WOMEN'S LEGAL SERVICE NSW

15 April 2020

Mr Paul McKnight
Executive Director
Policy Reform & Legislation
Department of Communities and Justice
GPO Box 6
Sydney NSW 2001

By email: policy@justice.nsw.gov.au

Dear Mr McKnight,

Response to Discussion Paper: Setting aside settlement agreements for past child abuse claims

1. Women's Legal Service NSW (**WLS NSW**) thanks the Department of Communities and Justice for the opportunity to comment on the Discussion Paper on setting aside settlement agreements for past child abuse claims.

2. We commend the NSW Government for inviting discussion on this very important topic.

3. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.

4. WLS NSW has provided legal advice and support to victims of child abuse over several decades. We advise and represent victims in accessing victims support in NSW (and previously, victims compensation) and have also advised and represented women who have been subjected to child abuse and child sexual assault in various institutions. This included representing 13 survivors of child sexual assault in civil litigation against the State of New South Wales that was the subject of the Royal Commission Case Study 19 into Bethcar Children's Home.

5. We strongly support reforms in NSW to give New South Wales courts the discretion to set aside settlement agreements for past abuse claims. Reforms must include both out of court settlements and judgments giving effect to settlement agreements.

6. These reforms are vital for the many survivors who have accepted unfair and unjust settlements from institutions.

7. Our clients have consistently reported barriers and factors which lead them to reluctantly enter into a settlement agreement with the institution responsible, which include an unequal power imbalance, risks of costs orders being made against them, hurdles with claims being statute barred (prior to legislative amendment for civil claims), difficulty in obtaining legal aid and legal representation, the years of protracted litigation hard fought by the institutions with much deeper pockets than our clients and the trauma involved in having to re-live and re-tell their experiences. All these factors have contributed to our clients settling cases in circumstances where they reported feeling like they had little other option but to do so.

8. In light of these well-documented issues and experiences of child abuse victim-survivors, and in keeping with other recent positive reforms to the civil litigation system in New South Wales for victim-survivors of child abuse, including the removal of limitation periods for all child abuse claims, we submit it is the proper and fair course for the NSW government to adopt these proposed reforms.

9. A consistent approach nationally is imperative and will provide fairness and consistency. It should not matter whether the abuse occurred in one state or another; victim-survivors should not be subjected to different laws by virtue of where the abuse took place.

10. Our limited resources mean we are not in a position to provide a detailed response to the Discussion Paper. However, we have had the opportunity to read the submission made by knowmore and we endorse their submission. In particular we endorse their key recommendations:

    10.1 Child abuse should be defined broadly to include sexual abuse, serious physical abuse and other connected abuse.

    10.2 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.

    10.3 'Just and reasonable' is the appropriate test for courts to apply when exercising the discretion to set aside a settlement agreement.

    10.4 Legislation should include a non-exhaustive list of factors that the court should have regard to when exercising its discretion to set aside a settlement agreement.

10.5 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.

10.6 Courts should also be given the discretion to set aside any judgement or order giving effect to a settlement agreement.

10.7 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.

10.8 Provisions clarifying that courts do not have the discretion to set aside a deed of release or an accepted offer of redress under the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) (***NRS Act***), or any settlement that has been taken into account as a relevant prior payment in an accepted offer of redress under the *NRS Act*.

10.9 Only the person who has received payment under the settlement agreement should be allowed to apply to have the agreement set aside.

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

12. If you would like to discuss any aspect of this submission, please contact me or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,
Women's Legal Service NSW

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Principal Solicitor