scheme to allow applicants an opportunity to have their case reconsidered and to avail of appeal to an independent body is to be welcomed.

The Group also welcomes the ability of applicants to have their case reviewed if their condition deteriorates.

15. Do you support the proposed support arrangements?

Yes

16. Have you any other comments you wish to make about the proposed approach to the scheme?

No