RELATIVES FOR JUSTICE

The untold stories of Relatives, Victims, and Survivors

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Relatives for Justice Response to:

"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

Government Consultation

November 2019

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Introduction

Relatives for Justice welcomes the opportunity to respond to the proposals for payments to victims of the conflict.

Relatives for Justice has long advocated a comprehensive approach to reparations for those who have suffered conflict related violations. Reparations for victims of human rights violations are meant to recognize and address the harms suffered, and acknowledge wrongdoing.

Reparations should serve to acknowledge the legal obligation of a state, or individual(s) or group, to repair the consequences of violations — either because it directly committed them or it failed to prevent them. They also express to victims and society more generally that the state is committed to addressing the root causes of past violations and ensuring they do not happen again.

With their material and symbolic benefits, reparations are important to victims because they are often seen as the most direct and meaningful way of receiving justice. Yet, they are often the last-implemented and least-funded measure of transitional justice. Indeed, measures of reparation formed little part of the Stormont House Agreement with unspecified commitments to a Mental Trauma Service and the aspiration that a pension for the most injured would be agreed. However, this was not a rights-based approach to reparation.

The approach of political contest/agreement, rather than fulfilment of the rights of those who have suffered violation is at the heart of the impasse that we witness on these matters.

The journey towards a pension for the injured, despite its evident justice, is a case study in political failure. But also, an indication of how the needs of victims and survivors have been viewed in a philanthropic manner, or a matter for political bargaining, rather than promoted and supported through the lens of human rights.

A step change of approach is required regarding reparations to victims and survivors. The proposed payment scheme should be seen as a contribution to a wider, rights based approach to reparation for all violations.

RFJ reiterates our call for a Tribunal of Reparations, with a mandate based on the United Nations Right to a Remedy and Reparation. This should be a speedy process, running for no

more than a year, which examines the impact all of the schemes to date, identifies gaps and inequalities and makes recommendations for a landscape of reparations for victims of human rights violations during the conflict.

This document engages with these discreet and long-awaited proposals for a pension for the injured in good faith, but with an eye to the human rights obligations of the British Government and all interested in ensuring lasting peace and justice for all victims.

Contents:

1.1 Relatives for Justice Vision

To support the empowerment of the bereaved and injured of the conflict to realise improved health and wellbeing, and full and equal participation at every level of our post-conflict society

1.1.1 Relatives for Justice Mission

- Building and providing access to safe, integrated and professional services and programmes of support for the bereaved and injured of the conflict
- Contributing to the health and wellbeing of victims and survivors
- Realising empowerment through building skills, confidence and self-awareness
- Encouraging the bereaved and injured to realise their role in peace building and processes designed to deal with the past
- Investing in Relatives for Justice through training and sustainable partnerships

1.1.2 Relatives for Justice Aims

- To provide a safe space for the bereaved and injured of the conflict
- To provide professional, appropriate and development based individual, family and group support for the bereaved and injured in an holistic, integrated fashion
- To develop and deliver said support in partnership with other professional organisations where appropriate
- To support the bereaved and injured to tell their story and document their experiences
- To build awareness and foster an understanding of the specific experiences and needs of the bereaved and injured of the conflict in a transitional context
- To contribute to the search for truth, highlight injustice and contribute to a culture of human rights
- To support families engaging with relevant processes to deal with the past including legal processes

- To liaise with domestic and international human rights NGOs, government bodies and other international organisations in the furtherance of the realisation of the rights of victims and survivors of the conflict

1.1.3 Relatives for Justice Core Values

- An active commitment to universal human rights and social justice
- The promotion of equality and respect for the background, diversity and experience of **all** those bereaved and injured by the conflict
- The application and development of the highest standards of professional support programmes for victims and survivors of the conflict
- The promotion of recognition and remedy for the specific gender harms and experiences of the bereaved and injured of the conflict

1.2 Eligibility

Relatives for Justice **only** supports victims and survivors of the conflict in its work. Eligibility for services is determined at initial contact and evidence retained.

2. The Work of Relatives For Justice

Relatives for Justice (RFJ) was founded in April 1991 when a number of bereaved families affected by the conflict came together to support one another. Instrumental in the formation of the organization were key figures that had, on a voluntary basis, been active for the previous 2 decades such as Monsignor Raymond Murray, Clara Reilly, Peter Madden, the law practice partner of the late Pat Finucane, and the late human rights lawyer Rosemary Nelson both subsequently murdered. RFJ is one of only a few organizations operating on a regional basis across the North and on an all island basis.

Relatives for Justice is a world recognised NGO working with and providing support to relatives of people bereaved, and injured, by the conflict across the North of Ireland including border regions in the 26 counties.

We assist and support families coping with the effects of bereavement through violence and the resulting trauma. We have 2 offices in Belfast, an office in Dungannon and 5 regional outreach centres. We are an accredited centre for counselling and psychotherapy with BACP.

RFJ identifies and attempts to address the needs of those who have suffered loss and injury; this is achieved through one to one contacts, self-help, group support, outreach and befriending, counselling support and therapy work, welfare and legal advocacy.

As relatives and survivors we all need to have our experiences heard and valued. In terms of conflict resolution this will also allow those most marginalised to realise the pivotal role and vital contribution that they bring to the creation of a new society based upon equality, respect and above all where human rights are secured.

This work highlights and attempts to address outstanding human rights abuses. Our primary objective in this area of work is to assist in the bringing about of a more human rights-based culture in order to safeguard and protect human rights for all.

3. Reparations in the context of the North of Ireland

In his country report regarding the United Kingdom to the UN in 2015, Special Rapporteur Pablo De Greiff observed that "The area of least achievement in the context of Northern Ireland remains reparations."[1]

Relatives for Justice concurs with this assessment. There is a legacy of inequity in relation to previous compensation schemes. These are multiple. Not least has been the provision of payments to some members of the what is known as the "Security" family and the lack of provision to the rest of the population. Through Freedom of Information requests Relatives for Justice has estimated that £1.2Billion has been paid in various schemes to the members of the armed forces and state organisations and their families. The schemes were designed to benefit members of the RUC, RUC Reserve, UDR, RIR and Prison Service and their families. All were the result of political negotiation following successful lobbying by political Unionism for these partial schemes which were then championed as delivering for "their own". This systemic partial approach of political bargaining, rather than a human rights compliant universal approach to ensuring reparations for all victims of conflict related violations is a significant matter on non-compliance with international legal norms, despite the British Government ratifying the Vienna Declaration and Programme of Action in 1993 and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law in 2005, when some of these schemes were being put in place and promoted.

The deep and lasting distress caused by these systemic inequities between civilians and state actors and indeed between civilians bereaved and receiving payments under differing compensation schemes is something referred to by the Report of the Consultative Group on the Past.[2]

The campaign for a pension for the injured stepped into the vacuum created by lack of application of human rights norms in terms of reparations for violations, and the previous partial approach. That the proposed scheme is also partial and creates a hierarchy of victimhood is very regrettable.

[1] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland. 17 November 2016. Presented to United Nations General Assembly, Human Rights Council, Thirty-fourth session 27 February-24 March 2017. (A/HRC/34/62/Add.1) 60

[2] Report of the Consultative Group on the Past, January 23 2009. 90

4. Recognition of the campaign of the most seriously injured

This response recognises the sterling work of the group of persons injured who have spear headed the campaign for a pension. This campaign suffered many false dawns and disappointments. Nonetheless it was fought with tenacity and considerable political nous to bring about the proposals that are currently under consideration. Of course, persons who have suffered the gravest of injuries should not have had to fight this campaign and we recognise those who passed away while campaigning. The cost was great. That this group was asked to advocate for compromise is disheartening. A universal approach which would deliver to all of those with serious injuries as per the 2006 Victims Order was the approach taken by the campaign. And part of its robust strength and compellability.

5. Definition of a Victim

It is a matter of great regret that the proposals attempt to change the definition of a victim.

In his country report in 2015, UN Special Rapporteur Pablo De Greiff made the following observations:

Despite the consensus that the past should be addressed, no single narrative of the past is acceptable to all sides. Even certain words about the past are used by some "to continue the struggle through other means". Disagreement even relates to terms with a well-established legal definition, such as "conflict" or "victim", the latter being a term that remains, in particular, the subject of intense contestation. Indeed, the very notion of human rights, which by its universality should play a socially integrative function, is regretfully seen by too many as a banner for partisanship.

The current statutory mechanisms alone cannot address this situation. The central mission is to liberate all parties from the sense that the uniqueness and greater sense of victimhood of the members of one community must be remembered and acknowledged before beginning any discussion about how to move forward. Once all parties are recognized as equal members of a shared, collective political project, it will be easier to manifest allegiances

without once again recalling the many ways that one community has aggrieved another in the past.[3]

While no doubt there is contest regarding our narratives of the past, there is no denying the deep suffering held by those who suffered violations across our community. This move to change the definition of victim diminishes the suffering and pain of some within our community for political purpose. This is unacceptable.

The payment proposals arise from a recognition of the particular needs of citizens who suffered devastating injuries. If we determine that payments are linked to need, which the "underpinning Principles" of the proposals do (pt35), then the decision to tamper with the 2006 Order is a retrograde step. We urge a critical reconsideration of such a denial of support to persons in desperate need.

Just as our community suffered together, it must heal together. The original definition, as agreed by the SDLP and UUP in the 2006 Victims and Survivors Order, was a positive and welcome step and was the only reasonable and logical way forward in dealing with the injured and bereaved and their needs. Since then that definition has served the interests and needs of the greatest number of victims and survivors of our conflict. The political drive to change it is very much part of the meta-conflict that continues through the prism of victims. Such a politicised approach has done nothing to lessen the burden for victims and survivors and indeed could be argued to have caused additional harm.

The current definition has supported many thousands to begin journeys of healing and thus has served us well. The definition must be above contest, be embracing and inclusive and support future generations to recover from our painful past.

6. Approach to Financial Payments

We note that the approach proposed regarding financial payments is based on the Industrial Injuries Disablement Scheme in addition to the War Pension Scheme. Injuries sustained as a result of a long-term complex and contested conflict are not compatible with a civilian time

[3] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland. 17 November 2016. Presented to United Nations General Assembly, Human Rights Council, Thirty-fourth session 27 February-24 March 2017. (A/HRC/34/62/Add.1)

industrial type scheme. That the differences and unique experience are not acknowledged in the proposals is a cause for concern. A “normalisation” approach regarding our conflict is not possible, particularly in this area of policy development. This is particularly the case for those affected by psychological injury. Persons who have suffered multiple violations and have survived for generations without seeking help require particular support.

The diagnostics tools being recommended for assessment of permanent psychological injury should be kept under robust review as understanding of trauma is a developing and dynamic arena of scholarship.

We believe that proposals for a Regional Trauma Network should be demarcated from any assessment role for psychological injury. However, the RTN could have a formal role in oversight of the process of assessment and ensuring good governance and a dynamic approach to diagnoses.

The “entry point” for ongoing schemes should be lowered. Permanent injury which affects 15% of one’s life is more reasonable an entry point than 20%.

6.1 Proposed Eligibility Timeframe

We note the proposed eligibility for the scheme will be for injuries sustained in actions between 1966-1998. The reasoning for this is that “A commonly used time period for the Troubles is to consider that they began in 1966 and ended with the signing of the Belfast/Good Friday Agreement on 10 April 1988.”

We consider the use of this timeframe to be unhelpful and damaging. While there may well be a convenient narrative that our conflict ended with our peace agreement, our lived experience has been that there were many conflict related deaths and injuries subsequently. It is absurd to put a notionary timeline on the payment scheme when so many live with needs arising from conflict actions that took place post April 1998.

It would be equally absurd to have one scheme of payments in place with an artificial timeline when schemes such as those provided in Victims and Survivors Groups and through the Victims and Survivors Service more accurately reflect the lived experience of our society where harms have cascaded beyond that date.

7. Carers

Overall the proposals do not take carers into practical consideration.

In pt54 carers and spouses are recognised rightly for the lifetime of sacrifice and the "impact of severe trauma caused by disablement from a Troubles related injury on a family unit". This recognition is only realised in this scheme following the death of the injured person.

Carers and spouses of living injured deserve the dignity of this scheme.

The current proposal that payments are transferred upon death to a carer/spouse should be **in addition** to a payment made to that carer/spouse in their own right.

The proposal for a lump sum payment underpins the gap in recognition and understanding of the experience of carers. While we recognise the values underpinning the proposal regarding a lump sum payment following 60yrs of age, Relatives for Justice would urge caution to ensure that carers would not be disadvantaged by this proposal, as the money may be spent long before a person passes away, and the carer will continue with their caring obligations after money has run out. Equally, in situations of domestic abuse the matter becomes more stark.

As the life expectation of the population is extending, longevity should not be penalised in this scheme. A life-time reduced payment accompanied by a sum amounting to a maximum of 40% of a ten-year award would be a more reasonable proposal which would reduce the potential for abuse and support the person should they survive past the age of 70yrs.

In conclusion by giving independent payments to carers and spouses the potential for abuse is diminished and additionally we do not think the lump sum payment of entirety should be made to the detriment of longevity or carers.

This is an area of significant gender inequality with women traditionally taking on the role of carers for the injured. As such this proposal would benefit from the application of a gendered lens.

8. Gender

None of the proposals demonstrate the application of a gendered analysis.

This is a significant gap in policy making for victims and survivors. In Relatives for Justice we have mainstreamed a gender analysis to all of our work. We have made concerted effort to

apply the idea and promise of UNSCR1325[4] and CEDAW General Recommendation 30. The promise is that societies will encourage participation of women most hurt by conflict and put in place support that is appropriate to their experience of conflict.

The North of Ireland enjoys the unenviable position where we live in a post conflict state but the UK, a permanent member of the Security Council, refuses to acknowledge the relevance of UNSCR1325 in the local context due to contest over the status of the conflict. The UK government refuses to accept that there was a conflict here. We have proposed mechanisms to deal with the past which mirror any initiative in a post-conflict context yet there is a refusal to acknowledge the remit of UNSCR 1325 for women living here.

This refusal has not been replaced by a commitment to ensuring substitute measures which would guarantee that women who experienced conflict harms are recognised and supported. In fact, the complete silence in these and wider proposals to deal with the past regarding gender, despite extensive lobbying of both governments and all parties to this end, is shameful.

We all know, and it is recognised in international doctrine, that women experienced conflict differently, and indeed that women experience trauma differently. In our context in the North of Ireland women from every community founded support groups and saw the necessity for peer support, group work, talking and gentle solidarity. With 91% of those killed being men there was a particular experience of violation that belonged to women.

Specific attention is required at address the gender gaps in relation to reparations.[5] To date there has been no official initiative examining gender and conflict. This is a recurring concern in matters pertaining to dealing with the past, however in relation to reparations there is no one area in which a gendered focussed approach is more critical.

Women promote group activity and safe space for recovery and healing. The promotion of individualised “interventions” over long term processes of recovery and reconciliation impacts women disproportionately. Individualised approaches discriminate against women, and their place in family and community, and disregards the role that family and

[4] United Nations Security Council Recommendation 1325 on Women Peace and Security (31 October 2000)
[5] Fionnuala Ní Aoláin, Catherine O’Rourke and Aisling Swaine, “Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice”, Harvard Human Rights Journal, vol. 28, 2015, p. 97.

community, with women at their centre, play. Therefore individualised "diagnostic techniques" for psychological injury may require active attention.

None of the proposed processes for dealing with the past have benefitted from a gender lens and neither has this proposal. There is a grave danger that any emergent process will have the ignominious status of being one of the very few international examples of where gender did not figure.[6]

This will serve to exclude women from benefitting in the very processes designed to address their experiences. All societal barriers which women face are compounded by trauma and violent loss. A lack of gender lens will compound this even further.

Relatives for Justice commends the publication "Gender Principles for Dealing with the Past"[7] to this consultation and much of the narrative in this submission reflects the recommendations contained therein.

These proposals would benefit in a gendered analysis to ensure that women are not disadvantaged by proposals that on the face of them raise problematic issues to that end a working group on gender, should be established, to apply a gender lens to the scheme.

9. "Secondary Victims" and the bereaved

Relatives for Justice is concerned regarding the approach taken to eligibility in Section 57. We understand that the approach taken is drawn from the Alcock case in regard to the events known as the Hillborough Disaster. To that end we make the following observations.

The Case of ***Alcock v Chief Constable of South Yorkshire; Penk v Wright; Jones v Chief Constable of South Yorkshire; Copoc v Chief Constable of South Yorkshire a.k.a. Jones v Wright*** **[1992] 1 A.C. 310**

The Secretary of State, Julian Smith, acknowledges, in his foreword, the "*hurt and suffering caused by decades of terrible violence have had a profound and deep-rooted impact not just on individuals but on generations of families…".* Indeed, he recognises the need, which he

[6] "Dealing With the Past: Where Are the Women?" Relatives for Justice February 2015 < http://relativesforjustice.com/wp-content/uploads/2015/02/Dealing-with-the-Past-Where-Are-the-Women.pdf>
"Gender Principles for Dealing with the Past" September 2015 < http://relativesforjustice.com/wp-content/uploads/2015/09/genderprinciples.pdf>
[7] ibid

calls a "*moral duty"*, to acknowledge and recognise the unacceptable suffering of those seriously injured during the conflict.

The chosen method for achieving this outcome is the Victims Payment Scheme, which seeks to "*support those individuals living with permanent disablement caused by injury in troubles-related incidents".* (per 56) The payments are a method of "*acknowledgement"* of the harm suffered and is underpinned by the fact that the harms suffered have had a negative impact on an individual's ability to provide for themselves and their families. (per 30)

The eligibility of the scheme is in line with "*usual public policy"* and will make awards to both primary victims (directly involved) and secondary victims (someone who has witnessed the distressing events and who must also be in a relationship of close proximity with the primary victim; have not been too remote i.e. been present at incident or immediate aftermath; and have sustained a diagnosable psychiatric injury due to shock caused by direct perception [per 57]).

This method of eligibility centres on tortious liability, as set out in controversial case of *Jones v Wright* [1992] 1 A.C. 310. (A.k.a *Alcock*) That case concerned the tragic *Hillsborough Disaster* of 1989 in which 96 people tragically died due to gross mismanagement and the negligent oversight by the South Yorkshire Police Force. The reason for the controversy in that case centred on the House of Lords' decision on the issue of liability. The contention came when deciding on liability of the police force for so-called 'secondary victims'.

For all claims in negligence, the plaintiff must show they suffered reasonably foreseeable damage resulting from negligent breach of a duty of care. Firstly, a causal link must be proved between the actions of the defendant and the harm suffered. Secondly, negligence must be proved. This involves 3 further things:

- The defendant owed the claimant a duty of care
- The defendant breached that duty of care
- That it was reasonably foreseeable that damage would be caused by that breach

This involves proving the existence of a relationship of proximity and satisfying a remoteness test. In *Jones v Wright*, Lord Keith set out what the court would agree was a

satisfactory relationship of proximity for 'secondary victims' – parent/child, spouses and siblings.[8]

On the issue of remoteness, Lord Oliver set out that those seeking damages would have to show that;[9]

- They were present at the incident; or
- They were present in the immediate aftermath;

It was decided by the court that if the claimant satisfied the relationship of a sibling, parent or spouse AND satisfied one of the above points of remoteness, then the damage resulting from the negligent acts of the police force was reasonably foreseeable – the fact that the damage was foreseeable allows the plaintiff to claim for damages. THIS IS THE EMPHASIS * This test for secondary victimhood is entirely based on tort principles – That people deserve to be compensated where there was a negligent breach of a duty of care and that the damage resulting from that breach was reasonably foreseeable.

9.1 Problem 1: The Context

In *Jones v Wright*, the secondary victims were only so made victims because of the incompetence and negligence of the South Yorkshire police force, however appalling. This test can only be considered equitable in situations where victims are in a situation where they can satisfy the above requirements. It is ONLY equitable because it seeks to redress the psychiatric trauma caused where there was a duty of care in existence. In a conflict situation, talk of duty of care is for the most part redundant and the inclusion of the test for a duty of care serves only to seek to reduce the scope of persons entitled to compensation under the proposed scheme.

In the context of the conflict, the vast majority of victims did not and do not suffer as a result of some breach of a duty of care. They do not suffer because of negligent acts, and the 'foreseeability' of the damage matters not – they lived through conflict, where the

[8] *Jones v Wright* [1992] 1 A.C. 310
[9] Ibid

threat of death characterised everyday life (all of it was foreseeable if we interrogate hard enough). The *Jones v Wright* test is therefore problematic in this context.

Paragraph 57 states that the test is *"in line with usual public policy"* but the scheme's conflict-context is the complete antithesis of usual. Let us take an example to illustrate the absurdness of this test being used in a conflict-context. RFJ member whose wife was killed. X's wife Y was killed in a conflict incident. The case details aside, let us examine the aftermath of her death and assess the family's position in applying for the VPS. X and Y were married, and they had 3 children. X was unable to work following the death of his wife, having been overcome by the trauma of losing Y. Diagnosable and debilitating psychiatric injury was the result of the shock he suffered upon hearing the news - this brought untold economic hardship to him and his 3 children. X, like many of his generation and time did not seek mental health support and just survived with the assistance of his own mother and sister. If X were to be assessed "*in line with usual public policy",* this would be his most likely outcome;

1. Not a primary victim so must be assessed as a secondary victim
2. A close, proximate relationship with the primary victim?
    a. Satisfies the spouse category
3. Remoteness Rule applied
    a. Fails
        i. X was not present at the time of Y's killing, nor was he present in the immediate aftermath

Accordingly, X would not be awarded any '*recognition or acknowledgement'* of '*profound and deep-rooted impact'* that the death of Y has had on him and generations of his family. And why? Because X's trauma, however debilitating, was not caused by direct perception. This test does not measure actual debilitation that people suffer from, it only cares about where and when that debilitation came from.

The *Jones v Wright* test assesses liability of a defendant, it assumes that a duty of care is to be found or not found and it operates according to guiding principles of tort law. In the context of measuring eligibility for the VPS, to whom are we to attribute liability? Are we to say that only those victims who can show that the harm they have suffered may only be

compensated if it was reasonably foreseeable? If so, to whom must it have been reasonably foreseeable? Who is the defendant in this scenario? It is entirely inappropriate and is dismissive of the debilitating trauma caused to so many by our conflict. In the context of our conflict, a more equitable test for eligibility must be sought.

This leads us to another linked point – should direct perception of an accident or its aftermath be a condition of eligibility for the scheme?

9.2 Problem 2: Direct Perception

As part of the eligibility processes outlined above, is the requirement that the claimant be at or near the scene of the accident or its immediate aftermath at the time of the incident. This is the 'direct perception' requirement. The idea behind such thinking, again, links back to the beginning of 'nervous shock' cases in civil law. That to directly perceive an incident or its immediate aftermath causes a 'sudden assault on the nervous system'; that 'the sudden appreciation by sight or around of a horrifying event violently agitates the mind'.[10] Presumably, the alternative to direct perception must be indirect perception – that one witnesses the void which has been created by the incident in question; A 'more elongated and retrospective process'.[11] There is no medical pontification on the issue – both direct and indirect perception of an incident and or its aftermath has and does lead to diagnosable debilitating psychiatric injury.

So why should the VPS scheme differentiate between the causes?

The experiences undergone by those who directly perceive an incident and indirectly perceive an incident are much the same. The trauma experienced no less painful than the next. Surely one could argue that those who directly perceive the aftermath of an incident had a 'long protracted and retro-speculative process' very similar to that of the indirect perceiver and yet the matter of an imaginary timescale can mean the difference in eligibility terms.

If a claimant arrives at the hospital 45 minutes after a loved one has arrived compared to 1 hour and 45 minutes, does this make the difference? What if one was held up by traffic?

[10] Ibid
[11] Ibid

Does living or working closer to the A&E department mean the difference of receiving this pension? What difference does it make when the victims assume that their loved one is already fatally injured? – The urgency on the relatives of the deceased to rush to the primary victim's side would be lacking.

This is beyond an artificial distinction and it is completely dismissive of the debilitating injuries suffered by so many victims of our conflict. Even in the civil law world this distinction has been described as leaving victims 'an unjust rule which excludes meritorious claims'.[12]

Further, we can see the successful arguing for this requirement to be dropped altogether from any test. The persuasive authority of the Australian High Court in *Annetts v Australian Stations* has pointed out that distance in space and time from an incident should not be decisive of liability and the requirement to establish 'sudden shock' should not be accepted as a pre-condition of recovery.[13] They go further and state that it is "*ridiculous to say that a plaintiff who has suffered mental harm as a result of a series of prolonged incidents should no be entitled to damages"*[14].

9.3 Problem 3: The Experience of Women

A major issue with the "*usual public policy"* for eligibility is that it unfairly and disproportionately affects women and fails to 'acknowledge' the suffering of women. It masks the fact that caring for injured loved ones is a task largely taken upon themselves by women in the community. *Bender* points-out that the proposed test for secondary victimhood eligibility as proposed by the VPS 'denies legal recognition of the harm by failing to award compensation, which sends negative messages to suffering women about the importance or value of their lives and their autonomy'.[15]

[12] Nasir, K.J. "Nervous Shock and Alcock: The Judicial Buck Stops Here" *The modern law review,* vol.55, no.5, 1992, pp.705-713
[13] (2002) 211 CLR 317
[14] Ibid
[15] Hocking, B., & Smith, A. "From Coultas to Alcock and Beyond: Will Tort Law Fail Women?"*QUT Law Journal,* vol.11,1995, pp.120-156

So-called 'secondary victims' are mostly women, as the vast majority of primary victims were men.[16] The test for eligibility 'erects conceptual and technical barriers' as a means of denying women recovery where they have suffered debilitating psychiatric illness because the majority of those subject to the secondary victim test will undoubtedly women – even in the civil-law world, actions are more commonly claimed by women than men and so this 'test' must have an element of gendered-thinking if it is to be ever used.[17]The barriers, outlined above, in the test reinforce the process of gender differentiation in who is entitled to compensation under the scheme therefore compounds gender disadvantage.

9.4 Rethinking Victimhood

As outlined above, eligibility criteria will be governed by the decision in *Alcock*. We have seen the difficulties in applying this very rigid/linear test when it comes to the context of our conflict. A solution to this rigidity would be to rethink victimhood. In other words, move away from the focus on primary victims and secondary victims and instead to a more holistic test which can take into account the specific circumstances of each application. Now, this is not to depart in anyway from the decision of the House of Lords – quite the opposite. If we look to the governing principles which guided Lord Oliver, we can then ascertain a more flexible criterium which would be far better suited. *Mullany and Handford* argue for a test of reasonable foreseeability which is characterised by an '*Atkinian'* spirit.[18] It is the argument, which is also brought into focus by Lord Wilberforce in *McLoughlin*, that can be seen very clearly from the way in which the foundational words of Lord Atkin in *Donoghue v Stevenson* are used to describe the 'neighbour principle'.[19] In assessing eligibility, the scheme should seek to determine "*those persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected."*[20] In essence, the scheme should understand these words as meaning that eligibility should be determined, accompanied and limited by the law's judgement as to persons who ought, according to the scheme's standards of values and justice, to have been in contemplation. Looking to the

[16] "Cost of the Troubles Study. Report on the Northern Ireland Survey: the experience and impact of violence." Morrissey, Smyth, Fay (1999) INCORE University of Ulster
[17] Hocking, B., & Smith, A. "From Coultas to Alcock and Beyond: Will Tort Law Fail Women?"*QUT Law Journal,* vol.11,1995, pp.120-156
[18] *Annetts v Australian Stations* (2002) 211 CLR 317
[19] *Donoghue v Stevenson* [1932] AC 562, 580
[20] Ibid

words of the Secretary of State and the scheme's guiding principles, this ought to include any relatives who suffer from debilitating psychological injury – not determined by rigidity of the current proposal which would only undermine the clear purposes of the scheme.

In Summary

1. All payments for the injured should be based on need within the framework of the 2006 Victims Order. No one should be left behind.

2. Diagnostic tools for psychological assessment of injury should be kept under dynamic review.

3. The timeline for eligible injury should be extended to include all conflict related actions resulting in injury

4. The role of carers while the injured person being cared for is alive should be recognised within the payment scheme.

5. Care must be taken to safeguard against domestic abuse, either of the injured or of carers.

6. A gender analysis should be undertaken of the entire proposals and a gender advisory group established.

7. The definition of secondary victims must be expanded to include the psychologically injured bereaved who were not present at the time of the incident or its immediate aftermath.

8. A Tribunal of Reparations should be progressed immediately. This Tribunal would have a role in ensuring that the payment scheme is human rights compliant, amd meeting the needs of victims and survivors. The issue of recognition payments to the bereaved as pursued by the Irish Government and recommended by the Consultative Group on the Past should form a significant part of the consideration of the Tribunal.[21]

9. The recovery of systemic data on patterns and trends as suggested by the Special Rapporteur would be a key part of the Tribunal and an ongoing piece of essential work.

[21] Ibid 92