IICSA INDEPENDENT INQUIRY INTO CHILD SEXUAL ABUSE

Civil Justice System Seminar: An update report

March 2018

INTRODUCTION

1. On 4 August 2016, the Inquiry published an issues paper on the civil justice system. Following the consultation period and receipt of written submissions, the Inquiry held a series of seminars on the civil justice system on 29 and 30 November 2016. A number of respondents to the issues paper attended.

2. The aim of these seminars was to give these individuals and organisations the chance to speak to their submissions, further develop their ideas, and engage with the views of others. The Inquiry is keen to ensure that it considers the perspectives of both claimant and defendant stakeholders. In the first introductory session, the Inquiry heard from the claimant stakeholders and, in the second, from the defendant stakeholders. The remainder of the sessions included both claimant and defendant stakeholders, all of whom provided their views on the various topics and helped to stimulate lively debate.

3. The Inquiry would like to thank again all those who contributed to the issues paper process and attended the seminars.

4. This report is not intended to be a comprehensive analysis of all the views expressed at the seminars. Its purpose is to summarise the discussions and to highlight key areas for follow-up work by the Inquiry.

Session 1:
Introduction to the civil justice system

5. The following topics were discussed with claimant stakeholders as part of an introduction to the civil justice system:

- The range of awards of compensation in child abuse cases
- The costs of bringing child abuse cases
- Public funding
- The merits of claims
- Future challenges.

6. It was said that most claimants receive an average of £10,000–£40,000 in damages if their cases are successful. Awards could be in the very low thousands. Awards significantly above £40,000 are unusual.

7. Depending on the value and stage of the case when it concludes, the average cost of litigating a claim was put at around £30,000. This includes £10,000 in court fees for issuing a claim and, in some cases, the costs of expert reports at around £5,000 to £10,000. A distinction was drawn between two different categories of abuse cases: the first are those based on vicarious liability (where an institution is liable for the individual perpetrator's abuse); the second are "failure to remove"[1] cases. In the first category of cases, there is no need to prove negligence by an institution. In the second category, investigative costs are more expensive because it is necessary to prove negligence and there are usually substantial volumes of records.

8. Attendees explained that the availability of public funding has decreased over the years. The proportion of claims publicly funded in each claimant solicitor firm depends on the category of case. In one firm, 75–85% of cases are publicly funded because it represents many care-leavers and prisoners; in another, the ratio of publicly funded to non-publicly funded cases is about 50/50 because it acts for a lot of children. The point was made that both the means and merits test for legal aid were very strict.

9. Attendees explained that they turned away the majority of people who made enquiries about bringing a civil claim. Various reasons for not being able to proceed with claims, whether publicly funded or under conditional fee arrangements, were provided. These included limitation, not having a defendant to sue, a defendant not having the financial means to satisfy a judgment, and proportionality (i.e. whether the costs of running the case are proportionate to the likely damages). The issues of limitation and identifying both the correct and solvent defendant were identified as being particularly acute, given that a large number of cases involve historic or non-recent allegations. Attendees explained that issues of funding and legal merits were difficult to explain to their clients.

10. The introduction of fixed costs and funding were identified as key issues going forward.

[1] "Failure to remove" cases are cases in which it is alleged that children have been abused as a consequence of the failure of local authorities and social services to remove them from their home.

Session 2:
Introduction to the civil justice system

11. Four broad topics were discussed with defendant stakeholders as part of the introduction to the civil justice system:

- Insurance cover
- The role of insurers in litigation
- The value of claims
- Costs.

12. Attendees explained that public liability insurance (PLI) was most relevant to child abuse claims. This insurance provides an indemnity for organisations for any legal liabilities that would arise to members of the public while they are operating their business or their activities (e.g. accidental slips and trips). Through developments in the law PLI has come to include child abuse claims. Child sexual abuse claims were thought to represent a very small percentage of public liability claims, with one insurer putting it at around 5.5%.

13. The overall view was that the role of insurers in litigation will vary depending upon the needs of the individual policyholder and the business model. Some insurers have teams that specialise in handling child abuse claims. The point was made that costs related to work done by claims handlers are essentially "hidden" costs because they are not included in legal costs.

14. Attendees agreed with the claimant stakeholders that in general terms child abuse claims were of relatively modest value, but cautioned against drawing conclusions without a detailed data-gathering exercise. Offers of assistance in this respect were made to the Inquiry. These are currently being followed up.

15. Attendees also expressed caution in trying to estimate the average costs of claims, given their diverse nature. One estimate provided was that around 40% of the overall settlement gets paid to the claimant solicitors and about 20% to the defendant solicitors.

Session 3:
Civil litigation - key issues

16. The first key issue discussed was limitation. Four broad and overlapping topics were explored:

- The importance of limitation today
- The claimant perspective on its use
- The defendant perspective on its use
- Reform.

17. For claimant stakeholders, limitation remains a major issue, both in terms of initiating and proceeding with a claim. They explained that, although the decision in *Hoare*[2] in 2008 clarified the law to a considerable extent, its application is not always straightforward in individual cases.

18. Defendant stakeholders made the point that limitation is raised in most cases at the letter of claim/response stage, but that ultimately it is only pursued as a positive defence in a very small number of claims.

19. This led to the question of whether limitation is used by defendants at the outset of cases in order to put pressure on claimants. For some claimant stakeholders, it was seen as a *"bargaining tool"* and a defence which could be fought on a *"highly technical level"*. Defendants refuted this idea, stating that it is considered and dealt with very quickly and, where appropriate, claims are settled. One claimant solicitor stated that some defendant stakeholders, including those at the seminar, generally take a reasonable stance on limitation, but that this is not universal on the part of defendant insurers.

20. Claimant stakeholders explained that one of the difficulties with the present law on limitation is that whether a fair trial is possible is only one part of the test. The other is whether the claimant is guilty of some culpable delay, which is an 'extremely subjective' issue. They accepted that even if limitation were abolished, as in other jurisdictions, the issue of a fair trial would still have to be considered by the courts. The defendant stakeholders stated that the law was fairly stable at present and they expressed concern that the removal of limitation might lead to satellite litigation.

21. As part of the discussion on fairness, attendees were asked what proportion of claims they thought genuine and legitimate, and what proportion are based on false allegations. Attendees on both the claimant and defendant side thought that very few cases were actually fraudulent, particularly in comparison to other claims such as whiplash and slips and trips. However, defendants maintained that it was important to investigate and (if necessary) defend claims appropriately, and that leaving aside the issue of fraud there could be difficulties relating to recollections and documentation.

22. Claimant stakeholders advocated the abolition of limitation. Defendant stakeholders were resistant to this idea, instead suggesting that a pre-action litigation protocol could assist in resolving the issue of limitation at an earlier stage in proceedings.

[2] *Hoare* [2008] 1 AC 844. It removed the fixed six-year limitation period for sexual abuse claims by allowing claimants to bring claims in negligence, which have more flexible time limits.

Session 4:
Civil litigation–key issues

23. Other key issues in civil litigation discussed were:

- The adversarial system
- Expert evidence
- The early stages of litigation
- Legal issues -- vicarious liability and consent
- Settlement

24. Attendees stated that the civil litigation system is inherently adversarial. This is reflected in the way in which the court process is set up, with one side pitted against another, each with their own specialist representation. One claimant solicitor made the point that, although the general view is that the adversarial system is unsuitable for victims of abuse, it can in fact redress the power imbalance between victim and defendant. Another claimant solicitor stated that clients may underestimate how stressful and traumatic a trial can be, but agreed that there could be a restorative healing effect of taking back control. It was suggested that special measures be put in place for the cross-examination of victims and survivors. One defendant made the point that challenges to a claimant's evidence very rarely related to the fact of the allegations of the abuse, given that claims are usually brought against organisations on vicarious liability grounds. However, one claimant solicitor stated that there has been an increased tendency in the last few years for institutions to seek recovery from the alleged or convicted abusers, thus bringing them into the claim and causing distress to victims and survivors. The defendant stakeholders present stated that in their experience any recovery action will be dealt with separately, after the underlying claim has been resolved.

25. Attendees spoke of a narrow pool of experts in psychiatry, consisting of two separate groups with polarised views. Some defendant stakeholders stated that they support the instruction of joint experts but find that claimant solicitors are unwilling to agree to this. Other defendant stakeholders advocated an approach to expert reports in which the defendant puts questions to the claimant's instructed expert or has a sensible discussion with the solicitors without the need for a second report unless absolutely necessary. One defendant solicitor stated that they only obtained reports in about 7% or 8% of claims. Claimant solicitors explained that they would not be fulfilling their duties to their clients if they did not seek appropriate expert evidence to deal with all relevant legal issues. Some attendees agreed that it may be appropriate for defendants to make more use of the entitlement to put questions to experts instructed by claimant solicitors.[3]

26. Attendees on both sides stressed the importance of disclosure. Claimant stakeholders spoke of the reluctance of

[3] Under Part 35 of the Civil Procedure Rules (CPR), a party may put written questions about an expert's report to an expert instructed by another party (or a single joint expert).

local authorities to provide claimants' records. Defendant stakeholders discussed the difficulties involved in the process of disclosure. Both sides agreed that this issue should be addressed in a pre-action protocol.

27. The general view was that, although the issue of vicarious liability is more settled than it once was, it still remains contentious. In the recent case of *Armes* the Supreme Court found that local authorities could be liable for historic physical and sexual abuse by foster carers of children in care. The issue of consent also continues to be problematic in a small number of cases and has yet to be resolved in higher courts.[4]

28. Attendees on both sides accepted that it was generally in the best interests of their clients to settle cases relatively early on in the proceedings, although one claimant solicitor made the point that early offers without medical evidence were not always appropriate in these cases. Attendees on both sides also stressed the importance of exploring alternative settlement options, such as apologies and joint settlement meetings. The variation in defendant behaviour was again raised by claimant stakeholders.

4 *Armes v Nottinghamshire County Council* [2017] 3 WLR 1000.

Session 5: Compensation

29. Key issues discussed in this session were:

- General damages
- Aggravated damages
- Human Rights Act damages
- Loss of earnings
- Treatment costs

30. Claimant stakeholders explained that it was very difficult to quantify the damage done by child sexual abuse. They felt that there was a misplaced focus on psychiatric injury and that general damages[5] awards, do not properly reflect the deterioration in quality of life for many victims and survivors. Positive reference was made to tariff schemes such as the Irish Redress Scheme, which attendees thought better compensated victims in this respect. Defendant stakeholders agreed that general damages award do not always fully compensate victims and survivors but they also made the point that it could be difficult to assess causation in these cases. Offers were again made to provide the Inquiry with data on the amounts of damages paid to claimants.

31. There was some divergence of opinion between claimant stakeholders as to the entitlement to claim aggravated damages.[6] One claimant solicitor thought that it would be sufficient for general damages to encompass the oppressive or insulting element of aggravated damages; another thought it was important to retain aggravated damages as a separate category. Defendant stakeholders disputed the appropriateness of aggravated damages as a separate head of loss on the basis that defendants were more often than not institutions rather than perpetrators of abuse, and a large number of insurance policies may exclude aggravated damages.

32. Attendees on both sides stated that the Human Rights Act 1998 did not play a significant role in damages claims[7]. Its relevance to "failure to investigate"[8] claims was acknowledged, but the point was made that in the context of historic child abuse claims the limitation period is a significant problem.

33. Attendees restated the difficulties of assessing the effects of child abuse in the context of loss of earnings claims. They explained the difficulties in trying to predict what a person might have earned but for their abuse as a child. In response to the written submissions of some defendants, one claimant solicitor explained that cases often settle for much lower than pleaded in schedules because it is necessary to put forward a hypothesis of what a claimant's life might have been like but for the abuse, and this can be a difficult exercise.

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5 Damages for the pain, suffering and loss of amenity suffered by the claimant.
6 Additional compensation that may be awarded by the court where a defendant's conduct is held to have been high-handed, insulting, malicious or oppressive.
7 However, the Act may since have acquired greater significance in light of the Court of Appeal's decision to limit the liability, at common law, of local authorities for the actions of third parties (*CN v Poole Borough Council* [2017] EWCA Civ 2185).
8 An example given of this type of case was the John Worboys case, where two women raped by a London taxi driver were awarded damages under the Human Rights Act for the police's failure to conduct effective investigations.

34. The issue of support during the litigation process was also said to be important. One defendant insurer stated that they made support and counselling available regardless of whether or not an individual intends to bring a claim. Claimant solicitors were also asked about the uptake of support after the resolution of claims, but stated that there was a limit to what they could do in respect of post-settlement support.

Session 6: Other types of accountability and reparation

35. This session looked more broadly at what accountability and reparation might mean for survivors and victims; what elements of accountability and reparation the civil justice system is able to provide; what limitations there are to the civil justice system; and the extent to which settlement, in particular, can achieve other types of accountability and reparation.

36. Attendees explained that victims and survivors want acknowledgement that the abuse occurred and for those who are to blame to take responsibility. It was explained that when victims and survivors say that they want "their day in court" this can mean a number of things, including the opportunity to confront those responsible for the abuse, not only in court but also in face-to-face meetings. The majority of cases do not go to trial and the point was made that even when they do, the issues at trial may not include whether the abuse happened. Moreover, even when a victim or survivor succeeds, this will not usually result in "punishment" of those responsible.

37. Attendees stated that some survivors did not see any value in an apology from anyone other than the perpetrator. Others do want want an apology from the institution. For such an apology to be "meaningful", where possible it should come from people with some responsibility for 'or involvement in' what happened. Insurers made clear that it should come from the institution and not the insurance company. One insurer stated that they encourage policyholders to make appropriate and meaningful apologies but that this might not be appropriate at the outset of many cases until an investigation had been carried out. They suggested that it would be useful to explain to victims and survivors at the beginning of the process that, if appropriate, an apology would be made at the conclusion of the investigation.

38. The extent to which changes within an institution could be enforced through the civil justice system was discussed. Attendees were asked whether or not there was scope for a judge to have the power to write a report akin to that of a coroner.[9] Attendees could see the benefit of such an option, particularly in "failure to remove cases", but the point was made that most child abuse cases do not go to trial and, even where they do, historic or non-recent child abuse claims are usually based upon vicarious liability with no examination into any potential negligence by the institution. However, attendees agreed that, when relevant and possible, more could be done in terms of the information provided to claimants about lessons learnt and steps taken to improve safeguarding.

39. Attendees also agreed that more should be done to deliver support to victims and survivors through the civil justice system. It was acknowledged that this was a complex

[9] Under paragraph 7 of Schedule 5 of the Coroners and Justice Act 2009, a senior coroner has a duty to write a Report to Prevent Future Deaths (a 'PFD report') where he/she believes that action should be taken to prevent future deaths.

area and might require some restructuring of the current process. One insurer expressed concern about providing support prior to any admission of liability. Another insurer explained that legislation made clear that counselling could be provided without admitting liability, and stated that they did encourage policyholders to provide support from the outset. It was also suggested that support could be provided independently from the institution with more control given to victims and survivors over the process.

40. The final part of this session looked at settlement and the extent to which this could be considered more creatively. It was noted that the civil justice system is tailored towards providing a full and final settlement, usually resulting in a lump sum payment. Periodic payments are not routinely used in child abuse cases, but insurers were receptive to the idea. Claimant stakeholders also expressed real concern at vulnerable victims and survivors not having the resources to manage awards. However, the point was made that the civil claims process is also about victims and survivors taking back control, which includes control over the management of awards.

Session 7: Possible reforms–civil litigation

41. This session explored the following issues:

- Existing initiatives
- Future initiatives
- Changes to the civil rules
- Changes to the law.

42. As part of the discussion on existing initiatives for change to the civil litigation process, a representative of Ecclesiastical Insurance Plc was asked about its guiding principles.[10] He explained that the purpose was not to change the way in which Ecclesiastical handles claims, but rather to be open and transparent about its processes and procedures. The principles provide guidance on issues such as apologies, support and counselling, the approach to investigations, joint medical experts, limitation and consent. Other defendant stakeholders explained that they approach the handling of child abuse cases in a similar way. Ecclesiastical's guiding principles have generally been well received by claimant solicitors. However, claimant solicitors also made clear that, in their experience, the approaches put forward by the defendant stakeholders at the seminars are not reflective of the entire defendant industry and they (with 'they' referring to the claimant solicitors) rejected any idea of a "sea change" on the part of defendants.

43. All attendees agreed that moving forward a pre-action protocol was crucial. They told the Inquiry about the initiative by Master McCloud[11] to develop new procedures for the management of child abuse claims and explained that there are a number of meetings organised with attendees similar to those attending the Inquiry seminars. General approval was expressed for this initiative.[12] The issue of sanctions was also raised, with some attendees stating that any such protocol should have "teeth".

44. As to improving the trial process, the use of specialist judges, previously suggested in an earlier session, was revisited. One claimant solicitor expressed concern that specialist judges might become 'burnt-out' working on child abuse cases all the time. Another stated that, given that so few cases end up at trial, it was not the trial judges who need training so much as the district judges, who are more involved in case management and procedural applications.

45. The next topic for discussion was reform of the law. The removal of limitation as a defence was again debated with similar points made as in the previous session. There was some discussion about the duty of candour in the healthcare context[13] and whether or not it could work in the context of child abuse cases. Some attendees stated that elements of this duty overlap with the idea of a pre-action protocol and apologies. One insurer queried the respective roles of the institutions and

[10] http://www.ecclesiastical.com/images/guiding-principles.pdf
[11] A master (procedural judge) of the High Court in the Royal Courts of Justice in London.
[12] The Inquiry has since taken steps to contact Master McCloud with a view to tracking the progress of her initiative.
[13] The duty on healthcare staff to inform patients (or their families) of mistakes.

insurance companies in making apologies and admitting responsibility, and the extent to which such a duty could be enforced by way of protocols. They agreed that further consideration should be given to this issue.

46. The last part of the discussion briefly touched upon the issue of “sexting” as an example of a new type of abuse. Attendees were of the opinion that this was being seen in some claims already and would become more of a concern in the future.

Session 8: Possible reforms

47. The final session on reform looked at the respective advantages and disadvantages of the civil justice system and an alternative redress scheme. One of the main advantages of a redress scheme was said to be greater access to justice for those unable or unwilling to engage with the civil justice system. But the point was also made that the adversarial process might suit some victims and survivors more than a formulaic redress scheme. Such a scheme might make the process of receiving compensation easier and less adversarial, but may also prevent the delivery of some of the other elements of accountability and reparation discussed in these sessions. Some attendees thought that the potential changes to the civil litigation process should be explored before looking at a redress scheme.

48. Attendees agreed that the biggest challenge of any national redress scheme is to find a model of sustainable funding. Attendees explained that, although attractive in theory, in practice redress schemes are often underfunded, rules get rewritten and schemes are wound up early. Examples of schemes in other countries were discussed. The Australian schemes were described as unaffordable. The Irish scheme was said to have worked well for a while but eventually to have become too expensive, leading to it being wound up. The Jersey scheme was seen as an example of a very good scheme, but the remit was confined to a particular group of survivors, about 150 in total. Through discussion with attendees, it is clear that careful consideration will have to be given to the funding of any redress scheme.

49. Attendees discussed the possibility of a "hybrid option" whereby, rather than having a national redress scheme, settlement schemes specific to particular events or places could be set up between parties to civil litigation. Stakeholders on both sides were receptive to this idea, some having had positive experience of such schemes already. However, some attendees repeated the point made at the outset of the session that the vast majority of survivors do not have access to the civil justice system. For them, it was imperative that the Inquiry gives some serious consideration to a national redress scheme.

Future work

50. The seminars provided a very helpful starting point for the Inquiry's work. Further investigation into the issues discussed will be undertaken through the case studies and research modules of this investigation. The Inquiry will also continue to engage with relevant stakeholders, including those who attended the seminars.

51. On the basis of the seminar discussions, we are seeking data on the following issues:

- Awards of damages
- Costs of bringing claims
- Costs of defending claims
- The proportion of potential claims rejected by claimant solicitor firms and, if possible, a breakdown of reasons
- The proportion of publicly funded claims
- The average age of allegations
- The proportion of insured/self-insured/uninsured institutions
- The proportion of public liability claims that relate to child sexual abuse
- The proportion of settled claims (and at what stage of proceedings)
- The proportion of claims where limitation is raised (and at what stage of proceedings)
- The proportion of claims where consent is raised (and at what stage of proceedings)
- The proportion of claims in which medical reports are obtained