



Association of Child Abuse Lawyers

**Legal Services Commission (LSC)**

**A New Focus for Civil Legal Aid**

**A Response  
by  
Association of Child Abuse Lawyers**

**October 2004**

## 1. Introduction

The Association of Child Abuse Lawyers was set up in late 1997 as a result of concerns within the legal profession that people who had been abused in childhood were either unable to find lawyers to take on their cases or who were experiencing poor standards of advice and assistance from lawyers they had instructed. There were concerns about the ability of some lawyers and experts to deal effectively with these traumatic cases. The Association of Child Abuse Lawyers (ACAL) is a not for profit community organisation which provides a helpline for survivors of abuse and then refers survivors to appropriate lawyers. We also provide training and support for lawyers and experts involved in obtaining compensation for people emotionally, physically or sexually abused in childhood and for people with learning disabilities who have been abused.

The objectives of ACAL are to promote and procure access to justice for people who have suffered abuse in childhood, including people with learning difficulties. We aim to obtain, promote and procure access for victims of abuse to sources of assistance, including but not limited to therapy, counselling, support and information. We also aim to educate, inform and develop a greater understanding amongst lawyers, experts, the judiciary, public servants and any other persons working within this field and to develop wider forms of redress within the legal system for children, adults and people with learning difficulties who are affected by abuse.

This response has been prepared by ACAL's Executive Committee and any enquiries in respect of this response should be addressed in the first instance to Tracey Storey, Association of Child Abuse Lawyers of Irwin Mitchell, 150 Holborn, London EC1N 2NS, Tel: 0870 1500 100, Fax: 0207 4040208, e-mail: [storeyt@irwinmitchell.co.uk](mailto:storeyt@irwinmitchell.co.uk).

## 2. Our Client Group

Adult survivors of childhood sexual abuse are a particularly vulnerable client group often socially disadvantaged and socially excluded. As children, they have often been involved in sexual activities which they do not truly comprehend, to which they have been unable to give an informed consent and they have often adopted complex coping strategies to deal with the traumatic nature of the abuse they have faced. The abuse will have often inhibited their development. By the time our client group presents to lawyers, the effects of the prolonged and repeated trauma suffered in childhood can lead to complex psychological symptoms. The childhood responses to abuse can become fixed and, as a result of their experiences, a survivor of childhood abuse may

have difficulty in trusting lawyers and professionals as they will often have great fears of being in situations where they will be rendered powerless, such as during the legal process and in the court room.

As a consequence of the complex psychological features of childhood sexual abuse and other abuse, it is often very difficult to get a full and accurate account of a person's childhood experiences without retraumatising the survivors. Disclosure of events in childhood can take time and require specialist lawyers with appropriate skills.

The majority of child abuse compensation claims being litigated involve limitation issues. Child abuse is often accompanied by secrecy and threats to the victim to remain silent. In the past, children who reported abuse were frequently not believed. The victim often feels ashamed and embarrassed by the circumstances of the abuse. Additionally a person who has suffered in this way in childhood will often only have the psychological status to come forward much later in their life, depending on a variety of life circumstances and the degree of their social exclusion in any event. Time limit problems are a key feature of child abuse litigation and the law of limitation is constantly evolving.

It should be pointed out that adult survivors of child abuse are not coming forward because of the so called "compensation culture". In the experience of ACAL members, survivors of child abuse are not motivated by money, they are simply looking for justice and wanting to speak their truth. Indeed, when advised that their only remedy in law is damages, they are often bitterly disappointed that this is the only redress for them. Survivors of child abuse want people who have disbelieved them in the past to be held to account and people, who have had the responsibility of protecting them but did not, to lose their jobs or at least to apologise for having let them down. Indeed, we should remember that as children, often money or rewards may have been given in return for their silence whilst being abused and so any damages awarded can seem tainted. In any event, no amount of money can ever make up for a lost childhood or the personal damage caused. Above all, ACAL survivors want to make sure that no other child has to go through what they have endured. Damages, although not the prime motivation for coming forward, are the only remedy available in our legal system, and of course can provide funds for therapy which together with a successful conclusion can help a person move forward in their lives.

### 3. Encouraging Early Resolution of Claims.

ACAL as an organisation is committed to early resolution of claims and discouraging unnecessary litigation. It should be remembered that child abuse litigation is still a developing area of law, often fraught with public policy considerations. Accurate and appropriate advice given at one stage in the

claim may need to be revised in the light of subsequent changes in the law. ACAL is committed to giving accurate and realistic advice based on the existing legal framework. It is in the interests of our client group to resolve cases as early as possible to avoid re-traumatisation, but we believe that no changes are necessary to the present Legal Aid system to effect this. Where appropriate, alternative dispute resolution and mediation are used in child abuse claims. The suggested changes to the system would not effect any earlier resolution of disputes and would not discourage unnecessary litigation. It should be remembered that these cases involve a vulnerable client group, already socially disadvantaged, bringing actions against (usually) public authorities or large organisations. To effectively mediate these claims involves a considerable amount of investigation so that the full effects of the abuse are known and that the appropriate level of compensation is sought.

#### 4. Eligibility for Public Funding

ACAL agrees with APIL that further changes to the availability of public funding will simply restrict a Claimant's access to justice further. Legal Aid is now currently available to none but the poorest in society. ACAL agrees that the proposed reforms by the LSC will further restrict the ability of survivors of child abuse, already socially excluded, to gain access to Legal Aid.

This of course has human rights considerations and we agree that the proposed reforms would bring the Government into direct conflict with article 6 of the Human Rights Act. The principle of "equality of arms" is particularly important for a client group who have been let down substantially by society in the past. Without public funding, they would not have an opportunity of presenting their case to a court without substantial disadvantage. The public authorities and private organisations against whom the majority of these claims are directed are well funded and insured whilst socially excluded and disadvantaged Claimants who are denied public funding would not be able to bring their claims against them.

ACAL agrees with APIL that to remove the £100,000 home equity disregard would substantially disadvantage ACAL's client group. In the main, we are talking about disadvantaged people being forced to place their homes at risk in order to fund justified litigation, often against a public authority which caused them injury in the first place. Those survivors who do manage to earn money and acquire a safe secure home, perhaps for the first time in their lives, do so often at immense personal emotional cost, having "blocked" and repressed their memories of the abuse in order to function in society. The decision to pursue a claim may coincide with a breakdown in such coping strategies with attendant risks to job security and earning capacity. To add to these stresses by placing a survivor's safe haven at risk is placing the

individual at such a disadvantage compared to the likely defendant that access to justice is effectively denied.

5. The Costs Benefit

As with clinical negligence cases it is often very difficult to assess the prospects of success in these cases any higher than 55% to 65%. Often Claimants present well after the expiry of the primary limitation period and as such are reliant on the discretion of the court to allow them to continue with what is a late case. Changes to the cost benefit test in relation to child abuse cases would render it difficult if not impossible, to bring the majority of cases. ACAL would argue that there is no need for any reform in the cost benefit test for child abuse cases, bearing in mind that this is still very much a developing area of law with liability, quantum and limitation problems.

6. Before the Event Insurance

It is rare for a survivor of child abuse to have a before-the event policy to fund child abuse litigation, particularly if the subject matter of the litigation happened some years before the victim was in a position to take out insurance cover. Most before the event policies exclude claims which arose before the period of insurance and exclude claims based on psychological injury or which form part of a group action. In any event, before an application for public funding can be submitted, careful consideration is given to any other forms of funding which may be appropriate. ACAL would argue that there is no need for any reforms in this regard as this is already covered by existing arrangements.

7. After the Event Insurance

It is all but impossible to obtain after the event insurance to support Conditional Fee Agreement cases of this nature. The ATE market is not sufficiently developed to offer cover for claims of this nature, bearing in mind the difficulties in assessing merits at the outset, the possible limitation problems and the psychological fragility of the client. Indeed, even if such policies were available, the premiums would be so high to make them beyond the reach of most individuals. At the moment, there are no viable insurance products readily available for adult survivors of abuse who wish to pursue their civil remedies.

In 1997, it was argued strenuously by ACAL founders that as there was no insurance available for child abuse claims, there was no alternative to Legal Aid and thus child abuse litigation should be kept within the scope of public funding. At this juncture, the then Lord Chancellor agreed that one could only abolish public funding for child abuse claims if there was ATE to take

its place. There is still no insurance available for these types of claims on the market and certainly not where a person's claim is part of a group action.

It has been suggested that Legal Aid could be refused for cases where a Conditional Fee Agreement be offered "whether or not insurance is in practice available". In practice, this would mean that adult survivors of child abuse would be risking their homes and personal bankruptcy in order to pursue their claims. This already disadvantaged and socially excluded client group could lose the little that they have in order to pursue their litigation against a Defendant, possibly a public authority with deep pockets and insurance. We would be faced with one of the poorest sections of society risking the little that they have, to pursue a remedy in the civil courts. In many cases, adult survivors would not be able to pursue their remedies facing such risks and so would have no redress for the abuse committed against them, often by servants or agents of the state. They would not be in a position to hold society accountable for what had happened to them and would not be able to have a proper enquiry into the failings of the organisations in whose care they were placed.

From a practical point of view, a Defendant faced with a claim funded by a Conditional Fee Agreement without insurance could legitimately apply to the Court to have the case struck out and/or make an application for security for costs. If the Claimant without funds was unable to provide security for costs, the case would be struck out, meaning that that person would have no remedy as a result of his lack of funds. It could have serious access to justice considerations.

#### 8. Alternative Dispute Resolution/Mediation

ACAL is committed to using all forms of alternative dispute resolution and mediation to bring these claims to a successful conclusion. In the majority of cases, informal mediation is often an effective and less traumatising way of achieving good settlements of compensation without the trauma of giving evidence in Court. However it should be recognised by the Legal Services Commission that entering into mediation or alternative dispute resolution can only be effective once the claim is properly investigated and quantified so that the adult survivor is in a sufficiently strong position to put forward his case, having been severely psychologically disadvantaged by the events which led to the claim in the first place.

#### 9. Limitation

Because this particular category of cases are often brought late due to complex psychological factors, it is often necessary to bring cases to issue at an early stage meaning that representation should be granted at an early stage to allow

a claim to be issued in the court. If investigative help is granted in the first instance without full representation, adult survivors of child abuse would be disadvantaged and possibly criticised for bringing their cases late. It should be remembered these cases are often challenged in relation to limitation and early issue is often the only way to avoid these cases failing for delay.

10. Cases not brought against public authorities

Adult survivors of child abuses not only bring claims against public authorities but also have claims against private schools, private youth clubs, religious orders, various charities and indeed individuals. Whilst claims against institutions are often framed in negligence and/or breach of statutory duty, the subject matter of the cases is not negligently caused injury but assault perpetrated by either employees, agents or servants of the institutions who failed to supervise, monitor or stop the abuse happening within the organisation. If all claims in negligence were excluded from public funding, it is feared that claims framed in negligence against public authorities and indeed some private organisations executing public duties would be excluded. Effectively very vulnerable individuals with considerable psychological problems would be denied access to a fair hearing and unable to hold organisations accountable for serious breaches of their human rights.

### Conclusions

In conclusion, ACAL supports the existing framework for funding child abuse cases. It is not considered that any changes to the eligibility criteria would assist in making sure that there was proper access to justice or equality of arms. The availability or otherwise of after the event insurance is important and cannot be disregarded as this would have serious human rights consequences, not least the opportunity for Defendants faced with a claim funded by a CFA without insurance to make applications to the court for security of costs. If ATE is not readily available, it would discourage many individuals from taking personal risks with the little that they do have. The reforms suggested would result in a further erosion of access to justice. It is ACAL's submission that to further restrict public funding to child abuse victims would require a change in primary legislation. ACAL seeks assurances that the proposed changes in the public funding scheme to exclude negligently caused injury is not designed to exclude child abuse claims, where the subject matter is by definition a non-negligently caused injury. Child abuse litigation remains a developing area of law, with complex issues involving a often very damaged client and primary limitation issues peculiar to this area of practice. ACAL supports early resolution of claims and the discouraging of unnecessary litigation and embraces attempts to mediate claims successfully. However there are important access to justice considerations here and any reform to the current system should take into consideration equality of arms arguments to ensure that disadvantaged people are not denied redress.

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