

1 Tuesday, 29 November 2016
2 (10.20 am)
3 Session 1
4 Welcome by Chair and opening comments
5 THE CHAIR: Good morning, everybody. My name is Alexis Jay
6 and I'm the chair of the independent inquiry into child
7 sexual abuse. I'm here with the full panel today:
8 Drusilla Sharpling, Ivor Frank and
9 Professor Sir Malcolm Evans.
10 I just want to say a few words by way of
11 introduction. The seminar has been organised as part of
12 the accountability and reparations investigation, and it
13 is as a result of the response to the inquiry's issues
14 paper on the civil justice system and criminal
15 compensation. Those issues papers were published on
16 4 August of this year. The consultation formally closed
17 on 29 September, although the inquiry received a small
18 number of submissions after that date. All submissions
19 received have been reviewed and considered by the
20 inquiry. They were received from a range of individuals
21 and organisations, and all responses have been published
22 on the inquiry's website. As we have so much ground to
23 cover over the next two days on the civil justice system
24 alone, we will hold a seminar on matters arising from
25 the criminal compensation issues paper in early 2017.

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1 The panel would like to thank everyone who took time
2 to consider and respond to the issues papers. Without
3 your valuable input, we would not be able to host this
4 seminar. I would also like to thank those individuals
5 who have agreed to take part in the seminar. It is
6 being live streamed over the internet with a short
7 delay, so that the general public can follow the
8 proceedings on a matter of central importance to this
9 investigation. The panel and I are looking forward to
10 open, lively and respectful discussion amongst
11 yourselves in relation to a number of key areas relating
12 to the civil justice system.
13 It is important to state at the outset that the
14 purpose of this seminar is not to gather evidence in the
15 formal sense. This is a forum where important issues
16 are to be discussed, facilitated by Peter Skelton QC,
17 who is the lead counsel to the accountability and
18 reparations investigation. We have attendees who will
19 bring to the table a wide range of experience and
20 knowledge about the operation of the civil justice
21 system in the area of child sexual abuse litigation.
22 They will be looking at its flaws and weaknesses, as
23 well as those aspects of the system where it can and
24 does work well. They will also bring forward ideas for
25 reform, both modest and potentially radical. The panel

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1 and I will be listening to what you have to say with
2 keen interest, and these discussions will undoubtedly
3 inform the investigation as a whole and should also
4 identify areas for further work.
5 I thank you for your participation and I will now
6 hand you over to Peter Skelton QC.
7 Opening comments by Facilitator
8 MR SKELTON: Good morning, everyone. Thanks very much for
9 coming. It is quite an intimate venue, particularly for
10 the lawyers to be all together in one room. I am
11 facilitating the seminar, by which I mean I am going to
12 try to keep the discussion moving, but really, I and the
13 panel want to hear from you, rather than me, and I won't
14 be asking the conventional QC type questions, ie, there
15 is no cross-examination and no sense you are on the
16 spot, or anything like that. It is a friendly
17 discussion.
18 I do need to say a little word about housekeeping.
19 Because of the sensitive matters we are dealing with in
20 this inquiry, child sexual abuse, we have got
21 a five-minute delay on the public feed and we have also
22 tried to restrict the use of live media within this
23 hearing chamber, just in case somebody mentions
24 something which is confidential or sensitive to those in
25 the room or outside the room, it allows us a degree of

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1 control over that information. It is not in order to
2 prevent public access to these hearings in any way.
3 That does mean that those of you who are using
4 electronic devices, which we didn't originally want to
5 be used in the room, we would be grateful if you would
6 not connect them to the internet in any way, if that's
7 okay, but please do use them to record what is being
8 said.
9 If anything comes up that I consider to be sensitive
10 or anyone else in the room considers to be sensitive,
11 I will pause and ask the chair to address it, because we
12 may need to restrict the use of that information in the
13 public, for reasons which I am sure you all appreciate.
14 I am going to cover quite a few topics in this first
15 session. We are running a little bit late, as you
16 probably appreciate. It is our first session and we are
17 a little bit behind and I would like to get back on
18 track, ie, finish in about 50 minutes' time.
19 The things I would like to discuss are: compensation
20 in child abuse cases, the levels of compensation that
21 one is generally looking at; the costs, from your
22 perspective, that are associated with it; and then
23 issues of public funding, such as it is; issues of
24 initial fee arrangements, ie, funding which comes from
25 lawyers and elsewhere; and then overall problems with

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<p>1 access to justice for survivors and victims of child 2 sexual abuse. 3 I will ask you at the end as well if you can give me 4 a steer, or give the panel a steer, on things we ought 5 to be looking at in terms of gathering data, 6 commissioning original research, in order to better 7 understand the things we are talking about. Broadly 8 speaking, those are the topics to cover. Can I start by 9 asking you to introduce yourselves? 10 Introductions 11 MR ENRIGHT: Good morning, Professor and members of 12 the panel. My name is David Enright. I am a partner 13 with Howe & Co solicitors and I represent the Forde Park 14 Group, the Stanhope Castle Group and Survivors of 15 Organised and Institutional Abuse. 16 MR DANIELS: I'm Luke Daniels, a partner with Irwin Mitchell 17 Solicitors. I head the child abuse litigation team in 18 our Birmingham office, who acts for a number of 19 survivors. 20 MR GARSDEN: Peter Garsden, I'm head of the abuse 21 department, a partner at Simpson Millar Solicitors. 22 I have been dealing with child abuse cases for the last 23 20 years and I'm also president of the Association of 24 Child Abuse Lawyers. I have led about 24 group actions 25 into institutional abuse as lead solicitor and our</p> <p style="text-align: center;">Page 5</p>	<p>1 every case turns on its own facts and every case will 2 depend on the level of damage suffered. Having said 3 that, as a very broad generalisation, I think in the 4 past people have talked about average awards being in 5 the region of 15,000 and certainly, typically, awards 6 tend to be in the £10,000 to £40,000 range in my 7 experience. It is relatively unusual to see awards 8 significantly above that, and certainly six-figure 9 awards are relatively unusual. That, of course, is 10 primarily because of the difficulty in proving the loss 11 of earnings aspect. Many cases tend to be typically 12 general damages plus counselling costs plus maybe 13 a modest award for disadvantaged in the labour market. 14 But substantial awards for loss of earnings are 15 relatively rare. 16 MR SKELTON: So the figure you have given is the totality of 17 the compensation, it is not simply general damages, it 18 is everything? 19 MR SCORER: I'm talking about the totality of 20 the compensation. 21 MR SKELTON: Most cases fall within that range. Presumably, 22 you do get some that are higher if there is a large loss 23 of earnings? 24 MR SCORER: Yes. I think in this country the highest awards 25 have probably been 600,000, 700,000, that sort of range,</p> <p style="text-align: center;">Page 7</p>
<p>1 department at any one time has approximately 700 cases 2 on its books. I'm also involved in the Janner module of 3 this inquiry. 4 MR SCORER: I'm Richard Scorer, I'm head of the child abuse 5 team at Slater & Gordon and I represent, I think, around 6 67 core participants in the inquiry. 7 MR BRIDGE: Good morning, I'm Jonathan Bridge. I'm head of 8 the abuse department at Farleys Solicitors in 9 Manchester. We deal with the full range of child abuse. 10 My particular specialism is probably children whom they 11 fail to remove from Social Services' care when they're 12 suffering abuse. 13 MR SKELTON: Thank you very much. I should say that our 14 core participants, some of them are attending, but 15 generally speaking, they are not participating, because 16 this is not a formal hearing with the usual examination 17 of witnesses. But as I say, we are publicly being 18 filmed and also there are some in the room, so you are 19 aware. 20 Open discussion 21 MR SKELTON: So far as the first topic is concerned, then, 22 compensation. Who wants to give us an idea of the kind 23 of range of compensation, generally speaking, one finds 24 in child sexual abuse cases? Richard? 25 MR SCORER: It's difficult to generalise, because obviously</p> <p style="text-align: center;">Page 6</p>	<p>1 but those are very unusual. 2 MR SKELTON: Does everyone agree with that general range? 3 MR ENRIGHT: I have seen quite a few examples where the 4 damages awarded were far lower, in the very low 5 thousands, £3,000/£4,000, but that often comes as 6 a result of settlement, where the individuals involved 7 feel compelled to settle for very low awards. I'm sure 8 that's the experience of some of my other colleagues and 9 that is something we do need to come on to. Damages is 10 the last stage in the process. Actually getting near 11 a court and getting near a solicitor is the starting 12 point score. 13 MR GARSDEN: I'm running, probably, one of the largest group 14 actions against Manchester City Council and that's been 15 going on for a number of years. That is institutional 16 abuse. 17 THE CHAIR: Sorry to interrupt you, but it appears that the 18 feed isn't very loud. Could everyone speak up, please, 19 around the table? 20 MR GARSDEN: I think I said I'm running one of the largest 21 group actions involving, I think, over the number of 22 years, about 800 claims, and we have conducted some 23 research into the level of damages, and it averages out 24 at I think about £13,700. 25 Those figures include very low awards, as low as</p> <p style="text-align: center;">Page 8</p>

<p>1 £1,000, where, frankly, the defendants are offering as 2 a sum of money on an economic basis to figures of 3 between £100,000 and £200,000, but they are rarer than 4 the lower figures. 5 One of the issues in this group action is that the 6 claimants are from the care system, and, therefore, 7 their putative achievement levels are arguably lower. 8 I have to say that, in my view, the damages generally in 9 these types of cases are abominably low and should be 10 a lot higher. I'm just giving you statistics. 11 MR SKELTON: One of the things we will be discussing in some 12 of the future seminars over the next couple of days is 13 the assessment of damages process. It is clearly a very 14 important topic that needs to be looked at in detail. 15 I want to get a flavour of the size of damages, but, 16 really, with a view to looking at how the costs' 17 proportionality issue can be examined. Can I ask you 18 about the costs side of things as well? What I am 19 interested in, I think, first of all, is, how much do 20 most of these claims cost and what is the driver to 21 those costs? What are the things that actually cost the 22 money in terms of litigating: experts, court time, 23 et cetera? 24 MR DANIELS: It is everything. Expert fees are very 25 expensive. Court fees are now £10,000 to issue a claim.</p> <p style="text-align: center;">Page 9</p>	<p>1 litigate in a more obstructive and difficult way. So 2 that is an issue. 3 MR GARSDEN: Another feature is the number of records that 4 are in existence which we have to pore over in fine 5 detail, because the answer to a case can sometimes be 6 a footnote on page 3006 of social care records, and the 7 degree to which records survive can determine the amount 8 of costs involved, which are not within our control. 9 MR DANIELS: Just getting access to those records can cost 10 quite a lot of money and take a considerable amount of 11 time. 12 MR SKELTON: You have got your documents that you need to 13 look at. You need to spend time with your clients, 14 taking a proof of evidence, which presumably is 15 fundamental. That takes some time for people to discuss 16 it comfortably with you and to get the evidence into 17 a shape that is disclosable. 18 Experts? If we are using a figure of, say, £30,000, 19 how much of that is going to be spent dealing with 20 a consultant psychiatrist, having a conference with him 21 or her? 22 MR BRIDGE: I have had a court recently with an adult 23 psychiatrist and the report cost £10,000. 24 An adult psychiatrist, jointly instructed, cost 25 £10,000, which is £5,000 to each side. You also quite</p> <p style="text-align: center;">Page 11</p>
<p>1 We do have real problems with proportionality. The 2 problem, really, is in terms of litigation risk for 3 these cases -- we are going to come on to the issue of 4 limitation no doubt. Obviously, insurers will make 5 quite low offers initially which are putting claimants 6 significantly at risk. 7 Insurers are making very low offers initially to be 8 able to put claimants at risk on their case at an early 9 stage. Because we know limitation can be so difficult, 10 claimants are forced into a situation where they have to 11 think very carefully about early low offers. 12 MR SKELTON: What is the range, in your view, of the kind of 13 costs that claimants will generally incur in litigating 14 a claim? 15 MR DANIELS: It is going to depend on value and stage of 16 the case where it concludes, but I would have thought 17 the average is probably going to be around £30,000. 18 I don't know if my colleagues agree. 19 MR SCORER: I would agree with that, and I'd add that Luke 20 mentioned a number of issues which impact on costs and 21 I think it is undeniable that one of those issues is 22 also defendant behaviour or the behaviour of 23 the defendant firm you are dealing with. There is no 24 question that cases against certain firms end up costing 25 more because of defendant behaviour and because they</p> <p style="text-align: center;">Page 10</p>	<p>1 often have an independent social work expert. Again, 2 the costs of that could be £5,000 to £10,000, dependent 3 upon the volume of documents that have to be considered. 4 I think the problem we have as well, as claimant 5 lawyers, is that all of this has to be incurred quite 6 often before you even know if there is a strong case. 7 If you have a standard personal injury claim walks into 8 the office, you tend to know quite early on, if it is 9 a road traffic accident, whether there is likely to be 10 a case. 11 In our work, you've got to do an awful lot before 12 you get to the point where you know that liability is 13 likely to be established. So there is a lot of 14 front-end costs that are difficult to fund. 15 MR SKELTON: Do you, as lawyers, pay for reports for your 16 clients in order to find out if they have got a good 17 claim? Is that a cost that you have to bear in order to 18 get things off the ground and take the risk of it -- 19 MR GARSDEN: It can be, if it is not publicly funded. 20 MR SCORER: I think it is worth drawing a distinction here 21 between, really, the two different categories of abuse 22 cases. There are the cases that are based on vicarious 23 liability of an organisation that's being sued, so 24 negligence doesn't come into that. There is no need to 25 prove or examine issues of systemic negligence --</p> <p style="text-align: center;">Page 12</p>

<p>1 MR SKELTON: Just because there are those watching who are 2 not familiar with that classic legal term, do you want 3 to explain what that means? 4 MR SCORER: A case based on vicarious liability is a case 5 that says, "You employed this person who abused me, 6 therefore, you are liable as an organisation for that". 7 A case based on negligence is saying that there was 8 something defective or flawed about the way in which you 9 manage your organisation that led to you displaying 10 a lack of care towards the child. 11 The two categories of cases that we run are 12 effectively vicarious liability cases and cases based on 13 what we call failure to remove, so allegations that 14 a local authority has failed to protect a child and -- 15 or should have taken that child into care sooner. 16 In that second category of case, investigative costs 17 are much more expensive because you need evidence from 18 an independent social work expert in order to assess 19 whether the standard of care of the local authority 20 meets the standard required of a reasonable social 21 worker. 22 MR SKELTON: Is there also an issue of documents in those 23 cases? Is there a greater volume -- 24 MR SCORER: Substantially. And given the volume of records 25 that are now created for children in care, those can be</p> <p style="text-align: center;">Page 13</p>	<p>1 accessing them and the costs can rise exponentially 2 because of that, and that's one area where some sort of 3 memorandum of understanding or some clarification could 4 be minimised. 5 MR SKELTON: Again, that is a very important area which we 6 will be discussing in terms of reforming the existing 7 system. 8 Before we get on to the merits of the claims and how 9 you assess them, can I just ask about funding? You 10 mentioned public funding. Could you explain, whoever 11 wants to, who has access to public funding in the 12 present day? 13 MR ENRIGHT: I just wanted to add something to the last 14 topic before we move on, Peter, and that is this, on the 15 issue of proportionality: what the insurance companies 16 who are not here with us now will be pushing for very 17 hard is fixed costs, which they have managed to persuade 18 the world is a great idea in other areas, and that is to 19 argue that there should be a fixed, very low cost for 20 solicitors adopting these kinds of highly complex, very 21 difficult work. What that will do is it will deny 22 people access to quality lawyers, like the gentlemen you 23 see before you now, who know their subject. Because 24 let's be clear about this: the insurance companies are 25 not good players in this. Their job is to protect their</p> <p style="text-align: center;">Page 15</p>
<p>1 very substantial. I mean, I have got cases where there 2 are, you know, 50 or 60 lever-arch files of records. 3 I'm sure you have the same. 4 MR BRIDGE: Yes. 5 MR DANIELS: But your costing for that will start before you 6 even get the documents, because sometimes local 7 authorities and their representatives will want you to 8 get a court order before you actually get access to 9 those documents, requiring you sometimes to make 10 a pre-action application for disclosure. Sometimes 11 there are valid concerns, because there will be other 12 individuals named who may not be your client. Some 13 sensible insurers and solicitors will have arrangements 14 in place where they will agree undertakings, so that we 15 can only use those documents for the legal case we are 16 looking at, but others will require you to go to court 17 for an order for those. Sometimes that process can take 18 about 12 months, in my experience. 19 MR GARDEN: One very problematical area is trying to 20 harmonise the different courts. That can involve a lot 21 of unnecessary cost, where, for example, some records 22 are in the Care Court, other records are in the Crown 23 Court, and with the police, that are absolutely vital 24 and fundamental to our case. But because of data 25 protection reasons, we have enormous difficulty in</p> <p style="text-align: center;">Page 14</p>	<p>1 shareholders' money and not to pay out, and they will do 2 anything they can not to pay out. 3 MR SKELTON: Costs. Public funding, first of all. 4 MR GARDEN: In general terms, public funding is very 5 sparingly granted, not only because of the incredibly 6 low means threshold, which means that anybody other than 7 somebody on benefit doesn't qualify, even people who 8 cannot afford civil litigation do not qualify, and 9 that's a cynical system that is designed to save money. 10 If you compare it to what it used to be -- I mean, 11 I have been qualified now for 30 years, God help me, and 12 I have seen a Legal Aid system that applied to, I think, 13 a third of the population, or it might have been higher 14 than that, be pared back and cut back to a situation 15 where it now applies to very few. Those that have 16 difficulty -- the people who go through abuse cases are 17 generally unable to work, for reasons connected with the 18 abuse, and, therefore, they are from the lower 19 thresholds, income thresholds, and it operates unfairly 20 against them. 21 We have a sort of poverty gap, where, actually, you 22 can't afford civil litigation, but you also don't 23 qualify for public funding. So that's the means 24 element. 25 MR SKELTON: Can you just break down in a bit more detail</p> <p style="text-align: center;">Page 16</p>

<p>1 what is it -- what is the criterion or the level of 2 income which tips the balance in favour of rejection 3 or -- 4 MR GARDSEN: I'm going from memory now. I think the income 5 threshold is £2,700 a year. Am I wrong about that? 6 MR SCORER: Something like that. 7 MR GARDSEN: The capital limit also includes, it is 8 important to emphasise, equity in your house. So 9 a Legal Aid Agency will expect you to sell your house to 10 pay for civil litigation, or you don't qualify. 11 MR SKELTON: How many of you are doing publicly funded 12 claims? 13 MR DANIELS: We do quite a lot of public funding. 14 MR SCORER: I don't know about David, but I think all 15 four -- 16 MR SKELTON: What proportion of your claims will be publicly 17 funded? 18 MR SCORER: Speaking for myself, it effectively depends on 19 the category of case. Going back to my earlier 20 categorisation, the cases that are based around 21 vicarious liability we run under condition fee 22 arrangements, by and large, and the cases that relate to 23 failure to remove, which often -- where our client is 24 often a child and we are often instructed through the 25 official solicitor, those cases, in the main, we run on</p> <p style="text-align: center;">Page 17</p>	<p>1 job at the local leisure centre during the summer 2 holidays, doing a couple of hours a week, he fell foul 3 of the means test and was denied Legal Aid. 4 MR SKELTON: Do you find that, even when you have Legal Aid, 5 you are having to go back to them again and again and 6 again to extend the certification? 7 MR GARDSEN: Means is only one element of it. The merits of 8 the case are the other half of the conundrum, and 9 persuading the Legal Aid Agency to grant you public 10 funding and that your case has merit requires a huge 11 amount of work. There is nothing based on -- when 12 I first started doing this work, in the late '90s, we 13 had a Legal Aid Agency that wouldn't require an awful 14 lot of detail. They accepted these cases were 15 meritorious and they should have public funding, not 16 only because they were good cases, but also because they 17 were child abuse cases, and there was that element. 18 Conduct of those applications then passed down to the 19 Special Case Unit in Brighton, who, frankly, take 20 nothing on trust and require you to prove everything and 21 are much more bureaucratic and difficult to deal with, 22 frankly, and I think I speak for everybody when I say 23 that. 24 MR ENRIGHT: Yes. 25 MR GARDSEN: There is almost -- one of the reasons some ACAL</p> <p style="text-align: center;">Page 19</p>
<p>1 Legal Aid, public funding. 2 MR GARDSEN: In my firm, it is probably 75 to 85 per cent, 3 simply because we act for a lot of care leavers and 4 a lot of prisoners. Other firms may have a different 5 proportion, because of the type of cases they deal with. 6 MR SKELTON: How much of your time do you have to spend 7 getting that funding sorted out in the early stages? 8 MR DANIELS: A huge amount of time. There are applications 9 that have to keep going back to the Legal Aid Agency at 10 every point you get to. I have had about probably 11 15 certificates of Legal Aid issued in the last two 12 months and I think the average amount given initially to 13 a client who wants to investigate is, I think, £1,500, 14 which is to get things started, and that's for you to 15 get your documentation, deal with the initial 16 investigations. Then, at that point, you are expected 17 to complete another application, to go back and explain 18 what you have found and to request perhaps another 19 couple of thousand pounds. 20 I think in our firm it would be about 50/50 because 21 we deal with a lot of children. Another point I would 22 like to mention is how strict the means test is. 23 I recently was instructed for a 17-year-old lad who 24 wanted to look at allegations of abuse in his past. 25 Because he had gone to get himself a part-time lifeguard</p> <p style="text-align: center;">Page 18</p>	<p>1 members don't deal with Legal Aid is because it is so 2 bureaucratic, requires so much effort. The amount of 3 work required to get Legal Aid is almost a third, in my 4 firm, almost a third of the total work that you do, 5 which is disproportionate. 6 MR SKELTON: Is that billed work? 7 MR GARDSEN: No, it is irrecoverable work. 8 MR ENRIGHT: It is irrecoverable cost? 9 MR GARDSEN: Yes. When you win a case, the loser pays the 10 winner's costs, but the loser will never pay the costs 11 of obtaining public funding. It is a loss. 12 MR SKELTON: Can I ask you, Jonathan, one of the issues is, 13 do people who have public funding get a different level 14 of legal service than those who are CFA or does it end 15 up being the same by hook or by crook? 16 MR BRIDGE: No. You have pre-empted something I was about 17 to say, that the Legal Aid will only pay a set hourly 18 rate to experts and there is an increasing number of 19 experts now who simply will not work at Legal Aid rates. 20 MR GARDSEN: And barristers. 21 MR BRIDGE: And some counsel as well. 22 MR SKELTON: Let's leave the barristers out of it. 23 MR BRIDGE: They can be paid twice as much from the 24 defendant. So we are not on a level playing field and 25 we are struggling sometimes in certain areas of</p> <p style="text-align: center;">Page 20</p>

1 the country to even find adult and child psychiatrists
 2 who will prepare reports at Legal Aid rates.
 3 MR GARDSEN: They have reduced the hourly rate down and down
 4 and down and there are now fixed hourly rates payable to
 5 experts. They find it -- a lot of them find it
 6 uneconomic. They are the core of abuse cases, because
 7 they will give us an opinion on not only time delay,
 8 which is crucial, but also quantum of damage, and
 9 obtaining good-quality experts is a constant problem for
 10 us. In the medical field, psychiatrists, psychologists.
 11 However, in even shorter supply are social care experts
 12 who will comment on the way in which local authorities
 13 ran their childcare departments and so it is enormous
 14 impediment.
 15 I think the view of the agency is that we should
 16 drive down costs and drive down hourly rates, but what
 17 that does is restrict access to justice and good quality
 18 expert opinion, which is vital in these cases.
 19 MR ENRIGHT: The point Peter has made so ably about the pain
 20 of being able to obtain Legal Aid and what's involved in
 21 that, the unintended consequence of that is it means
 22 that practitioners don't do this area of work. There is
 23 a very small pool of people doing that work. Because,
 24 why would you? It is so difficult, it is so badly paid,
 25 and the work is so complex.

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1 That is part of the ongoing barrier here. It is
 2 like there's a hurdle, but it is a hurdle no horse can
 3 jump, in most instances, to get funding.
 4 MR SKELTON: Do you think that limitation on the number of
 5 people who do that kind of work is actually preventing
 6 some people from accessing justice?
 7 MR ENRIGHT: Absolutely, because there will be huge deserts
 8 around the UK. Who would you go to over an historic
 9 child abuse case? It is a very, very limited pool.
 10 MR SKELTON: Sorry, just to run with this a little bit, do
 11 you generally get people from your geographical area as
 12 firms or do you get people from all over the country
 13 because you have a national reputation?
 14 MR DANIELS: National.
 15 MR SCORER: I think the majority of us who do this work act
 16 for clients all over the country. On the advice desert
 17 point, it is difficult to say, actually. But
 18 I certainly -- we certainly represent clients across the
 19 UK and we will travel to see clients, as I'm sure others
 20 will, but obviously there are only a relatively small
 21 number of us who do this work.
 22 MR GARDSEN: One of the reasons I set up -- helped set up
 23 with Richard, in 1997, the Association of Child Abuse
 24 Lawyers was to provide good quality representation for
 25 these very deserving people. We have a code of conduct

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1 and we have a sort of level of training required and we
 2 have a level of membership called panel membership and,
 3 if you look at that geographically, there are gaps where
 4 there is no solicitor in this area in that part of
 5 the country.
 6 MR SKELTON: Can I ask you all to speak up again?
 7 So the merits of claims. I think the first thing
 8 I would like, if I may, is a general view of, how many
 9 claimants walk through the door and end up being turned
 10 away, in terms of the proportion of people you tend to
 11 see who may have legitimate claims, they may not, but as
 12 far as they are concerned, they have a claim to make.
 13 But ultimately, for one reason or another, which we will
 14 come on to, you have to say, "I'm sorry, I can't take
 15 this on". I will start with you, Jonathan.
 16 MR BRIDGE: I think I'm probably different from others
 17 because I have read some of the submissions and we do
 18 tend to have a go at most cases that come in the door,
 19 even if we are a little bit dubious about the merits.
 20 Maybe we shouldn't, because we do end up quite often
 21 having to discontinue the cases.
 22 It is difficult, particularly with limitation,
 23 whether you do take that risk. But I think we tend to
 24 take a high proportion on and then possibly discontinue
 25 later, once we have tried.

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1 MR SCORER: I think the enquiries we get, and we get a very
 2 large volume of enquiries, we probably take on about one
 3 enquiry in eight or nine, something of that order. But,
 4 of course, a lot of the cases we have to filter out
 5 because there simply isn't a legal basis for a claim.
 6 So we look at that first, is there a defendant who can
 7 be sued, is there an organisation that may be
 8 responsible? We look at those issues obviously first.
 9 MR SKELTON: As opposed to, it is just an individual that an
 10 allegation has been made --
 11 MR SCORER: Where an allegation is made against an
 12 individual, obviously you have to look at -- if you are
 13 going to consider whether there is a possibility of
 14 a case, you need to obviously consider whether the
 15 individual has means to satisfy a judgment. So that's
 16 obviously, you know, a consideration.
 17 But of course, you know, that's the sort of first
 18 stage you look at. Then you have to look at the merits
 19 of the allegations, are they likely to be true, are they
 20 provable, those sorts of issues.
 21 MR SKELTON: Are others around the table more in Richard's
 22 sort of 20 per cent -- 10 per cent to 20 per cent
 23 proceed and the rest no?
 24 MR GARDSEN: Yes.
 25 MR DANIELS: We would unfortunately send away 75 to

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1 80 per cent of everybody who contacts us.
 2 MR SKELTON: Again, could you just elaborate the reasons
 3 why?
 4 MR SCORER: You had better just clarify that answer.
 5 MR DANIELS: I think we turn away about 75 to 80 per cent of
 6 people.
 7 MR SKELTON: On the grounds of what?
 8 MR DANIELS: Various factors: limitation, having somebody
 9 who is actually there to be able to be sued, as Richard
 10 mentioned, financial assets. A lot of the enquiries we
 11 get will be about familial abuse where we don't have any
 12 information about assets of individuals.
 13 Proportionality can be an issue because we have to bear
 14 in mind the legal costs involved in pursuing cases. So
 15 a wide variety of reasons.
 16 MR SKELTON: Do you tend to do some work to assess who this
 17 defendant is, can they be located, have they got assets,
 18 have they got insurance, before you take that final
 19 decision, or is it usually readily apparent from the
 20 start?
 21 MR DANIELS: It is not readily apparent and your client may
 22 have a little bit of information. But if you are going
 23 to look into somebody's assets, that can be a costly
 24 process as well in itself.
 25 MR GARDEN: Back to Jonathan's point, really, but before

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1 you know whether you can take a case on, you need to do
 2 some work. So how do you do that work? Well, either
 3 you have public funding and you can sign them up to
 4 a legal help forum, which is very few cases, or you take
 5 a punt on it. Now, I say there are three categories of
 6 case. Category A would be something like something
 7 within one of the modules, which is a well-known
 8 location. Category C are cases that we simply couldn't
 9 take on legally, for a variety of reasons. And then
 10 there is a category B type of case, which is worth
 11 looking at, and may turn into a winner or may not.
 12 Obviously we have to gauge how much work we should do
 13 for potentially no recompense. I have great difficulty
 14 with this, because all these people deserve good
 15 treatment and they deserve respect and they deserve
 16 a hearing. They will all be believed by us, I think
 17 that is fundamental, but whether or not we can take them
 18 forward, and the way in which we tell them we can't is
 19 a huge problem for me.
 20 MR SKELTON: Getting on to you, David, getting information
 21 out of defendants about insurance or locating the
 22 insurer, how much of that is a problem these days?
 23 MR ENRIGHT: If we come on to again -- once again, I am
 24 coming backwards. What the gentlemen beside me, and my
 25 colleagues beside me, are describing is the chilling

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1 effect. First and foremost, the people who actually
 2 come to us are the very tip of the iceberg, because the
 3 huge and overwhelming majority of people never come
 4 forward, for a whole variety of reasons. So the tip of
 5 the iceberg point. They suffer this chilling effect of
 6 the changes in legal funding that mean that solicitors
 7 have to make financial judgments about whether or not we
 8 can bear quite considerable risk of going forward on
 9 a case, even a case we think is very deserving, because
 10 our businesses simply could not stand the risk.
 11 MR GARDEN: One of the problems is that, statistically,
 12 80 per cent of abuse takes place with somebody you know
 13 and is not institutional. Those are often the
 14 problematic cases, where there is maybe no funds to meet
 15 the costs of compensation and legal costs. Therefore,
 16 what do we do with those types of cases? Well, you
 17 know, they are deserving, but can we pursue them?
 18 MR SCORER: I think you were touching on the point, Peter,
 19 about insurance.
 20 MR SKELTON: Indeed.
 21 MR SCORER: Certainly, speaking from my experience, there
 22 certainly are cases, because of course we deal with
 23 historic allegations, or at least part of our work
 24 involves historic or non-recent allegations, and
 25 therefore we are looking to hold organisations

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1 accountable for things that they did or didn't do, you
 2 know, 20 or 30 years ago, and we certainly do come
 3 across organisations that are not insured or we can't
 4 find the insurer. So there is certainly an issue of
 5 that kind. I wouldn't say it is a massive issue in this
 6 area, but it is an issue.
 7 MR GARDEN: In any other area of work, if a case is out of
 8 time, claimant solicitors wouldn't take it on,
 9 generally, for very good reason. In our area of work,
 10 you know, 95 per cent of our cases are out of time. So
 11 you have an impediment, which we will talk about --
 12 I know we will talk about limitation, I want to talk
 13 about it now, before you even start. That's an extra
 14 hurdle.
 15 MR SKELTON: Of what kind of vintage are the allegations for
 16 most of you? Obviously there has been, over the last
 17 five, ten years, a huge public impetus on child sexual
 18 abuse being a major problem nationally in various
 19 institutions and that's why this inquiry exists, but
 20 that must have led, clearly, to a change in the
 21 mitigation landscape for all of you. How old are most
 22 of your cases now?
 23 MR SCORER: Very difficult to generalise on that. They
 24 cover the full range. I think the oldest case that
 25 I have ever settled is one where the abuse was in 1955,

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1 and in fact it is difficult to go back any further than
2 that because the limitation law changed in 1954 and
3 before that it was problematic under the old limitation
4 law. But certainly in my practice they cover the full
5 range of the period since then. So '60s, '70s, '80, but
6 more commonly, certainly in the cases I'm dealing with,
7 probably 1990s now.
8 MR GARDEN: I have to say, institutional abuse is most
9 popular between the '60s -- sorry, "popular" is the
10 wrong word. Common.
11 MR SKELTON: The 1960s, it was most common within
12 institutions, in your experience?
13 MR GARDEN: What I meant was, institutions were more common
14 in those periods of time, forgive me, and therefore
15 institutional abuse that we deal with tends to be early
16 '60s to mid '80s. In the mid '80s, foster care became
17 much more common. That has its own legal problems.
18 MR SCORER: The majority of the sort of large-scale
19 children's -- traditional old-style children's homes
20 closed in the mid to late '80s.
21 MR GARDEN: And the prevalence of this type of allegation
22 only really started to arise in the early to mid 1990s,
23 and, therefore, commonly, the claimants tend to be
24 between the ages of 35 and 50, not only for that reason
25 but also because they generally find it very hard to

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1 deal with abuse when they're younger and the triggering
2 effect of events in childhood and having your own
3 children mean that that is often when they decide to do
4 something about it in later life.
5 So I would say, average time between us meeting the
6 client and the abuse, 20 to 30 years. Would that be
7 fair?
8 MR SKELTON: So you are dealing with people in early middle
9 age, for the most part?
10 MR GARDEN: We are, anyway. Would that be true?
11 MR DANIELS: We see the full range, as Richard has
12 explained, right up to abuse perpetrated in the last
13 12 months. We see absolutely everything.
14 MR SKELTON: I was going to ask you, do you actually get
15 many clients who are children coming in, either by
16 themselves or with support from somewhere?
17 MR SCORER: We certainly do, but quite a lot of those are
18 the type of cases I referred to earlier, where it is
19 a child who has come into care and there is some
20 allegation that the local authority failed to act fast
21 enough to take them into care. So a lot of those
22 instructions come via the official solicitor. But there
23 are other young people who approach us either directly
24 or through young people's advocates.
25 CORE PARTICIPANT: Can I just make a point, the average

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1 reporting time for sexual abuse to counsellors and
2 support services is somewhere around 10 years anyway, so
3 the likelihood of many coming forward before then is
4 very, very small.
5 MR ENRIGHT: That is Mr Nigel O'Mara from Survivors of
6 Organised and Institutional Abuse.
7 MR SKELTON: I have to continue this discussion for
8 a moment, but can I come back to you? Can I ask you,
9 Richard, while we are focusing on the issue of
10 the merits of claims, because you gave a statistic of
11 turning down a very large proportion of claims. What
12 are you looking for to take on a claim with public
13 funding or with a conditional fee arrangement? What is
14 the -- criminal convictions might be one thing,
15 corroborative evidence, presumably, evidence that might
16 support the allegation.
17 MR SCORER: Yes, you look at the merits of the allegation,
18 is the allegation one that is likely to be true, is it
19 provable? That is an issue you look at. You look at,
20 you know, whether there is a defendant who can be sued,
21 whether there is a solvent defendant, and you look at
22 limitation. Of course, limitation raises a whole host
23 of different issues about whether it is possible to have
24 a fair trial and whether the claimant is likely to be --
25 the putative claimant is likely to be criticised for

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1 delay in coming forward.
2 MR GARDEN: In terms of proportionality, you look at the
3 degree of harm caused to the claimant, but you have to
4 assume, actually, that if this has taken place, then
5 they have been harmed, even if they don't necessarily
6 tell you so. But that is objective visits to
7 psychiatric hospitals and degrees of harm.
8 MR SKELTON: I need to ask the lady at the back if she has
9 a question.
10 MR ENRIGHT: Karen Gray.
11 CORE PARTICIPANT: If we can quickly go back to the time
12 lapse between the abuse and the reporting, most victims
13 actually report early on. It is just nobody listens to
14 the child when they are trying to say, "This person is
15 hurting me".
16 MR BRIDGE: I think an additional problem, when you are
17 looking at the case to start with, when you are looking
18 at time periods as well as experts, a lot of the work we
19 do requires an independent social work expert. If the
20 abuse took place 30 or 40 years ago, you need a social
21 worker who was in practice then, probably quite senior,
22 who has gone on to become an expert, but you just can't
23 find an expert who now will probably be in their
24 70s or 80s to come and tell what the standard practice
25 was 30 or 40 years ago. So unfortunately, with a lot of

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<p>1 the failure-to-remove cases now, we do have to turn them 2 down because the experts aren't available to tell you 3 what the standard of social work practice should have 4 been back then. 5 MR SKELTON: The other expert pool is the psychiatric 6 expert. To what extent is the inability to get that 7 kind of evidence a problem, or is the reality that 8 people are just booked up and you need to get things in 9 their diaries? 10 MR DANIELS: I don't think that is a problem. It is not 11 a problem that would influence us taking on a case, but 12 there is a very small pool of experts in that area. 13 MR SCORER: A small pool with an increasingly long waiting 14 list and they are becoming increasingly expensive, as 15 I think Jonathan alluded to earlier. 16 MR GARDEN: Because of the time delay problems and the need 17 for expedition, we have to get on with these cases 18 quickly, more quickly than we would otherwise do. 19 MR SKELTON: The word "proportionality" has come up a lot. 20 I have mentioned it and some of you have done. Could 21 someone explain what it means and why it is a problem 22 for you or for the claimants? 23 MR GARDEN: Simply whether the likely costs of -- legal 24 costs of running the case are proportionate or valued by 25 the amount of damages or compensation that you might get</p> <p style="text-align: center;">Page 33</p>	<p>1 MR SKELTON: In reality, if you have a case -- you gave 2 quite a big range at the start. Say a case that's worth 3 £10,000. What happens when the costs reach £10,000 on 4 a publicly funded case and start to climb? 5 MR SCORER: If it fails to satisfy the relevant matrix, the 6 relevant ratio, that's required in order for funding to 7 continue, then funding will be withdrawn and your only 8 option at that stage would be to represent the client 9 under a conditional fee arrangement. 10 MR GARDEN: They have an unpublished ratio of 1.1:1, which 11 is a bit bizarre. So, in other words, if your 12 compensation is only going to be £2,000, you can only 13 spend £2,000 worth of public money on the case. The 14 problem with that is, when you come close to trial, 15 because what all survivors of abuse want is their day in 16 court, to be believed and listened to, and that of 17 course is the most expensive part of the civil process 18 and that is very often when Legal Aid pull the plug and 19 say, "You can't go to trial", and that causes huge 20 psychological problems for our clients who feel that is 21 authority working against them and stopping their right 22 to be heard. 23 MR SKELTON: Do you, at that point, have a choice about 24 converting into a different funding arrangement, ie, 25 a conditional fee arrangement?</p> <p style="text-align: center;">Page 35</p>
<p>1 out of it. It is sometimes done arithmetically. We try 2 to avoid an arithmetical comparison, but the Legal Aid 3 Agency are very, very interested in that. 4 MR SKELTON: So for those of who you who are doing 5 publicly-funded work, proportionality is a compulsory 6 component of the process of getting funding? 7 MR DANIELS: And it remains so during the entire process. 8 You have to keep reporting back on that. I have had 9 cases which have had Legal Aid Agency funding cancelled, 10 perhaps halfway through, because the costs, through 11 whatever reason, have become disproportionate. 12 MR SKELTON: I don't want to put you on the spot. Can any 13 of you explain the criteria for proportionality? What 14 are they looking for in terms of the merits of 15 the claim, its value and its costs in order to continue 16 public funding, leaving aside the means tested side. 17 MR BRIDGE: I think they just ask for a three-stage 18 assessment at each stage: what the costs are to date, 19 what the anticipated costs are to settlement, and what 20 the costs are to trial. Then you have to predict the 21 damages and they just do a -- 22 MR SCORER: They have a matrix that they apply, a set of 23 ratios that they apply, ratios between costs and 24 damages, that have to be met in order for the case to 25 continue to attract public funding.</p> <p style="text-align: center;">Page 34</p>	<p>1 MR SCORER: We would. If the case obviously had merits, and 2 presumably it would have merits if we were pursuing it 3 under a public funding certificate -- I mean, that's the 4 only basis on which we would be pursuing it -- and if 5 the public funding was withdrawn because it failed the 6 relevant ratio, then we would represent the client under 7 a conditional fee arrangement. 8 MR DANIELS: But there are issues with those. When you move 9 on to a conditional fee agreement, that is less 10 advantageous to a client, there are costs consequences 11 that need to be deducted from their damages. So if you 12 take out insurance premium to protect a client against 13 losing the case, that would need to be deducted from 14 their damages. So in fact, there is a deduction from 15 the claimants' damages when they are under a conditional 16 fee agreement. 17 MR GARDEN: There is a success fee. 18 MR ENRIGHT: You also have to give the client -- it is not 19 so much our choice, it is the client's choice, because 20 you have a professional duty to warn them that, if you 21 lose, the consequences may be catastrophic for that 22 person, insofar as a contrary cost order can be made 23 against them. 24 MR SCORER: But abuse cases are personal injury cases, they 25 have the benefit of one-way cost shifting, with one or</p> <p style="text-align: center;">Page 36</p>

<p>1 two exceptions. 2 MR SKELTON: There are quite a few points. We have got past 3 11 o'clock now. There are a few things I really want to 4 elicit from you. One of them is, a lot of what you have 5 talked about is very legalistic, to do with the funding 6 arrangements, quite complicated even for those of us who 7 work in the area, about public funding, how to get it, 8 how long you are going to keep it for. The same with 9 the conditional fee arrangements. 10 How much of that can your clients take in? And can 11 I ask you a second issue, which is to do with the 12 merits? We talked about the merits of the claim. Is 13 the reality that merits really means the prospect of 14 succeeding in a court as opposed to whether or not you 15 have actually been abused, which can be a very different 16 question? Can I ask one of you, first of all, to 17 address the former question, which is about how much 18 your clients comprehend about this complex funding 19 structure? 20 MR BRIDGE: I don't think many solicitors properly 21 understand the funding structure. Explaining 22 a conditional fee agreement and the way the success fee 23 works, the way it attaches to past loss rather than 24 future loss, it is hugely complex. When you are trying 25 to -- sometimes these clients are talking to us as the</p> <p style="text-align: center;">Page 37</p>	<p>1 regime? Do you have to have that conversation, some of 2 you? And how do you explain that in a way which sounds 3 like you're not a cynical lawyer? 4 MR GARDEN: I generally explain that the cost of taking the 5 case to trial can be anything between £50,000 and 6 £100,000 and that's a risk that we have to take on over 7 a two- or three-year period, and, therefore, if we take 8 that amount of financial risk, we have to mitigate that 9 by being entitled to some sort of premium if we lose 10 and, unfortunately, we can't get that from the other 11 side because of the way the law is, so we have to take 12 it out of damages, but we guarantee that that will not 13 be more than 25 per cent. It could well be a lot less, 14 depending on the amount of work done. That's what 15 I generally say. 16 MR SKELTON: Could someone mention the degree to which 17 "after the event" insurance is still required now? 18 I think you mentioned qualified one-way cost shifting, 19 which is yet another complex arrangement. 20 MR SCORER: Yes. Obviously the law on that changed 21 in April 2013, and so obviously any cases that predate 22 that, that were incepted prior to that, would be under 23 the old rules and there would be a risk of adverse 24 costs, so "after the event" insurance would be required 25 for that purpose.</p> <p style="text-align: center;">Page 39</p>
<p>1 first people they have ever approached about what they 2 have been through as children. The last thing they want 3 is us trying to explain funding arrangements, complex 4 funding arrangements, to them. So I think it is hugely 5 difficult for them to understand. 6 MR SKELTON: Is that generally your experience, all of you? 7 MR SCORER: Yes. I find that in the course of a case 8 I probably have to explain and reexplain the funding 9 arrangements maybe three or four times to clients 10 because they are quite complex. 11 MR GARDEN: You have to bear in mind that a lot of our 12 clients have learning difficulties which -- not all of 13 them, obviously, very widely, but some of them do have 14 problems and those problems are exacerbated by the 15 condition from which they suffer as a result of 16 the abuse. So they generally distrust authority because 17 they have been abused in childhood and, therefore, trust 18 of us as legal representatives is an issue, and we 19 sometimes get merged -- when things go wrong and there 20 are funding issues and not being able to take them to 21 trial, it can create conflict for us, as legal 22 representatives. 23 MR SKELTON: Is there an issue about you having to tell your 24 clients that you may be taking a percentage, some of 25 you, of their actual damages, because that's the new</p> <p style="text-align: center;">Page 38</p>	<p>1 For cases incepted after that date, "after the 2 event" insurance is really there not to protect against 3 adverse cost risks, because that has gone. "After the 4 event" insurance is largely there for what we call 5 part 36 risk; in other words, the risk of failing to 6 beat at court, or failing to beat through the litigation 7 process, an offer which has been made by the defendant. 8 So it is insurance against that risk that we have ATE 9 for. 10 MR SKELTON: If you have an offer that is a good offer which 11 you are likely to not beat, then you have to tell the 12 client, "You need to take it, otherwise you may lose 13 your funding". 14 MR SCORER: Yes. 15 MR SKELTON: If you have an offer you think you are going to 16 beat -- you can never be certain, of course -- you need 17 to insure against that risk. 18 MR SCORER: Correct. 19 MR SKELTON: Who pays for that? 20 MR SCORER: Well, the client pays. It is generally 21 a relatively modest sum, £40 or £50. 22 MR GARDEN: But only at the end. There is no premium 23 payable during the case. 24 MR ENRIGHT: Money is clearly a factor, it is certainly 25 something -- it is a form of vindication. But, as Peter</p> <p style="text-align: center;">Page 40</p>

<p>1 said, for a lot of people, they want acknowledgement and 2 they want an apology, which can only -- which is very 3 often refused by the defendant, where they will make 4 a monetary offer but refuse to offer the apology, and 5 that is what people want. They want a vindication. 6 Then you have to say, "Will I take the risk -- risk it 7 all to go to court to try and get someone to say, I was 8 abused and to apologise to me, or do I take the filthy 9 lucre?", as it were. 10 MR SKELTON: The litigation process, the civil justice 11 system, is geared towards providing a financial remedy, 12 ie, compensation. It is not geared towards the kind of 13 things you are talking about, which is vindication and 14 apologies. 15 MR ENRIGHT: Yes. 16 MR GARS DEN: There are often problems with them accepting 17 money for what happened, for the most obvious of 18 reasons, and what they want is an acknowledgement of 19 truth, to be believed, and for somebody to say they are 20 sorry that the institution, for example, has let them 21 down. That is what they really want. Though they 22 should be getting the compensation as well. 23 MR SKELTON: The second question I asked was about the 24 merits and your clients' understanding that the legal 25 merits of the claim may not be the same as whether or</p> <p style="text-align: center;">Page 41</p>	<p>1 support, that's why we can't proceed. But that is often 2 very difficult and it causes -- it does cause conflict. 3 MR BRIDGE: I always say at the outset of any case to the 4 client, whatever the outcome of the civil litigation, it 5 is not in any way a reflection on what they have been 6 through, but it is still very hard 6 or 12 months later 7 when you have to tell them you can't continue with the 8 case, because they do take that as being, "I'm not 9 believed by my own solicitor". 10 MR DANIELS: I think it also comes back to the speed of 11 the entire process because, if somebody can get that 12 advice at an early stage and be told that, it is much 13 better than having to wait 12 months, 18 months, to have 14 to fight to get documents and look through things. 15 I think it all comes back to the process, really. 16 MR GARS DEN: The problem is, the red mist comes up. That's 17 the problem. They are told that, but when it comes to 18 the point, it is like replication of the abuse, I'm 19 afraid. 20 MR SKELTON: That rejection. 21 MR GARS DEN: Yes. That sort of abuse of power, which is 22 what happened in the first place. 23 MR SKELTON: David, you made the point earlier that perhaps 24 a fraction of people actually walk through the 25 solicitors' office doors to come and initiate</p> <p style="text-align: center;">Page 43</p>
<p>1 not they are being believed by you or whether or not 2 what actually happened happened. How do you square that 3 with them and explain it to them? 4 MR SCORER: I think it is often quite a difficult thing to 5 explain. Obviously the question of whether somebody was 6 abused is relevant to the merits of the case. That is 7 central to the merits of the case. But that is only the 8 first part of it. The difficulty is in trying to 9 explain to a client, you know, "Yes, you were abused. 10 The evidence shows that you were abused. But you 11 haven't got a claim for legal reasons, you haven't got 12 a claim because of the law on limitation, or you haven't 13 got a claim because there isn't a solvent defendant we 14 can sue". So all of those issues are very difficult. 15 People, understandably, come to us with an expectation 16 that if they have been abused, the legal system will 17 recognise that and provide some recompense for it and 18 that often isn't the case. 19 MR GARS DEN: We have a big problem -- I mean, that it is the 20 worst part of the thing, telling somebody that we can't 21 help them and, when we say that, they often come to the 22 conclusion that we don't believe them or that we are in 23 cahoots with the defendant and the whole thing is 24 a setup. Whereas actually we are saying, because the 25 case is so old and because we can't find corroborative</p> <p style="text-align: center;">Page 42</p>	<p>1 litigation, or at least to talk about it. What is 2 stopping those people from taking that very first step 3 of even making contact? 4 MR ENRIGHT: Mr O'Mara acknowledged that there is plenty of 5 evidence out there that people will normally only report 6 within sort of 10 to 15 years. I think we have 7 mentioned in our submissions, for many people, they feel 8 they somehow deserve the abuse, horrifically, that they 9 were abused by people who were supposed to protect them 10 and love them, they felt that somehow they had done 11 something wrong and, therefore, it is their own fault. 12 That takes many, many years to overcome, if it is ever 13 overcome. 14 Another element of it, of course, is simply, "The 15 system is too complex for me" or "The system is not for 16 me". That puts a huge number of people off. 17 MR SCORER: I think there is an additional factor, which is 18 actually quite important, which is that people fear loss 19 of anonymity, and there is a lot of misunderstanding 20 about the law and anonymity. People think that if you 21 go through a legal process, a civil legal process, you 22 would be at risk of losing your anonymity. Obviously 23 that isn't the case and we can take action at the start 24 of the case to reinforce the protection of anonymity. 25 But there is a lot of, I think, misconception out there</p> <p style="text-align: center;">Page 44</p>

1 that that is a risk that you take if you go through
 2 a legal process.
 3 MR ENRIGHT: Peter, I just make one last point on that, and
 4 that is, when someone has been sexually abused, they
 5 don't want to talk about it. They don't want to talk
 6 about it again and again and again with this solicitor,
 7 that solicitor, that barrister, that judge. To keep
 8 reliving it, keep talking again and again about
 9 something you wish had never happened.
 10 MR SKELTON: Do you also feel there are people who may just
 11 simply be unaware that courts can provide --
 12 MR GARDSEN: Undoubtedly.
 13 MR DANIELS: I speak to many professionals who I'm amazed
 14 haven't given signposting advice to clients: police,
 15 other solicitors who are working in other areas.
 16 I think there is a genuine lack of understanding
 17 actually, bizarrely, about what the civil process can
 18 achieve. Some people are signposted to the Criminal
 19 Injuries Compensation Authority and the possibility of
 20 a civil claim is never mentioned to them by the police
 21 or the court support services.
 22 MR GARDSEN: One of the common impediments is parents being
 23 alive. There are many, many reasons why, but I find,
 24 over and over again, clients will only make -- do
 25 something about their abuse when their parents have died

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1 because they fear the effect upon the parents if they do
 2 make disclosure.
 3 MR SKELTON: We have run over our timeframe. I would just
 4 like to get some final thoughts from you on the
 5 challenges going forward of the next five or ten years,
 6 and the kind of things that you think we ought to be
 7 looking at in terms of overcoming those challenges. Can
 8 I just briefly ask you, very briefly, to mention it?
 9 MR BRIDGE: I think the one thing I would say is fixed
 10 costs. I think that is potentially a massive, massive
 11 cloud on the horizon for all abuse victims. If fixed
 12 costs come in for claims up to £250,000, as has been
 13 suggested, I think we will all find it very difficult to
 14 carry on representing victims.
 15 MR SCORER: I completely agree with that. I think we have
 16 talked about some of the difficulties in the system at
 17 the moment, but those would be as nothing compared with
 18 the implications of a fixed-costs regime. I think that
 19 would effectively render most of these cases unviable.
 20 MR GARDSEN: I think a protocol as to the way in which these
 21 cases are conducted to ensure -- good behaviour is one
 22 of the things we are going to be talking about and
 23 a more generous public funding system.
 24 MR SKELTON: An official protocol that is part of the civil
 25 rules of the court, effectively.

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1 MR GARDSEN: Yes. We are working on that independently of
 2 this with Master McCloud.
 3 MR SKELTON: Yes.
 4 MR GARDSEN: I have a first draft here.
 5 MR SKELTON: Thank you.
 6 MR DANIELS: For me, Legal Aid limits. I mentioned how
 7 small they can be, specifically at investigation stage.
 8 Fixed costs. I would agree with everything that my
 9 colleagues on the panel have said. Also, I would come
 10 back to what I talked about in terms of disclosure of
 11 documents and just echoing what Peter has said, about
 12 the need for more cooperation about that so that can be
 13 done more quickly.
 14 MR GARDSEN: And better voluntary agency support for our
 15 clients when they are going through the process. Where
 16 they don't have a next friend or a relative to keep them
 17 on track. We have a huge problems with clients who
 18 start enthusiastically but go walk-about because they
 19 can't face it. That's because they don't have the
 20 voluntary sector support if they don't have their own
 21 family to help them through.
 22 MR ENRIGHT: One of the things that this inquiry may achieve
 23 is a shift in perception, that child abuse is a matter
 24 of urgent national importance. It is in a society's
 25 best interest that child abuse is recognised and, where

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1 it has happened, it is acknowledged, apologised for and
 2 compensated. So rather than thinking of this as just
 3 a monetary system, if we can shift in society and say,
 4 "This is a terrible ill. We must facilitate ways that
 5 we can uncover it and try to put things right".
 6 MR SKELTON: Thank you very much. I should emphasise, from
 7 the inquiry's perspective, I have asked you to summarise
 8 a few points. There are more points you have made in
 9 your issues paper response which we are very grateful
 10 for and there may be other points that arise both for
 11 those around the table, or watching, or in the room, and
 12 the inquiry will, of course, be interested in listening
 13 to those.
 14 From my perspective, I think we should end there,
 15 but I'm very happy for any further questions.
 16 MR SHARPLING: Mr Garsden answered the question I intended
 17 to ask about those with special needs. Thank you for
 18 that.
 19 MR FRANK: I wonder if I could just ask two questions? One
 20 is, can you give us an idea of how many claimant lawyers
 21 relating to the issue of child sexual abuse you're aware
 22 of in England and Wales? Just numbers?
 23 MR GARDSEN: ACAL membership is 85.
 24 MR SCORER: Something of that size. But the majority -- but
 25 I think probably only a minority of those are doing this

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1 work as a sort of full-time specialist --
 2 MR SKELTON: 25 people, not firms?
 3 MR SCORER: People.
 4 MR GARSDEN: People, and they include some experts and some
 5 barristers, so they are not all solicitors. Of those,
 6 there's about 13 panel members.
 7 MR SCORER: So probably about 13 or 14 lawyers nationally
 8 who are doing this work as a sort of single
 9 specialist --
 10 MR GARSDEN: As a specialist department. There will be
 11 others in that department. Maybe more lawyers, but
 12 those are members.
 13 MR SKELTON: Thank you.
 14 (11.21 am)
 15 (A short break)
 16 (11.54 am)
 17 Session 2
 18 Welcome by Chair and opening comments
 19 THE CHAIR: Good morning again. It is only just morning.
 20 For the benefit of the new arrivals to the seminar, I am
 21 going to repeat what I said at the start of the first
 22 session.
 23 I want to welcome you to this first seminar of
 24 the independent inquiry into child sexual abuse. I'm
 25 Alexis Jay, and I am the chair. My colleague panel

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1 members here are Drusilla Sharpling, Ivor Frank and
 2 Professor Sir Malcolm Evans.
 3 This particular seminar is as a result of
 4 the responses to the inquiry's issues papers on the
 5 civil justice system and criminal compensation. Those
 6 issues papers were published on 4 August of this year.
 7 The consultation formally closed on 29 September,
 8 although the inquiry received a small number of
 9 submissions after that date.
 10 All submissions received have been reviewed and
 11 considered by the inquiry. They were received from
 12 a wide range of individuals and organisations, and have
 13 been published on the inquiry's website.
 14 As we have a lot of ground to cover over the next
 15 two days on the civil justice system alone, we will hold
 16 a seminar on matters arising from the criminal
 17 compensation issues papers early in 2017.
 18 The panel and I would like to thank everyone who
 19 took time to consider and respond to the issues papers.
 20 Without your valuable input, we would not be able to
 21 host this seminar. I would also like to thank those
 22 individuals who have agreed to take part. It is being
 23 live streamed over the internet, with a short delay so
 24 that the general public can follow the proceedings on
 25 a matter of central importance to this investigation.

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1 The panel and I are looking forward to open, lively
 2 and respectful discussion amongst yourselves in relation
 3 to a number of key issues relating to the civil justice
 4 system.
 5 It is important to state at the outset that the
 6 purpose of this seminar is not to gather evidence in the
 7 formal sense. This is a forum where important issues
 8 are to be discussed, facilitated by Peter Skelton QC,
 9 who is lead counsel to the accountability and
 10 reparations investigation.
 11 We have attendees who will bring to the table a wide
 12 range of experience and knowledge about the operation of
 13 the civil justice system in the area of child sexual
 14 abuse litigation. We will be looking at its flaws and
 15 weaknesses, as well as the areas where it can and does
 16 work well.
 17 We will also bring forward ideas for reform, both
 18 modest and potentially radical. The panel and I will be
 19 listening to what you have to say with keen interest.
 20 These discussions will undoubtedly inform the
 21 investigation as a whole and should also identify areas
 22 for further work.
 23 Now, I should say that we had a bit of a problem
 24 with sound earlier on. We have some additional
 25 microphones, but I would ask everyone around the table

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1 here please to speak up.
 2 Thank you for your participation, and I now hand you
 3 over to Peter Skelton QC.
 4 Opening comments by Facilitator
 5 MR SKELTON: Thank you very much for coming. We are running
 6 a little bit late, as you will appreciate. Thank you
 7 for your patience sitting here waiting for us to start.
 8 There are four broad topics I would like to discuss with
 9 each of you in this session: insurance generally, what
 10 is available, how much does it cost, who has it; the
 11 role of insurers in the civil litigation process, which
 12 can be varied; the value of claims, from your
 13 perspective; and costs, the vexed issue of costs, the
 14 claimants' costs, the defendants' costs.
 15 Before getting into the detail of the topics, can
 16 I just say a few words about evidence gathering and the
 17 investigation. The inquiry investigation is concerned
 18 to receive all views from anyone that has a significant
 19 opinion or information about accountability and
 20 reparation, not just those around the table today.
 21 Those who are listening to the live feed or seeing it
 22 online, those who read the transcript, and those who are
 23 present in the room are welcome to provide their views
 24 in due course. Those of you who are in the room, the
 25 best way for you to do that is to contact the solicitor,

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1 Mr Regis, who is sat at the table with me, and provide
2 your views to him, because the focus of today is to hear
3 from those who are sat at the table who have expertise
4 and experience in this area and so the panel can move
5 forward with its investigation in the future. But, as
6 I say, we are anxious to capture all views but I am also
7 anxious that we maintain and get as much evidence out of
8 our participants today as possible.

9 Can I ask you just to introduce yourselves, just for
10 the record? Shall we start at this end, with Mr Luck?

11 Introductions

12 MR LUCK: Yes, Rod Luck from Municipal Mutual Insurance.

13 MR BONEHILL: Good morning, I am David Bonehill, UK claims
14 director for Ecclesiastical Insurance Group.

15 MR LATTE: Good morning, I am John Latter and I work for
16 Zurich Insurance in the UK.

17 MS HANDYSIDE: I am Philippa Handyside. I work for the
18 Association of British Insurers, the ABI, which is
19 a trade association representing insurance and long-term
20 savings companies operating in the United Kingdom.

21 MR NICOLSON: Good morning. I am Mark Nicolson. I work in
22 insurance at the London Borough of Lambeth.

23 MS MACKENZIE: I am Carolyn Mackenzie. I work for RSA
24 Insurance Company.

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1 Open discussion

2 MR SKELTON: First, a basic topic. Bear in mind, obviously
3 we have received your responses and I have read them and
4 the panel has read them, but those who are watching
5 either in the room or online will not necessarily know
6 all of the intricacies of your professional lives in
7 terms of the specialist insurance and insurers that are
8 in this area. Could someone introduce for us the types
9 of insurance that cover child sexual abuse and are
10 relevant in the litigation context?

11 MS HANDYSIDE: Perhaps if I take that one. The type of
12 insurance that most often has a role to play in
13 providing compensation to victims and survivors of child
14 abuse is public liability insurance, and that provides
15 an indemnity for organisations for any legal liabilities
16 that would arise to members of the public whilst they
17 are operating their business or their activities. That
18 includes things like someone who trips on the premises
19 or something, but it has also come to include, through
20 developments in the law, child abuse claims.

21 There are some child abuse claims which are -- some
22 abuse claims, I should say, which fall under an
23 employer's liability policy, which would reimburse them
24 for claims as an employer from employees, but it is
25 mostly public liability insurance.

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1 That can operate in a number of ways, because some
2 organisations don't buy public liability insurance and
3 it can -- there can be an uninsured element, where
4 organisations take the first amount of any claims and
5 they pay for those themselves, or there can be a limit
6 to the claims that will be reimbursed by the insurer,
7 and that is all negotiated in policy terms between
8 organisations like schools, charities, local
9 authorities, and they decide -- make their own
10 commercial decisions about the extent to which they need
11 public liability insurance.

12 MR BONEHILL: I think it is just worth saying on that that
13 the insurance contract provides no protection whatsoever
14 for the perpetrator of abuse. I think we need to make
15 that quite clear. We provide protection to the
16 institutions, to our policyholders, where they may have
17 a legal liability attaching to them.

18 MR LATTE: Attaching to that, we also have an obligation to
19 defend allegations made against those organisations, so
20 we have an obligation to the policyholder to investigate
21 claims and to, where appropriate, mount defences on
22 their behalf.

23 MR SKELTON: That's written into the policy, the obligation?

24 MR LATTE: That's basically insurance practice. There are
25 instances that Philippa talked about earlier where an

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1 organisation will self-insure, and it is -- on that
2 basis, we might just handle the claims within their
3 deductible. So similar to your personal liability car
4 insurance where you have a voluntary excess, you are
5 responsible for the financial obligations there. It
6 will be that organisations take differing levels of
7 deductible, self-insured retention. We may then provide
8 risk transfer above that and, where we operate
9 self-insured retention, they may ask us to claims handle
10 on their behalf for a fee.

11 MR SKELTON: There are a few things you have said which
12 I will have to explore in more detail. The first is,
13 who has insurance and who doesn't have insurance? Who
14 are the self-insured and who are the uninsured?

15 MR NICOLSON: If I may respond to that, it is fairly mixed.
16 In my authority, for example, we do purchase insurance
17 and public liabilities, and insurance that we would
18 purchase. However, for some of these claims we are
19 looking at, they go back decades, so we have to look at
20 the insurance that was in place at that time. For us,
21 unfortunately, that means sometimes there is no
22 insurance for some of the earlier periods. So we simply
23 become self-insured for the purposes of dealing with
24 these claims. In a way, we are acting in the same
25 capacity as insurers when dealing with those claims.

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<p>1 We also, for some of the earlier years, do have 2 insurance, but the limit of indemnity available to us is 3 quite low by today's standards. Of course, we are 4 settling these claims today at today's costs. The 5 insurance was never really designed when it was 6 implemented back in those days -- it didn't envisage the 7 type of claims settlements we are seeing today. 8 We also take insurance out now with a high 9 deductible. Sometimes that is just because it is cost 10 effective for us as an organisation. It is actually 11 prohibitive to take insurance out with a very low excess 12 on the policy. So I would say, certainly for my own 13 organisation, the vast majority of the types of claims 14 we are discussing here are self-insured and come out of 15 public funds. 16 MR SKELTON: When you say "high deductible", which is 17 analogous to the excess imposed on car insurance and the 18 like, what do you mean by that in terms of figure? 19 MR NICOLSON: For us, it's half a million pounds per claim. 20 MR SKELTON: Also, for the insurance itself, you said there 21 might be a limit to the amount the insurer is prepared 22 to pay under the contract. Is that, again, per claim or 23 is that -- if you have a group of claims, do you rapidly 24 start to hit that limit? 25 MR NICOLSON: It's a group of claims. So an incident or</p> <p style="text-align: center;">Page 57</p>	<p>1 already been mentioned. Once you understand the risk, 2 you can then suitably price for it. That will vary from 3 the large corporations down to private companies. So 4 you do have, you know, really, the full spectrum. 5 I would also say that the contracts between the 6 organisations and the insurer, it is a private contract 7 taken out voluntarily, so it is not compulsory 8 insurance. I think that is very different to, as you 9 will know, employers' liability that is compulsory. 10 MR SKELTON: The uninsured. Perhaps you are not experts in 11 the uninsured, you're experts in the insured. The 12 charitable sector, presumably, a large charity, may 13 struggle to pay a premium of the kind we have had 14 mentioned. Do you have to negotiate better rates for 15 them or do you find some of them simply can't get 16 insurance from large organisations like yourselves? 17 MR LATTER: I'm not aware of anyone not being able to 18 purchase insurance. There is a range of insurers out 19 there. It is a competitive market. I'm not aware -- 20 I'm not saying that that isn't the case, but I'm not 21 aware of any, Peter, that can't buy insurance. 22 MS MACKENZIE: I would add to that it is quite common, for 23 example, for brokers to run schemes where charities, 24 youth groups, other groups, might obtain their 25 insurances through a scheme that's run by a broker.</p> <p style="text-align: center;">Page 59</p>
<p>1 event would erode that particular limit we have in 2 relation to the earlier years policy. 3 MR SKELTON: Might it already have gone in previous 4 litigation and then -- 5 MR NICOLSON: For us, it certainly has in some of 6 the earlier years. We have exhausted the indemnity that 7 is available to us. The period before that, there is 8 just no insurance or we are unable to provide evidence 9 of insurance for some of the earlier years. 10 MR SKELTON: Without betraying any confidences, how much 11 roughly does a public liability insurance cost for 12 a council of your size? 13 MR NICOLSON: It very much depends on the risk profile of 14 the organisation and the types of risks that you buy 15 insurance for along with deductible. But it is not 16 untypical for it to be in the region of certainly 17 400,000, 500,000 for a liability insurance policy for 18 a year. 19 MR SKELTON: Those of you who are insurers, is that roughly 20 the kind of figure you're looking at for a large 21 organisation like a county council? 22 MR LUCK: As we are not insuring and haven't done for over 23 20 years, I can't really comment on that. 24 MR BONEHILL: I think it is a full spectrum, Peter, in terms 25 of what is the risk, what's the risk profile, as has</p> <p style="text-align: center;">Page 58</p>	<p>1 MR SKELTON: Understood. 2 MS MACKENZIE: That broker would be an expert in that field 3 and negotiate on their behalf. 4 MR SKELTON: In answer to an earlier question, Philippa, you 5 mentioned public liability insurance is for a range of 6 adverse events, for want of a better phrase. Do you 7 have any idea what percentage child sexual abuse 8 occupies within that range, just to get an idea of 9 the payouts that are actually involved in this kind of 10 claim? 11 MR BONEHILL: For our organisation, it's about .4, 0.4, of 12 all claims we receive in a given year, and around 13 5.5 per cent of public liability claims relate to 14 physical sexual abuse. 15 MR LATTER: I don't have an exact number for you, but it 16 would be a very small proportion of the overall public 17 liability claims we see, but we are a very large 18 composite insurer that has risks that sit outside of 19 this arena as well. So it's probably not fair to 20 compare volumes, because we see an awful lot of 21 business, but we do know that the numbers remain 22 relatively small, but we have seen an increase over 23 recent years. 24 MR LUCK: Conversely to that, because we are dealing with 25 claims against historic policies, practically all of our</p> <p style="text-align: center;">Page 60</p>

<p>1 public liability claims now are historic child abuse 2 cases. 3 MR SKELTON: So you see a disproportionate number by 4 definition. 5 MR LUCK: Yes. It is purely the nature of our position. 6 MR SKELTON: In terms of the percentage, what are the other 7 main drivers for insurance payouts on a public liability 8 basis? 9 MR BONEHILL: It is the full range of accidents, to be 10 honest. Slips and trips is very common and probably is 11 a large proportion of those public liability claims. 12 MR SKELTON: For the most part, it is personal injury work. 13 MR BONEHILL: It is personal injury, yes. 14 MR SKELTON: Is that your experience as well? 15 MR NICOLSON: Yes. It is mainly highways -- we, for 16 example, deal with pot hole claims, trips and slips, 17 housing, housing land, because we are a housing 18 authority. But we also have a wide range of other types 19 of liability, even down to, for us in London, tree roots 20 cause a liability nuisance issue for us. So it is quite 21 a wide range of liability claims that we deal with. 22 I would add for us as well, that it is less than 23 1 per cent that relate to abuse claims. However, 24 I think that percentage is slightly changing in terms of 25 an increase in numbers.</p> <p style="text-align: center;">Page 61</p>	<p>1 possibly 30 years after the abuse has occurred. So one 2 can see that there would still be a continuation of 3 claims coming through over a period of time. 4 MR BONEHILL: From our organisation, yes, we are seeing an 5 increase, not at the sort of levels that others may have 6 seen, and I think the question is around the future -- 7 your question was about the future, and I guess the 8 question is around new types of abuse that may be 9 emerging, technological types of abuse. We are not 10 seeing that yet, but that is an area of focus. 11 MR LATTER: I think the other thing, Peter, is when more 12 victims of child sexual abuse come forward. We can't 13 predict that with any certainty. We have seen in the 14 press this week around the football. We wouldn't maybe 15 have foreseen that happening. So it is impossible for 16 us to determine that, because we don't know what level 17 of abuse took place, but, as we see different areas 18 develop, we may see an increase, but it is impossible to 19 determine. 20 MR SKELTON: Perhaps this is a question for you. That 21 difficulty in predicting the future, is it likely to 22 cause any fundamental problems for you in terms of 23 providing insurance and premiums? Perhaps I will ask 24 you, Philippa, first? 25 MS HANDYSIDE: I think there is a regulatory regime in the</p> <p style="text-align: center;">Page 63</p>
<p>1 MR SKELTON: How has it changed over the last -- the last 2 10 years have seen a huge focus in the public eye on 3 child sexual abuse and a growth in the litigation 4 associated with that. How has that affected your books, 5 as insurers? 6 MR LATTER: We, as I said just a moment ago, we have seen an 7 increase in the number of claims being brought against 8 our policyholders that are reported to us. I would say 9 it is very difficult, Peter, because the data that we 10 capture is not exact. So I will give you an indication: 11 we would say between '14 and '15, we have seen 12 a 50 per cent uplift based upon our '14 number. 13 However, that is based on a very small number. So while 14 50 per cent sounds a big step, the actual numbers still 15 remain relatively small. 16 MR SKELTON: Do others have a view on that in terms of 17 the changes? I know you can't predict the future in 18 this area, but whether or not it is going to stay at 19 this sort of level or whether you anticipate at some 20 point it will start to dip back down again? 21 MR NICOLSON: I think the other factor that impacts it is 22 where there has been a criminal conviction. So where an 23 abuser has been convicted, we often then see an influx 24 of claims following that. 25 MS MACKENZIE: I think it is common for claims to be brought</p> <p style="text-align: center;">Page 62</p>	<p>1 UK that requires insurers to hold capital against their 2 potential liabilities, and that is very much designed in 3 ensuring that, where claims are made, there are 4 resources to pay them. 5 So adequacy of insurers and insurers being able to 6 pay is a very, very low risk in the UK. So no UK 7 insurers were touched by the 2008 financial crisis in 8 the sense that some other financial institutions were. 9 So the Prudential Regulation Authority really manages 10 the adequacy of funds to pay future claims and a future 11 increase in claims. 12 MR LATTER: I think an important distinction is, what we are 13 seeing is that the payment of these claims is being made 14 against historical policies, not current unwritten 15 policies. So what may happen as we go forward, 16 depending upon the frequency and the severity of these 17 claims, is underwriting organisations may need to change 18 their approach to underwriting these risks, they may 19 need to apply larger deductibles, they may change their 20 pricing, and then it is for organisations such as Mark's 21 to determine whether they self-insure or they buy 22 commercial insurance to cover their risks, and that 23 may -- you may see a change in the face of insurance 24 that's provided as we go forward. 25 MR SKELTON: We did hear from the claimant stakeholders, or</p> <p style="text-align: center;">Page 64</p>

<p>1 some of them earlier today, and I think they gave 2 a similar figure of 20 to 30 years for some of these 3 claims, although some went back to the 1950s, in fact. 4 Those of you who didn't mention the dates, is it your 5 experience that it is, generally speaking, a sort of 20- 6 to 30-year timelag between allegations of abuse and 7 litigation? 8 MR LUCK: Yes, indeed. MMI, having ceased underwriting in 9 1993, is clearly now only receiving claims which are at 10 least 20-plus years old, and many of them do go back 11 with the allegations into the '80s, the '70s and 12 the '60s. So I think the statistics are that the 13 average age of a claimant at the moment is 43. So, yes, 14 we are seeing constant historic claims against old 15 policies, yes. 16 MR SKELTON: The policy obviously is the major document. It 17 sets out the limits of insurance and when it may or may 18 not apply. To what extent does it deal with the role of 19 the insurer in the litigation process? Does that vary, 20 for example, if you have got a higher deductible, you 21 may have less of a role and it may be the organisation 22 itself who is effectively insuring itself up to that 23 point. Who would like to explain? 24 MR BONEHILL: I just make the point, Peter, that not all 25 policies have deductible. In fact, the majority don't.</p> <p style="text-align: center;">Page 65</p>	<p>1 getting the documents? 2 MR LATTER: I think that depends. For instance, you will 3 see policyholders within our portfolio that have large 4 deductibles, but they have never been involved in child 5 sexual abuse previously and they may come to us and say, 6 "Look, we need support here, we don't know the process, 7 we don't understand the process, can you help guide us 8 through that?", and they will give us the right to help 9 them by claims managing within our organisation. Others 10 see a high frequency of claims, they have an 11 organisation set up to manage those claims, and they 12 will deal with it quite comfortably in-house. 13 So I think there is a spectrum, depending upon the 14 needs of the individual policyholder. 15 MR SKELTON: Is that the experience of others? 16 MS MACKENZIE: Yes. 17 MR LUCK: Yes, definitely. Without a doubt. 18 MR BONEHILL: We have a different business model. First of 19 all, the policy -- I think it is the same for most of 20 us -- allows us to take full conduct of any claims, so 21 the accountability for the claims handling philosophy 22 sits well and truly with me and my team in our 23 organisation, not with our policyholders. That 24 sometimes is misunderstood, I think. 25 We will then investigate the allegations that come</p> <p style="text-align: center;">Page 67</p>
<p>1 The majority of policies certainly that we handle, then 2 we deal with the claims ground up in their entirety. 3 MR LATTER: That is different from Zurich's perspective. We 4 have a lot of self insurance. Mark, would you want to 5 offer an opinion there? 6 MR NICOLSON: Certainly for my own organisation, because it 7 is a high deductible that we carry, it is public funds. 8 Therefore, there is more of an interest in us having 9 a say in how those claims are actually handled. We 10 actually have an agreement with our insurers whereby 11 claims handling is delegated to the organisation up to 12 a certain level within the deductible. 13 MR SKELTON: What is the role of the claims handler as 14 opposed to the solicitor? What do they do? 15 MR NICOLSON: The claims handler, from our perspective, and 16 we would -- for claims like this, we would appoint our 17 own legal handler to deal with the claim. So we would 18 work with the solicitor in terms of how that claim is 19 dealt with. We would also then work with the insurers 20 as well. Because we carry such high deductibles, we 21 have autonomous claims handling, but we would usually 22 appoint legal representation, particularly where claims 23 are litigated. 24 MR SKELTON: One of the things I'm interested in is, does 25 the insurer take a role in investigating what happened,</p> <p style="text-align: center;">Page 66</p>	<p>1 to us, we will do that ourselves, either with our own 2 staff or through our lawyers, and then we make the 3 decisions on liability and quantum. So we have full 4 conduct of the claim from start to finish. 5 MR SKELTON: You have given different views about your 6 respective roles. From the perspective of someone 7 actually buying insurance, will they come to you because 8 they want you to take that role, ie, if they have 9 a claim, they want it just given to someone else to 10 investigate, and do they come to you if they are 11 prepared to take a different role and prepared to pay 12 a different premium? 13 MR LATTER: A point of clarification: I actually agree with 14 David, we do have a risk within our portfolio with very 15 low or no deductible, and we would do exactly the same 16 as Ecclesiastical, so there is no difference between us 17 there. But we do have a large portfolio that is 18 self-insured. 19 I think you have to look at it from the point of 20 view of kind of what risk you're managing and remember, 21 you know, a lot of these risks were underwritten on this 22 basis before anybody knew that child sexual abuse was 23 going on. 24 So it kind of -- it may be that the risk transfer 25 mechanism that the organisation purchased, if they were</p> <p style="text-align: center;">Page 68</p>

<p>1 faced with the same issues today, they maybe would have 2 bought a different model and said to the insurer, "We 3 want you to take the risk round-up here, we are willing 4 to pay for that because you will then take on handling 5 the claim", but it was probably done with a lack of 6 knowledge, I guess, when they purchased the insurance, 7 is what I'm trying to say. 8 MR SKELTON: What I'm trying to understand is how consistent 9 or inconsistent the different types of insurance are, 10 and it is the same public liability insurance, but in 11 fact, how it converts in practice to the approach to 12 litigation, it sounds like it is pretty variable. 13 MS HANDYSIDE: I think you are right when it is a very 14 varied market for public liability insurance, and there 15 will be large, sophisticated organisations who run 16 children's services who have always been aware of 17 a number of the risks that that carries, and there might 18 be small, local charities with a very different 19 understanding. So the desire for help or 20 self-management can vary greatly, just as the kind of 21 cover sought can vary. 22 MR SKELTON: That's, broadly speaking, a positive feature 23 which reflects different needs of the insured, as 24 opposed to being just an inconsistency of the market 25 that's historical.</p> <p style="text-align: center;">Page 69</p>	<p>1 who would deal with these cases. In our case, we made 2 the decision about seven years ago to delegate that 3 handling to a firm of specialist lawyers with oversight. 4 So it is one or two people in RSA and a small group in 5 the specialist firm who handle these cases, because they 6 are very sensitive cases, obviously, and they have got 7 the expertise to handle that portfolio for us. I don't 8 know if that's -- 9 MR BONEHILL: So it does range. We have specialist claims 10 handlers. We have a team who specialise in this area. 11 We don't delegate any -- give delegated authority to any 12 third party firm. We use them to support us in 13 a supportive way, but the decision making sits with our 14 specialist team. 15 MR LATTER: Our model echoes the same. 16 MR SKELTON: Does that feature as a legal cost, that work 17 you do in-house? 18 MR BONEHILL: No, it is a claims handling cost, so it's not 19 part -- 20 MR SKELTON: It is hidden from the court's view, in terms of 21 the amount of work? 22 MR BONEHILL: Yes. 23 MR SKELTON: The reason I ask is there is a big emphasis, of 24 course, on proportionality, which we will come on to, 25 but if some of the costs from your perspective are, in</p> <p style="text-align: center;">Page 71</p>
<p>1 MR LATTER: Correct. It is about risk appetite and some 2 organisations would like to manage their own exposures 3 through self-handling. That's their choice as 4 a sophisticated policyholder. 5 MR SKELTON: A counterpoint to David's view about, if you 6 have a claim, if your insured notifies you of a claim, 7 what then happens in terms of your involvement going 8 forward in the litigation process after that point? 9 MR LATTER: The starting point -- I might ask others to chip 10 in -- is that, actually, when we are informed that 11 a claim has been made against our policyholder, really, 12 all of the evidence, all of the facts, sit with the 13 policyholder. So our first step would be to reach out 14 to the policyholder and say, "We need to gather 15 evidence", there is a process of gathering evidence, so 16 we would need to determine, could we have access to 17 records, could we have access to documents, could we 18 find witnesses that can give evidence in these cases? 19 So it is -- the initial step is to go back to the 20 policyholder and try to work out a way forward in terms 21 of evidence gathering. That would be our initial first 22 step. 23 MS MACKENZIE: I think it would be common as well, not 24 speaking for others but certainly for us, that it would 25 be a very small group of people in the insurance company</p> <p style="text-align: center;">Page 70</p>	<p>1 fact, hidden costs, because you have done work in-house, 2 whether that is a fair representation of the actual 3 amount of work which you have had to do as insurers and 4 insureds -- 5 MR BONEHILL: That will be a hidden cost. What won't be 6 a hidden cost is where we have to utilise the support of 7 third parties, such as lawyers, in the process. But 8 you're absolutely right, the claims handling cost is 9 hidden. 10 MR SKELTON: I presume that must mean that your legal costs 11 tend to be less than those who don't do as much work? 12 MR BONEHILL: Inevitably, yes. 13 MR NICOLSON: There would also be a cost associated with the 14 insured, because the bulk of the initial investigatory 15 work, the collection of evidence and documents, would 16 fall down to that insured organisation. 17 MR SKELTON: Are there any other aspects of the role of 18 insurers in the litigation process which the inquiry 19 ought to understand? We have heard about claims 20 handling, we have heard that it is a variable 21 involvement, but in terms of, for example, instructing 22 whether or not to settle a claim, what involvement will 23 you have in that process? 24 MR LUCK: If we are actually the people handling it, or it 25 is handled by our claims handlers using lawyers, then</p> <p style="text-align: center;">Page 72</p>

1 the decisions are usually down to the insurers, ie,
2 ourselves or our claims handlers, to agree on advice to
3 settle and at what level. But there is, with most of
4 these cases, a lot of regular negotiation and
5 interaction with our insureds or our former insureds.
6 MR SKELTON: When you say "negotiation", there is a sort of
7 tentative implication there might be some tension within
8 that discussion. Do you sometimes have the position
9 where your insured may take a different view of
10 the litigation, either want to fight it or, indeed, want
11 to settle it, than you do as the person backing it?
12 MR LUCK: Usually, the liaison is there such that any sort
13 of tension is already clarified before you actually go
14 to the table perhaps to discuss with the claimant
15 solicitors. So whilst that can arise, it's not usually
16 something which would hold up the handling of the claim.
17 MR SKELTON: Do any others have a view on that?
18 MR BONEHILL: My view is, as I have said before, the
19 decision rests solely with us. Yes, we collaborate, of
20 course we do, with our policyholders, but the decision
21 sits with us. We are not influenced by what others may
22 say.
23 MR SKELTON: Have you found that that's led to some
24 difficulties in some cases?
25 MR BONEHILL: Not particularly. I think the point Rod makes

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1 is a good one: as we're investigating these allegations,
2 we are working very closely with our policyholders, so
3 we are on a journey together, so there shouldn't be any
4 surprises when it comes to, you know, the final
5 decisions on liability.
6 MR SKELTON: In terms of the value of claims, again, we
7 heard from the claimants -- they called us earlier
8 today -- that most claims are of relatively modest
9 value, somewhere between about £15,000 up to, say,
10 £50,000. Generally, quite a low range in the personal
11 injury market. Is that your experience from your
12 perspective?
13 MR LATTE: I would issue some caution around the data.
14 Certainly, from our perspective, if you look at the
15 amount of claims that we settled in any 12-month period,
16 they are relatively low numbers, so when we are talking
17 about average and ranges, they can spike and dip
18 dramatically. If you have a very expensive claim that
19 settles in one year, your average will naturally go up
20 that year, because you don't have a large number of
21 claims that settle.
22 We recognise averages very, very carefully. There
23 are some figures that you can use, but I would caution
24 that they are not precise. There may be something, as
25 an industry, through the ABI we can look at in terms of,

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1 is there a way we can coordinate data to give to the
2 inquiry that would take away that cautionary note,
3 saying, actually, we have got a much broader spread of
4 data now, we are able to give you more exact averages
5 than one insurance company with a very discrete
6 portfolio. So maybe there is something there, but,
7 again, Peter, a caution that the systems that these
8 claims are processed against are quite archaic. They
9 were probably never set up to code child sexual abuse
10 because it wasn't in contemplation when the risk was
11 underwritten. So getting to the data would be quite
12 troubling, but there is certainly something we could do
13 to try to look to do that.
14 MR SKELTON: I think that is something we would be
15 interested in. It is probably not something we can
16 bottom out now, but if others were amenable to capturing
17 that kind of data, then that is -- broadly speaking, is
18 there a bell curve of claims and toward the range
19 I mentioned? So you would have some outlier claims that
20 are worth £250,000-plus and you will have some that are
21 worth only a few thousand pounds, but most might be
22 within that bracket of under 50.
23 MS HANDYSIDE: All I would caution against is that you have
24 four insurance companies here and there are more that
25 operate in the market, and they all, as you have already

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1 heard, have some quite different portfolios and quite
2 different businesses, and so I think it would be really
3 good to undertake a data-gathering exercise, and I heard
4 from the session this morning, concerns at the level of
5 damages for pain and suffering, loss of amenity, are
6 inadequate, and we would really welcome the opportunity
7 to participate with the inquiry in assisting and
8 gathering data so that you can look at those figures and
9 work out patterns and averages.
10 MS MACKENZIE: I absolutely support that. The one thing
11 I can contribute now, looking at how many cases we have
12 in a year that might settle for a six-figure sum, it is
13 probably about 10 cases a year for us.
14 MR SKELTON: Out of ...?
15 MS MACKENZIE: That's a good question. It is probably, in
16 a year, that might represent 10 per cent. But I would
17 need to check that and --
18 MR SKELTON: So the majority are considerably lower,
19 generally speaking?
20 MR LATTE: Yes.
21 MR SKELTON: Costs. The same question, in effect: firstly,
22 do you capture those from costs or do you have an idea
23 anecdotally, rather than in terms of the specifics, of
24 the kind of costs that you see paying to claimants if
25 they are successful?

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<p>1 MR LATTER: It is all part -- because of the lack of 2 sophistication in the systems, it is kind of all part of 3 the same ball of wax, so it is difficult for us to 4 absolutely accurately split that up. But we have got 5 a fix on costs in terms of the percentage of the overall 6 settlement from a claimant perspective. But, again, 7 I caution the data isn't precise. But we would estimate 8 based upon our portfolio that it's around 40 per cent of 9 the overall settlement gets paid to a claimant solicitor 10 and our own solicitors around about 20 per cent.</p> <p>11 MS HANDYSIDE: I think there's talk about proportionality in 12 this area and the relationship between the legal fees on 13 both sides and the amount of compensation. Certainly in 14 the inquiry's work I think that is an important area of 15 focus and investigation. I think it is important to say 16 that the insurance industry dealing with these claims 17 welcomes claimants who have access to good, experienced 18 expert lawyers in the area. That helps victims and 19 survivors understand the process and gets them the help 20 they need.</p> <p>21 It is also helpful for defendants and insurers in 22 terms of having a process and engagement that represents 23 the realities of the civil justice system.</p> <p>24 So these are very difficult cases with difficult 25 issues around evidence, and so we understand that costs</p> <p style="text-align: center;">Page 77</p>	<p>1 costs but that kind of resonates with us. As Rod says, 2 it is one extreme to another depending upon the 3 different type of claim.</p> <p>4 MR SKELTON: A point raised in the earlier session is some 5 claims will cost a lot to investigate: you have to get 6 social work experts, you may have to get a psychiatric 7 expert, as a claimant you have to pay your issue fee, 8 which could be up to £10,000, and you may have a lot of 9 documents, some of them stretching back years, and the 10 social care documents may be voluminous, running into 11 many, many files.</p> <p>12 Do you recognise -- I think this is the point you 13 were making, Rod -- that actually some claims, which may 14 be only worth £5,000, may actually require a lot of 15 legal work and expenditure? What I'm trying to isolate 16 is the difference between legitimate work from your 17 perspective and where it starts to spill into 18 illegitimate work from your perspective?</p> <p>19 MR LATTER: Actually, I think there is a lot of fixation 20 around fixed costs in this area. Zurich would take 21 a slightly different view, that, actually, if we look at 22 the process and we mend the process by making reform to 23 the current process where required, that actually that 24 will bring proportionality by a natural consequence, 25 because, if you streamline the process, you make each</p> <p style="text-align: center;">Page 79</p>
<p>1 can be high.</p> <p>2 I think, you know, as in all areas of endeavour, 3 there are differences of approach of solicitors' firms 4 who represent claimants, and, you know, a sort of 5 consistent approach to costs analysis and assessment in 6 the courts would go a long way towards ensuring that 7 appropriate levels were maintained.</p> <p>8 MR LUCK: I think the diversity of the nature of the claims 9 you are dealing with here, it is very difficult to come 10 out at what would be a standard sort of figure for costs 11 on either side. Small value claims can be just as 12 labour intensive and expensive to settle.</p> <p>13 I think in the vast majority of cases, claimant 14 costs are settled through negotiation. There are cases 15 where they're considered excessive, and assessment is 16 used, and we do see cases where substantial reductions 17 are made. But it is a very much a case-by-case matter.</p> <p>18 MR NICOLSON: I would agree. Certainly from our experience, 19 we see quite substantial variations in terms of costs, 20 and it is not unusual for us to agree a settlement and 21 then be faced with a claimant's legal bill of almost the 22 same amount, in some of the smaller cases, and we do 23 challenge those and have those reduced.</p> <p>24 I think John mentioned the figure on average around 25 40 per cent for claimant's costs and 20 per cent for our</p> <p style="text-align: center;">Page 78</p>	<p>1 side accountable for their actions, you will bring 2 efficiency to the current process.</p> <p>3 So we think absolutely focus on that to bring the 4 costs down, not just by fixing costs, because these 5 claims are very unique, each one needs to be treated 6 slightly differently.</p> <p>7 I think the other area is, we would welcome, 8 perhaps, when we can't agree on costs with the 9 claimants, access to expert cost judges in this area 10 that will hear those disputes. So it doesn't involve 11 the claimant, the survivor, it involves the dispute 12 between the claimant's solicitor and the insurance 13 company.</p> <p>14 MR SKELTON: Breaking some of that down, fixed costs, first 15 of all, on the face of it, could give certainty and 16 limits which are valuable from your perspective, but on 17 the other side could lead to an immediate unfairness if 18 you can't actually investigate the claim with experts, 19 by looking at documents. Is that accepted, generally 20 speaking, or do you think actually, never mind that, 21 there ought to be certainty of limits?</p> <p>22 MR BONEHILL: I think there needs to be an element of 23 fairness in the whole process and the victim/survivors 24 need to be supported by specialist lawyers, and that -- 25 you know, we accept -- certainly from our -- that comes</p> <p style="text-align: center;">Page 80</p>

1 at a cost. I'm not sure fixed costs is the way forward
2 for these types of claims. It is also worth just noting
3 that, although there may be a dispute on costs between
4 the insurance company and the firm, that does not
5 prevent the claim being settled. So it is a completely
6 separate negotiation to the primary claim.
7 MS HANDYSIDE: Where costs really start to escalate is when
8 litigation begins. So court fees for lodging a claim
9 have recently increased, and that must put a lot of
10 pressure on claimants and their representatives.
11 The more that can be done to establish what the real
12 issues are in a claim and what a victim and survivor
13 most wants out of the process before litigation is
14 embarked upon, that has got to be to the benefit of all
15 involved, and it is why we -- I noticed it was -- there
16 was a great deal of support in the responses to your
17 issues paper for a pre-action protocol, where, before
18 litigation starts, you aim to get the parties together,
19 have a cards-on-the-table approach, so that everybody
20 knows where they stand on the big issues, like
21 limitation and vicarious liability before anyone has to
22 spend any money on civil litigation. I think that would
23 be a universal improvement to the current civil
24 litigation process.
25 MR NICOLSON: Just to answer that, I think any review needs

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1 to look at avoidability in the process. Certainly when
2 we are dealing with some claimants' lawyers, there was
3 an element of work that's undertaken that is avoidable
4 if we could just reach some sort of a sensible agreement
5 from the outset. These are often in cases where we have
6 actually admitted liability, but there is a very
7 defensive response comes back. Of course, that just
8 adds time, adds cost, to the whole process.
9 MR SKELTON: Going back to John's point about saving legal
10 costs, which are a huge proportion of the insurer's
11 payout, where can the savings most readily be made
12 without damaging the claimant's ability to litigate his
13 or her case fairly?
14 MR LATTER: For me, I think we have talked about
15 previously -- we need access to documents and
16 information and witnesses as quickly as possible. So we
17 will encourage the pre-action protocol to really look at
18 frontloading the process, so that we absolutely get
19 those documents, so there is immediate transparency for
20 both sides of the allegations that sit around these
21 claims and how we can get to a liability decision as
22 quickly as possible.
23 I think the answer is, you hold both sides
24 accountable for putting the victim at the heart of
25 the claim and making sure that you prosecute that claim

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1 as quickly as possible on behalf of your client or, if
2 you are defending someone, you make sure that you
3 produce your response in a timely fashion so that the
4 victim's solicitor can respond to that.
5 So make this a victim-led process, to make sure the
6 information is available, and speed it up and make both
7 sides accountable for making that happen. That has to
8 be the way forward. And naturally costs will reduce as
9 you streamline the process.
10 MR NICOLSON: I think also it is about looking at the actual
11 number of documents that are required, because quite
12 often there is a significant volume of documents that we
13 have to then go through and provide, and is it strictly
14 necessary that all of the information within that bundle
15 of documents is actually required or can we narrow it
16 down to specifics that can be provided? Because a large
17 part of certainly the costs and the time from the
18 defendant organisation is in obtaining and reviewing
19 documents.
20 MR SKELTON: Do you recognise the point -- it was made
21 earlier by Mr Garsden on behalf of ACAL -- that it can
22 sometimes be that one document that provides you, as
23 a claimant, with the evidence to proceed with your
24 claim, and the problem with that is that you need to
25 find it, and sometimes --

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1 MR LUCK: I think that's exactly right. Until we have
2 actually reviewed all the documentation, we don't know
3 exactly what is within that documentation. So that can
4 be a problem.
5 MR SKELTON: We have heard about cost savings, about
6 particularly the pre-action idea of getting a protocol
7 and having agreed terms for providing documents and so
8 on. Where do you see costs being effectively wasted or
9 where costs are excessive from your perspective, from
10 the claimants' side, if at all?
11 MR LATTER: It is difficult to generalise because there
12 are -- it depends on the claimant law firm you are
13 dealing with. We feel that those firms that have
14 experience in this field are very aware of the process
15 that one needs to go through to prosecute a claim. We
16 tend to work better with those firms in terms of
17 limiting the document disclosure or limiting the issues
18 and we find that their awareness of the process allows
19 us to move forward much more quickly, where others maybe
20 take a little bit longer to arrive at the same place.
21 It is very difficult to generalise because I think
22 it does depend on which claimant firm you are dealing
23 with. What we would see from a pre-action protocol is
24 to say, actually, we can work with the claimant
25 solicitors in terms of defining what should be in the

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<p>1 pre-action protocol and agreeing, when things fall 2 potentially outside of that, allowing some flexibility. 3 My understanding through Master McCloud is there are 4 already steps afoot between the claimant solicitors and 5 defendant solicitors to look at that and we would 6 encourage this inquiry to engage with Master McCloud to 7 see whether she can provide that umbrella to move that 8 work forward and potentially push it to the CJC and ask 9 them to put their stamp on it and encourage defendants' 10 and claimants' solicitors to make this very much 11 a victim-led process and to really focus on the issues, 12 accepting that there are times when there needs to be an 13 extensive review of the documents, as Rod said. That is 14 why we are not going towards fixed costs but an improved 15 process. 16 MS MACKENZIE: To add to that point, I think the point of 17 the protocol as well, with that engagement between the 18 parties, you can agree through each phase, "We are going 19 to be reviewing these documents, it is likely to take 20 this period of time", and that kind of understanding 21 between the parties of the process you are going 22 through. I think the difficulty on occasion is that 23 nothing happens on the case for six, nine months and 24 you're not getting any response as to next steps, and 25 that might be because there is a very rigorous review of</p> <p style="text-align: center;">Page 85</p>	<p>1 victim/survivor needs in that case, I think that is key. 2 MR LATTER: To balance the point, there may be victims who 3 want to get through the process very quickly, receive an 4 apology and move on with their lives. So I think as 5 Carolyn said, you need a balance between the two. 6 That's why I say it has to be victim led and an 7 appreciation of that. 8 MR SKELTON: For those of you who have been involved with 9 industrial disease claims, have the protocols that were 10 brought in for that area of litigation, which is huge 11 and persistent now for many, many years, have they led 12 to the kind of improvements that one might hope would 13 occur with a protocol for sexual injury cases? 14 MR LUCK: I think certainly they have because it has enabled 15 better production of documentation, better presented 16 claims, which does enable easier handling. I think that 17 is the opportunity for these abuse claims to go down 18 a similar route, not necessarily based on any existing 19 protocols, because it warrants its own consideration, 20 but, as John said, if you can actually get better 21 disclosure, better claims presented, from the outset, 22 I don't think you can have a situation where you can 23 expect to reduce the costs and the documentation reviews 24 across all claims, but you may actually reduce the 25 number of claims where that work is required.</p> <p style="text-align: center;">Page 87</p>
<p>1 documents going on, but that kind of lack of 2 transparency in the process probably doesn't help with 3 the overall cost and time spent. So I think the 4 protocol would give that greater transparency and it 5 would be clear the steps that were being taken and 6 whether those steps were actually necessary. 7 MR SKELTON: We are getting close to the limit, but the 8 countervailing point might be that, actually, for some 9 victims and survivors, maintaining an expeditious 10 engagement in the legal process is, in itself, quite 11 difficult. 12 MS MACKENZIE: Yes. 13 MR SKELTON: They are not often like clients who are keen to 14 crack on. They need to take their time. They may 15 disappear for a while. They may come back in. The 16 difficulty, I suppose, with what you are saying, keeping 17 the pressure on, is it could penalise those who can't 18 handle it. 19 MS MACKENZIE: It doesn't have to be keeping the pressure 20 on, it is more about transparency. So if that is the 21 case and there needs to be a period of time taken, you 22 know, before someone is ready to come back and proceed, 23 then I think that's okay. 24 MR SKELTON: You need to know that. 25 MS MACKENZIE: Understanding that, that that is what the</p> <p style="text-align: center;">Page 86</p>	<p>1 MR SKELTON: Thank you. We have heard a lot about 2 pre-action protocols. I should say that is one of 3 the things we will be looking at specifically tomorrow, 4 I anticipate, when we look at reforming the civil 5 justice system as well as the more radical option, which 6 we haven't discussed, which is getting rid of it and 7 replacing it with a scheme. From my perspective, that 8 was very helpful. I don't know whether the panel would 9 like to ask any supplementary questions? 10 THE CHAIR: Yes, one. I'm not sure if it is going to be 11 covered tomorrow, Peter, but can you give an indication 12 of what the criteria are that you apply to this when you 13 settle claims to the level of payment to be made? 14 MR LATTER: So how do we agree a settlement value? 15 THE CHAIR: Yes. 16 MR LATTER: We will traditionally be led by the judiciary, 17 so England and Wales are based upon case law, and 18 settlements will be publicised. You also have the 19 judicial guidelines around damages. So we would tend to 20 follow the pattern of previous settlements based around 21 the facts in any individual case. If that is 22 unsuccessful, then the case will go to the judiciary and 23 they will set the level of damages as appropriate. 24 MR NICOLSON: In effect, it is like a tariff with various 25 levels and bands. So there is a tariff at a lower level</p> <p style="text-align: center;">Page 88</p>

<p>1 and an upper level. It would very much depend upon the 2 nature and extent of the injuries that have been 3 sustained. 4 THE CHAIR: Does it include frequency? 5 MR NICOLSON: Yes, it would include frequency and the nature 6 of the injury that's occurred. 7 MS HANDYSIDE: Is that something you're talking about 8 internally that you have? 9 MR NICOLSON: No, sorry, the Judicial Studies Board Guide, 10 that has bands within the guide. 11 MR SKELTON: Are there those out of the table area who would 12 like to ask anything finally before we close the 13 session. 14 CORE PARTICIPANT: I would like to ask, we had a lot of 15 figures about people who were coming forward whose 16 initial claims were dismissed, as it were, or not able 17 to go forward for various reasons. Of those ones that 18 you do take forward, could I ask how many are successful 19 on an average percentage? 20 MR LUCK: The difficulty on that is that the statistics -- 21 we simply don't have it to hand. There is nothing 22 within our systems which would really produce a factual 23 answer, I'm afraid. 24 MR SKELTON: Is that something where we could try to 25 interrogate the data in due course?</p> <p style="text-align: center;">Page 89</p>	<p>1 solicitor. 2 MR LUCK: The number. 3 MR FRANK: Two things. One is, we have seen some evidence 4 from the claimants' point of view that one difficulty 5 they have is actually establishing whether there is 6 insurance, who holds it and what its values may be. 7 One suggestion could be that there ought to be 8 a register of insurance that may answer to claims of 9 this kind. Have you got anything to suggest about how 10 that can be done, whether it should be done, and who 11 should do it, if it should? 12 MS MACKENZIE: So in employer's liability there is precedent 13 for that, and we have something, ELTO, which might have 14 been mentioned already which is the Employers' Liability 15 Tracing Office. The same thing doesn't exist for public 16 liability. I have to say, in our experience, where 17 I think, quite a long time ago, organisations understood 18 the need to retain employers' liability documentation 19 around their insurance, that probably hasn't been 20 understood as well with public liability. So 21 undoubtedly, I think there are gaps in what people have 22 retained and their ability to demonstrate what covers 23 they have -- to trace what covers they had. So 24 something similar in public liability I think is 25 something certainly worth considering.</p> <p style="text-align: center;">Page 91</p>
<p>1 MR LATTE: As part of the data trawl that we could conduct 2 through the ABI, we could certainly look at that. The 3 problem we have, as an organisation, is we didn't really 4 start to record child sexual abuse in this more granular 5 way until about 2013. So the historical part that's 6 already taken place, Peter, will be difficult to go back 7 and capture. 8 MR SKELTON: Roughly, do more cases settle with a payment of 9 damages than not? 10 MR BONEHILL: Certainly from our side, that is very much the 11 case. A high percentage we settle with a payment. 12 I think that is reflected in some of the litigation 13 rates we have, which are very low. 14 MS HANDYSIDE: I think the gentleman was -- in the first 15 session this morning, there was talk about, from the 16 claimants' representatives, legal representatives, about 17 not taking cases on. I think it would be really helpful 18 if the inquiry had a better understanding -- I don't 19 think that understanding exists at the moment -- about 20 when and why claims fall away so the ABI and the 21 insurers here can assist in, insofar as their records 22 allow and examine their records to try to establish 23 percentages of settled cases. 24 MR LATTE: We may not know why they are discontinued. It 25 may be an issue between the client and the claimant's</p> <p style="text-align: center;">Page 90</p>	<p>1 MS HANDYSIDE: So there is a precedent for it, if you like. 2 I think there are questions about how comprehensive it 3 would be and how much further it would actually take 4 things, in the sense that, if there are difficulties in 5 individual circumstances establishing what the insurance 6 position was, whether there was insurance and what form 7 it took, that exact problem might be faced in furnishing 8 a register of policies, but it's certainly something to 9 not rule out as a helpful tool. 10 MR FRANK: Again, if I might just take as an example, for 11 the BBC, which you had part of the primary cover for, 12 along with several other companies, it might be 13 difficult for a claimant to know which company to look 14 to in terms of any insurance cover. If there were 15 a register, the claimant's solicitor would have an 16 easier task and it would save costs upfront in doing the 17 research on that issue. 18 MS MACKENZIE: Correct, yes, that's right. I think where an 19 organisation can trace an insurer for a period, that 20 insurer can then facilitate the process of identifying 21 other insurances in other periods. But I do agree with 22 you, yes, it would be easier. 23 MS HANDYSIDE: And I think with restructurings, various 24 restructurings of local authority, care systems, there 25 are additional difficulties in that area, and that is</p> <p style="text-align: center;">Page 92</p>

<p>1 perhaps something that could be mapped out. 2 MR FRANK: Thank you. A separate subject, if I may: can you 3 tell us anything at all about the prevalence of a sexual 4 molestation exclusion clause which, as I understand it, 5 has become more prevalent since the allegations in 6 relation to Jimmy Savile. 7 MR LATTER: I'm not aware of that in our organisation. 8 MR BONEHILL: We certainly don't do that. 9 MR FRANK: If you do learn anything, perhaps you will let us 10 know. 11 CORE PARTICIPANT: Two words that keep coming up, one is 12 "evidence", the other one is "witnesses". If I get 13 attacked in the street, there's witnesses. How do I get 14 the witnesses? Very rare you will find a witness. 15 MR SKELTON: This is a point about dealing with the merits 16 of the claim when it comes to the court process. 17 CORE PARTICIPANT: Being told that I can't do it because 18 I've got no witnesses. 19 MS HANDYSIDE: I think the gentleman highlights a really 20 important point about how very difficult these cases 21 are, because of the context in which they took place, 22 and of course he is right that that is one of 23 the difficulties for claimants in bringing cases, and 24 particularly when they're historic cases, you're reliant 25 on memories from many, many years ago from anyone that</p> <p style="text-align: center;">Page 93</p>	<p>1 leader counsel for the accountability and reparations 2 investigation. 3 Opening comments by Facilitator 4 MR SKELTON: This session is the first one where we have 5 brought together claimant and defendant stakeholders, 6 which is, I hope, going to generate some useful 7 discussions. The main topic is limitation and how that 8 affects civil justice access to justice and indeed the 9 process itself. 10 There are four broad things I would like to elicit: 11 the importance of limitation now, as in the present day. 12 Historically, of course, we know it has been a feature 13 of litigation, satellite litigation, for decades, many, 14 many years. The first question, really, is how 15 important is it for a claimant now starting to litigate? 16 I would like to know the defendants' perspective on 17 it, its value, whether or not it is used as a shield or 18 a sword, and the claimants' perspective likewise, 19 whether it is seen to be a barrier for legitimate claims 20 or a fair way in which the courts can now actually 21 assess whether claims should proceed on the ground of 22 fairness. 23 We will touch upon at the end, if we may, issues of 24 reform, although, as you are probably all aware, reform 25 is very much on the table for tomorrow's seminars, not</p> <p style="text-align: center;">Page 95</p>
<p>1 can shed any light on the events in question. 2 MR SKELTON: Thank you very much. We will take a slightly 3 shorter lunch because we are still a little behind, I'm 4 afraid, so about 45 minutes. 5 (12.54 pm) 6 (The short adjournment) 7 (1.47 pm) 8 Session 3 9 Welcome by Chair and opening comments 10 THE CHAIR: Good afternoon. I appreciate that nearly 11 everyone here now has been here all day so far, but just 12 for the sake of those who may be listening, I want to 13 welcome everyone again to the first seminar of 14 the independent inquiry into child sexual abuse and 15 again to introduce my colleagues here, 16 Drusilla Sharpling, Ivor Frank and Professor Sir 17 Malcolm Evans. 18 I won't repeat what I have said this morning, twice, 19 but just to say that this will be included when the 20 transcript is uploaded onto the inquiry website, and 21 just to confirm, of course, what I said then, that the 22 panel and I are looking forward to further open, lively 23 and respectful discussion amongst yourselves in a number 24 of key areas relating to the civil justice systems. 25 I will now hand you over to Peter Skelton QC, the</p> <p style="text-align: center;">Page 94</p>	<p>1 for today, but I think it will be helpful to have a few 2 ideas about potential reform to the limitation law 3 today, just to inform tomorrow's discussions. 4 Can I start by asking you to introduce yourselves? 5 I know most of you -- perhaps all but one, in fact, have 6 been here before, but if you could introduce yourselves 7 again, that would be great, thank you. 8 Introductions 9 MR LUCK: Rod Luck, Municipal Mutual Insurance. 10 MR GARSDEN: Peter Garsden of Simpson & Millar and president 11 of the Association of Child Abuse Lawyers. 12 MR BRIDGE: Jonathan Bridge, partner from 13 Farleys Solicitors' abuse department. 14 MS JEFFERSON: Paula Jefferson, a partner from BLM. 15 MS HANDYSIDE: Philippa Handyside, I work for the 16 Association of British Insurers, the ABI, which is 17 a trade association representing insurance companies and 18 long-term savings companies in the UK. 19 MR SCORER: Richard Scorer, Slater & Gordon, lawyers. 20 MR LATTER: John Latter, I work for Zurich Insurance Company 21 in the UK. 22 MR ENRIGHT: David Enright, I'm a partner with Howe & Co 23 solicitors, representing the Forde Park survivors, the 24 Stanhope Castle survivors and Survivors of Organised 25 Institutional Abuse.</p> <p style="text-align: center;">Page 96</p>

1 MR SKELTON: Thank you. Can I ask you all to speak up
2 again? I know it is quite tempting, in this relatively
3 informal format, to speak at a conversational level, but
4 we do need to amplify a little bit, if we could.
5 Open discussion
6 MR SKELTON: Can I ask, first of all, I am going to put it
7 to you, Peter, the importance of limitation, because
8 I know you have been involved with, historically, many
9 cases over the years that have involved limitation
10 issues. Where are we now in terms of its importance for
11 claimants?
12 MR GARDSEN: It is the fundamental fighting ground in most
13 of these cases. I think, from a defendant's point of
14 view, there is something somewhat unattractive about
15 suggesting that the allegations are untrue. I think it
16 is probably far more appealing for them to say that the
17 case is out of time and it is not possible to have
18 a fair trial. So generally speaking, if we win on
19 limitation, time delay, then the case often settles.
20 Generally speaking, in my experience, defendants
21 will raise the issue of limitation in every case. In
22 some cases, we even have a situation where liability is
23 conceded but limitation is defended, which is perhaps
24 a less attractive position.
25 It is used as a bargaining tool sometimes to argue

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1 that a case should be settled at a nuisance value -- and
2 when I say "a nuisance value", that is usually between
3 £1,000 and £2,500.
4 The subject of limitation, without going into too
5 much detail, is intimately tied in with the case itself,
6 for the simple reason that, often, when a child is
7 abused, after the abuse, he or she having been groomed,
8 he is silenced with threats, sometimes, not
9 infrequently, of violence to himself and members of his
10 family. That threat, as well as the spell that the
11 abuser weaves over the child, inevitably keeps him
12 silent for many years.
13 There are examples of the child trying to complain
14 about it and not being believed, which only reinforces
15 his or her belief that it wasn't worth complaining in
16 the first instance.
17 When we take instructions from individuals many
18 years later, they often cite that as a reason for
19 remaining silent, as well as the obvious issues of shame
20 and embarrassment.
21 Therefore, to try limitation, or to defend on the
22 basis of limitation, is to not only take a technical
23 point, but also to criticise the silence of
24 the individual, which is all tied in with the sequelae
25 of abuse and the psychological profile of the claimant.

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1 That is why in some jurisdictions it has been
2 abolished for sexual abuse cases, which are, I think, in
3 a different category to physical abuse cases by the
4 nature of the shame and embarrassment attached to the
5 abuse itself, and why in other jurisdictions there has
6 been a model of good practice, that limitation should
7 only be tried sparingly in exceptional cases, whereas --
8 certainly that is the case in Australia. Whereas in
9 England, it is routinely tried in every case, in my
10 experience, or in most cases.
11 MR SKELTON: Thank you. You covered a lot of ground there.
12 Quite a few of the things, I am going to pick up later.
13 But the key point from my question is, it is still very
14 important, notwithstanding that some of the major cases
15 on limitation were heard now some years ago, it is still
16 a major issue for claimants' solicitors.
17 MR GARDSEN: It is.
18 MR SKELTON: So far as defendants are concerned, you have
19 heard from the claimants' side that it is still a major
20 issue. I have to say, from some of the responses in the
21 issues papers, I didn't see it as being quite so square
22 and centre. Paula, do you have a view on that?
23 MS JEFFERSON: Limitation is raised in all cases, in that it
24 is raised in the letter of the claim. So for
25 understandable reasons, when a letter of claim is

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1 received, the claimant solicitors will say -- will raise
2 the issue of limitation, because they are rightly
3 concerned to ensure that they don't do anything that
4 will prejudice their client's ability to proceed with
5 the claim.
6 So limitation is flagged in all cases for that
7 reason. But from my experience, in reality, it is
8 rarely an argument that is sustained. It is something
9 that, in investigating a case, will be considered and
10 will be dealt with very quickly.
11 MR SKELTON: I didn't set the scene for limitation. For
12 those that don't understand it -- I will be corrected by
13 the experts around the table -- limitation is a way in
14 which parliament has decided to protect defendants from
15 stale claims that are of a certain vintage. So the
16 general rule is that a claimant has three years from his
17 or her abuse to initiate a claim and, after that, it is
18 subject to the court's discretion and there are
19 particular criteria which the court must apply when
20 exercising its discretion. But you can't guarantee you
21 are going to succeed on that, you have to wait for the
22 trial judge to take a view. Broadly speaking, that is
23 the position.
24 MS JEFFERSON: Yes. That assumes that all cases go to
25 trial, and, in reality, very few do.

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<p>1 MS HANDYSIDE: Can I add one really important qualification: 2 the three years doesn't start to run until the victim or 3 survivor reaches the age of 18, so it is not three years 4 from the date of abuse. 5 MR SCORER: Can I just make an observation on what Paula has 6 just said? I think it is fair to say that I think Paula 7 and those she represents have generally taken 8 a reasonable stance on limitation. That is not 9 a universal stance taken by defendant insurers. Some of 10 them, or those who represent them, do fight the 11 limitation issue very hard. It may not be amongst those 12 in this room, but that is the reality, that there are 13 defendants who fight this issue and fight it on a highly 14 technical level. It is extremely frustrating and 15 difficult for claimants, of course, who want to have 16 a sense that the substantive allegations that they are 17 making are being addressed, and what they get is a legal 18 response that says, you know, "We are taking a point on 19 time limits". 20 So whilst I think Paula is correct in characterising 21 her own approach to it and that of those she represents, 22 I don't think that is a universal position. 23 MR SKELTON: Do you see the law, as it stands, as having 24 been clarified on limitation and now what you are 25 dealing with is, how strong is the defence on limitation</p> <p style="text-align: center;">Page 101</p>	<p>1 to extend. 2 MR GARDSEN: Indeed, because although we are suing an 3 assault, it is regarded as negligence and the time 4 limit, date of knowledge has gone out of the window, 5 that's deemed to be when the offence takes place, and we 6 are down to section 33 discretion, which is the way it 7 is judged. 8 I'm not saying that that is a wrongful or bad 9 interpretation of the law, but it has been twisted to 10 produce a certain result away from what the 11 Limitation Act intended, to the extent that you can't 12 really bring the argument now, because it is an 13 objective test, that the claimant wasn't aware of his 14 right to bring a claim, because it is an objective test 15 and date of knowledge passes at the time of the offence. 16 So date of knowledge has gone out the window. The 17 section that deals with assault on the limitation of six 18 years has really gone out the window, and we are down to 19 one section, which is section 33. 20 So the law has been twisted. The case of 21 Stubbings v Webb decided that personal injury includes 22 intentional assault, whereas, until Hoare, it didn't and 23 you had a crazy situation where you could bring a claim 24 against an institution in negligence but you couldn't 25 bring a claim against an abuser until the law changed in</p> <p style="text-align: center;">Page 103</p>
<p>1 and what view is the judge going to take on it, rather 2 than a technical point of limitation? 3 MR SCORER: Well, of course -- I have been dealing with 4 abuse cases for 20 years, and in that period -- of 5 course, much of that period there was satellite 6 litigation in relation to limitation. There is no 7 question that, since 2008, with the decision in the 8 Hoare case, that the law has been clarified to 9 a considerable extent. So the parameters of the law are 10 now fairly clear, but it is not always straightforward 11 as to how they will be applied in individual cases. 12 MR GARDSEN: But the law is certainly a legal contradiction. 13 I mean, whilst it is clear, it's been twisted and 14 manipulated to produce some sort of justice for 15 claimants, frankly. It is not in a satisfactory state. 16 MR SKELTON: What do you mean by that precisely? What's 17 been manipulated? By the judges, in order to favour 18 claimants, do you mean? 19 MR GARDSEN: I think there was a recognition in Hoare that 20 victims of sexual abuse have this psychological element 21 that prevents them from coming forward until a later 22 date. The law was twisted so that, although we are 23 meant to be suing an assault, the time limit for 24 assault, which is six years, is largely redundant. 25 MR SKELTON: And it is a fixed time limit without discretion</p> <p style="text-align: center;">Page 102</p>	<p>1 2008. 2 MR SCORER: I think I would add to that, and I think it is 3 quite an important point, that what Peter is really 4 alluding to is the fact that the interpretation of 5 the law and the way the law has been applied has been 6 very dependent over the years on the court's 7 interpretation of it at any given time, and those of us 8 who have done this for, as Peter and I have, the best 9 part of 20 years, we have seen the court's 10 interpretation of the Limitation Act in these kinds of 11 cases change in many different ways. That is, again, 12 very difficult for claimants, if you advised a claimant 13 in 2006, you know, and then you're advising them three 14 years later and giving them wholly different advice. 15 MR SKELTON: David, I think you have been waiting, and then 16 we will get to more defendants. 17 MR ENRIGHT: For the very good reasons we heard this morning 18 from Karen Gray and Nigel O'Mara, it is like an accepted 19 fact that the limitation in child sexual abuse cases is 20 just inappropriate for the offence, because you have 21 a limitation in certain circumstances where we all know 22 the majority of people will not report within that 23 timescale. Yes, there has been movement in relation to 24 how limitation is interpreted by the courts, but that is 25 only known to sort of a select few, and we have heard,</p> <p style="text-align: center;">Page 104</p>

1 as a result of your question, Mr Frank, this morning,
2 how few practitioners there are in this field.
3 If you are a quite well educated abuse survivor and
4 you do a little bit of research yourself before
5 considering, "Should I do anything?", one of the first
6 things you will come across, of course, is there is
7 a limitation, and you will think, "Well, that's me ruled
8 out". So it is, again, that kind of chilling effect, it
9 is a limitation standard we know shouldn't be there, it
10 is not used in other jurisdictions, there are -- if we
11 took away limitation, it wouldn't lead to a flood of
12 unmeritorious claims because the courts have the power
13 to order significant sanctions against dishonest claims.
14 So there is no real downside to removing a limitation,
15 certainly not for survivors, and I do not think it would
16 be particularly onerous to defendants.
17 MR SKELTON: Let's, again, park that issue, because that has
18 fed us straight to the "should it be reformed" point.
19 MR BRIDGE: Can I just add to what David said and carrying
20 on from what was said this morning, probably the major
21 consideration for a claimant solicitor, when deciding to
22 take a case on, is limitation. So it is not just the
23 defendant's attitude once you send the letter of claim.
24 Quite often the cases aren't even getting to that stage
25 because claimant lawyers are still interested in getting

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1 paid, it is still a business, and old cases, quite often
2 you will reject, purely because of the limitation,
3 particularly the failure to remove cases where you have
4 a client in their 40s or 50s, alleging Social Service
5 negligence 30 years ago and you can't find an
6 independent social work expert with the requisite
7 knowledge to report on that case.
8 MR SKELTON: So it is a gateway problem, in fact, to get the
9 claim started. What other factors beyond getting an
10 expert who can comment on an old claim are a problem for
11 you? How do you predict where the court is going to go
12 ultimately on exercising its discretion? What are the
13 factors that you think really bear upon that issue?
14 MR BRIDGE: The issues that are commonly raised by
15 defendants are witnesses who are no longer available.
16 You may have social workers, who were involved in the
17 case 30 years ago, who are no longer working with the
18 council, or even alive. Obviously, on our side, if
19 there is a conviction, it helps enormously, but it's
20 possibly lack of documents, if the Social Services
21 records have, for some reason, gone missing. These are
22 the issues that you are asking your clients about, if
23 they have the knowledge of that, when they first come to
24 see you, but limitation is -- the older it gets, the
25 less likely we are to take these cases on, with the

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1 limitation as it presently stands.
2 MS HANDYSIDE: I think Paula is right, that limitation is to
3 the fore in claims for historic child abuse for obvious
4 reasons, and I think that to call it a technical defence
5 is not realistic, because what limitation is about is
6 about ensuring that there is a fair way of assessing the
7 allegations that have been made and whether the evidence
8 is there for the process of validation.
9 So limitation, our information from the insurers
10 that are members of the ABI, is that limitation is
11 pursued as a positive defence in a very small number of
12 cases, and there are very few cases that go to trial
13 each year on limitation.
14 MR SKELTON: But is it used to press solicitors or
15 claimant -- their clients into taking a lower level of
16 damages? In other words, it is still used as a sword
17 even if, ultimately, you are not going to wield it at
18 trial.
19 MS HANDYSIDE: In recent years -- if you are a victim or
20 survivor who is bringing a claim, I can see that having
21 limitation as a live issue is another barrier that you
22 face in seeking compensation and redress, but in
23 discussions about settlement, the run of case law on
24 limitation and the factors about when cases will be
25 allowed to continue are reasonably well understood by

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1 claimant representatives and defendant representatives
2 in this area, and so there are the very difficult cases
3 around the edges, and those are the ones that sometimes
4 find their way to court, but there's a large degree of
5 commonality about whether limitation is a point that's
6 going to cause trouble in a case --
7 MR SKELTON: Peter made the point, though, that liability
8 can be admitted, but it is still pursued. Now,
9 limitation is not just about when you initiate your
10 claim, it is also about how fast you pursue it once you
11 have gone to see your solicitor. So presumably there
12 can be a residual limitation defence, even at that late
13 stage, which has nothing to do with the reasons people
14 didn't go and see someone.
15 MS HANDYSIDE: Of course there are two big issues in these
16 claims. One is the circumstances of the abuse and
17 liability; and the other is, what is the harm and the
18 loss arising out of that liability.
19 So many cases, that is the really thorny issue
20 that's being addressed. So because liability is clear
21 and established, it wouldn't necessarily mean that there
22 is agreement about what the appropriate compensation was
23 in a particular case. So a case where liability has
24 been admitted is not necessarily complete.
25 MR LATTER: Peter, could I just make a point? David said

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<p>1 that if limitation is upheld, it means that the claimant 2 is dishonest. That is not true. I want to put that on 3 the record. It means that -- 4 MR ENRIGHT: You must have misheard me. I said if 5 limitation was removed, there wouldn't be a flood of 6 claims because dishonest claims would be very heavily 7 penalised by the courts. 8 MR LATTE: I think dishonesty is a completely separate 9 issue. If you are talking about fraud, then I think we 10 would all agree that fraudulent claims shouldn't be 11 pursued. If a claim is struck out for limitation, it 12 doesn't mean the claim is fraudulent, it means that the 13 court, on balance, doesn't believe a fair trial can take 14 place. 15 I think that is our concern, that the only area that 16 we would have any concerns, and that's demonstrated by 17 the amount of claims that we actually take to trial on 18 limitation in Zurich, is incredibly small, because -- 19 I hope I follow in Richard's group of insurers that 20 actually do take a view that limitation generally falls 21 away and we use it very, very sparingly, and I think it 22 is only when we have concerns around prejudice to the 23 policyholder or access to a fair trial that we would 24 even consider running a limitation case to trial, 25 because the law is well established, there is no value</p> <p style="text-align: center;">Page 109</p>	<p>1 used to put some pressure on the claimant and then 2 withdrawn, or is it the case that in fact you have to 3 just plead it at the start of a case and then see if, in 4 fact, it's got any substance to it? 5 MR LUCK: I think it is general practice and it is necessary 6 that in the response to the letter of claim where 7 limitation is there, which, given the description we 8 have had about how limitation runs, will be in most 9 cases. But following on from that, we do move on, on 10 cases where they're appropriate to settle, to the 11 settlement process without going back to limitation. So 12 I don't think it can be said that it is always used as 13 a sword to use in negotiations. 14 MR LATTE: Peter, what we have seen in our portfolio is 15 that the gap between abuse and notification is growing, 16 and that's very understandable. So we are not 17 questioning that. 18 But 50 per cent of the claims that are now notified 19 to Zurich, the abuse took place longer than 10 years 20 ago. That is understandable, because of the profile of 21 the offences. 22 But that puts us in a difficult position, and, 23 therefore, limitation, in many cases, has to be 24 a consideration and, as Rod quite rightly says, during 25 investigation, those issues fall away and we move to</p> <p style="text-align: center;">Page 111</p>
<p>1 in us running a limitation argument that is doomed to 2 fail, and we, as Zurich, wouldn't use it as a technical 3 argument to negotiate settlement. 4 MR SKELTON: Can I ask Rod to chip in? Rod, you have been 5 very quiet so far. You are the other insurer around the 6 table. Do you have a view to add to that? 7 MR LUCK: I would think and hope that our position is very 8 similar to John's. The organisations are connected in 9 certain ways. As Philippa said, at the outset of 10 claims, limitation in response to the letter of claim is 11 very likely to be raised. We are often very open to 12 agreeing moratoriums on limitation whilst the claim is 13 investigated and, again, at the end of the day, I would 14 say it is just a very few number of cases where 15 limitation is pursued to trial, and particularly in 16 cases where perhaps liability has been admitted. 17 I can't say there's not a case like that. I can't 18 recall one offhand. But each of these cases has a large 19 number of separate factors, and in any negotiation, 20 limitation may be an outstanding issue which is taken 21 into account on certain cases amongst very many other 22 matters of that particular case. 23 MR SKELTON: Is it, though, sometimes used from the outset, 24 even in the knowledge that ultimately you are not going 25 to push it in front of the judge? In other words, it is</p> <p style="text-align: center;">Page 110</p>	<p>1 settlement as quickly as possible. 2 MR SKELTON: Richard and then David. 3 MR SCORER: I wanted to slightly challenge the 4 characterisation of the law that Philippa and John have 5 sort of presented, because, of course, the question of 6 whether it is possible to have a fair trial, that is one 7 part of the test that the courts apply and, for my part, 8 I accept that it is reasonable for that test to be part 9 of the mix. But the courts are not solely looking at 10 that. The test is not: can we have a fair trial? The 11 test is whether it is fair, in all the circumstances, 12 for the trial to take place. 13 So the courts don't only look at fairness of trial 14 and whether that is possible, they also look at delay by 15 the claimant and whether they consider that the claimant 16 is guilty of some culpable delay, which is an extremely 17 subjective issue, which, in my experience, different 18 judges interpret in different ways, which adds to the 19 uncertainty around the application of the law. 20 I personally accept that, even if limitation -- even 21 if the time bar were abolished, as is likely to happen 22 in Scotland, the question of whether you can have a fair 23 trial is still something that has to be considered by 24 the courts, for Human Rights Act reasons and other 25 reasons.</p> <p style="text-align: center;">Page 112</p>

1 One of the difficulties with the present law is that
2 that is not the test. The test is also whether the
3 claimant has been guilty of some delay, and that's
4 a highly subjective judgment.
5 MR SKELTON: There are two aspects of the fairness argument,
6 then. One is, is it inherently possible and fair to try
7 this case, to come to a positive finding that abuse has
8 taken place; and the second is, is it fair to have
9 a trial at all, in circumstances where it's taking
10 a long time to come to court --
11 MR SCORER: Correct.
12 MR SKELTON: -- and you have not acted quickly. Does that
13 latter bit put a claimant under quite a lot of personal
14 pressure not just to explain why he couldn't disclose
15 his abuse, but why he has acted slowly or ...?
16 MR SCORER: It certainly puts a claimant under pressure to
17 explain the reasons for delay. They clearly have to do
18 that. But it also puts claimants under pressure to
19 embark on proceedings more quickly. And sometimes, if
20 defendants -- I'm not suggesting that the defendants in
21 this room would do this, but there are certain defendant
22 insurers, and those who represent them, who refuse
23 limitation moratoriums. Again, in those circumstances,
24 claimants are forced to issue proceedings perhaps sooner
25 than they would otherwise have done.

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1 MR ENRIGHT: The insurers would be failing in their duty to
2 their clients if they didn't take limitation. It is
3 there and they are going to use it. But very helpfully,
4 from John from Zurich, we have statistical information
5 saying that 50 per cent of the claims received are over
6 10 years old. So what we know as a fact is the
7 limitation as it stands does not fit the crime and has
8 to be changed based on the statistics. We know also,
9 from what Jonathan has said and from what we know, that
10 there is a chilling effect of limitation from before you
11 see a solicitor, from when you first see a solicitor and
12 throughout the whole claim. It has been gotten rid of
13 in other jurisdictions. The only way to deal with this
14 is to remove it or seriously weaken it. Otherwise, you
15 would be failing in your duty if you didn't raise it
16 with your clients.
17 MR GARDEN: I think it is interesting to look at what they
18 did in -- it is either Victoria or New South Wales in
19 Australia, where they abolished limitation in sexual
20 abuse cases. Whilst they did that, there is a procedure
21 called the strike-out procedure, whereby in exceptional
22 cases, and they are exceptional cases, which are very,
23 very old and it is impossible to have a fair trial, it
24 is possible for the defendants in those cases to apply
25 for a strike-out.

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1 So abolishing it doesn't actually take away the
2 rights of the defendant to deal with appropriate cases,
3 but it stops them running it technically as a way of
4 beating down the claimant routinely, which is certainly
5 my experience. I accept what the defendant insurers say
6 around the table, but that is certainly not reflective
7 of practice in my firm.
8 MR LATTER: If you remove limitation, which is an option for
9 the inquiry to recommend, and we accept that and we
10 understand the issues there are for claimants, the
11 concern is that it will create some kind of vacuum
12 because there has to be something to follow along. In
13 an area where we have pretty much settled law, we have
14 a judiciary that understands how to apply discretion,
15 maybe not perfectly, but can be encouraged to do it in
16 certain ways, the question is, if we remove limitation,
17 what replaces it, and would that potentially result in
18 further satellite litigation, until everybody gets
19 comfortable with the new regime? That is a concern.
20 I don't know whether that would ultimately come to
21 pass, but you are taking away something that is known
22 and replacing it with something else.
23 MR SKELTON: One of the things the insurers have not
24 mentioned is the certainty point, the sort of
25 open-endedness. Is that because you are, in this area

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1 of your insurance, expecting cases to be so old that in
2 fact you can't really -- limitation, in the conventional
3 sense, wouldn't normally apply? These cases are going
4 to go back to the 1950s. I think June '54 is the oldest
5 case you could possibly bring under limitation. So, in
6 fact, the idea of certainty from limitation isn't really
7 such a big deal.
8 MR LATTER: I think it will come back to the points around,
9 you know, we use it sparingly because it is there as
10 a protection where we believe our policyholder has been
11 prejudiced or may not be able to have a fair trial,
12 accepting Richard's point earlier around the
13 subjectivity.
14 That is why its use in terms of trials for
15 limitation have fallen in number over recent years.
16 When we raise limitation arguments, in many cases the
17 claimant is represented by an expert claimant solicitor
18 who understands the law around limitation and can advise
19 that client that, "Actually, the limitation argument in
20 many cases falls away, so you should feel confident to
21 proceed with your claim". That is the legal advice they
22 should seek from their representatives.
23 MR SKELTON: Paula, can I ask you, we have used the term
24 "fairness" -- or the words "fair" and "fairness" have
25 been used quite a lot. What does it actually mean when

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1 it comes to assessing whether a claim can fairly
 2 proceed? What are the factors the judge is going to
 3 look at and what are you looking at as you advise your
 4 clients?
 5 MS JEFFERSON: We are looking at the perspective of -- if
 6 I am looking at a letter of claim, I will be looking to
 7 see -- you are looking at what is stated to have
 8 happened and when it happened and how, on behalf of
 9 the organisation against whom the claim is made, what is
 10 the link there, and those are the sorts of issues that
 11 you are looking at.
 12 One of the points I wanted to raise, which we
 13 haven't touched on, and I think, Peter, you mentioned in
 14 passing this morning, was around the number of victims
 15 who have been abused not in connection with any
 16 organisation, and we get in limitation this slightly
 17 bizarre position where, actually, the most successful
 18 arguments on limitation in recent trials have been
 19 raised by those people who are accused of abuse, as
 20 opposed to the organisation that has been involved.
 21 So when we are looking at all of these issues, we
 22 are looking at the whole picture.
 23 The reality is that the law, from a defendant's
 24 perspective, on a vicarious liability is relatively
 25 settled and in the majority of cases it is easy to make

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1 a pretty quick decision and to confirm that to the
 2 claimants and to their solicitors the limitation will
 3 not be an issue.
 4 Another factor that comes out, which is slightly to
 5 one side, but is relevant to limitation, is where there
 6 is then a significant claim for interest on the damages,
 7 which then goes back 20, 30, 40 years, and the fact that
 8 there has been an admission of limitation can then be
 9 used to increase that interest claimed on damages.
 10 It is a side issue, but it is something that, when
 11 we talk about wholesale removing limitation now, I can
 12 see many benefits for many people of doing that, but
 13 equally, we are, as John has said, in a position where,
 14 actually, the law is fairly stable, and to change things
 15 on a wholesale basis is potentially going to result
 16 in -- we only need to look at Scotland and the changes
 17 they have made to their draft bill, particularly linked
 18 into the human rights, and we don't need a lot of
 19 litigation around that.
 20 MR SCORER: But, Paula, we, of course, already -- if the
 21 time bar was abolished, as it is likely to be in
 22 Scotland, and the test becomes, is it possible to have
 23 a fair trial, the reality is, we already have quite
 24 a lot of court decisions on what constitutes fairness of
 25 trial, because it is already part of the existing test.

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1 It is just not the whole test. But it is already part
 2 of the existing test that the court has to apply. So
 3 there is already material and decisions that the courts
 4 can draw on.
 5 So I think it is not justified to say that we then
 6 necessarily end up with a lot of satellite litigation
 7 about the meaning of "fair trial".
 8 MR GARS DEN: The arguments on limitation are actually tied
 9 in with the arguments about the case. There have been
 10 a number of attempts over the years to have limitation
 11 tried as a preliminary issue in an effort to try and
 12 save costs. It is recognised, however, that that is not
 13 possible, because it is all tied in with -- perhaps the
 14 case I was elucidating earlier, if you have an argument
 15 on limitation, you are punishing the claimant twice.
 16 The important thing to understand -- I've forgotten
 17 what I was going to say. That's my age.
 18 MR SKELTON: We will never know, Peter.
 19 MR GARS DEN: It will come back to me.
 20 MR SKELTON: I would like to understand the spectrum of how
 21 fairness is decided. At one end, you might have an
 22 institution which has detailed records. You have
 23 a claimant who is going to give coherent evidence, they
 24 can remember exactly what happened. That may be
 25 corroborated by witnesses, and possibly you still have

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1 an abuser and you may be able to call that abuser to
 2 give evidence. So you have the full panoply of evidence
 3 you would expect to go before the court.
 4 At the other end, presumably, you have a dead
 5 abuser, an institution with very few records and
 6 a claimant who is under pressure to provide an account
 7 about something that happened when he or she was a very
 8 small person. Presumably, you have everything in
 9 between.
 10 How do you, as a claimant solicitor, take a judgment
 11 about whether you have enough to be able to make good
 12 your claim to the judge that it can be fairly tried?
 13 MR GARS DEN: I have remembered what I was going to say.
 14 Because the limitation argument -- I will answer your
 15 question.
 16 The limitation argument is tied in with the quality
 17 of the claimant's evidence. So if you take away the
 18 limitation bar, you still have a claimant who has to
 19 establish his case in evidence. So you don't actually
 20 take away the case. All you do is take away a technical
 21 defence.
 22 In other words, if the claimant -- this is answering
 23 your question -- is an unreliable witness and is
 24 confused about how the abuse took place, that may make
 25 you less confident about whether you are going to win

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<p>1 both on limitation and on liability. However, if there 2 are 25 other witnesses who are also abused by the same 3 person in an institution in remarkably similar ways, you 4 have a much stronger case and you are much more 5 comfortable about going to trial. 6 My argument is, if you take away technicality, you 7 don't take away anything from the defendants, because 8 you concentrate on what the case is really about, which 9 is whether the abuse took place, not whether the 10 claimant has delayed for psychological reasons. That is 11 what I was going to say. 12 MR SCORER: I think, Peter, it is quite difficult to answer 13 your question. What you are saying is, there is 14 a spectrum of cases and you have described the two ends 15 of the spectrum, and then you have got cases in the 16 middle. You might have, for example, a dead abuser but 17 where the allegation was put to them before they died. 18 You can have those sorts of situations. 19 It is difficult to generalise, because what we have 20 to do, as solicitors, is look at the individual facts on 21 an individual case and come to a view. There is an area 22 of uncertainty around that and it is absolute 23 uncertainty of the litigation. 24 MR SKELTON: One of the factors is you have to listen to 25 your own client and whether or not he or she is able to</p> <p style="text-align: center;">Page 121</p>	<p>1 things, including what's happened to the cogency of 2 evidence. 3 So under the current system, a judge, who is the 4 sort of individual who would be trying these cases and 5 understanding what the evidential difficulties were, 6 it's their consideration of all the circumstances of 7 the case. 8 There is a degree of rationality about that, in that 9 they know the problems they are going to face fairly 10 trying a case that's, on the face of it, long out of 11 time. 12 Habitually, these cases are allowed to continue and 13 the discretion is exercised, and I want to come back to 14 the point that this is a contested issue in a very small 15 number of claims. 16 MR SKELTON: The idea of the judge testing fairness is part 17 and parcel of the judge assessing whether or not the 18 abuse has taken place. It is part and parcel of that 19 assessment. Is it your experience generally that the 20 people -- I will start with the claimants -- who walk 21 through the door, whom you see, have been abused, or how 22 many cases do you have to say -- or how many cases do 23 you think, "This isn't necessarily the reality, and I am 24 going to have to turn you down on that basis"? 25 The reason I ask that question is one of</p> <p style="text-align: center;">Page 123</p>
<p>1 give evidence and withstand the forensic process, which 2 is presumably no fault of their own, if they can't, but 3 that is a factor. 4 MR GARDEN: It is going to be a much stronger case if the 5 claimant has given evidence in a criminal trial a year 6 ago and gotten a conviction than if there has been no 7 criminal trial, yet in cases like that, defendant -- 8 I have got a case like that where limitation is being 9 tried as a defence and used as a method of trying to 10 extract a lower settlement. 11 MR SKELTON: Do you get claims where the judge doesn't say, 12 "I can't fairly determine this". They say, "I have 13 heard all the evidence and I can't make a finding on 14 this", which is a slightly different argument. It may 15 be subtly different, but it is a finding that has 16 started to be made by the courts recently. 17 MR SCORER: That hasn't personally happened in a case I have 18 dealt with, but I'm aware it has happened, there have 19 been decisions of that kind. 20 MS HANDYSIDE: I'm going backwards slightly, but the factors 21 that are taken into account and that are set out in the 22 Limitation Act, they do include the conduct of 23 the claimant. They include the conduct of the defendant 24 too. I mean, what it requires there to be consideration 25 of is all the circumstances of the case, including those</p> <p style="text-align: center;">Page 122</p>	<p>1 the considerations the panel have to have of it is doing 2 away with limitation, partly to protect what are 3 genuinely legitimate claims. Is that the case? 4 MR GARDEN: In the last 20 years, I think I can confidently 5 say that -- I'm not saying it has never happened, but if 6 somebody has had the courage to come into our office and 7 tell us that they were abused, how can I possibly 8 gainsay what they say, nor should I do so anyway. 9 Nobody comes into our office and says, "Excuse me, 10 I have heard you can claim compensation. Would you mind 11 making up a story for me?" Nobody ever says that. They 12 often -- you can often tell from their body language 13 whether -- well, you can't often -- you can't always 14 because sometimes they dissociate, of course, and tell 15 you what happened to them in a way that displays no 16 emotion, but often we have grown men crying in our 17 office, in the way that you have seen recently on the 18 television in relation to footballers. That is a common 19 occurrence for us. 20 So it is manifestly obvious that what they say 21 happened, happened to them, unless -- well, it just is. 22 You can generally tell, but even if you can't tell from 23 body language, it is not for us to decide on the 24 veracity of allegations. That is a matter for the 25 courts.</p> <p style="text-align: center;">Page 124</p>

<p>1 MR SKELTON: Aren't there some claims when they may say, 2 "I was abused at this secondary school", and on 3 investigation they weren't at that school? Do you not 4 get a case like that, where you can't corroborate? 5 MR GARDEN: I'd say that you do get cases -- I'm just 6 trying to think of cases. I can't remember a case 7 similar to what you say. 8 Sometimes they say they were at the school and the 9 register doesn't show that they were there, but that 10 doesn't necessarily mean they didn't go. That may mean 11 the register was incorrect. You sometimes get people 12 who talk about abuse at institutions where the 13 defendants say that the abuser had retired, where, on 14 subsequent investigation, you find out that although 15 they'd retired, they visited the institution again 16 because they know the teachers. 17 So it's impossible to be specific, but that's 18 certainly not my experience. I have to throw it around 19 the room. 20 MR SKELTON: Can I ask all the claimant solicitors that, and 21 I would like to get it from the defendants' perspective, 22 if I may. 23 MR SCORER: If the question is, what proportion of the cases 24 that we see are either false allegations, deliberately 25 false, or mistaken in some way, I think the proportion</p> <p style="text-align: center;">Page 125</p>	<p>1 litigate in other areas of personal injury? Can you 2 compare it to -- I mean, notoriously, whiplash, of 3 course, is an area that has attracted a lot of attention 4 because of fraudulent claims or arguably fraudulent 5 claims. Can you compare your own experiences with other 6 areas of personal injury work where that might be more 7 of a legitimate concern? 8 MR SCORER: I did practise as a general personal injury 9 practitioner for some years and I would say that the 10 level of dishonesty, to the extent that there is any in 11 this area, is lower than in other areas of personal 12 injury cases. 13 MR BRIDGE: I think it is a wholly different area of work. 14 I did personal injury work back in the day. The clients 15 in personal injury work are constantly chasing you, they 16 are obsessed by the values of the claim. None of those 17 factors seem to be relevant to abuse victims. They 18 never ask about what the claims are worth. They are 19 more interested in proving that the abuse happened and 20 getting some closure as to what they have been through. 21 We have to chase them. They are very difficult 22 clients to deal with. We have to constantly be back at 23 them to try to persuade them to give you more 24 information or answer requests for forms of authority. 25 They are reluctant litigants.</p> <p style="text-align: center;">Page 127</p>
<p>1 is small: very small in the case of deliberately false 2 allegations; mistaken, probably a slightly higher 3 number, but still a small proportion of what we see. 4 MR ENRIGHT: My experience of that -- we are not judges, it 5 is not for us to judge, but what my absolute consistent 6 experience is, people who talk to me about child sexual 7 abuse always minimise the level of abuse and very often 8 grossly minimise the abuse suffered, and it is only by 9 the ability, over many years, to study the person, to 10 ask the additional questions, that you begin to get 11 a true flavour of the abuse. That is the interesting 12 thing about child sexual abuse, they hugely underreport. 13 MR GARDEN: The standard training device is, "Tell me about 14 your last consensual, intimate sexual experience?", in 15 a group, and then the trainer says, "I'm sorry, I was 16 only joking", as an illustration of how difficult it is 17 to talk about it to a complete stranger. And you often 18 get sequential disclosure, sometimes less to start, 19 then, when they get to know you better, more and more 20 comes out. Often it takes until the expert meeting for 21 the full disclosure to come, and that's quite common. 22 MR ENRIGHT: Just to admit it to themselves, just to admit 23 it to themselves, is a hugely difficult thing, often. 24 MR SKELTON: Before we move on to the defendants' side, for 25 those of you who litigate in this area, do you also</p> <p style="text-align: center;">Page 126</p>	<p>1 MR GARDEN: Very true. 2 MR SKELTON: From the defendants' side, not only answering 3 that question, but also there is obviously a concern 4 that if one takes that at face value, then you wouldn't 5 contest claims, but in doing that, you would be 6 incentivising fraudulent claims which may not at present 7 exist. So I can see a long-term problem with it. From 8 your perspective, does that accord across the insurance 9 market with public liability insurance? 10 MR LATTER: I'd broaden that to motor insurance as well as 11 public liability and any other insurance. I think the 12 first filter for claims is the people around this room. 13 They have a professional standard. So they are not 14 going to take a claim that they know is fraudulent, that 15 is just a fact. No solicitor will prosecute a known 16 fraudulent claim. So what we see has already been 17 through a filter in terms of fraudulent claims. Unlike 18 in the motor arena and other liability arenas, we do 19 not -- it is absolutely clear, we do not see the level 20 of fraud that you would anticipate around whiplash or 21 slips and trips on highways and other such claims. 22 Because of our obligations to our regulator, the FCA, we 23 are obliged to do what we can to eliminate financial 24 crime. 25 In the area of child sexual abuse, there are very,</p> <p style="text-align: center;">Page 128</p>

<p>1 very few cases that we would say actually are 2 fraudulent. It just -- I agree with these gentlemen. 3 MR GARDSEN: Why on earth would you make something up if it 4 was going to be, "I was sexually abused as a child"? If 5 you are going to make something up, I just don't think 6 you will choose this subject. I may be wrong. Maybe 7 I'm naive. But if so, I have been naive for the last 8 20 years. Because not only do they have to give 9 a statement in great detail to us, and that's not easy, 10 talking about the sort of things that they have to talk 11 about, but also we have a look at their records, number 12 two, and, number three, we send them to a psychologist 13 or psychiatrist, who is an expert in this area and will 14 sometimes do psychometric tests, and evaluate the 15 veracity of their testimony against the other known 16 documentation. 17 MR SKELTON: Can I continue with the defendant perspective, 18 Peter, and come back to that? 19 MR LUCK: Yes. From our position, of course, we don't meet 20 with the claimants, and our approach is that all claims 21 that come in are dealt with in exactly the same way. 22 There is no consideration about whether or not a claim 23 may be fraudulent at that stage. 24 One of our areas of concern is that often letters of 25 claim are not as detailed as we would like, and then,</p> <p style="text-align: center;">Page 129</p>	<p>1 of the abuse in the same way as you might with a road 2 traffic accident. Is that a legitimate thing to put to 3 an insurer, or are you just going to have to defend it 4 in any way you can? 5 MR LUCK: I think if we are defending these claims, we have 6 to be certain that we have got a proper defence to it, 7 because, ultimately, claims will litigate and, if they 8 go to trial, any gaps in our defence would clearly 9 become apparent very, very quickly. Practice and 10 procedures would, I'm sure, be under degrees of 11 criticism. 12 So, you know, where we are taking issues on claims, 13 it is only where we feel that the evidence is very, very 14 much there to substantiate the issues that we raise. 15 MR GARDSEN: One of the controversial defences used in these 16 types of cases is something called false memory 17 syndrome. I don't know if the panel is familiar with 18 that. But that is something thrown out of the -- into 19 the air often by defendants' experts when it's suggested 20 that memories are either misconceived or implanted into 21 claimants' memories by a process of inappropriate 22 counselling. It is just worth mentioning that. 23 MR SCORER: Although, to be clear, Peter, the numbers of 24 cases that involve any allegation of recovered memory 25 are very, very small. Very small.</p> <p style="text-align: center;">Page 131</p>
<p>1 when we do an investigation, you may come across 2 discrepancies in the evidence about when an abuser may 3 have been at the institution, and it doesn't tie in with 4 the claimant, and we do accept that some of these 5 claimants were, unfortunately, in and out of 6 institutions, so that is not an immediate issue that 7 means the claim is not genuine. 8 There are other factors which then come through in 9 the investigations. It is only as the claim progresses 10 and you get more information that you may think, well, 11 maybe not all the claim is genuine, or part of it is 12 exaggerated, but they are very, very few and far 13 between, those cases, and most of them are then settled 14 on the basis of, you know, what is an appropriate level 15 of compensation. But I would say that there are 16 certainly a number of claims which are not pursued but 17 we do not know, really, why they haven't been pursued. 18 It may be because we have raised a defence on liability 19 or there may be other factors into that. 20 MR SKELTON: The reason I am asking these questions is, is 21 it a legitimate thing to take into account, that in this 22 area of litigation, as Peter has said, claimants don't 23 make up the claims? The question really is then 24 quantification. It doesn't necessarily mean you have to 25 admit liability, but you may not push back on the facts</p> <p style="text-align: center;">Page 130</p>	<p>1 MR GARDSEN: There is certainly one defendant psychiatrist 2 who uses it in most of the reports that we see. That's 3 my experience. 4 MR SCORER: If it is the person I think you are referring 5 to, that is a different argument. That is an argument 6 effectively saying that any memory is compromised or 7 potentially wrong, which is a slightly different 8 argument. I don't think the courts would take that 9 argument seriously. 10 MR GARDSEN: It is that, but the false memory syndrome 11 argument is also used. I take your point. 12 MR SKELTON: I would like to get Paula's views on that issue 13 I asked before, and then I think we ought to try to talk 14 briefly about some ideas for reform and then a few last 15 questions in the next five minutes. 16 MS JEFFERSON: In terms of what was said, in terms of people 17 coming forward who may have made up the story entirely, 18 I agree with what's been said here, I can't think of 19 a case that I have been involved in where we have 20 thought that that was the case. 21 One of the challenges that we do have is where 22 someone makes allegations, there has not been a criminal 23 investigation or conviction, and the individual against 24 whom the allegations are made is still alive and is 25 saying, "I did not do this", and then, on behalf of</p> <p style="text-align: center;">Page 132</p>

<p>1 the organisation, we are almost stuck in the middle. So 2 you have a claimant who has come forward, no doubt, as 3 you have said, after a lot of thought and time, and you 4 have someone who says, "I just didn't do this", and we 5 have had some situations where it has been that the 6 person who has been named has been incorrectly 7 remembered, and that can be a difficult situation as to 8 the position that you are in, in terms of 9 the organisation. So that is one reason why things may 10 become more sort of challenging, and it is not that the 11 memory is false or that the abuse didn't happen, but the 12 recollection is either the wrong organisation or the 13 wrong person and the responsibility for that 14 organisation. 15 There are also issues around documentation, so, as 16 you said, someone's name might not appear on a register, 17 someone might have been in prison, their allegations are 18 against the prison warden and it doesn't look like they 19 were there at the same time, and on behalf of that 20 organisation, we will ask the question of the claimant's 21 solicitors to say, "Can you provide us with the evidence 22 to answer this question?", and then things go quiet, and 23 we never know the reason why we don't hear any more. 24 So back to -- I know there has been talk earlier on 25 today of looking at statistics and reasons why some</p> <p style="text-align: center;">Page 133</p>	<p>1 works as it currently is. I think we use it at Zurich 2 sparingly. I do accept Richard's point that that may 3 not be consistent across the market. I can't comment on 4 that because I don't know the behaviours of other 5 insurers or defenders. 6 I go back to something the previous chair of this 7 inquiry said at the very beginning: 8 "A balance which must be struck between encouraging 9 the reporting of child sexual abuse and protecting the 10 rights of the accused." 11 I think where we have serious concerns around the 12 evidence and the access to a fair trial, limitation is 13 the appropriate tool to use, and ask the courts, these 14 experts, the judiciary, to apply their discretion and to 15 determine whether such a case should proceed. 16 I think, if we do have reform to remove limitation, 17 one word of caution is I worry about what will come in 18 the space and whether we will see litigation sit around 19 that that will actually delay the settlement of claims 20 and maybe it is better to work and change what we have 21 got rather than completely discard it. 22 MR SCORER: I think abolish the time limit entirely. The 23 current three-year time limit is wrong and inappropriate 24 in this area of law. It doesn't fit this area of law. 25 It is unfair on claimants. So abolish that entirely.</p> <p style="text-align: center;">Page 135</p>
<p>1 claims succeed and some don't, and I think this is 2 something that we need to look at a bit more, and this 3 is really information that you have that, from 4 a defendant's side, we don't. But there is a difficulty 5 where you have got someone who says, "I didn't do it", 6 and we are into the wrong person being identified. 7 MR SKELTON: Thank you. Briefly, I will start with you, 8 David, on principal idea for reform of this area. On 9 limitation specifically, we are going to come on in 10 other seminars to other areas of potential reform. 11 MR ENRIGHT: I will. I just wanted to say if anyone wanted 12 to know what this inquiry is about and whether it has 13 made progress, we have heard it today, and we have the 14 insurers acknowledging openly -- and I'm sure the 15 survivors take huge comfort from it -- that survivors do 16 not make up allegations of abuse. I think that is 17 a huge thing. 18 In terms of reform, we make no bones about it, my 19 clients make no bones about it, that limitation should 20 be removed. It does not serve any purpose whatsoever. 21 The court fees -- 22 MR SKELTON: Just on limitation at the moment, that's all. 23 MR ENRIGHT: Limitation must simply be removed. 24 MR SKELTON: That is a nice simple reform from you. 25 MR LATTER: Our view is that the framework around limitation</p> <p style="text-align: center;">Page 134</p>	<p>1 But, as has been done in Canada and Australia and indeed 2 it is proposed for Scotland, in combination with 3 abolishing the time limit, retain a provision that 4 enables defendants to argue in certain cases that it's 5 no longer possible to have a fair trial. So that 6 facility would be there for defendants. But the 7 three-year time limit goes. 8 MS HANDYSIDE: I think one of the issues that's been 9 identified is the sort of deterrent effect of limitation 10 arguments, and I wonder if -- we spoke about what could 11 be achieved by pre-action protocol, and it strikes me 12 that early clarification of the arguments and the 13 evidence on limitation is a really good target for that 14 process, so that it is clear whether that argument is 15 going to be a live one, so that everybody knows what 16 arguments -- whether there is going to be a limitation 17 in the case going forward. 18 MR JEFFERSON: I agree. I think the protocol is the time 19 when you can resolve this issue fairly quickly and you 20 can build in cost penalties for a failure to do so. 21 MR BRIDGE: Notwithstanding what's been said today, we are 22 still, on a daily basis, facing limitations arguments 23 from defendants. The RE v GE judgment was greeted with 24 glee by a lot of the defendants we deal with. That not 25 only talked about the claimant's failure to bring the</p> <p style="text-align: center;">Page 136</p>

<p>1 claim sooner, but then the failure to progress the claim 2 as it went along with the solicitor's involvement. So 3 it is a real issue. It is preventing abuse victims 4 bringing the claim even before they get to the stage of 5 a letter of claim and I think limitation should go and 6 it would free up access to justice for a lot of victims. 7 MR GARSDEN: I agree with Richard. However, I fear, if you 8 did abolish limitation, that what has been said is that 9 you would fill it with something nastier in a vacuum. 10 That's what claimant lawyers of my organisation fear. 11 What you could have, if you don't abolish limitation, is 12 the model litigation policy, which I have alluded to in 13 my document, whereby -- and as has been said by 14 insurers -- limitation is only used sparingly. That 15 would be something everybody would have to sign up to, 16 so you'd still give something to defendants but take 17 away the barrier. 18 MR LUCK: Yes, limitation, as I have said, is used in cases 19 where it is considered appropriate. It is right that 20 defendants also have an entitlement to fairness and 21 a fair hearing. It is perhaps not for, perhaps, 22 insurers and certainly not an insolvent insured to say, 23 yes, limitation should be waived or removed, but if that 24 were to be the decision and the outcome of the inquiry, 25 then MMI would accept that and would not oppose it, but</p> <p style="text-align: center;">Page 137</p>	<p>1 as a question. I think once you get into litigation, it 2 is used very sparingly. So I think that might be -- 3 MR SKELTON: Thank you. 4 MR LATTER: I think the other thing to think about is when 5 people remove the arguments. Do they just leave them in 6 the case to run or do people, when they get actually 7 evidence that the claims will proceed, drop the 8 limitation argument? 9 MR GARSDEN: I think there may be a distinction between 10 instructions to legal representatives and what we hear 11 as claimant lawyers. 12 MR SCORER: The implication of what Philippa just said is 13 that limitation is not being pleaded as a defence in 14 pleadings and that is simply not the case. 15 MS HANDYSIDE: Sorry, I didn't say that. 16 MR SKELTON: There is a great eagerness, I feel, to carry on 17 talking about the subject. We have pretty much run out 18 of time. What I do need to say is, tomorrow we are 19 exploring reform in more detail. We are going to touch 20 on pre-action protocols and any other types of reform 21 that can be initiated. So I think it will come up 22 again. 23 Insofar as we don't manage to get to the bottom of 24 this subject tomorrow, which I anticipate is going to be 25 the case, then further evidence I think is going to be</p> <p style="text-align: center;">Page 139</p>
<p>1 as matters stand at the moment, we do think it is used 2 sparingly and only when totally appropriate. 3 MR SKELTON: Can I just say, I think this idea, there is 4 a bit of a disconnect here at the moment between 5 "sparing use" and "routine use", which I think we are 6 going to have to get to the bottom of rather than -- we 7 have very helpfully received a lot of evidence on it 8 today, but with respect, of course, it is anecdotal, 9 based on your own personal experiences. I think perhaps 10 outside of this room we will have to discuss how we 11 might capture more reliable data on that issue to see if 12 it is really the case. 13 MR GARSDEN: If it is of any assistance to you, in putting 14 forward the ACAL paper, that was the product of 15 a meeting of some of the most frequent litigators in 16 this area, and what we say is reflective of what comes 17 from our association, as well as what we individually 18 say. Is that fair to say? 19 MR SCORER: I think that's absolutely right. Whilst 20 I welcome what we have heard from insurers in this 21 meeting today, I don't think it is entirely reflective 22 of the practice that we see from insurers across the 23 board, unfortunately. 24 MS HANDYSIDE: I think one of the distinctions might be, in 25 correspondence before litigation, it is routinely raised</p> <p style="text-align: center;">Page 138</p>	<p>1 helpful in due course on this. I don't want anyone to 2 feel in the room that we have curtailed a legitimate and 3 very helpful and fruitful discussion, because we 4 haven't. We have just started it. Thank you. 5 I am going to ask if anyone in the room has any 6 questions. Then I will turn to the panel, if that is 7 okay. 8 CORE PARTICIPANT: I have a few things down here, but 9 this gentleman here, the comment he made earlier on, 10 I think I'll just point that one out. 11 MR SKELTON: What was his comment about? 12 CORE PARTICIPANT: About me being guilty. He made 13 a statement simply about that, because we didn't report 14 it, we are guilty of not reporting it. 15 MR SKELTON: No, I think the remark was that the courts 16 sometimes take a critical view of people who don't 17 report early on and go and see their solicitors. It is 18 not that they are guilty -- 19 CORE PARTICIPANT: That was his word, though. 20 MR SKELTON: I'm not sure who you are referring to. 21 CORE PARTICIPANT: This gentleman here, Mr Scorer. 22 MR SKELTON: Richard, do you want to clarify that one, 23 because I don't remember -- 24 MR SCORER: Sorry, I'm not entirely clear what -- 25 CORE PARTICIPANT: One of the things you said is about</p> <p style="text-align: center;">Page 140</p>

1 the time limitations and all that.
 2 MR SCORER: What I'm saying is I think claimants are
 3 unfairly criticised by the courts for delay in coming
 4 forward with the allegation. I think that is wrong.
 5 I don't think they should be criticised.
 6 CORE PARTICIPANT: I thought you said something like
 7 they were guilty for not coming forward.
 8 MR SCORER: They are criticised by the courts for that, and
 9 I'm saying they shouldn't be.
 10 CORE PARTICIPANT: Penalised by the courts.
 11 MR SCORER: Penalised by the courts, and they shouldn't be,
 12 is my view.
 13 MR SKELTON: To be fair, the debate was, in fact, at the
 14 moment, the courts are critical of claimants for not
 15 coming forward and there has been a debate about whether
 16 or not that should change by abolishing limitation.
 17 CORE PARTICIPANT: I did want to say a lot more, but
 18 I will give the gentleman his due about what he said
 19 after that. I appreciate him saying that as well, that
 20 the limitation should be abolished.
 21 MR SKELTON: Just two more questions. I'm afraid we have to
 22 keep it quite tight because we have run out of time.
 23 CORE PARTICIPANT: Can I make a quick point: the police
 24 are also very against survivors who don't come forward
 25 early on. They take a very negative view of it and they

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1 do not cooperate with the survivor. For example,
 2 Calderdale police force, they do not like dealing with
 3 survivors of historic abuse, and refuse, in some cases,
 4 to actually go and speak with the survivors.
 5 MR SKELTON: Thank you for raising that point. You, sir,
 6 last point.
 7 CORE PARTICIPANT: The issue about false memory syndrome
 8 is something that I, as a counsellor, think about quite
 9 a lot. What we do find is sometimes that people will
 10 not then start taking counselling, will not start on
 11 their recovery, until after the court case has been
 12 finished, because of fear of it interfering with the
 13 duties and process. We have to take very different
 14 approaches to counselling than the ones we would
 15 normally take in this situation. I think the panel
 16 needs to be aware of that and how that affects
 17 survivors.
 18 MR SKELTON: Thank you.
 19 MR FRANK: I just want to understand this. In relation to
 20 the suggestion -- I'm not sure it is entirely agreed --
 21 that limitation may be raised at an early stage but
 22 will -- I think it's been suggested -- almost invariably
 23 fall away, or very often will fall away. Clearly, if
 24 you are a claimant solicitor or representative, there is
 25 a cost in dealing with the issue of limitation at the

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1 outset and, from what I have understood so far,
 2 resources available at the beginning of cases are pretty
 3 limited.
 4 Is there something to be said for not having
 5 a limitation issue if it is going to fall away pretty
 6 routinely anyway, as a way of saving costs on both
 7 sides?
 8 MR LATTER: I think it goes back to what Peter Garsden said,
 9 in that you are going to have to get to the facts in the
 10 case anyway, in terms of whether they apply to the
 11 liability or limitation argument. So you are going to
 12 need to do that work. That is why, in the earlier
 13 session, we weren't pushing for fixed costs, because we
 14 absolutely agree that early investigation and
 15 ascertainment of the facts is critical to the claim,
 16 regardless of the limitation on liabilities.
 17 So we don't want to discourage that. That is why we
 18 were, you know, being very forceful on fixed costs,
 19 because we think there are other ways of delivering
 20 proportionality.
 21 MR SCORER: But I think you make a really important point.
 22 The costs in any case are determined by the number of
 23 issues that are in dispute. If you take away one area
 24 that is in dispute and it is no longer an issue, then
 25 costs -- cases will cost less to run.

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1 MR LATTER: But what we are saying is that, because we are
 2 unsure at the beginning of a case whether limitation is
 3 an argument that we will take forward, we have to plead
 4 it, and as a consequence of that, we are not asking for
 5 a limitation on the costs in that. That will eventually
 6 come out of our resources when we settle the claim. So
 7 I would rather spend the money there in the
 8 investigation to get to the facts, rather than waive
 9 limitation.
 10 MR GARDEN: I think my answer to your question would be
 11 that, if there was no limitation argument, I would be
 12 more persuaded to have a different type of medical
 13 report, costing not as much money, than if limitation
 14 was an argument, when I would insist on having quite an
 15 expensive psychiatric report, because there are ways of
 16 assessing quantum without an expensive psychiatric
 17 report, but not if you have limitation, because the
 18 expert is absolutely fundamental to a judgment on
 19 whether a psychological element of the client's
 20 personality has contributed to the delay and, without
 21 it, you lose your case.
 22 MR SKELTON: A whole new area of interesting debate there.
 23 I don't know whether we have got time.
 24 MS SHARPLING: I will leave it, then, and save it for
 25 tomorrow.

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<p>1 MR SKELTON: Thank you very much to all those who have given 2 information today. We will convene at 3.10 pm. 3 (2.56 pm) 4 (A short break) 5 (3.15 pm) 6 Session 4 7 Opening comments by Facilitator 8 MR SKELTON: Our last session today is really about other 9 issues which are significant in the context of the civil 10 litigation system. Obviously, that opens the door 11 perhaps to a variety of potential views and issues. 12 I would like to focus on those which you all think 13 personally, from your own practice and experience, are 14 the most significant ones. They will, for example, 15 include the very nature of the adversarial system, and 16 that's the first thing I am going to ask you about, but 17 they may also include things we have discussed earlier 18 about getting hold of documents, witness evidence, and 19 then of course legal issues, not just limitation, which 20 we have just had a session on, but also issues of 21 consent, vicarious liability, non-delegable duties and 22 other issues, possibly even forward looking about where 23 the law may be going, what are the next areas of 24 dispute. 25 I think almost everyone in the room has introduced</p> <p style="text-align: center;">Page 145</p>	<p>1 sides have their own medical expert. So that is one 2 aspect of the adversarial process. And of course, if 3 cases go to trial, that is, in itself, an adversarial 4 process. 5 MR SKELTON: So you have an independent judge but the judge 6 is not, himself or herself, initiating the 7 investigation. They are dependent on the claimant to 8 bring his or her case before the court and dependent on 9 the defendant to raise whatever defences it sees fit in 10 response to that case. So the litigation is run by the 11 claimant and run by the defendants and the judge is 12 simply adjudicating, and the classic test for evidence 13 is in cross-examination and the test is on the balance 14 of probabilities. So the judge needs to decide, is 15 there a greater than 50 per cent chance that this 16 allegation is true or not? Broadly speaking, that is 17 the system we are dealing with. 18 MR SCORER: Yes, although on the last point, I would add the 19 rider that I think some judges, in circumstances where 20 there hasn't been a conviction and they are having to 21 make a finding of abuse, will in reality apply 22 a slightly higher standard of proof because they are 23 concerned they are effectively making a finding of 24 criminal liability. So I think there is a tendency on 25 the part of some judges to do that.</p> <p style="text-align: center;">Page 147</p>
<p>1 themselves to the panel. Can I ask just those who are 2 new to the table to introduce themselves and then get 3 straight in? 4 Introductions 5 MS STOREY: Hello. I am Tracey Storey from Irwin Mitchell. 6 I head up the child abuse team. 7 MR GILLESPIE: Alastair Gillespie, Hill Dickinson. 8 Open discussion 9 MR SKELTON: Thank you. Can we start by discussing the 10 nature of the adversarial system? There are two aspects 11 of that I want to explore. The first is, what is the 12 inherently adversarial nature, by which I mean, in what 13 way does the civil justice system automatically set 14 claimants against defendants, whether it is 15 cross-examination, the use of experts, that kind of 16 thing and, secondly, behaviour and conduct, which may 17 not necessarily be inherent to the system, but may be 18 brought to bear within it. I am going to ask Richard 19 first. 20 MR SCORER: The civil litigation system we have in this 21 country is adversarial by its very nature, and that's 22 reflected in the way that the court process is set up, 23 it is one side pitted against another. 24 In abuse litigation, it is probably pretty rare for 25 single joint experts to be appointed, so generally both</p> <p style="text-align: center;">Page 146</p>	<p>1 MR SKELTON: In the civil courts, even though that is not 2 the law? 3 MR SCORER: In the civil courts, yes, even though that is 4 not the law, I think the reality is some judges will be 5 concerned that if they are making a finding that 6 somebody is criminally liable, they will look to 7 a higher standard of proof. 8 MR SKELTON: Is that others' experience? I have not heard 9 that before, the judiciary applying the wrong standards 10 in practice? 11 MS STOREY: I think the test is, the more serious the 12 allegation is being made, the more proof there needs to 13 be brought to bear. So I think the case law tends to 14 demonstrate that if you are making an allegation of 15 a very serious sexual assault, you have got -- the 16 weight of evidence has to be with you, so I think that 17 is the test that's applied in the civil courts. 18 MR GARDEN: I think there's an element -- I agree. 19 However, I think there is an element of punishment 20 administered by the civil courts as well. I can 21 remember the judgment in the very first Frank Beck, 22 Leicestershire County Council case where the judge 23 clearly said that because, in the same way as a criminal 24 judge, the defendants had made the claimant give 25 evidence and be cross-examined on whether the abuse took</p> <p style="text-align: center;">Page 148</p>

1 place, he was going to bear that in mind and award
2 higher damages than he would otherwise do.
3 MR SKELTON: Was that the -- we may come on to the term
4 "aggravated damages", which are sometimes awarded by the
5 court specifically to reflect the defendants' conduct,
6 either at the time of the events or subsequently, and
7 indeed in part of the litigation. Did that reflect the
8 judge's views of the litigation explicitly as aggravated
9 damages or was it just something he said was informing
10 his views?
11 MR GARDEN: The law on aggravated damages in 1996 was a lot
12 different from what it is now. It would have probably
13 been termed aggravated damages now or exemplary damages,
14 but it wasn't then, it was simply said that because the
15 claimants, who were very badly damaged by Frank Beck, if
16 you know any of the circumstances of the case, and the
17 way in which they were regressed, had been made to give
18 evidence and clearly damaged by giving evidence. He
19 would therefore take that into account in assessing what
20 the damages were. I think they got sort of £80,000 and
21 £50,000 each, which was a lot of money in 1996.
22 MR SKELTON: Thank you. Just a little bit more, perhaps,
23 Jonathan, on the adversarial system. For you, could you
24 identify the key problems which an adversarial system
25 creates, specifically for these types of claim, the

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1 child sexual abuse claim.
2 MR BRIDGE: I think we have already touched on the problem
3 with experts. The difficulty with experts, there is
4 obviously a move within the courts to encourage joint
5 instruction of experts and that's happened in most
6 personal injury litigation. The difficulty with this
7 area of law is the experts aren't just looking at
8 quantum, they aren't just looking at the value. We
9 mentioned before about limitation. Quite often, the
10 experts are having to look at limitation and, without
11 wanting to go back over old ground, that might help if
12 that is removed in encouraging defendants to agree joint
13 instructions in the future. There is also causation
14 problems. We invariably find with abuse victims there
15 can be other factors that may have contributed to their
16 ongoing problems and, again, it means that the expert
17 evidence is very contentious and I think that is one of
18 the biggest problems at the minute in the adversarial
19 system, is this difference between experts, not only
20 medico-legal experts but also independent social work
21 experts. You do tend to get quite polarised views at
22 the moment and it does make progression of these claims
23 very difficult.
24 MR GARDEN: I want to say something about the adversarial
25 system. It has been said that the adversarial system is

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1 wrong in this area of work for victims of abuse.
2 However, if you look at the psychology of abuse, it's
3 the psychology of the powerful triumphing over the
4 powerless. There is something about the adversarial
5 system that redresses the power back to the claimant
6 over the powerful, who is deemed to be the other side,
7 and, to a certain extent, because the claimant has his
8 own team who is sticking up for him, there is something
9 quite appealing about that which makes it better almost
10 than an inquisitorial system where one person with all
11 the power pulls all the strings. There is a greater
12 likelihood that the claimant will think that they're
13 being overpowered by that type of system.
14 MR SKELTON: Tracey, can I ask you, one of the things that
15 has been mentioned as far as experts, which I think we
16 need to come on to in detail, is cross-examination,
17 because that is one of the principal ways by which the
18 common law adversarial system tests evidence. To what
19 extent does that put off people who have had these sorts
20 of experiences from wanting to pursue them either
21 through the door of their solicitor's office or
22 ultimately to trial?
23 MS STOREY: I don't think necessarily people understand what
24 kind of pressure they will be placed under by the
25 litigation process when they first come to see us, and

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1 a lot of people will want the truth to be out, they want
2 to say what's happened to them, be acknowledged, and
3 there are all those very important reasons for coming
4 forward in the first place. But I don't think they
5 necessarily appreciate what cross-examination can be
6 like.
7 For those clients of mine who have gone to trial,
8 they will describe the experience as reliving the abuse
9 in full. So I think, generally speaking, and I think
10 this is across civil litigation, people do underestimate
11 how stressful and traumatic trial can be. That said,
12 I agree with what Peter said about when you make
13 a decision to seek civil justice, you are taking control
14 and you are taking back power and there is a restorative
15 healing effect of making that choice and, for once,
16 having people on your side to put forward your choice.
17 I think there has to be a recognition that people
18 who have suffered serious sexual abuse in the past and
19 have carried it around with them for years are going to
20 find it extremely difficult to give evidence.
21 I have had experiences where a client has disclosed
22 more serious abuse very close to trial after being my
23 client for many years, but disclosing abuse is
24 a process, not an event and, from the court system's
25 point of view, it looks as though she sort of made up

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1 bits closer to trial as we have gone on, but it doesn't
2 actually reflect the complexity, the psychological
3 complexity, of getting that evidence out. So I think we
4 let down survivors when we expect them to fit into these
5 neat civil procedure categories, and I don't think there
6 is enough flexibility in our system to allow that
7 process to come out. So it is very common, for example,
8 for us to take statements from people at the outset of
9 their cases and to find that their evidence evolves as
10 they become trusting and understanding of what we are
11 doing.

12 So I think cross-examination, there needs to be
13 special measures in place for people.

14 MR SKELTON: Special measures is something I was going to
15 ask about. I would like to capture the defendant
16 perspective on this first issue of cross-examination,
17 how claimants give their evidence. Obviously, in the
18 criminal courts, there is an idea of special measures
19 and getting the best evidence from a victim in that case
20 in the court may not necessarily involve the classic
21 cross-examination, ie, the really pointed questions
22 designed to trip you up, confuse you, elicit a different
23 answer from what's already been given, those sorts of
24 things, but something designed to get the best evidence.
25 From the defendant perspective, is that something that

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1 you welcome or does that undermine your access to
2 justice?

3 MR LUCK: I don't think it undermines the access to justice.
4 I would say that the number of cases that actually go to
5 trial, in my experience, is very, very few. You know,
6 most cases are dealt with prior to trial. Clearly,
7 a number have litigation commence within them, but only,
8 again, a small number of those go as far as the actual
9 trial.

10 We do gather what evidence is available as early as
11 possible, and certainly, if we are aware of a criminal
12 trial, we have, or will have, representation there to
13 listen to the evidence, that's taken on board, and we
14 have experience of cases where, immediately after such
15 evidence, we have moved to settle a tranche of claims.

16 So I appreciate the trauma involved in someone going
17 to a civil trial, where there is this cross-examination,
18 but I'm not sure how often it is actually taking place.

19 MR SKELTON: Two points in response, I suppose. One is, it
20 might disincentivise people to get to the trial point,
21 so the very fact they are facing this cauldron of
22 criticism, as they see it, may disincentivise them.
23 But, second, will it actually compromise your ability to
24 defend claims if cross-examination, for example, that
25 type of examination process, were taken away and

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1 replaced with something more inquisitorial?

2 MR LUCK: I suppose that, again, we are looking at an
3 alternative which -- I'm not sure exactly how that would
4 pan out or what it would really mean.

5 Clearly, the set process of a trial is that you have
6 cross-examination, and I would hope that any such cases
7 are dealt with appropriately. But, clearly, that can be
8 traumatic. I can't deny that.

9 To remove that option potentially could result in an
10 unfairness to defendants, but an alternative out there
11 may be possible to consider.

12 MR SKELTON: Do any others have a view on that particular
13 issue before we move on to experts?

14 MR GILLESPIE: In relation to the process generally, and the
15 fact it's been referred to as adversarial, but, as Peter
16 says, there is an element of each side having specialist
17 representation, having their own opportunity to examine
18 the evidence, rather than an inquisitorial system,
19 I think it is very important that, where appropriate,
20 and where you are able to do so, you challenge parts of
21 an individual's evidence.

22 In my experience, that is very, very rarely actually
23 the fact of the allegations of abuse themselves. In my
24 experience, acting for insurers of organisations who
25 face claims essentially on vicarious liability grounds,

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1 we are not acting for the alleged assailants, we are not
2 acting for those who are alleged to have committed these
3 terrible acts. Unless those individuals provide us with
4 a statement and are actually willing to attend court and
5 deny the allegations that have been put forward, then
6 actually there is no evidence to put forward to
7 counteract those allegations of assault.

8 MR SKELTON: You don't have a positive case to put forward.

9 MR GILLESPIE: You don't have a positive case to put
10 forward.

11 Another aspect of cross-examination, though, is not
12 just a question of whether the claim should succeed in
13 terms of the assaults having been proved, but actually
14 what is the true and fair value of that claim as well,
15 and that means that cross-examination has to extend not
16 just to the circumstances in which assaults may have
17 occurred, but also has to take into account other life
18 events, areas where, for example, the medical experts
19 disagree, in order that the court can actually reach
20 a fully informed view of what a true and fair value of
21 the claim is.

22 MR SKELTON: Thank you. Experts. Paula, can I ask you
23 about experts --

24 MR GARDEN: Sorry, can I just come back on two points on
25 the adversarial process? I think the adversarial

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<p>1 process -- I appreciate we are dealing with 2 institutional views, but where the abuser represents 3 himself, I think that's where the adversarial process 4 can come seriously unstuck and, these days, we are 5 having more and more cases against unrepresented 6 defendants, and they really are a law unto themselves. 7 The other point I would say is that, in the civil 8 process, because somebody's liberty is not at risk, 9 I think you tend to get from defendant counsel a gentler 10 approach than perhaps you would do in the criminal 11 courts. My experience of cross-examination by 12 defendants' counsel is that it is -- whilst we need to 13 move to special measures and courts aren't as good as 14 they should be, it is not generally as much of a problem 15 as it would be in the criminal courts. 16 MR SCORER: It is worth mentioning, just on the first point 17 Peter raised, that certainly on the claimants' side we 18 have seen much more of a tendency over the past sort of 19 two or three years, or I certainly have, for defendants, 20 institutional defendants, to bring the alleged abuser or 21 the convicted abuser into the claim as a party to the 22 claim. So not that we would be suing the abuser, but 23 that the defendant would bring them in to seek some 24 recovery from them, so they're brought into the claim 25 and they then have a role in the proceedings which</p> <p style="text-align: center;">Page 157</p>	<p>1 the civil litigation is ongoing. 2 MR SCORER: There have been some extreme examples where, 3 although the claim is against an organisation, the 4 perpetrator is a member of the claimant's family, so 5 allegations of negligence against the institutional 6 defendant, and in those circumstances it can be 7 exceptionally distressing for the perpetrator to be 8 brought into the proceedings. 9 MR SKELTON: David, where do you -- 10 MR BONEHILL: I would just echo the comments that have been 11 made. We would not bring a perpetrator into 12 proceedings. It is a separate action that we take once 13 the main action has been settled. I think the point to 14 make there is, as has already been said, that we will 15 seek to recover monies from a perpetrator where they 16 have the assets. Absolutely we will. We don't make any 17 apologies for that. 18 MR SKELTON: Do you need to seek the claimant's assistance 19 to have your separate proceedings against the alleged 20 abuser? 21 MS JEFFERSON: We would always seek to make it clear to the 22 claimant that that is what is happening. If someone 23 refuses, shall we say, to cooperate, and it got to 24 a stage where it was necessary to make an actual 25 litigated claim against them, then, yes, we would always</p> <p style="text-align: center;">Page 159</p>
<p>1 previously they didn't have. 2 MR SKELTON: So they are brought in at the time the 3 proceedings are running as opposed to afterwards, which 4 of course defendants -- 5 MR SCORER: Correct. My increasing experience, and to the 6 extent that -- I am assuming it is a deliberate policy 7 by defendant insurers to do that now. 8 MS JEFFERSON: I think it is fair to say that different 9 insurers would take different approaches. So certainly 10 I think most would look -- if there is any possibility 11 of recovery from the individual who, at the end of 12 the day, it was their choice to act as they did and to 13 abuse the victim, if they have any assets, then an 14 insurer or an uninsured organisation will look to see if 15 it is possible to recover. 16 But my experience is more that they will be 17 brought -- that that will be a recovery action that is 18 dealt with separately, after the underlying claim has 19 been solved. 20 MR NICOLSON: That's certainly my experience. In relation 21 to a public authority as a defendant, we would -- we 22 actually have a duty to undertake a recovery wherever 23 possible. However, that is usually done after the civil 24 litigation has concluded. I have certainly not seen 25 a case where we have undertaken any recoveries whilst</p> <p style="text-align: center;">Page 158</p>	<p>1 want to engage the claimant's legal advisers to explain 2 to them the implications about release of redacted 3 information. 4 My experience is that I have not had anyone who has 5 ever said, "No, we don't want you to pursue that person 6 who did this to me". We are very happy to provide you 7 with whatever support, but we try to minimise that, and, 8 in the majority of cases, we are able to resolve without 9 litigating. 10 MR SKELTON: Thank you. The issue of experts. I'm afraid 11 I am going to focus back on you immediately, Paula, just 12 to get the discussion going. 13 At the moment, the classic adversarial position is 14 that each party is entitled to their own expert evidence 15 subject to the leave of the court, and that will 16 routinely involve, in these sorts of cases, 17 a psychiatrist or a psychologist and may in some cases 18 have other expertise involved, like social work experts. 19 The obvious advantage of that is you get your own 20 expert that you can give instructions to, you can meet 21 that expert in consultation, and you can involve them 22 throughout the case. The disadvantage, of course, is 23 that it creates costs, and it doubles up the number of 24 experts involved in each case. Could you discuss some 25 of those issues?</p> <p style="text-align: center;">Page 160</p>

1 MS JEFFERSON: Yes. I think probably everyone would agree
 2 that one problem we have around experts is there just
 3 are not very many experts in this area and that is
 4 a major challenge for everybody, whatever side of
 5 the table that you are sitting at.
 6 What we find quite often is that, from a defendant
 7 point of view, we are willing to consider a joint
 8 expert, but actually from a claimant point of view, and
 9 at the stage of the letter of claim, it will say, "We do
 10 not consider that this is a case which is suitable for
 11 joint expert evidence". I can understand, for some of
 12 the reasons that Jonathan mentioned earlier about
 13 looking at issues around causation or limitation, having
 14 the ability to be able to ask questions, particularly
 15 for the claimant, and for the individual to understand
 16 what the expert is saying, it makes it more difficult if
 17 there is a joint report.
 18 MR SKELTON: Can I ask, first of all, to break down a bit of
 19 your answer, what exact expertise do you require? For
 20 example, a consultant psychiatrist with a specialism in
 21 sexual abuse claims of children?
 22 MS JEFFERSON: Yes.
 23 MR SKELTON: When you say there are few experts, are there
 24 few specialist doctors in that field or are there few
 25 specialist doctors in that field who are prepared to

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1 become experts for court purposes?
 2 MS JEFFERSON: I would say it is a fairly narrow field and
 3 then it is made narrower by those who want to take on
 4 the work to become experts, either because they are not
 5 interested in that area because they are interested
 6 elsewhere or they're just too busy. It is a challenge.
 7 A midway from the sort of -- there is the joint
 8 experts or there is each party having their own report,
 9 which obviously then has the challenges you have
 10 mentioned of costs, of delay, and for the individual of
 11 having to tell their story on two occasions, is getting
 12 to the stage of some sort of agreement where the
 13 claimant will obtain their own report and then disclose
 14 it, rather than -- the adversarial nature of a lot of
 15 personal injury litigation is, "I will only show you my
 16 report if you show me your report", and that is not
 17 helpful.
 18 So here where, I think, certainly working with
 19 a number of the people around this table, we would be in
 20 a position where we would say, "Well, you get your
 21 report from your expert to whom you can ask your
 22 questions, but then you show us your report", and we
 23 will endeavour, and in the majority of cases be able to,
 24 either put questions to that expert or to have
 25 a sensible discussion with the solicitors without the

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1 need for a second report. Sometimes, a second report is
 2 necessary, but I think we are moving away from that
 3 being the norm.
 4 MR SKELTON: Alastair, do you take that sort of approach, or
 5 do you favour having your own expert?
 6 MR GILLESPIE: We endorse that approach that Paula has just
 7 set out and in the vast majority of cases that is
 8 sufficient to see an end to the matter. Very often, for
 9 example, where there are convictions, liability is not
 10 in dispute, the parties can focus upon quantum and
 11 causation as the only issues that they actually need to
 12 resolve. If the claimant obtains a report which, to all
 13 intents and purposes, looks appropriate from our
 14 perspective, in terms of being able to assess the value
 15 of the claim, then it can easily be resolved.
 16 You mentioned getting a report being the norm. On
 17 our side, we do not take that step lightly at all. In
 18 the last seven years, we have resolved over 450 claims
 19 and we only obtained 39 medical reports on survivors in
 20 that time, which is 7/8 per cent.
 21 MR GARDEN: I think in the early days of my time in this
 22 type of work, in the late 1990s, the key criteria was
 23 that this was a new and developing area of both medical
 24 science and the law, and that it was therefore highly
 25 unlikely that experts would have common views on

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1 prognosis and medical science, and that, therefore, it
 2 was appropriate to have our own experts, because it was
 3 unlikely to have commonality.
 4 I think we have moved on from that, in that, you
 5 know, obviously 2016, it is 20 years ago since I started
 6 doing this work, so I think there is more likely for
 7 there to be commonality, but I'm not sure that we have
 8 reached the stage, and it would be a matter for,
 9 I think, medical experts to say where there is
 10 consensual agreement over the development of medical
 11 science such that it would be appropriate to have
 12 a jointly appointed medical expert. That was the first
 13 point.
 14 The second point was that certainly in the
 15 Manchester City Council cases that I am dealing with,
 16 the practice differs widely from what you have said. In
 17 my experience of dealing with you, generally we produce
 18 a medical report. If it is going to be a high-value
 19 case, the defendants will routinely get their own report
 20 and in a number of cases I have had to refuse permission
 21 because the claimant is, frankly, too badly damaged to
 22 be seen by a second expert and that's backed up by my
 23 own expert. So it can be a damaging process.
 24 MR GILLESPIE: I can only speak for my own experience on
 25 that point of view, but certainly, bearing in mind the

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<p>1 consequences in relation to the impact it will have upon 2 the survivor, the inevitable addition in cost which 3 ultimately we will have to bear as well, it is 4 a significant decision for us to take. But we only take 5 it in those cases where there is such a range of opinion 6 and complexity that the claim itself and the nature of 7 the claim and the merits of the claim justify that step 8 being taken. 9 MR GARS DEN: I know, and I agree. 10 MR SKELTON: Is it the complexity or partly the value, which 11 I think is the point you are mentioning. Actually, it 12 is worth you exploring the psychiatric consequences in 13 more detail in the higher value claims because you are 14 going to save some money if you get a report that's 15 supportive of a defence? 16 MR GILLESPIE: It's not so much getting a report in support 17 of the defence and saving money. It is actually, what 18 is the true and fair value of this claim? What is the 19 damage flowing from the assault or assaults, terrible as 20 they were, for which acts that individual should be 21 compensated by the insurers of the organisation, as 22 opposed to other very traumatic life events where an 23 individual -- maybe they have been abused elsewhere, 24 unfortunately, maybe they have had traumatic 25 bereavements or their parents split up when they were</p> <p style="text-align: center;">Page 165</p>	<p>1 principles that Ecclesiastical issued in June of this 2 year and in those guiding principles we talk about joint 3 experts, and that's an area where we have changed, if 4 I'm honest, our behaviours, we have reached out to try 5 to get, with claimant lawyers, agreement to instructing 6 one expert and, in our letter of response to a claim we 7 get now, we put in a paragraph on that very point, "Can 8 we reach agreement on a joint expert?" 9 With one or two exceptions, it is always declined. 10 There are a couple of firms of lawyers that will reach 11 out and we work well with them and that happens, but as 12 a general statement, that is declined. 13 I think -- there are complexities here, but I think 14 some of it is around behaviours and whether we can shift 15 some of those behaviours for the benefit of the victim 16 and survivor, and we have to make that step change, 17 because if we allow the current status to remain, 18 there's only one person that suffers in all of this. 19 MR NICOLSON: I would echo that behaviour. From our 20 perspective, that is one of the most common issues that 21 we have, the instruction of joint experts. Quite often, 22 we are open and willing to explore the appointment of 23 a joint expert. The response we get back is, "No". No 24 further discussion. We would like to open the door for 25 further discussion around what the issues are, but quite</p> <p style="text-align: center;">Page 167</p>
<p>1 very young, all sorts of different factors in their 2 emotional background that impact upon the overall 3 individual, the overall personality, and it's giving 4 true and fair weight to that individual to actually have 5 those matters investigated. 6 MR SKELTON: Just exploring that a little bit further, if 7 I may, you I think described fewer than 10 per cent of 8 cases over the last few years. 9 MR GILLESPIE: Yes. 10 MR SKELTON: Why in those 10 per cent of cases? What was it 11 about your own assessment prior to getting expert 12 evidence that made you think you needed it? 13 MR GILLESPIE: I have to make a sweeping generalisation in 14 terms of actually picking out specific cases, but 15 generally they will be cases typically where the expert 16 instructed by the claimant solicitors will provide 17 a report that suggests that pretty much anything and 18 everything that has been visited upon this individual is 19 as a result of the abuse, as opposed to other factors in 20 their life and, as a result of that, it turns into 21 a significant special damage claim which, actually, we 22 don't think is a true representation of the causation 23 position. 24 MR BONEHILL: I wonder if I could just take this back 25 a step? The inquiry will be aware of the guiding</p> <p style="text-align: center;">Page 166</p>	<p>1 often that door is well and truly closed on us. 2 MR LUCK: Our experience is very, very similar to what has 3 been said. There are a number of cases which are 4 settled without medical experts' reports, and we do look 5 at that primarily. Other cases, yes, we do see experts' 6 reports provided by the claimants, and they are 7 perfectly acceptable. But some reports, unfortunately, 8 are not, and we then are in the realms of having to get 9 our own report. 10 We would not be averse to, if there were maybe an 11 agreed panel of experts, and those experts had to follow 12 certain aspects which they must report on, because 13 certainly, on occasion, we find that the claimant's 14 report, the expert has not forensically examined the 15 information from what has been told by the claimant to 16 what is in the records, we have seen cases where the 17 expert has not even looked at the claimant's records and 18 has later commented, "If I did, it wouldn't change my 19 opinion", which clearly is unsatisfactory, and I don't 20 think that any of the defendants here and the claimants 21 here would be averse to a situation where you knew you 22 were getting immediately a one-off, balanced report from 23 an expert. 24 MS STOREY: I think we have -- 25 MR SKELTON: Hang on, Richard has been waiting.</p> <p style="text-align: center;">Page 168</p>

1 MR SCORER: On this point about single joint experts, it is
2 sort of, on the face of it, something that looks
3 tempting to say, "We ought to have single joint
4 experts". We, as claimant lawyers, certainly don't want
5 to put our clients through any more medical examinations
6 or medical interviews than is necessary. But we operate
7 in an adversarial system. Our responsibility is firstly
8 to prove the allegations and then to maximise our
9 client's claim. With a single joint expert, we don't
10 have the same freedom of privileged communication as
11 Jonathan said earlier.

12 In a sense, if we go down the joint expert route, in
13 the context of an adversarial system, we are potentially
14 disadvantaging ourselves and our client in that
15 approach.

16 MR GARS DEN: I think there are some experts that are known
17 to be used all the time by defendants and, in my
18 experience, when you get asked to choose a joint expert,
19 the defendant list is made up of those whom they
20 instruct regularly, with whom there is likely to be --

21 MR BONEHILL: You're absolutely right, but it works both
22 ways.

23 MR GILLESPIE: I think you will find it is on your side as
24 well.

25 MR BONEHILL: There are certain experts who will only do

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1 work for claimants or defendants.

2 MS STOREY: It comes back to Jonathan's point about
3 polarisation of experts. We sometimes get stopped at
4 the joint selection of an expert, let alone the joint
5 instruction, which are two different things. But
6 bearing in mind Paula's point about, you know, having
7 a look at the claimant's report before deciding whether
8 to incur expense yourselves, I think claimant lawyers
9 are aware of that approach and tend to sort of try and
10 get a report that's going to cover off all the issues
11 properly and appropriately, and to avoid a second
12 assessment of the survivor, if possible.

13 There are many cases where we have collaborated,
14 there have been group actions where we have collaborated
15 successfully and devised a panel of experts, and it's
16 been to good effect.

17 There's been cases involving -- I think there is
18 a particular dearth of experts in learning disability,
19 and so we have often collaborated to find the right
20 expert to do a report on somebody with a learning
21 disability and the impact of abuse upon them.

22 So I think we can do it where it is right, but
23 I think it comes back to, you know, our psychiatric
24 evidence is going to cover off limitation, causation,
25 quantum and all sorts of issues, and we wouldn't be

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1 serving our clients properly if we didn't do that
2 appropriately and properly.

3 MR LUCK: I don't disagree with that. All I am saying is,
4 is there an opportunity here, and we are never going to
5 come up with dealing with these claims with solutions
6 that will cover every claim because of the multitude of
7 aspects in different cases.

8 But if there is an opportunity whereby, in a further
9 tranche of cases, joint experts can be used, potentially
10 with arrangements that both sides are able to put their
11 questions to the expert and, ultimately, if a claimant
12 or a defendant still feel unhappy, could go to the court
13 to get authority to get their own further report, that
14 may actually take out another 10, 20 per cent of cases.
15 I don't know.

16 MR SKELTON: Can I ask, is the use of single joint experts
17 compulsorily feasible if at present (a) there is a small
18 pool of experts and (b) they have become polarised
19 because of the history of their previous practice? Can
20 the existing pool can converted into neutral --

21 MR SCORER: It is difficult to see how it would be
22 practically feasible at this point, I think.

23 MR GARS DEN: I think there are cases where instruction of
24 a joint expert is more likely than other cases. Those
25 would be cases where, for example, there's a concession.

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1 If we took out limitation and it was going to be
2 a quantum only case, there's far more likelihood -- if
3 a defendant came forward at a very early stage -- and
4 they don't always do this. If the defendant insurer
5 came forward and said, "We want to settle this case.
6 Can we instruct a joint expert?", I think we would be
7 far more amenable than if it was an all weapons fired,
8 fight on everything.

9 MR BONEHILL: Most cases are not like that. This is where
10 I disagree with you. The majority of cases, certainly
11 from my experience, we don't have those types of issues
12 around limitation, for example, which keeps coming up
13 time and time again and, therefore, what is the barrier
14 to preventing us instructing a joint expert?

15 MR GARS DEN: In that situation, it probably wouldn't be.

16 MR SCORER: When you say -- obviously we covered off
17 limitation in the earlier session, but when you say, you
18 know, defendants don't run limitation arguments, you may
19 think, from your point of view, that you're not really
20 running them, but you are telling us that you are
21 running them. That's the reality of it. So it is
22 a live issue in the case.

23 If a defendant were to say, you know, "We are
24 telling you that we are not running a limitation
25 argument. We are conceding that", then that is

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1 a different matter. But that's not the reality of how
2 these cases are run.
3 MS STOREY: We have a professional duty to explore the
4 causation links to put our clients' cases as best we
5 can, and I think we can only do that with interrogation
6 of the expert so that we really understand whether there
7 is a case linking the lost earnings with the damage
8 that's been caused.
9 But I think another thing is that part 35 of
10 the Civil Procedure Rules allows us to ask questions of
11 experts, and I don't think we all do that as much as we
12 could do. That could save a second examination. So
13 when we serve our reports upon defendants, there is no
14 reason why questions can't be put to our experts, and
15 that may well save some attritional costs later on and
16 some personal cost.
17 MR BONEHILL: I agree entirely with that. I think it feels
18 as though we are moving in that direction, albeit quite
19 slowly. I still don't fully understand, then, why that
20 expert can't be agreed before you instruct them, and we
21 seek some commonality, some common ground, between us
22 before you appoint that expert, bearing in mind both
23 parties can ask the questions of the expert.
24 MR NICOLSON: I think part of the issue is, we are having
25 this conversation around this table. This kind of

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1 conversation needs to happen as part of the process, and
2 it doesn't at the moment. Quite often, we want to have
3 the conversation, but we are just met with silence at
4 the other end. I think it is very important that we are
5 able to have the conversation. It may be an adversarial
6 process, but just defendant and claimant lawyers talking
7 over the matter is what is actually required and,
8 unfortunately, that isn't --
9 MS JEFFERSON: I think this is what Master McCloud will be
10 covering.
11 MR SKELTON: You very neatly transfer us onto other issues.
12 I'm interested in the early stages of litigation, of
13 what are the barriers to bringing a successful claim or
14 defending a claim successfully from your perspectives
15 and how could they be ameliorated, made better. Paula,
16 in terms of the early stages?
17 MS JEFFERSON: The early stages is around openness and
18 transparency and providing as much information as
19 possible. So I fully accept that when an initial letter
20 of claim is being sent, there may be some uncertainty as
21 to whether it's being sent to the right organisation
22 and, from a claimant's perspective, they don't want all
23 of their personal details being revealed to what may be
24 the wrong organisation or it may take some time to get.
25 But once that has been acknowledged, whether that be

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1 by an organisation that says, "We are looking for our
2 insurance. These are our insurers. We weren't
3 insured", then at that stage, if as much information as
4 possible can be provided, and often I find that, you
5 know, I will send an email to Tracey or to Richard to
6 say, "Have you got your client's police statement?", and
7 they will say yes and send it straight across to me.
8 I think this is where with the protocol, the more
9 information that can be provided at the outset, then the
10 more, from the defendant's point of view, it makes it
11 easier for us to investigate and to respond quickly.
12 MR GARDEN: Disclosure does work both ways, though.
13 MS JEFFERSON: Indeed.
14 MR BRIDGE: The biggest problem I have dealing with
15 particularly the local authorities is that they hold the
16 information that we need to prove the claim, and there
17 is a real reluctance on them to release that
18 information. I'm talking particularly about
19 Social Services records. I appreciate that they contain
20 a lot of sensitive information, quite often about third
21 parties, but the case I think Peter was involved with,
22 Dunn v Durham, gives very good guidelines as to how this
23 information should be shared, and it isn't being, and
24 regularly with the historic failure-to-remove cases we
25 are waiting years for disclosure of these records.

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1 MR SKELTON: Do you find there is a variation, then? Like
2 Paula says, you may have a relationship with certain
3 local authorities or their lawyers and with others you
4 may not, in which case you're back to square one.
5 MR BRIDGE: My local council is Lancashire County Council
6 and they are fantastic. We have an agreement with them
7 and, every single case we send to them, we get
8 a fantastic response and we do get the records within
9 a reasonable amount of time. Some of the London
10 Boroughs -- and I'm not having a go at Mark here -- they
11 are notorious for just ignoring the requests and then
12 agreeing to send records and not sending records and
13 obviously causing huge distress to the victims, as they
14 are waiting just to get to this first stage where we can
15 evaluate the claim by going through these records and
16 seeing what information is in there and just raising
17 obstacles that needn't be there.
18 MR GARDEN: I undertake a separate campaign called the
19 Access to Records Campaign with members of Barnardo's,
20 Care Leavers Association, CoramBAAF, over the problems
21 there are in relation to disclosure of social care
22 records. And fortunately, in litigation, because of my
23 case in Durham v Dunn, we are in the privileged position
24 of having greater weight to getting unredacted records,
25 but even so, there is substantial fighting ground over

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1 the Data Protection Act and whether we should be getting
 2 unredacted or redacted records and that persists with
 3 the police, as I think I have already said, and that can
 4 cause huge problems. I often think that there is
 5 a complete, you know -- there's an industry of people
 6 beavering away with black felt pens, crossing out
 7 thousands and thousands of bits of paper, which hinders
 8 the process. That's one of the things that --
 9 MR SCORER: I think really what this illustrates, and
 10 looking ahead to the way the process needs to be
 11 reformed, is that, yes, we need protocols for dealing
 12 with all this, but they need to be enforceable. There
 13 need to be sanctions for not supplying with them. Most
 14 of the people in this room, probably all of the people
 15 in this room, are people who would probably comply with
 16 any voluntary protocol that was there, but there are
 17 plenty of people who won't. So enforceability is key if
 18 we are going to have viable protocols in this area.
 19 MR GARDEN: Having spoken to Information Commissioner's
 20 Office and records, people in councils all over the
 21 country, they fear being prosecuted by the Information
 22 Commissioner's Office, and that's why they take
 23 a cautious approach. One of the things I have suggested
 24 is a change to the legislation whereby records officers
 25 will be given a statutory defence if they have looked at

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1 the records genuinely and decided what to release, and
 2 I think that's another issue, but it does come into
 3 litigation.
 4 MS STOREY: I think what Paula said about sending off
 5 the police statement, and it is wonderful when you have
 6 got the whole police file and you can do that, but
 7 increasingly, I have noticed that police investigations
 8 are getting longer and longer, and so, once your client
 9 has secured a conviction, sometimes there are ongoing
 10 criminal proceedings which mean that we can't access
 11 that information, and so we then have to take our client
 12 through a more detailed disclosure exercise, having
 13 already just done it with the police in the criminal
 14 proceedings. So that sort of duplicating efforts
 15 generally, I think.
 16 MR NICOLSON: Just a point on the disclosure issue, is that
 17 where we are looking at one claimant's set of records,
 18 that's probably not a problem. From a local authority
 19 that is faced with dozens of requests, it is a huge
 20 resource implication. It is not that we are not willing
 21 to disclose, it is just the sheer process of having to
 22 locate the files, often from archives, often to then
 23 have someone go through them to bundle them up. Of
 24 course, with the influx of claims that we are getting in
 25 and requests, that process is becoming more and more

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1 resource intensive.
 2 MR SKELTON: What about the issue raised about data
 3 protection, which, just to summarise, I think is really
 4 the release of sensitive personal data not just about
 5 the person who is alleging the abuse, but about other
 6 people they may have been in care with, for example, or
 7 indeed about the people who were caring for them who may
 8 have no relevance whatsoever to the situation? How do
 9 you deal with that? Do you have a set protocol for it
 10 or is it done on an ad hoc basis?
 11 MR NICOLSON: There are very clear protocols in place. One
 12 of the ways is for individuals to put in a subject
 13 access request, and that will then be sent, a redacted
 14 copy of the information in the file that's available to
 15 them. Of course, as part of the civil litigation
 16 process, we then move into disclosure and unredacted
 17 copies of the files, but I think the guidance that's in
 18 place is pretty standard and the Information
 19 Commissioner's guidance is very --
 20 MR GARDEN: The result of our round tables around the
 21 country is actually quite at odds with that. The
 22 practice of how records are redacted or not varies
 23 hugely around the country. We conducted, I think, about
 24 seven or eight round tables at different local
 25 authorities on an ad hoc basis. I wish it was so. At

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1 the end of the session, I produced an imaginary set of
 2 facts and said, "How would you deal with this
 3 redaction?", and there were arguments in the room as to
 4 how it should be. It really is very differing --
 5 MR NICOLSON: Open to interpretation.
 6 MR GARDEN: Very much so. That's part of the problem.
 7 That's what causes the delay. Because we had records
 8 officers arguing with other records officers as to how
 9 you would disclose one piece of information. That went
 10 on for 10 minutes, I promise you.
 11 MR SKELTON: How long does the process of disclosure
 12 routinely take?
 13 MR GARDEN: It can take years. It is meant to happen in
 14 40 days. But they all say that you can't comply with
 15 that time limit. Under the new Data Protection Act it
 16 is going to become even tighter. It is changing to
 17 a month. But it is impractical.
 18 MR SKELTON: From a defendant's perspective -- I ask you,
 19 Rod -- what other difficulties do you have in the early
 20 stages in terms of investigating a claim which has the
 21 kind of difficulties which could be overcome with better
 22 procedures?
 23 MR LUCK: I think, again, it differs from claim to claim.
 24 If you have got a series of claims involving vicarious
 25 liability against employees and you have already

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1 investigated, then further claims are often dealt with
2 very, very quickly. When you are more in the realms of
3 dealing with negligence claims in respect of failure to
4 remove, particularly going back to the '60s and '70s,
5 then you are up against the fact that records may be
6 very, very difficult to locate; you don't have experts
7 available, or very few of them, who were practising
8 during those periods, because you need people who were
9 of a sufficient level of experience at that time, which
10 means it is likely they are long since retired.
11 We have already talked about protocols, and I think
12 that this openness and upfront information following
13 certain procedures at the outset is the best first stage
14 for these particular claims. There will then always be
15 difficulties in contacting witnesses on particular
16 cases, and you have to take individual cases as
17 appropriate.
18 MR SKELTON: I would like to move on, please, if I may, to
19 legal issues. The Supreme Court, as everyone is aware,
20 relatively recently had two cases on vicarious liability
21 which has clarified the law to a large extent on that
22 issue, which has previously been a major issue in
23 personal injury litigation. To what extent is vicarious
24 liability still an issue from the defendant perspective?
25 Paula, do you have a view on that?

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1 MS JEFFERSON: I think, in the majority of cases, it is
2 relatively straightforward, but as with any area of law,
3 there are certain grey areas around the outside.
4 So, for example, the issue of when does someone --
5 if they are in a role that is more than them just
6 attending at a certain location for certain office hours
7 and then going home and doing something totally
8 different, but where they have a role that involves them
9 in a much wider sense, that it is with them all the
10 time, where does that role stop, if at all, and where do
11 things that happen entirely in their home life or their
12 family life separate?
13 So around vicarious liability, I think for the
14 majority of situations it is fairly settled. There will
15 always be one or two grey areas around the outside.
16 MR SKELTON: Is that a legal grey area or a grey area of
17 applying the existing law?
18 MS JEFFERSON: Well, it is a bit of both, really. So you
19 look at the existing law and say, "Would this apply in
20 this case on a strict legal analysis?" There are other
21 issues about whether or not, having reached your
22 conclusion on that legal analysis, whether in that case
23 you decide that you want to look at that issue.
24 But I think, generally, vicarious liability is
25 settled but there will always be grey areas that have to

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1 be looked at.
2 MR GILLESPIE: I don't think we are at the stage, nor do
3 I think it would be appropriate for us to be at the
4 stage, where an employer is responsible for each and
5 every act of an employee no matter in what circumstances
6 those acts took place. I ran a case last year on the
7 issue of vicarious liability when it was held that the
8 employer was not responsible for the actions of
9 the employee, and, as I say, I don't think we should
10 ever get -- it wouldn't be appropriate to get to that
11 end point. As Paula says, there are grey areas, there
12 are different scenarios, occurring all the time, but
13 I do think there will still be attempts to widen the
14 boundaries of vicarious liability still further,
15 possibly in the realm of independent contractors who at
16 the moment, because of a contract for services, are not
17 regarded as being someone for whom an employer who
18 engaged them can be vicariously liable. But we will see
19 whether the case comes that might mean that is tested.
20 MR SKELTON: I don't want to get into too much legalistic
21 terminology, but would joint liability be an issue,
22 where you are not liable as an employer or someone akin
23 to an employer, but someone jointly doing a task?
24 MR GILLESPIE: There is also a doctrine of dual vicarious
25 liability, so by extension, in the right circumstances,

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1 the court may consider that could arise as well, yes.
2 MR GARS DEN: There are big issues around people like
3 gardeners, caretakers, dining room stewards, and so on.
4 The peripheral jobs in an institution are causes of huge
5 debate. So is the gardener a gardening teacher or is he
6 a gardener? Was he employed to look after children or
7 not? The fact it was recognised he will come into
8 contact with children, does that impose a liability on
9 the defendant or not? Did the abuse take place on the
10 premises or at home? Usually, it takes place at home.
11 Was he then being an employee or actually on his own
12 time? As I say, he/she ...
13 MR SKELTON: To ask the same question I asked of Paula, is
14 that a difficulty with applying the existing principles,
15 which are fairly simple, or is it a problem really of
16 fitting those principles -- is it a problem with the law
17 inherently, with the principles themselves being wrong
18 and not fit for purpose?
19 MR GARS DEN: It depends on whether you want work for
20 lawyers, I suppose. If you want work for lawyers, then
21 there is going to be a grey area.
22 The existing principles of the close connection test
23 established in Lister v Heselley Hall Limited has recently
24 arguably been doubted in a case called Mohamud or
25 arguably not.

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<p>1 I think the law is still in a state of flux and, if 2 you look to Canada, there are lots of cases on whether 3 somebody is in their own time or whether they are not. 4 I don't want to go into foster carers and the 5 responsibility for them, but that is another huge area 6 of difficulty which will, with time, become more of an 7 area of difficulty because we have moved out of 8 institutions into foster care and that definitely needs 9 clarifying, and it isn't clarified. Arguably, 10 Woodland v Essex clarified that, but it hasn't been. 11 MR NICOLSON: That's the non-delegable duty -- 12 MR GARDEN: The non-delegable duty of care. We won't go 13 into legal niceties, but I'm a foster carer, personally, 14 and I'm insured, but insurance for foster carers only 15 came in relatively recently and, with older cases, it's 16 a huge problem, and there's something wrong about the 17 law when it says that if you were put in an institution 18 then, if you were abused, there will be liability, but, 19 however, if a local authority, same money, put you in 20 foster care, there won't be any liability because of 21 the relationship -- 22 MR SKELTON: There is a case going before the 23 Supreme Court -- 24 MR GARDEN: Yes, which we know about and we will eagerly 25 await the judgment in that. I'm just trying to</p> <p style="text-align: center;">Page 185</p>	<p>1 As we put more children into foster care, we need the 2 answers. 3 MR SKELTON: What other issues are there? One issue I think 4 has certainly attracted some attention is the consent 5 issue, that young adults in particular may be able to 6 consent to some form of sexual contact with other 7 people, and that doesn't constitute abuse. Is that an 8 issue for your claims and to what extent is that going 9 to be resolved in the near future? Can I ask you, 10 Alastair, about consent? 11 MR GILLESPIE: I understand why you ask that, because it is 12 a very -- perhaps an unusual word to use in the context 13 of these claims. I should say immediately that it is, 14 to our experience, something that only arises in very, 15 very exceptional circumstances, and in very exceptional 16 fact-specific scenarios as well. 17 Over the thousands of cases that we have dealt with, 18 there are probably only four or five cases where we have 19 even contemplated raising it as an issue. We do have 20 a case involving it which is being considered by the 21 Court of Appeal next February. But reading the facts of 22 that case -- I won't trouble you with them now -- they 23 are extremely unusual. I would hope, when you read 24 those, it will be readily understood why that issue 25 might arise in those specific circumstances. But, as</p> <p style="text-align: center;">Page 187</p>
<p>1 illustrate how unsettled the law actually is in this 2 area, rather than it being well established. In certain 3 cases, yes, it is, whereas previously it wasn't. If you 4 are a care worker, yes, it is clear. 5 MR SKELTON: Does that affect a significant volume of your 6 client base, these points of legal uncertainty? 7 MR GARDEN: I can think of a number of my cases. 8 MR BONEHILL: Yes. 9 MR BRIDGE: I had a three-day trial last year on vicarious 10 liability so it is an issue that's live. 11 MR SCORER: It is certainly a live issue. I broadly agree 12 with the way Peter and Paula have characterised it. It 13 is a more settled issue than it was but it remains live. 14 I have a case going in the Court of Appeal in January 15 which on your point about dual vicarious liability, the 16 principle of dual vicarious liability has been 17 established, but the way in which that's applied I think 18 will still be contested in some cases. 19 MS STOREY: I think when you explain to a potential client 20 that, had they been abused by a key worker in 21 a children's home as opposed to their foster father, 22 they would have a case, they are confused and upset by 23 that distinction. It just doesn't seem right. You 24 know, they regard the local authority as a corporate 25 parent and they had no choice about where they were put.</p> <p style="text-align: center;">Page 186</p>	<p>1 I say, it is not an issue that generally will arise in 2 any way, shape or form in the vast majority of claims. 3 MR SKELTON: Does that ring a bell, Richard, from your 4 perspective? 5 MR SCORER: It is my case, so, yes, it does. I think 6 whereas Alastair has characterised it that it is an 7 issue which some defendants raise not in a large number 8 of cases but it certainly is happening, I think there's 9 probably a variation between different defendants in 10 terms of their behaviour around this, and their 11 readiness and willingness to raise that as an issue. 12 But it is certainly cropping up. 13 MR SKELTON: I know you are sitting very close to Alastair, 14 but you used the word "behaviour", which on one view is 15 a slightly loaded word. From one perspective, it could 16 be a legitimate legal argument that needs clarification 17 by the court on the basis of very particular facts. On 18 the other side, it could be something which doesn't have 19 to be taken as a legal issue, it is optional to take 20 legal defences. Are you trying to say there may be 21 certain defendants who will opt to take those sorts of 22 points and others won't? 23 MR SCORER: That is precisely what I'm saying, or that's 24 been my experience on it. I don't know whether that is 25 shared by others, but that's been my experience.</p> <p style="text-align: center;">Page 188</p>

1 I wasn't using it in a loaded way. It is simply
 2 a descriptor of the way defendants behave.
 3 MR GARS DEN: I think it is more of a problem with the CICA,
 4 frankly, than it is with defendants. Not that I'm
 5 letting them off the hook, but there is a famous CICA
 6 case which involved one of the children's homes I was
 7 involved in, where a 14-year-old boy was deemed to have
 8 consented to buggery by the CICA, which was one of
 9 the most bizarre decisions --
 10 MR SCORER: I know we're not here to discuss the CICA, but
 11 the CICA are running that very argument in a child
 12 sexual exploitation case at the current time. So Peter
 13 is right, it is much more of a CICA --
 14 MR SKELTON: Is there a mismatch even with the criminal law
 15 about consent as well in a different way from the CICA,
 16 a different approach where there is a statutory rape,
 17 for example, of someone who could ordinarily consent to
 18 have sexual relations with someone, can't be taken to be
 19 consenting because that person may be in a position of
 20 responsibility. How do all these things match up?
 21 MR GARS DEN: You would have thought they would, wouldn't
 22 you, but I don't think they do. I think it is one law
 23 in a criminal case and another form of practice for the
 24 CICA. I think this is one of the points about whether
 25 or not there should be a redress scheme for these types

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1 of cases.
 2 If you look at the CICA and the differing practice
 3 that it adopts because it is government money -- perhaps
 4 that's controversial -- I think that sort of approach
 5 would not necessarily be adopted by a defendant firm of
 6 insurers in civil litigation. I don't think it would.
 7 But they can tell you themselves.
 8 MR SKELTON: Before moving on to the final issue, which is
 9 really about the settlement process, can I just
 10 understand a bit more about this point about different
 11 defendants taking different approaches. Again, some
 12 defendants may see themselves as the vanguard of legal
 13 claims, taking the legal points, and that's legitimate.
 14 Others may say, "Well, we don't want to take these legal
 15 points, we are prepared to take a more practical view of
 16 litigation".
 17 MR BONEHILL: It is a practical view and to us it is an
 18 ethical view as well. We will never allege consent for
 19 anybody under the age of 16. We have made that very
 20 clear in our guiding principles. That is an ethical
 21 stance, and I think it is absolutely the right thing to
 22 be doing.
 23 Where the victim/survivor is over that age, then we
 24 have a proper robust process in place whereby those
 25 decisions are discussed at a very senior level within

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1 the organisation before any authority is given. So the
 2 reality is that the processes are robust in terms of
 3 looking at the specific cases and the evidence that's
 4 available for those cases, and then a decision is made
 5 on a case-by-case basis. But, again, they are very few
 6 and far between and that's how it should be, in my view.
 7 MR SKELTON: Does anyone dissent from that?
 8 MR LUCK: Not at all. It is very, very rare, but it is
 9 utilised and considered in appropriate cases.
 10 MR SKELTON: Is there a difference with the self-insured
 11 defendant to these sorts of issues in terms of their
 12 approach to things as opposed to someone with an
 13 insurance company backing them?
 14 MR NICOLSON: No, I don't think there is. I think certainly
 15 for my own organisation, we would take a very ethical
 16 view. I could never see us using that kind of an
 17 argument going forward. It's not been an issue for us
 18 up until now either.
 19 MR SKELTON: Thank you. Turning then to the final issue --
 20 again, I'm afraid we have about 10 minutes to go --
 21 alternative dispute resolution and settlement, and
 22 settlement early on, particularly, saving legal costs
 23 and limiting the effect on the claimants and indeed the
 24 defendant institutions of long litigation.
 25 Can I ask someone just to open and express a view

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1 about what are the factors that allow you to get to the
 2 point of early settlement and what are the obstacles?
 3 Paula?
 4 MS JEFFERSON: The more information that we are provided
 5 with at an early stage, then certainly with those
 6 organisations and insurers that I'm advising, we will
 7 look to see if there is a possibility of making an early
 8 offer. That as much comes from the experience that we
 9 have all had over many years and the comments that are
 10 regularly made that it's not in the interests of any
 11 party, whether it be the claimant or the defendant, for
 12 there to be delay.
 13 If we can make an early offer and if that offer is
 14 acceptable to the claimant without the need for them to
 15 have medical evidence and that is their choice, then
 16 that is, I think, successful for everybody.
 17 I appreciate that there are, however, some people
 18 who (a) prefer to have an expert report or their legal
 19 advisers feel that it is really necessary, and they
 20 can't advise them on a settlement. But I think what is
 21 important is, if you have got the information and you
 22 are able to make an offer, then it is appropriate, from
 23 a defendant's point of view, to make that offer, it is
 24 then up to the claimant and their legal advisers whether
 25 or not they feel able to accept it at that stage.

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<p>1 I don't think there should be criticism, as I think came 2 through in some of the submissions, that this was 3 somehow done by defendants as a way of just trying to, 4 as it were, brush things under the carpet and deal with 5 things quickly. It is not. It is done in a genuine way 6 to try to answer the criticism that's been made over 7 many years that for some reason defendants delay. 8 MR SKELTON: Before I ask some of the claimant lawyers to 9 respond to that, what about the position that early 10 offers are made at a very low level, which puts pressure 11 on the claimant and his lawyers in a case which may not 12 be worth that much money and where there are funding 13 issues to take that offer and leave? 14 MS JEFFERSON: Well, I would say that the offers are made at 15 what is a realistic level based upon the evidence that 16 we have been provided with. 17 MR SKELTON: Do you find, then, that your early offer you 18 tend to stick with rather than getting closer to trial 19 when pressure is put back on the defendant and you end 20 up having to make a greater offer? 21 MS JEFFERSON: It will vary, and I can think of some 22 situations where we have, unfortunately, made an early 23 offer, we have had a settlement meeting at which that 24 offer has been made, it's not been accepted and a week 25 prior to trial I have had a letter from the claimant</p> <p style="text-align: center;">Page 193</p>	<p>1 together until you get to a stage where you can settle. 2 MR GILLESPIE: I think it is important to emphasise as well 3 that we talk about part 36 offers from our side. It is 4 open to either side to make a part 36 offer at any time 5 they wish to do so. I'm regularly met with part 36 6 offers from claimant lawyers at a time when virtually 7 nothing has been disclosed. There has been a set of 8 allegations and, with the same correspondence or very 9 shortly afterwards, an offer is put forward as well. So 10 at that stage I have the benefit of absolutely no 11 information whatsoever apart from a set of allegations 12 put forward by an individual and their solicitors. 13 MR SKELTON: To be clear on the terminology, part 36 is an 14 offer that's made, a monetary offer that's made, of 15 settlement that is an open offer until it is formally 16 withdrawn and which, if it is not accepted and then you 17 fail to beat it at trial, then there is a costs penalty 18 although I think it is right to say the costs penalty 19 are probably worse for defendants than claimants. 20 MR GILLESPIE: That's right. It is standard practice within 21 personal injury litigation generally. 22 MR SCORER: As we said earlier, litigation is stressful for 23 our clients and we don't want to prolong the litigation 24 any longer than is necessary. I think we always, 25 certainly in my practice and I think it would be true of</p> <p style="text-align: center;">Page 195</p>
<p>1 solicitor saying, "Actually, my client is going to 2 accept the offer that you made a year ago". That is not 3 really in anybody's interest whatsoever. 4 The evidence will change, and the reason -- if you 5 make an early offer, it is going to be based upon what 6 limited information is available. The reason it is 7 probably not accepted is that the claimant and their 8 solicitors feel that more information should be 9 provided, probably a medical report, and that is likely 10 to end up in a higher offer because then you get more 11 information which makes you think, well, maybe there is 12 more information to justify this claim. 13 MR SKELTON: From your perspective, does that occur? 14 MS JEFFERSON: Yes. We will make offers in the hope that 15 that is the right thing for the claimant, if they want 16 to settle that claim now. 17 From a defendant's point of view, the way the 18 compensation system works at the moment, that is the 19 main thing that we can do, but we will also try to 20 explore what else it is that a claimant will want. So 21 if they want an apology, a meeting, the plaque removed 22 from the school wall that commemorates the teacher, 23 whatever it is, it's about engaging across from both 24 sides of the table to find that out. But if you can't 25 resolve things at an early stage, you continue to work</p> <p style="text-align: center;">Page 194</p>	<p>1 other claimant lawyers here, welcome the opportunity to 2 discuss and try to settle cases at an early stage, 3 obviously consistent with our obligations to investigate 4 the case properly and ensure that the proper evidence 5 has been obtained. We have certainly been able to do 6 that with Ecclesiastical and those representing them. 7 I think that is a model of better practice than -- 8 I don't want to sound as if I'm obsessing again about 9 differences in defendant behaviour, but there are 10 variations in defendant behaviour around this. There is 11 no question. And, you know, some defendants and their 12 insurers will not approach it with the same willingness 13 to reach early settlement. 14 MR SKELTON: What effect does that have, in terms of the -- 15 obviously, it means you carry on litigating. Does it 16 mean ultimately -- because we have heard most cases 17 don't go to trial. So ultimately terms are reached? 18 MR SCORER: It means, actually, in some cases, that a case 19 that you could settle relatively early on in the 20 proceedings ends up being settled much later and at much 21 greater expense, and of course at a psychic cost for the 22 claimant as well because they have to go through that 23 very stressful process. 24 MR GARDEN: I think in terms of attitudes to litigation, 25 the traditional attitude of a defendant I think is to</p> <p style="text-align: center;">Page 196</p>

1 say to the claimant, "Look, you prove your case, you let
 2 us have what you have got and we will have a look at
 3 it". Whereas in fact, investigation can be done by the
 4 defendants, and I know is, to look at their own records
 5 to see whether from their own evidence, I don't know,
 6 there are cases where the records show that the abuser
 7 was actually investigated many years ago and we don't
 8 always know that.

9 If the defendants come to us and say at a very early
 10 stage, "We have looked at this case. We think it is one
 11 we want to settle. You get hold of some evidence and we
 12 will settle it on the best possible terms", that's the
 13 best possible approach to us and the most convivial one.
 14 Often what happens is, we write a letter of claim, the
 15 defendants say they are going to investigate. We don't
 16 hear anything. We then collect our evidence. We get
 17 a medical report and we make an offer with the medical
 18 report and then there is a war of offers.

19 It's the early behaviour of the defendants of
 20 a convivial and settling nature that is less likely to
 21 produce an adversarial and a more cooperative approach,
 22 if that makes any sense.

23 MR SCORER: It is also right to say that in some cases, and
 24 this applies to Ecclesiastical where there have been
 25 these early settlement discussions, as Paula said, other

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1 issues can be incorporated into that, like an apology,
 2 for example.

3 MR SKELTON: I was going to ask about that. How much can it
 4 be brought into play in the early settlement meetings,
 5 I mean very early on in particular, an apology or an
 6 admission of liability, for example? Do those tend to
 7 feature in those settlements early on?

8 MS STOREY: I think a lot of defendants who have been doing
 9 this work for a long time now will ask those questions
 10 outright at the outset. We will ask our clients what
 11 they want as well. I think when I first meet somebody,
 12 it would be, "What do you hope to achieve out of this
 13 process?" and try to find out to what extent that can be
 14 matched by what is achievable. I think, on the whole,
 15 we are asked those questions, and it's then a question
 16 of working out what's possible in any given fact.

17 But the reality is that these aren't straightforward
 18 personal injury cases. These aren't a broken leg in an
 19 agreed set of circumstances, 16 weeks off work, a bit of
 20 physiotherapy and you're back to normal. This is an
 21 analysis of something that happened a long time ago in
 22 a lot of cases, where it's had a lifelong effect, and
 23 it's been with that person causing them damage over
 24 a long time. So, first of all, we have to work out what
 25 we are arguing about, what's the subject matter, what

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1 happened. Is it more than was told to the police? Are
 2 our clients still disclosing the events that happened?
 3 Were they only able to say a certain bit to the police?
 4 Is it still coming out? Are we still learning about
 5 what actually happened here? So it is a process of
 6 disclosure. It doesn't sit comfortably with the system,
 7 as it were. Once we establish what actually happened,
 8 then we have to look at somebody's life, and people are
 9 complicated and our clients aren't a homogenous group of
 10 people. They are all different. Lots of other things
 11 have happened to them too.

12 Whilst I accept that Paula has made, in good faith,
 13 some of these early offers, I think that to quantify the
 14 cases properly, we do need that analysis of causation
 15 which comes from psychiatric evidence and a real
 16 understanding of that person's condition and what they
 17 can expect in future. If we can build in some rehab
 18 into this process, make sure that somebody can get
 19 access to some services and it is a matter of record
 20 what mental health services are like at the moment. If
 21 we can build rehab into civil justice, we will be doing
 22 a good service, I think.

23 MR BRIDGE: Following on from what Tracey said, I'm finding
 24 a real willingness from defendants to engage in joint
 25 settlement meetings pre-issue. I think they are an

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1 incredibly effective way of dealing with these claims.
 2 Claimants love them because they feel they have spent
 3 a whole day talking through the issues. The defendants
 4 have come along. Sometimes a representative from the
 5 council will be there, who will offer a personal
 6 apology, and they actually see justice being done and
 7 they go away from that meeting happy, not just with the
 8 settlement, they have avoided litigation, and I'm
 9 finding, where we are getting early settlement offers
 10 the defendants are not averse to agreeing to leave that
 11 settlement offer open until we get a medical and then
 12 coming along and talking about it at a JSM and rather
 13 than mediation or ADR, I think JSMs at the minute are
 14 a really effective way of dealing with these cases at an
 15 early stage.

16 MR GILLESPIE: You will find that as a consensus from our
 17 side as well. They are extremely effective. If we can
 18 build into a pre-action protocol the necessary steps to
 19 ensure JSMs take place on a properly informed basis
 20 I think you will see them being even more effective.

21 MR BONEHILL: Your point about apologies, it is a great
 22 opportunity to actually bring somebody senior from the
 23 organisation, from the institution, to give a personal,
 24 meaningful apology, which is invaluable.

25 MR GARDEN: What about the Compensation Act point, about

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<p>1 what sort of protection is given to an apology that 2 doesn't affect future litigation? Is that a problem -- 3 MR GILLESPIE: The Compensation Act -- without wishing to 4 get too technical -- doesn't, at the moment, cover 5 admissions in the context of vicarious liability but 6 a legislative change could address that. 7 MR SKELTON: That is something we are going to discuss at 8 another seminar. But thank you for dangling that. We 9 are going to have to draw to a close because we are 10 right up against the deadline. 11 There may be some issues that could get raised from 12 those who are sitting and listening. 13 CORE PARTICIPANT: Just really a point of information. 14 I take on board and am very cognisant of the concerns 15 the solicitors have raised about joint experts and the 16 difficulties, but it is worth actually pointing out, of 17 course, that in certain complex proceedings, such as in 18 family proceedings, the courts are actually directing 19 parties to appoint joint experts. 20 CORE PARTICIPANT: Brian Dewar(?), who is a senior 21 social worker. 22 CORE PARTICIPANT: Hi, Liz Davis. I just wanted to say 23 that the national archives contain an enormous amount of 24 material relevant to individual claims and class actions 25 and of course cannot be accessed, so I think that is</p> <p style="text-align: center;">Page 201</p>	<p>1 a young person on another, where staff members of an 2 institution have been aware of this, and have either 3 chosen to ignore it or actively encouraged it. In these 4 circumstances, what is the attitude of insurers? 5 MR LUCK: I think, first of all, you are looking at that 6 from a negligence point of view, but then you are 7 clearly raising the point that it was either an action 8 or non-action by the staff member. 9 We don't see very many of these cases, but I think 10 we would look at the individual circumstances and, if it 11 is quite clear that this was known, and certainly if 12 encouraged, that those are the types of cases that we 13 would be accepting and be looking to make settlements 14 on. 15 THE CHAIR: Thank you. My second question was about the 16 independent experts. Are they accredited, and if they 17 aren't, should they be? 18 MR GARSDEN: Most of the experts -- I'm in charge of 19 monitoring and recruiting experts at my firm. We look 20 for either substantial experience or a membership of 21 the expert witnesses register, and either route is good 22 enough, but experience is key. That would be my view. 23 Just on the point you raised about pupil/pupil 24 abuse, certainly one of the first group actions I ever 25 dealt with in 1996, there was certainly evidence that</p> <p style="text-align: center;">Page 203</p>
<p>1 a very important issue for this inquiry. 2 I also am very busy representing a number of 3 survivors trying to get access to files. I just think 4 it is the most cruel process ever. It used to be 5 a highly skilled social work task. Certainly over my 6 career, it is now you just meet an administrator who 7 hands you an envelope and the survivors quite often just 8 cannot face opening it. I have known some who have not 9 opened their envelopes over years, so obviously that has 10 to be thought of in terms of delay. So the process is 11 absolutely appalling and must change. 12 MR SKELTON: Thank you. 13 THE CHAIR: A couple of quick -- one question about 14 vicarious -- 15 CORE PARTICIPANT: What the lady said then, in red, just 16 today alone, I have been talking to my solicitor, and 17 there are still things I need to disclose and still 18 things I need to say and I need to get out, but I also 19 need help in doing it. There's some things I want to 20 say. I can't. It's hard to explain to you, but there 21 are things. Thank you for saying that. 22 THE CHAIR: Just a couple of quick questions. In respect of 23 vicarious liability, a question for the insurers, 24 really, about the circumstances where abuse has been 25 committed peer on peer, if you like, by one child or</p> <p style="text-align: center;">Page 202</p>	<p>1 abusers were recruiting -- were abusing boys and, when 2 they went higher up the school, they were being used as 3 adjutants, and made to abuse other boys and used as 4 protection for them as abusers. There wasn't much doubt 5 about that. 6 MS STOREY: I think the psychiatric experts, there is so 7 much subjectivity that we, in an adversarial system, can 8 use to either side's advantage. So for one person, it 9 could be that a lot flows from the abuse, it does 10 disrupt the career and, for another person, it was 11 always going to be that way. There is such a wide range 12 of opinion that can come out of the same set of 13 circumstances, so it is very subjective, and that comes 14 back to the polarisation, and accreditation might be 15 useful. It might be looking at the family courts and 16 what they do. 17 MR SCORER: The key thing, and you are absolutely right, 18 Tracey, is that experts reporting these cases, whichever 19 side they are reporting for, should know what child 20 abuse is about. They should be experts on that. That 21 is where I think the issue of accreditation comes in and 22 is important. 23 MR GARSDEN: The Legal Aid Agency, as part of their audit 24 process, insist that we have some sort of recruitment 25 process for experts. I think that's probably --</p> <p style="text-align: center;">Page 204</p>

<p>1 MR SCORER: But it is not a formal accreditation process. 2 MR GARSDEN: No. 3 MS SHARPLING: Coming back to the adversarial system for 4 a moment, Mr Garsden, you mentioned earlier, you alluded 5 to some of the challenges with your clients who may have 6 special needs, particularly those with learning 7 difficulties. I would just be interested in anybody's 8 understanding of whether those with special needs face 9 particular challenges in the civil justice system? 10 MR GARSDEN: Well, they do. I will give you an anecdotal 11 example. Many, many years ago I was asked to try to 12 represent victims of abuse who had special needs and 13 learning disabilities in a residential setting, and one 14 of the reasons the case never got off the ground was 15 that we couldn't find somebody to act as an interface 16 and support worker for these individuals who had enough 17 funding to help them through the civil litigation 18 process, despite the best efforts of a social worker, 19 and that is a problem, finding somebody who can help 20 someone with learning disabilities through the civil 21 litigation process and act as their next friend. There 22 is the official solicitor, of course, whom Richard has 23 mentioned, but that is a problem. 24 MR SCORER: There is some work being done at the moment 25 through the Advocate's Gateway around special measures</p> <p style="text-align: center;">Page 205</p>	<p>1 ask them all. But one general question, if I may: we 2 have heard on a number of instances where the experience 3 of the victim and survivor in terms of their journey 4 through the system may well depend on the particular 5 policy of the particular defendant in relation to claims 6 and defences, and I'm just wondering whether you have 7 any suggestions as to how we can make that more 8 consistent so that we don't have some claimants facing 9 the consent defence and some claimants facing 10 a limitation defence and others being spared that. 11 I wonder if there is a suggestion that -- 12 MR GARSDEN: I think the Ecclesiastical Insurance Company, 13 I have to give them credit for their pre-existing model 14 litigation policy which I have referred to in my paper, 15 which I have read and commend very highly. I think they 16 deserve a lot of credit for that. That sort of 17 experience we could develop to a national model 18 litigation policy, which would run alongside the 19 protocol, which I think we are, as claimant lawyers and 20 defendant lawyers, hoping to develop with 21 Master McCloud, and she's made gestures to us and that's 22 running in parallel to what this -- what IICSA is doing 23 as well. 24 MR SCORER: The route Master McCloud is looking to pursue, 25 which mirrors, I think, some of the experience of</p> <p style="text-align: center;">Page 207</p>
<p>1 for vulnerable and child witnesses within the civil 2 justice system, which mirrors, obviously, things that 3 have been done within the criminal justice system, but 4 like everything we have talked about today, the more it 5 can be formalised, the better. 6 MR GARSDEN: Definitely a very valid point. 7 MR FRANK: Thank you for that. It is a question I was going 8 to ask, whether we could have a view about how soon, if 9 at all, we should be adopting for the civil process the 10 same protections that the criminal process provides, 11 particularly with the advocates' tool kits and so forth, 12 which are, it seems to me, pretty much optional at the 13 moment, and so the experience of the victim/survivor 14 very much depends on the lottery of whether or not the 15 particular judge in a civil case is actually going to 16 bother with the ground rules here and so forth. So 17 I would be interested to see if there was a consensus 18 across both claimants and defendants in terms of 19 improving the journey of the victim and survivor through 20 the process. I know it is not every case that goes to 21 trial, but when it does, whether or not that can be 22 improved. I would be interested to hear further 23 submissions on that at some point, not necessarily this 24 evening. 25 I have a list of questions here. I am not going to</p> <p style="text-align: center;">Page 206</p>	<p>1 dealing with asbestos litigation in the courts, does 2 include the possibility of that being enforceable 3 through the courts. 4 MR GARSDEN: Yes. The model litigation policy, which I have 5 seen in Australia and was heartened to read, and the 6 existing one, I think there's certainly movement. 7 MS STOREY: I think at the moment we, as claimant lawyers, 8 tend to warn our clients, you know, it could be this, 9 prepare for the worst, hope for the best, but these are 10 some of the defences, some of the complicating features 11 of this litigation, so be prepared, and you feel a deep 12 professional obligation to make sure they're aware of 13 what they're getting into, and then you can give them 14 more advice when you know who your defendant is, who is 15 representing that defendant and you know what kind of 16 approach they are likely to take. So it is -- but 17 I imagine, from a survivor's point of view, being told 18 that anything could happen is probably quite disturbing. 19 MR GARSDEN: I think the problem is not those around this 20 table, but those not around this table, that we need to 21 provide this policy for. I'm absolutely convinced those 22 around this table are very experienced and ethical in 23 the way they approach things and that is why you have 24 heard what you have heard. If we had a model litigation 25 policy and an abuse protocol, then that would cover</p> <p style="text-align: center;">Page 208</p>

<p>1 anybody who enters this field of litigation that you 2 could point to as a model of good policy. 3 MS STOREY: That is absolutely right when we sue 4 perpetrators who go to criminal defence lawyers who have 5 no experience of the civil justice system and write 6 letters to us that we are obliged to show our clients 7 that cause them further trauma. So it's not the people 8 necessarily here, but it's, "Here is the protocol. This 9 is how we want to do it". 10 MR GARS DEN: That's exactly who I was thinking of. 11 MR SKELTON: Our third seminar tomorrow, which you have 12 neatly brought us onto, is the form of the existing 13 system where these precise things will be discussed in 14 more detail. 15 Can I just say about tomorrow, we have a 10.00 am 16 start. We will first be discussing compensation, 17 broadly speaking. We have another seminar on the idea 18 of accountability and reparation, what it means beyond 19 compensation, which is something that has been raised 20 today. Then reform of the existing system and then the 21 idea of more radical reform in our final session and 22 whether or not that is viable. So many of the things 23 that you have raised very helpfully today, thank you 24 very much, from my perspective. 25 THE CHAIR: Thank you. I have very little to add to what</p> <p style="text-align: center;">Page 209</p>	<p>1 2 Opening comments by Facilitator52 3 4 Introductions53 5 6 Open discussion54 7 8 Session 394 9 10 Welcome by Chair and opening comments94 11 12 Opening comments by Facilitator95 13 14 Introductions96 15 16 Open discussion97 17 18 Session 4145 19 20 Opening comments by Facilitator145 21 22 Introductions146 23 24 Open discussion146 25</p> <p style="text-align: center;">Page 211</p>
<p>1 Peter has said. Thank you to everyone for their 2 contribution, not just around the table but from the 3 floor as well. It has been extremely helpful. It has 4 opened up so many issues that are at the centre of what 5 the inquiry hopes to do, so we look forward to taking it 6 even further tomorrow. Thank you. 7 (4.43 pm) 8 (The hearing was adjourned until 9 Wednesday, 30 November 2016 at 10.00 am) 10 I N D E X 11 12 Session 11 13 14 Welcome by Chair and opening comments1 15 16 Opening comments by Facilitator3 17 18 Introductions5 19 20 Open discussion6 21 22 Session 249 23 24 Welcome by Chair and49 25 opening comments</p> <p style="text-align: center;">Page 210</p>	

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