Ministry of Justice

Criminal Injuries Compensation Scheme Review 2020

A response by the Association of Personal Injury Lawyers

October 2020

Introduction

APIL welcomes the opportunity to respond to the Ministry of Justice's (MoJ's) review of the Criminal Injuries Compensation Scheme (CICS) having engaged with the MoJ throughout the review process. We are disappointed that our concerns, shared with many other representative organisations on elements of the scheme such as eligibility, loss of earnings payments, trusts and the impact on sexual abuse victims have not been included in this review. APIL is also disappointed that more weight has not been given to Baroness Newlove's 2019 report; Compensation without Re-traumatisation[1].

We do however, support the introduction of a new compensation scheme for victims of terrorism at home and abroad as well as a scheme for families bereaved by homicide abroad. These victims are vulnerable and require support in making applications. These separate schemes will help with the grief and trauma that victims and their families will be experiencing at the time of application. We look forward to the opportunity to comment further when legislation is developed and there is information on how these schemes will operate.

In considering the consultation, APIL has responded to the consultation questions but has commented on other areas where we feel the Government should rethink its approach.

Q1. What in your view is the most appropriate language to use within the scheme to clarify the approach to those under the legal age of consent?

Prior to the release of the 2017 guidance on consent, CICS claims handlers were taking a rigid interpretation on consent in fact, which resulted in victims who had been groomed into thinking that they were in a committed relationship with their offender being unable to obtain an award through the scheme. Since the guidance in 2017, there has been no anecdotal evidence of cases being refused as a result of an issue around consent. This is positive progress. We believe that the Crown Prosecution Service's (CPS) common sense approach which is applied to underage factual consent should be adopted by the CICS.

Despite this improvement there are still numerous hurdles for victims of child abuse. It is unjust that there is no definition of grooming, and that compensation is not available/not significant enough for non-physical sexual abuse. Sometimes the most damaging abuse is the emotional, mental and psychological torture. Page 8 and 9 of this response further discuss the challenges which child sexual abuse cases encounter within the scheme. We believe that this is an area that should be revisited by Government.

[1] Compensation without re-traumatisation: The Victims' Commissioner's Review into Criminal Injuries Compensation January 2019 < https://s3-eu-west-2.amazonaws.com/victcomm2-prod-storage-119w3o4kq2z48/uploads/2019/01/VC-Criminal-Injuries-Compensation-Report-2019.pdf >

Q2. Do you agree with our proposal to legislate to establish a new compensation scheme for victims of terrorism at home and abroad?

APIL agrees that the MoJ should legislate to establish a new compensation scheme for victims of terrorism at home and abroad. It is our view that it is crucial that the scheme is separate from the current CICS. It must also be properly and separately funded in order to compensate victims fully for the harm and injury caused as a result of a terrorist attack.

Ensuring the scheme is standalone will ensure that certain categories of victims are not treated as a priority over other victims of crime.

Q3. If so, what are your views about ways in which a dedicated compensation scheme might differ from the Criminal Injuries Compensation Scheme and Victims of Overseas Terrorism Compensation Scheme?

There are currently no details on the separate scheme. We would like the opportunity to comment on the draft details. It is important that we are able to better understand how the terrorism scheme would differ from the CICS and the Victims of Overseas Terrorism Compensation Scheme. Until we are able to consider that information it is difficult to provide more detailed comments.

It is important however to ensure that the definition of a 'terrorist incident' is wide enough to ensure that those who have been affected by a terrorist incident have sufficient access to the scheme and are able to claim compensation for the harm or injury they have sustained.

Q4. What are your views on legislating to establish provision for compensation for families bereaved by homicide abroad?

APIL welcomes legislation to establish provision for compensation for families bereaved by homicide abroad. In considering our departure from the European Union, it is important that those who have lost loved ones abroad have a scheme to apply to. This will also help those who would have to struggle with the complexity of applying for compensation through different justice systems with language barriers.

We agree that state compensation in the country where the crime occurred can be complex and often cost prohibitive. By way of example the Portuguese Criminal injuries Compensation Scheme requires those claiming from the scheme to complete the forms in Portuguese and have the evidence translated into Portuguese, resulting in additional distress and cost for families in already distressing circumstances. Other European schemes present the same complications with limited or no assistance in pursuing a claim. Our members have informed us of claimants being forced to abandon the process of claiming for compensation abroad due to the cost to pursue their claim outweighing the award in which they would receive. Establishing this provision will therefore give bereaved families the support they need and compensation to acknowledge their loss without the complexity of navigating different justice systems and language barriers.

It is also important that this provision is funded properly. If this is to be a separate scheme, separate and proper funding is required to ensure bereaved families are able to access the scheme and obtain full compensation for the loss of a loved one abroad. On the other hand, if it is to be included within the current scheme, further funding would be required to continue

to compensate those who are already eligible for the scheme in addition to families bereaved by homicide abroad.

Q5. Do you agree with our proposal to remove the remaining 'same roof' rule, which applies to adults, from the scheme?

APIL agrees with the proposal to remove the remaining 'same roof' rule from the scheme. However, it is apparent that following the finding of the unlawfulness of the previous "same roof rule" and the amendments made to the 2012 Scheme, only a limited number of applications have been made as permitted under the amended scheme. This is despite the MOJ's own estimates as to the likely number of victims affected by the unlawfulness. We recommend that any new Scheme should extend the time by which victims of historic abuse who were affected by the "same roof rule", are entitled to make an application. We also suggest that further publicity is required in order to raise awareness of the changes and the possibility of bringing an application.

Q6. What are your views on revising the dividing line of mental injury from 2 to 3 years?

We do not agree with the proposal to revise the dividing line from 2 to 3 years. The paper does not sufficiently justify why this is required; it simply states that it will ensure consistency. What the paper does not address and what is apparent from the document is that by amending this bracket, those claimants whose injury falls within the 2 to 3 year bracket will lose out on compensation. By way of example, currently under the scheme a disabling mental injury lasting between 28 weeks and 2 years attracts an award of £2,400. An injury lasting between 2 years and 5 years £6,200. Under the new proposal those with an injury lasting up to 3 years will only attract compensation of £2,000. In our opinion, this can only be perceived to be an attempt to save money.

Q7. What are your views on merging bands A7 and A9, which combined with the proposal outlines in Q6, would mean any disabling mental injury with a prognosis for recovery of over 3 years would be categorised together?

Merging bands A7 and A9 would mean that individuals who would have previously been entitled to £13,500 under the CICS will now only be entitled to £8,000. As the figures stand, the merging of bands A7 and A9 may further undervalue mental health compared to a physical brain injury. The majority of victims of crime suffer some damage to their mental health. It is only in comparatively recent times that the impact of damage to mental health in the community has begun to be recognised by the Government. Anything that downgrades the value put on such damage is to be avoided. Mental health can have a detrimental effect on an individual's life in relation to work, relationships and pastimes and can be devastating. Overall, the CICS undervalues mental injury and does not reflect the impact that mental illness has. Merging bands A7 and A9 will only further undervalue mental illness/injury.

Q8. What are your views on the proposed approaches to Part A? (Please give reasons)

a) Simplification of language

APIL welcomes the simplification of language in Part A to ensure that those accessing the CICS without legal representation understand what each band constitutes.

b) Changing the language for injury severity

APIL is concerned with the proposal to use the word "moderate" and other similar labels such as "serious" or "severe". Continuing to use such terminology may cause potential oversimplification resulting in injuries being downgraded to moderate. A "broad brush approach" gives rise to the possibility of an unrepresented applicant not having the skills or understanding to appreciate that an award falls within a more serious bracket. This is something that our members have experienced happening. In many cases unrepresented individuals applying for compensation are not given sufficient information regarding the reasoning behind the award given. It is also not standard practice for applicants to be provided with the evidence or materials upon which a decision, as to the level of their award, has been made. Any further simplification will compound this difficulty. There should be transparent justification of the categorisation of injury to ensure that claims handlers are assessing injuries properly and showing that they have analysed all information to make their decision. Further training for claims handlers would ensure that they have sufficient knowledge to categorise injuries properly and give sufficient justification for the award they have given.

c) Reducing the number of bands

Rather than reducing the number of bands, training claims handlers to understand the bands would be more effective.

d) Grouping some injuries together where appropriate

APIL has no comment on this.

e) Overhauling the way brain injury is represented

Brain injury is exceptionally complex. This has been recognised by the all-Party Parliamentary Group for Acquired Brain Injury. APIL has its own brain injury specialist kite mark recognising the complexity within this field. Within the CICS, brain injury should be assessed by a specially trained team, claims handlers should also be required to undertake training on brain injuries and the affects they can have on people's lives. The Government states that the purpose of the scheme is to compensate the most seriously injured. Individuals who have sustained a brain injury are particularly vulnerable and their cases should be handled properly and with care. Many of those with brain injuries that have legal capacity are incapable of dealing with their application and the process appropriately. There is a requirement in cases where there is a lack of capacity for a Court of Protection Deputy to be appointed in order to make an application[2]. A specialist team is therefore required to identify such cases and to give more guidance. There should also be a requirement to ensure that these individuals are legally represented.

Evidence gathering in brain injury cases should be reassessed. The present method of simple provision of GP records will not often adequately identify the extent of the damage and short form pro-forma documents to consultants are wholly inadequate due to the lack of information included. Given the extent of the injuries in question, full reporting and information by the medical professionals involved is imperative in order to properly assess any tariff award and consequential further heads of award. Our members report that clients suffering moderate brain injury often do not have their case fairly assessed by claims

[2] PJV v Newcastle City Council and CICA [2015 and 2016] EWCOP 87 and 6

handlers until the case is appealed. At that stage, the CICA often agree that a specialist medical report is required. This is of significant concern where applicants are unrepresented and unfamiliar with the process. One member has had four cases in the past six months where the applicants have been significantly under compensated. One case saw a 4,084% increase from initial offer to appeal offer as a result of obtaining the correct medical evidence to assess the injuries adequately[3].

APIL is also concerned that under the current scheme there is no category for brain injury between up to six months and permanent. Currently, if an individual has sustained a minor head injury for less than 6 months, they will attract an award. However, if it continues beyond this point but is not permanent, then it does not attract an award. This is an area within the current scheme that needs looking at.

Q9. What are your views on the proposed approaches to Part B? (Please give reasons)

a) Moving the fatal injury award – potentially to the main body of the scheme

APIL welcomes moving the fatal injury award to the main body of the scheme as it would better follow the structure of the scheme.

b) Simplifying injury descriptions

Descriptions of the categories of sexual and physical abuse should not be unnecessarily complicated and should be simplified to ensure that an unrepresented individual could navigate the categories.

c) Removing distinctions under physical abuse and sexual abuse

APIL has no issue with removing the distinctions under the physical abuse and sexual abuse categories, however there should not be any reduction in the amount of award given. APIL highlights the necessity for great care to be taken when assessing applications involving sexual abuse. These cases should not be inadvertently fast-tracked to awards relating to the offence concerned. The mental health consequences of the crime must firstly be fully assessed.

d) Increasing awards for mental injury

APIL supports increasing awards for mental injury because the current scheme undervalues mental injury (see above). The awards should reflect the ongoing impact that mental injury has on an individual's life.

Q10. What are your views on the proposed change to the bereavement award available under the scheme?

APIL has a long history of campaigning for the reform of bereavement damages in England and Wales. We believe that the law should recognise that each bereaved person should be treated individually and that the award for compensation considered on a case-by-case basis, with personal circumstances and relationships considered. Losing a relative due to a deliberate criminal act is just as traumatic as a death that occurs because of negligence.

[3] See Appendix 1 data from one APIL firm's cases over a six-month period

Whist we believe that significant reform is required to the civil system in England and Wales to bring it in line with the Scottish system, we recognise that the CICS is a fund of last resort.

We are therefore pleased that the scheme finally acknowledges that where there are multiple family members entitled to a bereavement award, they will each receive the same award. Reducing the award by £3,000 per applicant is an affront to those who have lost a loved one. Doing this suggests that where there are multiple applicants their loss is somehow less traumatic because there are multiple family members affected.

Q11. What are your views on the proposal to change the approach to funeral payments within the scheme, introducing a new single payment of £4,500?

APIL welcomes the increase in the current funeral payment under the CICS to £4,500.

Q12. What are your views on the proposal to the scheme as to how a single funeral payment can be made?

APIL has supported the proposal within the consultation, however it is crucial that funeral payments should be fast tracked to whomever it is to be paid. This will ensure that families are not distressed further by worrying about invoices being settled.

Q13. What are your views on proposals to change how victims access the hardship fund by either:

a) **Changing the referral route to allow local victim support services to assess eligibility and make referrals in the regions where Victim Support is no longer present; OR**
b) **Removing the referral mechanism to allow victims to make applications directly to the CICA?**

The Hardship Fund established in 2012 is in need of a fundamental review. It was introduced in recognition that the then Government had decided to remove the five lowest tariff bandings within the CICS. A limited sum of £500,000 was made available in the fund but the qualifying criteria were very restrictive. The accessibility and timescales made it difficult to obtain a payment. Furthermore, the reorganisation of victims' services, their funding and the removal of Victim Support through whom access was to be obtained, has made the Hardship Fund even more inaccessible. The question arises as to whether there should be a fund, what its purpose should be and how access might be obtained.

Q14. What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform? Please give reasons

Q15. Do you agree that we have correctly identified the range and extent of the equalities impact under each of these proposals set out in the consultation? Please give reasons and supply evidence of further equalities impacts as appropriateQ16. Are there forms of mitigation in relation to equalities impacts that we have not considered?

APIL is concerned that the conclusions drawn in the equalities impacts have not considered all the data available and as a result some of the conclusions may be misleading. Paragraph 14 of the consultation records a 95% satisfaction rate from the analysis of the claims data from 1st January 2016 to 1st January 2019. However, no indication is given of the percentage of total users represented in the sample. Furthermore, the sample appears to relate only to first instance decisions made by the CICA. Without also analysing decisions that were subject to Review and Appeal, the data does not provide the full picture of the impact on users who have protected characteristics. By definition, applicants who have suffered injuries which have resulted in disability, including to their mental health, are likely to be in a vulnerable or protected group.

On equalities within the CICS generally, it is crucial that due to the vulnerability and disabilities of those accessing the scheme, the CICS must be user-friendly and accessible, especially for those looking to apply to the scheme without legal representation. It is also critical that CICS claims handlers are able to help those who have limited or no capacity to ensure their access to justice. See above in relation to brain injury.

APIL observes that by reference to the number of measured violent crimes identified by the consultation at paragraphs 51 to 61 it is of concern that in 2018-2019 only 31,000 applications were made, falling from historical figures that have been nearer to 80,000. APIL further expresses its concern that in the three year period of the sample including approximately 75,000 applications, not one award was made in brackets A14 to A19 reflecting greater severity of injury. That raises questions as to whether the failure to include Review and Appeal outcomes has distorted the picture. It is difficult to see how victims with protected characteristics would not have qualified for an award within those brackets.

APIL is concerned about the number of applications which fail because of the death of the victim before completion of the application under the terms of the scheme[4] and recommends that steps are taken to identify and protect applicants who are vulnerable and affected by these provisions. APIL questions whether it is fair that in such circumstances the claim should effectively “die” with the applicant in circumstances in which they leave dependents.

Q17. Do you have any further comments on the scheme?

APIL is disappointed that a number of elements of the scheme are not being consulted on.

Crime of violence definition

Firstly, the definition of ‘crime of violence’ is problematic and disproportionately excludes individuals from claiming through the scheme due to the inclusion of the word ‘violence’. Although “violence” has historically been a component part of the Scheme, it does not mean that it should not be removed. Crime can cause harm and injury to individuals without the presence of pure violence in the traditional sense. In relation to sexual offences, “violence” maintains the archaic view that strangers carry out a physical attack on a victim. Often in sexual offence cases, the attacker is known to the individual and there is no presence of violence per se. In cases of child sexual offences, manipulation and control are denominating factors which also do not necessarily constitute violence. In addition, the nature of grooming children and young people, leads to consent in fact and does not necessarily include violence, but is a criminal act which causes harm and potential injury.

[4] Criminal Injuries Compensation Scheme Review 2020, consultation document p 61 para 229

Cases of stalking also do not have a violent nature, but can cause significant harm to the victim.

It is further our view that to constitute a crime causing harm, recklessness should be accepted as being sufficient to found a qualifying crime, as has been the case in earlier schemes. Since 2012, animal attacks for example do not fall within the definition unless an owner intentionally uses or causes their animal to attack an individual and the harm and/or injuries which may be sustained through these attacks can be devastating. Warnings were given prior to 2012 about the unintended consequences of this change. The consequences have come to pass with cases involving attacks on young children and elderly people having been reported, some of which resulted in fatalities. These incidents would not now qualify for an award. There are also cases where pedestrians have been injured or killed by cyclists and as a result there has been a criminal conviction, however due to the lack of traditional "violence", the individuals do not qualify for the scheme.

Another example includes individuals who have sustained injuries in utero such as foetal alcohol syndrome or cases of drug abuse by pregnant women. The CICA had historically accepted these as qualifying crimes and made awards, however due to a change in policy, they have refused to continue to do so. This has resulted in a perception of unfairness with some damaged children having received awards and others not. Furthermore, children stabbed and harmed in utero have received awards after they have been born but others harmed by substances have not. The inconsistency regarding whether the crime arises as a result of recklessness rather than violence which as a result has caused harm or injury, creates a perception of unfairness to innocent children.

Case study

Victim is a seven-year-old boy who was born with significant injuries as a result of his father kicking his mother when she was 7 months pregnant with him. She was kicked so hard that her waters broke and the baby was born prematurely. When he was born, the victim also had injuries consistent with the assault.

His claim was refused at first, even though the CICA had police information that the father has been charged with assault on the victim and all the information required. An award was then offered at review without any further information.

In order to ensure that these victims of crime have access to the scheme, the 'violent' element of the definition should be removed. This would be a positive step to ensuring victims of crime are able to access justice after suffering harm or injury. APIL strongly suggests that the definition of crime of violence is re-assessed as it disproportionately impacts upon individuals who should be entitled to access the scheme for crimes committed against them but are currently unable to do so due to the narrow definition.

Child sexual abuse cases

Although the consultation suggests the CICS works well for victims of child sexual abuse, in practice it is a different story. Often for these victims, reporting to the police initially is challenging due to the nature of their relationship with their abuser and fear of not being believed. Assisting and cooperating with the police in their investigation is equally challenging as it is often extensive and require revisiting traumatic experiences, resulting in individuals not wanting to proceed with prosecution or facing their abuser. These survivors usually claim for the mental health award which also takes more time. This lengthy process

further distresses survivors of sexual abuse in addition to the requirement to obtain formal diagnosis from a psychiatrist or psychologist, which sometimes results in no diagnosis against which they can claim against the scheme,

The Independent Inquiry into Child Sexual Abuse (IICSA) disagrees with the fact the scheme is working for these victims. Often victims and survivors of child sexual abuse are completely unaware that the CICS exists and that this is something which they can access without a criminal conviction[5]. Within the IICSA report, they highlight the lack of publicity and signposting by the police of the CICS and the right to access it. Survivors of child sexual abuse have stated that the process is very disengaged to their traumatic experiences, some of the questions can be challenging to answer or understand[6] and there is a lack of support in completing the forms[7].

It is often challenging for those who have suffered historical child sexual abuse to bring successful claims due to the incident(s) being non-recent which may impact the evidence and in turn the decision made by the claims officer[8]. This is made more challenging by the subjective nature of the balance of probability test which is the basis of the decision-making process[9].

Child sexual abuse victims are continually being penalised by not being awarded compensation or having their compensation reduced due to their criminal convictions which were in fact a direct result of the abuse they experienced[10]. The IICSA report highlighted that in one case, the criminal convictions of the survivor were as a result of them stealing jewellery in order to survive after running away from the abuse he experienced whilst in care. This resulted in compensation through the CICS being reduced by half[11]. This clearly demonstrates how the CICS disproportionately and unfairly discriminates against these individuals.

In light of the above, although the CICA seem to believe the current system works well for survivors of abuse, it remains challenging for victims and survivors to access. It is also challenging for these individuals to initially muster the courage to put themselves and their claim under investigation, despite the additional barriers of the scheme.

Two year time limit

The two year time limit of the scheme prevents severely injured people from accessing compensation from the scheme for their injuries. The ability for claims handlers to use their discretion to allow a claim after the two year time limit in exceptional circumstances makes the scheme inconsistent and unpredictable. It is unfair and unreliable to rely on potentially unfavourable discretions, especially in circumstances in which unrepresented applicants may not fully understand the issues, some of which might be complex or be subject to legal interpretation.

[5] Accountability and Reparations Investigation Report (Independent Inquiry Child Sexual Abuse (IICSA) September 2019) p 70
[6] IICSA (n 1) p 74
[7] IICSA (n 1) p 75
[8] IICSA (n 1) p 75-76
[9] IICSA (n 1) p 76
[10] IICSA (n 1) p 77-78
[11] IICSA (n 1) p 78

Firstly, people are unaware of the scheme and the consultation itself acknowledges this[12]. Many become aware of it only after the time limit has passed and some have never heard of it. The lack of awareness of the scheme by local charities, the lack of knowledge and education itself and support from the police also contribute to impeding access to justice for those entitled to claim.

Secondly, there are practical concerns with the time limit because delays in the criminal justice system. These have recently been made worse by the Covid-19 pandemic and subsequent court closures, resulting in some cases taking longer than two years from the police involvement to conclude. Often the police advise and request the victims of crime to await the outcome of criminal proceedings prior to applying for compensation through the scheme because of likely defence cross examination based on compensation seeking arguments which undermines the prosecution's case. This is problematic because those that are entitled to apply under scheme have the right to do so, but law-abiding members of the public often do not wish to be perceived as contradicting police advice and will therefore not apply. This results in injured individuals missing out on the compensation which they deserve.

In order to ensure people are able to access the scheme, the two-year time limit should be extended to ensure those that suffer significant trauma and have difficulty in discussing their experiences can access the scheme. The period should be extended to at least three years from the date of the incident or reporting, ensuring that those who have found it difficult to report, such as victims and survivors of domestic or child abuse, are able to access the scheme. This would allow individuals to seek compensation regardless of whether the perpetrator has been convicted of the crime and also takes into account the delay in cases reaching trial for those involving prosecutions.

As highlighted by the Victims Commissioner there is also a serious problem with lack of awareness about the scheme and publicity for it. This is a longstanding problem and it is implicit in the consultation document that this is recognised. Consequently, APIL proposes that if the primary time limit is increased to three years, that could be reviewed after a suitable period of time following a publicity, education and profile-raising campaign.

Unspent convictions

The purpose of compensation under the scheme is to acknowledge harm or injury caused to an individual as a result of a crime committed against them. Previous or unspent convictions should not be the reason why a severely injured individual is unable to obtain compensation to help to put them back in a position they would have been if their injuries/harm had not occurred. Denying these individuals is significantly flawed because the scheme does not take into consideration the reason or circumstances for the previous or unspent convictions.

Case study

The 25-year-old female client was sexually abused by her father as a child. Her claim was initially refused on eligibility as she had a mental breakdown, attempted suicide and was hospitalised as a result. She was advised that continuing with the case would further affect her mental health and perhaps she would not be fit enough in any event to attend a hearing

[12] Compensation without re-traumatisation: The Victims' Commissioner's Review into Criminal Injuries Compensation January 2019 < https://s3-eu-west-2.amazonaws.com/victcomm2-prod-storage-119w3o4kq2z48/uploads/2019/01/VC-Criminal-Injuries-Compensation-Report-2019.pdf > p 10 - 11

in relation to her claim. The case went to appeal and the tribunal found that she was entitled to an award. The CICA's initial decision after appeal was to offer an award of £43,000.

The victim became unwell and whilst in hospital, threatened to kill herself with an envelope opener. The hospital subsequently called the police and she was convicted of possession of a knife. As a result of this conviction, she was then refused compensation. She was sectioned shortly afterwards and was hospitalised for over six months.

Many respondents to the MoJ's Getting it Right for Victims and Witnesses 2012 Consultation Paper, including the then principle Judge of the Criminal Injuries Compensation Appeals Panel, warned of the unintended consequences and likely unfairness of blanket changes removing discretion in the case of certain types of crime. A problem now experienced by our members on many occasions.

Often, people that fall into crime have had a challenging past, for example going through the care system, having experienced abuse, or having grown up in a deprived area. The fact that they go on to commit crimes themselves is often "without fault". There is particular concern regarding victims of sexual abuse who are disproportionately affected by this. These victims may turn to drugs or alcohol to cope with the trauma of the violence inflicted on them and in order to fund the habit that gives them release, they may also become involved in theft. These victims also often go on to abuse others. There are fundamental challenges in penalising sexual abuse victims because but for their abuse, they may never have turned to criminal activities themselves.

One example of this is Sammy's Law. Samantha Woodhouse was abused by a gang in Rotherham as a teenager and was forced to commit criminal offences as a result. As it stands, Sammy has criminal convictions which were a direct result of her abuse which are unfairly part of her record. Sammy's Law is an attempt to change the law for victims of abuse and grooming to enable them to move on and rebuild their lives without their criminal pasts impacting their future. Crimes committed during abuse do not define that individual as a criminal, because they may not have committed any crime if the abuse and coercion had not occurred.

Brain damage is another area in which a person of previous good standing can become an entirely different personality with totally changed characteristics which cause them to commit crimes. It would be regarded by many to be unfair that the life changing injury that rendered these changes then becomes responsible for them being refused full and fair compensation.

Case study

A 17-year-old male victim with exemplary character was attacked and suffered brain injury. His CICS application was submitted. His personality completely changed as a result of his injury and he became easily led.

The victim's friend went to his mother's house as she had called him regarding her boyfriend hitting her. The victim went with his friend and both entered the house. His friend seriously assaulted his mother's boyfriend and the victim pushed another individual and was told to sit down when he attempted to intervene.

The victim had been disturbed by what he had seen and so told his mother. His mother took him to the police to tell them what took place and the victim and his friend were convicted. The CICS claim was refused on the basis of his conviction. In view of the extent of the brain

damage in a 17-year-old, his claim would have been expected to attract the maximum award.

Police reporting requirement

Although reporting to the police may be administratively beneficial in terms of ease, the scheme ought to be about justice rather than administration and this requirement impedes access to justice for victims of crime. Victims may be ineligible to claim for compensation through the scheme if they do not report the incident to the police as soon as practicable or if they fail to co-operate with the police in their investigation into the crime. This again disproportionately impacts certain individuals such as those subjected to domestic violence or child abuse who have genuine fear as a result of their victimisation and potentially continued victimisation. Often with abuse victims, they fail to report due to the fear of not being believed, being blamed for their victimisation and/or the fear of further abuse as a result of reporting.

Domestic violence is on the rise as a result of the Covid-19 pandemic. A domestic violence call was made to the police every 30 seconds in the first seven weeks of lockdown[13], with a suspected 16 deaths as a result of domestic violence within the first three weeks of lockdown[14]. In addition, over two-thirds of women reported to the Women's Aid Survey in April 2020 that domestic abuse had become worse through lockdown[15] and the demand for the Men's Advice Line had increased by up to 60% between April and July 2020 compared to the same time the previous year[16]. Police reporting and the cooperation of domestic abuse victims in police investigations will continue to be an issue, potentially resulting in these victims being unable to obtain an award through the CICS. This should be reviewed in order to support such vulnerable victims in accessing compensation for their victimisation.

The victims of crime that want to claim for compensation through the scheme are often the most vulnerable in society. Discriminating against these victims fails to protect them. It would be immoral to turn such vulnerable people away after they have finally gained the courage to report their abuse and would result in a further sense of mistrust in the system.

Schemes before 2012 all permitted injured victims to fulfil the reporting requirements to other responsible people. They might have been a doctor, teacher, social worker, minister of religion etc. This was sufficiently successful. One of the biggest single causes of delay in the current administration of the scheme, which is understood to be a source of frustration and expense to the CICA itself as well as to applicants, is the extensive delays caused by waiting for and chasing police authorities for information. This can sometimes take many months. This problem would be avoided by changing the reporting requirements.

Those who are severely injured and are hospitalised due to their victimisation may assume that the hospital reports the incident to the police. If this assumption isn't made, they may be

[13] Metro, Darcy Jimenez, 'One domestic abuse call was made every 30 seconds at the start of lockdown' 17 August 2020 < https://metro.co.uk/2020/08/17/one-domestic-abuse-call-was-made-every-30-seconds-start-lockdown-13138690/ >
[14] The Guardian, Jamie Grierson 'Domestic abuse killings 'more than double' amid Covid-19 lockdown' 15 April 2020 < https://www.theguardian.com/society/2020/apr/15/domestic-abuse-killings-more-than-double-amid-covid-19-lockdown >
[15] Women's Aid Annual Survey 2020 < https://www.womensaid.org.uk/womens-aid-annual-survey-2020/ >
[16] BBC News 'Male domestic abuse victims sleeping in cars and tents' 24 September 2020 < https://www.bbc.co.uk/news/uk-england-54237409 >

unable to report the incident immediately which will result in them being unfairly excluded from the scheme.

In addition, the Criminal Injuries Compensation Authority and the scheme are not well known to the public. Without having knowledge of the requirements of the scheme at the time they sustained their injuries, they will be unable to access the scheme. The scheme itself and the requirements to be entitled to access the scheme must be publicised to ensure those that are severely injured as a result of criminal activity are able to access the scheme[17].

Diagnosis and prognosis requirement

This requirement disproportionately affects those with mental health issues as a result of traumatic experiences. The obligation to have seen a clinical psychologist or psychiatrist brings additional distress to those already suffering as a result of their victimisation. Access to medical professionals from these disciplines through either primary or hospital services is notoriously difficult to achieve due to lack of resources, budget or unwillingness to refer, possibly due to lack of insight or education by non-specialist GPs. If it becomes necessary, paying for a report from a psychiatrist or psychologist also creates additional distress and further pressure on victims of crime, especially if a diagnosis is not found.

APIL is concerned that the clinical psychologists and psychiatrists are “in-house”. The fact that they are employed by the CICA suggests the potential for and a perception of a conflict of interest. For example, if an insurance company employed their own psychiatrist, the outcome of the examination of the victim would not be accepted by the civil courts due to a conflict of interest. More worryingly APIL is also concerned that the in-house clinicians are recommending the amount of tariff awards to claims handlers rather than making objective and independent assessments of an applicant’s condition and prognosis. Recommending tariff awards is clearly not part of their role within their job description. This will profoundly impact the outcome of an individual’s claim for compensation under the scheme. It would be a fairer process if external independent medical evidence was obtained from a psychiatrist or psychologist to ensure that the assessment is objective and there is no potential conflict present. It should be sufficient for diagnoses and prognoses to be obtained separately from the CICA. The inability to do so can cause delays and be detrimental to a Claimant’s application.

Case study

A young female victim with psychological damage. This damage was well documented in GP records. A subject access request was made which showed a disclosed document from an in-house psychologist. The document makes clear that they specify in their report what the award/tariff should be for the case rather than a pure impartial analysis of the condition and prognosis of the injury. The report clearly also minimised the events in the GP records of the victim having treatment for over 10 years.

It is within the role description of the in-house psychologists to consult with the applicant or their treating medical professionals to have a better understanding of the applicant’s condition. APIL is not aware of this having happened in any individual case since their

[17] Compensation without re-traumatisation: The Victims’ Commissioner’s Review into Criminal Injuries Compensation January 2019 < https://s3-eu-west-2.amazonaws.com/victcomm2-prod-storage-119w3o4kq2z48/uploads/2019/01/VC-Criminal-Injuries-Compensation-Report-2019.pdf > p 10 -11

appointment. APIL proposes the removal of this criterion in relation to awards for mental health injury and its replacement with a recognition that evidence from other medical professionals and complementary therapists and practitioners should be accepted when assessing the extent of mental health damage. This was the view shared unanimously by all who attended pre-consultation focus groups. It will also be more cost effective and save time.

Loss of Earnings

The introduction of the cap on loss of earnings payments has resulted in further suffering for those who have been seriously injured as a result of crime, due to not having sufficient income to support themselves and their families. This exposes seriously injured individuals to financial hardship and further struggle, despite the purpose of the scheme being to protect these individuals. This has significantly affected not just those who had previously been higher income earners and but also young people at the outset of their career. This is subjects seriously injured people to even more challenging circumstances. Whilst there had always been some upper limits on claims for loss of earnings, by definition the greatest impact was felt by those who have suffered the most serious injury. A combination of the tightening of the qualifying criteria and the amounts paid by reference to Statutory Sick Pay have had a significant effect on seriously injured victims. It did not fit with the Government's stated intention at the time of trying to support the most seriously injured and it does not now.

An additional issue that our members commonly see in sexual abuse cases is that the CICA do not award loss of earnings unless they are challenged through the appeals process. When appealed, the judge orders a report in most cases which substantiates the loss of earnings claim and in some instances a claim for care. Once this happens, the CICA substantially revises their offer. One specific example provided by one of our members shows that the biggest increase can be as much as 2,064% from initial offer to appeal offer[18].

APIL notes that there is no similar limit Under the Northern Ireland Criminal Injuries Compensation Scheme 2009 (as amended) and indeed this means that there is no £500,000 upper limit [19].

Deductions

APIL deems it unfair that court ordered compensation is mandatorily deducted from any award to the victim through the CICS. These court ordered compensations are often not paid by the offender. Data shows that in 2018, defendants were ordered to pay £39 million under criminal compensation orders, of which only 47 per cent was paid within 18 months of the order being made[20]. This was down from 51 per cent in 2017 and 64 per cent in 2016[21]. This

[18] See Appendix 2 data from one APIL firm based on 14 cases settled
[19] The Northern Ireland Criminal Injuries Compensation (amended 2020) Scheme 2009 <https://www.justice-ni.gov.uk/sites/default/files/publications/doj/ni-criminal-injuries-amendment-2020.pdf > p 9 and p 11-12
[20] Ministry of Justice, *Criminal court statistics quarterly: April to June 2020*, September 2020, https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-april-to-june-2020

[21] Ibid.

shows that victims will miss out on compensation which has been decided that they are fairly entitled to for their injuries. This deduction often comes as a disappointment to a victim who has had to wait for a considerable length of time for an award. Furthermore, the suggestion that the victim must look to the offender to "make up the difference" and it is their responsibility to obtain it from them is distressing to the victim and simply re-traumatises them, a problem highlighted by the Victim's Commissioner.

Trusts

This was another issue highlighted by the Victim's Commissioner and has a significant impact on high value awards - the restrictive terms for future Special Expenses. The scheme currently limits the ability to use the award in certain circumstances. This prevents injured people exercising their freedom of choice by utilising their award in a way that would improve their quality of life, for example purchasing a property or investing in a mode of transport that would benefit them in the long term. Considering the trauma and life-changing injuries that may have been sustained as a result of a crime committed against them, it is unfair to deny injured people of their right to use their award to benefit themselves and prevent potentially life-changing investments. It has a particular impact in cases where a victim has lost mental capacity and their award is already under the control of the Court of Protection. It also causes major duplication of cost and expense. Victims wish to have the freedom to make their own choices as to how to improve their lives.

Case study

A female victim was sexually and physically abused by her father as a child. After a protracted claims process, taking many years and resulting in an appeal to the CICA tribunal, an award was made for close to maximum under the Scheme.

The CICA then insisted on the whole of the part of the award for future care being placed into a restricted trust where the victim was not able to choose to use it for treatment she desperately needed or to purchase a property that she wanted to live in. During the course of the dispute with the CICA about the restrictive trust, the victim committed suicide at the age of 30.

Operational improvements

APIL strongly recommends further in-depth training and guidance for claims handlers dealing with the claims for compensation. From our members' experiences with the scheme, it seems that claims handlers do not have sufficient training to deal with complex injuries, such as brain injuries, which are all very different on a case-by-case basis.

It would also be beneficial to send the evidence to claimants justifying the award that has been made to them as a result of their injury. APIL would suggest that this is something that should be mandatory. We are aware of individuals who request further evidence on their award being informed by claims handlers that they are not obliged to provide that information. This should be common practice for the principle of national justice and to allow individuals to be fully informed prior to making a potential appeal.

APIL recommends that operational improvements should be looked at separately and we would welcome any invitation to comment further.

£500,000 cap on awards

APIL is disappointed that the £500,000 cap on awards is not a point being consulted on. The cap has not increased since 1996. When advising applicants on the extent of the scheme, this is something that they find most surprising. The cap can have a significant impact on the award made to those most seriously injured.

About APIL

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation which has worked for 30 years to help injured people gain the access to justice they need, and to which they are entitled. We have more than 3,000 members who are committed to supporting the association's aims, and all are signed up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives, paralegals and some academics.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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Appendix 1

Initial award offer	Award offer on review	Award offer on appeal
£9,800	£9,800	£410,000
£250,000	£268,000	£500,000
£270,000	£245,000	£476,000
£136,000	£245,000	£500,000

Average initial offer: £166,450

Average review offer: £191,950 (up 15% on average initial offer)

Average appeal offer: £471,500 (up 183% on average initial offer)

The biggest percentage increase between the initial offer and the review offer was 80%.

The biggest percentage increase between the initial offer and the appeal offer was 4,084%.

Appendix 2

Initial award offer	Award offer on review	Award offer on appeal
£57,000	£131,134	
£16,500	£219,000	
£16,500	£74,000	
£6,600	£88,000	
£63,000	£392,248	
£67,000	£48,000	£490,000
£0	£6,600	£129,000
£6,600	£6,600	£22,000
£150,000	£150,000	£500,000
£3,300	£10,000	£61,000
£22,000	£83,000	£476,000
£22,000	£22,000	£123,000
£11,000	£11,000	£235,000
£4,400	£4,400	£44,000

Average initial offer: £31,850

Average review offer: £88,999 (up 179% on average initial offer)

Average appeal offer: £231,111 (up 626% on average initial offer)

The biggest percentage increase between the initial offer and the review offer was 1,233%.
The biggest percentage increase between the initial offer and the appeal offer was 2,064%.

-Ends-