



PERSONAL INJURIES BAR ASSOCIATION

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PIBA RESPONSE TO THE SUPPLEMENTARY CONSULTATION 2022 **ON THE UNSPENT CONVICTIONS ELIGIBILITY RULE OF THE** **CRIMINAL INJURIES COMPENSATION SCHEME 2012**

Introduction

1. PIBA is one of the largest civil specialist bar associations with about 1,450 members. PIBA's members practise in personal injury law, including criminal injuries compensation cases. They represent both claimants and defendants. Many PIBA members also sit in a variety of part-time judicial and tribunal roles at all levels, case managing, trying and determining cases across the full breadth of the civil and other jurisdictions.
2. Our observations on the consultation and response to the questions posed are set out below.

Background

3. In 2012, a rule was introduced to the Scheme pursuant to which an applicant is not eligible for compensation where they have an unspent conviction that has resulted in one or more of a number of specified custodial or community sentences ('the exclusionary rule'). The Consultation explains that the exclusionary rule:

‘is designed to prevent individuals who have committed serious illegal acts benefitting from state-funded compensation, to reflect the degree of harm done to others and the cost to society of offending behaviour.’¹

4. The Review sets out that before the change in 2012, the CICA had a 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 on the basis of those convictions.

5. The Review also sets out that that the new exclusionary rule was intended to:

‘simplify the scheme and support the principle that state funded compensation be provided to victims who have not cost society through their offending behaviour and allow further transparency, clarity and consistency in decision making.’²

6. The Review also makes reference to stakeholders raising concerns about the impact on victims of abuse, exploitation, and controlling and coercive behaviour, noting in particular that the Independent Inquiry into Child Sexual Abuse recommended that the 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.³ PIBA notes that the previous Victims’ Commissioner took a similar view and the All Party Parliamentary Group for Adult Survivors of Childhood Sexual Abuse went further and considered the rule should be abolished.

7. The Review suggests a graduated approach to withholding or reducing awards based on the seriousness of the conviction, the circumstances of the offender, and the applicable mitigation and further suggests that those individuals with convictions would have had ‘particular circumstances of their vulnerability presented in mitigation and taken into account during sentencing.’ However, the

¹ Para 17 CICS Review Supplementary Consultation 2022

² Para 101 CICS Review 2020

³ Interim report of the Independent Inquiry into Child Sexual Abuse section 5.2 April 2018.

Scheme is clear⁴ that no award will be made where there is any conviction which has resulted in a community order, youth rehabilitation order or any form of custodial sentence. In many cases, vulnerable individuals may have avoided a custodial sentence because of their vulnerability but will still have community or youth rehabilitation orders which will automatically disqualify them from an application for compensation. Therefore, the discretion which applies under the 2012 scheme in reality is only in relation to fines under £250 or a conditional discharge.

8. PIBA does not hold data in relation to what proportion of prospective applicants would fall within this discretionary category but considers it highly likely there are many more applicants who fall within the excluded category who have themselves been victims of sexual abuse. The Review observes that only 8% of cases were rejected for unspent convictions⁵ but this obviously does not include those candidates who have read the Scheme and understand or have been advised that there is no point in making an application because of the automatic ineligibility for an award should they have unspent convictions. The experience of our members is that this is commonplace.
9. The CICA's Annual Report for 2013 considered it likely that part of a 17.7% reduction in applications that year was attributable to this shift in eligibility criteria and that applications would reduce further once the eligibility criteria were more widely understood.⁶

Response to the Consultation Questions

Question 1: What are your views about the exclusionary part of the rule being retained unchanged?

10. PIBA considers that the rule should not be retained unchanged. We endorse the views of respondents supportive of reform that the rule has a disproportionate impact on victims of abuse, exploitation, trafficking and other forms of coercive

⁴ Para 26 of the CICS 2012 and Annex D to the same

⁵ Para 102 CICS Review 2020

⁶ https://www.justice.gov.uk/downloads/publications/corporate-reports/cica/_cica-annual-report-2012-13.pdf

behaviour, as well as the cyclical effect of trauma resulting from being a victim of crime, and the use of coping mechanisms such as alcohol and drug dependency, on future criminal activity. We consider that it is likely to have a disproportionate effect on some victims with acquired brain injuries who have no history of prior offending.

11. PIBA's view is that the exclusionary rule should be abolished and replaced with a discretion.

Question Two: 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?

12. PIBA supports and endorses the view of the Independent Inquiry into Child Sexual Abuse and the previous Victims' Commissioner and seeks a wider discretion in relation to the operation of the Scheme in relation to other categories of victims who may have criminal convictions linked to the criminal injuries sustained.

Question Three: 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?

13. PIBA does not consider that amending the rule by carving out various exempted categories is desirable or likely to be fair. Is a child who is systematically physically rather than sexually abused who then goes onto minor offending behaviour having had recourse to drugs or alcohol as a coping mechanism, less worthy of an award than their sexually abused peer? If a person with no offending history acquires a head injury and psychiatric injury or is exploited or trafficked and then is drawn into offending behaviour are they less worthy than their sexually abused peer? Each of these categories of victim is a victim of violent crime. We also think exemptions for some applicants only would add complexity to the Scheme for prospective applicants seeking to understand it.

14. In paragraph 1 of the Forward to the Criminal Injuries Compensation Scheme Review is it stated: ‘In our 2020 consultation we re-affirmed that the core purpose of the Criminal Injuries Compensation Scheme (the Scheme) is to recognise, through compensation, the harm experienced by a victim injured as a result of violent crime. The Scheme is universal, and although each individual and each case will be different, it must work equally for all victims of violent crime. It is therefore vital that all applicants are subject to, and all applications are assessed against, the same eligibility criteria, requirements and injury tariffs’. (Underlined emphasis added). We consider therefore that exemptions for some applicants would not be consonant with the expressed aims of the Review.
15. PIBA is mindful that the Scheme is a last resort for all victims of serious crime from all socio-economic backgrounds to obtain compensation. Given the fundamental importance of the recognition of the harm they have suffered by a state funded body and the payment of compensation that accompanies this recognition, PIBA supports the view that discretion should be available in all cases involving unspent convictions.
16. Since the inception of the original Scheme in 1964 Scheme and throughout all of the Tariff Schemes from 1996 to date the CICA, First Tier Tribunal and its predecessors in title have had a long history of evaluating the conduct and moral culpability of the victim which continues to this day. Under the 2012 Scheme the CICA and/or First Tier Tribunal may consider grounds for withholding or reducing an award for a whole host of what may be described as ‘conduct issues’ (paragraphs 22-26 of the Scheme) including reporting the incident to the police, cooperating in bringing the assailant to justice, cooperating with the application and conduct before, during or after the incident giving rise to the criminal injury. The CICA and First Tier Tribunal in appeals is well used to and well equipped to make evaluative judgments in relation to the conduct of a victim. PIBA does not consider therefore that permitting a discretion in all cases involving unspent convictions would incur any significant additional complexity and thereby expense to the operation of the Scheme although as observed above it may mean that more victims are eligible for an award.

17. If contrary to PIBA's views the exclusionary rule is not to be replaced by a general discretion, PIBA would urge that, at a minimum, an exemption be created for those applicants whose conviction is likely to be linked to their child sexual abuse. However, for the reasons set out above we consider that this is likely to discriminate unfairly against other categories of victims.

Question Four: What are your views about any exemptions and guidance on exercising discretion being set out in the Scheme?

18. The CICA has a long history of the application of discretionary rules prior to and since the 1996 Scheme and continues to apply discretionary rules in relation to waiver of time limits, as well as making nuanced judgments on evidence in relation to self-defence and provocation in assault cases and factual consent in sexual abuse cases together with a whole host of conduct issues identified above (paras 22-26 of the 2012 Scheme). The CICA is well equipped to make evaluative judgments on the culpability of victims in relation to previous offending behaviour. For transparency and consistency in decision making (for both the CICA and applicant's purposes) PIBA does consider that issuing guidance on exercising discretion within the Scheme would be appropriate.
19. PIBA considers that the following non-exclusive factors could be highlighted as relevant to the exercise of discretion on this issue:
- a) Any causal connection between the offending and the criminal injury/injuries sustained by the applicant;
 - b) The seriousness of the conviction, including consideration of the harm caused or intended to be caused, and the blameworthiness (culpability) of the applicant;
 - c) The circumstances of the applicant including any particular vulnerability; and
 - d) Mitigation on the part of the applicant including any conduct which balances or has balanced the cost to society of their offending behaviour.
20. PIBA also considers that a 'point scoring' guide to the exercise of discretion used by the CICA could be appropriate, so long as there remained an ultimate discretion to determine an applicant as eligible regardless of their score.

21. It is noted that the aim of the exclusionary rule is set out in Consultation as follows:
- ‘ to prevent individuals who have committed serious illegal acts benefitting from state funded compensation to reflect the degree of harm done to others and the cost to society of offending behaviour’⁷. It is submitted that neither of these factors are reflected in the operation of the exclusionary rule, and they would be much more amenable to discretionary review.
22. More fundamentally, it is not clear to PIBA that an individual who has been duly punished pursuant to the criminal law should be subject to effective further punishment by way of ineligibility to this Scheme, where it is arguable that the “degree of harm done to others and the cost to society of [their] offending behaviour” has already been accounted for by the criminal justice system and especially in circumstances where the criminal injury itself may have been linked to the offending behaviour. This is particularly so given the potential distance in time, circumstance, or severity of the crime in which the individual has been injured and the crime which they have committed – none of which is accounted for by the current exclusionary rule.

Question Five: 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?

23. PIBA supports such a change and contends that no claims should be automatically rejected on the basis of unspent convictions.

Question Six: What are your views about guidance on exercising discretion being set out in the Scheme?

24. (as above)

Question Seven: What are your views about removing the exclusionary part of the rule?

⁷ Para 17 CICS Review Supplementary Consultation 2022

25. PIBA supports such a change and contends that no claims should be automatically rejected on the basis of unspent convictions.

Question Eight: What are your views about defining in the Scheme how discretion should be exercised?

26. (as above)

Charles Bagot QC, Chair of the Personal Injuries Bar Association

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On behalf of the Executive Committee of PIBA

4 August 2022