knowmore
free legal help for survivors

Setting aside settlement agreements for past child abuse claims

Submission to the New South Wales Department of Communities and Justice

15 April 2020

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About knowmore

Our service

knowmore legal service (knowmore) is a nation-wide, free and independent community legal centre providing legal information, advice, representation and referrals, education and systemic advocacy for victims and survivors of child abuse. Our vision is a community that is accountable to survivors and free of child abuse. Our mission is to facilitate access to justice for victims and survivors of child abuse and to work with survivors and their supporters to stop child abuse.

Our service was established in 2013 to assist people who were engaging with or considering engaging with the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). knowmore was established by and operates as a program of Community Legal Centres Australia, with funding from the Australian Government, represented by the Attorney-General's Department. knowmore also receives some funding from the Financial Counselling Foundation.

From 1 July 2018, Community Legal Centres Australia has been funded to operate knowmore to deliver legal support services to assist survivors of institutional child sexual abuse to access their redress options, including under the National Redress Scheme.

knowmore uses a multidisciplinary model to provide trauma-informed, client-centred and culturally safe legal assistance to clients. knowmore has offices in Sydney, Melbourne, Brisbane and Perth. Our service model brings together lawyers, social workers and counsellors, Aboriginal and Torres Strait Islander engagement advisors and financial counsellors to provide coordinated support to clients.

Our clients

In our Royal Commission-related work, from July 2013 to the end of March 2018, knowmore assisted 8,954 individual clients. The majority of those clients were survivors of institutional child sexual abuse. Almost a quarter (24%) of the clients assisted during our Royal Commission work identified as Aboriginal and/or Torres Strait Islander peoples.

Since the commencement of the National Redress Scheme for survivors of institutional child sexual abuse on 1 July 2018 to 29 February 2020, knowmore has received 27,837 calls to its 1800 telephone line and has completed intake processes for, and has assisted or is currently assisting, 5,943 clients. Twenty-six per cent of knowmore's clients identify as Aboriginal and/or Torres Strait Islander peoples. Almost a quarter (23%) of clients are classified as priority clients due to advanced age and/or immediate and serious health concerns including terminal cancer or other life-limiting illness.

Our clients in New South Wales

knowmore has a significant client base in New South Wales — 19 per cent of our current clients reside in the state. We therefore have a strong interest in law reform in New South Wales that will enhance survivors' access to justice and ensure they are able to receive fair and just compensation for the harm they have suffered.

knowmore's submission

This section outlines knowmore's overall position on reforms to give New South Wales courts the discretion to set aside settlement agreements for past child abuse claims, and details our views on key features of the reforms.

In addressing the matters raised in the Department of Communities and Justice's discussion paper, knowmore has reflected on both the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) and its own work with survivors of child sexual abuse, particularly those who have previously accepted settlements from institutions.

knowmore's overall position on giving courts the discretion to set aside settlement agreements

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

knowmore strongly supports New South Wales introducing provisions to give courts the discretion to review and set side past settlement agreements for child abuse. Though not a recommendation of the Royal Commission, these reforms complement other recent improvements to New South Wales's civil litigation system for victims and survivors of child abuse, particularly the removal of limitation periods for all child abuse claims, and they are vital for the many survivors who accepted unfair and unjust settlements from institutions in the past.

We have dealt with many clients who have told us that they felt effectively coerced into settling their claims against the institutions responsible for their abuse. These clients were faced with a situation where, if they did not accept the amount of compensation offered by the institution (which they perceived as inadequate), their only other option was to take the matter to court, in circumstances where they had been advised that any such action would in all likelihood be doomed to failure because of the limitation barrier alone. When faced with these circumstances, the majority of our clients understandably resolved their claims by accepting the financial settlements offered. On any objective assessment, these settlements were manifestly inadequate and arbitrary in nature, bearing no similarity at all to the quantum of damages survivors would have received had they been able to litigate their matters before a court. We have seen many clients who reluctantly resolved their claim against the institution for less than $20,000, inclusive of their costs, despite having suffered prolonged sexual and other abuse as a child, with consequential debilitating complex trauma and its associated life-long adverse effects.

It is our clients' collective experience that nearly all settlements with an institution involved the execution of a deed of settlement upon resolution of the claim. Typically, those deeds expressly excluded any admission of liability and required a survivor to release the relevant institution, and often the State (in circumstances where the survivor may have been a Ward of the State, for example), from any and all liability for any claim relating to the survivor's mistreatment by the institution or the government or any official or person associated with either entity. In short, nearly all of the clients we have assisted who have faced these circumstances were required to execute a comprehensive and binding deed of settlement that saw them forego any future rights of action. Without the institution now waiving its rights under any such deed, the prospects of a survivor having such a deed overturned under the current law are remote.

Furthermore, we have assisted many clients who resolved past claims against institutions on the basis of only limited disclosures about their abuse. For example, it is common for survivors to have only disclosed physical and not sexual abuse, or to have only disclosed information about some perpetrators and not others. The reasons for such limited disclosure are based in our clients' experience of complex trauma, and reflect the general reasons underlying why it takes many survivors decades to disclose their abuse. In executing wide-ranging deeds of release relating to all claims, these survivors have effectively foregone any future rights to seeking justice for their undisclosed abuse.

For all of these reasons, we consider that giving courts the discretion to set aside settlement agreements is an essential step in ensuring that survivors of child abuse have access to justice, can have their claims determined on their merits, and can receive fair and just compensation for the harm they have suffered. Importantly, introducing such reforms in New South Wales will further improve national consistency in civil litigation for child abuse claims,[1] and ensure that survivors in New South Wales have the same opportunity to obtain justice as survivors in the other states and territories that have progressed these reforms to date. Ultimately, knowmore wants to see all states and territories introduce comparable provisions so that survivors have access to justice regardless of where they live or where they suffered abuse.

Finally, we note the points raised in the discussion paper regarding the financial and other impacts such reforms would have on institutions. However, our view is that there will only be an adverse impact on institutions where past settlements resulted in a survivor receiving inadequate or unjust compensation, or involved unfair or unreasonable conduct by the institution. This is demonstrated in the case of *TRG v The Board of Trustees of the Brisbane Grammar School*.[2] In determining whether the settlement agreement between the parties should be set aside, Davis J took into account a number of key factors, including:

- the conduct of the respondent throughout the settlement process
- that both parties were appropriately represented
- the incurring of settlement costs by the respondent
- the settlement figure of $47,000, which Davis J considered to amount to a fair settlement based on the proper assessment of the parties' respective cases at that time
- that "the discount of the applicant's claim was not materially contributed to by any consideration of limitation defences".[3]

After considering these factors and the intent of the legislation, Davis J concluded that it was not just and reasonable for the settlement agreement to be set aside. This case demonstrates that not all past settlements will be set aside under these reforms; rather, courts will consider and balance the interests of both parties in determining whether a settlement should be set aside.[4] In these circumstances, institutions who have paid just compensation to survivors have little to fear from the reforms.

1 As noted in the discussion paper, comparable reforms have already been introduced in Queensland, Tasmania, Victoria and Western Australia. We note that courts in the Northern Territory also have the discretion to set aside past settlement agreements for child abuse claims, with references to a judgment in section 54(5)(a) of the *Limitation Act 1981* (NT) extending to "an agreement entered into in relation to settlement of a matter" [section 53(2), *Limitation Act 1981* (NT)].

2 *TRG v The Board of Trustees of the Brisbane Grammar School* [2019] QSC 157 (21 June 2019). Note that the decision at first instance is currently under appeal.

3 *TRG v The Board of Trustees of the Brisbane Grammar School* [2019] QSC 157, Davis J at 272–279.

4 *TRG v The Board of Trustees of the Brisbane Grammar School* [2019] QSC 157, Davis J at 96.

knowmore's position on key features of the reforms

The types of abuse that should be covered

Question 2
Which definition of 'child abuse' should be used in the proposed reforms:
a. sexual abuse only (similar to Western Australia)
b. sexual and physical abuse (similar to 6(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?

knowmore's view is that reforms to give courts the discretion to set aside past settlement agreements should apply to child abuse broadly. We submit that child abuse should therefore be defined to include sexual abuse, serious physical abuse and other connected abuse, consistent with the definition of child abuse in section 6A(2) of the *Limitation Act 1969* (NSW) (option c). We strongly favour this approach for several reasons.

- A broad definition of child abuse recognises the realities of victims' and survivors' experiences. As we noted in a previous submission to the department,[5] the majority of knowmore's clients who were sexually abused as children also endured significant physical and emotional abuse — in many institutions, particularly residential home settings, it seems rare for sexual abuse to have occurred in isolation of other mistreatment. This is reflected in the settlement agreements many survivors have entered into with institutions, making it important for the reforms to be inclusive of all forms of abuse. It would be illogical and unjust for the law to enable settlement agreements to be set aside in relation to some aspects of a person's abuse but not others, and it is beyond doubt that victims and survivors would regard such a situation as traumatising and invalidating of their experiences.
- A broad definition of child abuse is important for national consistency. As the discussion paper notes, most other jurisdictions that have introduced provisions to enable courts to set aside settlement agreements have adopted a broad definition that encompasses sexual abuse, physical abuse and related abuse.[6] As indicated above, knowmore considers that national consistency is essential for ensuring that victims and survivors of child abuse have the same opportunity to obtain justice regardless of where they live. This is consistent with the views and recommendations of the Royal Commission.
- A broad definition of child abuse ensures that all survivors of child abuse receive equal treatment before the law, regardless of the particular type of abuse they experienced. As noted in the discussion paper, people who experienced non-sexual abuse as children have faced similar barriers in receiving fair and just compensation from institutions, and it is important that they too can benefit from these reforms.
- Defining child abuse to include sexual abuse, serious physical abuse and connected abuse ensures there is consistency with the definition of child abuse in section 6A(2) of the *Limitation Act 1969* (NSW). Given that these reforms complement the removal of limitation periods by ensuring that survivors who had previously accepted a settlement from an institution are not at a disadvantage and can seek fair and just

5 knowmore, *Submission to the New South Wales Government consultation in relation to the civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse*, September 2017, <knowmore.org.au/wp-content/uploads/2019/10/Knowmore-submission-civil-litigation-recommendations.pdf>.

6 Section 5A(6), *Limitation Act 1981* (NT); section 11A(6), *Limitation of Actions Act 1974* (Qld); section 5C(1), *Limitation Act 1974* (Tas), as amended by section 8 of the *Justice Legislation (Organisational Liability for Child Abuse) Amendment Act 2019* (Tas); section 27O(1)(b), *Limitation of Actions Act 1958* (Vic). As noted in the discussion paper, the Western Australian provisions apply only to child sexual abuse claims, as defined in section 6A(1), *Limitation Act 2005* (WA).

compensation in the same way as other survivors, it is only logical and appropriate for them to apply to the same types of abuse.

The settlements that should be covered

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

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

As we indicated above, the previously applicable limitation periods were arguably the foremost barrier that influenced survivors' acceptance of unfair and inadequate settlements in the past. For this reason, knowmore considers that is essential for courts to be given the discretion to set aside settlements for claims that were statute barred at the time the settlement was entered into (option a). This is consistent with every other jurisdiction that has introduced provisions to enable past settlement agreements to be set aside, and would ensure that survivors in New South Wales have the same opportunity to obtain justice as survivors elsewhere in Australia.

As identified in the discussion paper, it is possible that some survivors may also have entered into unfair settlement agreements before 1 January 2019 because there was no proper defendant to their claim, or because there were other circumstances historically that made it difficult for survivors to obtain compensation from institutions. knowmore agrees that there may therefore be merit in introducing broader provisions to allow courts to also set aside settlement agreements entered into before 1 January 2019 in matters where there was no proper defendant or the settlement was otherwise unjust or unfair (options b and c). From our experience, however, we believe there would be relatively few survivors whose settlements would be captured by these provisions but who would not also have been impacted by the expiration of a limitation period.

The test that should be applied by the courts when exercising the discretion to set aside a settlement agreement

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

As noted previously, knowmore supports national consistency in civil litigation reforms. We therefore support 'just and reasonable' being the test to be applied by the courts when exercising the discretion to set aside a settlement agreement (option a), consistent with the approach adopted in most other

jurisdictions.[7] This approach will also support the development of a body of case law around the circumstances where it is considered appropriate to set aside previous agreements. As noted in the discussion paper, this approach also has the advantage of being consistent with the current test in New South Wales for setting aside past judgments.[8]

Criteria for courts to consider when determining whether to set aside a settlement agreement

> *Question 6*
> 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?

knowmore supports the New South Wales provisions including a non-exhaustive list of factors that the court should have regard to when exercising its discretion to set aside a settlement agreement. In our view, the Tasmanian provisions provide a suitable model for this.[9] We note in particular that many of the factors listed in the Tasmanian legislation are consistent with those outlined by the Supreme Court of Queensland in *TRG v The Board of Trustees of the Brisbane Grammar School*.[10]

How payments made under a settlement agreement should be treated

With respect to the treatment of payments made under a set aside settlement agreement generally, we note the following comment on page 20 of the discussion paper:

> *It is arguable that any potential reforms should…:*
>
> - *Prevent a party from seeking to recover the payment that was made under the set aside settlement agreement; and*
> - *Require the courts to take the past payment into account when awarding damages in relation to a claim arising from the set aside agreement.*
>
> *This approach is consistent with that taken by Queensland, Western Australia, Victoria and Tasmania.* [Emphasis added]

knowmore generally supports this position but notes that, in relation to the second point, the provisions in other jurisdictions state that, when awarding damages, the court *may* — not must — take into account any amounts paid under the agreement.[11] We support New South Wales adopting the same approach in its reforms.

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7 Section 54(5), *Limitation Act 1981* (NT); section 48(5A), *Limitation of Actions Act 1974* (Qld); section 27QE(1), *Limitation of Actions Act 1958* (Vic); section 92(3), *Limitation Act 2005* (WA). As noted in the discussion paper, the test in Tasmania, in contrast, is 'in the interest of justice' [section 5C(2), *Limitation Act 1974* (Tas), as amended by section 8 of the *Justice Legislation (Organisational Liability for Child Abuse) Amendment Act 2019* (Tas)].

8 Schedule 5, section 10(3), *Limitation Act 1969* (NSW).

9 Section 5C(3), *Limitation Act 1974* (Tas), as amended by section 8 of the *Justice Legislation (Organisational Liability for Child Abuse) Amendment Act 2019* (Tas).

10 *TRG v The Board of Trustees of the Brisbane Grammar School* [2019] QSC 157.

11 Section 48(5C)(a), *Limitation of Actions Act 1974* (Qld); section 5C(6), *Limitation Act 1974* (Tas), as amended by section 8 of the *Justice Legislation (Organisational Liability for Child Abuse) Amendment Act 2019* (Tas); section 27QE(2)(a), *Limitation of Actions Act 1958* (Vic); section 92(6), *Limitation Act 2005* (WA).

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

With respect to the treatment of payments made under a settlement agreement relating to both child abuse and other causes of action, knowmore supports courts having the discretion to determine what portion of a settlement amount is taken into account as a payment for child abuse where this is not specified in the agreement. While we note that the provisions in Western Australia and Tasmania stipulate that half of the settlement amount will be presumed to have been paid for child sexual abuse/child abuse in these circumstances, this is rather arbitrary and may lead to injustices for survivors. knowmore considers that the court hearing the action is best placed to make an informed decision about this matter, consistent with the approach adopted in Queensland, Victoria and the Northern Territory.

How judgments and orders giving effect to a settlement agreement should be treated

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

We note the issues raised in the discussion paper with respect to orders or judgments that give effect to the terms of a settlement agreement, and other associated contracts and agreements. To avoid any barriers to the reforms operating as intended, knowmore supports New South Wales adopting the same approach as Victoria — that is:

- Courts should also be given the discretion to set aside any judgment or order giving effect to the settlement, consistent with section 27QE(1)(a) of the Victorian *Limitation of Actions Act 1958*.
- The provisions should make clear that when a settlement agreement is set aside, all related agreements (other than a contract of insurance) cease to have effect, consistent with section 27QF(2)(a) of the Victorian *Limitation of Actions Act 1958*. We note that the provisions in Queensland, Tasmania and Western Australia are also consistent in this regard.[12]

Settlements that should be excluded

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

Question 10
Should any other categories of settlement be excluded?

12 Section 48(5B)(a), *Limitation of Actions Act 1974* (Qld); section 5C(4), *Limitation Act 1974* (Tas), as amended by section 8 of the *Justice Legislation (Organisational Liability for Child Abuse) Amendment Act 2019* (Tas); section 92(4), *Limitation Act 2005* (WA).

We note the issues raised on pages 23 and 24 of the discussion paper with respect to how the proposed reforms would interact with the provisions of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) ('the NRS Act') for offers of redress made under the National Redress Scheme. For clarity, knowmore supports the inclusion of provisions in New South Wales consistent with those in Victoria specifying that courts do not have the discretion to set aside:

- a deed of release or an accepted offer of redress under the NRS Act; or
- any settlement that has been taken into account as a relevant prior payment in an accepted offer of redress.[13]

We do not consider that any other types of settlements should be excluded from the application of the reforms, consistent with comparable legislation in the other jurisdictions that have given courts the discretion to set aside past settlement agreements.

Who should be able to apply to have a settlement agreement set aside

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

With reference to the issues raised on page 24 of the discussion paper, knowmore considers it appropriate that, under the reforms, only the person who has received payment under the settlement agreement should be allowed to apply to have the agreement set aside. Given the overarching purpose of the reforms is to enhance access to justice for victims and survivors of child abuse who have been adversely impacted by past settlement agreements, knowmore would particularly oppose any move to allow defendants to a claim to seek to set aside a settlement agreement.

13 Section 27QA(3), *Limitation of Actions Act 1958* (Vic).

Conclusion

knowmore strongly supports New South Wales introducing provisions to give courts the discretion to review and set side past settlement agreements for child abuse. Though not a recommendation of the Royal Commission, these reforms complement other recent improvements to New South Wales's civil litigation system for victims and survivors of child abuse, particularly the removal of limitation periods for all child abuse claims, and they are vital for the many survivors who accepted unfair and unjust settlements from institutions in the past. Importantly, these reforms will ensure that survivors in New South Wales have the same opportunity to obtain justice as survivors in the other states and territories that have progressed these reforms to date.

In terms of the key features of the reforms, knowmore's position is that:

- Child abuse should be defined broadly to include sexual abuse, serious physical abuse and other connected abuse.
- It is essential for courts to be given the discretion to set aside settlements for claims that were statute barred at the time the settlement was entered into. There is some merit in also giving courts the discretion to set aside settlements entered into before 1 January 2019 in matters where there was no proper defendant or the settlement was otherwise unjust or unfair to the survivor.
- 'Just and reasonable' is the appropriate test for courts to apply when exercising the discretion to set aside a settlement agreement.
- It would be useful for the legislation to include a non-exhaustive list of factors that the court should have regard to when exercising its discretion to set aside a settlement agreement.
- Where a settlement relates to both child abuse and other causes of action, courts should have the discretion to determine what portion of the settlement amount is taken into account as a payment for child abuse where this is not specified in the agreement.
- Courts should also be given the discretion to set aside any judgment or order giving effect to a settlement agreement.
- The provisions should make clear that when a settlement agreement is set aside, all related agreements (other than a contract of insurance) cease to have effect.
- It would be useful to include provisions clarifying that courts do not have the discretion to set aside a deed of release or an accepted offer of redress under the NRS Act, or any settlement that has been taken into account as a relevant prior payment in an accepted offer of redress.
- Only the person who has received payment under the settlement agreement should be allowed to apply to have the agreement set aside.

We urge the New South Wales Government to progress these reforms as soon as possible.

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Community Legal Centres Australia acknowledges the traditional owners of the lands across Australia upon which we live and work. We pay deep respect to Elders past and present.

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