Submission to the Legislative Assembly, Western Australia – Community Development and Justice Standing Committee

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

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These submissions are prepared and submitted on behalf of Irdi Legal (**Irdi Legal**).

1. Terms of reference

1.1. Irdi Legal welcomes the opportunity to make a submission to the Parliament of Western Australia – Legislative Assembly, Community Development and Justice Standing Committee Inquiry into the options available to survivors of institutional child sexual abuse in Western Australia who are seeking justice.

1.2. Irdi Legal refers to the Inquiry terms of Reference (**Terms of Reference**).

1.3. Irdi Legal has experience as one of the leading legal firms representing respondents/defendants to historical child sexual abuse compensation claims in Western Australia.

1.4. The comments and views in this submission are general in nature, arising from our experience acting for non-government institutions and do not represent the response of any specific Irdi Legal client.

1.5. Irdi Legal will comment upon issues with the litigation process that in our view hinder the expedient resolution of litigated historical child sexual abuse claims.

1.6. In addition, Irdi Legal will comment upon processes that work well and certain provisions in the *Limitation Act 2005* (WA) (**LA**) and *Civil Liability Act 2002* (WA) (**CLA**) that are unclear or have hindered the smooth resolution of claims.

2. Irdi Legal – Background, Experience and Ethos

2.1. Over the past 25 years, Irdi Legal has had extensive experience in dealing with child sexual abuse and related claims, having advised, and represented religious entities who have responded to claims of child sexual abuse, including by operating their own compensation schemes.

2.2. In particular, Irdi Legal advised and assisted religious entities who operated their own form of pastoral or redress response to survivors of abuse, well prior to the changes brought about by the *Civil Liability Legislation Amendment Act (Child Sexual Abuse Actions) Act 2018* (**Act**).

2.3. Irdi Legal has also advised and assisted one religious entity to create its own form of compensation scheme to address what that entity saw as serious shortfalls in the levels of compensation offered by the National Redress Scheme.

2.4. Irdi Legal is currently engaged by a large number of churches, religious orders, institutions, and not-for-profit entities to advise and represent them in child sexual abuse proceedings commenced under the CLA.

2.5. Since the introduction of the Act in 2018 resulting in amendments to the CLA and the LA, Irdi Legal has acted in over 500 claims, the great majority of which involved civil actions commenced in the Western Australian District Court.

2.6. Irdi Legal also reviews clients' policies and processes and advises on whether legal requirements are being met, with the aim of protecting children and vulnerable people who engage with our clients, thereby reducing the risk of future claims.

2.7. Irdi Legal has a survivor focused, compassionate and empathetic approach to claims in which we seek to engage with survivors and their lawyers in a sensitive and respectful manner which minimises the risk of re-traumatisation.

2.8. We adopt a proactive approach to claims, working both within and outside court processes with the primary objective of reaching a timely resolution of each claim.

3. BACKGROUND AND CONTEXT INFORMATION

Sources of institutional child sexual abuse

3.1. The removal of the limitation period defence and so-called *Ellis* defence[1], has enabled survivors to commence claims for child sexual abuse that occurred anywhere up to 70 years ago, being the 1950s.

3.2. To date, the great majority of claims have been from child migrants who were sent to Australia during the 1950s and 1960s. Those survivors are getting on in age and it was imperative that their claims be dealt with as quickly as possible. In Irdi Legal's experience, most of the child migrant claims have now been resolved.

3.3. Since 2020, more claims have been commenced by survivors who as children were wards of the State and were placed into institutions, such as orphanages and homes. These claims commonly dealt with abuse occurring during the 1970s to 1980s.

3.4. More recently claims are being commenced by survivors who as children were abused whilst in a school, sporting, or other social setting during the period from 1980 onwards.

3.5. The majority of claims against institutions are based on the failure of the institution to have suitable policies and procedures in place (not necessarily in writing) to protect children, thereby providing opportunity for the abuse to occur. This failure has been accepted by most institutions, despite the fact it was not until the 1990s that the majority of institutions understood that specific policies and processes were required to protect children against abuse.

Compensation Schemes

3.6. Many religious entities have long had their own compensation schemes to enable survivors to present their stories and receive a pastoral response, and at times, monetary compensation for the effects of all forms of abuse[2].

3.7. Similarly the Western Australian Government operated the WA Redress Scheme in the late 2000s and provided compensation to survivors who had suffered abuse (physical and sexual) whilst in care at State operated or funded institutions.

3.8. More recently, the National Redress Scheme was created, which offered a non-litigious pathway by which survivors could obtain compensation for the effects of childhood sexual abuse.

3.9. The experience of Irdi Legal is that survivors avoid the National Redress Scheme as it is seen as offering too little by way of compensation. Survivors are advised by their lawyers (depending on the severity of the abuse and its consequences) that they will easily receive more than the maximum sum available under the National Redress Scheme if they commence civil proceedings against the relevant institution.

3.10. Irdi Legal does not have access to statistics from the National Redress Scheme and more importantly, it does not have access to the nature of claims that are being made to the National Redress Scheme or the categories of survivors who are making applications. It is not known if there is a pattern to these applications.

3.11. Irdi Legal's experience with the National Redress Scheme is therefore limited. However, Irdi Legal has clients who joined the National Redress Scheme but then had to withdraw

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[1] The decision in *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis & Anor [2007] NSWCA 117* confirmed that it was not possible to sue a Church entity that was not incorporated.

[2] Examples of such schemes include the Catholic Church's Towards Healing scheme and the Anglican Church's Pastoral Care and Redress Process.

from it, due to the institution's financial inability to continue to compensate survivors via the Scheme.

Evidence of the sexual abuse

3.12. Survivors who commence civil proceedings for historical child sexual abuse must prove what they would or would not have done in their life had they not been sexually abused as a child. Such claims therefore rely heavily on the survivor's recollection and retelling of the abuse and its effect on his or her life.

3.13. Due to the passage of time between the date of the abuse and commencement of a civil action, in most cases the perpetrator of the abuse is no longer alive, noting the majority of claims this firm has resolved to date involved allegations of abuse that took part at least 30 to 40 years ago, if not longer.

3.14. The legal system requires lawyers to compare and contrast different instances of sexual abuse in order to determine the level of severity of the abuse and its consequences upon the survivor. This exercise informs the value of the claim (ie damages a Court is likely to award to a survivor).

3.15. It is important to note that the injuries that survivors suffer as a result of child sexual abuse are psychiatric injuries. As such, these types of injuries are not necessarily visible and any diagnosis of a psychiatric condition is heavily reliant on the survivor's presentation of his or her history.

3.16. As the great majority of perpetrators of sexual abuse are either deceased or no longer have mental capacity, the circumstances of the sexual abuse and its consequences are primarily within the knowledge of survivor. This results in every claim being reliant on the survivors' memory, his or her ability to recount the past and how that survivor felt at various times throughout his or her life after the sexual abuse (which in some cases may have occurred some 50 years ago).

3.17. For most survivors this is an incredibly difficult task, which risks aggravating the survivor's trauma, but which is nevertheless a necessary part of the litigation process. The constant retelling of the story leads to inconsistent versions being presented, which in turn negatively impacts the presentation of the claim as a respondent cannot determine the veracity of the inconsistent versions.

3.18. Unless evidence exists to prove otherwise, a respondent has little choice but to accept the survivor's recount of his or her history and the view of what his or her life may have been absent the childhood sexual abuse.

3.19. Usually, the only mechanism by which to investigate, test or seek further details about the survivor's recollection of the abuse and its effect upon their life is to have the survivor examined by an independent medical expert. That expert will obtain a full history of the abuse and the survivor's psychiatric symptoms over time, as well as other factors that have negatively impacted that person's life.

3.20. A consequence of the passage of time is the inability of respondents to locate witnesses who can speak to the role of the perpetrator vis a vis the institution in question, what was known at the relevant time by the institution about the perpetrator, and the institutions' systems and processes at the relevant time. Respondents accept that this is an unavoidable result of the amendments to the LA and CLA with which they must contend.

3.21. It follows that, generally speaking, a respondent is not able to investigate the claim independently of information provided by the survivor. It is obvious that the sooner and more detailed the information a survivor provides to a respondent, the greater the prospect of a claim being resolved to the satisfaction of all parties.

3.22. Availability of insurance for respondents

3.23. Few respondents held insurance cover for child sexual abuse claims prior to the mid-1970s. Many did not obtain insurance cover until the mid to late 1980s.

3.24. When insurance was obtained, it was often capped at figures around $200,000 inclusive of the survivor's legal costs.

3.25. In the vast majority of matters where Irdi Legal has acted for respondents, the respondent did not have recourse to an insurer as the abuse predated the period when that respondent held insurance cover.

3.26. Of more recent concern, it is our experience that few insurers are currently offering insurance for historical child sexual abuse claims and respondents are being forced to pay the settled/awarded damages from internally sourced funds.

3.27. This situation has been made worse by the fact that Catholic Church Insurance will no longer be offering insurance for child sexual abuse claims. Anecdotally, we have heard that other insurers are declining to offer coverage for historical child sexual abuse claims.

3.28. This places additional pressure on respondents, who are commonly not for profit entities that rely upon donations to carry out their work.

The litigation process and pleading issues

3.29. Whilst the amendments to the LA and CLA enable a historical child sexual abuse claim to be commenced, irrespective of when the abuse occurred, and have enabled survivors to pursue compensation for damage inflicted upon them by perpetrators and institutions, to achieve that outcome survivors must resort to the litigation process or a redress scheme of some sort.

3.30. For the most part, the litigation process has very clear rules and the law relating to duty of care, causation in the legal sense and assessment of damages is reasonably well settled and understood. This enables lawyers to make a reasonably informed prediction of outcomes should the claim proceed to a trial, noting the comments below about certain evidentiary difficulties[3].

3.31. As with all litigation, the system is adversarial, and is based on all parties presenting evidence and having that evidence tested to enable a Judge to reach a decision on the merits of the case according to law.

3.32. The litigation process enables a respondent to question and test the allegations made by a survivor through the review historical materials (usually relating to the survivor's health and work history). A respondent's assessment of the merits of a claim and the quantum of damages the survivor is likely to received it the matter proceeded to a trial will be based on the evidence presented to it. The more information a survivor presents in support of his or her claim, the more informed the response.

3.33. Again, as is common in personal injury litigation, survivors sometimes do not fully understand the litigation process and interpret any exercise by a respondent to test and investigate their case as an attempt to thwart their lawful right to compensation. This is rarely the case but has and no doubt will continue to compel some survivors to view respondents as the 'enemy', a view which can frustrate the expedient resolution of litigated claims.

3.34. When defending historical child sexual abuse civil actions, respondents generally do not deny liability for the sexual abuse by an alleged perpetrator provided the requirements of section 15B of the CLA[4] are satisfied and there is no evidence to justify a denial that the sexual abuse as alleged took place.

3.35. In most claims, there is an admission that if the sexual abuse as pleaded is found to have taken place, the respondent admits it owed the survivor a duty of care and that duty of

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3 See paragraphs 3.3

4 Section 15B, CLA establishes the basis upon with an action can be commenced against a current officeholder of an unincorporated institution.

care was breached. This leaves the issue of causation and quantification of damages as the only live issues for most claims.

3.36. Respondents often do not admit the sexual abuse allegations in the early stages of the litigation process because they have yet to search for, locate and review relevant documentary materials or locate and interview relevant witnesses (noting that it is rare for witnesses to be available). The non-admission of the abuse by respondents does not add to the length or complexity of the case. All survivors must provide evidence of the nature and impact of the sexual abuse in order to demonstrate that the abuse took place, and more importantly, to provide evidence of the impact of that abuse upon the survivor's life.

3.37. In our experience, the only time the alleged sexual abuse has been denied (as distinct from it not being admitted) is when the evidence demonstrates the alleged perpetrator could not have abused the survivor as alleged (for example, if other evidence indicates the alleged perpetrator was not present at or otherwise involved with the institution in any capacity at the relevant time) or the institution in question did not, at law, have responsibility for the perpetrator.

3.38. Irdi Legal has found that this approach minimises the risk of re-traumatisation of survivors, reduces the complexity of the pleadings, and limits the dispute to the issues of causation and quantum of damages only.

4. COMMENTS & RECOMMENDATIONS

Evidentiary Issues

4.1. We refer to our comments in paragraphs 3.12 to 3.21 above.

4.2. In our experience, it is not the usual practice for lawyers representing survivors to prepare and exchange with respondents a formal witness statement detailing the sexual abuse and its effect upon the survivor's life (**witness statement**).

4.3. Hence, often the first time a respondent hears the details of the survivors' abuse is at the trial. This has certainly been our experience in two matters that proceeded to trial and in which Irdi Legal was involved. The first was the decision in *Lawrence v the Province Leader of the Oceania Province of the Congregation of the Christian Brothers* (2020) WADC 27 (**Lawrence**). The second was in a matter that did not proceed beyond the first day of the trial.

4.4. Further, in our experience, some survivors' recollection of the nature, extent, timeline, and effect of the child sexual abuse changes, at times significantly, over the course of the proceedings.

4.5. This change in recollection is explained in part by the traumatic nature of the child sexual abuse upon a survivor and the effects of having to describe the abuse on different occasions, to different people, for different purposes.

4.6. This has resulted in pleadings being amended very close to or during a trial, which prolongs the litigation process and makes it far more costly.

4.7. For example, often the major differences in the reports provided by expert medical witnesses are due to the fact that the survivor's recount of the sexual abuse and how it impacted his or her life varies. Such differences in the history recounted by the survivor on each occasion results in the experts forming sometimes markedly different views.

4.8. Variations in the survivor's retelling of the abuse and their personal history can result in an inference that the survivor is not being entirely truthful and is exaggerating or conflating his or her history with publicly available information.

4.9. Irdi Legal has acted in a number of matters in which the allegations of the nature of the abuse and/or the impact of that abuse upon the survivor's life and health has changed

considerably in the period shortly before a trial is due to commence. In the two trials in which Irdi Legal participated, such changes in the survivor's evidence took place during the trial itself.

4.10. If a detailed witness statement of a survivor was provided to a respondent prior to a pretrial conference or mediation, that would:

4.10.1. reduce the number of times that survivor would have to recount his or her abuse and its effect upon his or her life, thereby minimising the opportunities for re-traumatisation;

4.10.2. enable all experts to consider the same witness statement so that their opinions are based on an identical history of the abuse and its effects on the survivor;

4.10.3. promote efficiencies in the conduct of the litigation as a respondent would be in a better position to understand the case it has to answer, identify, and conduct relevant investigations earlier in the proceedings; and make a fair and reasonable assessment of the claim; and

4.10.4. enable that witness statement to stand as the survivor's evidence in chief at a trial (should the matter not be capable of settlement), again reducing the trauma to the survivor and ensuring a respondent is able to know the case which it is being asked to answer and to take steps to respond accordingly.

4.11. **Recommendation**: The District Court Rules be amended to require survivors to prepare and lodge with the Court and to serve on other parties, a statement of evidence prior to lodging the Entry for Trial document.

Applications to set aside prior deeds of settlement

4.12. The amendments to the Act enable survivors who have settled their claims for damages arising from childhood sexual abuse to have prior deeds of settlement or judgments recording those settlements to be set aside.

4.13. In particular, sections 91 and 92 of the LA enable deeds or judgments to be set aside where it is '*just and reasonable'* to do so.

4.14. Since 2018, the Courts have developed a clear view as to the circumstances in which it is *'just and reasonable'* that a prior deed of settlement (**Deed**), can and should be set aside pursuant to section 92 of the LA. To our knowledge, there has not been any application brought by a survivor to set aside a judgment under section 91 of the LA.

4.15. Apart from the first applications that were tested under section 92 of the LA to obtain a judicial pronouncement on what was required to satisfy section 92, Irdi Legal's clients have not opposed such applications. Since around late 2019, in most cases, Irdi Legal's clients offer undertakings to survivors not plead the prior deed as a bar to any action that may be commenced by a survivor.

4.16. The provision of such an undertaking alleviates the requirement for a survivor to apply to the Court for an order that the deed be set aside, thereby saving legal costs and Court time, and expediting the commencement of the substantive civil action.

4.17. This process has worked well, and apart from the rare case that raises issues which require judicial consideration, the application of section 92 of the LA has not been problematic and has not caused undue delay or expense to the parties.

Quantum of damages – management of expectations

4.18. Until the decision in *ZYX v Cable [No 5]*[5] was delivered in June 2023, the District Court's decision in Lawrence stood as the sole Western Australian precedent on how damages in a historical child sexual abuse claim should be assessed.

4.19. That case involved extensive and sustained sexual abuse (anal rape and forced oral sex) and physical and emotional abuse of the plaintiff at the Castledare and Clontarf orphanages from 1953 to 1957.

4.20. The Court awarded Mr Lawrence a total of $1,329,500 (being $400,000 for general damages, $620,000 for past economic loss, $400,000 for interest on past economic loss, $5,000 for future medical expenses and $14,500 for past special damages).

4.21. In the Cable [No 5] decision, which involved a claim that was not defended, the Court awarded the plaintiff a total of $818,700 (being $250,000 for general damages, $100,000 for exemplary damages, $400,000 for past economic loss, $43,200 for interest on past economic loss and $25,000 for future medical expenses).

4.22. In our experience, some legal representatives frequently make excessive claims for damages which have little or no regard to the principles set out in Lawrence or Cable and fail to provide the evidence required for a survivor to receive an award of damages within the range sought.

4.23. Irdi Legal have been involved in over 500 child sexual abuse claims, of which 258 have resolved. Those claims have ranged from extreme sexual abuse over years resulting in, for all intents and purposes, the destruction of the survivor's life, to claims where the acts of sexual abuse were of a much lesser severity and which had little impact on the survivor's life. In addition, some survivors, due to their resilience and tenacity, have coped much better than others irrespective of the severity of the sexual abuse.

4.24. In our experience, the amount a survivor can obtain by way of damages depends on 2 factors. Firstly the nature of the sexual abuse in question and secondly how that abuse impacted the survivor's life.

4.25. To put into context the environment in which respondents are operating, the average amount claimed by survivors is $1,684,368 per claim, whereas the average sum paid to survivors is $459,783 per claim. This represents survivors seeking approximately 4 times the agree value of their claims.

4.26. Using another point of comparison, the total amount claimed by survivors is $429,513,742, whereas the total amount paid to survivors is $118,164,237 (exclusive of legal costs).

4.27. Respondents understand that '*fat'* is built into survivors' claims for negotiating purposes, however the negative effect of this practice is that survivors' and respondents' expectations of achievable settlement terms are informed by the inflated figures, which makes survivors less inclined to settle for less than the claimed amounts and causes respondents to become sceptical of the amount being claimed.

4.28. The net result of these expectations is that both parties become more combative and disinclined to settle than they might otherwise be the case, had the figures been reasonable from the outset.

4.29. This is not an unusual practice for personal injury claims. It is part of the accepted litigation process. However, it is submitted that the large discrepancy between the amounts being claimed in child sexual abuse claims compared to the amounts for which claims are being settled requires further consideration.

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[5] (2023) WADC 61

4.30. Unrealistic claims are, in our experience, making settlements more difficult to achieve, increasing all parties' legal costs, wasting the resources of the Court and most importantly, adding to the stress and trauma suffered by survivors.

4.31. **Recommendation**: The CLA and/or DCR should be amended to provide that if a claim settles for less than 1/3rd of the amount claimed in the Particulars of Damage, the party lodging the Particulars of Damage are to be penalised by having their claim for legal costs reduced by 2/3rd.

Discovery process

4.32. The historical nature of these claims means a significant period of time has elapsed since the sexual abuse occurred.

4.33. Further, the lack of institutional record keeping and no (or few) witnesses mean a respondent is heavily reliant on a survivor's discovery of documents to establish the case it has to answer and to assess a claim in a fair and reasonable manner.

4.34. The *District Court Rules 2005* (**DCR**) state the discovery process for both parties must be completed prior to filing a certificate of Entry for Trial[6] which certifies that the parties have searched for and given discovery of all documents relevant to the civil action[7].

4.35. In our experience, respondents often receive incomplete and inadequate discovery and survivors' lawyers enter cases for trial before they have conducted all the relevant searches to identify discoverable documents.

4.36. The lack of adequate discovery places a defendant at a significant disadvantage in:

4.36.1. understanding the case it has to answer;

4.36.2. properly assessing the claim; and

4.36.3. preparing its case.

4.37. In our experience, this can result in delays to scheduled pre-trial conferences (**PTC**) and mediations as the new documents must be examined to resolve outstanding disclosure and evidentiary issues before the parties can engage in meaningful settlement discussions.

4.38. The failure to provide adequate discovery and the premature entry of matters for trial by survivors' lawyers may be attributable in part to their wish to secure Court orders for trial dates sooner rather than later, given the dates currently being allocated to a civil action in the District Court of Western Australia are for mid to late 2024.

4.39. The late provision of relevant documents has the effect that all relevant issues are not appreciated until close to the trial dates, when respondents are usually provided with further documents that could have and should have been produced before trial dates were allocated.

4.40. This can result is new issues being raised shortly before the trial and deprives a respondent of settlement opportunities that may have arisen if the documents in question had been provided at the PTC or mediation stage.

4.41. The production of additional materials shortly before the commencement of a trial or the recognition that a survivor's claim will be compromised due to the lack of necessary evidence, has resulted in matters settling shortly before the first day of the trial. This is wasteful of Court resources, as trials are usually listed for at least 10 days with the allocated trial Judge being made unavailable for other matters.

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[6] District Court Rule 37, Form 1

[7] Noting the obligation to provide discovery is a continuing one (*Rules of the Supreme Court, 1971* (O26, R2))

4.42. In our view, improved rigour around the identification and production of relevant documents prior to trial dates being allocated would result in the more efficient conduct of historical child sexual abuse civil actions, lead to greater settlement opportunities, and not waste Court resources in trial dates being vacated shortly before their commencement.

4.43. **Recommendation**: That DCR 43 (dealing with certificates to be filed with the District Court prior to the allocation of trial dates) be amended to require Counsel to certify that all relevant documents have been reviewed by Counsel and that no further documents are to be obtained and/or discovered.

Subpoenas

4.44. Inspection of subpoenaed documents is another important step in the litigation process to enable a respondent to understand the case it has to answer and to assess the claim in a fair and reasonable manner.

4.45. For some time, we (and other parties) have experienced significant delays with the District Court processes relating to inspection of documents produced under subpoenas. It is noted that the subpoenaed documents must be delivered to the District Court by the party responding to a subpoena, after which the parties to an action can arrange with the District Court to inspect and copy the documents.

4.46. For example, the timeframe within which the District Court grants permission to the parties to attend the District Court to inspect and copy subpoenaed documents has in some cases increased from two to three days to three to four weeks, causing commensurate delays to the conduct of the civil action.

4.47. Further, the process by which subpoenaed documents are returned, being either the physical production of hard copy documents or the production of soft copies via CD ROM or a USB flash drive, is inefficient and costly.

4.48. In all cases, once a party if approved to inspect the subpoena documents, that party must make an appointment to view the documents.

4.49. Where hard copy documents are produced in response to a subpoena, a party is only entitled to a half hour appointment, during which time that party seeks to photocopy as many of the subpoena documents as is possible. Thereafter, another appointment must be made to copy the remainder of the documents.

4.50. If soft copies of documents are produced in response to a subpoena, the District Court will usually copy the contents onto an electronic medium and provide it to the party at the inspection appointment.

4.51. Other jurisdictions, such as NSW, have moved to an online system of producing documents in response to a subpoena and for inspection by the parties to the action. This technology alleviates the need to seek an appointment from the Court to inspect the documents and then to physically attend Court to inspect and copy subpoenaed documents. It also makes responding to a subpoena by third parties easier, doing away with the need to physically attend the District Court to produce documents (whether hard or soft copies).

4.52. **Recommendation**: The Court takes steps to introduce an online system of responding to subpoenas and for inspection of documents so produced.

Trial dates

4.53. As mentioned at paragraph 4.38 above, there is currently a gap of at least 12 months between the listing conference where trial dates are allocated and the commencement of a trial.

4.54. The delay between the listing conference and the commencement of a trial is a disincentive to investing time and resources in necessary trial preparation, with the knowledge that any preparation will have to be revisited at a time closer to the trial date. Hence all parties undertake sufficient work to enable meaningful negotiations to take place, although there are often gaps in the presented evidence and expert reports require updating to take into any new evidence.

4.55. The reason for the delay in listing cases for trial appears to be two-fold:

4.55.1. since few Western Australian lawyers and Barristers work in the abuse law field, their skills and expertise are in high demand and their capacity to commit to new matters, including trials, is significantly restricted; and

4.55.2. the District Court has insufficient resources to allocate to civil trials, particularly those which are expected to take between 10 – 12 days, as is the case for most historical child sexual abuse claims.

4.56. One means to deal with this issue, at least as an interim measure until the current backlog of claims are dealt with, is to have a dedicated Child Abuse Cases List in the District Court with a Judge/s who does no other work than manage and hear trials for child sexual abuse claims. Judges could be allocated to this work on a 6 or 12 month basis, noting the very difficult nature of the work and that most trials will take at least 2 weeks for the hearing, with time required to write judgments hereafter. With a dedicated List and Judge, when matters that have been allocated a trial date are settled, another matter can be slotted into that trial date (rolling list). This was the practice in the Supreme Court of Western Australia many years ago, so the concept is not unique or unheard of.

4.57. It is interesting to note that to date, being 5 years after the introduction of the Act, I am only aware of 5 matters have actually proceeded to a trial. One was the Lawrence decision, another was the Cable decision (which was not contested), another was a matter that settled on day 2 of the trial and another 2 settled immediately before or on the first day of the trial.

4.58. If the parties are aware that when they lodge the Entry for Trial document, that a trial date is likely to be allocated within say 3 to 6 months, all the necessary preparation work will be done beforehand. This in turn will increase the prospects of a negotiated outcome because the parties will all be aware of exactly what will be alleged at the trial, subject to the comments above relating to witness statements.

4.59. **Recommendation**: The District Court introduce a dedicated Child Abuse Cases List to manage child sexual abuse claims, with a dedicated judge and rolling trial list procedure.

Court mediation

4.60. In our experience, the Court mediation process works very well, primarily due to the extensive experience of the Court Mediators.

4.61. This has resulted in the great majority of claims being resolved at the mediation stage.

4.62. It is becoming common practice for many survivors to bypass the pretrial conference procedure required by the DCR and instead obtain consent orders for the matter to proceed direct to a Court held mediation.

4.63. With this practice comes the delay in obtaining mediation dates due to the commitments and work load of the District Court mediators. Currently, a mediation cannot be obtained prior to November 2023, although the Court has always made special arrangements in the case of urgently required mediations.

4.64. Apart from the increasing delay issues, the Court mediation process works very well.

4.65. At times, private mediation have been resorted to by parties. In our experience, there is no greater success rate with private mediations than court mediations.

Survivors' legal costs

4.66. Section 15L of the CLA places a cap on the legal fees that can be charged by law firms in child sexual abuse claims. That cap can be increased if a Judge so orders.

4.67. It is important to recognise that a survivor will not recover his or her legal costs in full when settling a claim. As a rule of thumb, a survivor can recover up to 70% of his or her legal costs, depending on the efficiency and expertise of the lawyers.

4.68. The DCR *36* require lawyers to provide their clients with written advice outlining legal costs and disbursements up to entering the matter for trial and an estimate of future legal costs.

4.69. In most civil actions where a settlement is being negotiated with a survivor, the practice in Western Australia is to differentiate the amount of damages payable to the survivor from the legal costs and disbursements claimed by a survivor's lawyer.

4.70. In other words, the settlement is for $XXX plus legal costs to be agreed or taxed if not agreed. Irdi Legal supports this practice as it provides survivors with certainty about the sum he or she will receive in their hand at settlement.

4.71. Eastern States law firm often prefer to settle for $XXX inclusive of legal costs. This '*hides'* the amount a respondent has offered to pay towards a survivor's legal costs. In our view, this practice adversely impacts the settlement process as survivors are reluctant to accept settlement offers due to the large amount being deducted for legal costs, meaning the amount the survivor gets in his or her hands, is actually less than the amount offered by a respondent for damages, as distinct from legal costs.

4.72. If claims are settled for the damages amount plus legal costs, if those costs are not agreed, they can be taxed by the District Court, indicating to survivors what amount represents reasonable legal costs. It also enables survivors to contest the legal costs they are being asked to pay to their lawyers because they will know what proportion of their legal costs was paid by the respondent.

4.73. **Recommendation**: The District Court Rules be amended to prescribed that all settlements of sexual abuse claims are to state what amount is being paid for damages and what amount is being paid for legal costs.

5. OTHER MATTERS

Death of survivor – impact on child sexual abuse cause of action

5.1. Irdi Legal has acted in a few matters where the survivor has made a claim and/or commenced proceedings under the CLA, but died before the matter could be settled or proceed to a trial.

5.2. On occasion this has led to a number of contentious court applications relating to the statutory interpretation of section 6A(6) of the LA.

5.3. By way of legislative background, we highlight the following.

5.3.1. At common law, 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.

5.3.2. The common law position was modified by s 4 the *Law Reform (Miscellaneous Provisions) Act 1941* (**LRMP Act**) which enabled certain causes of action *'subsisting against or vested in'* the deceased party to survive against or for the benefit of his or her estate.

5.3.3. Section 6A(2) of the LA removes the limitation period with respect to child sexual abuse causes of action.

5.3.4. Subsection 6A(6) of the LA states that the definition of a *child sexual abuse cause of action* does not include a cause of action which could not be maintained but for the LRMP Act.

5.4. 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 in response to an attempt by the Executor of the survivor's Estate to continue the child sexual abuse cause of action.

5.5. 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 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.

5.6. It 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.

5.7. **Recommendation**: For the sake of clarity, section 6A of the LA should be amended to make it clear whether the removal of the limitation period for child sexual abuse causes of action is available to the survivor's Estate.