

COMMISSION OF THE EUROPEAN COMMUNITIES

GREEN PAPER

COMPENSATION TO CRIME VICTIMS

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 for assisting with the preparation of this response:

Richard Langton Executive Committee Member, APIL

Robert Martin Executive Committee Member and Coordinator of Northern
Ireland Regional Group, APIL

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

Annette Morris
Policy Research Officer
APIL
11 Castle Quay
Nottingham, UK
NG7 1FW

Tel: 0115 958 0585

Fax: 0115 958 0885

E-mail: Annette@apil.com

COMPENSATION TO CRIME VICTIMS

1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and is a membership organisation based in the United Kingdom. APIL represents around 5000 solicitors, barristers, legal executives and academics, both in the UK and abroad, whose interest in personal injury work is predominantly on behalf of injured victims. 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 promote health and safety;
 - 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. In summary, APIL welcomes the proposal to introduce minimum standards for the compensation of crime victims, which would not only create a safety net for EU residents, but also limit the unfair effects of the widely differing systems within member states in cross-border situations. We are concerned, however, that the introduction of minimum standards should not lead to the introduction of a harmonised criminal injuries compensation scheme within the EU. State systems of compensation for the victims of crime are based, and should remain based, on the individual socio-economic conditions of each jurisdiction. The structure of each compensation system - the eligibility criteria, the procedures and the compensation awarded - is based upon several jurisdiction-specific factors such as the welfare benefits available to injured people, the criminal justice system and the prevalence of insurance for personal injury. It would, therefore, be difficult for a harmonised system of compensation to meet the needs of the victims of crime in each jurisdiction.

Q1: Should a Community initiative on state compensation to crime victims pursue the three objectives listed on page 20 of the consultation paper? Are there other objectives that should be pursued as well?

3. As noted above, we fully support the introduction of minimum standards to create a safety net for the victims of crime in the EU and to make it easier for victims in cross-border situations to gain access to compensation. The second objective is to:

“...limit the unfair effects that can result from the widely differing levels of compensation available in different member states and which are, in practice, dependant on the victim’s member state of residence or in which member state he or she becomes the victim of a crime...”

We agree with this objective insofar as it relates to the principles underlying compensation levels in terms of, for example, the types of losses that are covered. We agree with the Commission, however, that compensation levels expressed in pecuniary terms cannot be made uniform. We further agree that the aim must be to build upon what already exists in member states rather than to set in place a new system. In addition, the introduction of minimum standards should not be used to justify any deterioration in current practices in the member states.

Q2: What should be the eligibility criteria for types of crime and for types of injury covered by a minimum standard?

4. We have always believed that criminal injuries compensation schemes exist in recognition of a Government’s failure to protect individuals within its society from the effects of violent crime (and acts as an incentive to reduce such crime). It is for this reason that we believe the minimum standards for the eligibility criteria in terms of the type of crime and the type of injury should be generous and should include direct victims, indirect victims and samaritans for intentional and non-intentional crimes.

5. It is suggested in paragraph 5.2.2 of the consultation paper that “crimes considered to be commonly covered by insurance could be excluded, such as traffic offences or offences in the workplace”. Insurance provision, however, differs in each jurisdiction and we do not believe it would be fair, therefore, to introduce such a restriction. In addition, we agree with the Commission that it would be too restrictive to exclude non-intentional crimes or to include only serious crimes.

Q3: Should the degree of proof required from an applicant for state compensation be included in a minimum standard?

6. It may be extremely difficult for some injured victims where to prove that they have been victims of crime and that the injuries suffered have been caused by that crime, for example, where there has been an assault but there are no witnesses. In addition, we agree with the Commission that the coverage of situations where the offender is not known or not prosecuted is a key function for state compensation in the first place. For these reasons we believe it is vital that the degree of proof required by an applicant for state compensation should be included in the minimum standard. We believe the minimum standard should state that the strongest degree of proof that a member state should be allowed to apply should be the balance of probabilities. To apply the stricter “beyond reasonable doubt” standard would unfairly hinder a victim whose assailant is untraced or acquitted. Normal investigation by the relevant authority dealing with complaints of assault should protect against the risk of fraudulent attempts to obtain compensation.

Q4: Should immaterial damages be included in a minimum standard, and if yes, could a definition of such damages be included?

7. As noted by the Commission, a victim may recover physically fairly quickly following the injuries he has sustained but the psychological effects of the

crime may be long term and cause severe suffering. We agree, therefore, that there are strong reasons for including immaterial damages in a minimum standard. We appreciate that it is very difficult to introduce a definition of what such compensation should be in view of the differences between the member states but we believe it could be done by requiring that all aspects of the physical and psychological trauma are included within the relevant definition.

Q5: Could compensation for permanent disability be defined for the purposes of a minimum standard?

8. In the UK, compensation for permanent disability is not provided as a separate head of damages under the tariff scheme, though permanent disability attracts a higher tariff award than a transitory injury. We do believe, however, that it would be helpful to define the concept of ‘permanent disability’ as a disability where physical or psychological problems persist for more than 12 months and for which the symptoms are not trivial.

Q6: Should a minimum standard allow for taking into account the victim’s financial situation, when determining the victim’s eligibility or when determining the amount of the compensation?

9. We do not believe that the minimum standards should allow a state to take into consideration a victim’s financial situation when determining the victim’s eligibility or when determining the amount of compensation to be awarded. We believe the justification for compensating a victim of crime for personal injury is the same regardless of the victim’s financial circumstances. In particular, as noted by the commission, the justification for compensating immaterial damages apply with equal strength regardless of the financial position of the victim.

Q7: How should the subsidiary character of state compensation, in relation to other sources of compensation to victims, be defined in a minimum standard?

10. We do not believe that other sources of financial assistance, such as private insurance or private pension provision should be taken into consideration when calculating the amount of compensation to be awarded through a state compensation scheme. This is because a victim of crime should not be penalised for his own prudence. Nor do we believe that a victim should have to wait to receive compensation because there is a possibility of obtaining compensation from the offender. In other cases, if there is such a possibility, this should be pursued by the state after it has awarded compensation to the victim. We believe, therefore, that the minimum standards should protect the victim from either of these possibilities. In situations where the offender is insured, however, principally in road traffic cases, the primary source of compensation should be the insurer.

Q8: What other sources of compensation should be deducted from state compensation?

11. We would have no objection to state benefits, awarded to help an injured victim cope with the consequences of his injury, from being deducted from state compensation, as this would otherwise amount to the state awarding double compensation to the victim.

Q9: Should a possibility for advance payment be included in a minimum standard?

12. As noted in the consultation paper, there are many reasons why there may be substantial delays in a victim receiving compensation through the state compensation scheme, especially in cross-border situations. For this reason,

we would support the inclusion of advance payments in the minimum standards.

Q10: Should criteria related to the victim's behaviour in relation to the crime, to his or her involvement in criminal activity in general, or other considerations of justice or public policy, be included in a minimum standard?

13. The issue of whether a victim's behaviour in relation to the relevant crime, or his involvement in criminal activity in general, should impact upon the compensation received under a state scheme is an extremely complex and sensitive issue. For this reason, we would prefer for this issue not to appear within the minimum standards and for each member state to be able to make this difficult decision in light of their own criminal justice systems.

Q11: What other criteria, not covered in this paper, could be considered for inclusion in a minimum standard?

14. It is vital that the minimum standards should deal with procedural fairness. In state compensation schemes, the body deciding whether compensation should be paid, and if so, the amount that should be paid, is the same body actually awarding the compensation. The minimum standards should, therefore, require member states to have an independent appeals process.
15. In addition, the requirement of a fair hearing for those applying for compensation should cover a reasonable contribution towards legal costs, particularly, for example, following a successful appeal against an initial decision. In practice most victims, especially those whose injuries are most serious, have great difficulty in understanding the detailed eligibility and quantification rules, however straightforward the mechanism for making an application may appear.

Q12: Would a right for the cross-border victim to receive assistance from an authority in his or her Member State of residence when applying for state compensation from another Member State be an appropriate way of facilitating access to state compensation for cross-border victims?

Q13: Would a possibility for the victim to get state compensation in his or her Member State of residence as well as in the Member State where the crime occurred be an appropriate way of facilitating access to state compensation for cross-border victims?

Q14: What solutions, other than those outlined in this paper, could be envisaged to facilitate access to state compensation for cross-border victims?

16. To ensure fairness of compensation awards, taking into account the socio-economic factors mentioned at the outset, we believe the quantification of compensation should be carried out in the victim's state of residence. For practical reasons, eligibility, i.e. establishing whether a crime has actually been committed against the victim, must be determined principally in the state where the injury occurs. Each state scheme could have an international section to coordinate and deal with cross-border claims in accordance with the above and we believe that this should be investigated further. There would clearly be issues of funding and administration, but with increased business and tourist movement within the European Union, the demand for such close liaison and assistance within and between member states will only increase.

Q15: Should harmonised forms, possible to use when applying for state compensation in all Member States, be established?

17. APIL does not believe that harmonised forms could or should be introduced. As noted at the beginning of the consultation paper, it is not intended to harmonise the criminal injuries compensation schemes within member states. The introduction of minimum standards would not prevent each compensation

scheme from having substantial differences. As a result, it would be difficult to devise and introduce harmonised forms for use in relation to each compensation scheme.