41ST PARLIAMENT

Community Development and Justice Standing Committee

Report 5

SEEKING JUSTICE: IMPROVING OPTIONS FOR SURVIVORS OF INSTITUTIONAL CHILD ABUSE

Volume 1: Legislative and high-level administrative matters

Presented by
Dr D.J. Honey, MLA

November 2023

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Community Development and Justice Standing Committee

Seeking justice: Improving options for survivors of institutional child abuse

Volume 1: Legislative and high-level administrative matters

Report No. 5

Presented by

Dr D.J. Honey, MLA

Laid on the Table of the Legislative Assembly on 30 November 2023

Inquiry Terms of Reference

The Community Development and Justice Standing Committee will inquire into the options available to survivors of institutional child sexual abuse in Western Australia who are seeking justice.

In particular, the Committee will consider:

1. The impact of the *Civil Liability Legislation Amendment Act (Child Sexual Abuse Actions) Act 2018* (the Act), including:
   a. the experience of survivors who have used the civil litigation process;
   b. the response of government and non-government institutions to civil claims brought by survivors;
   c. the efficiency with which courts deal with civil claims;
   d. State monitoring and reporting on the progress and impact of the Act.

2. The effectiveness of WA's support of the National Redress Scheme, including:
   a. the experience of survivors who have accessed the Scheme;
   b. the response of Government and non-government institutions to the Scheme.

3. The resourcing and provision of services to support survivors in whichever path they take.

4. Other options to provide justice, resolution and/or compensation to survivors and their families, including lessons from other jurisdictions.

Chair's Foreword

The Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) was a 5-year inquiry and it submitted its final report on 15 December 2017. One of the Royal Commission's key recommendations was to remove the limitations period for claims relating to child sexual abuse that had prevented survivors from obtaining remediation through civil court action.

Five years have passed since the initial response by the Western Australian Government, which included removing the limitation period for child sexual abuse claims. The Committee decided that it was timely to review the outcomes of that response and to determine whether improvements could be made to better serve justice for survivors of child abuse. Whilst there is further work to do, it is already very clear that there are reasonable changes that can be made to further improve outcomes for abuse survivors.

Many survivors are elderly and many have significant health issues as a direct result of their abuse. Any unnecessary delay in implementing the identified changes could deny survivors and their families the justice they deserve.

To allow the Government sufficient time to develop a response to our recommendations during this Parliament and avoid unnecessary delay, the Committee will present two reports. This first report focuses on critical legislative reforms that will improve timely resolution of civil claims for compensation for child abuse. It also identifies other changes to improve the delivery of justice. A second report will be delivered in mid-to-late 2024, and will deal with those aspects of our Terms of Reference that are not covered in this report.

Western Australia was one of the first states to enact legislative changes to deliver justice to historical sexual abuse survivors in response to the Royal Commission's recommendations. All other States have made similar changes, but they have also gone further than Western Australia to broaden the ability of survivors to seek justice. In particular, other States have acknowledged that extreme physical abuse and/or psychological abuse, so often entwined with sexual abuse, must also be considered when providing justice to victims.

Many of the reforms recommended in this report are already in effect in other Australian jurisdictions. Some of the recommended reforms go beyond what exists elsewhere.

We hope that the Western Australian Government will now build on the work of those other States and further improve the approach to delivering justice to abuse survivors as recommended in this report.

I thank my fellow Committee members for sharing their extensive collective experience related to the topic of the inquiry. This has greatly facilitated our ability to focus on key issues and identify appropriate witnesses. I am particularly grateful for the input of Committee Member, Hon. Dave Kelly, who has considerable knowledge of the inquiry topic through a long period of advocacy for survivors of institutional child abuse.

I also wish to thank the witnesses who made submissions and appeared before the Committee to give evidence to the inquiry, especially survivors and advocacy groups. The trauma that survivors have experienced leaves lifelong physical and mental scars that severely impacts them and their families. It is only by survivors and advocacy groups having the courage and tenacity to continue to speak out that we can understand these impacts and seek further improvements in outcomes.

On behalf of the Committee, I especially thank our hard-working staff, Dr Alan Charlton and Dr Sam Hutchinson, for their excellent guidance, research and facilitation of the inquiry. They have been exemplary in their handling of a very complex inquiry topic against a very tight deadline for the first report.

DR D.J. HONEY, MLA
CHAIR

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Executive Summary

The Community Development and Justice Standing Committee (the Committee) established this inquiry on 22 June 2023. The inquiry was based on our concerns that, despite legislative and other responses to the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission), survivors still face significant barriers when seeking justice.

During this inquiry, we have considered the impact that legislation, administration, court practice and institutional actions have on people living with the reality of child abuse. All survivors have their own stories, and no one example can encapsulate the whole picture, but we have tried to keep the potential personal cost at the forefront of our report. Which is why we have included 'John's story' below. It is not any particular person's story, but represents the collective experience of many survivors who have sought justice through civil litigation.

John's story

In 1975, a teacher sexually abused John at his religious primary school. After decades of depression and addiction, John told his story to his family in 1995. In 2000, after five more years coming to terms with events, he sought legal representation to seek compensation from the school. But, at that time WA's laws meant John could not make a civil claim for child sexual abuse.

In 2002, the school offered $20,000 as a 'good will' payment, without admitting the abuse occurred, and dependent on John signing a confidentiality agreement releasing them from further legal action. John accepted the payment and signed the release, but never accepted the outcome was just.

After a recommendation from the Royal Commission, WA removed limitations on child sexual abuse in 2018. As a result, in 2020, John with renewed hope took further legal advice. He began action to set aside the 2002 release agreement to allow him to sue for compensation from the school.

However, three years on, John's case is not finalised, and it could take another two years to get to trial.

In defending the claim, the school does not admit the abuse, even though it has paid compensation on similar claims. It sent John to its own psychologist, who examined his whole life. Its lawyers argue John's depression and addiction are due to beatings by other teachers and not to any alleged sexual abuse. In WA, physical abuse is not compensable unless it is connected to sexual abuse.

The school is also threatening to seek a permanent stay of proceedings because it claims the passage of time and the death of the teacher mean it cannot fairly defend itself against John's claim. If the case is permanently stayed, John may have to pay the school's legal costs.

John still wants justice, but is not as confident as he once was. He feels the school is dragging things out to force him to back down. He is frustrated that the court process takes so long. The threat of a permanent stay hangs over him like a sword.

John has recently been diagnosed with terminal cancer. He wants to win his case to provide something for his children, who have suffered from having a father who led a dysfunctional life due to the abuse he suffered. John is worried he will not make it to the end of his case. Under WA law, if he dies his claim against the school will die with him.

The background to this inquiry was the Royal Commission, a five-year inquiry into some of the most horrendous systematic abuse of children in Australia's history. It heard from around 17,000 people, held more than 8,000 private sessions with survivors, received around 1,340 written accounts, and produced a 17-volume final report in 2017, as well as three related interim reports, including a 2015 report on Redress and Civil Litigation. Across these reports, the Royal Commission made 409 recommendations that required action by Commonwealth, State and Territory governments as well as non-government institutions. Of those recommendations, 310 were relevant to the Western Australian (WA) Government and ranged across a number of areas, looking back to help right past wrongs as well as looking forward to prevent future harm. In the years after 2017, the Commonwealth and States passed much legislation to give effect to the most crucial recommendations.

The most important legal change that followed the Royal Commission was the removal of the statutory limitations that prevented many survivors of child sexual abuse from undertaking civil legal action to seek compensation from offenders and/or their institutions. Before this change, someone in WA taking civil action for personal injury (the most common form used in these cases) had to bring their claim within three years from the date of the incident that caused the injury, or within three years of turning 18.

WA was one of the first States to respond to the Royal Commission's recommendations to improve the opportunities for justice available to abuse survivors, including removing the statute of limitations on making civil claims. The Attorney General introduced a bill to amend civil liability legislation in November 2017. The bill was treated as urgent under the Standing Orders of the Legislative Assembly, and passed both houses by 10 April 2018. The *Civil Liability Legislation Amendment Act (Child Sexual Abuse Actions) Act 2018* received Royal assent on 19 April 2018. Like other jurisdictions, the WA Government has reported annually on the progress of its reform agenda, which covers much of the ground foreseen by the Royal Commission.

Nationally, the most important change following the Royal Commission was the introduction of the National Redress Scheme (NRS). The NRS allows people to seek redress from institutions, whether government or non-government. It can lead to formal recognition of the harm done, as well as a financial payment, a personal response from the relevant person or institution, and psychological support during the process. The scheme is something of a 'third way', between survivors' private dealings with institutions and civil litigation. It was created in part in recognition that many people wanted abusers and their institutions to

formally acknowledge the harm they had done, with a formulated financial component, without engaging in the more arduous and potentially re-traumatising process of civil litigation. At August 2023, more than 28,500 applications have been submitted to the Scheme, 4,084 relating to institutions that operated in WA.

After reviewing the approximately 50 submissions we received, and considering the evidence provided in nine hearings, the Committee identified several issues which it believes need to be addressed with urgency, to ensure the best chance for justice for survivors and their families. In particular, the Committee believes that a number of legislative amendments are required to ensure the intent of the Government's changes can be delivered in full.

Normally, we would have reported on our inquiry in mid- to late-2024. But the urgent nature of this issue, combined with the reality of the parliamentary cycle and the time it takes to draft and introduce legislation, meant it was important to table this initial report now. The work of the inquiry will continue after this report, where we will return to the breadth of issues covered in our Terms of Reference. We expect to table a final report in mid- to late-2024.

All committee inquiries are built on the evidence provided to them, none more so than in this case. The Committee wants to thank the many participants that have so far engaged with this endeavour, including representative and support groups, legal professionals, institutions and government entities. Most especially, however, we want to thank the survivors who have had input, whether individually or as part of organisations. We acknowledge your bravery and suffering, and your persistence in seeking justice for yourselves and for others. Thank you for your trust in the Committee process.

The Committee would also like to acknowledge the contribution of Mr Tim Hammond SC. The Committee engaged Mr Hammond during this inquiry to provide expertise on legal issues. His input was invaluable – we have benefitted greatly from his knowledge and insights, and also from the opportunity to test ideas and concepts with him as the report developed.

The current volume includes six chapters. Chapter 1 covers reforms to limitation periods in WA. It traces how statutes of limitation have been removed for certain types of abuse in WA, and how that experience differs from other Australian jurisdictions. It makes two recommendations: for legislative change to bring WA into line with the rest of the country by removing limitations on a broader range of abuse, and to monitor the impact of that recommendation.

Chapter 2 deals with some ongoing challenges in the setting aside of previously agreed deeds of settlement. It looks at the process of setting them aside, and recommends that this should happen concurrently with any new civil claim. It also looks at the breadth of what might be included in any new deed, and recommends that some limitations be imposed.

Chapter 3 recommends that changes be made to legislation to reverse the onus of proof for civil claims of child abuse where organisations cannot establish that they took reasonable precautions to prevent the abuse.

Chapter 4 examines what happens in civil claims of child abuse when plaintiffs die before their case has concluded. It looks at the difference between the NRS and civil litigation in WA, and recommends that legislation be amended so that existing claims can be continued by the estate of the plaintiff should they die. It also recommends that WA adopt a system similar to that in Victoria, where family members can also make claims in civil courts.

Chapter 5 looks at the issue of permanent stays, whereby defendants can apply to have a case ended if they cannot reasonably receive a fair trial. It notes the recent High Court of Australia majority decision which found that this process must be handled differently for child abuse cases. The chapter recommends amending legislation so that stay applications can only be made at the conclusion of the trial of the matter. It also recommends that people who have made a claim in good faith should not be liable for costs for successful permanent stay applications; and that legislation be introduced to allow any existing stays to be reviewed in light of the recent High Court majority decision.

Chapter 6 looks at the high-level operation of the District Court in regard to child abuse cases. Based on the broad agreement from witnesses, it recommends that a specialised court list be put in place for child abuse claims. It also recommends that trial dates be set as quickly as possible in child abuse cases, in line with Victorian practice.

Ministerial Response

In accordance with Standing Order 277(1) of the Standing Orders of the Legislative Assembly, the Community Development and Justice Standing Committee directs that the Attorney General report to the Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendations of the Committee.

Findings and Recommendations

Chapter 1 – Reforms to limitation periods in WA

Finding 1 **Page 4**

All Australian jurisdictions have removed civil statutes of limitation for child sexual abuse claims. However, only Western Australia restricts the scope of the amendments to 'sexual' abuse alone.

Finding 2 **Page 6**

Western Australia's current laws make artificial distinctions between types of abuse that together form larger patterns and create exploitative power imbalances between victims and perpetrators.

Recommendation 1 **Page 7**

That the Attorney General introduce amendments to Western Australia's civil liability legislation to remove limitation periods for personal injury claims relating to 'physical' or 'serious physical abuse', and 'associated psychological or emotional abuse' against minors, in addition to 'child sexual abuse'.

Recommendation 2 **Page 8**

That the Attorney General, through the Department of Justice, monitor the implementation of Recommendation 1 to ensure the court system is adequately resourced to manage any additional claims.

Chapter 2 – Setting aside deeds of settlement

Finding 3 **Page 13**

The process for setting aside deeds of settlement extends the time it takes to initiate and finalise a civil claim of child abuse with little benefit to any party.

Finding 4 **Page 14**

While it is important that respondents can oppose the setting aside of deeds, and this option has been taken up, we heard no evidence that applications were refused.

Recommendation 3 **Page 14**

That the Attorney General introduce legislation to ensure applications to set aside settlement deeds can run concurrently with civil claims that had previously been statute-barred (including any brought under legislative changes resulting from Recommendation 1).

Finding 5 **Page 15**

There is evidence that the State may have sought to impose too wide a restriction on claimants when settling cases of child sexual abuse.

Recommendation 4 **Page 15**

That all defendant institutions, including the State, ensure that they do not extend the scope of any deeds made to settle cases of child abuse (including those brought under legislative changes resulting from Recommendation 1) beyond the immediate issue at hand.

Chapter 3 – Reversing the onus of proof

Finding 6 **Page 18**

Western Australia has not followed the recommendations of the Royal Commission to impose a non-delegable duty on institutions, or to reverse the onus of proof for institutions in child sexual abuse claims.

Recommendation 5 **Page 19**

That the Attorney General introduce amendments to Western Australia's civil liability legislation to ensure that an organisation is presumed to have breached its duty of care for children who are victims of abuse perpetrated by anyone employed, engaged or associated with that organisation (including abuse covered by legislative changes resulting from Recommendation 1) unless it can establish that it took reasonable precautions to prevent that abuse.

Chapter 4 – What happens to claims when plaintiffs die

Finding 7 **Page 21**

If a claim to the National Redress Scheme has been finalised before the claimant dies, the deceased person's estate can receive the redress payment.

Finding 8 **Page 22**

The common law position currently means that any civil litigation on matters of child sexual abuse dies when the plaintiff dies, and cannot be carried on by their estate.

Recommendation 6 **Page 24**

That the Attorney General introduce amendments to the relevant legislation to ensure that civil litigation on matters of child abuse (including those brought under any legislative changes resulting from Recommendation 1) can be continued by the estate of the plaintiff.

Recommendation 7 **Page 24**

That the Attorney General introduce amendments to the relevant legislation to allow family members of the victims of child abuse to make civil claims consistent with the position in Victoria following the decision handed down by the Victorian Supreme Court of Appeal in the *Catholic Archdiocese of Melbourne v RWQ*, incorporating any legislative changes resulting from Recommendation 1.

Chapter 5 – Permanent stays

Finding 9 **Page 32**

Permanent stays have a place in the justice system to ensure fair proceedings for all parties, but it is currently possible for permanent stays to be misused, leading to unfair outcomes for plaintiffs seeking to have their claims adjudicated.

Recommendation 8 **Page 32**

That the Attorney General introduce legislation to ensure that applications for permanent stays in child abuse cases can only be made after the conclusion of the trial of the matter.

Recommendation 9 **Page 32**

That the Attorney General introduce legislation to ensure that when an application for a permanent stay is granted against a claim of child abuse made in good faith, the claimant should not be made liable for the applicant's costs.

Recommendation 10 **Page 33**

In light of the recent High Court majority judgement in the *GLJ* case, that the Attorney General introduce legislation to allow any permanent stays granted against child sexual abuse claims prior to that judgement to be reconsidered by the courts.

Chapter 6 – Separate court lists and early trial dates

Finding 10 **Page 39**

The District Court of Western Australia currently has no dedicated list for institutional or other child sexual abuse claims, despite their distinct characteristics. This appears to contribute to claims in Western Australia taking longer to finalise than in other States.

Recommendation 11 **Page 39**

That the Attorney General work with the District Court of Western Australia to implement a dedicated court list or case management system for child abuse claims (including any brought under any legislative changes resulting from Recommendation 1).

Finding 11 **Page 41**

There was a broad consensus that certainty about trial dates was important to survivors, and that the Victorian Supreme Court's Institutional Liability List approach to setting trial dates quickly was a worthy model for Western Australia to follow.

Recommendation 12 **Page 41**

To provide certainty for survivors and to increase the efficiency of the civil claim process for child abuse cases, that the Attorney General work with the District Court of Western Australia to enable trial dates to be set as quickly as possible in child abuse cases. In doing so, they should consider the approach taken by the Victorian Supreme Court's Institutional Liability List.

Chapter 1

Reforms to limitation periods in WA

1.1 There are many challenges in formally and legally responding to child abuse, whether that abuse is sexual or not, institutional or not, from long ago or recent. One lies in balancing the need to acknowledge and accept the extremely personal and traumatic effects of the harm caused with the need to categorise the events for legal and legislative purposes. The most obvious vehicle for the latter is the way legislation defines the experiences it deals with. At some level all legislation needs to define what is included and what is excluded. But these decisions can often have unintended or unforeseen consequences. Finally, any approach to dealing with institutional child abuse, and affecting survivors, should be routinely revisited to ensure the intent of that approach is still being met. Given those propositions, and the many changes in this area over the last six years, this chapter looks at reforms in WA legislation dealing with historical limitations to civil action for abuse survivors, with a particular focus on how the WA situation compares with similar legislation in other Australian jurisdictions.

Following Royal Commission recommendations, WA removed time-based limitations

1.2 Since 2015, Australian jurisdictions have been removing civil statute of limitation periods for personal injury claims in child sexual abuse cases, allowing plaintiffs to make claims against 'historical' abuse. As we discuss in Chapter 5, a recent High Court majority decision means that the term 'historical' has become extremely problematic. In the first instance, we acknowledge that the experiences of survivors, and the harm they suffer, endures. While the traumatic event might have occurred in the past, we recognise that it is anything but 'historical'. Second, the recent High Court majority judgement has specifically put an end to the notion. As it says, wherever someone claims to have suffered from child sexual abuse, it cannot be characterised as 'historical'.[1] However, to accurately reflect the evidence we received during this inquiry, which predated the High Court announcement, we have used the term at times throughout the report.

1.3 These changes to limitations statutes were largely based on the understanding that the nature of child sexual abuse and its consequent psychological injuries made such cases 'as a whole, sufficiently qualitatively different from standard personal injuries cases to warrant differential treatment by limitations statutes.'[2] The distinctive features include:

- the extended longevity of the psychological injuries caused;
- the typically long delay between the occurrence of the abusive event and its disclosure by a survivor; and

1 *GLJ v. The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) HCA 32 [51].

2 Ben Mathews and Elizabeth Dallaston, 'Reform of Civil Statutes of Limitations for Child Sexual Abuse Claims: Seismic Change and Ongoing Challenges', *UNSW Law Journal*, vol. 43, no. 2, 2020, p. 388.

- impediments arising from the survivor's commonly experienced post-traumatic stress disorder and associated avoidance of thoughts or memories related to the relevant experience.[3]

1.4 Victoria was the first Australian jurisdiction to make these reforms. This followed the 2013 *Betrayal of Trust* report by Victorian Parliament's Family and Community Development Committee, which recommended the Victorian Government consider amending its laws to remove limitations on 'criminal child abuse', and adding to its definition 'unlawful physical assaults'.[4] Then, in September 2015, the Royal Commission published its *Redress and Civil Litigation* report, one of three reports it released before its 17-volume Final Report.[5] *Redress and Civil Litigation* recommended the removal of the limitations period for civil litigation for personal injury related to institutional child sexual abuse, that this be retrospective, and be removed as soon as possible.[6] The Royal Commission noted that its Letters Patent restricted it to matters of institutional child sexual abuse alone, although it recognised that other forms of abuse 'may have accompanied the sexual abuse'.[7] While the Royal Commission had 'no objection' to States and Territories making broader changes, it emphasised that these should be 'consistent across jurisdictions.'[8] In subsequent years, all other Australian jurisdictions have removed the time-bar from such claims.

1.5 Following the Royal Commission, WA acted quickly on the recommendation regarding limitations periods. The Government introduced the Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Bill in 2017, which was passed into law as the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018.* This amended the *Civil Liability Act 2002* and the *Limitation Act 2005*. It removed limitation periods for civil actions for child sexual abuse, retrospectively and prospectively, 'retrospectively' meaning that there was no longer any statute of limitations on any claim of child sexual abuse, no matter how long ago it occurred.

1.6 The use of the term 'child sexual abuse' in the legislation was intentionally narrow. As the Explanatory Memorandum for the Bill said, '[c]onsistently with the focus of the Royal Commission and its Report, the Bill deals only with child sexual abuse and does not cover physical or emotional abuse or neglect which occurred during childhood.'[9] While 'child sexual abuse' is stated as being sexual abuse that occurred when the person was under the

3 Ben Mathews and Elizabeth Dallaston, 'Reform of Civil Statutes of Limitations for Child Sexual Abuse Claims: Seismic Change and Ongoing Challenges', *UNSW Law Journal*, vol. 43, no. 2, 2020, pp. 389-390.

4 Family and Community Development Committee, *Betrayal of Trust: Inquiry into the handling of child abuse by religious and other non-government organisations, volume 1*, Parliament of Victoria, November 2013, pp. xlv, xix.

5 Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, Commonwealth of Australia, 2015. This report runs to more than 650 pages and made 99 recommendations.

6 ibid., pp. 457-458.

7 ibid., p. 102.

8 ibid., p. 458.

9 Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Bill 2017 (WA), Explanatory Memorandum, p. 3.

age of 18, the amendments did not define 'sexual abuse' itself, leaving this to courts in the event of a trial.[10]

In WA, 'physical abuse' must be connected to 'sexual abuse'

1.7 In March 2020, the District Court of Western Australia (District Court) handed down a decision in *Lawrence v Province Leader of the Oceania Province of the Congregation of the Christian Brothers* (known as *Lawrence*), which was the first major case to consider the implications of the 2018 reforms. The case considered the lifelong consequences for the plaintiff who from the age of 8 to 16 was sexually, physically and emotionally abused at orphanages operated by the Christian Brothers. The defendant did not contest liability, so the trial revolved around whether other forms of abuse, including physical abuse, came within the meaning of 'child sexual abuse', or 'sexual abuse', in the relevant sections of the *Civil Litigation Act 2002* and the *Limitation Act 2005*. This meant that, in assessing figures for damages, the court needed to determine the extent to which injuries the plaintiff suffered were caused by forms of abuse that were not time-barred.

1.8 Ultimately, the Court said 'the physical and other abuse, including emotional deprivation' that Mr Lawrence suffered while living in the institutions was 'so inextricably intertwined and associated with the child sexual abuse that it cannot be separated from the sexual abuse'.[11] Notably, however, the Court said 'for this other conduct, specifically physical abuse, to fall within the meaning of the term sexual abuse there must be some connection to or association with the conduct which is sexual'. However, if 'the physical abuse is not connected to or associated with conduct for sexual gratification, the physical abuse does not fall within the meaning of the term sexual abuse.'[12] In other words, according to *Lawrence*, in WA, physical abuse suffered within an institution with no demonstrable connection or relationship to sexual abuse is unaffected by reforms to the Limitation Act.[13]

WA is the sole State or Territory that only removed time limits for child 'sexual' abuse

1.9 By contrast to WA, all other Australian jurisdictions have since 2015 removed the time limitation from more broadly defined types of 'child abuse'. Either at once or (in Queensland) in separate stages, other States and Territories now have also removed time limits from 'physical abuse', 'serious physical abuse' of a child, and/or 'connected abuse', or psychological abuse arising from the sexual or physical abuse, in comparable pieces of legislation.[14] (See Table 1.)

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10 Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Bill 2017 (WA), Explanatory Memorandum, pp. 3, 13.

11 *Lawrence v Province Leader of the Oceania Province of the Congregation of the Christian Brothers* [2020] WADC 27 [258].

12 ibid [102].

13 Ms Abigail Davies, Slater and Gordon Lawyers, *Transcript of Evidence*, 20 September 2023, pp. 1-2. See also Miss Rosemary Littlefair, Bradley Bayly Legal, *Transcript of Evidence*, 30 August 2023, p. 10; submission 12, Judy Courtin Legal, p. [4].

14 Submission 16, Slater and Gordon Lawyers, p. 7. See also submission 20, Beyond Abuse, pp. [9]; submission 31, knowmore Legal Service, p. 18; submission 35, Australian Lawyers Alliance, p. 25; Ben Mathews and Elizabeth Dallaston, 'Reform of Civil Statutes of Limitations for Child Sexual Abuse Claims: Seismic Change and Ongoing Challenges', *UNSW Law Journal*, vol. 43, no. 2, 2020, p. 416; Pam Stewart

Table 1: Definitions of 'child abuse' in current legislation for limitations periods in Australian jurisdictions

Jurisdiction	Act	Definition of 'child abuse' i.e. relating to minors
Western Australia	*Limitation Act 2005*	'Child sexual abuse' only.
New South Wales	*Limitation Act 1969*	Sexual abuse, serious physical abuse, any other abuse perpetrated in connection with sexual abuse or serious physical abuse of the person.
Victoria	*Limitation of Actions Act 1958*	Physical abuse or sexual abuse; and psychological abuse that arises from the physical or sexual abuse.
South Australia	*Limitation of Actions Act*	Sexual abuse; serious physical abuse; psychological abuse related to sexual abuse or serious physical abuse.
Queensland	*Limitation of Actions Act*	Sexual abuse or serious physical abuse; psychological abuse of the child perpetrated in connection with sexual abuse or serious physical abuse.
Tasmania	*Limitation Act 1974*	Sexual abuse, or serious physical abuse, of a person when the person was a minor, including any psychological abuse that arises from the sexual abuse or the serious physical abuse.
Northern Territory	*Limitation Act 1981*	Sexual abuse; serious physical abuse; or psychological abuse that arises from the above abuse.
Australian Capital Territory	*Limitation Act 1985*; *Civil Law (Wrongs) Act 2002*	Physical abuse or sexual abuse.

1.10 WA is now an outlier among Australian jurisdictions in not having reformed civil statutes of limitation to be more inclusive so as to improve the options for justice for survivors of child abuse.

Finding 1

All Australian jurisdictions have removed civil statutes of limitation for child sexual abuse claims. However, only Western Australia restricts the scope of the amendments to 'sexual' abuse alone.

WA's narrow definition can negatively impact survivors

1.11 We received much evidence on the implications of the current situation in WA. We heard of the grievance felt by survivors because their physical abuse could not form part of their case, even though the injuries suffered from other forms of abuse could be as great as or greater than those from sexual abuse.[15]

1.12 Tuart Place, for example, told us that '[f]ormer child migrants who experienced extreme violence, brutality, and permanent physical injuries in Christian Brothers orphanages, but did not disclose sexual abuse, have had no avenue by which to seek justice.'[16] This was so, it claimed, notwithstanding that a 'common injury is permanent hearing loss resulting from children's ears being "boxed" (a practice among some nuns and brothers)', or being lifted up

and Allison Silink, 'Australian civil litigation reform in response to the recommendations of the Royal Commission into Institutional Child Sexual Abuse', *Torts Law Journal*, vol. 26, no. 2, 2020, p. 11.

15 Dr Philippa White, Tuart Place, *Transcript of Evidence*, 20 September 2023, p. 12; Ms Susy Vaughan, Tuart Place, *Transcript of Evidence*, 20 September 2023, p. 12; supplementary submission 3A, Tuart Place, p. 2.

16 Supplementary submission 3A, Tuart Place, p. 2.

or dragged by their ears or 'punched in the side of the head by a male adult, causing the child's still-developing eardrum to burst.'[17]

1.13 Witnesses for Tuart Place said this kind of physical abuse went far beyond what might have been considered standard corporal punishment typical of an earlier time. Ms Newman elaborated:

> Sometimes it is very severe as a result of physical punishment – hitting heads, getting concussed, lips smashed, no medical follow-up. A year later, a dentist asks, 'What's happened here?' They go off to hospital and have surgery. That abuse stays with the person as entrenched grief, even more than the sexual abuse.[18]

1.14 Ms Vaughan continued: '[t]here is permanent disfigurement from physical abuse, permanent hearing loss, that terror that Jan spoke about. That trauma is carried.'[19] Similarly, Ms Davies of Slater and Gordon Lawyers told us the story of Trish, a 73-year old First Nations woman who grew up in a WA orphanage in the 1950s. We heard that when Trish (who had requested that Ms Davies share her story) was nine she failed to tell the time on a school clock. In response:

> Sister Winifred, an adult nun teaching, slammed Trisha's desktop on her fingers, pulled her outside by her hair and then proceeded to punch into her and kick her until she fell to the ground. She continued to punch into her, Trish, and kick her until Father Nicholas, who someone had gone to for help, came and pulled Sister Winifred off Trish.[20]

1.15 While Ms Davies told us that Trish is alive today and wishes to make her story known, '[s]he has continuing nightmares from it. She is on an antipsychotic drug to help her sleep.'[21] In other words, this is a lifelong psychiatric injury. But it is also an incident of pure physical abuse with no connected sexual abuse element and, subsequently, Trish has no options under current WA law.[22] It is also an example of abuse that was unlawful as far back as 1934, when new Child Welfare Regulations made it clear:

> The discipline enforced shall be mild and firm. All degrading and injurious punishments shall be avoided. The 'boxing' of children's ears is strictly forbidden, as is also the corporal punishment of girls of twelve years old and over. Corporal punishment shall not be inflicted upon girls below the age of twelve years, except under very extreme circumstances.[23]

1.16 These stories and the evidence we heard throughout the inquiry convinced us that the restrictive definition in WA law makes 'artificial distinctions' between types of abuse that

17 Supplementary submission 3A, Tuart Place, p. 2.
18 Ms Jan Newman, Tuart Place, *Transcript of Evidence*, 20 September 2023, p. 12.
19 Ms Susy Vaughan, Tuart Place, *Transcript of Evidence*, 20 September 2023, p. 12.
20 Ms Abigail Davies, Slater and Gordon Lawyers, *Transcript of Evidence*, 20 September 2023, p. 2.
21 ibid.
22 ibid., pp. 1-2.
23 R. 17, Child Welfare Regulations, 1934, *Western Australian Government Gazette*, No. 49, 28 September 1934, p. 1483.

together form larger patterns and create exploitative power imbalances between victims and perpetrators.[24]

Finding 2

Western Australia's current laws make artificial distinctions between types of abuse that together form larger patterns and create exploitative power imbalances between victims and perpetrators.

1.17 We also received evidence that some defendants use the current definition of 'child sexual abuse' to reduce their liability, even where they admit that various types of abuse took place. They do so, we were told, by arguing that the most injurious aspects of a plaintiff's claim did not result from the sexual abuse, but from physical or emotional abuse, which remains statute-barred in WA. Judy Courtin Legal put it this way:

> It is our experience that Defendant representatives may instruct medico-legal psychiatric experts to attempt to delineate these forms of abuse, so as to rely on limitation of actions provisions in respect of physical and emotional aspects of the episode(s) of child abuse. This is a way that Defendant representatives seek to go about 'carving' out an aspect of the claim, for which the Defendant submits it cannot be held liable.[25]

1.18 This approach, some witnesses said, runs counter to the intention of the 2018 reforms to increase access to justice for childhood abuse survivors.[26]

The Committee's view

1.19 The Committee sees several problems in WA's definitional position. First is the matter of national consistency. As noted above, the WA Government acted swiftly on the Royal Commission's recommendation to remove the limitations period for child sexual abuse cases, and it should be commended for this. However, in keeping narrowly to that recommendation, it now finds itself lagging behind the rest of the country.[27]

1.20 This fact relates to a second key issue, that of equity. The current WA focus is on survivors of child *sexual* abuse, to the exclusion of those who suffered other kinds of physical and emotional abuse. As Slater and Gordon Lawyers said, 'it has become an unjustifiable inequity for Western Australia to have an inferior access to civil remedies for personal injuries based on geographical location alone.'[28] Likewise, noting the need to recognise the diversity of experience of survivors, knowmore Legal Service said 'extended reforms in other

24 Mr Graham Droppert, Australian Lawyers Alliance, *Transcript of Evidence*, 13 September 2023, pp. 13-14.

25 Submission 12, Judy Courtin Legal, p. [4].

26 ibid. See also submission 30, Child Migrants Trust, p. 3; supplementary submission 3A, Tuart Place, pp. 2-3. See also Ben Mathews and Elizabeth Dallaston, 'Reform of Civil Statutes of Limitations for Child Sexual Abuse Claims: Seismic Change and Ongoing Challenges', *UNSW Law Journal*, vol. 43, no. 2, 2020, p. 397; Gary R Dean, 'Civil Claims for Institutional Abuse: Emerging Issues and Impacts on Survivors', 2019, cited in submission 15, Survivors of Child Abuse, pp. [30]; original paper, paras 37-40.

27 Submission 31, knowmore Legal Service, p. 15.

28 Submission 16, Slater and Gordon Lawyers, pp. 7, 10; submission 35, Australian Lawyers Alliance, p. 25; Ben Mathews and Elizabeth Dallaston, 'Reform of Civil Statutes of Limitations for Child Sexual Abuse Claims: Seismic Change and Ongoing Challenges', *UNSW Law Journal*, vol. 43, no. 2, 2020, p. 397.

jurisdictions also give long overdue recognition to those people who experienced non-sexual abuse as children and ensure that all survivors of child abuse are treated equally before the law.'[29]

1.21 Ultimately, expanding the scope of reforms to WA law in line with other jurisdictions will not only lead to more consistent and equitable national outcomes for survivors, it will open paths to justice previously closed to survivors. It is not enough that survivors of unspeakable cruelty in the form of physical abuse in institutional settings can seek justice in WA *so long as* they demonstrate that these actions were connected to sexual abuse. As Gary R Dean put it in a paper to a legal seminar in 2019, child sexual abuse could occur in institutional settings:

> permeated by other forms of physical and psychological abuse that would, but for the operation of the *Limitations Act 2005* (WA) and the fact that the Amending Act dealt only with sexual abuse, be the subject of claims for damages. It should also be obvious that this state of affairs is deeply unjust… [f]or Western Australia to limit claims to sexual abuse only demonstrates a political failure to address all forms of child abuse. We are way out of step with the majority of other state jurisdictions.[30]

In summary, WA's current position has a negative impact on the recognition of survivors' experiences, national legislative consistency, and ensuring justice and equity.[31]

Recommendation 1

That the Attorney General introduce amendments to Western Australia's civil liability legislation to remove limitation periods for personal injury claims relating to 'physical' or 'serious physical abuse', and 'associated psychological or emotional abuse' against minors, in addition to 'child sexual abuse'.

1.22 This recommendation impacts on other recommendations made in this report; where this is the case, we specifically refer back to Recommendation 1. The Committee carefully considered the potential unintended consequences of recommending this change. While we heard little that explicitly opposed the idea of broadening the range of matters from which limitations should be removed, there was some general concern about the effect of any changes. For example, the Diocese of Bunbury made a submission that proposals 'to further amend existing legislation will prove more costly to institutions' and diminish the services the Catholic Church provides to communities across WA.[32] Ultimately, is not clear to us that this would necessarily be the result. As Mr Rule of Maurice Blackburn Lawyers explained, it is not as if the test of 'very serious abuse' is an easy one, with the onus being on plaintiffs 'to prove that there is a permanent injury – usually a permanent psychiatric injury – [and] as a result, it has to be very serious abuse.'[33] In such circumstances, we see no undue risk in making the proposed change. And even if the financial and service burden on institutions

29 Submission 31, knowmore Legal Service, p. 17.
30 Gary R Dean, 'Civil Claims for Institutional Abuse: Emerging Issues and Impacts on Survivors', 2019, cited in submission 15, Survivors of Child Abuse, pp. [29]; original paper, para. 34-5.
31 Ms Lauren Hancock, knowmore Legal Service, *Transcript of Evidence*, 1 September 2023, p. 2.
32 Submission 4, Catholic Diocese of Bunbury, p. [1-2].
33 Mr John Rule, Maurice Blackburn Lawyers, *Transcript of Evidence*, 30 August 2023, p. 11.

was great, we do not believe that burden should be the primary consideration in determining whose suffering should be recognised in law.

1.23 More specifically, the Committee considered whether the ability of the Court to manage its workload might be affected if legislative change was to increase the volume of civil legal claims. We understand that the 2020 District Court Annual Review showed an increased workload resulting from the changes to the Limitation Act, and it is possible that expanding the reforms could see this further increase.[34] While the Chief Judge of the District Court expected any legislative change to remove limitations on an expanded definition of 'abuse' would increase the workload, and therefore put pressure on the resources of the Court, she could give no indication of the extent of this.[35] Other witnesses said that with the benefit of knowledge gained from other jurisdictions that have made that change, there was no compelling evidence that this resulted in a large volume of new claims.[36] The reason that only a modest increase in claims would be expected, they said, echoing other witnesses already cited, is that plaintiffs would still be required to prove that these claims caused 'compensable injury' such as a 'lifelong psychiatric injury', and would therefore have to be assessed as serious abuse according to the standards of the time that occurred within an institutional setting.[37]

1.24 We accept there is a risk that this change could lead to an increased demand on an already strained court system. However, we do not accept that the appropriate response to that risk is to foreclose options for justice to abuse survivors in advance. Rather, the better response should be to increase the resources available to deliver justice.

Recommendation 2

That the Attorney General, through the Department of Justice, monitor the implementation of Recommendation 1 to ensure the court system is adequately resourced to manage any additional claims.

1.25 As noted above, we heard that some defendants seek to exploit the narrow definitions in current WA legislation to avoid liability for damages resulting from institutional abuse by relying on evidence that injuries were caused by physical or emotional abuse. We do not seek to verify those allegations here, though we have no reason to doubt the evidence we have heard in this regard. It is enough for us that, as the legislation is currently worded, the possibility to do this is open to defendants, and that it should not be. As Barrister Gary R Dean has said:

> the fact that any defendant is prepared to rely on such a defence is a powerful argument in favour of the State Government revisiting the changes made by

34 Submission 40, Rightside Legal, p. 3.
35 Chief Judge Julie Anne Wager, District Court of WA, *Transcript of Evidence*, 22 September, p. 12.
36 Ms Abigail Davies, Slater and Gordon Lawyers, *Transcript of Evidence*, 20 September 2023, p. 7; Mr John Rule, Maurice Blackburn Lawyers, *Transcript of Evidence*, 30 August 2023, p. 11.
37 Ms Abigail Davies, Slater and Gordon Lawyers, *Transcript of Evidence*, 20 September 2023, p. 1. See also Mr Simon Bruck, knowmore Legal Service, *Transcript of Evidence*, 1 September 2023, p. 3; Mr John Rule, Maurice Blackburn Lawyers, *Transcript of Evidence*, 30 August 2023, p. 11.

> Amending Act and expanding them to allow damages to also be claimed for injuries from physical and psychological abuse, in addition to sexual abuse, as is now the case in other Australian jurisdictions. The Western Australian government should act quickly to remedy this injustice.[38]

Making the change to the definition will close this loophole.

1.26 A number of witnesses made proposals to amend legislation to remove limitation periods for personal injury claims relating to 'physical' or 'serious physical abuse', or emotional and/or associated abuse, in addition to 'sexual abuse'.[39] As we have noted above, this change could have a significant positive impact on survivors. We see every reason for survivors in WA to be afforded the same access to justice as those elsewhere in country, and we see no compelling reason not to do so.

38 Gary R Dean, 'Civil Claims for Institutional Abuse: Emerging Issues and Impacts on Survivors', 2019, cited in submission 15, Survivors of Child Abuse, pp. [30-31]; original paper: para. 43.

39 Submission 12, Judy Courtin Legal, p. [3]; submission 16, Slater and Gordon Lawyers, p. 6; submission 20, Beyond Abuse, p. [4]; submission 31, knowmore Legal Service, p. 18; submission 35, Australian Lawyers Alliance, p. 25; supplementary submission 3a, Tuart Place, p. 3; Mr John Rule, Maurice Blackburn Lawyers, *Transcript of Evidence*, 30 August 2023, p. 1.

Chapter 2

Setting aside deeds of settlement

The 2018 amendments allow the setting aside of deeds

2.1 As we saw in Chapter 1, one of the main recommendations of the Royal Commission was to remove the statutory limitations on civil litigation relating to child sexual abuse. This dealt with the inability of people to begin civil litigation. But some people had already come to arrangements with institutions and individuals prior to these reforms, and those arrangements had resulted in legally binding agreements called 'deeds of settlement'. These tend to include the details of settlement, and any financial obligations or confidentiality agreements that have been agreed. Importantly for the subject of this inquiry, they also tend to include release clauses. In these, parties agree to release each other from any future claims or actions based on the issues covered by the deed. Deeds are a standard part of civil litigation, and continue to be made when cases are settled.

2.2 Settlements and deeds made before the 2018 amendments, if allowed to stand, would effectively make it impossible for people to make new claims against institutions with which they had made a settlement. This was rectified by the new section 92 of the *Limitation Act 2005*, which in part says that the appropriate court (that which would have had jurisdiction had a case been brought at the time of the previous settlement) may, where it thought it 'just and reasonable':

> (a) grant leave to commence the action, subject to conditions; and
>
> (b) to the extent necessary for that, set aside the settlement agreement and any judgment giving effect to the settlement.[40]

2.3 Although there is ongoing legal consideration in Australia about precisely what the limits of putting deeds aside might be,[41] there is now clear case-law on the matter. The key case was first decided by the District Court in 2018, in *JAS v The Trustees of the Christian Brothers* (*JAS*), which set aside a previous settlement.[42] The judgement rested mainly on determining whether it would be 'just and reasonable' (as per s. 92 of the amended *Limitation Act 2005*) to set aside a particular settlement. In his explanation of the reasoning behind the decision, Sleight CJDC wrote that:

> Granting leave to commence an action is consistent with the broad intention of the amending Act to remove legal barriers to claimants commencing an action and having their claims decided on their merits.[43]

40 *Limitation Act 2005*, (WA) s. 92 (3).
41 See, for example: Ben Matthews, Elizabeth Dallaston, 'Reform of Civil Statutes of Limitation for child sexual abuse claims: Seismic changes and ongoing challenges', *UNSW Law Journal*, vol. 43, no. 2, 2020, pp. 386-415.
42 *JAS v The Trustees of the Christian Brothers* (2018) WADC 169.
43 *JAS* (2018) WADC 169 at 13 [28.5]

2.4 The evidence provided to us raises two key questions about historical deeds. The first concerns the process of setting them aside, and the delays involved. The second concerns the breadth of material covered by the deed, and how that might unfairly limit the ability of survivors to make a claim.

The process of setting aside deeds can cause unnecessary delay

2.5 Given that legislation and legal precedent now permits the setting aside of previous deeds, the Committee wanted to know that this process was not itself causing harm to survivors, especially through unnecessary delay. The first factor was that, like everything in this space, the number of cases that the District Court must deal with has risen greatly since 2018. The District Court told us that in 2019-20, the first reporting year after the *JAS* decision, 115 relevant writs were filed with the court.[44] The Australian Lawyers Alliance (ALA) told us that another 111 people sought to have previous settlements put aside.[45]

2.6 The process to put aside deeds is not straightforward, but it is unavoidable. Put simply, as Rightside Legal said in their submission, 'the claim for compensation cannot start until a Judge sets aside the old deed and gives permission for the new claim to start'.[46] A survivors' group thought the setting aside of deeds was of a part with the rest of the process:

> The court process can be unnecessarily drawn-out and inefficient, from setting aside prior deeds of release to various interlocutory steps. Every stage of the court process appears drawn out and inefficient. Including the delays in setting aside prior deeds of release.[47]

Similarly, the immediate past president of the ALA told us that the effect of the current process 'has been to increase delay, cost and hence stress'.[48]

2.7 Whether inefficient or drawn-out, the process is multi-stepped. As a lawyer in the area told us:

> The process to set aside the previous deed of settlement is done by way of filing an originating summons, supporting affidavit and a proposed writ of summons and a proposed statement of claim. The application proceeds to a directions hearing before a Registrar of the District Court, where procedural orders are made for the progression of the application, and the listing of a hearing before [a] Judge. If the application is unopposed, the application must still be listed before a Judge, where the Judge will read reasons for the transcript and orders are made. Judges and Registrars of the District Court do not make the orders sought on the papers, even when the application is consented to by the Respondent.[49]

44 Submission 48, District Court of WA, p. 1.
45 Submission 35, Australian Lawyers Alliance, p. 12.
46 Submission 40, Rightside Legal, p. 4.
47 Submission 15, Survivors of Child Abuse, p. 4.
48 Mr Graham Droppert, Australian Lawyers Alliance, *Transcript of Evidence*, 13 September 2023, p. 3.
49 Submission 40, Rightside Legal, p. 4.

2.8 The ALA told us this process originally could take nine months, although the current time was normally 4-6 weeks, where respondents did not oppose the application.[50] As Ms Davies from Slater and Gordon Lawyers told us, this time did not include the preparation time, which 'takes as long as it takes':

> Then it takes a month or however long to get before the registrar who says, yes, everything is in order and allocates it to a judge. It takes then another number of months to get to the judge for the judge to then exercise their discretion as to whether it is just and reasonable to grant leave and set aside the deed just because of its mere existence – and that is when it is not being opposed.'[51]

2.9 While opposition might not often (or ever) be successful, it does happen. And opposed applications take longer to resolve. A number of firms told us the figure was around nine months.[52] The ALA said opposed applications still took about nine months to reach a final hearing, and that the substantive proceedings – the new claim of child sexual abuse – could not begin until the setting aside was finalised. Perhaps most importantly, the ALA told us that 'no applications have successfully been opposed in WA'.[53]

2.10 A law firm that routinely represents religious institutions in these cases argued the *JAS* case was necessary to let the court test the law. It also told us that apart from some initial instances, its clients had not opposed the setting aside of deeds.[54]

2.11 We heard that opposing applications to set aside deeds might not always be the institution's choice. One individual told us that some insurers required respondents to 'use every available defence' or they might lose their coverage.[55]

The Committee's view

2.12 The Committee is concerned that there appears to be no good reason for the delays created in setting aside deeds of settlement, especially when they are unopposed. And even when they are opposed – and we accept that there must be a process to challenge the application – given the rarity of successful opposition, there seems little reason to delay the beginning of an already long process. We were told by one legal firm that, in Victoria, 'the survivor starts their new claim and as part of that process makes an application asking a Judge to get rid of the old deed.'[56] As the company said, and apart from anything else, this 'is a quicker process'.[57]

Finding 3

The process for setting aside deeds of settlement extends the time it takes to initiate and finalise a civil claim of child abuse with little benefit to any party.

50 Submission 35, Australian Lawyers Alliance, p. 12.
51 Ms Abigail Davies, Slater and Gordon Lawyers, *Transcript of Evidence*, 20 September 2023, p. 4.
52 Mr Graham Droppert, Australian Lawyers Alliance, *Transcript of Evidence*, 13 September 2023, p. 3; Ms Abigail Davies, Slater and Gordon Lawyers, *Transcript of Evidence*, 20 September 2023, p. 4.
53 Submission 35, Australian Lawyers Alliance, p. 12.
54 Submission 24, Irdi Legal, p. 6.
55 Submission 17, Private submission.
56 Submission 40, Rightside Legal, p. 4.
57 ibid.

Finding 4

While it is important that respondents can oppose the setting aside of deeds, and this option has been taken up, we heard no evidence that applications were refused.

2.13 The Committee understands that removing the limitations period from a broader range of matters, as per Recommendation 1, will likely increase the number of deeds of settlement that become open to setting aside. As we argue elsewhere in this report, while this might increase the workload on the court system, and impact the State and other defendants, our view is that improving access to justice must ultimately be the priority.

Recommendation 3

That the Attorney General introduce legislation to ensure applications to set aside settlement deeds can run concurrently with civil claims that had previously been statute-barred (including any brought under legislative changes resulting from Recommendation 1).

The scope of some deeds is too wide

2.14 The second concerning aspect of the use of deeds was their breadth of content. As noted above, deeds can be set aside because it is just and reasonable to do so. We also believe that any new deeds that are established should be 'just and reasonable' in their scope. And deeds continue to be created as cases are settled. While we do not have particular details of deeds which have gone beyond the pale, we did hear evidence that indicates they may have been stretched too far in their use.

2.15 The simplest view of the question is that a deed should only cover the particulars as set out in the claim. As Maurice Blackburn Lawyers put it, they 'strongly believe[d] that Deeds ought not apply beyond the terms of the present matter'.[58] Representatives from the State Solicitor's Office (SSO) shared the same broad view, but did note that sometimes there might be more room to expand the coverage:

> The scope of the deed normally reflects the pleadings in the matters which have gone to court, so they do normally reflect the statement of claim. If it is an informal and unlitigated matter, the deed may be slightly broader…[59]

> If there is a settlement ultimately for a set of events that have led to a particular harm for a survivor, a deed may well ensure that it settles entirely as a matter of legal liability for those events and that specific harm. In a sense, it avoids the risk of further litigation essentially on the same issues.[60]

58 Submission 32, Maurice Blackburn Lawyers, p. 6.
59 Ms Sonya Lomma, State Solicitor's Office, *Transcript of Evidence*, 11 September 2023, pp. 14-15
60 Mr Craig Bydder, State Solicitor's Office, *Transcript of Evidence*, 11 September 2023, p. 15.

2.16 We heard that the State was at times eager to extend the protection it sought through a deed. A representative from Maurice Blackburn Lawyers told us:

> We often receive deeds that, on reading them, purport to go beyond the scope of the case we have just settled. An example would be a plaintiff who has resolved their case and they indemnify a future claim that, say, might be being a survivor of the stolen generations or there was asbestos in the wall at their mission, but they have signed away their right to bring that claim by signing the deed for this child sexual abuse claim. Whether it is a deliberate strategy by the state or [an] imperfectly drafted deed, it now gets unnecessary and attracts unnecessary costs for having to address that. And we are very reluctant to have our clients sign deeds that potentially put them at risk of future actions that are entirely unrelated to that.[61]

The Committee's view

2.17 We do not believe there is a sustainable explanation for any party to attempt to bring extraneous issues into a deed designed to settle a child abuse case. As a self-proclaimed model litigant, the State should ensure that it stays within the bounds of fairness in this area. In our view, and no matter the defendant, deeds of settlement should only cover such things as were in reasonable contemplation of the parties as part of the claim.

Finding 5

There is evidence that the State may have sought to impose too wide a restriction on claimants when settling cases of child sexual abuse.

Recommendation 4

That all defendant institutions, including the State, ensure that they do not extend the scope of any deeds made to settle cases of child abuse (including those brought under legislative changes resulting from Recommendation 1) beyond the immediate issue at hand.

61 Mr John Rule, Maurice Blackburn Lawyers, *Transcript of Evidence*, 30 August 2023, p. 10.

Chapter 3

Reversing the onus of proof

WA has not altered the onus of proof in child abuse claims

3.1 Beyond removing the time-bar limitation to claims of child sexual abuse, the Royal Commission made a number of recommendations to tighten institutional responsibility for the actions of people employed, engaged or associated with institutions who carry out acts of child sexual abuse. In its *Redress and Litigation* report, the Royal Commission made two recommendations (89 and 90) designed to impose a non-delegable duty on institutions. This was intended to ensure that designated types of institution were 'liable for the deliberate criminal acts or negligence of their "members or employees"', and that this group should be defined widely.[62] The evidence we received was that this change has not been introduced in any jurisdiction, although some jurisdictions have 'implemented legislative provisions around vicarious liability.'[63]

3.2 We note that in WA's response to the Royal Commission, these recommendations were marked for 'further consideration'. As the Minister responsible wrote at the time,

> The introduction of such a duty would represent a significant departure from well-established principles in torts law. Therefore, the State Government needs to consult extensively before it can be in a position to support the recommendations in this section. As part of the consultation process, the State Government will also consider whether it will introduce legislation to reverse the onus of proof so that institutions will be liable for child sexual abuse by persons associated with the institution unless the institution proves it took reasonable steps to prevent the abuse.[64]

3.3 The second set of recommendations (91-93) dealt with 'reversing the onus' of proof for institutions. The key explanation for the need for this was that 'institutions should be liable

62 Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, Commonwealth of Australia, 2015, pp. 493, 495 (at which, the list of institutions is:
a. residential facilities for children, including residential out-of-home care facilities and juvenile detention centres but not including foster care or kinship care
b. day and boarding schools and early childhood education and care services, including long day care, family day care, outside school hours services and preschool programs
c. disability services for children
d. health services for children
e. any other facility operated for profit which provides services for children that involve the facility having the care, supervision or control of children for a period of time but not including foster care or kinship care
f. any facilities or services operated or provided by religious organisations, including activities or services provided by religious leaders, officers or personnel of religious organisations but not including foster care or kinship care.)

63 Ms Lauren Hancock, knowmore Legal Service, *Transcript of Evidence*, 1 September 2023, p. 9. See e.g. *Civil Liability Act 2002* (NSW), Division 3; *Civil Liability Act 2002* (Tasmania), s. 49J.

64 Minister McGurk, Royal Commission into Institutional Response to Child Sexual Abuse: Response by Minister McGurk on Behalf of the Government of Western Australia, June 2018, p. 17.

for child sexual abuse by their members or employees unless the institution proves it took reasonable steps to prevent abuse'.[65] We note that in WA's response to the Royal Commission, these recommendations were also marked for 'further consideration'.

3.4 Other States across Australia have introduced legislation to make good the 'reverse onus' recommendation, although they have done it in different ways. In New South Wales (NSW), the *Civil Liability Act 2002* was amended in 2018 so that s. 6F (3) reads:

> In proceedings against an organisation involving a breach of the duty of care imposed by this section, the organisation is presumed to have breached its duty if the plaintiff establishes that an individual associated with the organisation perpetrated the child abuse in connection with the organisation's responsibility for the child, unless the organisation establishes that it took reasonable precautions to prevent the child abuse.[66]

3.5 Queensland legislation makes two similar provisions. The first says that:

> An institution has a duty to take all reasonable steps to prevent the abuse of a child by a person associated with the institution while the child is under the care, supervision, control or authority of the institution.

The second says that an 'institution is taken to have breached its duty under section 33D unless the institution proves it took all reasonable steps to prevent the abuse.'[67]

3.6 In Victoria, the *Wrongs Act 1958* states that:

> In a proceeding on a claim against a relevant organisation for damages in respect of the abuse of a child under its care, supervision or authority, on proof that abuse has occurred and that the abuse was committed by an individual associated with the relevant organisation, the relevant organisation is presumed to have breached the duty of care referred to in subsection (2) unless the relevant organisation proves on the balance of probabilities that it took reasonable precautions to prevent the abuse in question.[68]

Finding 6

Western Australia has not followed the recommendations of the Royal Commission to impose a non-delegable duty on institutions, or to reverse the onus of proof for institutions in child sexual abuse claims.

The Committee's view

3.7 The Committee is of the view that survivors of child abuse in WA should not be limited in their protections compared to survivors in other States. In particular, we believe that the

65 Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, Commonwealth of Australia, 2015, p. 56.
66 *Civil Liability Act 2002*, (NSW), s. 6F (3).
67 *Civil Liability Act 2003*, (Queensland), s. 33 D ff.
68 *Wrongs Act 1958*, (Victoria), s. 91 (3).

civil liability legislation in WA should be amended to reverse the onus of proof unless institutions can show they have taken reasonable precautions to prevent that abuse.

Recommendation 5

That the Attorney General introduce amendments to Western Australia's civil liability legislation to ensure that an organisation is presumed to have breached its duty of care for children who are victims of abuse perpetrated by anyone employed, engaged or associated with that organisation (including abuse covered by legislative changes resulting from Recommendation 1) unless it can establish that it took reasonable precautions to prevent that abuse.

Chapter 4

What happens to claims when plaintiffs die

4.1 The reforms to policy and practice since the Royal Commission have made significant changes for survivors. They have opened previously closed opportunities for people to pursue civil litigation relating to child abuse, regardless of when this took place, and the NRS has allowed people who choose not to litigate to seek formal redress, including a financial component. While these have all been important steps towards finding justice for people who have been abused within institutions, there is one area in which there has been no real change.

4.2 All these reforms have been specifically focused on the individuals who were abused. As the Royal Commission and as many people and organisations who made submissions to this inquiry have noted, the group of people who suffered what has been called 'historical' child sexual abuse is an aging group. The changes that have been made came, for many people, decades after the event. This means that many people died before they could take issue with the institutions and individuals involved. It also means that there is a not insignificant risk that people might die while they are in the process of seeking justice, whether through the NRS or through civil litigation.

The National Redress Scheme and civil litigation treat the death of claimants differently

4.3 As the situation currently sits, there are different outcomes for claims in the NRS and in civil litigation in WA if the claimant dies before the completion of the process.

4.4 Under the NRS, where a claim has been finalised and the decision has been accepted by the claimant, their estate 'can receive their redress payment'.[69] However, this is not the case for any claims still in the process of being decided. As academics Guthrie and Dickerson say, 'redress is not payable to the estate of a deceased person where the redress has not been accepted, declined or withdrawn prior to death'.[70]

Finding 7

If a claim to the National Redress Scheme has been finalised before the claimant dies, the deceased person's estate can receive the redress payment.

4.5 With regards to civil litigation, the situation is different. As Ms Lomma from the SSO told us, it is 'only the person who has suffered the child sexual abuse who can sue in respect of that.'[71] Her colleague, Mr Bydder, explained further that the 'position at common law was

69 National Redress Scheme, *Who Can Apply?*, accessed 24 October 2023, https://www.nationalredress.gov.au/applying/who-can-apply

70 Robert Guthrie and Amy Dickerson, 'The National Redress Scheme for Institutional Child Sexual Abuse – The Western Australian Response', *Journal of Law and Medicine*, vol. 27, 2019, p. 489.

71 Ms Sonya Lomma, State Solicitor's Office, *Transcript of Evidence*, 11 September 2023, p. 15.

that a claim died with the person'.[72] In their submission, Irdi Legal explained that the common law was that 'a cause of action abated upon the death of a person and could not be continued by the deceased party's executor whether or not a proceeding had been commenced.'[73]

4.6 This approach was apparent from the start of the legislative process. When the amendments to civil liability law were introduced into Parliament in 2017, the Attorney General made it clear in his second reading speech that the changes would not affect the limitations around claims by deceased estates.[74]

4.7 We heard some support from religious organisations for continuing the status quo in this area. The Anglican Diocese of Perth submitted that 'the current operation of the *Limitation Act 2005* and the *Law Reform (Miscellaneous Provisions) Act 1941*, in restricting the family / estate of any deceased survivor from pursuing damages on their behalf in these matters is sensible.'[75] The latter Act specifically restricts the ability to award 'damages for pain and suffering', or for 'the loss of capacity of that person to earn'.[76] In its hearing before the Committee, the Anglican Diocese of Perth argued that by supporting the ongoing restriction on deceased estates making claims in these matters, they were 'only seeking to uphold what provisions are in place for other civil liability claims for negligence or compensation or other areas where compensation and negligence might be sought in the civil space.'[77]

Finding 8

The common law position currently means that any civil litigation on matters of child sexual abuse dies when the plaintiff dies, and cannot be carried on by their estate.

4.8 While the Committee understands the importance of consistency, it also believes that the situation of survivors of institutional child abuse warrants special consideration. That, after all, was the basis for the changes to civil liability introduced through the Parliament of WA. We believe there is an extremely strong case to extend the ability of claims to be carried on by the estate of a plaintiff in the event of their demise if the case is already on foot.

4.9 We heard from the SSO and Irdi Legal that there was already what Mr Bydder called a 'live issue' in train that might result in the District Court making a determination on the matter.[78] Irdi Legal explained the situation:

> One view is that the effect of section 6A(6) of the LA is that where a child sexual abuse cause of action survives the death of the survivor due to the operation of section 4 of the LRMP Act, the survivor's Estate is not given the benefit of the removal of the limitation period and a respondent can plead the limitation defence

72 Mr Craig Bydder, State Solicitor's Office, *Transcript of Evidence*, 11 September 2023, p. 15.
73 Submission 24, Irdi Legal, p. 11.
74 Mr J. R. Quigley, Attorney General, Legislative Assembly, *Hansard*, 22 November 2017, pp. 5913b-5915a.
75 Submission 13, Anglican Diocese of Perth, p. 6.
76 *Law Reform (Miscellaneous Provisions) Act 1941*, s. 4(2).
77 Mr Keith Stephens, Anglican Diocese of Perth, *Transcript of Evidence*, 22 September 2023, p. 12
78 Mr Craig Bydder, State Solicitor's Office, *Transcript of Evidence*, 11 September 2023, pp. 15-16; submission 24, Irdi Legal, pp. 11-12.

> in response to an attempt by the Executor of the survivor's Estate to continue the child sexual abuse cause of action.
>
> However this statutory interpretation of section 6A(6) of the LA has been challenged. To our knowledge, all claims bar one involving the death of a survivor (whether or not after a civil action had been commenced) have not been pursue[d] with the survivor's Estate accepting the survivor's child sexual abuse cause of action was subject to the limitation period. Only one claim was contested by a survivor's Estate, which claim has been resolved by the payment of an ex gratia payment to the Estate with no admission of liability by the named respondents.[79]

4.10 Irdi Legal argued that '[i]t would, we suggest, be a relatively simple exercise to clearly state that the removal of the limitation period is only available to survivors of child sexual abuse'.[80] While this might be true, it must also be true that it would be equally simple to draw an entirely different conclusion. As Bradley Bayly Legal told us:

> The state takes the position that once a survivor dies, their entire claim dies with them. The opinion we have had is that if the proceedings are commenced within their lifetime then the claim for past damages and all that kind of stuff will then be maintained.[81]

The Committee's view

4.11 As with many of the matters covered in this report, the issues discussed in this chapter have been or might soon be in the hands of the court. And as with the other examples, the Committee has no intention of second-guessing what the courts might determine. The courts hand down decisions, as they must, based on the law as it currently stands. That does not, however, mean the Committee cannot propose what the legislative position should be.

4.12 In this matter, the Committee believes that the special circumstances surrounding the people for whom the laws of limitation have already been changed mean that other changes should be instigated. If, as we have been consistently told, many people take many years to begin seeking civil justice for acts against them, they should be able to know those cases can reach a conclusion even if they die in the interim. We believe this should be permissible for anyone who has a case on foot at the time of their demise. We also note that permitting this change would not determine the outcome of any case. As Miss Littlefair of Bradley Bayly Legal said, while the claim might be able to be maintained in such a situation, '[t]he difficulty with that is you do not have a witness and if liability is an issue, you are in trouble.'[82]

4.13 Nonetheless, the Committee believes that the relevant legislation should be amended to allow claims to persist once they are on foot, even if the plaintiff dies.

79 Submission 24, Irdi Legal, p. 12.
80 ibid.
81 Miss Rosemary Littlefair, Bradley Bayly Legal, *Transcript of Evidence*, 23 September 2023, p. 16.
82 ibid.

Recommendation 6

That the Attorney General introduce amendments to the relevant legislation to ensure that civil litigation on matters of child abuse (including those brought under any legislative changes resulting from Recommendation 1) can be continued by the estate of the plaintiff.

4.14 In August 2023, the Supreme Court of Victoria's Court of Appeal handed down a decision that upheld the right of the father of a person who had allegedly been abused to make a civil claim against a religious institution.[83] The decision upheld an earlier decision by the Victorian Supreme Court that Victorian legislation made it possible for the father to make a claim against the institution for his own personal harm.

4.15 Beyond allowing claims to continue after a plaintiff dies, we believe there is merit in exploring the potential for the family of people who have been abused to be able to make a claim. The Victorian example cited above will not necessarily translate directly to WA, but the Committee believes the Government should increase the range of people permitted to make claims against individuals and institutions responsible for abuse.

Recommendation 7

That the Attorney General introduce amendments to the relevant legislation to allow family members of the victims of child abuse to make civil claims consistent with the position in Victoria following the decision handed down by the Victorian Supreme Court of Appeal in the *Catholic Archdiocese of Melbourne v RWQ*, incorporating any legislative changes resulting from Recommendation 1.

83 *Catholic Archdiocese of Melbourne v RWQ* (2023) VSCA 197; Guardian Australia, *Catholic church can be sued by family of George Pell's accuser, Victorian court rules*, 25/8/23, accessed 7/11/23, https://www.theguardian.com/australia-news/2023/aug/25/george-pell-catholic-church-victoria-court-ruling-can-be-sued-by-family-of-accuser-case; ABC Online, *Civil case over cardinal abuse allegations allowed to proceed against church*, 25/8/23, accessed 7/11/23, https://abcnews.go.com/International/wireStory/civil-case-cardinal-pell-abuse-allegations-allowed-proceed-102555177

Chapter 5

Permanent stays

5.1 During the inquiry we received evidence raising questions about the use of applications to cease, or 'permanently stay', civil legal proceedings relating to institutional child sexual abuse. Recent media coverage of permanent stay applications has amplified the issue's prominence.[84] Concurrent with this inquiry, the High Court of Australia was considering a case against The Trustees of the Roman Catholic Church for the Diocese of Lismore, on appeal from the NSW Court of Appeal, where it was examining the principles of permanent stay applications in such cases for the first time. The High Court handed down a majority decision on 1 November 2023. In this chapter we:

- review the place of permanent stays in the legal system, drawing on the recent High Court majority decision;
- evaluate evidence we received on how institutions have used applications, or potential applications, for permanent stays at various stages of the civil litigation process; and
- assess if and how the process surrounding permanent stays might be changed.

Permanent stays are an established part of the legal system, but must only be used in exceptional circumstances

5.2 The legal role of a permanent stay is to allow a court to halt proceedings where there is no possibility of a fair trial. Until now, applications in child abuse cases have been typically made on one of more of the following grounds:

- that the passage of time between alleged events and civil proceedings caused the deterioration or lack of evidence;
- the defendant is unable to either stand trial or have the allegations put to them; or
- because no relevant witnesses are available.

5.3 Academics Mathews and Dallaston set out the principles derived from earlier High Court jurisprudence relating to permanent stays. They include:

- that a defendant bears the onus of proving a stay should be granted;
- that this onus is heavy because a granted stay would 'terminate the plaintiff's fundamental right to have a claim adjudicated' and will therefore only be granted in 'exceptional circumstances'; and

84 Christopher Knaus, The Guardian, *'Red flags everywhere': high court asks Catholic church why it didn't investigate priest's abuse 50 years ago*, 8 June 2023, accessed 5 August 2023, 'Red flags everywhere': high court asks Catholic church why it didn't investigate priest's abuse 50 years ago | Australia news | The Guardian; Christopher Knaus, The Guardian, 6 June 2023, accessed 5 August 2023 Australian abuse survivors fight to stop Catholic church's 'new type of cruelty' | Australia news | The Guardian; Louise Milligan, Mary Fallon, and Jessica Longbottom, ABC News, 29 May 2023, accessed 5 August 2023 The extraordinary legal tactics institutions are using to fight compensation claims by abuse victims - ABC News

- a stay may be granted in cases where proceedings would be 'manifestly unfair to a party' or their continuance would be oppressive.[85]

5.4 An important precedent for cases relating to institutional child abuse was set on 1 November 2023 when the High Court handed down a majority decision to allow an appeal against a permanent stay that had been granted in a NSW case. The key questions the Court considered dealt with the 'applicable standard for appellate review' of permanent stays, and whether the circumstances in this particular case 'were so exceptional so as to justify a permanent stay.'[86] On the first, the majority found that a decision to grant a stay was not discretionary.[87] Rather:

> The extreme step of the grant of a permanent stay of proceedings demands recognition that the questions whether a trial will be necessarily unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process each admit of but one uniquely right answer.[88]

5.5 The majority wrote that granting a permanent stay means deciding that letting the matter go to trial 'would be irreconcilable with the administration of justice through the operation of the adversarial system.' And, that such a 'decision must be one of last resort on the basis that no other option is available. This is why only an exceptional case justifies the exercise of the power of a court to permanently stay proceedings.'[89] Further, it said if a court was to refuse 'to hear and decide cases in other than exceptional circumstances and as a last resort to protect the administration of justice through the operation of the adversarial system, that refusal itself will both work injustice and bring the administration of justice into disrepute.'[90]

5.6 The High Court majority noted that in the 'new world'[91] of post-statute of limitation reform:

> the mere effluxion of time and the inevitable impoverishment of the evidence which the passing of time engenders cannot attract the quality of exceptionality which is required to justify the extreme remedy of the grant of a permanent stay. If that were so, public confidence in the administration of justice in accordance with the law as enacted by Parliament would itself be undermined.[92]

5.7 Based on these considerations, the High Court majority found that the abolition of the limitation period that would have applied to and precluded the appellant's proceedings before the removal of limitations 'has created a new legal context within which the alleged abuse of process must be evaluated. In this new legal context, the Diocese's contention that any trial of the proceedings [in the particular case] would be necessarily unfair must be

85 Ben Mathews and Elizabeth Dallaston, 'Reform of Civil Statutes of Limitations for Child Sexual Abuse Claims: Seismic Change and Ongoing Challenges', *UNSW Law Journal*, vol. 43, no. 2, 2020, p. 400.
86 *GLJ v. The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) HCA 32 (Judgement summary), p. 1.
87 *GLJ* (2023) HCA 32 [26].
88 ibid. [17].
89 ibid. [3].
90 ibid. [3].
91 ibid. at 14.
92 ibid. [52].

rejected.'[93] More fundamentally, it found that the nature of these cases had been changed. By removing limitations:

> Parliament ensured that no claim for damages for death or personal injury resulting from child abuse can be characterised as 'historical'. Just as there is no 'historical murder' while a person is alive to mourn the victim, there is no 'historical child sexual abuse' while there is someone alive claiming to have suffered harm from the abuse.[94]

Permanent stays can be misused during negotiations

5.8 During the inquiry, religious institutions, law firms, legal bodies, and advocacy and support groups expressed differing views on how defendants used permanent stays. They also provided different views on the extent to which that use might be an issue in WA.

5.9 Slater and Gordon Lawyers, for example, believed that the growing number of permanent stay cases nationwide suggested they are 'not being utilised as an exceptional remedy' as intended,[95] and are 'a major issue in WA'.[96] Further, current laws also allow defendants to apply for orders of costs against victims in successful applications, an outcome Ms Davies of Slater and Gordon Lawyers described as 'a tragedy upon a tragedy'.[97] She said there were 'numerous' instances of permanent stays being granted Australia-wide and that '"[n]umerous" and "exceptional" are not terms that should be used to describe the same thing.'[98]

5.10 Witnesses mostly discussed permanent stays in relation to cases outside WA, even if they were concerned these followed a pattern that could be replicated here. As Maurice Blackburn Lawyers said, '[t]hankfully, it is not as much of an issue in WA yet, but we have seen it in New South Wales in particular, pretty strongly in Queensland and in some other jurisdictions as well.'[99] The District Court later clarified that as of 29 September 2023, it had received four permanent stay applications since 2018, one of which 'was a historical child sexual abuse matter as opposed to an institutional child sexual abuse matter.'[100] For the State's part, the SSO said it 'would be exceptionally rare for the state to apply for a permanent stay in relation to a survivor's claim' and that the State had made only one such application, which was itself never determined as the matter settled out of court.[101]

5.11 However, the number of formal applications for permanent stays does not give the full picture. We also heard evidence that defendants were raising the prospect of stays during settlement negotiations to pressure plaintiffs to reach potentially unfavourable settlements,

93 *GLJ* (2023) HCA 32 [4].
94 ibid. [51].
95 Submission 16, Slater and Gordon Lawyers, p. 5.
96 Ms Abigail Davies, Slater and Gordon Lawyers, *Transcript of Evidence*, 20 September, 2023, p. 4.
97 ibid., p. 6. See also Ms Sara Connor-Stead, Australian Lawyers Alliance, *Transcript of Evidence*,13 September 2023, p. 11.
98 Ms Abigail Davies, Slater and Gordon Lawyers, *Transcript of Evidence*, 20 September, 2023, p. 6.
99 Mr John Rule, Maurice Blackburn Lawyers, *Transcript of Evidence*, 30 August 2023, p. 3.
100 Her Honour Judge Julie Wager, Chief Judge, District Court of WA, Note of clarification, 29 September 2023, p. 1.
101 Dr Graham Hill, State Solicitor's Office, *Transcript of Evidence*, 11 September 2023, p. 4.

including in WA.[102] Mr Rule from Maurice Blackburn Lawyers told us, 'there has not been a flood of stay applications … It is more, from our experience, the threat of the stay.'[103] The ALA described the difficulties in advising clients receiving this 'threat', taking into account the costs that survivors might be liable for if the application was granted.[104] Bradley Bayly Legal said some institutions 'will come with a commercial settlement but threaten, if it is not taken' to pursue a permanent stay.[105] They told us that, not counting negotiations with the state, this occurs in approximately '50 to 75 per cent of negotiations', including 'institutions that will threaten them in every single case.'[106] Maurice Blackburn Lawyers described this practice as being comparable in their effect to the limitations periods or the so-called 'Ellis' defence, a legal loophole that had prevented survivors from pursuing damages from unincorporated organisations such as churches, in place before the Royal Commission. In other words, 'the way that [those legal defences] were used as an intimidation tactic and to cast a shadow over the plaintiffs … stays are now being used in the same way.'[107]

5.12 Non-state institutions denied exploiting legal options open to them. The Anglican Diocese of Perth said recent criticism of permanent stay applications, or the threat of their use, 'is not a phenomenon that the Diocese has observed and is certainly not an approach adopted by the Diocese.' Further, it 'has not yet received a Civil Claim to which a permanent stay application has been filed' and 'would only consider doing so in rare and specific situations where the circumstances overwhelmingly call for it.'[108] It referred to the small handful of stay applications in WA to argue that 'institutions are not bringing unnecessary or unjustified applications or using these applications as a delay tactic.'[109] Mr Lynch of the Catholic Archdiocese of Perth said it too had not used permanent stay applications 'in any of the matters that we have been involved with' and the threat of using permanent stays during the settlement process was 'outside [his] experience'.[110] The Catholic Diocese of Bunbury made a general submission that current laws around stays 'have worked well and are viewed as sufficient' and said the key problem was not about obstructing justice, but adhering 'to the rule of law and case law precedence.'[111] Several other institutions either chose not to respond to invitations to make a submission to the inquiry or were unavailable to give evidence before the Committee.

5.13 Ms Liscia of Irdi Legal, which represents defendant institutions, also denied that her clients use the possibility of stays as a negotiation tactic, and said she had 'raised the issue of seeking a permanent stay on definitely two, maybe three, occasions.'[112] Furthermore, she

102 Mr Andrew Ponnambalam, Bradley Bayly Legal, *Transcript of Evidence*, 30 August 2023, p. 15; Mr John Rule, Maurice Blackburn Lawyers, *Transcript of Evidence*, 30 August 2023, p. 6.
103 Mr John Rule, Maurice Blackburn Lawyers, *Transcript of Evidence*, 30 August 2023, p. 6.
104 Ms Sara Connor-Stead, Australian Lawyers Alliance, *Transcript o*f Evidence, 13 September 2023, p. 11.
105 Miss Rosemary Littlefair, Bradley Bayly Legal, *Transcript of* Evidence, 30 August 2023, p. 3.
106 ibid., p. 4.
107 Mr John Rule, Maurice Blackburn Lawyers, *Transcript of Evidence*, 30 August 2023, p. 6. See also submission 31, knowmore Legal Service, p. 21; Ms Abigail Davies, Slater and Gordon Lawyers, *Transcript of Evidence*, 20 September, 2023, p. 5.
108 Submission 12, Anglican Diocese of Perth, p. 4.
109 ibid., p. 5.
110 Mr Daniel Lynch, Catholic Archdiocese of Perth, *Transcript of Evidence*, 11 September 2023, pp. 15-16.
111 Submission 12, Anglican Diocese of Perth, p. 4.
112 Ms Anna Liscia, Irdi Legal, *Transcript of Evidence*, 13 September 2023, p. 13.

said, succeeding in stay applications is more difficult than media reporting might suggest.[113] The Chief Judge of the District Court even questioned whether threatening a permanent stay could be a successful negotiating tactic given how few had been granted.[114] While it is true that only a small number of stays have been granted,[115] it is also true that only a small number have been sought, meaning that the 'success rate' is high. It is therefore reasonable to suppose that any application could be successful, and that this possibility might play into people's considerations during proceedings or negotiations.

5.14 The support and advocacy group Survivors of Child Abuse (SOCA) was adamant that stays were used as 'a defence tactic' that 'provides institutions with immunity from prosecution, hindering survivors' pursuit of justice.'[116] For SOCA, the underlying issue was one of justice. It noted the extraordinarily long time it can take survivors to disclose incidents of abuse, during which an alleged offender might have died or be otherwise unable to offer a proper defence. It was, SOCA submitted, precisely to 'provide survivors with an opportunity to seek justice' in such cases that the Royal Commission recommended removing the statute of limitations.[117] As such, SOCA said even the 'threat of a Permanent Stay, coupled with the possibility of requesting "Costs," creates immense pressure on survivors, who have already been re-traumatised by the legal process.'[118]

5.15 The ALA submitted that decisions in Australian courts granting permanent stays were 'having chilling effects across the country; emboldening Defendant institutions to revert to a pre-Royal Commission tactics to delay litigation'.[119] It said 'special circumstances justifying a permanent stay are often largely created by the abuse itself and the failures of the institution to deal with a known risk.' The outcome, they said, is that '[w]hilst the alleged perpetrator's unavailability is said to produce manifest unfairness to the Defendant […] the result is a case that effectively disqualifies a class of witness and the evidence of survivors in their claims for civil law redress.'[120]

Decisions about permanent stays must always consider all parties' rights

5.16 The Committee wishes to be clear that there was no suggestion during the inquiry that permanent stays be disallowed entirely. We refer to the Royal Commission's explicit recommendation that the courts' existing power to stay proceedings be unaffected by its recommendation to remove limitation periods for child sexual abuse claims. While it appreciated this would 'allow institutions to apply for a stay of proceedings' and '[t]his may cause delay and extra expense for some plaintiffs', the Royal Commission saw this as 'a

113 Ms Anna Liscia, Irdi Legal, *Transcript of Evidence*, 13 September 2023, p. 13.
114 Chief Judge Julie Wager, District Court of WA, *Transcript of Evidence*, 22 September 2023, p. 12.
115 See *RC v The Salvation Army (Western Australia) Property Trust* (2023) WASCA 29; *GMB v UnitingCareWest* (2020) WADC 165.
116 Submission 15, Survivors of Child Abuse, p [2]. See also submission 28, International Association of Former Child Migrants and their Families, p. 2; submission 32, Maurice Blackburn Lawyers, pp.5, 7-8
117 Submission 15, Survivors of Child Abuse, p [2].
118 ibid., p [3].
119 Submission 35, Australian Lawyers Alliance, pp. 9-10.
120 ibid., p. 10.

necessary and acceptable risk: the courts' powers to prevent unfair trials should not be limited. Both the survivor and the institution are entitled to a fair trial.'[121]

5.17 Inquiry participants made similar points.[122] The Anglican Diocese of Perth said permanent stays 'have a legitimate place in Civil Claims where a defendant would not be able to receive a fair trial on the available evidence. Naturally, this may be appropriate in institutional abuse claims given the length of time that has often passed since the alleged abuse.'[123] Likewise, the Catholic Diocese of Bunbury believed 'that public trust and confidence in the court system is paramount in any democratic society' and that 'justice is not a one-way street for plaintiffs but a balance of the legal rights of defendants also.'[124] Chief Judge Wager told us that '[t]here are some situations when a stay is required and it would be an abuse of process not to have it, and constitutionally it will probably always be there.'[125] Even the survivor-focused law firm Bradley Bayly Legal accepted the role of the stay and did not suggest 'you could get rid of it completely.'[126] Rather, the problem it saw was institutions taking advantage of their own deficient record keeping.[127]

5.18 While it is of course for the courts to decide whether to grant stay applications, we also received evidence suggesting the need for more guidance on the circumstances in which it would be appropriate to grant them. Several submissions saw a role for legislative changes to provide clarity. As it stands, the current *Limitation Act 2005* contains a note in section 6A under 'special provisions for child sexual abuse actions: no limitation period'. The note states: 'this section is not intended to limit a court's power to summarily dismiss or permanently stay proceedings where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible.'[128]

5.19 Some submissions suggested restricting the grounds on which permanent stay applications might be granted. Slater and Gordon Lawyers submitted that permanent stays should be denied where there is a history of serious abuse either in the institution or by the alleged abuser, and where an institution did not implement a proper policy at the time to diminish or prevent the abuse, or kept no proper records of abuse and complaints.[129] The ALA proposed similar legislative amendments, and added that stays should also be denied '[w]here the alleged abuser has been convicted of a criminal offence against a child in a criminal trial.'[130] Further, for stay applications in institutional abuse cases, 'the applicant bears the onus of proof in respect of each of the above requirements.'[131]

5.20 Another submitter suggested the law be changed to prevent the misuse of permanent stays even if this applies in a time-bound way to a particular cohort of people (historical abuse

121 Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, Commonwealth of Australia, 2015, p. 457.
122 Submission 21, Christian Brothers, p. [4].
123 Submission 13, Anglican Diocese of Perth, p. 4.
124 Submission 4, Catholic Diocese of Bunbury, p. 4.
125 Chief Judge Julie Wager, District Court of WA, *Transcript of Evidence*, 22 September 2023, p. 12.
126 Miss Rosemary Littlefair, Bradley Bayly Legal, *Transcript of* Evidence, 30 August 2023, p. 15.
127 ibid.; Submission 35, Australian Lawyers Alliance, p. 10.
128 *Limitation Act 2005*, (WA), s. 6A(5)(n).
129 Submission 16, Slater and Gordon Lawyers, pp. 5-6.
130 Submission 35, Australian Lawyers Alliance, p. 10.
131 ibid., p. 11.

survivors), and to claims arising prior to its commencement.[132] The support organisation, Beyond Abuse, likewise proposed 'specific and narrow' legislative changes prohibiting permanent stays where institutional defendants caused or contributed to delays adversely affecting the survivor.[133] They pointed to a 2016 private member's Bill from Queensland that proposed, among other things, that the following should not be grounds for the court to grant permanent stays: the time passed between the abusive event and the start of proceedings; and where the defendant had caused or contributed to a delay in starting proceedings.[134]

5.21 The question for the Committee, then, is not whether any particular decision to grant permanent stays is right or wrong. It is whether WA law, with regard to the unique characteristics of child abuse cases in the post-2018 context, allows for appropriate consideration of both a defendant's right to fair proceedings, and the plaintiff's right to have their claim heard in full.[135]

The Committee's view

5.22 This Committee has been motivated by concerns about the options for justice available to survivors of institutional child abuse. A chief concern, that we have repeatedly raised, is the many years it can take for survivors to report their abuse. This was one spur to the removal of the limitation period for such claims. And it is why further procedural delays faced by survivors in undertaking civil proceedings can be so traumatic. It is therefore alarming to hear that the passage of time might be creating a new hurdle for survivors to have their claims heard, through no fault of their own.

5.23 Any attempt to use permanent stays to prevent plaintiffs gaining timely access to justice has the effect of nullifying claims in much the same way the pre-2018 limitations laws did. If we are in a 'new world' regarding child abuse claims, and these claims have special and unique characteristics, then we should not expect 'business as usual' procedures to create the best outcomes or be the most suitable mechanisms for dealing with them. We also believe that the broad test of 'exceptional circumstances' leaves openings that could be exploited, or at least have a cooling effect on plaintiffs' attempts to seek justice, although we expect the recent High Court majority decision will change this in time.

5.24 The current process, in common with any type of claim, requires respondents to apply for permanent stays before the evidence has been heard and tested. This must involve an element of guesswork as to whether the possibility of a fair trial exists. This is especially true where claims are based on events that occurred in the (sometimes distant) past. We believe

132 Submission 17, Private submission.
133 Submission 20, Beyond Abuse, pp. [2-3].
134 ibid., pp. 11-12. Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016 (Queensland) – This Bill was introduced into the Queensland Legislative Assembly in August 2016, but fell at the second reading on 8/11/2016 see https://www.parliament.qld.gov.au/Work-of-the-Assembly/Bills-and-Legislation/Bills-previous-Parliaments/55th-Parliament
135 Ben Mathews and Elizabeth Dallaston, 'Reform of Civil Statutes of Limitations for Child Sexual Abuse Claims: Seismic Change and Ongoing Challenges', *UNSW Law Journal*, vol. 43, no. 2, 2020, p. 404.

a better approach would let plaintiffs have their story heard, while also protecting respondents' rights.

5.25 If applications could only be heard after the evidence had been tested, the need for guesswork would be removed. This would maintain procedural fairness for both parties, while ensuring respondents cannot use the threat of a stay as a pre-trial negotiation tactic. Therefore, the Committee believes that relevant legislation should be amended so that applications for permanent stays for child abuse cases can only be made at the conclusion of the trial of the matter.

5.26 The recent High Court majority decision has offered guidance on certain key principles, especially in its affirmation that the removal of the limitations period has fundamentally changed the situation in which these matters are decided. Considering this and the evidence before our inquiry, we believe this issue requires legislative intervention now. Any additional delay will only further limit the ability of some survivors to gain the justice they deserve.

Finding 9

Permanent stays have a place in the justice system to ensure fair proceedings for all parties, but it is currently possible for permanent stays to be misused, leading to unfair outcomes for plaintiffs seeking to have their claims adjudicated.

Recommendation 8

That the Attorney General introduce legislation to ensure that applications for permanent stays in child abuse cases can only be made after the conclusion of the trial of the matter.

5.27 The Committee also believes that the issue of costs in permanent stays is unfairly onerous on plaintiffs who make a claim in good faith. Given that a claimant cannot know how and if their claim can be defended, we think it is unreasonable that they should have to bear the costs of an institution applying to have the case stayed.

Recommendation 9

That the Attorney General introduce legislation to ensure that when an application for a permanent stay is granted against a claim of child abuse made in good faith, the claimant should not be made liable for the applicant's costs.

5.28 Finally, the recent High Court majority decision raises questions about the status of any claims that have previously been permanently stayed. Given that very few cases in WA have been granted a permanent stay, and given the breadth of the High Court majority judgement, the Committee believes it would be prudent for the Attorney General to ensure that it is possible for any permanent stays previously granted for child sexual abuse claims to be reconsidered.

Recommendation 10

In light of the recent High Court majority judgement in the *GLJ* case, that the Attorney General introduce legislation to allow any permanent stays granted against child sexual abuse claims prior to that judgement to be reconsidered by the courts.

Chapter 6

Separate court lists and early trial dates

6.1 As we have emphasised, a fundamental focus for this Committee has been the apparently excessive delays survivors of child abuse face in undertaking civil proceedings. A primary cause of these delays is the fact that, in WA, child sexual abuse claims generally are dealt with in the same way as other personal injury claims, commencing in the District Court and subject to its case management rules. As such, child sexual abuse claims effectively compete with matters of a different order of priority, and do not have the tailored procedures and resourcing required to best deal with them.

There was broad support for a dedicated court list

6.2 As a general proposition, the evidence to this inquiry supported variations on the idea that the Committee could and should recommend something like a dedicated court list for child abuse claims to improve the opportunities available to survivors. Maurice Blackburn Lawyers, for example, said the most important recommendation it could offer was around the establishment of an 'abuse-specific court list'.[136] It said this 'would improve the efficiency of the court system in dealing with such claims, improve the court's oversight of parties' conduct, and help ensure quicker and fairer outcomes for victim-survivors.'[137] Rightside Legal also recommended having 'a separate Court list, and resources, dedicated to historical child sexual abuse claims'.[138] Beyond Abuse backed the idea of dedicated institutional child abuse court list 'if an analysis of Court resources and the statistics on the number of applications prove this to be advisable.'[139] The ALA went further to suggest the 'development of specialist civil courts to manage and hear matters relating to sexual abuse.'[140]

6.3 The idea had broad appeal. Irdi Legal, which represents defendants to child abuse compensation claims in WA, noted that procedural delays were caused by both the scarcity of specialist lawyers and barristers practicing in this area, and the limited resources available to the District Court to commit to civil trials for these claims, which are typically long. As a way to clear the backlog of claims, Irdi Legal therefore backed 'a dedicated Child Abuse Cases List in the District Court' with a judge or judges who exclusively manage and hear trials for these claims.[141] Ms Liscia of Irdi Legal favoured a dedicated list 'because although child sexual abuse claims are considered personal injury … they are very, very different … You are dealing with very wounded people'.[142]

136 Mr John Rule, Maurice Blackburn Lawyers, *Transcript of Evidence*, 30 August 2023, p. 1.
137 Submission 32, Maurice Blackburn Lawyers, p. 3.
138 Submission 40, Rightside Legal, p. 8.
139 Submission 19, Beyond Abuse, p. 4.
140 Submission 35, Australian Lawyers Alliance, p. 25.
141 Submission 24, Irdi Legal, p. 10.
142 Ms Anna Liscia, Irdi legal, *Transcript of Evidence*, 13 September 2023, p. 4.

6.4 As for institutions themselves, the Archbishop of the Anglican Diocese of Perth accepted in principle that 'a dedicated list would really assist and see things through in a more timely manner.'[143] Mr Stephens of the Anglican Diocese of Perth saw 'merit in a dedicated team of registrars who were focused on this particular area.'[144] More generally, the Catholic Archbishop of Perth also expressed support for any processes that would speed up the process and lead to better and less traumatic outcomes for survivors.[145]

Specialist lists in other courts provide lessons for WA

6.5 Several witnesses referred to the process in the Victorian Supreme Court's and County Court's Institutional Liability List, with dedicated judges and registrars, designed to hear particular types of claims, including child sexual abuse claims. The Victorian Supreme Court began the list in 2020 for damages claims arising from the Royal Commission and the Victorian Inquiry into the Handling of Child Abuse by Religious and Other Organisations, which saw a spike in the number of personal injury claims relating to historical institutional child abuse. The Court said the 'creation of the specialist list will allow for more efficient and experienced management of cases.'[146] An Institutional Liability List was announced for the Victorian County Court in July 2023.[147]

6.6 Witnesses for Bradley Bayly Legal said the Victorian model provided for an improved and accelerated process that WA should adopt. It detailed the Victorian model's procedural steps, which Bradley Bayly Legal praised for providing 'certainty to the survivor', because it immediately granted a trial date, even if pre-trial settlement is the more likely outcome. [148] Mr Seymour of Maurice Blackburn Lawyers stressed the Victorian system's designated staff, processes and practice notes, and the fact that the same judges hear most cases. Maurice Blackburn Lawyers said this system had 'reduced the wait time for a trial date, and allowed for an abuse-specific approach to the litigation process.'[149]

6.7 Other witnesses suggested the WA Supreme Court might be better placed than the District Court to manage these cases, citing the WA Supreme Court's Commercial and Managed Cases list. This list was designed for more complex matters requiring intensive supervision, specifically to manage cases relating to mesothelioma. Its objective 'is to bring cases to the point where they can be resolved by mediation or tried in the quickest, most cost effective way, consistently with the need to provide a just outcome.'[150]

143 Archbishop Kay Goldsworthy AO, Anglican Diocese of Perth, *Transcript of Evidence*, 22 September 2023, p. 11.
144 Mr Keith Stephens, Anglican Diocese of Perth, *Transcript of Evidence*, 22 September 2023, p. 11.
145 Archbishop Timothy Costelloe, Catholic Archdiocese of Perth, *Transcript of Evidence*, 11 September 2023, pp. 18-19.
146 Supreme Court of Victoria, *New Institutional Liability List*, media release, 4 February 2020.
147 County Court of Victoria, *The Court's Common Law Division will establish an Institutional Liability List and a corresponding Practice Note*, 18 July 2023, accessed 24 October 2023, https://www.countycourt.vic.gov.au/news-and-media/news-listing/2023-07-18-notice-practitioners-new-institutional-liability-list
148 Submission 38, Bradley Bayly Legal, p. 8; Ms Sarah Nielsen-Harvey, Bradley Bayly Legal, *Transcript of Evidence*, 30 August 2023, p. 6.
149 Submission 32, Maurice Blackburn Lawyers, p. 12.
150 The Supreme Court of Western Australia, *Consolidated Practice Directions*, 2009 (as updated on 18 October 2023), p. [114].

6.8 The key point, again, was the inordinate delays facing survivors. A Maurice Blackburn Lawyers representative explained:

> if a survivor walked into the door of our offices today, it would take maybe four years from walking in to getting their day in court and trial heard. In comparison, if a plaintiff came to a court proceeding in the Supreme Court under the commercial and managed cases list, say for a defamation action, it would take them 12 months to get a trial.[151]

6.9 Maurice Blackburn Lawyers explained how personal injury matters on this list are 'managed by a Judge or Supreme Court Master, which can better regulate parties' conduct, and result in trial dates being provided much more quickly', which it saw as evidence that specialist lists can improve 'timeframes for victim-survivors seeking civil justice'.[152] They were, however, ultimately 'agnostic' as to whether cases be dealt with in the District or the Supreme Court.[153] Nor were they prescriptive about how a specialist list should operate.[154] The aim, however achieved, was to have earlier, dedicated court involvement and case management in such cases to help expedite matters to reduce the toll on survivors. Slater and Gordon Lawyers also raised the specialist court list in the Supreme Court as a model for handling child sexual abuse cases in the District Court, or, if need be, through the Supreme Court itself, with a dedicated judge who supervises that system.[155]

6.10 Chief Judge Wager, however, affirmed that the District Court was the appropriate jurisdiction to deal with personal injuries cases, noting that its registrars and judges are highly experienced in these matters. She also emphasised the distinctive aspects of processes to handle claims relating to mesothelioma, which 'came in at a time when the plaintiffs in those matters often had about only six months to live. It was a true crisis. It just had to happen. In that situation, unlike these matters, there were one or two defendants'.[156] In essence, she said, 'the reasons for the mesothelioma expedited list being set up and what our court is experiencing with these matters, I think they are very different.'[157]

A dedicated court list may have resource implications

6.11 While the principle of a dedicated court list of some kind received general support, the District Court flagged concerns over resourcing constraints. The Court's Principal Registrar acknowledged calls to emulate the Victorian jurisdiction's model of separate case management practices, but suggested a direct comparison between Victoria and WA was unrealistic. The Principal Registrar told us that Victoria had 70 full-time judges, 22 reserve judges and seven judicial registrars compared with 32.5 judges and five registrars, in WA.'[158] In other words, while the WA District Court 'would love to be in a position to offer a similar level of case management' to that of Victoria, it is 'dealing with something in the order of

151 Mr Hugo Seymour, Maurice Blackburn Lawyers, *Transcript of Evidence*, 30 August 2023, p. 2.
152 Submission 32, Maurice Blackburn Lawyers, p. 12.
153 Mr Hugo Seymour, Maurice Blackburn Lawyers, *Transcript of Evidence*, 30 August 2023, p. 4.
154 ibid., pp. 7, 13.
155 Ms Abigail Davies, Slater and Gordon Lawyers, *Transcript of Evidence*, 20 September 2023, p. 3.
156 Chief Judge Julie Wager, District Court of WA, *Transcript of Evidence*, 22 September 2023, p. 13.
157 ibid.
158 Dr Brenda McGivern, District Court of WA, *Transcript of Evidence*, 22 September 2023, p. 4.

less than half of the judicial resources to do that.'[159] The judicial numbers are also low on a per capita rate – less than half the NSW and Victorian figures, slightly lower than Queensland, and higher than in South Australia. And the number of registrars in the District Court has remained constant at five since at least 2018.[160] The District Court did foresee a dedicated list eventuating, and told us it was in discussions on this point. Given the resourcing and timing constraints on judges, and the likelihood of continuing case involvement that registrars would offer, however, the District Court believed that it was more likely that registrars would manage cases and oversee listings.[161]

The Committee's view

6.12 It is clear to the Committee that the idea of a dedicated court list to deal with child abuse cases in WA has merit, and the support of inquiry stakeholders. We heard no compelling arguments against such a list in principle, and we note that Mr Droppert of the ALA said the idea was of 'low risk'.[162] There would no doubt be procedural challenges if this change was made. As Dr McGivern of the District Court said, a dedicated list is 'a good idea', but its implementation would need to answer technical questions. She added that in this effort the court could be guided by the lessons learned in other jurisdictions and adjust District Court rules or procedure as required.[163]

6.13 The most obvious hurdle is around resourcing, including the availability of suitably experienced judges and registrars to make such a list feasible. The other problem, which lies outside the court's control, is the potential shortage of counsel in this area with the specialist knowledge to deal with these often complex and lengthy cases.[164] The State Solicitor put it this way: '[l]isting for trial is a matter for the court, but can be affected by the availability of the parties' counsel. A limited number of counsel act in claims by survivors, so listing of some trials may be delayed if the parties' counsel are unavailable earlier.'[165] That is undoubtedly true, but given that this constraint appears already to exist, improved functionality through a better-focused and resourced court system should only improve the situation. The potential to take evidence remotely increases the availability of expert witnesses. And maybe there would be more room to develop the pool of required skills if the Court challenged the market to meet its needs, rather than the Court trying to meet its concept of the market.

6.14 It is our view that there remains a gap between the intent of the Government's laudable reforms to increase options available to survivors of institutional child abuse and what is currently being delivered. In their submission, Survivors of Child Abuse cited the paper by barrister Gary R Dean, who said 'the State Government, having made legislative changes that have inevitably increased the workload of the court, has not given sufficient consideration to providing the additional resources the court requires to deal with these historical child abuse

159 Dr Brenda McGivern, District Court of WA, *Transcript of Evidence*, 22 September 2023, p. 4.
160 Submission 48, District Court of WA, p. 3.
161 Dr Brenda McGivern, District Court of WA, *Transcript of Evidence*, 22 September 2023, pp. 4-5.
162 Mr Graham Droppert, Australian Lawyers Alliance, *Transcript of Evidence*, 13 September 2023, p. 4.
163 Dr Brenda McGivern, District Court of WA, *Transcript of Evidence*, 22 September 2023, p. 9.
164 ibid., p. 6; Mr Craig Bydder, State Solicitor's Office, *Transcript of Evidence*, 11 September 2023, pp. 8-9.
165 Dr Graham Hill, State Solicitor's Office, *Transcript of Evidence*, 11 September 2023, p. 3.

claims efficiently and expeditiously.'[166] On this basis, he recommended promulgating 'a specific practice direction for child sexual abuse actions' and appointing 'at least one dedicated Registrar to case manage these actions and set a procedure for expedited mediations and, if a claim doesn't settle at mediation, a speedy trial thereafter.' He also recommended appointing 'at least two dedicated judges before whom child sex abuse actions can be listed for trial with priority' and the 'State Government should take immediate steps, in conjunction with the court, to ensure that the additional funding and resources necessary to implement the above changes are provided to the court.'[167]

6.15 The Committee has no preference for what form a dedicated court list should take – specialist judges, dedicated registrars, or some other mechanism. This is for the courts to decide. They have the knowledge, and they will know best how to use the resources at their disposal. Our concern is with outcomes, and in doing what is necessary to ensure those outcomes are reached. The outcome we seek is to lighten the burden carried by survivors in pursuing their rights. In his paper, Mr Dean also said the particular circumstances and advanced age of many survivors make '[a]ny unnecessary procedural delays work an injustice' and are 'inconsistent with the remedial purpose of the legislative changes' made in 2018. He added that '[t]he maxim "justice delayed is justice denied" is patently applicable to these claims' and should therefore be 'determined with priority.'[168] We agree. A dedicated court list to deal with child abuse claims is both desirable and achievable. It will require working through practical and technical issues. It will also require increased resources.[169] We therefore urge the Attorney General to work with the District Court to determine how best to implement an effective system to prioritise the needs of survivors using the civil litigation process, consistent with the principle of procedural fairness, and to resource these needs accordingly.

Finding 10

The District Court of Western Australia currently has no dedicated list for institutional or other child sexual abuse claims, despite their distinct characteristics. This appears to contribute to claims in Western Australia taking longer to finalise than in other States.

Recommendation 11

That the Attorney General work with the District Court of Western Australia to implement a dedicated court list or case management system for child abuse claims (including any brought under any legislative changes resulting from Recommendation 1).

There was much support for setting trial dates early in the process

6.16 We heard numerous times about the role that certainty and trial dates played in this area. There was a broad consensus that uncertainty could be a debilitating matters for survivors, and that its opposite was a benefit. As Dr White from Tuart Place told us, this was an

166 Gary R Dean, 'Civil Claims for Institutional Abuse: Emerging Issues and Impacts on Survivors', 2019, cited in submission 15, Survivors of Child Abuse, p. [33]; original paper, para. 56.
167 ibid.: paras 57.2, 57.3.
168 ibid.: para. 59.
169 Dr Brenda McGivern, District Court of WA, *Transcript of Evidence*, 22 September 2023, p. 5.

important general factor in providing a 'trauma-aware' set of services: 'It is important for survivors to have certainty. Timelines are great; if there is a deadline for something, that is hugely helpful for someone going in to a claim or a court process.'[170] Ms Liscia from Irdi Legal had a similar view:

> From a claimant's perspective, often knowing there is a trial – it might be two years away; it might be six months away – but having that knowledge gives them a degree of certainty that this is eventually going to be over, instead of being in limbo land.[171]

6.17 Ms Connor-Stead of the Australian Lawyers Alliance agreed that a 'court date certainly seems to focus the mind.'[172] Without this, there is a risk that the plaintiff's evidence will no longer be up to date, meaning they could be subjected to another, potentially traumatic, medical assessment.[173] As this evidence suggests, the current process in WA unnecessarily drags things out for survivors in a way that can greatly exacerbate survivors' existing mental health conditions. This is, in other words, manifestly not a survivor-focused procedure, and 'is not conducive to good justice outcomes for survivors.'[174] And Mrs Pratt of Bradley Bayly Legal told us:

> Speaking as a survivor right now, even if [a trial date] is 18 months into the future, that is fantastic to have something to hang your hat on, rather than what we are currently doing now, which is: How long is this going to take? How long is a piece of string? Honestly, we cannot give direct answers.[175]

6.18 While there was a broad consensus on the importance of providing certainty for plaintiffs, there was only one real example provided where a solution had been found, that of the Victorian Supreme Court's Institutional Liability List. A specific benefit of that list was that in that case, unlike in WA, a trial date is set immediately after the close of pleadings. Bradley Bayly Legal submitted that even though most matters will resolve before getting to trial, the setting of a trial date at an early stage in proceedings has several significant advantages:

> Almost from the outset of filing their claim in the Court, [survivors] are provided with a 'worst case scenario' timeframe being the trial date, with the likelihood of resolving prior. This certainty also allows both parties to strategically obtain up to date medical evidence at a juncture that is both suitable for continued negotiations and the trial date listed. Further, it provides continued momentum for the survivor between a mediation and the trial date. During this time, negotiations are often continuing, with the pressure mounting on both parties to resolve prior to trial. It

170 Dr Philippa White, Tuart Place, *Transcript of Evidence*, 20 September 2023, p. 3.
171 Ms Anna Liscia, Irdi Legal, *Transcript of Evidence*, 13 September 2023, p. 3.
172 Ms Sara Connor-Stead, Australian Lawyers Alliance, *Transcript of Evidence*, 13 September 2023, p. 5. See also Mr Hugo Seymour, Maurice Blackburn Lawyers, *Transcript of Evidence*, 30 August 2023, p. 2.
173 Ms Sara Connor-Stead, Australian Lawyers Alliance, *Transcript of Evidence*, 13 September 2023, p. 5. See also Miss Rosemary Littlefair, Bradley Bayly Legal, *Transcript of Evidence*, 30 August 2023, p. 7.
174 Mr Hugo Seymour, Maurice Blackburn Lawyers, *Transcript of Evidence*, 30 August 2023, p. 2; Miss Rosemary Littlefair, Bradley Bayly Legal, *Transcript of Evidence*, 30 August 2023, p. 7.
175 Mrs Kirsty Pratt OAM, Bradley Bayly Legal, *Transcript of Evidence*, 30 August 2023, p. 2.

> requires the parties to negotiate in good faith, noting the costs involved in proceeding to trial.[176]

6.19 Ms Nielsen-Harvey of Bradley Bayly Legal said 'it is imperative that trial dates are provided early' as it 'ensures that parties proceed through interlocutory steps in a timely manner' and 'also allows legal practitioners to work collaboratively should there be any delay in one or two of the steps.'[177] Similarly, Mr Rule of Maurice Blackburn Lawyers stressed the importance of ensuring 'the trial date is set at the outset so that when you file proceedings and the defendant has filed their defences, you get a timetable at that point for the whole process, including a trial date. That gives certainty to your client as to how long the process could take.'[178] Mr Rule suggested that in the Victorian process, a survivor might expect to get a trial date approximately 18 months to two years earlier that in a comparable scenario in WA.[179]

The Committee's view

6.20 Some uncertainty is inherent in the civil litigation process. But it is essential that the State and the courts take all reasonable steps to reduce that uncertainty where they can, without compromising procedural fairness. Changing the way trial dates are set for child abuse claims, and using the Victorian approach, seems to us a reasonable idea whose benefits for participants outweigh any potential procedural difficulties. At the least it should increase the efficiency of the claims process. But most importantly, it should provide a much-needed sense of security and certainty to survivors.

6.21 The Committee believes that setting early trial dates will significantly reduce trauma for survivors by providing them with certainty about the 'worst case scenario' to have their cases resolved. Setting a trial date early in the process is also likely to catalyse earlier settlement of cases, which will benefit all parties, including the courts.

Finding 11

There was a broad consensus that certainty about trial dates was important to survivors, and that the Victorian Supreme Court's Institutional Liability List approach to setting trial dates quickly was a worthy model for Western Australia to follow.

Recommendation 12

To provide certainty for survivors and to increase the efficiency of the civil claim process for child abuse cases, that the Attorney General work with the District Court of Western Australia to enable trial dates to be set as quickly as possible in child abuse cases. In doing so, they should consider the approach taken by the Victorian Supreme Court's Institutional Liability List.

176 Submission 38, Bradley Bayly Legal, p. 8.
177 Ms Sarah Nielsen-Harvey, Bradley Bayly Legal, *Transcript of Evidence*, 30 August 2023, p. 2.
178 Mr John Rule, Maurice Blackburn Lawyers, *Transcript of Evidence*, 30 August 2023, p. 3.
179 ibid., pp. 3-4.

Appendix One

Committee's functions and powers

The functions of the Committee are to review and report to the Assembly on: -

a) the outcomes and administration of the departments within the Committee's portfolio responsibilities;

b) annual reports of government departments laid on the Table of the House;

c) the adequacy of legislation and regulations within its jurisdiction; and

d) any matters referred to it by the Assembly including a bill, motion, petition, vote or expenditure, other financial matter, report or paper.

At the commencement of each Parliament and as often thereafter as the Speaker considers necessary, the Speaker will determine and table a schedule showing the portfolio responsibilities for each committee. Annual reports of government departments and authorities tabled in the Assembly will stand referred to the relevant committee for any inquiry the committee may make.

Whenever a committee receives or determines for itself fresh or amended terms of reference, the committee will forward them to each standing and select committee of the Assembly and Joint Committee of the Assembly and Council. The Speaker will announce them to the Assembly at the next opportunity and arrange for them to be placed on the notice boards of the Assembly.

Appendix Two

Submissions received

No.	Person/Organisation
1	Private individual
2	Anglican Diocese of Bunbury
3 / 3A	Tuart Place
4	Catholic Diocese of Bunbury
5	Catholic Education WA
6	Swan Canoe Club Inc.
7	Survivors and Mates Support Network
8	Private individual
9	The Institute of Sisters of Mercy of Australia and Papua New Guinea
10	Parkerville Children and Youth Care
11	Private individual
12	Judy Courtin Legal
13	Anglican Diocese of Perth and the Perth Diocesan Trustees
14	Commissioner for Children and Young People
15	Survivors of Child Abuse
16	Slater and Gordon Lawyers
17	Private individual
18	Private individual
19	Department of Social Services (Commonwealth)
20	Beyond Abuse
21	Christian Brothers Oceania Province
22	Catholic Archdiocese of Perth
23	Department of Communities
24	Irdi Legal
25	Children's Policy Advisory Council
26	Thirdman Interim
27	Private individual
28	International Association of Former Child Migrants and their Families (IAFCM)
29	Department of Health
30	Child Migrants Trust

31	knowmore Legal Service
32	Maurice Blackburn Lawyers
33	Helena College
34	Holy Trinity Abbey New Norcia
35	Australian Lawyers Alliance
36	Scotch College
37	Uniting Church in Western Australia
38	Bradley Bayly Legal
39	Department of Justice – Office of the Commissioner for Victims of Crime
40	Rightside Legal
41	Kingsway Christian Education Association Inc.
42	Care Leavers Australasia Network
43	Edmund Rice Education Australia
44	Department of Education
45	Catholic Diocese of Geraldton
46	Sisters of Saint Joseph of the Sacred Heart
47	Wanslea
48	District Court of Western Australia
49	Private Individual

Appendix Three

Hearings and briefings

Date	Name	Position	Organisation
30 August 2023	Ms Sarah Nielsen-Harvey	Lawyer	Bradley Bayly Legal
	Mrs Kirsty Pratt OAM	Abuse Client Consultant	
	Miss Rosemary Littlefair	Lawyer	
	Mr Andrew Ponnambalam	Lawyer	
30 August 2023	Mr Hugo Seymour	Lawyer	Maurice Blackburn Lawyers
	Mr John Rule	Principal Lawyer	
1 September 2023	Mr Nick Hudson	A/CEO	knowmore Legal Service
	Mr Simon Bruck	Principal Lawyer	
	Ms Lauren Hancock	Manager Law Reform	
	Ms Richa Malaviya	Managing Lawyer	
11 September 2023	The Most Reverend Timothy Costelloe SBD DD	Roman Catholic Archbishop of Perth	Roman Catholic Archdiocese of Perth
	Mr Daniel Lynch	Executive Director – Office of the Archbishop of Perth	
11 September 2023	Dr Graham Hill	State Solicitor	State Solicitor's Office
	Mr Craig Bydder	Deputy State Solicitor	
	Ms Sonya Lomma	A/Deputy State Solicitor	
13 September 2023	Ms Anna Liscia	Lawyer	Irdi Legal
13 September 2023	Mr Graham Droppert	Former National President	Australian Lawyers Alliance (ALA)
	Ms Sara Connor-Stead	ALA Abuse Law Group member	
	Ms Eleanor Scarff	ALA WA Committee member	
20 September 2023	Dr Philippa White	Director	Tuart Place
	Ms Susy Vaughan	Clinical Manager	
	Ms Jan Newman	Social Worker	

20 September 2023	Ms Abigail Davies	Lawyer	Slater and Gordon Lawyers
22 September 2023	The Most Reverend Kay Goldsworthy AO	Archbishop of Perth	Anglican Diocese of Perth
	Mr Keith Stephens	Diocesan Secretary and Executive Officer	
22 September 2023	Her Honour Judge Julie Wager	Chief Judge	District Court of Western Australia
	Dr Brenda McGivern	Principal Registrar	

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