THE CHALLENGES FOR LAWYERS DEALING WITH SURVIVORS OF ABUSE[1]

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Introduction

1. This paper is intended to provide some practical guidance by identifying some of the challenges that a lawyer will face in dealing with clients who are survivors of abuse who now want to pursue a claim in respect to the abuse. My main focus is on care leavers as most of my experience in this area has been assisting survivors who were abused in out of home care. This paper is designed to complement the presentation by Dr Philippa White who will deal with two other important topics: first, the special skills needed to manage the high risk of re-traumatising the client through the interview and litigation process; and secondly, she will briefly touch on managing the impact of vicarious trauma on legal staff. Nothing said in my paper is original. It has been said before by other more experienced and able experts, to whom I am deeply indebted in preparing this paper.[2]

The Terrain

2. An **early challenge** is to understand the terrain we are in; to comprehend the physical features of the landscape in which a claim for damages or redress is to be contemplated; and to assist survivors to navigate what, for them, is a daunting and distressing course through unfamiliar territory.

3. For a survivor of child sexual abuse living in Western Australia there are now two principal avenues opening up to enable a claim:
   3.1 A civil claim for damages in respect to child sexual abuse[3]; and
   3.2 An application for redress through the Commonwealth National Redress Scheme (**NRS**).

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[1] This paper was originally prepared in June 2018 for Legalwise Seminars by Gary Dean, Barrister, WA Bar. It has since been modified to take into account the changes that came into effect on 1 July 2018. This document does not purport to be comprehensive or to render legal advice. Readers should not act on the basis of any matter contained in this document without first obtaining their own professional advice.

[2] In preparing this paper I am indebted in particular to the work of Professor Kathleen Daly in the area of redress for institutional abuse of children.

[3] The changes to the limitation laws in Victoria (*Limitation of Actions Amendment (Child Abuse) Act 2015*) provide that the time limitations do not apply to injuries from sexual abuse, physical abuse or psychological abuse that arise from the sexual or physical abuse of a minor. That this approach was not followed in Western Australia is profoundly disappointing.

4. These are important changes because they alter the previous power imbalance between plaintiffs and defendant institutions, that was heavily weighted against the survivor of abuse: this means that rather than being able to rely on Limitation Act defences, institutions responsible for sexual abuse will now have to defend, and, during the course of proceedings, attempt to negotiate settlements of claims at mediation, that are likely to sound in significant damages. This is a very different landscape in terms of damages and the quantum of reasonable settlements than has been traversed in the past.

5. It should, however, be noted that private alternative dispute resolution processes, such as under the Catholic Church's *Towards Healing* protocol will continue to operate. However, in view of the legislative changes referred to in this paper, offers of monetary redress through *Towards Healing*, should a survivor choose to use this process (and some do), will need to be much higher than in the past. My recent experience with *Towards Healing* has demonstrated that some Church Authorities do not appreciate that the landscape has changed; and the profound effect of abuse and the redress process, particularly the Authority's engagement in it, on a survivor complainant, is simply not appreciated or is deliberately disregarded when it comes to negotiating a monetary payment.

6. So far as a civil claim for damages is concerned the relevant legislation is the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018 (WA).* This Act made important amendments to the *Civil Liability Act 2002*, and the *Limitation Act 2005*. This legislation came into effect on 1 July 2018.

7. So far as the Commonwealth scheme for redress is concerned, the relevant legislation is the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth).*[4] The Commonwealth redress scheme is, in my view, deeply flawed. This, however, is not the place to discuss the scheme's myriad shortcomings.

[4] This Act was the subject of an inquiry by the Senate Community Affairs Legislation Committee. I suggest that you read some of the submissions lodged with the Committee; in particular, the submission by Tuart Place dated 30 May 2018 (#14), in which a number of defects are identified: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/NationalRedressScheme/Submissions

8. Earlier Commonwealth legislation – the *Commonwealth Redress Scheme for Institutional Child Abuse Bill 2017* – was considered by the Senate Community Affairs Legislation Committee. Many of the written submissions lodged with and oral evidence given before the Committee, urged the Committee to recommend that the redress scheme be widened to cover all forms of abuse, not just sexual abuse. The Committee, in its majority report, chose not to.

9. What is important to note here is that many survivors are deeply disappointed with both of these laws because they allow claims in respect to sexual abuse only. This narrow focus started with the terms of reference for the recent Royal Commission[5] and has continued into the redress scheme and the WA legislation.

10. Professor Daly notes that "care leaver advocacy groups have long criticised the sole focus on sexual abuse. They children were violated in every sense in an institution and being sexually used was only one of the violations".[6]

11. The practical effect of this narrow focus is:
    11.1 Many WA survivors of institutional abuse – who suffered horrific physical, emotional and other abuse, but not sexual abuse - will have no entitlement to seek either damages or redress;
    11.2 Those survivors who suffered all forms of abuse – sexual, physical and emotional – will be able to seek and be awarded damages or redress for their sexual abuse only;
    11.3 This will create a "hierarchy of value" of childhood abuse and will leave a large area of injustice festering and still to be rectified;
    11.4 This "hierarchy" will also depend on where the abuse occurred – plaintiffs in Victoria, Tasmania and Queensland can claim for forms of abuse other than sexual abuse. In WA the changes relate to child sexual abuse only.
    11.5 Once again the WA and Commonwealth governments have failed the survivors of abuse in care.[7]

Important Concepts

[5] Royal Commission into Institutional Responses to Child Sexual Abuse.
[6] Daly, K. (2018). "Abuse in care versus not in care: we need to tackle potential bias in a national redress scheme", *The Conversation*, (16 February 2018).
[7] See Submission dated 29 May 2018 by Frank Golding OAM which lucidly argues why the current Commonwealth Redress Bills should be withdrawn and the question of redress reconsidered and reconceptualised. This submission can be downloaded from the website referred to in footnote 4.

Two Groups of Litigants – Care Leavers and Non Care Leavers

12. A **second challenge** is to understand that there are two separate groups of claimants with different experiences.

13. Broadly speaking, survivors of childhood sexual abuse comprise two different claimant groups: those who were abused in care and those who were abused in non-care settings.

Figure I:

Survivors of child sexual abuse in institutional contexts: Spectrums of harm

Group 1 Care leavers	***Group 2 Non-care leavers***
Abuse in 'closed' institutional welfare setting	Abuse in 'open' non-residential setting
Family systems non-existent or abusive	Family relationships intact
Socially isolated, no community networks	Community networks intact
Education unsatisfactory or too traumatised to learn	Education not disrupted
Complex trauma requiring comprehensive specialist support	May or may not require specialist support

Care leavers

14. There is a distinction between children who were abused 'in-care' and those abused in 'non in-care' settings. This distinction was first explained in 2016 by a Scottish politician, Deputy First Minister John Swinney, in the context of the Scottish inquiry into institutional abuse of children.[8]

15. As Professor Daly points out Swinney defined "in-care" settings as those in which "institutions and bodies have legal responsibility for the long term care of children in the place of a parent, with all of the legal and moral obligations that status carries. [This] is different to 'non in-care' settings such as day schools and youth groups, in which other adults had 'a duty of care on a short-term basis, but crucially not replacing the role of parents".[9]

[8] Daly, K. (2018). "Inequalities of Redress: Australia's National Redress Scheme for Institutional Abuse of Children", *Journal of Australian Studies.* p 208-9.
[9] *Ibid* p 208.

16. Care leavers comprised more than 50% of witnesses at the child abuse Royal Commission.[10] Care leavers will likely be a significant subgroup of applicants to the National Redress Scheme, and will also likely be highly represented among civil litigants. As children, "care leavers were state wards or placed by family members in out-of-home-care, or they were committed to youth detention".[11]

Older care leavers

17. Older care leavers belong to one of three groups: (1) the 'Forgotten Australians'; (2) former child migrants from the UK and Malta; and (3) the Stolen Generations and other Aboriginal people who were taken into state care last century. A series of Australian national inquiries have reported that children in state care often suffered multiple forms of abuse and neglect, for example: physical violence and cruelty, torture and humiliation, cultural disconnection, solitary confinement, denial of education, forced labour, deprivation of food, clothing, and bedding, medical experimentation, falsified documents, as well as the various forms of neglect.[12]

18. Older care leavers are recognised by the Department of Health & Ageing as a Special Needs Group. Their abuse occurred in 'closed' residential state welfare settings (both in institutions and foster care) and their civil claims are likely to be against an institution and/or the Church Authority that operated the institution and/or the State Government.

Younger care leavers

19. The de-institutionalisation of child welfare systems and an increasing reliance on foster care has meant that younger care leavers were not exposed to some of the more extreme systemic abuses that were common in old-style orphanages and large children's Homes fifty years ago. However, the shift from public institutions to private homes created different opportunities for the sexual abuse of children 'in care'. Civil claims by younger care leavers are likely to be against the State Government, for sexual abuse in foster care, juvenile correctional facilities or group Homes.

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[10] Royal Commission into Institutional Responses to Child Sexual Abuse (2017). *Final Report: Preface and Executive summary*. p.11

[11] Daly, K. (2018). *Op.cit.* p.209

[12] *Bringing them Home, the Report of the National Inquiry into the separation of Aboriginal and Torres Strait Islander children from their families* (1997); *Lost Innocents, the Senate Community Affairs Reference Committee's Report on Child Migration* (2001); and *Forgotten Australians, the Senate Committee Report on Australians who experienced institutional or out-of-home care as children* (2004).

20. Significantly, the childhood abuse of care leavers – both young and old – occurred while they were living 'in the care of the State', having already experienced separation from family of origin, generally under traumatic circumstances, and sometimes involving prior abuse.

Non-care leavers

21. Compare the circumstances of care leavers to those of non-care leavers, who in most cases grew up in families of origin, as private citizens, in their own homes. Their childhood sexual abuse occurred in non-institutional settings or in 'open', non-residential, non-welfare institutions, such as day schools, dance academies, church parishes and sporting clubs. Civil claims by non-care leavers may be against institutions, or against individual defendants for abuse occurring in these settings.

22. The impact of their childhood sexual abuse is not necessarily greater or lesser than that of care leavers, however the difference in circumstances and the context of the abuse is highly relevant.

What is the significance of the distinction?

23. A **third challenge** is to imagine the experiences of a survivor to empathise with them; to try to understand the depth of their hurt; and to assess whether they should bring a civil claim or seek redress under the NRS.

24. It needs to be noted that care-leavers, and particularly older care leavers who, for example, may have been at Bindoon or Castledare (Christian Brothers) or St Joseph's Orphanage (Sisters of Mercy) and similar institutions, "grew up in "total institutions"; that is, living as part of a large group of "inmates", controlled by a small supervisory staff. The major spheres of life – sleeping, playing, working – were all in "the same place and under the same single authority". Survivors recall a "dehumanizing institutional environment", one of being "totally at the mercy" of staff with no one to turn to. They lived in "a constant fear of sexual abuse [and were subject to] deprivations of food and schooling, forced labour and medical neglect", alongside physical and sexual abuse".[13]

25. As Professor Daly points out, "care leavers were abused in total institutions, where sexual abuse is diffuse and part of a sexualised environment, in which there is no

[13] Daly, K. (2018). *Op.cit.* p.209.

separation in the spheres of life. For these reasons, it can be difficult for survivors to trace sexual abuse to specific acts (or places) that align with a personal injuries understanding of abuse".[14]

26. The key characteristics of childhood sexual assault are silence, secrecy, shame and delayed disclosure. Further, evidence to the Royal Commission showed that many victims do not disclose child sexual abuse until many years after the abuse occurred, often when they are well into adulthood. Survivors who spoke with the Royal Commission in private session took, on average, 23.9 years to tell someone about the abuse and men often took longer to disclose than women (the average for females was 20.6 years and for males 25.6 years). Some survivors never disclose.[15]

27. "Disclosure is not an event but a process". Research with adult survivors has found that many did disclose in childhood only to experience blame and minimisation. Abuse may then continue in spite of the disclosure. Negative and shaming reactions to sexual abuse disclosures have been shown to significantly increase the risk of mental illness and distress in the victim. In "historical" allegations the years that elapse between the abuse and a court case are often indicative of the long journey that survivors take to recover from abuse and find a forum in which their complaint will be heard. Initial disclosures of abuse are likely to be to friends, partners and other people the survivor trusts.[16]

28. Understanding factors like these is relevant to considerations of the pleading and proof of claims as well as what expert evidence may be required.

Application to the NRS

29. These factors are also relevant if an application to the NRS for redress is to be made. Professor Daly observes that:[17]

[14] *Ibid.* p.213.
[15] Royal Commission into Institutional Responses to Child Sexual Abuse (2017). *Final Report: Volume 4 – Identifying and disclosing child sexual abuse*. p.9
[16] Salter, M. (2015). "Why does it take victims of child sex abuse so long to speak up?" *The Conversation*, (27 August 2015).
[17] Daly, K. (2018). Op cit p 215

29.1 "The Commonwealth's proposed assessment matrix has not been made public.

29.2 Nor do we know what the specific decision-making guidelines will be.

29.3 It is not unreasonable to assume that the matrix will frame sexual abuse (and associated physical abuse) within a personal injuries framework, which first considers the types and frequency of specific acts of abuse, for which claimants are able to recall names of specific perpetrators and a time frame; and then considers the subsequent mental and physical impact.[18]

29.4 It is also not known to what degree the guidelines for decision will steer more closely to an administrative method than to strictly legal criteria and evidence".

30. In either case, a personal injuries framework is "not well-suited to care leavers for whom sexual abuse was both direct and diffuse, and interwoven in everyday life, which makes it difficult to recall specific people and dates".[19] Add to this the lengthy time that has passed and the age of many older care leavers and this disadvantage is compounded.

31. Professor Daly argues that the sexual abuse experiences of care leavers and their poor social status as children "will have a direct disadvantaging impact on care leavers, as a group", in assessments of monetary payments under the NRS.[20]

32. That this is likely is borne out by evidence before the Royal Commission. In a report prepared for the Royal Commission in 2015 by Finity Consultants a comparison was done of average payments awarded under the Catholic Church's *Towards Healing* protocol. They were $30,000 (for claims of abuse in residential care), but $50,000 to $55,000 (for claims of abuse in education and religious settings). The report went on to say that the different amounts were "inconsistent with private session information", which suggested "a higher severity of abuse in residential settings" compared to others.[21]

33. Further, "compared to non-care leavers, care leavers as children:

[18] It is apparent from the DSS Submission to the Senate Standing Committee on Community Affairs dated 30 May 2018 at paragraph 4.9 that a personal injuries framework is proposed – one that looks at severity of abuse, impact on the survivor, related non-sexual abuse and extreme circumstances.
[19] Daly, K. (2018). Op cit p 215
[20] *Ibid.* p 215
[21] Finity Consultants Pty Ltd. (2015). *National Redress Scheme Participant and Cost Estimates* Sydney, (July 2015), p.40.

33.1 grew up in total institutions, in which sexual abuse was both public (that is, witnessed or heard) and private, both direct and more diffuse in a sexualized and violent environment, one in which sexual abuse occurred in all spheres of living, working and sleeping;

33.2 were considered to be and treated as low status, second-class children, and as morally and socially inferior to other children;

33.3 experienced a greater degree of familial economic stress and social disadvantage before being removed from families or placed in care; and

33.4 grew up in total institutions, inadequately schooled, clothed, fed, cared for and loved; and, as a consequence, are today more likely to be educationally, socio-economically, and physically handicapped".[22]

34. We must be aware of and counteract the tendency (as became evident in the assessment of payments under *Towards Healing* referred to above) to devalue the abuse of disadvantaged children as being, in some way, "less damaging" and therefore deserving of lesser compensation.

35. Being aware of these factors and the possible in-built biases in the NRS should inform your preparation of any redress application and your assessment as to what may be required to support it. It will also be relevant to assessing whether any offer by the Operator of the NRS is reasonable and appropriate.

36. What Professor Daly said about the NRS assessment process was prescient. The NRS Assessment matrix has now been published. It is very difficult to source online so I have **attached** a copy to this paper with a summary of how I see it is likely to be applied, by reference to some hypothetical examples. It uses a personal injuries framework within fixed categories.

37. I will leave you to form your own view of the matrix. Suffice to say my view is that it is a typical product of a cold, unfeeling, ignorant bureaucracy – it is devoid of any humanity.

Some Practical Matters

38. Many survivors have poor literacy and numeracy skills (the sad legacy of educational neglect by institutions). Do not assume that correspondence can and will be read.

[22] Daly, K. (2018). *Op.cit.* p.214.

Trust must be built through communication, and survivors respond well to face to face meetings.

39. Understanding this factor should inform how you manage important aspects of the solicitor-client relationship - such as explaining legal costs; taking instructions; providing advice; or reporting as a matter progresses – to avoid misunderstandings and ensure that your client understands the advice being given.

40. Be careful in assessing whether a survivor can cope with the rigours of litigation. Consider whether the NRS is a realistic alternative. Be clear and open about the advantages and disadvantages of each, the risks and likely costs. Some important points to note are:
    40.1 The maximum award under the NRS is $150,000. This payment will recognise only the most extreme cases – that is only cases involving penetration - regardless of the actual psychological effects that may flow from other forms of sexual abuse;
    40.2 Awards at this level are unlikely to be common;
    40.3 The Commonwealth expects the average monetary payment to be in the vicinity of $76,000, before prior payments are taken into account;
    40.4 No minimum payment has been prescribed;
    40.5 No payment under the NRS will have any relationship to the likely amount of common law damages that would be award by a court in respect to the abuse;
    40.6 Execution of a deed of settlement and release is required. So court proceedings for damages and an application for redress under the NRS are alternatives. It is one or the other.

41. If a survivor has a good claim proceedings by writ will likely achieve a much better financial result than the NRS.

42. Survivors' Evidence:
    42.1 Lawyers regularly record their client's evidence. This process usually has a number of stages – an initial general summary; the expansion of this as other information comes to hand; the preparation of a proof of evidence which will form part of a brief to counsel; conferring with the witness to settle the proof; and finally preparation of a witness statement to be filed in accordance with

trial directions; counsel conferring with the witness to settle the witness statement.

42.2 At each stage the survivor is likely to be re-traumatised. Take care. Note paragraph 43 below.

42.3 There is a tension between the lawyer's propensity to want to get down "all the facts of the abuse" and a survivor's propensity to not disclose the worst incidents, or to minimise the incidents of abuse.

42.4 As pointed out earlier, the experience of sexual abuse suffered by care leavers often means that it is very difficult for them to recall specific people and dates. This is compounded by the length of time that has passed, decades in the case of care leavers, and the age of survivors. Experiences get compressed in an environment of total control.

42.5 Defence counsel may go to great lengths to challenge the factual accuracy of evidence of abuse and the credibility of the plaintiff. In doing so, of course, defence counsel is simply doing his or her job in testing the evidence.

42.6 However, in my view, in these sorts of cases such an approach will often lead to injustice. It may well be that the factual accuracy of each recollected instance of abuse could be challenged. However, the fact that a survivor's memories remain vivid after an interval of many years shows the genuine intensity of the pain and suffering and anger that suffuse them. The point is that the evidence of recollection truly reflects the impression that the experiences of abuse have left on him or her as a child, even though precise details cannot be recalled or may be hazy.

42.7 The long lasting bitterness, damage and anger of a survivor should leave no room for doubt that the abuse described occurred and has left the impression described.

42.8 Issues such as these will need to be canvassed with appropriate experts. Expert evidence may be necessary to put the plaintiff's evidence into perspective.

43. When taking instructions, and in particular when preparing a plaintiff's witness statement, to minimise any re-traumatisation it is important to be aware of other sources of information which will reduce the need to go over "old ground" in taking a proof of evidence. Such sources include:

43.1 Redress WA[23] applications;

43.2 Redress WA assessments;

43.3 Towards Healing contact reports;

43.4 Institutional records;

43.5 Statements given to other inquiries, including the Royal Commission;

43.6 Evidence given to other inquiries, including the Royal Commission;

43.7 Statements of evidence prepared for a prosecution of a perpetrator;

43.8 Royal Commission exhibits;

43.9 Inquiry reports;[24]

43.10 Reports published by the Royal Commission.

44. As you are all aware, taking instructions means listening to the client's story. This should only be done where absolutely necessary. If a client confirms that other documents, such as those referred to above, contain complete details of what they experienced, then all that should be required is a short witness statement to that effect attaching the material documents.

45. There will be occasions where hearing the survivor's story will, however, be necessary. This can be harrowing and, over time, the cumulative effect of these stories can have an adverse effect on the solicitor's well-being. Take care of yourself, as well as the client's claim.

46. Anonymity and confidentiality:

46.1 Consideration needs to be given as to whether the plaintiff's full name should be disclosed in the proceedings.

46.2 In some jurisdictions it is common for proceedings to be taken using initials: for example *ADC v Prince Edward College Incorporated* [2015] SASC 12 (which went on appeal all the way to the High Court); *'B' v Reineker* [2015] NSWSC 949.

46.3 It is also common for plaintiffs to sue in their full name: for example, *Ellis v Pell* [2006] NSWSC 109 (John Andrew Ellis sued 3 defendants in his full name).

46.4 The authorities are not entirely settled about the circumstances in which the court has the discretion to make orders to secure the anonymity of a party.

[23] The Redress WA Scheme was a redress scheme established by the WA government to acknowledge, apologise, and provide monetary redress to adults who were abused and neglected as children while in the care of the state. It ran from 2008 to 31 December 2011. Also see footnote 25.
[24] See footnote 12.

Such an application is arranged through the principal registrar and will be heard by a judge in private chambers on an oral motion. Any affidavit in support should not be filed but should be delivered direct to the judge's associate: *Civil Procedure Western Australia* @ [6.7.2].

46.5 It should not be assumed that anonymity can be claimed automatically. In *J v L & A Services Pty Ltd (No.2)* [1995] 2 Qd. R 10 at 45, 46, 47, the majority of the Court of Appeal held that information (in this case relating to whether the plaintiff had AIDS or was HIV positive) may not be withheld from the public merely to save a party or witness from loss of privacy, embarrassment distress, financial harm or other collateral disadvantage: see *Civil Procedure* @ [6.7.2].

46.6 Having said this, my experience with leave applications in the District Court is that:

(a) When an application is filed the court will, administratively, suppress the applicant's name;

(b) When leave is obtained, if a plaintiff wants to remain anonymous, then a suppression order to that effect can be sought from the court.

47. This issue needs to be discussed as many care leavers have not disclosed their abuse to their families of, if they have disclosed to close family, may not want the fact of their abuse published to wider family and friends.

48. At various stages in a child abuse action – preparing a witness statement; preparation of pleadings; preparation for and attending a mediation; preparation for and giving evidence at trial – you will need to be aware that your client may need counselling or other support. Such support is also likely to be necessary for applicants to the NRS as well. This should be discussed and planned for at the outset.

Prior Deeds of Settlement

49. Care leavers who have participated in private redress schemes with Church Authorities, whether under *Towards Healing* or otherwise, are likely to have executed deeds of settlement.

50. With older settlements a care leaver may not have had legal representation. For settlements negotiated in more recent years some Church Authorities encouraged claimants to get legal representation and usually agreed to defray some of the claimant's legal fees.

51. Section 92 of the *Limitation Act* deals with causes of action that were settled before the limitation period was removed. Relevantly:
    51.1 Leave of the Court is required to commence a child abuse action (s 92(2));
    51.2 The Court may, if satisfied that it is just and reasonable to do so, grant leave to commence the action, subject to conditions [25]; and to the extent necessary for the grant of leave, set aside any settlement agreement and any judgment giving effect to the settlement (s 92(3));
    51.3 If an action on a previously settled cause of action is commenced, the settlement agreement and each agreement relating to the settlement, other than a contract of insurance, is despite any written or other law, void to the extent to which it relates to the child abuse the subject of the cause of action (s 92(4));
    51.4 A party (such as a Church Authority) cannot seek to recover any moneys it has paid under the void agreement (s 92(5));
    51.5 The Court dealing with the action may, if satisfied that it is just and reasonable to do so, take any previous amount paid under the void agreement to the extent to which the amount relates to child sexual abuse the subject of the action (s 92(6));
    51.6 If the agreement does not relate solely to child sexual abuse and the agreement does not expressly state how much of the payment relates to child sexual abuse then the Court may take into account 50% of the payment for the purposes of s 92(6) (s 92(7)).

52. A number of points can be made about this provision.

[25] The Explanatory Memorandum at p.16 cites as an example of a condition "that the action must be commenced within a certain period of time"

53. First, the environment in which claimants, particularly care leavers, previously settled their claims completely favoured the Church Authority or other institution. The elements of this were:
    53.1 The Institution responsible for the abuse was always bargaining from a position of power relative to the claimant;
    53.2 The identification of the proper defendant was often a difficult issue, particularly where there was a lack of perpetual succession in unincorporated institutions. Rarely, would a Church Authority disavow its entitlement to rely on the so called Ellis defence;
    53.3 The claims were statute barred and Church Authorities would maintain their entitlement to rely on a limitation defence if sued;
    53.4 All settlements were without admission of liability even in respect to the most egregious abuses;
    53.5 In many cases the amounts offered were paltry when compared to the nature of the abuse, its effect on the care leaver, and likely common law damages;
    53.6 Some Church Authorities offered derisory settlements that palpably reflected the weak position of the claimant;
    53.7 All payments were made 'ex gratia' and usually did not reflect any willingness to offer substantial compensation based on the harm suffered by the complainant;
    53.8 Even where a Church Authority was genuinely trying to give meaningful monetary redress all offers made and settlements agreed were against the background that the claimant had no opportunity to claim damages at common law;
    53.9 In some cases claimants had no legal representation;
    53.10 It was a condition of most settlements that the claimant was required to agree to execute a deed of settlement and release – no deed, no payment;
    53.11 Claimants were often elderly and in fairly straitened circumstances and saw a settlement as a way to receive some redress when the alternative was to get nothing. The sub-text was "take it or leave it" because any legal proceedings will fail.

54. Second, the test for leave is that the court must be satisfied that it is just and reasonable to grant leave. In light of the factors in the previous paragraph the bar for this threshold test should, in my view, be set fairly low by the court once it comes to consider the first applications for leave.

55. Third, a number of leave applications have been dealt with by the District Court. All that I am aware of have been conceded by Church Authorities. As yet there is no published judgment that gives any guidance to applicants on the applicable principles, however, in a recent matter the Chief Judge indicated that he would publish a judgment. So, watch for it.

56. Fourth, the court has a discretion as to whether it will deduct any previous payment from any amount awarded at the trial of a child abuse action commenced pursuant to leave granted. That is, a deduction will depend on the circumstances. In my view a factor that would militate against a deduction would be the absence of the defendant having paid interest on the amount previously paid from the date when the wrong was committed. Such an interest payment calculated back for years would, in many cases, likely far outweigh the amount of the previous payment.

57. Finally, notwithstanding what is said in paragraph 55 above, it should come as no surprise if Church Authorities and other institutions oppose applications for leave on the basis that the deeds of settlement are binding and should not be set aside.

Cap on Legal Fees[26]

58. Section 15L of the *Civil Liability Act* limits the legal fees that a practitioner may charge for acting on behalf of or appearing for a person in a child sexual abuse action to those properly recoverable under any applicable costs determination that is in force.

59. Section 15L(2) provides that an agreement must not be made for a law practice to receive any greater reward for services in a child abuse action than is provided for in the applicable costs determination and section 15L(3) provides that any agreement contrary to subsection (2) is void and any money paid under such an agreement is recoverable by the person who paid the fees.

60. The applicable costs determination is the *Supreme and District Courts (Contentious Business) Determination 2018*. Determinations are reviewed every 2 years.

Costs Agreements

[26] To the writer's knowledge this is the first such legislative provision capping legal fees in Western Australia. A cap on fees was introduced in the UK to apply to clinical negligence cases worth less than 25,000 pounds.

61. The issue of costs agreements and the likely costs of proceedings or redress applications are issues that will need sensitive handling and careful explanation. Most, if not all victims of sexual abuse find it very difficult to trust generally, let alone trust a lawyer. They have experienced the worst abuses of trust and, in the case of care leavers, have also seen how their experiences have been devalued by governments and their hopes for proper redress betrayed.[27] Those who experienced the Slater and Gordon class action against the Christian Brothers, in which most participants received a payment of only $2,000 for years of neglect and abuse (and the firm received over $1 million in fees) are also very wary of lawyers and their fees.

62. No applicant to the NRS should be charged legal fees. Knowmore Legal Service has received $39m in federal funding to assist redress applicants without charge. Any redress applicant needs to be informed of this service and should be referred to Knowmore.

63. The fact of lack of trust will be exacerbated in cases where a care leaver client has poor literacy and, therefore, great difficulty in understanding the process, the amount of legal fees he or she will be liable to pay in certain events, and concepts such as 'no win, no fee'.

64. Patience, clear explanations in plain English and understanding will be essential. I suggest that firms acting for claimants prepare, in simple straightforward prose, a suite of short standard letters that explain: the court process (including the need to obtain leave, the steps in the action, mediation, trial); legal costs (including the types of costs, the firm's cost agreement, how costs are charged, and the liability the client will have to pay costs either out of any settlement or judgment after trial); and alternative dispute resolution processes.

A Final Point

65. Laws, particularly written statutes, are a tangible indicator of what our society values. Notwithstanding the reservations expressed in this paper concerning the narrow

[27] The restriction of redress under the NRS to sexual abuse only has, as pointed out earlier, failed care leavers. Further, the experience of care leavers with *Redress WA* when the incoming Barnett Liberal government halved the payment levels, after all applications had already been lodged, was a galling breach of trust which was understood by care leavers to mean that the government did not value them, nor did it appreciate the depth of the damage caused by the appalling physical, sexual, emotional and psychological abuse that had been suffered lifelong and for which the state and religious organisations were responsible.

focus on sexual abuse only, the opening of the door to civil claims for damages for child sexual abuse and the establishment of the NRS are significant advances. These changes throw out a fundamental challenge to lawyers acting in this area – to radically re-cast their thinking about what is adequate and reasonable compensation for survivors of child sexual abuse.

66. For too long many Church Authorities and other institutions have offered woefully inadequate settlements to care leavers because of the power imbalance between them and a claimant. In the past it was always open to Church Authorities not to rely on limitation defences. They steadfastly refused to do so. That imbalance is now being redressed. Church Authorities and other institutions liable for sexual abuse will need to quickly re-calibrate their approach to the quantum they should offer to settle claims – amounts to be offered will now need to reflect a more realistic assessment of the likely damages at common law. That re-calibration will take time but it will happen – it will come as significant awards of damages are made by the courts, as well as from plaintiff lawyers insisting on realistic settlements at mediation that adequately reflect the loss and damage suffered.

GR Dean

30 November 2018