Civil Justice System Issues Paper:
A summary of the themes raised by respondents

Introduction

1. On 4 August 2016 , the Inquiry published an issues paper on the civil justice system. The deadline for submissions was on 29th September 2016, although some submissions were received after this date.

2. The aim of the paper was to give individuals and organisations the chance to provide their opinions on particular topics relevant to the Accountability and Reparation Investigation. The responses received will help to shape the focus and direction of the Investigation. This represents the first stage of engagement with stakeholders on the topics under discussion. Further engagement with key groups, including victims and survivors, is planned for 2017. The Inquiry will ensure it considers the perspectives of all key stakeholder groups in the course of this Investigation.

3. The Inquiry received detailed submissions on all of the topics raised in the issues paper, which have been published on the Inquiry's website.[1] This report is not intended to be a comprehensive analysis of all of these submissions. Its purpose is to provide a summary of the key themes raised and then to set out the topics which will form the basis for further discussion at the seminars on 29th and 30th November 2016.

Summary

4. Submissions[2] were sought on the following topics: reparation (questions 1-8), the civil claims process (questions 9-12, in particular legal issues and insurance), reform (questions 13-15), and support (questions 16-18).

[1] https://www.iicsa.org.uk/about-us/issues-papers
[2] A total of 29 individuals/organisations responded.

Reparation generally

5. The Inquiry asked a series of questions in an attempt to understand what results victims and survivors want from the civil claims process and the extent to which these results are, or can be, delivered by the existing system.[3]

6. The Inquiry will be engaging further with victims/survivors on these questions. However, the submissions received from respondents, in particular legal representatives and victim/survivor groups, provided an extremely useful starting point.

7. It is clear from the submissions that there is no "one size fits all". There are a variety of outcomes that victims/survivors seek from the civil claims process. These include: acknowledgment of the abuse having taken place; acknowledgement of the harm done; justice; compensation; access to counselling and therapeutic support; an apology; an independent and impartial investigation; truth and accountability; punishment of the abuser; an admission of institutional failure; a commitment to learning lessons; changes to prevent recurrence; vindication; closure; and a "day in court".

8. The process for providing such outcomes was also identified as being important. Survivor groups, such as The Survivors' Trust (TST) stressed the need for victims and survivors to be treated fairly, sensitively and in a dignified manner by everyone involved in the process. Legal representatives also emphasised the need for resolution within reasonable timeframes and without undue emotional stress. Legal representation and advice were said to be crucial to this process, although so too were the issues of legal costs and funding.

[3] See paras 71-84 below.

9. Three broad points were made about the extent to which the civil claims process currently delivers the outcomes identified above:

   (1) The purpose of a civil claim is to restore an injured party to the position he/she would have been in but for the injury through the award of damages. The focus of the civil claims process is therefore to provide compensation for victims and survivors. Some of the other outcomes might be achieved through this process. But generally this is only to the extent that that it is necessary to resolve the civil claim.

   (2) The system by which such claims are adjudicated by the civil courts is an adversarial one – it creates conflict so is inherently not conducive to resolution.[4]

   (3) The conduct of the parties to the litigation within such a system also impacts upon the delivery of the outcomes and the extent to which victims/survivors feel that they have achieved any form or accountability or reparation.[5]

10. The Inquiry also sought to understand why some victims/survivors may have chosen not to pursue civil claims. Respondents provided number of potential reasons including lack of awareness of legal remedies; mistrust of the legal system; psychological barriers; fear of the legal process; lack of support; a culture of disbelief; or simple unwillingness.

11. As the reasons why some victims/survivors were unable to pursue civil claims, reference was made to the lack of specialist solicitors in certain places. Even specialist claimant solicitors explained that they often have to reject cases due to prospects of success, funding and costs issues, and where defendants are unable to pay damages and costs.

[4] See paras 48-59 below.
[5] Ibid.

Legal issues

12. The Inquiry sought submissions on the legal issues potentially relevant to the civil claims process. These can be grouped into five broad categories:

- **The interaction between the criminal justice system and the civil justice system.** It was noted that criminal convictions can assist victims/survivors in any civil claim. However, a number of difficulties were raised: the risk of victims/survivors being cross-examined in civil proceedings on whether they had made claims for compensation; delays in civil litigation and associated limitation problems;[6] legal privilege issues where the police ask solicitors for files relating to any civil claim; disclosure of documents from the police and criminal courts following criminal proceedings; and generally insufficient interaction between the two systems.

- **Legal representation/funding/costs.**[7] The claimant solicitors noted that there are relatively few solicitors who specialise in this area. They were particularly concerned about funding issues including the demise in legal aid, Conditional Fee Agreements and the difficulties in obtaining After the Event Insurance (ATE). They explained that they have to turn claims down where the defendant had no assets or insurance and is therefore unable to meet a judgment or costs order. They also expressed concerns about increasing court fees, the concept of proportionality and the proposal to introduce fixed costs for all civil claims. By contrast, defendants referred to claimants' costs often being disproportionate to damages awarded.[8]

[6] Child sexual abuse claims are governed by sections 11, 14 and 33 of the Limitation Act 1980. The general rule (leaving aside minors and those with a disability) is that a claim must be brought within three years of the date of the injury or the "date of knowledge", although the court has a general discretion to allow late claims. See paras 39-47 below.
[7] See paras 21-32 below.
[8] See para 37 below.

- **Legal bases for bringing and defending claims.** The overall view was that the law on vicarious liability[9] and non-delegable duties[10] is *relatively* settled, subject to further clarification in respect of the position of foster carers. The case of *NA*[11] will be heard by the Supreme Court in February 2017 and is expected to provide clarification of this issue. Limitation was still said to be a key issue.[12] Some claimant solicitors also referred to the use of consent as a defence to child abuse claims, although defendants stated that its use was rare.

- **The litigation process.** Numerous issues were raised in relation to: identifying the correct defendant; disclosure; the use of defences; evidence; experts; admissions; settlement; Alternative Dispute Resolution (ADR); and court proceedings, including the cross-examination of vulnerable witnesses. [13]

- **The assessment of damages.** Issues were raised in respect of proving causation; the quantification of damages; and payment options.[14]

Insurance

13. There was a general impression on the part of Claimant stakeholders that insurers have obstructed inquiries in the past and, more significantly, drive the litigation process. Claimant solicitors are of the view that some insurers can be obstructive in their approach to civil claims, although examples were given of fair and reasonable practice. Reference was also made to the need for mandatory public liability insurance.

[9] Vicarious liability refers to a situation where a person or organisation can be held liable for the actions or omissions of another person, for example a school may be held liable for the actions of one of its employees.
[10] A non-delegable duty is a duty of care owed toward a person or group of persons that cannot be assigned to someone else.
[11] *NA v Nottinghamshire County Council* [2016] QB 739, [2015] EWCA Civ 1139.
[12] See paras 39-47 below.
[13] See paras 48-59 below.
[14] See paras 60-70 below.

14. Defendant stakeholders, including the insurers themselves, made clear that they would not seek to influence inquiries and reviews. In relation to the civil claims process, they stated that where the insurer indemnifies an institution, it is appropriate for them to play a significant role in handling the claims. Defendants expressed concerns about the implications of introducing mandatory public liability insurance.[15]

Reform

15. Two main options for reform were suggested:

    (1) changes to the existing civil litigation system;[16] or

    (2) replacing the civil litigation system with an alternative redress scheme.[17]

Support

16. Submissions referred to the limited support for victims/survivors during the litigation process and resource issues, particularly in the voluntary sector. Although the focus of the questions in this paper was on support during the litigation process, submissions referred to the availability of support more generally.

Seminar topics

17. The Inquiry has selected a small number of topics for further exploration at the seminars, although it will continue to investigate all topics relevant to this investigation. The investigation is still at an early stage. The seminars are part of the exploratory work into some of the key issues that are raised in the issue papers and will inform the work of the investigation as it proceeds.

[15] See paras 33-38 below.
[16] See paras 85-90 below.
[17] See paras 91-100 below.

18. This section of the report introduces the topics and themes that the Inquiry wishes to explore at the seminars. It is not intended to be a comprehensive analysis of all the submissions. Rather it is a starting point for discussions.

19. The following topics will be discussed at the seminars on 29th and 30th November 2016:

    - Access to justice
    - Defendant stakeholders and civil litigation
    - Limitation
    - Other issues in civil litigation
    - Compensation
    - Other types of accountability and reparation
    - Possible reforms to civil litigation
    - A redress scheme

20. The full agenda for the seminars can be found on the Inquiry's website here: https://www.iicsa.org.uk/key-documents/913/view/03.Agenda.pdf

Access to justice

21. In order to access justice through the civil justice system, victims and survivors must be aware of the ability to bring civil claims. Alan Collins, in his submissions on behalf of J1 and J2, explained that many victims and survivors are simply unaware or misadvised in relation to this. In addition, some victims and survivors may be wary of the legal process, having already been through the criminal process. David Enright and Sam Stein QC, in their submissions on behalf of the Stanhope Castle Survivor Group, stated that: *"As a result of deeply unsatisfactory experiences with another part of the justice system, i.e. the police and CPS, Survivors transfer their distrust/have that distrust further entrenched against other parts of the justice system i.e. the Civil Justice System."*

22. For those victims and survivors who do want to bring civil claims, submissions made clear that legal advice and representation is fundamental. However, victims and survivors may face significant hurdles in this respect.

23. The first problem that victims and survivors may encounter is finding a solicitor who specialises in child abuse claims. Linked to this is the issue of access. As the Stanhope Castle Survivor Group made clear: *"The issue of lack of funding requires better understanding; it is not just the funding of the solicitors that requires a re-think but, more generally, assistance in dealing with travel costs and expenses... The simple question of getting to legal assistance is of itself an obstacle and real barrier."*

24. Assuming that a victim/survivor is able to find and access a solicitor specialising in this area, claimant solicitors made clear that they have to turn down a significant number of those who come through the door. The main reasons for that are low prospects of success, the defendant not having insurance or funds to pay damages and costs, and problems with legal funding/costs/proportionality.

25. It was self-evident for claimant solicitors that there is little point in suing an uninsured defendant or one with insufficient assets. As Alan Collins put it: *"There is no point in suing a man of straw."* Jonathan Bridge, stated that in order to consider a claim, his firm would normally require an uninsured defendant having at least £100,000 in unencumbered assets. David Enright and Sam Stein QC, in their submissions on behalf of the Forde Park Survivor Group, felt that it was *"very important that the civil claims process should not just be about monetary settlements, but about obtaining the truth, justice and an apology so as to avoid claims failing at the first hurdle due to a lack of insurance".*

26. Cases may also be rejected on the basis that the costs will far outweigh any damages recovered. Leigh Day stated that *"[o]ne of the most common reasons for us turning down potential new claims is proportionality."* Slater and Gordon stated that the way in which proportionality could prevent lower value claims was unfair: *"proven abuse should always be properly compensated, otherwise society is effectively*

condoning abuse by absolving perpetrators or the organisations who employ them of legal accountability."

27. Part of the costs of bringing a claim include court fees. Many solicitors were concerned about the recent significant increase in fees by the Ministry of Justice. As Jonathan Bridge explained, a court fee is calculated as a percentage of the predicted value of the overall claim and so this can add to proportionality difficulties.

28. Jonathan Bridge stated that legal aid covers the majority of institutional abuse cases. However, Irwin Mitchell stated that while legal aid may be available for sexual abuse claims, providing that the cost/benefit ratio is met, many lawyers do not make use of it due to the delays it creates and the limits it can place on their investigations. The Association of Child Abuse Lawyers (ACAL) also referred to the *"excessively bureaucratic way"* in which Legal Aid is administered as well as the *"draconian"* means-testing which excludes all but the very poor from its scope. Many others shared concerns about the reduced eligibility for legal aid over the years.

29. Given the difficulties with obtaining public funding, victims/survivors may have to rely upon Conditional Fee Agreements (CFAs).[18] However, solicitors may be reluctant to take on cases on this basis due to the high risks involved. Irwin Mitchell stated that they have to reject approximately 80% of cases due to insufficiently high prospects of success in respect of limitation, vicarious liability or causation. ACAL explained that there are high levels of rejection generally: *"Most firms who specialise in this area reject between 50 and 75% of cases which come through the door, not because the abuse did not take place but because of the prospects of success. It is thus very important for the Inquiry to consider the rights and wishes of the victims of abuse whom lawyers reject."*

30. In addition, even where claimants are successful, as David Greenwood explained, *"LASPO means that 25% of claimants' damages are taken from them in legal costs.*

[18] A CFA is a funding arrangement whereby the claimant will pay his/her solicitor's fees only if successful. They are informally referred to as "no win, no fee" agreements.

This feels like this group of deserving claimants is being penalised."[19] Imran Khan & Partners (IKP) on behalf of White Flowers Alba, G1, G2, G3, G4, G5, G6, Z8 and another also made the point that *"[n]one of the methods of funding a civil claim take account of the vindication element of a claim."* If a defendant makes a reasonable Part 36 offer[20] without an admission of liability or apology, a claimant may have to accept it due to the costs implications of failing to beat that offer following a trial. David Enright and Michael Mansfield QC, in their submissions on behalf of Survivors of Organised and Institutional Abuse (SOIA), expressed similar concerns in relation to qualified one-way costs shifting (QOCS)[21] and Part 36 offers.

31. As to future reforms, there were concerns about the proposal to introduce fixed costs regime to civil claims worth up to £250,000. Jonathan Bridge stated: *"To impose the same fixed costs regime on abuse victims as standard civil claims would be a disaster. It would restrict access to justice."*

32. Various recommendations were put forward, including: greater availability of legal aid, the removal of the proportionality test, and exemption for court fees. Some submissions also suggested the introduction of mandatory public liability insurance and a central register where the relevant details are recorded.

Defendant stakeholders and civil litigation

33. The Inquiry is interested in exploring issues relating to insurers and insurance cover, the interaction between defendant institutions and their insurers, and the costs involved in defending claims.

[19] "*LASPO"* is a reference to the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
[20] A Part 36 offer is an offer of settlement which complies with the requirements in Part 36 of the Civil Procedures Rules ("CPR") and has certain costs consequences set out in that Part. Part 36 offers are designed to encourage parties to settle claims without having to go to trial.
[21] Qualified one-way costs shifting (QOCS) is where a successful defendant cannot recover their costs from the unsuccessful claimant, except in certain defined circumstances.

34. Submissions from defendant stakeholders, including the Association of British Insurers (ABI) and insurers, explained how insurance works in the context of abuse claims. The key points were as follows:

    - Liability insurance indemnifies an institution but not the abuser. Historically policies were not written with child abuse claims in mind.

    - In child abuse claims public liability (PL) or employers' liability (EL), insurance policies will be relevant;

    - The most common type of PL policy covers liability for incidents that occur during the period of cover (known as as "occurrence/events-based cover"). Alternatively, more rarely, there is a policy which covers liability for claims presented during the period of cover (known as "claims-based" or "claims-made" cover);

35. Submissions made clear that where insurers provide an indemnity to the insured, they are entitled to conduct the litigation. Ecclesiastical Insurance Plc stated that *"[a]s a matter of insurance law and practice, the process of managing claims is a matter for the insurer alone, who is authorised and regulated by the Prudential Regulation Authority and the Financial Conduct Authority. The insurer, when providing the indemnity, can take over the defence."*

36. Some insurers explained that managing the claim would involve liaison with the insured. Mutual Municipal Insurance (MMI) stated that their practice was to *"work collaboratively with local authorities in the handling of these cases".* They further explained: *"Although insurers generally have the contractual authority within the contract to run the claim, there are limits to this. For instance, no admission of liability can be made without the direct authority of the local authority defendant and the local authority must approve and sign any defence."* Lambeth Borough Council stated that the extent to which insurers were involved would depend upon the insurance cover in place.

37. Defendant stakeholders were of the general view that claimants' costs could be disproportionate. Royal & Sun Alliance (RSA) was also critical of the position prior to the Jackson reforms[22]: *"Before the Jackson costs reforms, defendants faced excessive costs liabilities in the event of failure at trial, which had a "chilling effect" on litigation. In the experience of RSA, this feature of the system sometimes led to settlement of claims which were not meritorious and which would otherwise have been disputed at trial."* In the future, Lambeth Borough Council suggested that a fixed costs regime could be appropriate: *"the civil justice system needs to ensure that it is designed to minimise legal costs on both sides (particularly claimants solicitors costs) and ensuring that more goes into the damages awarded to survivors and victims. One way of achieving this is by implementing a fixed costs regime on abuse claims."*

38. Some respondents acknowledged that a lack of insurance can act as an obstruction to victims or survivors, although Zurich Insurance Plc stated that non-financial remedies could also be offered where liability is established. ABI and other insurers explained that the introduction of mandatory PL insurance would not necessarily mean that child abuse claims would be covered in the future. RSA made the point that if cover became mandatory it could be very expensive for small businesses. Lambeth Borough Council explained that *"[m]aking public liability insurance mandatory for institutions would bring with it its own set of issues and challenges"* and *"[a]t a time when public bodies are under significant financial pressure adding to this pressure through the settlement of historic abuse claims due to the failure of an insurer doesn't seem to be the most sensible way of funding these types of claims."*

[22] The reforms implemented by Government in 2013 on the recommendation of Lord Justice Jackson, which included the abolition of conditional fee arrangements that allowed claimants' lawyers to claim an uplift of up to 100% of their fees in the event of a successful claim.

Limitation

39. As a form of personal injury, child sexual abuse claims are governed by sections 11, 14 and 33 of the Limitation Act 1980. The general rule (leaving aside minors and those with a disability) is that a claim must be brought within three years of the date of the injury or the "date of knowledge", although the court has a general discretion to allow late claims. The applicability of limitation periods to child sexual abuse claims has been a subject of concern for many years.

40. Limitation remains an important issue for claimant stakeholders. They explained that many survivors do not disclose their abuse for lengthy periods of time and so limitation can be a significant deterrent and/or bar to litigation for individuals who would otherwise have valid and worthy claims. The Forde Park Survivor Group made the point that the prospect of limitation being used as a defence can deter solicitors from taking on these cases in the first place, particularly on a CFA basis.

41. Many claimant representatives also feel that the defence of limitation can be used unfairly by defendants. ACAL stated that it was used *"routinely"* in most cases, including by public authority defendants. Leigh Day commented that *"even in cases where there has been a recent criminal prosecution and the likelihood of any prejudice being caused to the defendant by the delay is minimal (if not non-existent), it is not uncommon for defendants to rigorously pursue limitation as a defence, focusing on the conduct of the claimant."* Leigh Day went on to state that *"questioning the claimant on whether they can justify (as opposed to explain) the delay is entirely unnecessary and tips the balance in favour of the defendant."* Irwin Mitchell and ACAL were critical of the use of limitation as a defence even where liability is admitted, thereby preventing interim payments of damages. The Forde Park Survivor Group stated that limitation remained a live issue right until the time of settlement and it was felt that this may have influenced the solicitors' advice regarding settlement.

42. For Slater and Gordon, the court's discretion to allow a late claim does not sufficiently resolve the issue. In particular, they stated that *"as illustrated by RE v GE [2015*

EWCA Civ 287], the court will consider whether it is fair in all the circumstances for a trial to take place, this being a wider question than whether it is still possible to have a fair trial." They further explained that this case stated that *"one of the matters which must weigh on the court in exercising its direction is "the very existence of the limitation period which parliament has decided is usually appropriate."*

43. The majority of claimant representatives advocated reform to the law of limitation, although proposals as to the precise nature of such reform varied. Slater and Gordon proposed that limitation should be abolished in its entirety in child sexual abuse claims. Others, such as Leigh Day, suggested that it would be more sensible to limit the issue to whether a fair trial is still possible. IKP stated that there should be a presumption in favour of departure from the limitation rules. The Forde Park Survivor Group felt that victims and survivors should be treated in a similar way to those with disabilities. Alternatively they suggested a presumption in favour of admitting an out of time claim where it involves allegations of child abuse against a public body. It was also suggested that public bodies could adopt a policy of not raising limitation. Similar proposals were put forward by SOIA as alternatives to its primary recommendation that limitation is removed.

44. Many defendant stakeholders acknowledged the difficulties faced by victims/survivors, with Lambeth Borough Council calling limitation *"probably one of the greatest obstructions in seeking redress".* By contrast, RSA were of the view that the current law on limitation is actually generous to claimants. MMI stated that the law remained problematic for both claimants and defendants. They explained that investigating historic allegations is difficult for defendants. This is particularly the case in failure to remove cases where establishing negligence is difficult in the absence of records and access to key witnesses.

45. BLM stated that some defendants take a *"much more defensive stance",* which creates uncertainty. Some respondents made clear that they would only use limitation as a defence where appropriate on a case-by-case basis. Zurich Insurance Plc stated: *"Our practice is to examine each claim on its merits and we frequently*

agree extensions to limitation periods with claimants and their representatives." In their guiding principles, Ecclesiastical Insurance Plc commit to pleading limitation as a defence *"very sparingly in relation to sexual abuse claims".* They stated that limitation has been pleaded as a defence in 4% of claims. ABI stated that they "*support the use of a mutually agreed period of time where both parties can investigate a claim without reference to limitation issues."*

46. Defendant stakeholders did not advocate reform to the law of limitation. BLM referred to the current thinking in many jurisdictions that limitation periods for abuse claims should be removed but pointed out that not every jurisdiction has the same rules such that total removal may not always be appropriate. BLM made the further point that all parties involved in any judicial process are entitled to a fair trial, in accordance with Article 6 of the European Convention of Human Rights (ECHR). They also raised concerns in respect of the additional claims that would follow any removal of the limitation period and the impact that would have on the court system, defendants and the insurance industry.

47. ABI was of the view that the courts are best-placed to determine the issues, referring to the case of *RE v GE,*[23] where the court also stated that *"[i]nsurance cover is taken out and maintained on the basis that claims against the insured must be timeously brought".* ABI expressed concern about the impact of removing limitation on insurers and self-insured.

Other issues in civil litigation

48. The Inquiry received submissions on a number of legal topics relevant to the civil claims process. Underpinning the responses is the fundamental concern about the nature of the civil justice system itself.

49. Submissions from both claimant and defendant stakeholders made clear that the system by which claims are adjudicated by the civil courts is an adversarial one.

[23] [2015] EWCA Civ 287.

Therefore, it inherently creates conflict. For example, on the claimant side, the Forde Park Survivor Group believed that the *"process is entirely adversarial and conducted with a view to undermining and attacking the other side's case, rather than conducting an impartial inquiry that seeks the 'truth'."* Slater and Gordon referred to *"arcane and technical disputes about causation and damage".* On the defendant side, BLM stated *"[a]n adversarial system may not deliver an easy route to compensation. By its nature Claimants and Defendants start from opposing positions and that can significantly influence the dialogue which results."*

50. Taking the example of expert evidence, on the claimant side, Jonathan Bridge stated that *"[t]here is a small pool of experts specialising in this area of work whose views tend to be polarised."* Ecclesiastical Insurance Plc stated *"[i]t is in the historic nature of litigation, and ingrained in both Claimant and Defendants, that both sides would with to instruct their own expert in the hope of obtaining a report that is favourable to their position".*

51. For claimant stakeholders, it is the way in which some defendants approach civil litigation that causes difficulties for victims and survivors. Claimant solicitors explained that this varies widely and will depend on the behaviour of those involved in the process. Slater and Gordon talked of some defendants adopting *"an aggressive & obstructive approach, apparently seeking to wear down claimants in a war of attrition. Others are more reasonable and pragmatic and seek to resolve matters through early JSMs."*[24] Irwin Mitchell stated that the difference in approaches *"creates a further element of uncertainty for survivors in respect of prospects of success, level of compensation they may recover, and ultimately when a resolution will be reached".*

52. Examples of unhelpful behaviour by defendants include: exploiting the difficulties faced by claimants in identifying the correct defendant; insisting on formal disclosure applications being made to the court; the tactical use of defences such as limitation in

[24] "*JSMs*" refer to Joint Settlement Meetings.

order to prevent interim payments and prolong proceedings; obtaining their own medical evidence therefore requiring claimants to go through the examination process twice; refusing to admit liability, apologise or constructively engage in settlement negotiations; and making a modest offer of settlement at early stages, which claimants may feel forced to accept even if their claims are worth significantly more.

53. For some, it was felt that the approach of some defendants in civil litigation was insurer-driven. The Stanhope Castle Survivor Group's submissions stated that insurers have a duty to their investors and therefore will seek to defend claims wherever possible. ACAL stated *"it has been said that where insurance companies are involved with litigation involving abuse, a more litigious approach is taken than where local authorities, who take instructions from Social Services, and thus are concerned about the needs of children in care, are self-insured."* However, ACAL also stated that there are also instances of good practice on the part of insurers, referring to the example of Ecclesiastical Insurance Plc's guiding principles (also referred to by Irwin Mitchell).

54. ACAL further acknowledged that although *"technical arguments"* were used against the claimants in the St Vincent's and St Aidan's group action, it was at a time when the law was developing and *"[i]f the Defendants were asked to comment, they would probably argue that they were taking the above points in the hope that some clarity could be gained in an area of new and developing law."* Today, it appears that an emerging issue is the use of consent as a defence. Slater and Gordon referred to an increase in its use. They considered such arguments to be *"largely opportunistic"* and stated that *"to avoid defendants obstructing claims on these grounds, this is an area which may require greater clarification/reinforcement by the courts/parliament."*

55. Defendant stakeholders generally agreed that the adversarial nature of the civil justice system can make the process of obtaining compensation difficult for victims and survivors. BLM also acknowledged that there could be differences in behaviour within this system, both on the side of defendants and claimants.

56. For some, such as Ecclesiastical Insurance Plc, the issue was not only the nature of the system. More fundamentally it is often *"the unrealistic expectations of what the civil justice is there to deliver which causes disillusionment with the current process. Claimants' solicitors therefore have a key role in explaining the process, explaining to their clients what is achievable, and what is not."* For example, Ecclesiastical Insurance Plc went on to explain that false and vexatious claims do happen and insurers have a regulatory responsibility to investigate all claims and the basis of liability.

57. For defendants, properly investigating and defending claims can involve raising legal arguments which need to be determined by the courts. MMI stated that, at one time *"[t]here was uncertainty about the existence and scope of a duty of care in negligence, and these issues were tested in the courts."* Some defendants explained that the use of consent, for example, as a defence is rare but might be appropriate in some circumstances. RSA explained that the Court of Appeal is going to consider this further in 2017.

58. Defendants also provided examples of what they considered constructive approaches to civil claims. Some acknowledged the difficulties that claimants might face in identifying the correct defendant; and the general view was that this should not be used as a technical obstacle, with RSA stating that an insurer will often agree a nominal defendant in such circumstances. Defendants also suggested that they sought to settle cases where appropriate, with MMI stating that in appropriate cases, such as those based upon vicarious liability, this could be without medical evidence. Defendants stated that apologies could sometimes be provided, although concerns were expressed to whether this would constitute an admission of liability. Ecclesiastical Insurance Plc have produced a statement of guiding principles in order to assist parties in understanding the principles which they apply.

59. Many defendants were also critical of the way in which claimant solicitors approached civil litigation in this field. They raised issues such as: delay at the

pre-action stage; insufficient detail at the outset to enable a proper assessment of the facts; and providing incomplete or late expert evidence and schedules of loss in advance of ADR. Lambeth Borough Council stated that *"some claimant solicitors appear to seek to maximise their costs, through adopting a non-cooperative approach that doesn't always have the claimant's best interests at heart."*

Compensation

60. The result of a successful civil claim is an award to compensate for the injuries caused by the defendants. Several important issues were raised in respect of the assessment and quantification of these damages.

61. For claimant stakeholders the primary issues are proving causation of injury and quantifying the damages. Leigh Day stated that the: *"[q]uantification of damages in abuse claims poses very specific difficulties, due to the nature of ongoing injury which is often psychological rather than physical, and the fact can be a multiplicity of potential factors that may have contributed to and/or caused the injury in question, from childhood to adulthood."* Irwin Mitchell stated that *"the evidence of Claimant and Defendant psychiatrists are often at complete odds with one another, with Defendant experts nearly always pointing to other causes of the psychiatric injury such as genetics, other childhood factors, and abuse by other abusers than the Defendant."*

62. David Greenwood accepted that issues of causation have to be built into any system of compensation. However, the level of damages in civil claims was *"woefully inadequate".* The Forde Park Survivor Group "*could not see how the system could even attempt to accurately quantify the damage caused by years of child abuse or the life-long consequences that followed from that abuse."* It was felt by many that general damages were low and did not adequately compensate survivors and victims. David Greenwood stated that *"[j]udges should be enabled to assess the true impact of the abuse on the survivor's quality of life*". Irwin Mitchell explained that

"[m]any lawyers therefore argue that there should be a new head of loss to compensate the Claimant's deterioration of life".

63. Both Irwin Mitchell and ACAL also discussed the applicability of aggravated and exemplary damages to these claims as well as the Irish Redress Board Scheme, which they felt recognised the impact of abuse. ACAL also referred to the Law Commission which looked at the subject of aggravated, exemplary and restitutionary damages as long ago as 1997 and advocated reform,[25] which has not been actioned.

64. Other elements of awards were also the source of concern. Slater and Gordon stated that when quantifying loss of earnings there *"is an element of 'finger in the air assessment"*. They also noted that while damages can be awarded for counselling and therapeutic support, *"[i]n reality however survivors often have a high level of vulnerability and simply covering the cost of therapy does not enable a sufficient post-claim support structure to be put in place."*

65. Another issue raised was the way in which damages were paid to victims and survivors. SOIA stated that *"providing a significant sum of money to a person suffering from dependency issues, without any additional support and guidance, may have very negative consequences… Simple steps could easily be taken in certain cases such as staggered payments or regular payments could be made to support the victim over a far longer period, with provision for money management advice."* However, the Forde Park Survivor Group felt that a one-off *"life-changing"* payment was more appropriate, although they did suggest that guidance on how to use the money would be welcome. SOIA also made the point that local authority defendants could provide *"much wider forms of tangible life support"* including the provision of housing, counselling, dependency and other support.

[25] http://www.lawcom.gov.uk/wp-content/uploads/2015/04/LC247.pdf

66. For defendant stakeholders, it was entirely proper that damages were awarded only for those injuries caused by the defendant. RSA stated that "*it is right in principle that compensation should only be recoverable for harm and loss which is actually attributable to the abuse, not for that which is due to entirely different and separate causes"*. BLM referred to the role of the claimants' solicitors in managing expectations: *"Causation of injuries is not something that obstructs the delivery of accountability and reparation to Claimants, however, many Claimants do not seem to understand or have not had it explained to them by their Legal Representatives that in assessing damages, neither the Defendant or the Court can assess in a vacuum and it must be considered in the context of the Claimant's overall life experiences."*

67. MMI did acknowledge that *"[a]s in all personal injury claims the damages can never truly compensate for the effects of the injury suffered".* They explained that while awards in respect of the actual acts of abuse can be determined by reference to previous awards made in the courts and the Judicial College Guidelines,[26] the assessment of psychiatric injuries is *"imprecise".* Zurich Insurance Plc suggested that the system could be improved by formal guidelines on the assessment of the level of harm.

68. RSA stated: "*[t]he JC Guidelines are regularly updated and set scales which reflect the relative seriousness of different types of injury. Meanwhile, there are numerous examples of senior judges assessing general damages for child abuse, which provide more specific guidance to the courts. The level of damages payable across the board has been considered repeatedly by the Law Commission and the courts, with proper regard to policy-based factors."*

69. In respect of aggravated damages,[27] BLM made the point that *"[v]icarious liability and aggravated damages do not sit well together".* BLM also stated in respect of special damages, that heads of loss are improperly included in schedules of loss by

[26] The *Guidelines for the Assessment of General Damages in Personal Injury Cases* (2015) 13th edition.
[27] 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.

claimant solicitors and that they routinely *"see claims with hugely inflated schedules which settle for much lower sums."*

70. As to the nature of payments, BLM also stated, in the context of "*failure to intervene*" cases and large payments, that "*no research has been undertaken to establish the impact good or bad on Claimants of receiving compensatory lump sums".* Lambeth Borough Council also stated: *"Compensation should be considered in its wider sense rather than just a physical case payment that is made, as is the practice under the current system. In some circumstances the establishment of a trust fund or provision of non-cash alternatives such as direct payment of housing rent may be more appropriate."*

Other types of accountability and reparation

71. As noted in the summary to this report, a number of outcomes other than an award of damages may be sought through the civil claims process by victims and survivors. In general, claimant stakeholders explained that the extent to which such outcomes can be delivered is limited due to the nature of the civil justice system.

72. Submissions made clear that early settlement, in particular, can prevent the delivery of other types of accountability and reparation. Leigh Day stated: *"it is not uncommon for insurers to make modest offers of settlement at early stages in proceedings, prior to making any admissions of liability and before the parties have had the opportunity to discuss the appropriateness of alternative remedies. This flies directly in the face of the very purposes of the civil justice system as we see it; to deliver truth and accountability and to offer individuals who have otherwise been silenced the right to be heard."* Irwin Mitchell also made the point that early settlement prevents survivors' *"day in court".* The Forde Park Survivor Group felt that their voice had not been heard in the civil justice system.

73. In relation to admissions of institutional failure, Slater and Gordon stated that these are *"rarely forthcoming"* on account of the fact that most claims are now argued on

the basis of vicarious liability. Leigh Day stated that "*this model of secondary liability doesn't always deliver what the client ultimately wants from litigation; for example, to understand the ways in which the institution has failed such as any failings in employment procedures/supervision/safeguarding that allowed the abuser to operate in the first place and accountability in that regard*."

74. There was a clear view on the part of claimant stakeholders that further consideration should be given to alternative remedies, in particular apologies. Leigh Day stated that *"[i]n some cases, for example, a letter of apology from the impugned institution, or assurances that internal policies/practices will be changed, may itself be sufficient … In one case where we where we were able to secure both monetary compensation and a meeting between our client and representatives from the defendant institution, this delivered real benefits to that client, over and above those that could ever have been achieved by a damages award only."*

75. Apologies cannot be ordered by the court, only volunteered. However, as Slater and Gordon stated, "*much can depend on the wording and tone of an apology: a mealy mouthed apology ... is frankly worse than no apology at all."* Similarly, IKP stated: *"Apologies should not only be a generic admission of liability, but be specific about the nature and manner of the abuse that a particular victim suffered. Too often in civil claims victims receive generic, ambiguous, non-committal and effectively meaningless "apologies". Out of court settlements should always be accompanied by a robust, meaningful apology."*

76. In relation to access to counselling and support, SOIA stated: *"Adult survivors do not present a one size fits all picture and require access to a variety of services depending on individual need … more thoughtful needs based settlement that seeks to address the Survivors complex needs, with the provision of housing, counselling and medical support built into a settlement."* The Forde Park Survivor Group suggested that *"provision should also be made by the Defendants (who are often public bodies) to provide for counselling and coaching in life skills, which could include help with job applications, advice regarding job interviews, skills training,*

advice regarding applying for benefits and even advice and counselling regarding interpersonal relationships."

77. Although damages awarded at the end of a successful claim may include the cost of support and therapy, the point was also made that access to such support may be required before the resolution of a claim. Leigh Day stated *"Whilst the concept of rehabilitation is firmly embedded in the Pre-Action Protocol for Personal Injury Disputes … this was not drafted with abuse claims in mind. In abuse claims, where claimants are often extremely vulnerable and have complex (and immediate) needs, the requirement for medical treatment or other rehabilitative measures is absolutely fundamental. Where possible, this should be offered at an early stage, and whilst civil proceedings are ongoing … If, for example, there has been a criminal trial, the perpetrator has been convicted and the claimant clearly requires therapeutic support, we can see no reason why an interim payment for therapy costs cannot be made at the start of civil proceedings."*

78. Defendant stakeholders varied in their opinions as to the extent to which the civil claims process can achieve the various outcomes sought. RSA stated that the civil claims process satisfies the right to an independent and impartial investigation and that *"[w]here allegations are disputed and there is a trial, the civil claims process can often deliver a measure of accountability by establishing the facts in a public judgment"*. RSA did, however, accept that *"there are aspects of the right to truth and accountability which cannot be delivered by any civil claims process (e.g. punishment of individuals by criminal sanctions)."* BLM made the point more generally that an independent investigation, truth and accountability were outcomes that the criminal justice system was often better placed to deliver.

79. The point was made that the system was not designed to deliver guarantees of non-recurrence. It was also difficult to see how non-recurrence could ever be guaranteed. However, it was accepted that lessons could be learnt. ABI explained that *"wider considerations of the practices of the organisation and lessons to be learned are not part of the litigation process, but may occur as a result of civil claims*

being brought." RSA stated that the civil claims process *"does provide a financial incentive both to institutions and to their insurers to promote good safeguarding practices".*

80. Lambeth Borough Council also explained that *"concerns are often raised some substantial time after the actual event took place and usually when the individual is no longer a child in care. Under these circumstances a guarantee of non-recurrence to the individual may not be particularly relevant but it may be appropriate for institutions to provide assurances on what action they have taken to minimise the risk of similar occurrences affecting children now."* Zurich Insurance Plc suggested looking at the advantages of introducing an alternative standard process for meetings between institutions and victims and survivors prior to the civil claims process.

81. Defendant stakeholders accepted that that ADR procedures and settlement meetings could prove invaluable to victims and survivors and stated that they are willing to engage on this basis. They were also willing for apologies to be made in appropriate circumstances. BLM stated that apologies from the accused or more commonly a senior representative of the Defendant are more commonplace than previously. MMI similarly stated *"apologies are seldom requested, but where they are, as part of the settlement of the Claim, local authorities usually have few if any objections to making such apologies".*

82. However, questions were raised as to the value of an apology from an insurer, particularly where the case is based on vicarious liability. Allianz stated *"it is unclear whether an apology from an insurer would be looked at as meaningful from a victims and survivor perspective".* ABI considered that it is preferable for the apology to be made by the abuser or tortfeasor but sought feedback on this point from victims and survivors. RSA stated: *"There are some cases in which the claimant does not even allege that the institutional defendant did anything wrong or could have done anything to prevent the abuse. In such a case, it would be absurd and pointless to expect the defendant to make an apology, and the claimant may well not want one."*

83. Concerns were also raised as to the legal status of apologies. Submissions explained that under section 2 of the Compensation Act 2006 an apology may be made without it of itself amounting to an admission of negligence.[28] However, RSA stated that In cases based on vicarious liability, section 2 does not apply. ABI stated that "*the Compensation Act could go further in clarifying the relationship between apologies and admissions of liability."* Zurich Insurance Plc stated that they welcome the consideration of legislation to the effect that apologies have no probative value in any later assessment of value, as in other jurisdictions. Lambeth Borough Council stated that in order to make apologies it would be necessary to obtain assurances from the insurers that this will not prejudice their right to subsequent indemnity.

84. As to the provision of support by defendants, some respondents, such as Lambeth Borough Council, explained that access to services are determined as part of the claim and therefore are provided only after liability for the injury has been admitted by the organisation. However, Ecclesiastical Insurance Plc made clear that: *"The provision of counselling support and other forms of psychological treatment by the Defendant organisation will not by itself be deemed to be an admission of legal liability. The updated 2015 Rehabilitation Code specifically allows for this and is there to encourage both sides to seek early medical redress so as to mitigate the effects of any injury.* This is reflected in their own statement of guiding principles.

Reforms to civil litigation

85. Reforms to civil litigation were suggested by both claimant and defendant stakeholders. Significantly, there was consensus around the introduction of a Pre-Action Protocol for child abuse claims. For Leigh Day, *"early discussions and/or meetings between the respective parties should be encouraged, or indeed enforced by way of a Pre-Action Protocol for abuse claims, during which a neutral evaluation of the claimant's main objectives in litigating should be undertaken, and any immediate needs identified and addressed."* They also said that such a protocol

[28] Section 2 of the Compensation Act 2006 states: *"[a]n apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty."*

could assist in the identification of the correct defendant and, where relevant, disclosure from the insurer of insurance policies. ACAL considered that guidelines, such as those produced by Ecclesiastical Insurance Plc, could be incorporated in whole or in part in a special pre-action and case progress protocol. IKP urged revision to the CPR and pre-action protocols in order to introduce more severe costs consequences for defendants who are found liable for unlawful or tortious acts and have conducted the litigation in a manner that has caused distress to the claimant.

86. On the defendant side, ABI stated that a pre-action protocol *"could include encouragement for parties to instruct experts on a joint basis, where appropriate"* and also made clear their support for the use of "*limitation moratoriums*". They stated that *"[f]eedback from our members is that agreements of this nature work well and could be built into a Pre-Action Protocol for abuse claims."* BLM stated that there should be a pre-action protocol *"requiring the early and mutual exchange of as much information as possible to enable the parties to reasonably assess the case before the issue of proceedings. This will help avoid litigation and quicken the decision-making process.* Zurich Insurance Plc suggested: *"Such a bespoke pre-action protocol could set out the types of evidence that would be needed so that it could be provided at an earlier stage, allowing all parties to agree the issues and make a decision on liability: either to agree the claim or set out reasons why it was not agreed."* They went on to say that a pro-forma list could set out required details, for example dates and locations. RSA similarly provided a list of requirements that could be included in both letters of claim and letters of response, as well as guidance on other issues such as limitation moratoria and pre-action ADR procedures.

87. Linked to the suggestion of a pre-action protocol was the proposal by some claimant stakeholders that some form of model guidelines be introduced into the process. Alan Collins drew upon the report published by the Australian Royal Commission into Institutional Responses to Child Abuse[29] and stated: *"Government, both national and local, along with the Church of England, religious institutions, and insurers should*

[29] http://www.childabuseroyalcommission.gov.au/getattachment/0d8ecf95-ba08-47a6-8e29-5d26a0a83eca/Redress-and-Civil-Litigation-Report

adopt the "Model Litigant Policy" which is a concept designed to provide guidelines for best practice in civil litigation matters. It is founded upon the concepts of behaving ethically, fairly and honestly to model best practice in litigation." As stated above, ACAL made positive reference to Ecclesiastical Insurance Plc's guiding principles, as well as examples of other litigation guidelines in parts of Australia.

88. The focus of most defendant stakeholders appeared to be on a pre-action protocol, although the extent to which this may overlap with a set of guiding principles will be discussed further in the seminars. BLM suggested that insurers be encouraged to discuss and agree a cross-insurer working set of guidelines/principles.[30]

89. In general, both claimant and defendant stakeholders supported the use of ADR, particularly Joint Settlement Meetings (JSMs). A significant number of respondents stated that more should be done to encourage the ADR process.

90. Numerous other suggestions for reform to civil litigation were put forward, mainly by claimant stakeholders. These include: abolishing limitation; introducing a duty of candour; making an apology an actionable remedy; adverse costs consequences, penalties and higher levels of aggravated and exemplary damages when defendants conduct litigation in a way which causes distress to claimants; appointing specialist judges; special measures for giving evidence; and greater powers for judges, for example the power to order apologies. Many of these overlap with the issues already identified above.

A redress scheme

91. Some claimant stakeholders felt that reform to the civil claim process was preferable to a redress scheme, although they remained open to the idea provided that it was workable. Slater and Gordon stated: *"We believe that the deficiencies/flaws in the civil claims process, e.g. unfair limitation laws, should be tackled by reforms to the*

[30] BLM referred to the Industrial Disease Claims Working Party agreement (IDCWP) as an example.

process, rather than wholesale replacement by an alternative redress board model. However, consideration should be given to a beefed up redress board model along the lines of the Irish redress board for those survivors who wish to pursue that route, but not by removing the right to pursue civil proceedings."

92. ACAL stated that *"whilst a non-contentious, non-adversarial scheme could be introduced, our experience of such schemes suggest that they are never as good as the civil litigation process, and as such we are not in favour of them. If an ideal scheme could be devised, which was properly funded, provided therapeutic support for vulnerable applicants, paid compensation at a fair level, - legal costs in addition to an award, and enabled the victim to tell a tribunal what happened to him/her so he/she could "have his day in Court" and be believed, then there may be an argument in favour of it."* ACAL stated that the Irish Redress Scheme as *"came close to an ideal fair and well-funded scheme, but it only lasted a matter of years before it was closed down".*

93. Other claimant stakeholders were more firmly in favour of some form of alternative to the civil claim process. David Greenwood stated that "*[o]nly a truly impartial system of investigation will ensure that the maximum number of survivors will seek help, thereby improving their quality of life and potentially contributing to society by getting back into social work activity. For this reason I advocate the establishment of an independent body to oversee justice and redress for survivors who contemplate coming forward."* He proposed an expanded version of the Irish Redress system.[31]

94. Alan Collins stated that the immediate alternative to civil litigation is a redress scheme and pointed to examples of redress schemes in other jurisdictions: Jersey, Ireland and Australia. However, his main recommendation was for the Inquiry to *"examine the concept and practicality of a unified sexual offences court".* This model could deliver alternative mechanisms such as mediation, ADR, restorative justice and redress, with any redress scheme managed by the court: *"The specialist court would*

[31] http://www.rirb.ie/

also oversee any redress scheme which it is recommended it created to provide redress and restorative justice for those survivors who cannot for example for whatever reason be compensated by their abuser, or an institution or third party. It is a default scheme designed to ensure that victims are placed on an equal footing, and it would displace the CICA scheme in its entirety."[32]

95. IKP were also in a favour of *"access to a national redress scheme which victims can apply to if they have not been able, or chose not, to obtain damages elsewhere or have been awarded insufficient compensation. The Scheme would look at all the evidence including that which was presented elsewhere. It should not be curtailed by rules of evidence and compensation should be awarded if a balance of probability test is met … "*

96. SOIA proposed a new national structure, namely a national authority/standing commission. They focused on the underpinning principles rather than the particular form of model: *"It is not possible in the time allowed or context of this consultation, and would provide a hostage to fortune, to put forward a particular form of working model right down to the nuts and bolts or how it might operate. We therefore focus on the objective of establishing the principles, which need to be incorporated in a new/parallel model …"*

97. The views of defendant stakeholders varied. BLM stated that "*[a] streamlined codified Civil Claims Process with appropriate psychological support ... is probably the best option … A No Fault Redress Scheme which seeks to respond to all abuse claims is in reality likely to face so many hurdles and challenges that it ultimately fails.* They went on to state that *a hybrid between the current system and no fault redress effected and recommended in other jurisdictions should be considered."* Any scheme would have to include a direct response from the defendant, if so required. In addition, there should be consideration given to a permanent fund to meet any life-long counselling and psychological care required, as well as some form of

[32] "CICA" is a reference to the Criminal Injuries Compensation Authority.

permanent education fund. However, such provisions should stand alone from any redress scheme and would require state funding.

98. Others were not in favour of major changes. RSA stated: *"The civil justice system is one part of the apparatus by which the state provides means for victims and survivors to obtain redress. Another important part of that apparatus is the criminal justice system. A third part is the criminal injuries compensation system. RSA would be opposed to radical change which would result in child sexual abuse claims being pursued outside the civil justice system or in that system operating differently for this one class of claim. For reasons already explained, RSA considers that the existing civil justice system provides a fair means of resolving claims based on allegations of abuse."*

99. MMI expressed concerns about the cost of any statutory scheme and stated that *"even with tariff based damages, such a scheme would potentially be very expensive … If local authorities themselves were asked to contribute, then plainly that could be at the cost of front line services and potential child protection today".* Lambeth Borough Council acknowledged that in order to provide all the aspects of redress desired by victims and survivors *"a new abuse redress scheme would need to be established and operated nationally and independently."* However, "*[w]ith any changes that are made careful consideration needs to be given as to how compensation is to be funded. We are concerned about the costs of compensation falling on the public purse and particularly the effect that this has on local government".*

100. ABI discussed the possibility of *"provision for the Courts, or an abuse protocol, to encourage the use of voluntary schemes in civil claims to be set up in a non-adversarial manner, where appropriate….A well-publicised example of a successful scheme is the historic abuse redress scheme implemented in Jersey".* However, ABI considered that further investigation is required into sustainable funding models.

Conclusion

101. The Inquiry is very grateful to all of the respondents for providing such informative responses to its issues paper on the civil justice system.

102. The Inquiry looks forward to exploring the above topics further at the seminars on 29th and 30th November 2016, as well as continuing to engage with all relevant stakeholders on all topics relevant to the Investigation.