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5 June 2019

Professor Alexis Jay OBE
Independent Inquiry into Child Sexual Abuse
PO Box 72289
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Dear Professor Jay,

We write further to the public hearings of the Accountability & Reparations investigation of the Independent Inquiry into Child Sexual Abuse (IICSA), which took place towards the end of 2018, to which the ABI's General Counsel, Philippa Handyside, gave evidence. We are grateful for opportunities to support the important work of the Inquiry, including providing evidence, a report requested by IICSA on the feasibility of a register of public liability insurance (which we submitted on 24 April 2019) and more widely.

Under the current law in England and Wales, a child sexual abuse (CSA) claim brought more than 3 years after the victim or survivor reaches the age of 18 (or knew enough to pursue a claim, if later) is "time-barred". This can lead a victim or survivor to believe that they have a significant barrier to overcome to even start their claim. The ABI previously considered that no change to the current law was necessary because the law allows courts to disapply the time bar, which they routinely do for CSA claims.

However, we have listened to the compelling accounts of victims and survivors about the significant deterrent effect of the current law on limitation. No victim or survivor of abuse should be discouraged from seeking the compensation they may be entitled to. We now believe that there is a need for change and will support a review of the current law on limitation for CSA claims.

We would therefore welcome the opportunity to engage with IICSA, law makers and other concerned stakeholders, including victims and survivors and their representatives, to develop a more suitable framework for the law on limitation in CSA claims. In our view, any change to the current framework needs to strike a careful balance between not deterring victims and survivors from bringing a claim but recognising that it must be possible for defendants to have a fair trial. It must also be considered in light of other steps which can and should be implemented to achieve an earlier resolution of CSA claims, such as a dedicated Pre-Action Protocol.

The Appendix to this letter sets out the ABI's explanation of the background to this issue.

We look forward to hearing from you.

Yours,

Huw Evans

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APPENDIX

The ABI is a trade association which represents insurers providing a wide range of insurance and long-term savings products. Claims for CSA can be made against the employer of the alleged abuser and those employers may have had public liability insurance which covers these liabilities. Some of those public liability insurers have direct involvement with the Inquiry as Core Participants. The ABI is not a Core Participant but continues to offer assistance to the Inquiry and, as a representative trade association, speaks for its members, including those public liability insurer members who are Core Participants.

THE CURRENT LAW ON LIMITATION FOR CSA CLAIMS

The limitation period for CSA claims is governed by the Limitation Act 1980 as interpreted by case law.

Claims for personal injuries, of which claims for damages for CSA are a type, in general must be brought within 3 years of the victim or survivor reaching the age of 18 or, if later, 3 years from when the victim or survivor became aware that their injury was significant and that it was attributable to the failings of an identified other party (section 11 of the Limitation Act). This is known as the "primary limitation period".

However, the court has a discretion to extend the primary limitation period and allow a claim to proceed if, considering a number of factors (set out in section 33 of the Limitation Act), it considers it fair to do so. The factors are: the length of and reasons for the delay; the extent to which the delay is likely to weaken the evidence of either party; the conduct of the defendant, including how they have responded to requests from the claimant; the extent to which the claimant acted promptly once they had the necessary knowledge to bring a claim; and the steps they took to obtain advice, including legal or medical. The court has a broad and unfettered discretion, including consideration of the case from a human perspective.

The compelling reasons which prevent victims and survivors of CSA from recognising their right to claim or from actively pursuing it mean that CSA claims usually overcome the primary limitation period.

The particular factors warranting extension of the primary limitation period in CSA claims have been considered in numerous cases and are best summarised by Mr Justice Males in the case of *NA v Nottinghamshire County Council* [2014] EWHC 4005 (QB) at paragraph 82:

> "In summary, and without attempting to be exhaustive, the position is as follows:
>
> i) The burden is on the claimant to show that it would be equitable to disapply the limitation period.
>
> ii) Where more than one claim is brought by a claimant, the discretion should be exercised separately in relation to each claim.
>
> iii) The longer the delay, the more likely it is that the defendant will be prejudiced, but this will always depend on the issues and the nature of the evidence going to those issues. Delay is not critical in itself, but only to

the extent that it has an effect on the defendant's ability to defend the claim.

iv) If a fair trial is no longer possible, that will be the end of the matter. An action cannot be allowed to proceed if that would result in an unfair trial. But if a fair trial is possible notwithstanding that there is some prejudice, the balance of injustice needs to be considered, weighing whatever prejudice the defendant has suffered in the light of all circumstances of the case.

v) The troubled background of many claimants complaining of child abuse must be taken into account. This will include, where applicable, the fact that the lives of many such claimants deteriorate into alcohol and drug abuse and crime, often caused to some extent by their childhood experiences. The law must also recognise the inhibitions which abuse will often cause, making it difficult or impossible for claimants to describe what has happened to them, sometimes until well after they reach adulthood. Such considerations may provide a good reason for delay in commencing proceedings.

vi) Developments in the law relating to vicarious liability (and, I would add, non-delegable duties) have made it easier for a claimant to establish liability against an employer or similar defendant because, in the cases where the defendant is responsible in law for the conduct of the abuser, all that the claimant needs to prove is the fact of the abuse; in such cases it is no longer necessary to prove a systemic failure on the part of the defendant; in consequence, the evidential focus in such cases is likely to be narrower than it previously was; so too, therefore, the effect of delay on the possibility of a fair trial will generally involve a narrower enquiry.

vii) Ultimately, the discretion is wide and unfettered, with all relevant circumstances needing to be taken into account, including those mentioned in section 33 itself, although this list is not exhaustive."

HOW THE CURRENT LAW OPERATES IN PRACTICE

The current framing of the law on limitation means that many claims arising out of historic CSA are technically "time-barred", by reason of the primary limitation period. However, circumstances may well indicate that the case should proceed (because it would benefit from the discretion to extend the limitation period).

In considering whether a fair trial is possible, the parties must investigate the availability of evidence and consider its cogency. Parties are likely to consider whether there is evidence to confirm the link between the accused and the defendant, whether there is evidence to link the claimant to the defendant, whether the accused is alive and their response to the allegations, whether there has been a prosecution and the evidence available from the same. In some cases, difficulties arise in establishing whether the accused organisation still exists, whether another organisation might be liable for it, whether that organisation had insurance cover and, if not, whether it has any assets with which to pay damages. These may require some detailed investigations of document archives, attempts to trace and contact witnesses and extensive correspondence between the representatives of the parties.

Pre-notification of a claim

Prior to a claim being notified to a defendant it will usually have been considered by a legal representative acting on behalf of the victim or survivor. We understand that one of the factors which claimant representatives consider is whether or not the claim is out of time and whether the claimant is likely to be granted discretion to proceed out of time. We do not have any data about how many claims do not progress beyond this stage.

Pre issue of proceedings

According to the procedural rules, a CSA claim is formally notified to the defendant by a "Letter of Claim" from the claimant or their representative. The current Pre-Action Protocol for Personal Injury Claims (which would apply to many CSA claims) requires (at paragraph 6.3) the defendant to send a "Letter of Response" within 3 months of acknowledgement of the Letter of Claim. Many Letters of Claim raise the topic of limitation and request a limitation moratorium. That is a period when, in effect, limitation is suspended. That allows both parties to investigate and open dialogue without the need for the claimant to immediately issue proceedings. Most defendants and insurers will agree a moratorium as soon as the Letter of Claim is received.

During the 3-month investigation period the defendant needs to identify if it had insurance to cover the period of the abuse and to engage with its insurers. In many cases, insurers will then typically take over responding on behalf of the defendant. The defendant or its insurers are required in the Letter of Response to state what approach will be taken to liability (usually admit, deny or further evidence/investigation needed). In many cases, it will not have been possible for the defendant or its insurer to establish, by the time the Letter of Response is required, whether the historic nature of the allegations has had such an effect on the cogency of the evidence that it is no longer possible to have a fair trial.

It is for this reason that most claims receive an initial response which raises the possibility of a limitation defence. Claimants will, we understand, be told about this by their legal representatives. While those with experience in CSA claims are aware of the kind of factors that are likely to mean a court will allow a case that is out of time to proceed, claimants themselves cannot be expected to make those judgements and instead may conclude that their claim is too late. Evidence from victims and survivors of abuse at the public hearings in November and December 2018 was very clear that this is profoundly discouraging. This should not endure.

The Inquiry heard evidence that different claimant representatives have different approaches in managing their client's expectations through the process of a civil CSA claim. Similarly, defendant insurers and their legal representatives have different approaches. Some insurers have produced guidance on the approach they will take to CSA claims.

Post issue of proceedings

When court proceedings are commenced, a defendant must decide whether to formally plead limitation as a defence. If so, limitation needs to be stated in the defence. Given that limitation is not now dealt with by the courts as a preliminary issue, once pleaded the defence is likely to remain as a feature of the case as the case develops towards resolution. This goes some way to explain why limitation is asserted and maintained in so many CSA claims. Even so, some insurers have committed only to plead limitation "sparingly" or "not to apply limitation as a matter of course".

The Inquiry heard evidence at the public hearings of a perception that defendants and insurers have too readily raised limitation and that this has discouraged claimants or pressured them to accept a lower settlement for fear that their claim might fail

completely. At times correspondence can also appear insensitive and overly legal. There are undoubtedly past instances where defendants' and insurers' approaches to CSA claims have been focussed on the legal issues and use of legal terminology and have failed to reflect appropriate sensitivity, or an appreciation that those letters will be shown to victims and survivors as opposed to explained to them. This may be less surprising in correspondence which passes between lawyers on opposing sides. However, there are definitely lessons to be learned about how such an approach is likely to be received by victims and survivors legitimately seeking compensation.

The situation under the current framework remains; that non-recent CSA claims are at risk of being out of time until it can be established that there is enough surviving evidence to fairly try the allegations. Even expressed with the utmost sensitivity, this perceived barrier to achieving compensation can have a deterrent effect on some victims and survivors pursuing the compensation that they are entitled to.

PRINCIPLES FOR ANY CHANGE TO THE LAW OF LIMITATION

The ABI has argued in the past that no change to the law on limitation is necessary for CSA claims because in practice limitation did not stop courts from allowing most CSA claims to proceed. The real issue was always the availability of evidence. Of all the trials of CSA claims over the last few years we would estimate that fewer than 20 have been concerned with the issue of limitation and, of these, in some cases the limitation defence has been raised by accused individuals rather than institutions.

Having heard the compelling accounts of victims and survivors during IICSA public hearings, the ABI now recognises that the requirements of the current framework operate to present victims and survivors with what appears to be another obstacle to being compensated for the abuse they suffered and thereby discourages them from pursuing their claims, even if that obstacle would likely be overcome. This should not continue.

We would be very grateful for the opportunity to engage with the Inquiry, lawmakers and other concerned stakeholders, including victims and survivors and their representatives, on how the system could be made more suitable for the unique circumstances of CSA claims.

The critical principle which should be at the centre of any reforms is achieving justice. Any change to the current framework must preserve the principle that claims cannot be brought where it is not possible for the issues to be fairly tried. The possibility of claims progressing to which the principles of natural justice do not apply could have even wider ramifications, including the availability of public liability insurance for organisations which are responsible for the care and supervision of children.

The Limitation (Childhood Abuse) (Scotland) Act 2017 disapplies the Scottish equivalent to the 3 year limitation period for CSA claims unless the "defender satisfies the court that it is not possible for a fair hearing to take place" (section 17D(2)). Similarly, all territories in Australia which have removed the limitation period for CSA cases have preserved a right for cases to be dismissed or permanently stayed if the lapse of time has had such an effect on the defence so as not to allow a fair trial.

WIDER REFORMS

It would be important for any reform to the law of limitation for CSA claims in England and Wales to be set in the context of any wider recommendations made by IICSA. In this wider picture, decisions can be taken about who bears the burden of proving that it is possible for a fair hearing to take place, the necessary standard of that proof and the factors to be taken into consideration.

Similarly, consideration should be given to the necessity for wider reforms consequent on any changes; in particular, the need for a better framework for pre-litigation conduct between parties to CSA claims. The ABI and its members, together with the Forum of Insurance Lawyers, have prepared a draft Pre-Action Protocol specifically designed for abuse claims which seeks to promote earlier exchange of information relevant to the claim with a view to facilitating a quicker resolution for victims and survivors.

On 16 February 2018 the ABI wrote to the Deputy Head of Civil Justice, Mr Justice Coulson, requesting that he ask the Civil Procedure Rule Committee to develop our proposals, by engaging with other interested stakeholders, such as abuse victims and survivors and their representatives. A further proposal was also put forward by the Association of Child Abuse Lawyers and their members. Prior to submission of these protocols there was significant cross industry collaboration to identify the issues which arise in CSA claims. There are many similarities between the two protocols. Our draft Protocol included template correspondence for parties to agree an early "limitation moratorium".

CONCLUSION

We hope that the Inquiry continues to engage constructively with all relevant stakeholders to obtain the best information available in order that any recommendations it makes serve the interests of CSA victims and survivors but also preserve the principle that defendants must not be exposed to allegations which they cannot fairly defend in court.