SUBMISSION

to the

DEPARTMENT OF COMMUNITIES AND JUSTICE

in response to the

public consultation discussion paper

SETTING ASIDE SETTLEMENT AGREEMENTS FOR PAST CHILD ABUSE CLAIMS

New South Wales

April 2020

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1. My background

Request for anonymity

I request that the Department please make this submission public so that stakeholders are able to read the contents, provide responses, whether in agreement or disagreement, such that it may contribute to democratic debate on the proposed reforms; however, I ask the Department to redact all identifying personal details (eg, name, age, occupation) to respect my privacy and also to comply with relevant privacy legislation including:

- section 578A of the *Crimes Act 1900* (NSW)

My reasons for requesting anonymity is simply because I would like for my life to be defined by what I achieve as an adult, not by what was done to me as a child without my consent. I accept full accountability for the contents of my submission and am available to give direct testimony to the Department about any matter raised in this submission.

Any person reading this submission who knows me or is able to identify me from its contents is hereby reminded of their obligations under law including:

> Section 578A of the *Crimes Act 1900* (NSW):
>
> Prohibits publication (including dissemination by **any** electronic means) of **any matter** which is likely to lead to my identification.
>
> An offence is punishable by 6 months imprisonment.

My experience with this issue

My name is [redacted], I am [redacted] years old and a qualified [redacted]. I am a survivor of sexual abuse in an institution. The offender had a known background of offending including criminal prosecution prior to the offences perpetrated against me. The institution eventually admitted knowing that I had been one the offender's victims. The institution initially took various measures to cover up the fact of the abuse and the extent of the abuser's offending including by publicly praising the offender despite knowing of his offences, and also promoting and rewarding senior leaders who concealed abuse. The matter was subject to a Royal Commission Case Study and various adverse findings were made against senior leaders and the institution.

When I first came forward to the institution as an adult seeking help, they did not offer any health care, despite being in receipt of professional medical advice that the victims should be offered health care and that victims risked significant health consequences if left untreated. I was left to fend for myself as best I could. When, despite my best efforts, my symptoms eventually caused me to lose employment I again approached the institution for assistance, such as accessing health care and getting back on my feet and back to work. They responded with lawyers. They admitted that the abuse had occurred but they invoked the 'time limits defence' telling me I was 'out of time' and therefore had no right to pursue justice.

In the context of having no legal right to pursue recovery of actual damages – for example, the cost of health care, the cost of lost income – I was railroaded into a settlement that constituted less than 10% of actual provable financial losses. Because of the institution's behaviour in tolerating child abusers, concealing 'scandal' and rewarding staff who protect the brand at all costs, and because of the unjust time limits laws (which were upheld by the Parliament for so many decades) the institution successfully evaded 90% of its proper liability.

Who continues to carry the burden of that 90%? Me. I ask the Department and other stakeholders reading this submission (including all of the lawyers) to please consider if you had health care costs and lost income as a result of abuse and now imagine taking 90% of that and giving it to the institution who knowingly caused you to be abused. Does that feel like a fair go?

So, I understand fully the impact of the time limits legislation, the dynamic of abuse and natural delays to reporting, the knowingly corrupt behaviour of institutions in concealing offending, denying matters that they in fact know to be true, destroying or concealing evidence in many cases, and placing finances and reputation ahead of the lives of children and vulnerable adults.

Also please do not lose sight of the fact that the time limits defence was created by the Parliament and was allowed to be perpetuated for decades by the Parliament – the Parliament made this injustice possible and so the Parliament bears the responsibility for correcting the injustice wrought by its unjust legislation. This is not a matter of legislation needing to be changed only because times and social values have changed. It is not a matter where the time limits defence was once appropriate but now is not due to changing social values. No – the Royal Commission reported that the time limits defence was *always* unjust and *always* operated unjustly even when it was first created and the Royal Commission have reported that it should never have existed, which is why they recommended it be removed with retrospective effect.

Consultation with key stakeholders

This submission is informed by consultation over a number of years with a wide range of stakeholders including:

- Government departments
- Statutory authorities
- Professional associations
- Religious institutions and affiliated bodies (various denominations)
- Child protection organisations
- Survivors of child abuse
- The Royal Commission into Institutional Responses to Child Sexual Abuse
- Senior legal professionals

As well as review of a wide range of relevant documents, including:

- Royal Commission Case Study reports and evidence
- The Reports of Church Inquiries and Government Inquiries into child abuse
- Government departmental policies
- NSW legislation – existing and previous including Explanatory Notes
- Legislation of other Commonwealth jurisdictions
- Australian Institute of Criminology papers
- Law Society reports
- Medical, psychological and scientific literature
- Church Canon and policy regarding canonical offences by clergy
- Church sex offender re-integration policies
- Church risk management policies
- Church protocols for responding to allegations of child abuse
- Victim impact statements
- Submissions to Parliamentary Committees

I have supported a number of survivors through various stages of interacting with their offending institution, and have seen the pattern of behaviour by offending institutions. I am pleased to be able to report that I have observed some very early signs of very recently reformed behaviour by a small minority of institutions, which is cause for cautious optimism that there is, in some quarters, a genuine understanding of the harm the institution has perpetrated.

However, unfortunately, I observe that this is usually only witnessed when in the context of a clear legal framework creating institutional responsibilities. Without such legal framework, I have observed that far too many institutions continue to retreat to legalistic tactics and loopholes and still use their asymmetry of power against the victim and are motivated by insurance concerns. A robust legal framework is necessary if only for the purpose of instructing the institution on the minimum behaviour expected of them by the community. A robust legal framework will also potentially preserve an institution's access to insurance when treating victims fairly.

Conflict of interest statement

The information and opinions put forward in this submission are given freely and are to support the rights of victims of abuse in New South Wales who do not currently hold the same rights as victims of abuse in other Australian jurisdictions.

I do not stand to benefit in any way from the proposed reforms as described by the Discussion Paper if they are implemented in New South Wales. In my personal case, I am not affected by whether or not New South Wales passes appropriate legislation to set aside past unjust settlements.

This is because the abuse against me was perpetrated in a jurisdiction where the legislation has already been passed, and as a consequence I have negotiated with the institution to undertake an evidence-based assessment of full compensatory damages.

That is the true power and the value of legislation allowing past unjust settlements to be set aside – it is not the number of court cases that might result, but is the number of court cases avoided because institutions act more fairly by participating in the evidence-based assessment of full compensatory damages that should have occurred in the first place, but did not due to the time limits defence or other misconduct of the institution. With these reforms in place, institutions know that if they do not act more fairly towards survivors, then a court case may likely result.

The information in this submission is given for the benefit of all New South Wales stakeholders and is given freely and without self-interest.

2. General background to the issue

The proposed law reform would create a provision to allow victims / survivors who have been locked into unfair past settlements (as a result of inappropriate legal defences or other misconduct by institutions) to have an avenue to have those past settlements set aside. This is consistent with similar legislation rolling out in other States and Territories across Australia. The result of setting aside an unjust past settlement will simply be that the institution and survivor then participate in a proper evidence-based assessment of damages. This is simply what should have occurred the first time but did not, due to the conduct of the institution at the time.

The proposed law reform is essential for New South Wales' compliance with the important reforms recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse, in particular ensuring access to justice for victims and survivors of institutional abuse. The Royal Commission recommended that barriers to civil litigation and *all* time limits be removed *before* commencement of the National Redress Scheme. This has not yet been done in NSW.

Similar legislation is now in place in the majority of jurisdictions in Australia and has been in place in some jurisdictions for three years now. It has not resulted in a 'flood of litigation' in those jurisdictions. It is safe and sensible legislation. The effect of the legislation in the jurisdictions where it already exists has simply been that institutions have been motivated to negotiate more fairly and reasonably with survivors in renegotiating those past unfair settlements, knowing that the survivors otherwise have a legal right of recourse to the courts. This is simply as it should be.

How should reparations for survivors of abuse be properly calculated?

It should be based on evidence. For example, doctors submit a report as to the survivor's diagnosis, prognosis and recommended treatment plan. This gives an indication of the health care costs the survivor faces. As well, the survivor can submit evidence regarding loss of earnings.

When a child is abused it usually causes interruption to their schooling and education – quite simply, it is difficult for a child to focus on academic learning when the child is focused on trying to avoid or to survive the next assault. Therefore, child abuse may often lead to under-education and subsequent under-employment, with the obvious associated economic loss. There are long-established routine methods for calculating these amounts on the evidence.

When the evidence has been gathered, and the institution has had the opportunity to consider and respond to the evidence, then the quantum of the survivor's actually real losses is known – ie the amount that the survivor has actually lost over time due to under-employment, and the amount the survivor has had to spend on health care/treatment for their injuries and some other areas of damages where applicable. This is the amount of reparations that is fair and reasonable that the victim/survivor should receive.

How were reparations calculated by institutions hiding behind the time-limits defence?

Randomly, with no consideration of the evidence, and in a context of intimidating the victim.

Institutions usually ignored any semblance of an evidence-based process, simply telling victims they were "out of time" and therefore by law were denied the right to undertake any process of having their evidence properly tested or of properly calculating fair reparations.

Institutions made up numbers that had no basis in reality, they were low numbers, and they were presented to victims on a 'take it or leave it' basis. Worse still, institutions subjected victims to significant duress by threatening that if the victim did not accept the offer, the institution would pursue the victim for the institutions' legal costs, often claimed to be in the many tens of thousands of dollars, and many times more than the reparations offered.

This is, and always was, reprehensible conduct by institutional leaders, betraying the core values of their institution. It was an organisational double standard that has, quite rightly, shocked most grassroots members of the institutions to learn what their leadership has been perpetrating in the name of the institution.

It is time to put an end to that reprehensible conduct and it is time to replace it with moral conduct; conduct consistent with the stated values of the institutions, and conduct consistent with community expectations. IE fair reparations based on a proper assessment of the evidence.

Didn't we already deal with this issue in NSW a couple of years ago?

No, not yet. The NSW Government, to their credit, have removed the time limits defence from the statute books for cases resulting from child abuse. That reform means that any victim or survivor coming forward, *who has not previously come forward*, now has the right to access justice, to have their evidence properly tested and to participate in an evidence based process of calculating fair and accurate reparations; and not be told "you're out of time".

However, that reform did not address the issue of the victims of abuse who reported their abuse and sought justice, only to have the time limits defence used against them by institutions and were then bullied into unfair settlements. Without legislation such as that proposed by this current potential law reform, those survivors will remain forever trapped in those inappropriate and unjust settlements – forever trapped by the time limits defence that the Royal Commission found to have always been an injustice and has said should be abolished.

Is setting aside past unjust settlements consistent with Royal Commission recommendations?

Yes.

Recommendation 85 of the Royal Commission's *Redress and Civil Litigation Report* states:

> *"…governments should introduce legislation to remove **any** limitation period…. [relating to child abuse]"*

Without the law reform proposed by the Discussion Paper, the limitation period in NSW has not yet been removed from the cohort of victims who remain cruelly locked into past unjust settlements. Those settlements are the fruit of the poisoned tree. The Royal Commission has said that ***any*** limitation period be removed.

Recommendation 86 further states:

> *"…governments should ensure that the limitation period is removed with **retrospective** effect…"*

While survivors remain cruelly locked into a **past** unjust settlement (those settlements being the poisoned fruit resulting from the inappropriate use of the time limits defence and not being based on any genuine assessment of the evidence as to what would be fair reparations in each case) then the removal of time limits has not had the requisite retrospective effect.

The law reform proposed by the Discussion Paper is essential for compliance with Royal Commission recommendations and plugs the accidental gap created by the existing recent reforms.

How does the proposed law reform fit with the National Redress Scheme?

The Royal Commission has always been very clear in its intent that the delivery of justice relies on governments and institutions providing two parallel pathways: one is the National Redress Scheme (NRS) and the other is removal of unfair obstacles to seeking evidence-based full compensatory damages. Survivors then determine which pathway is right for them.

By its own terminology, the NRS does not pay *compensation* for the abuse, it pays a 'recognition payment'. The NRS openly states that the payment in no way takes the role of being compensation or reparations (although it requires any person accepting a 'recognition payment' to waive their legal rights to pursue full compensatory damages).

The NRS was established to provide a less stressful pathway for those survivors for whom seeking full compensatory damages may not be a viable option. For example, some survivors may today struggle to produce the requisite evidence to pursue full compensatory damages. This is through no fault of the survivor but is a consequence in many instances of such things as the passage of time since the abuse, as well as the conduct of institutions, such as institutions changing name or structure, institutions destroying records, and even a consequence of the pathology of the abuse.

But for survivors who do have the capacity to submit evidence seeking full compensatory damages, the Royal Commission is clear that governments and institutions must clear the path of all inappropriate obstacles (such as time limits defences, denying liability, etc).

The Royal Commission's position has always been clearly expressed that the delivery of justice demands that both pathways be implemented simultaneously. This is to avoid the situation where victims/survivors get inappropriately 'rail-roaded' into participating in the NRS simply because they have no effective legal alternative.

Such a scenario could threaten the legitimacy of the NRS, such as by the NRS losing public confidence or the NRS being subject to legal challenge, such as being invalid due to duress. It is in the best interest of all stakeholders – survivors, governments, institutions and the community – that the proposed law reform be implemented and the integrity of the NRS be maintained by providing survivors with genuine and legitimate alternatives, free from duress.

In fact, the Royal Commission specifically state, at Recommendation 46, that the NRS should not commence until *after* the reforms on time limits and duty of institutions (recommendations 85 – 95) have been implemented:

> *"Those who operate the redress scheme should specify the [commencement] date as being the date on which the Royal Commission's recommended reforms to civil litigation in relation to limitation periods and the duty of institutions commence"*

However, the NRS has already commenced operation in New South Wales and yet these reforms (removal of time limits for all victims) are not yet fully implemented.

This is not the NSW Government's fault, it is simply a (probably unavoidable) consequence of the difficulty in coordinating the timing of the implementation of State reforms with the timing of the Federal Government's implementation of a scheme as complex as the NRS. The NSW Government are, quite rightly, taking time to review and consider all of the issues in constructing any potential legislation, because it is important to get it right.

The NSW Government are to be commended for their diligent approach to this question and for the Discussion Paper.

3. Responses to Discussion Paper questions

The answer to all of these questions can be determined by referring back to the intent of the proposed legislation, which is to create equality of access to justice for all survivors of child abuse.

The wrong that is intended to be remedied by any proposed legislation is that victims of abuse were denied full compensatory damages as a result of the conduct of institutions, and / or unjust laws (the statutory time limits defence). The intended outcome of any proposed legislation is that any victim who has been denied access to full compensatory damages, for example by being trapped in an unjust past settlement, now has access to full compensatory damages, based on a proper examination of the evidence.

Ultimately this is all victims have ever asked for – the right to have their evidence of damages properly tested, rather than being unfairly blocked from that evidence being tested.

The proposed legislation should ensure that a past unjust settlement is set aside for the purpose of allowing an examination of the evidence for full compensatory damages. So the answer to any of the following twelve questions, and the answer to any further questions that arise, is:

> "whatever allows a past unjust settlement to be set aside for the purpose of allowing an examination of the evidence of full compensatory damages"

The only relevant question for the court should be: 'was the original settlement that victim's full compensatory damages, yes or no?'. If yes, then the settlement was fair and should not be set aside. If no, then the settlement was not fair, *for whatever reason* , and should be set aside to allow full compensatory damages to be determined and then paid.

This does create a sort of 'horse and cart' situation where the assessment of damages is required to be done, at least to some preliminary or *prima facie* standard, to be able to make that assessment – but there is nothing wrong with that being the process.

There is nothing wrong with a process whereby the court makes a preliminary *prima facie* assessment about whether or not it is available for a court to find that the original settlement is likely to be found to be less than full compensatory damages, for the purposes of deciding to set aside the settlement and allowing the full examination of the evidence to then occur.

This is not a new concept and in fact it mirrors a longstanding court process that already exists in criminal law – the committal process. A *prima facie* assessment is made that *it is possible for a subsequent court to convict* and on that basis a matter is allowed to proceed to the next step. Everyone understands that a committal in no way constitutes the trial proper. But the *prima facie* assessment allows the next stage, the full examination of the evidence, to occur.

When that intent – that survivors be given the right to have their evidence properly tested – is remembered, the answer to the Discussion Paper questions becomes much clearer.

Q1. Should the courts be given the discretion to set aside settlement agreements in relation to historical child abuse claims?

YES. Actually, it should be automatic upon application and not even at the *discretion* of the court! If a court is to be given discretion, the legislation should specify a very low bar in favour of setting aside the settlement as it needs to be very clear to the court that the intent and purpose of the legislation is that an entrenched injustice now be ended – the purpose is NOT preserving the legal status of 'settlement deeds' or preserving crusty outdated instruments that perpetuate injustice.

The legislation should make clear that the default position of the court should be:

- a settlement is almost automatically overturned on application
- refusing an application should be the rare exception, not the norm
- refusing an application should only occur where the institution can show some *significant and overwhelming reasons specific to that case*

It should be remembered that we are talking about cases in which institutions are not simply 'vicariously liable', ie somehow ignorant of the aberrant conduct of their employee – we are talking about cases in which the institution was an *active participant* in concealing crimes, was *actively complicit* in protecting offenders, destroying evidence and silencing and marginalising victims. Through their proven misconduct such institutions have forgone any claim to be entitled to relief from the Court or the Parliament in terms of resolving this particular cohort of injustices.

The burden of proof should be on the institution to prove that it would *not* be in the interest of justice to set aside the agreement in a particular case – the burden of proof should not be on the applicant to prove that the application should be set aside. After all, setting it aside is simply to facilitate an examination of the evidence of damages, something that should have been done in the first place but never was due to the exploitation of the time-limits loophole and other misconduct by institutions. This approach would be consistent with the 'reverse onus of proof' already applied in the legislation in NSW relating to duties of institutions.

The safeguard against the situation whereby victims who did receive a fair settlement might seek to overturn their settlements is that this would be obviously futile for them in the long run – the examination of the evidence would clearly reveal that the original settlement had been fair and there was no further damages owed. Their legal representation would of course conduct a preliminary assessment of likely damages *before* undertaking the application process.

The wider safeguards for other deeds in the law (ie deeds other than deeds of settlement relating to child abuse) is that the proposed measures are very narrowly focused, in relation to a very specific, well described category of deeds and will clearly not apply to all deeds of settlement at law. This ensures there is no risk of overreach – in fact any risk of overreach might be more likely to exist if these provisions are *not* provided by statutory law and instead it is left to common law to resolve, and a child abuse deed is overturned in such a way that it impacts all deeds more broadly. Therefore statutory provision is the safe and sensible approach.

Q2. 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?

All forms of abuse should be covered by the definition.

Ideally, the legislation should be consistent and interoperable with other existing NSW legislation (noting the unfortunate slight inconsistency that already exists between the CLA and the LA).

For example the legislation should be clear to cover:

- Sexual abuse
- Physical (or serious physical) abuse
- Psychological (or serious psychological) abuse
- Connected or associated abuse

Given the intent of the legislation is to provide equal access to justice for survivors of institutional abuse by providing proper access to full compensatory damages, the definition of abuse should err on the side of creating equality and inclusion rather than inequality or exclusion.

If there are concerns about unintended overreach such as use of the legislation in cases not intended by the legislators to be covered, qualifying terms such as 'serious' can be applied to physical abuse and left to the common law to determine on the facts in each case.

Similarly, psychological might be qualified by 'serious' or restricted to psychological abuse where it is connected with sexual or physical abuse for the same reasons and in the same way.

However for those stakeholders concerned about overreach, or 'vexatious' claims, it should be remembered that there is an inbuilt safeguard already which is that the law already requires any harm or injury to be above a certain threshold of gravity or causative of a certain level of injury or certain magnitude of loss for there to be a right of action in the first place. So there are already existing safeguards preventing against 'vexatious' or 'trivial' claims. The definition of abuse does not need to be restricted in an attempt to prevent overreach. Claimants will still have to prove their case including proving injury and damages. The proposed reform simply gives claimants the opportunity for their evidence to be tested. This should be sufficient safeguard against overreach.

Legislators should be cautious about being too draconian in restricting application of these reforms to too narrow a group of survivors, and instead should trust in the application of the laws on a case by case basis to resolve any issues that may arise in relation to 'marginal' cases.

Q3. 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?

Yes to all three (noting previous comments that the legislation should be clear that the court's threshold should be a very low bar in favour of approving an application in all but the most exceptional of cases).

3(c) is particularly relevant as 'statute barred' is not the only circumstance in which injustice caused a forced settlement. There were also factors that informed judgements and settlements such as judges and lawyers being ignorant of material facts relating to the dynamic of abuse and the impact of child abuse when making their arguments and determinations. This has resulted in determinations which were favourable to the dry legal argument of institutions and out of touch with the lived reality of victims, or the recognised medical evidence. Courts, mediators and lawyers for both sides often relied on incorrect assumptions (based on no medical evidence) about how a child is expected to react to abuse, what a child is expected to do, or what the effect abuse has when a person reaches adulthood, etc.

The Royal Commission has ruled that there is no such thing as a 'normal' reaction to abuse, and that many and varied reactions have been observed and all are legitimate. Survivors trapped in past unjust settlements as a result of such misconceptions should have their evidence re-examined.

Again, when in doubt, legislators should err on the side of ensuring the legislation is *inclusive* and provides *equality of access to justice*, rather than seeking to make it more divisive or further bar access to justice – remembering that all the legislation will be doing is removing the barrier to *evidence being tested*. The proposed reform will simply be allowing evidence to be properly tested, nothing more scary than that.

There are numerous Supreme Court rulings in various jurisdictions in relation to applications to stay proceedings which rule that stays should be the exception on the grounds that they deprive evidence from being properly tested by the Court, and there should be a very high bar set for any party who seeks to obstruct evidence from being tested by the Court,. A similar approach should be taken to victims who have been trapped by time limits and deeds of settlement from having their evidence properly tested – the principle of the legislators and the Court should be to always err on the side of evidence being allowed to be tested as the default position, when in doubt.

Another example of 3(c) other than 'statute barred' is the conduct of the institution. There are cases of misconduct by institutions such as willful concealment or destruction of evidence, interfering with witnesses, etc. All of those factors, not just the 'time limits defence' should be available to the Court (as the Tasmanian legislation directs) and be relevant grounds to set aside the past unjust settlement for the purpose of allowing an examination of the evidence to determine what should be full compensatory damages.

Q4. 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?

The discretion should not be restricted to before 1 January 2019. This is because the purpose of the legislation is to create equity and inclusion, and any restriction fails to do this by definition.

Similarly there should be no limitations on the courts discretion with regards *allowing* an application, noting also the recommendations in response to the previous questions.

While it may well be accurate to hope that it might be rare for an unjust settlement to occur after the removal of time limits, on the basis that without the time limits loophole to hide behind, institutions are not able to block a victim's evidence from being properly tested, the sad fact is that there remain other potential scenarios to cause a settlement to be unjust.

For example, misconduct by the institution (destruction of evidence, withholding of evidence, interfering with witnesses, etc) and abuse of process or other legal tactics. If the basis for setting aside a settlement is not restricted to injustices caused only by the removal of time limits then the legislation should allow for those other instances. The likely reality is that most cases will be those that resulted from the imposition of unjust time limits.

If legislators prefer a hard date for the purpose of providing legal certainty surrounding subsequent deeds, then the date of the commencement of this legislation would be the more appropriate date.

But why would any legislator, acting reasonably, argue that it is any sort of desirable outcome to create legal certainty by locking in *unjust* settlements where for example a powerful institution forces a traumatised victim to enter a settlement by concealing evidence from the process, and that evidence is then uncovered years later – why would we think it serves justice to benefit the wrong doer by preserving their wrongfully obtained settlement and bar the victim from having that settlement properly revisited?

Why and how does that create legal certainty or a justice worth preserving? It would simply send the message to institutions – 'conceal evidence and get a settlement locked in and you've gotten away with it, even if the evidence is uncovered later the settlement will remain ironclad, you've gotten away with your crime!' I don't think that is the message the community wants to send to institutions in whom the community places our trust, substantial funding, and our children.

A better message would be – 'do the right thing the first time, because if not and you are caught later the penalty will be even worse!' That would drive more honest conduct.

There is precedent for this in other areas of law whereby judgements and jury verdicts can be later overturned on the presentation of newly obtained evidence, including evidence that had been concealed by the wrong-doer. In jurisdictions even acquittals for murder can be overturned if new evidence of guilt is later discovered. So why would society choose to trap victims of child abuse

in unjust settlements that only exist due to the institution concealing evidence, for the sake of 'legal certainty'?

There should be no limits on the discretion of the court in terms of the grounds for *approving* an application. Any matter should be available to be *considered* and then either accepted or rejected by the court. Justice is best served by allowing arguments and evidence to be put before the court.

There should, however, be appropriate limitations on the court's discretion to *refuse* an application to ensure the courts discretion is default exercised in favour of the applicant with a very high bar for the institution to overcome to seek to oppose an application, for the reasons stated in answer to earlier questions. How can such imbalance be justified? The answer is because this is a unique, temporary and narrowly distributed problem which requires and deserves a unique, temporary and narrowly distributed solution as the necessary remedy.

Refused applications should be the exception not the norm and in each case the institution should have been required to prove that the original damages were fair on the basis of *already being that person's full compensatory damages*. That really is the ultimate and only question, regardless of reason and other factors: 'was the original settlement quantum that person's full compensatory damages, yes or no?'

That central question must remain the central and key question for the court in deciding to overturn a past unjust settlement particularly when any particular case becomes distracted and complicated with various legal arguments about other points of law that threaten to distract the court's focus from the true issue at hand – was the past settlement the person's true damages or was it a mere percentage, for any reason?

Q5. 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?

Ideally New South Wales would create its own test, one that focuses on the question of whether or not the original settlement, *prima facie,* was equal to the victim's genuine full compensatory damages. If not, the application should be granted to set the past unjust settlement aside and allow a proper evidence based assessment of full compensatory damages.

The concern is that, if a court gives equal consideration to what is 'just and reasonable' to both parties – victim and institution – this is likely to lead to the institution relying on dry legal argument about esoteric points of law once again at the expense of the purpose of the legislation which is to right a wrong.

For example, it is predictable that institutions will argue such lines as overturning a settlement being not 'fair or reasonable' or not 'just to do so' to the institution, on the grounds that it may cause some prejudice by the passage of time. However this overlooks that the institution is the cause of the passage of time, by being the perpetrator of the abuse, by lying about the abuse for many years delaying investigation, by concealing evidence or even destroying evidence, by moving offenders from parish to parish, and by imposing the unjust past settlement to begin with.

The institution who behaves in such a way to delay justice should not then be rewarded for that conduct by being granted a judgement that 'the passage of time' makes overturning an application 'not in the interest of justice' to the institution. That is simply saying to institutions "if you can get away with it for long enough, you get away with it forever" which is not a sound basis for setting the moral standards expected of our institutions.

Of all the definitions legislated to date, the Tasmanian is the superior as it is most open to be interpreted as more than a comparative assessment of what is 'just and reasonable' for the applicant versus what is 'just and reasonable' for the institution, but also introduces this consideration of the third entity, the community, who demand and deserve justice in this unique situation of institutional child abuse – obviously the victim deserves in 2020 the justice they always deserved but were, up to this point, denied, and any legal process that delivers anything other than this outcome is an unjust process. The Tasmanian legislation potentially provides for that higher analysis of what is 'in the interest of justice' and should be read in the context of the Tasmanian legislation also providing examples to the court of what to consider (giving clearer directions to the court than the legislation in other jurisdictions).

Ultimately New South Wales has an opportunity to be the best at this and present best possible legislation including the most clear direction to the court that applicant and institution are *not* equal parties in these matters, that this is a *unique situation* of a longstanding injustice borne of the

asymmetrical power imbalance between institution and victim, compounded by unhealthy legal loopholes only recently closed, and that *a unique problem deserves a unique solution*, namely that the court is almost directed that applications be granted provided the applicant can show *prima facie* that the original settlement was not anywhere close to full compensatory damages.

The legislation needs to make clear to the court that any application decision is expected to be weighted in favour of the applicant and that considerations relating to 'fair and reasonable' are not to be equally weighted between applicant and institution, due to considerations such as the power imbalance between the parties, the past misconduct of the institution, the vulnerability of the applicant at the time of the original settlement, etc, without completely removing the consideration of what is fair and reasonable towards the institution (for example preserving the ability of the court to reject an application only where it is apparent on a *prima facie* assessment that the original settlement was likely close to full compensatory damages).

Let us take a look at the fallibility of the "just and reasonable" test as played out in the only court case so far in Queensland. In that jurisdiction there has been the one application, rejected, and currently under appeal. The appeal hearing has been held and appeal judgment is pending.

The just and reasonable test in that jurisdiction in that judgement has been too narrowly and too poorly defined and applied and the court's determination in that application has not delivered the outcome of righting the past wrong. The only just outcome would have been for the application to be approved and the victim's full compensatory damages assessed on the evidence.

To highlight the injustice arising from that judgement, at the institution in question there were multiple victims of the same offender, abused in similar ways. Some of those victims brought actions and were subjected to the injustice of the time limits defence and trapped in settlements far below their full compensatory damages. By contrast other victims did not commence actions, for various reasons. They now have a full right of action and are now able to pursue full compensatory damages. The damages being currently provided by the institution (on the evidence) to victims coming forward with a full right of action are many multiples of the damages awarded to the victims who remain trapped in past unjust settlements.

The only question for the Queensland court should have been – if the applicant were to come forward today, with a full right of action and not trapped in an unjust settlement, what would their full compensatory damages be?

Is it justice that a victim was forced into a settlement a mere fraction of their true damages, the damages being heavily discounted for reasons of dry legal argument, abuse of process and tricky maneuvering by lawyers? Is it justice that another child abused at the same time by the same offender but who did not take legal action, is now able to pursue their full compensatory damages (as well they should) but the original victim is not?

The court judgement in Queensland has failed to deliver justice, whether by failure of the judge to give appropriate weight to the appropriate considerations, or whether by failure of the Parliament to more clearly instruct the court through the legislation as to what the community expects of the judge.

I note also that it has been suggested in some quarters that the judge in that application has materially erred by regarding the applicant as having a weak case on liability in the original proceedings, when in fact the applicant had a strong case on liability, because there were two highly credible witnesses proving direct liability – namely that the institution had known the offender was abusing children prior to the abuse perpetrated on the applicant – and also regarding vicarious liability, as there had actually been a prominent Queensland case at the time of the original proceedings and prior to settlement, that case determining vicarious liability to an institution for child abuse in comparable circumstances as the applicant's.

New South Wales should embrace a criteria that ensures it does not see a repeat of the court judgement in Queensland, and ensures simple and predictable assessments of applications on the fair basis of whether or not the original settlement was reflective of true evidence-based full compensatory damages as would be available to the victim if assessed today for the first time.

This is a matter of overturning an injustice perpetrated by the institutions. They should not be equal parties to the 'just and reasonable' test as they were not equal parties in the abuse, they were not equal parties in the cover up of the abuse, and they were not equal parties in the use of legal tactics and the asymmetry of power to extract the original unfair settlement in the first place.

The focus of the court should be on allowing evidence to be tested and removing whatever barrier to that occurring. As previously stated, this is consistent with various existing judgements on the question of applications to stay proceedings where various judgements find that it is fundamental to justice that evidence be allowed to be tested and that evidence not be kept from being tested in any but the most extreme cases.

It is an entirely consistent principle here that victims are only seeking the right for the evidence of their damages to be allowed to be properly tested, rather than continue to be concealed from the court, which is what the institutions are seeking and perpetuating when raising a deed of release as a bar to an action.

There is no prejudice to institutions in allowing evidence to finally be properly tested.

Remember that in all cases the institution has accepted that the child was abused. That is not contested, by virtue of the acceptance of their initial claim and payment of the original settlement.

We are talking about children who the institution already knows it has abused. The facts of that abuse do not need to be determined by the court, as those facts are not in question. Only the facts of the injuries (medical evidence) and resultant damages are required to be assessed and this is all that victims are seeking.

Thusly there will be no prejudice to the institution such as by the passage of time.

The fact of the abuse does not need to be established, as it is already accepted, so there is no prejudice to the institution caused by any loss of evidence or witnesses by the passage of time, as to the fact of the abuse having occurred.

Similarly, there is no prejudice in most cases with regards proving the liability of the institution as liability does not need to be established, as institutions are almost certainly vicariously liable as per the High Court test in most cases, or can be assumed liable by virtue of having paid a past settlement already (acknowledging that most deeds of release will include a denial of liability, but that is simply more legal dishonesty by the institution – if they were not liable, why did they pay a settlement in the first place? They cannot have it both ways). So there is no prejudice caused by the loss of evidence or witnesses as to liability, as it is now accepted that the institutions are liable vicariously in any event.

That leaves only questions of causality, injury and loss all matters which turn on currently available evidence including medical evidence and financial evidence none of which is effected adversely by the passage of time.

The medical evidence is available to be cross examined as it is current and is not lost or deteriorated by the passage of time. The victim can be assessed by a forensic medical assessor and both the victim and any expert are available to be assessed by the Court. So there is no prejudice.

Similarly, the financial evidence such as earnings and lost earnings is not deteriorated by the passage of time – if anything the evidence is superior to the evidence that would have been available had the matter been tried 20 years earlier, This is because a matter tried early in a plaintiff's life must rely on a large amount of hypothesis by the court as to future losses, whereas a matter tried later in a plaintiff's life can provide the actual recorded and documented fact of the earnings and losses with far less reliance on hypothesis.

So all cases by default, should be reopened immediately upon application because we are talking about cases where there is no doubt that the person was abused, that is not contested by the institution and there is no doubt as to liability (the institution is either directly liable or in any event is vicariously liable) and the only issues therefore is the proper assessment of the evidence of injury and damages which is available to be conducted thoroughly and accurately.

It is only ever in the interest of justice that such evidence be properly assessed. The assessment is not overly burdensome to the institution as it really only requires a couple of expert forensic assessments such as a medical assessment and possible accountant assessment.

The examination of the evidence does not even need to be conducted in an expensive trial setting in every case. Most cases could be resolved by mutual cooperation of the victim and the institution, acting reasonably, on the basis of suitably qualified legal review of 'the damages that a court would award' based on the evidence. Trial can be left for the few cases where agreement was still not possible.

Morally the institution (who caused the abuse) should pay for those forensic assessments but where there is dispute about this the victim / their lawyer can cover the cost of this with a view to recovering those costs from the institution as part of being reparated their fairer full compensatory damages (minus the initial settlement amount adjusted for inflation).

Q6. Should criteria be prescribed that the court must consider in applying the above test? If so, what should these be?

Yes, with the emphasis being on matters that the court must consider when raised by the applicant and matters the court must ignore when raised by the institution. While this may sound unfair in fact it is to prevent perpetuation of unfairness, as previously described.

Any criteria should be written in such a way as to not narrow or limit what a court can take into consideration on behalf of the application when raised by the applicant. Also, criteria may appropriately limit what the court may consider in regards to institution's representations.

The experience to date in the Queensland court case (noting that case to be under appeal at time of this submission) shows the necessity for legislation to provide clear directions to the court so that the court does not apply the legislation inconsistently to the Parliament's intent. The Queensland case shows what can go wrong when the legislation fails to clearly direct the Court that the Parliament's intent is that every survivor should have access to full compensatory damages.

It is my understanding that this was partly the motivation for the Tasmanian Parliament in offering the clear directions in their legislation, to prevent the misapplication of the Parliament's intent as appears to have occurred in the Queensland court case.

So there is a role for criteria – to prevent narrowing by the court of the Parliament's intent.

Any criteria should be broad and with a view to it being clear that the expectation upon the Court is that an application will be approved in all but the rarest of cases and that the burden of proof is upon the institution to prove why an application should not be approved, and that the reason shall be essentially restricted to proving that the original settlement was equal to the person's full compensatory damages.

Given the intent of the law reform is that evidence should be allowed to be properly tested (and not continue to be concealed by institutions) it is consistent that there should be a broad scope given to the sort of evidence the applicant is allowed to present to the court.

As previously repeated, ultimately the only question should simply be: 'do the original damages closely represent the victims full compensatory damages, yes or no?'. If yes, then the application should likely not be approved as the past settlement would be unlikely to be unfair. If no, then the application should be approved as the past settlement is most likely unfair.

The legislation should clearly specify that the definition of 'fair' and 'unfair' should turn solely on the question of whether or not the victim received full compensatory damages and this determination should be above and before consideration of any other matter such as the question of 'why' they did not (whether due to time limits, institutional misconduct or some other reason) and whether or not overturning the settlement would be 'fair' or 'unfair' to the institution.

Q7. 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?

This is a matter in which there are a diverse range of cases and diverse range of settlement contexts and the answer that will be correct for one case may not be correct for another.

Given that most unjust past settlements were not calculated based on any actual evidence but were issued by institutions on a 'global sum basis' a breakdown of damages often does not exist. What is known about these settlements is that they are a mere fraction of true full compensatory damages.

Whichever approach is taken, the objective must be that the approach does not result in victims being unfairly prejudiced.

The obvious concern about any prescriptive approach in the legislation is that it will not be able to accommodate the full diversity of cases and may reasonably be predicted to create injustice in some cases. For example, if the legislation were to prescribe a 50% apportionment to cases where there were two causes of action, one covered by the reforms and one not, then this disallows medical evidence that might exist proving a different apportionment in a particular case.

On the other hand, the obvious concern with leaving the matter to the court to determine, is, in the absence of clear guidance as was seen in the Queensland case, the court may make a determination inconsistent with the intent of the legislation, which is to provide equal access to justice for all survivors of abuse and to provide for access to full compensatory damages.

The variation that might reasonably be expected to exist from case to case is probably better resolved by the courts having regard to the facts of each case. This allows both parties to put forward their arguments and evidence as to apportionment. Any unjust past settlement even though it might have been on a 'global sum' basis with heads of damages unspecified would nonetheless likely have a body of supporting documentation including assessments of damages and correspondence which the parties and the court could refer to for guidance on apportionment.

By contrast the parliament does not enjoy access to such case by case information in making a prescriptive approach.

The problem is essentially one of 'disentanglement'.

The question is, how to most accurately determine, on the evidence, how much of a person's injury was caused by one cause of action versus another. This issue of disentanglement was seen to arise in jurisdictions who provided statutory reforms for sexual abuse but not physical abuse (Queensland and Western Australia failing to include physical abuse in their definitions of abuse) – how could a victim of both physical and sexual abuse determine their matter?

It is offensive to have legislation that permits an abusing institution to seriously tell a victim or the court "because we bashed you *and* we raped you, and the law only allows you to recover damages for the raping but not for the bashing, we are discounting the damages you are owed by the amount that the bashing has caused".

That is absurd and offensive but is the situation created by jurisdictions who do not include all forms of abuse in the legislation.

This issue of disentanglement resulted in Queensland eventually amending their legislation last year to include physical abuse (joining with the rest of the nation) leaving only Western Australia as the last jurisdiction still yet to catch up on that reform. It is hoped Western Australia will include physical abuse in their legislation, sooner rather than later, resolving this issue.

The simplest remedy therefore is to apply the reform to all forms of abuse so they are all covered, removing any issue of disentanglement in relation to multiple forms of abuse perpetrated at the same institution.

That leaves only the issue of disentanglement in relation to a child who has suffered abuse from two different culpable entities, such as two different institutions, or one institution and the family home, etc.

Ultimately, the best remedy is likely a planned combination of all three remedies (not either / or):

1. Remove the need for disentanglement in the majority of cases, where all abuse was perpetrated by the same institution by applying the reforms to all forms of abuse (this resolves any issue of disentanglement where all forms of abuse were perpetrated by the same institution, leaving only the need for disentanglement in cases where abuse may have been perpetrated at multiple institutions, or at an institution and in the family home, etc)

2. *As well as the above*, the Parliament to provide general guidance to the court, through the legislation, by providing instructions to the court that the Parliament's intent is that the process adopted should result in the survivor of abuse having access to justice, defined as receiving full compensatory damages (minus the original settlement adjusted for inflation)

3. *As well as the above*, in those cases where disentanglement remains an issue, leaving the final assessment of apportionment to the court who has the means and ability to examine all of the relevant evidence in a particular case, something which the Parliament does not. For example, the court can consider all of the medical evidence as to causality and all of the correspondence and other documentary evidence from the original settlement.

Q8. 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?

The court should have whatever power is necessary to allow the settlement to be set aside for the purpose of an evidence based assessment of full compensatory damages.

The parliament may determine that it is appropriate to preserve arrangements between the insurer and insured institution as has been done in other jurisdictions. Indeed this is seen as preferable by institutions and central to delivery of justice to survivors of abuse and the institution's viability.

The effect of setting aside the settlement should not require the victim to repay the original settlement. This is because any settlement will have been overturned on the basis of a *prima facie* assessment that the damages owed is of course a higher amount than that already paid. It would be ridiculous, without purpose or merit, and unnecessarily burdensome for the survivor to be required to pay the original settlement back for the few months that it takes to undertake the evidence based assessment of full compensatory damages, only to then receive it back again as part of the payment of full compensatory damages. It makes more sense that the amount not be paid back, but simply be deducted (adjusted for inflation) from the full compensatory damages when eventually paid. This is the common sense approach taken in other jurisdictions.

The 'original settlement sum' should be the amount *received by the victim of abuse* and not necessarily the amount paid by the institution. This is because in many cases these amounts differ.

For example, out of the settlement payment the victim has, where applicable, had to pay:

- Medicare
- Centrelink
- Private health insurer
- Their legal costs / fees

While there may well be some valid discussion around whether or not it is fair to count the amount the victim has paid to their lawyer as part of the amount they 'received' as the original settlement sum, it is quite clear that any amount *collected by the victim from the institution on behalf of Medicare, Centrelink or a private health insurer* was never *received* by the victim, it was collected as a statutory obligation on behalf of those entities and repaid to them. The money passed *through* the victim but was never part of the original settlement.

There will be no problem with accuracy of calculations as these amounts will all have been precisely calculated and documented by the relevant agencies. Those amounts should not form part of the 'original settlement sum' that is deducted from any subsequent payment of evidence-based full compensatory damages, as the survivor never received them.

Q9. Are there any other issues that stakeholders have identified in relation to the interaction between the potential reforms and the National Redress Scheme?

The two systems are two separate pillars of justice. This is as the Royal Commission intended.

The Royal Commission are quite clear that Redress and Civil Litigation should exist side by side and both should be equally available to the victim / survivor at the discretion of the victim / survivor as to which is most appropriate for them.

Many survivors will elect to have their matter determined via the National Redress Scheme for a variety of reasons. This includes, age, infirmity, or inability to prove certain matters via civil litigation (through no fault of their own, eg destruction of evidence by the institution).

But some survivors have good evidence of damages and the National Redress Scheme is inadequate in their circumstances to deliver justice.

Also, the National Redress Scheme has been watered down by the federal government from the Royal Commission's originally intended model.

Also, a number of institutions remain not signed up to the National Redress Scheme – in these cases victims need the right to pursue fair reparations via civil litigation (which might also motivate recalcitrant institutions to sign up to the Redress Scheme).

As previously mentioned, the Royal Commission clearly state at Recommendation 46 of the Redress and Civil Litigation Report that the National Redress Scheme should not commence until *all* time limitations are removed. Time limitations have not yet been removed for victims trapped in unjust settlements so technically the National Redress Scheme is operating in a manner in which victims are being deprived of true legal choice / options. If allowed to continue this potentially jeopardises the legal legitimacy of the National Redress Scheme.

It is a requirement to preserve the legitimacy of the National Redress Scheme and to deliver on the recommendations of the Royal Commission, that survivors of abuse trapped in unjust past settlements be given the right to access full compensatory damages based on the evidence.

Some jurisdictions have chosen to bar National Redress Scheme settlements from being eligible for an application to a court to overturn the settlement.

Q10. Should any other categories of settlement be excluded?

The legislation should enable any settlement relating to a victim of child abuse to be reopened for the purpose of undertaking an evidence-based assessment of full compensatory damages.

Q11. 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?

The purpose of the legislation is to overturn the injustice causes by unjust past settlements (whether resulting from the imposition of time limits defence, or other contumelious conduct of the institution or both). The purpose is not to perpetuate injustice. So if allowing another person to apply (such as a legal guardian or a descendant) would facilitate justice then it should be given serious consideration. It should be at the discretion of the courts on the merits of each case.

Institutions should not be allowed to initiate an application as this goes against the principle of empowering the victim as the decision maker.

This question should be determined primarily by consideration of what is in the best interest of the victim for whom the reforms are being prepared. If limiting who can apply is likely to cause an injustice to the victim or alternatively to a victim's descendant then it should not be limited. If the opening up to other persons is likely to cause an injustice to the victim then it should probably be limited.

There should be attempted consistency with existing NSW legislation regarding the rights to litigate after the death or incapacity of the injured party to extend the same rights here – remembering it is all about the underlying principle that the person should have been awarded full compensatory damages in the first place. This means their damages would have been available to provide for their family, or to provide for their own aged health care. Should that cease due to the death or incapacity of the victim? Is that fair? It will depend on the circumstances of each case.

Existing legislation provides that from any settlement quantum things such as Centrelink and Medicare are required to be repaid and how this interacts with any planned provision as to who may apply to set a past unjust settlement aside should be considered.

The agency and autonomy of the survivor should be the paramount consideration.

Q12. Are there any further issues that stakeholders wish to raise in relation to the potential reforms?

Simply to reiterate that when deciding on what the legislation should do in relation to any of the above questions and in relation to any other questions that might arise during the departmental and parliamentary processes, at all times these questions should be resolved by returning to the original intent and purpose of the legislation:

- These are victims of abuse as vulnerable children who are yet to receive full justice
- They were exploited by the institution and the legal system when trying to seek justice
- They should have received full compensatory damages but were denied this
- They were underpaid fair reparations and are currently locked into this
- The process now should be such that it facilitates an examination of the evidence of injury / damages with a view to determining full compensatory damages and paying those damages (minus the original settlement adjusted for inflation)
- Therefore the legislation should instruct courts to approve applicants in all but the rarest of exceptions and to allow an evidence based review of full compensatory damages, with sole grounds for refusing an application to be if the institution is able to prove that the original settlement was equal to the victim's full compensatory damages that they would be awarded today, with the onus of proof upon the institution.