

IICSA: THE END OF LIMITATION?

To conclude GB Speciality's analysis of the key recommendations proposed by the IICSA inquiry, **Senior Associate, Wendy Goulder**, looks at Recommendation 15 of the final report: *The removal of the three-year limitation period for personal injury claims brought by victims and survivors of child sexual abuse.*

Following the extensive investigation carried out by IICSA, the Inquiry considered the issue of limitation to be one of their key recommendations, number 15 to be exact. The Inquiry has recommended to the government that the limitation period for bringing a claim should be removed in **all** cases involving child sexual abuse, other than those that have already been dismissed at trial or settled. Yet, preserving the defendant's right to a fair trial, albeit with the burden falling on the defendant to show that a fair trial is not possible.

To consider this in detail and further analyse, let's go back to basics.

What is limitation?

Simply put, Section 11 of the **Limitation Act 1980** states that a personal injury claim must be brought within three years of the event or date of knowledge (whichever is later). Where the claimant is a child at the time of the incident and/or abuse, the law allows them to bring a claim no later than the date of their 21st birthday.

How does this impact victims and survivors of sexual abuse?

As described by the Inquiry, the law of limitation aims to strike a balance between the rights of the claimants to bring claims and the interests of the defendants where it may be unfair or impossible to defend cases long after the events in question have taken place.

By allowing limitation to be a procedural defence (where claims are not automatically barred, the defendants must actively raise the issue), the onus is subsequently on the victims and survivors to ask the court to exercise their discretion (under Section 33 of the Limitation Act 1980) to allow their claims to proceed. The court must then consider the circumstances of the case in addition to the following: the reasons for the delay in bringing a claim; the conduct of the defendant after the claim was brought; the steps taken by the claimant to obtain medical, legal, or other advice; the extent to which the evidence has become less effective by the claim being brought out of time.

The Inquiry considered evidence from victims and survivors where the defence of limitation has operated unfairly in child sexual abuse claims and acted as a barrier at three key stages of the litigation process:

- **Taking on claims** – although no actual figures were provided in support, the Inquiry was told that limitation prevented many solicitors from taking on a significant proportion of child sexual abuse claims.
- **Settlement and values of claims** – it was indicated to the Inquiry that limitation was a significant factor. The claimants' solicitors explained that victims and survivors may be advised to accept a reduced settlement offer rather than proceed to court, where they not only run the risk of losing on limitation but also stand the risk of being re-traumatised by the court process.
- **Trial** – the Inquiry noted that the trial of limitation issues can be intrusive and traumatic for claimants, with the outcome difficult to predict.

Why is there a delay in child sexual abuse claims?

Well, there are numerous reasons for the delays in reporting child sexual abuse claims. The Inquiry heard that victims and survivors face several barriers to disclosing such abuse. These include (but are not limited to) being ashamed, feeling guilty or embarrassed, and worrying that no one will believe them. In some cases, claimants did not realise until much later in their lives that they had suffered abuse by virtue of the grooming process that had preceded it. Victims and survivors often have psychological injuries because of the abuse they suffered and can find that the entire process of lawyers, litigation, and revisiting past events increases their vulnerability and makes symptoms worse. In reality, it can take years to feel able to discuss the abuse they suffered. The Inquiry heard that research from the All-Party Parliamentary Group on Adult Survivors of Childhood Sexual Abuse indicates that the average time for victims and survivors to disclose sexual abuse is 26 years.

Therefore, it is fair to say that only a minority of victims and survivors will make claims within the limitation period, with a significant number inevitably encountering the roadblock of limitation.

Reasons for amending the current position on limitation

Limitation can be considered an unfair and unreasonable outcome for victims and survivors of child sexual abuse. The Inquiry heard from several defendant solicitors and insurers, who confirmed they were open to some sort of reform, provided that any change preserved the right to a fair trial.

Given the potential support from defendants, the Inquiry has considered a stance appropriate to ensure fairness and reasonableness are afforded to both parties.

What does IICSA recommend?

The Inquiry notes that the current regime was not designed with the needs of victims and survivors of child abuse in mind and heard that limitation was a barrier to victims and survivors. To rectify this, they have proposed the following recommendations:

- Legislative reform – removal of the three year limitation period for personal injury claims based on child sexual abuse.
- To apply retrospectively to claims that have not already been dismissed by a court or settled.
- Claims that have previously been dismissed by a court on the grounds of limitation or have already been settled will not be re-opened if the limitation law is changed (on the basis that the Inquiry considers it to be inappropriate and impractical to reverse a judicial decision or an agreement reached in good faith by the parties).
- The express protection of the right to a fair trial, with the burden falling on defendants to prove that a fair trial is not possible.
- Can only apply to claims brought by victims and survivors, not claims brought on behalf of victims' and survivors' estates.

How legislative reform may affect organisations

If the government implements the above recommendation for limitation, several potential unfavourable consequences could impact state and non-state organisations and their insurers. These may include an increase in costs due to increased volumes of claims, the ability to obtain insurance, and an increase in outlay for local authorities and other organisations regarding financial costs, i.e. premiums and legal costs.

However, the Inquiry makes it clear that they consider the benefits of changing the law on limitation to far outweigh any potentially adverse consequences.

What's the likelihood of government implementation?

Some readers may recall that, previously, many courts deemed the limitation period for abuse claims to be a six-year fixed period. However, in 2001, the Law Commission submitted a recommendation for an extended three-year limitation period to also be applied for abuse claims. The government did not implement this at the time, and it was only following the House of Lords decision in *A v Hoare* [2008] that the three-year limitation period was eventually applied to sexual abuse claims.

However, over the past 10 years, the world has changed and is much more aware of the impact of child sexual abuse, and that the delays in bringing claims are due to numerous factors that extend beyond the abuse itself. As such, should victims and survivors be further prejudiced against by virtue of a tight three-year limitation period? It seems that other countries have developed further on this front, with Scotland having recently reformed their law on limitation. Following the implementation of The Limitation (Childhood Abuse) Act 2017, there is no longer a time bar on childhood abuse (suffered post 26/9/1964 only) claims within civil courts in Scotland. Will our government now take steps to follow suit?

Discussion

It cannot be denied that there has been a clear shift in public perception in recent years following high-profile scandals, such as that of Jimmy Savile, with many victims and survivors now feeling more encouraged to speak out. The times of child abuse being something that no one spoke about or dared raise are thankfully long gone, and with this shift, there is now a new understanding that it will not be tolerated. As such, if limitation is removed in child sexual abuse cases, this could lead to a significant number of historical claims being advanced. However, it is of interest that the Inquiry does not recommend that any claim can be brought on behalf of the estates of victims and survivors. This means that all claims must be brought by living claimants only. It is worth noting that in recent years, the Inquiry heard that several large insurance companies and local authorities have already amended their codes of practice to ensure that the issue of limitation is not taken in all sexual abuse claims. This has enabled more claims to be brought and settled without the added stress of facing limitation arguments, indicating that there is now much more acceptance of the trauma that victims and survivors experience. However, there are likely to be many claims that have previously been brought and defeated on the grounds of limitation that may be resurrected if this recommendation is implemented. This brings the potential issue of evidence having been lost or destroyed, given that these claims were previously thought to have been defeated. During the Inquiry, the claimants' solicitors were unable to provide strong evidence regarding the number of claims that had failed on the point of limitation and/or were never taken on due to limitation. This is not helpful when trying to forecast how many claims will potentially be made/re-opened if the limitation period is abolished. However, the Inquiry's proposed recommendation of legislative change is not guaranteed, and you only need to look at the recommendation made by the 2001 Law Commission (as discussed above) to see that. However, times have changed, with the current world being a much different landscape than previously following the numerous high-profile historical abuse claims. This could well mean that the government will take the step in carrying out legislative reform.

At the time of writing, the government has remained silent on the report, although a formal response will be required at some stage. As such, it's very much a case of watching this space.