RIGHTSIDE LEGAL

EXPERIENCE | RESULTS | ON YOUR SIDE

# An inquiry into the options available to survivors of institutional child sexual abuse in Western Australia who are seeking justice

Submission to the Community Development and Justice Standing Committee

28 August 2023

# Contents

Rightside Legal – experience and expertise ........ 2
Survivors of historic sexual abuse ........ 3
The efficiency with which courts deal with civil claims ........ 3
Recommendations ........ 8

## Rightside Legal – experience and expertise

Rightside Legal is a law firm specialising in compensation claims for survivors of historical child sexual abuse.

Rightside Legal has offices in Melbourne and Perth.

Rightside Legal is in a unique position to assist in this Parliamentary Inquiry because we have intimate knowledge of two jurisdictions, and have run more cases to judgment than any other firm in Western Australia and Victoria for survivors of historical child sexual abuse.

As a result, we can offer a comparison of the Western Australian and Victorian litigation experience of abuse survivors.

Rightside Legal is the only firm to have litigated historic sexual abuse claims to judgement in Western Australia since the extensive law reform in 2018 which removed time limits for sexual abuse claims, abolished the Ellis defence and gave survivors the right to see to have old and unfair settlement deeds overturned.

Rightside Legal has secured two judgements in abuse claims Western Australia:

> *Lawrence v Province Leader of the Oceania Province of the Congregation of the Christian Brothers* [2020] WADC 27; and
>
> *ZYX (pseudonym initials) v Cable* [No 5] [2023] WADC 61.

Rightside Legal is the only firm in Victoria to have run historical abuse claims to verdict in that state since 2015. In that period, we have obtained the following verdicts:

> *Hand v Morris & Anor* [2017] VSC 437;
>
> *Perez v Reynolds & Anor* [2020] VSC 537;
>
> *PCB v Geelong College* [2021] VSC 633; and
>
> *O'Connor v Comensoli* [2022] VSC 313.

Further, Rightside Legal was the first firm in WA to bring an application under s 92 of the *Limitation Act 2005* (WA) to set aside a prior deed of settlement and has two judgments setting aside prior deeds:

> *JAS v The Trustees of the Christian Brothers* [2018] WADC 169; and
>
> *WPM v Trustees of the Christian Brothers* [2020] WADC 112.

## Survivors of historic sexual abuse

The Committee will be well aware of the entrenched life-long damage typically caused by childhood sexual abuse. There is a vast literature on that subject and the two decisions listed above (in the Western Australian District Court) canvass that issue comprehensively.

Survivors often suffer severe damage to their mental health, attendant physical ill health, and a loss of trust and confidence and resilience.

Importantly, as a class of personal injury litigants they have typically been dealing with their injuries for decades longer than any other group of litigants. Abuse survivors do not report their abuse for decades (for well understood reasons, as recognised by the Western Australian Parliament's abolition of time limits for abuse survivors). By the time they bring a claim (if they do bring a claim) they have been living with their injuries, uncompensated and often in need of treatment for decades.

Further, until the middle of 2018, they had no legal rights in Western Australia to seek compensation and those who did seek compensation were forced to accept paltry sums.

In those circumstances, it is submitted, it is important to do everything possible to allow survivors of historic sexual abuse access to justice in the most efficient way possible, and not via a protracted legal process that advantages the responsible institutions and places a further unwarranted burden on the health of the survivors, or forces them into another desperate settlement.

## The efficiency with which courts deal with civil claims

The District Court

The District Court of Western Australia is the court that primarily deals with historical sexual abuse claims.

Claims can also be brought in the Supreme Court of Western Australia, but that is rare (and would require an unusual circumstance, like a terminally ill Plaintiff).

Unlike in Victoria, there is no special list for sexual abuse claims. In Western Australia, a sexual abuse claim is dealt with in the same process as general personal injury claims, including workers compensation injuries and car accidents.

In the 2020 District Court Annual Review (which is the most recent review published), the Court recognised that there had been an increased workload as a result of the amendments to the *Limitation Act 2005* (WA). The Annual Review stated that in 2020 there were 73 child sexual abuse writs filed, and 111 applications made by claimants setting aside previous settlement agreements.

The Review states '[m]any of the claimants are elderly, alleging historic sexual abuse while they were children kept in institutions run by religious orders. Given the age of

the claimants there is a need to deal with these matters expeditiously and this has created a significant challenge for the Court'.[1]

If the committee has access to more recent data, there is no doubt it shows a far greater number of claims and deed applications than there were in 2020.

Our submissions will seek to provide some data as to the extent to which the file numbers, the nature of the legal process and other factors have led to a protracted and often very painful litigation experience for abuse survivors.

The process

The process of a civil claim for damages is very often a two-step process.

If the Plaintiff has previously settled their claim (in the past, when they had no legal rights, and usually for a paltry sum), the deed of settlement must be set aside and leave to commence a child sexual abuse cause of action must be given by the Court.

In other words, the claim for compensation cannot start until a Judge sets aside the old deed and gives permission for the new claim to start.

By contrast, 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. This is a quicker process.

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 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. There have been no successfully defended deed applications in Western Australia.

The first applications to set aside a deed of settlement were filed as soon as the law changed in 2018, and the first deed decision was *JAS v Trustees of the Christian Brothers* [2018] WADC 169. The decision was handed down on 13 November 2018.

Following the *JAS* decision, a significant number of applications to set aside a previous deed of settlement were filed. At that time, all applications of this nature were required to be listed before the Chief Judge of the District Court, who heard these applications

---

[1] District Court of Western Australia Annual Review 2020, 2 <https://www.districtcourt.wa.gov.au/A/annual_reviews.aspx>

one afternoon per fortnight. By mid-2019, the delay in having these applications heard had increased to nine months.

At this point the vast bulk of deed applications being made were for men who had been child migrants (brought out from the United Kingdom or Malta, alone, under a Catholic Church/Government initiative) and then deposited in Christian Brothers orphanages where many had been terribly physically and sexually abused, sometimes by multiple offenders.

Rightside Legal represented over 100 members of this cohort, and the average age of that cohort was in their 70s in late 2019.

These men suffered from serious mental illness and often physical illness, associated with difficult lives damages by sexual abuse.

Yet on average this ageing and ill group of abuse survivors had to wait nine months before being greenlighted to start their claim.

Two of our clients died and one lost capacity during this process.

In 2019, the Court implemented new measures and allocated additional resources to address the backlog, which has reduced the delay in deed applications being heard.

For the purposes of this submission, we have collated data from the matters that have settled over the past two financial years. The nature of this work is changing, and there are fewer deed applications being brought.

Of Rightside Legal claims that settled in the 2021 and 2022 financial years, 27 matters had a previous deed of settlement to be set aside. In those 27 applications, the range in time from filing the application to the orders being made by the Court setting aside the deed of settlement was four weeks (a month) to 38 weeks (about nine months). The average length of time for the application process for a deed of settlement to be set aside, and before the Writ could be filed, was 16 weeks (just under four months).

Applications to set aside a previous deed of settlement that are opposed, are still taking up to nine months to be heard. We have been advised by the Court that there is only one hearing allocated per month for contested deed applications, and if that date is unsuitable to the parties, then the proposed hearing is pushed back month by month until a suitable date for all parties, including the Court, is found.

<u>Substantive claim – once the deed is set aside</u>

The claim for compensation in a child sexual abuse action is commenced by way of Writ of Summons, and then proceeds through the court process, in a manner similar to all personal injury claims.

Mandatory steps in the process include a pre-trial conference or mediation, and in the event the claim doesn't settle, the claim proceeds to a listing conference and then to a trial.

To be clear, no trial date is assigned until all discovery material has been exchanged, expert reports have been obtained, the matter has been mediated and the matter has not settled.

At that point, the parties seek a listing conference and a trial date is assigned (often up to a year in the future).

In our experience, very few claims settle at a pre-trial conference/mediation by comparison with other types of personal injury claims.

Reasons for this often include:

(a) the Defendant/s having made no attempt to obtain their own expert evidence prior to the conference, notwithstanding they do not accept the Plaintiff's expert evidence.
(b) Defendant/s make nil offers or very low offers.
(c) Legal representatives of the Defendant/s attending the conference without a representative of their institution being present or available to provide instructions on offers.
(d) The Defendant/s requiring additional information or evidence from the Plaintiff, which hasn't been communicated to the Plaintiff prior to the conference.

Generally, our experience with Defendant behaviour across the board is poor, and it results in undue delay and further trauma to already vulnerable Plaintiffs. Notably, the State of Western Australia often espouses their guiding principles for responding to civil litigation involving childhood sexual abuse. The guiding principles are designed to minimise the potential for re-traumatisation of survivors and ease the legal process. However, our experience with the State of Western Australia as a Defendant is in direct contradiction with their guiding principles.

The District Court has attempted has assisted the progression of these claims to mediation, by having one dedicated Registrar who presides over mediations, and where required, the Court makes internal adjustments to running the Registrar's Chambers lists, to allow for these mediations to be listed. Unfortunately, while more matters do settle at mediation than a pre-trial conference, the vast majority of claims progress beyond the mediation date, to a listing conference.

The listing conference is usually held within a handful of weeks after the mediation.

Drawing on the experience of our own clients, for those claims that settled during the 2021 and 2022 financial years, the time between the Writ of Summons being filed and the parties attending a listing conference ranged between 52 and 117 weeks, with an average of 76.7 weeks.

In other words, it took between a year and more than two years just to get to the point where a trial date was assigned (to a future date) – with the average being almost exactly 18 months. And that is on top of the four months (on average) to have an old deed set aside (if there was an old deed).

The next step is assigning a trial date.

Again, drawing on our own experience of matters which settled in 2021 and 2022, the date of commencement of a trial after the listing conference, ranged between 15 weeks (in an expedited matter) and 83 weeks, with an average of 46 weeks – more than 10 months.

Almost all cases settle in the lead up to the trial. Since the reforms in mid-2018 only two matters have gone to trial. In both cases the Plaintiff succeeded.

But the lengthy process (four months to set aside the deed, 18 months to a mediation and listing conference, another year to a trial) imposes enormous burdens on Plaintiffs.

Many cases settle for less than the Plaintiff would be entitled to because the endless delays have become too much for a fragile Plaintiff to bear.

In our experience, the District Court has accommodated applications for expedited trials, where the Plaintiff has suffered a serious physical illness or psychiatric injury. Disappointingly, Defendants often oppose these applications, which causes further delay, stress, and trauma to the already vulnerable Plaintiff.

In all Rightside Legal claims that settled in Perth in the 2021 and 2022 financial years, the range of time between the Writ of Summons being filed and the claim settling was 19 weeks (in an expedited claim) and 223 weeks, with an average of 80.6 weeks. Excluding the claim of 223 weeks as an anomaly due to the complexity of the case, the average time from filing a Writ of Summons to settlement is 77.5 weeks.

In all claims that settled in the 2021 and 2022 financial years the duration of the entire claim, inclusive of applications to set aside a deed of settlement ranged from 18 week to 223 weeks, with an average of 95.6 weeks. Excluding the claim of 223 weeks as an anomaly due to the complexity of the case, the average duration of a claim is 92.7 weeks.

Rightside Legal Claims in Melbourne

In Melbourne trial dates are allocated approximately seven weeks after a Writ of Summons is filed.

For Rightside Legal claims in Melbourne for the 2021 and 2022 financial years, the range of time between the Writ of Summons being filed and the claim settling was 16 weeks (in an expedited claim) and 131 weeks, with an average of 67 weeks – and that includes claims where a previous Deed of Settlement needed to be set aside.

## Recommendations

Rightside Legal is in a unique situation to provide suggestions as to how the Western Australian civil claim process can be improved, to reduce delay, and increase satisfaction of the parties involved in the process.

Recommendations to improve the civil litigation process include:

1. Have the application to set aside any previous Deed of Settlement within the substantive proceedings, rather than as a separate process taking up to 10 months.
2. Have a separate Court list, and resources, dedicated to historical child sexual abuse claims.
3. List a directions hearing three months after the Writ of Summons is filed for case management. At that hearing:
   a) list a mediation conference for the 12-month mark of the filing of the Writ of Summons. Make orders that the parties have in place all evidence, including medical evidence, to ensure that the mediation is meaningful and has real prospects of resolving the claim.
   b) list provisional trial dates for 18 months following the filing of the Writ of Summons. Given that only two trials have run to judgment, unavailable dates of counsel and judicial resources should not be taken into account at this provisional stage. Trial dates can be adjusted within three months at any unsuccessful mediation.
4. If a Defendant attends a settlement conference and makes no settlement offers, they need to be held to account.

Rightside Legal is able to provide further information if required and welcomes the opportunity to assist the Western Australian Government and the Inquiry by the Community Development and Justice Standing Committee.

Rightside Legal
28 August 2023