



Joint response to the consultation on the Criminal Injuries Compensation Scheme Review 2020

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JustRight Scotland (JRS) is a registered charity established by an experienced group of human rights lawyers. We use the law to defend and extend people's rights, working towards a model of collaborative social justice —lawyers working with non-lawyers and others— towards the shared aims of increasing access to justice and reducing inequality in Scotland. We do this by providing direct legal advice to individuals and organisations, running outreach legal surgeries and helplines, delivering rights information, training and legal education, and contributing to research, policy and influencing work. We work across a number of policy areas including women's legal justice and gender-based violence, trafficking and exploitation, disability and trans justice, and migration and citizenship.

The Scottish Women's Rights Centre (SWRC) is a unique collaborative project, between JustRight Scotland, Rape Crisis Scotland and the University of Strathclyde Law Clinic, that provides free legal information, advice and representation to women affected by violence and abuse. The SWRC exists because of abuses of power and because a gap persists between women's experience of violence and abuse and their access to justice. The SWRC strives to fill these gaps by working with specialist solicitors and experienced advocacy workers. Informed by our direct work with victims/survivors of violence and abuse, we seek to influence national policy, research and training to improve processes and systems, and ultimately to improve the outcomes for women who have experienced gender-based violence (GBV).

We recognise that people of any gender can be affected by abuse and violence (including sexual violence). However, statistics show that that these crimes are more often committed by men against women. Despite this, we are aware —and do acknowledge— that any person can be subjected to these crimes.

JRS and SWRC solicitors provide direct legal advice and representation in making applications under the Criminal Injuries Compensation Scheme (the "Scheme") for victims/survivors of gender-based violence, including sexual offences, and for survivors of trafficking, including migrants, refugees and asylum seekers. Our written evidence below is drawn from our direct frontline experience working with these

particular client groups, primarily women and child applicants, to frame successful applications under the Scheme.

Section 2: Scope of the Scheme

Consent in sexual assault claims

1. 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?

We believe that the only way to prevent inappropriate claim refusals from being made in future is for the Scheme's definition of consent to be fully aligned with the criminal law on consent. This will ensure that the Scheme is coherent and will prevent confusion amongst applicants. Learning from past mistakes, **there should no longer be any scope within the CICA's rules for a claim handler to suggest that a child has consented to sexual activity with an adult. No child can ever consent to abuse.**

So long as the Scheme's approach continues to be misaligned with criminal law, there will always be the risk that blameless victims/survivors of sexual abuse will face further injustice and victim-blaming, regardless of the internal guidelines or procedures implemented to mitigate these risks. The current approach does not fit with the consultations aims of "simplicity, transparency and ease of navigation".

Victims of terrorism

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

N/A

3. 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?

N/A

Homicide abroad

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

N/A

Section 3: Eligibility rules

Same roof rule

5. Do you agree with our proposal to remove the remaining same roof rule, which applies only to adults, from the Scheme?

Yes, we agree with this proposal. Adult victims of sexual offenses might continue to be living with the perpetrator and their circumstances might make it impossible to leave a household they share with the perpetrator — for example because the abuse also involves coercive control; leaving the shared household would place the victim/survivor at risk of homelessness; or financial constraints or lack of practical or emotional support might prevent them from moving to another household. We believe victims/survivors of these crimes should not be refused compensation for situations that might not always be under their control. The proposed change would benefit vulnerable potential claimants and we note it aligns with human rights legislation.

Section 4: Injury awards

Mental injury

6. What are your views on revising the dividing line from 2 to 3 years?

We are aware that the rationale for this change is that clinical psychologists often use the terminology “complex” or “non-complex” when completing assessments and that a 3 year dividing line matches this terminology more closely. This does not however match our frontline experience where we routinely work with clinical psychologists for the women and children we represent who have complex cases of mental injury.

It is our understanding that the term “complex” does not relate to recovery time but to the characteristics of the experience and the number and range of functional impacts the experience has had on the person. Thus, the choice of terminology would seem rather arbitrary. In our view, what really needs to be considered is what constitutes “significant suffering” as, in our experience, being impacted psychologically for a 2 year period would be classed as significant suffering.

Indeed, we routinely work with women and children with complex cases of mental injury with significant injury where the prognosis from clinical psychologists is often noted within a 2 year period. We are, therefore, not persuaded by the rationale noted in the consultation document, particularly given that revising the dividing line on this arguably arbitrary basis could mean that more people fall into the lower bracket compared to the upper bracket.

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

We have no comment on the revision in relation to the upper bands as we do not often work with women and children in this situation. We however would like to refer to our comments in part 6 above regarding the revision of the lower bands.

Simplification of the tariff of injuries

8. What are your views on the proposed approaches to Part A (please give reasons for your responses): 1) Simplification of language? 2) Changing the language for injury severity? 3) Reducing the number of bands? 4) Grouping some injuries together, where appropriate? 5) Overhauling the way brain injury is represented?

1) We agree that overly complex, medical language should be avoided where possible and replaced with more common terminology that is easy to understand. This is particularly important to make the Scheme as accessible as possible for applicants whose first language is not English and for those with learning disabilities.

2) We agree that the categorisation of injuries as “moderate/ serious / severe” is preferable to referring to some injuries as “minor”, which some applicants may feel is insensitive. For those who have suffered trauma, appropriate use of language is very important so as to not undermine their experiences.

3 & 4) We are not opposed to the number of bands being reduced and for some injuries to be grouped together where appropriate, as long as these changes are implemented in order to simplify the Scheme rather than to reduce costs.

5) We have no experience of brain injury claims and therefore we are not able to comment on this matter.

9. What are your views on the proposed approaches to Part B (please give reasons for your responses): 1) Moving the fatal injury award 2) Simplifying injury descriptions 3) Removing the distinction between under-18s/adults lacking mental capacity and adults 4) Increasing awards for mental injury Other payments

1) We cannot comment on fatal injury awards as we do not have experience of these.

2) We agree that injury descriptions should be simplified where possible. As stated in our response to question 8, it is important to make the Scheme as accessible as possible for applicants, particularly for those for whom English is not their first language and for individuals with learning disabilities.

3) Sexual offences committed against children are listed separately to those committed against adults in the Sexual Offences Act 2003, as an offence against a child is an aggravated one. The current tariffs within the Scheme reflect this. We believe that it is in the interests of both justice and simplicity for the rules and tariffs within the Scheme to accurately reflect criminal law. Therefore, we believe that the difference in severity for these types of crimes should be maintained.

10. What are your views on the proposed change to the bereavement award available under the Scheme?

N/A

11. 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?

N/A

12. What are your views on the proposal to the Scheme as to how a single payment can be made?

N/A

13. 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 regions where Victim Support is no longer present; or, b. Removing the referral mechanism to allow victims to make applications directly to the CICA?

N/A

Equalities

14. 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.

There are a number of relevant issues raised in the review where no reforms have been proposed, and no comments have been invited in the questionnaire. We note that, without opening up more areas for reform, the Scheme will not be fit for purpose and this will inevitably impact negatively on individuals with protected characteristics.

Below we include some points to consider, some of which were noted in the CICS' review Equality Impact Assessment (EIA):

Improving the accessibility of the Scheme: given the inaccessibility of the Scheme, many victims/survivors feel the need to request assistance from a solicitor to submit an application. This is particularly problematic for individuals who might not be able to access/not know how to obtain legal advice/support. This currently impacts on individuals for whom English is not their first language, migrants facing barriers due to their immigration conditions (e.g. those with the No Recourse to Public Funds condition), as well as children and vulnerable adults. In our view, the Scheme should be accessible enough for individuals to be able to submit an application without the need to seek legal advice/support.

Residence test: we are concerned with the impact that the current rule to demonstrate connection to the UK might have on particular groups, specifically migrants and asylum-seekers and particularly those whose immigration application might be ongoing at the time of the violent crime or who are undocumented. Further, we are concerned to see that victims who have had their asylum application rejected will also have their compensation refused. Despite some of the mitigation measures mentioned, asylum-seekers and undocumented migrants are often some of the most vulnerable individuals in our society with restricted access to other forms of support or the ability to claim this from their countries of residence. Furthermore, it is likely that EU citizens who are unable to apply to the UK settlement scheme will become

undocumented once the UK leaves the EU, and they might no longer be able to access the Scheme. Thus, this criterion might in fact lead to the exclusion of some of the most vulnerable individuals in the country from the Scheme who, because of their protected characteristics and immigration condition, are also more likely to fall victims to violent crime and exploitation.

Requirement to report to the police: although we agree that individuals seeking compensation should, in principle, consider assisting the authorities in reporting the crime, as mentioned in the EIA, this could have a disproportionate impact on victims from BME communities, as well as those living in tight-knit communities (including victims in remote rural communities) where there is a risk of being isolated from the community if a crime is reported. There needs to be further recognition that not all victims of violent crime will be able to report to the police. This is already recognised for victims of childhood sexual abuse. However, similar consideration should be given to BME communities, who experience structural discrimination and structural disadvantages that can in turn hinder their engagement with the police. For instance, BME people (and particularly Black people) are overrepresented in the criminal justice system¹, a situation that might make them feel less confident to report crimes to the police. Similarly, individuals who risk being isolated from their community if they report might decide not to do so. In our view, it is imperative to consider how some of the criteria for the Scheme might act as a structural barrier for individuals with protected characteristics and to include effective steps to mitigate this risk of exclusion.

Ineligibility for compensation due to minor offences: as we explain on question 17 below, we do not believe victims should be refused compensation due to committing minor offenses, particularly as some of these offenses might be connected to their traumatic experience. Moreover, as mentioned above, some groups (specifically BME communities, but also young people) are overrepresented in the criminal justice system and also more likely to have previous criminal convictions². In turn, this means they will be more likely to have their compensation refused. Again, we think it is imperative that these structural barriers are acknowledged in relation to the eligibility criteria for the Scheme as a way to improve its accessibility and ensure the Scheme truly works for all victims.

In our experience, individuals with protected characteristics affected by violent crime are also subject to structural inequalities (inability to access support, inaccessibility of services, discrimination, prejudice, criminalisation, etc). Therefore, we strongly believe that in order for the Scheme to be truly “universal” and “work equally for all victims of violent crime”, as this review sets out, further steps need to be taken to understand how these structural barriers might be at play in the proposed reforms and the Scheme as a whole — from awareness-raising about the Scheme, to the

¹ As has been noted by the think-tank Runnymede Trust in their publication ‘Criminal Justice v. Racial Justice Minority ethnic overrepresentation in the criminal justice system’:

www.runnymedetrust.org/uploads/publications/pdfs/CriminalJusticeVRacialJustice-2012.pdf

² https://consult.justice.gov.uk/digital-communications/victims-witnesses/supporting_documents/victimswitnessescicseia.pdf

application process, decision-making, waiting times, final response and appeals process).

15. Do you agree that we have correctly identified the range and extent of the equalities impacts under each of these proposals set out in this consultation? Please give reasons and supply evidence of further equalities impacts as appropriate.

N/A

16. Are there forms of mitigation in relation to equalities impacts that we have not considered?

N/A

17. Do you have any further comments on the Scheme?

Section 1: Scope of the Scheme

We refer to paragraph 50 and submit that the scope of the Scheme should be flexible enough to account for the evolving nature of how crime manifests itself (particularly forms of human trafficking and exploitation as well as online exploitation and abuse). We consider that there should be more clarity around what the definition includes. As stated in paragraph 63, the definition of “threat of immediate violence” can include crimes such as online exploitation, trafficking, stalking and harassment, although many applicants submitting a claim themselves will not be aware of this.

In reference to paragraphs 63 to 64, we disagree that widening the scope of the Scheme (to include, for example, online exploitation, grooming, stalking and human trafficking) would risk drawing arbitrary distinctions between other crime types, such as fraud and dishonesty. We believe that online sexual violence, child abuse, and crimes such as human trafficking which restrict the most basic and fundamental freedoms should be correctly categorised as a crime of violence.

For instance, when it comes to human trafficking, the requirement to prove that there was some kind of physical or mental injury for which treatment was sought does not speak to the insidious nature of human trafficking, where often victims/survivors are exploited from a position of vulnerability or are coerced through non-violent means. This does not detract from their experience of exploitation, which could be violent or non-violent. The fact that the experience of trafficking was non-violent, or the person does feel able to seek treatment, does not make the experience of debt-bondage, forced labour or any other type of exploitation any lesser.

Notably, under the English, Scottish and Northern Irish legislation the ‘means’ element of the legal definition of a victim of trafficking (set out in the Council of Europe Convention on Action against Trafficking in Human Beings [CoE CAT]) is expressly disapplied. It therefore does not matter how a person was forced into their exploitation (i.e. by violent or non-violent means). By enabling the mere fact that a person is a victim of trafficking to satisfy the ‘crime of violence’ test, the Scheme would fall in line with law and practice across the UK in terms of victims/survivors.

Furthermore, Article 15(4) of the CoE CAT states that “Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law” (emphasis added). We are concerned that by excluding some victims of human trafficking from the scope of the Scheme this unfairly denies them a right contained in the CoE CAT.

In sum, we note that including online sexual violence, child abuse, and crimes such as human trafficking in the definition of “crimes of violence” would provide more clarity and simplicity within the Scheme.

Section 3: Eligibility rules

We refer to paragraph 95 and note that one particular area where misunderstandings commonly arise is the 2-year time limit. Many victims/survivors will not be in a position to make an application when they are still recovering from the trauma of the incident(s) and may not be aware that a late application may still be accepted.

Although we agree that applications are often accepted out-with the 2-year limit, as this fits with our experience, we believe that there should be more clarity/transparency for applicants around what may be considered “exceptional circumstances”. This will ensure that those who are eligible to apply do so.

As noted in paragraph 96, although the CICA caseload data set shows that 63% of personal injury cases submitted outside the 2-year time limit still went on to receive an award, we would like to raise that this data cannot account for the victims/survivors who never submitted an application because they believed it would be automatically rejected for falling out-with the time limit. Through our outreach services, we have heard from a number of victims/survivors with potentially “exceptional circumstances” that they never submitted an application as the 2 year time limit had expired. It was only after receiving legal advice that they discovered they may still have been/may still be able to apply.

As stated in paragraph 98, we agree that there should be further explicit information and clarity on Scheme time limits within the Victims’ Code.

Referring to paragraph 102, we echo the concerns raised by Stakeholders about the impact of the 2012 unspent convictions rule on victims of abuse, exploitation and controlling and coercive behaviour that the Scheme does not differentiate between victims who have been forced to offend by their exploiters and abusers, and offenders who have more agency over their actions. We are also particularly concerned about victims/survivors being ineligible for compensation due to minor offences committed when they were suffering a mental health crisis as a result of their abuse. We do not believe that refusing compensation in these circumstances is in the interests of justice. We submit that there should be more discretion to allow each individual’s circumstances to be taken into account.

Section 4: Injury awards

In reference to paragraph 147, we agree with the concerns from applicants that the tariff is not user friendly: it is very long (spanning a third of the Scheme), is complex to navigate, the layout is not always easy to follow and the language can be difficult to understand. The inaccessibility of the Scheme means that many victims/survivors do not feel empowered to apply without the assistance of a solicitor, while there is also an access to justice gap as many victims/survivors cannot access a solicitor.

We note that paragraphs 147 and 149 state that the approaches proposed in the review are intended to improve simplicity and transparency. However, in our view there are inconsistencies here as these principles are not being applied to other areas in need of further simplification and transparency and which the consultation does not address, such as the time limit rules, definition of a crime of violence and definition of consent.

We refer to paragraph 173, where a proposed category of sexual assault (B14) is “permanent – moderate with serious internal injury”. We would like to raise that injuries of this nature would be best categorised as severe. Moreover, it may be triggering for victims/survivors to see their internal injuries resulting from sexual assault described as “moderate”.

We refer to paragraph 231 and note that the CICA has engaged with organisations including Samaritans, Women’s Aid and Rape Crisis Scotland to provide specialist trauma informed training to ensure that staff are better equipped to deal sensitively with those who have lived through traumatic periods of abuse. As an organisation working with victims of trauma, we welcome this collaborative approach to trauma informed practice.

We refer to paragraphs 234 to 235, which details the ways in which improvements have been made to make compensation claims simpler and more accessible while acknowledging that further improvements could be made. We would like to raise some of the additional difficulties experienced by victims/survivors who have contacted us through our outreach services and who we have represented as clients.

We agree that the key aims should be for decisions to be made under the Scheme in a consistent, fair and transparent way for all victims. Nevertheless, we note that many of the areas where simplicity and transparency could be improved have not been consulted on. These principles have not been applied to key areas such as definitions and time limits as noted above. We feel it is important to highlight that **we have heard from victims/survivors that the application is not accessible enough, particularly when there are few solicitors taking on CICA cases for representation.** The Scheme itself is not simple/transparent enough —the rules and the CICA’s interpretation of them can be difficult for the average person to understand.

We have heard from victims/survivors contacting us through our outreach services, that when an average person submits an application without a solicitor, the process takes much longer than the 20 minutes advertised. Many victims do not know which evidence is needed (e.g. medical records, psychological reports, etc.) and they

usually think that basic information about the incident and their injuries will be sufficient to submit the application.

We also note that the online application is not printable and cannot be accessed in any alternative accessible formats, which can cause difficulty for some applicants, or potentially cause an absolute barrier to access.

With regards to the rule within the Scheme that “an award may be withheld or reduced because the applicant’s *character*”, we know that for many victims/survivors of sexual assault, this wording may evoke connotations of victim-blaming. Some women read this wording and worry that if they apply to CICA they will be questioned about their sexual history and/or blamed for their sexual assault, particularly if they have engaged in sex work. There should be more clarity around what this rule entails and assurances that victims/survivors of sexual assault will never be judged or blamed.