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Description automatically generated**Criminal Injuries Compensation Scheme Review**

**Supplementary consultation 2022**

**A response by the Association of Personal Injury Lawyers**

**June 2022**

**Introduction**

We welcome the opportunity to respond to the Ministry of Justice’s (MoJ’s) supplementary consultation on the review of the Criminal Injuries Compensation Scheme (CICS). We are pleased that this consultation is focused on the review of the unspent convictions rule, given that the previous consultation did not include any questions on this matter. We believe that the exclusionary part of the rule should be removed so that no claims are automatically rejected on the basis of a specified unspent conviction. It is crucial that claims are analysed on a case-by-case basis to reflect the merits of the claim and the factors that might have influenced an applicant’s criminal record.

APIL has responded to the consultation questions within our remit.

**1. What are your views about the exclusionary part of the rule being retained unchanged?**

We believe that retaining the rule as it is now, is unfair and does not reflect the purpose of the Scheme. The purpose of compensation under the Criminal Injuries Compensation Scheme (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. Automatically denying these individuals’ applications is significantly flawed because the Scheme does not take into consideration the reason or circumstances surrounding the unspent convictions.

In the schemes prior to 2012, the Criminal Injuries Compensation Authority (CICA) had discretion on a case-by-case basis to pay out awards for those with unspent convictions where there were exceptional reasons for an award not to be withheld or reduced. We believe that this provision avoided unfair results by looking at the circumstances and the factors that might have influenced the individual to commit the offence. The scheme as it stands unfairly discriminates against those who suffered abuse, and those who have suffered brain injuries, in particular, as demonstrated by the case studies below.

APIL is of the view that the exclusionary part of the rule should be removed, and there should be a return to discretion on a case by case basis. We believe that discretion for all claims in the schemes prior to 2012 allows for fairer results and guarantees access to justice. It cannot be right that an injured person is automatically rejected compensation due to an unspent conviction without a proper evaluation of their claim. 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 impact on justice of the change to the rule on unspent convictions and the likely unfairness and unjust results of blanket changes removing discretion in the case of certain types of crime. This is 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 circumstances of neglect and deprivation. The fact that they go on to commit crimes themselves may be “without fault”. There is particular concern regarding victims/survivors of sexual abuse who are disproportionately affected by this. Research highlights how some offending behaviours can be adopted (often indirectly) as a mechanism to cope with abuse, and even to escape it. For example, a study describes an account of a victim and survivor who began shoplifting in an attempt to get arrested to escape the person who was abusing him.[[1]](#footnote-1) Further, victims/survivors may also turn to drugs or alcohol to cope with the trauma of the violence inflicted on them and in order to fund the addiction that gives them release, they may also become involved in theft. Some victims and survivors of abuse go on to abuse others. There are fundamental challenges in penalising sexual abuse victims/survivors because but for their abuse, they may never have turned to crime. Crimes committed during abuse do not define that individual as a criminal, because they may not have committed any crime if the abuse, coercion, grooming had not occurred. Often with these sorts of relationships, the abuser grooms or coerces the child into committing petty crime as a way of then having hold over them. That then makes it more difficult for the child to disclose abuse as they themselves have become criminals – this is particularly the case with grooming gangs. Unfortunately, this is not uncommon, and our members do see situations where the abuse suffered by the victim/survivor influences their behaviour.

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 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 the 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.

Brain damage is another area in which a person of previous good standing can become entirely different 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. 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.

We are also concerned that the exclusionary part of the rule fails to consider grooming, exploitation, controlling and coercive behaviour that is experienced by victims/survivors of abuse. It can be a tactic not dissimilar to blackmail, used to silence victims and survivors. The individuals become scared of talking to their parents/police to report the abuse because of the crimes they themselves have committed. Such situations can be the reason behind the unspent conviction, it is common that victims are forced to offend by their exploiters and abusers. Thus, by automatically rejecting applications, the Scheme is penalising these victims/survivors for acts that were caused by the abuse that they suffered.

For all those reasons, we strongly believe that the exclusionary part of the rule must be removed and that there should be a return to the position that all claims are evaluated on their merits. The test in the Scheme (set out in the Criminal Injuries Compensation Act 1995) is the balance of probabilities and there is no reason why the discretion applicable to any issue arising under the Scheme should not apply, just as it did before 2012. That would include the impact of convictions, which ultimately should be within the judgement of an independent arbiter, the Tribunal.

**2. What are your views on the recommendation of the Independent Inquiry into Child Sexual Abuse that the unspent convictions rule be revised so that awards are not automatically rejected in circumstances where an applicant’s criminal conviction is likely to be linked to their child sexual abuse, and that each case be considered on its merits?**

We agree with the Independent Inquiry into Child Sexual Abuse that there should be discretion where an applicant’s criminal conviction is likely to be linked to their child sexual abuse. It is common that victims/survivors of abuse go on to commit crimes themselves as a mechanism to cope with abuse, and even to escape it.

The Independent Inquiry into Child Sexual Abuse’s report *The impacts of child sexual abuse: A rapid evidence assessment[[2]](#footnote-2)* reiterates that victims and survivors of child sexual abuse (CSA) may display a range of externalising behaviours during and after the experience of sexual abuse, and into adulthood. Victims and survivors may adopt certain behaviours in an effort to manage, suppress or gain temporary relief from the trauma and distress of the abuse. They have been found to be 1.4 times more likely to have contact with the police, and almost five times more likely to be charged with a criminal offence, than those who have not experienced CSA.[[3]](#footnote-3) It is also common that during the abuse, these externalising behaviours are a means of communicating that something is wrong and signalling a need for help.

Moreover, other circumstances may also have a significant influence on the likelihood of victims/survivors falling into crime. A publication by the Mayor of London Office for Policing and Crime *Reducing criminalisation of looked-after children and care leavers – A Protocol for London[[4]](#footnote-4)* found that care leavers and children in care continue to be disproportionately represented in prison.[[5]](#footnote-5) Studies suggest that at least one-quarter of the adult prison population has experienced care as a child. More than half of the children in prison are or have been in care and over half are from Black and minority ethnic backgrounds.[[6]](#footnote-6) Adverse childhood experiences and ongoing trauma experienced by individual children and young people may be contributing or causative factors to such offending behaviour. There is a complex interplay of factors which account for the criminalisation of children living in residential care. The children themselves will have suffered a range of disadvantages, trauma and vulnerability that potentially increase the likelihood of behaviour that might lead to police contact. Failings in the care system and in the care children receive can intensify, create and promote criminal behaviour as well as unnecessary recourse to the police.

We believe that the discretion should not only apply to those whose conviction is likely to be linked to previous abuse, however. There are other applicants, such as those who have suffered brain injuries (see our response to question 1), who will be unfairly prejudiced by the current exclusionary rule. All cases should be considered on their merit, and discretion should be applied to all cases.

**3. Do you consider that exemptions should be considered only for some applicants? If so, what should the basis of the exemptions be and when should discretion be available?**

We believe that there should not be an exception for any particular class of victims. It is unfair and discriminatory that certain victims are put in a better position than others. Discretion should be available in all cases. For instance, it would not be fair and reasonable that a victim of brain injury is automatically excluded from compensation due to an unspent conviction, while a claim by a victim/survivor of sexual abuse is considered based on discretion. Having different rules for different classes would be discriminatory.

**4. What are your views about any exemption and guidance on exercising discretion being set out in the Scheme?**

As set out above, we do not believe that there should be any exemptions based on unspent convictions. There should be a return to discretion on a case-by-case basis, as to whether a claim can be brought where there is an unspent conviction. We believe that nothing should be written into the scheme leaving it open to interpretation by an Independent Tribunal. A Tribunal comprises a balanced panel of three members. Their decision is also subject to legal challenge through the judicial review process. In our view, that is the only way in which discretion will be truly available to the applicant. There is a need to rebuild public confidence in the Scheme, particularly around this aspect of the provisions. It is an area that has continually attracted widespread adverse publicity over the years because of the perceived unfairness of decisions under the current rules. Guidance on exercising discretion would be welcomed, to ensure that the discretion is being exercised correctly. We would welcome the opportunity to help develop this guidance.

**5. What are your views on amending the exclusionary part of the rule to reduce the number of claims that would be automatically rejected on the basis of a specified unspent conviction?**

We do not believe that amending the exclusionary part of the rule would assist in dealing with the unfairness created by the current scheme. As set out above, the exclusionary part of the rule should be removed, and there should be discretion in all cases to allow a claim to proceed where there is an unspent conviction.

**6. What are your views about guidance on exercising discretion being set out in the**

**Scheme?**

Please see our response to question 4.

**7. What are your views about removing the exclusionary part of the rule?**

We strongly believe that the exclusionary part of the rule must be removed and that there should be a return to the position that all claims are evaluated on their merits. We refer to our response to question 1, above.

**8. What are your views about defining in the Scheme how discretion should be exercised?**

We do not believe that discretion should be defined within the Scheme. Discretion should be open ultimately to an independent Tribunal. See question 4.

As we have said above, we are open to the CICA devising and publishing its own policy and guidance just as it has done in the past. Working in such a way will ensure that there are adequate considerations of the injured individuals’ own circumstances. Whilst we recognise that the policy has always been to try to remove discretion, where possible for ease of administration, our view is that the overriding objective should be about fairness and justice to injured victims of crime, many of whom have suffered life-changing injuries.

1. Nelson, S. (2009) *Care and Support Needs of Men who Survived Childhood Sexual Abuse: Report of a qualitative research project* The University of Edinburgh [↑](#footnote-ref-1)
2. <https://www.iicsa.org.uk/reports-recommendations/publications/research/impacts-csa> [↑](#footnote-ref-2)
3. Cutajar, M. C., Mullen, P. E., Ogloff, J. R. P., Thomas, S. D., Wells, D. L., and Spataro, J. (2010) *Psychopathology in a large cohort of sexually abused children followed up to 43 years. Child Abuse & Neglect* [↑](#footnote-ref-3)
4. <https://www.london.gov.uk/sites/default/files/reducing_criminalisation_of_looked_after_children_and_care_leavers-_a_protocol_for_london.pdf> [↑](#footnote-ref-4)
5. . Williams, K. et al (2012) Prisoners’ childhood and family backgrounds Results from the Surveying Prisoner Crime Reduction (SPCR) longitudinal cohort study of prisoners. London: Ministry of Justice [↑](#footnote-ref-5)
6. HM Inspectorate of Prisons (2020) Children in Custody 2018–19 An analysis of 12–18-year-olds’ perceptions of their experiences in secure training centres and young offender institutions. London: HMIP [↑](#footnote-ref-6)