BRADLEY BAYLY LEGAL

18 August 2023

The Honourable Dr David Honey MLA
Chair
Community Development and Justice Standing Committee
Parliament House
GPO Box A11
PERTH WA 6837

**By post and email:** lacdjsc@parliament.wa.gov.au

Dear Chair, Deputy Chair and Members

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

We thank you for the invitation to make submissions to the above Inquiry received from Dr Alan Charlton, Principal Research Officer, Community Development and Justice Standing Committee, by way of email dated 1 August 2023.

Bradley Bayly Legal is a plaintiff personal injury law firm that acts for survivors of child sexual abuse, among others. We will make submissions in relation to the following Inquiry terms of reference for the Committee's consideration:

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; and

    c. the efficiency with which Courts deal with civil claims.

**The experience of survivors who have the used the civil litigation process and the response of the Western Australian Government**

Western Australian Government Whole of Government Guiding Principles for Responding to Civil Litigation Involving Child Sexual Abuse

The Guiding Principles include the following:

*The State and its agencies should at all stages of the litigation process be mindful that litigation can be a traumatic experience for persons who have suffered sexual abuse as children. In an effort to reduce trauma and ease the burden of litigation the State and its agencies should:*

*…*

3. *make available to claimants and potential claimants information about initial steps which need to be taken both by the Plaintiff and the State/agency to resolve a claim. This may include information about the claimant, the institution at which the alleged abuse occurred and the time that may be required by the State to undertake document searches needed in order to respond to the allegation(s);*

*…*

5. *consider whether a matter can be resolved without proceedings being issued;*

6. *make available to the Plaintiff access to records relating to the claimant and the alleged abuse, subject to the others' privacy, legal professional privilege and any legal restrictions on the provision of such access to the Plaintiff;*

7. *assist claimants and their legal representatives to identify the proper defendant(s) if they have not already been identified;*

8. *consider paying claims without litigation and engage in settlement negotiations as early as reasonably possible in the process in circumstances where the State considers it is arguable it bears some liability at law for the abuse;*

9. *where expert reports are required, nominate several relevant experts to whom it would agree to the claimant being referred so that, where possible, an agreement can be reached with the plaintiff as to use of a single expert;*

<u>The Experience of Survivors and the Response of Government Institutions to Civil Claims</u>

We thank the State for its policy of not applying for an order for a stay of proceedings in relation to common law claims for loss and damage arising out of historical child sexual abuse.

However and with respect, it is our view that the State (as a model litigant) and its agencies (including the State Solicitor's Office and several State Government Departments, including the Department of Communities and the Department of Justice) could amend policies and procedures currently in place (and/or implement new policies and procedures) that are associated with claims for loss and damage arising out of historical child sexual abuse based on common law principles. It is our view that some of those policies and procedures operate contra to the Whole of Government Guiding Principles listed above.

- The "Informal Process": Resolving Matters Without Proceedings Being Issued

It is our experience that when the State and/or an agency of the State is notified that a plaintiff/claimant is intending to claim loss and damage for injuries arising out or historical child sexual abuse we are sent an "initial" letter from the State Solicitor's Office where the writer usually states, among other things, the following:

*Informal Process*

4. *Pursuant to the Guiding Principles, with a view to reducing trauma associated with and the burden of litigation, this Office and its clients will consider whether a matter is*

*capable of resolution without proceedings being issued, which may include attending an informal conference.*

*Step 1 – particulars and supporting documents on liability*

5. *Before my client can consider whether it is appropriate that this matter is capable of resolution without proceedings being issued, the first step is to invite your client to provide particulars of their position on liability and any supporting documents on liability. The particulars on liability must include (but are not limited to):*

   (a) *full particulars of the alleged abuse (eg a statement from your client, or submissions), including details of any report to police or recorded criminal convictions;*

   (b) *details of the cause of action alleged by your client (this can be a draft statement of claim, submissions, a letter, or otherwise). Please note the following:*

      (i) *if your client alleges negligence, the details should include the duty of care it is alleged was owed, how it is alleged the duty was breached, and causation of any alleged harm;*

      (ii) *if your client alleges that my client had, knowledge of a fact, matter or thing, pursuant to Order 20 r 13 of the Rules of the Supreme Court 1971 (WA), please particularise the facts on which your client relies.*

   *Please note if further particulars are required, these will be requested.*

6. *My client will not be in a position to agree to an informal process before full particulars on liability are received.*

7. *If, after receiving particulars on liability, my client considers an informal process (including any informal conference) is appropriate, this will be communicated to you.*

*Step 2 – particulars and supporting documents on quantum*

8. *If my client agrees to engage in an informal process, the second step will be for your client to provide particulars and supporting documents in relation to the damages your client seeks. Depending upon the claim advanced, this will include (but not necessarily be limited to):*

   (a) *A schedule of damages;*

   (b) *An independent psychiatrist report;*

   (c) *Complete medical records for the claimant;*

   (d) *If economic loss is claimed:*

      (i) *Complete financial records (including ATO records) for the claimant;*
      (ii) *Other economic loss records, for instance details of qualifications, CV and school/academic records may be required;*

(e) *Complete Centrelink records for the claimant (if relevant);*

(f) *Any welfare support provided by the National Disability Insurance Scheme (if relevant);*

(g) *Medicare information for the claimant including Medicare Benefits Scheme history and Pharmaceutical Benefits Scheme history;*

(h) *details of any past compensation payments*

(i) *details of criminal record (if relevant).*

9. *Until the particulars and supporting documents relating to quantum are provided and this Office has received instructions to attend an informal conference as well as availability for an informal conference, my client will not be in a position to agree to a date for an informal conference.*

10. *It would also assist the speedy resolution of the claim if a draft bill of costs could be provided prior to an informal conference which includes a list of disbursements and supporting evidence.*

In our view and with respect, if we were to comply with the above "Informal Process" on behalf of our clients, the "*burden*" would not be much less burdensome than commencing proceedings on behalf of our client at the District Court at Perth. As an example of the time taken when engaged in the "Informal Process" we notified the State Solicitor's Office of a client's intention to claim damages on 30 March 2021. The State Solicitor's Office replied with their "initial letter" outlining the "Informal Process" on 18 August 2021. We provided all of the documents in our client's possession, custody or power on 14 September 2021. The State Solicitor's Office then replied with another letter dated 15 September 2021, the substance of which was essentially the same as their "initial letter". We sent the State Solicitor's Office a draft Statement of Claim on 21 December 2022 and then sent Particulars of Damages on 23 February 2023. As at 4 August 2023, no informal conference has been arranged.

In the event the State agrees "*to a date for an informal conference*" (in circumstances where there is no mechanism to compel it to attend an informal conference), the parties are not compelled to settle a case in good faith. If proceedings are commenced at the District Court at Perth the parties, unless otherwise ordered by the Court, must attend a pre-trial conference or mediation and must, in good faith, attempt to settle the case.

We submit that, without streamlining the "Informal Process" and introducing a mechanism to compel the State to attend an informal conference within a specified time, the process operates contra to the Whole of Government Guiding Principles. In our view the process in its current format, being likely as burdensome and lengthy as litigation, is unlikely to reduce the trauma of a survivor claiming loss and damage based on common law principles, if he or she chose the "Informal Process" instead of civil litigation.

There is also the State's position that it will not provide complete discovery as part of the "Informal Process". The State Solicitor's Office has confirmed that the State "does not agree to provide documents informally…as it is incompatible with its informal process".

- Discovery

As stated above, the State's position is that it will not provide complete discovery (that is discovery in addition to documents provided in response to a request made pursuant to the *Freedom of Information Act 1992* (WA)) when participating in the informal process. It is essential that, when a claimant is abused while under the care and/or management and/or control of the Department of Communities (or one of the Department's previous incarnations) that a claimant's complete Department file (redacted to protect others' privacy, legal professional privilege and for the purposes of any other legal restrictions) is discovered. We should not (unless circumstances, such as the declining health of our client oblige us to do so) provide categorical advice to our clients, nor provide complete particulars of our clients' "*position on liability*" and "*particulars on quantum*" without perusing our clients' complete Department file.

Categorical advice on the issues of establishing liability and the quantum of a claim should not be provided prior to inspection of all parties' discovered documents. For example, it is essential to determine some, if not all, of the following material facts, prior to providing an opinion on the merits of a claim:

- The date a client came to the attention of the Department.
- The date(s) a client was committed to the care of the Department and the time period(s) of that commitment.
- The identities of the Institutions and/or foster parents that a client was placed out to by the Department.
- Whether or not a client has correctly identified an offender or offenders?
- If an offender or offenders have been correctly identified, were they providing services under the auspices of the Department that coincide with a client's committal to the care of the Department and the institutions/foster carers to which a client was placed out to?
- The extent of the knowledge the Department had of abuse being committed generally and in particular, upon a client at Departmental facilities or centres and/or foster parents registered by the Department.

It is our experience that the bundle of documents provided by the Department of Communities in response to a request made pursuant to the *Freedom of Information Act 1992* (WA) has a significant number of pages removed from our clients' Department file. It is our experience that the information contained in the bundle of documents provided by the Department of Communities in response to a request made pursuant to the *Freedom of Information Act 1992* (WA) often does not contain information that would unequivocally confirm some, if not all, of the material facts referred to above.

It is our experience that many of our clients' Department of Communities complete file consists of approximately 4,500 pages (after being redacted to protect others' privacy, legal professional privilege and for the purposes of any other legal restrictions) whereas, we are provided approximately several hundred pages in response to a "*Freedom of Information*"

request and the State will only provide a complete Department file when compelled to do so by way of:

- a Court order for pre-action discovery made pursuant to Order 26A of the *Rules of the Supreme Court 1971* (WA); or

- discovery given pursuant to Rule 46 of the *District Court Rules 2005* (WA) following the commencement of proceedings at the District Court at Perth.

We submit that, without streamlining the "Informal Process", introducing a mechanism to compel the State to attend an informal conference within a specified time and having the State change its policy so that it provides complete discovery as part of the "Informal Process", the process operates contra to the Whole of Government Guiding Principles.

- Delays and Restrictions on Access to Information

As stated above, in order to provide proper advice to our clients and properly prosecute their common law claims for loss and damage arising out of historical child sexual abuse we need access to all records generated by the State and its agencies (subject to others' privacy, legal professional privilege and any other legal restrictions on the provision of such access) relevant to our clients' claims. We and subsequently our clients, have experienced delays and restrictions in accessing that information.

We proffer the Department of Justice as an example. We lodged an application for documents generated by the Department of Justice on 22 November 2022 and received the documents on 10 May 2023. We understand that the time taken to provide the documents may have been caused by staff shortages in the Department and a large volume of information requests, but, nevertheless, submit that a 24 week and 2 day delay in providing plaintiffs access to information is contra to the Whole of Government Guiding Principles and is a remediable barrier to engaging in settlement negotiations as early as possible.

Additionally, another remediable barrier to engaging in settlement negotiations as early as possible (and in our view is contra to the Whole of Government Guiding Principles) is the policy of the Department of Justice to limit access to information for each application for information to 30 pages.

We submit that policies be amended and/or new policies be applied and that sufficient resources be allocated in order to minimise delays in providing relevant information to parties entitled to receive it.

**The response of non-government institutions to civil claims brought by survivors**

A successful application for an order for a stay of proceedings is fatal to a common law claim for loss and damage arising out of child sexual abuse. The issue of when it is appropriate for a Court to make such an order has been ventilated by all stakeholders and the media (e.g. the ABC Four Corners episode: "Hiding Behind Tombstones: The new legal tactics blocking justice for survivors"). The issue will be tested in the High Court of Australia (e.g. *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* S150/2022).

We respectfully suggest that the Committee extend the time to lodge submissions in relation to applications for a stay of proceedings until the High Court of Australia provides precedent. In our view, any amendments to the relevant legislation relating to stays of proceedings should

be considered by law makers after review of that precedent and any submissions in relation to the minutiae of those amendments should be made after review of High Court decisions.

**The efficiency with which Courts deal with civil claims**

We thank the District Court for listing mediations for civil claims for loss and damage arising out of child sexual abuse at the David Malcolm Justice Centre and appointing experienced Registrars as Mediators. In our view, the absence of parties from other matters at the Centre and the presence of a trauma informed Mediator makes a significant contribution to our clients' wellbeing at the mediation. Though, in our view, the length of time it takes to prosecute civil claims for loss and damage arising out of child sexual abuse and the relatively uncertain nature of the District Court Case Management Timetable need to be considered.
It is our practice to commence proceedings for civil claims for loss and damage arising out of child sexual abuse by filing (at the District Court at Perth) and serving a Writ of Summons with a General Indorsement and then a Statement of Claim. When a Defence is filed the Court will confirm an entry for trial date where the plaintiff must enter the matter for trial before that date. When a plaintiff enters a matter for trial a trial date is not listed. The standard pre-trial steps for commencing and prosecuting/defending a personal injury claim in the District Court are:

- Commence proceedings by way of a Writ of Summons and Statement of Claim.
- File and serve a Defence within 10 – 21 days of the service of the Writ of Summons and Statement of Claim.
- The parties exchange discovery lists within 60 days of service of the Defence.
- After the parties inspect discovered documents the plaintiff will file and serve Particulars of Damages and "enter the matter for trial".
- Upon the matter being entered for trial the Court will list a pre-trial conference (for claims for loss and damage arising out of child sexual abuse the plaintiff will likely apply for an order for a special appointment mediation instead). At the pre-trial conference or mediation the parties will attempt to negotiate settlement of the matter under the supervision of a Court Officer (it is our experience that claims for loss and damage arising out of child sexual abuse are less likely to be settled than other personal injury claims at this stage).
- If settlement is not successfully negotiated at the pre-trial conference or mediation a Court Registrar will then list a Listing Conference.
- At the Listing Conference the Court will set dates for a trial.

In relation to the time period between commencing proceedings and the listing of a trial we had, for example, a claim for loss and damage arising out of child sexual abuse that was commenced (by filing a Writ of Summons) on 24 February 2021, a Listing Conference was listed on 16 May 2022 where a trial was listed to commence on 4 September 2023: being a period of 2 years, 6 months and 12 days.

We submit that the model used in the Victorian jurisdiction for claims for loss and damage arising out of child sexual abuse should be implemented in the Western Australian jurisdiction.

<u>The Victorian Jurisdiction</u>

The Supreme Court of Victoria (and as of 23 July 2023, we understand the County Court of Victoria) has a dedicated Institutional Liability List. Upon filing a Statement of Claim and a Defence being served, the parties are required to submit to the Court a "Minute of Proposed Consent Orders" formulating the interlocutory timetable, including a "not before" trial date. For example, if the "Minute of Proposed Consent Orders" was drafted in July 2023, the Order may read: "The proceeding is fixed for trial *not before 28 January 2025* before a Judge and Jury on an estimate by the parties that the trial will occupy 10 - 14 sitting days".

The Court reviews the proposed timetable and when making the orders, provides the parties with the trial date, usually set 18 months from that time. Using the above example, the Court may list the trial on say 4 February 2025. The Court routinely lists multiple proceedings to commence trial on the same date. In the intervening period, the Minute of Proposed Consent Orders forming the timetable requires the parties to comply with, among other things, discovery, interrogatories, and service of particulars of damages, prior to mediation. Mediation often occurs approximately 3 - 4 months prior to the trial date.

Should the matter not resolve at mediation, a Post-Mediation Directions Hearing will take place shortly thereafter to ventilate any issues arising, for example, compliance with discovery. A Final Directions Hearing will at this time be listed for approximately 4 weeks prior to the trial date set out in the initial Orders. After the Post-Mediation Direction Hearing the parties will attend to any outstanding matters in the preparation for trial and at the Final Directions Hearing, will confirm with the Court that the proceeding is ready for trial and/or ventilate any final issues prior to trial.

Most proceedings resolve in the period between setting the trial date and the Post-Mediation Directions Hearing or Final Directions Hearing. In these circumstances, the parties notify the Court immediately and that trial date is vacated. As mentioned above, the beginning of the interlocutory process will see multiple trials listed for the same day, however, within two weeks of said trial date, it is often the case that only one or two remain listed.

This Victorian model provides certainty to the survivor. Almost from the outset of filing their claim in the Court, they 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 requires the parties to negotiate in good faith, noting the costs involved in proceeding to trial.

Please also note that the Supreme Court of Victoria hosts "User Group Meetings" for the Institutional Liability List and with the establishment of the Victorian County Court Institutional List, we understand that the County Court will also host User Group Meetings.

The objective of the meetings is for practitioners and the Court to discuss arising issues and practical ideas to ensure that the List operates smoothly. This is a helpful way to ensure that practitioners are utilising the Court's preferred practices, thereby reducing avoidable issues arising throughout proceedings; and for the Court to hear from practitioners as to what may be helpful in the future.

If you wish to discuss our submissions or require further information, please contact us. Otherwise we look forward to your response to our suggestion that the Committee extend the time to lodge submissions in relation to applications for a stay of proceedings.

Yours faithfully
**Bradley Bayly Legal – Child Sexual Abuse Team**