

NORTHERN IRELAND OFFICE CONSULTATION

CRIMINAL INJURIES COMPENSATION (NI) ORDER 2001

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

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The executive committee would like to acknowledge the assistance of the following people who contributed to the preparation of this response:

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1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents more than 4800 solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. The aims of the association are:
 - To promote full and prompt compensation for all types of personal injury;
 - To improve access to our legal system by all means including education, the exchange of information and the enhancement of law reform;
 - To alert the public to dangers in society such as harmful products and dangerous drugs;
 - To provide a communication network exchanging views formally and informally.

2. We have 110 members in Northern Ireland and over decades of civil unrest many of them have developed expertise in representing the victims of criminal injury in their pursuit of compensation. In summary, we are opposed in principle to the draft Criminal Injuries Compensation (NI) Order 2001 and the introduction of a fixed tariff scheme. The current common law based scheme has, in our view, served the victims of crime well over the years, providing them with the compensation they actually need to rebuild their lives after a traumatic event and it should continue to do so. We are also extremely concerned about the removal of paid legal assistance, which we fear will place injured victims in a disadvantaged position.

3. APIL strongly objects to the proposed introduction of a fixed tariff scheme which we suspect has been proposed on the basis of costs rather than in the interests of injured victims. A fixed tariff scheme would be both unfair and inflexible. Injuries are listed against specific and inflexible figures and no distinction is made between individuals – each victim of crime with the same injury is treated in the same way as another. This inevitably leads to anomalies and unfairness. For example, a pilot who loses an eye would receive the same compensation as an elderly person despite the fact that the

pilot's resulting handicap would last longer and have more significant effects on, for example, his employment prospects. Every victim is different and deserves an individual assessment to take account of the effect of the injury on that person.

4. The provision of a sum of money that does not reflect the needs of an injured victim misunderstands the purpose of compensation. Compensation is awarded in an attempt to put the person in the position they would have been in before the injury occurred as far as money can do so. Whilst it may be asserted that compensation is available to the victims of violent crime as a practical expression of sympathy on behalf of the community, we assert that the purpose of awards should be to make some attempt to recognise the failures of society in protecting the victims of crime.
5. We fear that under the proposed fixed tariff scheme injured victims will be under-compensated for their injuries. It is APIL's contention that if victims feel aggrieved at the level of compensation they have been awarded, they will consider pursuing other avenues for monetary compensation. For instance, hospitals, health authorities, schools, education authorities, local councils and police forces. An example of this would be in a case where an individual was attacked by a psychiatric patient that had recently been released from a secure psychiatric unit. If the victim, or his family, were not satisfied by the level of damages awarded through the tariff, he/they may well consider the possibility of pursuing an action against the psychiatric hospital or NHS Trust responsible for releasing the patient into the community. It is APIL's view that this is likely to be more expensive in the long run.
6. We do not only object to the introduction of a fixed tariff but to the introduction of all tariff based schemes, as they all preclude the assessment of an injured victim's needs to varying degrees. Having said that, some tariff based schemes have more in-built flexibility than the fixed tariff. If, therefore, despite strong objections, the Northern Ireland Office insists on introducing a tariff-based scheme, we submit that a more flexible model should be adopted. This would reduce, though not eliminate, the adverse impact of a tariff-based

scheme on the victims of criminal injuries. Some examples follow of more flexible tariff-based schemes. We should stress that we do not refer to these as positive suggestions for reform but as the “lesser of two evils” in comparison with a fixed tariff:

- The court could assess injuries by reference to the victim rather than by reference to a fixed scale. This could be done by introducing a banding system similar to the Judicial Studies Board Guidelines which provide bands for the assessment of particular injuries and enable an assessment to be made within parameters, but reflecting the circumstances of the individual victim. A flexible tariff or banding system would be far more effective than the fixed tariff. Victims deserve to be treated as individuals rather than slotted into fixed cases.
 - The tariff figure could be seen as the starting point with discretion given to the person making the assessment to vary it by plus or minus a percentage figure, to reflect the particular victim’s circumstances.
 - Another option would be to use the tariff figures as the norm, with discretion given to the person making the assessment to increase the award to reflect any exceptional or special circumstances affecting the victim within a fixed maximum percentage – for example, if the application was on behalf of a child.
 - A more sophisticated matrix-based tariff, reflecting objective criteria, such as the age and sex of the victim and taking into account the effects of the injury on that person.
7. Whilst we object to the proposed fixed-tariff scheme in principle we feel compelled to address the practical inadequacies within the scheme as currently proposed. Again, in doing so, we do not intend to support the scheme in principle.

Eligibility Criteria

8. It is proposed in paragraph 18 of the draft scheme that “[w]here at the time when the injury was sustained, the victim and any assailant (whether or not that assailant actually inflicted the injury) were living in the same household as members of the same family, an award will be withheld” unless certain conditions are satisfied. We strongly object to this discriminatory provision as it will operate to exclude many deserving victims. Living in the same household as an assailant is not an indication that the victim consented to the crime or is involved in a lifestyle in which violent crimes can be expected to occur – a crime is a crime and should be treated as such.

Statutory Time Limit

9. We are concerned that applications under the proposed scheme would have to be made within two years of the date of the relevant incident. We do not believe that this provides sufficient time for an application to be lodged and believe that the limitation period should be maintained at three years so that it is the same as the limitation period for civil claims. The longer three-year time limit is extremely important for many victims, particularly those who are suffering from psychological injury, or are the victims of sexual violence (especially children) as many claimants do not feel able to make a claim in the immediate period after the incident in which they suffered injury. This is particularly significant since the time limit runs from the date of the incident irrespective of the age of the victim, nature of the injury or extent of the victim’s knowledge. Whilst we are pleased to see that the two year time limit may be waived where it would be reasonable and in the interests of justice, this cannot replace the need for a sufficiently lengthy basic limitation period. In addition, we believe that the limitation period should run from the age of maturity in relation to children.
10. We should stress that if the scheme is to have tight time limits the scheme must be well publicised within the community to ensure that all those who

may be in need of compensation are aware of its existence and the point of contact for initiating an application.

Removal of Paid Legal Assistance

11. We strongly oppose the removal of paid legal assistance to the victims of violent crime wishing to make an application for compensation. The operation of the tariff scheme and the application procedures for compensation under it will be extremely confusing to those unfamiliar with such matters and will be especially difficult for those traumatised as a result of a crime. Many injured victims of crime may be unable to read and write and, therefore, unable to complete forms or follow written instructions from the Northern Ireland Office on how to apply for compensation.

12. We believe the victims of crime need legal assistance from lawyers who are qualified and trained to deal with such matters. Under the current proposals a claimant would have to pay for that legal assistance. In fact, most victims would have to pay for it out of the compensation awarded to them for the injuries resulting from the violent crime. This is the situation in England and Wales. Alternatively, a victim could consult an organisation such as Victim Support. Whilst we are full of admiration for the work conducted by such organisations we fear that their personnel will lack the required expertise and skills to provide the necessary legal assistance to victims. We fully support, however, the provision of further financing to organisations such as Victim Support to enable them to continue their work in assisting victims to cope with life after a violent crime.

Multiple Injuries

13. We are concerned that awards for multiple injuries under the proposed scheme would be too low. We believe that if a tariff based scheme is adopted, multiple injuries should be compensated on the following basis:

- 100 per cent of the tariff amount for the highest-rated description of injury; plus
- 50 per cent of the tariff amount for the second highest-rated description of injury; plus where there are three or more injuries,
- 25 per cent of the tariff amount for the third highest-rated description of injury.

We believe that the panel should then reconsider the final figure, taking into account the circumstances of the case, and consider whether the total is fair, and if not, be empowered to adjust it accordingly.

Sexual Abuse

14. The way in which awards are determined in sexual abuse / child abuse cases involves an analysis of the offending act and does not consider the residual effects of the injury or the suffering/anxiety experienced by the victim as it should.

Future Loss of Earnings

15. We do not agree that compensation for loss of earnings should be limited to one and a half times the gross average industrial earnings at the time of assessment. At the moment a victim of crime would receive full compensation for his loss of earnings and we believe that he should continue to do so regardless of whether a tariff scheme is introduced or not.
16. In calculating future loss of earnings it is stated that the multipliers, discounts and life expectancies contained in the Government Actuary's Department Actuarial Tables for Personal Injury and Fatal Accident Cases in force at the time of the incident will be applied. Those tables, however, demonstrate appropriate multipliers on the basis of a variety of rates of return. The

assumed rate of return can, of course, have a significant effect upon the amount of compensation awarded for future losses. We seek the Northern Ireland Office's reassurance, therefore, that the rate of return used to calculate future losses will be that prescribed by the Lord Chancellor under the Damages Act 1996, i.e. 2.5 per cent.

Deductions

17. We do not agree that all awards payable under the scheme should be subject to a reduction to take account of social security benefits as proposed. If the victim received full compensation under the proposed scheme we would agree that deductions should be made to avoid double or over compensation but as they would not, we do not believe it is fair to make such deductions.

Appeals

18. We believe that there should be a right of appeal and that it should lie to a court of law rather than an administrative panel, as was recommended by Sir Kenneth Bloomfield. Sir Bloomfield recognised that many criminal injuries compensation applications are determined to a large extent on police evidence, either as to the circumstances in which the offence gave rise to the application occurred, or as to the criminal record, terrorist involvement or other 'antecedents' of the applicant or victim, or both. We agree with his conclusion outlined in paragraph 8.132 of his report where he stated:

"We were advised in strong terms by the Law Society, Bar Council and others that it was eligibility issues such as these which formed the basis of most County Court appeals and that it was highly desirable in the particular circumstances of Northern Ireland that contentious issues of this kind should ultimately be capable of being determined by the ordinary courts. They suggested that it would not suffice in the present climate to have the final decision on such issues determined by a special tribunal, even if that tribunal

was presided over by a senior and independent barrister or solicitor. We accept that this, unfortunately, is the case at present and may remain for some time. Accordingly, we recommend that there should continue to be a right of appeal from the determination of the Agency to the County Court.”

19. We also believe his observations highlight how important it is that both applications and appeals should be handled by qualified lawyers and that victims of violent crime should have access to paid legal assistance. Directing the right of appeal to a court rather than an administrative panel is not just important because of the likely issues to be determined. To many injured victims of crime it is psychologically important for them to have their injuries and their right to compensation recognised in law. This may be especially important to victims where the person responsible for their injuries has not been formally prosecuted.

Inflationary Increases

20. It is imperative that if a tariff based scheme is introduced that the awards within the tariff are increased annually to account for inflation to ensure that the awards are up to date.
21. In conclusion, whilst we recognise there may be some minor problems within the current common law based system of criminal injuries compensation, we believe that it serves the injured victims of violent crime well in providing them compensation suited to their individual needs and, for this reason, the current system should not be radically reformed. The proposed tariff scheme may appear more financially attractive than the current common law based scheme, but we do not believe that economic interests should take precedence over the interests of the injured victims of crime. The victims of crime should be awarded compensation as at present – on the basis of their individual needs and losses.