Criminal Injuries Compensation

Research Paper 95/64

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The Criminal Injuries Compensation Bill [Bill 121 of 1994/95] is due to be debated on Second Reading on Tuesday, May 23rd 1995. This paper describes the background to the introduction of the tariff scheme for criminal injuries compensation in April 1994, the successful challenge to the scheme by the Fire Brigades Union and others and the main provision of the Bill, which is intended to provide a statutory framework for a tariff-based system of criminal injuries compensation. The Bill extends to England and Wales and Scotland, but not to Northern Ireland.

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I The History of the Criminal Injuries Compensation Scheme

The Criminal Injuries Compensation Scheme was established in 1964 under the prerogative, to provide compensation from the state for victims of crimes of violence. It is funded by central government and was administered by the Criminal Injuries Compensation Board (CICB), which dealt with, and has been dealing with, all applications submitted before 1st April 1994. On that date a "tariff scheme" administered by a newly-created body, the Criminal Injuries Compensation Authority, came into operation, having also been introduced under the prerogative. Payments by the Board and the Authority were and are made ex gratia and there is neither a statutory obligation on the Board or the Authority to pay compensation, nor a statutory right to receive it. In *R v. Criminal Injuries Compensation Board ex p Lain [1967] 2 QB 864 DC* the CICB was held to be amenable to judicial review. There have since been several successful legal challenges to decisions made by the Board. Nonetheless, the absence of statutory authority for payments under the Scheme has often been criticised.

Ministers have used their powers under the prerogative to modify the Scheme on several occasions since 1964. The version which was in force prior to the introduction of the tariff scheme in April 1994 had been in existence since December 1990 but had itself subsequently been amended. In the White Paper *Criminal Justice - Plans for Legislation* [Cmnd 9658] published in March 1986 the Government confirmed that it intended to place the Scheme on a statutory basis, saying that:

> "A statutory scheme will confer on eligible applicants a definite right to receive compensation and will provide specific Parliamentary authority for the expenditure incurred"[1]

In the same White Paper the Government announced that an interdepartmental working party had been reviewing the scheme in readiness for placing it on a statutory footing [Cm 9658 p.12]. The Report of this working party was published on 6 November 1986. Its main conclusions on the proposed statutory framework were as follows:[2]

> 28.1 One of the most important aspects of the statutory Scheme is that compensation will no longer be awarded on an *ex gratia* basis. Anyone who satisfies the conditions for payment of compensation will have a legal and enforceable right to compensation. The Scheme will be administered by an independent statutory body under the supervision of the Council on Tribunals. We also recommend that applicants, for the first time, should have a statutory right of appeal on points of law to the High Court in England and Wales and the Court of Session in Scotland.

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1 Cm 9658 p.12

2 Criminal Injuries Compensation: a statutory scheme. Report of an Interdepartmental Working Party HMSO 1986

The Report's conclusions and recommendations were broadly reflected in provisions in Sections 108 to 117, Schedule 6 and Schedule 7 of the Criminal Justice Act 1988, which were designed to put the Scheme on a statutory basis. These parts of the 1988 Act have not, however, been implemented. In its 1989 annual report the CICB suggested that it should be permitted to operate within the existing non-statutory scheme for a reasonable period, so as to enable it to build on progress made in reducing delays and trying to resolve other administrative problems.[3]

During the 1989-90 Session the Home Affairs Select Committee carried out an inquiry into the Board's administration. In evidence to the Committee the Chairman of the CICB, Lord Carlisle of Bucklow, explained the Board's reasons for wishing to retain the non-statutory scheme as follows:[4]

96. Yes, particularly about the statutory scheme. You accept the idea of it being a statutory scheme in principle?
(Lord Carlisle of Bucklow) Yes, in principle, but we -

97. I gather that at the present stage you are not keen to see it on a statutory basis because it would increase delays, is that right?
(Lord Carlisle of Bucklow) Yes, we think it would divert a lot of effort which at the moment we want to put into trying to find means of reducing backlog.

98. 1 am not quite clear why it should cause delays.
(Lord Carlisle of Bucklow) There are various reasons. One, it would mean we would have to provide all statutory rules and regulations, a great deal of work would have to go into the preparation of those. That will all have to be done in conjunction with Counsel of Tribunals. All our forms would then have to become prescribed. Further, we really would be running two schemes alongside each other. At the moment we run a scheme under which applicants are compensated for crimes of violence. The 1988 Act changed the basis. Instead of saying "crimes of violence" it specifies that the injuries have to be as a result of an identified offence as set out in, I think it is, section 19, rather than basically as a crime of violence. We think that this would cause a good deal of additional training of the staff and we think that in fact at the moment, whilst not in any way being against the principle of the scheme becoming statutory, we could achieve and have achieved those changes much quicker-the changes that the Home

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3 *Criminal Injuries Compensation Board Twenty-Fifth Report* Cm 900 p.2 para 1.8

4 *Compensating victims quickly: the administration of the Criminal Injuries Compensation Board* Second Report from the Home Affairs Committee HC 92 Session 1989-90 pp 14-15

Office announced last Friday-which will enable us to speed up the way the scheme is being dealt with and also enable us to see what actual statutory rules are required because when one has statutory rules it makes it much less flexible, much more difficult to change them, it also means it is probably more likely to be judicially reviewed than it is at the moment by people rushing to court saying we have technically broken a statutory rule.

99. So would you see any timescale for it becoming statutory, or are you happy for it to rub along as it is?

(Lord Carlisle of *Bucklow)* In fairness, no, I would not like to answer that. What I asked the previous Home Secretary, when I saw him earlier in the year, was to give us a reasonable period of stability or quietude (if that is the right word) whilst we can get on and see what we can do.

100. That would be, I think, not less than five years?

(Lord Carlisle *of* Bucklow) It might be.

The Home Office view was put to the Committee as follows:[5]

243. If I have this correct: the Home Secretary in December indicated that he did not feel that the scheme should be put on a statutory basis. Why does the Home Office think that putting the scheme on a statutory basis will increase delays which I understand is a suggestion that was made at that time?

(Mr Angel) The Home Office accepted the judgment of Lord Carlisle that putting the scheme on a statutory basis would bring a significant extra measure of change at a time when stability was needed. I might say it was not just a question of accepting what the Chairman said because he is the Chairman. The argument was convincing, convincing not only to officials but to Ministers: it would mean rewriting instructions; it would mean every procedure would be more formal and it would mean caution, which is already a feature to some extent of the Board's approach to administration, would be strengthened because naturally one is even more cautious if the procedures are more formalised and more strictly laid down in law.

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[5] HC Session 1989-90 p.36

In its report, the Home Affairs Committee said it was satisfied that the Scheme "should not be put on a statutory footing at present" because this would add to delays and regretted that the energies of Members of Parliament and Board staff had been employed in preparing legislation which was not going to be brought into force for the foreseeable future.[6] In its reply to the Committee's report the Government welcomed the Committee's agreement that the Scheme should not be put on a statutory footing for the time being.[7]

The Scheme was revised in 1990. In the same year a Management Review of the CICB was carried out by the Home Office Management Advisory Services with Capita Management Consultancy. The report of this review was published in June 1991. On the question of the status of the Scheme the Management Review noted that:

> Recommendations for changing the Scheme are outside our remit. But we have ventured suggestions on how the Scheme might be modified, in smaller or lesser respects, to ease the burden and enable the board to discharge more effectively and efficiently its responsibility for compensating innocent victims. The fact that the Scheme has not yet been made statutory gives opportunity in our view for others to consider what changes might be made with benefits to victims and taxpayer.

The more recent annual reports of the CICB have noted improvements in the operation of the Scheme made through the streamlining of procedures, computerisation, the reduction of delays in dealing with claims and other factors.[8]

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6 HC 92 Session 1989-90 p. xv

7 Cm 1153 July 1990 p. 6 para 24

8 e.g. Criminal Injuries Compensation Board Thirtieth Report Cm 2849, May 1995 Chapter 2

II The Basis of Compensation under the pre-1994 Scheme

In the versions of the Scheme up to and including the arrangements introduced in 1990 compensation was generally assessed by the Board on the basis of common law damages. Calculations were therefore made on a basis similar to that which applies in actions for negligence and other civil wrongs, and included loss of earnings, but not exemplary or punitive damages.

The Board would not pay compensation for an injury for which the total amount of compensation payable on this basis after deduction of social security benefits was less than £1,000. (This lower threshold was last amended in January 1992.) There were exceptions to this rule where funeral expenses and payments to dependants and relatives in fatal cases were concerned.[9]

Paragraph 14(a) of the 1990 Scheme noted that:

> (a) the rate of net loss of earnings or earning capacity to be taken into account shall not exceed one and a half times the gross average industrial earnings at the date of assessment (as published in the Department of Employment Gazette and adjusted as considered appropriate by the Board);

Paragraph 15 of the Scheme stated that where a victim had died as a consequence of the injury, no compensation other than funeral expenses would be payable for the benefit of his estate, but the Board would be able to entertain applications from, and pay compensation within the provisions of the Scheme to, any person who was a dependant of the victim within the meaning of Section 1(3) of the Fatal Accidents Act 1976 or a relative of the victim within the meaning of Schedule 2 to the Damages (Scotland) Act 1976. The Guide to the Criminal Injuries Compensation Scheme explained what this meant in practice as follows:

> 58. Where the victim dies as a result of a criminal injury the Board will assess compensation for the dependants or relatives of the victim in accordance with the Fatal Accidents Act 1976, for incidents occurring in England or Wales and in accordance with the Damages (Scotland) Act 1976 for incidents occurring in Scotland.
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> 59. Compensation in either case is based primarily on the financial dependency of the dependant or relative of the victim. In Scottish law this element is referred to as "Loss of Support". The Board can make no award unless satisfied by evidence in support of the application that the applicant

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[9] 1990 Scheme paragraphs 5, 13, 16

depended upon the victim financially. A financial dependency cannot be founded on social security benefits.

60. In addition, the Board may award compensation under the following headings:

- **Bereavement.**

England and Wales. Under the Fatal Accidents legislation the bereavement award is a fixed sum of £3,500 (or £7,500 for deaths occurring on or after 1st April 1991) which is payable for the benefit:

(a) of the wife or husband of the deceased: and

(b) where the deceased was a minor who was never married:-

(i) of his parents if he was legitimate; and

(ii) of his mother, if he was illegitimate.

In the case of the death of a minor under (b) (i) above the sum of £3,500 (or £7,500 for deaths occurring on or after lst April 1991) is divided equally between the deceased's parents.

Scotland. An award of compensation for "Loss of Society" may be made to any member of the deceased's **immediate family** within the meaning of section 10(2) of the Damages (Scotland) Act 1976. In this case the Board will require evidence to show the kind of relationship enjoyed between the relative and the deceased.

The Scheme also allowed for the awarding of a reasonable sum to the person who paid for funeral expenses in fatal cases, even if that person was otherwise ineligible to claim under the Scheme.

The 1986 report of the Home Office and Scottish Home and Health Department interdepartmental working party set up to consider how the Criminal Injuries Compensation Scheme might be put on a statutory basis took the view that arrangements for assessing compensation on the same basis as damages awards in the civil courts had operated satisfactorily since the introduction of the Scheme in 1964 and noted that evidence submitted to it suggested that the present system met with general approval. It recommended no change in the basis of compensation. It did, however, set out in some detail a dissenting view that a "criminal scale" might be more appropriate as a basis of compensation:[10]

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[10] *Criminal Injuries Compensation: A statutory scheme* - HMSO 1986 para 12.2-12.5

12.2. A notable dissentient was Dr Joanna Shapland, of the Oxford Centre for Criminological Research, who advocated a move away from the calculation of general damages according to civil scales towards the adoption of a completely new 'criminal scale' for compensation for use both by the Board and the criminal courts. Dr Shapland argues that the infliction of intentional injury is something fundamentally different and more serious than injury which is caused by accident or negligence, and consequently that there is no reason why compensation for criminal injury should be based on damages awarded by civil courts in personal injury cases. The 'criminal scale' would be based on a concept of the seriousness of the offence from the point of view of the typical victim, taking into account not only the actual consequences to the victim, but also the symbolic gravity of the offence and the fact that the victim has been the victim of a crime rather than an accident. According to Dr Shapland, 'intentional violence may be considered more hurtful and, therefore, harmful by its recipient than negligent or accidental violence. Being cut with a knife is more serious than being punched in the mouth, even if similar injuries result'. Under this criminal tariff an offence of high symbolic gravity, but low consequences (for example, a knife blow which was deflected and merely scratched the skin), would receive an award higher than common law damages; but where the symbolic gravity is low and the consequences high (for example, a case where a slight blow causes serious unintentional injury), the victim would receive much less under the criminal scale.

12.3. A similar approach would be to provide a statutory tariff laying down the compensation to be awarded for specified criminal injuries. Such a tariff would allow the Secretary of State to adjust common law priorities where appropriate, for example to include an element in the award reflecting society's abhorrence of certain offences, and to set a ceiling on the maximum award of compensation in any particular case. This approach would be much simpler and cruder than the present Scheme but not necessarily easier to operate in practice, since it would be difficult to list and assign an award to all possible injuries and combinations of injuries.

12.4. Devising a completely new tariff for all types of injury for application in criminal cases would be a daunting undertaking. In civil proceedings the basis for the assessment of damages for personal injury is the actual consequences of the tort for the plaintiff, in terms of pain and suffering and financial loss. We consider that this is the best available basis for the compensation of victims by the state; and we accordingly recommend that, so long as the necessary money is available, compensation should continue to be assessed on the same basis as damages for personal injury in the civil courts, subject to specific exceptions dealt with elsewhere.

12.5. It has been suggested, alternatively, that the assessment of compensation should continue to be based on common law damages, but that there should be provision for compensation payable to be reduced by a percentage or a fixed sum specified by order of the Secretary of State. This would provide the Government with a mechanism for controlling the overall expenditure on the Scheme from year to year, in the light of current priorities in public expenditure, without reducing the number of victims eligible to receive compensation under the Scheme. In view of the ever-increasing cost of the Scheme, we consider that this is an option which the Government will wish to consider seriously. In our view control of overall expenditure by this means would be more acceptable than resorting to a

frequent adjustment of the lower limit, which would have the effect of depriving of compensation applicants who would otherwise have received small awards.

The report made the following remarks about difficulties in reconciling the levels of damages awarded in the different jurisdictions in Great Britain:[11]

12.6. The present general practice of the Board is to follow the civil law of the appropriate jurisdiction where the civil law of Scotland differs from that of England and Wales, but otherwise to assess Scottish awards at the levels of damages which would be awarded in England and Wales. Although in the past the levels of damages awarded in Scottish courts were generally lower than those in England and Wales, Scottish courts (and therefore the Board in Scottish cases) are entitled to take account of damages awarded in English courts, and the levels of damages awarded by Scottish and English courts are now thought to be broadly similar. To this extent the problem is perhaps more apparent than real.

12.7. We considered a number of possible approaches to the problems presented by the two jurisdictions. The first is to require the Board to adhere strictly to the civil law practice of the jurisdiction in which the injury was incurred. Although more logical than the present approach, this would create difficulties for the Board in relation to Scottish cases, since there is a narrower range of Scottish personal injury cases to use as a basis for the levels of compensation awards.

12.8. Another solution might be provided by the adoption of a separate tariff for criminal injury compensation but this would present the practical problems to which we referred in paragraph 12.4 above.

12.9. Another way of bringing about consistency in the assessment of awards throughout Great Britain would be to adopt either Scots or English law as the basis for compensation in all cases, but it would be illogical and in some cases might seem unfair to apply Scots law in English cases or vice versa. We have been unable to find a generally acceptable common method of assessment to be followed throughout Great Britain, and we cannot therefore recommend any change from the present practice of dealing with every application according to the civil law of the jurisdiction in which the injury took place.

A 1993 report of an independent working party convened by Victim Support to consider *Compensating the Victim of Crime* proposed a "tariff" in which compensation would be paid on a fixed scale relating to the seriousness of the inquiry. The report went on to set out what the working party felt would be essential feature, such as effective procedures for updating and review, access to reliable advice for preparing applications and contesting decisions and suitable provision for appeals and access to judicial review. The report emphasised the

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[11] *Criminal Injuries Compensation: a statutory scheme* HMSO 1986 para 12.6-12.9

working party's view that no arrangement for financial compensation would be adequate without wider forms of recognition:[12]

> Policy and practice on compensation should not be considered in isolation from policy and practice relating to other forms of recognition. Not all of these are matters for the state or the government: they are also matters for individuals - employers, providers of services, and statutory and voluntary organisations of many kinds. The government does however have important responsibilities which include not only funding and providing for the administration of a state compensation scheme, but also promoting an awareness of victim's issues in all services and agencies for which it has responsibility, (health and social services and social security as well as the various criminal justice services, and overseeing the legislative and administrative framework in which the relevant functions are performed. None of these should be neglected or overlooked.

The working party considered that additional forms of compensation or financial support should include support for victim services, affordable and adaptable insurance cover, support from employers and compensation by the offender.[13]

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[12] *Compensating the victim of crime* - report of an independent working party convened by Victim Support 1993 p.44

[13] p.45

III The Administration of the pre-1994 Scheme

The 1990 Scheme stated that:

> 1. The Compensation Scheme will be administered by the Criminal Injuries Compensation Board, which will be assisted by appropriate staff. Appointments to the Board will be made by the Secretary of State, after consultation with the Lord Chancellor and, where appropriate, the Lord Advocate. A person may only be appointed to be a member of the Board if he is a barrister practising in England and Wales, an advocate practising in Scotland, a solicitor practising in England and Wales or Scotland or a person who holds or has held judicial office in England and Wales or Scotland. The Chairman and other members of the Board will be appointed to serve for up to five years in the first instance, and their appointments will be renewable for such periods as the Secretary of State considers appropriate. The Chairman and other members will not serve on the Board beyond the age of 72, or after ceasing to be qualified for appointment, whichever is the earlier except that, where the Secretary of State considers it to be in the interests of the Scheme to extend a particular appointment, beyond the age of 72 or after retirement from legal practice, he may do so. The Secretary of State may, if he thinks fit terminate a member's appointment on the grounds of incapacity or misbehaviour.

The Scheme has been administered by 44 senior barristers, advocates and solicitors as members of the Board, supported by over 400 seconded, loaned or assigned civil servants. In its report on the administration of the CICB the Home Affairs Committee made the following comments about the make-up of the Board and the use of staff other than Board members in making decisions about awards of compensation under the Scheme:[14]

> 9. We are also satisfied that it,has been right for the Board to be made up of very senior lawyers. As Lord Carlisle explained, Queen's Counsel have more time and more experience than junior barristers. This second factor means that their determinations are more likely to be accepted by victims and their professional advisers. We are particularly pleased that the present Board Chairman has considerable very senior administrative experience as well as his legal background. **We therefore support the current make-up of the Board**.
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> 10. The scheme which begins on 1 February will, however, allow more delegation of work to staff. Mr Graham Angel, the Assistant Under-Secretary of State in the Home Office's Criminal Policy Department, suggested that the Board should consider allowing its staff to take decisions on eligibility and amount of awards below a certain level, perhaps £2000 or £5000. With certain caveats, Victim Support was also in favour of delegation of minor cases. Lord Carlisle was cautious, but appeared to be

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[14] *Compensating victims quickly: the administration of the Criminal Injuries Compensation Board*. Second Report of the Home Affairs Committee Session 1989-90 HC 92 pp vi-vii

contemplating delegating decisions on eligibility which were 'far easier than issues of quantum'.

11. The Committee supports Lord Carlisle's cautious approach, above all because we believe it will enhance morale and job satisfaction among the Board's staff. However, we believe that a number of important considerations should be borne in mind:

(a) the administrative model for the Board's operation which is favoured by the Home Office may not be trusted by victims in the way the present judicial model is
(b) there may be more cases of judicial review if decisions are taken by officials, not senior lawyers
(c) delegation of work to staff should actually increase the pressure upon them and so add to the CICB backlog-we would be very alarmed if delegation resulted in less thorough work, an inference which could be drawn from the reply of one of the Home Office's officials that work in 'good order' and 'in a fit state for a QC' would no longer be necessary.

Our cardinal principle is that delegation to staff should work to the benefit of Justice and of victims rather than for administrative convenience.

12. **The Committee also gives a cautious welcome to the Home Office's measures designed to reduce the number of cases going to oral bearing**. It is clear that such cases are considerably more expensive than those resolved on the papers-in 1988-9, they cost £537 on average as opposed to £152. Lord Carlisle persuasively outlined some of the circumstances in which an oral hearing. However, we trust that the Home Office and Board will watch carefully the new appeal procedures to ensure that they are equitable. Once again, it will be important to monitor whether there is a higher incidence of judicial review.

The Home Office's management review team was not convinced that the assessment of general damages in the broad run of cases necessarily warranted consideration by a lawyer. Nor did they think that award assessments were generally at a level which warranted decision at senior level. The management review report made the following proposals for change:[15]

Most CICB cases will involve an assessment of general damages which befit the injuries sustained, and the confirmation or calculation of special damages (which is chiefly an administrative task). We are not convinced that the assessment of general damages in the broad run of cases necessarily warrants consideration by a lawyer. Nor do we think that award assessments - as important as we acknowledge them to be, especially to the claimant - are in general at a level which warrants decision at senior level - the great majority of awards are of

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[15] *Report of the Management Review of the Criminal Injuries Compensation Board* Home Office June 1991 p xii

less than £2000, representing a weight of decision which by several analogies within the civil service does not call for decision above executive officer.

We emphasise that we do not propose that final decisions should be taken by junior administrative staff at their own uncontrolled discretion - that would rightly be seen as unjust.

Our proposal is that the Board's first decision to make an award, in those reasonably straightforward cases which most are, should be capable of being taken by a caseworking officer, if it falls within guidelines which the Board should for other purposes strive to develop (especially to improve the quality of its present decisions). Cases involving greater discretion would be referred to higher level. The minority of cases involving large sums, or difficult legal issues, or uncertain sums, would be referred higher. In general, following standard civil service practice, a decision adverse to the applicant would be referred to a higher level than a decision in his or her favour. And all of this would relate to first decisions: it would always be open to the applicant to have the case reviewed either on the basis of some new material or on showing that some mistake had been made.

We stress that the Board has the power now, without changing the present Scheme, to establish well-ordered categories of delegation of decision-making to its staff, with great potential benefits to victims.

IV The Introduction of the Tariff Scheme

On 23 November 1992 in a Written Answer to a Question from Sir John Wheeler the then Home Secretary, Kenneth Clarke, announced that the Government intended to introduce a procedure for the assessment of criminal injuries compensation based on a tariff system rather than the more complex system involving calculations in line with common law damages. Mr Clarke said the Government felt that a tariff structure offered the best prospect of providing quicker payments to claimants through a means that was fair, straightforward and understandable.[16] Mr Clarke referred to the Management Review, which had made the following comments about the basis on which compensation for criminal injuries compensation was assessed:[17]

> Changes in the review and hearings arrangements, while they could with benefit be made independently of any other change, would probably be easier to achieve if the whole basis of assessment of compensation were reviewed, with a view to some simplification.
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> We understand why the Scheme refers to common law damages, i.e. what an applicant in a civil suit could expect to receive from his aggressor (leaving out any consideration of limited means). Civil court decisions on quantum of damages are a natural starting point for the compensation scheme. But we are not convinced that they represent the right finishing point as well. Much of the CICB's business is of a kind which would not ordinarily be litigated in the civil courts - the sums involved are very low, set against the risk of costs, and disputes about the facts would very often make pursuit of a civil claim an unattractive proposition. There is some debate, we understand, whether the Board is simply following awards in like cases in the courts, or leading the Courts, given the very large volume of chiefly low value claims which the Board settles.
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> We are conscious that most litigants pursuing a civil claim have to have some regard to the prospects of success, and to the risk of having costs awarded against them if they are unsuccessful. These considerations do not apply to applicants to the CICB.
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> We are also conscious about the much wider debate surrounding 'no fault' compensation schemes, particularly in relation to medical negligence. Some press estimates have suggested that most of some £100m paid by health authorities as a result of negligence actions goes on legal costs to decide the case, with only a fraction awarded directly as compensation. Obviously the CICB is very far from that position administration costs have typically represented about 10% of

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[16] HC Deb Vol 214 cc 457-8 23.11.92

[17] Report of the *Management Review of the Criminal Injuries Compensation Board* - Home Office June 1991 p.177-8

the total expenditure. Nevertheless it must surely be an aim of those responsible for criminal injuries compensation policy to reduce still further the percentage of total spending on it which is consumed administratively, without benefit to victims.

There is also the issue of discrepancies in the awards made under the present arrangements. We know that the Board itself has been concerned to develop guidelines to try to ensure that decisions by different members in certain difficult categories of case are in line with one another. But on the evidence we have seen there is a much more wide-ranging problem of consistency, across the full range of decisions. Individual Board members will see cases differently. This can be illustrated sharply when two or three consider the same case at a hearing. But it applies to first instance decisions on the papers too, for we are aware that Board members presented with identical information have reached markedly different decisions on cases. This is not surprising or blameworthy - but it does negate any preconception an innocent outside observer might hold that assessment of common law damages is an exact science where a good quality decision means coming up with the right answer. There is no exactly right answer.

It seems to us that these considerations could be met by reconsidering how the Scheme applies to lower value awards - those accounting for the great majority of cases. It is not evidently sensible to spend time and money trying to assess whether the 'right' sum of compensation is £900 or £1100. We discussed in Section 6 the extent to which assessing general damages could not be regarded as an exact science. We suggest that it would in the main simply recognise the realities of the present position and build upon them if the Scheme did not stipulate common law damages as such, but instead provided for lower level awards to be gathered in bands, with a single cash value representing the right award for each band.

A system of banding would be honest to the degree of science which can realistically be brought to bear upon each decision. Plainly the effect of this 'rounding' of awards within bands would be that some victims would be awarded a little more than under the present arrangements, others a little less. But as well as reflecting the nature of decision making more fairly, a simplified system would enable the Board to deal very much more quickly with applications, to victims' overall benefit, particularly in psychological terms. It would remove any scope for niggling dissatisfaction - which we understand is uncomfortably prevalent among those who do receive awards - that they have been treated unfairly compared with another victim who is described to have suffered broadly comparable injuries but whose award is, say, £250 higher. We believe, in short, that victims' interests are best served by being awarded whatever compensation they are due very quickly, and on a basis which is both fair and

comprehensible, which they will within reason accept as comparable with others' treatment.

The Government set out its plans in more detail in a White Paper *Compensating victims of violent crime: Changes to the criminal injuries compensation scheme* [Cm 2434] published in December 1993. The White Paper set out the Government's view of the need for and nature of the changes proposed as follows:[18]

10. There is no obvious or logical way of matching a particular sum of money precisely to the degree of pain and hurt suffered by an injured person. Even under common law damages the award of damages is not an exact science. Judgements tend to be made pragmatically on the facts of the case and with regard to precedent. But the assessment is essentially subjective rather than objective and any amount awarded must to some extent be regarded as artificial. There is no exactly right answer.

11. It has also to be remembered that, unlike claimants in the civil courts, claimants to CICB do not necessarily have to be able to identify their attacker, or weigh up their prospects of success and the risk of having costs awarded against them if they are unsuccessful. Claims to CICB are essentially risk free; and most are of a kind that would not be pressed in the civil courts. The sums involved are usually comparatively low when set against the risk of being forced to meet legal costs if the case were lost and the risk of disputes about the facts, which could both make pursuit of a civil claim a more dubious proposition. Moreover, a successful claim on CICB will invariably be paid. This may not be the case in a civil court action when the offender has limited means or simply refuses to pay.

12. Such factors have been major elements in the consideration that led the Government to decide that awards based on common law damages are no longer appropriate for a state financed compensation scheme. Since there is no absolute or right figure for an award, the Government does not consider it appropriate to attempt the very difficult and time consuming task of trying to assign a precisely calculated, but essentially arbitrary sum to the injury suffered. It will however continue to provide a tangible recognition of society's sympathy and concern for the blameless victims of crimes of violence. This will be done by making payments which are related to the nature of the injury suffered. The new system will accordingly be based on a tariff or scale of awards under which injuries of comparable severity are grouped together in bands for which a single fixed payment is made. This means that people with similar injuries will get the same payment, which is by no means the case under the present system where people can often get radically different awards for similar injuries.

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[18] Cm 2434 p.2-3

The White Paper summarised the proposed new arrangements thus:[19]

(i) compensation will no longer be assessed on the basis of common law damages;

(ii) injuries of comparable severity will be grouped or banded together in a tariff of awards, and each band will attract a single lump sum payment;

(iii) there will be 25 tariff levels, with awards ranging from £1,000 to £¼ million;

(iv) tariff levels will be based on the Board's past award levels;

(v) the average claimant should be no worse off than under the current scheme,

(vi) no separate payment will be made for loss of earnings or medical expenses;

(vii) the basic rules for eligibility will remain largely as before;

(viii) the new scheme will apply to all applications lodged on or after 1 April 1994;

(ix) cases lodged before April 1994 will be cleared by the present Board under the current rules.

The Government's proposals for changes in the administration of the Scheme were set out in some detail. They included a proposal for market-testing the administration of the tariff scheme once it had been satisfactorily established:[20]

28. The severance of the link to common law damages and the introduction of a straightforward tariff scheme, under which payments are made from a scale of awards related to the nature of the injury, means that the specialised skills of senior lawyers with experience of personal injury casework will no longer be needed and that cases can be decided administratively. There will accordingly be no longer term role for the present Board to play under the tariff arrangements. However, claims lodged before the new scheme starts will fall to be cleared under the present rules by the present Board. That process might take about two years, during which time the old and the new schemes will run in parallel. Board members will still be needed in that period.

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[19] Cm 2434 p.1
[20] Cm 2434 p.5-6

29. The Government would like to take this opportunity to record its very sincere thanks for all the good work the Board have done in the past and to make it clear that the introduction of the tariff scheme implies no criticism of their achievements.

30. On the basis that it would not be appropriate for the present Board to be running the new scheme a range of options for administering the new arrangements has been considered. These included immediate privatisation, market testing and contracting out (if appropriate), creating an agency, leaving the organisation as a non-departmental public body (NDPB), or bringing the administration within central government. It was concluded that true privatisation (letting the private sector run the scheme on a private insurance basis) was unacceptable in principle. Bringing administration within central government was also discounted because the Government's policy is to devolve functions, rather than take on new ones. Agency status would have brought the administration of the scheme closer to Government than is the case now when the Board has NDPB status; and it was rejected on broadly the same grounds. The best approach seemed to be to market test the operation. But practical considerations-in particular, the need to concentrate management effort on establishing the tariff scheme on a sound and viable basis in the run up to the tariff scheme's introduction next year and the two year period thereafter, when the old and new schemes would be running in parallel-rule this out as a sensible option in the short term. It has been decided therefore that the new scheme should, initially at least, be run by a non-departmental public body (NDPB), in the same way as its predecessor has been-using the same administrative staff as the current scheme. That will allow the same staff to work on both schemes, with a gradual cross-over of staff as the balance of work shifts from the old scheme to the new, ensuring the best use of experience and resources, enabling common services to be shared, and keeping the overall costs of administration as low as possible. It will, of course, be necessary to change the grade mix of the administrative staff to reflect the fact that they will now be taking decisions themselves, rather than processing the papers for consideration by Board members.

31. As indicated, however, there is no reason why, once the new scheme has been satisfactorily established, the administration should not be market tested. The organisation, which will be known as the Criminal Injuries Compensation Authority (CICA), has therefore been included in the Home and Scottish Office market testing programmes for 1995-96, with the expectation that a contract or service level agreement in the case of a successful in-house bid would operate from 1 April 1997. In the meantime CICA will produce an annual management plan and will publish targets and commitments on standards of service, in line with the Citizen's Charter.

The new Scheme was introduced on 23 February 1994 with effect from 1 April 1994. The tariff scheme and a guide to its provisions was published by the new Criminal Injuries Compensation Authority in March 1994.[21] The new arrangements for administering claims submitted after 1st April 1994 were described as follows:

> 1. The Tariff Scheme will be administered by the Criminal Injuries Compensation Authority (the Authority). Appeals against decisions of the Authority will be considered by an independent Criminal Injuries Appeals Panel (the Panel).
>
> 2. The Authority and the Panel will consist of such staff and members as may be appointed by the Secretary of State and under such terms and conditions as he considers appropriated
>
> 3. The Authority and the Panel will be funded through a Grant-in-Aid from which ex-gratia payments will be made in accordance with the rules of the Tariff Scheme set out below. The net expenditure will fall on the Votes of the Home Office and The Scottish Office. The Authority and the Panel will maintain appropriate accounts.
>
> 4. The Authority will be entirely responsible for the administration of the Tariff Scheme and for deciding what awards should be paid in individual cases. Its decisions will be subject to appeal to the Panel. No decisions, whether by the Authority or the Panel, will be subject to appeal to the Secretary of State. The general working of the Tariff Scheme will, however, be kept under review by the Government. The Authority and the Panel will accordingly submit annually to the Secretary of State a full report on the operation of the Tariff Scheme together with supporting accounts.

The tariff of injuries, which was set out at the back of the guide, was determined by sampling 20,000 previous awards and identifying the median award for each injury. The White Paper described the procedure for establishing the tariff as follows:[22]

> 13. Although it has been argued above that there is no precisely right figure for compensation in a particular case, the Government has started from the position that the tariff should be set in a way that would produce, for any particular injury, an award broadly in line with current levels, while leaving the average claimant no worse off than before. The intention was to build on the collective and distilled experience of the present Board by basing the tariff payments on awards previously made by them. This would allow injuries to be sorted into groups of comparable severity, as measured by the level of Board awards. and a suitable tariff to be determined for each grouping or band.

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[21] DEP 10468

[22] Cm 2434 p.3

14. Since the Board does not collate centrally information about types and numbers of injury or corresponding awards, it was decided to examine a representative sample of recently completed cases to provide the necessary data. The most recent year for which full information was available when the exercise was mounted was 1991-92. Accordingly, nearly one third of the 60,000 cases finalised in that year were examined. Care was taken to ensure the sample was statistically representative of all claims, while the number of cases sampled was more than sufficient to provide the level of accuracy needed. The information from the survey was then subjected to computer analysis to inform decisions on setting the injury groupings and corresponding award levels.

15. This extensive and thorough sampling exercise showed that some 200 different injuries were sustained by successful claimants in 1991-92. It also showed that it was quite feasible to list those injuries in order of severity according to the median award for that injury. The 'median' was used for this purpose rather than the 'mean' since it reflects more closely the value of the pain and suffering element of the award ie it is more indicative of the award for the injury itself. The mean average could be distorted by special factors such as loss of earnings and payment for medical or other expenses.

16. The resulting list was then subjected to further analysis to rectify any data input errors and to remedy inconsistencies where, for example, a very small number of examples of a particular injury produced an atypical result. The corrected list was then compared against other sources of information about levels of award in personal injury cases and, as far as was possible, any remaining anomalies were then corrected. At the same time, other comparable injuries, which had not actually been sustained by claimants in 1991-92 but which might be sustained by claimants in future, were inserted; while unnecessary duplication, where different injury descriptions had been assigned to essentially similar injuries, was removed. The Government believes that the resulting list provides as fair and equitable a basis for comparing the severity of different injuries and setting the tariff as it is reasonably possible to produce.

The £1,000 lower threshold for awards would remain the lower limit under the tariff scheme.

Several different aspects of the new tariff scheme provoked controversy. It was claimed that large numbers of people would be worse off under the new arrangements than they would have been under the old system based on common law damages. There was particular criticism of the removal of payments for loss of earnings. Commentators also criticised the decision to reduce the involvement of professional lawyers in assessing the awards. A particular criticism voiced in both Houses of Parliament was the non-implementation of the provisions in the Criminal Justice Act 1988 which would have created the statutory scheme.

It was equally noted that the Government had not made use of legislative opportunities since 1988 to repeal those provisions.

During a debate in the House of Lords on the changes proposed in the 1993 White Paper the chairman of the Criminal Injuries Compensation Board, Lord Carlisle of Bucklow, a former Conservative Minister, strongly criticised the introduction of the tariff scheme on a number of different grounds of principle and practice, and because there had, he felt been insufficient prior consultation:[23]

> I can assure the Minister that the board fully understands the anxiety expressed by the Government as to the ever mounting cost of the scheme. We share the aims of the Government in wanting to see an efficient scheme, a scheme which deals with individual cases as reasonably quickly as possible, and one which is readily understandable. But I have to say to the Minister that the board is concerned and dismayed that the Government should decide to change the fundamental basis on which until now compensation has been based without any prior consultation of the board, even as to the practicality of what is being proposed. They have done so in a way which the board considers to be fundamentally flawed, in that we believe that the move to a total tariff system as is proposed will be seen to be manifestly unfair and certainly a far less fair system of compensation than that which at present exists.
>
> Until now, as has been said, under the common law damages system each application is individually considered so as to compensate the individual victim for the loss and injury he has actually sustained. To replace it with a tariff system with one single lump payment for a particular type of injury is, I believe, a retrograde step in that of its very nature a tariff system cannot and does not take account of the vastly differing effects of similar injuries on different people.
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> A tariff of its nature, for example, means that no regard can be had to such fundamental matters as the age, sex, occupation or way of life of the victim, all of which are reflected enormously in the effect which an injury may have on an individual. Many examples of that have been given. I take only one. The elderly lady mugged in the street, when she is knocked to the ground and her handbag snatched, may suffer very little physical injury, but the effect on her life may be totally devastating. I fear that she may be far more gravely injured than in a similar incident occurring to a fit young person in their twenties. Yet I fear that under the tariff system the elderly lady will probably no longer succeed in achieving any rights to compensation.
>
> Further, in arriving at the tariff figures in the way in which the Government do, as the noble and learned Lord, Lord Ackner, said, no proper account has been taken of the loss of earnings or the loss of future earning capacity. The effect of that is that those who have suffered the most will in future be under-compensated, in many cases substantially so.
>
> It is said by the Government that the figures in the tariff are based on an analysis of the Criminal Injuries Compensation Board's awards. I accept that. I accept fully that the figures in the tariff are generally comparable with the pain and suffering element of general damages. I believe that the White Paper is right when it states that many victims will receive the same amount or perhaps slightly more than they would receive under the present scheme. However, it is equally true that many will receive less, and some substantially less, as no proper account has been taken of loss of earnings and earning capacity, or of the cost of future medical care.
>
> The man whose injury means that he is off work for six months will receive no more than the retired or the unemployed person with a similar injury but who has no similar loss. The building worker who has an injury to his ankle or knee which means that he can never work again, or cannot work at the skilled tasks that he now undertakes, again will receive no more than for a similar injury occasioned to a person who has no loss in earning capacity. Surely that cannot be a fair system.

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[23] HL Deb Vol 552 c.1081-1084

The Government say that there is in each of the awards a degree of loss of earnings. To some extent that is true, but it simply means that those who have no loss of earnings will be compensated slightly more than they are at present, at the direct expense of those individuals who have lost as a result.

We believe that the proposed scheme is unfair. Further, we believe that in many areas the scheme will be shown in practice to be unworkable. There are certain types of offences where the resulting injury caused to the victim varies so widely as to make any tariff system unworkable. I pose certain questions. Let us take the area of child sex abuse. What is the correct tariff figure for sexual abuse? Every case differs. The effect of such cases on any child varies so enormously that it seems to me that each case must require individual assessment. What is said about sex abuse of children can be said equally about many cases of rape. I give another example. The effect of the shock on the bank clerk who is the victim of an armed robbery varies enormously depending on the makeup of the individual concerned. Psychological injury, sexual abuse and rape are, sadly, growing areas of our work.

The final example I take is the whole question of facial scarring. While I accept that the Government have made an effort in their tariff to provide a classification of facial scarring, frankly I do not believe that one can fairly compensate an individual for facial scarring without assessing the effect on that individual of his scars, rather than saying that they are merely medium or severe, or words to that effect. Thus, the board's feeling is that the scheme proposed is unfair and in certain aspects unworkable.

I turn briefly to consider the advantages that the Government see in their proposals. The White Paper says that the scheme will be quicker and more readily understandable. As regards speed, I accept that if each case does not have to be considered individually, there will be some savings. But I am bound to tell the Minister that I do not think that the savings in time will be significant. Delay has always been a problem for the Criminal Injuries Compensation Board. Lack of resources at an earlier stage created a system where in 1989 92 per cent. of applications were not able to be dealt with in less than nine months from the date of the application. I remind the Minister that that has now dramatically changed and that in 80 per cent. of all our applications a decision is now given to the victim within a nine-month period. I do not believe that a great deal of saving can be made beyond that because the restraints that exist are the need to obtain reports from the police to find out what happened and reports from the doctors to see the effect of the injuries the person received. Those restraints will be there, whatever scheme we have.

As regards the scheme being more readily understandable, I am at a loss as to what the Government mean. I do not know whether they realise that we already send to every applicant a piece of paper which is a guide to the level of awards and which sets out, as the noble Lord, Lord lrvine, said, the pattern of general damages awards that people can expect.

Finally, the cost: again, I accept that there should be some saving in administrative cost. But I think the Minister will agree and the Government will accept that the amount will be unquantifiable. Our costs today are something less than 9 per cent. of our total budget. What of the cost on the compensation scheme? If I may say so, the Government are rather coy there. They say that they will be providing more money in compensation in the next few years than in the current year. I remind noble Lords that the total overall cost depends far more on the volume of violent crime and the number of applications that are made than on the individual amount given to any applicant. But doing the best we can, our calculation is that the new scheme will mean that the amount paid out in compensation will be 20 per cent. less than it would be under the current scheme. Our objection-and I believe it is a fundamental objection -is that the whole of that saying will be made at the expense of the biggest losers. It is those who have borne the worst injuries who will suffer the most. The board believes that that is the wrong way to make the savings. We believe that there are other and better ways. We have expressed our willingness on many occasions to discuss the changes which we think would meet the Government's aims and so far, frankly, we have not been heeded.

I end by saying to the Minister that I hope that the system for compensation of the victims of crimes of violence is outside the ambit of the party political battle. Since its inception, the scheme has been supported by both parties in Government and in Opposition. It has been reviewed twice by the

Home Affairs Select Committee, both times with approval. It was put forward, as we have already been reminded in speeches, by the present Government to Parliament in 1987 as the proper basis for a scheme which should be statutory. On 23rd November 1992 the then Home Secretary, without any prior consultation with any of those interested, announced the intention to change the basis of the scheme. At that time he stated that the Government's intention was to publish a White Paper in the early part of last year and introduce the scheme in April of this year.

In replying to an Adjournment debate on 18th March 1993 in another place, the then Minister of State said:

"Of course, there will be an opportunity for the House to consider our proposals when the White Paper is published". - *[Official Report,* Commons, 18/3/93; col. 508.]

In the event, the White Paper was not published in the early part of last year. It was published on the eve of Parliament's adjournment for the Christmas Recess on 15th December. The scheme is due to be implemented next month. The effect has been that there has been no time for that informed discussion which the Government said they had intended would take place. The Government claim that the great advantage of a non-statutory scheme is that they can change it at any time without requiring parliamentary legislation or debate.

I hope that, in the light of the criticisms that have been and may still be made tonight, the Government will look again at their proposals, with the clear intention to achieve what I believe to be possible; namely, a scheme that will reflect the changing nature and volume of the board's work, one which will achieve the Government's stated aims but will do so in such a way as to avoid the fundamental flaws which are inherent in a total tariff system such as is now proposed.

Lord Ackner successfully introduced an amendment designed to implement the 1988 statutory scheme during the Committee stage in the House of Lords of the Bill which became the Criminal Justice and Public Order Act 1994.[24] The amendment was removed when the Bill returned to the House of Commons.[25]

A number of trade unions and other organisations applied for judicial review of the continuing decision of the Home Secretary not to bring the provisions of the 1988 Act concerning criminal injuries compensation into force. The High Court held that he was not under a duty to do so. The union appealed and in a majority decision the Court of Appeal held that while the Secretary of State was not under a duty to exercise a power to bring a statutory provision into force "on such a day as he may appoint", if he had not done so he could not introduce a radically different scheme under his prerogative powers while the enacted provisions remained unrepealed.

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[24] HL Deb Vol 555 cc 1828-1851 16.6.94

[25] HC Deb Vol 248 c 445-477 20.10.1994

The case was referred to the House of Lords, which held by a majority that the Home Secretary's decisions not to implement the relevant provisions of the Criminal Justice Act 1988 and to introduce a non-statutory scheme for criminal injuries compensation were unlawful. The House of Lords took the view that the Home Secretary was not, however, under any legally unenforceable duty to bring the sections into force at any particular time.[26]

On the day the House of Lords delivered its judgment in the Fire Brigades Union case the Home Secretary announced in a Written Answer to a Question from Mr Ainger that the Government intended "to introduce as soon as practicable a Bill inviting Parliament to give statutory force to a new tariff scheme as quickly as possible".[27]

In a Written Answer to a Question from Mrs Roche on 26th April 1995 the Home Office Minister, David Maclean, estimated the total additional cost of administering the change to a tariff scheme at around £1 million [HC Deb Vol 258 c 561(W) 26.4.95]. He also made the following comments about awards made under the tariff scheme and their reassessment following the House of Lords ruling:[28]

> **Mrs. Roche:** To ask the Secretary of State for the Home Department how many claimants were awarded compensation by the Criminal Injuries Compensation Authority under the tariff scheme; and what action he now proposes to take with regard to those awards. [20406]
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> **Mr. Maclean:** At 31 March 1995, 4,891 monetary awards had been offered or paid under the tariff scheme. All applications received on or after I April 1994 are now to be considered or reassessed under the 1990 scheme. Where a higher award results, the board will pay the balance to the applicant. In other cases the tariff award will be allowed to stand.

In a Written Answer to a Question from Mr Straw on May 17th 1995 the Home Office Minister, David Maclean said the additional cost of compensation arising in respect of cases lodged in the year ending 31st March 1995 was likely to be in the order of £85 million.[29]

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[26] *R v. Secretary of State for the Home Department ex p. Fire Brigades Union and others.* House of Lords 5.4.1995

[27] HC Deb Vol 257 c 1250(W) 5.4.1995

[28] HC Deb Vol 258 c 561(W) 26.4.95

[29] HC Deb Vol 260 c.288(W) 17.5.1995

V The Criminal Injuries Compensation Bill

The Bill was published on May 11th 1995. It is designed to repeal the provisions for a statutory scheme of compensation based on common law damages set out in the *Criminal Justice Act 1988* and instead establish a statutory basis for a tariff-based scheme of criminal injuries compensation. The establishment of a statutory Criminal Injuries Compensation Scheme is intended to be provided for by Clause 1 of the Bill. Other provisions of the Bill set out a general framework within which the Tariff Scheme will operate. It is intended that more detailed aspects of the scheme including the tariff itself, should be set out in subordinate rather than primary legislation.

Clause 2 sets out the basis on which compensation is to be paid under the Scheme and is intended to provide for the payment of a standard amount by reference to the nature of the injury, calculated according to a tariff drawn up by the Secretary of State. It will also permit the payment of additional amounts in specified cases to cover loss of earnings, special expenses and amounts payable in cases of fatal injury. Clause 3 sets out some of the matters which may be dealt with by the scheme, such as the circumstances in which awards of compensation may be withheld or reduced. Under Clause 10, details of the tariff itself and statements relating to certain other provisions of the Scheme will have to be laid before Parliament in draft for its approval under the affirmative procedure.

Clause 3 provides for awards to be made by "claims officers" appointed on terms and conditions considered appropriate by the Secretary of State. It also provides for the possible appointment of a "Scheme manager" who will take decisions on compensation applications or appoint other people to decide such matters.

Clause 4 will require the Scheme to provide a procedure for the review of any decision taken in respect of a claim for compensation. The review will have to be carried out by someone other than the person who made the decision. Clause 5 requires the Scheme to include provision for rights of appeal against decisions on claims for compensation which will enable appeals to be made to adjudicators appointed by the Secretary of State. The Clause also provides for the appointment of adjudicators as members of a body responsible for dealing with compensation appeals, with a chairman and staff also appointed by the Secretary of State. The Home Office paper *Criminal Injuries Compensation : Proposals for a tariff-based Scheme* issued on the day of the Bill's publication notes the Government's intention that, as with the now withdrawn tariff scheme, provision will be made for appeals to be made to an independent panel made up of lawyers, doctors and others with relevant experience.

It is specifically stated in the Bill that claims officers, the Scheme manager and adjudicators are not to be regarded as having been appointed to exercise functions of the Secretary of State or to act on his behalf and that no decision taken by any one of them (or in the case of the

Scheme manager, any person appointed by him) is to be regarded as having been taken by or on behalf of the Secretary of State. This is designed to emphasise the distribution of responsibility between the Secretary of State and those people responsible for the day-to-day running of the Scheme. It is intended to preserve arrangements which have applied in relation to both the common law-based scheme and the tariff scheme, under which the Secretary of State has overall responsibility for setting up the Scheme and is accountable to Parliament for its operation, but it is not involved in the appeals process from the decisions of claims officers, the Scheme manager or the adjudicators. An applicant who is dissatisfied with decisions made in relation to his claim and unsuccessful in having them reversed following a review or an appeal to the adjudicators will have to apply to the High Court for leave to apply for judicial review of those decisions. As has already been noted[30] the 1993 White Paper suggested that the administration of the Scheme might be market-tested once it had been satisfactorily established.

As far as policy considerations behind the Bill and the proposed new Tariff Scheme are concerned, the Government remains convinced that the scheme based on common law damages should be replaced by a tariff-based scheme. In a Written Answer to a Question from Mr Butler on the day of the Bill's publication, the Home Secretary set out the Government's views and announced some changes in, the proposed new tariff scheme, including payment for loss of earnings in some circumstances.[31]

Criminal Injuries Compensation

Mr. Butler: To ask the Secretary of State for the Home Department what plans he has to introduce legislation dealing with criminal injuries compensation. [24309]

Mr. Howard: I have today introduced the Criminal Injuries Compensation Bill.

The Bill provides a power to establish a new criminal injuries compensation scheme. It also repeals the provisions in the Criminal Justice Act 1988, which, if implemented, would have put the old, common law damages scheme on to a statutory footing.

Following the judgment of the Judicial Committee of the House of Lords, which was delivered on 5 April, I have been giving very careful thought to the arrangements which should be made for compensating those who have the misfortune to be injured as a result of a crime of violence.

The judgment related to the method of introduction of the tariff scheme, not its merits. The effect of the judgment was to require the 1990 common law damages scheme to be reinstated in place of the tariff based approach introduced on 1 April 1994. The costs of the common law damages scheme have risen very substantially
since The scheme was first introduced in 1964 and more than doubled in real terms between 1987-88 and 1993-94. Although improvements have been made in administration of the scheme, we believe that a tariff based approach offers greater scope for further improvement and the speedier settlement of cases. I remain of the view, therefore, that steps need to be taken to constrain future expenditure and to ensure that a quicker service is provided. This cannot be achieved within the framework of a system based entirely upon common law principles. I remain therefore of the view that the 1990 common law damages scheme should be replaced by a new tariff-based approach,

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30 p.17

31 HC Deb Vol 259 c557-8 11.5.1995

I have, however, considered very carefully the concerns which have been expressed about the effect which such an approach may have on those who are most seriously injured. We all have immense sympathy for such victims and the Government are anxious to do all that they can to safeguard the position of victims. I have therefore come to the view that the tariff-based approach should be enhanced to provide payment for loss of earnings and special care for those who are incapacitated for more than 28 weeks-the period during which statutory sick pay is payable. I also propose that there should be provision for loss of dependency/support in fatal cases. In addition, I propose that structured settlements should be available: these will greatly help those receiving the higher awards by providing a guaranteed, index-linked, tax-free income for life, thus considerably increasing the net benefit of the award for many victims.

I believe that a scheme of this sort will be fair while at the same time providing a mechanism for controlling future expenditure. Further details of the proposed scheme are set out in a paper entitled "Criminal Injuries Compensation: proposals for a Tariff Based Scheme" which has been placed in the Library and the Vote Office.

Ours is the most generous compensation scheme in the world. We pay out more compensation than all other European countries added together. That will remain the case under our new proposals.

The Home Office paper *Criminal Injuries Compensation: Proposals for a tariff-based Scheme* referred to by the Home Secretary in his Answer said the Government had decided that changes needed to be made to the scheme, partly to enable future costs to be controlled and partly to provide a quicker and more transparent service to victims. It also reiterated the Government's view that a system based entirely on common law damages made it more difficult to deliver the standard of service claimants were entitled to expect and that the predicted rate of growth of expenditure was unsustainable for a state-funded scheme. The paper sets out the detailed provisions and scales of the proposed new tariff to be introduced under the Bill's provisions.

VI Criminal Injuries Compensation Bill - Financial Effects

In any one year, expenditure on compensation is determined by three principal factors:

* the number of cases resolved in that year
* the proportion of those cases attracting a monetary award
* the average (mean) value of the awards

Appendix 1 sets out a historical record of the Criminal Injuries Compensation Scheme for each year since 1964-65, setting out the number of applications made, cases resolved, cases outstanding, expenditure on compensation and the average value of awards. The current plans through to 1997-98, as part of the public expenditure round, are also included.

The number of cases received in a year does not directly affect spending in that year, as from Appendix 1 one can see that there is a significant backlog of outstanding cases. Cases that are resolved may come from this backlog and so were received before the year of compensation expenditure.

Appendix 1 shows the variation over time in the number of cases received and settled and the average award (presented in both cash terms and real terms using the GDP deflator). Over the past ten years, the number of applications made has increased by 7.8% per year, the number of applications resolved by 8.9% per year, and the average award has increased by 4.7% a year more than GDP inflation. The number of cases settled attracting a monetary award has settled at about 62%.

On the assumption that these trends continue, estimated expenditure on compensation under the present arrangements in the five financial years 1996-97 to 2000-01 is estimated to be in the order of £260 million, £300 million, £350 million, £400 million and £460 million respectively, though as mentioned before these costs are unlikely to be paid in the years concerned because of the backlog.

Under the arrangements envisaged in this Bill the corresponding liability to compensation is estimated to be in the order of £175 million, £190 million, £205 million, £240 million and £260 million.

Forecasts of expenditure under the old and new schemes are necessarily "simplistic" in nature. The forecast for the old scheme is based on the trend over the past ten years. One key consideration for the new scheme is to cut the costs of very high awards made in a very few cases. Because the distribution of awards is so uneven - ie a few awards are very high whilst most are reasonably low in comparison - it was considered desirable that the average tariff award be pegged.

The tariff awards under the new system are based on the *median* award under the old system. The median award is the middle one, if all awards are arranged in order of size. Because the few very high awards make the average (mean) award relatively high, the median is lower than the average in this case.

In summary, whilst it is true that the *average* award under the new tariff scheme will be lower than the *average* award under the old system, this ignores the uneven nature of the distribution of awards. The Home Office estimate that 60% of claimants under the tariff system will be at least as well off than under the old system. Though this may not appear to be reconciled with the fact that the average award will be lower, it is precisely because most claimants receive less than the mean award under the old system (because of the few very high awards which make the average award relatively high) that 60% of claimants will be no worse off.

The new tariff system has two main elements to it. The first element is the compensation award itself (based on median values from the old system) and this will be raised over time at the discretion of Ministers as and when required. For the cost estimates made above, it was assumed, purely for planning purposes, that the tariff rates were fixed for three years and then raised by the rate of GDP inflation. The second element is the add-ons - for example compensation for loss of earnings and future health care. These have an uprating already built in the sense that the payment will be based on the then current costs for these add-ons. For the costings above, these add-ons were raised in line with specific wage inflation and health care inflation trends.

Appendix 2 sets out an international comparison of criminal injuries compensation based on the latest figures available to the Home Office. Of course, schemes may not always be directly comparable in terms of scope (eg eligibility, cover, etc). Great Britain (£165 million) has the highest expenditure of all countries in the world, higher than that of the United States of America (£155 million) and higher than the rest of Europe combined (£76 million).

VII Constitutional Aspects of the Fire Brigades Union Case

For the present Bill the importance of the House of Lords judgment lies in its effect on the status of the statutory and tariff Schemes, but the case also has constitutional interest, not least in the relationship between Parliament, Ministers and the courts.

Parliament had enacted the statutory Scheme in the *Criminal Justice Act 1988* (a Government measure), but inserted, as is common, a commencement provision (s171(1)) providing for the bringing into force of the Scheme on a day appointed by the Secretary of State by order. The Secretary of State's decisions to introduce a tariff Scheme under the prerogative, and not to implement the 1988 Act Scheme, are at the heart of the legal dispute in this case. It is probably fair to say that commencement provisions have rarely been a matter of significant legal controversy, save for unimplemented legislation such as the *Easter Act 1928*. In the present case the nature of the Secretary of State's power/duty to make the appropriate order proved to be central to the legal argument.

The Court of Appeal

In the Court of Appeal[32] two judges, Hobhouse and Morritt LJJ, said that the Secretary of State was not obliged to implement the statutory provisions, and the Master of the Rolls, Sir Thomas Bingham, said that the Secretary of State was under a duty to bring the provisions into force at such date as he considered appropriate. Thus, in this respect, the court decided that the Home Secretary had not acted unlawfully in failing or refusing to bring the Scheme into force.

However the court decided by 2-1 (Hobhouse LJ dissenting) that, having regard to the overriding legislative role of Parliament, the enactment of the Scheme by Parliament meant that the statutory provisions were, until their repeal, "an enduring statement of Parliament's will", and therefore the Secretary of State could not introduce a radically different scheme under the prerogative. By purporting to implement the tariff Scheme, the Home Secretary had acted unlawfully in abuse of his powers.

Hobhouse LJ, in rejecting the approach of the majority, said that an unimplemented statute was not part of the law of the UK, was incapable of creating rights or duties and "for a court in any way, to give effect to, or treat as law, a statutory provision which the statute says has not come into force is to act contrary to the statute."

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[32] [1995] 2 WLR 1

The House of Lords

The Secretary of State's appeal to the House of Lords[33] was dismissed by 3-2, the judges splitting on essentially the same points as the Court of Appeal judges. Lord Browne-Wilkinson said that s171(1) of the 1988 Act did not impose any statutory duty on the Secretary of State to bring the section into effect, but "the plain intention of Parliament" was that the power given to the Home Secretary "is to be exercised so as to bring those sections into force when it is appropriate and unless there is a subsequent change of circumstances which would render it inappropriate to do so." Therefore the Secretary of State was acting unlawfully in giving effect to the statement in the White Paper of December 1993 that the statutory scheme would not be implemented. The Secretary of State could not claim to use his power not to bring the provisions into force because of subsequent events if he himself procured these events by introducing the tariff Scheme.

Lord Browne-Wilkinson rejected the proposition that, as the statutory provisions had not been brought into force, they had no significance in deciding whether or not the Home Secretary had acted lawfully. He believed that such unimplemented provisions in these circumstances were "directly relevant" to an interpretation of the Secretary of State's actions. The Home Secretary could not validly resolve never to bring the statutory scheme into force by giving up his statutory duty to consider from time to time whether he should implement it. Therefore his decision to introduce the tariff Scheme when the 1988 Act provisions were on the statute book was unlawful and an abuse of prerogative power.

Lords Lloyd of Berwick and Nicholls of Birkenhead made speeches in agreement with Lord Browne-Wilkinson. The latter's speech contains a brief but useful consideration of statutory commencement provisions.

Lords Keith of Kinkel and Mustill delivered dissenting speeches. Lord Keith believed that the Secretary of State's decision-making on whether to implement the statutory Scheme was a political and administrative matter for which the Home Secretary was answerable to Parliament, not something at all appropriate for the courts. The Secretary of State's decision to establish the tariff Scheme could not be unlawful on the ground that the statutory scheme had been enacted, because that statutory scheme had not been brought into force. He concluded his speech by saying that granting the trades unions relief "would represent an unwarrantable intrusion by the court into the political field and a usurpation of the function of Parliament."

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[33] transcript, 5/4/95

Lord Mustill's speech emphasised that, though limited in range, the issues in the case were of "great constitutional importance." The Secretary of State's decisions and actions may be open to complaint, but that was a political and Parliamentary, rather than a legal, matter. His conclusion emphasised the constitutional importance of the separation of powers in the light of the growth of judicial review. He believed that such judicial activity was "greatly to the public benefit" but it brought risks that the courts could overstep the boundary into the political field. These boundaries between courts and Parliaments set up in the *Bill of Rights 1688*, are "of crucial significance to our private and public lives; and the courts should, I believe, make sure that they are not overstepped".

Conclusion

The *Fire Brigades Union* case is of constitutional interest in the relationship between Parliament and the Executive. Ministers will, in appropriate circumstances such as have arisen in this case, have to take account of the will of Parliament even when it is expressed in enacted *but unimplemented* legislation, when exercising their statutory or prerogative powers or duties.

The form and content of commencement provisions in legislation may well now be more closely considered following this case. There may, for example, be a greater tendency to use provisions which seek to limit ministerial discretion as to how and when to bring statutory provisions into force.[34]

The separation of powers aspect of this case maintains the standard constitutional approach of "Parliament", that is, the 'Queen in Parliament', as making the law. Thus the White Paper's statement that the 1988 Act statutory Scheme would not be implemented and "will accordingly be repealed when a suitable legislative opportunity occurs" strictly speaking offends against the constitutional theory that Parliaments, not Governments, make the law. The judges in both courts adopt conventional separation of powers theory in reaching their conclusions, in the relationship between Parliament and the Executive in the legislative context, and the role of the courts in disputes arising from that relationship. Thus, to simplify the legal argument in the case, the courts found that the Executive, in the person of the Home Secretary, acted contrary to the legally expressed will of Parliament.

A line of argument which gave greater weight to what might be termed the practical realities of the legislative process in Parliament rather than the constitutional theory may shed some light on possible implications of the judgment, and provide a reason, perhaps, for the strongly-held differences between the judges in the case. In practice, especially where there is a

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[34] See, eg, 55(2) of the *Domestic Violence and Matrimonial Proceedings Act 1976* : if any provisions not in force by 1 April 1977, the Lord Chancellor "shall then make an order ... bringing such provisions into force".

Government with a secure working majority, Governments do make the law, in most cases. To say that, by piloting what became the *Criminal Justice Act 1988* through Parliament, the Government sought to give themselves powers to implement a statutory criminal injuries compensation scheme, is, in constitutional terms, not a fully accurate statement, but it probably reflects the practical situation. If so, the Secretary of State, by not implementing the statutory Scheme and by introducing the tariff Scheme, could be said to have simply decided not to take up provisions Ministers had, through Parliament, given themselves in 1988, and the question of offending against the will of Parliament would, in this sense, arise as a political rather than a legal matter.

This sort of argument - not one which is available under present constitutional theory and practice - perhaps suggests how the distinction between the constitutional doctrine of the separation of powers (ie the courts regarding Parliament as an autonomous lawmaker, separate from Government, whose will can be expressed through legislation), and the political reality of the Government's usually dominant role in the initiation and passage of legislation, can contribute to genuine legal and judicial difficulty in ascertaining the 'intention' or 'will' of Parliament[35] in cases such as *Fire Brigades Union.*

[35] None of this approach should be confused with the distinct question of the *legal sovereignty*, or legislative supremacy, of Parliament

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