

Handling Allegations of Non-Recent Abuse



Ben Longworth and Maria Strauss | 20 April 2016

The [Independent Inquiry into Child Sexual Abuse](#) is now well underway and details of the first 12 investigations of the Inquiry have started to emerge from the preliminary hearings. The publicity that the Inquiry will generate will, we expect, lead to higher numbers of victims or alleged victims of abuse contacting institutions.

Here are some issues which institutions should consider if contacted about non-recent abuse linked to the institution:

Contacting the statutory authorities

Although only strictly applicable to schools, the Government's recent statutory guidance, Keeping Children Safe in Education ([KCSIE July 2015](#)) states that "*historical allegations of abuse should also be referred to the police*" (paragraph 108). It is essential that all institutions, not only schools, report abuse allegations to the appropriate authorities, however long ago the abuse is said to have occurred. Making a report allows the police to take the appropriate steps to investigate where crimes have been committed and helps to ensure that other children are not put at risk. Even where the alleged perpetrator of the abuse is believed to be deceased, making a report demonstrates that the institution is not seeking to "cover up" the abuse. Institutions will usually wish to take legal advice in relation to allegations which have been made. In addition, the LADO can normally give advice on how to handle an allegation and so it is prudent to contact the LADO as well. Institutions which are charities should also take advice on making a Serious Incident Report to the Charity Commission. Please see [Charity Commission: the Role of Charity Trustees in Safeguarding](#) for more information.

Apologies to victims

Institutions are often reluctant to make apologies to victims because they fear that doing so will amount to an admission of liability which could affect the willingness of an insurer to provide cover in relation to any claims made. However, Section 2 of the Compensation Act 2006 states that:

"An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty".

In some circumstances it is therefore possible for an institution to issue an apology to a victim. It is quite common for institutions to wish to do so and receiving an apology can often be very helpful for victims. Care should be taken to ensure that the wording of an apology does not compromise the institution's position and it is important to take legal advice and to consult the institution's insurer which will usually want to be fully informed and to have the opportunity to provide input on the wording of any apology.

"Self-reporting" to the Goddard Inquiry

As we have reported [elsewhere](#), institutions should consider whether to self-report to the Goddard Inquiry. In her [opening statement](#), Justice Goddard laid down a challenge for all institutions to "*take the initiative to self-report instances of institutional failure*". A number of clients have taken this step. In addition, referring victims to the [Truth Project](#) part of the Inquiry is consistent with a positive attitude to the Inquiry and consistent with its purposes.

Handling Publicity

Inevitably, negative publicity can quickly follow where an allegation of abuse is made against an institution, leading to reputational harm and scrutiny of those involved. Justice Goddard has also announced that she will consider applications to broadcast some of the Inquiry's proceedings, although protective measures will need to be taken to preserve the anonymity of victims. Organisations should therefore be prepared to handle press enquiries and, where appropriate, to protect the privacy of those involved.

Defending or settling legal claims

When an institution is presented with an allegation of non-recent abuse, especially where a legal claim is threatened, the following matters should also be considered:

Insurance

Institutions should contact their current insurers as soon as possible to inform them of an allegation or claim. However, the relevant insurance policy is likely to be the one which was in place at the time of the alleged abuse, which could be many years ago. It is essential that early efforts are made to identify the relevant historic policy and to contact the insurer. Insurance policies often include cover for legal expenses. Insurers will often recommend firms of solicitors to advise institutions about potential claims, although institutions are not necessarily limited to instructing a firm on an insurer's panel.

Insurance companies are likely to play a key role in the Goddard Inquiry. The Association of British Insurers have released [this statement](#) on the insurance aspects of inquiries and investigations.

Investigation

It will be important to carry out a thorough investigation into whether the alleged abuse happened. In some cases the abuser might already have been convicted in a criminal court of abusing the particular claimant. In those circumstances, given the lower burden of proof which applies in civil proceedings, it is very likely that a civil court would be satisfied that the alleged abuse happened. In other cases establishing what has happened may require more careful investigation.

Vicarious Liability

Any employer can in certain circumstances be "vicariously liable" for the actions of its employees or of people akin to employees (such as religious ministers and potentially in certain circumstances even volunteers). Victims of abuse who seek to pursue civil compensation claims will in most cases seek to bring a claim against the institution

which employed the alleged abuser rather than against the individual perpetrator. This is partly because victims often prefer not to have any dealings with the perpetrator but also because the institution is more likely to be able to satisfy a damages payment or settlement.

The law in this area is complex and it would be prudent for an institution faced with a civil claim to seek advice at an early state about whether it may be liable for the alleged abuse.

Limitation as a defence

One of the legal arguments that may be available to an institution defending a non-recent abuse claim is that the claim is time barred. The starting point under The Limitation Act 1980 is that a claim arising out of sexual abuse must be made within three years of the act complained of. In most cases the three year period will not start to run until the victim reaches 18. After that, the court has a discretion to extend the period in which a claim can be brought and it is common for courts to do this.

In deciding whether to extend the limitation period the court will weigh up a number of factors including the length of the delay in bringing a claim, the reason for the delay, whether the cogency of the evidence in the claim would be affected by the delay and the prejudice which would be suffered by the parties as a result of the court's decision. In practice, the onus is likely to be on the institution to show that it would suffer serious prejudice if the limitation period were extended. Perhaps the clearest example would be where the alleged abuser had died, so it was no longer possible for the institution to obtain evidence to deal with the claim. Even in those circumstances it may be difficult to persuade a court to deny a claimant the opportunity to bring a claim purely on the basis of the passage of time.

Damages

The level of damages to which a victim of abuse is entitled is highly dependent on the facts of each case, including the severity of the abuse and the short and long term effects of that abuse. In most cases evidence from a consultant psychiatrist will be obtained by one, or both, parties in order to help to establish precisely what effect the abuse has had.

A claimant is entitled to claim two types of damages. "General Damages" are compensation for the assaults themselves and for any psychological damage which the abuse caused. "Special Damages" are compensation for losses suffered as a result of the psychological damage. In particular, victims often claim that their career has suffered as a result of the abuse and that they have lost significant earnings over their whole working life. Judges tend to take a reasonable approach to these claims and will weigh up the likely effects of the abuse and of any other factors which may have affected the claimant's career.

Costs

The Jackson reforms which came into force in April 2013 have shifted the balance of risk of litigation in favour of defendants. Previously, defendants could be liable to pay not only the claimant's legal costs of bringing a claim but in addition a 100% uplift on those costs known as a "success fee" if the claimant's solicitors were acting on a "no win, no fee" basis. Defendants are no longer required to pay such an uplift. However, a process called "qualified one way costs shifting" also means that defendants will often

not be able to recover their legal costs from the claimant even if the claim is ultimately unsuccessful, except in exceptional circumstances. Even if a mutually acceptable settlement can be agreed quickly, an institution will generally be required, as part of that settlement, to pay the claimant's reasonable legal costs incurred up to that point.

Legal costs in non-recent abuse claims can escalate quickly, in particular because both sides may want to instruct a barrister and, as mentioned above, an expert psychiatrist to assess the effects of the abuse on the claimant.

Settlement Agreements

The swiftest and most cost effective way to resolve non-recent abuse claims can often be to have an early without prejudice meeting or a mediation so all the relevant issues can be discussed and an agreement reached. Agreeing a settlement gives the parties scope to include terms which would not be ordered by a court if the claim were to go to trial. For example, institutions can offer an apology or offer to make specific contributions towards medical or psychiatric treatment for the claimant.

Seeking a contribution from the abuser

It is worth noting that an employee who has committed abuse remains liable for that abuse even if the victim brings a claim against the institution which employed him. Institutions and insurers are entitled to recover from the abuser the full sum paid to the claimant plus their legal costs, although doing so may not always be practical.

Learning Lessons

It is imperative whenever organisations become aware of instances of non-recent abuse that they take the opportunity of learning lessons and implementing any changes required. It may be the case that no failings in safeguarding can be identified, or any failings that there were have already been rectified. However, there will frequently be useful institutional lessons which can be learnt and used as a test of the current regime. For example, if a past case identified inadequate boundaries between children and adults in the organisation, is today's organisation content that these boundaries are in place and adhered to?

If you require further information on anything covered in this briefing please contact Maria Strauss (maria.strauss@farrer.co.uk or 020 3375 7259), Ben Longworth (ben.longworth@farrer.co.uk or 020 3375 7195) or your usual contact at the firm on 020 3375 7000. Further information can also be found on the [Child Protection](#) page on our website.

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April 2016