Judy Courtin Legal

127 Victoria Avenue
Albert Park Victoria 3206
03 9521 2265
www.judycourtinlegal.com
ABN 52 534 437 443

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Community Development and Justice Standing Committee
Parliament House
4 Harvest Terrace
WEST PERTH WA 600

lacdjsc@parliament.wa.gov.au

03 9521 2265
admin@judycourtinlegal.com
www.judycourtinlegal.com
ABN 52 534 437 443

Dear Committee,

Submission: An inquiry into the options available to survivors of institutional child sexual abuse in Western Australia seeking justice

1. Introduction

We thank the committee for the critically important work to be addressed in this Inquiry.

We represent victims of institutional child sexual and other abuse. Although based in Victoria, we represent clients in other states, including Western Australia. Our clients include people who are Indigenous.

We have previously written to the Chief Justice of the District Court, Her Honour Wager, and the Attorney-General, Mr Quigley, raising our concerns about the harmful delays experienced by our clients who are litigating institutional abuse claims in the District Court of Western Australia.

2. The terms of reference

A. The impact of the *Civil Liability Legislation Amendment Act (Child Sexual Abuse Actions) Act 2018* (the Act), including:

- the experience of survivors who have used the civil litigation process;
- the response of government and non-government institutions to civil claims brought by survivors;

- the efficiency with which courts deal with civil claims.

We are very concerned at the pronounced delay in the resolution of institutional abuse matters once they are issued in the District Court of Western Australia.

The delays continue to have a devastating impact on our inherently traumatised and vulnerable clients, especially our clients who are Indigenous, who face the very real prospect of reduced life expectancy[1] .

It has been our experience that once a matter is issued in the District Court, it may take 2 to 3 years to reach a trial date.

A significant portion of this delay occurs in the approximately 15-18 month period in obtaining a trial date after the interlocutory steps are completed, such as the discovery of relevant material, and the service of the Plaintiff's Schedule of Damages.

That is, it is the delay that follows the Entry for Trial Milestone in these matters (at which stage, the Plaintiff's preparations are largely complete) which hinders the timely resolution of matters.

This additional delay, from when the trial date has been set, means there is no pressure on, or desire or incentive for, defendants to re-enter negotiations and settle these matters, since the trial can be one and half years away.

In some circumstances, it is our experience that the Defendant and its legal representation are unavailable for trial for long periods, owing to the listing of many other trials. That is, there is a backlog of claims on the backend. This unavailability is often communicated for the first time at the Listing Conference.

Further, in our experience, more than ninety percent of claims do not resolve at pre-trial or special mediation conferences. We say this flies in the face of the purpose of such conferences – that is, to reduce the administrative burden on the court and to minimize costs and secondary legal trauma for plaintiffs.

It is our experience that solicitors acting for institutional defendants are at liberty to oppose the listing of a matter for trial, when issues such as service of expert evidence (be that primary or supplementary evidence) and issues of further/better discovery are outstanding in *any* way.

It is our opinion that the obtaining of such evidence, and the maintenance of obligations of discovery are processes which should not, and need not, impede the listing of matters for trial – indeed we see this in practice in other jurisdictions.

It is our view that such delays deleteriously affect our vulnerable clients who unnecessarily suffer secondary trauma by reason of court delays and cause unnecessary

[1] Aboriginal and Torres Strait Islander life expectancy lowest in remote and very remote areas | Australian Bureau of Statistics (abs.gov.au).

additional costs.

In the Supreme Court of Victoria, institutional abuse matters are managed via a specialised 'Institutional Liability List.' At present, the Supreme Court provides a trial date via a General Form of Order upon the close of pleadings.

The period of time between issuing a matter in the Victorian Supreme Court to trial – via this List – is currently estimated at about 12-18 months. That period ably provides for the completion of interlocutory processes in most instances.

As the Committee would be aware, the life-long impacts of childhood sexual abuse and other crimes, often leave the victim/survivor suffering severe life-long mental harm.

A set trial date in such matters provides victims/survivors with certainty as to the knowledge that by a particular time, their claim will have resolved.

This is, in our experience, of great benefit to clients who otherwise lack control over a highly adversarial legal process concerning matters that are highly personal and sensitive.

Of paramountcy for our clients, is that all reasonable steps should be taken to ensure that the resolution of matters concerning plaintiffs who are victims/survivors be facilitated as promptly and with as much certainty as possible.

It is our view that such a 'specialised list', as in Victoria, if adopted in the District Court of Western Australia, would enable the timely and cost-effective resolution of a great number of civil matters.

In the alternative, or in addition, we suggest that institutional abuse matters be managed in the Supreme Court of Western Australia which we understand has capacity and jurisdiction to hear institutional abuse matters.

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

We urge amendments be made to the *Civil Liability Legislation Amendment Act (Child Sexual Abuse Actions) Act 2018*, to include 'serious physical abuse' within the definition of 'abuse'. That is, to include 'serious physical abuse' in addition to 'sexual abuse'. This would provide victims of institutional abuse in Western Australia the same access to justice for institutional abuse matters as all other states in Australia.

It is only Western Australia and the ACT that do not include 'serious physical abuse' within the definition of 'abuse' for institutional child abuse matters.

At present, the judgement of Heron DCJ in *Lawrence*[2] provides that where physical and other abuse, including emotional abuse is "*so inextricably intertwined and associated with the child sexual abuse that it cannot be separated from the sexual abuse*",[3] then such abuse will fall within the definition provided for within the legislation – it not then being the subject of limitations of actions provisions.

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.

Such an approach does not conform with the clear intention of the legislative amendments in the space of child sexual abuse – that is, to enable greater parity of justice for victims/survivors of childhood abuse.

3. Conclusion

We see the delays in the District Court of Western Australia as unacceptable, and action to stem them is urgently required. Should significant changes not be made to enhance access to justice for such vulnerable people, the risk of further harm to our clients, and the likelihood that many of them will never see justice done in their lifetime, is a tragic and probable outcome.

We would be very happy to provide further information or details of our matters which are issued in WA, if this would assist the Committee in addressing these delays. Many of our clients are willing to engage with the Committee if such communication would be of some assistance.

Yours sincerely,

Dr Judy Courtin
Lawyer
[redacted]

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