



LAW REFORM
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Law Reform Commission Publishes Consultation Paper on Compensating Victims of Crime

Wednesday 9th February 2022: The Law Reform Commission has today published a Consultation Paper on **Compensating Victims of Crime**. The publication follows extensive examination and analysis of the way in which the State compensation scheme for victims of violent crime operates in Ireland. The Consultation Paper commences the Commission's consultation process: the Commission will consult widely and conduct further research before publishing a Report setting out the Commission's final analysis and law reform recommendations.

The Consultation Paper sets out the key concepts that the Commission is considering in relation to reform of the state-funded Criminal Injuries Compensation Scheme.

The Commission's Consultation Paper examines:

- the nature of awards of criminal injuries compensation;
- who is eligible to receive compensation;
- how the criminal injuries compensation process operates;
- who should make decisions on compensation awards and
- what a reformed statutory scheme should look like.

The Scheme is administered by the Department of Justice; decisions on compensation are made by the Criminal Injuries Compensation Tribunal.

The Consultation Paper provides an outline of the Scheme's procedures and its development over time, as well as the origin of state-funded victim compensation schemes internationally. It provides the context in which such schemes were established and continue to operate, and traces the development and recognition of victim's rights, particularly the binding legal obligations that arise for EU Member States in various Directives.

The consultation period will run for ten-weeks, commencing today, and the Law Reform Commission's objective is to achieve a strong level of participation by interested parties and the general public on the issues raised and discussed in the Consultation Paper. To assist public

participation, the Commission has set out a series of questions concerning the key issues under consideration and welcomes responses from all quarters. The Commission will also publish a Plain English summary document. A series of consultative events will also be organised over the coming months.

The Consultation Paper focuses on a number of key dimensions of the Scheme, including:

1. The fact that the Scheme is not statute-based

The Commission is of the view that there are significant benefits to a statutory scheme. Legislation could clearly state the purpose of, and the principles that underpin, the state-funded compensation process. Legislation would also provide structure, permanence and consistency in the determination of applications for compensation. A legislative basis is appropriate for a permanent fixture of the victims' rights landscape.

2. The need for a clear statement of purpose and guiding principles

In assessing the potential for reform, and in seeking to minimise the potential for secondary trauma within the victim compensation process, the Commission seeks views on the guiding principles that should underpin legislation on criminal injuries compensation. The Commission suggests that such principles could include:

- reparation;
- compensation as of right;
- acknowledgement and solidarity and
- minimisation of secondary victimisation.

3. Responsibility for administration of the scheme

The Consultation Paper raises a number of questions and issues concerning the funding and administration of the scheme. These include whether it should continue to be administered by the Department of Justice; whether it should be located within an existing body (such as the Personal Injuries Assessment Board or the State Claims Agency), or whether it should be situated in a new specialist criminal injuries compensation body.

The Commission suggests that the decision to locate responsibility for the Criminal Injuries Compensation Scheme should be consistent with the overall aims of reform, including the need for efficiency, trauma-responsiveness and compensation as part of overall recognition of victim status, in a holistic response to victim needs. It further suggests that, wherever the compensation scheme is ultimately located, the potential for procedural justice must be maximised.

The Commission emphasises that respectful treatment of victims of violent crime is of the greatest importance.

From its research to date, it appears to the Commission that the existing system of state-provided victim compensation – in which victims experience lengthy delays, bureaucratic hurdles and procedural obstacles, and in which they are required to repeatedly revisit details of the violent crimes they have been subjected to – can actually compound the stress and anguish that victims experience. As such, a compelling argument can be made for a full redesign and a new body. The Commission has not yet made final recommendations on the various issues that arise. However, the Commission considers that it is imperative that whatever body runs the Scheme should be:

- established in legislation;
- properly and consistently funded;
- appropriately staffed with the necessary skills and training;
- run efficiently with minimal procedural hurdles;
- operated compassionately, in a way that is sensitive to victims' trauma throughout the application process.

4. Funding of the Criminal Injuries Compensation Scheme

The Scheme is a cash-limited grant scheme with a limited annual budget. If the budget is spent before year-end, applicants must wait until the next annual allocation to receive awards of compensation. When a large claim absorbs a significant proportion of the annual budget in a given year, this causes delays for both large and small claims. It is clear that a consistent and adequate funding model is required for the Scheme.

The Consultation Paper discusses a variety of ways in which funding could be contributed for the Scheme, such as court fines and the allocation of money forfeited to the State as the proceeds of crime, as well as assets seized by the Criminal Assets Bureau. It also draws on approaches taken in other jurisdictions, including the "Offender Levy" in Northern Ireland and the Federal Crime Victim Fund in the United States. In its 2005 Report on the *Court Poor Box: Probation of Offenders* (LRC 75-2005), the Commission recommended that the Court Poor Box system should be replaced with a statutory Reparation Fund. Even part-funding from such sources would incorporate a symbolic element of compensation and reparation.

5. Non-monetary supports

Compensation is intended to practically assist victims in their recovery from the effects of a criminal offence and to symbolically acknowledge the harm caused to them. The Commission acknowledges that monetary compensation cannot solely provide for a victim's needs in the aftermath of a crime and raises the question of whether a reformed compensation scheme should include non-monetary supports, alongside, or as an element of, an award of compensation. These could include access to a certain amount of counselling or assistance in re-joining the workforce by re-training. The Commission posits that if the criminal injuries compensation process assessed financial needs of victims in the aftermath of a crime as well as providing (or referring victims to) the therapeutic and practical supports they need, the harm caused would be minimised and the potential for recovery would be increased.

6. Awards of compensation

The Consultation paper sets out both non-binding principles recommended in international legal instruments in respect of victim compensation systems and binding principles of compensation under EU law. It then assesses the provisions of the Irish Scheme against both.

Under the Irish Scheme, compensation is paid for special damages: quantifiable out of pocket expenses, such as medical costs and loss of earnings. Following revisions to the Scheme in 2021, payment of general damages, i.e., recompense for non-financial losses (pain and suffering), applies only in fatal cases. Payments are generally made in one lump sum, but the Tribunal has the discretion to make interim payments.

The Commission questions the justifiability of the exclusion of general damages, other than in fatality cases, in the light of Ireland's international obligations on victim compensation. It also questions whether the requirement for "fair and appropriate" compensation includes an obligation to provide general damages for all victims, in accordance with the CJEU interpretation of compensation as a contribution to material and non-material losses.

7. Eligibility and exclusion

A crucial consideration in the design and operation of a State-funded victim compensation system is clarity in relation to what categories of victim are eligible to receive compensation. Eligibility criteria are essential in determining who can receive compensation. Predictability and consistency are fundamental aspects of fairness in this context.

The Irish Criminal Injuries Compensation Scheme sets out what categories of claimant are eligible to apply for compensation and the criteria by which compensation awarded by the tribunal may be refused or limited.

Eligible persons include:

- the victim of the offence;
- a person responsible for the maintenance of the victim who has suffered monetary loss or incurred expenses as a result of the victim's injury;
- a dependant of the victim where they died as a result of their injuries;
- where the victim has died and they have no dependants, any person who has incurred expenses as a result of the death, or
- any dependant of the victim where the victim has died, otherwise than as a result of the injuries caused by the criminal offence.

The crime must be committed in Ireland and the victim must report the offence to the Garda Síochána or the Garda Síochána Ombudsman Commission. Claims must be submitted within three months of the offence, although the Tribunal has discretion to extend this period. It is not clear from the provisions of the Scheme whether a victim who has suffered a purely psychological injury, rather than physical injury, can be compensated under the scheme.

The terms of the scheme include restrictions on eligibility, which the Tribunal may consider in determining if the applicant is eligible for compensation:

- the minimum amount of expenses caused by the crime must exceed €500;
- the applicant must have provided “reasonable assistance” to the Tribunal;
- If the Tribunal deems the conduct of the victim, their character or way of life, make it inappropriate to grant an award, it can refuse the claim in its entirety, or reduce the amount of the award.

Victims injured in road traffic offences are not eligible, except in cases where there was a deliberate attempt to run down the victim.

If the Tribunal considers that a victim was responsible for their own injuries, because of provocation or otherwise, their compensation can be reduced or refused.

The Consultation Paper raises issues in relation to the Tribunal’s discretion in interpreting the eligibility and exclusion criteria. Under EU law, victims of violent intentional crime have a right to “fair and appropriate” compensation. It follows that it is essential that there is clarity on the application of the rules governing the Compensation Scheme from the outset. Analysis of past Tribunal decisions on the interpretation of these discretionary limitations on eligibility shows a lack of clarity and consistency between applicants.

The Commission raises particular issues concerning the limitation criterion relating to victims’ conduct, character or way of life. It states that on the face of it, this limitation on eligibility is arguably overly broad and vague. Furthermore, the terms of the Scheme do not expressly require a causal link between the victim’s conduct, character and way of life and the injuries criminally inflicted. It is not clear what factors the tribunal will consider in the interpretation and application of this discretion. In fact, it is not clear what “character or way of life” mean in this context.

8. Procedural Issues

The Consultation Paper examines a number of practical and procedural issues with both the terms of the Scheme and the procedures of the Tribunal. The Commission states that there is a clear duty under EU law to protect victims from secondary victimisation. This duty is contained in both the Victims’ Directive and in the EU strategy on victims’ rights. As such, trauma-responsiveness is an important consideration in the assessment of the Tribunal’s procedures. The Compensation Directive expressly states that “Member States shall endeavour to keep to a minimum the administrative formalities required of an applicant for compensation.” The Victims’ Directive states that “Victims of crime should be protected from secondary and repeat victimisation ... should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice.”

The Consultation Paper outlines the application process, which is based on the completion, by hand, of an application form that requires extensive information relating to the expenses incurred by the victim and considerable personal information. There is no on-line facility for the submission of applications, so they must be posted to the Tribunal. This process must be completed within the three-month timeline set by the Tribunal. This time limit has been criticised as unduly restrictive. It

also fails to take account of the overwhelming consequences of the severe injuries and/or traumatic bereavement that applicants may have experienced.

When the administrative procedures have been completed, the application is submitted by the Secretariat to the Tribunal for consideration and decision. Where the claim is less than €75,000, it will be decided by one Tribunal Member. Claims above that level will be decided by three Tribunal members. The consideration process is conducted on the basis of the documentation received. While there is provision for an oral hearing on the claim, this may not take place and the victim will be informed of the Tribunal decision. The victim can appeal a decision and an adjudication will be made by three Tribunal Members. An oral hearing may take place.

The Commission raises concerns in relation to the Tribunal's appeal process and indicates that it will consider whether an external appeals mechanism to a court for Tribunal decisions is desirable or necessary. Creating a right of appeal to a court would provide a more robust appeal process, as such an appeal would involve the standard features of a legal process and be decided by a judge, who is completely independent of the Tribunal and the initial decision.

Applicants are entitled to engage a legal representative in the process of applying for victim compensation. If they do so, however, it is at their own expense and the Compensation Scheme will not refund the costs incurred. The Commission is of the view that this issue requires further consideration, particularly in cases where the victim's circumstances create severe difficulty in pursuing a legitimate claim for compensation.

Issues arise in relation to the bureaucratic nature of the Tribunal's procedures, in the context of the right of victims of violent crime to compensation by the State. The Commission emphasises that there are aspects to the Tribunal's procedures which could, with small and inexpensive changes, better assist in the reparation of victims, including small actions such as sending a letter or an email to the victim acknowledging their experience with empathy and compassion and expressing solidarity with them on behalf of the people of Ireland. From that point on it is essential that the processes of the tribunal are designed with reparation in mind, minimising administrative hurdles and bureaucracy and maximising fairness and transparency. The Commission is keen to understand how existing procedural hurdles can be eliminated.

9. Interaction with compensation in the criminal process

EU law requires Member States to operate national state-funded compensation systems, under the Compensation Directive, as well as a process to receive a decision on offender-paid compensation in legal proceedings.

Where there has been personal injury or loss as a result of the offence, criminal courts in Ireland can order compensation to be paid from offenders to victims at the conclusion of the criminal trial. Compensation is also frequently offered to victims by offenders voluntarily at sentence.

To comply with the requirements of the Criminal Injuries Compensation Scheme, a victim must apply to the Tribunal within three months of the criminal incident. However, in cases where the offender has been identified and is the subject of criminal proceedings, the Tribunal's practice is to withhold a

decision on the victim's claim, pending the finalisation of the criminal proceedings. Any compensation from the offender, whether ordered by the Court or voluntarily paid, will be deducted from an award of compensation claimed under the Scheme. This is in line with the principle against double compensation under the Scheme.

In relation to the delays that inevitably arise in cases where offenders are the subject of criminal proceedings, the Commission questions if there are valid reasons to await the conclusion of court proceedings before a decision is made on an application for compensation. Furthermore, the Commission states its view that where injuries of a serious nature have been sustained and where there is no question but that they have been criminally inflicted, delaying a compensation award while parallel proceedings are ongoing can cause undue hardship to victims. The Commission invites views on ways in which these processes could be streamlined and better coordinated.

10. A National Victims' Office

The potential reforms proposed by the Commission provide an opportunity to design a system that reduces the unnecessary barriers and procedural hurdles, as well as stress and trauma for victims of crime. As part of that assessment, the Commission invites submissions on whether a National Victims' Office is required to provide both compensation and general and/or specialised support services in a coordinated and cohesive way.

Background Notes for Editors The Law Reform Commission is an independent statutory body whose mission is to keep the law under independent, objective and expert review, to make recommendations for law reform and to make current law accessible for all. The Commission strives to ensure that the Commission's law reform publications are practical, relevant, solutions-driven and focused on the end-users of legislation. To date, the Commission has published over 200 documents (Consultation Papers, Issues Papers and Reports) containing reform proposals. The majority of these proposals have influenced the drafting and content of reforming legislation.

Seeking views by 19th April The Commission seeks the views of consultees on the issues raised in this Consultation Paper by 19th April 2022. The Consultation Paper will be available on the Commission's website, www.lawreform.ie from 7am on 9th February.

Responses can be submitted to the Commission by email: VictimCompensation@lawreform.ie

For further information / interview with Rebecca Coen, Director of Research, contact:

Larry Donald, Heneghan 087 2581787
Michael Hall, Heneghan 087 3106238