

CONSULTATION PAPER

**COMPENSATING
VICTIMS OF CRIME**

(LRC CP 67 – 2022)

Consultation Paper

Compensating Victims of Crime

(LRC CP 67 - 2022)

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GLOSSARY

The following abbreviations are used throughout this Consultation Paper

BV case	Case C-129/19 <i>Presidenza del Consiglio dei Ministri v BV</i> , a 2020 case in which the Compensation Directive was interpreted by the Court of Justice of the European Union. The Court confirmed that the Compensation Directive requires fair and appropriate compensation to be paid to victims of violent intentional crime not only in cross-border cases, but in domestic cases also
COE	Council of Europe
CICT	Criminal Injuries Compensation Tribunal
CJEU	Court of Justice of the European Union
Compensation Directive	Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims OJ L 261, 6.8.2004. The Directive requires all EU countries to have a compensation scheme for victims of violent intentional crime committed on their territories. The organisation and operation of such schemes is left to the discretion of each EU country. It also sets up an EU-wide cooperation system based on those national schemes
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
Milquet Report	Report of Special Adviser Milquet to the President of the European Commission entitled “Strengthening victims’ rights: from compensation to reparation” (European Commission 2019)
PIAB	Personal Injuries Assessment Board

SCA	State Claims Agency
Scheme	The Scheme of Compensation for Personal Injuries Criminally Inflicted (sometimes referred to as 'The Criminal Injuries Compensation Scheme'). The Scheme is administered by the Criminal Injuries Compensation Tribunal ("the CICT" or "the Tribunal")
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
Victims' Directive	Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, replacing Council Framework Decision 2001/220/JHA. The Directive was given effect in Irish law by the Criminal Justice (Victims of Crime) Act 2017

OVERVIEW AND EXECUTIVE SUMMARY

1. This Consultation Paper forms part of the Commission's Fifth Programme of Law Reform.¹ The project examines the way in which state compensation for victims of criminal injuries operates in Ireland, with a particular focus on the Scheme of Compensation for Personal Injuries Criminally Inflicted, referred to in this Paper as "the Scheme".
2. This Consultation Paper will address the Scheme, examining its terms and procedures as well as its broader legal context, the victims' rights landscape in which it is located and the international legal instruments that create binding obligations on states in respect of victim compensation. The Paper will also look at the interaction between court-ordered compensation in the criminal process and awards of compensation under the Scheme. Questions are asked of consultees on potential reform of the Criminal Injuries Compensation Scheme.
3. In considering how to approach compensation for criminal injuries, it is important to bear in mind that the concept of compensation is not necessarily limited to the making of monetary awards. Compensation in this context can (and arguably should) include the provision of services to aid a victim's recovery, such as physiotherapy or counselling, and indeed might encompass restorative justice practices designed to promote healing. It is important to note at the outset that thinking of compensation only in financial terms is unduly limiting. Indeed, in relation to the provision of victim services generally, a holistic approach is both necessary and desirable.
4. Broadly speaking, the conceptual questions the Commission is considering in relation to reform of the state-funded victim compensation scheme are:
 - (a) the nature of awards of compensation;

¹ *Report on Fifth Programme of Law Reform (LRC 120-2019) Project 7.*

- (b) who is eligible to receive compensation;
- (c) how the compensation process operates;
- (d) who should make decisions on compensation awards; and
- (e) what a statutory reformed scheme should look like.

Chapter 1 The Criminal Injuries Compensation Scheme provides an outline of the Scheme: its terms, procedures, and its development over time. It addresses the origins of state-funded compensation schemes generally, the policy justifications for them, and alternative methods of seeking compensation as a person injured by a criminal act.

Chapter 2 Victim Compensation in Context addresses the context in which state-funded victim compensation schemes were established and continue to operate. This involves discussion of the development and recognition of victims' rights generally, both in domestic and international law. Non-binding recommendations from the United Nations and the Council of Europe in respect of victims' rights are set out, along with the binding legal obligations on European Union Member States in various Directives.

Chapter 3 Legislating for Victim Compensation addresses the non-statutory nature of the Scheme of Compensation for Personal Injuries Criminally Inflicted. The advantages of legislating for the victim compensation scheme are discussed. Potential guiding principles for a reformed statutory scheme are discussed. The chapter also looks at the funding and administration of the Scheme.

Chapter 4 Awards of Compensation discusses the nature and extent of awards of compensation under the Scheme. The discussion notes a clear contextual shift, evident in a number of jurisdictions in recent years, in which victim compensation has come to be seen as a right rather than merely as a discretionary token paid as an expression of sympathy from the State. Recent EU law developments have put beyond doubt that fair and appropriate compensation is a benefit which should be available to victims of violent intentional crime as of right to meet their needs in the aftermath of a crime.

Chapter 5 Eligibility and Exclusion sets out the eligibility criteria for compensation under the Scheme. The criteria are assessed against the binding obligations and guiding principles set out in international legal

instruments. Consultees are asked about ways in which the current eligibility criteria under the Scheme might usefully be reformed.

Chapter 6 Procedural Issues addresses practical and procedural issues in the terms of the Scheme and the procedures of the Criminal Injuries Compensation Tribunal that administers it. The procedures of the Tribunal are assessed both from the applicant's perspective and as an administrative body exercising quasi-judicial functions.

Chapter 7 Interaction with Compensation in the Criminal Process looks at the operation of section 6 of the Criminal Justice Act 1993, which provides for a procedure whereby a criminal court may order an offender to pay compensation to the victim in respect of any personal injury or loss resulting from the offence. The intersection with the Criminal Injuries Compensation Scheme is examined.

Seeking your views

A Consultation Paper contains an analysis of issues that the Commission considers arise in a particular law reform project, together with a series of questions intended to assist consultees. A Consultation Paper does not usually contain any settled view of the Commission. It is therefore intended to provide consultees with an opportunity to express their views and to make any related submissions on the questions that arise in the Consultation Paper.

Consultees need not answer all questions and are also invited to add any additional comments they consider relevant.

Consultees should note that submissions are, in principle, subject to the possibility of disclosure under the Freedom of Information Act 2014. Any person may make a submission saying that he or she is making it on a confidential basis, especially if it contains personal information, and we would then treat it as confidential as far as possible. In the event that we receive a request for any material to be disclosed under FOI, we will, before releasing the information, contact the person concerned for their views.

Submissions can be sent in either of the following ways:

(a) You can email your submission—in whichever format is most convenient to you—to the Commission at VictimCompensation@lawreform.ie.

or

(b) You can post your submission to:

Law Reform Commission,
Styne House,
Upper Hatch Street,
Dublin 2,
Ireland.

We would like to receive submissions on this Consultation Paper no later than close of business on **19 April 2022** if possible.

CHAPTER 1

THE CRIMINAL INJURIES COMPENSATION SCHEME

1. Introduction

- [1.1] The Scheme of Compensation for Personal Injuries Criminally Inflicted, often referred to as “the Criminal Injuries Compensation Scheme”, provides an avenue to compensation for victims of crime without having to pursue a claim for compensation against the offender (which may not be possible or practical in any event). The provision of compensation to victims of crime is not novel, but the question arises as to whether the Scheme as currently constituted is fit for purpose.
- [1.2] A review of the Scheme was included in the Law Reform Commission’s Fifth Programme of Law Reform in 2019.¹ Research was underway by the Commission when the terms of the Scheme were revised in April 2021. These amendments were necessary in light of various developments in Irish and international law. These include several judicial reviews of the Scheme,² and important EU level developments such as the first interpretation of the Compensation Directive by the Court of Justice of the European Union (“CJEU”).³ In response to the revised terms of the Scheme in April 2021, the Commission revised the scope of its project to take a broader approach to victim compensation. The Minister for Justice committed to place the Scheme on a statutory footing and to undertake further review of the Scheme in light of the Commission’s work in this project.⁴

¹ Law Reform Commission, *Report: Fifth Programme of Law Reform* (LRC 120-2019).

² Such as *Byrne v Criminal Injuries Compensation Tribunal* [2017] IEHC 28, *Vonkova v Criminal Injuries Compensation Tribunal* [2019] IEHC 13 and *Kelly and Doyle v Criminal Injuries Tribunal* [2020] IECA 342.

³ Case C-129/19 *Presidenza del Consiglio dei Ministri v BV* EU:C:2020:566.

⁴ Department of Justice, “Minister McEntee announces reforms to the Criminal Injuries Compensation Scheme” <<https://www.justice.ie/en/JELR/Pages/PR21000092>> accessed 22 November 2021.

- [1.3] This chapter will provide an outline of the Scheme: its terms, procedures, and its development over time. It will also address the origins of state funded compensation schemes generally and alternative methods of receiving compensation as a person injured by the criminal act of another.
- [1.4] A detailed consideration of the Scheme is required given that one of the principal purposes of this Consultation Paper is to examine whether the Scheme is in need of further reform having regard to Ireland's obligations to compensate victims of crime under the Compensation Directive.

2. The Criminal Injuries Compensation Scheme

- [1.5] The Scheme was established in 1974. Compensation under the Scheme is intended to reimburse expenses that victims have incurred, or losses suffered, as a direct result of a crime of violence. It also makes limited provision for general damages ("pain and suffering") in fatal cases.
- [1.6] The Scheme is non-statutory. It was not established by or under statute but by administrative decision in 1974. It continues to operate on a non-statutory basis (the implications of this will be further discussed in Chapter 3). The terms of the Scheme, available on the Department of Justice website and in Appendix A of this Paper,⁵ set out who and what may be compensated.
- [1.7] Financial compensation may be paid where injuries are suffered as a direct result of a crime of violence or arising from the action of the victim in assisting, or attempting to assist, in the prevention of crime or saving of human life. Injuries must have been sustained within the Irish State, or on board an Irish ship or aircraft, on or after 1st October 1972.⁶ The terms of the Scheme indicate that arson and poisoning are included within the scope of the expression "crime of violence" (not further defined in the Scheme). Injury includes fatal injury.

⁵ Terms of the 2021 Scheme, available at <http://www.justice.ie/en/JELR/Scheme_of_Compensation_for_Personal_Injuries_Criminally_Inflicted_effective_from_20_April_2021.pdf/Files/Scheme_of_Compensation_for_Personal_Injuries_Criminally_Inflicted_effective_from_20_April_2021.pdf> accessed 22 November 2021.

⁶ The scope of the scheme is intentionally retrospective to 1972 to include victims of bombings that predated the establishment of the Scheme. Osborough, "The Work of the Criminal Injuries Compensation Tribunal" (1978) 13 *Irish Jurist* (NS) 320.

[1.8] Compensation may be claimed by:

- the victim of the offence;
- where the victim has died as a result of their injuries (or otherwise), any dependant of the victim; or
- where the victim has died as a result of their injuries and has no dependants, a person who has incurred expenses as a result of the death or a person responsible for the maintenance of the victim who has suffered financial loss or incurred expenses as a result of the injury.

[1.9] To be eligible for compensation under the Scheme, the victim's injuries must be directly caused by a violent crime committed in Ireland and the crime must be reported to the Garda Síochána. The offender does not have to be identified or prosecuted to claim compensation under the Scheme,⁷ nor does any immunity of the offender from prosecution prohibit claiming compensation.⁸ The terms of the Scheme also contain five "limitations and restrictions" on eligibility for compensation, which are applied at the Tribunal's discretion, and which may be used to reduce or refuse an award. These are discussed in further detail in Chapter 5.

[1.10] Compensation is paid for financial losses such as lost earnings and evidenced out of pocket expenses. There is a minimum award threshold of €500 – if the expenses arising from the injuries caused by the crime fall under €500, a victim cannot apply under the Scheme. Compensation for general damages is paid only for fatal injuries and is limited to a maximum of €35,000.⁹ Awards of compensation are generally paid in one lump sum. The Tribunal has discretion to make alternative arrangements for the administration of awards of compensation¹⁰ or to make an interim award if

⁷ The terms of the Scheme do not state that the offender must be identified or prosecuted in order to receive compensation under the Scheme – if criminal proceedings are ongoing, the Tribunal requires details of these proceedings.

⁸ Paragraph 1 of the Scheme: "in determining whether any act is a crime for the purposes of the Scheme, the Tribunal will not take account of any legal immunity which the person who inflicted the injury may have by reason of his mental health, his youth or otherwise."

⁹ Paragraph 6(e) of the Scheme.

¹⁰ Paragraph 31 of the Scheme.

the applicant is awaiting a final medical assessment of their injuries.¹¹ The terms of the Scheme contain a principle against “double compensation” – meaning that a victim cannot recover compensation twice for the same injuries. If a victim has received compensation from another source, they can still apply under the Scheme, but this amount will be deducted in calculating an award of compensation under the Scheme (if any will be awarded).

[1.11] Compensation will be calculated on the basis of damages awarded under the Civil Liability Acts 1961 - 2017, with the following exceptions for which compensation will not be payable:

- (a) Exemplary, vindictive or aggravated damages;
- (b) Maintenance of any child born to a victim of sexual offence;
- (c) Loss or diminution of expectation of life;
- (d) Where the victim has died, for the benefit of their estate;
- (e) (other than in fatal cases) Compensation in respect of pain and suffering.¹²

[1.12] The nature and extent of the compensation available under the Scheme will be discussed further in Chapter 4.

[1.13] The Scheme is administered by the Criminal Injuries Compensation Tribunal (“the CICT” or “the Tribunal”).¹³ Tribunal members are qualified legal professionals who decide compensation applications on a part-time basis. Tribunal members are appointed by the Minister for Justice. Since 1990, the Tribunal has also been responsible for the administration of the Scheme of Compensation for Personal Injuries Criminally Inflicted on Prison Officers.¹⁴ As the Scheme relating to the compensation of prison

¹¹ Paragraph 8 of the Scheme.

¹² Paragraph 6 of the Scheme.

¹³ The Tribunal was established under paragraph 16 of the Scheme.

¹⁴ The terms of this Scheme are available online at <
https://www.justice.ie/en/JELR/Pages/Criminal_Injuries_Compensation_Scheme>
accessed 22 November 2021.

officers operates on different terms and compensates prison officers only, it is not considered in this project.¹⁵

- [1.14] The Scheme is a cash-limited grant scheme, with an annual budget set and provided by the Oireachtas.¹⁶ Where the Tribunal's annual funding is spent before the end of the calendar year, no further awards can be made, and awards must be deferred until after the next annual funding allocation. This can create significant delays for victims in receiving the compensation awarded to them. The effects of how the Scheme is funded are discussed further in Chapter 6.
- [1.15] Application forms can be found online and submitted by post (see Appendix B). There are two application forms: one for fatal injuries and one for non-fatal injuries. Both application forms require detailed information relating to loss of earnings, medical expenses, and the Garda Síochána incident report of the crime, along with other documents. Applications must be made in writing within three months after the crime which caused injury.¹⁷ This is arguably an unduly restrictive time limit to apply for compensation under the Scheme – an issue which will be explored in further detail in Chapter 6.
- [1.16] Applications are processed by staff of the Department of Justice and forwarded on to the Tribunal for decision once all the required documents have been received from applicants. If the award claimed is under €3,000 a decision on the application may be made by a duly authorised officer of the

¹⁵ Paragraph 4 of that Scheme permits members of the Garda Síochána to apply under the scheme in the following circumstances: if they are unlawfully attacked, were attempting to prevent a crime or take a person into custody, in the course of an attempt to rescue a person in custody, in the course of a riot/disturbance/threatened disturbance of the peace, or while engaging in saving a human life. Compensation is otherwise available to Gardaí injured in the line of duty under the terms of the Garda Síochána (Compensation) Acts 1941 to 1945. Reform to that system is expected in 2022 (see <<https://www.gov.ie/en/publication/32097-legislation-programme-spring-session-2021/>> accessed 31 January 2022) and therefore will not be addressed in this project.

¹⁶ The Scheme's budget for 2021 was €7 million, increased from the 2020 budget of €4 million, see <<https://www.gov.ie/en/press-release/f1e46-a-record-3-billion-budget-to-modernise-reform-and-covid-equip-justice-sector-announced-by-minister-mcentee/>> accessed 22 November 2021.

¹⁷ Paragraph 20 of the Scheme. Tribunal members have discretion to waive this 3-month time limit where justified by exceptional circumstances but may only do so up to a maximum 2 years after the offence was committed.

Tribunal.¹⁸ Awards over that threshold are generally decided by one Tribunal member. If the award claimed is over €75,000, the application will be decided by three members of the Tribunal.¹⁹

- [1.17] The Tribunal is responsible for the determination of cross-border applications for compensation. In other words, a Spanish person injured by a criminal act in Ireland can apply for compensation under the Irish Scheme. This is required by the Compensation Directive (discussed in more detail in Chapter 2).
- [1.18] Applications are determined in an entirely paper-based process at first instance based on the documents received. If an applicant appeals the first instance decision, three Tribunal members may hold an oral hearing to make a fresh decision on the application. The Scheme affords Tribunal members discretion on several eligibility criteria and procedural matters. Procedures are intended to be as informal as possible, so that applicants do not require legal representation. Applicants may engage legal representation if they wish, however it will be at their own expense. Compensation awards do not reimburse legal fees nor are applications to the Scheme covered under the civil legal aid system.²⁰ Practical and procedural issues in the compensation scheme will be further discussed in Chapter 6.

(a) Changes to the terms of the scheme since its establishment

- [1.19] The Scheme was established on a non-statutory basis in 1974. The initial terms of the Scheme remained unchanged until a significant amendment in 1986. Under the initial terms of the Scheme (“the 1974 Scheme”), awards of compensation included general damages/damages for pain and suffering.
- [1.20] In 1986, the terms of the Scheme were amended, and awards of compensation excluded general damages. This amendment was made to reduce the cost of the Scheme for the State in the severe economic

¹⁸ Paragraph 24 of the Scheme. The term “duly authorised officer of the Tribunal” is not defined in the terms of the Scheme but refers to a staff member of the Department of Justice, likely the secretary of the Tribunal, assigned to provide administrative support to the Tribunal. There are currently no duly authorised officers of the Tribunal.

¹⁹ Paragraph 24 of the Scheme.

²⁰ Paragraph 26 of the Scheme.

downturn of the 1980s. The amendment in 1986 was the last change to the Scheme until several further amendments were made in April 2021. In other words, there have been three versions of the Scheme:

- the 1974 Scheme;
- the 1974 Scheme (as amended in 1986); and
- the 1974 Scheme (as amended in 1986 and 2021, referred to in this Paper as the 2021 Scheme).

[1.21] This chapter will trace the changes to the terms of the Scheme and detail the justification and causes behind those changes.

(i) Terms of the 1974 Scheme

[1.22] The introduction of the 1974 Scheme, and its retrospective application to crimes committed in 1972, reflected the State's intentions to address the position of victims of criminal acts, notably bombings, that occurred in the early 1970s. Given this background to the 1974 Scheme, it is perhaps unsurprising that its general scope was similar to the comparable Scheme already in place since 1966 in Northern Ireland. The Northern Ireland Scheme was, in turn, based on the UK Scheme (operating in England, Scotland and Wales) first introduced on a non-statutory basis in 1964.²¹ Several other jurisdictions, such as New Zealand and California, introduced national victim compensation systems in the 1960s.²² However, at that time there was little attention paid to victim's rights in international law. In fact,

²¹ Parliamentary discussion stemmed from a letter written by Margery Fry (a leading member of the Howard League of Penal Reform) and published in *The Observer* newspaper in 1957. The letter and subsequent legal discussion were set out in a 1959 volume of the *Journal of Public Law*. Fry, "Justice for Victims" (1959) 8 *Journal of Public Law* 191. This led to the publication of a Government White Paper which formed the basis of the first UK compensation scheme in 1964 (this excluded Northern Ireland, which has operated a separate compensation system since 1966).

²² Maguire, "The Needs and Rights of Victims of Crime" (1991) 14 *Crime and Justice: A Review of Research* 363 at page 418.

the Irish Scheme preceded the first Council of Europe recommendations on victim compensation.²³

- [1.23] The 1974 Scheme stated that compensation paid by the Tribunal was *ex gratia* (meaning without obligation) and that awards were made at the discretion of the Tribunal. Accordingly, there was no legal right to compensation: the Tribunal had sole authority whether to award compensation under the Scheme or not.
- [1.24] Compensation was awarded for both special and general damages. Originally, awards under the 1974 Scheme were intended to mirror those in civil tort claims, a feature of many of the early comparable Schemes in other jurisdictions such as the scheme in Northern Ireland and the first UK scheme of 1964.
- [1.25] The terms of the Scheme set out the various eligibility criteria which Tribunal members could consider in making awards of compensation. Tribunal members were afforded significant discretion in applying these eligibility criteria to refuse or reduce awards of compensation.
- [1.26] The eligibility criteria of the 1974 Scheme are largely still in place except for one significant amendment made in the 2021 Scheme: the removal of the “same roof” rule. The “same roof” rule meant that compensation was not payable where the offender and the victim were living together as members of the same household at the time the injuries were inflicted.²⁴ This limitation on eligibility for compensation automatically excluded parent-child, intimate and cohabiting relationships. Victims of domestic abuse, including fatalities arising from domestic violence, and many victims of sexual offences were ineligible for compensation if they cohabited with their abuser at the time injuries were inflicted.
- [1.27] The rationale behind this limitation on eligibility was not explicitly stated in the 1974 Scheme. One observer has suggested that it was based on a perception prevalent at the time of the Scheme’s inception that society should not attempt to interfere with private familial business and

²³ The first European recommendations on victim compensation took the form of non-binding recommendations in the 1977 Council of Europe Resolution (77) 27 on the Compensation of Victims of Crime (Adopted by the Committee of Ministers on 28 September 1977, at the 275th meeting of the Ministers’ Deputies).

²⁴ Paragraph 10 of the 1974 Scheme.

“what went on behind the closed doors of houses”.²⁵ Indeed, it was not until two years after the Scheme was introduced that the first express piece of legislation in this area was enacted, the Family Law (Maintenance of Spouses and Children) Act 1976, introducing the first statutory form of barring order.²⁶

- [1.28] However, it is more likely that the rationale for the “same roof” rule was to prevent the offender from benefitting from an award of compensation. This is the basis on which a similar limitation on eligibility is explained in the comparable UK scheme (excluding Northern Ireland which operates a separate compensation system) and the justification that has been advanced in litigation challenging the same roof exclusion in the UK.²⁷ Under the scheme operated in England, Scotland and Wales, however, if the victim and the offender are no longer living together and are unlikely to do so again, the victim will be eligible to receive compensation.²⁸ When this was introduced, it did not have retrospective effect to applications for crimes committed between 1964 (the inception of the UK Scheme) and 1979. A public consultation held by the UK government in 2020 to review the compensation scheme recommended the complete removal of this rule with retrospective effect to 1964.²⁹
- [1.29] The “same roof” limitation on eligibility under the Irish Scheme did not go uncriticised. Submissions from stakeholders which influenced the content of the Commission’s Fifth Programme of Law Reform criticised the “same roof” rule of eligibility under the Scheme. In 2002, the Department of Justice recognised, in analysis of the requirements of the then **proposed**

²⁵ Nugent, “Review of the Scheme of Compensation for Personal Injuries Criminally Inflicted” (1999) 4(6) *The Bar Review* 286.

²⁶ Section 22 of the Family Law (Maintenance of Spouses and Children) Act 1976 (later replaced by the Domestic Violence Act 1996 and, in turn, the Domestic Violence Act 2018).

²⁷ *JT v First Tier Tribunal* [2018] EWCA Civ 1735, [2019] 1 WLR 1313 (Court of Appeal of England and Wales); *In re Meenan* [2018] NICA 42 (Court of Appeal of Northern Ireland).

²⁸ Criminal Injuries Compensation Scheme 2012 (as amended) at paragraph 20.

²⁹ Ministry of Justice, *Criminal Injuries Compensation Scheme Review 2020* (CP 277) at paragraph 110, available at < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901140/cics-review-2020.pdf> accessed 22 November 2021. This change to the Scheme has not yet been implemented.

Compensation Directive, that this limitation should be removed or qualified.³⁰ The Second National Strategy on Domestic, Sexual and Gender Based Violence 2016-2021 proposed that the Department of Justice review the Scheme for victims of domestic violence in relation to this rule.³¹

- [1.30] The same roof rule in its unqualified form was the subject of successful challenge in England and Wales³² and in Northern Ireland.³³ In each case, the court concluded that the right to apply for compensation under the applicable scheme was a “possession” protected by Article 1, Protocol 1 of the European Convention on Human Rights and that the exclusion of compensation on the basis of the same roof rule violated Article 14 of the Convention.³⁴ *Vonkova v Criminal Injuries Compensation Tribunal*³⁵ involved a challenge to the “same roof” rule in this jurisdiction on grounds that it was incompatible with the Convention. The applicant, a mother claiming compensation after the murder of her daughter, was refused compensation under the Scheme as the victim was residing in the same household as the offender at the time of the offence. The applicant was granted leave to apply for judicial review of the Tribunal’s decision, but the matter was settled between the parties. In light of the revised terms of the Scheme in 2021, the issue is now moot.
- [1.31] Since its commencement in 1974, the Scheme has not, until now, undergone any public review.³⁶ As will be outlined below, there have been

³⁰ Joint Committee on Justice, Equality, Defence and Women’s Rights, *EU Scrutiny Report No 3: COM(2002)562* (prn 2677, April 2004).

³¹ Cosc National Office for the Prevention of Domestic, Sexual and Gender Based Violence, *Second National Strategy on Domestic, Sexual and Gender Based Violence 2016-2021*.

³² *JT v First Tier Tribunal* [2018] EWCA Civ 1735, [2019] 1 WLR 1313 (Court of Appeal of England and Wales).

³³ *In re Meenan* [2018] NICA 42 (Court of Appeal of Northern Ireland).

³⁴ A similar challenge in Scotland failed in *MA v Criminal Injuries Compensation Board* [2017] CSIH 46.

³⁵ [2019] IEHC 13.

³⁶ An internal review of the scheme was carried out by the Department of Justice in 1997 as stated in the discussion paper “Tackling Crime”. The findings of this review were not publicised, and no changes were made to the terms of the scheme. Nugent, “Review of the Scheme of Compensation for Personal Injuries Criminally Inflicted” (1999) 4(6) *The Bar Review* 286.

several developments in both domestic and international law which make such a review timely at this stage.

(ii) Terms of the 1974 Scheme as amended in 1986

[1.32] The terms of the Scheme were amended in 1986 to remove compensation for general damages, or “pain and suffering”, due to the significant cost of operating the Scheme on the State.³⁷ Initial annual reports of the Tribunal indicated that the number of applications had been significantly increasing until the removal of compensation for general damages.³⁸ The number of applications under the Scheme fell sharply after this amendment.³⁹

[1.33] The Scheme operated from 1986 until early 2021 without change but not without criticism. The criticisms centred on several points:

- The non-statutory nature of the Scheme;
- The lack of clarity and certainty as to the eligibility criteria which can refuse or reduce an award of compensation;
- The lack of awareness of the Scheme which hindered its accessibility;⁴⁰
- The lack of any discretion to reimburse legal fees and exclusion of applications under the Scheme from the remit of the civil legal aid system;⁴¹

³⁷ Nugent, “Review of the Scheme of Compensation for Personal Injuries Criminally Inflicted” (1999) 4(6) *The Bar Review* 286.

³⁸ The Ninth Annual Report 1986 (pl 3958) indicated a 65% increase in applications received under the Scheme, available at <<https://opac.oireachtas.ie/AWDData/Library3/Library2/DL035313.pdf>> accessed 22 November 2021.

³⁹ O’Morain, “Crime victims wait long for compensation” *The Irish Times* (2 February 1988).

⁴⁰ As Osborough remarked, “[a] continuing concern of the Tribunal has been ignorance within the community at large as to its very existence.” Osborough, “The Work of the Criminal Injuries Tribunal” (1978) 13 *Irish Jurist* (NS) 320 at page 321. The low profile of the Scheme has been maintained in the intervening decades.

⁴¹ Nugent, “Review of the Scheme of Compensation for Personal Injuries Criminally Inflicted” (1999) 4(6) *The Bar Review* 286.

- Removal of compensation for “pain and suffering”;⁴² and
- Significant delays in the processing of applications and in receiving awards of compensation.⁴³

[1.34] Several judicial reviews have been taken against decisions of the Tribunal since its creation. These judgments (which will be discussed throughout the Consultation Paper) highlight past and present issues in the terms of the Scheme and the procedures of the Tribunal. For example, the Supreme Court in *The State (Creedon) v Criminal Injuries Compensation Tribunal*,⁴⁴ in recognition of the fact that the Scheme attracts the protections of constitutional justice in its administration, created an obligation on Tribunal members to provide reasons for the refusal of an application for compensation. In *Byrne v Criminal Injuries Compensation Tribunal*⁴⁵ the High Court held that the thirteen-year delay between an initial application and receipt of the final award of compensation was a breach of the applicant’s right to constitutional justice.

[1.35] The recent judgment of the Court of Appeal in *Kelly and Doyle v Criminal Injuries Tribunal*⁴⁶ (discussed in further detail below) held that the lack of information on how discretionary eligibility criteria are applied was in breach of the applicants’ constitutional right to fair procedures and/or failed to meet the requirements of effective protection of their EU law rights in the 2004 Compensation Directive, as set out by the European Court of Justice in *Presidenza del Consiglio dei Ministri v BV* (“the BV case”).⁴⁷ The judgment required the Tribunal to make previous decisions publicly

⁴² O’Flaherty J, speaking extra-judicially, called for the re-inclusion of payments for pain and suffering in 1996: Maher, “Judge urges compensation for pain of crime victims” *The Irish Times* (20 February 1996) <<https://www.irishtimes.com/news/judge-urges-compensation-for-pain-of-crime-victims-1.30883>> accessed 22 November 2021. This was echoed by the Law Society in 1997: Editorial, “Law Society focuses on crime victim” *The Irish Times* (12 June 1997) <<https://www.irishtimes.com/news/law-society-focuses-on-crime-victim-1.81269>> accessed 22 November 2021.

⁴³ Grant, “The Criminal Injuries Compensation Scheme for Personal Injuries Criminally Inflicted: In Need of Reform” (2020) 30(4) *Irish Criminal Law Journal* 94.

⁴⁴ [1988] 1 IR 51 at page 55.

⁴⁵ [2017] IEHC 28.

⁴⁶ [2020] IECA 342.

⁴⁷ Case C-129/19 *Presidenza del Consiglio dei Ministri v BV* EU:C:2020:566.

available, in a suitable format, to offer guidance to potential applicants on the application of various limitations on eligibility under the Scheme.

(b) Terms of the 2021 scheme

[1.36] The Scheme was further significantly amended in April 2021. The changes made to the Scheme in April 2021 include:

- (a) Removal of references to compensation being *ex gratia* (*ex gratia* means “as a favour” – without a legal obligation);
- (b) Re-introduction of compensation for pain and suffering but only in fatal applications for injuries sustained after 1 January 2006. This is subject to the limit of the maximum amount set in any statutory instrument made pursuant to section 49(1A) of the Civil Liability Act 1961 as amended (currently €35,000);
- (c) Increase of the minimum award threshold from €63.49 to €500, and provision to the effect that an authorised officer of the Tribunal (usually the Tribunal’s secretary) may only decide claims under €3,000;⁴⁸
- (d) Complete removal of the restriction on eligibility for victims who lived with the offender at the time their injuries were inflicted (or the “same roof” rule found in paragraph 10 of the previous Scheme);
- (e) Doubling of Tribunal members – from 7 to 14 (including the Chairperson);
- (f) The time limit to apply remains three months but the Tribunal’s discretion to waive this in exceptional circumstances will be restricted to a two year time period;⁴⁹
- (g) Offences may be reported to the Garda Síochána Ombudsman Commission (“GSOC”) where the crime is alleged to have been carried out by a member of the Garda Síochána;

⁴⁸ The previous minimum award threshold was set out in the Scheme as £50. This equates to €63.49. Under the previous terms, an authorised officer of the Tribunal may have decided on claims under £250.

⁴⁹ Previously there was an unrestrained discretion to waive the time limit to apply under the Scheme.

- (h) All applications claiming over €75,000 in compensation will be decided by a three-member tribunal, to improve the governance framework of the CICT;
- (i) Decisions of the Tribunal, appropriately redacted to remove personal data, may be made publicly available.⁵⁰

[1.37] These changes have substantially altered the compensation scheme and undoubtedly improved numerous aspects of the Scheme from an end-user perspective. However, there are a number of aspects of the Scheme which were not revised and have not been revised since the inception of the Scheme in 1974 which would benefit from review.

(c) Need for further reform

[1.38] The following developments give rise to further examination of the Scheme with a view to reform:

- The obligations on European Union Member States regarding crime victim compensation as set out in the 2004 Compensation Directive;⁵¹
- Interpretation of the Compensation Directive by the CJEU in the *BV* case⁵² which identified the right to compensation under EU law;
- The EU Strategy on Victims' Rights 2020 -2025;⁵³ and
- The decision of the Court of Appeal in *Kelly and Doyle v Criminal Injuries Tribunal*.⁵⁴

⁵⁰ A number of past decisions have been made publicly available in a redacted format with respect to the application of discretion regarding the time limit to apply and the "conduct, character, way of life" limitation on eligibility, accessible at <https://web.archive.org/web/20210721115625/https://www.justice.ie/en/JELR/Pages/Access_to_past_decisions> accessed 22 November 2021.

⁵¹ Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims OJ L 261, 6.8.2004.

⁵² Case C-129/19 *Presidenza del Consiglio dei Ministri v BV* EU:C:2020:566.

⁵³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Strategy on victims' rights (2020-2025), Brussels 24.06.2020 COM (2020) 258.

⁵⁴ [2020] IECA 342.

- [1.39] One of the purposes of this Consultation Paper is to examine whether the Scheme is in need of further reform having regard to Ireland's obligations to compensate victims of crime under the Compensation Directive. The Compensation Directive was considered by the CJEU in the *BV* case on 16 July 2020. The Directive provides at Article 12 (2): "All Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims."
- [1.40] In the *BV* case the CJEU held that victims of violent intentional crime must be able to invoke a right of access to the compensation scheme of the Member State in which the crime in question was committed, whether they are in a cross-border situation or reside in that Member State.⁵⁵ The Court also addressed the purpose of state paid compensation (a contribution to the reparation of material and non-material losses suffered) and that compensation awards must have regard to the seriousness of the consequences of the crime committed for the victim. The CJEU indicated certain requirements for compensation to be considered "fair and appropriate" - which has significant implications for the Scheme in this jurisdiction.
- [1.41] The European Commission adopted its first strategy on victims' rights in June 2020.⁵⁶ The strategy aims to strengthen the framework for the support and protection of victims and to improve existing EU rules on victims' rights. The Irish Scheme must be re-assessed against the standards for national compensation schemes set out in the strategy.
- [1.42] In *Kelly and Doyle v Criminal Injuries Tribunal*, the Court of Appeal considered a challenge to the operation of the 1974 Scheme (as amended) on four grounds:
- (1) the absence of any provision for legal aid and/or costs;

⁵⁵ The Italian national compensation scheme had limited its application only to victims in cross-border situations and the Italian State unsuccessfully argued before the CJEU that Italian nationals could not rely on Article 12 of the Directive to establish a right to compensation.

⁵⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Strategy on victims' rights (2020-2025), Brussels 24.06.2020 COM (2020) 258.

- (2) the discretion to refuse an applicant an award or to reduce an award on the basis of his or her conduct, character or way of life (paragraph 14 of the Scheme);
- (3) the absence of any method by which an applicant can access previous decisions of the Tribunal on the application or non-application of paragraph 14; and
- (4) the exclusion of compensation for pain and suffering from the Scheme with respect to injuries suffered after 1 April 1986.

[1.43] On the third point, the Court held that the inability of the applicants to access any information as to how paragraph 14 had been applied in the past by the Tribunal was in breach of their constitutional right to fair procedures and/or failed to meet the requirements of effective protection of their EU law rights in the 2004 Compensation Directive, as set out by the CJEU in the *BV* case.

[1.44] The decisions in *BV*⁵⁷ and in *Kelly and Doyle*⁵⁸ have significant consequences for the Scheme. Recent amendments to the terms of the Scheme have resolved some of these issues but not all. A number of terms of the initial 1974 Scheme remain in operation and would benefit from review. An examination of the potential for reform of the law relating to compensation for victims of crime is therefore timely. Further, in December 2021 the European Commission indicated that EU rules on victims' rights (and their possible shortcomings) would be reviewed in 2022. In that regard, a number of policy options are being considered at EU level, including possible amendments to the Victims' Directive and the Compensation Directive. Such proposals might include minimum rules on state compensation by defining the procedural requirements to obtain compensation and on the amount of compensation.⁵⁹ The entirety of the Scheme, both its terms and procedures, require review in light of the above listed developments in national and international law in respect of victim compensation.

⁵⁷ Case C-129/19 *Presidenza del Consiglio dei Ministri v BVEU*:C:2020:566.

⁵⁸ *Kelly and Doyle v Criminal Injuries Tribunal* [2020] IECA 342.

⁵⁹ Call for evidence for an impact assessment, Revision of the victims' rights acquis - Ares(2021)7683097, 13 December 2021 <<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13096-Criminal-justice-EU-rules-on-victims%E2%80%99-rights-update-en>> accessed 28 December 2021.

3. Why Compensate Victims of Crime?

- [1.45] It is important in setting out the context for this project to address the policy rationale for state compensation for criminal injuries.
- [1.46] The purpose of financial compensation, or “reparation”, for victims of crime is both symbolic and practical. It is symbolic as the offender, or the State, is acknowledging the harm caused to the individual and to society by crime. Compensation is practical in its attempt to restore the victim to the financial position they would have been in if the crime had never been committed. This is done through compensating out-of-pocket expenses and loss of earnings. One observer has suggested that financial compensation should never be the only form of reparation for victims, as this would be an over-simplified view of victims’ needs.⁶⁰ Reparation can also include apology or acknowledgement, and other outcomes facilitated by restorative justice programmes.
- [1.47] The provision of compensation to victims of crime is not novel; indeed almost all liberal democracies provide for the compensation and reparation of victims of crime, some taxpayer-funded and some offender-funded.⁶¹ Miers notes that many such schemes were introduced during the 1960s and 1970s “in response to an increasingly vocal victims’ lobby that repeatedly drew attention to the perceived secondary victimization that victims suffered at the hands of criminal justice systems whose objectives and values were focused upon offenders.”⁶²
- [1.48] That said, the provision of compensation to victims of crime was initially controversial: why, it was asked, are victims of violent crime more

⁶⁰ Mulder, “How do we compensate a victim’s losses? An Economic Perspective” (2009) 16 *International Review of Victimology* 67 at page 68.

⁶¹ Miers, “Offender and State Compensation for Victims of Crime: Two Decades of Development and Change” (2014) 20(1) *International Review of Victimology* 145. Information on victim compensation systems in each European Union Member State is available at <https://e-justice.europa.eu/content_if_my_claim_is_to_be_considered_in_this_country-491-dk-en.do?member=1> accessed 22 November 2021. Similarly, general information on each state’s victim compensation system in the United States is available at <<https://nacvcb.org/state-information/>> accessed 22 November 2021.

⁶² Miers, “Offender and State Compensation for Victims of Crime: Two Decades of Development and Change” (2014) 20(1) *International Review of Victimology* 145, at page 147.

deserving of compensation from the State than others affected by disease, or workplace injuries?⁶³ Violent criminal acts usually amount to torts (civil wrongs) also, but civil and criminal law have different purposes: while criminal law aims to regulate conduct and to maintain social order, tort law is concerned with the provision of compensation and the resolution of disputes between individuals.⁶⁴ Unless a serious failing could be pointed to, such as an offender being at large when bail or temporary release ought to have been revoked, a victim of crime would not, on ordinary tort principles, be entitled to damages from the State for criminal injuries inflicted by a third party. However there have frequently been *ad hoc* compensation schemes established to meet the needs of those affected by disasters or avoidable failings without an acknowledgement of liability,⁶⁵ and without a direct connection between a state failing and the harm caused.

- [1.49] Victim compensation schemes have, over time, come to be acknowledged as an important aspect of the State's general duties to enforce the criminal law and to protect and vindicate individual rights.⁶⁶ In 1957 Margery Fry, (a leading member of the Howard League of Penal Reform), argued forcefully (and successfully) for a state-funded compensation scheme in Britain on the basis that "the State, which forbids our going armed in self-defence cannot disown all responsibility to protect."⁶⁷ She pointed to state-funded compensation as a means of sharing the risk posed by violent crime among all members of society, and suggested that the value of compensation would not be merely economic:

"For the family of a murdered man, for the girl
whose health has been permanently broken by a

⁶³ See, for instance, Ashworth, "Punishment and Compensation: Victims, Offenders and the State" (1986) *Oxford Journal of Legal Studies* 86.

⁶⁴ See McMahon and Binchy, *Law of Torts* 4th ed (Bloomsbury Professional 2013) at paragraph 1.10. Tort law is quite expansive: one purpose of the law of torts is to vindicate rights: see, for example, the decision of the Supreme Court in *Grant v Roche Products (Ireland) Ltd* [2008] IESC 35, [2008] 4 IR 679. See, for example, Stevens, *Torts and Rights* (Oxford University Press 2007).

⁶⁵ A scheme of compensation was established to deal, for example, with a tragic fire at the Stardust disco (The Scheme of Compensation for Personal Injuries Suffered at the Stardust, Artane on 14 February 1981).

⁶⁶ Ashworth, "Punishment and Compensation: Victims, Offenders and the State" (1986) *Oxford Journal of Legal Studies* 86 at page 122.

⁶⁷ Fry, "Justice for Victims" (1959) 8 *Journal of Public Law* 191.

brutal rape, for the skilled workman who can no longer follow his trade, the simple fact that their hardships had been specially recognized would help to assuage the bitterness of their lot.”⁶⁸

- [1.50] It has been argued that as citizens and taxpayers that we are owed protection by the state, and that a criminal injury represents a failure by the state that requires redress.⁶⁹ Alternatively criminal injury compensation schemes might be viewed as a form of collective insurance: the risk of criminal injury applies to us all, and society should pay compensation when that risk materialises for a particular individual.⁷⁰
- [1.51] In the United States in 1982, the President’s Task Force on Victims of Crime identified the justification for numerous state compensation schemes in that jurisdiction as a mixture of tort theory, State failure to adequately protect these citizens, humanitarian rationale to provide assistance for compelling needs and recognition that victim satisfaction benefits the criminal justice system.⁷¹
- [1.52] Miers notes that in contrast, successive governments in the UK have denied that the compensation scheme in that jurisdiction is an acknowledgement of vicarious state liability, but rather have justified victim compensation schemes on the ground that compensation is given to victims of violent crime as a mark of recognition and public sympathy and an acknowledgement of the harm done to the victim as a member of the community.⁷²
- [1.53] While participatory rights for victims in the criminal process remain controversial, rights to respectful and sympathetic treatment, to support

⁶⁸ Fry, “Justice for Victims” (1959) 8 *Journal of Public Law* 191.

⁶⁹ O’Malley, *Sentencing Law and Practice* 3rd ed (Thomson Reuters 2016) at paragraph 27-04.

⁷⁰ O’Malley, *Sentencing Law and Practice* 3rd ed (Thomson Reuters 2016) at paragraph 27-04.

⁷¹ President’s Task Force on Victims of Crime, *Final Report* (87299, 1982) at page 39.

⁷² Miers, “Offender and State Compensation for Victims of Crime: Two Decades of Development and Change” (2014) 20(1) *International Review of Victimology* 145 at page 155, citing Ministry of Justice, *Getting it Right for Victims and Witnesses*, (CM 8288, 2012) London, the Stationery Office at paragraph 149 and Home Office, *Rebuilding Lives: Supporting Victims of Crime* (Cm 6705, 2005) London, the Stationery Office at page 21.

and help in the aftermath of the offence, to information, appropriate facilities and to compensation either from the offender or from the State are now firmly established and recognised as an important element of social provision for those harmed by crime.⁷³ This is reflected in the legal instruments which establish minimum standards for the provision of services and compensation to victims of crime. The existence of various international legal instruments, discussed below, which provide victims of crime a right to compensation, indicate that State compensation is now widely accepted as a proper response to victims of violent crime.⁷⁴ What is more, the contextual shift at a European level marks an important foundational shift in which compensation is a legal right rather than merely being a token of solidarity and acknowledgement.

- [1.54] The 1983 Council of Europe Convention on the Compensation of Victims of Violent Crimes⁷⁵ refers to reasons of “equity and social solidarity” as justification for schemes of compensation. The 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power⁷⁶ refers to the entitlement of victims to “access to the mechanisms of justice and to prompt redress ... for the harm that they have suffered.” The Compensation Directive of 2004 frames access to compensation as an entitlement of all crime victims in the European Union,⁷⁷ while the Victims’ Directive of 2012 refers expressly to crime as an individual rights violation, reinforcing the need for the various minimum rights for victims set out in the Directive.

⁷³ Ashworth, Campbell and Redmayne, *The Criminal Process* 5th ed (Oxford University Press, 2019) at page 50. On participatory rights the authors state that in contrast to rights to information and respectful treatment “completely different justifications are needed if it is claimed that victims have procedural rights in the criminal process. Should victims have the right to be consulted on decisions whether or not to prosecute, on bail / custody decisions, on the acceptance of a plea to a lesser offence or to fewer offences, or on sentence? Though some victims and victims’ families want this kind of involvement, the question here is whether there are good arguments for recognizing such wishes or claims as rights.”

⁷⁴ Maguire, “The Needs and Rights of Victims of Crime” (1991) 14 *Crime and Justice: A Review of Research* 363 at page 418.

⁷⁵ ETS 116, Strasbourg, 24.XI.1983.

⁷⁶ UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 November 1985: <<https://www.ohchr.org/en/professionalinterest/pages/victimsofcrimeandabuseofpower.aspx>> accessed 22 November 2021.

⁷⁷ Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, Preamble paragraph 6.

Further, the Victims' Directive articulates a need for criminal justice and victim services to operate in a manner that minimises secondary victimisation and trauma. Paragraph 9 of the Preamble to the Victims' Directive provides:

“Crime is a wrong against society as well as a violation of the individual rights of victims. As such, victims of crime should be recognised and treated in a respectful, sensitive and professional manner without discrimination of any kind based on any ground such as race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, gender, gender expression, gender identity, sexual orientation, residence status or health. In all contacts with a competent authority operating within the context of criminal proceedings, and any service coming into contact with victims, such as victim support or restorative justice services, the personal situation and immediate needs, age, gender, possible disability and maturity of victims of crime should be taken into account while fully respecting their physical, mental and moral integrity. Victims of crime should be protected from secondary and repeat victimisation, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice.”

- [1.55] The principles articulated in the Directive, of minimising secondary harm, facilitation of recovery and compensation as an element of access to justice, will guide the Commission's work in this area. The principles set down in the 1985 UN Declaration will also inform the Commission's recommendations. Those principles are practical and pragmatic, specifying that judicial and administrative measures that enable victims to obtain redress should be “expeditious, fair, inexpensive and accessible ... avoiding unnecessary delay.”⁷⁸

⁷⁸ UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 November 1985: <<https://www.ohchr.org/en/professionalinterest/pages/victimsofcrimeandabuseofpower.aspx>> accessed 22 November 2021.

[1.56] In summary, while initially state funded victim compensation schemes were conceptually conceived as a discretionary benefit, made available to victims as an expression of compassion by the State, it is now conceptually considered as a benefit which should be available to victims as of right to meet their needs in the aftermath of a crime.

4. Alternative Routes to Compensation

[1.57] There are two alternative routes to compensation open to victims of violent crime in Ireland, apart from application to the Scheme, which will be briefly examined in turn:

- (a) Civil litigation against the person who is alleged to have caused the death or injury;
- (b) Compensation within the criminal process: an offender may offer voluntary compensation by way of mitigation and an acknowledgement of remorse, or the trial judge may order compensation to be paid by the offender (or their parents).⁷⁹

(a) Civil litigation

[1.58] Compensation is generally understood to mean payment to make amends for loss or injury to person or property, or to compensate for some deprivation.⁸⁰ Most frequently that occurs when one party sues another for damages when harm is caused. It is open to any victim of crime to litigate against the person who is alleged to have injured them, since a criminal offence will usually also amount to tortious wrongdoing (or civil wrong) such as the torts of assault and battery. In such litigation, damages are sought from the alleged wrongdoer both as compensation for the wrong committed and as a means of vindicating constitutional rights.⁸¹ The award of damages as compensation for a wrong done seeks to put the injured

⁷⁹ Such orders are provided for by section 6 of the Criminal Justice Act 1993.

⁸⁰ Hunt, *Murdoch and Hunt's Dictionary of Irish Law* 6th ed (Bloomsbury Professional 2016).

⁸¹ McMahon and Binchy, *Law of Torts* 4th ed (Bloomsbury 2013) at paragraph 44.01.

person in the position they would have been in had the wrong not occurred, so far as money can achieve that aim.⁸²

- [1.59] When a violent criminal injury has been inflicted, financial compensation has obvious and substantial limitations: while property can be replaced, and out of pocket expenses can be reimbursed, emotional losses like anxiety and grief cannot be calculated in economic terms.⁸³
- [1.60] Further, it can be difficult to identify a wrongdoer to sue, and often there is no realistic prospect of recovering damages from them even if they can be identified. In some circumstances, a claim for compensation may lie against a person other than the wrongdoer, such as the victim's employer or an entity vicariously liable for the actions of the wrongdoer. However, as McMahon and Binchy have noted, in many cases involving criminal injuries "tortious compensation for the injuries suffered was seen as a remote possibility either because the criminal was not likely to be apprehended or, if apprehended, the criminal did not represent "a good mark" for tortious proceedings."⁸⁴ In other words, quite apart from the stress and expense involved, the pursuit of the offender in the civil courts would be pointless because the person responsible for the wrongdoing would not be in a financial position to pay an award of damages. In her plea for fair treatment of victims, Fry referred to a civil case in which a man had been blinded by an assault. An award of £11,500 was made against his assailants, who were ordered to pay five shillings a week each. Calculating that the victim would have to live a further 442 years to collect the last instalment, she characterised the position as "a bitter mockery."⁸⁵
- [1.61] Quite apart from the practical consideration referred to by McMahon and Binchy, that offenders are often unlikely to have the funds to meet a civil claim, civil litigation is an additional source of stress for victims of crime who may also be involved in lengthy criminal proceedings.

⁸² This is sometimes referred to as the principle of *restitutio in integrum*, which means "restoration to the original position". See Law Reform Commission, *Report on Aggravated, Exemplary and Restitutionary Damages* (LRC 60-2000).

⁸³ See Mulder, "How Do We Compensate a Victim's Losses? An Economic Perspective" (2009) 16 *International Review of Victimology* 67 – 87.

⁸⁴ McMahon and Binchy, *Law of Torts* 4th ed (Bloomsbury 2013) at paragraph 1.33.

⁸⁵ Fry, "Justice for Victims" (1959) 8 *Journal of Public Law* 191.

(b) Compensation within the criminal process

- [1.62] In some circumstances civil litigation can be avoided and in effect rolled into the criminal justice system: offenders frequently offer compensation voluntarily in the course of sentencing, as an indication of remorse (a mitigating factor in sentencing) and an acknowledgement of tortious wrongdoing. It is open to the sentencing court to make an order under section 6 of the Criminal Justice Act 1993 requiring an offender, or where appropriate, their parent or guardian, to pay compensation for any personal injury or loss resulting from the offence to any person who has suffered such injury or loss. Of course, that is only possible when an offender has been identified, apprehended, prosecuted and convicted. This will be explored in further detail in Chapter 7.

CHAPTER 2

VICTIM COMPENSATION IN CONTEXT

1. Introduction

- [2.1] State compensation for victims of crime has evolved in tandem with a developing victims' rights movement, against a backdrop of European Union and Council of Europe legal instruments that set down minimum standards and obligations in recognition of the rights of victims to information, redress, and access to justice. It is important to address how these developments have influenced the conceptual and practical development of victim compensation.

2. The Evolution of Victims' Rights

- [2.2] While historically victims of crime sought out their own justice, from the late nineteenth century onwards with the advent of a professionalised police force, prisons, and the establishment of a public prosecution model of criminal justice, the role of victims of crime in the adversarial criminal justice system became peripheral. Rather than the central actor, the victim's role came to be reduced to that of informant and witness for State prosecution authorities.¹
- [2.3] Changes in penal policy over the last fifty years have seen increasing attention on the needs and rights of victims, both in Ireland and internationally.² The civil rights movements, an upsurge in crime rates and the growth of feminism in the 1960s all contributed to the turn in attention to the lack of victims' rights in the criminal justice process in the early 1970s in the United States and in Europe.
- [2.4] A great variety of participants constituted the initial victims' rights movement, from feminists, welfare workers and psychologists, to "law-

¹ Coffey, "Accommodating Victims of Crime: A Survey of the Legislative and Juridical Landscape" (2018) 28(4) *Irish Criminal Law Journal* 104–117 at page 105. See also Coffey, "The Victim of Crime and the Criminal Justice Process" (2006) 16(3) *Irish Criminal Law Journal* 15–22.

² McGovern, "The Victim and the Criminal Justice Process" in O'Mahony (ed), *Criminal Justice Ireland* (Institute of Public Administration 2002) at page 394.

and-order" groups.³ The women's movement was a notable driver of change, campaigning to raise awareness of male violence against women and children and highlighting the structural and patriarchal nature of domestic abuse.⁴ Calls for practical measures, such as shelters for women who were victims of domestic and sexual violence, were led by non-governmental organisations ("NGOs") that simultaneously campaigned for governmental service provision for victims of crime and the recognition and empowerment of victims.⁵

- [2.5] Over the following decades the relevance and centrality of the victim to the criminal justice system came to be recognised. Victim support services for victims of crime were established and victims' rights were guaranteed in national, regional and international legislation.⁶

(a) Politically contentious aspects of victims' rights

- [2.6] From its inception, aspects of victims' rights have been politicised. In criminal policy, politicians often use victims of crime to advance certain objectives, such as increasing penal sentences, which may not necessarily align with victims' interests or needs. The concept and definition of "victim" can often have political origins or be created for political gain.⁷ McGrath has commented that "policy-makers are quick to camouflage despotic legislation as victim-centred reform, even when those policies proposed and adopted in their name seldom directly serve victims' interests."⁸

³ Maguire, "The Needs and Rights of Victims of Crime" (1991) 14 *Crime and Justice: A Review of Research* 363 at page 367.

⁴ European Union Agency for Fundamental Rights, *Victims of Crime in the EU: the Extent and Nature of Support for Victims* (Publications Office of the European Union, 2014) at page 17 <https://fra.europa.eu/sites/default/files/fra-2015-victims-crime-eu-support_en.pdf> accessed 22 November 2021.

⁵ *Ibid.*

⁶ European Union Agency for Fundamental Rights, *Victims of Crime in the EU: the Extent and Nature of Support for Victims* (Publications Office of the European Union, 2014) at page 17 <https://fra.europa.eu/sites/default/files/fra-2015-victims-crime-eu-support_en.pdf> accessed 22 November 2021.

⁷ Heber, "Good versus Bad: Victims, Offenders and Victim-Offenders in Swedish Crime Policy" (2014) 11 *European Journal of Criminology* 410.

⁸ McGrath, "In Whose Service? – The Use and Abuse of Victims' Rights in Ireland" [2009] 1 *Judicial Studies Institute Journal* 78 at page 83.

Victims' rights can be used as a frame through which "social movements and political groups stake claims to resources and public attention".⁹

- [2.7] The current political priority is to protect victims, hear their voices, honour their memories, express their anger, and address their fears.¹⁰ It may be, however, that what is required is acknowledgement and a suite of supports and measures of a practical nature to aid in victims' recovery, rather than an emphasis on punitive measures that may, in themselves, do little to improve the experience of victims within the criminal justice system.
- [2.8] The aims of the victims' rights movement have never been uniform, and so questions as to who comes within the definition of victim, what victims need and what rights victims have, do not lend themselves to simple answers. A consequence of the diversity and fragmentation of victim advocates, activists and NGOs has been piecemeal progress and differential treatment for certain kinds of victims, without the cohesion of an overarching victim support strategy. As will be seen below, developments at a European level have signalled a new approach to crime victims across the European Union that is leading to clear impacts on the victim experience, as state agencies are forced to re-evaluate their service provision in light of legal obligations set out in rights-based international legal instruments such as the Victims' Directive.¹¹

(b) Participatory rights versus rights to support

- [2.9] There has been significant debate on the appropriate role and level of participation of the victim in adversarial legal systems. On one side, it is argued that victims should, like offenders, have substantive rights guaranteed within the criminal justice system. On the other, the State prosecutes criminals on behalf of individual victims and society in adversarial legal systems, which naturally assigns the victim to the role of informant and witness. Nevertheless, as will be seen, over the last three

⁹ McCullagh, "Respectable Victims and Safe Solutions: The Hidden Politics of Victimology" (2017) 68 *Northern Ireland Legal Quarterly* 539 at page 553.

¹⁰ Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press 2001) at page 11.

¹¹ Examples in Ireland include the establishment of Divisional Protective Services Units by the Garda Síochána, the establishment of a Victim Liaison Unit in the Office of the Director of Public Prosecutions, and the introduction of numerous protective measures in Part 3 of the Criminal Justice (Victims of Crime) Act 2017.

decades, the status of the crime victim in Ireland has changed gradually from “being perceived as a ‘nonentity’ to a stakeholder whose interests and opinions matter.”¹² While the debate on procedural and participatory rights continues, this shift in status has resulted in concrete gains in procedural and informational rights and in the provision of practical supports for victims of crime. There is also increasing recognition and understanding of the need for services across the legal system to be both trauma-informed and trauma-responsive.¹³

- [2.10] When discussing “victims’ rights” it is important to note that frequently no distinction is drawn between “rights” of victims and “supports” for victims. There is, however, an important difference. Legal rights for crime victims include rights to information, or to be heard at sentencing, whereas supports can involve more costly and resource-intensive measures: court accompaniment services, counselling and so on. There may be a right to certain support services but not all practical supports are available to victims as of right. Legal rights for victims in Ireland include the right to be kept informed during the criminal justice process,¹⁴ separate legal representation in certain circumstances in sexual assault cases,¹⁵ and a right to provide an account of the impact of the crime on their lives at the sentencing of the offender.¹⁶
- [2.11] Practical supports such as court accompaniment and counselling are not “rights” to which there is a legal entitlement in this jurisdiction. A right to

¹² Kilcommins, Edwards and Harold, “Victims of Crime with Disabilities in Ireland: Invisible Citizens within an Adversarial Paradigm of Justice” (2013) 23(2) *Irish Criminal Law Journal* 45.

¹³ The Victims’ Directive refers repeatedly to the need to protect victims from “secondary victimisation”. See also McKenna and Holtfreter, “Trauma-Informed Courts: A Review and Integration of Justice Perspectives and Gender Responsiveness” (2021) 30(4) *Journal of Aggression, Maltreatment & Trauma* 450-470, and Pemberton, Aarten and Mulder, “Beyond retribution, restoration and procedural justice: The Big Two of communion and agency in victims’ perspectives on justice” (2017) 23(7) *Psychology, Crime & Law* 682–698.

¹⁴ Sections 7 – 11 of the Criminal Justice (Victims of Crime) Act 2017.

¹⁵ Section 4A of the Criminal Law (Rape) Act 1981, as inserted by section 34 of the Sex Offenders Act 2001.

¹⁶ Section 31 of the Criminal Justice (Victims of Crime) Act 2017 broadened the category of person and of the crime in which a victim may provide the court with a Victim Impact Statement initially provided in law under section 5 of the Criminal Justice Act 1993.

free legal advice for victims of sexual or gender-based violence, or violence in a close relationship, was proposed to be placed on a legislative footing in Ireland, by amendment to the Criminal Justice (Victims of Crime) Act 2017, but was not enacted into law.¹⁷ Free legal advice for such victims was also recommended in this jurisdiction by the Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences (“the O’Malley Review”).¹⁸ The Department of Justice Action Plan 2021 contains a commitment to legislation expanding access to legal aid in line with the recommendations in the O’ Malley Review. Some jurisdictions may blur this distinction between rights and support by enacting victim-centric legislation which creates legal rights to specified support services – such as the New South Wales Victims’ Rights and Supports Act 2013 which includes a right to 22 hours of free counselling for certain classifications of crime victims.¹⁹ The effect of such legislation is to make supports “rights” and an important question for this project to address is whether compensation legislation should frame elements of compensation and other victim supports as statutory entitlements.

- [2.12] Both participatory rights in the criminal justice system and rights to support services attract criticism and debate. The introduction of participatory rights for victims in the criminal justice process is problematic in an adversarial justice system focused on determination of guilt or innocence, while the introduction of statutory rights to various support services has significant financial implications for State funds. Dispassionate, objective decision-making in criminal justice is valued, and indeed is a key reason for an independent prosecutor and a professional criminal justice system. Therefore, arguments for procedural rights that would see victims consulted on and influencing key decisions in the

¹⁷ Criminal Justice (Victims of Crime) (Amendment) Bill 2018.

¹⁸ Department of Justice Working Group, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* (2020) at paras 7.12 - 7.20 available at < http://www.justice.ie/en/JELR/Review_of_Protections_for_Vulnerable_Witnesses_in%20the_Investigation_and_Prosecution_of_Sexual_Offences.pdf/Files/Review_of_Protections_for_Vulnerable_Witnesses_in%20the_Investigation_and_Prosecution_of_Sexual_Offences.pdf> accessed 22 November 2021. This was also recommended for introduction in Northern Ireland by the Gillen Review (Recommendation 40) available at < <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>> accessed 22 November 2021.

¹⁹ Sections 31 – 33 of the Victims Rights and Supports Act 2013 (New South Wales).

criminal process – decisions to charge, to grant bail, to accept pleas and so on – are met with considerable opposition.²⁰ Apart from the financial implications, arguments in favour of supports – information about the progress of a criminal case, dignified treatment, appropriate court facilities, processes that minimise repeat victimisation and compensation – are relatively uncontroversial.

3. Victims' Rights in Irish Law

(a) Irish legislation

[2.13] The law relating to victims' rights in Ireland is evolving. Victim Impact Statements were introduced in this jurisdiction in the Criminal Justice Act 1993.²¹ Four attempts to introduce statutory rights for victims failed prior to the post-Victims' Directive enactment of the Criminal Justice (Victims of Crime) Act 2017.²² The Victims' Rights Bill 2002 and Victims' Rights Bill 2008 were similar in their focus on creating rights of information²³ and rights to be heard in bail and parole decisions. However, the 2008 Bill went further by proposing the establishment of the Commission for the Support of Victims of Crime on a statutory basis,²⁴ which would publish a victims charter,²⁵ and to create a protection of persons order which would prevent the intimidation of victims before criminal trials.²⁶ Lastly, the Restorative

²⁰ See for instance Ashworth, Campbell and Redmayne, *The Criminal Process* 5th ed (Oxford University Press 2019) at pages 49 - 51.

²¹ Section 5 of the Criminal Justice Act 1993.

²² Victim Support Bill 1995, Victims' Rights Bill 2002, Victims' Rights Bill 2008, and the Restorative Justice (Reparation of Victims) Bill 2013.

²³ Clause 7 of the Victims' Rights Bill 2008 proposed to create a duty on the CICT, and other specified state bodies, to provide information about services or remedies available to victims from the tribunal itself or any state agency and any local accessible voluntary agency.

²⁴ Established on a non-statutory basis in March 2005.

²⁵ Clause 47 of the Victims' Rights Bill 2008. The Charter was intended to serve as a Code of Practice as to the rights of victims and the services to be provided by the Commission.

²⁶ Clause 72 of the Victims' Rights Bill 2008 proposed to amend section 26 of the Criminal Justice Act 2007 which allows a court to order the monitoring of an offender after release from prison for the purpose of protecting the victim of the offence or another relevant person, to include a protection of persons order before criminal proceedings have commenced until the conclusion of said proceedings.

Justice (Reparation of Victims) Bill 2013 intended to introduce a requirement for offenders to make financial reparation for injury suffered by victims and for reparation to be considered a mitigating factor in sentencing.²⁷ None of these Bills were enacted into law.

- [2.14] Statutory rights for victims were introduced in this jurisdiction in the Criminal Justice (Victims of Crime) Act 2017. The 2017 Act was necessary to give effect to the provisions of the Victims' Directive (discussed further below). The 2017 Act provides for the protection of victims during investigations and criminal proceedings.²⁸ The rights provided for include the right of victims to request interviews to be carried out by a person of the same sex in the investigation of offences of sexual, gender-based violence or violence in a close relationship;²⁹ the exclusion of the public from court during the proceedings;³⁰ restrictions on questioning in relation to the victim's private life;³¹ the use of screens to shield the victim from the view of the accused while giving evidence.³² The Act provides for mechanisms of restorative justice to be used where it is in the best interests of the victim.³³ The 2017 Act also broadened the existing circumstances in which a Victim Impact Statement may be made,³⁴ in respect of any offence which has directly caused physical, mental or emotional harm or economic loss to the victim, and expanded the category of persons who may give a Victim Impact Statement.³⁵
- [2.15] The 2017 Act has undoubtedly introduced significant changes to the victims' rights landscape in this jurisdiction. However, some observers argue that the provisions of the 2017 Act fall short of full compliance with the Victims' Directive – particularly its narrow focus upon the right to

²⁷ Restorative Justice (Reparation of Victims) Bill 2013.

²⁸ Sections 12 – 26 of the Criminal Justice (Victims of Crime) Act 2017.

²⁹ Section 17(b) of the Criminal Justice (Victims of Crime) Act 2017.

³⁰ Section 20 of the Criminal Justice (Victims of Crime) Act 2017.

³¹ Section 21 of the Criminal Justice (Victims of Crime) Act 2017.

³² Section 30 of the Criminal Justice (Victims of Crime) Act 2017, inserting section 14A into the Criminal Evidence Act 1992.

³³ Section 26 of the Criminal Justice (Victims of Crime) Act 2017.

³⁴ First introduced in this jurisdiction in section 5 of the Criminal Justice Act 1993.

³⁵ Section 31 of the Criminal Justice (Victims of Crime) Act 2017.

information, the protection of victims during investigations and criminal proceedings and limited reach to only those victims that engage with the Garda Síochána.³⁶

- [2.16] Policy reviews have been undertaken in recent years to identify potential reforms to the victim's rights landscape. In 2018, the Department of Justice commissioned a review of best practices for involving the victim in various stages of the criminal justice process.³⁷ The Department of Justice established a working group which reviewed protections for vulnerable witnesses in the investigation and prosecution of sexual offences.³⁸ The Department subsequently published an implementation plan for the recommendations made in that report.³⁹ These recommendations include creating greater supports for victims of sexual offences, from improved reporting services, victim-centred policing and the promotion of awareness of victims' rights. The 2021 policy and legislative plan for the Department emphasised the need to better support victims. Specifically, it includes a commitment to review the Criminal Injuries Compensation Scheme with a view to reforming it and placing the Scheme on a statutory basis.

³⁶ Leahy and Spain, "Exploring the Impact of the Victims' Directive on service provision for victims of crime in Ireland" (2017) Winter 68(4) *Northern Ireland Legal Quarterly* 519 at page 520.

³⁷ Healy, *Exploring Victims' Interactions with the Criminal Justice System* (2018) available at <[http://www.justice.ie/en/JELR/Victim Interactions with the Criminal Justice System.pdf/Files/Victim Interactions with the Criminal Justice System.pdf](http://www.justice.ie/en/JELR/Victim%20Interactions%20with%20the%20Criminal%20Justice%20System.pdf)> accessed 30 December 2021.

³⁸ Department of Justice Working Group, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* (2020) available at <[http://www.justice.ie/en/JELR/Review of Protections for Vulnerable Witnesses in%20the Investigation and Prosecution of Sexual Offences.pdf/Files/Review of Protections for Vulnerable Witnesses in%20the Investigation and Prosecution of Sexual Offences.pdf](http://www.justice.ie/en/JELR/Review%20of%20Protections%20for%20Vulnerable%20Witnesses%20in%20the%20Investigation%20and%20Prosecution%20of%20Sexual%20Offences.pdf/Files/Review%20of%20Protections%20for%20Vulnerable%20Witnesses%20in%20the%20Investigation%20and%20Prosecution%20of%20Sexual%20Offences.pdf)> accessed 30 December 2021.

³⁹ Department of Justice, *Supporting a Victim's Journey: a plan to help victims and vulnerable witnesses in sexual violence cases* (2020) available at <[http://www.justice.ie/en/JELR/Pages/Supporting a Victims Journey](http://www.justice.ie/en/JELR/Pages/Supporting%20a%20Victims%20Journey)> accessed 30 December 2021.

(i) Support services

- [2.17] When discussing the victims' rights landscape in Ireland, it is important to briefly set out where victims of crime can find further information and practical support services.
- [2.18] A revised Victims Charter was published online by the Department of Justice in 2021.⁴⁰ The charter describes the criminal justice system from the victim's point of view, provides information on support services and sets service standards for the organisations named in the charter who are in contact with victims. The charter provides information on the CICT such as what to expect from the Tribunal and how to make a complaint about the services provided by the Tribunal if expectations are not met, as well as a general overview on how the Scheme works.
- [2.19] Support services for victims are available within state agencies, such as the Garda Victim Service and within the office of the Director of Public Prosecutions. Support services are provided both at local and national level by non-governmental organisations,⁴¹ but the availability of these may depend on location and demand. The importance of these services cannot be understated. It should be acknowledged that no centralised approach exists with respect to support services. The fragmented nature of the response system available to victims in Ireland can create difficulties and add to existing stress at a time of vulnerability for victims.⁴² These issues are compounded by a lack of inter-agency co-operation, the absence of a mechanism or process to monitor the quality-of-service provision to

⁴⁰ <https://www.victimscharter.ie/>. A previous Victims Charter and Guide to the Criminal Justice System was published in 2005 but was considered to need revision following the enactment of the Criminal Justice (Victims of Crime) Act 2017. Coffey, "Accommodating Victims of Crime: A Survey of the Legislative and Juridical Landscape" (2018) 28(4) *Irish Criminal Law Journal* 104 at page 4.

⁴¹ The Victims Charter provides contact information for a wide range of victim support services which can be accessed online at <https://www.victimscharter.ie/>. For more information, you can contact the National Crime Victims Helpline (by phone or email) or your local Garda Victim Service Office.

⁴² Leahy and Spain, "Exploring the Impact of the Victims' Directive on service provision for victims of crime in Ireland" (2017) Winter 68(4) *Northern Ireland Legal Quarterly* 519 at page 534.

victims and the lack of adequate resourcing for both statutory and non-statutory support organisations.⁴³

(b) Obligations under EU Law

[2.20] Over time victims' rights have evolved from aspirational ideals to more clearly defined rights. European Union law is an important part of the domestic legal order of the State. The obligations of EU membership mean that EU law has supremacy over national law. EU legislation, therefore, has the strongest influence on the minimum standards that apply, as the Directives that set out Member States' obligations to victims of crime (both generally, and in relation to specific categories of victim) impose legally binding obligations on Member States:

- the 2004 Compensation Directive;
- the 2012 Victims' Directive;
- the 2017 Counter-Terrorism Directive and
- the 2011 Anti-Trafficking Directive.

[2.21] The obligations imposed by these directives are minimum standards and much is left to the discretion of Member States in giving effect to them. That is particularly the case under the Compensation Directive. It does not set out to harmonise the substantive law relating to victim compensation or prescribe the process for determining such compensation. Article 17 of the Directive makes it clear that Member States are free to introduce or maintain more favourable provisions for the benefit of victims of crime or any other persons affected by crime, provided that such provisions are compatible with the Directive.

[2.22] The EU Strategy on Victims' Rights 2020-2025, the first strategy on victims' rights adopted by the European Commission, is also relevant in this context. The strategy notes that existing EU instruments on victims' rights have not yet reached their full potential due to incomplete transposition or incorrect implementation into national legal orders. Therefore, the strategy is intended to strengthen existing EU instruments by ensuring full implementation of them by Member States. If a Member State does not meet the requirements regarding national compensation schemes set out

⁴³ *Ibid.*

in the strategy, the European Commission can bring infringement proceedings against that State.

- [2.23] Throughout the Consultation Paper, the Commission will examine whether any aspects of the Scheme require reform to meet EU standards but will also consider whether there are other reforms that would improve the delivery of compensation to the victims of crime. First it is necessary to set out the key legal instruments on victims' rights that come from a number of sources: the European Union, the Council of Europe and the United Nations. Throughout the Consultation Paper the Commission will critically examine the approach to criminal injuries compensation in Ireland, to ensure that the compensation process actually delivers in practice what the State is committed to in principle.
- [2.34] European Union law has placed binding obligations on Ireland in respect of victim compensation in the Compensation Directive). As noted above, the Directive drew on the 1983 Council of Europe Convention. Further binding obligations on Ireland in respect of victims' rights more generally are found in the Victims' Directive. Further obligations for specific categories of victim are also detailed below.

(ii) The Compensation Directive

- [2.35] The Compensation Directive facilitates EU-wide cross-border access to compensation for victims of violent intentional crimes. Obligations under this Directive are two-fold:
- First, Member States must establish compensation schemes for victims of violent intentional crime in their domestic legal systems which provide "fair and appropriate compensation".
 - Second, victims should be able to apply for compensation in the Member State where the criminal injuries were inflicted, where that is not the state of residence. In other words, a French tourist injured in an assault in Ireland must be able to apply for compensation under the Irish Scheme.⁴⁴
- [2.36] The Directive requires significant levels of co-operation between national authorities which administer schemes of compensation. It also stipulates that Member States should keep administrative formalities to a minimum

⁴⁴ Article 12.

for applicants.⁴⁵ Victims have the right to submit an application in their Member State of residence, where authorities must then send and submit the application to the authorities in the Member State where the crime was committed.⁴⁶ Member States must establish or designate a body or authority to provide information and application forms to applicants, as an “assisting authority” that does not make any assessment of applications.⁴⁷ As already stated, the Directive sets out minimum requirements and Member States are free to introduce and maintain more favourable provisions for the benefit of victims of crime.

(iii) The Victims’ Directive

- [2.24] The Victims’ Directive aims to ensure that victims of crime receive appropriate information, support and protection and can participate in criminal proceedings. Recitals to the Directive discuss the standard of treatment that victims should receive, without discrimination or exposure to secondary victimisation, from any service that provides assistance to victims.⁴⁸ The Directive creates a right to receive information about how to access compensation⁴⁹ and requires Member States to promote offender funded compensation.⁵⁰ The Criminal Justice (Victims of Crime) Act 2017 was enacted to transpose the obligations of the Victims’ Directive into Irish law.

(iv) The Counter-Terrorism Directive

- [2.37] Victims of terrorist offences are recognised in EU law as a category of victim with specific needs. Directive 2017/541, “the Counter-Terrorism Directive”⁵¹ establishes minimum rules concerning the definition of criminal offences and sanctions in the area of terrorist offences as well as measures of protection of, and support and assistance to, victims of

⁴⁵ Article 3(3).

⁴⁶ Article 1.

⁴⁷ Articles 3 – 11.

⁴⁸ Recital 9.

⁴⁹ Articles 4(1)(e) and 9(1)(a).

⁵⁰ Article 16.

⁵¹ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combatting terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L 88.

terrorism. Member States shall ensure that support services addressing the specific needs of victims of terrorism are in place in accordance with the Victims' Directive.⁵² The Directive further states that victims of terrorist offences should have assistance with claiming compensation under the national law of the Member State concerned.⁵³

(v) Anti-Trafficking Directive

- [2.25] Victims of human trafficking are also recognised in EU law as a category of victim with specific needs. The Anti-Trafficking Directive introduces common provisions to strengthen the prevention of human trafficking and for the protection of human trafficking victims.⁵⁴ Member States must ensure that victims of trafficking have access to "legal counselling" (legal advice) without delay, including for the purpose of claiming compensation.⁵⁵ The Directive also requires that victims of trafficking have access to existing schemes of compensation to victims of violent intentional crime.⁵⁶

4. International Law Influences

- [2.26] In addition to the obligations that arise from EU membership, the State has a number of legal obligations in relation to victims of crime under international law, obligations that arise from membership of the Council of Europe and membership of the United Nations.

(a) The Council of Europe

- [2.27] Ireland became a founding member of the Council of Europe in 1949. The Council of Europe has been engaged in work on the rights of victims of crime since the 1970s. The following instruments and recommendations are not binding – other than the 1983 Council of Europe Convention (which Ireland has not signed and which accordingly imposes no obligations on the

⁵² Directive (EU) 2017/541, Article 24.

⁵³ *Ibid.*

⁵⁴ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combatting trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101.

⁵⁵ Directive 2011/36/EU, Article 12(2).

⁵⁶ Directive 2011/36/EU, Article 17.

State) they are by nature “soft law” intended to guide member states in the development of law and policy.

- [2.28] In 1977 the Committee of Ministers of the Council of Europe adopted Resolution (77) 27 on the Compensation of Victims of Crime.⁵⁷ The Resolution contains thirteen guiding principles to harmonise national provisions on victim compensation for Member States to take into consideration. These include that compensation may be reduced or refused on account of the victims conduct and relationship to the offender and recommending the provision of interim awards in urgent cases.⁵⁸ As a Council of Europe Member State, Ireland is obliged to report on the implementation of the principles in the 1977 Resolution.
- [2.29] In addition, the Council of Europe built on the 1977 Resolution against the background of the creation of various national compensation schemes and the greater focus upon the victim in the criminal justice process in international law. This led to the 1983 Council of Europe Convention on the Compensation of Victims of Violent Crime,⁵⁹ which was also intended to harmonise national schemes of compensation and achieve greater unity between Council of Europe member states, in the interests of equity and social solidarity.⁶⁰ Ireland is not a signatory to the Convention.⁶¹
- [2.30] The 1985 Recommendation Rec(1985)11 on the position of the victim in the framework of criminal law and procedure refers to victims being informed of opportunities to obtain restitution and compensation within the criminal justice process.⁶² It was further recommended that a criminal court should be authorised to order compensation from offenders to the victim and that

⁵⁷ Council of Europe Resolution (77) 27 on the Compensation of Victims of Crime (Adopted by the Committee of Ministers on 28 September 1977, at the 275th meeting of the Ministers’ Deputies).

⁵⁸ Articles 8 and 11.

⁵⁹ ETS 116, Strasbourg, 24.XI.1983.

⁶⁰ Katsoris, “The European Convention on the Compensation of Victims of Violent Crimes: A Decade of Frustration” (1990) 14 *Fordham International Law Journal* 186.

⁶¹ The 1983 Convention directly influenced the terms and interpretation of the Compensation Directive and therefore the Convention will be discussed in that context in this Paper.

⁶² Council of Europe Recommendation (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure (Adopted by the Committee of Ministers on 28 June 1985, at the 387th meeting of the Ministers’ Deputies).

such an order be considered as part of or a substitute for a penal sanction.⁶³ Recommendations are also made regarding police and prosecutors' duties, during questioning and court proceedings, which are beyond the scope of this project.

- [2.31] More significantly, the 2006 Recommendation Rec(2006)8 on assistance to crime victims recommends certain standards and assistance for victims of crime on fifteen related issues.⁶⁴ These include making certain support services like counselling and other psychological health services available for victims in the immediate aftermath of crime, the right to effective access to other remedies and raising awareness of the effects of crime. Recommendations are made for minimum standards of service from victim support services, training standards for personnel in contact with victims and the co-ordination of support services in a Member State.⁶⁵ At Article 8, it is recommended that Council of Europe Member States put in place a compensation framework for crime victims.⁶⁶ A compensation framework should, it is stated, award compensation to victims without undue delay, at a fair and appropriate level, based on the principle of social solidarity. Compensation should cover treatment and rehabilitation for physical and psychological injuries. Loss of income, funeral expenses, and loss of maintenance (for dependants) should be considered and compensation for pain and suffering may be considered. State compensation should be awarded to the extent that the damage is not covered by other sources such as from the offender, insurance or state funded health and social provisions. Ireland, as a Member State, must also report to the Committee of Ministers on the implementation of the principles in the 2006 Recommendation.

(b) The United Nations

- [2.32] The 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and abuse of power was a milestone for victims' rights on a global level.⁶⁷

⁶³ Recommendations 9 and 10.

⁶⁴ Council of Europe Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims (Adopted by the Committee of Ministers on 14 June 2006 at the 967th meeting of the Ministers' Deputies).

⁶⁵ Recommendation 5 and 12.

⁶⁶ Recommendation 8.

⁶⁷ 29 November 1985 - A/RES/40/34.

The Declaration is not legally binding but can be used as a benchmark for measuring State practice in relation to victims' rights.⁶⁸ The UN Declaration sets down international standards on ways in which UN Member States are expected to provide victims with access to justice, restitution, compensation, and assistance. Victims are defined in the UN Declaration as:

“Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws...”.⁶⁹

[2.33] In providing access to justice and fair treatment, UN Member States are called upon to ensure:

- (a) that victims are treated with compassion and respect for their dignity;⁷⁰
- (b) access to the mechanisms of justice and prompt redress for victims;⁷¹
- (c) redress procedures that are expeditious, fair, inexpensive, and accessible;⁷²
- (d) the provision of proper assistance to victims throughout the legal process;⁷³

⁶⁸ Department of Justice, Victims of Crime Office: <<http://www.victimsofcrimeoffice.ie/en/vco/Pages/WP08000530>> accessed 22 November 2021.

⁶⁹ UN Declaration of Basic Principles of Justice for Victims of Crime and abuse of Power 1985, Principle 1.

⁷⁰ UN Declaration of Basic Principles of Justice for Victims of Crime and abuse of Power 1985, Principle 4.

⁷¹ UN Declaration of Basic Principles of Justice for Victims of Crime and abuse of Power 1985, Principle 4.

⁷² UN Declaration of Basic Principles of Justice for Victims of Crime and abuse of Power 1985, Principle 5.

⁷³ UN Declaration of Basic Principles of Justice for Victims of Crime and abuse of Power 1985, Principle 6(c).

(e) that unnecessary delay is avoided in in disposing of cases and executing orders or awards to victims.⁷⁴

[2.34] The UN Declaration provides that “offenders ... should, where appropriate, make fair restitution to victims, their families or dependants” including “the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization...”.⁷⁵ Governments are urged to review their laws to “consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.”⁷⁶

[2.35] On compensation, the Declaration provides:

“When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

- (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
- (b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.”⁷⁷

[2.36] It is noteworthy that psychological injury is expressly mentioned. Further, the Declaration stipulates that:

“Victims should receive the necessary material, medical, psychological and social assistance

⁷⁴ UN Declaration of Basic Principles of Justice for Victims of Crime and abuse of Power 1985, Principle 6(e)

⁷⁵ UN Declaration of Basic Principles of Justice for Victims of Crime and abuse of Power 1985, Principle 8.

⁷⁶ UN Declaration of Basic Principles of Justice for Victims of Crime and abuse of Power 1985, Principle 9.

⁷⁷ UN Declaration of Basic Principles of Justice for Victims of Crime and abuse of Power 1985, Principle 12.

through governmental, voluntary, community-based and indigenous means.”⁷⁸

- [2.37] In addition, victims ought to have information about the availability of such services and sources of assistance and should have ready access to them.
- [2.38] Of crucial importance, and a provision that is echoed in the Victims’ Directive (discussed below) the UN Declaration highlights the need for police, justice, health, social services and others involved with victims to receive “training to sensitize them to the needs of victims.”⁷⁹

(c) EU Strategy on Victims’ Rights 2020–2025

- [2.38] The EU Strategy on Victims’ Rights aims to strengthen the framework for the support and protection of victims and to improve existing EU rules on victims’ rights.⁸⁰ This strategy was based on recommendations made in the report of Special Adviser Milquet to the President of the European Commission entitled “Strengthening victims’ rights: from compensation to reparation” (“the Milquet report”).⁸¹
- [2.39] As the Commission will continue to monitor and assess the implementation of EU rules on victims’ rights, infringement proceedings may be initiated where such rules have not been correctly or fully implemented.⁸² Therefore it is important that the Irish compensation scheme is compliant with the standards set under the strategy.
- [2.40] Victims’ access to compensation is specifically addressed in section 3 of the strategy. The overall objective of compensation is identified as recognising

⁷⁸ UN Declaration of Basic Principles of Justice for Victims of Crime and abuse of Power 1985, Principle 14.

⁷⁹ UN Declaration of Basic Principles of Justice for Victims of Crime and abuse of Power 1985, Principle 16.

⁸⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Strategy on victims’ rights (2020-2025), Brussels 24.06.2020 COM (2020) 258.

⁸¹ Milquet, *Strengthening Victims’ Rights: from Compensation to Reparation for a new EU Victims’ Rights Strategy 2020-2025* (European Commission 2019).

⁸² EU Strategy on victims’ rights (2020-2025) at page 3.

victims of violent intentional crime and to add to the healing process.⁸³ Key actions for Member States to take are as follows:

- Evaluate national compensation schemes and, if necessary, eliminate existing procedural hurdles.
- Ensure that fair and appropriate state compensation for violent, intentional crimes, including victims of terrorism, is reflected in the national budgets.
- Ensure the full application of the Regulation on the mutual recognition of freezing orders and confiscation orders, in particular its provisions on restitution of property to the victim and victims' compensation.⁸⁴
- Take actions to ensure that victims are not exposed to secondary victimisation during the compensation procedure.
- Facilitate homogenous access to information about national compensation schemes (set up interactive, accessible, and user-friendly websites).
- Ensure that staff of national compensation authorities are aware of victims' rights and needs to avoid risks of secondary victimisation.
- Co-operate with other Member States in cross-border cases within the relevant EU structures.

[2.39] In December 2021 the European Commission indicated that EU rules on victims' rights (and their possible shortcomings) would be reviewed in 2022, in line with the EU's commitment under the strategy. A number of policy options are being considered at EU level, aiming to improve victims' access to information, support and justice, and to strengthen multi-agency

⁸³ EU Strategy on victims' rights (2020-2025) at page 17.

⁸⁴ Ireland and Denmark have an opt-out from Regulation 2018/1805 on mutual recognition of freezing orders and confiscation orders, which came into force in December 2020, so that for Ireland the Framework Decision 2003/577/JHA as regards the freezing of property and Framework Decision 2006/783/JHA remain the relevant EU law.

cooperation between all relevant stakeholders who come into contact with victims.⁸⁵

- [2.40] In light of the above listed obligations in the EU Strategy on Victims' Rights, this review of the Irish Criminal Injuries Compensation Scheme is not only timely but necessary. The specific obligations on Member States will be discussed in the relevant chapters.

⁸⁵ Call for evidence for an impact assessment, Revision of the victims' rights acquis - Ares(2021)7683097, 13 December 2021 <<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13096-Criminal-justice-EU-rules-on-victims%E2%80%99-rights-update-en>> accessed 29 December 2021.

CHAPTER 3

LEGISLATING FOR VICTIM COMPENSATION

1. Introduction: The Non-Statutory Nature of the Scheme

- [3.1] The impact of international law in progressing victims' rights has been set out in Chapter 2. As has been seen, aspirational ideals have evolved into concrete rights and obligations. State-funded compensation is now acknowledged to be a right in and of itself, as well as an important aspect of a victim's right of access to justice.¹ As the European Union Agency for Fundamental Rights ("the FRA") put it:

"The move from a needs-based rhetoric to human rights language changes profoundly the relationship between the victim and the state. The victim is no longer pleading for help on the basis of their vulnerability, pressing needs and deservingness but demanding that the state should take seriously what it owes to the individuals living on its territory and their human rights. The state is no longer in the comfortable and patronizing position of a more or less generous Good Samaritan, but a duty-bearer indebted to the individuals living under its jurisdiction as rights-holders".²

- [3.2] It appears to the Commission that in order to fully give effect to Ireland's international law obligations, Ireland's criminal injuries compensation scheme requires a legislative foundation. As will be seen, there is a persuasive argument to be made that the scheme needs to be put on a

¹ Milquet, *Strengthening Victims' Rights: from Compensation to Reparation for a new EU Victims' Rights Strategy 2020-2025* (European Commission 2019).

² European Union Agency for Fundamental Rights, *Victims of Crime in the EU: the Extent and Nature of Support for Victims* (Publications office of the European Union, 2014) at page 17 <https://fra.europa.eu/sites/default/files/fra-2015-victims-crime-eu-support_en.pdf> accessed 22 November 2021.

clear statutory footing, and that any exceptions and exclusions must be clearly drawn.

- [3.3] While there is statutory provision for compensation orders to be made in the criminal process,³ and for compensation for malicious damage exceeding £100 in value caused to property in the course of a riot or by a person acting on behalf of or in connection with an unlawful organisation,⁴ the Scheme operates on an administrative basis. That means that its terms and processes are not provided for by or under any enactment of the Oireachtas. Therefore, the main vehicle for victim compensation operates outside the mainstream civil litigation system, without legislation underpinning it or guiding the conditions under which it awards compensation. While that affords flexibility to the administrator of the Scheme, currently the Department of Justice, it means that it may be difficult for victims to know, or indeed to challenge, the way in which the Scheme is administered.
- [3.4] The Minister for Justice has indicated an intention to place the Scheme on a statutory footing.⁵ This chapter sets out the advantages of doing so and asks a number of key questions, including
- (1) Whether the nature of the obligations in the Compensation Directive require the Scheme to be on a statutory footing;
 - (2) What the advantages of a statutory scheme are;
 - (3) What the guiding principles of such legislation should be;
 - (4) How the Scheme should be funded and administered;
 - (5) What the functions of State's criminal injuries compensation process should be, and how those functions should be articulated in legislation; and
 - (6) Whether the Scheme should be situated within the Department of Justice (as it is at present), or in another agency (such as the

³ Section 6 of the Criminal Justice Act 1993.

⁴ Section 5 of the Malicious Injuries Act 1981, as amended by section 2 of the Malicious Injuries (Amendment) Act 1986.

⁵ Department of Justice, "Minister McEntee announces reforms to the Criminal Injuries Compensation Scheme" <<https://www.justice.ie/en/JELR/Pages/PR21000092>> accessed 22 November 2021.

Personal Injuries Assessment Board (PIAB) or the State Claims Agency (SCA)), or within some other body.

- [3.5] These are important legislative design issues.
- [3.6] Prior to April 2021, when the terms of the Scheme were revised, awards were paid not on the basis of an entitlement in law, but rather on an *ex gratia* basis (*ex gratia* means “as a favour” – without a legal obligation). The Scheme as revised in April 2021 no longer refers to awards being made on an *ex gratia* basis. However, notwithstanding this revision, as the Scheme remains on a non-statutory footing, it is not clear the precise legal basis on which compensation is awarded and the nature of the legal entitlement to compensation that applicants may have. The Compensation Directive,⁶ was initially interpreted as establishing a right to compensation only in cross-border situations. However, in the *BV* case the CJEU held that the Directive confers a right to fair and appropriate compensation under national compensation schemes not only in cross-border cases but in purely domestic cases also. While the *BV* case leaves many questions unanswered, or only partially answered (such as what in practice constitutes “fair and appropriate compensation”), the clear holding that the Compensation Directive gives rise to a right to compensation has very significant implications, including (but not limited to) the need to put the Scheme on a clear legislative basis, as well as potentially significant implications for the nature of the compensation decision-making process and the procedural entitlements of applicants for compensation. These issues are discussed further below.
- [3.7] The rationale behind the creation of a non-statutory scheme of compensation for criminal injuries was said to be a desire for informality, avoiding the formality and delays of the general legal process.⁷ However, applicants have complained of delays in processing their applications. Obviously, whether a scheme is operated on a statutory or non-statutory basis does not determine the speed with which claims are resolved; rather adequate staffing, resourcing and appropriate systems for the swift resolution of applications are required regardless of the legal basis of the Scheme itself.

⁶ Directive 2004/80/EC.

⁷ Grogan, “Victims of violent Crimes can now claim damages: Cooney gives details of new scheme” *The Irish Times* (9 May 1974).

[3.8] It should be noted that the non-statutory character of the Scheme, and of the Criminal Injuries Compensation Tribunal, does not preclude judicial review of decisions: the High Court can review decisions of the Tribunal in appropriate cases such as where fair procedures have not been observed or where the Scheme has been misinterpreted.⁸ The courts have determined that the Scheme must comply with fair procedures: in *State (Creedon) v Criminal Injuries Compensation* the Supreme Court held that:

“ ... the requirement which applies to this Tribunal, as it would to a court, that justice should appear to be done, necessitates that the unsuccessful applicant before it should be made aware in general and broad terms of the grounds on which he or she has failed. Merely, as was done in this case, to reject the application and when that rejection was challenged subsequently to maintain a silence as to the reason for it, does not appear ... to be consistent with the proper administration of functions which are of a quasi-judicial nature.”⁹

[3.9] The key advantage of a non-statutory scheme is its adaptability. By comparison, the terms of a statutory scheme are relatively more fixed and inflexible. It might be said that what ultimately matters is not the format of the Scheme but its content: what matters is that compensation is awarded in a highly effective and victim-centric process. However, legislation undoubtedly strengthens rights and makes them enforceable, and also increases scrutiny of processes and procedures.

[3.10] The need to legislate for victim compensation has long been acknowledged: in 2002, the Department of Justice recognised, in an analysis of the then proposed requirements of the Compensation Directive, that EU law would require the Scheme to be placed on a statutory footing.¹⁰ As already noted, the Minister for Justice has indicated an intention to put Ireland’s criminal

⁸ *State (Hayes) v Criminal Injuries Compensation Tribunal* [1982] 1 ILRM 210.

⁹ *State (Creedon) v Criminal Injuries Compensation Tribunal* [1988] 1 IR 51.

¹⁰ Joint Committee on Justice, Equality, Defence and Women’s Rights, *EU Scrutiny Report No 3: COM(2002)562* (prn 2677, April 2004).

injuries compensation scheme on a statutory footing.¹¹ It appears to the Commission that that is necessary and appropriate in light of the CJEU judgment in *BV*. In this chapter the Commission considers the principles that might usefully underpin legislation on compensation for victims of violent crime, having regard to their entitlements under international law.

2. Implementation of EU Directives

- [3.11] In considering the issue of whether compensation for victims of crime should be put on a statutory footing, the *BV* case is highly significant. As already explained, the CJEU there held in very clear terms that Article 12(2) of the Compensation Directive confers a right for victims of violent crime to obtain fair and appropriate compensation even in the absence of any cross-border element.
- [3.12] While Article 288 TFEU allows Member States a degree of flexibility as regards the choice of form and methods for implementing directives, the CJEU has emphasised Member States'

“... obligation to give effect to the provisions of the directive by means of national provisions of a binding nature... mere administrative practices, which by their nature may be altered at the whim of the administration, may not be considered as constituting the proper fulfilment of the obligation deriving from that directive.”¹²

- [3.13] The CJEU has also stated that:

“It follows from an equally consistent line of case-law that the provisions of a directive must be implemented with unquestionable binding force and with the specificity,

¹¹ Upon publication of the revised terms of the Scheme in April 2021, Minister for Justice McEntee announced that further reforms to the Scheme were under consideration by the Department. These relate to the future management of the Scheme, whether an existing statutory body expert in personal injury claims should administer the Scheme, and the possibility of introducing upper limits on awards of compensation. The Minister acknowledged that further reforms to the Scheme would be informed by the work of the Commission. Department of Justice, “Minister McEntee announces reforms to the Criminal Injuries Compensation Scheme” available at <<http://www.justice.ie/en/JELR/Pages/PR21000092>> accessed 29 November 2021.

¹² Case 96/81 *Commission v Netherlands* [1982] ECR 1791 at paragraph 12.

precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights (see, *inter alia*, Case C-197/96 *Commission v France* [1997] ECR I-1489, paragraph 15; Case C-207/96 *Commission v Italy* [1997] ECR I-6869, paragraph 26; and *Commission v Luxembourg*, paragraph 34)."¹³

- [3.14] While the “implementation of a directive does not necessarily require legislative action in each Member State”¹⁴ the CJEU’s jurisprudence suggests that the circumstances in which directives that create rights for individuals (as the Compensation Directive clearly does) can be adequately implemented without specific legislative provision are limited and exceptional.¹⁵
- [3.15] In view of the Minister’s stated intention to put the Scheme on a statutory footing, it does not appear necessary to reach a definitive view as to whether that is a matter of strict legal obligation, though that appears to the Commission to be the case. But, apart from the issue of whether legislation is, in principle, necessary, the CJEU jurisprudence is also significant in its strong emphasis on the need for specificity and clarity in this context. Whatever its legal form, any scheme of compensation should be clear and precise in its terms, so that the entitlements of victims are clearly identifiable and enforceable. Even if legislation is not strictly required, it is likely to facilitate the achievement of that objective.
- [3.16] In the Commission’s view, these considerations provide important support for the proposed enactment of legislation to put the Scheme on a statutory footing.
- [3.17] Although the discussion above focuses on the Compensation Directive, the same considerations apply to the implementation by the State of the Victims’ Directive.

¹³ Case 427/07 *Commission v Ireland* [2009] ECLI:EU:C:2009:457 at paragraph 55.

¹⁴ Case 29/84 *Commission v Germany* [1985] ECR 1661 at paragraph 23.

¹⁵ Case 29/84 *Commission v Germany* [1985] ECR 1661 at paragraph 23.

3. The Advantages of a Statutory Scheme

[3.18] The Commission is inclined to the view that there are significant benefits to a statutory scheme. One of the primary advantages of a statutory scheme is that it would provide a clear and certain legal basis for the Scheme. This would reflect both its significance as a method of implementing Ireland's EU law obligations and its importance in the Irish victims' rights landscape generally. The Commission suggests that legislation could and should convert the State's obligations to victims under international law into clearly articulated legal rights in Irish law. A number of advantages to a statutory approach can be identified, each of which will be considered in turn:

- (a) To set out the Scheme's guiding principles in legislation;
- (b) To provide structure, permanence, standards and consistency;
- (c) To increase public knowledge, aiding accessibility; and
- (d) To potentially provide the judicial oversight of a court appeal process.

(a) To set out the Scheme's guiding principles in legislation

[3.19] The Commission's preliminary research on the operation of the Criminal Injuries Compensation Tribunal suggests that merely placing current structures and practices in legislation will not provide a satisfactory system for victims of crime, nor for the people of Ireland on whose behalf awards are made. A full re-evaluation of the State's approach to acknowledging and compensating victims of crime is required. An important aim of this project, therefore, is to identify guiding principles for a statutory compensation scheme, so that the provision of state compensation to victims of crime fits with a more modern, trauma-responsive understanding of the needs of crime victims. This is explored in further detail below.

(b) Structure, permanence, standards and consistency

(i) Addressing a continual need to provide compensation

- [3.20] EU law requires Member States to operate a scheme of compensation for all victims of violent intentional crime.¹⁶ It can be argued that the administrative, non-statutory nature of the Scheme is inappropriate for an important and permanent fixture of the victims' rights landscape. The Scheme is not a reactionary measure to one event or tragedy, but rather is addressing a continual need: to provide compensation to victims of violent crime.
- [3.21] Ireland has frequently established *ad hoc* no-fault compensation schemes to provide compensation in the wake of major accidents, errors and disasters. In such cases, there may be difficulty in determining who was at fault (assuming that there was fault in the legal sense) and there may also be difficulties and delays in recovery, even if fault can be established. Many such compensation schemes have been established by legislation¹⁷ whereas the Criminal Injuries Compensation Scheme has operated without the structure and permanence that legislation would give it.

(ii) Providing appropriate structures and procedures

- [3.22] Although the terms of the Scheme state that Tribunal procedures are informal, they can also be legalistic in some respects, an impression that is perhaps reinforced, or created, by the composition of the Tribunal: all Tribunal members are legal professionals. Its rules allow the applicant victim to present their case and to call, examine, and cross-examine witnesses if an oral hearing is held. A member of the Tribunal's staff may also call, examine, and cross-examine witnesses.¹⁸ The terms of the Scheme indicate that the Tribunal will use the balance of probabilities as the standard of proof for determination of any claim.¹⁹

¹⁶ Directive 2004/80/EC, Case C-129/19 *Presidenza del Consiglio dei Ministri v BVEU*:C:2020:566.

¹⁷ See for instance the CervicalCheck Tribunal Act 2019; the Hepatitis C Compensation Tribunal Acts 1997 – 2006; the Residential Institutions Redress Acts 2002 – 2011.

¹⁸ Paragraph 26 of the Scheme.

¹⁹ Paragraph 30 of the Scheme.

- [3.23] While the Tribunal has some legalistic procedural rules, it awards compensation without some of the standard features of a court, including the strict application of the rules of evidence, operation in public, publication of decisions and so on. That informality has both benefits and disadvantages, but it might be said that the Scheme lacks the structure that legislation would give it, and that it is unnecessarily bureaucratic and legalistic in some respects.
- [3.24] Legislation could establish parameters for the exercise of discretion both in awarding compensation and the rules relating to eligibility and exclusion and the application of those rules. These issues are discussed further below, and in detail in Chapter 5.

(iii) Developing institutional knowledge and expertise

- [3.25] The main criteria for eligibility for positions of member and/or Chair of the Tribunal are that applicants are practising barristers or solicitors with at least five years' experience in practice. No particular experience or expertise in dealing with or addressing the needs of victims of crime is required for appointment.²⁰ While the training required by the Victims' Directive may be provided to Tribunal members after they have been appointed, it must be said that legal training alone will not appropriately equip Tribunal members. Legal training will not be sufficient to meet the requirements of the Victims' Directive: that officials who come into contact with victims should receive both general and specialist training to increase their awareness of victims' needs and to enable them to deal with victims in an impartial respectful and professional manner.²¹ The UN Declaration of Basic Principles of Justice for Victims of Crime also highlights the need for

²⁰ Booklet for Applicants – Expressions of Interest for the positions of member and/or chair of the Criminal Injuries Compensation Tribunal, Department of Justice and Equality, September 2020, see <<https://www.justice.ie/en/JELR/Pages/PR20000181>> accessed 29 November 2021.

²¹ Directive 2012/29/EU provides at Article 25(1): "Member States shall ensure that officials likely to come into contact with victims, such as police officers and court staff, receive both general and specialist training to a level appropriate to their contact with victims to increase their awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner." Article 25(5) provides: "In accordance with the duties involved, and the nature and level of contact the practitioner has with victims, training shall aim to enable the practitioner to recognise victims and to treat them in a respectful, professional and non-discriminatory manner."

police, justice, health, social service and others involved with victims to receive “training to sensitize them to the needs of victims.”²²

- [3.26] It is worth noting that the Tribunal sits on a part-time basis: its members are legal professionals with full-time practices alongside their commitments to the Tribunal. They are required to remain practicing barristers or solicitors for the duration of their appointment. They are not full-time employees of the Tribunal nor of the Department of Justice, but rather are paid fees per decision or hearing. This impermanence among the Tribunal’s key decision-makers does not assist with developing institutional memory, nor to acquiring a strong corporate identity with the necessary institutional and individual expertise to deal with victims of crime in a trauma-responsive and sensitive way that minimises the potential for further traumatising. Further it poses challenges in terms of the consistency of the Tribunal’s decisions.
- [3.27] Appropriate training, through which staff develop sensitivity and specialist expertise in dealing with victims of crime, helps to protect victims from secondary victimisation. Secondary victimisation means victimisation occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim.²³ Secondary victimisation can occur, through repeated questioning of the victim about the same facts, the use of inappropriate or insensitive language or repeated exposure of the victim to the perpetrator.²⁴
- [3.28] Placing the Scheme on a statutory footing would facilitate the development of service standards as well as ongoing training and professional development for Tribunal staff and members. The need for the development of a highly professionalised and trauma-responsive service, delivered by a permanent body of staff in which institutional knowledge and expertise has been developed, provides a strong argument for putting the Scheme on a legislative basis.

²² UN Declaration of Basic Principles of Justice for Victims of Crime and abuse of Power 1985, Principle 16.

²³ Council of Europe (CoE) (2006), Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims, available at: <<https://rm.coe.int/16805afa5c>> accessed 5 February 2021.

²⁴ European Institute for Gender Equality, see <<https://eige.europa.eu/thesaurus/terms/1358>> accessed 5 February 2021.

- [3.29] The staff of the Tribunal should have appropriate supports themselves to protect them from the vicarious trauma that can arise in dealing as a practitioner with deeply distressing material daily on an ongoing basis.²⁵ Permanence would aid in that objective also.

(iv) Predictability and consistency in decision-making

- [3.30] A Tribunal operated by part-time adjudicators will inevitably struggle to achieve consistency in its decision-making. Denham J, writing extra-judicially, argued for a permanent Court of Appeal on that basis. Permanence, she argued, would benefit litigants and would “make the court system more efficient and effective. In addition, it would provide an infrastructure which would support the development of a consistent jurisprudence ...”²⁶ Following a constitutional referendum, a permanent Court of Appeal was established. An important rationale for its establishment was that a permanently constituted court would lead to a more consistent pattern of decision-making in criminal matters by comparison with the somewhat *ad hoc* nature of the composition of the pre-2014 Court of Criminal Appeal.²⁷ Consistency is as much a fundamental facet of fairness in criminal injuries compensation as it is in the determination of any other right or entitlement. Consistency leads to predictability, which aids applicants in assessment of their claims both at the outset of the process and in deciding whether to appeal a decision on an award. In *PPA v Refugee Appeals Tribunal* the Supreme Court held that

“[i]t is not that a member of a tribunal is actually bound by a previous decision but consistency of decisions based on the same objective facts may, in appropriate circumstances, be

²⁵ See Newell and MacNeil, “Professional burnout, vicarious trauma, secondary traumatic stress, and compassion fatigue: A review of theoretical terms, risk factors, and preventive methods for clinicians and researchers” (2010) 6(2) *Best Practices in Mental Health: An International Journal* 57–68; Vrkleviski and Franklin, “Vicarious trauma: The impact on solicitors of exposure to traumatic material” (2008) 14(1) *Traumatology* 106–118; O’Morain “Vicarious trauma: The jobs that inflict invisible wounds” *The Irish Times* (31 October 2019) <<https://www.irishtimes.com/life-and-style/health-family/vicarious-trauma-the-jobs-that-inflict-invisible-wounds-1.4058030>> accessed 29 November 2021.

²⁶ Denham, “Proposal for a Court of Appeal” [2006] 6 *Judicial Studies Institute Journal* 1.

²⁷ Byrne, McCutcheon, Cahillane and Roche-Cagney, *Byrne and McCutcheon on the Irish Legal System* 7th ed (Bloomsbury Professional 2020) at paragraph 7.43.

a significant element in ensuring that a decision is objectively fair rather than arbitrary.”²⁸

- [3.31] A permanent statutory body would ensure that the terms of the State’s compensation scheme are interpreted and applied in a more uniform fashion and as such would increase fairness, accountability and predictability. Not only would predictability aid applicants, it would assist the administrators of the Scheme in determining practical matters such as budgetary requirements. Transparency, and thus legitimacy, would also be increased.

(c) Independence

- [3.32] In *Zalewski v The Workplace Relations Commission*²⁹ O’Donnell J stated that “[i]ndependence and impartiality are fundamental components of the capacity to administer justice.”³⁰ At issue in *Zalewski* was the function of the Workplace Relations Commission (“WRC”) to adjudicate on unfair dismissals claims under the Unfair Dismissal Acts. That function was held by the Supreme Court to constitute the administration of justice within Article 34 of the Constitution but the Court went to hold (by a majority) that it was nonetheless lawful to confer that function on the WRC having regard to Article 37 of the Constitution. The functions of the Tribunal under the Scheme differ significantly from the functions of the WRC under the Unfair Dismissals Acts and it is unlikely that they come within Article 34. Nevertheless, it appears to the Commission that the emphasis by the Supreme Court on the need for independence has resonance in this context also. Whether the determination of applications for compensation under the Scheme involve “the determination of ... civil rights and obligations” such as to engage Article 6 ECHR is less clear, as is the application in this context of Article 47 of the Charter of Fundamental Rights of the European Union. As discussed in more detail elsewhere in this Consultation Paper, the issue of the application of Article 6 ECHR was considered by the Court of Appeal in *Kelly and Doyle v Criminal Injuries Tribunal*³¹, with particular reference to the

²⁸ *PPA v Refugee Appeals Tribunal* [2006] IESC 53 at paragraph 27.

²⁹ *Zalewski v The Workplace Relations Commission, an Adjudication Officer, Ireland and the Attorney General* [2021] IESC 24.

³⁰ *Ibid* at paragraph 147.

³¹ [2020] IECA 342 at paragraph 108 and following.

decision of the ECtHR in *Gustafson v Sweden*.³² The Court did not arrive at a concluded view on the issue but proceeded on the assumption that Article 6(1) applied and that EU law principles of effective judicial protections were engaged.³³ *Kelly and Doyle* did not involve any issue as to the independence of the Tribunal; rather the context was the absence of legal aid and the exclusion of any power to award costs to applicants under the Scheme. Whether or not Article 6 applies, in light of the *BV* case, compensation for criminal injuries is a **right**. In the circumstances, therefore, the Commission is of the view that decision-makers adjudicating on compensation claims should be, and should be seen to be, independent and impartial.

- [3.33] A further advantage of a statutory scheme is that appropriate statutory provision can be made to ensure and safeguard the institutional independence of the Tribunal and the independence of its constituent members.
- [3.34] The staff of the Tribunal's secretariat are staff of the Department of Justice. Members of the Tribunal are appointed by the Minister for Justice. The terms of their appointment are not referred to in the Scheme, but documents published by the Department state that the "[t]ribunal members are independent in their decision-making on applications"³⁴. They are appointed for a 5-year term and may be re-appointed for one further reappointment, at the sole discretion of the Minister."³⁵
- [3.35] While the Commission has no reason to doubt that the Tribunal's members are in practice independent in the performance of their functions, legislating to establish a statutory compensation scheme would provide an opportunity to guarantee in law the institutional independence of the Tribunal and the independence of its members. Even if such a step is not strictly required by Article 6 ECHR and/or Article 47 of the Charter, it appears to the Commission that, having regard to the nature of the

³² App No 23196/94 (ECtHR 1 July 1997).

³³ [2020] IECA 342 at paragraph 112. See also the subsequent ruling of the Court in relation to costs [2020] IECA 131 at paragraphs 15 and 16 (per Ní Raifeartaigh J) at paragraph 108 and following.

³⁴ Booklet for Applicants – Expressions of Interest for the positions of member and/or chair of the Criminal Injuries Compensation Tribunal, Department of Justice and Equality, September 2020, see <<https://www.justice.ie/en/JELR/Pages/PR20000181>> accessed 29 November 2021.

³⁵ *Ibid.*

Tribunal's functions, and in light of the *BV* decision from which it is clear that victims of violent crime have a **right** under EU law to fair and appropriate compensation, such a measure is timely and appropriate. However, the Commission would welcome the views of the public on this issue.

(d) Increasing public knowledge and aiding accessibility

- [3.36] From the Commission's preliminary research on the Criminal Injuries Compensation Scheme, it seems that the existence of the Scheme and of the Tribunal are not widely known. Various politicians believed at various stages of its existence that the Tribunal had been abolished and in 2007, the Government committed to re-instating it in their Programme for Government.³⁶ This belief was perhaps strengthened by fact that the Tribunal sits in private, as well as by its former practice of not publishing its annual reports to the Minister for Justice.³⁷ As the Tribunal does not advertise its existence, it rarely attracts media attention. There is useful information on the Scheme on the Department of Justice's website. Nevertheless, it appears to the Commission that establishing the Scheme on a statutory footing would improve public awareness of the possibility of seeking compensation for criminal injuries and therefore aid victims in accessing compensation.

(e) Appeals

- [3.37] The terms of the Scheme provide for an internal appeal mechanism. Minor claims may be dealt with by a duly authorised officer of the Tribunal (a member of staff of the Department of Justice assigned to provide secretariat support to the Tribunal). Claims exceeding €3,000 are taken by one member of the Tribunal, while claims exceeding €75,000 will be taken by three members. Where a claimant is dissatisfied with a decision at first instance, there may be an internal appeal in which the original decision

³⁶ The 2007-2012 Programme for Government pledged to re-instate the Criminal Injuries Compensation Tribunal at page 71, available at <<http://michaelpidgeon.com/manifestos/docs/pfgs/PfG%202007%20-%202009%20-%20FF-Green-PD.pdf>> accessed 29 November 2021.

³⁷ Annual reports of the Tribunal are available from 1975 – 1986, see <<https://www.oireachtas.ie/en/publications/historical-publications/>> and became publicly available again in 2019, see <https://www.justice.ie/en/JELR/CICT_Annual_Report_2019.pdf/Files/CICT_Annual_Report_2019.pdf> accessed 29 November 2021.

maker(s) will not be involved, but there is no external oversight. While the Criminal Injuries Compensation Tribunal is subject to judicial review, no provision is currently made for appeals from final decisions made by the Tribunal. A right of appeal is an important element of fair procedures and access to justice.

- [3.38] An appeal to the High Court is one option. However, there are many statutory schemes which provide for appeals to be brought to the District or Circuit Courts.
- [3.39] The Commission is interested to learn if the oversight of an appeal to a court is considered by consultees to be desirable and this issue is further considered in Chapter 6.

4. The Guiding Principles of the Scheme

- [3.40] Writing in 1986 about a variety of legislative approaches in the UK to victims of crime, including both court-ordered compensation and criminal injury compensation tribunals, Ashworth identified a tendency “to introduce piecemeal changes on pragmatic grounds, with a characteristic reluctance to discuss general issues and underlying principles.”³⁸ More recently Kilcommins and Moffett have echoed those concerns on the impact of piecemeal advances on victims’ rights in Ireland.³⁹ Complaining that sustained progress has been hampered by the absence of a unified approach to the difficulties experienced by victims of crime in the criminal process, they have, however, expressed hope that the Victims’ Directive will aid change “by demanding that stakeholders re-examine the nature of their engagements with victims of crime.”⁴⁰
- [3.41] The Criminal Injuries Compensation Scheme, established in 1974 and revised in 2021, does not expressly articulate its underlying philosophy.

³⁸ Ashworth, “Punishment and Compensation: Victims, Offenders and the State” (1986) *Oxford Journal of Legal Studies* 86.

³⁹ Kilcommins and Moffett, “The Inclusion and Juridification of Victims on the Island of Ireland” in Healy, Hamilton, Daly and Butler (eds), *The Routledge Handbook of Irish Criminology* (Routledge 2016).

⁴⁰ Kilcommins and Moffett, “The Inclusion and Juridification of Victims on the Island of Ireland” in Healy, Hamilton, Daly and Butler (eds), *The Routledge Handbook of Irish Criminology* (Routledge 2016) at page 398.

The Magdalen Laundry compensation scheme,⁴¹ by comparison, sets out its aims as including commitments to “exclude mutually antagonistic roles and positions,” avoiding “invasive and painful inquiry and interrogation” in “a speedy procedure as part of a final process of healing, reconciliation and closure.”⁴² No such aims are articulated in the terms of the Scheme.

[3.42] In the Australian State of Victoria, the Victims of Crime Assistance Act 1996 sets out its purpose clearly as being “to provide assistance to victims of crime.”⁴³ The Act’s objectives are stated as follows:

- “(a) to assist victims of crime to recover from the crime by paying them financial assistance for expenses incurred, or reasonably likely to be incurred, by them as a direct result of the crime; and
- (b) to pay certain victims of crime financial assistance (including special financial assistance) as a symbolic expression by the State of the community’s sympathy and condolence for, and recognition of, significant adverse effects experienced or suffered by them as victims of crime; and
- (c) to allow victims of crime to have recourse to financial assistance under this Act where compensation for the injury cannot be obtained from the offender or other sources.”⁴⁴

[3.43] Because state-funded compensation is not compensation in the ordinary sense (from wrongdoer to wronged person), it is essential that there is clarity on the rationale for state-funded compensation in this context. In assessing the potential for reform of the Irish scheme, and in seeking to minimise the potential for secondary trauma within the process, a clearer statement of purpose should be expressed. The Commission considers that

⁴¹ Quirke, *The Magdalen Commission Report on the establishment of an ex gratia Scheme and related matters for the benefit of those women who were admitted to and worked in the Magdalen Laundries* (May 2013).

⁴² *Ibid* at paragraph 2.01.

⁴³ Section 1(1) of the Victims of Crime Assistance Act 1996.

⁴⁴ Section 1(2) of the Victims of Crime Assistance Act 1996.

the following guiding principles should underpin legislation on criminal injuries compensation, and is keen to learn the views of consultees as to whether these or additional or alternative guiding principles should apply:

- (a) Reparation;
- (b) Compensation as of right;
- (c) Acknowledgement and solidarity;
- (d) Minimisation of secondary victimisation.

(a) Reparation

[3.44] The Milquet Report noted that European state compensation schemes do not include “reparations in kind” (such as free support for professional reintegration, mobility, trauma, childcare or special practical support) in national definitions of state compensation.⁴⁵ This is reflective of the traditional view of compensation as an expression of solidarity rather than the current understanding of compensation as a right and an integral part of a victim’s healing process. The Report suggests that a wider perspective on reparation should be adopted. The section of the report which deals with the objectives of compensation is worth setting out in full:

“According to international law and international agreements that underwrite the approach to reparation, full and effective reparation should include, as appropriate, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Restitution consists of measures trying to re-establish, as much as possible, the situation of the victim prior to the violation but in including when needed the irreversible effects of the violent act. It aims at restitution of what is taken. Very rarely victimisation has merely reversible consequences.

Compensation is a specific form of reparation provided to victims when replacement or recovery is not possible. This applies for instance for victims of rape or terrorism where

⁴⁵ Milquet, *Strengthening Victims’ Rights: from Compensation to Reparation for a new EU Victims’ Rights Strategy 2020-2025* (European Commission 2019) at page 15.

the experience, psychological consequence or other cannot be erased. The financial compensation can pertain to pecuniary (monetary) or non-pecuniary losses. Money will be used not to replace but form a monetary substitute for the pre-victimisation status. But money is insufficient to provide reparation for victims. That is why support services must also be included in a broader definition of compensation.

Rehabilitation is the provision of medical and post trauma or psychological care, as well as additional social services that foster the rehabilitation of a victim.

Satisfaction/Recognition refers to forms of reparation that include 'full and public verification of the facts, and formal acceptance of any State responsibility'. The concept of satisfaction is closely linked to recognition of victims.

Guarantees of non-repetition or non-recurrence is a form of reparation where governments and actors take the necessary responsibility and actions to protect the victims and reduce the risk of repetition.

As can be seen above, reparation efforts can be individual and collective, financial or not, and a successful reparation strategy entails reparation on both levels. All aspects of reparation are strongly connected and interlinked. Additional efforts on aspect of reparation will unavoidably have an influence on the others. Having a stronger rehabilitation system – with quality medical and psychological services accessible to all – will unavoidably influence the compensation that is required to contribute to the reparation of the harm done by the victimisation."⁴⁶

- [3.45] The Commission considers that reparation should be a key guiding principle of the State's compensation scheme.

⁴⁶ Milquet, *Strengthening Victims' Rights: from Compensation to Reparation for a new EU Victims' Rights Strategy 2020-2025* (European Commission 2019) at pages 3 – 4.

(b) Compensation as of right

- [3.46] It has been acknowledged that in many Member States across the European Union, victims’ access to compensation is difficult. Barriers to compensation cited in the EU Strategy on Victims’ Rights include insufficient information on rights to compensation, procedural hurdles (including restrictive time limits), insufficient allocation from national budgets and complicated rules on offender and state compensation.⁴⁷
- [3.47] One critical commentator, writing before the introduction of the Victims’ Directive, commented that “[a]ny victim “rights” in Ireland are emblematic, theoretical and titular rather than real and enforceable; making it a country that talks about doing more than is actually being done.”⁴⁸ As noted elsewhere, the Victims’ Directive and the Compensation Directive have prompted re-evaluation and have recast victims’ rights as tangible, enforceable and requiring adequate and appropriate state resourcing. The impact of European Union law is striking in this area.
- [3.48] Statutory rights for victims were introduced in this jurisdiction through the enactment of the Criminal Justice (Victims of Crime) Act 2017 (“the 2017 Act”). The 2017 Act was necessary to give effect to the provisions of the Victims’ Directive (discussed further in Chapter 2).
- [3.49] Undoubtedly the provision of compensation is considerably more costly than participatory rights, such as the right to make a Victim Impact Statement (a right provided for in Irish law since the enactment of the Criminal Justice Act 1993).⁴⁹ In that regard the Commission notes a key action for Member States set out in the EU Strategy on Victims’ Rights as being to “[e]nsure that fair and appropriate state compensation for violent, intentional crimes, including victims of terrorism is reflected in the national budgets.”⁵⁰

⁴⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Strategy on victims’ rights (2020-2025), Brussels 24.06.2020 COM (2020) 258 at page 16.

⁴⁸ McGrath, “In Whose Service? – The Use and Abuse of Victims’ Rights in Ireland” (2009) 1 *Judicial Studies Institute Journal* 78 at page 78.

⁴⁹ Section 5 of the Criminal Justice Act 1993.

⁵⁰ EU Strategy on Victims’ Rights (2020 – 2025) at page 18.

- [3.50] The Commission considers that recognition of compensation as of right should be a guiding principle of legislation that provides for it.

(c) Acknowledgment and solidarity

- [3.51] In France, the Victims Guarantee Fund refers on its website to its purpose as being “in the name of national solidarity, to accompany each victim on the road to their reconstruction.”⁵¹ The Victorian legislation, which states its aim as being to “assist victims of crime to recover” and says that compensation is “awarded as a symbolic expression by the State of the community’s sympathy and condolence for, and recognition of, significant adverse effects experienced or suffered by them as victims of crime” shows this approach well. It seems to the Commission that the formal statement of the aims and purpose of compensation would be worthwhile.

(d) Minimisation of secondary victimisation

- [3.52] The Victims’ Directive provides that victims are entitled to protection from secondary victimisation, both in the sense that they must be protected from retaliation and intimidation, but also from being harmed through engagement with legal processes. Recital 9 states:

“Victims of crime should be protected from secondary and repeat victimisation, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice.”

- [3.53] Article 18 obliges Member States to ensure that “measures are available to protect victims and their family members from secondary and repeat victimisation.”
- [3.54] While the Directive expressly mentions criminal and restorative justice processes as potential risks for secondary victimisation, the preamble makes clear that the obligation has broader application. Recital 57 sets out a general requirement to tailor services to those at particular risk, such as victims of human trafficking, terrorism, organised crime, violence in close

⁵¹ See <<https://www.fondsdegarantie.fr/agir-pour-les-victimes-au-nom-de-la-solidarite-nationale/>> accessed 29 November 2021.

relationships, sexual violence or exploitation, gender-based violence, hate crime, and victims with disabilities and child victims.

- [3.55] The aims of recognition, healing and avoidance of secondary victimisation are also expressly mentioned (with specific reference to compensation) in the EU Strategy on Victims' Rights a strategy informed by the Milquet Report:

“The overall objective of compensation is to recognise victims of violent intentional crime and to add to the healing process. Under no circumstances, victims should be exposed to the risks of secondary victimisation during the compensation procedure. Member States should ensure that victims are protected from risks of secondary victimisation not only during criminal proceedings, but also when claiming compensation. In this context, consideration should also be given to victims of terrorism, creating a particular responsibility of each Member State to assure fair and appropriate compensation.”⁵²

- [3.56] The goals of reparation and of minimising secondary victimisation can therefore be seen to be interconnected, and the objective of preventing further avoidable harm should therefore, in the view of the Commission be a guiding principle of legislation.
- [3.57] The Commission would welcome views on the suggested approach of guiding principles based on reparation, compensation as of right, acknowledgement and solidarity and minimisation of secondary victimisation should underpin criminal injuries compensation legislation. The Commission is keen to learn if any other guiding principles should be included.

5. The Funding and Administration of the Scheme

- [3.58] A key question in legislating for criminal injuries compensation is what body or agency should be responsible for the administration of the Scheme.

⁵² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Strategy on victims' rights (2020-2025), Brussels 24.06.2020 COM (2020) 258.

[3.59] Responsibility for the administration of the Scheme currently rests with the Department of Justice. Staff within the Department provide the secretariat support for the Tribunal. Department of Justice staff process applications under the Scheme, communicating with applicants and compiling all necessary documentation. Once all documentation has been received, the file will be passed on to a Tribunal member (or members depending on the amount of compensation claimed) for decision. The Minister for Justice is responsible for appointing the chairperson and members of the Tribunal.

[3.60] In the press release attached to the revised terms of the Scheme in April 2021, the Minister for Justice indicated that Department officials will

“examine the future management of the Scheme and whether one of the State bodies expert in personal injury assessment should be in charge of it”.⁵³

[3.61] Key questions for consideration are therefore:

- (1) whether the Scheme should continue to be administered by the Department of Justice;
- (2) whether it would be better to locate it within an existing body (such as the Personal Injuries Assessment Board or the State Claims Agency); or
- (3) whether a new specialist criminal injuries compensation body is desirable.

[3.62] Determining the appropriate body that should have responsibility for criminal injuries compensation ties in with the overall aims of reform, which include the need for efficiency, trauma responsiveness and compensation as part of overall recognition of victim status, in a holistic response to victim needs. The potential for procedural justice must be maximised, wherever the compensation scheme is ultimately located.

[3.63] In that regard, respectful treatment is of the greatest importance. That requires a number of practical matters, including:

- (1) adequate staffing, with an appropriately skilled and trained team;

⁵³ Department of Justice, “Minister McEntee announces reforms to the Criminal Injuries Compensation Scheme” <<https://www.justice.ie/en/JELR/Pages/PR21000092>> accessed 29 November 2021.

- (2) expeditious and efficient management of applications and timely decision making;
- (3) high-quality examination of applications and consistent decision-making;
- (4) transparency in the process, in which victims can play an active part and are kept informed of their cases' progression.⁵⁴

(a) Funding

[3.64] The EU Strategy on Victims' Rights sets out:

“The [European] Commission recommends that Member States make their national schemes of compensation more victims-friendly by simplifying rules on access to compensation and by increasing available amounts of compensation by adapting national budgets.”⁵⁵

[3.65] Bearing that obligation in mind, the manner in which the Scheme is funded is problematic. It is a cash-limited grant scheme with a limited annual budget; if the budget is spent before the end of the year, applicants must wait until the next annual funding allocation to receive awards of compensation. Large awards can take up a significant proportion of the annual budget and cause delays for both large and smaller claims. However the Scheme is funded, a consistent and adequate funding model is required.

[3.66] Before discussing the options for administration of the Scheme – whether it should operate within an existing agency or body or a newly established one – the question of the Scheme's funding must be considered. The Scheme had an annual budget of €7 million for 2021. It is for the Tribunal to decide how to allocate that budget in terms of individual compensation awards. The Department of Justice can request additional funds to be provided for the Scheme when necessary. The level of the Scheme's funding is a matter to be determined by Government. It is not a question of

⁵⁴ Adapted from Victim Support Europe, “A Journey from Crime to Compensation: An Analysis of Victims' Access to Compensation in the EU” (2019) available at <https://victim-support.eu/wp-content/files_mf/1574261567A_Journey_From_Crime_To_Compensation_2019.pdf> accessed 29 November 2021.

⁵⁵ EU Strategy on victims' rights (2020-2025) at page 17.

law, nor law reform, for the Commission to consider. However, how the Scheme's funding is structured (currently as a cash-limited grant scheme) and the sources of the Scheme's funding are matters on which the Commission can consult as these matters directly impact on how the Tribunal operates.

- [3.67] It has often been suggested that the State's compensation scheme could be funded from court fines, money seized by the Criminal Assets Bureau and money surrendered to the State as the proceeds of crime.⁵⁶ Head 30 of the Criminal Justice (Community Sanctions) Bill 2014 proposes to replace the non-statutory Court Poor Box system with a statutory Reparation Fund.⁵⁷ The Explanatory Note to Head 30 of the Bill states that the intention is that "the receipts from the Reparation Fund should be allocated to State financing of essential services for the support of victims of crime and the State-funded criminal injuries compensation scheme." Head 30 would, if enacted, implement the recommendation in the Commission's *Report on the Court Poor Box: Probation of Offenders* to replace the Court Poor Box system with a statutory Reparation Fund.⁵⁸ In that Report, the Commission noted that this proposal was similar to the use of surcharges found in other jurisdictions, such as the Offender Levy, and which were ring-fenced for specific uses such as a Victim Fund. These options would incorporate a symbolic element of compensation.
- [3.68] An "Offender Levy", imposed on convicted persons after a criminal trial, is used to support Victim Support bodies in Northern Ireland, and so forms part of the context within which the Northern Ireland Scheme is framed. The Victim Assistance Fund in Manitoba, Canada is funded in a variety of ways including "surcharges" on offenders (fines imposed as part of a guilty sentence and applicable to nearly all criminal offences) and money seized

⁵⁶ This was proposed in the defeated Victim Support Bill 1995. Clause 5 proposed a specific fine to be imposed on offenders where the crime results in the physical injury of the victim, to be paid into a fund shared between the State and the Criminal Injuries Compensation Scheme. Clause 6 proposed that the proceeds of crime should be used to fund the Criminal Injuries Compensation Scheme.

⁵⁷ The Criminal Justice (Community Sanctions) Bill 2014 is included on the Government's Spring 2022 Legislative Programme, where it is stated that revised Heads are underway: see <<https://www.gov.ie/en/press-release/10b60-spring-legislation-programme-published-by-government-chief-whip-jack-chambers/>> accessed 31 January 2022.

⁵⁸ Law Reform Commission, *Report Court Poor Box: Probation of Offenders* (LRC 75-2005) at paragraph 4.09.

from the proceeds of crime.⁵⁹ The Federal crime victims fund in the United States is funded by fines imposed against federal criminal offenders and each State receives an annual grant out of this federal fund to operate its' victim services and victim compensation schemes.⁶⁰

- [3.69] Another funding source that might be considered would see the State pursuing offenders to recoup some or all of the compensation awarded to victims. This is already a feature of the provision for compensation orders in sections 6 to 9 of the Criminal Justice Act 1993. This could ensure that victims swiftly receive the compensation awarded to them under the Scheme, avoiding the need for civil litigation by the victim, and could also reduce the cost of the Scheme for the taxpayer. In practice, however, recovery is likely to be limited and the costs of implementing such a scheme might be disproportionate to any financial benefit obtained.
- [3.70] The Commission questions whether the current structure of the Scheme's funding is appropriate and whether additional sources of funding could assist in resolving the difficulties discussed with the current funding structure. The views of consultees are sought as to whether some of that funding should come from court fines and the confiscated proceeds of crime and/or other such sources.

(b) Administration of the Scheme

- [3.71] The administration of the Scheme is a fundamental aspect of a reformed statutory scheme of victim compensation. Administration refers to the nature of the body responsible for the logistics of running, operating and organising the Scheme. The key question in that regard is under the remit and responsibility of which agency criminal injuries compensation should fall. It does not include discussion on the adjudication of applications by the Tribunal: that is dealt with in Chapter 6.
- [3.72] At present, the administration of the Scheme is the responsibility of the Department of Justice, which provides funding for the Scheme and administrative support to the Tribunal and to victims. This section

⁵⁹ Section 44 of the Victims' Bill of Rights CCSM c V55 (Manitoba, Canada). A surcharge is a type of fine and is enforced in the same way as other fines in the jurisdiction.

⁶⁰ Chapter 201 of the Victims Compensation and Assistance Act of 1984 ("VOCA") Pub. L. 98-473.

addresses the nature of the body that should have responsibility for the administration of the Scheme in a reformed statutory scheme. The Commission is of the provisional view that the body that administers the Scheme should be:

- established in legislation;
- adequately and consistently funded;
- adequately staffed by a permanent core team who are appropriately skilled and regularly trained;
- operated with administrative efficiency; and
- trauma responsive.

Option 1: Remain under the remit of the Department of Justice

- [3.73] Many of the jurisdictions examined by the Commission house their compensation schemes within their equivalent of the Department of Justice. By way of example, the Compensation Services unit in the Northern Ireland Department of Justice, which administers the Northern Ireland Scheme, is situated within the "Justice Delivery" Directorate of the Department. This Directorate also includes the "Enabling Access to Justice" Division, which has responsibility for policy and strategy concerning legal aid and access to civil and family justice.
- [3.74] Situating the Scheme within the Department has the advantage of retaining the Department's institutional knowledge and experience of operating the Scheme.
- [3.75] As is outlined throughout the Consultation Paper, the Scheme as currently operated could be improved in many aspects. However, many of the delays and difficulties might be said to be consequences of the cash-limited nature of the Scheme.
- [3.76] However, the Commission is aware of dissatisfaction expressed by some victims and their families in relation to their experiences of engaging with the Tribunal. At a 2021 webinar hosted by the Victims' Rights Alliance on the topic of victim compensation, victims and victim advocates were critical of the Scheme as currently operated. They referred to applicants feeling disrespected, to a lack of warmth and empathy from the Tribunal and to

unacceptable delay in dealing with applications. The process was, they said, intrusive, overly complicated and retraumatising.⁶¹

- [3.77] It might be said, therefore, that while there is institutional knowledge and experience within the Department of the decision-making and financial elements of the administration of the Scheme, there may be scope for a clearer appreciation of, and sensitivity to, the trauma that has invariably been experienced by those who have been affected by violent crime. In addition, retaining the Tribunal within the Department may have an impact on public perceptions of the Tribunal's independence.
- [3.78] The Commission is keen to learn the views of consultees as to the advantages and/or disadvantages of the Scheme remaining under the remit of the Department of Justice.

Option 2: Bring the Scheme under the remit of an existing State body with expertise in personal injury assessments

- [3.79] As noted above, in 2021 the Minister for Justice announced an intention to examine the future management of the Scheme and whether one of the State bodies "expert in personal injury assessment should be in charge of it".⁶² These bodies were not identified but it is likely that the Personal Injuries Assessment Board ("PIAB") and the State Claims Agency ("SCA") could be considered bodies expert in personal injury assessment.
- [3.80] PIAB was established by the Personal Injuries Assessment Board (PIAB) Act 2003. PIAB is a statutory body which provides independent assessment of personal injury compensation for victims of workplace, motor and public liability accidents, as an alternative route to costly and time-consuming civil litigation. The objective is to divert cases from the courts and to achieve a more prompt and inexpensive settlement.⁶³
- [3.81] The National Treasury Management Agency is known as the State Claims Agency ("SCA") when managing personal injury and property damage

⁶¹ Victims Rights Alliance Webinar on the Criminal Injuries Compensation Tribunal, 17 June 2021. See also further discussion in Chapter 6.

⁶² Department of Justice, "Minister McEntee announces reforms to the Criminal Injuries Compensation Scheme" <<https://www.justice.ie/en/JELR/Pages/PR21000092>> accessed 22 November 2021.

⁶³ Byrne, McCutcheon, Cahillane and Roche-Cagney, *Byrne and McCutcheon on the Irish Legal System* 7th ed (Bloomsbury 2020) at page 271.

claims against the State and State authorities, and in providing related risk management services. The SCA was established by the National Treasury Management Agency (Amendment) Act 2000, and manages the following types of personal injury (clinical and non-clinical) and property damage claims on behalf of its client State authorities, their servants or agents:

- (1) Injury to employees;
- (2) Injury to a member of the public;
- (3) Clinical negligence; and
- (4) Third-party property damage.

[3.82] The SCA manages claims from their initial notification through to final resolution.

[3.83] It is important that any body tasked with dealing with victims of violent crime has the requisite level of expertise on the effects of trauma. The Milquet Report notes that “[p]roviding information on compensation face-to-face is argued to be more effective for those experiencing trauma and information is more likely to be better perceived as being provided respectfully when done so in person.”⁶⁴ PIAB and the SCA are two very different entities in terms of their functions and responsibilities. While both bodies may well have the logistical capacity to administer a victim compensation scheme, neither is specifically designed to deal with victims of crime, nor do they appear to have any relevant institutional experience in that context. Neither has any face-to-face engagement with the public. Assuming that the function of adjudicating on compensation claims remains vested in a different body (currently the Tribunal), giving responsibility to PIAB or the SCA to **administer** the scheme (in lieu of the Department of Justice) would not result in an integrated service for victims, which the Commission considers would be beneficial (see the discussion of Option 3 below). If, on the other hand, what is contemplated is that the function of **adjudicating** on claims for compensation might be conferred on PIAB or the SCA, additional considerations would appear to arise. The SCA is a state agency, which manages certain categories of civil claims on behalf of the State. It has no function in adjudicating on such claims – that is a matter for the courts. Conferring on it a function of adjudicating on claims for compensation by victims of crime would appear to raise potentially

⁶⁴ Milquet, *Strengthening Victims’ Rights: from Compensation to Reparation for a new EU Victims’ Rights Strategy 2020-2025* (European Commission 2019) at page 42.

significant issues regarding institutional competence and independence. PIAB has no adjudicative functions either. It does not conduct hearings or hear evidence. It does not determine issues of liability but simply makes recommendations as to compensation which the parties may accept or reject. Again, conferring on PIAB a function of adjudicating on claims for compensation by victims of crime would appear to raise potentially significant issues regarding institutional competence. While the Commission is doubtful of the benefits of conferring on PIAB or the SCA the functions of administering the victim compensation scheme, it has not reached any concluded view on this issue and wishes to have the views of the public on it.

Option 3: Create a new specialist body to administer the Scheme

- [3.84] Under this heading the Commission considers the argument can for a full redesign of the compensation system, involving the establishment of a new body, appropriately resourced with specialist full-time staff, providing an integrated service to victims.
- [3.85] Undoubtedly compensation should have a reparative aim. Financial compensation is not the only way to compensate victims of violent crime: acknowledgement, being heard, dignity and respect after the injury are potentially even more important than financial compensation.⁶⁵ Against the backdrop of a criminal prosecution process in which the focus is on the rights of the accused person, it is essential that victims are fully recognised and afforded procedural justice in the compensation process. That is to say that victims are satisfied, if not with the outcome, with the processes through which outcomes are generated and that they are adequately informed at all stages. The Commission considers that a state-funded compensation scheme for criminal injuries should have victims as its primary focus, and that it should be trauma-responsive and easy to understand, access and navigate for all applicants. In designing a process of compensation an important element of the reparative aim should be to ensure that routes to compensation are efficient, timely, accessible, transparent, consistent and predictable. Processes should be minimally

⁶⁵ Mulder, "How Do We Compensate a Victim's Losses? An Economic Perspective" (2009) 16 *International Review of Victimology* 67 – 87.

retraumatising,⁶⁶ with maximum therapeutic effect.⁶⁷ Financial compensation should not be viewed as the only route to recovery. In that regard, a dedicated specialist body might be better placed to meet both the needs of victims and to satisfy the State's legal obligations in this area.

- [3.86] A related question is whether such a dedicated agency should stand alone, or operate within a broader, more cohesive suite of measures. Victims' Commissioners come in many forms, governmental and nongovernmental, but they can be broadly viewed as regulators of victims' rights.⁶⁸ Some are information points and advocates for victim-centric policy; some investigate complaints from victims regarding service providers (similar to an Ombudsman); others provide both of the above and also administer the national victim compensation scheme.
- [3.87] Quite apart from the supports that the State is obliged to provide to victims in the investigative and criminal processes, the State has numerous intersecting obligations to victims of crime, both in terms of compensation and in terms of the provision of information. A disjointed approach to service provision can lead to both gaps and duplication. The Garda Síochána has responsibility for the provision of a considerable amount of practical information and ongoing liaison with victims where prosecutions are proceeding. Information in relation to various agencies is housed on the Department of Justice Victims' Charter website,⁶⁹ but that does not provide a centralised hub of services. The services to which visitors are directed in

⁶⁶ The Victims' Directive (Directive 2012/29/EU) is the core instrument of the EU victims' rights policy. It provides in the Preamble at paragraph 9 that: "[v]ictims of crime should be protected from secondary and repeat victimisation, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice." Article 18 obliges Member States to ensure that victims and their family members are protected from secondary and repeat victimisation, including emotional and psychological harm.

⁶⁷ See Chapter 4 Awards of Compensation. See also Milquet, *Strengthening Victims' Rights: from Compensation to Reparation for a new EU Victims' Rights Strategy 2020-2025* (European Commission 2019); Northern Ireland Department of Justice, *Consultation – Review of Criminal Damage and Criminal Injuries Compensation Schemes* (2014) pages 53- 54 and Victorian Law Reform Commission, *Report: Review of the Victims of Crime Assistance Act 1996* (2018).

⁶⁸ Holder and Kirchengast, "Crime Victims' Rights Commissioners: Public Interest Entities in a Regulatory Regime" (2021) 45 (1) *International Journal of Comparative and Applied Criminal Justice* 67-87.

⁶⁹ See <<https://www.victimscharter.ie/>> accessed 10 January 2022.

the Charter are not state-funded nor state-provided services. They are not evenly geographically spread across the country: under the heading “Counselling Support Services available to victims of crime”, four counselling services are listed covering Dublin, Athlone, Galway, Wicklow, Donegal and Louth. Some of the counselling services listed are run by volunteers. None of the services listed appear to tailor their services specifically to victims of crime. Under the heading “Homicide Victim Services”, visitors are directed to the services of the non-governmental organisations AdvIC and Support After Homicide, rather than to a state-provided service. Equally, the heading “Child victim Support Services” links to the non-governmental organisations Barnardos and CARI.

- [3.88] Much outstanding work is done for victims by a variety of agencies, both governmental and non-governmental. Many NGOs do so with substantial financial assistance from the Department of Justice.⁷⁰ However it seems to the Commission that there may be scope for integration of those services, both in terms of the provision of information and practical support services. In posing questions on the possible functions of a single hub or contact point for victims of violent crime, the Commission seeks to determine what services ancillary to compensation should be provided to further the reparative aim of the compensation process.
- [3.89] NGOs have worked tirelessly to seek practical and legislative improvements. Many agencies are, however, niche, lobbying and providing services in relation to discrete categories of victim: victims of sexual violence, gender-based violence, domestic abuse, families of those bereaved by homicide and others. Voluntary organisations provide support services such as court accompaniment and emotional support, but the sector is fragmented. On a governmental level Cosc, the National Office for the Prevention of Domestic, Sexual and Gender-based Violence had operated to deliver a co-ordinated whole of government response to domestic, sexual and gender-based violence. It was disbanded in 2020 when the Department of Justice was restructured and in tandem with the

⁷⁰ The 2022 Budget allocation for supporting Victims of Crime is €4.9 million, see: “Minister McEntee announces details of funding for organisations supporting victims of abuse and crime to mark 16 days of activism against gender based violence” (25 November 2021) <<https://www.justice.ie/en/JELR/Pages/PR21000286>> accessed 10 January 2022.

Department's publication of *Supporting a Victim's Journey*.⁷¹ An audit of Domestic, Sexual and Gender Based Violence Services conducted by the Department of Justice noted the fragmentation of the various services involved, stating:

"There are indications of fragmentation within and across the sector, largely due to failure to invest in building a culture of joint problem solving that would support and drive the development of effective responses."⁷²

- [3.90] The audit recommended that policy leadership for Domestic, Sexual and Gender Based Violence be placed clearly with the Department of Justice, to bring all relevant policy elements under one Department and to provide a lead and accountable body for the totality of policies and interventions on domestic, sexual and gender-based violence.
- [3.91] Although this is a logical approach to policy and direction-setting, having a national office for some victims but not for all can contribute to a sense of there being a "hierarchy of victims". This can cause the gaps to widen between those who fall within the definition of victim included in a policy and those who fall outside it, and there is a danger that policy responses and the services that flow from them reinforce that impression. To name a few examples, legal advice and assistance are available for victims of trafficking and victims of certain sexual offences, but not for other forms of violence;⁷³ anonymity is provided for as of right for some victims but not

⁷¹ Department of Justice, *Domestic, Sexual and Gender Based Violence: An Audit of Structures* (June 2021) see https://justice.ie/en/JELR/DSGBV_Audit_Report.pdf/Files/DSGBV_Audit_Report.pdf accessed 29 November 2021.

⁷² Department of Justice, *Domestic, Sexual and Gender Based Violence: An Audit of Structures* (June 2021) at page 4, see https://justice.ie/en/JELR/DSGBV_Audit_Report.pdf/Files/DSGBV_Audit_Report.pdf accessed 29 November 2021.

⁷³ Sexual offences including but not limited to: the offence of rape under the common law, the offence of rape under section 2 of the Criminal Law (Rape) Act 1981 and the offence of aggravated sexual assault under section 3 of the Criminal Law (Rape) (Amendment) Act 1990, as provided in section 26(3A) of the Civil Legal Aid Act 1995, (as inserted by the Civil Law (Miscellaneous Provisions) Act 2008).

others.⁷⁴ A striking example relates to victim impact statements: initially the option to make a victim impact statement was only available to primary victims, not to family members in homicide cases, as the legislation provided for evidence and submissions to be heard concerning the effect “of the offence on the person in respect of whom the offence was committed.”⁷⁵ The relevant section was amended in 2010 to provide that victim impact statements could be made by the family members of those bereaved by an act of violence, but that amendment by definition excluded those bereaved by a road traffic offence such as dangerous driving causing death.⁷⁶ The section was amended again in 2017 to bring those bereaved by fatal road traffic offences within the definition of those entitled to make a victim impact statement when reference to sexual and violent offences was replaced with a broader definition that encompasses “an offence where a natural person ... has suffered harm, including physical, mental or emotional harm, or economic loss, which was directly caused by that offence.”⁷⁷

- [3.92] In the mission to appropriately provide for victims of domestic, sexual and gender-based violence it is important not to lose sight of the fact that services to support those victims should be provided within an overarching victim response framework, and that all victims of violent intentional crime are entitled to information and to fair and appropriate compensation. The EU Strategy on Victims’ Rights outlines that “national support and protection measures need to be effective for **all victims** and at all times.”⁷⁸ There is no doubting the specialist approach required for domestic, sexual and gender -based violence, but there are many categories of victim who are equally deserving of the kind of cohesive strategic planning that is proposed to be applied to domestic and sexual abuse. The families of homicide victims are an obvious category. Victim service provision must, at a macro level, be designed bearing in mind the needs of all victims, with

⁷⁴ Anonymity is provided for rape complainants in section 7 of the Criminal Law (Rape)(Act) 1981. It was later extended to complainants in incest cases in the Criminal Law (Sexual Offences) Act 2017.

⁷⁵ Section 5 of the Criminal Justice Act 1993, as enacted.

⁷⁶ Section 5 of the Criminal Justice Act 1993, as amended.

⁷⁷ Section 5(1) of the Criminal Justice Act 1993, as amended.

⁷⁸ EU Strategy on victims’ rights (2020-2025) at page 8.

tailored supports for specific categories bearing in mind their particular needs.

- [3.93] The language of the Compensation Directive is egalitarian in its approach to compensating “victims of violent intentional crime” as, it is suggested, is appropriate. As has been mentioned previously, a full assessment of the advantages and disadvantages of a Victim Commissioner are beyond the scope of this project. This project is focused on compensation, but in its analysis the Commission will be looking at compensation in a broad sense (including the provision of services, such as counselling) with a reparative aim. The Commission’s provisional view is that there is much to be said for the establishment of a Victim’s Office to centralise the provision of detailed information, practical and emotional support, as well as compensation, in a trauma-responsive way.
- [3.94] That approach can include specific provision for particular categories of victim, as envisaged by the EU Strategy on Victims’ Rights, which is clear in its calls for tangible supports and the concretisation of victims’ rights:

“EU rules on victims’ rights require Member States to ensure that victims have access to general and specialised support services that are confidential, free of charge and respond to victims’ individual needs. Under the Victims’ Rights Directive, general support services should provide information, advice, emotional and psychological support and refer to medical aid. In addition, such services should protect the privacy of victims and their families. All victims with specific needs should have access to specialised support services that are based on an integrated and targeted approach, which takes into account the specific needs of victims, the severity of the harm suffered, the relationship between the victim and the offender and the situation of victims in their wider social environment.

The Victims’ Rights Directive also requires that all victims have access to protection in accordance with their individual needs. Special attention must be paid to victims with specific

needs of protection from the risks of secondary, repeat victimisation, intimidation and retaliation.”⁷⁹

- [3.95] The Commission would welcome the views of consultees as to whether a National Victims’ Office is required to provide both compensation and general and/or specialised support services in a coordinated and cohesive way. As outlined above, Victims’ Offices and Victim Commissioners come in many forms. Some are involved in the provision of state-funded and facilitated services; some are independent of government and advocate for service improvement, policy change and the promotion of victims’ interests. Some blend service delivery and analysis of service provision. Rather than addressing the issue of a potential Victim Commissioner as a role involving policy-based advocacy and activism, the focus of this Consultation Paper is the provision of compensation as a victim service. In assessing whether the administration of the victim compensation scheme should be situated within an agency with broader responsibilities, the kind of agency envisaged in this proposal is focused on service delivery and provision of information, rather than advocacy or lobbying. This proposed agency is more in the nature of the New South Wales government Victims Services department than, for example the Victim Commissioner for England and Wales who is “a voice for victims” and whose role is “to champion the interests of victims of crime and witnesses.”⁸⁰
- [3.96] In New South Wales the government’s Victims Services⁸¹ department centralises services for victims. services are provided through a single contact point website, including counselling, financial support and recognition payments. Financial assistance for immediate needs includes help to pay for things urgently needed to be safe and healthy because of a violent crime: a grant of up to AU\$5,000 is available to help pay for security, relocation, furniture and household items and basic cleaning and toiletries. Financial support is also available for funeral expenses. A forensic cleaning grant is also available of up to AU\$5,000 for families of homicide victims, to restore a property to a liveable condition. In South Australia, the Commissioner for Victims’ Rights is an independent statutory officer whose duties are set out in the Victims of Crime Act 2001 as including

⁷⁹ EU Strategy on victims’ rights (2020-2025) at page 9.

⁸⁰ See <<https://victimscommissioner.org.uk/>> accessed 10 January 2022.

⁸¹ See <<https://www.victimsservices.justice.nsw.gov.au/>> accessed 10 January 2022.

- (a) to marshal available government resources so they can be applied for the benefit of victims in the most efficient and effective way;
- (b) to assist victims in their dealings with prosecution authorities and other government agencies;
- (c) to monitor and review the effect of the law and of court practices and procedures on victims.⁸²

[3.97] It is worth noting that, although it was not ultimately reflected in the EU Strategy on Victims' Rights, the Milquet Report had included a recommendation on the establishment of national victims' rights coordinators to ensure effective access to justice and compensation for victims. Milquet recommended:

“The Commission could oblige or recommend to the Member States to designate a national victims' rights coordinator in charge of the national coordination between the different authorities and between the public authorities and the victim support services. This proposal would go with the setting up of a permanent national coordinating structure under the supervision of the national victims' rights coordinator, providing for internal different platforms of department to offer common services and exchanges of information between the different national stakeholders (compensation bodies, victim support organizations, prosecutors, police, health care, emergency services, foreign affairs). This structure could be decentralized and become a single contact point where the victims can find different information and connections with the personal support needed and the direct contacts with the state compensation authorities.”⁸³

[3.98] If it is considered that a new specialist body is desirable, the Commission is keen to learn the views of consultees as to whether such an agency should be confined solely to the assessment and administration of awards of compensation and measures with related reparative aims, or whether additional services should be provided. Could such a body function as a

⁸² Section 16 of the Victims of Crime Act 2001.

⁸³ Milquet, *Strengthening Victims' Rights: from Compensation to Reparation for a new EU Victims' Rights Strategy 2020-2025* (European Commission 2019) at page 41.

single contact-point for victims and be responsible for the provision of information, assistance in the criminal justice process (either in partnership with the Garda Síochána or as a complementary service), as well as victim support services and compensation?⁸⁴ How might such a system intersect with existing state- and NGO-provided victim services? Again, it should be emphasised that the type of body envisaged by the Commission in considering this question is focused on service coordination and delivery as opposed to lobbying and advocacy. The Commission is particularly keen to gain an insight into what consultees consider might be the best corporate structure for such a body, as well as the kinds of professions and skills that should be brought together within it to best serve victims of all kinds of violent intentional crime.

6. Non-monetary supports

- [3.99] Compensation is intended to practically assist victims in their recovery from the effects of a criminal offence and symbolically acknowledge the harm caused to them. It is widely acknowledged that compensation is just one aspect of a victim's journey to recovery. Restorative justice practices, such as an apology from the offender, may often do more to assist a victim's recovery than any amount of compensation. Indeed, it is recognised that to focus on financial compensation as the "sole method to make victims 'whole again' seems to be an over-simplified view of victim's needs".⁸⁵ The Commission acknowledges that compensation cannot solely provide for a victim's needs in the aftermath of a crime. An important question is therefore whether a reformed compensation scheme should include provision of non-monetary supports, alongside or as an element of an award of compensation.
- [3.100] The Milquet Report begins its examination of the European victims' rights landscape by stating that money is insufficient reparation for victims, and therefore support services must also be included in the definition of compensation.⁸⁶ Some national compensation schemes, such as those operated in Sweden and the Netherlands, are viewed as just one element in

⁸⁴ Milquet, *Strengthening Victims' Rights: from Compensation to Reparation for a new EU Victims' Rights Strategy 2020-2025* (European Commission 2019) at pages 39-41.

⁸⁵ Mulder, "How do we compensate a victim's losses? An Economic Perspective" (2009) 16 *International Review of Victimology* 67 at page 68.

⁸⁶ Milquet Report at page 3.

a larger suite of broader social services that exist to support a victim in their recovery.⁸⁷ Viewing compensation in this way means that the focus of state funded compensation is on meeting the needs of victims.

- [3.101] Often, compensation systems with low or comparatively strict caps on financial awards tend to offer a range of non-monetary supports to victims eligible under the compensation system. Examples include access to a certain amount of counselling, or assistance in re-joining the workforce by re-training (which may be necessary because of injuries inflicted during the commission of the crime). The victim compensation system in California, for example, while having comparatively low maximum limits on compensation for loss of earnings and attorney fees, provides that victims may engage in up to 40 hours of counselling and receive assistance in job re-training.⁸⁸
- [3.102] The need for State authorities to not expose victims to secondary traumatisation, emphasised in both the Victims' Directive and the recommendation in the EU Strategy on Victims' Rights,⁸⁹ arguably would most effectively be advanced by a unified and holistic approach to victim compensation. In other words, if the criminal injuries compensation process assessed both financial and non-financial needs of victims in the aftermath of a crime and could provide or refer victims to the necessary support services, the risk of exposure to secondary traumatisation in the compensation process could be much lower. Victims would not have to repeat their stories and experiences to the various bodies and agencies that currently provide assistance to victims of crime. Victim services are currently delivered by a wide range of agencies, a combination of state bodies such as the Garda Síochána and the Office of the Director of Public Prosecutions and by NGOs, many of which are funded in part by the State. For instance, under a holistic model, a victim would not have to separately apply for compensation under the Scheme, providing all the details of the crime and the resulting effects and expenses, and seek out counselling services or informal support groups and consider re-training programmes to change career following injury. A holistic victim compensation model would (at the least) assist victims in seeking out information on these non-

⁸⁷ *Ibid.*

⁸⁸ California Government Code 13950 – 13966.

⁸⁹ Directive 2012/29/EU, Recital paragraph 9. EU Strategy on victims' rights (2020-2025) at page 17.

monetary supports or it could be designed to also refer victims to such services where needed.

- [3.103] Successful civil litigation against offenders is relatively rare, but the pursuit of justice via civil litigation is not necessarily solely undertaken with financial compensation as the chief objective: a finding of responsibility may be equally, if not more important, as civil litigation by those affected by the 1998 Omagh bombing illustrates.⁹⁰ In a study on litigation following medical malpractice, Relis has found that litigation is driven not by primarily financial motivation, but by psychological and emotional needs. Their objectives were found to be based on principles rather than the pursuit of monetary compensation. Plaintiffs cited as primary objectives the prevention of future harm, admission of fault / responsibility, acknowledgement of the harm caused and the pursuit of both answers and apologies.⁹¹ This implies that there are other means to compensate victims of crime beyond financial compensation: acknowledgement, being heard, dignity and respect after the injury are perhaps even more important than financial compensation.⁹²
- [3.104] The Commission would welcome the views of consultees on whether legislation providing for a reformed Scheme should be confined to monetary awards alone, or whether it should provide for compensation to be awarded alongside a broader suite of reparative measures, such as counselling, medical and other practical services, and/or restorative justice measures.

⁹⁰ Miers, "Offender and State Compensation for Victims of Crime: Two Decades of Development and Change" (2014) 20(1) *International Review of Victimology* 145 at page 148.

⁹¹ Relis, "It's Not About the Money!: A Theory on Misconceptions of Plaintiffs' Litigation Aims" (2006) 68(2) *University of Pittsburgh Law Review* 341-386.

⁹² See Mulder, "How Do We Compensate a Victim's Losses? An Economic Perspective" (2009) 16 *International Review of Victimology* 67 – 87.

Tell us your views

- Q. 3.1** Do you agree that legislation is required to underpin Ireland's criminal injuries compensation process?
- Q. 3.2** The Commission seeks to identify the guiding principles that should be reflected in any legislation, so as to ensure that the provision of state compensation to victims of crime accords with a more modern, trauma-responsive approach to the needs of crime victims. Do you agree that the following would be appropriate guiding principles to be included?
- (1) Reparation;
 - (2) Compensation as of right;
 - (3) Acknowledgement and solidarity; and
 - (4) Minimisation of secondary victimisation.

Are there additional or different guiding principles that should be reflected in legislation in this context?

- Q. 3.3** The Commission considers that a steady and consistent funding model is essential to the effective and efficient functioning of any victim compensation scheme. The Commission seeks consultees' views as to whether some of that funding should come from court fines and the confiscated proceeds of crime and/or sources other than the Exchequer.
- Q. 3.4** The Commission seeks consultees' views on the following:
- (1) Whether the Scheme (including any amended Scheme) should continue to be administered by the Department of Justice; or
 - (2) Whether the Scheme should be administered by a body such as the Personal Injuries Assessment Board or the State Claims Agency); or
 - (3) Whether a new specialist criminal injuries compensation body is desirable.
- Q. 3.5** If a new specialist body is desirable, what should its functions be?
- Q. 3.6** Should it be concerned only with administering financial compensation (including adjudicating on claims for compensation), or should other measures, such as the provision of non-financial supports and services (for example counselling) and/or restorative justice measures, form part of its functions?
- Q. 3.7** If other measures should form part of its functions:

- (1) What services could or should be provided?
- (2) What professions and skills are required?
- (3) How should the body be structured?
- (4) How might such a body intersect with existing state- and NGO-provided victim services?

Q. 3.8 In addition to administering the compensation scheme, could a specialist body function as a “one-stop-shop” for victims? Should it have responsibility for providing information and assistance to victims going through the criminal justice system?

CHAPTER 4

AWARDS OF COMPENSATION

1. Introduction

- [4.1] Compensation for victims of crime is intended to be practical and symbolic. Compensation is of practical assistance to victims in its attempt to place them in the financial position they would have been in if the crime had not been committed. By covering costs, such as medical expenses and loss of earnings, the financial burden on the victim after the crime is lessened. It is symbolic as the offender, or the State, acknowledges the harm caused to the victim and to society by the crime through compensation. Although the first state-funded victim compensation systems were initially criticised,¹ they have since been recognised as a proper response by the State to victims' needs in the aftermath of crime.
- [4.2] State-funded victim compensation systems repay victims for evidenced expenses that directly result from a criminal offence – such as a loss of earnings or medical costs. Some systems include an amount to recognise victims' experiences and compensate them for the pain and suffering caused by the offence. Of course, the nature and extent of awards of compensation will depend on the financial resources of each country. Therefore, there is great variation in how and what level of compensation is awarded across jurisdictions.
- [4.3] Many international legal instruments require countries to create and operate victim compensation systems. EU law, under the Compensation Directive,² requires Member States to create national victim compensation mechanisms. Initially, international legal instruments focused their recommendations on the need to create state-funded compensation systems. Compensation was viewed as an expression of sympathy or solidarity from the State to victims of crime. More recently, a contextual shift has occurred, and EU law has recognised that compensation should be available to victims as of right. In turn, focus has shifted to the purpose of compensation awards and what is actually being compensated.

¹ See, for instance, Ashworth, "Punishment and Compensation: Victims, Offenders and the State" (1986) *Oxford Journal of Legal Studies* 86.

² Directive 2004/80/EC, Article 12.

Compensation has come to be viewed as an essential, but not sole, part of a victim's journey to recovery.

2. Principles of Compensation

- [4.4] International legal instruments from the Council of Europe and the United Nations recommend that States create and operate victim compensation schemes. These recommendations are not legally binding but are intended to guide the development of national law and policy in the jurisdictions in which they apply (the 1983 Council of Europe Convention imposes binding obligations on States but it has not been signed by Ireland). The key "soft law" recommendations specifically relating to how and what compensation should be awarded are set out below.
- [4.5] European Union Member States are legally required by the Compensation Directive to create victim compensation schemes in national law which guarantee fair and appropriate compensation to victims of violent intentional crimes.³ Recent interpretation of that Directive by the Court of Justice of the European Union in the *BV* decision, discussed in detail below, has important implications for national victim compensation schemes. EU Member States are also bound by the Victims' Directive, which requires that victims are facilitated to obtain a decision on compensation by the offender in the course of, or separate to, criminal proceedings.⁴ The effects of these binding obligations on the Scheme are discussed at the conclusion of this Chapter.

(a) The Council of Europe

- [4.6] In September 1977, the Committee of Ministers of the Council of Europe adopted Resolution (77) 27 on the compensation of victims of crime. This Resolution recommended that compensation be paid to victims through national frameworks of social security, by recourse to insurance or through specially created compensation schemes.⁵ The Resolution further stated that compensation should be the fullest and fairest possible, taking into account the nature and the consequences of the injuries.⁶ The Resolution

³ Directive 2004/80/EC, Article 12(2).

⁴ Directive 2012/29/EU, Article 16.

⁵ Principle 3.

⁶ Principle 4.

included a principle against “double compensation” – that state-funded compensation schemes should deduct or reclaim any amount of compensation already paid to the victim for the same injuries.⁷ It is also set out that for practical or economic reasons, Member States may set minimum or maximum awards or operate on the basis of a fixed scale or percentage assessment of injuries. It was further recommended that compensation be paid in a lump sum or in periodic payments and should be calculated to include, in appropriate cases:

- the loss of past and future earnings, increase of earnings, medical expenses, expenses of medical and professional rehabilitation and funeral expenses, at the least;
- the possibility of granting interim awards, in urgent cases when there would be a delay in determining the full award of compensation.⁸

[4.7] The 1977 Resolution was followed in 1983 by the Convention on the Compensation of Victims of Violent Crimes. The Convention states that compensation shall cover at least:

- loss of earnings,
- medical and hospitalisation expenses and funeral expenses, and
- loss of maintenance for dependants.⁹

[4.8] Under the Convention, Council of Europe Member States may set upper and lower limits, for any or all elements of compensation.¹⁰ The Convention incorporates a principle against double compensation and permits States to deduct from the compensation awarded or reclaim from the person compensated any amount of money received by the victim for the same injuries.¹¹ The Convention also permits the refusal or reduction of an award based on the personal circumstances of the victim such as their financial

⁷ Principle 9.

⁸ Principles 5 – 8.

⁹ Article 4.

¹⁰ Article 5.

¹¹ Article 9.

situation or their involvement in organised crime.¹² It should be noted that Ireland is not a signatory to this Convention and is not bound by its terms.¹³ However, discussion of the Convention's provisions is important, as the terms of the Convention informed the provisions of the Compensation Directive subsequently adopted by the European Union.

- [4.9] A 2006 Recommendation on assistance to crime victims, Rec(2006)8, recommends certain standards and assistance for victims of crime on fifteen related issues.¹⁴ At Article 8 it is recommended that Council of Europe Member States put in place a compensation framework for crime victims. The Recommendation states that compensation should be granted without undue delay, at a fair and appropriate level.¹⁵ It was recommended that Council of Europe Member States provide compensation for the treatment and rehabilitation of physical and psychological injuries. Compensation should include loss of income, funeral expenses, and loss of maintenance for dependents. It was further recommended that States consider the provision of compensation for victims' pain and suffering.¹⁶

(b) The United Nations

- [4.10] The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power sets out international standards on ways in which UN Member States are expected to provide victims with access to justice, restitution, compensation and assistance. The Declaration makes few recommendations in respect of victim compensation. Article 13 recommends that national funds for compensation to victims should be established, strengthened, expanded and encouraged. This is not a binding obligation but rather a recommendation for Member States of the United Nations to consider in their national victim compensation schemes.

¹² Article 8.

¹³ The Convention was ratified by 26 of the 47 Council of Europe Member States. For detailed analysis of the poor implementation of this Convention see Katsoris, "The European Convention on the Compensation of Victims of Violent Crime: A Decade of Frustration" (1990) 14 *Fordham International Law Journal* 186.

¹⁴ Council of Europe (CoE) (2006), Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims, available at: <<https://rm.coe.int/16805afa5c>> accessed 5 February 2021.

¹⁵ Principle 8.4.

¹⁶ Principles 8.6 and 8.7.

(c) Obligations under EU law

[4.11] European Union Member States have legally binding obligations in respect of victims' rights, and specifically victim compensation, which are set out in a number of Directives. These include the Compensation Directive, the Victims' Directive, the Anti-Trafficking Directive, and the Counter-Terrorism Directive.

(i) The Compensation Directive

[4.12] The Compensation Directive facilitates EU-wide cross-border access to compensation for victims of violent intentional crimes. The Directive sets out minimum requirements. Member States are, of course, free to go beyond those minimum requirements to introduce and maintain more favourable provisions for the benefit of victims of crime.¹⁷

[4.13] Obligations under this Directive are two-fold. First, victims must be able to apply for compensation in the Member State where criminal injuries were inflicted, where that is not the victim's state of residence. In other words, a French tourist injured in an assault in Ireland must be able to apply for compensation under the Irish scheme. Second, Member States must establish compensation schemes for victims of violent intentional crime in their domestic legal systems which provide "fair and appropriate compensation".¹⁸ The Compensation Directive was initially interpreted as establishing a right to compensation only in cross-border situations. However, in *Presidenza del Consiglio dei Ministri v BV* ("the BV case"),¹⁹ the Court of Justice of the European Union ("CJEU") held that in fact the Directive confers a right to fair and appropriate compensation under national compensation schemes in purely domestic cases, not only in cross-border cases.

(ii) Court of Justice of the European Union interpretation of the Compensation Directive: the BV decision

[4.14] The victim in *BV* was violently sexually assaulted in Italy in 2005. The offenders were convicted, sentenced, and ordered to pay the victim €50,000

¹⁷ Directive 2004/80/EC, Article 17.

¹⁸ Directive 2004/80/EC, Article 12(2).

¹⁹ Case C-129/19 *Presidenza del Consiglio dei Ministri v BV* EU:C:2020:566.

in damages. This amount could not be recovered as the whereabouts of the offenders was unknown. Italy had implemented the obligations of the Compensation Directive with a fixed scheme of compensation for criminal injuries. Levels of compensation were fixed in a scale laid down by Ministerial Decree. Under that fixed scheme the victim in *BV* was entitled to €4,800 in compensation.²⁰ This amount was significantly lower than what could be recovered by a victim of sexual violence in an ordinary claim for damages in Italian law, and indeed was significantly lower than the amount ordered to be paid to her in compensation by the offenders, which could not be recovered. In 2009, *BV* brought a claim against Italy, arguing that Italy had failed to correctly and fully implement the obligations flowing from the Compensation Directive, particularly the obligation in Article 12(2). The Italian *Corte Suprema di Cassazione* (Supreme Court of Cassation) referred a question of law to the CJEU seeking a preliminary ruling on the interpretation of the Compensation Directive.

[4.15] The CJEU had to first determine whether European Union citizens could rely on Article 12(2) against their Member State of residence to assert a right to fair and appropriate compensation. The CJEU was also asked to give a preliminary ruling on the meaning of “fair and appropriate” compensation, which national schemes are required to provide to victims of crime under the Compensation Directive. In other words, the CJEU had to decide:

- (1) whether individuals can directly rely on Article 12(2) of the Compensation Directive to invoke Member State liability and receive compensation; and
- (2) whether that compensation is fair and appropriate in the circumstances.

[4.16] Article 12(2) provides:

“All Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims.”

²⁰ Case C-129/19 at paragraph 23.

- [4.17] On the first question, the CJEU considered the wording of Article 12, its context, and the objectives of the Directive as a whole. It found that the Directive was intended to confer a right that was not limited to cross-border situations, but rather that compensation schemes would have national application:

“It follows that Article 12(2) of Directive 2004/80 confers the right to obtain fair and appropriate compensation not only on victims of violent intentional crime committed in the territory of a Member State who find themselves in a cross-border situation, within the meaning of Article 1 of that Directive, but also on victims who reside habitually in the territory of that Member State. Therefore [...] an individual has a right to compensation for damage caused to him or her by the breach by a Member State of its obligation flowing from Article 12(2) of Directive 2004/80, and that is so irrespective of whether that individual finds himself or herself in such a cross-border situation at the time when he or she was the victim of a crime which is a violent intentional crime.”²¹

- [4.18] On the second question, the CJEU addressed what constitutes “fair and appropriate” compensation. The CJEU stated that compensation is not necessarily required to ensure the complete reparation of material and non-material losses suffered by the victim but should represent a contribution to the reparation of the suffering to which the victim has been exposed to an appropriate extent.²² Although Member States are afforded a discretion in the matter, the CJEU also stated that awards of compensation which are “purely symbolic or manifestly insufficient” having regard to the seriousness of the consequences of the crime committed will not be considered fair and appropriate:

“Thus, it is necessary to state that a Member State would exceed its discretion under Article 12(2) of Directive 2004/80 if the national provisions provided compensation to victims of violent intentional crime that was purely symbolic or manifestly insufficient having regard to the seriousness of

²¹ Case C-129/19 at paragraph 55.

²² Case C-129/19 at paragraphs 60 and 64.

the consequences, for those victims, of the crime committed.”²³

[4.19] With respect to fixed rates of compensation or tariff schemes, the CJEU held that the language of Article 12(2) does not preclude fixed rates of compensation, but these must be capable of being varied in accordance with the nature of the violence suffered.²⁴ Compensation scales must be sufficiently detailed to avoid the possibility that fixed awards of compensation could be manifestly insufficient.²⁵ Considering that sexual violence is likely to give rise to the most serious consequences of violent intentional crime, the compensation awarded to the victim in the *BV* case was found not to be “fair and appropriate” within the meaning of Article 12(2).²⁶

[4.20] The *BV* decision has important consequences for national compensation schemes in Member States. The findings of the CJEU in *BV* can be summarised as follows:

- The Compensation Directive establishes a right to compensation for victims of violent intentional crime regardless of where in the EU the crime was committed (it is not limited to cross-border cases);
- Compensation available in national criminal injury compensation schemes must be fair and appropriate;
- Member States have discretion to determine what is considered fair and appropriate compensation;
- The financial viability of the scheme is a relevant consideration;
- The amount of compensation awarded under a state-funded criminal injury compensation scheme does not necessarily have to correspond with what the perpetrator of the crime would be ordered to pay;
- Fair and appropriate compensation does not necessarily require the complete reparation of material and non-material losses;

²³ Case C-129/19 at paragraph 63.

²⁴ Case C-129/19 at paragraph 65.

²⁵ Case C-129/19 at paragraph 66.

²⁶ Case C-129/19 at paragraph 69.

- Fair and appropriate compensation should represent a contribution to the reparation of the suffering to which the victim has been exposed to an appropriate extent;
- Fair and appropriate compensation is not purely symbolic or manifestly insufficient and should have regard to the seriousness of the consequences of the crime committed;
- Fixed rates or tariff schemes of compensation are permissible under the Directive but must be both capable of being varied and be sufficiently detailed to avoid awards of compensation being manifestly insufficient.

[4.21] The *BV* decision provides guidance to Member States as to the interpretation of the Compensation Directive – particularly what is considered “fair and appropriate” compensation as per Article 12. The case is the CJEU’s only interpretation of that Directive. In order to assess compliance with the Compensation Directive, the Irish Scheme must be assessed against the *BV* principles set out above.

(iii) The Victims’ Directive

[4.22] The primary focus of the Victims’ Directive is to create procedural rights for victims: rights to information, support, protection and some participatory rights in the criminal process. The Victims’ Directive does not create further obligations for Member States in respect of national victim compensation schemes. However, the Directive strongly emphasises the need to minimise repeat victimisation, one element of which is to provide services in a coordinated way that reduces victims’ repeated interactions with a variety of agencies. Recital 62 of the Directive provides that

“Victims should be assisted in finding and addressing the competent authorities in order to avoid repeat referrals. Member States should consider developing ‘sole points of access’ or ‘one-stop shops’, that address victims’ multiple needs when involved in criminal proceedings, including the need to receive information, assistance, support, protection and compensation.”²⁷

²⁷ Directive 2012/29/EU, Recital 62.

- [4.23] Article 4 of the Victims' Directive requires Member States to ensure that victims are offered information on a variety of key matters from their first interaction with the criminal justice system, including how and under what conditions they can access compensation.
- [4.24] Article 16 of the Victims' Directive creates a right to a decision on offender paid compensation in the course of criminal proceedings. Article 16 includes an exception where such a decision can be made in other proceedings. Member States are also required to promote measures to encourage offenders to provide adequate compensation to victims.²⁸
- [4.25] Member States therefore must, as per the Compensation Directive, operate state-funded national compensation schemes **and**, as per the Victims' Directive, facilitate offender-paid compensation.

(iv) The Anti-Trafficking and Counter- Terrorism Directives

- [4.26] The Anti-Trafficking Directive²⁹ introduces common provisions to strengthen measures aimed at the prevention of human trafficking and to protect human trafficking victims. Article 17 requires Member States ensure that victims of human trafficking can access existing schemes of compensation for victims of violent intentional crime. The Directive also requires Member States to ensure that victims of trafficking have access to "legal counselling" (legal advice) without delay, including for the purpose of claiming compensation, free of charge where the victim does not have sufficient financial resources.³⁰ This obligation has been given effect in Irish law by section 26(3B) of the Civil Legal Aid Act 1995, and so potential victims of human trafficking can avail of legal advice on a number of issues, including compensation, from the Legal Aid Board.
- [4.27] The Counter-Terrorism Directive³¹ requires Member States to implement measures of protection of, and support and assistance to, victims of

²⁸ Article 16(2).

²⁹ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combatting trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101.

³⁰ Article 12. The Directive also provides a right to legal representation where that is provided for in the national legal system.

³¹ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combatting terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L 88.

terrorism. Article 24 of the Counter-Terrorism Directive obliges Member States to provide specific assistance to victims of terrorist offences with claims for compensation under national law. There are no further obligations in relation to victim compensation under the Counter-Terrorism Directive.

(v) EU Strategy on Victims' Rights 2020 – 2025

- [4.28] The EU Strategy on Victims' Rights aims to strengthen the framework for the support and protection of victims and to improve existing EU rules on victims' rights.³² The strategy identifies the purpose of victim compensation as recognising victims of violent intentional crime and to add to the healing process.³³ It is recommended that Member States ensure that fair and appropriate state compensation for violent, intentional crimes, including victims of terrorism, is reflected in national budgets. The strategy does not make specific recommendations on how and what level of compensation should be paid to victims of crime.
- [4.29] The strategy was based on recommendations made in the report of Special Adviser Joëlle Milquet to the President of the European Commission called "Strengthening victims' rights: from compensation to reparation" ("the Milquet Report").³⁴ The Milquet Report made several recommendations in respect of victim compensation and called for a fundamental shift in attitudes to compensation. The Report called for a conceptual shift from compensation to reparation, no longer based on a needs-based approach but on a "rights-based" approach. The Report states that victims should no longer be viewed as vulnerable persons pleading for help but viewed as persons to whom the State owes a duty to assist. Essentially, the Milquet Report states that victims of crime are entitled to compensation, and that more should be – and can be – done to ensure that compensation actually assists victims in their recovery. The focus has therefore shifted from the need to merely create state-funded compensation schemes to the need to

³² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Strategy on victims' rights (2020-2025), Brussels 24.06.2020 COM (2020) 258.

³³ EU Strategy on victims' rights (2020-2025) at page 17.

³⁴ Milquet, *Strengthening Victims' Rights: from Compensation to Reparation for a new EU Victims' Rights Strategy 2020-2025* (European Commission 2019).

assess the purpose of state-funded compensation schemes for victims and how compensation assists victims in their journey to recovery.

- [4.30] A similar approach was adopted by the Northern Ireland Department of Justice in a 2014 Consultation on a review of the Criminal Injuries Compensation Scheme there.³⁵ The underlying aims of the review were to balance the affordability of the system for the State and to ensure that the needs of victims are met in a holistic response to needs, by a system that is accessible, efficient, and transparent.³⁶
- [4.31] This reconceived, rights-based concept of victim compensation is evident beyond the European Union. The importance of assessing both the purpose and effect of compensating victims of crime is also emphasised in Australia. In its 2018 review of state victim compensation legislation, the Victorian Law Reform Commission stated that a state-funded assistance scheme should seek to ensure outcomes for victims that are fair, equitable, timely, consistent, predictable and minimise trauma while maximising the therapeutic effect for victims.³⁷ The Victorian Law Reform Commission's approach intended to reflect the diversity of victims, to be trauma-informed and to move the compensation process away from any association with the adversarial trial process. The recommendations of the Commission were intended to ensure that the financial assistance system does more than simply provide financial assistance to the victim. In May 2021 the Victorian government committed in principle to enacting the Victorian Law Reform Commission's recommendations for reform by introducing a more accessible and trauma-informed financial assistance scheme.

(d) Summary of Compensation Principles

- [4.32] In summary, the following **non-binding** principles have been recommended in international legal instruments in respect of victim compensation systems:

³⁵ The review also incorporated a review of Northern Ireland criminal damage legislation which is not relevant to the scope of discussion in this project.

³⁶ Northern Ireland Department of Justice, *Consultation – Review of Criminal Damage and Criminal Injuries Compensation Schemes* (2014) at pages 53- 54.

³⁷ Victorian Law Reform Commission, *Report: Review of the Victims of Crime Assistance Act 1996* (2018) see <<https://www.lawreform.vic.gov.au/all-projects/implementation/>> accessed 29 November 2021.

- Compensation should be the fair and fullest amount possible with respect to the nature of the injuries;
- Compensation should cover at the least: loss of past and future earnings, increase of earnings, medical expenses, expenses of medical and professional rehabilitation and funeral expenses, loss of maintenance for dependants, treatment and rehabilitation for physical and psychological injuries;
- Compensation may include an amount for pain and suffering;
- Compensation should be granted without undue delay, through a lump sum or by periodic payments;
- Interim awards should be made available where the full award of compensation is likely to be delayed;
- Compensation systems may operate minimum or maximum awards or operate on the basis of a fixed scale or percentage assessment of injuries;
- Compensation should not be paid twice for the same injury and national compensation systems may consider compensation already received by victims in calculating awards from the State (principle against double compensation);
- States should provide for the establishment, strengthening and expansion of national funds for compensation.

[4.33] In summary, the following are the **binding** principles of compensation under EU law:

- Victims must be able to apply for compensation in the Member State where the injuries were inflicted if this was not their Member State of residence;
- Member States must establish national mechanisms of compensation that pay fair and appropriate compensation to victims of violent intentional crime;
- Victims have a right to receive a decision on offender compensation in the course of criminal proceedings;
- Victims of human trafficking must have access to existing national compensation schemes and legal advice including legal advice to assist with access to compensation;

- Victims of terrorist offences must be assisted in claiming compensation under national compensation schemes.

- [4.34] The provision of awards of compensation under the Irish Scheme is discussed in detail below. The Scheme appears to incorporate most of the recommendations of the non-binding international legal instruments from the Council of Europe and the United Nations in respect of victim compensation.
- [4.35] The binding obligations on Member States in the various Directives discussed above are minimum standards. Compliance with them does not prevent detailed review of awards of compensation under the Irish Scheme. The Commission is keen to understand, through consultation, how the various aspects of awards of compensation could be improved, in order to better meet these obligations or indeed to surpass the minimum standards set by EU law.
- [4.36] For example, the terms of the Scheme could be amended to refer to those binding obligations more specifically – particularly in respect of the eligibility of victims of human trafficking under the compensation scheme. The Counter-Terrorism Directive requires that Member States ensure specific assistance is available for victims of terrorist offences when claiming compensation. It is not clear whether the Irish Scheme fulfils this obligation in respect of victims of terrorist offences.

3. Awards of Compensation under the Scheme

- [4.37] In this section the provision of awards of compensation under the Scheme will be set out and then assessed against both the non-binding principles from the Council of Europe and the United Nations and the binding compensation principles deriving from EU law.
- [4.38] Under the Scheme, compensation is paid for special damages: quantifiable, out of pocket expenses such as medical costs and loss of earnings.
- [4.39] Under the terms of the revised 2021 Scheme, general damages, that is to say damages for non-pecuniary losses or “pain and suffering”, are excluded, other than in fatal cases, where such damages are capped at the amount fixed under section 49(1A) of the Civil Liability Act 1961.
- [4.40] Awards of compensation are generally paid in one lump sum, but the Tribunal has discretion to make interim awards. The minimum award is set

at €500. There is no maximum limit on awards of compensation under the Scheme.

- [4.41] The terms of the Scheme provide that compensation is awarded on the basis of damages that would be awarded under the Civil Liability Acts but excludes:
- (a) Exemplary, vindictive, or aggravated damages;
 - (b) Damages in respect of the maintenance of any child born to any victim of a sexual offence;
 - (c) Damages in respect of loss or diminution of expectation of life;
 - (d) Where the victim has died, damages for the benefit of the victim's estate;
 - (e) Damages for pain and suffering (except for fatal injuries sustained on or after 1 January 2006).³⁸
- [4.42] Where the victim has died otherwise than as a result of the criminal injury inflicted, the Tribunal may award compensation in respect of loss of earnings, expenses and liabilities incurred before the death but only to a dependent who would, in the opinion of the Tribunal, otherwise suffer hardship.³⁹
- [4.43] The guidance notes provided on both fatal and non-fatal injury application forms give an indication of the kind of expenses that awards of compensation will reimburse funeral costs, medical expenses (including costs of travelling for medical care), and both actual and future loss of earnings. Funeral and medical costs must be evidenced with original receipts, whereas loss of earnings will be calculated with reference to actuarial, employer, and Revenue reports.⁴⁰

³⁸ Paragraph 6 of the Scheme.

³⁹ Paragraph 7 of the Scheme.

⁴⁰ Discussed in guidance notes to both fatal and non-fatal injury application forms, accessible here
<http://www.justice.ie/en/JELR/Pages/Criminal_Injuries_Compensation_Scheme>
accessed 29 November 2021.

(a) General damages

- [4.44] General damages, or compensation for “pain and suffering” (or, in the language of the CJEU in *BV*, damages for “non-material loss”) were initially recoverable under the Scheme. This changed in 1986, when general damages were entirely removed, in light of the significant economic crisis at that time. The number of applications under the Scheme fell sharply after the removal of compensation for general damages.⁴¹
- [4.45] It is important to stress the distinction between compensation for general damages, or pain and suffering, and reimbursing evidenced costs arising from the mental health effects of crime on the victim. In other words, compensation for pain and suffering is not intended to repay specific costs such as the cost of counselling services that a victim may have engaged with after the offence.⁴²
- [4.46] The Supreme Court gave some consideration to the purpose of general damages in *Sinnott v Quinnsworth*.⁴³ The plaintiff in *Sinnott* suffered catastrophic and profoundly life-altering injuries in a road traffic collision in which he was left quadriplegic. In recognition of the fact that compensating an individual who had suffered injuries such as the plaintiff in *Sinnott* would be “to talk of assaying the impossible”, the court nevertheless determined that the actual amount of compensation awarded mattered – as it mattered for the defendant liable to pay it. O’Higgins CJ (with Henchy, Griffin and Hederman JJ concurring) stated that:
- “General damages are intended to represent fair and reasonable monetary compensation for the pain, suffering, inconvenience and loss of the pleasures of life which the injury has caused and will cause to the plaintiff”.⁴⁴
- [4.47] The exclusion of general damages has been unsuccessfully challenged several times since the amendment to the Scheme in 1986. In *AD v*

⁴¹ O’Morain, “Crime victims wait long for compensation” *The Irish Times* (2 February 1988).

⁴² Although not explicitly listed as compensable expenses under the terms of the Scheme or on application forms, there does not appear to be any reason why these costs would not be recoverable under the Scheme.

⁴³ [1984] ILRM 523.

⁴⁴ *Ibid* at page 531.

Ireland,⁴⁵ the plaintiff argued that the State failed to vindicate her constitutional right to bodily integrity as far as practicable in failing to compensate her for her pain and suffering as a victim of sexual offences. Carroll J held that there was no doubt that the crime committed against the plaintiff violated her bodily integrity but as there was no constitutional right to compensation for criminal injuries, the State had not failed to vindicate the plaintiff's right to bodily integrity by failing to compensate her for her pain and suffering resulting from those criminal injuries. The question of compensation was a matter of policy for the Government and the Oireachtas.

- [4.48] The decision in *AD* was followed by the High Court in *Byrne v Criminal Injuries Compensation Tribunal*.⁴⁶ It was held that the lack of provision of compensation for pain and suffering under the Scheme did not impinge on the constitutional rights of a victim of crime.⁴⁷
- [4.49] The applicants in *Kelly and Doyle* argued that “fair and appropriate” compensation under Article 12(2) of the Compensation Directive must include general damages for pain and suffering.⁴⁸ The Court considered the judgment in the *BV* case and determined that it was not clear whether the requirement for “fair and appropriate” compensation required an award to include general damages. It was held that this matter may ultimately require a reference to the CJEU that it was premature to do in this case as no decision had been reached on Mr Kelly's and Mr Doyle's applications under the Scheme.⁴⁹
- [4.50] The total exclusion of general damages under the Scheme had been criticised. O'Flaherty J, speaking extra-judicially, called for the re-inclusion

⁴⁵ [1992] 1 IR 369.

⁴⁶ [2017] IEHC 28.

⁴⁷ [2017] IEHC 28 at paragraph 21.

⁴⁸ *Kelly and Doyle v Criminal Injuries Tribunal* [2020] IECA 342.

⁴⁹ *Ibid* at paragraph 129.

of payments for pain and suffering in 1996⁵⁰ and this was echoed by the Law Society in 1997.⁵¹

- [4.51] Comparatively, Croatia, Cyprus, the Czech Republic and Poland do not pay compensation for pain and suffering.⁵² All other EU Member State compensation schemes do compensate for pain and suffering, although to different extents or subject to certain limitations.⁵³ Regarding other comparative common law jurisdictions, there is no consistent approach to the payment of compensation for pain and suffering across compensation schemes. No compensation is specifically paid in Northern Ireland or in England, Scotland and Wales for victims' pain and suffering.
- [4.52] The CJEU emphasised in the *BV* case⁵⁴ that the Compensation Directive involves a right under EU law to "fair and appropriate" compensation under national compensation schemes. Although the Directive affords discretion to Member States as to the level of fair and appropriate compensation, the CJEU in *BV* referred to non-material losses being compensable for victims. At paragraph 64, the Court stated that the compensation granted to victims "represents a contribution to the reparation of material and non-material losses suffered by them".⁵⁵ This could be interpreted as a requirement for some degree or provision of general damages under national compensation schemes.⁵⁶

⁵⁰ Maher, "Judge urges compensation for pain of crime victims" *The Irish Times* (20 February 1996) <<https://www.irishtimes.com/news/judge-urges-compensation-for-pain-of-crime-victims-1.30883>> accessed 29 November 2021.

⁵¹ Editorial, "Law Society focuses on crime victim" *The Irish Times* (12 June 1997) <<https://www.irishtimes.com/news/law-society-focuses-on-crime-victim-1.81269>> accessed 29 November 2021.

⁵² Information on all European Union Member States' compensation schemes is available through the official European Commission e-justice portal, available at <https://e-justice.europa.eu/content_if_my_claim_is_to_be_considered_in_this_country-491-at-en.do?member=1> accessed 29 November 2021.

⁵³ *Ibid.*

⁵⁴ Case C-129/19 *Presidenza del Consiglio dei Ministri v BVEU*:C:2020:566.

⁵⁵ Case C-129/19 at paragraph 60.

⁵⁶ Murphy, "The Right under EU law to Compensation for Injuries Criminally Inflicted: the Implications of *BV* for Irish law" (2021) 23(1) *Irish Journal of European Law* 219-248.

- [4.53] It seems likely that the question of what constitutes “fair and appropriate compensation to victims” for the purposes of Article 12(2) of the Directive will be revisited by the CJEU. *BV* leaves some significant issues unanswered. One such issue – and one important in an Irish context – is whether “fair and appropriate compensation to victims” requires compensation to be provided for “non-material losses” or, as it would be put here, for “pain and suffering”. Another critical issue is what relationship the compensation made available to victims should bear to the overall material and non-material harm suffered by them. In other words, how is the “appropriate contribution” referred to by the CJEU in paragraph 69 of *BV* to be assessed? Future CJEU decisions may clarify these issues. The Directive may also be subject to revision.
- [4.54] The Commission notes the limited re-introduction of general damages under the Scheme. However, there are three questions to be asked with regard to the current provision of general damages. First, is the payment of general damages only for fatal injuries justifiable in light of Ireland’s international obligations of victim compensation? Second, does the requirement for “fair and appropriate” compensation include an obligation to provide general damages for all victims as per the CJEU interpretation of compensation as a contribution to material and non-material losses? Thirdly, and in any event, the question arises as to whether, as a matter of policy, provision ought to be made for the awarding of damages for pain and suffering in all claims (not limited to fatal claims)?
- [4.55] In the event that the Scheme was to be revised to provide for awards for pain and suffering, it would be necessary to consider how such awards should be assessed. One option would be to provide for the assessment of such damages on the same basis as courts assess such damages in tort claims. However, that could have very significant resource implications. Furthermore, it seems clear from the *BV* decision that the State’s obligation to provide for “fair and reasonable compensation” for victims of violent crime does not require such compensation to be equivalent to the compensation that would be available in an action against the wrongdoer: “complete reparation of material and non-material loss suffered by that victim” is not required by Article 12(2). Other options include making provision for awards for pain suffering but subjecting such awards to a cap. A further option would be to adopt a tariff scheme for the pain and suffering component of Tribunal awards. These options would provide a benefit for victims in that compensation for pain and suffering would be available (albeit not at the level that would be awarded by a court in a tort claim) whereas now such compensation is excluded (other than in fatal claims)

while also controlling the cost to the Exchequer. Capped and tariff schemes are discussed further below.

(b) Lump sum payments

- [4.56] Awards made under the Scheme are generally paid in one lump sum. The Tribunal may make interim payments where a final award must be postponed until a final medical assessment of injuries can take place.⁵⁷ The publicly available Tribunal annual reports indicate that interim awards are made infrequently, and later reports give no indication of when the balance of an award of compensation was paid where an interim award was made.
- [4.57] Delay in both deciding the application and delay in receiving an interim award and a final award was found in *Byrne v Criminal Injuries Compensation Tribunal*⁵⁸ to be a breach of the applicant's right to constitutional justice. There was a six-year period between payment of the interim award and the final award in the *Byrne* case. It is important that the ability to grant interim awards is not used to disguise the often-lengthy delays in receiving compensation under the Scheme.
- [4.58] Lump sum payments for victims are often criticised as they fail to immediately provide victims with financial assistance.⁵⁹ For example, a victim of crime may have to spend large amounts on emergency dental treatment after suffering a violent assault. If that victim does not have savings or discretionary funds to cover those immediate costs, they could be placed in an unstable financial situation and wait several years to be reimbursed for those expenses under the Scheme. This situation may not be improved or resolved by social welfare as there is no statutory right to sick pay in Ireland.⁶⁰

⁵⁷ Paragraph 18 of the Scheme.

⁵⁸ [2017] IEHC 28.

⁵⁹ Victim Support Europe, *A Journey from Crime to Compensation: An Analysis of Victims' Access to Compensation in the EU* (2019) at page 67. Milquet, *Strengthening Victims' Rights: from Compensation to Reparation for a new EU Victims' Rights Strategy 2020-2025* (European Commission 2019) at page 33.

⁶⁰ The payment of sick pay depends on each individual employer. It was announced by the Tánaiste in June 2021 that new legislation is being designed to create a statutory sick pay scheme on a phased basis over the next four years, see <<https://www.gov.ie/en/press-release/fee76-tanaiste-announces-details-of-statutory-sick-pay-scheme/>> accessed 29 November 2021.

- [4.59] Lump sum payments are also criticised as they may not adequately compensate future expenses of a victim with serious injuries.⁶¹ All future healthcare and rehabilitation costs may not be foreseeable at the time of application under the Scheme. Periodic payments of an award, or entitlement to re-apply under the Scheme for further incurred expenses from the same injuries, may be attractive options for victims with significant injuries and expenses. Neither option is expressly included or excluded under the terms of the revised 2021 Scheme.
- [4.60] Periodic payment orders, set out in the Civil Liability (Amendment) Act 2017,⁶² could be used as an alternative to lump sum awards of compensation. Periodic payment orders (“PPOs”) may be made at the discretion of the court in civil claims, for plaintiffs who have suffered catastrophic injuries, where the ongoing nature of the injuries involved (such as certain clinical negligence claims) may require indefinite future care. Despite the significant practical issues with the statutory PPO regime,⁶³ the intention behind the legislation remains relevant in the consideration of awards of compensation for criminal injuries under the Scheme. The PPO regime was enacted in recognition of the inadequacy of lump sum payments to provide for all future and long-term needs of the most severely injured. The legislation aimed to ensure that the most severely injured receive ongoing financial assistance to meet their indefinite needs and future care. An award of damages, calculated at the time of court proceedings, may not be sufficient to meet the future needs of the injured person – indeed the extent of their injuries and resulting needs may only become clear over a longer time period. Periodic payments ensure that regular financial assistance is provided with flexibility to increase or decrease the level of those payments in line with the person’s needs. The Commission seeks the views of consultees on whether an equivalent

⁶¹ Grant, “The Criminal Injuries Compensation Scheme for Personal Injuries Criminally Inflicted: In Need of Reform” (2020) 30(4) *Irish Criminal Law Journal* 94.

⁶² Part IVB of the Civil Liability Act 1961, inserted by the Civil Liability (Amendment) Act 2017 part II.

⁶³ The Commission noted practical difficulties with the statutory provision for periodic payment orders in its *Report on Capping Damages in Personal Injury Actions* (LRC 126-2020). *Hegarty v Health Service Executive* [2019] IEHC 788 illustrated that that index could not ensure that a PPO made under the 2017 Act could sufficiently cover the plaintiff’s anticipated future care needs in full as the system is not index-linked to the earning levels of treatment and care personnel, nor to changes in costs of medical and assistive aids and appliances.

periodic payment system should be introduced for severely injured victims of crime receiving awards under the Scheme.

- [4.61] Some European Member States allow the periodic payment of compensation awards for criminal injuries. The Austrian compensation scheme for example pays for pain and suffering and funeral costs in a lump sum but all other compensation, such as loss of earnings or care allowance, is paid periodically.⁶⁴ Ten Member States offer emergency, or up front, payments for victims who urgently need it.⁶⁵ An advantage to introducing an option to pay compensation in periodic instalments is that costs are spread over a longer period.
- [4.62] Both emergency and upfront payments are recommended by the Milquet Report in order to better meet victim's immediate needs.⁶⁶ The Commission seeks the views of consultees on what circumstances are emergency and/or interim awards desirable and how might such awards operate? Should provision be made for compensation to be paid by periodical pension or periodical payment order? If so, in what circumstances?

(c) Deductions from awards

- [4.63] The Scheme sets out rules for deductions from an award of compensation. The primary intention behind these rules is the principle against double compensation – that a victim may not be compensated twice for the same injuries.⁶⁷ Compensation will be reduced by the value of the victim or

⁶⁴ Information on all European Union Member States' compensation schemes is available through the official European Commission e-justice portal, available at <https://e-justice.europa.eu/content_if_my_claim_is_to_be_considered_in_this_country-491-at-en.do?member=1> accessed 29 November 2021.

⁶⁵ Austria, Belgium, Estonia, France, Hungary, Latvia, Luxembourg, Malta, Portugal and Spain, see <https://e-justice.europa.eu/content_if_my_claim_is_to_be_considered_in_this_country-491-at-en.do?member=1> accessed 29 November 2021.

⁶⁶ Milquet Report, Recommendations 24 and 25 at pages 55-56.

⁶⁷ Paragraph 5 of the Scheme: "Entitlement to claim compensation otherwise than under the scheme does not prohibit a victim from applying under the scheme but an award of compensation from another source will be considered in deciding on an application. No payment under the scheme should result in compensation being duplicated and so the Tribunal may make no award, make a reduced award or make an award that is subject to conditions of repayment if compensation is subsequently received from another source."

claimant's entitlement to social welfare benefits payable as a result of the injury and will be reduced, to the extent determined by the Tribunal, in respect of the victim's entitlement to receive wages or salary while on sick leave.⁶⁸ Any sum paid to or for the benefit of the victim, or his dependents, by way of compensation or damages from the offender, or any person on behalf of the offender, will also be deducted from the amount of an award made under the Scheme.⁶⁹

- [4.64] For example, if a claimant is seeking to recover funeral costs for a relative killed by a criminal act, they must indicate on the application form whether they received a social welfare payment intended to cover funeral costs.
- [4.65] These deductions are distinct from the discretionary deductions that the Tribunal can make from an award of compensation under paragraphs 12 and 13 of the revised 2021 Scheme (as set out in Chapter 5). These discretionary deductions may be made where the Tribunal is satisfied that the victim was partially responsible for the offence or where it is considered appropriate to reduce the amount of an award having regard to the conduct, character or way of life of the victim. It is not clear from the terms of the Scheme how such deductions are calculated or how they may impact on an award of compensation under the Scheme.
- [4.66] It is also important to note that discrepancies in an applicant's tax affairs may reduce or cancel any award of compensation. This is not set out under the terms of the Scheme but is stated in the certification of authorisation on both application forms that an applicant must sign.⁷⁰ This means that incorrect or fraudulent tax affairs of an applicant can result in a deduction in an award of compensation. The Commission questions whether this practice is legally sound, given that there is no reference to that limitation on eligibility in the terms of the Scheme.
- [4.67] The decision in *State (Hayes) v Criminal Injuries Compensation Tribunal*⁷¹ highlights the absence of clear rules on how the value of social welfare benefits is to be calculated and deducted from an award of compensation.

⁶⁸ Paragraph 14 of the Scheme.

⁶⁹ Paragraph 15 of the Scheme.

⁷⁰ The certificate of authorisation permits the Tribunal to seek further information from a variety of sources on the effects of an applicant's injuries.

⁷¹ [1982] 1 ILRM 210.

⁷² Mrs Hayes applied under the Scheme for compensation on the death of her husband, on whom she and their children were financially dependent, and provided an actuarial report based on the deceased's loss of earnings. The Tribunal awarded compensation of an amount less than the amount calculated by the actuary. Mrs Hayes claimed that a deduction was made based on the possibility of her remarriage, but the High Court (Finlay P) determined that no such deduction was made and stated that if the Tribunal erred in its method of assessing the amount to be set off for social welfare contributions it was not an error which would be reviewable by the courts.⁷³ This decision highlights the lack of clarity for applicants as to how the Tribunal assesses and makes deductions from awards of compensation under the Scheme.

[4.68] In *Hill v Criminal Injuries Compensation Tribunal*⁷⁴ the proportion of the deceased's earnings spent in relation to his dependent widow and children was at issue. The Tribunal's award of compensation was 40% lower than the actuary's calculation of the loss. The High Court (Lynch J) quashed the award and remitted the application to the Tribunal for reconsideration. It was held that the Tribunal's miscalculation of the deceased's loss of earnings was "of sufficient magnitude to bring the case within the ambit of the *State (Creedon) v Criminal Injuries Compensation Tribunal* [1988] IR 51 on the basis that the resultant decision from the Respondents is at variance with reason and common-sense."⁷⁵

[4.69] In *Gavin v Criminal Injuries Compensation Tribunal*⁷⁶ the High Court (Carroll J) held that the Tribunal must give reasons for reductions in an award of compensation. The plaintiff had been subjected to serious intimidation, abuse, and property damage in the run up to the criminal trials against those who caused the victim's initial injuries and in which he was a witness. The Tribunal, at first instance and on internal appeal, awarded the victim £100,000 in special damages. This was considerably lower than the actuarial calculation of his losses. The Tribunal refused to provide a

⁷² Osborough, "The Work of the Criminal Injuries Tribunal" (1978) 13 *Irish Jurist* (NS) 320.

⁷³ *The State (Hayes) v Criminal Injuries Compensation Tribunal* [1982] 1 ILRM 210 at 214.

⁷⁴ [1990] ILRM 36.

⁷⁵ [1990] ILRM 36 at page 41.

⁷⁶ [1997] 1 IR 132.

detailed breakdown of the award to the applicant or provide reasons for the deduction. Carroll J stated that “the long history of trauma and delay which the Applicant had suffered for years demanded a reasoned decision if he were not to get the full amount of his claim”.⁷⁷ On the issue of whether the injuries for which compensation was sought were directly attributable to the original injuries (which were previously compensated by the Tribunal), the court held that nothing in the Scheme required loss or damage to be solely attributable to the crime of violence. The court determined that if the Tribunal decided that the later injuries were partially caused by the original crime, the award could be reduced. The court directed the Tribunal to reconsider the claim in accordance with the findings of the judgment.⁷⁸

- [4.70] Comparatively in Northern Ireland, prior to the introduction of a tariff system there, the Secretary of State could deduct, subject to some restrictions, any amount payable by the offender or a person on the offender’s behalf and any pension, gratuity or social security benefit which had been paid to or for the benefit of the victim or any of his relatives consequent on the criminal injury or resulting death.⁷⁹ A discretion also existed for the Secretary of State to “top up” an award of compensation which was subject to those deductions.⁸⁰ This flexibility in the former compensation scheme was designed to prevent unfairness in the calculation of awards.
- [4.71] All compensation schemes operating in EU Member States will deduct compensation received from other sources from an award made under the State scheme. As previously mentioned, some Member States require that a victim seek, and be unsuccessful in seeking, compensation from the offender before they will be eligible for State funded compensation. Despite these differences, all compensation systems surveyed will not compensate a victim twice for the same injuries, regardless of the source of that compensation.
- [4.72] Although the ability to make deductions from awards in some circumstances is undoubtedly necessary for the financial viability of the

⁷⁷ [1997] 1 IR 132 at page 146.

⁷⁸ *Ibid* at page 21.

⁷⁹ Article 6(2) of the Criminal Injuries (Compensation)(Northern Ireland) Order 1988.

⁸⁰ Article 10 of the Criminal Injuries (Compensation)(Northern Ireland) Order 1988.

Scheme, information on permissible deductions from awards of compensation should be transparent and accessible for applicants.

(d) Capped or maximum awards

- [4.73] As a matter of practical reality, any reform of the Scheme should ensure its financial viability. In that regard, the Commission considers it appropriate to discuss the possibility of introducing capped or maximum awards of compensation. Capped systems are conceptually distinct from tariff systems as a tariff system uses fixed amounts (or fixed ranges) of compensation for injuries listed in the tariff (tariff systems are discussed below). A capped system does not have fixed amounts of compensation but has a fixed maximum amount that can be awarded, whether in respect of special damages, general damages or both. A compensation scheme can operate with a maximum compensation award without operating on the basis of a tariff system. In practice, a scheme can have elements of both. At present there are no caps on awards or any maximum amount payable to an applicant for special damages under the Scheme. There is a cap, or maximum amount, on general damages recoverable for fatal injuries under the Scheme as set under section 49 (1A) of the Civil Liability Act 1961 as amended (currently €35,000).⁸¹
- [4.74] In the *BV* decision,⁸² discussed above, the CJEU determined that capped or tariff schemes are in principle permissible under the Compensation Directive. Capping awards is also expressly contemplated by the 1983 Council of Europe Convention. The CJEU in *BV* made it clear that any fixed amount of compensation should be capable of variation to reflect the gravity of the injuries in a specific case. Compensation scales must also be sufficiently detailed to avoid the fixed rate of compensation being manifestly insufficient.⁸³ Therefore, obligations under EU law can, in principle, be met by a capped or tariff system so long as the system can be varied and is sufficiently detailed.
- [4.75] Maximum compensation amounts will depend greatly upon the economic resources of the State and other supports available to victims. Finland, Malta, the Netherlands, Poland, Romania, Slovenia, and Sweden have

⁸¹ Article 2 of the Civil Liability Act 1961 (Section 49) Order 2014 (S.I. No. 6 of 2014).

⁸² Case C-129/19 *Presidenza del Consiglio dei Ministri v BVEU*:C:2020:566.

⁸³ Case C-129/19 *Presidenza del Consiglio dei Ministri v BVEU*:C:2020:566 at paragraphs 65-68.

maximum awards of compensation (while not operating on the basis of a tariff system).⁸⁴ The maximum award of compensation ranges from €23,300 in Malta to €61,500 in Finland.⁸⁵

- [4.76] It appears that a significant proportion of comparative law jurisdictions also operate capped criminal injury compensation systems. Western Australia categorises victims based on the date their injuries were inflicted and sets caps on awards based on specified time periods.⁸⁶ For example, injuries inflicted between 22 January 1971 to 17 October 1976 are subject to a maximum payment of \$2,000 AUD for an indictable offence. Injuries inflicted on or after the date of the Act's commencement in 2003 are subject to a maximum award of \$75,000 AUD.⁸⁷
- [4.77] The victim compensation system in California also caps criminal injury awards. The maximum overall benefit a victim may receive is \$70,000. There are also specific caps on different recoverable expenses such as a \$7,500 cap on funeral expenses and \$2,000 for relocation expenses (where recommended by the police or a therapist).⁸⁸
- [4.78] Using capped schemes of compensation can increase consistency in awards between victims of similar injuries and transparency for applicants. It can also increase the speed with which applications can be processed and concluded – as the assessment of the award to be paid is usually straightforward and may not require legal professionals to calculate awards of compensation.
- [4.79] The Scheme in this jurisdiction is comparatively generous when assessed against other EU Member States, as it does not place caps on the amount of compensation for special damages which can be awarded. Individual

⁸⁴ Information on all European Union Member States' compensation schemes is available through the official European Commission e-justice portal, available at <https://e-justice.europa.eu/content_if_my_claim_is_to_be_considered_in_this_country-491-at-en.do?member=1> accessed 29 November 2021.

⁸⁵ *Ibid.*

⁸⁶ Section 31 of the Criminal Injuries Compensation Act 2003 (Western Australia).

⁸⁷ Section 31 of the Criminal Injuries Compensation Act 2003 (Western Australia).

⁸⁸ California Government Code 13950 – 13966.

awards of compensation can amount to millions of euro.⁸⁹ The current cap on compensation for fatal injuries (in addition to special damages) mirrors the amount recoverable in a civil action for fatal injuries (currently €35,000). As discussed throughout this Paper, reforms to the Scheme must balance the needs and rights of victims and the continuing costs of the compensation scheme on the State, which must be adequately resourced as per European Union law.

- [4.80] In the press release attached to the revised 2021 Scheme, the Minister for Justice indicated that the Department are looking into the possibility of introducing capped awards of compensation.⁹⁰ As a matter of constitutional law, there would appear to be no barrier in principle to the adoption of a compensation scheme involving capped awards. There is authority that the right to bodily integrity protected by Article 40.3 of the Constitution guarantees a just law of negligence.⁹¹ However there is a distinction to be drawn between litigation against the person alleged to have directly caused the damage suffered and the provision of compensation by the State. Case law on compensation such as *Sinnott v Quinnsworth Ltd*⁹² and *Morrissey v Health Service Executive*⁹³ are concerned with the assessment of damages in circumstances where one person establishes that they have suffered injury, and consequent financial loss and damage, as a result of the negligence and/or other tortious conduct of another. In contrast, it has been held in *AD v Ireland*⁹⁴ (followed in *Byrne v Criminal Injuries Compensation Tribunal*⁹⁵) that Article 40.3 does not require the State to compensate victims of crime. If there is no constitutional requirement to compensate,

⁸⁹ For example, one claimant received €3.8 million in 2012 for the severe brain injuries he received because of the criminal actions of his then partner. "Man injured by thrown bottle awarded €3.8m" *The Irish Times* (13 November 2012). From 2013 to 2018, five claimants received €6.2 million of the total €27 million paid out by the Tribunal. Gallagher, "Five cases consumed 23% of compensation budget for crime victims" *The Irish Times* (17 December 2018).

⁹⁰ Department of Justice, "Minister McEntee announces reforms to the Criminal Injuries Compensation Scheme", available at <<http://www.justice.ie/en/JELR/Pages/PR21000092>> accessed 29 November 2021.

⁹¹ *Sweeney v Duggan* [1991] 2 IR 274.

⁹² [1984] ILRM 523.

⁹³ [2020] IESC 6.

⁹⁴ [1994] 1 IR 369.

⁹⁵ [2017] IEHC 28.

then, obviously there can be no constitutional requirement to provide “full compensation”.

- [4.81] While a compensation scheme involving capped awards would appear to be constitutionally permissible in principle, that is not to say that the implementation of such a scheme might not give rise to constitutional issues (for instance issues of discrimination or unequal treatment).
- [4.82] The position arising under the Compensation Directive requires separate consideration. Article 12(2) of the Compensation Directive, as interpreted by the CJEU in the *BV* case, obliges Member States to establish compensation schemes for victims of violent crimes committed in their respective territories. The provision of such compensation is no longer “a matter of policy for the Government and the Oireachtas”, as the High Court in *AD* considered was the position.⁹⁶
- [4.83] Neither the Advocate General nor the CJEU appeared to see any difficulty in principle about a fixed tariff scheme. According to the Advocate General, nothing in the Directive “prevents national laws and procedures from including provisions, which in the determination of the amount of compensation to be granted, allow for ranges, maximum and/or minimum ceilings, and standard or fixed financial values for each type of loss or injury suffered by the victim, or type of crime committed”.⁹⁷
- [4.84] Article 12(2) requires that such compensation schemes guarantee “fair and appropriate compensation to victims”. What that involves in practice remains uncertain in significant respects but some guidance is provided by *BV*. In his Opinion, Advocate General Bobek made the following observations:

“Second, I also agree with the Italian Government that there is no basis in Directive 2004/80 to sustain the view that the compensation to be granted under the national schemes is to equate to damages that the perpetrator would be obliged to pay under national tort law. The rationale and the logic for both types of payment is different.

⁹⁶ *AD v Ireland* [1992] 1 IR 369 at page 373.

⁹⁷ Advocate General’s Opinion in Case C-129/19, *Presidenza del Consiglio dei Ministri v BV* ECLI:EU:C:2020:375 at paragraph 141.

On the one hand, compensation (or damages) that a perpetrator is to pay to the victim of the crime tend to follow the logic of full reparation or restitution. The sum awarded ought to mirror, as closely as possible, the full compensation of loss, injury and harm suffered by the victim.

On the other hand, as far as it might be inferred from the minimalist rules adopted, the logic of the compensation provided pursuant to Directive 2004/80 is rather one of a (generalised) public (monetary) assistance to crime victims. The basis for the intervention of the national scheme cannot be found in some form of fault committed by the Member States' authorities, such as, for example, in identifying or prosecuting the offenders. Moreover, in a number of languages, the name and the provisions of Directive 2004/80 also refer to the compensation due under the national schemes as an 'indemnity'. As I understand it, that term is, in many countries, often associated with a fixed or flat-rate type of compensation, or in any event with a form of reparation that does not necessarily correspond with (full) damages in private law."⁹⁸

[4.85] In the subsequent judgment of the Court, this passage was expressly approved.⁹⁹ Similarly, the Court was of the view that the Directive could not be interpreted as precluding "a fixed rate of compensation to ... victims, with the fixed amount granted to each victim being capable of being varied in accordance with the nature of the violence suffered".¹⁰⁰ However, the Court emphasised, where a Member State opted for such a scheme, it is obliged to ensure that the compensation scheme is sufficiently detailed so as to avoid the possibility that the fixed rate of compensation for a specific type of violence should prove to be "manifestly insufficient".

⁹⁸ Advocate General's Opinion in Case C-129/19, *Presidenza del Consiglio dei Ministri v BV* ECLI:EU:C:2020:375 at paragraphs 137 - 139.

⁹⁹ Case C-129/19 *Presidenza del Consiglio dei Ministri v BV* EU:C:2020:566 at paragraph 60.

¹⁰⁰ *Ibid* at paragraph 65.

- [4.86] The issue of quantum – the amount of the awards of compensation – might be said to be a matter of policy rather than a legal question. However, in light of the decision in *BV*, it is not possible to draw a hard distinction between the legality of adopting a tariff-based or capped compensation scheme and the level of awards payable under such a scheme. It is clear that the State is obliged to allocate sufficient resources to fund the payment of “fair and appropriate compensation” to victims. It appears clear that “fair and appropriate compensation” does not require compensation to be fixed at the level of awards available in tort claims. The amount of awards to be paid will always be a matter for determination by each national compensation scheme but what “fair and appropriate” compensation involves will ultimately be determined by the CJEU and/or in European Union legislation. While issues of Member State resources may be an element (indeed, perhaps, an important element) in such assessment, the provision of the necessary resources to pay such compensation is mandatory, not (or not exclusively) a matter of Member State discretion or policy.
- [4.87] If a decision was made in principle to make provision for the award of general damages under the Scheme, capping the awards that could be made would assist in controlling the costs of the Scheme and making those costs more predictable.
- [4.88] The Commission asks if consultees consider that capped awards of compensation would provide a fairer system for a greater number of applicants, promoting consistency and transparency? Alternatively, do capped awards have the potential to operate unfairly?

(ii) Tariff compensation systems

- [4.89] A tariff compensation system is one that uses fixed amounts of compensation (or fixed bands of compensation) for injuries listed in the terms of the scheme. The list of injuries and their corresponding amounts of compensation are known as a tariff. For example, compensation for a broken arm could be listed in a tariff as a fixed amount of €500. All injuries listed in the tariff are to be compensated by the amount stated. It is a standard flat rate that is not based on an assessment of individual needs. In a tariff system, there may be little or no discretion available to a decision maker to award more or less compensation than the stated amount, even in exceptional circumstances. Tariff systems are therefore a more rigid form of compensation system.

[4.90] The compensation schemes that operate in England, Scotland and Wales and in Northern Ireland both operate on a tariff basis for awards of compensation. Initially, compensation awarded under both schemes paralleled damages that could be recovered in a civil liability context, but the tariff systems were introduced to control and lower the costs of both schemes.¹⁰¹ Under the tariff system in Northern Ireland, the minimum award is set at £1,000 and the maximum is set at £250,000. The tariff scale is set out in the guide for applicants (which is available online) and has 25 levels.¹⁰² For applicants with multiple injuries, the tariff compensates the most serious injury, plus a percentage of the amount for the less serious injuries. Compensation Services may refer an applicant for further medical assessment to clarify the tariff level their injuries meet.

[4.91] Generally, the advantages of a tariff compensation system include:

- quicker decisions on applications;
- that decision makers are not required to be legal professionals;
- greater transparency in the assessment of awards of compensation;
- absolute consistency between applicants of similar injuries; and
- applicants are not required to supply a vast amount of information on the expenses caused by their injuries on application to the scheme.

[4.92] There are also disadvantages to tariff compensation systems which include:

- the assumption that persons of similar injuries have exactly the same expenses arising from those injuries;
- a lack of flexibility, even if desirable or necessary;

¹⁰¹ Miers, *Criminal Injuries Compensation: State and Offender Compensation for Violent Crime* (Oxford University Press 2018) Chapter 1.

¹⁰² Compensation Services, *A Guide to the Northern Ireland Criminal Injuries Compensation Scheme* (2009) Issue 2 at page 21, available at <<https://www.nidirect.gov.uk/sites/default/files/publications/8criminal-injuries-compensation-scheme-2009.pdf>> accessed 29 November 2021.

- a perception by victims of a crude reduction of the extent of their injuries and their suffering to a set and generic monetary figure.

[4.93] As set out above, the CJEU determined that tariff schemes are in principle permissible under the Compensation Directive. A reformed compensation scheme in Ireland could operate, like the systems in England, Scotland and Wales and in Northern Ireland, entirely on a tariff basis, for both general damages (to the extent that such damages were available) and special damages. Or a tariff could be operated solely in respect of general damages (again, on the assumption that general damages were available in principle). Fixed amounts of general damages could be created for fatal injuries and for non-fatal injuries. Under this model, individual assessments would continue to be made for special damages. It would be a matter for the Oireachtas or the Minister to fix the tariffs and, as already noted, the amount of awards would not have to be equivalent to the compensation recoverable in a tort claim. While not a tariff scheme as such, the Personal Injuries Guidelines adopted by the Judicial Council in 2021,¹⁰³ could be used as a basis for such a tariff scheme (with reduced amounts, reflecting the fact that the tariff scheme is concerned with compensating the victims of crime rather than assessing the amount of compensation that a tortfeasor should pay). The introduction of a partial tariff would assist in controlling the costs of the Scheme for the State while continuing to ensure that individual needs are met in respect of loss of earnings and other expenses.

[4.94] The September 11th Victim Compensation Fund of 2001, established for victims of the terrorist attacks on September 11 2001 in the United States, operated on both a tariff and individualised assessment basis. Where a victim died, the person claiming compensation received a fixed amount of \$250,000. A spouse and each dependant of the deceased victim could receive an additional \$100,000. The administrator of the fund, known as the Special Master, had statutory power to deviate from these amounts and had discretion to determine an appropriate amount of compensation. The assessment of compensation for personal injury and economic loss was done on an individual case-by-case basis.¹⁰⁴ The decision to calculate the

¹⁰³ The Judicial Council, *Personal Injuries Guidelines*, available at < <https://judicialcouncil.ie/assets/uploads/documents/Personal%20Injuries%20Guidelines.pdf>> accessed 20 January 2022.

¹⁰⁴ Macleod, "September 11 Victim Compensation Fund" in Macleod and Hodges (eds), *Redress Schemes for Personal Injuries* (Hart 2017) at page 348.

economic loss of all deceased victims on an individual basis was criticised as it was said to have “effectively valued a high-income victim’s life as more valuable than that of a rescue worker.”¹⁰⁵ However, a flat rate of compensation for economic loss would not have satisfied all applicants to the fund, as an award based on an “average wage” for families would have a different impact based on their circumstances.¹⁰⁶ This is an inherent difficulty in answering the question of how awards of compensation should be calculated in any compensation system.

- [4.95] The Commission asks consultees whether there is a case to be made for the introduction of a tariff system of compensation, whether generally or (for example) solely for compensation payable for general damages. What would the advantages and disadvantages of a tariff system be?

Tell us your views

- Q. 4.1** Should provision be made for the awarding of damages for pain and suffering (or, in the language of the *BV* case, damages for “non-material loss”) in all claims (not limited to fatal claims)?
- Q. 4.2** In what circumstances are emergency and/or interim awards desirable? How might such awards operate?
- Q. 4.3** Should provision be made for compensation to be paid by periodical pension or periodical payment order? If so, in what circumstances?
- Q. 4.4** Do consultees consider that capped awards of compensation would provide a fairer system for a greater number of applicants, promoting consistency and transparency? Alternatively, do capped awards have the potential to operate unfairly?
- Q. 4.5** Is there a case to be made for a tariff system of compensation, whether generally or (for example) in relation to any compensation payable for pain and suffering? What would the relative advantages and disadvantages of a tariff system be?
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¹⁰⁵ Macleod, “September 11 Victim Compensation Fund” in Macleod and Hodges (eds), *Redress Schemes for Personal Injuries* (Hart 2017) at page 348.

¹⁰⁶ *Ibid* at page 367.

CHAPTER 5

ELIGIBILITY AND EXCLUSION

1. Introduction

- [5.1] A crucial consideration in the design and operation of a state-funded victim compensation system is precisely what categories of victim are eligible to receive compensation. Compensation systems may be established to compensate certain types of victim – such as victims of crime or victims of large scale disasters. Eligibility criteria are essential to ensure that compensation is awarded in line with the system’s purpose. If a compensation system is intended to compensate victims of crime, the system naturally must define a victim of crime and any circumstances, of the offence or of the individual, which may operate to reduce or refuse compensation to an applicant.
- [5.2] Eligibility criteria are also necessary in light of the considerable financial implications for the State in establishing compensation systems. In other words, the State needs to ensure that only those persons intended to be compensated are. Therefore, every compensation system uses eligibility criteria to determine who can receive compensation. There are usually policy and financial considerations at play behind the design of eligibility criteria for state-funded compensation.
- [5.3] Predictability and consistency are fundamental aspects of fairness in this context: it is essential that victims are in a position to ascertain, with a reasonable degree of certainty, whether the terms of the State’s criminal injuries compensation scheme apply to them, and how any conditions for exclusion or reduction of awards will operate. It is therefore of cardinal importance that the criteria are set out with the utmost clarity, so that they are capable of being applied in a predictable and consistent way. Not only must the criteria be fair, proportionate and justifiable, they must be drafted with precision, so that, insofar as is possible, the risk of arbitrary and inconsistent decision-making is minimised.

- [5.4] As discussed in Chapter 2, the concept, definition, and interpretation of who is a “victim” can differ for a number of reasons, which may be political,¹ social,² or cultural.³ For example, cultural perceptions and stereotypes of who is a “victim” are often based on age, gender, and physical characteristics.⁴ This generally excludes men although research findings state that men are more likely to be victims of violent crime.⁵ However, under general perceptions of victims as weak, powerless and vulnerable, men are not automatically afforded the status of “real” victims by societies.⁶ These perceptions can also exclude from victim status anyone who has engaged in criminal behaviour themselves. People who break the law have a higher likelihood of being victims of crime. Yet the perception that offenders are “unfeeling and unreformable” means that they do not conform to society’s conception of a blameless, vulnerable person unable to protect themselves and therefore they do not generally conform to the concept of victim when they become one.⁷
- [5.5] This introduces the concept of the “deserving” and the “undeserving” victim in both public and political discourse. The “deserving” victim of crime is innocent and blameless – a “good, prudent citizen” who is worthy of our sympathy and an award of compensation.⁸ McCullagh notes that the language of victimology embodies this distinction which is influenced by

¹ Heber, “Good versus Bad: Victims, Offenders and Victim-Offenders in Swedish Crime Policy” (2014) 11 *European Journal of Criminology* 410.

² McCullagh, “Respectable Victims and Safe Solutions: The Hidden Politics of Victimology” (2017) 68 *Northern Ireland Legal Quarterly* 539.

³ See recent political debates over the classification of victims in Northern Ireland. Political parties argued over inclusion of former paramilitaries under the compensation scheme for criminal injuries. McHugh, “Northern Ireland Victims Commissioner to leave role” *Irish Examiner* (29 July 2020). <<https://www.irishexaminer.com/news/arid-40024370.html>> accessed 27 October 2020.

⁴ McCullagh, “Respectable Victims and Safe Solutions: The Hidden Politics of Victimology” (2017) 68 *Northern Ireland Legal Quarterly* 539.

⁵ Heber, “Good versus Bad: Victims, Offenders and Victim-Offenders in Swedish Crime Policy” (2014) 11 *European Journal of Criminology* 410.

⁶ *Ibid.*

⁷ McCullagh, “Respectable Victims and Safe Solutions: The Hidden Politics of Victimology” (2017) 68 *Northern Ireland Legal Quarterly* 539 at page 544.

⁸ Heber, “Good versus Bad: Victims, Offenders and Victim-Offenders in Swedish Crime Policy” (2014) 11 *European Journal of Criminology* 410 at page 421.

hidden social and class-ridden notions of who is a “deserving” victim.⁹ He further states that the many additional attributes of the “deserving” victim are not clearly stated in victim ideology but that they have the capacity to surface “in a brutal fashion” when the discussion moves to compensating victims.¹⁰ Undoubtedly these perceptions can – and do – directly influence who will be considered eligible to receive state-funded compensation. In the UK victim compensation system (excluding Northern Ireland, which operates a separate scheme), for example, this distinction is expressly articulated. The UK government has consistently stated that the state-funded compensation system is intended only for “innocent, blameless victims” which justifies the various restrictions on eligibility- such as the reduction of an award where a victim contributed to their injuries or the offence giving rise to them.¹¹ Interpretation of these restrictions on eligibility has not gone without criticism. Miers says, in the context of the UK compensation system, that “blame” does not refer to a person’s actions in respect of the criminal injury but to his “moral worth as a person who should properly be the beneficiary of public money”.¹²

- [5.6] Whether to exclude individuals who have contributed to their injuries or the offence giving rise to them, or to exclude those with criminal records, are important considerations in designing eligibility criteria for a compensation system. Other factors to consider include the financial means of the victim, the extent of their injuries, and whether they have received compensation from another source in respect of the same injuries. Eligibility criteria speak to the very purpose of a compensation system. These considerations are influenced by guiding principles established in international legal instruments and, in this jurisdiction, must take into account any binding obligations in respect of eligibility criteria under EU law.

⁹ McCullagh, “Respectable Victims and Safe Solutions: The Hidden Politics of Victimology” (2017) 68 *Northern Ireland Legal Quarterly* 539 at page 542.

¹⁰ McCullagh, “Respectable Victims and Safe Solutions: The Hidden Politics of Victimology” (2017) 68 *Northern Ireland Legal Quarterly* 539 at page 546.

¹¹ Home Office, *Rebuilding Lives: supporting victims of crime* (Cm 6705, 2005) at page 15, available at < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/272209/6705.pdf> accessed 29 November 2021.

¹² Miers, “Rebuilding lives: operational and policy issues in the compensation of victims of violent and terrorist crimes” (2006) *Criminal Law Review* at page 7.

2. Principles of Eligibility

[5.7] International legal instruments relating to victims' rights generally define a "victim" for the purposes of that instrument but rarely set out principles of eligibility for the rights contained therein. There is limited guidance in the instruments themselves on who should and should not be eligible to receive state-funded compensation. This matter is left to the discretion of each State – due to the financial implications of designing eligibility criteria and differing individual economic resources of Member States. In other words, international law provides guidance only as to who should receive the various identified rights, but with the exception of EU law, States are not bound to follow those principles. The path to rights to compensation and information in EU law was paved with so-called soft-law international instruments that have promoted recognition of the needs of victims in the form of declarations and resolutions that set out numerous aspirational and non-legally binding rights.¹³

(a) The Council of Europe

[5.8] In September 1977, the Committee of Ministers of the Council of Europe adopted Resolution (77) 27 on the compensation of victims of crime. This recommended that Member States provide for state compensation of victims, or dependants of victims, of intentional violence where compensation could not be ensured by any other means. It also set out thirteen guiding principles intended to harmonise national provisions on victim compensation. There is some guidance regarding eligibility criteria in this non-binding instrument. The Resolution recommends that Member States should compensate, where compensation cannot be secured by other means, anyone who has sustained severe bodily injury as a result of crime and the dependents of any person who died as a result of crime.¹⁴ Regarding crimes which cause bodily injury at least all intentional crimes of violence should be covered.¹⁵ Compensation may be limited to victims who are in "a serious material situation".¹⁶ Compensation might be reduced or

¹³ See generally Kilcommins and Moffet, "The Inclusion and Juridification of Victims on the Island of Ireland" in Healy, Hamilton, Daly and Butler (eds), *The Routledge Handbook of Irish Criminology* (Routledge 2016).

¹⁴ Article 1.

¹⁵ Article 2.

¹⁶ Article 6.

refused on account of the victim's conduct and his relationship to the offender and his "milieu" (in other words, his social environment).¹⁷ The Resolution also states that the principle of reciprocity might be applied in respect of victims injured in a member state of which they are not a citizen.¹⁸

[5.9] Although Ireland is not a signatory, the 1983 Council of Europe Convention on the Compensation of Victims of Violent Crime sets out certain eligibility criteria for compensation which Member States can apply in their national systems. Where compensation is not fully available from other sources, the State shall contribute to compensate those who: have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence and the dependants of persons who have died as a result of such crime.¹⁹ Compensation shall be paid to nationals of the States which are party to the Convention and nationals of all Member States of the Council of Europe who are permanent residents in the State on whose territory the crime was committed.²⁰ Member States may set an upper limit and/or minimum threshold for compensation.²¹ Compensation may be reduced or refused based on:

- the applicant's financial situation;²²
- the victim's or the applicant's "conduct before, during or after the crime, or in relation to the injury or death;
- the victim's or the applicant's "involvement in organised crime or his membership of an organisation which engages in crimes of violence"; or
- a consideration that making an award or a full award "would be contrary to a sense of justice or public policy."²³

¹⁷ Article 11.

¹⁸ Article 13.

¹⁹ Article 2.

²⁰ Article 3.

²¹ Article 5.

²² Article 7.

²³ Article 8.

- [5.10] The 2006 Recommendation Rec(2006)8 on assistance to crime victims makes recommendations at Article 8 in respect of state-funded compensation. It is recommended that victims of serious, intentional, violent crimes, including sexual violence, and the immediate family and dependants of victims who have died as a result of such crime should be eligible for compensation. State compensation should be awarded to the extent that the damage is not covered by other sources such as from the offender, insurance or state funded health and social provisions. No further recommendations are made in this Recommendation in respect of eligibility criteria for state funded compensation.

(b) The United Nations

- [5.11] The 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends that States should endeavour to provide financial compensation to victims where it is not fully available from the offender or other sources. The principles define victims for the purposes of compensation as; those who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes and the family in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimisation.²⁴ No other principles are set out relating to eligibility for compensation.

(c) Obligations under EU law

- [5.12] The Compensation Directive requires Member States to establish national compensation systems for victims of violent intentional crimes.²⁵ The only eligibility criteria set out in the Directive is that victims must be able to apply for compensation in the Member State where the criminal injuries were inflicted where that is not their state of residence. This means that national compensation systems must include other EU citizens as eligible victims and conversely, a national compensation system in a Member State cannot include a residence requirement in creating eligibility criteria for a national compensation scheme. The Compensation Directive does not include the various limitations on eligibility that are included in the 1983 Convention.

²⁴ UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, Principle 12.

²⁵ Directive 2004/80/EC, Article 12.

- [5.13] In the development of the terms of the Compensation Directive, further terms were suggested in respect of eligibility for compensation in national schemes. These included consideration of the applicant's behaviour directly relating to the event which caused injury or death, the extent of injuries (those with minor injuries could reasonably be excluded) and that a victim can be asked to seek compensation from the offender first. These proposed provisions did not refer to a victim's personal circumstances or existence of a criminal record.²⁶ These provisions were not included in the final Directive as Member States argued that Article 308 of the TFEU did not provide a legal basis for the proposed minimum standards of national compensation systems.
- [5.14] Principles of eligibility or exclusion in respect of compensation awards are not addressed in the Victims' Directive, the Counter-Terrorism Directive, the Anti-Trafficking Directive or in the EU Strategy on Victims' Rights.

3. Eligibility under the Criminal Injuries Compensation Scheme

- [5.15] All state-funded financial benefit schemes require eligibility criteria in order to operate in a financially sustainable manner. The Scheme is no exception. The terms of the Scheme set 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. The Scheme's eligibility criteria will be set out below, and comparisons will be drawn to the criteria applied in EU Member States and other common law jurisdictions where relevant to the issues identified for consultees' consideration. It is important to closely re-examine eligibility criteria under the Scheme in light of the right to compensation under EU law as identified by the CJEU in the *BV* case. In considering potential reforms, the Commission is eager to determine how eligibility and exclusion criteria can be drafted with clarity so as to ensure their consistent, fair and predictable application.
- [5.16] The Scheme applies "in respect of personal injury where the injury is directly attributable to a crime of violence", or to circumstances arising from the action of a victim in assisting or attempting to assist the prevention of crime or saving of human life. Compensation may be paid to

²⁶ Joint Committee on Justice, Equality, Defence and Women's Rights, *EU Scrutiny Report No 3: COM(2002)562* (prn 2677, April 2004).

victims of crimes of violence, where their injuries were sustained within the State or onboard an Irish ship or aircraft. The term “crimes of violence” is not defined. “Personal injury” is defined in section 2(1) of the Civil Liability Act 1961 as including “any impairment of a person’s physical or mental condition”. Having regard to Paragraph 6 of the Scheme, it seems clear that references to “personal injury” in the Scheme are to be construed accordingly. The Scheme sets out that arson and poisoning are included, but it is unclear if offences involving psychological violence such as harassment,²⁷ threats to kill or cause harm,²⁸ extortion,²⁹ coercive control³⁰ or recording, distributing, or publishing an intimate image without consent³¹ come within the definition.

[5.17] Persons eligible to claim compensation include:

- (a) the victim of the offence;
- (b) a person responsible for the maintenance of the victim who has suffered financial loss or incurred expenses as a result of the victim’s injury;
- (c) a dependant of the victim where they died as result of their injuries;
- (d) where the victim has died and they have no dependants, any person who has incurred expenses as a result of the death, or
- (e) any dependant of the victim where the victim has died otherwise than as a result of the injuries caused by the criminal offence.³²

[5.18] Victims must show that the offence giving rise to the injury was the subject of criminal proceedings or reported to the Garda Síochána, or the Garda Síochána Ombudsman Commission (“GSOC”), without delay.³³ If the

²⁷ An offence contrary to section 10 of the Non-Fatal Offences against the Person Act 1997.

²⁸ An offence contrary to section 5 of the Non-Fatal Offences against the Person Act 1997.

²⁹ An offence contrary to section 17 of the Criminal Justice (Public Order) Act 1994.

³⁰ An offence contrary to section 39 of the Domestic Violence Act 2018.

³¹ An offence contrary to section 3 of the Harassment, Harmful Communications and Related Offences Act 2020.

³² Paragraph 3 of the Scheme.

³³ Paragraph 22 of the Scheme.

applicant was so seriously injured that they could not make a report, the Tribunal has discretion to waive this requirement where it is satisfied that all reasonable efforts were made to notify the Gardaí or GSOC of the offence and to co-operate with them.

- [5.19] As indicated on the Scheme’s application forms, and as is standard procedure across most criminal injury compensation systems,³⁴ the Tribunal is obliged to request a garda report in relation to all applications. This report is used to determine that the injuries directly resulted from a crime of violence. The report is also considered by Tribunal members when exercising discretion as to whether compensation should be refused or reduced.
- [5.20] The Scheme specifies the categories of victim who may apply under the Scheme and contains five “limitations and restrictions” on eligibility for compensation - which are applied at the Tribunal’s discretion. These restrictions will be discussed in turn and analysed with reference to eligibility criteria in comparative jurisdictions and the principles of eligibility set out in international legal instruments set out above. Analysis of past decisions publicly available on the interpretation of these discretionary limitations on eligibility shows a lack of clarity and consistency between applicants.³⁵ The Commission seeks the views of consultees on whether the existing criteria can be deemed fair and appropriate restrictions on eligibility.

(a) Categories of victim

- [5.21] The terms of the Scheme set out the categories of victim who may apply for compensation: the victim themselves, any dependant of a deceased victim, or a person who has suffered financial loss because of the victim’s injuries.³⁶

³⁴ Information on all European Union Member States’ compensation schemes is available through the official European Commission e-justice portal, available at <https://e-justice.europa.eu/content_if_my_claim_is_to_be_considered_in_this_country-491-at-en.do?member=1> accessed 29 November 2021.

³⁵ Access to past decisions <https://web.archive.org/web/20210721115625/https://www.justice.ie/en/JELR/Pages/Access_to_past_decisions> accessed 29 November 2021.

³⁶ Paragraph 3 of the Scheme.

- [5.22] As the terms of the Scheme refer only to “crimes of violence”, there is a lack of clarity on the entitlements of victims without physical injury to receive compensation. A victim of crime solely with mental or psychological injuries may recover for any evidenced expenses such as loss of earnings, and an award is made or refused at the Tribunal’s discretion. As previously discussed, it is essential that the terms of the Scheme are clear and unambiguous.
- [5.23] The terms of the Scheme do not refer to victims of crime or applicants who are legally minors at the time of the offence. Of course, minors (persons under the age of 18) are generally financially dependent on adults and therefore would not generally have expenses or lost earnings to claim as a result of a crime of violence. However, whether minors can apply for compensation under the Scheme for the fatal injuries of an adult on whom they were financially dependent while they are a minor is not clear. An adult may be able to make the application on the minor’s behalf in such circumstances, or a Tribunal member may use discretion to waive the time limit to apply (to allow the minor to apply on reaching the age of majority) in these circumstances.
- [5.24] Compensation systems in other jurisdictions operate with various categories of victims, who are entitled to varying levels of compensation and supports. All state compensation systems in Australia use categories of victims to determine maximum compensation awards and eligibility for other support services. The Victims of Crime Assistance Act 1996 in Victoria, Australia uses three separate categories of victim: primary, secondary, and related victims. A primary victim is the person directly injured by a violent crime and is entitled to the highest compensation awards.³⁷ A secondary victim is a person present at the scene of an act of violence and who is injured as a result of witnessing that act.³⁸ A related victim is a close family member, dependant of the victim, or an individual who had an intimate personal relationship with the primary victim who has died as a direct result of a crime of violence.³⁹ These categories are set out in primary legislation alongside the maximum awards that each category of

³⁷ Section 7 of the Victims of Crime Assistance Act 1996 (Victoria).

³⁸ Section 9 of the Victims of Crime Assistance Act 1996 (Victoria).

³⁹ Section 11 of the Victims of Crime Assistance Act 1996 (Victoria).

victim can be awarded – creating transparency and consistency amongst victims.

- [5.25] Several US States also use categories of victim to determine awards of compensation and eligibility for other supports. California for example operates a compensation system for victims classified as direct or derivative victims.⁴⁰ A direct victim is the individual who is the victim of a qualifying crime involving physical injury, threat of physical injury or death, and for certain crimes emotional injury. Derivative victim status is based on the relationship to the direct victim – an individual who sustains monetary loss because of injury or death of a victim of a qualifying crime. A derivative victim may be a spouse, parent, sibling, child, or grandparent.
- [5.26] The Commission seeks the views of consultees as to whether the existing categories of victim under the Scheme in this jurisdiction are sufficient or whether these could be clarified by further classification as seen in comparative jurisdictions.
- [5.27] The Commission is inclined to the view that victims without physical injury but with solely psychological injuries resulting from a criminal offence should be eligible for compensation. The key issue on which the views of consultees are sought in this regard is whether crimes that result in purely psychological injury should be expressly included within the definition of a crime of violence in a reformed statutory scheme.

(b) Minimum award

- [5.28] No compensation will be payable unless the Tribunal is satisfied that the injury is such that compensation of not less than €500 should be awarded.⁴¹ Prior to April 2021, the minimum award threshold was set at €63.50 under the terms of the 1974 Scheme (as amended).
- [5.29] The inclusion of a minimum award threshold appears to be a reasonable limitation on eligibility. The determination of relatively small claims may take up disproportionate time and resources for the Tribunal.
- [5.30] However, applicants under the Scheme may have vastly differing financial means. The minimum award recoverable, set at €500, may exclude those

⁴⁰ California Government Code 13950 – 13966.

⁴¹ Paragraph 9 of the Scheme.

most in need of compensation after a crime from eligibility under the Scheme. Take for example, a person working part-time on a minimum wage of €10.20 per hour, who misses 20 hours of work to seek medical attention for injuries sustained in an assault, and to engage with the Garda Síochána in the reporting and investigation of the offence. If those wages of just over €200 combined with their medical costs are under €500, they cannot recover under the Scheme, which could create a knock-on effect for that individual's economic stability. Therefore, in setting a minimum award threshold to recover under the Scheme a balance must try to be achieved between maximising the Tribunal's time and resources and ensuring victims can be compensated for their losses as fairly as possible.

- [5.31] There is no uniformity across comparative jurisdictions regarding minimum, or indeed, maximum awards of compensation. The majority of EU Member States, similarly bound by the terms of the Compensation Directive, do not have a minimum award threshold.⁴² Of those systems with a minimum award threshold, the amount varies from €9 in Sweden to €500 in Belgium.⁴³
- [5.32] The Northern Ireland 2009 Scheme (as amended) and the 2012 Scheme (as amended) that applies in England, Scotland and Wales both set the minimum injury payment at £1,000.⁴⁴
- [5.33] The Commission seeks the views of consultees on the existing minimum award threshold for compensation under the Scheme - does that minimum strike a fair balance between maximising Tribunal resources and ensuring victims are appropriately compensated?

⁴² Information on all European Union Member States' compensation schemes is available through the official European Commission e-justice portal, available at <https://e-justice.europa.eu/content_if_my_claim_is_to_be_considered_in_this_country-491-at-en.do?member=1> accessed 29 November 2021.

⁴³ *Ibid.*

⁴⁴ Section 2 of the Criminal Injuries Compensation Act 1995 establishes the basis on which compensation is to be calculated, under a tariff system determined by the Secretary of State. The tariff system is set out under the terms of the Criminal Injuries Compensation Scheme 2012 (as amended). The minimum award of £1,000 is set out at paragraph 32 of the 2012 Scheme.

(c) Give all reasonable assistance

- [5.34] No compensation is payable to an applicant who has not, in the opinion of the Tribunal, given all reasonable assistance, in relation to any medical report that it may require, and otherwise.⁴⁵ Tribunal members have discretion in applying this limitation on eligibility, and it is not known how it is applied in practice. Analysis of available Tribunal annual reports from 1975–1989,⁴⁶ however, show that failure to provide reasonable assistance was a frequent reason for refusal of awards under the Scheme in its initial years of operation.
- [5.35] “Reasonable assistance” is not defined in the terms of the Scheme. The guidance notes attached to both the fatal and non-fatal application forms set out the documentation an applicant is required to provide, including birth certificates of any dependant children, a copy of the victim’s statement to the Gardaí and receipts for all expenses claimed. The applicant is also required to authorise Tribunal members to seek further information from relevant sources relating to their injuries.
- [5.36] For example, the applicant must authorise the Gardaí to provide the Tribunal with all relevant information including a copy of the applicant’s statement, yet the applicant must also provide a copy of that statement. It is not sufficiently clear from review of the Scheme’s application forms, what information must be provided by the victim, initially or subsequently, at the request of the Tribunal. If it is not clear who must provide what documentation, it follows that what is considered reasonable assistance in providing information to the Tribunal is not clear.
- [5.37] One past decision made publicly available by the Tribunal refused an applicant compensation for a number of reasons, including the opinion held

⁴⁵ Paragraph 10 of the Scheme.

⁴⁶ The Criminal Injuries Compensation Tribunal Annual Reports are available up until 1989 but were not published annually, often one report was used to provide information on several years of the Scheme’s operation: First Report 1975 (pl 4991), Second Report 1977 (pl 6094), Third Report 1978 (pl 7224), Fourth Report 1978 (pl 9537), Fifth Report 1978 (pl 9537), Sixth Report 1981 (pl 9770), Seventh Report 1981 (pl 9875), Eighth Report 1983 (pl 1600), Ninth Report 1986 (pl 3958), Tenth Report 1986 (pl 3958), Eleventh Report 1986 (pl 3959), Twelfth Report 1987 (pl 4996), Thirteenth Report 1989 (pl 6579), Fourteenth Report 1989 (pl 6580), Fifteenth Report 1990 (pl 7521), Sixteenth Report 1991 (pl 8462).

by the Tribunal member that the applicant failed to co-operate with the Gardaí by withdrawing his complaint against the alleged perpetrator.⁴⁷

- [5.38] The majority of compensation systems surveyed require applicants to provide reasonable assistance, in the application process and also to the police in the investigation of the offence. While the provision of assistance is necessary for the application process, guidance as to what is considered “reasonable assistance”, and what is considered “unreasonable assistance” which may result in a reduced award, or no award at all, may be beneficial for potential applicants under the Scheme.
- [5.39] The Commission seeks consultees’ views as to whether it is fair and appropriate to refuse an award of compensation to an applicant if they withdraw their complaint from the Garda Síochána.

(d) Road traffic accidents

- [5.40] No compensation is payable in respect of injuries inflicted in a traffic offence except in a case where there has been, in the opinion of the Tribunal, a deliberate attempt to run down the victim.⁴⁸
- [5.41] Injuries caused by road traffic accidents are compensated by insurance, in respect of which third party accident cover is mandatory, or, where the driver is uninsured, by the Motor Insurance Bureau of Ireland (“the MIBI”). In general terms, the MIBI is responsible for compensating innocent victims who are injured by uninsured or untraced motorists. The funds required to pay compensation to these victims is financed by a levy on motor insurers.⁴⁹
- [5.42] This limitation on eligibility is in keeping with the principle against double compensation under the Scheme, that a person cannot be compensated twice for the same injuries and prevents duplication in compensation mechanisms for injured persons. The majority of compensation systems in

⁴⁷ Application number 53593, Access to past decisions
<https://web.archive.org/web/20210721115625/https://www.justice.ie/en/JELR/Pages/Access_to_past_decisions> accessed 29 November 2021.

⁴⁸ Paragraph 11 of the Scheme.

⁴⁹ Noctor and Lyons, *The MIBI Agreements and the Law* 2nd ed (Bloomsbury 2012).

EU Member States also have this limitation on eligibility in respect of road traffic accidents.⁵⁰

- [5.43] The Commission considers that the current limitation of the Scheme intentional road traffic incidents is a reasonable limitation on eligibility.

(e) Contribution to the injury

- [5.44] No compensation is payable where the Tribunal is satisfied that the victim was responsible, because of provocation or otherwise, for the offence giving rise to his or her injuries, and the Tribunal may reduce the amount of an award where, in its opinion, the victim has been partially responsible for the offence.⁵¹
- [5.45] The “contribution to injury” limitation on eligibility was raised as a concern for victims of sexual offences in the submissions received by the Commission which influenced the Commission’s Fifth Programme of Law Reform.⁵² This limitation could also be problematic for victims of domestic violence considering the often complex, cyclical violence that can occur in intimate relationships. It was submitted that this concept of provocation under the Scheme could be used to justify refusing awards on the basis of rape myths (as discussed in the Commission’s Report on Knowledge or Belief Concerning Consent in Rape Law).⁵³
- [5.46] How Tribunal members determine what constitutes a “contribution to or responsibility for” the offence which gave rise to the injuries is not entirely clear. Whether the Tribunal considers the actions of the victim preceding or during the offence as contributing to the injuries is not clear for applicants. Tribunal members may refer to principles of contributory negligence under tort law in an assessment of the applicant’s behaviour- which would be appropriate considering that awards are said to be assessed in line with

⁵⁰ Information on all European Union Member States’ compensation schemes is available through the official European Commission e-justice portal, available at <https://e-justice.europa.eu/content_if_my_claim_is_to_be_considered_in_this_country-491-at-en.do?member=1> accessed 29 November 2021.

⁵¹ Paragraph 12 of the Scheme.

⁵² Law Reform Commission, *Report on Fifth Programme of Law Reform* (LRC 120-2019) Project 7.

⁵³ (LRC 122- 2019) pages 12- 21.

damages under the Civil Liability Acts 1961 - 2017. Reliance could also be placed in part or totally on the garda report of the offence to determine whether an applicant contributed to the offence.

- [5.47] In one application in relation to a fatal injury, compensation was refused on this ground in circumstances where the Tribunal noted that the deceased had previous convictions and also that the person convicted of his killing had asserted both on arrest and at trial that the deceased had first assaulted him in an attempt “to call in a drug debt.”⁵⁴
- [5.48] It is not clear if the Tribunal has any established policy in relation to the intoxication of applicants and whether intoxication could have a bearing on consideration of the victim’s “contribution to” the offence which gave rise to their injuries. One past Tribunal decision stated: “I’m afraid I believe the applicant must accept some responsibility in this instance for the injuries sustained” citing the statement in the garda report that “the group consumed alcohol and some or the entire group had taken drugs.” The Tribunal member reduced by half the compensation claimed by the applicant.⁵⁵ No other available decisions refer to intoxication of the applicant at the time of the offence. It is noteworthy that on appeal that decision was reversed and the three-member appeal panel accepted that the “[a]ppellant was entirely blameless with regard to the vicious assault occasioned on him on by the same offender who had fatally assaulted his sister immediately prior to his assault.”⁵⁶ Whatever the position of the Tribunal regarding intoxication as a contribution to injuries, it should be made clear to potential applicants.
- [5.49] Applicants under the Scheme could infer from the wording of this limitation on compensation that they are required to prove their innocence in the offence committed against them. This could create a risk of secondary victimisation for applicants. The phrasing of this limitation on eligibility, and

⁵⁴ Application number 53191, Access to past decisions
<https://web.archive.org/web/20210721115625/https://www.justice.ie/en/JELR/Pages/Access_to_past_decisions> accessed 29 November 2021.

⁵⁵ Application number 51002, Access to past decisions
<https://web.archive.org/web/20210721115625/https://www.justice.ie/en/JELR/Pages/Access_to_past_decisions> accessed 29 November 2021.

⁵⁶ Application number 51002, Access to past decisions
<https://web.archive.org/web/20210721115625/https://www.justice.ie/en/JELR/Pages/Access_to_past_decisions> accessed 29 November 2021.

in what circumstances a victim is considered responsible for an offence committed against them, should be clarified.

- [5.50] A similar limitation on eligibility exists under the Northern Ireland compensation scheme. The guide to the 2009 Scheme (as amended) explains this limitation as a discretion to consider the victim’s conduct such as the use of provocative or offensive language or behaviour, excessive alcohol consumption or use of illicit drugs.⁵⁷ Examples are provided—if a person initiated a fist fight, regardless of the level of force used by their opponent, compensation will generally not be awarded.
- [5.51] A similar limitation on eligibility also exists under the compensation scheme that operates in England, Scotland and Wales. A guide to the compensation scheme indicates that claims officers will consider aggressive, threatening behaviour which provoked the incident which caused the injuries, an intention to provoke a fight or assault, and any history of violence between the applicant and the assailant for which the applicant was injured as a result of a challenge or retaliation for a previous incident.⁵⁸ It also states that intoxication should only be relevant where it contributed to the injury or its effects, and not because it increased an applicant’s vulnerability to attack.⁵⁹
- [5.52] In comparative analysis of compensation systems in other jurisdictions, many consider the actions of the victim immediately before or during an offence. An award may be reduced or refused if it is determined that the victim was injured in the course of committing an offence themselves, directly provoked the offence or contributed to the crime. For example, the Dutch compensation scheme will refuse to pay compensation to a person if

⁵⁷ Compensation Services, *A Guide to the Northern Ireland Criminal Injuries Compensation Scheme* (2009) Issue 2 at page 21, available at <<https://www.nidirect.gov.uk/sites/default/files/publications/8criminal-injuries-compensation-scheme-2009.pdf>> accessed 29 November 2021.

⁵⁸ Ministry of Justice, *A guide to the Criminal Injuries Compensation Scheme* (2014) available at <<https://www.gov.uk/government/publications/a-guide-to-the-criminal-injuries-compensation-scheme>> accessed 29 November 2021.

⁵⁹ Ministry of Justice, *A guide to the Criminal Injuries Compensation Scheme* (2014) available at <<https://www.gov.uk/government/publications/a-guide-to-the-criminal-injuries-compensation-scheme>> accessed 29 November 2021.

they were injured during the commission of a criminal offence.⁶⁰ Seventeen EU Member States, similarly bound by the obligations of the Compensation Directive, will consider the actions of the victim or if they contributed to the crime in a decision to award compensation.⁶¹

- [5.53] It is a logical limitation on eligibility to exclude persons injured during the commission of a criminal offence or from an offence that they directly brought about. These circumstances were considered expressly permissible limitations on eligibility under the 1983 Convention on the Compensation of Victims of Violent Crimes.⁶² However, as shown by reference to comparative jurisdictions, guidance could be provided on the interpretation of this limitation to prevent an inference being drawn that applicants must prove their innocence in the events that injured them in order to receive compensation and eliminate the risk of secondary victimisation.
- [5.54] The Commission seeks the views of consultees on how reference to an applicant's contribution to their injuries should be defined for the purpose of limiting eligibility.
- [5.55] The Commission also seeks views as to whether intoxication should form part of an assessment of "contribution to their injuries".

(f) Conduct, character or way of life

- [5.56] No compensation is payable where the Tribunal is satisfied that the conduct of the victim, his or her character or way of life make it inappropriate that he or she should be granted an award. The Tribunal may also reduce the

⁶⁰ See <https://e-justice.europa.eu/content_if_my_claim_is_to_be_considered_in_this_country-491-nl-en.do?member=1>. More information on the Dutch compensation scheme is available at <<https://www.schadefonds.nl/en/>> accessed 29 November 2021.

⁶¹ Austria, Belgium, Bulgaria, Czech Republic, Denmark, Germany, Estonia, Spain, France, Hungary, Latvia, Luxembourg, Croatia, Malta, Netherlands, Poland, Portugal, Sweden. See <https://e-justice.europa.eu/content_if_my_claim_is_to_be_considered_in_this_country-491-at-en.do?member=1> accessed 29 November 2021.

⁶² Article 8 of the Convention states: Compensation may be reduced or refused on account of the victim's or the applicant's conduct before, during or after the crime, or in relation to the injury or death.

amount of an award where, in its opinion, it is appropriate to do so having regard to the conduct, character or way of life of the victim.⁶³

- [5.57] The guidance notes provided on both fatal and non-fatal injury application forms state that Tribunal members will read the garda report before considering the limitations on eligibility under paragraphs 12 and 13 of the Scheme. They also indicate that any criminal record of the applicant or deceased victim, and any discrepancies in their tax affairs, will be taken into consideration. As with the previous limitations, Tribunal members have discretion to apply this limitation on eligibility.
- [5.58] In *Kelly and Doyle v Criminal Injuries Tribunal*,⁶⁴ the Court of Appeal considered the interpretation of this limitation on eligibility. The Court acknowledged that the question of when paragraph 14 will be applied in a given case is a matter within the discretion of the Tribunal on a case-by-case basis. The appellants argued that the Compensation Directive precludes matters relating to a victim's conduct, character or way of life from ever being relevant to a claim for compensation. Ní Raifeartaigh J held:

“In my view, it is inconceivable that the Directive does not give discretion to member states to provide a general clause in their schemes of compensation giving the decisionmaker a discretion to reduce or refuse an award on the basis of the matters referred to in paragraph 14. Take the wording of Article 8 of the 1983 Convention, which I accept is not in any way binding but nonetheless assists on constructing hypothetical examples; it refers to involvement in organised crime or membership of an organisation which engages in crimes of violence, and it refers to an award which might be contrary to a sense of justice or to public policy (ordre public). Suppose a man who has a lengthy record of drug-dealing and murder receives injuries in the course of an assault by one of the many enemies he has generated in the course of his criminal lifestyle. I am absolutely persuaded that the Directive does not require that all member states are mandated to give an award of compensation which

⁶³ Paragraph 13 of the Scheme.

⁶⁴ [2020] IECA 342.

completely disregards his criminal history and lifestyle, particularly when the Directive in its recitals refers to the 1983 Convention, Article 8 of which suggests a number of situations in which a refusal of compensation might be considered appropriate. The refusal of an award to such a man would not, in my view, constitute a form of discrimination prohibited by the Treaty provisions cited by the appellants. That being so, the real question, I believe, posed by the appellants' claim is as to when it is appropriate to refuse or reduce an award on the basis of matters such as criminal record."⁶⁵

- [5.59] The question to be answered was **when** it is appropriate to reduce or refuse an award on the basis of such matters as prior criminal record. Ní Raifeartaigh J recognised that issues may arise with this discretionary limitation on eligibility regarding proportionality, non-discrimination, and fair and consistent treatment of applicants. The Court could not resolve these issues in this case as the applicants had not been refused under the conduct, character or way of life provision of the Scheme, as they had not completed their applications.
- [5.60] The Court did address the need for consistency in the application of this limitation criteria, under paragraph 13 (formerly paragraph 14 under the 1974 Scheme and as cited in the judgment) of the Scheme, to ensure that Tribunal decisions are fair rather than arbitrary. The Court held that the Tribunal should strive for a measure of consistency in the application of this paragraph and that the lack of access to previous decisions of the Tribunal was compounded by the absence of any other source of information, such as guidelines, about the issue.⁶⁶ The Court found that this lack of access to information was both a breach of constitutional fair procedures and a failure to effectively protect the exercise of a right under EU law.⁶⁷
- [5.61] From a survey of the publicly available past decisions of the Tribunal, it appears that generally a criminal record of the victim, or the applicant

⁶⁵ [2020] IECA 342 at paragraph 140.

⁶⁶ [2020] IECA 342 at paragraph 162.

⁶⁷ *Ibid.*

where the primary victim is deceased, can exclude them from eligibility under the Scheme. However, there appears to be a lack of consistency in the application of this limitation evident in the small number of past decisions which have been made publicly available. One application in 2019⁶⁸ was refused as the applicant had a prior conviction for assaulting a police officer 13 years earlier. Another application in 2015 stated that the applicant's past convictions did not "engage Article 14 of the Scheme"⁶⁹ (now paragraph 13 under the revised terms of the Scheme). These divergent decisions are difficult to reconcile on the facts available in the published decisions – one applicant was refused due to their prior conviction, yet another applicant's prior conviction was held not to affect their eligibility under the Scheme. As there is little public guidance available on how these limitations on eligibility are interpreted by the Tribunal, these inconsistencies raise concerns about arbitrary consideration of the personal circumstances of an applicant to refuse or reduce an award.

- [5.62] On its face, this limitation on eligibility is arguably overly broad and vague. Whether these three factors (conduct, character, or way of life) must be connected to the offence which gave rise to the injuries or may be totally unrelated to the offence and the application process is not entirely clear. The terms of the Scheme do not expressly require a causal link between a victim's conduct, character or way of life and the injuries criminally inflicted.⁷⁰ It is not clear what factors Tribunal members 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. It is not explicitly clear that spent convictions cannot be considered in an assessment of an applicant's conduct, character or way of life.⁷¹ One commentator notes that a "more structured discretion on refusing compensation by reason of bad character

⁶⁸ Application number 53788, Access to past decisions Access to past decisions <https://web.archive.org/web/20210721115625/https://www.justice.ie/en/JELR/Pages/Access_to_past_decisions> accessed 29 November 2021.

⁶⁹ Application number 51954, Access to past decisions Access to past decisions <https://web.archive.org/web/20210721115625/https://www.justice.ie/en/JELR/Pages/Access_to_past_decisions> accessed 29 November 2021.

⁷⁰ Murphy, "The Right under EU law to Compensation for Injuries Criminally Inflicted: the Implications of BV for Irish law" (2021) 23(1) *Irish Journal of European Law* 219-248.

⁷¹ A spent conviction is one that a person no longer has to disclose, subject to certain exceptions. See Part II of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016.

would surely be preferable in the interests of transparency and consistency, even if not required by the Compensation Directive”.⁷²

- [5.63] A similar limitation exists in both the England, Scotland and Wales and Northern Ireland compensation schemes. This limitation on eligibility is consistently justified on the basis that the compensation scheme is intended to compensate only “blameless, innocent” victims.⁷³ After considerable criticism in Britain of the scope that these provisions gave to the (formerly known) Criminal Injuries Compensation Board to introduce moral judgements about the applicant, the “way of life” provision was removed from the Scheme in 1990.⁷⁴ The current restrictions on eligibility relate to the conduct of the applicant before, during or after the incident giving rise to the injury, if the applicant has an unspent conviction or convictions, or where the applicant’s character makes it inappropriate to make an award or an award in full.⁷⁵
- [5.64] A recent challenge in the English courts to the mandatory refusal of applications where the applicant has an unspent conviction failed.⁷⁶ This limitation on eligibility is consistently justified as a legitimate restriction on eligibility in light of the aims of the compensation scheme. Despite being termed by some commentators as “a radical and highly restrictive” rule,⁷⁷ the 2020 public consultation on a review of the scheme that operates in

⁷² Murphy, “The Right under EU law to Compensation for Injuries Criminally Inflicted: the Implications of BV for Irish law” (2021) 23(1) *Irish Journal of European Law* 219-248.

⁷³ Home Office, *Rebuilding Lives: supporting victims of crime* (Cm 6705, 2005) at page 15, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/272209/6705.pdf> accessed 29 November 2021.

⁷⁴ Miers, *Criminal Injuries Compensation: State and Offender Compensation for Violent Crime* (Oxford University Press 2018) at paragraph 4.02.

⁷⁵ Criminal Injuries Compensation Scheme 2012 (as amended), paragraphs 25 – 28.

⁷⁶ *R (A and B) v Criminal Injuries Compensation Authority* [2018] EWCA Civ 1534.

⁷⁷ Miers, *Criminal Injuries Compensation: State and Offender Compensation for Violent Crime* (Oxford University Press 2018) at paragraph 4.48.

England, Scotland and Wales declined to commit to making any change to this limitation on eligibility.⁷⁸

- [5.65] Information on how this limitation is applied in Northern Ireland is available in guidance documents on the Compensation Services website.⁷⁹ The guidance document states that it is inappropriate to compensate those with significant criminal records or who contributed to their own injuries. A penalty point system operates in relation to specific sentences, considering when they were imposed and the time of the compensation application, and a set percentage is accordingly deducted from an award. Generally, the higher the penalty points, the more deductions will be taken from the award. For example, a court sentence of imprisonment for 6 months or less and an application for compensation submitted within the period of sentence will attract 10 penalty points, a score which will result in a total refusal of compensation.⁸⁰
- [5.66] EU Member States, similarly bound by the Compensation Directive, such as Croatia, Estonia, Latvia, Malta, and Romania, consider an applicant's previous criminal record in compensation decisions.⁸¹ The Romanian compensation system will only consider an applicant's criminal record if they have been convicted of specific offences such as murder or participation in organised crime.⁸² Information available on the compensation systems in Denmark, Slovenia and Sweden stress that any criminal record of the applicant will not be considered. The majority of Member States have defined limitations on eligibility, but do not contain a similar "conduct, character or way of life" limitation. The only Member State

⁷⁸ Ministry of Justice, *Criminal Injuries Compensation Scheme Review 2020* (CP 277) at paragraph 106, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901140/cics-review-2020.pdf accessed 29 November 2021.

⁷⁹ Compensation Services, "A Guide to the Northern Ireland Criminal Injuries Compensation Scheme (2009) Issue 2 at page 21, available at <https://www.nidirect.gov.uk/sites/default/files/publications/8criminal-injuries-compensation-scheme-2009.pdf> accessed 29 November 2021.

⁸⁰ *Ibid.*

⁸¹ Information on all European Union Member States' compensation schemes is available through the official European Commission e-justice portal, available at https://e-justice.europa.eu/content_if_my_claim_is_to_be_considered_in_this_country-491-at-en.do?member=1 > accessed 29 November 2021.

⁸² *Ibid.*

to also use such a limitation on eligibility is Malta, where compensation may be reduced or refused if the claims officer considers the victim's behaviour, character or lifestyle warrant such an action.⁸³

- [5.67] This limitation on eligibility speaks to the purpose of the Scheme – as it determines what victims are considered “deserving” of compensation. The England, Scotland and Wales and Northern Ireland schemes both stipulate those individuals with criminal records will not receive compensation awards on par with individuals without criminal records. The Northern Ireland scheme provides information on how this limitation on eligibility is applied in application decisions. Tribunal members' discretion in applying this eligibility criteria under the Scheme in this jurisdiction may be too broad and ambiguous considering the issues raised regarding proportionality, fairness and non-discrimination in the *Kelly and Doyle* judgment.
- [5.68] The views of consultees are sought on how to reform this limitation on eligibility:
- (1) What criteria should justify refusal or reduction in an award of compensation for criminal injuries? For example, should a history of criminality generally justify refusal or reduction, or only criminality of a particular level or seriousness?
 - (2) Could a similar limitation be retained but restricted to conduct that is causally linked to the injuries inflicted?
 - (3) Could the decision-maker retain discretion to consider an applicant's personal conduct or circumstances in relation to the injuries inflicted but be required to conduct a proportionality assessment in the exercise of this discretion?

⁸³ Information on all European Union Member States' compensation schemes is available through the official European Commission e-justice portal, available at <https://e-justice.europa.eu/content_if_my_claim_is_to_be_considered_in_this_country-491-at-en.do?member=1> accessed 29 November 2021.

4. Assessing the Irish Scheme against eligibility principles in international instruments

[5.69] International legal instruments from the UN and the Council of Europe do not mandate any eligibility criteria for state funded victim compensation systems as they are by nature “soft law” (not legally binding). Common threads can be found across international legal instruments in respect of principles of eligibility for compensation. These recommendations include:

- (a) compensation should be made available for victims with bodily injuries caused by intentional crimes,
- (b) compensation should be also made available for family members or dependents of deceased victims,
- (c) that non-citizen victims or applicants be eligible for compensation if the principle of reciprocity applies (which means if an Irish person could receive compensation for an injury in Spain, a Spanish person should be able to receive compensation in Ireland),
- (d) the financial means of the victim or applicant may be taken into consideration in assessing compensation to be awarded,
- (e) the victim’s conduct may be considered in an assessment of compensation to be awarded.

[5.70] The 1983 Convention of the Compensation of Victims of Violent Crimes made several recommendations in respect of eligibility criteria for victim compensation systems, in an attempt to harmonise the provision of compensation across Member States. As Ireland is not a signatory to the Convention, it is at most influential in the assessment of eligibility criteria under the Irish Scheme. It was referenced by the Court of Appeal in *Kelly and Doyle* in discussion of the Compensation Directive.⁸⁴ Under the 1983 Convention, compensation may be reduced or refused based on:

- the applicant’s financial situation;⁸⁵

⁸⁴ The terms of the 1983 Convention were cited by the Court of Appeal in *Kelly and Doyle* in the assessment of the application of the paragraph 14 limitation on eligibility under the Irish Scheme.

⁸⁵ Article 7.

- the victim's or the applicant's "conduct before, during or after the crime, or in relation to the injury or death";
- the victim's or the applicant's "involvement in organised crime or his membership of an organisation which engages in crimes of violence"; or
- a consideration that making an award or a full award would be "contrary to a sense of justice or public policy".⁸⁶

[5.71] It should be noted that these eligibility criteria in the 1983 Convention were not included in the terms of the Compensation Directive. They were also not included in the proposed minimum standards that ultimately were not adopted in the Directive.

[5.72] Assessing the Irish Scheme in light of these principles, it appears that the terms of the Scheme include most of the eligibility criteria recommended in non-binding international legal instruments.⁸⁷ The terms of the Scheme arguably go beyond these eligibility criteria as the discretionary limitations on eligibility are so broadly stated that their actual interpretation in practice is not known. Therefore, the Commission considers that the broad and unstructured discretions afforded to Tribunal members in the interpretation of these eligibility criteria requires further assessment and review. As stated previously, there is also a need for greater scrutiny of eligibility criteria in light of the right to compensation under EU law as identified in the *BV* case.

[5.73] Perceptions and stereotypes can directly and indirectly influence who will be considered "deserving" of compensation and therefore eligible for awards of state-funded compensation. For instance, discrepancies in an applicant's tax affairs can exclude them from eligibility under the Scheme.⁸⁸ As tax evasion can result in criminal sanctions and the fact that the Scheme is funded by the taxpayer, it logically follows that an individual who does not pay tax would be considered undeserving of compensation

⁸⁶ Article 8.

⁸⁷ The Irish Scheme does not consider the financial means of the applicant in assessing awards of compensation or eligibility under the Scheme. All other non-binding recommendations in respect of eligibility are incorporated in the terms of the Irish Scheme.

⁸⁸ This limitation on eligibility is set out in the application forms for the Scheme – it is not expressly stated in the terms of the Scheme.

under the Scheme. However, other perceptions and stereotypes may be indirectly embedded in the Irish Scheme in the discretions afforded to Tribunal members to refuse or reduce awards based on various judgements of an applicant's personal circumstances.

- [5.74] Firstly, if a Tribunal member(s) considers that the applicant has not provided reasonable assistance in the application process, they may be refused compensation entirely or receive a reduced award. On its face, this discretionary limitation on eligibility is logical – the Tribunal require an applicant's assistance in order to assess the compensation to be awarded to them. However, as outlined above, it is not always clear to applicants what they are required to provide to the Tribunal and what information the Tribunal will seek out themselves. The application form lists a number of required documents which may take some time and resources to collect. This may not be practically feasible for all victims – particularly those with psychological injuries or with either physical or intellectual disabilities. It is not known whether such circumstances are taken into consideration under the assessment of reasonable assistance. The Commission asks consultees for their views on whether this limitation on eligibility could be clarified in a reformed statutory scheme of compensation.
- [5.75] Secondly, if a Tribunal member(s) considers that the applicant or victim has contributed to the injury they may refuse or reduce an award of compensation. It implies that a victim who could be subjectively considered to have contributed to their injuries or the offence giving rise to them is not a deserving victim. This appears to embody the principle stated in international legal instruments that a victim's conduct can be considered in the calculation of an award. As outlined above, an issue arises because it is not entirely clear how the Tribunal apply discretion in respect of this term. Other jurisdictions with a similar limitation on eligibility provide guidance as to how this is interpreted and applied in practice. The Commission seeks the views of consultees whether a reformed statutory scheme of compensation should stipulate what is considered to be a contribution to injuries, perhaps requiring a direct causal link between the applicant's behaviour and the injuries sustained, or whether guidance as to the interpretation of this term would be sufficient for applicants.
- [5.76] Thirdly, if a Tribunal member(s) considers that the applicant's "conduct, character, or way of life" is such that justifies a refusal or a reduced award, they have discretion to refuse or reduce an award of compensation. What aspects of an applicant's conduct, character or way of life can be considered by the Tribunal is not clear. The terms of the Scheme do not

require a causal link between the applicant's conduct, character or way of life and the injuries sustained. For example, an applicant can be refused compensation under the Scheme for injuries sustained in an unprovoked, violent assault on a public street if they had a previous conviction for an unrelated offence such as burglary. The applicant's way of life, being involved in criminal activity and having a previous conviction, can be interpreted by the Tribunal as reason to reduce or refuse an award of compensation even if this is wholly unrelated to the criminal act which inflicted their injuries or the circumstances in which it occurred. This can also be applied regardless of the extent of the injuries inflicted. The terms of the Scheme do not require Tribunal members to apply any form of proportionality assessments in the exercise of these discretions.

- [5.77] The State cited Article 8 of the 1983 Convention in its defence of this limitation in the *Kelly and Doyle* decision (discussed above).⁸⁹ Ní Raifeartaigh J looked to the meaning of Article 8 of the Convention, accepting it is in no way binding on the Irish State, to inform the purpose and fairness of limitations on eligibility under the Compensation Directive.⁹⁰ One commentator questions whether these are in fact a reliable source for interpretation of the Directive as it is referenced in the Directive only as "being a reason why some Member States had already established compensation schemes".⁹¹ The terms of the 1983 Convention, even those related to eligibility criteria, are not replicated anywhere in the Directive. The Court of Appeal raised concerns about fairness and consistency in the application of this limitation on eligibility. From analysis of the past decisions made publicly available by the Tribunal, it appears that this limitation on eligibility is not consistently applied.
- [5.78] The Commission is provisionally of the view that this discretionary limitation on eligibility is unstructured, overly broad and should be reformed. Reference to character and way of life are both vague and subjective. These issues could be resolved in different ways in a reformed statutory compensation scheme. A more structured discretion could be afforded to the decision-maker by providing a non-exhaustive list in

⁸⁹ [2020] IECA 342.

⁹⁰ *Ibid* at paragraph 140.

⁹¹ Murphy, "The Right under EU law to Compensation for Injuries Criminally Inflicted: the Implications of BV for Irish law" (2021) 23(1) *Irish Journal of European Law* 219-248 at page 240.

legislation of factors relating to an applicant's personal circumstances that a decision-maker may consider in refusing or reducing an award on this ground. These factors could include serious convictions or convictions within a specific time period. Decision-makers could be required to conduct a proportionality assessment in the exercise of this discretion. A reformed statutory compensation scheme could require a causal link between that conduct, aspect of their character or way of life and the injuries inflicted to refuse or reduce an award of compensation. Whatever the form of limitations on eligibility in a reformed statutory compensation scheme, they need to be strictly defined and proportionate in order not to exclude victims from access to compensation which they are entitled to under EU law. Clear, accessible and unambiguous criteria are essential for predictability and consistency, which in turn serve to maximise efficiency and fairness and to minimise the potential for arbitrary and inconsistent decision-making.

Tell us your views

- Q. 5.1** The terms of the Scheme set out the categories of victim who may apply for compensation: the victim themselves, any dependant of a deceased victim, or a person who has suffered financial loss because of the victim's injuries. Are the existing categories of victim under the Scheme in this jurisdiction sufficient? Should they be further classified, or classified differently? If so, how?
- Q. 5.2** European Union law requires fair and appropriate compensation to be paid to victims of violent intentional crime. There is a lack of clarity in the terms of the Scheme on the entitlement of certain victims without physical injury to receive compensation. Do you agree that psychological injury should be expressly included within the definition of a crime of violence in a statutory reformed scheme?
- Q. 5.3** The current minimum award threshold is €500. Does that minimum strike a fair balance between maximising Tribunal resources and ensuring that victims are appropriately compensated?
- (1) If your answer is no, can you suggest a minimum award threshold that would be fair and appropriate?
- Q. 5.4** A standard feature of most criminal injury compensation schemes is that the applicant/victim is required to "provide all reasonable assistance" in the compensation process and also to the police in the investigation of the offence.
- (1) Is it fair and appropriate to refuse an award of compensation if an applicant has withdrawn their complaint from the Garda Síochána?
- Q. 5.5** No compensation is payable where the Tribunal is satisfied that the victim was responsible for, and contributed to, because of provocation or otherwise, the offence giving rise to their injuries, and the Tribunal may reduce the amount of an award where, in its opinion, the victim has been partially responsible for the offence.
- (1) How should reference to an applicant's contribution to their injuries be defined for the purpose of limiting eligibility?
- (2) Should intoxication of the victim form part of an assessment of "contribution to their injuries"?

Q. 5.6 Compensation can be refused or reduced if the Tribunal considers that the conduct of the victim, his or her character or way of life make it inappropriate that he or she should be granted an award. The Commission considers that this exclusion, as currently drawn, is overly broad and potentially disproportionate. The references to character and way of life are both vague and subjective. The views of consultees are sought on how to reform this limitation on eligibility:

- (1) What criteria should justify refusal or reduction of an award of compensation for criminal injuries? For example, should a history of criminality justify refusal or reduction, or only criminality of a particular level or seriousness?
- (2) Should a similar limitation be retained but restricted to conduct that is causally linked to the injuries inflicted?
- (3) Should the decision-maker retain discretion to consider an applicant's personal conduct or circumstances in relation to the injuries inflicted but be required to conduct a proportionality assessment in the exercise of this discretion?

CHAPTER 6

PROCEDURAL ISSUES

1. Introduction

- [6.1] It is important that the Scheme, and the Tribunal that administers it, work fairly and effectively for the victims that they are intended to benefit. This chapter will examine a number of practical and procedural issues with both the terms of the Scheme and the procedures of the Tribunal, to seek to determine how these procedural issues affect applicants as service users. The chapter will also assess the Tribunal as a quasi-judicial body: the degree to which its procedures facilitate transparent, consistent decision-making and access to justice.
- [6.2] The terms of the Scheme and the procedures of the Tribunal impact to a significant degree on the applicant's experience of the compensation process. These are elements of procedural justice. Procedural justice refers to the fairness, transparency and inclusivity of the process itself. It has long been recognised that, regardless of the outcome, in civil disputes participants are always more satisfied with decisions when they are included in the decision-making process.¹ In fact, in many ways the process matters as much, if not more, than the outcome. Victims are particularly concerned about being treated with dignity and respect and being included in the process is an important part of that.² Fair procedures do more than provide comfort to service-users, they also influence attitudes towards authorities and institutions, enhancing their legitimacy. With the respect and support of citizens, authorities can function more effectively.³

¹ Thibaut and Walker, *Procedural Justice: A Psychological Analysis* (Wiley 1975); Shapland, Willmore, and Duff, *Victims in the Criminal Justice System* (Gower Publishing 1985); Tyler, "What is procedural justice?: Criteria used by citizens to assess the fairness of legal procedures" (1988) 22 *Law Society Review* 103-135.

² Wemmers, van der Leeden, and Steensma, "What is Procedural Justice: Criteria used by Dutch Victims to Assess the Fairness of Criminal Justice Procedures" (1995) 8(4) *Social Justice Research* 329 at pages 347 and 348.

³ Wemmers, van der Leeden, and Steensma, "What is Procedural Justice: Criteria used by Dutch Victims to Assess the Fairness of Criminal Justice Procedures" (1995) 8(4) *Social Justice Research* 329 at page 330.

- [6.3] As a matter of EU law, there is a legal obligation on the State to provide victims of violent intentional crime with fair and appropriate compensation. International law does not provide detailed guidance on the procedural and practical elements of the administration of national compensation schemes. In the EU, such matters are left to the discretion of Member States, which results in divergent approaches to criminal injuries compensation across the EU's various jurisdictions. Some jurisdictions (within the EU and beyond it) include criminal injuries compensation as a part of the State's overall social welfare system, while others operate national schemes that are separate and distinct from both social welfare and ordinary court proceedings.
- [6.4] There is, however, one clear procedural duty under EU law: the requirement to protect victims from secondary victimisation. This duty is contained in both the Victims' Directive⁴ and in the EU Strategy on Victims' Rights.⁵ As such, trauma responsiveness is an important consideration in the assessment of the Tribunal's procedures.
- [6.5] Article 3 paragraph 3 of the Compensation Directive provides that "Member States shall endeavour to keep to a minimum the administrative formalities required of an applicant for compensation." The EU Strategy on Victims' Rights also refers to a duty on Member States to eliminate existing procedural hurdles in national compensation systems,⁶ an important goal, both in terms of reducing secondary traumatisation and in increasing efficiency and effectiveness generally.
- [6.6] As discussed in Chapter 3, the terms of the Scheme do not expressly articulate its purpose. It need hardly be said that in order to compensate victims effectively, the Scheme should operate efficiently, fairly and sensitively. Even if reparation is not an explicitly expressed aim, it appears to the Commission that this must be the Scheme's implied objective. As such, there are aspects of the Tribunal's procedures which could, with small and inexpensive changes, better assist in the reparation of victims. These might include simple actions, such as sending a letter or an email to

⁴ Directive 2012/29/EU, Recital 9.

⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Strategy on victims' rights (2020-2025), Brussels 24.06.2020 COM (2020) 258 at page 18.

⁶ *Ibid.*

the victim acknowledging their experience with empathy and compassion and expressing solidarity with them on behalf of the people of Ireland.⁷ From that point on in the process, it is essential that the processes and procedures of the Tribunal are designed with reparation in mind, minimising administrative hurdles and bureaucracy and maximizing fairness and transparency. The views of consultees are sought on how the Scheme and Tribunal can be reformed and improved to best serve the often traumatised people who engage with, and have to navigate, the victim compensation system.

2. Assessing the Scheme from an applicant's perspective

[6.7] To ensure that victims of crime can access the compensation they are entitled to under EU law with ease and efficiency, the Scheme and the Tribunal must be assessed from the applicant's perspective. To that end, a number of key elements must be considered:

- (a) the navigability of the application process itself;
- (b) the accessibility of the Scheme;
- (c) the Tribunal's procedures;
- (d) the appeals mechanism;
- (e) delays.

[6.8] Applicants have different needs and different capacities. Some, such as families of homicide victims, will have lost a loved one in tragic and traumatising circumstances and as such require the utmost care and sensitivity. Others will have suffered comparatively less significant material losses. It may be that applicants have different expectations of the Scheme. Some might seek recognition and acknowledgement of their experience through the application process. Others might be satisfied with an entirely paper-based process (as is the current procedure for first instance decisions by the Tribunal), or an online application procedure

⁷ The French equivalent of the Criminal Injuries Compensation Scheme, the Guarantee Fund for Victims, outlines that solidarity "is the raison d'être of the Guarantee Fund for Victims," and that "the Guarantee Fund for Victims is here, in the name of national solidarity, to guide each victim as they rebuild" (translation by the Fund's website). See <<https://www.fondsdegarantie.fr/en/acting-on-behalf-of-victims-in-the-name-of-national-solidarity/>> accessed 19 November 2021.

(such as that which is operated by the Personal Injuries Assessment Board). Bearing the diversity of victims in mind, it is essential that the compensation process works for all victims who are eligible to receive an award under the Scheme. Reducing procedural obstacles and reducing delays will benefit all applicants.

- [6.9] After a crime, a victim may experience emotional, physical and psychological harm. They often face disruption to their employment, with concerns about their future financial wellbeing and earning capacity. They may be unable to participate in their day-to-day activities and hobbies, or to meet their caring responsibilities. They can find the criminal investigation process difficult: investigations can involve invasive forensic medical examinations; there is intrusion involved in the seizure and examination of victims' mobile phones and other devices. An applicant for compensation for fatal injuries will inevitably also be experiencing profound loss and grief. In short, the disruption to the lives of victims, both practically and psychologically, is substantial.
- [6.10] Complicated application or appeals processes may add to the stress experienced by victims, and even deter them from applying for compensation under the Scheme. Any reforms must, therefore, take into account the physical and mental effects of crime: such effects can include changes in one's ability to "understand and remember information and cope with administrative tasks".⁸

(a) Application Process

- [6.11] Application forms for compensation under the Scheme are available on the Department of Justice website (see Appendix B).⁹ Forms must be printed, filled in, signed by hand and sent by post to the Tribunal. The application forms include guidance on how to complete the form and what documents are required. A compensation application may be completed entirely in a

⁸ Victim Support Europe, *A Journey from Crime to Compensation: An Analysis of Victims' Access to Compensation in the EU* (Victim Support Europe 2019) at page 28.

⁹ Application forms are available here <http://www.justice.ie/en/JELR/Pages/Criminal_Injuries_Compensation_Scheme> accessed 19 November 2021.

paper-based process. The Tribunal may set up an oral hearing in relation to an application if it is deemed necessary.¹⁰

[6.12] Little information is publicly available on applicants' experiences with the application process. The information that is available comes from victims of crime speaking publicly about their experiences with the compensation process under the Scheme. Representatives of the non-governmental organisation Support After Homicide provided insights into their clients' experiences as applicants to the Criminal Injuries Compensation Tribunal in a webinar hosted by the Victims' Rights Alliance in June 2021. Applicants frequently reported to Support After Homicide that:

- The application process was extremely stressful and overwhelming, especially at a time when day to day living was difficult;
- It was difficult to get birth certs and organise documents from a large extended family;
- It was difficult to discuss family members waiving their rights, especially relatives who were not close to the family;
- The application form was complicated and added to applicant's grief and anxiety in the wake of their tragic loss.¹¹

[6.13] The process of receiving compensation under the Scheme can be lengthy.¹² In some cases, a victim can wait over ten years from initial application to receipt of an award. A lengthy and inefficient application process can compound and worsen the stress a victim suffers.

[6.14] In the UK, victims of crime surveyed on the compensation scheme reported that the process re-triggered their original trauma as a result of constantly having to repeat their story and the delays, uncertainty and poor communication they experienced.¹³ It is long recognised that having to

¹⁰ The terms of the Scheme are sufficiently broad that Tribunal members have discretion over all procedures and what forum to decide applications in.

¹¹ Examples provided by Support After Homicide in Victims' Rights Alliance Webinar on Victim Compensation (17 June 2021).

¹² See, for example *Byrne v Criminal Injuries Compensation Tribunal* [2017] IEHC 28.

¹³ Padfield, "Compensation without Traumatization" (2019) 4 *Criminal Law Review* 269-271.

repeat one's story, as well as poor treatment in the criminal justice process, can add to original trauma or re-traumatise victims of crime.¹⁴

[6.15] The Commission seeks the views of consultees on all aspects of the application process: its format, whether it is generally easy or difficult to complete, and aspects which are not clear or could be improved. In particular, the Commission is keen to assess the processes of the Tribunal with a view to ensuring not only that they are efficient and fair, but also that they do not re-traumatise victims.

(i) Application Forms

[6.16] Applicants are required to provide a significant amount of information and documentation in order to complete an application for compensation. Providing the required information and documents may pose difficulties, particularly if an applicant has been incapacitated by a criminal injury. For example, for a non-fatal injury, applicants must provide:

- Personal information including contact details and PPS number;
- Details of the incident that caused the injury;
- Reasons why the application is outside the time limit to apply (if necessary);
- Details of the Gardaí report of the incident including a copy of the victim's statement to the Gardaí (if available);
- Details on any civil or criminal proceedings (anticipated, ongoing or concluded) related to the incident and any compensation already received for the injuries;
- Details of the injuries, treatment received and time absent from work as a result of the injuries;
- Expenses incurred (such as travel expenses to receive treatment, dental, optical and medical expenses); and

¹⁴ Shapland, Willmore, and Duff, *Victims in the Criminal Justice System* (Gower Publishing 1985).

- Details of lost earnings, employment details and social welfare payments including details of income tax, PRSI and USC contributions for previous 3 years.¹⁵

[6.17] Applicants for compensation for fatal injuries, who are either the personal representatives of the victim or the victim's dependants, are required to provide the above listed information and:

- an original death certificate for the deceased;
- an original marriage certificate if the applicant was the spouse, and
- the particulars of all dependants – including a waiver for each dependant who is not included in the claim.¹⁶

[6.18] An applicant must also sign a certificate of authority (as part of the application form) to permit Tribunal staff to seek further information from a variety of sources such as the Revenue Commissioners, the Garda Síochána and any medical facilities which provided treatment for the injuries. Because an applicant must provide certain documents themselves and must also authorise the Tribunal to seek the same documents (such as the official statement made to the investigating member of the Garda Síochána), an applicant may have the incorrect impression that the Tribunal will “fill in the blanks” where an applicant cannot or does not provide necessary documentation. This is not the case. The onus of proof is on the applicant to provide details of their costs and expenses. Tribunal staff will try to assist in sourcing documents, ultimate responsibility is on the applicant to provide the necessary information, and an applicant may be refused compensation or offered a reduced award for failure to provide reasonable assistance to the Tribunal.¹⁷ It would be helpful for applicants to know what documents they need to provide to the Tribunal, and what the Tribunal will source themselves. Representatives from Support After Homicide provided one example of a client who has reading difficulties and

¹⁵ Application Form (Non-Fatal Cases) available at <<https://www.justice.ie/en/JELR/Pages/WP15000110>> accessed 19 November 2021. See also Appendix B of this Paper.

¹⁶ Application Form (Fatal Cases) available at <<https://www.justice.ie/en/JELR/Pages/WP15000110>> accessed 19 November 2021.

¹⁷ Paragraph 10 of the Scheme.

mental health issues, who would not apply under the Scheme as the application process would be too difficult.¹⁸

- [6.19] The Commission is keen to understand how existing procedural hurdles can be eliminated to best meet the needs of all victims who are eligible to apply for compensation. Many jurisdictions, including Northern Ireland, operate online victim compensation application processes.¹⁹ The advantages of an online application process include increased efficiency and accessibility. For example, an online application process may allow for better case management and information sharing if applicants could log in to the application portal to check the status of an application and be alerted quickly if additional information or documentation is required. In its Report on Suspended Sentences, the Commission recommended that the information communication technology (“ICT”) systems underpinning court processes should be examined with a view to streamline and modernise the ICT systems in each agency of the criminal justice system. If these ICT systems can operate better together, this would facilitate a collaborative and efficient approach to the operation of the criminal justice system.²⁰ The administrative burden on applicants and on Tribunal staff could be reduced if the Tribunal’s ICT systems were interoperable with those of other criminal justice agencies such as the Garda Síochána, the Office of the Director of Public Prosecutions and the Courts Service. The Milquet Report recommended the digitisation of national compensation application processes in order to simplify them.²¹ This is undoubtedly necessary.
- [6.20] There are obvious advantages to an online application process, but such an impersonal system is arguably inappropriate for bereaved and severely injured people. This raises the possibility of parallel application systems: one for complex cases including severe injuries and another simpler process, possibly online, for straightforward cases. However, for the aim of

¹⁸ Examples provided by Support After Homicide in Victims’ Rights Alliance Webinar on Victim Compensation (17 June 2021).

¹⁹ For more information on the online application process in Northern Ireland see <<https://www.nidirect.gov.uk/services/apply-compensation-or-check-progress-your-claim>> accessed 19 November 2021.

²⁰ Law Reform Commission, *Report on Suspended Sentences* (LRC 123-2020) at paragraph 8.9.

²¹ Milquet, *Strengthening Victims’ Rights: from Compensation to Reparation for a new EU Victims’ Rights Strategy 2020-2025* (European Commission 2019) Recommendation 28 at page 59.

simplicity there is much to be said for a single process rather than one that distinguishes between categories of victims on the basis of severity of loss or injury. An online system could include additional supports for those who have been bereaved and those who are severely injured. The Commission would value the insights of consultees on these issues and how, in practical terms, the Scheme could be simplified while meeting the needs of victims.

- [6.21] Considerable detail is sought on the application form of the existing Scheme. If the existing form is overly complicated or challenging to complete, it is undesirable that the form should be mirrored in an online process. The Commission seeks the views of consultees on what information is, in their view, necessary for the purpose of completing a compensation application.

(ii) Time limit to apply

- [6.22] Under the existing Scheme, applications should be made within three months of the date of the offence that caused the injuries. The Tribunal has discretion to waive the time limit where the circumstances justify exceptional treatment, but only up to two years after the offence occurred.²² The criteria used by the Tribunal in determining whether to waive the time limit are not clearly defined. The Commission is not aware of any guidelines that are applied by the Tribunal in determining whether to waive the time limit. There is therefore potential for inconsistency in the treatment of similar applications. Further, the time limit might result in harsh treatment if an applicant was incapacitated (physically or mentally) for more than two years and did not have an application made on their behalf within that timeframe.
- [6.23] There are a small number of past Tribunal decisions publicly available that provide some indication as to how the discretion to extend the time limit to apply has been applied by the Tribunal in practice.²³ It would appear from these decisions that the discretion to extend time is strictly interpreted, and that applicants must provide detailed reasons to explain why the application is late. An analysis of these past decisions demonstrates that

²² Paragraph 20 of the Scheme.

²³ Accessible at https://web.archive.org/web/20210721115625/https://www.justice.ie/en/JELR/Pages/Access_to_past_decisions accessed 22 November 2021.

applications received outside the time limit were refused in circumstances where the following reasons for seeking an extension were given:

- (a) Ignorance of the existence of the Scheme;
- (b) Grief or trauma following the crime;
- (c) Ongoing or pending criminal proceedings; and
- (d) Ongoing Gardaí investigations.

- [6.24] However, analysis of past decisions also demonstrates inconsistencies in the approach of the Tribunal to waiving the time limit to apply. For example, application number 52553 was accepted outside the time limit due to an ongoing investigation, while application number 51140 was not accepted in the same circumstances and the decision stated that “awaiting the outcome of an ongoing Garda investigation has never been accepted as a justifying excuse”.²⁴
- [6.25] One example of circumstances which justified waiving the time limit involved an applicant with serious head injuries, severe depression, and post-traumatic stress disorder as a result of the crime. The garda statement was also received outside the time limit to apply and so these were considered sufficient reasons to justify waiving the time limit.²⁵
- [6.26] Analysis of the publicly available past decisions of the Tribunal suggests that ongoing legal proceedings do not generally justify late application under the Scheme.²⁶ Victims are still required to apply under the Scheme within the three-month time limit, regardless of whether criminal or civil proceedings are ongoing. In practice the Tribunal will await the outcome of any civil or criminal proceedings against the offender to determine

²⁴ Application number 52553 and number 51140, Access to past decisions <https://web.archive.org/web/20210721115625/https://www.justice.ie/en/JELR/Pages/Access_to_past_decisions> accessed 24 November 2021.

²⁵ Application number 52166, Access to past decisions <https://web.archive.org/web/20210721115625/https://www.justice.ie/en/JELR/Pages/Access_to_past_decisions> accessed 24 November 2021.

²⁶ Application number 53053, Access to past decisions <https://web.archive.org/web/20210721115625/https://www.justice.ie/en/JELR/Pages/Access_to_past_decisions> accessed 24 November 2021.

if compensation is offered or ordered before deciding on a compensation application.²⁷

- [6.27] Time limits to apply for criminal injuries compensation vary across EU Member States. The Czech Republic, Ireland, Hungary, and Slovenia require victims to apply for compensation within six months or less of the crime.²⁸ Other Member States, such as the Netherlands, have a ten-year time limit to apply for criminal injuries compensation.²⁹ Germany does not have a time limit to apply for state-funded criminal injuries compensation.³⁰
- [6.28] As far back as 1977 the Tribunal recognised, in the Second Annual Report, the difficulties applicants had with the three-month time limit.³¹ The Report further noted that many applicants stated that in the initial months after the crime they were focusing on medical treatments and co-operating with Gardaí in the investigation and prosecution of the offender. They stated that it was only once they began to physically recover that they could begin to think about compensation. The Tribunal considered at that time that a longer time limit would relieve applicants of the additional trouble of having to make a special case for the time limit to be extended.³² It is striking that the time limit has remained so short and strict, given that the difficulty it has posed for applicants has been acknowledged by the Tribunal itself since the earliest days of its operation. Victim Support Europe has asked what benefits there are to imposing such short-term deadlines “beyond the arbitrary exclusion of the victims themselves”.³³

²⁷ Aylmer, “Criminal Damages” (2020) 114(7) *Law Society Gazette* 32. See also FAQs on the Scheme on the Department of Justice website <<https://www.justice.ie/en/JELR/Pages/WP15000110>> accessed 24 November 2021.

²⁸ Information on all European Union Member States’ compensation schemes is available through the official European Commission e-justice website, available at <https://e-justice.europa.eu/content_if_my_claim_is_to_be_considered_in_this_country-491-at-en.do?member=1> accessed 24 November 2021.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Criminal Injuries Compensation Tribunal, *Second Annual Report* (1977) prl 6094.

³² *Ibid* at page 3.

³³ Victim Support Europe, “A Journey from Crime to Compensation: An Analysis of Victims’ Access to Compensation in the EU” (Victim Support Europe 2019) at page 46.

[6.29] Three months appears to the Commission to be an excessively restrictive time limit. A victim's injury might affect their ability to apply (whether through physical or psychological barriers); the extent of injuries and expenses may not become known for many years after a crime. The Commission seeks the views of consultees on a suitable time limit, if any, that should apply to applications for compensation under the Scheme. The Commission would also appreciate the views of consultees on circumstances in which extensions of time should be permitted? If so, what circumstances?

(b) Accessibility

[6.30] Given that the process is intended to be applicant-led, and to be navigated without legal advice or assistance, ensuring clarity in the Scheme's terms is an important element of the overall accessibility of the Scheme. Not only should the terms be clearly and plainly explained, the language of the Scheme and its application forms should be sensitive and trauma-informed to prevent against the risk of secondary victimisation. This is necessary in light of the duty not to expose victims to secondary victimisation in both the Victims' Directive and the EU Strategy on Victims' Rights.³⁴

[6.31] Some terms of the Scheme are not expressed as clearly as they should be. The various limitations on eligibility, for example, are not all listed together – the limitations are listed as paragraphs 9 to 15, but it is not until paragraph 22 that the terms indicate that the offence(s) giving rise to the injury must be reported to the Garda Síochána or the Garda Síochána Ombudsman Commission ("GSOC") to qualify for compensation. One discretionary limitation on eligibility, that discrepancies in tax affairs can result in a reduced or refused award of compensation, is not listed in the terms of the Scheme but is set out only on the certificate of authority included in the application form.³⁵

[6.32] The terms of the Scheme refer to the cross-examination of witnesses in oral hearings. It is not clear from the terms of the Scheme why witnesses may be needed, who witnesses may be or who should arrange for the appearance of witnesses at a Tribunal hearing. The circumstances in which

³⁴ Directive 2012/29/EU, Recital 9. EU Strategy on Victims' Rights 2020-2025 at page 18.

³⁵ See discussion in Chapter 5. Application forms are available at <<https://www.justice.ie/en/JELR/Pages/WP15000110> > accessed 24 November 2021.

witnesses, and their cross-examination, are required is not explained either in the terms of the Scheme, the application forms, nor in publicly available information on the Scheme or the Tribunal.

- [6.33] It appears to the Commission that immediate improvements can and should be made, as interim measures in anticipation of more substantive reform to the Scheme through legislation. For persons with limited literacy skills, or limited English, the terms of the Scheme are inaccessible. The terms of the Scheme should be set out on a dedicated website in a more logical manner, reflecting the stages of the application process for applicants, and in plain language. The terms of the Scheme should be made available in a Plain English format online as well as in other languages. To be more accessible and inclusive, application forms should also be available in various languages, including *as Gaeilge*. It is important that victims with diverse needs are accommodated, with information available in Irish Sign Language, and in Braille or audio formats. Further information on the Scheme is currently available directly from the Tribunal secretariat by phone or by email. However, a comprehensive website is necessary to provide both information and access to assistance with applications. These simple improvements would aid accessibility considerably.
- [6.34] The Commission is interested to learn the views of consultees as to whether there are sufficient supports in place to assist those with language barriers, physical or intellectual difficulties or victims making cross-border applications from other jurisdictions. What measures are required to protect victims from secondary victimisation in the compensation process generally? The Commission asks consultees for their views on how to make the Scheme more accessible and trauma-responsive generally.

(c) Procedures

- [6.35] Applications under the Scheme are generally decided at first instance in an entirely paper-based process. Tribunal members make decisions based on the documents submitted with an application. The number of Tribunal members making the decision depends on the amount of compensation claimed. Claims for awards over €75,000 in value are decided by three Tribunal members.³⁶ Appeals may be decided in an oral hearing.

³⁶ Paragraph 24 of the Scheme.

[6.36] As previously stated, procedures must not expose victims to secondary victimisation. Recital 9 to the Victims' Directive states that victims of crime should be recognised and treated in a respectful, sensitive, and professional manner, without discrimination of any kind on any of the stated grounds³⁷, and protected from secondary and repeat victimisation.³⁸ Recital 9 adds that

“In all contacts with a competent authority operating within the context of criminal proceedings, and any service coming into contact with victims, such as victim support or restorative justice services, the personal situation and immediate needs, age, gender, possible disability and maturity of victims of crime should be taken into account while fully respecting their physical, mental and moral integrity”.

[6.37] As discussed in Chapter 3, arranging the Scheme on a non-statutory basis was intended to avoid the formality of the general legal process. Paragraph 19 of the Scheme states that the general intention is that the administration of the Scheme and the proceedings of the Tribunal should be informal. Legal aid is not provided, nor are costs of legal representation reimbursed, discouraging the involvement of lawyers and the formality they bring to the scheme. However, certain terms of the Scheme and aspects of the Tribunal's procedures are legalistic and complicated. Paragraph 25 of the Scheme, for example, describes the procedure in relation to an appeal of a Tribunal decision. In an appeal hearing, the applicant will present his or her case and may call, examine and cross-examine witnesses. The terms state it is for the applicant to “establish his case” and that they will have all information before the Tribunal available to them. A member of the Tribunal's staff may also call, examine and cross-examine witnesses. It is not clear from the terms of the Scheme, nor any publicly available information on the Tribunal, when witnesses may be needed and whether, considering there may be cross-examination of witnesses as in a legal trial, appeal hearings are informal in practice.

³⁷ The stated grounds are race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, gender, gender expression, gender identity, sexual orientation, residence status or health.

³⁸ Directive 2012/29/EU, Recital 9.

- [6.38] Paragraph 30 states that the standard of proof the Tribunal will apply to a determination of a claim is the balance of probabilities. The standard of proof refers to the degree of evidence needed to prove something in a legal context. The balance of probabilities is the standard of proof required in civil proceedings in Ireland. Presumably the standard applies to every element of the determination of an application. However, it is not necessarily clear to applicants as to when the standard of proof is applied. There may be dispute as to the extent of an injury, or the crime that inflicted it, or a dispute concerning the appropriate amount of the award, or the applicant's projected loss of future earnings. Because the Tribunal's approach to the standard of proof is not explained in detail, applicants may face difficulties in progressing their applications. In civil litigation a litigant would be guided by their solicitor as to how to discharge the burden of proof, when to engage expert evidence and so on. References to the standard of proof also reinforce an impression that procedures are not informal, that they are legal proceedings in which they have to meet a legal and evidential burden of proof.
- [6.39] As discussed in Chapter 3, the Tribunal appears to be operating in a semi-legalistic manner. It awards compensation without the standard features of a court, including legal representation, evidential rules, operation in public and so on. Informality has both benefits and disadvantages, but it suggested that it should be one or the other. The process should arguably involve either an informal, non-legalistic, straightforward process that can be navigated by an individual unaided, or a formal quasi-judicial body with representation and the other standard features of a legal process.
- [6.40] Some victims may not be capable – or may not feel capable – of applying for compensation under the Scheme by themselves. The Tribunal allows a victim to authorise another person to apply on their behalf. There is no mechanism within the current operation of the Scheme for additional support for applicants. Some non-governmental organisations such as Support After Homicide assist victims with compensation applications under the Scheme. Further information on the Scheme is available directly from the Tribunal secretariat (by phone or by email). However, providing assistance with applications via a freephone number or an online assistance feature would improve the accessibility of the Scheme and could also improve users' experiences applying under the Scheme.
- [6.41] Comparatively, some US states provide in-house advocates to assist with the compensation application process. In California, for example, victim advocates are available to help with the compensation application process

and they may also assist victims in finding emergency accommodation, food or clothing.³⁹ Victim Support Europe recognised Northern Ireland Victim Support as an example of best practice in this area, as advice workers can log into the victim compensation portal and provide updates on the status of a victim's application.⁴⁰

- [6.42] The Commission seeks the views of consultees on how compensation procedures can be designed to minimise secondary traumatisation of victims and maximise the reparative effect of engagement with the State's victim compensation scheme.

(d) Appeals

- [6.43] Paragraph 19 of the Scheme provides that the Tribunal is free to draw up and publish any instructions it considers necessary regarding the procedure for administering the Scheme. Instruction 1 under paragraph 19 states that applicants have three months to accept or appeal a decision of the Tribunal in writing.⁴¹ Applicants also have three months to accept a decision on appeal. Appeals are internal: if an applicant indicates in writing that they wish to appeal the initial decision, the application will be sent for a new decision (or *de novo* in legal terminology). Appeals may be decided in an oral hearing. If the original decision was made by a three-member Tribunal, those three members will not make the appeal decision.⁴² There is no further or external appeal mechanism for a decision on an application.
- [6.44] Decisions of the Tribunal can be subject to judicial review. Judicial review is a process by which an individual makes an application to the High Court to determine if a body has acted in excess of its legal authority or contrary to

³⁹ For more information on assistance with a compensation application or locating other support services in California see <<https://victims.ca.gov/for-victims/how-compensation-works/>> accessed 24 November 2021.

⁴⁰ Victim Support Europe, "A Journey from Crime to Compensation: An Analysis of Victims' Access to Compensation in the EU" (Victim Support Europe 2019) at page 31.

⁴¹ Instruction 1 was signed by the Tribunal Chairperson on June 10 2020, and became effective from 1 September 2020, see <https://www.justice.ie/en/JELR/Instruction_1_under_paragraph_19_of_the_Scheme.pdf/Files/Instruction_1_under_paragraph_19_of_the_Scheme.pdf> accessed 24 November 2021.

⁴² Paragraph 24 of the Scheme.

its duty.⁴³ However, judicial review is intended to review only the decision-making process to ensure that the decision-maker acted lawfully, not the decision itself.⁴⁴ If the decision-maker acted unlawfully (or *ultra vires*, beyond their powers), judicial review in court can quash that unlawful administrative decision or order the decision-maker to start the decision-making process again. Judicial review is not an appeal, and therefore cannot change the decision that was made. In this context, a decision of the Tribunal could be judicially reviewed if an applicant can successfully argue that the way in which the decision was made was unfair, biased or *ultra vires*.

- [6.45] Compensation is paid to victims who would otherwise be unable to recover from the offender. Awards are calculated based on the principles of liability in civil law actions under the Civil Liability Acts 1961 - 2017. The principles set out in that legislation include guidance on how to determine the extent of liability for each wrongdoer if there is more than one individual responsible for harm caused⁴⁵ and how to calculate damages where the person harmed contributed to that harm (contributory negligence).⁴⁶
- [6.46] The Tribunal can be classified as an administrative decision-making body. Some administrative decision-making bodies, such as the Workplace Relations Commission,⁴⁷ have an appeal mechanism to a court on decisions they make. The Commission will consider whether an external appeal mechanism to a court for Tribunal decisions is desirable or necessary.
- [6.47] An appeal to a court for a decision made by an administrative body is often on application of legal principle. In other words, an appeal can only be taken on a point of law. This is distinct from judicial review which, as noted above, reviews the decision-making process. In relation to decisions made under the Scheme, an appeal to a court could review the amount of compensation awarded. Creating a right of appeal to a court would provide a more robust appeal process, as such an appeal would involve the

⁴³ *Murtagh v Board of Management of St Emer's National School* [1991] 1 IR 482.

⁴⁴ De Blacam, *Judicial Review* 2nd ed (Bloomsbury 2009) at page 85.

⁴⁵ Sections 11 – 33 of the Civil Liability Act 1961.

⁴⁶ Sections 34 – 42 of the Civil Liability Act 1961.

⁴⁷ Section 46 of the Workplace Relations Act 2015.

standard features of a legal process and be decided by a judge, who is completely independent of the Tribunal and the initial decision.

- [6.48] Twelve EU Member States, including Austria, France, and Poland, provide an external appeal mechanism for a decision on compensation made in a national compensation system.⁴⁸ In Hungary for example, the compensation system decision can be appealed to the Ministry for Justice at second instance and further appealed to a court.⁴⁹ In Luxembourg, compensation decisions can be appealed to district courts.⁵⁰
- [6.49] The appeal system under the Northern Ireland Scheme could be used as a model for reform of the appeals process in this jurisdiction.⁵¹ The first stage of appeal under the Northern Ireland Scheme is an internal review by an officer of Compensation Services, the unit within the Northern Ireland Department of Justice that administers the Scheme. This officer is independent of the original decision. If not satisfied with the internal review, a victim may make an appeal to the Criminal Injuries Compensation Appeals Panel for Northern Ireland (“CICAPNI”) within 90 days of receiving of the reviewed decision. The members and staff of the Appeals Panel are entirely independent of Compensation Services, and the chair and panel members are appointed by the Northern Ireland Judicial Appointments Commission. The CICAPNI is funded by the Northern Ireland Courts and Tribunals Service. The membership of the CICAPNI is drawn mainly from the legal and medical professions but also includes lay members. Panel members will reconsider the initial application, may hold an oral hearing, and make a final decision on the compensation award. A complaints mechanism also exists within the Office of the Ombudsman for Northern

⁴⁸ Information on all European Union Member States’ compensation schemes is available through the official European Commission e-justice website, available at <https://e-justice.europa.eu/content_if_my_claim_is_to_be_considered_in_this_country-491-at-en.do?member=1> accessed 24 November 2021.

⁴⁹ Information on all European Union Member States’ compensation schemes is available through the official European Commission e-justice website, available at <https://e-justice.europa.eu/content_if_my_claim_is_to_be_considered_in_this_country-491-at-en.do?member=1> accessed 24 November 2021.

⁵⁰ *Ibid.*

⁵¹ A useful guide to the Northern Irish compensation system is available online here <<https://www.nidirect.gov.uk/publications/ni-criminal-injuries-compensation-amendment-2020-scheme-2009>> accessed 24 November 2021.

Ireland for victims who are not satisfied with the process or with the decision reached.

- [6.50] Under the scheme operated in England, Scotland and Wales, the first stage of an appeal is an internal review within the Criminal Injuries Compensation Authority (“CICA”). If the applicant is unsatisfied with the review decision, they may appeal it within 90 days to the Criminal Injuries Compensation Tribunal. An applicant making an appeal must provide the decision letter from the CICA and documents supporting their case. The Tribunal are independent of government and the CICA.⁵² An appeal may be decided on the basis of the documents submitted or by oral hearing. An applicant can request an oral hearing if they wish. An appeal hearing will be attended by two or three tribunal judges or members, a clerk, a representative from CICA and any witnesses that may be needed. The Tribunal will make a decision based on the terms of the Criminal Injuries Compensation Scheme 2012. The Tribunal must follow the ordinary procedural rules which apply to bodies of its kind in the UK.⁵³ The Tribunal can uphold the CICA decision, ask the CICA to make the decision again or the Tribunal may increase, reduce or refuse an award of compensation entirely. Previous decisions are accessible online.⁵⁴ The decision of the Tribunal is final but judicial review is available if the applicant thinks the decision was wrong for a legal reason.
- [6.51] The Commission seeks the views of consultees regarding the benefits of creating an external appeal mechanism, to a court or other appeal body on a compensation decision. It may be that a non-court-based appeal process could usefully be adopted, and the Commission is open to ideas on how an independent, fair and efficient process could function in this context.

(e) Delays

- [6.52] As previously discussed, victims often experience significant delays in receiving compensation under the Scheme. In *Byrne*, the High Court held

⁵² Information on the appeals process is available online at <<https://www.gov.uk/criminal-injuries-compensation-tribunal/print>> accessed 27 January 2022.

⁵³ Tribunal Procedure (First-tier Tribunal)(Social Entitlement Chamber) Rules 2008 S.I. 2008 No. 2685 (L. 13).

⁵⁴ See <<https://cicap.decisions.tribunals.gov.uk/Public/publicsearch.aspx>> accessed 27 January 2022.

that the thirteen-year delay between an initial application and receipt of a final award of compensation was a breach of the applicant's rights to constitutional justice.⁵⁵

- [6.53] Delays in the Scheme as currently constituted arise for many reasons. First, they are caused by the nature of the Scheme's funding. As set out in Chapter 3, the Scheme is a cash-limited grant scheme with an annual budget set and paid by the government. This means that if the Scheme's budget is spent before the end of the year, applicants must wait until the next annual funding allocation to receive awards of compensation. In this way, large awards can take up a significant proportion of the annual budget and cause knock-on effects for smaller claims. Alternatively, larger awards may take a significant amount of time to be paid as they use up a large amount of an annual budget.
- [6.54] Further funding options for the Scheme were discussed in Chapter 3. It may be necessary to re-assess how the Scheme is funded in light of the obligation on EU Member States, as set out in the EU Strategy on Victims' Rights, to increase available amounts of compensation by adapting national budgets.⁵⁶
- [6.55] Delay can also be caused by the nature of the application process. As set out above, a significant number of documents are required, and it may take months to gather all necessary information. Delay can be worsened if there is inefficient communication between applicants and Tribunal staff when they are requesting further information on an application. For example, it may take six months to receive necessary medical reports detailing the nature and extent of the injuries, which is crucial to the determination of an award. These difficulties may be felt more by applicants who do not have legal or other assistance.
- [6.56] Delay can also be caused by the nature of the Tribunal's composition and structure. Tribunal members are practicing lawyers who decide applications under the Scheme on a part-time basis. Until 2021, there were seven Tribunal members including a chairperson. One significant change to the operation of the Scheme in April 2021 was the increase in the size of the Tribunal. The Tribunal is now made up of fourteen members including a

⁵⁵ *Byrne v Criminal Injuries Compensation Tribunal* [2017] IEHC 28.

⁵⁶ EU Strategy on Victims' Rights (2020-2025) at page 17.

chairperson. Tribunal members continue to make decisions on applications on a part-time basis, alongside their own busy legal practices.

- [6.57] Ongoing legal proceedings against offenders may also cause delays in receiving a decision and/or an award under the Scheme. As set out in Chapter 7, a victim can receive compensation from the offender voluntarily or as ordered by the court under section 6 of the Criminal Justice Act 1993. This does not prevent a victim from applying for compensation under the Scheme. However, a core principle of the Scheme is the rule against double compensation. This means that a victim cannot be compensated more than once for the same injuries. If a victim has received a large amount of compensation from the offender, the Tribunal may consider that the victim has been properly compensated and refuse their application under the Scheme. In practice, the Tribunal will wait for the conclusion of any legal proceedings against the offender before deciding on an application for compensation.⁵⁷ If a criminal prosecution takes five years to come to trial, compensation as part of the criminal process (whether by a compensation order or the payment of voluntary compensation) will only be dealt with at the point of sentence. If no compensation is offered or ordered against the offender in the criminal trial, the victim will then have to wait until the compensation application is decided to receive any compensation.
- [6.58] Delays in receiving a decision and in receiving an award of compensation can cause distress to victims, with the potential to negatively impact on a victim's recovery and their ability to move on with their lives. Delays can also result in financial hardship.
- [6.59] The Commission seeks the views of consultees as to the effects of delay on applicants under the Scheme and possible options to reduce or eliminate delays in the compensation and appeals process.

(f) Access to Justice

- [6.60] Access to legal advice and representation are important elements of access to justice generally. Legal advice and legal representation are often necessary to ensure that individuals can enforce their legal rights. If an individual cannot enforce their legal rights, those rights are strictly

⁵⁷ Aylmer, "Criminal Damages" (2020) 114(7) *Law Society Gazette* 32.

aspirational and theoretical.⁵⁸ There are many barriers to accessing justice and the cost of legal services is one of them. In response to those barriers, the State operates legal aid systems, criminal and civil, to assist individuals in accessing justice. There is no constitutional right to civil legal aid in Ireland⁵⁹ and civil legal aid does not extend to the majority of tribunal proceedings in this jurisdiction. Yet tribunals have various statutory powers that can substantially affect individual's rights and can involve very legalistic procedures.⁶⁰ The Commission considers it necessary to assess access to justice considerations in the application process and procedures of the Tribunal under the Scheme.

- [6.61] Applicants for compensation under the Scheme cannot receive legal aid under the civil legal aid scheme, nor are applicants' privately-funded legal costs reimbursed by the Tribunal.⁶¹ Paragraph 20 of the Scheme states that the general intention is that informality should inform the administration of the Scheme and proceedings at the Tribunal. It is intended that victims can apply under the Scheme without legal representation, but they may hire representation if they consider it necessary.
- [6.62] In *Kelly and Doyle*⁶² the Court of Appeal discussed the question of a need for legal representation for applications under the Scheme. In light of the decision of the CJEU in the *BV* case that there is an EU right to fair and appropriate compensation, the Court stated that the question to be answered was whether there must be an ancillary procedural right to have legal aid to make a compensation claim or have the costs of making a claim awarded at the end of the process.
- [6.63] The Court considered the jurisprudence on the right of access to justice under both the Council of Europe Convention of Human Rights and Fundamental Freedoms and under the European Union Charter of

⁵⁸ Anonymous, "Constitutional Right to Legal Aid in Civil Matters" (1997) 2(4) *The Bar Review* 153.

⁵⁹ *Corcoran v Minister for Social Welfare* [1991] 2 IR 175, *McBrearty v Morris* [2003] IEHC 154, *Grogan v The Parole Board* [2008] IEHC 204. Two exceptions exist to the rule that there is no constitutional right to civil legal aid, and these are wardship proceedings (*S v Landy* High Court, 10 February 1993) and petitions for release from psychiatric facilities (*Kirwan v Minister for Justice* [1994] 2 IR 417).

⁶⁰ Phelan, "The Civil Legal Aid Bill 1995: A Critique" (1995) 13 *Irish Law Times* 109.

⁶¹ Paragraph 27 of the Scheme.

⁶² *Kelly and Doyle v Criminal Injuries Tribunal* [2020] IECA 342.

Fundamental Rights.⁶³ Similar principles apply under both, and each require a national court to consider whether the following criteria require the provision of legal aid:

- the subject matter of the litigation;
- whether the applicant has a reasonable prospect of success;
- the importance of what is at stake for the applicant;
- the complexity of the applicable law and procedure; and
- the applicant's capacity to represent himself or herself effectively.⁶⁴

[6.64] As Tribunal proceedings are not adversarial, and there is no question of costs being awarded against applicants, the Court of Appeal concluded that the absence of legal aid or possibility of reimbursement of legal costs was not in breach of the proportionality rule.⁶⁵ The Court also held that the financial viability of the Scheme and the fact that the State was not the party at fault in the determination of compensation awards were also factors in its decision not to find a corresponding right to legal aid or the reimbursement of legal costs.

[6.65] One commentator has criticised the finding of the Court in *Kelly and Doyle* in relation to legal aid and legal costs. It was argued that the "outright exclusion of costs in all cases arguably threatens to impair the core of the right to access the Tribunal" which is contrary to Article 47 of the Charter of Fundamental Rights and Article 6 of the European Convention of Human Rights.⁶⁶ Particular emphasis was placed on applicants who may face exclusion from the Scheme based on the application of the discretionary

⁶³ European Convention of Human Rights, Article 6. Jurisprudence under that article is often referred to as the "*Airey* jurisprudence" after the seminal decision of *Airey v Ireland* [1979] 2 E.H. R.R 305 which assessed the impact of legal aid on an individual's effective access to justice. Charter of Fundamental Rights of the European Union, Article 47. The interaction between the availability of legal aid and the right of effective access to justice under the Charter was analysed in Case C 279/09 *DEB v Bundesrepublik Deutschland* EU:C:2010:811.

⁶⁴ [2020] IECA 342 at paragraph 105.

⁶⁵ *Kelly and Doyle v Criminal Injuries Tribunal* [2020] IECA 342 at paragraph 118.

⁶⁶ Murphy, "The Right under EU law to Compensation for Injuries Criminally Inflicted: the Implications of BV for Irish law" (2021) 23(1) *Irish Journal of European Law* 219-248.

limitations on eligibility such as the conduct, character or way of life limitation. It was questioned whether applicants could adequately represent themselves in making submissions relevant to that paragraph of the Scheme. If they cannot, a risk is created that the applicant could be deprived of potentially significant compensation which they would otherwise be entitled to as a matter of EU law, “solely by virtue of the Tribunal’s perception of their character, conduct or way of life”.⁶⁷ A more proportionate approach was suggested in the creation of a process to consider whether to grant legal aid or award costs in difficult cases.⁶⁸

- [6.66] The blanket exclusion of legal aid and legal costs does not take into account applicants’ individual circumstances, nor the fact that applicants may be traumatised by their experience of the crime, may be vulnerable persons or minors, may be physically or mentally incapable of making an application without representation and that there is a restrictive three-month time limit to apply under the Scheme. National courts are required to assess individual circumstances to determine whether the provision of legal aid is necessary to facilitate access to justice under the relevant provisions of the Convention of Human Rights and Fundamental Freedoms and under the Charter of Fundamental Rights. Although not a court, there is an argument to be made that decision-makers under the Scheme should be provided with a discretion to consider the individual circumstances of applicants in respect of legal aid or reimbursement of legal fees.
- [6.67] Comparatively, other jurisdictions such as California⁶⁹ and South Australia will repay a victim’s legal costs incurred in the compensation process, subject to capped amounts.⁷⁰
- [6.68] In the Australian state of Victoria, the Victims of Crime Assistance Tribunal (“VOCAT”) has discretion to reimburse an applicant’s legal costs.⁷¹ In a review of the state compensation system in 2018, the Victoria Law Reform Commission recognised that the discretion of VOCAT to reimburse legal

⁶⁷ *Ibid* at page 234.

⁶⁸ *Ibid* at page 235.

⁶⁹ Subject to a maximum amount of \$500 or 10% of the award for victims and derivative victims. Article 4: 13957.7 of the California Government Code.

⁷⁰ Section 25 of the Victims of Crime Act 2001.

⁷¹ Section 48 of the Victims of Crime Assistance Act 1996.

fees added to the overall costs of running the scheme.⁷² Stakeholders informed the Victoria Law Reform Commission that access to

“adequately resourced, culturally safe and specialist legal advice and representation was vital, even if the existing scheme was to be simplified or access improved, and that all victims should be able to access high-quality legal advice.”⁷³

[6.69] In response to those concerns, the Victoria Law Reform Commission recommended both the introduction of better case management, to simplify processes for all applicants, **and**:

- (a) in applying for assistance, victims have a right to be represented by a legal practitioner;
- (b) a legal practitioner is not entitled to recover from the applicant any costs in respect of a victim’s application for assistance;
- (c) the scheme decision maker may award a legal practitioner the reasonable legal costs of, and incidental to, a victim’s application for assistance;
- (d) to assist the scheme decision maker in determining awards for legal costs, guidelines should be developed and be publicly available.⁷⁴

[6.70] It may be that the absence of legal assistance deters eligible applicants from applying for compensation. Equally some applications might not be as comprehensive as they might be if they were managed by a solicitor who has experience with engaging with vocational assessors, actuaries and other professionals routinely engaged in personal injuries litigation. The Commission is of the provisional view that some mechanism should be created for applicants to recover legal costs. The Commission would

⁷² Victoria Law Reform Commission, *Report: Review of the Victims of Crime Assistance Act 1996* (2018) at paragraph 10.151.

⁷³ *Ibid* at paragraph 10.163.

⁷⁴ Victoria Law Reform Commission, *Report: Review of the Victims of Crime Assistance Act 1996* (2018) Recommendation 17 at page 205. Recommendations in the report have been in principle approved by government and committed to progress these reforms in the next term of government, see <<https://www.lawreform.vic.gov.au/all-projects/implementation/>> accessed 7 January 2022.

welcome the views of consultees on whether a system of legal advice, legal aid or discretionary reimbursement of applicants' legal fees would, along with efforts to simplify procedures of the Tribunal, increase access to the Scheme. Recital 9 to the Victims' Directive states that victims of crime should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice.⁷⁵ Recital 39 makes express reference to legal advice for "particularly vulnerable" victims:

"Specialist support services should be based on an integrated and targeted approach which should, in particular, take into account the specific needs of victims, the severity of the harm suffered as a result of a criminal offence, as well as the relationship between victims, offenders, children and their wider social environment ... The types of support that such specialist support services should offer could include providing shelter and safe accommodation, immediate medical support, referral to medical and forensic examination for evidence in cases of rape or sexual assault, short and long-term psychological counselling, trauma care, legal advice, advocacy and specific services for children as direct or indirect victims."

- [6.71] It is noteworthy that what is envisaged by the Victims' Directive is a specialist, integrated and targeted approach.
- [6.72] The Commission is inclined to the view that legal costs should be recoverable by applicants in certain circumstances, such as those where the applicant is unable to complete the application process themselves. Do you agree that the Tribunal should have the power to award legal costs to applicants where it considers such an award to be appropriate? What limits, if any, should be imposed on such a power?

3. The Tribunal as an adjudicative body: Principles and possible reforms

- [6.73] The Tribunal is a non-statutory, administrative decision-making body. This may also be termed a quasi-judicial body, in that it considers evidence and has discretion to make determinations on the rights of applicants. Ireland

⁷⁵ Directive 2012/29/EU, Recital paragraph 9.

has a large number of administrative decision-making bodies, but these are not consistently established or designed and so there is no uniformity in their procedures. These themes are the focus of the Commission's Fifth Programme project on Reform of Non-Court Adjudicative Bodies and Appeals to Courts.⁷⁶

- [6.74] Although the Tribunal is not a court and its functions do not appear to involve the administration of justice within the meaning of Article 34 of the Constitution (unlike the functions of the WRC at issue in *Zalewski v Workplace Relations Commission*)⁷⁷, it is nevertheless clear that it is bound to discharge its functions judicially and in accordance with fair procedures.⁷⁸
- [6.75] Certain principles have been identified by the courts as desirable features of administrative decision-making. These include transparency, consistency and access to justice. These are crucial considerations in the design of a reformed statutory Scheme.

(a) Transparency

- [6.76] Until the recent revisions to the terms of the Scheme, very little information was publicly available about the procedures or members of the Tribunal. The Department of Justice website now contains more information for applicants: including the names of Tribunal members, a "Frequently Asked Questions" section, further information on accessing compensation in cross-border situations and a small number of past decisions of the Tribunal.⁷⁹
- [6.77] Paragraph 19 of the Scheme states that the Tribunal may, in connection with its annual report or otherwise, publish such information concerning the Scheme and decisions in individual cases as may, in its opinion, assist intending applicants for compensation. The first 16 Annual Reports of the Tribunal, covering the period from 1972 to 1989, were laid before the Houses of the Oireachtas. Until recently, these would have been difficult to

⁷⁶ Law Reform Commission, *Fifth Programme of Law Reform* (LRC 120 – 2019) Project 1.

⁷⁷ [2021] IESC 24.

⁷⁸ See paragraph 3.6 above.

⁷⁹ See <<https://www.justice.ie/en/JELR/Pages/WP15000110>> accessed 24 November 2021.

access, but they are now available online through the digitised “Historic Documents” section of the Houses of the Oireachtas website.⁸⁰ This is not, however, by any means the most accessible manner in which the Annual Reports could be made available to the public. It underscores the need for the Tribunal to have a dedicated comprehensive website. The Tribunal did not publish annual reports between 1990 and 2018; the practice of publishing an annual report recommenced in 2019. The Tribunal’s Annual Reports for 2019 and for 2020 are available on the Department of Justice website.⁸¹

[6.78] In *Kelly and Doyle*, the Court of Appeal criticised the Tribunal’s failure to make past decisions available on grounds of fairness, proportionality, and consistency in decision-making.⁸² It was stated that the inability to access to previous decisions was compounded by the absence of any other source of information about the issue, such as guidelines. The availability of past annual reports of the Tribunal was not considered sufficient guidance for potential applicants under the Scheme.⁸³ It was further recognised that the manner in which the Tribunal reaches a decision on this issue should be more transparent. The Court concluded that this lack of access to information was both a breach of constitutional fair procedures and a failure to effectively protect the exercise of the right under EU law to compensation as found by the CJEU in the *BV* case.⁸⁴ Past decisions of the Tribunal were made available on the Department of Justice website following the judgment in *Kelly and Doyle*. One commentator stated that the doctrine of fair procedures invoked by the Court of Appeal should have

⁸⁰ The digitised “Historical Documents” database of the Houses of the Oireachtas is available at <<https://www.oireachtas.ie/en/publications/historical-publications/>> accessed 7 January 2022. Osborough, “Note: The Work of the Criminal Injuries Compensation Tribunal” (1978) 13 *Irish Jurist* (NS) 320 discusses the content of the first three reports of the Tribunal, the first report covering the period from 1972 (from when the 1974 Scheme was deemed to apply) to 1975, the second covering 1975 to 1976 and the third 1976 to 1977.

⁸¹ See <<https://www.justice.ie/en/JELR/Pages/WP15000110>> accessed 24 November 2021.

⁸² *Kelly and Doyle v Criminal Injuries Tribunal* [2020] IECA 342 at paragraph 162.

⁸³ *Kelly and Doyle v Criminal Injuries Tribunal* [2020] IECA 342 at paragraph 162.

⁸⁴ *Ibid.*

implications” for the Tribunal’s transparency obligations extending well beyond the boundaries of paragraph 14” (now paragraph 13).⁸⁵

- [6.79] Despite the availability of some past decisions of the Tribunal in respect of paragraph 13 (conduct, character or way of life limitation) and paragraph 20 (time limit to apply), there is still little transparency in how discretionary limitations on eligibility are applied in practice by the Tribunal. This could be resolved by enacting a reformed statutory scheme which clearly indicates factors Tribunal members can consider in the exercise of the various discretions afforded to them in determining applications for compensation. This would continue to afford Tribunal members discretion and flexibility in decision-making, while also being more transparent for applicants. Publishing a user guide to the Scheme could also make all processes of the Tribunal more transparent and accessible for victims. In addition, the Commission considers that, as an interim measure pending broader legislative reform, details of awards and decisions should be published as a matter of course to ensure consistency and to enable practitioners and applicants to engage with the Tribunal in an informed way.

(b) Consistency

- [6.80] Naturally, victims will have different injuries and different expenses following a crime. Discretion affords flexibility to decision-makers and can potentially prevent unfairness that could arise from a strict interpretation of terms or rules. However, consistency in the exercise of discretion is of paramount importance and issues of unfairness and unequal treatment could arise if victims of similar injuries with similar expenses do not receive similar awards of compensation under the Scheme. This could arise if Tribunal members apply the discretionary limitations on eligibility differently.
- [6.81] The Court of Appeal in *Kelly and Doyle* raised concerns about fairness and proportionality in the application of these limitations on eligibility and consistency in decision-making. The Court determined that the question to be answered was whether consistency in the application of paragraph 14 of the Scheme (now paragraph 13 under the revised 2021 terms) in different cases is important to ensure that Tribunal decisions are fair rather than

⁸⁵ Murphy, “The Right under EU law to Compensation for Injuries Criminally Inflicted: the Implications of BV for Irish law” (2021) 23(1) *Irish Journal of European Law* 219-248.

arbitrary. The Tribunal stressed the individuality of the decision-making process and the lack of any database recording previous decisions on paragraph 14.⁸⁶ The Court posed a hypothetical situation to examine this issue:

“One might consider the following hypothetical example; suppose the Tribunal had before it three claimants; and that all their cases were the same in all material circumstances; and that all their criminal records were likewise the same. Suppose, further, that the first claimant received a substantial award of compensation, the second only 50% of that award, and the third no compensation at all. It would seem to me that such inconsistency would be considered unfair. It is in my view the type of matter which is and should be susceptible of a consistency of approach.”⁸⁷

[6.82] The Court of Appeal held that, in its view, the Tribunal should strive for a measure of consistency in the application of paragraph 14, even if it currently does not. Ní Raifeartaigh J went on to state that:

“it could not be said that the right to fair and appropriate compensation under EU law could be said to be adequately vindicated if the Irish system of compensation allowed room for arbitrary and inconsistent awards because paragraph 14 of our Scheme was applied in an inconsistent manner on the issues of conduct, character and way of life.”⁸⁸

[6.83] As discussed in Chapter 5, the small sample of past decisions of the Tribunal which have been made publicly available following the *Kelly and Doyle* judgment show significant inconsistencies in relation to the treatment of applicants. One example of this is how one applicant with a prior conviction was refused an award under the Scheme, whereas another application with a prior conviction(s) was considered eligible to receive an award. In the latter decision, the Tribunal member stated in their written decision that the applicant’s prior convictions did “not engage paragraph 14

⁸⁶ *Kelly and Doyle v Criminal Injuries Tribunal* [2020] IECA 342 at paragraph 148.

⁸⁷ *Ibid* at paragraph 158.

⁸⁸ *Ibid* at paragraph 160.

of the Scheme".⁸⁹ These two decisions are completely at odds with each other: in one, a criminal record was used to justify refusal of an award of compensation, in another it was not used to reduce an award of compensation.

- [6.84] Leaving aside the question of whether it is fair and just to exclude an applicant on the basis of past criminal convictions, there is clearly an inconsistency in the approach to these cases that has resulted in unequal treatment. The Commission seeks the views of consultees as to how that risk of inconsistency in the exercise of discretion can be mitigated. In particular, the Commission would welcome submissions on whether legislation providing for a reformed Tribunal should include the criteria for eligibility and/or exclusion, or whether such guidance should be included in a Code of Practice.

⁸⁹ Application number 51954, Access to past decisions
<https://web.archive.org/web/20210721115625/https://www.justice.ie/en/JELR/Pages/Access_to_past_decisions> accessed 24 November 2021.

Tell us your views

- Q. 6.1** The Commission is committed to assessing the processes of the Tribunal with a view to ensuring not only that they are efficient and fair, but also that they do not re-traumatise victims. The Commission seeks the views of consultees on all aspects of the application process: its format, whether it is generally easy or difficult to complete, and aspects which are not clear or could be improved.
- (1) What information is necessary to complete an application for compensation?
 - (2) How can administrative burdens be reduced?
- Q. 6.2** Would an online application process reduce administrative obstacles and make the scheme more accessible?
- (1) Would an online application process be suitable for all claims, or only for more minor claims?
 - (2) What are the disadvantages of an online system?
- Q. 6.3** The current Scheme requires applications for compensation to be made within three months of the date the criminal injury is sustained. No applications may be accepted by the Tribunal where the event giving rise to the injury took place more than two years prior to the date of the application.
- (1) Are time limits required?
 - (2) If so, are the existing time limits appropriate?
 - (3) Are there circumstances in which extensions of time should be permitted? If so, what circumstances?
- Q. 6.4** The Commission would like to hear from consultees on the kinds of supports that would assist applicants in the application process:
- (1) Are additional supports required for particular categories of victim? If so, what supports are required?
 - (2) What additional supports are required for applicants with language barriers, physical or intellectual difficulties?
 - (3) What additional supports are required for families and loved ones bereaved by homicide in the application process?
 - (4) What additional supports are required for victims making cross-border applications from other jurisdictions?

- Q. 6.5** What measures are required to protect victims from secondary victimisation in the compensation process generally?
- Q. 6.6** The Commission seeks the views of consultees as to the effects of delay on applicants under the Scheme and possible options to reduce or eliminate delays in the compensation and appeals process.
- Q. 6.7** The Commission seeks the views of consultees as to whether applicants require legal advice and/or representation in the compensation process. If it is considered that legal assistance is necessary and desirable, should provision be made for legal aid?
- Q. 6.8** Should the Tribunal have discretion to award legal costs to applicants where it considers such an award to be appropriate? What limits, if any, should be imposed on such discretion?
- Q. 6.9** The Commission seeks the views of consultees regarding the benefits of creating an external appeal mechanism, to a court or to a body such as the Ombudsman, on a compensation decision.
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CHAPTER 7

INTERACTION WITH COMPENSATION IN THE CRIMINAL PROCESS

1. Introduction

- [7.1] Studies have shown that although it is likely to be limited, victims prefer compensation from the offender to compensation from the State, because it represents acknowledgement and recognition by the offender of harm done.¹ Therefore, receiving compensation from an offender rather than from the State may contribute to the reparative aim of victim satisfaction.
- [7.2] In Ireland, it is common practice for compensation to form part of the criminal process: offenders frequently offer compensation voluntarily at sentence, as an indication of remorse and an acknowledgement of tortious wrongdoing (a civil wrong). It is a means by which an offender can seek to mitigate sentence.
- [7.3] As will be seen below, it is also open to the sentencing court to make an order requiring an offender, or where appropriate, their parent or guardian, to pay compensation for any personal injury or loss resulting from the offence to any person who has suffered such injury or loss.² The Criminal Justice Act 1993 provides for compensation to be ordered to be paid to the victim from the offender at sentence.
- [7.4] Unlike in many American States where “restitution” orders from offender to victim are mandatory, there is no such uniformity in the approach to compensation in the Irish sentencing system. Equally, there is no interaction between the Criminal Injuries Compensation Tribunal and the

¹ Bazemore, “Crime Victims, Restorative Justice and the Juvenile Court: Exploring Victim Needs and Involvement in the Response to Youth Crime” (1999) 6 *International Review of Victimology* 295 -320; Bolivar, “Conceptualizing Victims’ ‘Restoration’ in Restorative Justice” (2010) 17 *International Review of Victimology* 237 – 265; Doak and O’Mahony, “The Vengeful Victim? Assessing Attitudes of Victims Participating in Restorative Youth Conferencing” (2006) 13 *International Review of Victimology* 157-177; all cited in Miers, “Offender and State Compensation for Victims of Crime: Two Decades of Development and Change” (2014) 20(1) *International Review of Victimology* at page 148.

² Section 6 of the Criminal Justice Act 1993.

criminal court in which a related criminal prosecution takes place. This chapter explores opportunities for such interaction, and possibly integration, as part of a comprehensive, victim-centred compensation process.

2. Legal provisions on compensation from offenders as part of the criminal process

(a) The Victims' Directive

- [7.5] Article 16 of the Victims' Directive provides that victims are entitled to have a decision on compensation from the offender made in the course of criminal proceedings:

“1. Member States shall ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings.

2. Member States shall promote measures to encourage offenders to provide adequate compensation to victims.”

- [7.6] Therefore, EU law requires Member States to operate national state-funded compensation systems, under the Compensation Directive, and a process to receive a decision on offender paid compensation in legal proceedings, under the Victims' Directive.

(b) The Probation of Offenders Act 1907

- [7.7] A probation order is a formal warning to a person that if they do not keep the peace and comply with conditions imposed by the court, they will be brought back before the court for punishment. The Probation of Offenders Act 1907³ allows a sentencing court to supplement a probation order with an order directing the offender to pay damages for injury, or compensation for loss, and such costs of the proceedings as the court considers reasonable.⁴

³ (7 Edw 7 c 17).

⁴ Section 3 of the Probation of Offenders Act 1907.

(c) The Criminal Justice Act 1993

[7.8] Compensation orders can be made by a judge in any criminal case under section 6 of the Criminal Justice Act 1993. Section 6(1) provides:

"... on conviction of any person of an offence, the court, instead of or in addition to dealing with him in any other way, may, unless it sees reason to the contrary, make ... an order (in this Act referred to as a "compensation order") requiring him to pay compensation in respect of any personal injury or loss resulting from that offence (or any other offence that is taken into consideration by the court in determining sentence) to any person (in this Act referred to as the "injured party") who has suffered such injury or loss."

[7.9] In deciding whether to make a compensation order under the 1993 Act, criminal courts must have regard to the offender's financial means.⁵ Civil courts do not have to consider the financial means of the tortfeasor (the person who has committed a civil wrong) in making awards of damages.

[7.10] Under the 1993 Act, the amount of compensation ordered cannot exceed the amount that would have been recoverable in a civil action for an injury of that nature.⁶ As outlined above, in making a compensation order, a judge must take the means of the offender into account. A section 6 order is flexible, as the convicted person can apply to have it amended. A section 6 order can be made in any type of criminal proceedings and can be paid in instalments. The injured party can make representations to the court on the offender's application to amend or nullify the order.⁷

3. Interaction between awards of compensation under the Scheme and court-ordered compensation

(a) Delay due to parallel proceedings

[7.11] The Tribunal will deduct any sums paid to or for the benefit of the victim or their dependents by way of compensation or damages from the offender or

⁵ Section 6(5) of the Criminal Justice Act 1993.

⁶ Section 6(2) of the Criminal Justice Act 1993.

⁷ Section 6(8) of the Criminal Justice Act 1993.

any person on the offender's behalf following the injury.⁸ This means that any amount of compensation ordered by the court under section 6 of the Criminal Justice Act 1993 and paid to the victim, or compensation voluntarily paid by the offender, will be deducted from an award of compensation claimed under the Scheme. This term is in line with the principle against double compensation under the Scheme and indicates that the Scheme is in theory compatible with court-ordered compensation. What appears to be at issue is the sequence of compensation assessments under the Scheme and by the courts.

- [7.12] Court-ordered or voluntary compensation from the offender is determined or offered at the sentencing stage of criminal proceedings. Damages are calculated and awarded at the conclusion of civil proceedings (unless settled by agreement previously). In practice the Tribunal will await the outcome of any civil or criminal proceedings against the offender to determine if compensation is offered or ordered before deciding on a compensation application.⁹ This not clearly stated in the terms of the Scheme and so may not be widely known to applicants.
- [7.13] Victims are still required to apply under the Scheme within the three-month time limit, regardless of whether criminal or civil proceedings are ongoing.¹⁰ Under the terms of the Scheme at present, it appears that there are two options for victims seeking compensation for their injuries with ongoing court proceedings, which will be examined in turn.
- [7.14] In the first scenario, Victim A waits until the conclusion of criminal or civil proceedings to apply for compensation under the Scheme. Although the legal proceedings take two years, and the application is outside the time frame to apply for compensation under the Scheme, Victim A applies and indicates on the application form the reason for the delay in applying (waiting for the conclusion of legal proceedings). The Tribunal may exercise discretion and accept Victim A's late application. If Victim A received compensation from the offender, as ordered by the court under section 6 of

⁸ Paragraph 16 of the Scheme.

⁹ Aylmer, "Criminal Damages" (2020) 114(7) *Law Society Gazette* 32.

¹⁰ Past decisions made publicly available indicate that the Tribunal do not generally consider awaiting the conclusion of legal proceedings as a sufficient reason to waive the three-month time limit to apply under the Scheme – see access to past decisions <[https://web.archive.org/web/20210721115625/https://www.justice.ie/en/JELR/Pages/Access to past decisions](https://web.archive.org/web/20210721115625/https://www.justice.ie/en/JELR/Pages/Access%20to%20past%20decisions) > accessed 29 November 2021.

the Criminal Justice Act 1993, they must disclose this amount on the application form. The Tribunal will then award compensation, subject to the other limitations on eligibility under the Scheme as set out in Chapter 5, with the amount of compensation already received deducted from an award under the Scheme. The Tribunal may consider the amount paid by the offender to be sufficient compensation and therefore refuse any further award. If no compensation was awarded by the court under a section 6 order, the Tribunal may use their discretion to accept Victim A's late application and award compensation in line with all other terms of the Scheme.

- [7.15] In the second scenario, Victim B applies for compensation under the Scheme **before** the conclusion of criminal or civil proceedings and provides details of those proceedings to the Tribunal. The Tribunal may either invoke the informal practice of "stopping the clock" on the application, until the conclusion of those proceedings, or proceed to determine the compensation application. If, at the conclusion of those legal proceedings, compensation has been offered or ordered by the court, and compensation has been awarded under the Scheme, Victim B will be required to reimburse the Tribunal for the duplicate compensation (due to the fundamental principle of the Scheme that compensation is not paid twice for the same injuries).
- [7.16] Neither option appears to be an efficient or clear process for victims. It is arguable that there should be just one process for all applicants under the Scheme who have ongoing legal proceedings. Legislating for a statutory scheme of victim compensation provides an opportunity to assess how to make this process more efficient. The Commission seeks the views of consultees on how to better integrate these parallel processes in a clear and efficient manner for victims.

(b) Difficulties in the blending of civil and criminal mechanisms

(i) The nature of section 6 compensation orders

- [7.17] Section 6 compensation orders can be considered a hybrid of criminal and civil law. Tort law is primarily concerned with private disputes between individuals, while criminal law is concerned with the regulation of conduct, the maintenance of social order and the imposition of penalties. Reflecting on the distinction, McMahon and Binchy have said the introduction of court-ordered compensation orders as part of the criminal process (under section 6 of the Criminal Justice Act 1993), was a distinct cultural shift in

which the sharp boundaries between the criminal and the civil law have been blurred.¹¹

- [7.18] O'Malley has noted a lack of clarity on the purpose or rationale for court-ordered compensation in criminal cases: whether it is to spare victims from having to take separate civil proceedings against offenders, or whether compensation orders are designed to advance restorative or reparative objectives and, perhaps, to instil in offenders a sense of responsibility for their actions.¹² These are questions that might usefully be addressed in legislation.
- [7.19] Walsh has commented that, strictly speaking, the compensatory nature of such payments means that they ought not to be considered part of the punishment, although in practice they are inevitably perceived to be.¹³ This is problematic, in that it can lead to perceptions of affluent offenders being in a position to reduce their sentence, as the Court of Appeal put it in *People (DPP) v Lyons*:

“In the view of the Court, the making of an order for compensation in serious criminal cases at the time of sentencing by an accused is unavoidably a delicate and difficult issue. There can never be any question of it being applied in a way that suggests there is one law for the rich and one law for the poor. Nonetheless, the Oireachtas has ordained that a sentencing court must have the option of compensating a victim by means of a ‘compensation order’ by reference to the accused’s means. This statutory coupling of a ‘compensation order’ with the sentencing in serious indictable cases, could at least be said to be unsatisfactory (and warrant review by the legislature) as it risks giving rise to the misconception that in such serious cases an accused could escape the appropriate sentence simply by the payment of compensation.”¹⁴

¹¹ McMahon and Binchy, *The Law of Torts* 4th ed (Bloomsbury 2013) at paragraph 1.11.

¹² O'Malley, *Sentencing Law and Practice* 3rd ed (Thomson Reuters 2016) at paragraph 9-126.

¹³ Walsh, *Walsh on Criminal Procedure* 2nd ed (Round Hall 2016) at paragraph 24-444.

¹⁴ *Director of Public Prosecutions v Lyons* [2014] IECCA 27.

[7.20] As has been seen, the Scheme sits outside both the tort law and criminal law systems. Much as the parameters of the civil and criminal law have not been fully worked out in respect of compensation orders, the integration of the state-compensation process and the criminal process, and how they might be sequenced to meet the needs of victims effectively, does not appear to have been given detailed consideration.

(ii) The role of compensation orders at sentencing

[7.21] In *People (DPP) v Lyons* the Court of Criminal Appeal held that a compensation order should only be made in addition to an appropriate sentence, including imprisonment, that meets the gravity of the offence.¹⁵ The Court pointed to the very distinct nature of the processes of civil litigation and criminal prosecution:

“a person who, through criminal wrongdoing, inflicts injury or loss on another person ... is separately and distinctly liable to pay full compensation in civil proceedings. It represents a civil liability independent of the criminal liability of the convicted person.”¹⁶

[7.22] The Court noted that compensation on foot of civil proceedings might be paid before or after conviction in a criminal case, and as such the payment of compensation should not automatically be a factor in mitigation. However, because compensation is paid at sentence it is inextricably linked with it. It can therefore be difficult to escape the suggestion that compensation should count towards mitigation.

[7.23] Approaching compensation at the conclusion of the trial can have important symbolic benefits. It can also spare the victim the cost and stress of separate civil proceedings. That said, the payment of compensation sits uneasily in the criminal process, as seen in the case of *People (DPP) v McCabe (No. 2)*¹⁷ in which the victim of an aggravated sexual assault was drawn into discussions on sentencing. The trial judge had asked prosecuting counsel if the victim understood the consequence of accepting compensation, commenting “it is not my practice to combine payment of

¹⁵ *Director of Public Prosecutions v Lyons* [2014] IECCA 27 at paragraph 68.

¹⁶ *Ibid.*

¹⁷ [2005] IECCA 90.

monies with imprisonment. Do you wish to consult with her?" After a consultation with the victim the sentencing judge was prepared to accept the sum offered "knowing" what the consequences of the acceptance might be. The Court of Criminal Appeal found an error in principle in the way in which the matter was approached. The Court held:

"This court ... would be strongly of the view that victims in circumstances of this nature should not be drawn into any sort of pro-active role in determining or negotiating the amount of any compensation which an accused person may offer with a view to mitigating sentence. The extent of the victim's involvement should be either to indicate a willingness to accept or refuse any sum of compensation that may be offered. Thereafter, it is entirely a matter for the court to determine the appropriate sentence having regard to all the multiple considerations which must be borne in mind in this context, including any payment of compensation offered or made. It is inappropriate in the view of the court to draw the victim in any way into the decision as to the amount of sentence."¹⁸

[7.24] The Court of Criminal Appeal reached the same conclusion in the case of *People (DPP) v McLaughlin*,¹⁹ where the court made it very clear that victims should not be drawn into any kind of proactive role in determining or negotiating the amount of compensation that may be acceptable in mitigation of the sentence. The victim should be asked simply if they are willing to accept the compensation being offered. The sentence is to be determined by the court in its absolute discretion, having regard to all of the relevant elements, including the payment of compensation.

[7.25] These cases show the difficulties created by the hybrid nature of the compensation order. In ordinary civil litigation, if compensation were offered, an injured party would rightly have an active role in the negotiation of a settlement. Unquestionably, tying that kind of negotiation into the sentencing process is highly problematic, even inappropriate. However, from the victim's perspective, limiting the degree to which they can engage in discussions on compensation might well be perceived as a means of

¹⁸ [2005] IECCA 90 at paragraph 28.

¹⁹ [2005] IECCA 91, [2005] 3 IR 198.

excluding them from a process that should be reparative, and of denying them agency within that process.

(c) Are section 6 compensation orders under-utilised?

- [7.26] Information on how often section 6 compensation orders are made by judges is not collected; indeed, there is a regrettable lack of data available on the operation of the criminal justice system in Ireland more generally.²⁰ Therefore, it is not clear whether these orders are common practice or an under-utilised mechanism of restorative justice. Academic commentary suggests that section 6 orders are not frequently made by the courts.²¹ It would appear that the voluntary payment of compensation is the more common means by which compensation is paid from offender to victim in the course of the criminal process.
- [7.27] There are many reasons as to why court-ordered compensation might be underused. First, there is the question of the financial means of criminal defendants: people who appear before the criminal courts are more likely to be marginalised and to come from circumstances of socio-economic disadvantage. Second, if the court makes an order and it is not complied with, the offender has to be pursued to enforce it,²² which might add to a victim's distress. Finally, compensation in the criminal process can give an impression that offenders with means can "buy" themselves out of a longer sentence.²³
- [7.28] Situating compensation in the criminal process results in an uneasy blending of civil and criminal law, the contours of which have not been fully

²⁰ In its *Report on Suspended Sentences*, the Commission recommended that consideration be given to providing each relevant agency within the criminal justice system the necessary resources for the establishment of a dedicated data analysis unit. Such a unit would facilitate the collection, collation and dissemination of data and support evidence-based policy making (LRC 123-2020 at page 273).

²¹ Coffey, "The Victim of Crime and the Criminal Justice Process" (2006) 16(3) *Irish Criminal Law Journal* 15.

²² Payments under a compensation order must be made to a District Court clerk, and from the clerk to the injured party (Criminal Justice Act 1993, section 7(1)). The procedure that applies under the Family Law (Maintenance of Spouses and Children) Act 1976 applies to compensation orders, including provisions on attachment of earnings (Criminal Justice Act 1993, section 7(2)).

²³ Rogan, "The Role of Victims in Sentencing – the Case of Compensation Orders" (2006) 24(24) *Irish Law Times* 202-209.

defined. The Commission is keen to learn of consultees' insights into how frequently section 6 orders are made at sentencing.

4. Potential for reform

- [7.29] An obvious practical issue with court-ordered compensation is that the offender must be identified, prosecuted, convicted, and have sufficient means to pay compensation. Paradoxically, because it is the practice of the Tribunal to await the outcome of criminal proceedings, an applicant to the Tribunal whose assailant has not been identified can access compensation much more quickly than an applicant whose compensation application is delayed by awaiting the outcome of criminal proceedings. There are exceptions, in that it is possible for applicants to be awarded interim awards from the Tribunal before criminal proceedings have concluded, but such payments are an exception to the general rule. It is for these reasons, and due to obligations under EU law, that a statutory process for court-ordered compensation can never replace the need for a state-funded compensation scheme.
- [7.30] Waiting for the conclusion of court proceedings, which could take several years, inevitably causes significant delay in assessing and awarding compensation under the Scheme. This process does not appear to be a time efficient system for victims to receive compensation. The Commission questions if there are valid reasons to await the conclusion of court proceedings in every case before a decision is made on an application for compensation.

(a) Streamlining parallel processes and protecting the accused from prejudice

- [7.31] The Commission is inclined to the view that where injuries of a serious or significant nature have been sustained, and where there is no question that they have been criminally inflicted, delaying an award of compensation while parallel legal proceedings are ongoing can cause undue hardship. The criminal process serves a different purpose than the compensation process, it primarily operates to determine whether a particular accused person is guilty of the offence alleged. While the question of what crime has been committed (for example whether an act constitutes murder or manslaughter) also has to be determined, in most cases in which death has resulted from violence it is clear that, whatever the label ultimately attached, the killing was unlawful. The same can be said of violent, unprovoked attacks. In that vein, the current system which requires victims

to wait until the conclusion of criminal proceedings to have a decision made on their application for compensation appears to the Commission to be inefficient and a possible cause of hardship for victims.

- [7.32] Protection from prejudice and the right not to incriminate oneself are aspects of the accused person's presumption of innocence, fundamental fair trial rights protected both by Article 38 of the Irish Constitution and Article 6 of the ECHR. There is a possibility of prejudice when civil and criminal proceedings run in parallel: Walsh cites the example of civil enforcement proceedings being initiated by a public authority when criminal matters arising from the same facts are pending. To defend the civil action might undermine the right to silence that applies in the criminal case. The question arises as to whether the civil proceedings should be stayed until the conclusion of the criminal prosecution; in practice that can mean a long delay in determining the civil aspect.²⁴
- [7.33] There is no general principle to the effect that criminal proceedings must take priority over parallel civil proceedings arising out of the same matter.²⁵ Clearly, compensation cannot be ordered to be paid by an offender before a determination of their guilt or innocence has been made, which can only take place after a criminal trial. However, the process of seeking state-funded compensation operates whether an offender is identified, or indeed convicted. A victim is a victim whether a person is identified, apprehended or convicted.²⁶ The Commission is keen to determine if the process of court-ordered compensation could be restructured so that it offers protection for accused persons from prejudice, while maintaining the integrity of the sentencing process and providing reparation for victims. For example, could the compensation order at the conclusion of the criminal trial operate notionally in favour of the victim, with provision for the order in fact to operate in favour of the state criminal injuries compensation fund, so that the cost of compensation is not unnecessarily borne by the taxpayer? Attachment of earnings orders

²⁴ Walsh, *Walsh on Criminal Procedure* 2nd ed (Round Hall 2016) at paragraph 22-29.

²⁵ Walsh, *Walsh on Criminal Procedure* 2nd ed (Round Hall 2016) at paragraphs 22-30, citing *O'Flynn v Mid-Western Health Board* [1991] 2 IR 223, *Wicklow County Council v O'Reilly* [2006] 3 IR 623.

²⁶ Recital 19 of the Victims' Directive provides: "A person should be considered to be a victim regardless of whether an offender is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between them..."

could operate in favour of the compensation fund, and delays in providing victims with much needed supports could potentially be alleviated.

- [7.34] Anonymity in respect of criminal injuries compensation could also offer protection against potential prejudice.

(b) Reducing administrative barriers and hurdles

- [7.35] Legislation to put the Criminal Injuries Compensation Scheme on a statutory footing provides an opportunity to design a system that reduces unnecessary barriers and procedural hurdles for victims of crime. A straightforward option to reduce some of those barriers may be to provide a formal system of information sharing between criminal courts and the Tribunal to reduce the administrative burden on applicants. This could involve the use of court documents or information about the victim's injuries from the book of evidence in the criminal trial as supporting documents for a victim's compensation application.

The Commission is keen to learn the views of consultees as to how court-ordered compensation in the criminal process could be streamlined and integrated with the criminal injury compensation process. The Commission seeks the views of consultees on how these parallel systems of compensation could work together more efficiently. The Commission also seeks the views of consultees on the possibility of reducing procedural hurdles for victims of crime with ongoing legal proceedings by introducing information sharing by the criminal or civil courts with the Tribunal, such as sharing the book of evidence from a criminal trial, as supporting documents for a victim's compensation application.

5. Tell us your views

- Q. 7.1** The Commission is keen to learn of consultees' insights into how frequently orders under section 6 of the Criminal Justice Act 1993 are made at sentencing.
- Q. 7.2** Do section 6 orders meet the objectives of the Victims' Directive that:
- (1) victims are entitled to obtain a decision on compensation by the offender, **within a reasonable time**, except where national law provides for such a decision to be made in other legal proceedings, and
 - (2) Member States shall promote measures to encourage offenders to provide adequate compensation to victims.
- Q. 7.3** How could such orders be improved, or measures to encourage offenders to provide adequate compensation be strengthened?
- Q. 7.4** The Commission is keen to determine if the process of court-ordered compensation could be restructured so that it offers protection for accused persons from prejudice, while maintaining the integrity of the sentencing process and providing reparation for victims. The Commission is inclined to the view that the current process of waiting for the conclusion of criminal or civil proceedings to decide on an application for compensation under the Scheme is potentially inefficient. It may also cause financial hardship for victims.
- (1) Do you have any views or suggestions on how to better integrate these parallel processes in a clear and efficient manner for victims?
 - (2) Could the compensation order at the conclusion of the criminal trial operate notionally in favour of the victim, with provision for the order in fact to operate in favour of the state criminal injuries compensation fund, so that the cost of compensation is not unnecessarily borne by the taxpayer?
- Q. 7.5** The Commission seeks the views of consultees on the possibility of reducing procedural hurdles for victims of crime with ongoing legal proceedings by introducing information sharing from the criminal or civil courts to the Tribunal, such as sharing the book of evidence from a criminal trial, as supporting documents for a victim's compensation application.
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FULL LIST OF QUESTIONS TO CONSULTEES

For convenience, the Commission sets out here the full list of questions on which the views of consultees are sought. Submissions may address some or all of the issues raised in this Consultation Paper and may also address other issues that consultees believe may be of relevance.

Chapter 3 Legislating for Victim Compensation

Q 3.1 Do you agree that legislation is necessary to underpin Ireland's criminal injuries compensation process?

Q 3.2 The Commission seeks to identify the guiding principles that should be reflected in any legislation, so as to ensure that the provision of state compensation to victims of crime accords with a more modern, trauma-responsive approach to the needs of crime victims. Do you agree that the following would be appropriate guiding principles to be included?

- (1) Reparation;
- (2) Compensation as of right;
- (3) Acknowledgement and solidarity; and
- (4) Minimisation of secondary victimisation.

Are there additional or different guiding principles that should be reflected in legislation in this context?

Q 3.3 The Commission considers that a steady and consistent funding model is essential to the effective and efficient functioning of any victim compensation scheme. The Commission seeks consultees' views as to whether some of that funding should come from court fines and the confiscated proceeds of crime and/or sources other than the Exchequer.

Q 3.4 The Commission seeks consultees' views on the following:

- (1) Whether the Scheme (including any amended Scheme) should continue to be administered by the Department of Justice; or
- (2) Whether the Scheme should be administered by a body such as the Personal Injuries Assessment Board or the State Claims Agency); or
- (3) Whether a new specialist criminal injuries compensation body is desirable.

Q 3.5 If a new specialist body is desirable, what should its functions be?

Q 3.6 Should it be concerned only with administering financial compensation (including adjudicating on claims for compensation), or should other measures, such as the provision of non-financial supports and services (for example counselling) and/or restorative justice measures, form part of its functions?

Q 3.7 If other measures should form part of its functions:

- (1) What services could or should be provided?
- (2) What professions and skills are required?
- (3) How should the body be structured?
- (4) How might such a body intersect with existing state- and NGO-provided victim services?

Q 3.8 In addition to administering the compensation scheme, should a specialist body function as a “one-stop-shop” for victims? Should it have responsibility for providing information and assistance to victims going through the criminal justice system?

Chapter 4 Awards of Compensation

- Q 4.1** Should provision be made for the awarding of damages for pain and suffering (or, in the language of the *BV* case, damages for “non-material loss”) in all claims (not limited to fatal claims)?
- Q 4.2** In what circumstances are emergency and/or interim awards desirable? How might such awards operate?
- Q 4.3** Should provision be made for compensation to be paid by periodical pension or periodical payment order? If so, in what circumstances?
- Q 4.4** Do consultees consider that capped awards of compensation would provide a fairer system for a greater number of applicants, promoting consistency and transparency? Alternatively, do capped awards have the potential to operate unfairly?
- Q 4.5** Is there a case to be made for a tariff system of compensation, whether generally or (for example) in relation to any compensation payable for pain and suffering? What would be the relative advantages and disadvantages of a tariff system be?

Chapter 5 Eligibility and Exclusion

- Q 5.1** The terms of the Scheme set out the categories of victim who may apply for compensation: the victim themselves, any dependant of a deceased victim, or a person who has suffered financial loss because of the victim’s injuries. Are the existing categories of victim under the Scheme in this jurisdiction sufficient? Should they be further classified, or classified differently? If so, how?

- Q 5.2** European Union law requires fair and appropriate compensation to be paid to victims of violent intentional crime. There is a lack of clarity in the terms of the Scheme on the entitlements of victims without physical injury to receive compensation. Do you agree that psychological injury should be expressly included within the definition of a crime of violence in a statutory reformed scheme?
- Q 5.3** The current minimum award threshold is €500. Does that minimum strike a fair balance between maximising Tribunal resources and ensuring victims are appropriately compensated?
- (1) If your answer is no, can you suggest a minimum award threshold that would be fair and appropriate?
- Q 5.4** A standard feature of most criminal injury compensation schemes is that the applicant/victim is required to “provide all reasonable assistance” in the compensation process and also to the police in the investigation of the offence.
- (1) Is it fair and appropriate to refuse an award of compensation if an applicant has withdrawn their complaint from the Garda Síochána?
- Q 5.5** No compensation is payable where the Tribunal is satisfied that the victim was responsible for, and contributed to, because of provocation or otherwise, the offence giving rise to their injuries, and the Tribunal may reduce the amount of an award where, in its opinion, the victim has been partially responsible for the offence.
- (1) How should reference to an applicant’s contribution to their injuries be defined for the purpose of limiting eligibility?
- (2) Should intoxication of the victim form part of an assessment of “contribution to their injuries”?
- Q 5.6** Compensation can be refused or reduced if the Criminal Injuries Compensation Tribunal considers that the conduct of the victim, or his or her character or way of life make it inappropriate that he or she should be granted an award. The Commission considers that this exclusion, as currently drawn, is overly broad and potentially disproportionate. The references to character and way of life are both vague and subjective. The views of consultees are sought on how to reform this limitation on eligibility:

- (1) What criteria should justify refusal or reduction of an award of compensation for criminal injuries? For example, should a history of criminality justify refusal or reduction, or only criminality of a particular level or seriousness?
- (2) Should a similar limitation be retained but restricted to conduct that is causally linked to the injuries inflicted?
- (3) Should the decision-maker retain discretion to consider an applicant's personal conduct or circumstances in relation to the injuries inflicted but be required to conduct a proportionality assessment in the exercise of this discretion?

Chapter 6 Procedural Issues

Q 6.1 The Commission is committed to assessing the processes of the Tribunal with a view to ensuring not only that they are efficient and fair, but also that they do not re-traumatise victims. The Commission seeks the views of consultees on all aspects of the application process: its format, whether it is generally easy or difficult to complete, and aspects which are not clear or could be improved.

- (1) What information is necessary to complete an application for compensation?
- (2) How can administrative burdens be reduced?

Q 6.2 Would an online application process reduce administrative obstacles and make the scheme more accessible?

- (1) Would an online application process be suitable for all claims, or only for more minor claims?
- (2) What are the disadvantages of an online system?

Q 6.3 The current Scheme requires applications for compensation to be made within three months of the date the criminal injury is sustained. No applications may be accepted by the Tribunal where the event giving rise to the injury took place more than two years prior to the date of the application.

- (1) Are time limits required?
- (2) If so, are the existing time limits appropriate?
- (3) Are there circumstances in which extensions of time should be permitted? If so, what circumstances?

- Q 6.4** The Commission would like to hear from consultees on the kinds of supports that would assist applicants in the application process:
- (1) Are additional supports required for particular categories of victim? If so, what supports are required?
 - (2) What additional supports are required for applicants with language barriers, physical or intellectual difficulties?
 - (3) What additional supports are required for families and loved ones bereaved by homicide in the application process?
 - (4) What additional supports are required for victims making cross-border applications from other jurisdictions?
- Q 6.5** What measures are required to protect victims from secondary victimisation in the compensation process generally?
- Q 6.6** The Commission seeks the views of consultees as to the effects of delay on applicants under the Scheme and possible options to reduce or eliminate delays in the compensation and appeals process.
- Q 6.7** The Commission seeks the views of consultees as to whether applicants require legal advice and/or representation in the compensation process. If it is considered that legal assistance is necessary and desirable, should provision be made for legal aid?
- Q 6.8** Should the Tribunal have discretion to award legal costs to applicants where it considers such an award to be appropriate? What limits, if any, should be imposed on such discretion?
- Q 6.9** The Commission seeks the views of consultees regarding the benefits of creating an external appeal mechanism, to a court or to a body such as the Ombudsman, on a compensation decision.

Chapter 7 Interaction with Compensation in the Criminal Process

- Q 7.1** The Commission is keen to learn of consultees' insights into how frequently orders under section 6 of the Criminal Justice Act 1993 are made at sentencing.
- Q 7.2** Do section 6 orders meet the objectives of the Victims' Directive that:

- (1) victims are entitled to obtain a decision on compensation by the offender, within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings, and
- (2) Member States shall promote measures to encourage offenders to provide adequate compensation to victims.

Q 7.3 How could such orders be improved, or measures to encourage offenders to provide adequate compensation be strengthened?

Q 7.4 The Commission is keen to determine if the process of court-ordered compensation could be restructured so that it offers protection for accused persons from prejudice, while maintaining the integrity of the sentencing process and providing reparation for victims. The Commission is inclined to the view that the current process of waiting for the conclusion of criminal or civil proceedings to decide on an application for compensation under the Scheme is potentially inefficient. It may also cause financial hardship for victims.

- (1) Do you have any views or suggestions on how to better integrate these parallel processes in a clear and efficient manner for victims?
- (2) Could the compensation order at the conclusion of the criminal trial operate notionally in favour of the victim, with provision for the order in fact to operate in favour of the state criminal injuries compensation fund, so that the cost of compensation is not unnecessarily borne by the taxpayer?

Q 7.5 The Commission seeks the views of consultees on the possibility of reducing procedural hurdles for victims of crime with ongoing legal proceedings by introducing information sharing from the criminal or civil courts to the Tribunal, such as sharing the book of evidence from a criminal trial, as supporting documents for a victim's compensation application.

We would like to receive submissions on this Consultation Paper no later than close of business on **19 April 2022** if possible. Submissions can be sent in either of the following ways:

- (a) You can email your submission—in whichever format is most convenient to you—to the Commission at VictimCompensation@lawreform.ie.

or

(b) You can post your submission to:

Law Reform Commission,
Styne House,
Upper Hatch Street,
Dublin 2,
Ireland.

APPENDIX A

Scheme of Compensation for Personal Injuries Criminally Inflicted Effective from 20 April 2021

General

1. The Criminal Injuries Compensation Tribunal established under Paragraph 16 of the Scheme may pay compensation in accordance with this Scheme in respect of personal injury where the injury is directly attributable to a crime of violence, or, as provided for in Paragraph 4, to circumstances arising from the action of the victim in assisting or attempting to assist the prevention of crime or the saving of human life. The injury must have been sustained within the State or aboard an Irish ship or aircraft. Arson and poisoning will be regarded as coming within the scope of the expression “crime of violence” and, in determining whether any act is a crime for the purposes of the Scheme, the Tribunal will not take account of any legal immunity which the person who inflicted the injury may have by reason of his mental health, his youth or otherwise. The word “injury”, as used in the Scheme, includes a fatal injury.

2. The Tribunal will be entirely responsible for deciding in any particular case whether compensation is payable under the Scheme, and, if so, the amount. There will be no appeal against or review of a final decision of the Tribunal.

Persons who may claim compensation under this Scheme

3. The Tribunal will consider claims for compensation made by or on behalf of;

(a) the person who sustained the injury (the victim);

(b) any person responsible for the maintenance of the victim who has suffered pecuniary loss or incurred any expenses as a result of the victim’s injury;

(c) where the victim has died as a result of the injury, any dependent of the victim or, if he has no dependent, any person who incurred expenses as a result of his death;

(d) where the victim has died otherwise than as a result of the injury, any dependent of the victim.

4. The Tribunal will also consider claims in respect of injury received in the following circumstances:

(a) because of, or in the course of, the victim's coming to the assistance of a member of the Garda Síochána

(i) because of an unlawful attack upon the member, or

(ii) because the member was attempting to prevent a crime or to take a person into custody, or

(iii) in the course of a riot, or a disturbance or threatened disturbance of the peace, or

(iv) in the course of an attempt to rescue a person in custody, or (v) because the member was engaged in saving a human life;

(b) because of, or in the course of, attempting to prevent a crime in a public place;

(c) because of, or in the course of, attempting to prevent, in a public place, the escape of a person who had committed a crime, or the rescue of a person in custody;

(d) because of, or in the course of, attempting to save a human life.

5. If the injury is inflicted in the circumstances set out in the Scheme and any person would be entitled to claim compensation (whether statutory or non-statutory) otherwise than under the Scheme for the injury, he will not be prohibited from also claiming compensation under the Scheme but the Tribunal will decide the claim on the basis that no payment under the Scheme should result in compensation being duplicated and may accordingly decide either to make no award or to make a reduced award and may, moreover, decide that an award will be subject to conditions as to its repayment in whole or in part in the event of compensation being subsequently received from another source.

Nature and extent of compensation

6. Subject to the limitations and restrictions contained elsewhere in this Scheme, the compensation to be awarded by the Tribunal will be on the basis of damages awarded under the Civil Liability Acts 1961 - 2017. except that compensation will not be payable

(a) by way of exemplary, vindictive or aggravated damages;

- (b) in respect of the maintenance of any child born to any victim of a sexual offence.
- (c) in respect of loss or diminution of expectation of life;
- (d) where the victim has died, for the benefit of the victim's estate, or
- (e) in so far as injuries sustained on or after 1 January, 2006 are concerned, with the exception of fatal cases, in respect of pain and suffering. In fatal cases, the maximum award for compensation for pain and suffering is limited to the maximum amount set in any Statutory Instrument made pursuant to section 49 (1A) of the Civil Liability Act 1961 as amended.

7. Where the victim has died otherwise than as a result of the injury the Tribunal may award compensation in respect of loss of earnings, expenses and liabilities incurred before the death but only to a dependent who would, in the opinion of the Tribunal, otherwise suffer hardship.

8. Compensation will be by way of a lump sum payment, rather than a periodical pension, but it will be open to the Tribunal to make an interim award and to postpone making a final award in a case in which a final medical assessment of the injury is delayed.

Limitation and restriction of compensation

9. No compensation will be payable unless the Tribunal is satisfied that the injury is such that compensation of not less than €500 should be awarded.

10. No compensation will be payable to an applicant who has not, in the opinion of the Tribunal, given the Tribunal all reasonable assistance, in relation to any medical report that it may require, and otherwise.

11. No compensation will be payable in respect of injuries inflicted in a traffic offence except in a case where there has been, in the opinion of the Tribunal, a deliberate attempt to run down the victim.

12. No compensation will be payable where the Tribunal is satisfied that the victim was responsible, either because of provocation or otherwise, for the offence giving rise to his injuries and the Tribunal may reduce the amount of an award where, in its opinion, the victim has been partially responsible for the offence.

13. No compensation will be payable where the Tribunal is satisfied that the conduct of the victim, his character or his way of life make it inappropriate that he should be granted an award and the Tribunal may reduce the

amount of an award where, in its opinion, it is appropriate to do so having regard to the conduct, character or way of life of the victim.

14. Compensation will be reduced by the value of the entitlement of the victim or claimant to social welfare benefits payable as a result of the injury and will be reduced, to the extent determined by the Tribunal, in respect of the entitlement of the victim to receive, under his conditions of employment, wages or salary while on sick leave.

15. The Tribunal will deduct from the amount of an award under this Scheme any sums paid to or for the benefit of the victim or his dependants by way of compensation or damages from the offender or any person on the offender's behalf following the injury.

Finance and Administration

16. The Scheme will be administered by the Criminal Injuries Compensation Tribunal, the members of which will be appointed by the Minister for Justice. It will consist of a Chair and 13 ordinary members. The Chair and each member will be either a practising barrister or a practising solicitor. The members of the Tribunal will act on a part-time basis but they will be paid fees for work done on a basis to be determined by the Minister for the Public Service.

17. Compensation will be payable out of funds made available to the Tribunal out of moneys provided by the Oireachtas. [See Annex.]

18. The Tribunal will submit annually to the Minister for Justice a full report on the operation of the Scheme together with their accounts. The report and accounts will be laid before both Houses of the Oireachtas. In addition, the Tribunal may, in connection with its annual report or otherwise, publish such information concerning the Scheme and decisions in individual cases as may, in its opinion, assist intending applicants for compensation.

Procedures etc.

19. The Tribunal will be free to draw up and publish any instructions it considers necessary regarding the procedure for administering the Scheme. However, these instructions will be consistent with the provisions of the Scheme and with the general intention that the administration of the Scheme and, in particular, proceedings before the Tribunal, should be informal.

20. Applications should be made as soon as possible but, except in circumstances determined by the Tribunal to justify exceptional treatment, not later than three months after the event giving rise to the injury. No applications may be accepted by the Tribunal where the event giving rise to the injury took place more than two years prior to the date of application.

21. Applications should be made on the Tribunal's application form. This will be obtainable from the Secretary to the Tribunal.

22. To qualify for compensation it will be necessary to indicate to the Tribunal that the offence giving rise to injury has been the subject of criminal proceedings or that it was reported without delay to the Gardaí or to the Garda Síochána Ombudsman Commission (GSOC) in any case where the crime is alleged to have been carried out by a member of An Garda Síochána. However, the Tribunal will have discretion to dispense with this requirement where they are satisfied that all reasonable efforts were made by or on behalf of the claimant to notify the Garda Síochána or the GSOC as the case may be, of the offence and to cooperate with them.

23. The Tribunal's staff will process applications in the first instance and may seek all relevant information as to the circumstances of the injury either from the applicant or otherwise.

24. A decision by the Tribunal on a claim may, in the first instance, be taken by a duly authorised officer of the Tribunal where the amount claimed does not exceed €3,000. Where the claim is for a greater sum than €3,000 or where the claimant is not satisfied with a decision by that officer, the decision will normally be taken by one member of the Tribunal. However where a decision involves an award of €75,000 or more, that decision will be taken by three Tribunal members. The Tribunal will have discretion to hear any claim at a hearing before three members of the Tribunal and a person who is dissatisfied with a decision of first instance given by one member or three members as the case may be, may also have his claim so heard. In the latter case the member or members who gave the initial decision will not be amongst the three members of the Tribunal present at the hearing. Apart from an appeal by an applicant against a decision of a duly authorised officer or against a decision of first instance given by one member or three members as the case may be, there will be no appeal against a decision of the Tribunal.

25. The proceedings at the hearing of the Tribunal will be by way of a presentation of his case by the applicant who will be entitled to call, examine and cross examine witnesses. It will be for the claimant to

establish his case. A member of the Tribunal's staff may make submission to the Tribunal on the case and will also be entitled to call, examine and cross examine witnesses. All information before the Tribunal will be available to the applicant.

26. An applicant may be accompanied by his legal adviser or another person but the Tribunal will not pay the costs of legal representation.

27. The Tribunal may, at its discretion, pay the necessary and reasonable expenses of witnesses.

28. Hearings will be in private.

29. The decisions of the Tribunal, appropriately redacted to remove personal data, may be made publicly available.

30. The standard of proof which the Tribunal will apply to a determination of any claim will be the balance of probabilities.

31. The Tribunal will be entitled to make any arrangements which it considers desirable for the administration of money it awards as compensation.

Annex

Payment of Awards by the Tribunal

Applicants should note that the budgetary subhead under which the monies awarded under the Scheme are provided has been designated by Government as a "cash-limited grant scheme". This means that the Tribunal has no capacity or authority to pay out more funds in any one year than has been voted by the Dáil. Thus, if the Tribunal's funding becomes exhausted before the end of a financial year it has to wait until the next financial year, when it is again voted funds, before making any further payments to applicants. Government Accounting Procedures and Practices provide the following explanation of cash limited grant schemes:

Cash-limited Grant Schemes. C3 – Grants and Grants-in-Aid

The exercise of virement to create or increase a cash-limited grant Scheme is not permissible. The ambit of a Vote that contains a cash-limited grant scheme includes a reference to the fact that the individual subhead for the scheme is designated "cash-limited". The term "cash-limited" means that the funds available for a particular scheme for the year will be limited to the cash amount specified in the Estimates allocation and so

entitlement to payment in the year under the scheme will be contingent on the availability of funds. In cases where a scheme is “cash-limited”, the Government can decline to take a Supplementary Estimate to increase the subhead allocation. Departments administering such schemes should clarify in advance to applicants that the relevant scheme is cash limited.

APPENDIX B

Non-Fatal Injuries Application Form

**APPLICATION FORM (NON-FATAL INJURY¹)
SCHEME OF COMPENSATION FOR PERSONAL INJURIES
CRIMINALLY INFLICTED
“The Criminal Injuries Compensation Scheme”
Last updated 19/05/21**

Ref. No. NF/....., Official Use

Please answer all questions and please use a black pen and block letters.

If you experience any difficulties completing this form please contact the Tribunal secretariat at criminalinjuries@justice.ie or Telephone: Within Ireland: (01) 479 0290 or from abroad +353 1 479 0290

1. PARTICULARS OF APPLICANT

(a) Surname _____

(b) First Name(s) _____

(c) Address

¹ For applications in fatal-injury cases, the fatal injury application form must be used instead

(d) Date of Birth _____

(e) Occupation _____

(f) Marital status _____

(g) P.P.S. No. _____

(h) Contact Telephone Number _____

(i) E-mail address _____

2. CIRCUMSTANCES IN WHICH THE CRIMINAL INJURY OCCURED

Note that it is a requirement of the Scheme that an applicant be able to demonstrate that the incident was reported without delay to An Garda Síochána, (or the Garda Síochána Ombudsman Commission (GSOC) in any case where the crime is alleged to have been carried out by a member of An Garda Síochána), and/or that the applicant has made all reasonable efforts to notify the Gardaí or GSOC and to co-operate with them.

(a) Date of Incident

.....

(b) Location of Incident

.....

(c) Any further details of the incident which you can provide to assist the Tribunal

.....

.....

(d) Name(s) of offender(s), if known

.....

(e) Was the incident reported to An Garda Síochána? ²

.....

3. TIME LIMIT FOR APPLICATIONS

Please note that under the terms of the Scheme, there is a 3 month time-limit from the date of the incident for making an application.

The Tribunal has discretion to accept a late application for up to a maximum of 2 years after the date of the incident “in circumstances determined by the Tribunal to justify exceptional treatment.” No applications where the incident occurred beyond 2 years may be accepted.

Where your application is submitted after the 3 month limit, you must set out the reasons why your application is late and the Tribunal will decide on the basis of the reasons provided by you, whether exceptional treatment is justified and whether to accept the application or not.

Reasons why application is late:

.....
.....
.....
.....

² The incident may be reported to the Garda Síochána Ombudsman Commission (GSOC) in any case where the crime is alleged to have been carried out by a member of An Garda Síochána.

