Submission in response to the

NSW Government Discussion Paper

Setting aside settlement agreements for past child abuse claims

Submitted on behalf of

Slater and Gordon Lawyers

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Slater and Gordon Lawyers appreciates the opportunity to make a submission in response to NSW Government Discussion Paper into setting aside settlement agreements for past child abuse claims

Key Points

Slater and Gordon's experience has shown that at times, after being advised of the legal requirements of proof and the previously applicable limitation period in relation to an injury where institutional child sexual abuse was the cause some claimants may elect not to proceed with legal action. Commensurately in our experience the prospect of enduring such these processes may have led victims to unnecessarily cede their rights in historical settlements.

Accordingly there is now an opportunity for the NSW Government to:

1. Enable claimants the opportunity to seek further advice in regard to the adequacy of historical settlements.
2. Enable claimants the opportunity to seek appropriate further compensation having regard to the current state of the law in regard to institutional child sexual abuse claims.

Slater and Gordon would welcome the opportunity to expand on our observations on request from the Department of Communities and Justice.

Background

Company Background

Slater and Gordon Limited is a publicly listed company.

We are a leading Australian Consumer Law and Plaintiff Injury Law firm employing 800 people in 40 locations across the country. Our mission is to give people easier access to world class legal services. We provide specialist legal and complementary services in a broad range of areas, including:

- Personal Injury
- Superannuation and Insurance
- Class Actions
- Commercial Litigation
- Employment Law.

Since our establishment in 1935, we have built a powerful reputation as a law firm built on social justice values that fights to achieve the best outcomes for our clients, while reducing the stress they go through to obtain justice. From the many landmark legal cases we have won, to the introduction of innovations such as No Win - No Fee, we have been determined to ensure that more Australians are able to access affordable legal services, no matter where they are.

Consistent with our deep commitment to social justice principles we've long recognised the significant psycho-social difficulties our clients face within the legal context, and over ten years ago identified a service gap and made the decision to employ a social work team to provide free social work services to our clients. In fact, we were the first - and are still the only - law firm in Australia to do so.

The work of both our legal practices and our social work team has given us unique insights into the impact of child sexual abuse and we look forward to continuing to work with policy-makers in all jurisdictions to create improved legislative protections for those who have suffered abuse.

In our observation juveniles continue to be sexually and physically abused across multiple care settings, including private and public schools, and in juvenile detention.

In the juvenile detention setting we have identified many different paedophiles, both male and female, employed as youth officers over long periods of time. These individuals have sexually abused children in care over many years at multiple institutions. They have occupied positions of power, and had unfettered access to children largely unmonitored and unsupervised.

Sexual abuse perpetrated in the institutional context has catastrophic health and economic impacts for our state and the nation. It is well established that survivors have a much higher propensity for drug abuse and criminal activity as a direct result of childhood trauma. Survivors often have horrific psychological injuries and are more susceptible to long term physical health concerns. The trauma of survivors adversely effects interpersonal relationships leading to domestic violence, and patterns of offending in future generations.

Legal costs are far outweighed by the lifelong impact on the economy caused by the trauma of survivors.

There is much further reform needed to reduce institutional abuse in NSW.

Slater and Gordon's work with survivors of child and institutional sexual abuse

Recent years have seen a sharp rise in the number of people approaching Slater and Gordon to seek advice and guidance on claims of both historical and contemporary institutional child sexual abuse.

As one of Australia's leading Personal Injury Law firms Slater and Gordon assists many Australian to exercise their rights. Our many landmark legal cases include undertaking the first action on behalf of survivors of abuse at the hands of the Christian Brothers throughout the 1950s, 60s and 70s.

While this matter was ultimately settled out of court in the 1990s it was the subject of some focus at the 2014 Royal Commission into Institutional Responses to Child Sex Abuse.

Slater and Gordon was invited to give evidence on the resistance shown by Church authorities and their lawyers when facing sex abuse claims. These cases were regarded by the Royal Commission as crucial in bringing to light systemic problems within the Church, in particular its failure to properly respond to victims' cries for help.

Our submission to the Royal Commission indicated that there was never any suggestion that the settlement was fair. Similarly we indicated that the 'rehabilitation' fund established for the victims had its own challenges.

> *"Because these men were denied their day in court, there was a sense the church authorities had never properly acknowledged the abuse and the harm these men had suffered. What they wanted was closure. This settlement, well intentioned as it was, didn't reflect that."* Hayden Stephens (Slater and Gordon) 2014.

As one plaintiff wrote to Slater and Gordon at the time of the settlement, grateful for a little money but heartbroken all the same: 'I would like to have seen a few Brothers in court, but not to be.'

This history of this case is available in further detail on the Slater and Gordon website at: https://www.slatergordon.com.au/blog/christian-brothers-a-betrayal-of-trust

The current era presents a pivotal moment for the NSW Government in modelling compassionate and effective processes for survivors of institutional abuse to navigate civil claims. It is now well established that religious institutions, through their legal representatives, over the years have consistently fallen short of model litigation parameters. These issues continue.

The NSW Government now finds itself increasingly occupying the role of Defendant in institutional abuse matters. These matters often involve very detailed accounts of severe and horrifying abuse in juvenile detention.

The Guiding Principles for Government handling of abuse claims are a simple yet important starting point. The NSW Government has a serious responsibility to set out a unique efficient claims and litigation process properly tailored to abuse. Care must be taken to reduce the pain of litigation on survivors. Relevant juvenile and adult detainee records should be proffered to survivors free of change and without unreasonable delays on release. Medicare and Centrelink documents should be similarly provided without undue administrative process and further delays. Formal apologies should be provided where appropriate and issues of liability should be traversed respectfully and with due care.

The ultimate aim needs to be providing survivors with a degree of closure and in attempting to redesign a system that in some ways has been fractured for some time.

Responses to Questions

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

Yes – As noted above, over recent years and particularly since the Royal Commission into Institutional Abuse there has been an increasing level of recognition of the significant and long-lasting effects that such child abuse can have. Prior to the Royal Commission many victims had little incentive to tell their story and seek restitution due to the fear of not being believed, anticipated resistance by some institutions in response to such claims, and the perceived and actual legal barriers. Victims who came forward in such a climate and settled their claims may well have accepted inadequate compensation than would be deemed appropriate due to the community's more contemporary appreciation of the level and extent of abuse.

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?

Limitation Act definition is preferable.

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, in all 3 instances.

In Slater and Gordon's view the discretion afforded to the Courts should be as broad and wide-encompassing as possible. Pre 1-January-2019 settlements were all arguably infected by the limitation period issue in terms of positioning the Plaintiff in a compromised position when attempting resolution.

However, beyond that, there should be wide discretion to set aside a settlement that may be otherwise unjust or unfair – with concepts such as deficient legal representation/advice, incapacity of plaintiff; and unconscionable conduct of institutions being properly weighed and considered.

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?

No. In our view the Court should have broad general discretion to set aside unjust/unfair settlements. This discretion should not be specifically limited to excluding matters involving agreements entered in to post-January-2019.

In Slater and Gordon's observations matters compromised by limitation issues and/or the Ellis defence form only a proportion of matters that are currently resulting in an unjust/unfair settlement.

In relation to post Jan 2019 matters, there are risk of a number of problematic unintended consequence posed by the advent of the Redress scheme.

Survivors find it difficult to adequately understand the application/scope of the scheme, in comparing against the option of instituting a common law claim.

The redress scheme has the effect of potentially funnelling viable common law claims involving severe institutional abuse into the scheme due to a combination of factors including a lack of understanding of the reach of the scheme. This is made worse by the provision of deficient legal advice to survivors. The $150,000 cost cap suggests the scheme is focused on minor scale abuse. It is difficult to envisage an equitable outcome where a child rape victim receives a cap of $150,000 in damages where a case is established strongly on its merits. Particularly where the central imperative for the scheme is to provide an efficient litigation alternative for abuse survivors.

Irrespective of the purported low evidentiary threshold, the delays in processing and modest compensation outcomes of the scheme must be fully understood by survivors if they are to make informed decisions about the most suitable avenue for compensation.

There may be legal practitioners & community sector stakeholders present in this field who are not properly/fully/adequately advising clients on the application of the redress scheme against the possibility of instituting a common law claim.

Deficient legal advice may lead to an increase in professional negligence claims – and pursuing lawyers in negligence as opposed to pursing institutions is inconsistent with the policy imperatives of the Royal Commission Recommendations – if a settlement (or indeed redress outcome) is determined to be unfair. It is the institution that should be responsible to pay further damages.

There is a risk that survivors may be pressured by practitioners into settling matters early/light. Often survivors have severe and permanent psychological injuries, in some instances akin to brain injury.

In addition, these types of clients are more susceptible to pressure/desperation due to substance abuse issues, and often crippling financial pressure. This translates to high risks in understanding advice / giving instruction/ accepting settlements.

There is a misconception among survivors that common law claims are difficult/hard fought, and in comparison, redress applications involve a simple non-litigated alternative.

In reality, at least in relation to juvenile justice matters, adherence to the model tailored litigation parameters should posit survivors to effectively advance genuine common law claims to resolution without the need to navigate contested and protracted hearings. These matters must be effectively litigated with proper evidence on liability and impairment, and if done so should be capable of leading to (low trauma) successful resolution.

If the above issues, lead to unfair/unjust settlements, then irrespective of the time an agreement is executed, the Court should have broad discretion to set aside if determined to be 'just and reasonable' to do so.

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?

A – this option encompasses both considerations of justice and reasonableness in the relevant circumstances.

Q6 Should specific criteria be prescribed that the court must consider in determining whether to set aside a settlement agreement? If so, what should these be?

Any criteria should be guiding and not limiting or overly prescriptive. In our view criteria is better establishing through case law, akin to other jurisdictions.

There are a number of key concepts, including but not limited to:

- Appropriate/effective representation
- Incapacity
- Impact of limitation period defences

The Contracts Review Act criteria (at 5.35) are not suitable, as they are tailored to more commercial arrangements.

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?

Yes. This would assist in practical application.

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?

Yes. Discretion should extend to setting aside any related agreements.

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

[Nil answer]

Q10 Should any other categories of settlement be excluded?

[Nil answer]

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?

There should also be scope for a person's representative or attorney to apply, particularly as these claims generally involve psychiatric injury which may result in a person being unable to apply themselves.

However, it should be limited so that the compensation payer is not able to seek to set aside a settlement agreement.

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

[Nil answer]

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