Historical sexual abuse claims: The problem with Pre-Action Processes

Samuel Sheppard
Lawyer, Judy Courtin Legal

When plaintiffs (victims/survivors of institutional child abuse) pursue a civil claim, it can be challenging. And depending on the state or territory in Australia, clients can be negatively impacted by what are called 'Pre-Action Processes'.

What are Pre-Action Processes?

Certain states in Australia including South Australia and Queensland require Plaintiffs to undertake a Pre-Action Process before they are permitted to commence legal proceedings.

Pre-Action Processes are compulsory procedures setting out a series of steps a Plaintiff must complete before legal proceedings are commenced.

They are not optional.

The rationale behind Pre-Action Processes is understandable. They encourage early resolution of claims, and help keep claims out of the courts, freeing up the court's limited resources. However, in the context of historic sexual abuse claims, Pre-Action Processes unfairly favour Defendants, and are to the detriment of Plaintiffs.

We must remember that plaintiffs, as individuals, are entering a legal process in which the opponent (the defendant) is usually a powerful institution, such as the Catholic church or a state government.

The frailties and limitations inherent in human beings do not apply to institutions. For instance, Plaintiffs in historic sexual abuse claims are often in poor mental and/or physical health.

Plaintiffs also face the issue of time. As they age, time becomes a critical concern. This is also unsurprising, given it can take survivors decades to disclose the sexual abuse they suffered.

Plaintiffs must also contend with the stress of a highly adversarial legal process, often causing a decline in their mental health. Civil claims are inherently stressful for Plaintiffs – their claim is constantly on their mind, they have to remain in frequent contact with their lawyers, and they have to continuously recount their story.

It can take two to three years before the Pre-Action Process reaches the point of a Settlement Conference between the parties.

By this time their coping resources have worn thin. And without any trial date or mediation date fixed, which can only occur when legal proceedings are commenced in court, there is no incentive for institutions to attend Pre-Action Settlement Conferences and put a serious offer on the table.

The result is that Pre-Action Processes impose an additional time burden on Plaintiffs, while often failing to facilitate the fair resolution of civil claims at an early stage in the claims process. Plaintiffs inevitably get lowballed by Defendants at Pre-Action Settlement Conferences. Afterwards, they are faced with the harsh reality of soldiering on and commencing legal proceedings in court. Trial dates may be anywhere from a further one to two years away, and so the legal process drags on for Plaintiffs who are already several years into their claims.

What are we doing about this?

Judy Courtin Legal is making submissions to some governments to address this problem.

Being a model litigant means the legal process should minimise any secondary legal trauma for plaintiffs.

The way things stand at the moment in many jurisdictions is far from the reality.