

Independent Inquiry into Child Sexual Abuse
Issues Paper Number 2: Criminal Compensation



A response by the Association of Personal Injury Lawyers
September 2016

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain access to justice they need and deserve. We have over 3,500 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

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This paper has been prepared by an APIL working group, which included APIL and Association of Child Abuse Lawyers (ACAL) members. This paper has been endorsed and supported by the ACAL Executive Committee.

Introduction

The Criminal Injuries Compensation Scheme (CICS) is under resourced and does not currently provide effective reparation to victims of sexual abuse. Reforms to the scheme introduced in 2012 have made it more difficult for survivors of sexual abuse to obtain reparation. Whereas in previous schemes there was discretion to provide a full or reduced award to those who have a criminal conviction, it is now in some cases impossible for those people to apply for an award under the scheme, ignoring the realities of why the person may have committed the offence. The 2008 and 2012 schemes also introduced a provision whereby CICS awards are reduced by the amount of any court-ordered criminal compensation order. It is then the responsibility of the victim to seek to recover this part of their compensation directly from the perpetrator. Requiring the victim, particularly a survivor of sexual abuse, to maintain a link with the perpetrator is extremely distasteful and should be abolished. It is also highly impractical for the victim to recover this money effectively.

In terms of criminal compensation for the victims of child sexual abuse, our members have more experience dealing with claims under the Criminal Injuries Compensation Scheme, and less dealing with criminal compensation orders. Our response to this paper focuses mainly on the CICS, therefore.

Executive Summary

- The Criminal Injuries Compensation Scheme is woefully under-resourced, and several aspects of the scheme mean that it does not cater effectively for victims of sexual abuse.
- The eligibility criteria for the scheme work against potential applicants who have suffered sexual abuse. Applications from those with unspent criminal convictions at the date of the application for offences (other than minor offences) will be refused, regardless of whether the reason they have committed an offence is as a result of the sexual abuse itself, or their vulnerability which made them a target for sexual abuse in the first instance.
- Regarding compensation levels, the tariffs are low, and are not comparable to civil compensation awarded in court for the same injuries. It is a misnomer to call the sums awarded as “compensation”. The government itself suggests that awards are more of a token or recognition than compensation. The cap of £500,000 has not been increased since the tariff system was introduced in 1996. An inflationary increase is well overdue; savings made under the 2012 scheme were predicated on the contention that this would enable more seriously injured people to be compensated. Almost by definition, the scheme changes have prevented this from happening.
- Particularly in complex cases, applicants should be signposted to proper independent legal advice.
- The scheme is not well-publicised at present.

Reparation generally

Q1) What outcomes should a criminal compensation scheme aim to deliver for victims and survivors of child sexual abuse?

- **Full compensation for victims and survivors**

Since the introduction of the tariff based system in 1996, victims of sexual abuse who have claimed an award through the CICS have been awarded an amount that falls far short of an award that would be recoverable in civil litigation for the same injuries. We believe that the award cannot be properly referred to as “compensation”, as it does not adequately compensate the victim for their injuries, and their losses suffered as a result of those injuries. If the scheme is to be properly compensatory, the tariff scheme should be removed, and awards should be made on a restitutionary basis, as was the case before the tariff system was introduced.

Loss of earnings payments are very difficult to qualify for, and even when they are awarded, they are limited to the equivalent of statutory sick pay.

There is also a provision in the 2012 scheme which requires a deduction from the final award of a sum equivalent to any criminal compensation order made by the court. The victim is then responsible for recovering the amount of that deduction directly back from the perpetrator. This is extremely distasteful and it will be highly traumatic for the victim to have to maintain a connection with the perpetrator. It is also practically impossible in most cases. The scheme is meant to be one of last resort enabling the victim to have the certainty of a state made award, even if it is less than compensation through the civil courts. The provisions for deduction of court imposed compensation totally undermine that purpose.

- **Prompt decisions and outcomes**

At present, it takes far too long for a person to obtain compensation through the Criminal Injuries Compensation Scheme. According to the CICA’s annual report 2014-2015, 39 per cent of cases take over 12 months for a decision to be made¹. While all of these will not be sexual abuse cases, survivors of these crimes will feel the delays keenly – being unable to move on or obtain closure for what happened to them until they receive recognition for the damage suffered.

- **Sensitivity**

Claims through the Criminal Injuries Compensation Scheme are not always dealt with sensitively, with recognition for the harm that has been done to the victim.

- **Transparency**

At present, when the CICA is making an initial decision, it will refuse to disclose the information it has obtained about the case until its final decision has been made. In civil proceedings, where two parties are dealing with the process, normally the parties would be expected to make disclosure of what comes into their possession. The CICA, however, refuses to do this, despite information that comes into their possession potentially being wrong or inaccurate. The applicant is unable to address

¹ Page 7, Table 3

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/440299/ar_2014-15.pdf

these inaccuracies until after a decision has been made. Sometimes it is possible to obtain the information through a data protection request, but this requires a fee to be paid, which does not sit well with a scheme which deals with victims of abuse.

We understand it would be impractical for all information in every case to be disclosed, but crucial information, which if containing inaccuracies will have an effect on the final award, such as the police report and medical evidence, should be disclosed to the victim and their legal representative should they have one. With delays as they are, it will be highly traumatic for a victim of abuse to finally get a decision after a year, only to realise that the information it was based on was wrong, and to then undergo a further 9 months of waiting whilst the decision is reviewed. If the victim and their legal representative are allowed to see the information, it is more likely that a satisfactory decision will be arrived at in the first place, with no need for a review or appeal. The approach adopted by the CICA is contrary to principles of natural justice.

- **The delay in making eligibility decisions**

There is very often no reason why the CICA cannot at least form a view on an applicant's eligibility for the scheme early on, the relevant test being the balance of probability. As the process works now, a person submits their application and must then wait for the final outcome – without being told in the meantime whether they are even eligible for an award. For a victim of sexual abuse, just an acknowledgement that they are eligible for an award, that the abuse has been suffered, will go some way towards helping them to recover.

Q2) In your experience, how far do the two existing procedures for criminal compensation, i.e. the CICA scheme and the court's criminal compensation orders, deliver these outcomes for victims and survivors?

Please see above in answer to question 1.

Q3) How important are the following:

- i) **The right to independent legal representation**

The right to independent legal representation is extremely important. There can be complex issues around eligibility, around which tariff band the applicant falls in to, and whether or not the psychological damage that has been done to the victim is more serious than the tariff band for the sexual offence itself. For certain sexual abuse offences, if one can demonstrate that the psychological impact of the offence is severe, the award made by the CICA will reflect this. The CICA is not likely to voluntarily investigate psychological damage and is more likely to default to an offer of the amount set by the tariff for the individual sexual offence, which is likely to be less, and in some cases, substantially less. This is a complex legal issue, and independent legal advice will be necessary to ensure that the applicant gets an award which goes some way towards reflecting the severity of the injury that they have suffered.

In civil claims, where psychological evidence is routinely obtained, invariably there is a psychological diagnosis consequent on the abuse. In a CICS claim, psychological evidence is not routinely sought in the first instance, and a default amount set by the tariff is awarded, which will not properly reflect the severity of the injury suffered. Independent advice from a lawyer is vital to ensure that the survivor of abuse obtains the amount of compensation that they are rightly entitled to. It will usually only be through the advice of a lawyer that the applicant applies for a review or even appeals the CICA's decision, at which point a psychological report will be obtained and the full extent of the damage suffered brought to light, thus allowing the applicant to be properly compensated. A person without a lawyer will not be well placed to claim under this scheme, as they will accept the tariff award which has not factored in any psychological harm. In our members' experience, there is no signposting of applicants to legal representation. On the contrary, the CICA may actually tell applicants that they do not need a lawyer. People are sometimes signposted to voluntary sector representation, for example the Citizens Advice Bureau or Victim Support. While these organisations can provide vital moral support, very often the volunteers will only have a limited skill set and will not be legally qualified, so will not be able to provide the level of support that a legal representative can.

ii) The right to an independent and impartial investigation

This is very important, and the CICA is one of the vehicles which can contribute to the provision of such a right.

iii) The right to truth and accountability

It is desirable that this should be incorporated as part of the criminal compensation process.

iv) Compensation

As above, since the introduction of the tariff scheme and the 2012 amendments which might also mean that the victim must recoup some of their damages directly from the perpetrator, the scheme does not offer proper "compensation". The upper cap has not been amended since the tariff based system was introduced in 1996, despite there being new schemes introduced in 2001, 2008 and 2012. It is extremely important that awards go some way towards reflecting the harm suffered, and at present they do not.

v) Guarantees of non-recurrence

While this may be an important outcome for victims of abuse, it is difficult to see how a compensation scheme can guarantee non-recurrence.

vi) Support services

As above, CAB and Victims Support can provide valuable moral support to the applicant, but should not be a substitute for effective legal representation which will allow the applicant to properly navigate the system and deal with any complex issues arising, ensuring that they get an award reflective of the abuse they have suffered. It is debatable whether a system which relies so heavily on

the voluntary sector to provide support to applicants can truly provide the vital features such as independent and impartial investigation and truth and accountability.

Q4) Which of the above have the existing procedures for criminal compensation successfully delivered?

Anecdotally, the CICS successfully delivers the above outcomes where an applicant is skilfully represented, or where the matter proceeds to a tribunal and the tribunal exercises its impartial function to achieve a just outcome.

Q5) If there are elements you have identified as not always successfully delivered, then what, in your experience, have been the reasons for this?

The main reason that the above important elements are not always successful delivered is that the CICA is currently under-resourced. APIL members report that their experience of dealing with the CICA is that the process is deliberately strung out, and rather than a scheme which is set up to provide compensation for victims, the feeling is that the CICA will try to find a way not to pay out an award. APIL highlighted at the last meeting of the CICA stakeholder group that the there was a lack of offers and decisions made from January to April each year, and then a sharp increase in awards made. It was explained that this was because in March, the CICA was permitted to put in a bid for any unused Treasury funds. If they were successful in obtaining further funds then more awards could be made. This begs the question as to what happens if further funds had not been secured and assumes that those cases in which offers were made in April had been waiting for some time for funds to be available in order for the offer to be made. ? This is not an effective way of running a compensation scheme, and the resource issue must be addressed.

If the responsibility of recouping back criminal compensation orders from perpetrators was removed from the victim, which APIL strongly believes it should be, we suggest that the CICA should recoup back, where possible, the costs of paying out the award to the victim from the perpetrator. In civil cases, the “polluter pays” principle is well established, and we see no reason why, if the perpetrator has the funds to pay back the cost of the award to the CICA, the CICA should not be permitted to recoup this. This would not be desirable, however, whilst it is still the responsibility of the victim to claim back the compensation order from the perpetrator, because this would put the victim and the CICA in competition for the perpetrator’s most likely limited, funds.

Q6) In your experience, why have some victims and survivors chosen not to apply for criminal compensation?

APIL members report that potential applicants are often discouraged by investigating officers and the CPS from making a claim through the CICS whilst the criminal process is on-going. If the criminal case takes longer than 2 years to conclude, which is not unusual, the applicant will then be out of time to bring a claim under the scheme. There is no legal reason why the applicant must wait until criminal proceedings have concluded before they are allowed to apply under the CICS, because the CICS uses a civil standard of proof and not the criminal standard. There may be other reasons why an applicant may be advised not to apply to the CICA until after the criminal case has closed. The victim may be questioned on their application to the CICS in cross examination, to discredit them and give the impression that

the victim is only interested in making money. This is clearly wrong, but will have an impact on the potential applicant's decision as to whether they bring a claim under the CICS or not.

It is important that applicants are not discouraged in this way, as for all of the resource issues, it may be that the CICA provides an option for redress, recognition that the abuse has been suffered, where the criminal court has fallen short. The recent focus in the press on the Ampleforth sex abuse claims (in particular in *The Times*²) highlights how the criminal process can fail non-recent sexual abuse victims. In this case, a group of former pupils at the school alleged that they had been sexually assaulted by a former teacher. Some cases were initially dismissed as not having sufficient evidence to provide a realistic prospect of conviction – which is a problem in non-recent child abuse cases. Later, the judge decided before the jury was sworn in that the physical contact said to have taken place was not, in law, indecent. Only one of the former pupils was permitted to give evidence to the jury, with the others' claims never put before the jury. The former pupil, then the sole complainant, spoke of a frustrating and extremely unpleasant experience at trial. He was not permitted to make any reference to the other complainants, and he felt that the jury thought he was simply "jumping on the Jimmy Savile bandwagon, determined to have my day in court". The teacher was cleared of the offence.

Q7) In your experience, why are some victims and survivors unable to apply for criminal compensation despite wanting to do so?

We can only speculate as to the reasons why some victims and survivors are unable to apply for criminal compensation despite wanting to do so. One reason may be that these people are suffering from severe psychological problems as a result of the abuse, and have not been properly supported to make an application by a person with the appropriate skill set.

Q8) What are the advantages and disadvantages of the existing procedures for criminal compensation as a means of delivering reparation, when compared to the civil claims process?

The way that the Criminal Injuries Compensation Authority currently operates is a disadvantage, for all of the reasons set out above.

An advantage is the appeals system, in comparison to the civil court system. There is no fee, and the tribunal system is more informal and easier to navigate than the clunky court system.

The Criminal Injuries Compensation Scheme (administered by CICA)

Q9) Are there elements of the CICA process which may obstruct the delivery of reparation to victims and survivors, and if so, in what way? In particular, submissions are welcome on the following issues:

a) The right to independent legal advice and representation

As above, there are issues with people not being signposted to independent legal advice, and in some cases the CICA have actively discouraged applicants from seeking legal advice and representation.

² *The Times* Thursday August 25 2016

b) Eligibility provisions, including:

- i) **The definition of “crime of violence” and “consent”**
Whether “true” or “real” consent has been given to a sexual act, and therefore whether a “crime of violence” has been committed, is a matter of fact ultimately for judicial decision, after consideration of precedents.
- ii) **The eligibility criteria for persons who were present at, and witnessed, the sexual abuse of another person or its immediate aftermath**
We do not believe this to be an issue.
- iii) **The non-applicability to injuries before 1 August 1964, the date on which the first scheme was introduced**
There needs to be a cut off at some point in time, and we believe that 1 August 1964 is a sufficiently long time in the past so as to not be unfair.
- iv) **The “same roof rules” precluding awards of compensation to victims who were living with their assailants at the time as members of the same family**
The “same roof rules” were introduced in 1979. The rules were intended to prevent too many claims that were difficult to prove and that would put a strain on the public purse, but we suggest that this rationale is flawed, outdated, and ties in with the myth that children are most likely to be abused by a stranger. 90 per cent of children who are sexually abused know their abuser³. The rules will preclude, for example, a person who was abused by their step-father in 1979, who many years later summons the courage to go to the police. There is a conviction, but the survivor of the abuse will be denied compensation under the Criminal Injuries Compensation Scheme because they were living “under the same roof” in 1979. The same roof rules should be abolished.

c) The application process, including:

- i) **The role of the police**
The police are often well-meaning, but not sufficiently knowledgeable about the basic rules of the scheme to provide effective assistance. Helping victims to apply to the scheme is not a priority for the police, especially as most police forces also have stretched resources – both in terms of funding to train officers, and to allow them time to become familiar with the compensation scheme so that they can provide effective guidance. We are aware that there are some specially trained officers, which is obviously a welcome development; although we are not sure that there are enough in practice.
- ii) **Time limits**
Time limits can be a huge barrier for survivors of non-recent abuse. The statutory scheme has a two year time limit from the date of the incident giving rise to the application (compared with the three year time limit in civil personal injury claims). Paragraph 88 of the 2012 scheme provides that where the applicant was a child under the age of 18 on the date of the incident giving rise to the criminal injury, the application must be received by the authority within the period ending on their 20th birthday if the incident was reported to

³ <https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/child-sexual-abuse/sexual-abuse-facts-statistics/>

the police before the applicant's 18th birthday, or in the case of an incident reported to the police on or after the applicant's 18th birthday, within two years after the date of the first report to the police in respect of the incident. A claims officer may extend the time period where he is satisfied that "due to exceptional circumstances, the applicant could not have applied earlier, and the evidence presented in support of the application means that it can be determined without further extensive enquiries by a claims officer". Due to the vagueness of the scheme, there have been a number of Upper Tribunal decisions following applications for judicial review of First-tier Tribunal decisions on appeals against CICA's claims officers' decisions. The 2012 scheme makes it more difficult than ever before for sexually abused victims to overcome the time limit obstacle.

Further, applications are often done online or by telephone. The CICA refuses to record telephone calls on a costs basis. APIL members report that they have had several potential applicants who have made an inquiry over the phone to the CICA and been told that they were out of time or ineligible, with no record of how this decision was arrived at. Fortunately, these people have then sought independent legal advice about this decision, but – particularly with the lack of sign posting to legal advice - there are surely other genuine applicants who have accepted what they were told by the CICA, and thus have been denied their right to compensation.

iii) Costs of making the application, for example instructing lawyers or obtaining expert evidence

As above, independent legal advice is key to achieving the right outcome, particularly in more complex cases involving psychological harm as well as sexual abuse. It is deplorable that there is not legal aid available for people to use the Criminal Injuries Compensation Scheme. The scheme is run by the state, the state is the purse holder, and for there not to be any support available to those bringing a claim is highly unfair in that it creates an inequality of arms both in perception and in practice. In a similar but unrelated forum there has been widespread recognition that a just outcome was only able to be achieved at the Hillsborough inquest because the families had the benefit of appropriate, independent legal representation, paid for by the state. There is also a difficulty in obtaining suitable expert evidence.

iv) Reviews and appeals

According to the 2014/2015 Annual Report, 20.5% of cases in 2014/2015 went to review. 4% went to appeal⁴. We are unsure how many of these appeals were subsequently successful, but anecdotally, the vast majority of review applications are successful.

d) The circumstances in which an award may be withheld or reduced;

⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/440299/ar_2014-15.pdf

Since the introduction of the 2012 scheme, there is no longer a discretion to make a full or reduced award to an applicant who has an unspent conviction for an offence resulting in certain sentences. This is even the case if the earlier abuse contributed to the later criminal behaviour. This rule is also particularly discriminatory to the most vulnerable in society, such as those who have been brought up in care – the Prison Reform Trust reported that those in care between the ages of 10-17 are ten times more likely to come into contact with the criminal justice system.

e) The relationship between the criminal injuries compensation scheme and other compensation processes (civil or criminal)

As mentioned above, the scheme wording requires the court to reduce the amount paid in an award to the victim in line with any court ordered fines that the perpetrator must pay. It is then the responsibility of the victim to recoup this money back from the perpetrator themselves. It is extremely distasteful and highly upsetting for the victim to have to maintain a connection to the perpetrator in order to recoup back money which the perpetrator may not pay.

f) Quantification of awards

The rationale behind the imposing of the tariff and then removing lower tariffs in 2012, was to ensure that with the limited resources available, there should be more money directed to the awards for the most seriously injured people. However, the cap still sits at £500,000, which is now woefully inadequate. Loss of earnings payments are very difficult to qualify for, and even when they are awarded, they are limited to statutory sick pay (£88.45 per week/£4,600 per annum). In effect, this is not a loss of earnings payment at all, given that the average salary in the UK is currently £26,500 per annum.

g) The responsibility of local authorities to make applications on behalf of children

The case of *VL v Oxfordshire County Council*⁵ held that there is no statutory duty on the local authority to make a CICS application on behalf of the child. As there is no legal onus on the local authority to make a claim, and they are most likely to be under resourced and quite likely will have nobody specially qualified in this area to make the claims, it is likely that some local authorities do not make applications. It is a postcode lottery for victims as to whether the local authority will proceed with the claim or not. Of course, a child can still apply post-18, but if the abuse happened when the child was six, there will be lasting damage, wasted years that will have an impact on them later in life, and some evidence will also likely no longer be available, which may jeopardise their claim. Also, no interest is payable on an award and if a claim is only brought many years later than it might have been then there is a potential loss of the benefit of an earlier award.

10) Are there other elements of the CICA process which may obstruct the delivery of accountability and reparation to victims and survivors? If so what are they?

⁵ [2010] EWHC 2091 (QB)

As above, there is an issue with the CICA not disclosing the evidence it has before making a decision, which means that the applicant does not have an opportunity to correct any inaccurate or out of date information before the decision is made.

Criminal compensation orders

11) To what extent do criminal compensation orders made by the criminal courts provide adequate reparation for victims and survivors?

12) What are the advantages and disadvantages when compared to the civil claims process and/or the CICA process?

We have set out above our concerns surrounding criminal compensation orders.

Changes, alternatives or additional routes for redress

13) In your experience, is there anything that has made it more difficult for victims and survivors to achieve accountability and reparation through the existing procedures for criminal compensation? If so what? What could be done to help people overcome these barriers?

As stated above, the current scheme does not achieve reparation, as the tariffs are inadequate and do not reflect the levels of compensation that would be awarded if the person was to pursue a claim in the civil court.

Compensation for private medical expenses was also removed in the 2012 scheme. This will have a particular effect on those who have suffered psychological damage. In a situation where access to full and proper psychiatric support is very difficult to come by on a stretched NHS, this means that the person does not have access to the services they need to prove their case, as, coupled with the removal of payment of private medical expenses, there is also a requirement in the scheme that in an application for psychological harm, there must be a diagnosis by a clinical psychologist. Treatment by a GP is no longer sufficient. There is a “double whammy” effect as the person does not get the treatment they need and they also won’t have the necessary evidence to support their claim. Again, it is important that the survivor of abuse has access to independent legal advice, to ensure that a psychological report is obtained, which will allow the survivor to obtain the proper compensation for their injuries, and the treatment that they require.

14) What changes could be made to the existing procedures for criminal compensation in order to make it easier for victims and survivors to achieve accountability and reparation?

Private medical expenses should be restored, and the cap on damages should be increased at the very least to bring it in line with inflation. Loss of earnings payments should actually reflect a person’s loss of earnings rather than being a token payment. The provision whereby CICS awards are reduced by the amount of the criminal compensation order should be abolished. The victim should not have to maintain a link with the perpetrator to recover damages.

15) Are there any alternatives to the existing procedures for criminal compensation that could better deliver reparation to victims and survivors, either on their own or in

conjunction with the existing procedures for criminal compensation? If so, what are they?

There does not necessarily need to be an alternative to the CICA, but it does need to be better resourced and its profile needs to be raised. Its effectiveness would be improved if the general public were more aware of its existence, and the CICA worked with the victims to secure them their awards, rather than putting up barriers to prevent claims succeeding. It is important for there to be a process through which victims can be heard, and for them to receive an acknowledgement that the abuse happened. Making sure the system is better resourced and funded.

Support

16) What information, support and resources are you aware of to help victims and survivors (and/or their families) access reparation through the existing procedures for criminal compensation?

The non-solicitor support offered to victims is a mixture of that provided by Citizens' Advice Bureaux, Victim Support, pro bono assistance by the Bar, and university law faculties. It is a postcode lottery as to the level of support that a victim will receive, and there needs to be greater consistency. People also need to be properly signposted to legal advice.

17) In your experience, have people who needed these services and support been able to access them? If not, why not? Availability of support services is an issue in some areas.

18) How do you think the current provision of support could be improved?

There should be more consistency in the availability and level of support throughout the country. There should be greater efforts to sign post people to appropriately qualified legal advice.

- Ends -

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