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This matter is being dealt with by:

Resources Department

T [REDACTED]

E [REDACTED]

W nottinghamshire.gov.uk

29 September 2016

Dear Sir/Madam

IICSA Issues Paper Number 1 - Civil Justice System

Nottinghamshire County Council (NCC) wishes to make the following submission relating to the Civil Justice system as it applies to cases of child sexual abuse. We also note that at the formal opening of the Accountability and Reparations stream it was stated by Lowell Goddard that the Inquiry expects to hold a number of expert seminars (after consultation had closed) to consider some of the contextual issues that are raised. If this request is to form part of that further examination then we would be happy to assist further should it be required.

Many of the questions asked are not directly relevant to NCC, but as we will be directly involved in the process, we wish to provide the Inquiry with a number of generic observations in relation to matters relating to Civil Justice which the Inquiry may find useful.

Sexual abuse claims are brought as tortious claims within the UK Civil Courts for which either standardised statutory and/or common law rules apply. The purpose of the system is to provide financial recompense for loss and or damage where fault can be established. The UK operates an adversarial system whereby both parties present their respective positions before a judge, who, on the balance of probability, decides whether the facts as presented, establish

a proven case, as opposed to other jurisdictions which operate an inquisitorial based system, where a Judge effectively conducts an investigation.

The English system is concerned with what can be proven on the balance of probabilities. If proved to be correct, an issue is deemed to have happened, but that does not of itself mean it happened in reality. This can be seen in the context of both criminal and civil liability. A matter can be considered proven in the civil but not criminal context because the criminal context requires a higher standard of proof meaning - where on balance, a matter it is proven in the civil context, it is not beyond all reasonable doubt that it actually did happen. There is therefore, a disjoin between what claimants may actually want and what the civil process is there to remedy. Victims and survivors of child sexual abuse are often looking for an opportunity for their story to be heard and the truth of their experience acknowledged.

Financial compensation is often secondary or simply irrelevant to victims at all. However, the primary purpose of the civil justice system is not to establish the individual truth of the matter, but to compensate loss and damage financially, where on balance it is found proven. Its focus and emphasis are different.

Legal proceedings can be lengthy and complicated. All jurisdictions develop mechanisms in order to shorten that process both in time and cost. One such vehicle is early settlement. The advantages to a claimant in the context of civil proceedings is that financial recompense is made sooner and at a reduced cost with the claimant avoiding the uncertainty of receiving nothing at all if a claim is unsuccessful. Negotiated settlement is almost always the result of an assessment of the evidence supporting or undermining the respective cases, coupled with a costs benefit analysis of fighting a case to settle. Equally, a defendant also benefits in that they avoid litigation risk, the potential for increased costs. Removing elements such as the ability to settle "without admission" – would not in our view be helpful to an early settlement process.

Often, a civil claim will be in conjunction with a linked criminal investigation. The civil process may have to wait until the criminal case is concluded. For reasons given above, a finding in a criminal context is more determinative of an issue in the civil context and to that end it makes

sense to await a criminal outcome. That however can lead to lengthy delays between the start of an investigation and the eventual outcome of a criminal trial during which time, civil claims may essentially have to be parked. That of course does not mean that civil claims cannot move forward in the interim and each case has to be looked at individually e.g will moving ahead on the civil case – prejudice the potential outcome in a criminal case or would it have no impact at all for instance. A stay therefore, in criminal cases, is usually appropriate but perhaps too long an investigation can cause difficulties as all interested parties are unable to move forward.

A way of recognising the impact of a criminal conviction and moving directly to civil compensation would ensure victims and survivors receive compensation in a timelier manner, and would reduce legal fees and other costs incurred in the civil element of the process. A criminal conviction may prevent the need to do extensive liability investigations in the civil claim. However, just because there has been a criminal conviction that does not of itself mean an employer is liable in the civil courts and equally, an employer has the right to have their alleged failure / breach established on the balance of probability.

The civil claims process includes time limitation defences. It may well be that it is considered inappropriate for time limits to be applied in sexual abuse cases. That would require major legal change. In addition, one would have to question if time limits are changed, then why not other jurisdictions? This opens a potential floodgate. Limitations in law are there to provide certainty for all parties and all parties are entitled to know when a matter or chapter may be closed. Without certainty there is uncertainty. This has the potential for cases to be brought for indeterminate periods for indeterminate numbers with ever escalating costs. In addition, there are already safeguards because there is judicial discretion to extend time based on firmly established principles in law.

Since costs are often borne by insurance companies, Local Authorities and other public bodies covered by insurance policies, an insured cannot unilaterally decide not to use legitimate arguments, defences whether that be time limitation or other argument in support of a defence because public bodies are bound by their own fiduciary duties and applicable terms in any relevant insurance contract. Were this not to be the case then we would need to

question the impact that that would have on the ability to either a) obtain insurance at all and the willingness for liability to be underwritten or b) if so, at what premium?

The rules as currently drafted allow claimant's representatives to recoup considerable fees. Fees which are often significantly greater than any payment made to an individual claimant. In essence, the amount paid by way of settlement or compensation is dwarfed by the totality of officer time, costs and fees claimed by representatives, all of which do nothing but reduce still further, an ever decreasing public sector purse. In short, we would welcome a better way of dealing with such claims, perhaps some form of Statutory Compensation scheme.

If the Council can be of further assistance please feel free to get in contact.

Yours sincerely

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Nottinghamshire County Council