

Written evidence submitted by Ian Smith, barrister, 33 Chancery Lane (VIC0048)

1. I am a barrister practising in England and Wales. Prior to that I was a solicitor. I have represented victims of crime for some 20 years. I am an author of texts on the subjects of confiscation and fraud.
2. I am a committee member of the Victims of Crime Association of Lawyers (VOCAL), an international association of lawyers, and was its first president.
3. I am currently carrying out academic research into access to justice for victims of fraud, comparing the UK justice system with some others. In that research I have interviewed some 130 lawyers, approximately half of whom practice in the UK (mostly in England, some in Scotland) and half of whom practice in other countries.
4. The following is a summary of the evidence I can give to the Justice Committee. I would be happy to further explain and amplify my evidence. My evidence is my own and does not necessarily reflect the views of any of my colleagues in the chambers in which I practice, or in the Victims of Crime Association of Lawyers.

Proposed further measures

5. My contribution is to suggest how access to financial justice will be improved by the proposed Victims Bill and to give suggestions in relation to the question that has been posed: ‘*Whether there should be any further measures included in the Bill?*’ My answer to that question is that the Justice Committee should consider the following further six measures, to provide victims with important formal legal rights.
 - i. The right of victims to access evidence gathered in a criminal investigation;
 - ii. The right of victims to be consulted by public prosecutors over the nature of charges to be brought against accused persons, and the impact of charges on the victims’ rights to obtain compensation¹ and/or restitution² under the Sentencing Code;³
 - iii. The right of victims to expect police / prosecutors to make applications to courts for restraint orders and for those restraint orders to be made in support of potential confiscation and restitution orders, and for there to be a duty on police and prosecutors to consider making such applications and to give reasons if they decide not to make them;
 - iv. Criminal court compensation and restitution orders to be made mandatory in most cases;

¹ The powers of the criminal courts to make compensation orders are set out in Chapter 2 of the Sentencing Act 2020. A compensation order is an order against an offender to pay a monetary sum of money to a victim of an offence.

² The powers of the criminal courts to make restitution orders are set out in Chapter 2 of the Sentencing Act 2020. A restitution order is an order against an offender to restore an asset to a victim, in circumstance where the asset was stolen or extracted from the victim and may include orders for the restitution of assets that represent those that were stolen or extracted from a victim.

³ The Sentencing Act 2020 is officially known as the Sentencing Code.

- v. Criminal-court compensation orders to reflect the full value of victims' direct losses, rather than simply being orders limited to an offender's means; and
 - vi. The right of victims to participate in criminal proceedings, for the purpose of pursuing compensation awards and to explain why confiscation proceedings may pose a threat to the interests of victims
6. From both my work as a lawyer and my academic research, I have observed a widespread lack of confidence on the part of lawyers working in the English and Welsh criminal justice system when it comes to financial justice for victims of economic crimes. I believe that there must be a similar lack of confidence on the part of victims, those who do not receive compensation from convicted persons that they ought to receive at the conclusion of criminal proceedings.
 7. There is a perception among some lawyers that successive governments have prioritised the interest of the state in receiving monies under confiscation orders made against offenders, whilst doing less for victims of the same crimes by the same offenders.
 8. In setting out potential solutions, I summarise below a number of problem areas for the criminal justice system as it currently exists. They stem from: weakness of a victim's standing in criminal proceedings; weakness in compensation powers and restitution powers of the criminal courts (those set out in the Sentencing Code); and the particular disadvantage that victims may indirectly suffer because of the state's strong confiscation powers.

9. Proposed measure 1: The right of victims to access evidence gathered in a criminal investigation

10. Proposed measure 2: The right of victims to be consulted by public prosecutors over the nature of charges to be brought against accused persons, and the impact of charges on the victims' rights to obtain compensation and/or restitution under the Sentencing Code

11. These two proposed measures are linked and can be considered together.
12. At present, a victim is given little information about the evidence that is gathered in an investigation and is effectively presented with a *fait accompli* as to the nature of the charges that are brought against the accused. The lack of rights leaves victims in the dark and unable to make assessments of the probabilities that they will receive compensation; and unable to access evidence to use in civil-court proceedings.
13. Take for example, a case of corruption reported by the buyers of a business. After buying the business, they discover that the business has obtained contracts with customers through providing bribes to employees of customers. The former owners fraudulently failed to disclose the corruption when they sold the business to the buyers. The buyers report the matter to the police. After a long investigation, persons are charged with criminal offences. Those persons are the former owners of the corrupt business and the employees of the customers. They are all charged with

corruption offences. No charges are made against the former business owners in relation to their fraudulent sale of the business to the buyers. The investigative direction taken by the police and the charging decision made by the police and prosecutors means that the buyers of the business are excluded from the category of persons who will be classified as victims and entitled to claim compensation. This is because their losses (stemming from the purchase of a dud business) have not resulted from the corruption offences. Their losses have arisen from the fraudulent sale of the business. But as no charges have been levied for that offence, the victim will not be eligible for a compensation award or a restitution award from the criminal court. The woes of the victim are compounded by the fact that it will have waited years for the charging decision and has little idea of much of the evidence that has been gathered by the police in their investigation; and by the fact that the prosecutor will press on with confiscation proceedings and potentially also have to consider whether to advocate for compensation awards for victims of the corruption offences, both of which have the potential to take all available assets held by the former business owners, leaving nothing left for the victims of the fraudulent sale of that business.

14. A right of access for victims, to evidence held by the police and public prosecutors, would lead to greater awareness by victims of the direction of a police investigation and would give greater scope for meaningful dialogue between victims and authorities over the direction of investigations, the charges that are likely to be levied, and the impact of potential charges on the victims' positions in relation to their compensation needs. In addition, access would enable victims to advance their claims for compensation, either in the criminal proceedings themselves, or in related civil proceedings.
15. A right to be consulted by public prosecutors over the nature of charges to be brought would give victims the opportunity to identify potential problems that will arise if certain charges are brought or not brought. That would then give prosecutors the ability to modify charges or add new charges as appropriate.
16. The Justice Committee may wish to consider the various access-to-evidence rules in other countries, in particular those in other countries in Europe as set out in various codes of criminal procedure.⁴

17. Proposed measure 3: The right of victims to expect police / prosecutors to make applications to courts for restraint orders and for those restraint orders to be made in support of potential confiscation and restitution orders, and for there to be a duty on police and prosecutors to consider making such applications and to give reasons if they decide not to make them

⁴ Many Codes are published in English language form by relevant governments. See for example the German Code of Criminal Procedure, which can be retrieved at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html. And the Swiss Criminal Procedure Code which can be retrieved at <https://www.fedlex.admin.ch/eli/cc/2010/267/en>. And the Swedish Code of Judicial Procedure which can be retrieved at https://www.government.se/contentassets/a1be9e99a5c64d1bb93a96ce5d517e9c/the-swedish-code-of-judicial-procedure-ds-1998_65.pdf. And the Dutch Code of Criminal Procedure, which can be retrieved at https://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf.

18. Restraint orders are critical. They allow prosecutors to ask courts to order that the assets of the accused are frozen.
19. As the law stands, a court has no power to make a restraint order in support of potential compensation orders or restitution orders.
20. At present, restraint orders can only be made in support of potential confiscation, which may be either of indirect benefit to victims or an indirect detriment to victims. A confiscation-purposed restraint will benefit a victim if that victim is ultimately the recipient of a compensation or restitution order that is then paid from the restrained funds of an offender. But if no compensation or restitution orders are made, the use of confiscation-purposed restraint orders can lead to the detrimental result that the restrained funds are used to satisfy a confiscation order made against the offender, leaving little or nothing for the victim to try and enforce against in civil-court claims.
21. Clear improvements in justice for victims could be achieved if criminal courts were given powers to issue restraint orders in support of potential compensation and restitution awards; and if the police and prosecutors were required to explain any decisions made to not apply for such restraint orders.

22. Proposed measure 4: Criminal court compensation and restitution orders to be made mandatory in most cases

23. As the law currently stands, courts have a discretion about whether to make compensation orders and restitution orders in favour of victims. Such a position must lead to great inconsistencies in the practices of the criminal courts. This discretion can be contrasted with the position in relation to confiscation orders which are mandatory.
24. There is no good reason why compensation and restitution orders should not also be made mandatory in all cases in which an offender has pleaded guilty or found guilty of an offence which has caused harm to a victim.⁵
25. Making compensation and restitution mandatory would bring UK law in line with, for example, the law in the USA, where, under federal law, restitution or compensation to victims is mandatory in all cases where an offender has been convicted of relevant offence by a court (whether after a guilty plea or after being found guilty by a court), under US Code, Title 18, Section 3663A.⁶ Those mandatory requirements to order restitution or compensation do not apply if a court finds that '*the number of identifiable victims is so large as to make restitution impracticable*'; or '*determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process*'.

⁵ Subject only to exceptions in cases where the victim has already received compensation or restitution or has disclaimed such rights.

⁶ This provision can be retrieved at <https://www.govinfo.gov/content/pkg/USCODE-2010-title18/pdf/USCODE-2010-title18-partII-chap232-sec3663A.pdf>

26. The problem of the discretionary basis of compensation orders and restitution orders has been compounded by case law. The appellate courts of England and Wales have in lines of authority, determined that only “straightforward” cases of compensation and restitution should be considered by the criminal courts and that complex cases should be left to the civil courts. These lines of authority date back many decades to a time before the introduction of confiscation procedures.
27. The combination of discretion and the case law that bars complex claims, leaves many victims with little or no access to justice at all for these reasons:
- (a) Many if not most victims have insufficient means to bring their own civil claims against offenders in the civil courts, which means that if the criminal court does not provide justice and the victim cannot afford to bring civil proceedings then no financial justice will be done for the victim. The Justice Committee will be well aware of the high costs of civil-court litigation and the barrier that this presents to lower and middle-income individuals and businesses.
 - (b) A victim will usually be stressed and exhausted by her/his/its engagement in the criminal process. It will often not have the energy and will power to bring separate civil-court proceedings, either concurrently with or after criminal proceedings.
 - (c) A confiscation order made (under the Proceeds of Crime Act 2002) against a convicted person, if made without simultaneous compensation or restitution orders, will deplete the assets of the convicted person and in many cases make it impossible for a victim to make subsequent recoveries from a convicted person via civil-court proceedings.
 - (d) Confiscation orders are made under a legislative steer (in POCA 2002) that requires a court to ignore the rights of a victim who has an ordinary (unsecured) damages claim against an offender, and this poses a significant risk in all cases where confiscation orders are made but compensation orders or restitution orders are not made by criminal courts.
28. The traditional view that compensation claims can be too complex is outdated. It is no longer compatible with the position that criminal courts make very complex determinations in post-conviction confiscation proceedings. The Government has pursued extremely complicated confiscation proceedings before the criminal courts for decades. A key issue in confiscation proceedings is the value of an offender’s benefit from crime. This question will often mirror the key question in compensation proceedings, namely what direct loss a victim suffered as a result of the crime.
29. The time has come to recognise that if the criminal courts are expected to deal with complex confiscation issues (as they are and should be), they should also be expected to deal with similarly complex compensation issues as well, hence the suggested proposal that compensation and restitution orders be made mandatory. The mandatory provision could of course be made subject to an exception of the kind found in the USA’s federal law (quoted above).

30. Proposed measure 5: Criminal-court compensation orders to reflect the full value of victims' direct losses, rather than simply being orders limited to an offender's means

31. At present, the law in relation to compensation orders requires criminal courts to limit the orders made to amounts that the paying defendant can afford to pay, after carrying out an enquiry as to the offender's means. There is no power to revise a compensation order upwards at a later date.

32. Accordingly, in many cases compensation orders will not reflect the true value of a victim's loss. This has both practical and symbolic effects. Victims are in many cases awarded low sums of compensation, when compared with their losses, leading to a powerful sense of injustice, both real and symbolic, that their losses have not been recognised by the criminal justice system. And in practical terms, victims are denied the opportunity to explore whether offenders do in fact have sufficient assets to meet a full compensation award or to be able to enforce a full award at a later date when an offender acquires additional assets.

33. Many other countries have laws which provide for much fuller compensation awards:

- (a) In the USA, the courts are required by the relevant federal statute⁷ to make compensation awards that reflects the full value of a victim's direct loss from the crime; and
- (b) In most, if not all continental European countries, criminal courts are empowered to make compensation orders that reflect the value of at least all the direct losses suffered by a victim.

34. Proposed measure 6: The right of victims to participate in criminal proceedings, for the purpose of pursuing compensation awards and to explain why confiscation proceedings may pose a threat to the interests of victims

35. There is an anomaly in the law as it exists at present. Victims are permitted to have standing in criminal proceedings for the purpose of making an application for a restitution order, but they have no standing when it comes to requesting a compensation order.

36. This lack of standing, regarding compensation orders means that victims have no ability to directly address the court on the issue of compensation. Instead, a victim has to petition the public prosecutor to make an application for compensation and hope that such an application will be made and made in a satisfactory way. The victim has a right to make a Victim Personal Statement,⁸ which may include information about the financial harm suffered by the victim, but this is not a substitute for the right to advocate for a compensation order.

⁷ See footnote 6 above for the link to the relevant statute.

⁸ On Victim Personal Statements generally, see the Joint Agency Guide to the Victim Personal Statement, published by the Crown Prosecution Service:
https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/joint-agency-guide-victim-personal-statement_0.pdf

37. The current lack of standing in relation to compensation orders has a major impact on victims. It leaves them unable to advocate for a compensation order, it leaves them unable to make arguments as to the amount of a compensation order, it leaves them unable to make arguments about the detrimental effect that a confiscation order may have on the victim; and it leaves them unable to appeal a refusal by a court to make a compensation order.
38. Given that the law already recognises the need for victims to have standing in order to make applications for restitution orders, there seems no good reason why the same approach should not be taken in the case of compensation orders. The Sentencing Code could be amended accordingly.

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