Draft Civil Liability (Child Abuse Settlements) Bill 2020

Submission to Policy, Reform and Legislation, Department of Communities and Justice

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Protecting and promoting justice, freedom and the rights of the individual.

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the draft Civil Liability Amendment (Child Abuse Settlement) Bill 2020 ('the draft Bill').

Legislation in other states and territories

2. Queensland was the first jurisdiction to enact this reform with ss48(5A)–(5C) of the *Limitations of Actions Act 1974,* which commenced on 1 March 2017. Under s48 of the *Limitations of Actions Act 1974* as amended on 1 March 2017, a judgment may be set aside by the Supreme Court (s48(4)) and as per s48(5A):

> *'An action may be brought on a previously settled right of action if a Court, by order on application, sets aside the agreement effecting the settlement on the grounds it is just and reasonable to do so.'*

3. According to s48(5C) the Court 'may' take into account any amounts paid or payable under any agreement voided or paid or payable as costs. The Court may set aside a limitation judgment (s48(3)(a)).

4. Victoria followed with amendments to the *Limitations of Actions Act 1958*. Under ss27QB and 27QD, a previous judgment on a limitation issue or giving effect to a settlement may be set aside by the Supreme Court. The test under s27QC is that on an application, the Court may set aside a previous settlement or judgment if 'satisfied that it is just and reasonable to do so'. Amounts previously paid or payable in respect of damages or costs may be taken into account if it is 'just and reasonable to do so'.

5. In the Northern Territory, the *Limitation Amendment (Child Abuse) Act 2017* gives the Court power to set aside settlements (s53(2)) or pre-existing limitation judgments (s54(3)) if it is 'just and reasonable to do so' and may take into account amounts paid or payable if it is 'just and reasonable to do so'.

6. In Western Australia, the *Limitation Act 2005* abolished limitation periods retrospectively. In addition ss89 and 92 permitted setting aside causes of action previously resolved by settlement or judgment including limitation judgments if satisfied it is 'just and reasonable to do so' (s92(3)).

7. In Tasmania, s5C of the *Limitation Act 1974* permits a relevant court to set aside an agreement effecting the settlement if it is 'in the interest of justice to do so' (s5C(2)). In doing so, under s5C(3) the court is required to have regard to:

> *'(a) The amount of the agreement;*
>
> *(b) The relative strengths of the bargaining positions of the parties;*
>
> *(c) Any conduct, by or on behalf of the organisation to which the agreement relates, that –*
>
> *(i) relates the cause of action; and*
>
> *(ii) occurred before the settlement was made; and*
>
> *(iii) the Court considers to have been oppressive.'*

A court may set aside a previous settlement if 'it is just and reasonable to do so'.

8. In the ACT the limitation period has been removed but no action appears to have been taken in respect of setting aside a settlement.

9. In South Australia, the *Limitations of Actions Act 1936* has been amended so that limitation judgments made be set aside pursuant to Schedule 1–3(1)(c) of the amending Act. The *Limitations of Actions (Actions for Child Abuse) Amendment Bill 2019* proposes to insert s3B(2), permitting an action to be brought on a previously settled right of action if a court thinks 'it is just and reasonable to do so'. Amounts paid 'may' be taken into account.

10. However, the Bill fails to deal with setting aside previous judgments. The right to set aside a previous cause of action is limited to a failure to obtain an extension of time under the old limitation law.

The draft NSW Bill

11. Under the proposed s7A, the legislation permits an application to set aside a claim for child abuse which was settled 'on unfavourable terms because the person could not reasonably pursue a legal cause of action at the time of the settlement'.

12. Self-evidently, this would not encompass settlements which were inadequate because of the bargaining power of the institution or the risks of the litigation, including the risk that the amount might not be paid by the person or body against whom the claim is brought.

13. An 'affected agreement' under the proposed s7B means an action which was 'not maintainable' or would have been pointless because the organisation was not incorporated. Again, this deals only with actions which must have failed.

14. Under the proposed s7C, a court may set aside an affected agreement if it is 'just and reasonable to do so'. In doing so, it may set aside a contract, deed or other agreement including an order or judgment of a court. However, this appears to be confined (under s7C(5)) to an order or judgment of a court 'that gives effect to the agreement'.

15. It follows that an existing settlement which is affected by the disproportionate finances and/or the strength and bargaining power of the parties cannot be set aside. It also follows that a settlement cannot be set aside unless it is 'an affected agreement'. Section 7B limits this to actions that were effectively not maintainable.

16. There is no provision for misconduct (including hiding of evidence in respect of documents or witnesses) or the concealing of known history of abuse by those involved to be taken into account. Nor is there provision for very small settlements obtained by an institution because of disproportionate bargaining power to be taken into account.

17. In short, the legislation fails miserably to deal with the matters raised in the Discussion Paper and the disproportionate bargaining power of the parties in particular. It compares very badly with most other jurisdictions in Australia. It fails utterly to rectify previous injustices in respect of settlements as well as judgments.

18. The NSW proposed legislation would have the bizarre effect that a plaintiff would have to prove that an action was bound to fail in order to have a settlement set aside. The plaintiff would have to argue the defendant's case, including the argument that the certifying solicitor on the Statement of Claim was in breach of her or his duty to the court. The defendant on the other hand would oppose the setting aside of the settlement agreement on the basis that the plaintiff's claim had merit in law, even though the defendant's pleading denied that there was any prospect of success. The defendant might similarly argue that the certifying solicitor in respect of the defence had to be in breach of his or her duty to the court. The circus that would follow from such a hearing (in the unlikely event that anyone

ever thought it worthwhile to bring such proceedings) would be embarrassing for the NSW Government.

19. The provisions are so limited that the proposed reform should be withdrawn and wholly redrawn along the lines of the Victorian or Western Australian provisions. Specifically, settlements and judgments giving effect to settlements or judgments on limitation periods should be set aside where a court deems it 'just and reasonable to do so'.

20. The assurances given in the Attorney-General's Media Release of 29 November 2020 about overturning 'unfair settlements' would then be met and not confined to 'legal technicalities'.

Conclusion

21. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the draft Civil Liability Amendment (Child Abuse Settlement) Bill 2020. The ALA does not support the draft Bill in its current form and considers that the Bill should be wholly redrawn along the lines of the Victorian or Western Australian provisions.

22. The ALA is willing to assist the Department in redrafting the Bill.

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National Spokesperson regarding Institutional Child Abuse

Australian Lawyers Alliance