SHINE LAWYERS

RIGHT WRONG.

Setting aside settlement agreements for past child sexual abuse claims

Submission to the NSW Government,
Department of Communities and Justice
April 2020

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1. Introduction

Shine Lawyers are pleased to provide this submission in response to the Discussion Paper Setting aside settlement agreements for past child sexual abuse.

2. About Shine Lawyers

Shine Lawyers is the third largest specialist plaintiff litigation law firm in Australia. The firm has 680 people spread throughout 44 offices in Australia.

We have a dedicated team of abuse lawyers who specialise in providing legal advice and guidance to survivors of abuse, standing as a voice for clients, and helping them access justice and acknowledgement for the wrongdoing they have suffered.

Shine Lawyers has extensive experience representing survivors seeking redress in every institutional redress scheme in Australia. Shine Lawyers represented clients giving evidence before the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission). The firm has conducted many individual and group actions in processing and negotiating compensation arrangements for survivors of sexual abuse. Significant litigation that the firm has successfully concluded includes:

[redacted] **Group Litigation**

The claim involved some 80 former orphans of the [redacted] operated by the [redacted].

[redacted] **Group Litigation**

This claim involved the successful resolution of claims for some 30 victims of sexual abuse, operated by the [redacted].

[redacted] **Sexual Abuse Litigation**

This action commenced in the Supreme Court of Queensland was on behalf of 75 former students of the [redacted] who were subjected to sexual abuse as children.

[redacted] **Sexual Abuse Group Litigation**

The claim involved some 25 former students of [redacted] who were subjected to sexual abuse during their school years.

[redacted]

This litigation on behalf of a single claimant resulted in the largest award in Australian history for compensation for a victim of sexual abuse, which included the largest award for punitive damages in Australian history.

Australian Defence Force

Shine Lawyers has represented close to 200 current and former members of the Australian Defence Force in relation to abuse they suffered while in the Defence Force, including a large number of former child sailors who were abused at HMAS Leeuwin. Shine Lawyers worked closely with the legal representatives of the Australian Defence Force to develop a collaborative, cost effective and empathetic process which provides compensation, as well as Direct Personal

Responses (apologies and acknowledgement of the harm done). The psychological welfare of the abuse survivor is central to the process.

1. **Should the courts be given the discretion to set aside settlement agreements in relation to historical child abuse claims?**

Prior to the limitation period being lifted on claims for child sexual abuse, survivors were often prevented from accessing compensation for their injuries resulting from abuse. Others were able to secure settlements in circumstances that were less than ideal, many feeling they had no option but to accept settlements for inadequate sums including on advice that the operation of limitation periods prevented the survivor from pursuing claims for adequate damages in court. Where claims were statute barred or where there was no proper defendant to sue as a result of the so called Ellis defence, survivors were in a lesser bargaining position that institutions culpable for abuse.

We represent clients who now, given the passage of time and in light of recent amendments, wish to revisit the settlements they entered into. Courts should be given the discretion to set aside settlement agreements in relation to historical child abuse claims to allow survivors this opportunity. This should not be limited to historic child abuse claims against an institutional defendant.

Shine Lawyers supports the proposal to enact crucial changes to the law to permit survivors of child sexual abuse to set aside settlements entered into prior to limitation periods being lifted. There is no satisfactory reason why survivors of child sexual abuse in NSW should have significantly less access to justice than survivors in other states.

2. **Which definition of 'child abuse' should be used in the proposed reforms:**
    a. **Sexual abuse only (similar to Western Australia)**
    b. **Sexual and physical abuse (similar to 6F(5) or 6H(4) of the Civil Liability Act (NSW))**
    c. **Sexual, physical and other connected abuse (similar to s6A(2) of the Limitation Act (NSW)**
    d. **Some other definition?**

We suggest the broadest definition of child abuse should be adopted to allow the broadest group of survivors who wish to revisit settlements to be able to do so. We suggest the definition in section 6A(2) of the *Limitation Act* NSW including sexual, physical and other connected abuse. The definition should not be limited to historic child abuse claims against an institutional defendant.

3. **Should the courts be given the discretion to set aside:**
    a. **settlements for claims that were statute barred at the time the settlement was entered into;**
    b. **settlements entered into where there was no proper defendant for a claim;**
    c. **settlements entered into in other circumstances that might mean the settlement was unjust or unfair?**

Courts should be given the discretion to set aside settlements for claims that were statute barred at the time the settlement was entered into, where there was no proper defendant for a claim or where the circumstances were otherwise unjust and unfair. Our view is that the broadest group of abuse survivors ought to benefit from the opportunity to set aside past judgments.

4. **Should the courts' discretion be defined by referring to settlement agreements entered into before 1 January 2019? If so, should there be any limitations on this discretion?**

We do not think it is necessary to define 1 January 2019, when the proper defendant reforms came into effect, as the last date on which settlements might be set aside. Instead relevant issues such as whether the [redacted] defence was in force at the time of the settlement will be raised for consideration by the court in the exercise of its discretion.

5. **Which test should the legislation provide for the exercise of the court's discretion to set aside a settlement agreement:**
    a. **'just and reasonable' (Qld, Western Australia and Vic test);**
    b. **'in the interests of justice' (Tas test);**
    c. **'if just to do so' (Contracts Review Act (NSW) test); or**
    d. **some other test?**

Our opinion is that the "just and reasonable" test has been applied appropriately in the states that have adopted it to date so we suggest "just and reasonable" be adopted as part of the NSW reforms.

6. **Should criteria be prescribed that the court must consider in applying the above test? If so, what should these be?**

Rather that prescribing criteria the court must have regard to in applying the "just and reasonable" test, we prefer the courts to be allowed a broad discretion regarding what it considers relevant. We are satisfied the courts will consider and balance the interests of both parties when considering whether to set aside a deed. In due course common law will develop a set of factors to be regarded when considering whether a settlement agreement ought to be set aside.

7. **If a settlement agreement entered into in relation to child abuse and other causes of action does not set out the amount paid with respect to child abuse, should the potential reforms specify what portion of the settlement amount is to be taken into account as a payment for child abuse? Alternatively, should this be left to the courts' discretion?**

Our experience is that it would be very rare for parties to have separated out different causes of action or amounts for specific heads of damage in a settlement agreement. We feel a statutory formula presuming the portion of a prior settlement that was for child abuse for example would likely lead to unfair outcomes. We do not think the potential reforms should specify what portion of the settlement amount is to be taken into account as a payment for child abuse where the settlement agreement itself did not specify. Instead, the amount should be left to the discretion of the courts' to determine and ought to be interpreted beneficially to the claimant.

8. **If the courts are given the discretion to set aside a settlement agreement, should they also have the discretion to set aside orders, judgments, and other contracts or agreements (excluding insurance contracts) giving effect to the set aside settlement agreement?**

We agree that in order to ensure a settlement agreement no longer has any effect once set aside that it is necessary that the courts have the discretion to set aside associated judgments, contracts and agreements.

9. **Are there any other issues that stakeholders have identified in relation to the interaction between the potential reforms and the National Redress Scheme?**

We see no reason a Deed signed after an offer by the National Redress Scheme ought to be treated any differently to other Deeds for the purposes of the reforms.

We have been approached for advice by individuals who have pursued and accepted an application for redress from the NRS but who felt they were under pressure to accept the amount offered. Only after time passed were the applicants able to put the decision into perspective and then regretted the decision to accept redress rather than pursuing civil law options. The time limit imposed on applicant's to the NRS of only 6 months (with the possibility of a further 6 months) puts individuals under pressure to accept when they may not feel psychologically prepared to make such a decision. This pressure is compounded due to the NRS having no external appeal mechanism.

Survivors of abuse who signed a Deed from the NRS ought to have the same opportunity to seek to have a Deed set aside as other survivors. Of course in the exercise of its discretion Courts are unlikely to set aside every Deed for which an application is received after considering and balancing the matters raised by the parties.

11. **Should the potential reforms be limited so that only the person who received payment under a settlement agreement can apply to have the settlement agreement set aside?**

It is appropriate to limit the reforms so that only the person who received payment can apply to have the agreement set aside. We do not consider it appropriate that applications to set aside a Deed be pursued on behalf of a deceased estate for example.

Conclusion

New South Wales lags behind other states in its failure to allow abuse survivors the ability to set aside inadequate settlements which were reached when limitation periods and other hurdles applied to child sexual abuse claims. We support the proposed reforms and look forward to the time survivors in NSW are able to set aside unfair settlements.

We are grateful for the opportunity to provide our views in this submission. In the event you have any questions regarding this submission, please contact [redacted] Head of Specialist Personal Injury at [redacted] or on 13 11 99.