JOINT RESPONSE THE BAR COUNCIL OF ENGLAND AND WALES AND THE CRIMINAL BAR ASSOCIATION TO THE CONSULTATION PAPER, 'GETTING IT RIGHT FOR VICTIMS AND WITNESSES'

INTRODUCTION

1. The Criminal Bar Association ("CBA") represents about 3,600 employed and self-employed members of the Bar who prosecute and defend in the most serious criminal cases across England and Wales. It is the largest specialist Bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. Their technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts, ensuring on our part that all persons enjoys a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintain ed.

2. The consultation paper "Getting it Right for Victims and Witnesses" ("the consultation paper") quite properly states that "proper protection and support for victims of crime is fundamental"[1]. It goes on to suggest that the current system falls short in failing to provide:

   a. swift and sure justice which punishes offenders properly;

   b. intelligent justice which demands offenders to face up to the causes of their behavior;

   c. support for victims to help them recover from the effects of crime; and

   d. support for victims in coping with the stress of the investigation and prosecution of the crimes of which they are victims.

[1] Foreword by the Lord Chancellor and Secretary of State for Justice

3. No single consultation paper could possibly address all these concerns and this consultation paper focuses principally upon the support for victims, with a nod towards the complex issue of restorative justice – which might be seen to be an aspect of the 'intelligent justice', the aim of which would be to completely alter a criminal's attitude towards offending.

4. A rather more lengthy passage of the consultation paper addresses practical aspects of reparation by way of the 'victim surcharge'.

5. By far and away the greatest part of the consultation paper is devoted to reforming the system of compensation for victims of crime with only the sketchiest of outlines for actual support for the victims of crime. The reform of the compensation process is largely devoted to removing entirely from the scheme those who are the victims of less serious crime and imposing eligibility criteria that would further reduce the numbers of victims eligible for compensation.

6. Members of the Bar Council and specifically members of the Criminal Bar Association have some specialist practical experience of the way in which the criminal justice system responds to the needs of witnesses who may also be victims in respect of the crimes that our members prosecute.

7. We are acutely aware that the mere fact of assisting the police with their inquiries may be stressful and can give rise to understandable anxieties that by doing so members of the public may experience at least the fear of repercussions at the hands of offenders, even though such fears are happily not often realized.

8. If a member of the public makes a witness statement then at the very least that statement may be served upon a defendant and the witness may well have to endure a period of uncertainty whilst it is established whether or not they will have to attend court. If they are required to go to court any anxieties they may have had will often intensify. Ultimately some of these witnesses will give live evidence in court. We are reassured that in our experience the majority of such witnesses appear to be composed and give evidence in a satisfactory way; it is only in a minority of cases that the experience is clearly stressful and difficult.

9. To volunteer assistance requires a recognition of every citizen's civic responsibility to help keep society as crime-free as possible. We welcome any steps that are taken to make the experience of cooperating with a criminal investigation as comfortable as possible, although it can never be stress-free in all circumstances. Similarly it should be emphasised that we all owe a duty to each other to give such evidence as may be required in a court of law to ensure that prosecutions of the guilty are as effective as possible and that the innocent are not unfairly convicted. Witnesses are therefore owed a duty of care by the criminal justice system to ensure they are treated fairly and with dignity and respect.

10. This however should not detract from the fundamental principle that a defendant has the right to be presumed innocent until proved guilty. It therefore follows that many witnesses' evidence will be quite properly tested in court and no assumptions can be made in advance that their accounts are necessarily all true and accurate. The task of the criminal justice system is to achieve the proper balance between these sometimes conflicting rights. Our members always strive to achieve that balance.

EXECUTIVE SUMMARY

Questions 1 to 3 of the consultation paper deal with the broad principles of victim support – who most need support and what are their needs. We have little to add to the consultation paper's assessment but counsel against an attempt to over-rigidly categorise types of victims.

Questions 4 to 8 raise the issue of locally commissioning victim support services. We have concerns that this will lead to different levels and standards of support in different areas that are not based upon actual need, but rather upon local political attitudes.

Question 9 asks what further assistance could be provided for victims of terrorism and bereaved families and we put forward no proposals

Questions 10 to 18 focus upon the principles governing how the Criminal justice system deal with victims and witnesses. We accept and welcome the principles of the new Victims Code. We raise two important issues.

Firstly, the difficult and sensitive issue of the extent to which a witness should be treated automatically as a victim of a crime when the process of investigation and trial may, in some cases, focus upon the very issue of whether they <u>are</u> a victim. In many cases there is no issue as to whether a prosecution witness has been a victim of a crime; in some cases that itself is a live issue.

Secondly we express our concerns about the extent to which the prosecution have started to be seen as merely the agent of the alleged victim of a crime the function of which is to seek and obtain restitution for the victim, rather than to seek justice by securing, on behalf of society as a whole, the conviction of those guilty of breaking the criminal law.

Neither of these issues detract from the principle that all users of the Criminal justice system should be treated fairly and with respect for their dignity.

Questions 19 and 20 appear to be directed towards asking how attitudes towards restorative justice could be positively influenced, but no detail proposals are made in the consultation paper.

Questions 21 to 32 deal with proposals to widen the scope of Victim Surcharge orders and increase the sums payable. While we do not take issue with the principle that perpetrators of crime should pay – where possible – some share of the costs of supporting victims. However we question whether the Victim Surcharge is anything more than a fairly arbitrarily set hypothecated tax upon offenders.

Questions 33 to deal with the Governments aims of reforming the Criminal Injuries Compensation Scheme (CICS) by: -

- Reducing the numbers of those eligible for compensation
- Limiting compensation to those most seriously affected by violent crime

Questions 33 to 34 ask how a crime of violence should be defined and we agree with the consultation paper's general approach, and we consider crimes involving the explicit or implicit threat of violence – such as stalking or harassment – should be included.

Questions 35 and 36 propose excluding from compensation those either temporarily or illegally present in the UK. No figures are provided as to the amount that this exclusion would save and we question whether it might undermine the UK's reputation for fairness and respect for universal human rights.

Questions 37 to 39 deal with proposals to exclude from the right to compensation those who do not cooperate satisfactorily with the criminal justice system. Whilst we consider it might be appropriate to refuse compensation in cases where there was no possible justification for a victim's failure to behave in a manner that the authorities consider to be appropriate, there may be many reasons why a victim may be reluctant to cooperate, and indeed the reasons may be directly related to the extent to which they have been victimised. To refuse compensation in such circumstances would be perverse.

Question 40 asks our views on the proposal to extend compensation to cases where it previously would have been deemed against the applicant's interests; we support the proposal.

Questions 41 to 43 deal with the principle of limiting eligibility in cases where the victim has previously been an offender. We consider that the two proposed options are too arbitrary and could result in real unfairness. We advocate a more nuanced discretionary approach.
Question 44 proposes ignoring a deceased's character when considering a bereavement claim: we agree.

Questions 45 and 46 deal with removing from the scope of the scheme those suffering less serious injuries. We agree that there is merit in removing from the scheme those who suffer minor injury if it causes minimal pain and suffering, but consider there may be cases where

apparently minor injury could cause significant suffering, and the CICS should continue to compensate such victims.

Questions 47 to 48 deal with loss of earnings and we do not comment upon them

Questions 49 to 53 deal with other consequential expenses and we agree with the proposals.

Questions 54 asks if applicants should be required to supply information to support their application and clearly this is necessary to a reasonable degree.

Questions 55 and 56 and propose asking claimants to pay a contribution for medical reports, or alternatively a sum be deducted . This may be inappropriate in cases where the applicant's means are limited and there are no specific proposals as to how the appropriate sum would be assessed.

Questions 57 proposes deducting wasted costs from the award where the applicant is responsible. There is some merit in this idea but the proposal is short on detail.

Question 58 proposes reducing the time for acceptance of a decision and we agree.

Question 59 proposes extending the circumstances in which repayment of an award can be requested. We do not agree that the reasons for such a request should automatically include failure to cooperate in bringing the offender to justice.

Questions 60 to 62 propose removing the option to request a re-opening of a case on medical grounds, deferring decisions and administratively change decisions in the applicant's favour. For the reasons set out in the full response we are fully supportive of reasonable proposals in this regard but oppose arbitrary refusals.

Question 63 proposes in principle implementing powers to recover money from offenders to enable victims to obtain compensation for personal injury from the person legally responsible is a good idea and could be called 'Legal Aid'.

Questions 64-66 deal with the equality analysis of the paper. The Equality and Diversity Committee of the Bar Council do not propose to comment upon these questions.

RESPONSE TO THE CONSULTATION PAPER

Q1 Are there groups of victims that should be prioritised that are not covered by the definitions of victims of serious crimes, those who are persistently targeted and the most vulnerable? If so, can you provide evidence of why they should be prioritised and what support needs they would have?

It is unarguable that priority should be given to victims who need it the most. It may be unwise to seek to categorise them by groups as that simply creates the risk that someone who demonstrably needs support is denied it because they do not fit into one of the defined groups. Surely a grouping by effect would be more sensible?

Q2 Should supporting victims to cope with the immediate impacts of crime and recover from the harms experienced be the outcomes that victim support services are assessed against?

We agree that victim support services should provide both support in the short term to deal with the immediate effects and also in the longer term to assist recovery and so it is axiomatic that their success is measured against those criteria.

Q3 Are the eight categories of need identified correct? Are there any other categories of need that support services should address?

The eight categories of need are widely drawn and seem to encompass needs that are likely to exist in many cases, irrespective of the impact of any particular crime. The consultation paper is unclear as to how there would be any assessment as to whether the particular needs in question arose from the impact of the crime in question or from a completely different cause.

Q4 Is a mixture of locally-led and national commissioning the best way to commission support services for victims of crime?

This question disguises a very complex issue: to what extent does the government seek to achieve a degree of consistency in the approaches of different areas to the same impact of the same crime? Will this superficially attractive policy of a local approach to local needs, lead a 'postcode lottery' as to what support individual victims receive? In particular, will it mean that in an area with a high level of need for victim support because of a high level of crime, individual victims will receive a lower level of support, or will the service in their area receive a higher level of funding?

Q5 Should police and crime commissioners be responsible for commissioning victim support services at a local level? Who else could commission support services?

As with the previous question we can foresee entirely different levels, types and priorities of victim support being commissioned in different areas not on the basis of need but on the basis of individual local commissioners social and political views. It is not clear whether "Such a framework is best applied by local decision-makers based on a detailed assessment of demand against need"[2] means the local decision-makers would assess both the demand and the need. If so there may be a wide variation from area to area as to what the 'need' actually is, not on the basis of any objective criteria. This is likely, given the consultation paper's declared aim of there being only "a small set of minimum entitlements for the most vulnerable victims" to be funded as a priority.

[2] Paragraph 35

Q6 Who do you think should commission those services at a national level?

Q7 Which services do you think should be commissioned at a national level?

We have grave reservations whether it is either reasonable or practicable to propose that "services provided by voluntary, community and social enterprise organisations should be funded through a competitive commissioning process"[3]. Such small local organisations may have superb skills developed over time to provide the first-class support that victims of crime require, but do not have the time, resources or expertise to engage in competitive commissioning exercises. Such a proposal will result in them either giving up their functions or diverting scarce resources towards paying for specialist advice and assistance to secure contracts. Similarly, the proposal that "Those services commissioned nationally could be commissioned by the Ministry of Justice. Alternatively, voluntary, community and social enterprise organisations could compete for a national commissioning contract to deliver these services"[4] is, we consider, equally unrealistic and is an example of taking the notion of applying market forces to absurd extremes. What is proposed in creating PCCs and this entire commissioning process will simply divert resources away from where they are required and waste it on tiers of bureaucracy and divert it into profit centres. This is too high a price to pay for a perceived improvement in outcomes which may be entirely unreal.

Q8 Should there be a set of minimum entitlements for victims of serious crimes, those who are persistently targeted and the most vulnerable?

We agree, for the reasons set out above, that there should be a set of minimum requirements which apply nationally. The question is whether it should be a small set (the consultation paper's preferred option[5]), or a much broader and more comprehensive set, which we consider more appropriate.

Q9 Is there further support that we need to put in place for victims of terrorism, and bereaved family members affected by such incidents, to help them cope and recover?

We do not consider we are best placed to advice the Criminal Injuries Compensation Authority or the Victim Support's National Homicide Service on further improvements to the approach they take to providing support.

Q10 How could the Victims' Code be changed to provide a more effective and flexible approach to helping victims?

This is an extremely broad and wide-ranging question. Indeed the consultation paper refers to a further prospective consultation with criminal justice agencies about the Witness

[3] Paragraph 44
[4] Paragraph 51
[5] e.g. Paragraph 35

Charter[6] and we would like to confine our answer to one important principle.

The consultation paper correctly identifies a tension (although it is not described as such) between the needs of the Criminal justice system ("CJS") and the needs of victims.[7] Elsewhere reference has been made to the fact that some victims say they feel like accessories to the CJS and find the process impersonal and frustrating.[8] The consultation paper recites the steps taken in the last two decades to improve the experience of victims and witnesses[9]. Most practitioners would applaud most of these steps. But equally many criminal barristers are concerned about the direction of travel.

Firstly there is the issue of who the parties are in a criminal trial. It is not for nothing that all criminal trials are designated as Regina v the Defendant. The parties are, on the one hand the State and on the other a citizen. The crime is often a crime committed against 'the Queen's Peace' as it was sometimes called. This means that the commission of a criminal offence is a crime against all of us, embodied in the trial, in the 'State'. Why does this matter? Because a prosecutor is not the 'victim's lawyer'. Too often in the recent past we have become accustomed to hearing a victim describe the prosecutor as 'my lawyer' - they are not. A prosecutor owes a duty of fairness and impartiality to the Court and is often called upon to take decisions that may seem counter to the interests of an individual witness, but are taken in the interests of the CJS as a whole. In some cases they have to take the decision to drop a prosecution because reasonable and justified doubts about the credibility of a witness – often the alleged victim – mean that there is no realistic prospect that a reasonable jury properly directed could convict. Not surprisingly many complainants in such circumstances feel aggrieved. This is why many barristers feel uncomfortable about certain aspects of the 'Prosecutors' Pledge' and why sometimes it is inevitable that witnesses may feel that they are "accessories to the Criminal justice system". They are central to the CJS sense, but the trial itself is not, in one sense, all about them.

Secondly, what is often forgotten in discussions about victims' rights is that the CJS is designed to achieve the outcome of convicting the guilty and acquitting the innocent by the provision of a system of investigation and trial that is fair to all, including the suspect or defendant. It is essential to this system that there is a presumption of innocence and the trial itself resolves whether that presumption is over-turned. In the course of that process it is inevitable that <u>sometimes</u> there are critical issues to be resolved as to whether there was a victim at all and, even if there was, the degree to which they were blameless or culpable. These are uncomfortable issues that cannot be avoided. So in many contested rape trials the issue that has to be resolved by the trial is whether the principal witness – the complainant – <u>was</u> a victim. This is why in court they are referred to as the complainant and not the victim - to do otherwise simply pre-judges the issue that the trial is about. In many murder trials the defence advanced is one of self-defence, and thus evidence is adduced that it was the defendant who was the victim, not the deceased.

These are very complex issues and not capable of easy resolution, but we simply urge that

[6] Paragraph 77
[7] Paragraph 76 and 77
[8] Paragraph 6
[9] Paragraph 65

nothing should done that prejudices the important principle that a defendant on trial is presumed to be innocent until proved guilty.

Finally, attention is paid to the differences in the levels of satisfaction with the Criminal justice system amongst victims and witnesses. This begs an important question: when is a witness not a victim? Sometimes the answer is simple, sometimes it is not. A more fundamental problem is in establishing the causes of dissatisfaction. Someone who reports a burglary may be dissatisfied if no one is charged or convicted, even though there was no realistic prospect of that happening because of an absence of evidence Sometimes people have unrealistic expectations. Someone who complains they were assaulted and identifies their assailant may be very dissatisfied indeed if a jury concludes that they were mistaken in their identification and acquits the defendant. That does not mean that there has been any failure in either the system or their treatment by the system.

Q11 What do you think of the proposed principles for the new Code?

We agree entirely with the principles of the new Code. We merely note that some caution be applied to the principle of the pro-active provision of information to victims. Clearly the investigators have to exercise some circumspection about this to avoid prejudicing an investigation by providing too much information to a potential witness which could result in them changing their evidence, consciously or unconsciously. A simple example is in the case of identification witnesses. They are presently prohibited from knowing, at the time they purport to make an identification during an identification procedure (formerly a 'parade' now a video process) whether they have picked out the suspect or someone else. This is to avoid providing unconscious external support for the correctness of the identification, as it is likely to affect how they ultimately give evidence.

Q12 Are there additional needs for bereaved relatives which should be reflected in a new Victims' Code?

None of which we are aware

Q13 How could services and support for witnesses through the criminal justice system, work together better?

This is not an easy question for the CBA to answer, given that the Bar does not have intimate knowledge of how the agencies which provide support and services to witnesses and victims interact with each other. However, if there is objective evidence that agencies which provide such support and services have previously failed to work together to an acceptable standard, the obvious advice would be to encourage better coordination, and the holding of regular multi-agency meetings so that all work towards the same goals.

Q14 How could the Witness Charter be improved to ensure that it provides for the types of services and support witnesses need?

The Witness Charter is a comprehensive document which provides for certain key standards to be maintained and striven for in respect of victims and witnesses, by agencies which work within the criminal justice system. It is currently sound and there is nothing about the

existing document which is objectionable. However, one aspect of the charter which could be expanded upon, is the requirement of agencies to explain their decisions and be accountable for them. Simply keeping witnesses informed of the progress of the case, and explaining why certain decisions and judgments have been made is fundamental and easily achieved. Although, this should not be confused for encouraging agencies to become supine and reliant on approval from witnesses and victims before any decision (large or small) can be made, or inhibiting agencies from making sensible but difficult decisions.

Q15 How can the processes which allow victims and witnesses to make complaints to CJS agencies be improved to make accessing redress easier?

Clearly, there will frequently be occasions when a victim or witness will have a well founded complaint about the way in which the authorities, counsel or other members of the CJS have dealt with the case. But in the experience of the CBA the vast majority of complaints are rooted in an ignorance of, or misunderstanding of the system. Complaints that victims and witnesses generally make, relate to the result of a trial, or a sentence with which they disagree. Either the accused will have been acquitted; will have been allowed to plead guilty to a lesser charge or on a reduced basis; or the Judge will have imposed a sentence which they consider too light. This question might better have been framed 'what do witnesses and victims usually complain about, and how might these complaints be reduced or redressed'. The answer is to require CJS agencies to explain their decisions and ensure that victims and witnesses are well informed and understand the rules by which we all act - why a lesser charge was accepted, the sentencing guidelines etc..

Q16 How could our existing processes be changed so that Victim Personal Statements are taken into account in sentencing and at other stages of a case, as appropriate?

It is the experience of members of the CBA that victim impact statements are fully taken into account by sentencing tribunals, where appropriate, and are an important part of the sentencing process. It is difficult to see how a victim impact statement could properly be taken into account at any other stage of the proceedings but sentence. It would be totally inappropriate to introduce evidence in aggravation of the seriousness of an offence in the trial of an accused and possibly inhibit the impartial decision that is called for. The introduction to the English and Welsh courts of the practice of witnesses addressing the court personally at sentence (as done in some states in the US) is not supported by the CBA.

Q17 What process could be put in place so businesses can explain the impact of crime on individual members of staff and the business as a whole

We do not see why the impact of crime on individual members of staff of businesses offended against, cannot be adequately explained in a standard victim impact statement. In the case of the wider impact upon a business as a whole, it would be entirely appropriate for an Impact Statement to be taken from a company officer, a senior partner or a sole trader which explained the impact on the business in terms of reduced profit, redundancies or, in the worst cases, the entire collapse of a business and the loss of employment. This would avoid the current tendency of large-scale frauds, for example, being treated as almost victim-less crimes.

Q18 What could be done to improve the experience of witnesses giving evidence in court?

The courts currently have a wide range of measures and procedures which can be called on to make the experience of a witness less inconvenient and less painful. These include screening the witness from the defendant and public, TV link, ABE interviewing and other special measures. The hearsay provisions allow for evidence to be introduced without a witness even needing to be present at court. In certain cases a witness may be granted anonymity. It is difficult to see what other measures might be introduced which would strike a fair balance between improving witnesses experience of attending court, and ensuring a fair trial for the accused. For example, the CBA would be opposed to allowing witness statements to stand as evidence in chief (as is currently done in civil litigation); or for the hearsay provisions to be more widely used especially where the hearsay evidence is the sole or decisive evidence in the case. However, witnesses frequently have to endure excessive waiting at court. The reason for this is usually because judges are extremely intolerant of time being wasted because a witness is unavailable, with the result that a 'reserve' of witnesses is called to court just in case they are required and often have to return the next day.

Another reason why witnesses are inconvenienced is because trials are given totally unrealistic time markings. For example a whole series of unconnected applications together with a trial are listed at ten in the morning. The trial will only be reached by perhaps midday and the witnesses not called until after lunch. Yet because it is listed at ten a.m. the witnesses are expected by the court to attend at 10 a.m.

A third reason why witnesses are inconvenienced is because trials are listed as 'floating' trials - that is a case listed for trial but where there is no allocated court available but it is hoped something else will 'collapse' creating a vacancy. Sometimes a vacancy arises, sometimes it does not, and witnesses will have been summoned to court for nothing.

All these problems arise because courts are run and court staff trained to list things with one aim in mind – a court and judge should never be idle. The trial process is an imperfect thing and no one can accurately predict exactly how long any witness or legal argument will take, although all participants, lawyers and judges, do their utmost to try to be as accurate as humanly possible in estimating how long things will take. A culture change is required to reduce inconvenience to victims and witnesses, although it has to be recognised that this would result in increased costs caused by courts being idle at times. In an ideal world, a witness should be given a time slot in which it is hoped that he/ she will start and complete his/ her evidence and the practice of floating trials would be stopped.

Witnesses often experience pressure or lack of understanding by their employers. We believe that every witness should be given a court document (stamped and signed by an appropriate officer of the court) confirming that they are required to give evidence at a certain time and place; that delays are possible; and that witnesses are to be placed under no pressure by employers. This would be quite apart from the current practice of issuing witness summonses. This way, a witness would be able to answer a difficult employer's questions.

Q19 What measures could be put in place to ensure the safety of the victim when undertaking restorative justice?

The principal measure is of course the victim's views, coupled with expert assessment of individual cases, including a proper review of both the offence and the offender's history

Q20 How can we change attitudes and behaviour towards reparation and demonstrate how reparative outcomes can be achieved in innovative ways?

Our experience of post-conviction and post-sentence outcomes is limited to conducting appeals and anecdotal evidence from offenders who have undertaken restorative justice procedures. Publicising the successful outcomes of restorative justice is obviously essential. It is particularly important that this is from the point of view of victims, as it is perhaps counter-intuitive that victims may benefit greatly from confronting offenders in a constructive way.

Q21 Should the Surcharge on conditional discharges be set at a flat rate of £15 for those over the age of 18?

Q22 When applied to fines, should the Victim Surcharge be set as a percentage of the fine amount? If so, should the percentage be set at 10%?

Q23 Should there be a minimum Victim Surcharge amount applied to fines? If so, should this be set at £20?

Q24 Should the maximum level for Surcharge on fines be set below the Victim Surcharge on a custodial sentence of over 2 years?

Q25 Should the Victim Surcharge, as applied to adult community sentences, be set at a flat rate? If so, should the flat rate be set at £60?

Q26 Should Penalty Notices for Disorder be increased by £10? Should the additional revenue this raises be used to fund victim support services?

Q27 Should the same increase be applied to both lower and higher tier Penalty Notices for Disorder?

Q28 Should the Surcharge on custodial sentences be set at a higher value than that for adult community sentences? If so, should this be set according to length of sentence?

Q29 For multiple offences, resulting in concurrent or consecutive orders, should the Surcharge be ordered on the highest individual sentence?

Q30 Should offenders be required to pay the Victim Surcharge whilst in prison?

Q31 Should the Surcharge be extended to the full range of disposals for juvenile offenders?

Q32 Should the Surcharge for juvenile offenders be set at three levels: £10 for conditional discharges; £15 for fines and community sentences; and £20 for custody of any length?

The Victim Surcharge is a slightly curious measure given that it does not reflect the value of the damage inflicted on the victim in each individual case. It is really a form of hypothecated tax on offenders. We have the following general observations on the Victim Surcharge:

Firstly, it is little understood by offenders; the fact that it bears no relation to their offence – other than it increases in accordance with the gravity of the offence – they see it simply as a fine by another name.

Secondly, we have no specific proposals concerning either the level at which the Victim Surcharges should be set or the scope of their imposition. This is because, as stated above, they appear to bear little relation to either the offenders' ability to pay or the gravity of the offending behavior. These questions can only really be answered by proper research into the attitudes of those who have to pay the surcharge and some sort of proper impact studies.

Thirdly, the level of Victim Surcharge in respect of offenders serving custodial sentences is difficult for them to comprehend. To someone serving over 2 years, a surcharge of £120 is at best an irritant – if they have means – and at worst a considerable burden if it has to be paid out of prison earnings. Setting it at a flat rate at best may attract derision and at worst serious and a justifiable sense of grievance. A penniless offender who receives 2 years imprisonment for possession of cannabis with intent to supply it – and many such offenders have no savings or assets – may wonder why they are paying £120 out of their prison earnings to purely hypothetical 'victims' whereas someone doing ten years for GBH is, or has, paid the same.

Q33 How should we define what a "crime of violence" means for the purposes of the Scheme? What are your views on the circumstances we intend to include and exclude from the definition?

The CBA believes that the appropriate definition should include: any act or omission which involves any use of force or threat of force against the person, which is hostile and which either causes some hurt or a fear of immediate force which will cause some hurt. We do not consider that any of the expressed inclusions or exclusions proposed by the consultation are objectionable, and we support them in principle.

Q34 What other circumstances do you believe should or should not be a "crime of violence" for the purposes of the scheme?

We consider that the consultation paper is well thought out in defining what should be a crime of violence. We would however wish to make clear that we consider certain crimes involving harassment and threats (even made over the telephone or by electronic or internet media) should be encompassed within the definition. Such harassment or threats can be truly terrifying for victims and can have significant psychological or psychiatric consequences.

Q35 To be eligible for compensation, should applicants have to demonstrate a connection to the UK through residence in the UK for a period of at least six months at the time of the incident?

Q36 What are your views on our alternative proposal to exclude from eligibility for compensation only those who were not legally present in the UK at the time of the incident?

The CBA does not see any fair or rational reason to make residence in, or connection to the UK for a minimum duration, a criterion for eligibility for compensation. By analogy, human rights apply to all in the UK whether they are UK citizens or illegal immigrants - why then should they be less deserving of compensation depending upon where they live or come from? It would undermine the standing of our system of justice internationally, if such an eligibility requirement existed.

Q37 What are your views on our proposal not to make any award:

- Where the crime was not reported to the police as soon as reasonably practicable?

- Where the applicant has failed to cooperate so far as practicable in bringing the assailant to justice?

Q38 What considerations should be taken into account in determining what is reasonably practicable for the applicant with respect to reporting the incident and co-operating with the criminal justice system?

Q39 Do you agree that there should be an exception to the rule that the incident should be reported as soon as reasonably practicable in certain cases? What should those cases be?

The types of crimes to which these provisions will usually apply are sexual and domestic violence offences, offences against children or involving children, and generally crimes involving the most vulnerable in society. We do not believe that there should be any possibility for a perverse, discretionary refusal to make an award in these circumstances and they should be expressly excluded.

In cases of a different kind, it must be born in mind that generally speaking the accused will have been convicted. Therefore, the victim will be just as much a victim even if he/ she was slow to report the crime or unwilling to put themselves trough the inconvenience or trauma of court proceedings for whatever reason. There may however, be a compelling argument for a reduced award in a non-sexual, domestic violence or child related case, where the victim failed to cooperate with the authorities. Clearly, if these provisions are used, the obvious considerations should be: age, mental capacity, the nature of the offence, any evidence of fear on the part of the witness - involving the defendant or not, embarrassment, and the consequences to the witness in giving evidence.

Q40 What are your views on our proposals to make an award where previously it would have been deemed to be against the applicant's interests (e.g. in cases of sexual or physical injury to a very young child)?

We agree with this proposal. In personal injury cases involving children, dealt with in the Civil Courts, damages are paid into a government-controlled account gaining interest and held on trust until the child reaches adulthood. We believe that such a system could easily be applied to compensation in the criminal courts.

Q41 What are your views on the options for limiting eligibility to the scheme for those with unspent convictions:

- Option A, our preferred option, to exclude from the scheme all those with unspent criminal convictions? or

- Option B, to exclude those with unspent criminal convictions for offences that could lead to an award under the Scheme (ie. violent and sexual crimes), with a discretion to withhold or reduce an award in the case of other unspent convictions?

We do not believe that undue weight should be given to a victim's past when considering whether or how much to compensate them. We consider that Option A is completely arbitrary and likely to give rise to irrational and unfair results. Similarly Option B could produce some bizarre and manifestly unjust results. The reason is straightforward and can be illustrated with a hypothetical case. A woman of previous unblemished good character commits an assault occasioning actual bodily harm as a result of serious provocation and causes an injury was just sufficient to trigger an award under the CICS - a fractured cheek bone. She pleads guilty, is duly contrite and full of remorse and receives a fine by way of sentence, partly to reflect her good character and partly to reflect the degree of provocation. That conviction is unspent for five years. Four years later she has the misfortune to be brutally attacked and raped in a completely unconnected incident, an ordeal from which she never recovers and she is traumatised and disabled for the rest of her life. Under the proposals in this consultation paper she would be entitled to no compensation at all, even under Option B.

We would propose that there should always be a discretion to award compensation (or a reduced amount of compensation) to victims with previous convictions, even for for violent and sexual offences.

Q42 Under Option A, what circumstances do you think are exceptional such that it might be appropriate for claims officers to exercise their discretion to depart from the general rule on unspent convictions?

Q 43 Are there any further impacts that you consider that we should take into account in framing our policy on unspent convictions, and any discretion to depart from the general rule?

The CBA is totally opposed to the unfair and arbitrary Option A, and therefore do not agree that it should be the general rule to which exceptions apply. In framing the policy on

unspent convictions, we would urge the government to avoid the modern and growing obsession with previous convictions. Any discretion should involve the consideration of: the age of offence/ offences; the age of the victim at time they offended in the past; the types of offences and their circumstances; any evidence of rehabilitation; and any evidence of good character for a significant period of time.

Q44 What are your views on our proposal to ignore the convictions of the deceased in bereavement claims?

- Should claims officers have discretion to depart from this rule and withhold payments when the deceased had very serious convictions?

- If so, what convictions should we consider as very serious for this purpose?

We agree with the proposal to ignore the deceased's convictions. The bereavement award is not made to the deceased, it is made to their next of kin, whose past is irrelevant. We see no circumstances in which the deceased's convictions should reduce an award, whatever they may be.

Q45 What are your views on our proposed reforms to the tariff:

Removing awards for injuries in bands 1 to 5 from the tariff except in relation to sexual offences and patterns of physical abuse?

Reducing awards in bands 6 to 12 of the tariff except in relation to sexual offences, patterns of physical abuse, fatal cases and for loss of a foetus?

Protecting all awards in bands 13 and above?

Compensation payment is made in recognition of the pain and suffering that a victim of crime has experienced. That pain and suffering will take a variety of forms and have widely differing effects depending on the individual circumstances. It would be impossible to cater for each and every one and maintain a fair system of payment in which those who deserve it, receive it. We consider the bands should reflect the effect of the injury rather than the type of injury.

Very often the most deserving victims will be those who are the most seriously injured but this will not always be so. By removing the lower bands, the proposals risk eliminating many who are the victims of less serious crime but are nonetheless in need of assistance. As set out in response to question 1, categorising by group creates the risk that someone who needs support is denied it because they do not fit neatly into a group.

We agree that sexual offences and patterns of physical abuse should be maintained.

Q46 Do you agree that we should protect tariff awards for sexual offences, patterns of physical abuse, bereavement and loss of a foetus and re-categorise the award for patterns of physical abuse to clarify that it can be claimed by victims of domestic violence?

Yes.

Q47 What are your views on the options for changes to loss of earnings payments:

Option A, to cap annual net loss of earnings at £12,600 and continue to reduce payments to reflect an applicant's other sources of income?

Option B.1, to pay all applicants a flat rate equivalent to Statutory Sick Pay and not reduce payments to reflect to an applicant's other sources of income?

Option B.2, as option B.1 but we would not make payments in any year where the applicant had employer-funded income in excess of £12,600?

Q48 What are your views on our proposal that applicants must demonstrate that they have no capacity to earn, or very limited earning capacity, to qualify for a loss of earnings payment? What should be taken into account when deciding whether an applicant has very limited earning capacity?

We do not consider this to be something we are able to comment upon.

Q49 Should we retain all categories of special expenses other than for private medical care?

Yes.

Q50 Should we retain the bereavement award at its current level, and the existing categories of qualifying applicant for the bereavement award and other fatal payments?

Yes.

Q51 What are your views on our proposals on parental services:

To continue making payments for loss of parental services at the current level (£2,000 per annum up to the age of 18)?

To continue to consider other reasonable payments to meet other specific losses the child may suffer?

We agree.

Q52 Should we retain dependency payments and pay them in line with loss of earnings proposals?

We agree dependency payments should be retained.

Q53 Should we continue to make payments for reasonable funeral costs?

Yes.

Q54 What are your views on our proposals to require applicants to supply the information set out above?

It is not clear whether the proposals change the evidence required to be submitted with the application and the current scheme is deficient in this regard. It is important that the process is clear from the outset and applicants understand what is required of them. The information required seems reasonable.

Q55 Please let us have your views on our proposal that applicants should pay a small cost (up to a maximum of £50) to obtain the initial medical evidence to make out their claim?

We do not agree that victims should pay towards the cost of medical evidence. We are concerned that bearing this cost at the initial stage could have a prohibitive effect, deterring those who would otherwise be eligible from making an application.

Q56 Where CICA continues to cover the initial medical costs, should this be deducted from the final award (up to a maximum of £50)?

We do not consider this to be appropriate.

Q57 Should costs associated with medical expenses be deducted when:

An applicant misses medical appointments that CICA is paying for?

The applicant commissions additional medical evidence that is not required to determine the claim?

In principle, there is merit in the proposal to deduct costs for missed appointment unless there is a reasonable excuse. However, the paper does not set out what might amount to a reasonable excuse nor how it is to be resolved when reasonable excuse is raised by an applicant.

Q58 What are your views on our proposal to reduce the time available for applicants either to accept the claims officer's decision, or seek a review, from 90 to 56 days, with a further 56 day extension for exceptional reasons?

We agree.

Q59 What are your views on our proposals to extend the circumstances where repayment of all or part of the award may be requested?

We do not consider it appropriate to extend the circumstances to include repayment where the applicant has not cooperated in bringing the assailant to justice. This would be wholly inappropriate. The reasons for non-cooperation are many and varied. Victims should be encouraged to engage and are more likely to do so where there is an appropriate system of support and not because of the threat they will not receive compensation.

Further, if there is a correlation between the payment of compensation and a victims attendance to give evidence, for instance, that may lead to allegations that the only reason

the victim is giving evidence is for the money and will undermine that victim and the process generally.

To use compensation as a means of securing cooperation in a criminal trial could lead to more victims being made to feel as though they are accessories to the system [see references in paragraphs 76 and 77, and answer to question 10]

Q60 What are your views on our proposal to remove the option to request a reopening of a case on medical grounds?

We consider it is only right and proper that a case is re-opened on medical grounds if there is a material change.

Q61 What are your views on our proposal for deferral of Scheme decisions

Deferral of decisions should be made only in exceptional circumstances. If the criminal trial is not determinative, it makes little sense to defer to await the outcome. Where the impact of the injuries cannot is not known and the applicant makes a request to defer, it seems sensible so to do.

Q62 What are your views on our proposal to enable claims officers to withdraw a review decision under appeal and issue a decision in the applicant's favour?

We agree if it means avoiding unnecessary appeal hearings and matters can be properly dealt with administratively.

Q63 What are your views on our proposal to implement powers to recover money from offenders, where criminal injuries compensation has been paid to their victims, if a cost effective process for recovery can be developed? How could this process work?

In principle the idea is a worthwhile one. The difficulty will be developing a system to recover from those in custody, on benefits etc. We are not in a position to comment further.

Q64 Do you think we have correctly identified the range and extent of effects of these proposals on those with protected characteristics under the Equality Act 2010?

Q65 If not, are you aware of any evidence that we have not considered as part of our equality analysis? Please supply the evidence. What is the effect of this evidence on our proposals?

Q66 Given the fiscal climate in which these proposals are made, are there any other ways that you consider we could mitigate against the potential effects identified in the equality analysis?

We have no comments to make upon these questions

CONCLUSION

10. Witnesses and victims are indeed, at the heart of the CJS. A proven victim of crime, is entitled to justice and redress. It is fundamentally important to recognise though, that a 'victim' may only be accurately described as such, if the accused is convicted or concedes the same. Many people who are accused of crimes, are innocent and even victims themselves. Witnesses are entitled to be treated courteously, with respect and to be inconvenienced as little as humanly possible and it is absolutely right that those who work in the criminal justice system strive to achieve this. However, there is no reason why the accused and his family, and the accused's witnesses should not be afforded the same standards. Therefore, the consultation paper might have been less emotively entitled, 'Getting it right for those who encounter the criminal justice system'. Whilst we strive to ensure that witnesses and victims are treated fairly and appropriately (which is an entirely laudable goal), we must be careful to avoid the criminal justice system becoming a one sided affair.

For and on behalf of the Bar Council and Criminal Bar Association

Paul Keleher QC

20 April 2012