MEMO ON CONCERNS EXPRESSED BY SIR ROBERT OWEN AND VCJD TRUSTEES AND THEIR PROPOSED AMENDMENTS TO THE TRUST DEED

1. Although it might be helpful to examine the "chronology of cases" provided by Charles Russell solicitors in October 2005 by way of confirmation, it seems clear that the principal problems encountered by the trustees are as follows:-

   1.1. Their view that before making payments to relatives and loved ones of each victim (the "qualifiers") they should carry out a detailed investigation in order to identify everybody who might be treated as a qualifier. This has led to time consuming and expensive investigations and creates a problem which otherwise would not exist of apportioning very small sums between those individuals. The purpose of the original trust deed was always that the sums (being small) should ordinarily be distributed between the immediate family of the victim who resided with the victim or cared for him/her but that because in divided families or where the care was provided by somebody other than the spouse, such a crude approach might not be appropriate, there would be a residuary discretion in the trustees. Thus in most cases the cohort between whom to divide the sums would be obvious.

   1.2. Far more people than expected have felt it appropriate to make claims for psychiatric injury, both basic and "particular". This seems to have involved considerable costs and administrative time because the trustees have not had a simple test approach to the basic award. However, this could readily be cured by being satisfied with a general practitioners letter as a condition of paying the basic sum, with a simple rule that no payment would be made without such a letter.

   1.3. The trustees have had real difficulty in working out how to deal with the provision for payment of additional sums where the psychiatric condition has caused "particular" financial or emotional hardship. This was always intended to cover the truly unusual situation, so that it would be exceptional for a payment to be made under it. There appear to have been very large numbers of applications, possibly on the basis each family wanted to feel that they had been sufficiently close to the victim that they suffered particular hardship and the trustees seem to have been unable to see a clear way through without incurring very substantial costs both on the part of the secretariat and on the part of the victim's lawyers.

   1.4. The trustees seem to have had a similar problem with the discretionary care provisions under clauses 5.4 and 5.5, which again were intended for the exceptional situation where for example the breadwinner had to give up work to care for the victim or where the victim was earning substantial sums but had to give up work leaving himself and dependants suffering hardship. In such a case the dependency claim does not help because it covers future loss.

   1.5. The final difficulty caused to the trustees has been in controlling both their own and Irwin Mitchell's costs. In the case of Irwin Mitchell, it is clear that very substantial costs have been allowed to be run up in relation to very

small payments. This is partly the result of the secretariat taking a very detailed approach to the obtaining of information and partly the result of Irwin Mitchell's own approach.

2. The other matter that has become clear during the 5 years that the trust has been in operation is that victims appear to be living longer in conditions where they require substantial care. In an ordinary common law case, this would lead to a somewhat higher figure for pain and suffering (although much less than the £125,000 increased payment agreed by the then Secretary of State) and that expenses and other recoverable costs would also increase, thus narrowing the gap between the current awards and the common law equivalent.

3. The trustees' proposal will certainly simplify the scheme in that it requires a single payment of a fixed sum to be paid in all cases, with dependency to be worked out in accordance with the existing trust deed. This would limit substantially the work of the trustees in effect depriving them of any need to exercise any discretion. It would, however, have the following disadvantages:-

   3.1. The sum of £200,000 is substantially higher than the average figure of £146,000 (without care) or £163,000 with hardship, etc., paid to the existing victims. It is apparently suggested that all existing victims should be topped up to £200,000 but of course there is no indication of how that sum is to be distributed between them.

   3.2. The averaging approach takes no account of the fact that some families have suffered more hardship than others and would ordinarily have been entitled under the exercise of the trustees' discretion to a higher payment. The trustees' proposal, both for the present and for the past, removes all those distinctions so that all families are treated the same, irrespective of their personal situation, except for dependency.

   3.3. Perhaps most importantly, the trustee's proposals deprive those families which suffer exceptional hardship in one form or another or for whom some exceptional expenditure is required, from obtaining any further payment from the trust, thus eliminating the real purpose of having trustees exercising a discretion.

   3.4. Examination of the detail of the proposal suggests that the intention is to transfer the task of deciding how the payments are to be made from the trustees to the executors where there is a will and to Intestacies' Trustees, including a professional solicitor, where there is no will, with all costs to come out of the basic sum proposed. It may be, of course, that once they realise that they are spending their own money in raising issues, families will reach agreement on the division of the sum more readily, but this proposal has the disadvantage that in difficult cases, the trustees have simply transferred the burden to those who are in most need of help. It also does not deal with the position where an old will bears no relationship to the current position, i.e. after a family break-up where there has been no remarriage.

3.5. The proposal does not take account of the increased length of time that some victims may now live and provides a "one size fits all" solution to all situations.

3.6. Finally, the proposal does not remove the current discretion on costs which the trustees have found so hard to control.

Possible solution

4. The following changes would appear adequate to meet the trustees' genuine difficulties and to cater for the change in the pattern of the condition.

4.1. A proviso in relation to qualifies that the trustees shall ordinarily make the payment to the immediate family of the victim except where they are satisfied that to do so would not be in accordance with the victim's wishes (wording can be tightened up).

4.2. The definition of particular hardship can be changed to "exceptional".

4.3. To avoid problems with psychiatric injury, the basic sum could remain the same, subject to a GP's letter or such other evidence as the trustees require, whereas for the greater award there should be a fixed sum of say £20,000 to be made where the condition lasts for more than 6 months and is supported by a psychiatric report by a qualified psychiatrist.

4.4. Costs incurred in relation to discretionary payments should come out of the discretionary fund, and costs should be capped, except in exceptional circumstances, to say £2,000 per victim for the main application and £3,000 per victim in relation to the discretionary fund.

4.5. The basic award should be increased by say £20,000 per annum for each year that the victim survives beyond the maximum survival rate of the first hundred victims, (i.e. say over two and a half years).

5. These amendments would leave the scheme largely in tact but would meet some of the trustees' concerns.

Justin Fenwick QC
2 October 2006