



THE GOVERNMENT REPLY TO THE
FOURTH REPORT FROM THE
HOME AFFAIRS COMMITTEE
SESSION 2001-2002 HC 836

The Conduct of Investigations into Past Cases of Abuse in Children's Homes

**Presented to Parliament by the Secretary of State
for the Home Department
by Command of Her Majesty
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INTRODUCTION

1. There has been extensive debate about investigations into historical cases of child abuse in recent years. Much is at stake, given the necessity for the police to investigate thoroughly all complaints that are made to them, some of which relate to extremely serious crimes.

2. Justice for the victims of past incidents of sexual abuse is vital. Some of the victims in these crimes have experienced horrendous ordeals that were committed against them when they were at their most vulnerable, as children in the care of local authorities or institutions. The Government has a clear duty to ensure that the balance of justice reflects the severity of these offences, and takes account of the difficulty faced by victims who wish to come forward, sometimes many years after they have been abused. Victims must feel that the Criminal Justice System will take their complaints seriously, and that they will receive a fair hearing.

3. Objections have been raised, not least by those convicted of offences, to the methods employed by the police in their investigation of these cases. The argument is that either deliberate impropriety, or mistakes induced by flawed techniques have contributed to miscarriages of justice occurring.

4. In addition, further claims are made that many complaints are unfounded and motivated either by the prospect of financial reward through criminal or civil compensation, or the offer of preferential treatment in some form or other to those who are in custody or otherwise involved in the criminal justice system.

5. The passage of time and the damage done so frequently by the experiences of victims means that proper safeguards must be observed in the chain of evidence gathering. In particular, an accurate and proper record should be kept of the initial approaches by the police to witnesses, to enable the jury to have the full picture of the procedure followed.

6. The Government therefore welcomes the Committee's report. We are acutely aware of the very sensitive nature of these investigations and the deep dissatisfaction and frustration voiced by those who are concerned that justice has not been done.

7. Both the Government and the Association of Chief Police Officers published guidance in 2002 for police, social workers and other professionals involved in these types of investigation. The views of those concerned about the impact of investigations on suspects were taken on board. Both sets of guidance were drafted to include consideration for people accused of these crimes, and who may have to undergo an investigation that could seriously affect their personal and professional lives.

8. The Government guidance describes the role of the inter-agency Strategic Management Group as a steering group for investigations. One of the key tasks of the Strategic Management Group is to “ensure that there are safeguards in place to guarantee the integrity of the investigation, taking into account the need to exercise particular care to guard against the risk of eliciting false allegations against innocent people” (Section 3.2, paragraph g, p6).

9. The Government are in agreement with the Committee when it says that these cases represent an “immensely difficult” area of criminal prosecution, and we believe that the only way to proceed is to adopt a cautious and prudent approach, firmly based on objective fact.

10. The Government therefore respects the views of the Committee, but does not share its belief in the existence of large numbers of miscarriages of justice. The Committee’s conclusions would appear partly to have arisen from a combination of assumptions, which include:

- Significant numbers of complainants make fabricated complaints for dishonest motives;
- They conspire to do so;
- These fabrications remain undetected throughout lengthy inquiries;
- A range of agencies, from the police and CPS to personal injury solicitors, are both unaware of these deceptions and/or unwittingly assist them; or are complicit in their fabrication;
- Significant numbers of complainants are either serving prisoners or ex-offenders;
- They are therefore more likely to be dishonest when making complaints of abuse, (although a different standard is applied and their word is relied upon as significant evidence when they are disclosing details of alleged impropriety in the conduct of investigations); and
- ”False allegations” are assumed to have occurred in a whole range of circumstances, from acquittals and cases that do not proceed to occasions when their existence is claimed by either those who claim to have made them or their associates. Rarely is there clear substantiation that these allegations have indeed been deceptions.

11. The Government sees no evidence to support these assumptions and notes that the Committee have themselves recorded their own reservations in this respect. We are concerned that they have nonetheless relied upon them significantly, without the weight of significant and consistent substantiation to back them up.

12. The Government feels that there is lack of clarity surrounding the use of the term “miscarriages of justice”, and what specifically is being referred to. If the concerns relate to the criminal justice processes, we feel that they have not produced evidence that such cases exist.

13. The Government recognises that this is an area where solid facts can be difficult to identify, however we feel that the weight given by the Committee to the views of those who believe in the existence of miscarriages of justice, including those who claim to be the victims themselves of such cases, is disproportionate. The consideration for the views of abuse survivors, such as those represented in the submission to the Committee from Fire In Ice, and whom we can reasonably assume lack motive to fabricate their claims, point towards a wholly different view of these issues. The Government feels that consideration of this issue must be balanced and must rely as far as possible on established facts.

14. The inquiry's terms of reference addressed five separate issues in its consideration of the existence of possible miscarriages of justice. None of the answers to these questions result in any substantive evidence that a problem exists. In fact, the Committee satisfies itself on at least three of these points that there is not a significant cause for concern.

15. Despite the Government's disagreement with the Committee's view on miscarriages of justice, we feel that there have been some potentially useful ideas discussed in the inquiry. We are open to the possibility of further improving guidance and taking steps to ensure that where it is sensible to develop or improve investigative processes, this action is taken.

SUPPORTING FACTS

16. A summary of judicial outcomes in historical child abuse cases was submitted as evidence to the Committee (Memorandum 2, Appendix D) by Terence Grange of the Association of Chief Police Officers (ACPO). It was based on internal research conducted by ACPO of cases between 1997-2000.

17. This summary showed that, of the cases examined, 55 out of 163 cases (34%) where a plea was entered pleaded guilty. Of the total of 189 cases that were finalised in court, 3 resulted in appeals going to the Criminal Cases Review Commission (CCRC), although obviously further appeals may have been made since this data was collected.

18. More recently, the CCRC have confirmed that there have been 24 applications of cases of historical abuse between 1997 and the present day. Of these cases, 7 are now closed and none of them were referred to the Court of Appeal. The remaining 17 cases are still being dealt with.

19. Although the CCRC look at cases on an individual basis, a recently introduced case management system will enable comparison of historical abuse cases and the identification of common links of relevance.

20. A recent Court of Appeal judgment has resulted in the convictions of two men imprisoned for historical child abuse being found unsafe. The original convictions were challenged by new evidence from witnesses who had not given evidence at the original trials.

21. Clearly, the circumstances of these cases do not imply that other convictions are unsafe. The fact that evidence emerged at a later date which challenged witness accounts that may have led to convictions does not mean that other convictions are doubtful.

22. Nonetheless, the Government will watch with interest the progress of any future appeals in historical abuse cases, as well as work with the CCRC, to identify any relevant trends that would indicate systematic problems.

DETAILED RESPONSE TO KEY CONCLUSIONS AND RECOMMENDATIONS:

The Conduct of Police Investigations

23. (Recommendation 1) Although we hold some reservations about the conduct of police trawls, we do not accept that trawling should be prohibited. The police have a statutory duty to investigate allegations of child abuse, regardless of whether they relate to contemporary or past events. In general, the longer the delay between the alleged offence and the allegation being made, the more difficult the investigation. We believe that senior officers should retain their discretion to determine the nature and scale of an investigation, particularly in complex investigations into past institutional abuse. In every case, however, there should be clear justification for the decision to launch a trawl (paragraph 26).

24. (Recommendation 2) We take the view that any initial approach by the police to former residents, should—so far as possible—go no further than a general invitation to provide information to the investigation team. We invite the Association of Chief Police Officers to revise the internal police handbook for senior investigating officers, in order to set out clearly the terms of an initial approach to potential witnesses (paragraph 34).

25. The Committee uses the term “trawling” for the sake of convenience. The Government considers that accuracy is just as important a consideration when selecting a term that best describes the practice referred to. We are disappointed to see this term favoured, particularly given the Committee’s acknowledgement of its negative connotations. “Trawling” implies an indiscriminating approach, with a pre-determined outcome in mind. The suggestion is that the police are looking for allegations, and focus their activities to this end. “Dip sampling” is a more accurate and neutral term and we encourage its use.

26. The Committee heard detailed evidence from the police about this practice, that it is an entirely necessary response to the duty of the police to investigate serious criminal allegations. The Committee rightly acknowledges the police’s statutory duty and the difficulties they face when complaints of historical abuse are made.

27. We are therefore pleased to see that in this case the Committee, although they make reservations, do not agree that this practice is flawed. Clear justification for a dip sample would of course be recorded as a matter of routine in the Senior Investigating Officer (SIO)’s policy file, and this is already made clear in the Association of Chief Police Officer’s Handbook for Senior Investigating Officers.

28. The Government agrees that the implementation of recommendation 2 would help to ensure that dip samples follow best practice.

Interviewing potential complainants and other witnesses

29. (Recommendation 3) We believe there is a strong argument, in cases of this kind, for introducing a general requirement to record police interviews of complainants and other significant witnesses on video or audio tape. Where a video-recording is impracticable, we recommend that the interview be recorded on audio tape, as a mandatory requirement (paragraph 45).

30. (Recommendation 4) We recommend, that the Home Office issues a code of practice for the audio and visual recording of police interviews with complainants and other significant witnesses in cases of historical child abuse (paragraph 47).

31. The evidence presented to justify the need for mandatory recording of interviews is not entirely persuasive, being as it is largely anecdotal and disputed. However, this does not mean that there is not a case for recording interviews.

32. The evidence given to the Committee by police officers suggests that there is a well established sensitivity in this area, and that it is routine practice for senior officers to provide detailed briefing to interviewing officers (QQ 651-658), to ensure that they do not influence the responses of the witness.

33. If implemented, these recommendations would place complainants in a unique category of crime victims, in that extra precautions would be taken to ensure the validity of their evidence. This policy could act as a disincentive to victims of these crimes, who may feel they are being stigmatised by this approach. However, if it were explained to a witness that the recording may prevent cross-examination to the effect that, for example, the officer led the witness, they may themselves see the advantage in this approach.

34. Although we feel that these recommendations are not fully justified, we are not closed to the possibility that there could be an argument for introducing audio or video tape recording, if it can be established that there is clear justification for the resources that would be necessary, and if it could be fairly defined which cases it should apply to. Improving the quality of witness evidence is clearly something that the Government supports, and recording could be of significant value in improving the quality of prosecution decisions.

35. At the very least, the Government considers that there would be a clear benefit in ensuring that a documented and accurate record is kept, including in some cases tape or video recording, of all approaches to witnesses and will discuss with ACPO how this can be implemented.

36. (Recommendation 5) We recommend that resources are channelled into researching and piloting the use of "statement validity analysis" as a tool for evaluating the credibility of witness testimony in complex historical child abuse cases (paragraph 50).

37. The use of statement validity analysis (SVA) to establish the credibility of statements from child witnesses/victims of sexual abuse has been validated through many research studies (e.g. Stella and Kohnken, 1989; Raskin and Esplin, 1991). Its application to statements from adult witnesses/victims of sexual abuse (including those cases of historical child sexual abuse cases where the offence took place as a child but is not reported until adulthood) has not undergone such validation. There have been very few research studies conducted in this area and the findings from these studies have not been wholly convincing. Consequently, further research is required and as such, the recommendation can be supported. However, it is important to note that SVA is one of a range of techniques (e.g. SCAN) that could be applied to this area and the applicability of all relevant techniques should be explored.

38. The Government also notes that although SVA may be a useful tool for evaluating the credibility of witnesses, the report has not produced any evidence to the effect that it would assist in preventing false testimony.

39. The ACPO Investigative Interviewing Group, which aims to develop and assist the implementation of a national investigative interview strategy, are currently producing advice to forces on the use of a number of techniques, including SVA, that claim to detect instances of potential deception.

The Senior Investigating Officers' Handbook

40. (Recommendation 6) We would, encourage the Association of Chief Police Officers to distil the core recommended practices and procedures into a prescriptive list, to be included in the police handbook for senior investigating officers (paragraph 59).

41. The Government has doubts that a prescriptive list would be of benefit, and fears that such a step could prove counter-productive in ensuring that these complex investigations are pursued as efficiently and effectively as possible. We believe that the approach advocated in the Government's inter-agency guidance, whereby the Strategic Management Group must apply rigorous scrutiny to the "overall process for gathering corroborative and additional evidence" (Section 3.2, paragraph g) achieves the same end, while allowing each investigation the necessary flexibility to respond appropriately to its own particular circumstances.

Victim Support Services

42. (Recommendation 7) We endorse the view that, where a trawl is conducted, complainants should be offered appropriate victim support services, such as counselling, from an early stage of their involvement in the investigation (paragraph 61).

43. We are pleased that the Committee has recognised the importance of supporting victims from an early stage in the investigation, a matter that is addressed in the Government guidance on Complex Child Abuse Investigations: Inter-Agency Issues.

The role of the Crown Prosecution Service

44. (Recommendation 8) In our view, the Crown Prosecution Service is presently faced with a difficult task when reviewing past cases of institutional child abuse. However, the sheer volume of such cases which are rejected by the CPS, seems to indicate that it is applying a sufficiently robust review to sift out weak cases. We are not persuaded that there should be a new test for Crown Prosecutors (in addition to the evidential and public interest tests) to require firm evidence, or a firm belief, that a crime has been committed for the prosecution to proceed. We, therefore, decline to recommend any changes to the Code for Crown Prosecutors (paragraph 70).

45. We welcome the conclusion that the existing CPS tests are considered robust and sufficient to prevent weak cases from reaching court, and the conclusion, as expressed by the Director of Public Prosecutions, that any potential third test would be “superfluous”.

Disclosure

46. (Recommendation 9) We note that failure to disclose evidence inconvenient to the prosecution case was a factor in many—if not most—proven miscarriages of justice and we express the hope that the recommendations made by these various studies are acted upon without delay. We look forward to hearing from the Home Office on this point (paragraph 72).

47. The police and CPS have been taking action to improve prosecution disclosure in the form of a joint project. This has taken forward recommendations made by the CPS Inspectorate in their thematic review of disclosure, published in March 2000, the Attorney General's Guidelines, issued in November 2000 and the Home Office commissioned research published in December 2001. Revised joint operational instructions on disclosure have been approved and issued to the police and CPS in December 2002. Police and CPS training based on the new instructions will begin in April 2003, with a view to full implementation in early summer.

48. Improvements in prosecution disclosure will also be assisted by closer co-operation between the police and the CPS. This is taking place in the course of the pilots for new charging procedures, which are being placed on a statutory basis in the Criminal Justice Bill that is being considered by Parliament. In addition, joint working is taking place in police/CPS criminal justice units, as recommended by Sir Iain Glidewell in his Review of the Crown Prosecution Service published in June 1998.

49. The Criminal Justice Bill will introduce a single disclosure test to replace the present two tests. This should simplify the process and contribute to the work outlined above to improve prosecution disclosure.

50. (Recommendation 10) We welcome the proposal for a national protocol for the disclosure of third party material and hope to see its speedy delivery. In the longer term, we support Lord Justice Auld's recommendation for a new statutory scheme for third party disclosure, "to operate alongside and more consistently with the general provisions for disclosure of unused material". We again look forward to hearing what plans there are to implement Lord Justice Auld's recommendations on disclosure (paragraph 74).

51. A draft model protocol between the CPS, police and local authorities on the exchange of information in the investigation and prosecution of child abuse cases is being developed by an inter-agency working group led by the CPS. It is hoped that the model protocol will be issued to the CPS, police and local authorities by early summer 2003 when local areas will be encouraged to draw up their own protocols based on the model.

52. In the Annex to the White Paper 'Justice for All', the Government indicated that it wished to consider further Sir Robin Auld's recommendation that consideration should be given to a new statutory scheme for third party disclosure. The Government wishes to take account of the work on developing the model protocol before reaching a view on the best way to proceed.

Similar fact evidence

53. (Recommendation 11) Whilst we accept that the criminal justice system needs to be more sensitive to the needs of victims and witnesses, we are concerned that the proposed removal of safeguards for the defendant, set out in Justice for All, may further prejudice the defendant in historical child abuse trials. We are particularly concerned about the proposed relaxation of the rules of evidence, which may allow for greater admission of 'similar fact' evidence. In our view, given the sensitive and difficult nature of investigating allegations of historical child abuse, there is a strong case for establishing special or additional safeguards for the exclusion of prejudicial evidence and/or severance of multiple abuse charges (paragraph 83).

54. (Recommendation 14) We, recommend that the law of similar fact evidence is reformed to require a "striking similarity" in historical child abuse cases. We suggest that the law of severance is also reformed, to introduce a presumption in favour of severance in cases where the similar allegations are inadmissible on a similar fact basis (paragraph 97).

55. The Committee's recommendation would return the law on similar fact evidence (for these cases) to the position that applied following the case of Boardman in 1975. However, the test for admitting such evidence has developed since then to recognise that its value is not limited to cases of "striking similarity". For example, multiple accusations against an offender have a significance that derives from the unlikelihood that a person will be independently falsely accused of offences of a like nature, whether or not there is a particular degree of similarity. Whilst such accusations do not establish that

an incident is true, and issues of collusion need to be considered carefully (as they would if the threshold were “strikingly similar”), such evidence is certainly relevant to assessing the cogency of a witness’s account. Evidence of other incidents might also be relevant when considering an innocent explanation put forward by the defendant - what might credibly be explained as a mistake on one occasion becomes much less so in respect of repeated incidents. Here, too, the relevance of the other allegations does not depend on establishing a particular level of similarity between the events.

56. The Government is therefore concerned that reverting to the “strikingly similar” test would risk denying juries and magistrates a range of potentially highly relevant evidence. Our approach, as embodied in our proposals for reforming the law on evidence of bad character in the Criminal Justice Bill currently before Parliament, is to enable juries and magistrates to hear the widest range of relevant evidence that will assist them to reach a fair verdict. The admissibility of bad character evidence should therefore depend on its relevance to the issues in the case, rather than on a particular degree of similarity.

57. We are not, however, complacent that dangers cannot arise where evidence is admitted in these circumstances. However, there are safeguards to ensure that trials are fair. For example, in determining whether to admit the evidence, the courts must consider whether it would be more prejudicial than probative. The judge will therefore be able to direct that the charges be considered evidentially separate if necessary. And where this might not be sufficient to secure a fair trial, the judge can order that the various charges are tried separately, ensuring that the jury in each case is not aware of the evidence in the others. The Criminal Justice Bill also proposes that judges should be under a duty to withdraw a case from the jury where it becomes clear that seemingly independent allegations are in fact the result of collusion or other distortion and a conviction would be unsafe.

58. The Committee also recommends a presumption in favour of ordering separate trials where allegations cannot be heard as evidence in support of each other on a similar fact basis. In their judgement in the case of *Christou* (1997), dealing with the severance of charges for sexual offences, the House of Lords held that a trial judge should exercise his discretion to sever to achieve a fair resolution of the issues. This is buttressed by the Human Rights Act 1998, which makes it clear that the courts must act in a way that is compatible with the European Convention on Human Rights including ensuring a fair trial. Given the centrality of fairness to the issue of severance, it is not clear what the proposed presumption would substantively add. The Committee is concerned that “sexual offences tend to engender greater prejudice than non-sexual offences” (paragraph 96). However, we do not agree that this warrants a special rule to deal with historic child abuse cases: the issue of prejudice will clearly be an important aspect of deciding whether severance is required and to the extent that there is a greater risk of prejudice in any particular case, whether of historic child abuse or any other, the argument in favour of severance will clearly be stronger.

A time limit on prosecutions of offences relating to child abuse

59. (Recommendation 12) We are inclined to agree that the prosecution of offences relating to child abuse should not be time-barred. In our view, prosecution decisions should continue to be based on the merits of the case, having regard to public interest factors, such as delay. Whilst a limitation provision may protect innocent defendants from fabricated allegations that are difficult to refute, it may also prevent guilty defendants from being brought to justice. For these reasons, we decline to recommend the introduction of a statutory limitation period (paragraph 89).

60. Recommendation 20 of Setting the Boundaries said that "there should be no time limit on prosecution for the proposed new offence of adult sexual abuse of a child ". The government has accepted this recommendation on the basis that although concerns have been raised about false allegations, there is no logical reason why this offence alone (or indeed sex offences in general) should be singled out for a time limit. Under existing legislation, prosecution for the offence of unlawful sexual intercourse with a girl under 16 cannot be commenced more than 12 months after the offence took place. This provision will be repealed along with the offence when the new Sexual Offences Act is introduced. There are no time limitations attached to any of the offences in the Bill.

Safeguards against abuse of process

61. (Recommendation 13) We recommend that the prosecution of offences relating to child abuse, which is alleged to have occurred over ten years since the date of the offence, should only proceed with the court's permission. We suggest that the time period does not begin to run until the complainant has reached age 21 (paragraph 92).

62. We are not persuaded by this recommendation. It is the role of the CPS as the prosecuting authority to consider, on a case by case basis, whether there is sufficient evidence for a realistic prospect of conviction, and if so whether it is in the public interest to bring a prosecution. We see no reason to interfere with this role. When reaching a prosecution decision, one of the factors for consideration to which the prosecutor will have regard is any delay in reporting an allegation and the reasons for that delay.

Extension of anonymity to the accused

63. (Recommendation 15) We suggest that the statutory reporting restrictions, which preserve the anonymity of victims of sexual offences, are extended to persons accused of historical child abuse. We believe that the restrictions should operate to protect the accused until the date of conviction, with provision to lift the restrictions by court order. Although there is a case for extending this recommendation to all sexual offences, for which the victim is granted anonymity, this goes beyond our remit for this inquiry (paragraph 99).

64. The Government believes that the law presently strikes a proper balance between the principle of open justice, in which the public has the wider interest, and the very important need to ensure that victims of sexual offences are encouraged to report such crimes. The rationale for protecting victims alone is not only to protect them from hurtful publicity, but to encourage other victims to report offences and co-operate with the prosecution. These arguments do not apply to the accused.

65. Historical child abuse cases cover a wide range of offences (both sexual and non-sexual) which may have occurred over a period of time. There would be definitional difficulties in determining which defendants in historical child abuse cases should be granted anonymity.

66. The Government is presently minded to retain the existing format in regard to anonymity for defendants as no other category of offence is dealt with in this way, but it will continue to listen to the arguments of those who feel strongly on the matter.

The working relationship between personal injury solicitors and the police

67. (Recommendation 16) We are concerned that neither the internal police guidance, nor the Government guidance, on historical child abuse investigations, give any specific direction on the proper relationship between the police and personal injury solicitors. We recommend that the Home Office issues guidelines, which prescribe the elements of a 'model relationship'. We suggest that the Home Office act in consultation with the Association of Chief Police Officers to ensure consistency between the various guidance documents (paragraph 108).

68. The Government does not think that the existence of a problematic relationship between police forces and firms of solicitors has been substantiated, and therefore specific guidelines are not justified. The assumptions that civil compensation claims have driven false allegations, or that impropriety has existed in relationships between police forces and firms of solicitors is not supported by any evidence.

69. We agree that some guidance for police officers and other professionals involved in an investigation is useful. The Government's Complex Child Abuse Investigations: Inter-Agency Issues paragraphs 6.4 to 6.6 refers specifically to matters relevant to the disclosure of information to solicitors. We feel that this provides sufficient guidance to ensure that the balance of all interests are met. The explicit reference to the potential dangers of compensation being seen as a possible inducement for co-operating in an investigation is an adequate safeguard in this context. The Government is prepared to amend this guidance if it is shown that specific problems need to be addressed.

Civil compensation and the Criminal Injuries Compensation Scheme

70. (Recommendation 17) We recommend that the Criminal Injuries Compensation Authority conduct a review of its Scheme, with a view to ensuring that it is sufficiently user-friendly and attractive to victims of past institutional child abuse (paragraph 115).

71. The Criminal Injuries Compensation Scheme, and any amendments to it, are made, not by the Criminal Injuries Compensation Authority, but by the Secretary of State, with the consent of both Houses of Parliament. The tariff-based compensation scheme was introduced in April 1996. It was comprehensively reviewed during 1999-2000 following a public consultation exercise launched by the issue in 1999 of a consultation document entitled "Compensation for Victims of Violent Crime: Possible Changes to the Criminal Injuries Compensation Scheme".

72. Following that public consultation exercise a number of substantial improvements were made to the Scheme with effect from 1 April 2001. Additional injury descriptions were included in the tariff of injuries listed in the Scheme, and the descriptions relating to sexual assault and child abuse were redefined, re-ordered and expanded to make them both more comprehensive and easier for potential claimants to understand. The compensation awards for most such injuries were increased at the same time. The Scheme is kept under review on a continuing basis.

Vicarious liability

73. (Recommendation 18) We would like to see a return to the legal position, pre-2001, when employers were not generally regarded as liable for sexual assaults committed by their employees, unless the employer was also at fault through his own negligence. To go back to this position would not, in any way, affect the liability of employers who were found to be negligent, nor would it prevent complainants from suing the alleged abuser directly, or from claiming compensation from the Criminal Injuries Compensation Authority. For these reasons, we recommend that the Government gives serious consideration to the introduction of legislation to overturn the House of Lords' decision in *Lister v. Hesley Hall Ltd*, which—in our view—has broadened the scope of 'no-fault' (vicarious) liability too far (paragraph 121).

74. The Government does not propose to change the law in this area. The law on vicarious liability is wholly common law based, and has been developed by the courts over many years. There is a wide range of case law in which the courts have considered the basic principles which should govern the extent to which employers should be responsible for the acts or omissions of their employees and their applicability in the circumstances of individual cases. It is a matter for the court to decide whether an employer is vicariously liable in the light of all the circumstances of the case.

75. It would not be desirable or practicable to replace the common law by statute in one particular set of circumstances in which vicarious liability may be held to apply. It would be very difficult to specify precisely the circumstances in which the new provision should and should not apply, and thus any change could have the effect of preventing legitimate claims. In addition, a change in one area would inevitably have substantial repercussions on the law on vicarious liability as a whole.

76. It is therefore preferable that the courts should continue to have the flexibility to consider all the circumstances of the individual case in reaching a decision as to whether vicarious liability should apply.

77. The Lister judgment does not go so far as to say that an employer will always be vicariously liable for any sexual assault committed by an employee at work. Therefore, it is not quite accurate to refer as the Committee do at paragraph 119 of the report to an employer knowing that “he will be liable for the abuse, regardless of his efforts to tighten management procedures.”

78. Furthermore, there is no evidence that child protection safeguards have become more lax since the Lister judgment.

79. There are, of course, some safeguards that ought to be in place irrespective of concerns about vicarious liability. For example, children’s homes, fostering services and care homes (that may provide accommodation to children), all fall within the Care Standards Act 2000 regime. Providers of these services are subject under the Care Standards Act to requirements (amongst other things) about fitness of providers, managers and staff. These include obtaining satisfactory information about past employment and Criminal Records Bureau checks. A breach of these requirements is a criminal offence. From 1st April residential family centres and from 30th April adoption services will also fall within the Care Standards Act.

80. In the particular context of children’s homes, the Children’s Homes Regulations 2001, make provision for the protection of children and the promotion of their welfare. In addition, the provider of a children’s home has a duty of care towards a child accommodated in the home. This includes having adequate measures in place to protect him from harm. Failure to do so may result in a quite separate claim against the provider.

81. There are also the general duties under section 22 of the Children Act 1989, of local authorities to safeguard and promote the welfare of children in their care or to whom they provide accommodation.

82. With regard to the potential for unscrupulous claims, the evidence is lacking that the Lister judgment has had any effect in this regard.

Public funding

83. (Recommendation 19) We are not persuaded that personal injury actions arising from historical child abuse should be excluded from public funding (paragraph 126).

84. The Government agrees with this recommendation.

Other factors

85. (Recommendation 20) We would invite the Association of Chief Police Officers to further revise the internal police handbook for senior investigating officers, with a view to minimising the risks of inducing false or exaggerated allegations. First and foremost, we believe that any practice by the police of offering, or acceding to requests for, mitigation in exchange for evidence against suspected child abusers in historical cases should be prohibited (paragraph 129).

86. The Government believes that there is value in the consistent promotion of good practice, and will therefore discuss with ACPO the possibility of revising and developing the Guidance to further minimise the potential for inducing false allegations.

87. Both the Government and the Association of Chief Police Officers firmly agree that the practices suggested in this recommendation are wholly inappropriate. However the report has not presented any information to the effect that they do happen. Nor does the unpublished memoranda held at the House of Lords reveal any information to this effect.

The Criminal Cases Review Commission

88. (Recommendation 21) We conclude—and this is a point that goes wider than simply historical child abuse cases—that the Commission's test for referral to the Court of Appeal is too narrow. We believe that the test should be broadened, to bring it into line with the test applied by the Scottish Criminal Cases Review Commission. We, therefore, recommend that the test is revised to allow the Commission to make a referral where they believe that a miscarriage of justice may have occurred and that it is in the interests of justice that a reference should be made (paragraph 137).

89. The Royal Commission on Criminal Justice recommended the test that “a miscarriage of justice may have occurred”. But it was accepted during the passage of the Criminal Appeal Act 1995, which established the CCRC, that there was a need to go further than this. It was argued that in the absence of anything new, the implication would be that the CCRC, which had referred the case, disagreed with the previous finding on appeal. This would place both the CCRC and the appellate court in a most invidious position. There would also be no real purpose in such a reference, since the appellate courts cannot be expected to alter their previous judgements unless there is some substantial new

point on which to focus. The Court's test is whether a conviction is "unsafe" and the CCRC's test is derivative. It would not seem sensible for the Commission to work to a different formula than the court. To do so could cause friction between these two bodies.

90. The Scottish CCRC was established following the recommendations of the Sutherland Committee (The Committee of Criminal Appeals and Miscarriages of Justice procedures). Prior to the setting up of the SCCRC the Secretary for State for Scotland under s124 of the Criminal Procedures (Scotland) Act 1995 could refer a conviction or sentence to the High Court with no form of words to circumscribe his discretion. The Sutherland Committee, however, noted that the Secretary of State's practice had been to intervene only where fresh evidence or new considerations of substance which had not been before the Courts, suggested a miscarriage of justice might have taken place. The Crime and Punishment (Scotland) Act 1997 (which set up the SCCRC) reflects the test under the 1995 Act and bears with it the proposition that a reference should only be made on the basis of fresh evidence or argument. It seems unlikely that the Sutherland Committee envisaged that the Court would quash a conviction in the absence of new evidence or argument. Indeed, the Committee specifically addressed the question of what should happen in a case where the SCCRC believed there to have been a miscarriage of justice but for want of new evidence or argument the High Court would be unable to consider the case. They recommended that the SCCRC be empowered to refer such cases to the Secretary of State with a view to the exercise of the Royal Prerogative.

91. We have consulted the CCRC who are opposed to the proposal. Their view is that the existing formula is broad. They commented: "The test now comprehends not only cases where the conviction is flawed factually but also cases in which, for want of due process, the conviction cannot be upheld without compromising the integrity of the criminal justice system. In cases where relevant and credible new evidence appears the test may be satisfied provided that the CCRC considers that the Court will conclude that it cannot be certain what the result of the trial would have been had the jury heard fresh evidence. The current test preserves the position of the jury or magistrates as finders of fact whilst giving considerable latitude to the CCRC where new evidence or argument appears."

92. The more fundamental consideration is whether the existing formula leaves miscarriages of justice unredressed and whether adoption of the Scottish formula would allow the CCRC to address these. The CCRC are unable to conclude that a change to the Scottish formula would produce any change in practice.

93. The CCRC has, furthermore, a flexible head of power that allows them to review cases that don't meet the criteria, but appear to be obvious miscarriages of justice. Section 13(2) of the Criminal Appeal Act 1995 provides the CCRC with a power to exercise a wider criterion based on "exceptional circumstances". This is irrespective of the terms of section 13(1)(a) and (c) (i.e. such a referral does not require a real possibility, and new evidence, or new argument on a point

of law). The Commission has used these powers. Additionally the Commission has the power under s16 (2) of the 1995 Act where they are of the opinion that the Secretary of State should consider the exercise of Her Majesty's prerogative of mercy to refer such a case to him. This power could be used in cases where no new facts or evidence are available.

94. The CCRC has powers to allow them to consider and deal with cases where new evidence or argument is not available and to widen their criteria could dull their focus which could result in numbers of less convincing cases getting in the way of more worthy ones. The Government is not convinced therefore that this recommendation would produce any change or benefits in practice.



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