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THIS PAPER IS FOR DECISION

SC(14)99

SCOTTISH CABINET

HISTORIC ABUSE OF CHILDREN IN CARE: PROPOSED INQUIRY

PAPER BY THE CABINET SECRETARY FOR EDUCATION AND LIFELONG LEARNING

Purpose

1. Following discussion at Cabinet on the possibility of an inquiry into historic abuse in care on 28 October (SC(14)31st Conclusions refers), this paper sets out more detail about a proposed independent inquiry into the abuse of children in care. Cabinet is invited to agree the need for an inquiry into historic child abuse in care, the outline terms of reference, and that we should consult further with survivors and relevant organisations as part of our ongoing commitment to democratic participation, with a view to developing a further proposal for Cabinet.

2. Cabinet is also invited to note the range of options for delivering this inquiry, their likely costs, and the interaction with the broader range of Government activity in this area.

Timing

3. This paper is scheduled for discussion at Cabinet on 4 November.

Scottish Government Position

4. I brought a paper to Cabinet on 12 August (SC(14)26th Conclusions refers) which confirmed that the Scottish Government's response to the issue of child protection and historic abuse should have three main strands:

- ◆ A response to historic abuse, which brings perpetrators to justice;
- ◆ A focus on continued strengthening of our current child protection policy and processes which protects children at risk now;
- ◆ Enhancement of survivor support, in an effective manner.

5. I will make a statement to Parliament next week on child protection and historic abuse. As I reported to Cabinet last week, my experience of the InterAction process has convinced me of the need for a cathartic process of review to give survivors the opportunity to move on and thrive. It is essential that, given the very positive results of the InterAction process and our commitment to working with survivors in the development of a support fund and appropriate commemoration, any inquiry must built on the work which has already taken place. This will provide survivors with a public acknowledgement and validation of the abuse they have

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suffered and of its impact on them, and give them an opportunity to find reconciliation. I have set out in **Annex D** how a proposed inquiry forms part of a wider package of support aimed at mitigating the inequalities that many survivors have endured as a consequence of the impacts of abuse on their life chances.

6. I am also conscious that we are vulnerable to political criticism as the only part of the UK not currently undertaking an inquiry into historic abuse of children in care. Our focus until now, through the work of SurvivorScotland and its strategy for survivors of abuse, has been understanding the issues affecting survivors, working with them to develop and deliver services, and support that enables them to work through the effects of their abuse on their everyday lives. While we have made great progress (and the positive participation of the interaction process is testament to that), I now believe that the time is right for us to undertake a positive, meaningful inquiry with significant engagement from survivors and relevant organisations which would be very different from that proposed in England and Wales, and which would go further than the 2007 Shaw review.¹

Purpose, vision and principles

7. The proposed terms of reference for an inquiry are set out in **Annex A**. It will build on the work already under way with survivors and as part of the Interaction Response the Government committed to continuing to engage with survivors and relevant organisations, so I propose that these terms of reference be consulted on. My intention is to create a process that will:

- i) Honour our commitment to further engage with survivors and relevant organisations on the scope and focus of the inquiry;
- ii) Increase public awareness of the history of institutional child abuse;
- iii) Create a comprehensive national record both of that abuse and the steps that have been taken to eliminate it;
- iv) Provide survivors with a public acknowledgement and validation of that abuse and its impact on them, and give them an opportunity to *div*e and thrive^q
- v) Demonstrate that Scottish justice is about more than just apology or compensation, important as they are; and
- vi) Be inquisitorial rather than adversarial, focusing on creating a true and comprehensive chronology.

8. The year 1996 is the working assumption for a cut-off date because of the changes that took place in the care system following the Children (Scotland) Act 1995. The inquiry into historic abuse in Institutions in Northern Ireland has a cut-off date of 1995, and the Inquiry in England and Wales is much wider in scope and will consider matters from 1970 to the present. Any cut-off date will be informed by our consultation with survivors, and the scale and scope of any inquiry will have an impact on the resources required to deliver it.

¹ *Historical Abuse Systemic Review: Residential Schools and Children's Homes in Scotland 1950 to 1995*, an Independent review led by Tom Shaw (2007)

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9. Early estimates suggest there will be significant cost associated with establishing and running any inquiry (and a statutory one in particular), as described further in **Annex C**.

10. The proposed terms of reference provide assurances in relation to the sequencing of any criminal prosecutions, and work will continue with the Lord Advocate to develop protocols.

11. The previous Cabinet discussion covered the need to ensure synergy with the Police Scotland National Child Abuse Investigation Unit (NCAIU). That Unit will have three specific functions (as set out in **Annex D**):

- ◆ Allow the development of a more co-ordinated and strategic response to Child Abuse across Scotland;
- ◆ Support local policing Child Protection Units by providing dedicated specialist investigative resources; and
- ◆ Ensure equity of specialist support to all local policing divisions

12. Given the nature of any Inquiry, criminal activity will most likely be revealed. As such, it will be important to have a clear outline of the process whereby criminal activity which had previously not been reported/investigated would be progressed. It will be important to ensure that any resultant criminal investigations do not detract from progress in investigating and tackling emerging abuse through impact on specialist police investigators (current demands are prioritised through threat, risk and harm, and financial implications). For example, the Historical Institutional Abuse Inquiry for Northern Ireland has generated some 570 new criminal investigations to date.

13. In addition, the impact of any renewed investigations can be significant for both victims and witnesses. As well as the trauma of re-interview, the time and costs of locating potential witnesses around the UK, and in a lot of cases abroad, is often undermined by a less than productive outcome due to recollection and detail diminished by the passage of time. In many cases, the practical aspects of location of paper files, the effect of information retention policies, the management of media interest and Freedom of Information requests for a re-investigation can have a greater resource impact than an evolving investigation.

14. I am also conscious that we should learn from the mistakes of the current inquiry in England and Wales, and that we choose an appropriate chair. We would want the leading candidate to have relevant knowledge and experience in the subject area. This is reinforced by events over the past few days, and the resignation of Fiona Woolf CBE as chair of the inquiry in England and Wales. I suggest that we need to take our time to identify the right chair, and early engagement with survivors as part of this process will be key to that. I will want to make that point very clear in my statement to Parliament next week.

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Presentation

15. It is expected that there will be considerable media attention surrounding the Ministerial Statement on 11 November, particularly if the decision is made to announce an inquiry. In preparation for this, officials will liaise directly with communications colleagues ahead of the Statement to prepare a media release and wider handling, and will develop a pro-active response.

16. In addition to media handling, if the decision is taken to announce an inquiry and to engage with the survivor community as part of the process, officials will need to develop a plan to engage and support them as well. There is the potential to use mechanisms already in place such as the Scottish Human Rights Commission InterAction process.

Decisions

17. **Cabinet is invited to:**

(a) **Agree the need for an inquiry into historic child abuse in care, the outline terms of reference, and that we should consult further with survivors and relevant organisations as part of our ongoing commitment to democratic participation, with a view to developing a further proposal for Cabinet; and**

(b) **Note the range of options for delivering this inquiry, their likely costs, and the interaction with the broader range of Government activity in this area.**

MR
November 2014

HISTORIC ABUSE OF CHILDREN IN CARE: PROPOSED INQUIRY

KEY ADDITIONAL INFORMATION

Proposed outline remit for the inquiry

The proposed remit for consultation would be:

- ◆ To hear the experiences of people affected by child abuse in care, and to provide an opportunity for public acknowledgement and validation;
- ◆ To raise public awareness and understanding of historic abuse of children in care and its devastating impact on the health and wellbeing of survivors;
- ◆ To create a national public record and chronology of abuse of children in care in Scotland, covering the period up to 1996;²
- ◆ To examine the extent of abuse of children in care and to consider the extent to which practice, policy or legislative issues that may have led or made in care abuse easier have since been addressed;
- ◆ To hear from both state and non-state institutions regarding their perspective on meeting their past duty of care to protect children in care³ from abuse (whether sexual, physical or emotional); and
- ◆ To produce a report to the First Minister and Deputy First Minister covering the points above.

Led by an Independent Chair ("the Chair") who will:

- ◆ Consider all/any information which is available from the various published and unpublished reviews, court cases, investigations which have so far concluded;
- ◆ Hear individual testimony in private from survivors of abuse in care at their request, and prepare an anonymised record of that evidence. Individuals will not be required to give testimony unless they consent to do so;
- ◆ Seek the co-operation of individuals and institutions, agencies or compel them to provide evidence where seen as relevant for the purpose of the inquiry.

Principles on which the Inquiry will be conducted:

- ◆ The Inquiry is expected to be inquisitorial rather than adversarial, and both cooperative and reconciliatory in nature. In this spirit, the compelling of witnesses or production of documents should be considered a last resort;
- ◆ Hearings may be held in public or in private, and should be designed to achieve the retrieval of all relevant evidence, and take and record evidence and report. The inquiry is to be held in such a way as to avoid prejudice to any current, or potential future, criminal proceedings;

² The year 1996 is the working assumption for a cut-off date because of the changes that took place in the care system following the Children (Scotland) Act 1995, but this will also form part of the consultation with survivors. The inquiry into historic abuse in Institutions in Northern Ireland has a cut-off date of 1995.

³ In-care abuse will cover the abuse of children (under age 18) where placements were made under statutory provision

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- ◆ The Lord Advocate would have the right to advise the chair that testimony from any particular witness may compromise any on-going or future criminal investigations;
- ◆ The anonymity of individuals will be maintained (but state or non-state institutions can be referred to);
- ◆ The Chair is not required to inquire, or to continue to inquire into a particular matter, if the Chair is satisfied that the matter has or will be appropriately dealt with. Means by which this can happen can include another inquiry or investigation or a criminal or civil proceeding;
- ◆ It is not part of the Inquiry's function to determine civil or criminal liability of named individuals or organisations and the Inquiry should proceed in a way that does not prejudice current, or future criminal or civil proceedings or other inquiries taking place at the same time and would not review prosecutorial decision making;
- ◆ The Lord Advocate will have the right to consider the draft report and request removal of any material that could potentially prejudice current or future criminal proceedings;
- ◆ The Inquiry should not prejudice or interfere with the National Confidential Forum, the confidential acknowledgement forum for survivors of institutional abuse in Scotland. The forum will act as a separate body, whose reports will form part of the overall public record;
- ◆ If the Inquiry considers that there is evidence available to it that suggests any criminal activity by any organisation or individual within an organisation then that should be reported to the Police and it is not a function of the Inquiry to investigate it.

Given the intention that the inquiry should provide a national record as well as a therapeutic and reconciliatory opportunity for individuals, it is not proposed that any early limit beyond 'living memory' should be placed on the period to be examined.

A large number of survivors that the Scottish Government engages with and envisages coming forward to the inquiry, have already been party to successful criminal prosecutions, so the focus for them is more firmly on the issue of public record and chronology. Further details about how the inquiry will interact with the work of National Child Abuse Unit can be found in **Annex D**.

There are legal issues that require further consideration, specifically in relation to discharging our obligation under Article 6 ECHR to ensure a fair trial for perpetrators about evidence being taken in public or in private.

Sensitivities of committing to an inquiry and mitigations

The purpose of an inquiry would be to satisfy survivors' needs for a public acknowledgement and validation of their experience. The importance of working with survivors on the shape and focus of an inquiry cannot be underestimated in its ability to achieve that purpose. The commitment given by the Cabinet Secretary for Education and Lifelong Learning as part of the Government's response to the InterAction process was to engage with survivors on all aspects of the implementation in response to the action plan, including an inquiry.

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This follows on from an InterAction process led by the Scottish Human Rights Commission which was sensitively put together to ensure that the needs and requests from all around the table formed the basis of an action plan. The emphasis of the process was to remain survivor led, which provides empowerment to survivors and avoids survivors feeling things are 'done to them'.

In an effort to mitigate this, it is essential that consultation and engagement with survivors and relevant organisations takes place, on the terms of reference of an inquiry and throughout the process. This will confirm their part in the process and enable them to have some form of ownership of the inquiry also.

Residential child care has formed the focus of previous investigations into in care abuse. There has been a significant effect on staff morale and staff retention. A further inquiry, while providing a means for survivors to have their experiences heard, may in itself bring limited new learning yet have the unintended consequence of further damaging the reputation of residential child care. To mitigate this, the outcomes of the inquiry must be clear, and it should be evident that we are striving for a narrative of improvement where lessons from past mistakes will be learned.

Committing funds to an inquiry may take away resource now from vulnerable children who need protection from abuse, and also from those survivors who need support now. Any inquiry which delays the implementation of a support package for survivors would attract a high level of criticism from these groups. To mitigate this risk, the Scottish Government should continue with the work already under way in relation to the InterAction Response, and continue the ongoing work in Child Protection.

HISTORIC ABUSE OF CHILDREN IN CARE: PROPOSED INQUIRY

FORMS OF INQUIRIES

Three options have been identified about the form that any inquiry could take:

- ◆ A statutory inquiry under the Inquiries Act 2005;
- ◆ A non-statutory inquiry; and
- ◆ A Royal Commission.

A Statutory Inquiry

A statutory Inquiry is set up in terms of the Inquiries Act 2005 and the Inquiries (Scotland) Rules 2007. It is conducted by a chair who may be assisted by an Inquiry Panel and the chair does not need to be from the legal profession. An inquiry cannot establish the criminal and civil liabilities of any person.

Examples of statutory inquiries include the McKie Fingerprint Inquiry, C-Diff at Vale of Leven Hospital and the Penrose Inquiry.

A Non-Statutory Inquiry

Scottish Ministers may establish a non-statutory inquiry using their common law powers as a result of their accountability to the Parliament and the electorate.

A Commission or Committee may be established to act independently of Ministers to investigate a set of circumstances and, if properly appointed, can carry as much public confidence as can a Public Inquiry into the quality of its recommendations, but the statutory protections of independence from Ministerial interference provided to such bodies are limited, and there could be concerns that Ministers will exert improper influence over the committee or commission, including in the provision of resources and funds. Further, such bodies will have no powers to compel the appearance of unwilling witnesses or the production of documents or other evidence, and are not required to be conducted in public. Nor will they have the power to prevent lawful disclosure of information provided to members of the inquiry or recorded by it.

Royal Commission

A Royal Commission is in essence a form of non-statutory inquiry, and shares the features of a non-statutory inquiry. It cannot compel witnesses to attend or give evidence (other than through primary legislation), nor can it prevent lawful disclosure of information provided to its members or recorded by it.

A Royal Commission is an invited group from outside government, usually used for more important matters where greater formality than an advisory committee is appropriate, and where time is not of the essence. A Royal Warrant is issued to the

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commissioners by the Sovereign on the advice of ministers, and it does not need specific Parliamentary approval. The Commission will usually call for evidence from individuals and organisations outside government or public authorities and may undertake its own research. It usually hears the main evidence in public and publishes copies of oral and written evidence, leading to a written report published and laid before Parliament.

It is important to note that a non-statutory inquiry can be converted to a statutory inquiry under the 2005 Act. To do so, Scottish Ministers must consult the chair, and then give notice to the persons appointed to the inquiry that it is to become a statutory inquiry. The terms of reference can also be altered if necessary. This would allow Ministers the flexibility to make an inquiry statutory at a later date if the non-statutory inquiry encountered difficulties in compelling witnesses or documents.

Risks and benefits of establishing a statutory inquiry with this remit:

The procedure under the 2005 Act is well established and generally considered to be quite robust. The need to strike a balance by establishing a measure of control by the State (as sponsor and funder) and the independence of an inquiry is well catered for under the provisions of the 2005 Act.

Witnesses and organisations can be compelled to attend and give evidence. Survivors will view this positively; however, the opposite may be true of organisations which have already entered voluntarily into discussions via the InterAction process.

There is a risk that a statutory inquiry may take a significant period of time to complete its remit. Scottish Ministers cannot be prescriptive about a completion date for the inquiry, but they can seek agreement of the chair at the time of establishing the inquiry. Survivors have been unanimous that any inquiry should be complementary to the other areas of support and that it should not negatively impinge on the other commitments in future. A process that has an indefinite timetable would attract criticism from some survivor groups. A statutory inquiry may have a significant cost implication which may detract from resources currently employed for child protection or survivor support.

Statutory inquiries have tended towards a legalistic and adversarial approach, which is one that all survivor groups agree that they would like to avoid. If there were to be a statutory inquiry, then it would be preferable if its members were not all drawn from the legal profession, but it would need to have an appropriate level of legal advice.

Risks/Benefits of establishing a non-statutory inquiry or Royal Commission with this remit

The main disadvantages of a non-statutory inquiry with this remit are first that it lacks the power to compel witnesses to give evidence or for documents to be produced, and secondly it cannot prevent evidence presented to it from being disclosed elsewhere. Past experience in the Shaw Review held that this was a barrier to achieving a comprehensive picture of instances of abuse. This may be an issue that will draw criticisms from survivor groups.

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A key benefit of a non-statutory inquiry is to give scope to Ministers to be more influential on expected timescales for completion, (while acknowledging that it will ultimately be for the chair to set timescales). This would sit well with all survivors and organisations who want to speedily achieve acknowledgement and details for the public record and move on.

A non-statutory inquiry may also be significantly cheaper than a statutory inquiry, as outlined in **Annex C** below.

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COST IMPLICATIONS

The cost of a public inquiry varies greatly depending upon its terms of reference and the complexity of the issues being investigated.

Inquiries costs are likely to be incurred on the following:

- ◆ Remuneration and expenses for Chair or Panel;
- ◆ Salaries and expenses for inquiry staff;
- ◆ Fees for subject experts and inquiry counsel;
- ◆ Witness expenses;
- ◆ Building accommodation for offices and hearings;
- ◆ Specialist IT equipment, including document management and hearings;
- ◆ Website, communications and media relations.

It is believed that a statutory inquiry may be significantly more expensive than a non-statutory inquiry is the expectation of funding for legal representation of core participants in a statutory inquiry.

There are particular operational costs associated with a statutory based inquiry, as they tend to have 3 teams which have to be independent of each other. These are:

◆ **The Inquiry Team:**

The Chair sets up their team and decides how many and which staff they require. It tends to have Senior Counsel, Junior Counsel, Advisors, Secretary, Deputy Secretary and admin staff. The Inquiry team need to be completely independent of the Scottish Government and housed in a non SG building and staff likely seconded from the SG.

◆ **The Sponsorship Team:**

This is made up of SG staff 3-5 people within the commissioning Directorate.

◆ **Core Participant Team:**

Core Participants are given this status by the Chairman. Core Participants are people or organisations whom the Chairman feels are of relevance to the inquiry or will be impacted by the inquiry. Scottish Government will need a core participant team. Others must include Survivors Groups, Health Boards, Schools etc. as well as individuals.

Being granted Core Participant status then brings with it an expectation of entitlement to legal expenses. The Core Participant Team (made up of two or three people) would also need to have their own Counsel (so for example, in the Vale of Leven the Scottish Government core Participant team had a Counsel, Senior Counsel and a Lawyer). The Scottish Government chose to pay for its own legal costs rather than claim through the Inquiry, but all other core participants would recover costs from the Inquiry.

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The role of the Scottish Government Core Participant Team is to provide briefing and advice to Ministers as well as provide information, evidence, etc. to the inquiry. This team needs to be completely separate and independent from the Sponsorship Team.

Examples of costs for a statutory inquiry include:

- ◆ The McKie Fingerprint Inquiry, which lasted approximately four years at the cost of £4.75 million;
- ◆ C-Diff at Vale of Leven Hospital, which lasted approximately five years. The cost was originally estimated at £4 million but has currently risen to £9.5 million;
- ◆ The Penrose Inquiry, which has lasted for five years and is still ongoing at a current estimated cost of £12 million.

Examples of costs for non-statutory inquiries/reviews are:

- ◆ The Kerelaw Inquiry 2009, which lasted 18 months at a cost of £346,000 (the Scottish Government contributed £213,000 and Glasgow City Council contributed £133,000);
- ◆ The Shaw Review cost £245,000.

It should be noted that these cost cannot be seen as indicative of how much an inquiry with this remit would cost. Both of the non-statutory inquiries mentioned were much smaller in scope than this proposed inquiry.

Financial implications

No budget has as yet been identified to cover the costs of an inquiry, and such costs would require to be identified as a pressure in financial year 2014-15 and beyond. This would be in addition the existing identified unfunded pressure around implementing the government's response to the InterAction report.

Based on the breadth of the proposed terms of reference, very initial broad brush estimates suggest that a statutory inquiry that was to be comprehensive and definitive may cost around £3 million a year, with higher costs in year 1 to include setup.

HISTORIC ABUSE OF CHILDREN IN CARE: PROPOSED INQUIRY

INTER-ACTION WITH OTHER PUBLICLY FUNDED INITIATIVES:

Police Scotland National Child Abuse Investigation Unit

Police Scotland are currently in the process of actively setting up the National Child Abuse Investigation Unit (NCAIU). The Unit is a natural consequence of the move to creating specialist national resource within Police Scotland to better reduce harm and investigate crime. The Unit is built on the recognition that a clear and consistent response to child abuse and neglect coupled with high quality, robust investigations that ensure children are protected timeously and that those investigations can withstand high levels of scrutiny over time. Police Scotland believe the key challenge currently faced is to ensure they have appropriate resource to tackle current and emerging threats. The NCAIU will have its main focus on this challenge. For this reason the NCAIU will not primarily focus on historic abuse although any abuse that requires national specialist support will be within its remit.

The establishment of the NCAIU will:

- ◆ **Allow the development of a more co-ordinated and strategic response to Child Abuse across Scotland.** It is designed to add investigative value to local policing divisions who will continue to retain responsibility and accountability for the delivery of child protection through devolved inter-agency arrangements within their geographical Local Authority boundaries;
- ◆ Deliver an enhanced specialist response that **supports local policing Child Protection Units by providing dedicated specialist investigative resources**, including Senior Investigating Officers (SIOs), who will lead and/or provide assistance locally;
- ◆ **Ensure equity of specialist support to all local policing divisions.** It is envisaged that the final structure of the NCAIU will be a national 'hub' with several 'spokes' at key locations across Scotland.

The formation of the NCAIU provides a real opportunity to maximise the efficient use of other national specialist investigatory units by co-locating alongside officers from the National Rape Task Force and Major Investigation Teams at certain locations.

Police Scotland have identified that at this stage of development it is difficult to define exact criteria of when the NCAIU will become involved in a case although the broad parameters identified are to it provide investigative leadership and/or investigative resources when a complex child abuse investigation is raised. The assessing factors will be the complexity of the investigation and threat, risk and harm posed and not the environment the reported abuse was committed i.e. family; institution; on-line or the context of the crime type i.e. Non-Accidental Injury; Child Sexual Exploitation; non-recent child sexual abuse, etc.

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The NCAIU will draw on existing resources across Scotland, without reducing capacity within local Child Protection Units. A design model has been completed which outlines the structure, roles, responsibilities, resource requirements and options for deployment.

To date, two new posts have been created within the Specialist Crime Division, those being Detective Superintendent (Child and Adult Protection) and Detective Chief Inspector (Child Protection).

It is anticipated that an evaluated pilot will commence within the proposed 'hub' (Livingston) and the North (Inverness) and North East (Aberdeen) 'spokes' prior to the year-end. The timing of full implementation will be dependent on the evaluation of the proposed pilot.

Survivor Scotland Strategy and Development Fund

The Scottish Government recognised over a decade ago the need to reconcile modern society with past abuses in care. This has focused on creating a framework to provide survivors with a climate of trust and support which will encourage and enable those with concerns to come forward and to be heard. This support is channelled through the Survivor Scotland strategy which is now in its tenth year. The strategy through the Survivor Scotland Development Fund – has funded thirty five survivor agencies who have developed one hundred and six survivor projects since the launch of the Strategy in 2005, with services that focus on trauma, physical health, male survivors, minority ethnic communities, learning disability and prisons and prevention. Some of these agencies also act as a 'one-stop shop' for survivors by helping to signpost them to other sources of help they might require. Survivor Scotland is currently considering how best to direct its resources, given that projects are currently very small and splintered across the country.

In-care survivor service Scotland

In-care survivor service Scotland (ICSSS) a tailored support service to any survivor of historic in-care abuse who wishes it including access to counselling, advocacy, befriending and support to track down and access historic files. This service has helped over 900 hundred survivors across Scotland since its launch in 2009.

These services have had a direct impact and benefit to survivors's lives. Currently the existence of a fund with a specific remit for survivors of childhood abuse provides confirmation that the impacts of their adverse childhood experiences in care are of importance and that this fund is ring-fenced for their specific support needs, although clearly the InterAction process reinforces the fact that survivors are looking for an enhanced response and package of support from Government

Following on from the commitment made in the response to the interaction process future focus of this work will seek to further enhance support for survivors and will be taken forward as part of the interaction response by the development of a support fund for survivors. Scotland has many survivor agencies that provide care and support to survivors. To date we have knowledge of some 68 agencies, but there will

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be others, as well as more informal peer group support organised by survivors for survivors.

Building on the capacity of these agencies and of statutory services (including mental health services) in developing the proposed support fund could offer a holistic life service, place-based across Scotland, through an expanded one-stop shop approach including counselling and advocacy but also looking at wider issues such as employment and career development. This sort of service could contribute to positive outcomes for survivors and help to reduce the stigma that many survivors carry in seeking support. Informal engagement with survivors indicates that there is a demand for this sort of service. Giving survivors a role in shaping and informing their support will be paramount to its success.

The National Confidential Forum

The National Confidential Forum (the Forum) will open applications towards the end of 2014. The Forum will give people who were placed as children in a residential care or health service the opportunity to share and acknowledge their experiences, including experiences of abuse and neglect through a confidential, supportive and non-judgmental process. Testimony from hearings will be confidential except where there are issues about current or future harm to children or where it is in the public interest to report allegations of historic abuse.

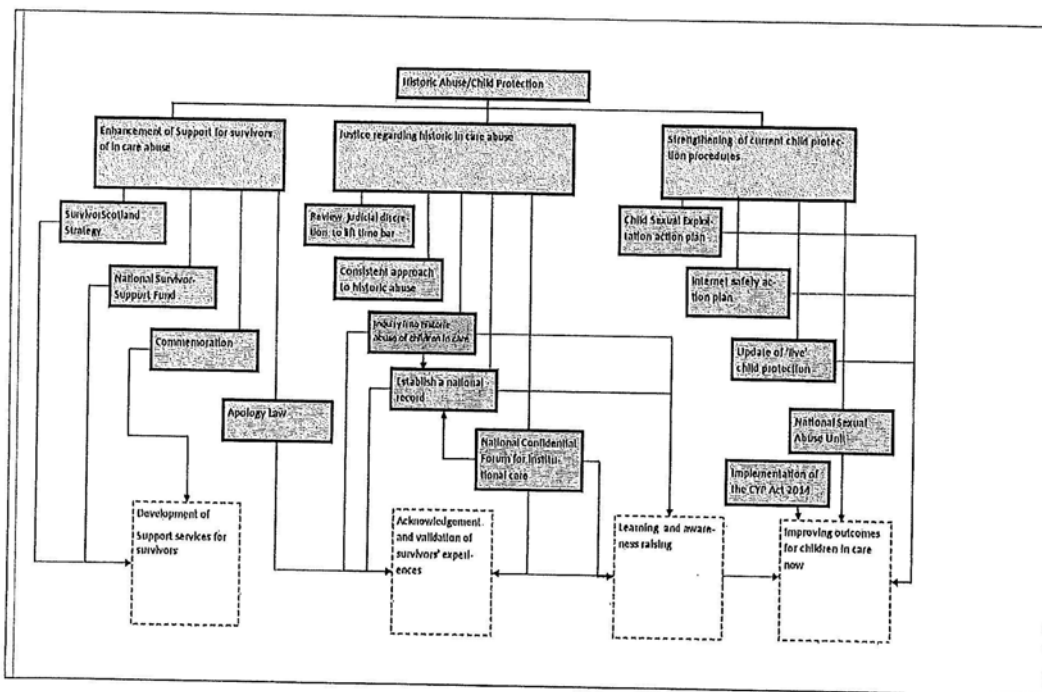
The statutory functions of the Forum are:

- ◆ To receive and listen to testimony from those who were in **institutional** care as children with the aim of contributing positively to their current health and wellbeing;
- ◆ To prevent harm to children and young people currently in care by learning lessons from the past; and
- ◆ To signpost other appropriate services to those who were in institutional care as children – before, during, and after hearings.

The Forum will also recount the experiences of those who were in institutional care as children through its published reports – and this should enhance public knowledge and understanding of an important part of Scotland's history. However, it is important to note that the NCF's reporting powers are limited by paragraph 11 of schedule 1A to the Mental Health (Care and Treatment) (Scotland) Act 2003 (as amended by the Victims and Witnesses (Scotland) Act 2014), so that any reports the NCF produces must not identify the alleged perpetrator of abuse or any establishment providing institutional care. This means that the forum's reports need to be a separate record from those of any inquiry.

The diagram below is a representation of how any inquiry might sit with the work already under way in the context of child protection and support for survivors.

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LEGAL CONSIDERATIONS

Confidentiality

Depending on the format and remit of any inquiry, there may be issues in relation to any confidentiality assurance offered to witnesses to the inquiry. It is understood that witnesses in the Northern Ireland Inquiry, were told that their evidence would be confidential – but with a caveat that certain information would require to be passed on to the police if it was in relation to certain crimes. The issue does not yet appear to be addressed by the Independent Panel Inquiry into Child Sexual Abuse in England and Wales.

From a prosecution perspective, any assurance of confidentiality may be problematic. If a crime is disclosed, especially where other children may still be in danger, it is difficult to see how this could not be reported to the police for investigation. This issue was raised during the drafting of the legislation on the National Confidential Forum, with the result that specific provisions were made for mandatory reporting to the police of information which was necessary for the prevention of an offence involving abuse of a child.

Disclosure

Any statement (recorded or written) made to the Inquiry by any person about a crime which later resulted in a prosecution, would potentially be a statement which would be disclosable to the defence in the subsequent criminal matter. Witnesses including victims of abuse to the Inquiry could not be told that their evidence would not be used in any subsequent criminal trial. Even if the Crown decided that the evidence was not disclosable, it would always be open to the defence to apply to the Court for disclosure of the information.

These disclosure considerations would be relevant regardless of whether or not the evidence to the inquiry relates to a new allegation or to allegations where a prosecution is ongoing. The Crown's disclosure obligations further extend to cases even where there has been a conviction and the accused has been convicted. Allegations which relate to an accused that is now deceased would be less problematic.

'No Action Meantime'

On occasion the Procurator Fiscal may take no action meantime in relation to a particular accused. This may happen if there is insufficient evidence to proceed at that particular time, but there is the possibility of further witnesses providing evidence (Moorov doctrine). It is crucial that in these circumstances that the accused is not told by the Crown that no action is being taken, as this would prohibit future proceedings. In evidence in any inquiry the fact that no prosecution was being taken

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would have to be carefully explored to ensure that any future proceedings, should further evidence come to light, would not be barred from proceeding.

Unfair Trial- pre-trial prejudicial publicity

In general terms, there is an issue in relation to the accused's right to a fair trial. If the Inquiry hears evidence in a public forum which is thereafter reported in the media, regarding a particular accused, or a set of circumstances within a particular institution, there is a danger that the publicity may mean that the accused cannot get a fair trial and accordingly cannot be prosecuted.

Incriminating Evidence

It is noted that the Director of Public Prosecutions in Northern Ireland has stated that evidence provided by a person will not be used against them in any subsequent trial against that person. Additionally, the evidence will not be used as a basis for deciding whether or not a prosecution should commence. It is understood that such an assurance will give witnesses to the inquiry the confidence to provide information without fear of prosecution.

These issues will require to be considered when drafting any Terms of Reference and remit for an inquiry. They will also have to be considered throughout the Inquiry and when deciding what information and assurances can be given to witnesses to the Inquiry. It would therefore be imperative that someone leading the inquiry had knowledge and understanding of the criminal justice process.

Were the inquiry's remit to provide for any evidence which related to potentially criminal activity to be given in private and recorded in anonymised form (as is the case for the National Confidential Forum) then this may well resolve these issues. But further detailed consideration is needed.

Relationship with UK Policies and Bodies

Officials have offered on our behalf cooperation with the UK Government in relation to the Independent Panel Inquiry into Child Sexual Abuse, should it uncover any issues in relation to devolved activity in Scotland. There is also a clear expectation that any suggestion of criminality in Scotland would be reported immediately to the police. Officials are exploring with their counterparts in the UK Government whether the UK Inquiry will consider activity in relation to reserved institutions in Scotland (such as the immigration detention centre at Dungavel).

The remit of our inquiry will be quite distinct from that at UK level, but clearly we should offer ongoing mutual cooperation.

HISTORIC ABUSE OF CHILDREN IN CARE: PROPOSED INQUIRY

LESSONS FROM OTHER COMMISSIONS AND INQUIRIES INTERNATIONALLY

Australia – Royal Commission into Institutional Responses to Child Sexual Abuse

Type of Inquiry – Royal Commission – Enabling legislation Royal Commissions Act 1902 – with powers to compel witnesses and documents as required.

Start date June 2014 – still ongoing

Chair Honourable Justice Peter David McClellan AM

Purpose: to inquire into institutional responses to allegations and incidents of child sexual abuse and related matters and to make any recommendations arising out of the inquiry, including recommendations about any policy, legislative, administrative or structural reforms.

Jersey – Independent Jersey Care Inquiry

Type of inquiry – statutory

Start date – April 2014 – still ongoing

Chair – Frances Oldham QC

Purpose: A wide ranging inquiry to undertake investigation into historical child abuse in Jersey (post war with focus on 1960 – onwards). The Inquiry will allow victims and others to recount their experiences, to establish how establishments caring for children were managed and to compare this to the norms of the time, examine the political and societal environment during the period under review and its effect on the oversight of children's homes, fostering services and other establishments run by the States, on the reporting or non-reporting of abuse within or outside such organisations, on the response to those reports of abuse by all agencies and by the public, on the eventual police and any other investigations, and on the eventual outcomes.

Northern Ireland – Inquiry into Historical Institutional Abuse in Northern Ireland between 1922 and 1995.

Type of Inquiry – Statutory set up by its own legislation. The Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013 became law on the 19th January 2013. The Statutory Rules made under section 21 of the Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013 were laid before the Assembly on 24 June 2013 and take effect from 25 July 2013.

OFFICIAL-SENSITIVE

Start date – Terms of Reference agreed on 31 May 2012. Legislation was given royal assent in January 2013. – Still ongoing.

Chair – Sir Anthony Hart

Purpose: The Inquiry is independent from government and has two main components.

- **First:** an Acknowledgement Forum, whose members have been listening to the experiences of those who were children in residential institutions (other than schools) in Northern Ireland between 1922 and 1995.
- **Second:** a Statutory Inquiry. This is investigating whether children suffered abuse in the same institutions between 1922 and 1995, and gathers evidence from those who say they suffered abuse in those institutions, as well as evidence from the institutions themselves, and evidence from government and other public bodies such as health and social care trusts. The Statutory Inquiry component commenced its public hearings in January 2014.

England and Wales – The Independent Panel Inquiry into Child Sexual Abuse

Type of inquiry – non-statutory

Start date – Yet to start proceedings

Chair – Vacant following resignation of Fiona Woolf CBE

Purpose: To consider the extent to which State and non-State institutions have failed in their duty of care to protect children from sexual abuse and exploitation; to consider the extent to which those failings have since been addressed; to identify further action needed to address any failings identified; and to publish a report with recommendation

Rigby B (Brian)

From: Duggan C (Catherine)
Sent: 04 November 2014 14:33
To: Blair D (David); De Wit I (Isabella); McPherson J (Jessica); Watters L (Linda)
Subject: Fw: Cabinet today

Trying to get further info. . .

From: Cabinet Secretary for Education and Lifelong Learning
Sent: Tuesday, November 04, 2014 02:24 PM
To: Duggan C (Catherine); Smith DR (Deborah)
Cc: Cabinet Secretary for Education and Lifelong Learning; McAllister C (Colin); DG Learning & Justice; Fallis R (Russell)
Subject: Cabinet today

Cat/ Deborah

Just wanted you to be aware the Cabinet paper was not agreed. Mr Russell has agreed to take a further paper developing the paper he took to Cabinet today at a future date to be agreed with the DFM.

Mr Russell will still be making his statement next week.

I am aware you are out on an away-day today. It would be good to speak early tomorrow morning about how this is all taken forward.

Thanks

Ellen

Ellen Mackinnon

Private Secretary to the Cabinet Secretary for Education and Lifelong Learning

Ext: [REDACTED]

Please see the [Cabinet Secretary's Preferences](#)

which may be of assistance to you.

All e-mails and attachments sent by a Ministerial Private Office to another official on behalf of a Minister relating to a decision, request or comment made by a Minister, or a note of a Ministerial meeting, must be filed appropriately by the recipient. Private Offices do not keep official records of such e-mails or attachments. Thank you.

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