FARRER&Co

Legal claims for child sexual abuse and IICSA

Maria Strauss | March 2020

Many of our clients have faced legal claims or threatened claims for non-recent child sexual abuse. This is a complex area where both expertise in safeguarding as well as proper claims handling is essential. Cases, which are already complex, can be made more so by overlapping criminal investigations, serious case reviews or independent reviews commissioned by the organisation itself. Also, there is often uncertainty over historical insurance arrangements and sometimes the institutions at which the abuse took place no longer exist.

"Accountability and Reparations" has been a major focus of the Independent Inquiry into Child Sexual Abuse (**IICSA or the Inquiry**). IICSA has sought to address some of the issues set out above as well as other areas within a specific stream of their work.

This note takes stock of IICSA's work so far in this area and highlights the findings emerging in respect of accountability and reparations. This note is relevant to all clients and contacts handling claims in this area.

If you require further information on anything covered in this briefing, please contact:

Maria Strauss
+44(0)203 375 7259
E: maria.strauss@farrer.co.uk

Alternatively, please contact the firm on 020 3375 7000. Further information can also be found on our website.

Status of the "Accountability and Reparations" work stream

An investigation into "Accountability and Reparations" was announced at the opening of IICSA in 2015. The scope of the investigation was, broadly, to investigate "the extent to which support services and legal processes effectively delivery reparations to victims and survivors of child sexual abuse and exploitation".

In August 2016, the Inquiry published "issues papers" on the civil justice system and on criminal compensation. It held seminars on these topics in November 2016 and February 2017. It made some recommendations in respect of claims in its overarching Interim Report in April 2018 (which are picked up in this note).

IICSA selected 5 case studies for the purposes of this investigation. The case studies were those involving "group actions" (ie several victims bringing cases) which meant for IICSA a large number of potential witnesses from which to gauge experience of both the civil and criminal compensation processes. The institutions in these case studies were all either children's homes or "approved schools" (ie residential institutions approved by the Secretary of State to which children could be sent by a Court for reasons such as protection or punishment). Two of the approved schools were faith based.

More than 40 witnesses gave evidence to this stream of the Inquiry's work spanning a time period of nearly 60 years from the 1960's. Evidence was heard from victims, lawyers, insurance companies, the police, the Ministry of Justice and charities.

The Inquiry published an Interim Report of its findings in this investigation in September 2019 and then held a public hearing in November 2019, with extra sitting days in December 2019, January 2020 and February 2020. Therefore, this investigation is currently open and ongoing.

What has the Inquiry found so far?

Considering both the civil and criminal justice systems which are of course separate and distinct processes, and related support services, IICSA made a number of findings and some interim recommendations.

An overarching finding is that many victims seeking reparations have found the legal process sometimes "hostile, baffling, frustrating and futile" as well as "distressing". The redress which a victim may seek can include:

- Compensation from an individual or institution;
- Acknowledgement that the abuse occurred;
- An explanation of how the abuse was allowed to happen;
- An assurance of non-recurrence;
- Genuine and meaningful apologies; and
- Counselling or other support.

"Accountability" and "redress" can mean different things to different victims; for some it very much focused on prosecution of the offenders whereas for others there was a desire for the truth to come out publicly and for some it was to receive apologies from the institutions. Few appeared to be motivated by compensation claims. From the evidence heard, IICSA found that none of the avenues for redress (be they civil or criminal avenues) were always able to adequately provide the remedies sought by victims and that it appeared to be impossible for any one system, to satisfy everyone: none of the legal systems are designed to deliver all elements.

Obtaining civil compensation

In respect of the civil justice system, IICSA noted that:

1. Legal claims arising from sexual abuse are dealt with as personal injury claims and the process is governed by the civil procedure rules (**CPR**) which encourages early settlement;
2. Witnesses reported that litigation was emotionally challenging and it compounded the trauma they had already suffered;
3. Victims were often dissatisfied with the outcome either because their case failed, or if they accepted a settlement offer, they perhaps did not receive an explanation or apology for what happened as they had hoped;
4. Some victims were not aware they could make civil claims and so did not do so;
5. The police do not always sign post victims and survivors to seek legal advice about potential civil claims;
6. Victims who did bring legal claims had several different reasons and their objectives did not always align with the fundamental purpose of a civil claim (ie to obtain financial compensation). The Courts cannot order apologies or explanations or meetings with senior people from the institutions or indeed promise that abuse will not happen in that particular organisation again;
7. IICSA are still specifically considering recommendations around the law of limitation which is one of the most contentious issues they heard about. Limitation is used by some insurers to defend claims or as a negotiating point in settlement discussions;
8. IICSA found that limitation periods are in the general public interest allowing individuals and institutions to arrange their affairs without the fear of facing litigation at some

indeterminable time in the future. Related to limitation, the issue of whether a fair trial is possible years later is obviously a very important point in our justice system;

9. Whilst there is currently no pre-action protocol (under the CPR) for child sexual abuse claims, a group of representatives for both claimants and defendants have prepared a draft pre-action protocol for non-recent abuse claims; the status of this protocol is currently not clear;

10. It is apparent that different insurers take very different approaches to legal claims. Some insurers (eg Zurich and Ecclesiastical) follow internal agreed protocols on the handling of abuse cases with positions adopted in relation to issues such as apologies and limitation defences. It is always worth clients checking whether their insurer has an internal protocol and also generally, at the outset of a case, being completely on top of the approach an individual insurer will take to a case as decisions made in the handling of non-recent abuse cases have real consequences for victims and organisations today;

11. Civil courts, unlike the criminal courts, do not have special rules governing the questioning of vulnerable witnesses and claimants are treated like any other personal injury claimant, and could be questioned robustly (including by the alleged perpetrator of the abuse if they are representing themselves). In the criminal courts various "special measures" are afforded to witnesses deemed vulnerable. The measures include protections such as screens being used to shield the witness from the defendant, evidence being given via live link or in private, removal of barristers' wigs and gowns, to name a few examples;

12. A number of victims reported to IICSA that they did not understand how their settlement had been reached or calculated out of court;

13. There appeared to be agreement between many witnesses that the level of damages was overall too low. "General damages" (ie for the abuse itself and any physical or psychiatric injuries resulting) are quantified by reference to the Judicial College Guidelines (guidelines for the assessment of all personal injury cases). "Special damages", for example cost of therapy is straightforward to quantity (and generally the medical expert in the case will recommend a certain number of therapy sessions). However, claims for loss of earnings are more complex and fact specific but also tend to settle for relatively low sums.

Obtaining compensation through the Criminal Courts

In respect of criminal compensation, victims can seek this in one of two ways. First, a Criminal Compensation Order (**COO**) which is an order made by the Court after a successful prosecution requiring the convicted offender to pay compensation to the victim. Second, an application to the Criminal Injuries Compensation Authority (**CICA**) which is a publicly funded body. Awards can be made whether or not there has been a conviction.

IICSA noted that only around 0.02 per cent of COOs relate to child sexual abuse cases and that the courts have made clear that CCOs should only be used in simple straightforward cases (property damage or theft for example). CCOs should not be made where there is no realistic possibility of compliance because, for example, the offender is in jail or does not have the resources to pay within a reasonable time period.

In respect of CICA awards, a number of victims were unaware of the scheme so did not apply. In response to this, IICSA considered the publicity of the CICA scheme. The Victims' Code is statutory guidance which sets out the support and services that victims of crime are entitled to receive from criminal justice agencies. The Code makes clear that victims can apply for compensation under the scheme, but knowledge of the Code itself is "pretty low" and the Code is felt to be not very accessible. The government published the Victims' Strategy in September 2018 with the aim of improving accessibility and awareness of the Victims' Code.

One of IICSA's key findings in this work stream is that the Police have not always consistently made victims aware of their right to pursue compensation (either through the civil or criminal courts). This may have been because of concerns in the past that criminal proceedings could have been undermined by accusations that the victim had fabricated allegations to obtain compensation. National guidance to the police issued in 2013 by the College of Policing makes clear that applications to the CICA for awards should not be delayed until the conclusion of a criminal investigation or trial but the guidance does not currently require police officers to be proactive in raising the scheme's existence.

The CICA may refuse to make an award in circumstances where the applicant did not report the crime as soon as reasonably practical (and this can often be the case with allegations of child sexual abuse), or if they have not cooperated as far as reasonably practicable in bringing the perpetrator to justice (which again can be the case with victims of sexual crime generally). CICA awards can be withheld if, for example, the applicant themselves is not of good character (eg has a criminal conviction) or they refuse to cooperate with the police or fail to give assistance to the CICA in the application. CICA awards are based on a tariff and the levels of award are modest. The Ministry of Justice reported to IICSA that there is no political appetite for increasing the level of CICA awards but that a review of the system was taking place.

Support during civil and criminal proceedings

A consistent theme from victims has been their struggle to access the right support at the right time when they are going through a civil or criminal case (and in some cases, some victims will be going through both). Support services are offered by public, private and voluntary organisations and there is a "postcode lottery" of sorts in the provision of local services with particular gaps in services for men. In its interim report in April 2018, IICSA recommended that the government establish levels of expenditure and the effectiveness of the expenditure on services for victims of child sexual abuse. This recommendation was accepted by the government who are due to present their findings to IICSA.

IICSA heard evidence from lawyers for claimants who reported that their clients rarely receive therapeutic support when going through civil cases and some discontinue cases due to the stress of litigation. Those who do pursue civil claims to the end often report feeling "cut adrift" once the process has ended. The personal injury pre-action protocol requires that parties should consider as early as possible whether the claimant has reasonable needs that could be met by medical treatment or other rehabilitative measures and states that the Rehabilitation Code is helpful when considering this issue. The Rehabilitation Code is intended to assist an injured claimant to make the best and quickest possible medical, social, vocational and psychological recovery (for example interim payments can be made or early medical treatment to help longer term recovery).

Payments of compensation do not always lead to victims getting support as it is up to claimants how to spend any compensation they receive.

Finally, in respect of support during the criminal process, this appears to be much better than during civil cases. Over the last 20 years, there has been significant changes in the provision of support during criminal investigations with the police focusing on prioritising the needs of the victims and survivors and this seems largely in part due to the introduction of the Victims' Code.

Redress schemes

Redress schemes were always going to be a major focus of IICSA given these have been recommended by other similar inquiries (such as in Australia and Ireland). In general, a redress scheme is intended to be a non-adversarial process in which a victim can obtain compensation, and other forms of redress such as an apology, access to support and for example meetings with senior people in the organisation. Redress schemes are intended to be a means of achieving a speedier resolution than civil litigation or compensation through COOs or the CICA. Whilst there are advantages to a redress scheme, there are also disadvantages including, they are often time limited

and victims report that a redress scheme does not have the same effect of "holding an organisation to account". Finally, some insurers in IICSA were reluctant to commit to how they might engage with a redress scheme without seeing specifically what is proposed – insurers considerations are purely financial they said and they cannot for example, compel anyone to offer an apology or make commitments that abuse will not happen in the future.

IICSA did not appear to consider whether a Tribunal system might be a better option for child sexual abuse cases than either civil litigation or a redress scheme.

Conclusions and recommendations from IICSA in this area:

1. An inspection of compliance (by the MoJ, the Home Office and Attorney General's Office) of the Victims' Code specifically in relation to survivors of child sexual abuse. This recommendation was accepted by the Government and a review is underway. In the interim period, the Code to be revised to ensure that victims are made aware of their rights to compensation within both the civil and criminal justice system;

2. IICSA concluded that there is a compelling need for legal claims to be treated differently from other forms of personal injury litigation. Claimants must be treated sensitively; defendants to recognise that provision of explanations, apologies, reassurance and access to specialist therapy and support is just as important (or in some cases more important) to victims than compensation;

3. Institutions must be able to make apologies, offers of treatment and other redress to victims without undermining their ability to defend civil claims;

4. The Association of British Insurers (**ABI**) to consider whether a register of public liability policies should be put in place so that claims are not prolonged or undermined by not knowing at the outset if insurance cover exists;

5. The Judicial College to revise its guidelines in respect of child sexual abuse compensation to more fully reflect the lifelong consequences of sexual abuse;

6. Claimants in civil cases for child sexual abuse cases to be given the same protections as vulnerable witnesses in criminal cases;

7. Further investigations to be carried out by the MoJ so that the use of COOs can be improved;

8. As part of a review by the MOJ of the CICA scheme, IICSA expect consideration to be given to the fact that the current CICA rules fail to recognise the impact of child sexual abuse and to revise the rules so that applications are not automatically rejected where there are criminal convictions likely to be linked to their sexual abuse as a child;

9. IICSA recommended that the CICA ensures claims relating to child sexual abuse are only considered by case workers who have specific and detailed training in the nature and impact of child sexual abuse;

10. A new code, or changes to the existing Rehabilitation Code, to ensure that victims of child sexual abuse receive early help and get the support they need at the outset of a case;

11. The Inquiry continues to consider whether the law of limitation should be reformed to make it easier for victims to bring claims in respect of non-recent child sexual abuse and also continues to consider the potential for redress schemes to offer accountability and reparation to victims of child sexual abuse;

12. The MoJ to revise the Victims' Code to make clear that victims of child sexual abuse must be advised by the police that they are entitled to seek compensation through the civil courts; they are entitled to assistance completing applications for CICA awards; they are entitled to a CCO at the end of a criminal case and victims be referred to organisations who can offer them support;

13. The Local Government Association and ABI should each produce codes of practice for responding to civil claims for child sexual abuse; the codes to recognise the long-term effects of sexual abuse and acknowledge that it may be difficult for victims to disclose what has happened to them. Specifically, the codes should also include guidance that claimants should be treated sensitively; a limitation defence should only be used in exceptional circumstances; single experts jointly instructed should be considered in all cases; wherever possible, claimants should be offered apologies, acknowledgment, redress and support;

14. The Government should introduce legislation revising the Compensation Act 2006 to facilitate apologies or other forms of redress to victims and survivors;

15. The DWP should work with the ABI to introduce a national register for public liability insurance policies;

16. The Judicial College should revise its guidelines so there is a free-standing section on the damages for child sexual abuse;

17. The MoJ to work with relevant bodies in order to increase the use of CCOs where appropriate; and

18. The International Underwriting Association of London should take the lead in producing a code, comparable to the Rehabilitation Code, for the benefit of victims to ensure they get access to therapy and support as soon as possible.

Conclusion

There is obviously much to think about on receipt of a legal claim for non-recent child sexual abuse. Clients handling claims in this area should carefully consider the conclusions and recommendations that IICSA have made so far as summarised above to ensure that legal claims are handled appropriately, particularly in relation to support for victims where possible. As well as the proper handling of a potential legal claim, organisations are likely to have reporting obligations in relation to a non-recent child sexual abuse case, such as to the local authority and police as well as regulators.

There will be a final report produced in due course by IICSA on Accountability and Reparations and this topic is also likely to feature heavily in IICSA's overarching final report when that is available.