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

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Protecting and promoting justice, freedom and the rights of the individual.

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the 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.

2. The ALA acknowledges that the Royal Commission into Institutional Responses to Child Abuse delivered 409 recommendations across four reports. While those recommendations were varied, the ALA notes that several states and territories are significantly lagging behind expectations in terms of enacting recommendations in a timely manner.

3. The ALA continues to advocate for legislative responses in line with all the Royal Commission's recommendations and is available for further consultations on the matters outlined below.

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 role of the District Court of Western Australia

4. Most child sexual abuse litigation in Western Australia is dealt with in the District Court of Western Australia. The ALA notes there has been no clear recognition that survivors of child abuse deserve special consideration when using the civil litigation process. This occurs even though it is self-evident that participating in litigation is highly stressful and that survivors of child sexual abuse are vulnerable to re-traumatisation.

5. The ALA notes it is well understood that civil litigation can provide a survivor with a formal acknowledgement of the trauma suffered, a sense of control, a sense of closure and a sense that they helped to deter future offending. Further, we note that for survivors, pursing justice does not occur in a vacuum, and it is never about money. Unlike mesothelioma cases in the Supreme Court of Western Australia which are managed with the careful oversight of a Judge, survivors of child sexual abuse must proceed through the District Court as if their claim is like any other personal injury claim.

6. The ALA contends it is time that the civil litigation process accommodated the reality of survivors of child sexual abuse in all steps prior to the final determination stage. We believe that having clear milestones and timeframes to convey to survivors is incredibly helpful when managing their expectations around the legal process and thus improving the survivors trust and confidence in their lawyers and in the legal system more broadly. It has been our members' experience that the usual milestones set by the District Court rules are not realistic, nor achievable in abuse matters given their complexity.

7. The ALA recommends that a tailored approach should be taken to program matters toward mediation at an early stage, such as the close of pleadings. This would allow lawyers to convey realistic timeframes to their clients with degree of certainty at an early stage.

8. We believe that the standard pre-trial conference as the default-early-dispute-resolution-mechanism is inappropriate. At a standard pre-trial conference there is typically little involvement from the Registrar in regulating the process by which the parties conduct the pre-trial conference. Further, most of the rooms available are small and intimidating and the result is that there is ordinarily no real opportunity for survivors to participate in the event they choose to do so. The ALA contends that a framework that disempowers the survivor and can re-traumatise them, is almost the antithesis of what civil litigation for survivors can and should be.

9. The ALA welcomes the District Court providing opportunity for these matters to be ventilated at Mediation Conferences, and for conducting the same in the David Malcolm Justice Centre. This setting is more private and allows for the survivor to participate in the Conference in the event they have chosen to. Further, the participation of the Registrar as mediator assists the parties in narrowing the issues and provides for a more meaningful experience for the survivor.

10. Therefore, the ALA recommends that during all mediations, the presiding Registrar should:

    a. Introduce themselves and explain their role as a mediator.
    b. Show the survivor (even where the Plaintiff lawyer has done so) where the conference room is, where the breakout room is, where the bathroom is etc. The purpose of this is to demystify the arena and prevent the disempowering of survivors unfamiliar with the legal process.

c. Explain that, while it is up to the survivor whether and to what extent they participate, the conference room is a place where the Court wishes them to feel safe so that if there is anything that is making them feel unsafe to please know that this is a topic that they can ask their lawyer to address the Court on and every attempt will be made to accommodate any such request.

d. Explain to the survivor that they are allowed to change their minds about whether and to what extent they will participate at any time.

e. Ask the Plaintiff lawyer in private each time the parties convene whether the survivor would like to be involved in any way and expressly mention/repeat that the survivor may change their mind at any time because the process is able to be flexible.

Barriers to Justice in Civil Litigation

11. The ALA recognises the significant difficulties encountered by claimants and their legal representatives, creating barriers to accessing justice. Challenges have included:

In Common Law Negligence Claims:

a. The Defendants' position on legal costs and legal disbursements which appears to have no regard to the complexity and longevity of the claims.

b. The extremely limited pool of sufficiently experienced Child Adolescent Psychiatrists that have the level of skill needed to evaluate survivors. The timeframes for appointment times are lengthy as are the timeframes to produce reports.

c. The difficult, variable, and time-intensive process in dealing with government agencies seeking recovery e.g., Medicare, WA State Disability Services and in particular the National Disability Insurance Agency which cannot confirm from its own records what actual National Disability Insurance Agency expenditure has been and will only provide an estimate prior to a Compromise.

d. The power of the National Disability Insurance Agency to require a survivor to progress a claim "however modest" the damages may be even if those damages may be eclipsed by National Disability Insurance Agency recovery.[2]

In Criminal Injuries Compensation Claims:

e. The wide and varying approaches taken by Criminal Injuries Compensation Assessors with respect to:

    i. The degree of evidence required to establish alleged offences for example, from not being required to provide submissions to being required to provide signed Statement of Events, Reasons for Delay and Impact Statement (which is not a requirement under the *Criminal Injuries Compensation Act 2003* (WA) noting the Application Form already requires an overall declaration of veracity) and particularised incidents of sexual abuse.

f. The 'knock-out provisions' of:

    i. Section 38 - whether it was reasonable to not report the offences. In some circumstances, the survivors are being asked whether they are now going to report the historical sexual abuse to WA Police when their claims are being assessed leading them to be fearful that they will not receive any criminal injuries compensation if they do not. The ALA recognises that there are many valid and sound reasons why a survivor does not feel comfortable to do so including fear of retribution from the offender (which often is a family member) or that it is too traumatic for them and then be subject to giving evidence in a criminal trial.

    ii. Section 41 - to determine whether the survivor's behaviour directly or indirectly contributed to his/her injuries.

[2] NDIS Operational Guidelines refer to "*Degiorgio v Dunn* (No 2) [2005] NSWAC 3 (1 February 2005) at 17 where the Supreme Court of New South Wales held that "reasonable prospects of success include reasonable prosects of damages being recovered in the action – not necessary as claimed but some damages, however modest".

iii. Progressing another available remedy under section 21 e.g., a National Redress Scheme claim where it may be unsafe to do so.

g. The technical difficulty of the new e-lodgement process including the inability to later see what was lodged unlike other Courts in Western Australia where restricted information may still be seen by the Survivor and their legal representative.

h. The practical and commercial limitations of appealing a Criminal Injuries Assessor's decision as a Criminal Injuries Compensation Appeal is a hearing de novo in the District Court of Western Australia which traumatises the survivor and often the survivor has no financial means to fund the cost of a Criminal Injuries Compensation Appeal which limits their access to justice. There are currently very few "no win – no fee" law firms in Western Australia that would be prepared to indemnify a survivor of these costs if they were not successful on Appeal and very few Community Legal Centres in Western Australia have funding to do so.

i. Provision of Information: There are significant delays in the provision of information to survivors sought pursuant to an early discovery order or by way of freedom of information requests especially in circumstances where the survivor is or was a ward of the state and is seeking a copy of their file and/or their siblings file from the Department of Communities. At present, there is a reported delay for up to 12 months or longer even when requested by Criminal Injuries Compensation Assessors.

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

Model litigant obligations

12. The ALA recommends that non-government institutions that receive, or expect to receive, civil claims for institutional child sexual abuse should adopt guidelines for responding to claims for compensation concerning allegations of child sexual abuse.

13. The ALA recommends the guidelines should be designed to minimise potential re-traumatisation of claimants and to avoid unnecessary adversarial responses to claims. The guidelines should include an obligation on the institution to assist claimants and their legal representatives in identifying the proper defendant to a claim if the proper defendant is not identified or is incorrectly identified. In addition, we support non-government institutions publishing the guidelines they adopt or otherwise make them available to survivors and their legal representatives.

14. The ALA is concerned that while the '*Western Australia Government Whole of Government Guiding Principles for Responding to Civil Litigation Involving Child Sexual Abuse'* ('Guiding Principles') was once issued regularly to survivors and their legal representatives by the State Solicitor's Office for all government institutions, it is now largely no longer referred to by the State Solicitors Office, its clients, agencies from which documents are sought or the Court nor the Office of Criminal Injuries Compensation.

15. We are concerned that until the Guiding Principles are adopted into the practice directions of Courts in Western Australia as binding requirements, they merely provide a non-binding suggestion for what should be done.

16. The ALA recommends that the Guiding Principles should be binding for the State of Western Australia and its agencies at <u>all</u> stages of the litigation process up to and including at Trial.

Excessive Permanent stays in Institutional Child Abuse Cases

17. The ALA is gravely concerned by numerous decisions of Australian courts which have granted orders permanently staying civil law claims brought by survivors of historical child sexual abuse in circumstances where the alleged perpetrator of the abuse is deceased or infirm at the time of hearing and was not previously confronted with the express allegations.[3]
18. We note that orders granting permanent stays are having chilling effects across the country; emboldening Defendant institutions to revert to a pre-Royal Commission tactics to delay

[3] James Masur, 'Dead men tell no tales – Permanent stays in historical child sexual abuse litigation and 'dead man statutes – an unforeseen outcome or an intended regression?' (Report, 2022*); Connellan v Murphy* [2017] VSCA 116; *The Council of Trinity Grammar School v Anderson* [2019] NSWCA 292; *Moubarak by his tutor Coorey v Holt* [2019] NSWCA 102; *Ward v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2019] NSWSC 1776; *Fields v Trustees of the Marist Brothers* [2022] NSWSC 739; *Chalmers v Leslie* [2020] QSC 343; *BRJ v The Corporate Trustees of the Diocese of Grafton* [2022] NSWSC 1077.

litigation. We also note there is ample evidence of a greatly excessive number of permanent stays in older claims for child sexual and physical abuse cases by institutions in New South Wales as outlined in a paper by James Masur Esq.[4]

19. The ALA draws particular attention to the average time from first alleged incident date and the date the complaint was received was found by the Royal Commission to be 29 years[5] which institutions are using to try and prevent compensating their victim's contrary to the approach recommended by the Royal Commission.

20. The ALA draws particular attention to the fact that the 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. Whilst the alleged perpetrator's unavailability is said to produce manifest unfairness to the Defendant and bring the administration of justice into disrepute due to the unavailability of a material witness, the result is a case that effectively disqualifies a class of witness and the evidence of survivors in their claims for civil law redress.

21. In respect of this issue of permanent stays in institutional abuse cases, the ALA submits that the following legislative amendments would be appropriate and should apply from the date that s6A of the *Civil Liability Legislation Amendment – Child Sexual Abuse Actions – Act 2018* (WA) came into effect. The ALA proposes the following should be expressly retrospective in its application to stays granted since that date:

No permanent stay in an institutional abuse case is to be granted where:

1. *There is a history of serious abuse in the institution; or*
2. *There is a history of serious abuse by the alleged abuser; or*
3. *No proper policy was implemented at the relevant time to diminish or prevent such abuse; or*
4. *No proper records of abuse and complaints in respect of abuse was and is kept.*
5. *Where the alleged abuser has been convicted of a criminal offence against a child in a criminal trial.*

[4] James Masur, 'Dead men tell no tales – Permanent stays in historical child sexual abuse litigation and "dead man statutes – an unforeseen outcome or an intended regression?"' (Report, 2022).

[5] The average time between the first alleged incident date and the date the complaint was received was 29 years (Royal Commission into Institutional Responses to Child Sexual Abuse, 2017c).

In respect of any application for a permanent stay in an institutional abuse case, the applicant bears the onus of proof in respect of each of the above requirements.

The efficiency with which courts deal with civil claims.

22. The ALA notes that the District Court of Western Australia deals with serious criminal offences including serious assaults, sexual assaults, serious fraud and commercial theft, burglary, and drug offences. It also determines civil claims up to $750,000 and has unlimited jurisdiction in claims for damages for personal injury.[6]

23. We also note in the most recently available District Court of Western Australia Annual Review 2020 [7] the report, by Her Honour Chief Judge Julie Wager, states an increase in both the criminal and civil workload:

> *The civil workload of the Court has increased as a result of amendments to the Limitation Act 2005 (WA) that came into effect on 1 July 2018 removing time limitations for claims for damages for child sexual abuse causes of action. The amendments also provide a mechanism for claimants to apply to set aside out-of-court settlement agreements made prior to the amendment which would have otherwise prevented such claims being made.*
>
> *Many 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.*

24. In Western Australia, there is no special accommodation for historical cases of child sexual abuse, and they are considered 'standard' personal injury claims. Once a Writ is filed, historical child sexual abuse cases are dealt with alongside claims for motor vehicle accident, work injuries, and the like, with no special accommodation.

25. The ALA contends that some procedural steps impacting the efficiency with which courts deal with civil claims include:

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[6] *District Court of Western Australia* (Website), <https://www.districtcourt.wa.gov.au/>.

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

Two-step process

26. The process allowing a claimant to apply to set aside a previous Deed is the first step carried out before a Writ can be filed to initiate a substantive claim for compensation. We note that in 2019, there were 134 writs filed claiming damages for child sexual abuse causes of action, an increase of 191.3% on the previous year.[8] In addition, 111 applications were made by claimants seeking orders setting aside previous settlement agreements and seeking leave to commence proceedings for damages for child sexual abuse.[9] This represents a 753.8% increase from the previous year.

The Deed process

27. The Deed application process is commenced by Originating Summons at the District Court. The Applicant must seek leave to bring a claim for child sexual abuse and have any previous Deed set aside. These applications were first heard by the Chief Judge sitting for one day once a fortnight. The first application to result in a decision was commenced as soon as the law changed in July 2018. The decision was made on 13 November 2018, the decision of JAS,[10] the process then taking a little over 4 months.

28. As we noted above, the number of applications following the decision in JAS increased significantly in 2019. As a result, some applications (even if unopposed) took over 6 months to be heard. In October 2019, the backlog was considerable and there were additional judicial resources allocated clearing the backlog.

29. We note that while the length of time for unopposed Deed applications to be heard has greatly reduced in length to around 4-6 weeks, opposed applications are still taking up to 9 months to reach a final hearing. This is an additional 9 months wait until a Writ can be filed to commence proceedings. No applications have successfully been opposed in WA.

[8] Ibid.

[9] District Court of Western Australia, Annual Review (2019), <https://www.districtcourt.wa.gov.au/A/annual_reviews.aspx>.

[10] *Jas -v- The Trustees of the Christian Brothers* [2018] WADC 169 (11 December 2018).

30. The ALA suggests setting aside of the Deed could be dealt with in the substantive claim to avoid this two-step process.

Delay by Defendants

31. Survivors of institutional abuse matters are inherently traumatised and vulnerable clients; they are often elderly and mentally unwell. Many have experienced unsatisfactory outcomes in previous dealing with the Defendant institutions.

32. The ALA is deeply concerned by the use of delay tactics by Defendants, particularly those which utilise the special circumstances of the abuse itself to create additional delays. For example, we have observed ample evidence of Defendants that delay seeking expert medical evidence under the guise of avoiding further trauma, only to make nominal or no settlement offers at the conference. The ALA is concerned that this approach to attending settlement conferences is in and of itself traumatising to victims of abuse, some of whom have waited 60 years for the opportunity for evidence based and fair compensation. The process is then delayed a further 3-6 months to enable the Defendant to seek medical evidence, with no sanction, or intervention, from the court.

Delay in the process

33. The ALA is concerned that very few claims settle at pre-trial conference in comparison with other injury claims. Registrars have been reluctant to progress claims to a listing conference without an additional mediation. We also note that Defendants, including the State of Western Australia, have attended pre-trial conferences disputing the Plaintiff's evidence, without having obtained evidence of their own. The ALA contends that this can and should be dealt with via improved case management from the close of pleadings.

34. The ALA welcomes the Court accommodating survivors in the provision of an experienced Registrar to mediate in historical sexual abuse matter. The David Malcolm Justice Centre has also been utilised for mediation, providing a less threatening environment for Plaintiff's. Unfortunately, success at a first mediation conference, although greater than at pre-trial conference, occurs less often than in other personal injury matters.

35. The ALA highlights that historical abuse cases require lengthy trials with many requiring 10 or more days to hear, leading to litigation fatigue and fear that they will not survive to trial. These experiences, we contend, lead many Plaintiffs, especially elderly and unwell abuse survivors, to under-settle their claims rather than endure the wait for a trial.

36. The District Court has been very accommodating where there are grounds to seek an expedited trial based on serious, or terminal illness. Although it is noted that Defendants often oppose these applications, regardless of the prognosis of the Plaintiff's illness, leading to potential further delay.

Delay in trial dates

37. Once a matter is issued in the District Court, it may take 2-3 years to reach a trial date. There is approximately 12-month delay from the listing of trial dates to the commencement of trial, this is after interlocutory steps are completed, including pre-trial conference and often mediation.

38. This additional delay means there is no pressure on, or desire for, Defendants to continue negotiations and settle these matters. When a trial is often months or perhaps a year away the Defendants move to more pressing matters. The Plaintiff is left in limbo, with their expert reports growing stale.

39. It is not until weeks, or sometimes days, before the trial is due to commence that serious settlement negotiations are entered. This results in trials being listed for many months, only to settle at the eleventh hour through no fault of the Plaintiff. The 'blame' for this is often attributed to the Plaintiff, although in practice settlement sums are often in the range offered by the Plaintiff at pre-trial conference or mediation.

Impact of Covid

40. During lockdowns arising from the COVID-19 pandemic, the Court to vacate nearly 1,500 trial days around the State. By June 2020 the criminal trial delay in Perth had increased from 11 months in January 2020 to 18 months. This delay had a knock-on effect on civil trials that persists in 2023.

41. Whilst the amendments to the *Limitation Act 2005* (WA) removing time limitations for claims for damages for child sexual abuse causes of action were an excellent step forward, in practice victims of childhood sexual abuse risk being further traumatised by the sub-optimal efficiency with which courts deal with these claims. Delay in the Court system only benefits the Defendants in these cases.

The effectiveness of WA's support of the National Redress Scheme

The experience of survivors who have accessed the Scheme.

42. While the definition of sexual abuse seems non-exhaustive, the National Redress Scheme automatically streams the abuse into three categories - penetrative, contact and exposure with the maximum payment decreasing in the same order regardless of the circumstances.

Assessment Framework

	Column 1 Kind of sexual abuse of the person	Column 2 Recognition of sexual abuse	Column 3 Recognition of impact of sexual abuse	Column 4 Recognition of related non-sexual abuse	Column 5 Recognition person was institutionally vulnerable	Column 6 Recognition of extreme circumstances of sexual abuse
1	Penetrative abuse	$70,000	$20,000	$5,000	$5,000	$50,000
2	Contact abuse	$30,000	$10,000	$5,000	$5,000	Nil
3	Exposure abuse	$5,000	$5,000	$5,000	$5,000	Nil

43. The above categories do not, however, consider survivors that have been subject to the following:

- humiliating acts for children like being made to strip naked.
- acts where children have had intimidating/threatening acts like bedroom/bathroom doors being taken off, walking into private spaces unannounced.
- acts where children are forced to play/re-enact scenes with toys/dolls in a sexual manner.
- grooming behaviour.

44. We note that it appears that child-on-child abuse (which we know is very common and very damaging) is not compensable but offences where the offender has been acquitted are. This is contrary to criminal injuries compensation and an inconsistent approach which is confusing for survivors.

45. The ALA also notes that there is no legal obligation for an institution to join and previous "incentives" by the National Redress Scheme have included "name and shame" and threat of loss of charitable status if institutions have not joined by a certain date. However, this doesn't appear to have had much traction in Western Australia. The National Redress Scheme appears to have now shifted to "negotiating" with institutions to encourage them to join and is becoming increasingly flexible with timeframes.

46. Where an institution does not join, the State of Western Australia may or may not step in as funder of last resort. If the State of WA does not step in and the National Redress Scheme determines that that institution was responsible for some or all the abuse, the survivor will not receive any payment for that abuse.

47. Other than the above table, the public is expressly prohibited from accessing the Assessment Framework Policy Guidelines[11] and disclosure is also prohibited to a Court or Tribunal unless it is to "*give effect to the National Redress Act*"[12]. The ALA contends that, in the interests of justice, this information should be available to the public. We have seen that the Independent Decision Makers of National Redress Scheme have been applying very broad discretion and the outcomes of National Redress Scheme applications sound in inconsistent results from which it is very difficult for survivors and their legal representatives to understand the likely outcome of such claims.

48. While the principle of "no double-dipping" is fair and reasonable, possibly the most contentious aspect of the determination process is the inconsistent and opaque treatment of prior payments. For example, the Application Form asks for information about prior payments for "*this abuse*" which arguably only requires disclosure of prior payments relating to the sexual abuse for which one is applying under the National Redress Scheme. However, the Offer of Redress refers to "*sexual abuse, as well as related non-sexual abuse*" and appears to

[11] *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Act 2018* (WA) ('*NRS Act 2018*') s 104.

[12] *NRS Act 2018* (WA) s 105.

deal with both together referring to the former as "*the abuse*" in relation to which the offer is made and various institutions are released.

49. We note the legislation offers some guidance but only where a prior payment has been made pursuant to a Court order and if that institution is the only institution responsible, Redress is not available.[13] One issue is that extremely few abuse in care matters are formally progressed to a court judgment and (unlike the calculation in the amended *Civil Liability Act 2002*) there is no mechanism in the National Redress Scheme Act to account for matters settling on a commercial global basis for claims relating to numerous incidents of abuse by numerous offenders (which is often the case for Applicants who have experienced pre-care, in-care and post-care abuse). Accordingly, we are seeing cases where National Redress Scheme is deducting entire prior payments even if they did not relate to the sexual abuse.

50. Only an internal review is available by another Independent Decision Maker who can only have access the same information and may make a different decision, including decreasing an offer or refusing the claim altogether. If you do not agree with the internal review, it appears there is no further right of appeal unlike decisions made by a Criminal Injuries Compensation Assessor which are heard on appeal in the District Court of WA.

51. Independent Decision Makers are not required to have any legal qualifications or background which would be advantageous in the determination of applications given the complexity of these applications. Criminal Injuries Compensation Assessors in WA are required to hold these qualifications which is entirely appropriate as a decision maker.

52. "Reasons for the determination" are given but at present appear to be written in a formulaic manner and contains very little details. There are also no published decisions. Therefore, for legal representatives of survivors, it is extremely difficult it is providing advice about the merits of a review is other than to say an offer may stay the same, increase or decrease or the claim may be refused altogether.

53. In addition to the above comments with respect to the extent of advice with respect to progressing alternative remedies provided by the National Redress Scheme or agencies funded to do so, there are other matters that are barriers to justice:

    a. Unwieldly Form

[13] Rule 11, *National Redress Scheme for Institutional Child Sexual Abuse Rules 2018*.

i. Albeit the Application Form is printed in large easy to read 14-point font, it is **44 pages alone**;
ii. Should there have been abuse at more than one institution, the survivor must submit an additional Part 2s numbering 14 pages;
iii. In remote areas, it is practically difficult to print out this large number of pages.

b. Correspondence with NRS
    i. There is no Running Sheet of communication with the National Redress Scheme;
    ii. The only way to communicate with the National Redress Scheme is by post or by telephone. National Redress Scheme will not write back to confirm any telephone discussion had;
    iii. There is no possibility to see how the National Redress Scheme sorts/maintains its files. For complex claims, National Redress Scheme will split Supporting Documents and Submissions from the Application Form and can easily inadvertently overlook documents.
c. Determination Time
    i. At the outset, the National Redress Scheme provided an anticipated determination time of 12 months, their website now only states that "the time to assess each application will be different, depending on the circumstances";
    ii. With complex claims, determination times of 2 years or more are common especially where the survivor also often has a Criminal Injuries Compensation application pending awaiting the National Redress Scheme determination;
    iii. The delay albeit understandable is cause of much anxiety for already psychologically damaged survivors.
d. Reporting to the WA Police by the National Redress Scheme and/or Responsible Institutions
    i. Unlike the Criminal Injuries Compensation Act, where the Criminal Injuries Compensation Assessor will only notify the offender and seek recovery where there has been a conviction, the National Redress Scheme has much broader criteria and the offer to anonymise provides little/no protection to child survivors who have been harmed by family or within relative foster care.

ii. The National Redress Scheme does not have a clear Information Sheet or any clear language on its website. We understand that the National Redress Scheme Child Reporting Team will look for six (6) triggers at an initial assessment.

1. The Applicant is still a child.
2. Any other reasons that children may be at risk of abuse.
3. The Offender has children themselves.
4. The Offender works with children.
5. The abuse occurred in the last 10 years.
6. The Applicant asks that a report be made to the Police.

54. National Redress Scheme may report the historical sexual abuse to the Police and/or to the Institution which may in turn report to the WA Police. While the rationale is to keep children safe in the future, the feedback provided by child survivors is that they do not feel protected by authorities e.g., WA Police/the Department of Communities, which historically have not protected them. A Violence Restraining Order is difficult/impossible to enforce against under-the-radar retribution by the offender's family at large e.g., drive-by's, ostracization, verbal and emotional abuse. There are many child survivors that do not feel safe enough to be able to pursue a NRS claim due to the above.

55. Criminal injuries compensation is 'compensation of last resort' and while a Criminal Injuries Compensation Assessor will usually not require a Criminal Injuries Compensation Applicant to pursue a common law claim they are required to defer a Criminal Injuries Compensation Application if they are of the view there is "a reasonable likelihood" that the person is eligible for the National Redress Scheme.[14]

56. Acceptance of an offer extinguishes a common law claim against an institution with respect to the sexual abuse claimed for in the National Redress Scheme Application (and it would seem related non-sexual abuse by virtue of the Reasons and Release Terms contained in the Offer of Redress).[15] If a criminal injuries compensation claim is the last stop on the line and a National Redress Scheme claim extinguishes a common law claim against an institution, it

[14] *NRS Act 2018* (WA).

[15] *NRS Act 2018* (WA) s 43.

follows that consideration must first be given by a survivor as to whether or not they have a viable common law claim.

57. The ALA highlights that it is not clear on the face of the National Redress Scheme application that acceptance of the Offer of Redress of a National Redress Scheme claim extinguishes a common law claim against an institution. There are only two (very difficult to find references) in the 44-page National Redress Scheme Application Form that acceptance of a NRS Offer extinguishes the right to make a Common Law Claim:

    - "know more will help you work out if applying to the National Redress Scheme or making a civil claim is a better option for you" (page 2); and

    - "if you accept an offer of redress you need to sign a document that will release the institution(s) from further claims" (page 7).

58. We note the only place where it becomes clear is when an Offer of Redress and the Acceptance Document is received by a survivor as it requires a survivor to tick that s/he has received legal advice about accepting/declining an Offer of Redress. The issue with getting the advice after having received an Offer of Redress is that a survivor has 6 months in which to make a decision to accept or decline[16] or the offer lapses.[17]

59. However, we note that the advice about whether to make a National Redress Scheme claim or accept a National Redress Scheme offer versus progressing a common law claim is complex. It will be impossible for a survivor or their legal representative to make a reasonably well-informed decision without making minimum enquiries e.g., with the institution, WA Police, hospitals etc. The current wait time for responses to freedom of information requests to Department of Communities is approximately 12 months or more and with the WA Police approximately 6 months or more.

60. If survivors were children at the time of the abuse, they are unlikely to recall when the abuse happened and who/which institution may have been responsible for putting them in the position of harm, information which is critical to both a National Redress Scheme and common law claim.

[16] *NRS Act 2018* (WA) s 40 (6-month extension available if requested).

[17] *NRS Act 2018* (WA) s 45(2).

61. Further, if a survivor has had a previous settlement or judgment for a common law claim which related to institutional child sexual abuse that was statute-barred at the time whether in part or in whole, then advice needs to be provided about setting aside the same and whether there are grounds to seek leave to commence a proposed cause of action.[18]

62. The issue that is facing the majority of survivors is access to obtaining legal advice with respect to making an National Redress Scheme claim and/or or accepting a National Redress Scheme offer versus progressing a common law claim.

63. At present, if the survivor is a ward of the state or a survivor that has recently left the care of the Department of Communities and is under 21 years of age, there is a fixed amount of up to $1,000 including GST and disbursements that are eligible to cover all the above. This is manifestly inadequate.

64. Like common law negligence claims, we note that the survivor often has no financial means to fund the cost of any common law legal advice for a National Redress Scheme which limits their access to justice. There are currently very few "no win – no fee" law firms in Western Australia that would be prepared to do so as it would mean that a significant proportion of a survivor's offer of redress would be eclipsed by legal fees and very few Community Legal Centres in Western Australia have funding or resources to do so.

65. Many survivors who have suffered child sexual abuse in the care of the State for which they have a National Redress Scheme Claim, have often also suffered:

    iii. incidents of harm that brought them into care in the first place.

    iv. incidents of harm other than sexual abuse in care.

    v. incidents of harm after being returned to parents or placed with Special Guardians

for which they may have a Common Law Negligence Claim and/or a Criminal Injuries Claim/s.

66. Sadly, many child survivors will also almost always have a Criminal Injuries Compensation Claim for incidents of harm e.g., chronic domestic violence after they turn 18. It is a survivor's

[18] *Limitation Act 2005* (WA) ss 91-92.

best interests to have one lawyer/law firm deal with all three claims or at least the National Redress Scheme and Criminal Injuries Compensation Claim for reasons including to minimise re-traumatisation by repeating events to another person, brief one medico-legal expert to address all incidents, and make consistent submissions to both decision-makers.

67. Most Community Legal Centres are only funded to do one type of claim and certainly not a Common Law Claim nor complex claims with multiple offence and offenders over a long period of time. We have observed this is more so the case in regional WA. This means that survivors do not have a full range of options to seek redress or if fortunate to find another lawyer/law firm, must repeat events and likely incur additional costs.

68. Legal Aid does not provide funding towards legal fees and the Department of Communities will only contribute as outlined above for National Redress Scheme claims which is not reflective of the level of work and length of time to establish the offences and impacts.

69. The impact of the *Civil Liability Legislation Amendment Act (Child Sexual Abuse Actions) Act 2018* (WA) must be considered along with the experience of survivors progressing claims for similar and related abuse through other avenues such as state-based victims of crime legislation e.g. *Criminal Injuries Compensation Act 2003* (WA) ("CIC Act") and Commonwealth legislation e.g. *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* as a survivor of child sexual abuse has almost always also experienced at least chronic neglect which brought them into care, other incidents of harm in care and/or when returned to parents and/or after turning 18 years of age in violent relations, the impacts of which are inextricably entwined.

70. Further funding needs to be provided by the WA State Government for survivors to access legal advice required. Funding and contribution to costs for all aspects of the claim process is one of if not the biggest barriers to justice that survivors face to date.

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

71. The Australian Bureau of Statistic (National Study of Mental Health and Wellbeing, 2020-21 | Australian Bureau of Statistics (abs.gov.au); see also Mental health in Australia: a quick guide – Parliament of Australia (aph.gov.au) reports the following important statistics from 2021 National Study of Mental Health and Wellbeing and the 2016 Personal Safety Survey:
    a. Australia has a growing mental health issue with estimated 1 in 5 (21%) of Australians aged 16-25 having experienced a mental disorder in the previous 12 months;
    b. Persons who experience childhood abuse are more likely to suffer from psychological disabilities.
    c. An estimated 2.5 million Australian adults (13%) have experienced childhood abuse.
    d. The average age at which the first incident of sexual or physical abuse occurred was 6.8 years.
    e. 86% of people who experienced childhood sexual abuse knew the perpetrator and 35.6% were family members.

72. It is self-evidently the case that participating in litigation is stressful. It is also self-evidently the case that survivors of child sexual abuse typically have a psychiatric injury such as post-traumatic stress disorder (PTSD) and are vulnerable to re-traumatisation.

73. From **1 January 2023** Western Australian victim-survivors electing to participate in the National Redress Scheme and forgo civil litigation will access their Counselling and Psychological Care (CPC) entitlements in a different way. Instead of receiving a lump sum payment up front, victim-survivors can choose an appropriately recognised counsellor and the State Government will pay the counsellor direct for the services they provide. There is nothing equivalent available to survivors who commence proceedings.

74. The Christian Brothers made a commitment at the Royal Commission to provide survivors of abuse suffered at facilities operated by the Christian Brothers with ongoing professional psychological counselling, for life, if need be. This is in recognition of the value of long-term, individual psychological support in healing.

75. In Western Australia, the time between notification of a claim through to settlement or determination is typically a number of years. During this time, the risk of re-traumatisation is well recognised. In our submission survivors who commence proceedings should have the same options for psychological services available to them as survivors who have elected to use the National Redress Scheme.

76. This demonstrates a real challenge for Australian policy makers. While the Commonwealth Government is involved in funding mental health in Australia, the ALA submits that the issue of the availability of psychological services to survivors is so intimately bound up in the justice for survivors that it is imperative that the Western Australian State Government adds this issue to its agenda.

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

77. The process victim survivors must go through to obtain compensation is too difficult for most. It is a system that is retraumatising. In the criminal process, there is a 'justice gap' between those cases of sexual assaults that occur, those that are reported and those that result in charges and court proceedings. There are also high rates of attrition and low numbers progressing through the justice system that result in conviction. It is a process seen by many victim survivors as too difficult, it causes significant stress and impact on their mental health.

78. The Queensland Women's Safety and Justice Taskforce sets out in its report, *Hear Her Voice: Report Two: Women and girls' experiences as victim-survivors of sexual violence,* that "victim-survivors told the Taskforce that they have been traumatised by the offence of sexual violence, and then retraumatised by the justice system".[19]

    As detailed above, the civil process is also gaining a reputation of being a difficult one for victim survivors. There can be significant delays in obtaining documentation, access to medico legal psychiatrists is becoming more difficult and stay applications are used as a weapon.

[19] Women's Safety and Justice Taskforce, Queensland Government, '*Hear Her Voice: Report Two: Women and girls' experiences as victim-survivors of sexual violence' (Report two, 2022), 49.*

79. The ALA welcomes the review led by the Office of Commissioner for Victims of Crime into the experience sexual violence victim-survivors have had with the criminal justice system. We note that the experiences and needs of diverse groups of victim-survivors will be considered to identify opportunities for system reform and will include investigations of:

    a. Experiences of adult victim-survivors (regardless of their age when the relevant sexual offending occurred) with the criminal justice system.

    b. Factors which contribute to under-reporting of sexual offences, and why people report but do not continue with the formal legal process.

    c. Alternative and innovative processes or procedures for receiving, investigating and resolving (through prosecution or otherwise) sexual offence complaints that are consistent with victim-survivors' interests and the interests of justice – for example, restorative justice processes.

80. The ALA submits that there is a need to broaden this investigation to include the civil process, including development of specialist civil courts to manage and hear matters relating to sexual abuse. We also recommend extending legislation that enables child abuse claims to be brought to include pure physical abuse which would provide justice to more survivors of child abuse and their families.

81. In all jurisdictions around Australia, other than Western Australia and the ACT, in addition to the removal of a limitation period for personal injury resulting from child sexual abuse, there is no limitation period for personal injury resulting from the serious physical abuse of a child (in NSW, the Northern Territory, South Australia and Tasmania), the physical abuse of a child (in Victoria), connected abuse (in NSW), and psychological abuse arising from the sexual or physical abuse (in the Northern Territory, South Australia and Victoria.

82. In our submission it is an unjustifiable inequity for Western Australia to have an inferior access to civil remedies for personal injuries based on geographical location alone.

Conclusion

83. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the 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.

84. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.

Ian Murray

WA Branch President

Australian Lawyers Alliance