Criminal Injuries Compensation Scheme consultation

Background

The Criminal Injuries Compensation Scheme (CICS) presently bars applicants with an unspent custodial or community sentence from receiving compensation. This rule has been widely condemned since its introduction in 2012.

In 2018 the government announced a consultation on this particular rule (the so-called 'exclusionary rule') as part of its Victims Strategy. Other reforms in the strategy were included in a broader public consultation, but this single reform was not, and the government quietly decided not to pursue reforms to the rule any further.

In 2020 Kim Mitchell, a survivor of childhood sexual abuse who acquired a criminal record as an adult and was refused compensation from the CICS, launched a judicial review arguing that it was unlawful for the government to unilaterally change its position without the promised consultation. The High Court agreed and in 2021 issued a ruling requiring the government to undertake the consultation and deliver an impartial decision regarding the future of the exclusionary rule.

In 2022 the Ministry of Justice responded to the court ruling and launched a consultation, inviting responses from across the criminal justice sector and the general public.

Views from people with criminal records

When we asked people with criminal records how they felt about the exclusionary rule we got responses like these:

"Like I don't matter [and] what I went through doesn't matter compared to others."

"It feels like my own conviction means they do not treat me like a proper citizen who can be a victim"

"The government think we are less than citizens. [The] violent and sexual crimes that happened to us are seen as less harmful, even when the crimes we have committed were less serious."

"[You feel] branded negatively, and not able to move on even though you have paid your debt to society."

"I feel like a second-class citizen; no matter what I do, I will never be considered rehabilitated… it triggers feelings of not being believed or protected by those in authority as a child."

About Unlock

Unlock is a national, independent advocacy charity for people facing obstacles, stigma and discrimination because of their criminal record. Every year we hear from thousands of people who are unnecessarily held back in life because of their criminal record. We work at policy level to address systemic and structural issues. We listen to and consult with people with criminal records, undertake research and produce evidence-based reports to inform policy makers and the public.

Why are we responding to this consultation?

The exclusionary rule established in the CICS is a very clear institutional barrier faced by people with criminal records who simply seek equitable treatment with their fellow citizens.

Unlock help and support all people with criminal records whether they are spent or unspent, recent or historic. While not all of our service users are impacted by the exclusionary rule, many are and a significant majority would have been impacted at some point in their lives if they had needed to claim to the CICS.

Unlock are one of few stakeholder groups who solely focus on criminal records and not on broader justice issues. Our work regarding the CICS has been informed directly by our day-to-day interactions with people who contact us because they have personally encountered a problem accessing the CICS. For our service users the concerns that we raise here are a day-to-day lived reality.

Unlock
for people with criminal records

Our consultation response

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

Unlock's opinion is that the exclusionary part of the rule cannot be retained unchanged under any circumstances.

The present rule directly contradicts the government's policy expressed in the Victims Strategy and more recently the Victims Bill to fairly compensate all victims of crime, particularly those of intimate partner violence or childhood sexual exploitation. Retaining a rule that expressly opposes policy would open the government up to a challenge regarding the rational basis of the decision, as well as potentially breaching Article 8 of the Human Rights Act because a tangible policy goal is required in the test for proportionality.

More broadly, the argument made in paragraph 42 to justify not changing the rule – that all concerns that would be relevant to the CICS are considered by judges at sentencing – is weak and does not consider several important factors.

Firstly, judges and magistrates follow sentencing guidelines delivered by the Sentencing Council which explicitly do not consider criminal record impacts as part of the decision. Even if the courts did consider the CICS, the scheme does not even consider the whole judgement. Instead, the exclusionary rule takes one single piece of information – the disposal – and tries to infer the impact of the original offence without considering any additional details.

Secondly, the exclusionary rule does not allow for the prospect of individual rehabilitation. People's criminal records follow them around for a long time, in some cases for decades. The exclusionary rule ensures that subsequent behaviour, including attempts to make amends, are never considered at all. The CICS perceives that the 50-year-old charity worker who helps young people avoid involvement with gangs is the same person that they were at 20 years old when they committed a serious offence as part of a gang.

Thirdly, judges and magistrates are only able to weigh the factors that are presented to them at sentencing. Any number of issues that come to light later may indicate that the disposal given was incorrect, most pertinently to this consultation the fact that an 'offender' was in fact a victim being exploited and controlled by someone else.

Finally, sentencing outcomes change over time. New kinds of disposals and new guidelines for using them have reduced the number of prison sentences given today, but this was not always the case. A good number of historic convictions even relate to offences that no longer exist. Sentences are always products of their time. The CICS needs to be future proofed, and be able to consider the context of a sentence as well as its disposal.

Unlock does not question the Supreme Court's ruling, referenced at paragraph 42, that the existing system creates clarity and consistency. However, if the outcomes are manifestly unjust then these supposed advantages are of little value. It is easier to be clear and consistent when you refuse to ignore pertinent factors, but if the eventual decision is wrong then the process must change.

It should also be noted that the exclusionary rule is relatively new, and brought in as part of larger reforms in 2012. In the 2012/13 annual report the then CICA Chief Executive outlined that the changes were '*...designed to put the Scheme on a more sustainable financial footing by removing awards for people with the least serious injuries and focusing awards on victims with more serious injuries*' with no reference to fairness, justice or even a policy objective.

Even on these terms the 2012 reforms have failed. Victims of extremely serious violence and exploitation are routinely denied compensation due to the exclusionary rule. The government clearly already perceives that there is a link between unfair compensation decisions and the exclusionary rule; that is why a consultation on this rule was promised in 2018 in the Victims Strategy.

What are your views on the recommendation of the Independent Inquiry into Child Sexual Abuse that the unspent convictions rule be revised so that awards are not automatically rejected in circumstances where an applicant's criminal conviction is likely to be linked to their child sexual abuse, and that each case be considered on its merits?

Unlock strongly supports the recommendations from the Independent Inquiry into Child Sexual Abuse (IICSA). Victims of childhood sexual exploitation have endured some of the worst crimes imaginable and subsequently face huge challenges in the rest of their lives. Victims are at a hugely elevated risk for all negative outcomes, including criminal offending, whether due to direct compulsion or linked to a chaotic childhood and significant trauma.

It is clearly unjust to automatically reject victims with such complex histories, particularly those who were coerced or forced into committing crimes by their abusers. However, it is not clear at all why a criminal record acquired separately from their abuse should universally prevent their case being heard on its merits.

As paragraph 47 discusses, it is extremely difficult to create a system that could tell the difference between offences linked to abuse and those which are not. An attempt at this may well be a moot point in any case because abuse victims are profoundly impacted for the rest of their lives. Even years after abuse has stopped, victims are disproportionately likely to suffer from mental illness, substance abuse issues and also to be the victims of other kinds of crime and victimisation.

Even if the CICS could accurately tell the difference between offences linked or not linked to abuse, this would have to be a qualitative process that considers each case to determine whether a record is linked or not. A further process would be necessary to determine which applicants can be considered as victims of sexual exploitation.

We strongly agree that sexual abuse victims should be considered on their own terms, but Unlock would argue that this is best achieved by considering all cases on their merits. This will ensure that all victims of childhood sexual exploitation have the opportunity to claim as well as many other deserving victims who were not, or at least were not officially classified as, victims of abuse.

Do you consider that exemptions should be considered only for some applicants? If so, what should the basis of the exemptions be and when should discretion be available?

Statutory exemptions are by nature a black-and-white approach. In this context such exemptions would require a great deal of technical detail, to define what offences are considered to be, for example, childhood sexual exploitation.

This will necessarily result in victims being excluded for all manner of non-obvious reasons simply because they do not exactly fit the specification given in the regulations. This does not work well with the messy complexity of the criminal justice system. The victim has no control over which specific offences their abuser was charged with.

It is relatively common that offenders who abuse multiple people are only prosecuted for a smaller number of offences for which there is the strongest evidence. A significant reason for this is to avoid exposing victims to further trauma and public cross examination if possible. However, this also results in the final tally of convictions not necessarily reflecting all of those abused or in what way they were abused. Access to the CICS cannot be gated behind this pragmatic and sometimes even arbitrary outcome.

While it is understandable to try and find a simple way to give victims of childhood sexual exploitation more scope to claim, this simply shifts the point of discussion. IICSA by its nature is only concerned with victims of childhood sexual exploitation and so made a recommendation on that basis. However, if an exemption is made for childhood sexual exploitation victims this begs the question why children who suffered from violent abuse, emotional abuse or neglect are not also included.

Exemptions must always be seen as a form of special pleading. Victims of childhood sexual exploitation certainly do deserve to be judged on their own merits but so too do all victims of all kinds of crime. Allowing some victims of exploitation more scope to claim would make the system more just but would not make up for those people who are still excluded.

As a result, Unlock believes that exemptions are not a useful way to decide which cases can continue and which will be summarily rejected. Discretion should be broadly available in almost all cases.

What are your views about any exemption and guidance on exercising discretion being set out in the Scheme?

Unlock does not support the use of exemptions in this case, however, if the government were to pursue this approach we believe that guidance needs to be delivered separately from the scheme itself and in a form that can be regularly and transparently updated.

Amending the scheme is a significant undertaking in its own right. It is to be expected that new provisions and new guidance would need to be revised several times to arrive at a robust and

equitable approach. Making those changes should be simple and encouraged, made through the executive powers of the Ministry of Justice, guided by the responsible minister, and agreed by parliament's justice committee.

What are your views on amending the exclusionary part of the rule to reduce the number of claims that would be automatically rejected on the basis of a specified unspent conviction?

Amending the rule would certainly be better than nothing but any attempt to do so must offer a clear and convincing argument for why those people with unspent convictions who will continue to be automatically rejected cannot reasonably be dealt with on their own merits, or even receive cursory consideration before rejection.

The existing rules already set out that the overwhelming majority of people with unspent convictions would not be automatically rejected, and instead would be considered individually. Increasing the number of convictions that would be treated on an individual basis is an improvement but this will continue to leave a significant number of people, at least the 100,000 per year who receive immediate or suspended custodial sentences, being excluded from an aspect of the justice system.

It is also important to note that the existing rules, and the suggested change in paragraph 49, have a broader context than this consultation seems to understand. The spending period that applies to a disposal is not a singular figure, and the length of time that any given disposal remains unspent for is not necessarily linked to the severity of the offence or the disposal.

The most obvious case of this is the fact that summary motoring offences remain unspent for five years, longer than most prison sentences, regardless of whether they receive a fine or community order. This is because a summary motoring offence also carries with it the imposition of penalty points and a licence endorsement which will remain active for five years and which the court imposes as part of the criminal disposal. The disposal cannot become spent while any part of the sentence is still active, and so it remains unspent for five years.

Some 35,000 people per year in the UK receive community sentences resulting from a summary motoring offence and as such will be rejected by the CICS for five years. A person who receives a six-month prison sentence for Actual Bodily Harm (ABH) will stop being rejected by the CICS 18 months after conviction. However, those who receive fines for other offences, even very significant fines, will not be rejected even if they also received penalty points or endorsements which mean the sentence is still active.

This is replicated across the criminal justice system by the use of ancillary orders which have the same effect as penalty points; the order is given alongside a minor disposal but the order remains active and so unspent for a protracted period.

Ancillary orders can be given alongside any criminal disposal, including community orders and custodial sentences. Some ancillary orders can even last for life. The exact combination of primary disposal and ancillary order can therefore have an extremely long-lasting impacts on

whether a person's conviction becomes spent, but the severity of the offence is still the same and this cannot be judged from the fact that the offence is still unspent.

There is also the issue of drag-through to be considered, which prevents an older offence from becoming spent when a newer one is committed during the spending period. This includes summary motoring offences, or offences that create ancillary orders. This means that a person who completed a short prison sentence but received a motoring fine sometime in the year afterwards will see their earlier conviction remain unspent for a further five years, and so be unable to make a claim to the CICS for five years. The CICS's rules did not intend for speeding fines to prevent a claim, but they already do this by using the complex spending regime as the basis for rejection.

If the CICS is to be a fair and impartial process, it must be able to tell the difference between a serious criminal record and an accident of timing. There are no bright line rules that can do this, and even the suggestion to somewhat reduce the impact of bright line rules is misguided. If the CICS wishes to consider the seriousness of an offence in their award, they must look at the individual case and not rely on an unreliable measure such as whether it is spent.

Even ignoring unexpectedly prolonged spending periods, using a black and white approach relating solely to the disposal issued will still always result in injustice. Sentencing outcomes in Gloucestershire are not the same as in central London, and a bright line using the disposal would strongly favour those from suburban communities. Conversely such a rule would disproportionately penalise those from urban communities which are more heavily policed, or from minority groups whom official statistics show receive disproportionately harsher sentences.

While it would still be positive to ensure that more people with unspent records can be considered on their own merits, we do not believe that there is a rational place to draw the line between who is and isn't worthy of individual consideration. The only way to make a credible decision is to examine each case on its own merits.

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

As set out in our response to question 4, we do not believe that guidance should be set out in the scheme itself but provided alongside the scheme's regulations to enable it to change and react more quickly.

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

Unlock believes that removing the exclusionary part of the rule is the only solution that will allow the CICS to properly compensate all victims of crime.

A discretionary, qualitative process is the only way to ensure that the right decision is reached in each case. Arbitrary rules that exclude sections of the British public ensure that many people deserving of compensation will not receive it, no matter how delicately that line is drawn.

There is no such thing as a perfect victim, and it is simply wrong to believe that the only 'real' victims are those who have never been criminalised by the justice system. It is important to remember that this consultation is only happening at all because of a judicial review brought by Kim Mitchell, a victim of childhood sexual abuse who was denied compensation by the CICS because of her criminal record.

Ms Mitchell is certainly a victim and that is not changed by the life she went on to live. She was eight years old when she was abused, but according to paragraph 42 of the consultation document the 'degree of harm done to others and the cost to society' of a subsequent public order offence is so large that there is no point in even considering the harm that she suffered as a child.

There are complex interconnected factors underlying a person's criminal record and history of victimisation. Sometimes one directly causes the other, but sometimes not. In many cases victimisation and criminal behaviour are cyclical, because prior interactions with the justice system make victims less likely to speak up and so they become easier to victimise. There is no simple way to tell how these factors influence each other, so it must always be a case-by-case decision.

Individual consideration does not imply that compensation will be paid out in all cases, nor should it. Individual consideration only ensures that all factors relevant to each case will be considered and balanced against each other.

In the UK we live as equal citizens under the law. We are not all entitled to identical compensation from the CICS, but we should be entitled to make our case and for our claims to be judged independently, using all relevant factors.

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

As set out in our response to question four, we do not believe that guidance should be set out in the scheme itself but provided alongside the scheme's regulations to enable it to change and react more quickly.

Do you agree that we have correctly identified the range and extent of the equalities impacts for no change and each of the potential reforms set out in this consultation (Annex A)? Please give reasons and supply evidence of further equalities impacts as appropriate.

Unlock believes that the consultation document does not properly consider the issue of age or age-related discrimination. The victim's age is distinct from a person's age when they apply to the scheme, but the existing rules do not acknowledge this.

This is because the CICS is structured so that, in general, claims must be made relatively quickly following victimisation. There are certain exceptions to this, the most common being where

applicants were victimised as children, but there is no consideration of this important difference in the exclusionary rule. Both historic and recent victims follow the same rules regarding automatic rejection.

This means that most applicants to the CICS do so with the criminal record that existed at the time that they were victimised. This can still result in unjust outcomes but at least the criminal record is broadly contemporary to the case being considered. This is not true for people who were victimised as children. Instead, they are judged based on whatever criminal record they have subsequently acquired as an adult.

This is compounded by the fact that childhood sexual exploitation is incredibly damaging and strongly correlated to criminalisation, both during and after abuse. Not only are victims at greater risk, they have more time for that risk to result in a criminal record.

A 32-year-old victim is considered as the person they were when they were victimised. A 12-year-old victim is not; they will be judged based on the life they lived subsequently and will face rejection if they happen to have an unspent conviction today.

As a result, the exclusionary rule discriminates against young victims who are not able to make claims at the time that they are abused. They are treated differently to adult victims and have a higher standard to be accepted by the scheme.

More broadly, the consultation document sets out a reasonable enough list of equality impacts. Unlock agrees with the assessment made in paragraphs 18 to 21 in the Annex; that the exclusionary rule results in unequal treatment.

However, we would describe these outcomes as discriminatory, which the consultation document conspicuously chooses not to do but without any explanation. The effects discussed may not be direct, intentional discrimination from the CICS itself, but by using decisions made earlier in the criminal justice process (sentencing outcomes) as a foundation, the CICS inherently has the same discrimination built into it.

However, there is a simple way to redress this: have a single process where each case is assessed on its own merits.

As we have touched on numerous times in this response, bright line rules always result in unjust outcomes. Some are individually unjust such as Kim Mitchell, others perpetuate systematic discrimination. A lack of discretion inevitably results in deserving applicants being turned away. The only way to ensure equal treatment is to treat everyone as an individual.

As the Annex notes at paragraph 28, requiring the CICS to treat all applicants the same would certainly benefit those people who are being excluded much more than people who are not being excluded. However, those people presently being excluded are suffering from unequal treatment and remedying this is a necessity, even if some people benefit more when they start being treated fairly.