

COMMUNITY DEVELOPMENT AND JUSTICE STANDING COMMITTEE

**AN INQUIRY INTO THE OPTIONS AVAILABLE TO SURVIVORS OF INSTITUTIONAL
CHILD SEXUAL ABUSE IN WESTERN AUSTRALIA
WHO ARE SEEKING JUSTICE**



**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 13 SEPTEMBER 2023**

SESSION TWO

Members

**Dr D.J. Honey (Chair)
Mr M.J. Folkard (Deputy Chair)
Mr D.J. Kelly
Ms C.M. Tonkin
Dr K. Stratton**

<008> P/4

Hearing commenced at 10.32 am

Mr GRAHAM DROPERT

Former National President, Australian Lawyers Alliance, examined:

Ms ELEANOR SCARFF

Solicitor and WA State Committee Member of the Australian Lawyers Alliance, Australian Lawyers Alliance, examined:

Ms SARA CONNOR-STEAD

Principle Rightside Legal, ALA Abuse Law Group Member, Australian Lawyers Alliance, examined:

The CHAIR: Thank you for taking the time to come here. First of all, I would like to acknowledge the Whadjuk Noongar people, the traditional owners of the land on which we meet today, and pay respect to their elders past and present. On behalf of the committee, thank you very much for coming and appearing before us today. My name is David Honey, I am the chair of the community and member for Cottesloe. My committee members include the deputy chair, Mark Folkard, member for Burns Beach; Dr Christine Tonkin—sorry! Dr Katrina Stratton at the end of the bench, member for Nedlands; Hon Dave Kelly, member for Bassendean; and Christine Tonkin, member for Churchlands. Thank you very much.

It is important to understand that any deliberate misleading of this committee may be regarded as a contempt of Parliament. Your evidence is protected by parliamentary privilege. However, this privilege does not apply to anything you might say outside of today's proceedings. If there are any questions you have about today's proceedings, please make sure that you ask us. You can continue on to a brief opening statement if you wish to do that. Thank you very much.

Mr DROPERT: First of all, thank you for inviting us to have the opportunity to provide some written submissions and also be here today. Can I allow my fellow representatives of the Australian Lawyers Alliance to introduce themselves and then I will introduce myself, make a brief opening statement, then address any of the matters raised by the committee or anything that has otherwise arisen.

The CHAIR: Okay, wonderful. Thank you.

Ms CONNOR-STEAD: My name is Sara Connor-Stead. Thank you for the opportunity to appear. I have been an ALA—Australian Lawyers Alliance—member since 2010. I am also a member of the recently formed national ALA abuse law special interest group. I am a personal injury lawyer and have been for 23 years, both in the UK and, since 2010, in Western Australia. For the last five years, I have acted exclusively for plaintiffs who have experienced childhood sexual abuse. We have litigated over 130 cases in Perth. The firm has been involved in the two decisions that went to judgement.

The CHAIR: Thank you.

Ms SCARFF: My name is Eleanor Scarff. I am a WA state committee member of the ALA. I am also a committee member of the national abuse law special interest group that Sara just mentioned. I have been admitted as a legal practitioner since 2008. I recently opened my own law firm in March this year. Prior to that, I was a director of Dwyer Durack lawyers and the head of its personal injury department. Dwyer Durack has and continues to act for a significant number of victims of childhood

institutional sexual abuse who are, or have been, in the care of the Department of Child Protection as it was then known; it is now known as the Department of Communities.

Dwyer Durack have been one of the law firms in Western Australia, historically, that has acted in that practice area for quite a long time. They have seen the development of the law surrounding this including the most recent changes in the legislation to remove the statute of limitations for these sorts of matters, the evolution of criminal injuries compensation claims, WA Redress and also the recent establishment of the National Redress Scheme.

Most of the victims that Dwyer Durack has acted for are young people represented by the Public Trustee of WA and the Office of the Public Advocate. There are some direct clients that no longer have SAT orders that apply to them because they either turned 18 or are no longer in need of such orders. That is the majority of the practice that I was involved in at Dwyer Durack. I am pleased to appear before you and answer any queries you have today.

The CHAIR: Thank you very much.

Mr DROPPERT: I am Graham Droppert. I am a Senior Counsel. I practice as a barrister. I had the pleasure of being the president—now former president—of the Australian Lawyers Alliance. The Australian Lawyers Alliance is a not-for-profit national association of lawyers and others established for the benefit of the community and community members who have particular needs. Essentially, their mission statement is to ensure justice for individuals. We estimate that 1 500 members represent 200 000 people each year across Australia. We promote justice and equality before the law for all individuals regardless of their wealth, position, gender, sexuality, age, race or religious belief. The national office is located on land traditionally owned by the Gadigal people of the Eora Nation. We acknowledge the traditional owners and custodians of the lands both on which our head office is located and where we all work. We welcome the opportunity to have input in the committee.

A large number of our members in this practice area assist the survivors and have contributed to the submissions that you have before you. We acknowledge that the Royal Commission into Institutional Responses to Child Abuse delivered over 400 recommendations. Although those recommendations vary, we note that several states and territories fall behind the expectations of the terms enacted through the royal commission. We advocate for legislative responses largely in line with the royal commission identifications. I am happy to say that we are ready to field any questions you may have.

The CHAIR: Beautiful. Thank you very much for that. It is great background. Perhaps we will just cut straight to the chase in relation to deficiencies in the court processes. In your submission you have said there are deficiencies. Would you like to outline perhaps at least the top areas where you see that effective change could be made? Obviously, we have a general interest, but our specific focus is on the things that we can do through legislative processes and otherwise directing the way that agencies behave. Perhaps you could outline the things that you see as the most important areas.

Mr DROPPERT: The solicitors who represent survivors of child abuse are the ones who are very much at the front line. If you wanted anecdotes—I am not sure that that is what you are looking for—they have a vast experience as to the way in which the processes work and the way that creates additional trauma and stress on people. The reason they are bringing claims is because they have endured significant stress, trauma and abuse. Sometimes the court processes operate rather than to ameliorate that but to exacerbate that. The main areas are basically delay and the costs that claimants are put to formulate and pursue their claims. There are separate issues relating to the National Redress and so on, but I will talk about court processes, so the Supreme and District courts.

Mr D.J. KELLY: That would be great.

<009> S/5

[10.40 am]

Mr DROPPERT: So, one of the questions is resourcing available within the courts. We would ask the committee to make a recommendation for the government and the Parliament to liaise closely with the senior judges and the administrators at the District and Supreme Courts as to what additional resources they need. I will tell you at large, but, specifically in this area, what is it that they need to ensure a quicker, but also more efficient method of resolving these claims. Most of them go to mediation, so they do not go to trial. Most of them are settled at mediation, but it can be a long time to get there. One of the impediments for a lot of survivors of child abuse is that somewhere along the line, they enter into a deed of settlement for usually quite small perhaps sums of money in the past when there were limitation issues. They basically literally took what was offered. So, the deeds have to be set aside. Even in the case of consent or non-opposition, that process can take, you know, six months. If they are contested, they can take the best part of 12 months. It is too long. There is no application that has been refused to set aside a deed. One of our recommendations is that there should be a change in the legislation that enables the setting aside of the deed to be dealt with simultaneously with the claim, because it is not seriously contended by institutions or their insurers in Western Australia that deeds that have been obtained in the past under circumstances where there was injustice, there was not a level playing field. So, that should never be an impediment to actually bringing the claim. It was well intentioned, I am sure, but the effect has been to increase delay, cost and hence stress.

The CHAIR: Just quickly, in relation to that, would you see that if you were to legislate that, that would be time bound for pre and post the legislative changes in 2018? There was a deed last year, for example, and then there was a subsequent claim of someone saying, “Hang on; no, I don’t think I did get the right recompense out of that.” Would you see that as automatically being set aside or would you see it as we have to do it around when the legislation was changed?

Mr DROPPERT: I was not so much saying it should be automatically set aside, although that largely is the effect, but there might be a better argument if somebody was properly advised, entered a deed a month ago, and then comes back three months later and says, “I want to set it aside because I heard that someone got more money.” It is not so much automatically setting it aside, but rather than making it a prerequisite before you can commence a claim itself. It should be capable of being dealt with as part of the claims process rather than as a prerequisite. That is the point we make about that.

The second point we make is about resourcing of the courts. There is some experience in other states about specialist courts or court streams in relation to child abuse survivors. We see that happen in commercial litigation. Commercial litigation in the District Court is dealt with quite differently from civil litigation. The objective is to get the parties to sit down and talk about the real issue sooner rather than later, rather than to take step after step after step before you can even get to the point of asking for a mediation conference. If it can be done for commercial matters, it should be able to be done for child abuse survivors.

Mr M.J. FOLKARD: So, that is a specialist list with one or two judges that sit over it so that there is a consistency in the approach and time frames et cetera. Is that what you are saying—with it properly resourced?

Mr DROPPERT: It would be a great improvement. I think it would be hard for the Parliament to tell the District Court, the Chief Judge —

Mr M.J. FOLKARD: A hundred per cent.

Mr DROPERT: — that there should be one or two. I think inevitably, given the nature of the material, it is very hard for one judge or one registrar, or indeed one police officer, or indeed one lawyer, to constantly have to deal with what are sometimes terrible, terrible stories. If the District Court Chief Judge says, “We are going to have three judges”, that might be a wise thing. It might be, for example, at the registrar level, but the court comes back says, “If you want us to do this and cut the waiting periods, we really need to have an additional registrar.” Whether that is the registrar for child abuse or whether it is someone who might be appointed for, I do not know, a five-year period to ensure that the whole backlog of these things is washed out, and so by the time we get three or four or five years down the track, maybe the general resourcing of the court could deal with it. But there is still a large backlog.

Mr M.J. FOLKARD: In Victoria, they have a domestic violence space where they have a specific cadre—for want of a better term—with not only registrars, but both lawyers by plaintiff and all that space. I come back to that specialist court, but, as you say, properly resourced. What are your thoughts on that?

Mr DROPERT: The answer, in principle, is yes. It would be a question of resourcing. In Victoria, it is a much larger group of judges with a lot more associate judges, registrars and so on. We think the respectful thing to do to the courts is to ask them what resources they would need to be able to achieve that either as a structure like a formal structure or just by way of processes. They could issue practice directions. It could easily be practice directions issued to say these are the way these matters will be progressed in District Court or Supreme Court. I think they are mirror practice directions. In principle, yes, it might be that the Western Australian version of that might be a bit different from the Victorian version, and we do not want to preclude that.

Dr K. STRATTON: Are there any risks to a specialist list? We had another witness suggest that it may get in the way of a fair trial, particularly from the perspective of defendants.

Mr DROPERT: Judges are always very mindful of fair trials, and I think implicit in the—I did not see or listen to any of the previous witnesses, although I did see Mr Kelly appear on the news.

The CHAIR: He is a multimedia celebrity!

Mr D.J. KELLY: The mainstream media is not yet dead.

Mr DROPERT: But I think implicit in that proposition would be that judges would not be able to fulfil their judicial oath, and I think it is a low risk.

Mr D.J. KELLY: The suggestions you have made have a bit of commonality with other witnesses. The other issue raised with us in respect of delays is that the delays have been either manufactured or utilised by defendants to get an outcome that is more favourable to their clients. You used anecdotes. Is that the experience of lawyers that you represent? Maybe anecdotes—maybe examples is a better way of putting it. Is there any substance to that claim?

Mr DROPERT: I am happy for Eleanor or Sara to answer that. They are much more at the coalface about that. Barristers tend to get wheeled in towards the end and after all the delays have occurred.

Ms CONNOR-STEAD: Yes, I have experienced delay. I think the committee has already heard about the discovery of documents and the delay, particularly for state entities, and a resource issue. Not perhaps an intentional delay, but a delay nevertheless that can be perceived as being somewhat deliberate, and it is hard to explain why that is not properly resourced when the law was changed five years ago. From other defendants, a delay perhaps in obtaining medical evidence. We have found that to be a case that we go to conferences with our evidence in place and the defendants

have not sought any evidence to counter it. We arrive at the conference and are told that our evidence is rejected, and so there will be no meaningful negotiation. Then we adjourn or are sent away and the defendants will take three to six months to obtain their medical evidence. That delays the whole process in getting to another meaningful negotiation. Those are just two examples.

<010> S/G

[10.50 am]

Mr D.J. KELLY: The other issue that has been raised is even once everything has been assembled, that offers of settlement are not made early, that the reasonable offers of settlement do not come until there is a court date looming. Is there any substance to that, in your view?

Ms CONNOR-STEAD: This may not be ALA's view, but as a practitioner, yes. A court date certainly seems to focus the mind, and when we have court dates that are up to 12 months away, negotiations screech to a halt. Meanwhile, the plaintiff's evidence is getting stale, so we have to put our client through another medical assessment closer to trial because the 12-month report, a judge wants to have up-to-date evidence, so often it is weeks and, unfortunately, days before trial, or sometimes, very unfortunately, when the trial has commenced already and the client is giving their evidence.

Mr D.J. KELLY: Specifically on that issue, you are saying sometimes because of the long period before you get to trial, you actually have to get the victim —

Mr DROPPERT: Almost inevitably.

Mr D.J. KELLY: — to get a second medical opinion because the first one is so old?

Ms CONNOR-STEAD: Yes.

Mr D.J. KELLY: And you are saying that happens almost all the time?

Ms CONNOR-STEAD: Yes.

Mr M.J. FOLKARD: The time frame is 12 months or is it —

Ms CONNOR-STEAD: From listing conference for a 10-day trial is 12-plus months.

Ms C.M. TONKIN: You have mentioned that with the pre-trial settlement conference process that settlements in these types of cases are less likely than in other cases of personal injury. I would like you to elaborate, please, on if there is anything specific in a legal sense that would explain this, and if you could improve upon the situation, how would you go about it?

Ms CONNOR-STEAD: I am happy to speak to that. I think in most of the cases—and you will see that these cases we included with the motor vehicles, with the slips and trips, and with the work injury, so we are all in the same environment for a pre-trial conference. In those cases, mostly, there has been the exchange of evidence. The exchange of documents are obtained or the medical evidence to enable such like a motor vehicle accident to settle; if not on the first conference, there will be a consultation of any questions or anything that both parties think are missing, and then they can go to, pretty quickly, a second conference. Whereas in these cases, as I said, there is not any medical evidence or any counter evidence. The first time we hear the objections to the plaintiff's evidence is actually at the conference.

Mr DROPPERT: Can I follow up on that, and it is in our paper, but I think if there was a recommendation from this committee that the District and Supreme Courts issued practice directions as to the expectations of the court, on both parties, when they attend—let us call it mediation conferences for the sake of simplicity. And, for example, I would hope that that would include that both parties have obtained the evidence that they say that they need at that point to

try and resolve the claim, because Sara is right. You go to these things and they say, “Well, all right, if you do not take our offer, we will send your client to see Dr Smith,” and Dr Smith is not available for eight or 10 weeks, and then it will take another four weeks to get a report, and then another four weeks for us to think about it, so you will have to come back in six months’ time. Why? Because they did not do their job properly beforehand. And apart from the fact that—because claimants kind of steel themselves for what it is they have to go through, and they go through it and they get their mediation conference date, and then they get told, “Well, you’re going to have to go and do it all again, aren’t you?”

Mr M.J. FOLKARD: That re-traumatises our victim.

Mr DROPPERT: Absolutely.

Mr M.J. FOLKARD: This is what we are trying to negate.

Mr DROPPERT: So, a recommendation from this committee to the courts to issue practice directions as to the expectations by the courts of both parties.

Ms C.M. TONKIN: In practice, what would that look like?

Mr DROPPERT: A practice direction?

Ms C.M. TONKIN: No.

Mr DROPPERT: In practice.

Ms C.M. TONKIN: What would —

Mr DROPPERT: What would happen?

Ms C.M. TONKIN: Of both parties being ready, what would that include on both parts?

Mr DROPPERT: That would include both parties to have—a large part of the abuse claims is psychiatric injury components. There is sometimes physical components as well, but in any event, if you come to a conference and you say there are medical issues involved, you should have appropriate medical evidence to deal with that. The other thing, for my part, I think an almost standard requirement for a defendant to formally respond before the mediation conference to the written claim that the plaintiff is required to submit. So, the rules require a plaintiff to submit it, the rules do not require a defendant to respond, and so you get there on the day and then they tell you why they think my number is too high and why they are not allowing something. But I think that is mechanics that the court can address. Sometimes they do it, but it is an ad hoc thing. Anything that eliminates unnecessary disputation around issues that should not be in dispute, so, the medical evidence should be clear.

Ms C.M. TONKIN: Just to clarify, the plaintiff’s story, their statement is very clear, and the supporting evidence for that statement is clear. And on the defendant’s side, there is clarity of their position as well.

Mr DROPPERT: That is what it should be. The plaintiff’s claim is set out in detail in the statement of claim, so they know exactly what the plaintiff is going to allege what happened. In terms of the value of their document, they file documents that are either three pages or 13 pages long, setting out what the plaintiff says they have lost by way of income, what their expenses are in the past, what their expenses will be in the future, what their losses are in the future, and what they say is a reasonable allowance for what we used to call pain and suffering, but now we call it non-pecuniary loss. But it is the same thing. The defendant could file a defence which simply says, “Not admit, not admit, not admit, not admit,” and say, “Well, it is up to you to prove it,” and, “We are here to say we do not agree with your position and so we are going to offer you a fraction of what you say your

claim is worth.” The plaintiff says, “Well, I am not going to accept that.” They say, “All right, well now we need to send you to a psychiatrist.”

The CHAIR: In terms of preparing that information, and perhaps Sara and Eleanor could say, what sort of cost do you think would be involved to prepare that level of information?

Ms CONNOR-STEAD: For the defendant or for the —

The CHAIR: This is as exactly as Mr Droppert outlined, and that is that you have got a clear statement of claim from the claimant; there is medical evidence on both sides. I think we heard what sort of cost would be involved in that process for the claimant.

Ms CONNOR-STEAD: To get to the point of a conference?

The CHAIR: Yes.

Ms CONNOR-STEAD: Legal costs would probably be in the region of maybe total party costs. It depends on various things, because it depends on the complexity.

The CHAIR: I will put a point to you. We were told that perhaps those costs would be in the order of, say, \$20 000 or \$30 000 to get to that point of having sufficient information, where the defendant could then make a response.

Mr DROPPERT: That a defendant would spend \$20 000 or \$30 000?

The CHAIR: No, the claimant would have to spend \$20 000 or \$30 000.

Mr DROPPERT: I would think that that is too low. I would think it would be higher than that, because typically, for someone who has undergone abuse in the past over a long period of time and then has lived their life and their life will involve experiences that are a result of the trauma that you need to, in a sense, eliminate as being the true cause of their future problems. So, you have to get evidence, you have to track down records. These things, if it involves time, it involves cost. Then you go to the experts and say, “Here are all the records. We need a report from you which identifies what are the central issues, what is the cause of this, what is the diagnosis, what is the cause,” and so on, and the experts who provide reports in this field are not cheap. So, you pay what you have to pay to get an appropriate report, and they could be \$2 000 or \$3 000, but they could also be \$8 000. So \$20 000 or \$30 000 disappears before you even get there. Can I say something about costs in a moment?

Mr D.J. KELLY: Sure. I have a question about the medical reports that you are asked to get, but just a point of clarification. I think you are talking about a clear statement of claim in the writ as opposed to a witness statement. I think one of the previous witnesses talked about requiring the defendants to have a witness statement as opposed to a statement of claim. You are just talking about a clear statement of claim in your writ, are you not?

<011> A/5

[11.00 am]

Mr DROPPERT: When you say the defendant is to provide, you mean to have one? Do you mean for the claimant to —

Mr D.J. KELLY: For the claimant to have a clear witness statement as opposed to a statement of claim.

Mr DROPPERT: The general rules of court do not require a claimant to provide a written statement of their evidence prior to trial. It used to be quite common in the Supreme Court, but they actually abandoned that process. It would give a defendant insurer a huge free kick for them to get a —

Mr D.J. KELLY: In what sense?

Mr DROPERT: Because they can spend as long as they like picking over every paragraph, finding anything anywhere that is a minor inconsistency and say, “There you go; the plaintiff is not telling the whole truth”, and the defendant can sit back and say, “Well, we don’t have to engage in this until we feel like it or until the judge tells us to.” I would see that as a very retrograde step.

The other thing is the court processes enable a defendant to, as we say, interrogate or administer interrogatories. So, if they want a plaintiff to commit on oath on central issues, they are entitled to ask the questions, and the plaintiff will be required to answer. There are mechanisms for them. If they say, “We don’t know what happened in this five-year period”, they can interrogate. If it turns out they were in jail, you will not be able to claim loss of earnings for that five-year period.

Mr D.J. KELLY: I did have one question about the process of getting medical reports. Victims often get psych reports from someone recommended by their lawyers. They then go on and they get sent to a psychologist by the defendant, and it is a very traumatic experience and they often feel as though the person is trying to really break them. It is an awful process. It occurred to me—not being a lawyer, you can tell me this is a ridiculous idea if you like—that when you provide your statement of claim and your medical report, if the defendant is going to object to the medical report, would it not be possible to have the court require that the abuse victim go to a psych who is appointed from a panel by the court rather than someone who is basically being paid or whatever by the defendant so that there is some independence or some feeling at least that the person who is providing the report owes a duty to the court in the way that they behave? The perception is that they are a psych who just does work for defendants. Then the court would have a report which is independent in nature and that may be a less traumatic process. I am not aware that that is done in any other jurisdictions, but is that something that we could consider?

The CHAIR: Could it be done?

Mr D.J. KELLY: Without the world ending?

Mr DROPERT: WorkCover has certified specialists in various areas and they have a medical assessment panel, so there are some models that look a little bit like that. I do not do WorkCover anymore, fortunately or unfortunately, but if I look at the doctors who appear on those panels, they tend to be very similar to the cross-section of doctors who get used either on the plaintiff’s side or the defendant’s side, although the process of being able to say, “Let’s use a court-approved specialist” in a sense might remove a little bit of the stress of saying, “Clearly, the defendant has just hand-picked their favourite go-to person who inevitably and always says, ‘Not much to see here’.” It might remove that bit of it, but I do not know that the personnel would change a lot, but Eleanor might have a different view.

Ms SCARFF: I can speak to that because I do practise in the area of workers compensation. Similarly with workers compensation where a worker needs to get an evaluation of permanent impairment as a result of a workplace injury, whether that be psychological or physical, you see that same practice. A plaintiff lawyer will get them to attend an approved medical specialist who is trained in these WorkCover guidelines. The defendant will also do so. Usually, it is quite instantaneous. A plaintiff will get a report and the defendant will say, “I don’t really like that; that’s a bit high. We’re going to get our own independent decision.” There is a mechanism in WorkCover WA where there is a specialist panel, so if there is a dispute that arises with respect to an evaluation of permanent impairment, a worker can apply for that panel then to make the deciding call. I have never seen that done in all my areas of practise. I am not aware of any ones that have been done recently. I will be corrected if that is the case, because what the insurers and the lawyers all appreciate is that specialists are independent. When they are briefed, they know that there is the possibility that they will have to go to court and they have to stand by their opinions and their convictions that they put

in that report. Often when you find negotiations that occur, especially with those differences of opinion from psychological or physical perspectives of impairment, you will usually find that each party will weigh up each report and make relevant concessions on each side. While that is available for workers in WA, it is not very much utilised, and I am not too sure whether that would be of assistance to victim-survivors of abuse in that circumstance. Workers compensation is quite specific in terms of calculations; if you can move your arm this way or left or right, there is a specific assessment guide that the specialists are guided by.

The CHAIR: Just coming back to a previous topic and this idea of making sure that you have clear directions on what both sides have to have and by when, would that result, do you think, in a significant reduction in overall costs for both sides if that was done? Does the delay just actually add up for costs?

Mr DROPPERT: One thing is I think it will reduce delay, and if you reduce delay, you reduce costs. Sure, the defendant would have to commit to go and get their medical evidence before a mediation conference rather than just sit on their hands and hope that they can low-ball a settlement offer and a plaintiff, for whatever reason, will take it. Yes, there will be some additional costs for insurers and defendants to do that, but I suspect, overall, there will be a significant reduction in costs because it will increase the chances of matters resolving at the first mediation conference, it will reduce delay and it will mean that a person who goes to the mediation conference will, in a sense, know that that traumatising process will have come to an end because both sides will come saying, "This is where we stand", make whatever compromises they make and that will then be the end of it, rather than you having to tell your client, "We're going to go and have a go, but they may very well offer way too little money and we won't tell you to take it and then they will send you to another psychiatrist." Of itself, that is unhelpful and, indeed, sometimes damaging.

Can I say something about costs, just seeing as it was indirectly raised? I notice from the submission from, I think, IRDI Legal, at 4.31 of their written submission is the proposition that if a claimant got less than one-third of what they set out in their particulars of damages, their costs should be reduced. Can I just say first of all that there are many reasons why someone might settle their claim for less than what is claimed in the particulars of damages. Indeed, there might even be good reasons why they would settle for less than a third. The first might be they have just been crushed to the point where they are going to take whatever they can because it is time; they have to finish it. For their own mental health, they have to say, "That's it", no matter how unsatisfactory or short of proper compensation. That is one thing. If you were to weaponise costs in this way, you would actually increase the incentive on defendants and institutions and their insurers to make certain that their offers fall below that mark because there will be a heavy cost penalty to a plaintiff.

The second thing is there might be liability risks. Although you can properly say to your client, "If you succeed on all your issues, your claim will be worth \$1 million", but if there are major liability risks, you might say you should factor that in, and then someone might take \$320 000. They would fall below the third mark, but it is not that the claim was too high; it is just that the liability risk is not reflected if you say, "If I get the full compensation, what is the fair figure that I am seeking?"

<012> N/4

[11.10 am]

The third thing is someone might die. So, at the time their claim is framed, it is appropriately claimed, but as soon as they die, their pain and suffering damages disappear and that might be a significant portion of the claim. Their future treatment costs will disappear. Their future loss of earnings will disappear. Their future care needs will disappear. And at that point the claim will definitely be worse. Except in the case of the old survivors, who all of their losses have already

occurred, and they have got only five years to live anyway because they are 89 or whatever number—you know, whenever five years' life expectancy kicks in at that stage.

And then the people get ill from other causes—unrelated causes—and if you have someone who has a claim and they are 28 years of age and they develop an illness, totally unrelated to anything and they are going to die within five years, their claims will be worth way less than a third of what was framed properly at the time. So, any of these arbitrary cost rules inevitably work against claimants and potentially weaponise costs as part of a negotiating process. In any event, the courts have full control over fixing the costs to be fair and reasonable to both parties. The rules about that are the defendant does not have to pay all of the costs; they just have to pay what the reasonable costs are and so there are some pretty good protections for defendants in relation to that.

The second thing that was raised in the early submission at 4.73 was that all-in settlements potentially disguise the amount of costs that are being paid and so there is a lack of transparency or so on. Entirely and utterly in the control of defendants and insurers. In every negotiation that I am involved in, I always say, "What's the fair figure for the claimant?", and defendants inevitably at some point prior to the matter being settled say, "What are your costs?", because they want to factor that in before they reach their final number. They are the ones who ultimately want to drive the all-in settlement mechanism. They are entirely and utterly entitled to say, "Our offer is \$300 000 plus your reasonable costs." They can make a costs offer. If it is not accepted, the court will have to determine that in a separate exercise. If there is potentially or theoretically an issue, it is entirely within the control of the defendants to stop doing it.

Mr M.J. FOLKARD: Should that be legislative, then, that the costs and awards be two separate negotiations, for want of a better way of putting it, and never should the lines cross?

Mr DROPERT: No, because sometimes in commercial settlements, you have defendants who simply say, "We've got \$300 000; that's it. We don't care whether it is 200 plus 100 or whether it is 250 plus 50; it is just 300." And you would not want to stop them in a limited number of cases where it is a legitimate position to take from doing that and if it is legislated, unless you legislate it and then start providing exceptions—so that becomes a long and slippery path.

But the final thing is this: every plaintiff's lawyer who sends an account to their client is obliged by law to put at the bottom of it, "If you have any dispute about any aspect of this account, you are entitled to challenge it." So claimants are told, "These are your costs, if you disagree with that, you are entitled to challenge it and have it independently assessed." So there are significant protections already for claimants. There might be the odd lawyer who is more robust than they should be—I am not saying it never happens—but, certainly, from my experience with the Western Australian profession it would be an exception.

Dr K. STRATTON: Just a slight change of topic. You say in your submission, quite rightly, that survivors should not be treated differently depending on their geographic location, and one of the things that I have been interested in is perhaps the different and unique experience of Aboriginal and Torres Strait Islander people. We do know that often the care experience was different as well. I am just wondering if you have any comments about what are the different experiences perhaps of Aboriginal and Torres Strait Islander people and particularly those who live regionally and in remote communities?

Ms SCARFF: In my practice, especially given that we are given referrals for children, we often find that they are from Indigenous Aboriginal and Torres Strait Island backgrounds. It is incredibly difficult for them to, first of all, I think really have the courage, and usually their referral is through the Public Trustee who is acting on their behalf. I feel that their voices are difficult to be heard in the sense that a lot of the abuse in care matters—I am speaking in my capacity as a legal practitioner

in this area—are committed by family members, and it is a very difficult process for them to go through. The Public Trustee does an amazing amount of work. One recommendation I had looked at was there had recently been officers who had retired—this also goes to the State Solicitor's Office as well. We have had magnificent, wonderful legal representations or officers in those roles who have retired or they are simply burnt out—they cannot practice in this area—and they have not unique understanding as well with respect to children who come from those disadvantaged backgrounds as well.

I certainly do think that resourcing for those government departments can be looked at. Whether there also could be particular officers who might have a background within those cultural areas as well will, I think, provide a lot of voice for those victims who feel quite isolated. A lot of them live in regional areas as well. They do find it especially difficult, I suppose, really understanding—these are the direct clients who do not have orders through the Public Trustee. The process is long for them. I found all of them absolutely lovely and kind and just very grateful for their chance to be heard, but if I point to the National Redress form and that forming part of our submissions, that is 44 pages long. It is difficult to read. I know that the National Redress Scheme has worked hard to try and make it a very user-friendly form. But when you are dealing with Indigenous people, children who are 22 or 23—they are young adults—trying to find access to that, print out the form, understand that, and then also then find a way to get legal advice is extremely difficult.

Community legal centres that have people who are experienced to deal with this are far and few between, so navigating that process is certainly a challenge, I have found. The process through criminal injuries compensation as well is a long process. They have to provide, I suppose, a statement or witness statement, a victim impact statement, and some are actually requested by officers of the criminal injuries assessors to give evidence in person if need be. I have not come across that for any of my children clients. There have been colleagues of mine who have had that, but the resourcing that is available in remote areas is, I think, very lacking. Any recommendations that the committee can make towards looking at funding regional and remote areas through their community legal centres would be absolutely welcomed.

Ms CONNOR-STEAD: I do not have any direct experience.

Mr D.J. KELLY: One of the issues that you have addressed is the issue of permanent stays. I have a couple of questions. We know there is a High Court decision around that, but you have offered some suggestions as to what we might do at paragraph 21. In your experience is the issue of permanent stays—the potential—used as a negotiating tactic? Secondly, can you just speak a bit to what your recommendation is at page 21 and, interestingly, your proposal that it be retrospective?

Ms CONNOR-STEAD: I have experienced stays being raised as an issue. Who could say if they are a negotiation tool? But they are raised, and, of course, then we have to, with the way the current law stands, advise our client that even if it at the start of the claim that was not a risk to them, it has become a risk because of the decisions of the court, which talks about a cost risk, which is something that we do warn them about. But it becomes very real for them that they may lose this stay application, which will halt the whole claim in its tracks and leave them potentially liable for costs, so it certainly will change their expectations.

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[11.20 am]

Mr D.J. KELLY: And you have to advise the individual of that potential, even if the other side do not raise it?

Ms CONNOR-STEAD: If it is raised as an issue, we have to advise them.

Mr D.J. KELLY: On the cost issue, even if it is not threatened, because it is a potential, you have to advise the client?

Ms CONNOR-STEAD: Yes, because it is a cost risk, and that will certainly put fear into them and change their expectations and perhaps make them settle their claim.

Mr D.J. KELLY: Is that as far as your recommendation as to how we approach it at paragraph 21?

Mr DROPPERT: In terms of being retrospective, I do not think it can be made retrospective in relation to matters that had already been the subject of stay applications, but it should just apply to claims going forward, even if the claim has occurred in the past. So, retrospective in that sense, but not retrospective in the sense of undoing decisions that have already been made under the law as it was legislated. There are only a handful of them in WA, I think. It is much more contentious on the east coast.

Mr D.J. KELLY: I suppose one thing that occurred to me when I read that was we would pass legislation which allowed deeds to be unpicked if they were entered into at a time when there was a statute of limitations. Is there not some argument that, for deeds that are entered into as the law currently stands where there is the threat of a stay and potential costs, there should be an ability, if there was a legal change, to allow those deeds to be unpicked in the same way? Is that not an option?

Mr DROPPERT: To revisit a stay application, for example?

Mr D.J. KELLY: No, where a stay application may not have been heard and delivered, but the threat of a stay application was a material risk.

Mr DROPPERT: Absolutely it should be retrospective in that sense, but lawyers are always a little reluctant to say that laws should be made retrospective to change the position the parties adopted and applied under laws that Parliaments have legislated in good faith, thinking that that was the appropriate mechanism. There is a bit of general opposition, but in the sense of if there was a way in which legislation could be, in one view, seen as retrospective, but, in effect, ensuring that the appropriate rights or that true justice is obtained for all who have not had their cases determined yet. I think it would be hard to go back behind a settlement that took place in the face of a threat of a stay application because no-one will ever know how that weighed in the calculations and it might be said it is too easy to say, "Well, I only settled for \$300 000 because it was mentioned in passing there may be a stay application, and if that hadn't been a possibility, I would never have settled for \$300 000." The law also requires certainty for claimants but also for defendants. I am now trying to wear a balanced hat.

Mr M.J. FOLKARD: Sorry to go back to Redress issues. We have had allegations of legal firms Redress shopping. It is a problem on the east coast. What are your thoughts in relation to that? I know that they have actually outlawed it over there. What are your thoughts, particularly in regional WA where law firms are travelling out there and drawing in a couple of —

The CHAIR: I think it was more around just going out with a scattergun approach and seeking people to then engage them in the Redress Scheme and get a quick settlement, and then the firm picks up its dollars on the way, but it is not really looking at the clients particularly.

Mr D.J. KELLY: Especially where the service could have been provided by someone for nothing, but the law firm is charging for the Redress application. Have you got any comments on that behaviour?

Ms SCARFF: Obviously, the concern is that there is predatory claims harvesting behaviour. Claims harvesting has been considered not just in this area of law, but in other areas of law as well. In personal injury law in Western Australia, the Insurance Commission are looking at that. We have

certain views about that. I suppose that really comes down to also the education of these remote and regional communities of what actually is available to them. I know that the Office of Criminal Injuries Compensation do roadshows and they go out to some of these Indigenous communities and Torres Strait Islander communities. For any victim, not knowing what to do or where to go is one of the key issues. That is when we look at the community legal centres and we look at what Knowmore does. They are funded through the government for that. Certainly, the ALA absolutely do not stand for any predatory behaviours for claims harvesting of innocent survivor–victims at all. But really looking at what resources are available to help educate the general public and these sorts of survivors and survivor advocacy groups about getting information available to them in these sorts of communities I think is really key.

Mr DROPERT: Can I just draw a distinction around the claims harvesting thing? The point about it is that it is the predatory claims harvesting. If you had a law firm that paid a community organisation a chunk of money so that they could come into the community and sign everybody up and do the sort of thing that Mr Kelly indicated, it is the kind of thing the ALA would condemn. Indeed, in South Australia, they have introduced legislation to control predatory claims harvesting in relation to sexual abuse claims. I know that because one of my last bits of email as immediate past president I saw was an email from the South Australian Parliament inviting ALA to make a submission in relation to proposed terms of reference and so on. It is definitely an issue that is gaining concern, and all I can say is ALA's position in relation to any predatory claims harvesting is to oppose it, to make it illegal—to make it illegal for lawyers to be paid if they are buying claims. What needs to happen, though, is that whenever this space is approached, you do not then stop people who have claims having access to services, and if community legal aid centres are not being properly funded to provide those services, someone has to do it. If a lawyer says, "I'm prepared to drive all around the north west of Western Australia to say if you have a claim, I'm happy to help you", it would be, I think, a retrograde step to say that that should be made illegal.

The CHAIR: We are just about approaching the end of our time.

Ms C.M. TONKIN: I just have a quick one on deeds. We have heard complaints that the deeds drafted by the State Solicitor's Office are often written in a scope that not only settles the matter of the child sexual abuse, but may be expanded to cover other forms of harm and prevent future claims for those. What is your experience in that regard?

Mr DROPERT: I think the answer is, yes, it does happen. We would have thought the requirement for lawyers acting on behalf of the state to adhere to model litigant rules should in fact preclude that. Indeed, if there is any matter that I am involved in, we just refuse to agree to those, with threat of complaining elsewhere, and then that would solve a problem. But me being hard-headed as an individual does not necessarily solve the problem, but, sure, there should be a recommendation from the committee that in matters involving the state where there are deeds of settlement, it should be strictly confined to the matter the subject of the litigation or the specific claim.

Mr M.J. FOLKARD: We have had very much a focus on sexual abuse. Other jurisdictions across the country have also looked at physical abuse as a separate legal cause of action. What are your thoughts on that?

Mr DROPERT: Can I say it is a very important point you raise and it is in the submissions. We think that the fairly narrow definition in Western Australia is one of the most restrictive and it forces judges to say, "If you beat the child and it's part of the sexual abuse, then it is in, but if you just beat the child, it isn't." So, if you beat them naked, it is part of the sexual abuse; if you beat them while they are clothed, it is not. These are artificial distinctions. It is part of a pattern of abuse and it creates the power imbalance that allows the sexual abuse to take place, and although the sexual

abuse is, in a sense, the most horrific and it is the one that calls for the most immediate response—the government did so, and we welcome that—we think it is time to revisit the definition of what it is that is covered by the lifting of the Limitation Act.

I am sorry for holding you up. I know you are due elsewhere very soon. It has been a pleasure and thank you. We wish you well with the rest of your deliberations.

The CHAIR: Thank you for that. Just before you leave, there is an official closing statement as well.

Thank you for your evidence before the committee today. We will forward a transcript of this hearing to you for correction of transcription errors. Any such corrections must be made and the transcript returned within 10 working days from the date of the email attached to the transcript. If the transcript is not returned within this period, it will be deemed to be correct. New material cannot be added via these corrections and the sense of your evidence cannot be altered. Should you wish to provide additional information or elaborate on particular points, please include a supplementary submission for the committee's consideration when you return your corrected transcript of evidence.

Thanks very much. As I said, if there are bright thoughts that come to you, do not hesitate to get back to us with those. Otherwise, it may be that the committee has their own bright thoughts of questions and would send them to you. Otherwise, we are really grateful for your time in appearing here today.

Hearing concluded at 11.31 am
