

# IICSA: THE PROPOSAL OF A NATIONAL REDRESS SCHEME FOR ENGLAND AND WALES - A SINGLE REDRESS SCHEME FOR ALL?

GB Speciality is considering the key recommendations proposed by the Inquiry into Child Sexual Abuse in their final report published on 20 October 2022. Furthermore, we will provide an analysis of what the future may hold with respect to the implementation of the Inquiry's key recommendations.

In this article, Wendy Goulder, senior associate at GB Speciality, looks at **Recommendation 19: a national redress scheme for England and Wales.**

The Inquiry's final report concluded that the impact of past failures to protect children from sexual abuse and support those who have been harmed is incalculable. To help address this, the Inquiry has recommended the implementation of a national redress scheme in England and Wales for the benefit of victims and survivors who have suffered **child sexual abuse and exploitation in state and non-state institutions.**

The Inquiry recommends a single redress scheme be implemented that encompasses straightforward processes, through which fixed-term financial redress (as well as other forms of possible redress) will be provided to applicants. The Inquiry is keen to ensure that the scheme will not be a substitute for civil or criminal justice systems, nor will it replace the Criminal Injuries Compensation Authority (CICA).

The Inquiry's proposal is for the scheme to reflect the following core elements:

- There should be a clear connection between the institution and the alleged sexual abuse or exploitation (not only limited to sexual abuse that has taken place on an institution's premises).
- The scheme will remain open for five years.
- The scheme will consist of a two-tier payment structure comprised of a fixed-rate recognition payment and the option to apply for a second-tier payment upon the disclosure of more detailed evidence.
- Funding will be provided by central and local government, and voluntary contributions will be sought from non-state institutions.

A key feature of the Inquiry's recommendations is that an applicant who receives an award through the scheme should not have to waive their rights to pursue compensation through subsequent civil proceedings. This is commented on later in the article.

## **Who will be deemed an eligible applicant?**

While the Inquiry notes that other forms of abuse often accompany child sexual abuse and exploitation, such as physical abuse, emotional abuse, and neglect, the government has been left to consider how these additional forms will be accounted for via an extension of the scheme's scope. To be eligible for application at this stage, the Inquiry proposes that an applicant must have suffered child sexual abuse and exploitation connected to an institution (state or non-state) in England or Wales.

Irrespective of whether the abuse was perpetrated by adults or other children, victims and survivors of child sexual abuse should be able to apply for redress through the scheme. However, the Inquiry recognises that sexual activity between children under the legal age of consent may be consensual and non-abusive; therefore considers this kind of sexual activity will not fall within the scope of the scheme unless judged to be abusive, coercive, or exploitative.

Although there must be a clear connection between the institution and the sexual abuse, this does not mean that the abuse must have taken place on the institution's premises. While it will sometimes be easy to identify a connection, the Inquiry notes that in other circumstances the correlation may be less obvious. While the Inquiry does not seek to define these circumstances, they have suggested a number of potential indicators that will assist in establishing whether a clear connection exists:

- Whether the institution was responsible for the care or custody of the child (i.e, Looked after Children in the care of local authorities for longer than 24 hours).
- Whether the sexual abuse occurred on the premises of the institution (while the institution was still in control of the premises) or in connection with its activities.
- Whether the sexual abuse was committed, caused, or contributed to by a person working or volunteering at the institution in the context of those activities.

All children placed in private or voluntary care homes by the state as well as those placed in foster care (with local authority foster carers or via private voluntary foster care agencies) fall within the scheme.

## **Who cannot apply to the scheme?**

Anyone who has previously pursued a civil claim for compensation arising from child sexual abuse that has been rejected by the court should be excluded from applying – except for cases that have been rejected due to issues of limitation.

If an applicant has received an award previously, they may still apply to the scheme. However, the Inquiry recommends that the scheme deduct any previous award from the payment. CICA payments may be ordered to be repaid.

## **Relevant time periods**

The Inquiry recommends that the scheme should not be limited to abuse that took place after a certain date. Therefore, there appear to be no limitation restrictions. However, the Inquiry also recommends that the duration of the scheme should be limited and restricted to child sexual abuse that took place prior to the scheme's establishment.

## Awards

The Inquiry recognises that payments awarded through the scheme should sufficiently address the experiences of victims and survivors. However, the rewards may not be as high as those available in civil claims for two reasons. First, the scheme intends to acknowledge applicants' experiences and not provide compensation akin to a civil claim. Second, substantial awards for long-term losses (e.g. loss of earnings, treatment for psychiatric conditions) will necessitate complex and time-consuming assessments, which will undermine the speed, simplicity, and certainty that a redress scheme would otherwise provide.

The scheme should be comprised of a two-tier system. (i) A fixed-flat recognition payment available to all victims and survivors who meet the eligibility requirements. This payment would reflect that the applicant does not want to recount the sexual abuse they suffered in detail; (ii) the option to apply for a second-tier payment. In this case, the applicant wishes to provide more information and evidence (including that of a medical nature if necessary).

While the Inquiry does not propose a specific redress tariff, it does recommend the first-tier payment be set at a moderate level. Victims and survivors should be consulted to obtain their views on the payments, along with any factors to be considered during the second-tier payment assessment, (e.g. nature of the abuse, age of the victim, duration of the abuse, the impact).

## The positives and potential issues of a national redress scheme

The Inquiry reports that many institutions have repeatedly failed to meet the needs of victims and survivors who seek redress or even acknowledge their experiences. These institutions were often found to be motivated by reputational and financial concerns rather than concern for victims of child abuse. As a result, victims and survivors have been left feeling unheard, dismissed, and unsupported. While victims and survivors can seek financial redress through the civil justice system and the CICA, they have reported finding these processes inadequate. The point has been made that redress is not always about financial recompense: sometimes an apology, acknowledgement that the abuse happened, or recognition of their experiences is all that is wanted.

### Advantages of redress schemes

1. The provision of a swift settlement, which negates the need for court attendance.
2. Limitation is often waived or is less restrictive.
3. The flexibility of a scheme enables non-financial redress to be awarded, which can include therapy, personal apologies, assistance, and support. This is important, as not all victims and survivors want monetary compensation. Some consider these other elements of redress as equally important – if not, more so.
4. Mechanisms for providing victims and survivors with recognition and reparation without the potential distress and burden involved in making a civil claim, which may require medical examination and witness testimony.

### Disadvantages of redress schemes

1. The verification process: determination of who will be deemed a qualifying applicant.
2. Issues with the availability of evidence and records related to the passage of time. If the applicant must show proof that they were in an institution or placement, there may be issues with locating paper records.
3. Assessment of damages under the scheme. Usually, these are set on a points system or tariff, which limits the amount of compensation offered.
4. Strict time limits for the scheme's operation. Usually, time limits are due to funding being provided by the government and/or institutions, meaning that funding cannot be infinite.
5. The scheme must be well publicised to enable potential victims and survivors to apply.

All the above will require the government's careful consideration when accounting for the details of a national redress scheme's implementation.



## Recent redress schemes: Lambeth

While there have been historic redress schemes (e.g. Jersey, Ireland) as well as those in operation currently (e.g. Australia, Scotland), a state-funded scheme was set up in 2018 by Lambeth Council following the acknowledgement of the systemic abuse that occurred in numerous children's homes operated by the local authority and local authority foster care placements. The lawyers working within GB Speciality were involved in the implementation of this scheme and had first-hand knowledge of the processes and handling of applications.

The Lambeth Redress Scheme has been well documented by IICSA. Overall, it was well received (though not perfect, and evolved organically during its progression). The scheme opened on 1 January 2018 with a closure date of 1 January 2020, but the duration was subsequently extended by two years: closing for new applications on 1 January 2022. As of 31 March 2022, £82.5m has been paid out in redress compensation, and the estimation of the final costs, including compensation, disbursements, and administrative costs, fell in the region of £153m to £177m. The scheme itself went beyond offering financial compensation: the extent of redress offered included written apologies, meetings with senior representatives of the council, therapy, and the provision of a two-tier compensation award. To reflect the fear of living in a harmful and fearful environment, a Harms Way Payment (HWP) was offered to any person who was placed in a Lambeth children's home, and an Individual Redress Payment (IRP) was provided following the disclosure of further evidence (i.e. psychiatric medical evidence). The HWP was a set sum of money, which enabled applicants to receive recompense even if they did not want to provide further disclosure. It is likely that the government will consider this approach within the National Redress Scheme (if implemented) and take its benefits on board given the Inquiry's proposed two-tier compensation system.

## Commentary

The Inquiry accepts that no amount of financial recompense can ever truly compensate a victim or survivor of child sexual abuse. However, the intention of recommending a national redress scheme is to provide victims and survivors with the means to access therapy and other meaningful support through a non-adversarial process. There are challenges and operational uncertainties presented by the proposed scheme, so clarity and detailed guidance will be required if it is to be implemented.

The assessment of how tier payments are calculated will require in-depth consultation. The first tier (a fixed payment) will be offered to acknowledge the abuse endured by the applicant. Lambeth set their HWP at a respectable £10,000, and it is unlikely that a national redress scheme would pitch its first-tier payment any lower, given it is intended to reflect an award sufficient for abuse victims who do not wish to risk re-traumatisation by disclosing further information. Further information will be required to support a second-tier payment. This information could be in the form of a detailed witness statement or medical evidence (GP records) that supports psychiatric impact. Given the comments within the Inquiry's final report regarding time-consuming assessments, which would undermine the speed, simplicity, and certainty that the redress scheme could otherwise provide, it is unlikely that the applicant will be required to attend a specific medical assessment. However, the government will face inevitable complexities in developing a redress tariff that appropriately compensates all applicants given the varying types of abuse and psychological harm.

In respect of non-financial redress, the government will need to carefully consider whether it can be offered as part of a national scheme. Victims and survivors have mentioned their need for apologies, support, and/or therapies to assist them. While offering further support and therapies may be straightforward, offering apologies may be more difficult. For example, consideration will need to be given as to who would provide an apology when the relevant institution has long been dissolved. Will applicants be satisfied with generic apologies from the government? Or would such apologies be viewed as insincere and tokenistic? This will require careful deliberation.

While the Inquiry has proposed that central and local government would fund the National Redress Scheme, they have also stated that there is an expectation that institutions responsible for the welfare of children whom they failed to protect would contribute. Each institution that contributes will want to ensure that any voluntary contribution made is reasonable to avoid criticism and any unintentional disrespect to survivors and victims. However, potential issues may arise because the Inquiry proposes that an applicant would not be waiving their right to subsequently pursue a separate civil claim due to being awarded redress through the scheme. As such, there is likely to be reticence from institutions to contribute significant sums of money (if at all) if the risk of civil litigation and cost remains. Finally, in these types of matters, demonstrable legal liability is usually required to trigger an insurer's obligation to accept cover and execute a settlement; however, the Inquiry specifically states that this should not prevent insurers from making voluntary contributions.



In respect of insurers contributing to the funding of a national scheme, some insurers told the Inquiry they were reluctant to commit to methods of engagement with a redress scheme – whether voluntary or obligatory because of the potential impacts that could arise from not knowing further details. This is understandable because the compensation that insurers pay is not discretionary but based on a legal liability within the civil justice system to indemnify institutions.

The Inquiry has not specifically stated the non-state institutions that will be required to contribute to the national scheme. However, it does state that there is an expectation that institutions responsible for the welfare of children that failed to protect them from sexual abuse will contribute to the funding unless they have (or intend to) set up their own redress schemes. Therefore, the institutions involved could include a variety of private schools, higher education organisations, charities, and sports clubs. It is noteworthy that the Church of England are intending to launch their own redress scheme.

The proposal of a single national redress scheme is a notable concept, and the execution of this recommendation will require significant time and effort to ensure it achieves the Inquiry's intention. It will be imperative for victims and survivors to feel they are being heard, recompensed, and treated with sensitivity and dignity should this recommendation be implemented. However, it will also be crucial for the government to support any implementation of this recommendation with detailed guidance and constructive analysis of the challenges that need to be overcome.