

**RESPONSE BY THE PROVINCE OF SYDNEY AND THE ARCHDIOCESE OF
CANBERRA & GOULBURN**

TO THE NSW GOVERNMENT DISCUSSION PAPER:

**SETTING ASIDE SETTLEMENT AGREEMENTS FOR PAST CHILD ABUSE
CLAIMS**

Introduction

1. This submission is on behalf of the Province of Sydney and the Archdiocese of Canberra and Goulburn (**NSW Province**) which comprises 11 Roman Catholic dioceses and 3 eparchies as follows:

Archdiocese of Canberra and Goulburn (partially located in NSW);

Archdiocese of Sydney;

Diocese of Armidale;

Dioceses of Bathurst;

Diocese of Broken Bay;

Diocese of Lismore;

Diocese of Maitland-Newcastle;

Diocese of Parramatta;

Diocese of Wagga Wagga;

Diocese of Wilcannia-Forbes;

Diocese of Wollongong;

Chaldean Eparchy of St Thomas;

Maronite Diocese of St Maroun of Sydney; and

Eparchy of St Michael, the Archangel (Melkite) (the latter 3 are partially located in NSW).

2. The NSW Province welcomes the opportunity to provide this submission to the NSW Government in response to the release of the discussion paper on setting aside agreements for past child abuse claims (**Discussion Paper**).
3. The bishops of the dioceses and eparchies in the NSW Province have a longstanding and prominent commitment to child protection and to justice for survivors. In NSW, there has been a very close working relationship between the dioceses and State institutions protecting children, such as the NSW Ombudsman and NSW Children's Guardian.

4. The recommendations of the Royal Commission have been acknowledged by all of the NSW bishops to be important groundwork for the development of public policy and legislation to deliver the continuous improvement in child protection that our entire community rightly expects. Through the Truth Justice and Healing Council, the NSW Province extensively co-operated with and made several policy submissions to the Royal Commission, and, since the Royal Commission, the NSW Province has engaged in dialogue with, and has assisted, NSW Government, in this important work. With the rest of the Catholic Church in Australia, the NSW Province has a strong commitment to ensuring that child safety plays a prominent role in all activities where children may be present.

Summary of Position

5. In more recent times, the NSW parliament has removed two major legal obstacles to a personal injury claim for historical child sexual abuse. The first was to remove any time bar on a cause of action,¹ and the second was to provide for the commencement of proceedings against unincorporated associations, including by the appointment of a proper defendant.²
6. In less recent times, where claims for historical abuse have been settled by agreement, neither claimant nor defendant could have foreseen such considerable change to the legal landscape in this area of the law. It may therefore seem unfair, from the perspective of hindsight, that a claimant has forgone their right to sue on an understanding of the law as it existed at the time of settling a claim, without any anticipation that the law could possibly change in the way that it has.
7. It is this unfairness, caused by legislative amendment which could not have been known, which is the driver behind the current proposal for further reform. That reform, if implemented, would allow claimants in yet to be defined circumstances to avoid the central promise contained in the settlement agreements which they have executed. That central promise is that the claimant would release the institutional defendant from legal

¹ Limitation Act 1969 NSW, s 6A.

² Civil Liability Act 2002, NSW, Part 1B, Div 4.

liability in relation to the subject matter of their claim. The consideration provided for such a release was the payment of financial compensation.

8. In broad terms, the Discussion Paper proposes legislative reform which would empower a Court to avoid the intended consequence of the undertaking to release the defendant from all liability thereby by setting aside the claimant's central promise under the settlement agreement. The Discussion Paper proposes as part of that reform that where a Court engages such a power to set aside a claimant's obligation under the settlement agreement, the claimant should not be required to repay any monies received in consideration for that promise.
9. This submission argues that the impetus behind the proposed reform deserves support. A discretion should be bestowed upon Courts to set aside settlement agreements in defined circumstances.
10. The conferral of a discretion should not be at large. Given the reasons for its implementation, the discretion ought be accompanied by appropriate legislative guidance in the form of a list of factors a Court may consider relevant to the exercise of the discretion. This framework would assist a Court in its consideration of applications to set aside settlement agreements with a common criteria in mind for application on a case-by-case basis. It would also direct a court's attention to the mischief which is the target of reform. This mischief is unfairness which may have arisen because of the implementation of the unforeseeable legislative reforms referred to above.

What is the unfairness?

11. The proposal the subject of the Discussion Paper is significant. If implemented, it represents a substantial departure from the general policy of the law. That policy has been referred to by Courts in the context of the Contracts Review Act 1980. In *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389; ASC ¶155–107 Allsop P (as he then was) held at [269]:

One aspect of the public interest recognised early is keeping people to their freely entered bargains: *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1 at 9. By stating the importance of this aspect of the public interest shortly, I should not be thought to be consigning it as a

matter of mere note only. It is fundamental, indeed it inheres in the [Contracts Review Act] itself.

12. In the case referred to by Allsop P in the above paragraph, *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1, Gleeson CJ held:

The general policy of the law is that people should honour their contracts. That particular policy forms part of our idea of what is just.

13. There is a further policy of the law which encourages parties to settle their disputes. In *Bartlett v Coomber* [2008] NSWCA 100 the Court was considering a settlement agreement in the context of the Family Provision Act 1982. Mason P held at [57]-[58]:

[I]t must be borne in mind that litigation under the Act takes place in an adversary context in which the active parties to the particular litigation are usually expected to be the best judges of what is in their own interests. The policy of Australian law encourages the settlement of disputes ... Our legal system would collapse were it not for the fact that most disputes are resolved by agreement.

14. This policy applies equally to the resolution of complaints of historical child sexual abuse.

There is of course nothing wrong with the negotiated settlement of a dispute, even in cases of historical child sexual abuse. It could not be suggested that the entry into settlement agreements where victims of sexual abuse provided releases was in itself unfair. Indeed, the National Redress Scheme contains a mechanism whereby applicants under the Scheme who are willing to accept an offer of redress are required by legislation to provide final releases to the relevant institution.³

15. It is therefore important that the legislative provisions contain clarity about what is, and what is not, unfairness which will enliven a judicial discretion to set aside a settlement agreement.

Judicial Discretion

16. The concept of judicial discretion is commonly encountered in litigation. However, an understanding of the source of the Court's power and the context in which a discretion is exercised is critical.

³ Section 43, National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth).

17. In *Norbis v Norbis* [1986] HCA 17; 161 CLR 513 Mason and Deane JJ said this in the context of a statutory discretion exercised under the Family Law Act 1975 (Cth):

The sense in which the terms "discretion" and "principle" are used in these remarks needs some explanation. "Discretion" signifies a number of different legal concepts (see, for example, the discussion in Pattenden, *The Judge, Discretion, and the Criminal Trial* (1982), at pp.3-10). Here the order is discretionary because it depends on the application of a very general standard - what is "just and equitable" - which calls for an overall assessment in the light of the factors mentioned in s.79(4), each of which in turn calls for an assessment of circumstances. Because these assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion. The contrast is with an order the making of which is dictated by the application of a fixed rule to the facts on which its operation depends.

18. Sometimes a judicial discretion will be expressly fettered in terms by the relevant statute.

One such example is a court exercising the sentencing discretion for Commonwealth offences under the Crimes Act 1914 (Cth). Section 16A(1) of that Act requires in the exercise of the sentencing discretion a Court must impose a sentence or make an order that is of a severity appropriate for the offence. The requirement to impose an appropriately severe sentence is mandatory, however the section does not dictate the length of sentence to be imposed leaving that to the discretion of the sentencing judge. Section 16A(2) further prescribes mandatory considerations that a sentencing judge must take into account in the exercise of the sentencing discretion to the extent that they are relevant and known. The non-exhaustive list of matters includes such considerations as the degree of contrition shown, any injury or loss resulting from the offence, whether there has been a plea of guilty, and so on.

19. Other statutes confer broad discretions but do not necessarily contain express fetters or guidance in respect of the exercise of a discretion. That does not mean such discretions are unfettered. In those cases one looks to the objects of the statute in which the relevant provision appears and interprets the discretion in its legislative context.

20. Similarly, superior Courts in New South Wales often grant discretionary relief in the equitable jurisdiction. One example is the power to grant relief against forfeiture of a lease. The discretion is broad, but not unfettered. A court exercising such a discretion is guided by principles which have developed organically over many years. Precedent plays a fundamental role in decision making.

21. The discretion proposed in the Discussion Paper is entirely new. The uniqueness of the reforms means there is no real precedent to draw upon. The reforms are not readily grafted into an existing body of law which might guide a court as to the circumstances in which a settlement agreement in an historical child sexual abuse case might be set aside. It is recognised that other jurisdictions have introduced legislation which empowers a court to set aside such agreements, not all of which have provided express guidance as to how that discretion ought be exercised. There is very little case law in those jurisdictions. That which exists suggests that in the absence of guidance from Parliament, the approaches taken by Courts may be disparate: see *JAS v The Trustees of the Christian Brothers* [2018] WADC 169; *TRG v The Board of Trustees of the Brisbane Grammar School* [2019] QSC 157.
22. It is submitted that it is highly desirable for any legislative reform to include a non-exhaustive list of factors which a Court may take into account in exercising its discretion. Such factors would not only guide a Court in the exercise of a new and unique power, but would promote consistency in decision making and predictability of outcome. They would also increase the likelihood of achieving the aspirational goals of the reform. The absence of such express guidance gives rise to a risk of contrasting approaches to the concept of what is just and fair in the circumstances.
23. In the present context, the words of Gleeson CJ are instructive (writing extra curially when he was Chief Justice of New South Wales):⁴
- [P]eople look to a system of justice to function in an even handed and consistent manner. To the extent to which the results of cases depend upon the personal and subjective evaluation of situations by individual judges, especially where discretionary remedies are available, this expectation is disappointed. ... The greater the scope for the exercise of judicial discretion and the application of subjective value-judgments, the less will be the assurance, essential for public confidence, that the outcome of cases depends as little as humanly possible on the identity of the judges who decide them.
24. The above remarks are apposite to the discretion presently under consideration.
25. Any legislative regime to set aside settlement agreements should give some structure and content to the exercise of the discretion by listing factors relevant to the grant of relief.

⁴ The Hon A M Gleeson AC, *Individualised Justice – the Holy Grail* (1995) 69 *ALJ* 421 at 431.

It would be appropriate for such a list to be non-exhaustive in recognition of the fact that each application should turn on its own circumstances. This will also allow some judicial flexibility in the consideration of applications to overturn settlement agreements, allowing a Court to take into account common features of an application as well as the particular features of each case in reaching a determination which is fair and just.

26. Ordinarily the exercise of a judicial discretion involves a balancing of considerations and interests. The threshold test should be expressly framed so as to refer to the interests of both parties, so that it is clear that the exercise of the statutory power to overturn a settlement agreement involves the exercise of a discretion and is not a mere administrative task.

27. A benefit of a non-exhaustive list is to promote, at least to some degree, consistency in outcomes in an area in which, absent such legislative guidance, there may be significant scope for minds to differ on what is fair and just in the circumstances.

28. A non-exhaustive list of factors should include the following:

- a. The extent to which the existence of a limitation period materially contributed to an Applicant's decision to accept a settlement offer;
- b. The extent to which the absence of a proper defendant materially contributed to an Applicant's decision to accept a settlement offer;
- c. The amount of compensation received by the Applicant, taking into account the rate of inflation since receipt.
- d. Whether the Applicant is likely to receive compensation in an amount which is materially higher than that already received;
- e. The circumstances in which the settlement agreement was negotiated and finalised, including but not limited to whether:
 - i. The negotiations were affected by an imbalance of power;
 - ii. Whether the Respondent has engaged in any unfair conduct;

- iii. The effect and content of any legal advice received by the Applicant;
 - iv. Whether the Applicant was legally represented;
- f. Whether setting aside the settlement agreement will cause material prejudice to any party.

The National Redress Scheme

29. A person may make an application for redress under the National Redress Scheme.⁵ An applicant may withdraw an application at any time before a determination is made to approve the application.⁶ If an application is accepted, an offer of redress is made to the applicant.⁷ That offer may be accepted⁸ or declined⁹ by the applicant. If the person accepts an offer, there is a statutory bar on the commencement or continuation of any civil proceedings against the relevant institution or official in relation to the abuse the subject of redress.¹⁰

30. It is submitted that it would be undesirable for a person to make an application under NSW legislation for leave to commence or continue civil proceedings against an institution after an application has been made under the National Redress Scheme but before an offer has been accepted. If the application for redress led to an acceptance by the applicant of an offer of redress the time, money, resources and personal distress incurred in the related civil litigation would have been for no purpose. For that reason, it is submitted that where an application has been made under the National Redress Scheme but has not been withdrawn, or there has been no acceptance or rejection of an offer of redress, such that the application is extant:

- a. Any civil proceedings relating to abuse the subject of the National Redress Scheme which were commenced prior to the application for redress being made ought to

⁵ Section 19, National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth).

⁶ Sections 22, 29.

⁷ Section 39.

⁸ Section 42.

⁹ Section 45.

¹⁰ Section 43.

be stayed pending the withdrawal of the application or the acceptance or rejection of an offer for redress;

- b. An applicant should not be granted leave to commence civil proceedings relating to abuse the subject of the National Redress Scheme unless the applicant either withdraws the application for redress or declines an offer of redress under the Scheme.

Settlement negotiations and the Evidence Act

31. The touchstone of the proposed amendments is unfairness. The exercise of a discretion to alleviate that unfairness by setting aside a settlement agreement would invariably include consideration of the settlement negotiations between the parties.

32. Section 131(1) of the Evidence Act 1995 (NSW) provides as follows:

(1) Evidence is not to be adduced of—

(a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute, or

(b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

33. Section 131(2) provides a list of circumstances in which the exclusion of evidence of settlement negotiations under subs 131(1) does not apply. Conceivably some of those exceptions may apply in an application for leave to set aside a settlement agreement. However, the exceptions will not apply universally. It is submitted that a provision should be included in any proposed legislation which over-rides the exclusionary effect of s 131(1) of the Evidence Act in applications for leave to set aside a settlement agreement relating to historical child sexual abuse.

Conclusion

34. NSW Province appreciates the opportunity to provide these comments to the NSW Government. NSW Province would be pleased to have the opportunity to engage in dialogue with, and to assist the NSW Government in this important work.

Dated: 6 April 2020

Response to Questions Posed in the Discussion Paper

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

Yes, it is submitted that there should be a discretion to set aside settlement agreements in relation to historical child sexual abuse claims if the circumstances in which those agreements were entered into were unfair, or have somehow caused some relevant injustice.

- 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 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?

It is submitted that the definition of child abuse should be similar to s 6A(2) of the Limitation Act NSW.

- 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?

It is submitted that Courts should be given discretion to set aside settlements entered in circumstances which mean the settlement was unjust or unfair.

- 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?

Yes. The discretion should be subject to criteria discussed above.

- 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?

It is submitted that the circumstances for enlivening the discretion ought be those which are 'just and reasonable'.

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

Yes. The criteria is set out in detail in the submission above.

- 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?

No, the legislation should not specify the portion of the settlement amount and yes this should be left to judicial determination (not discretion, as it involves objective fact finding).

- 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?

Yes. This power is a necessary corollary of the discretion.

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

See the discussion above at paragraphs 29 and following.

- 10 Should any other categories of settlement be excluded?

No.

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?

Yes.

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

There ought be an exception to overcome s 131(1) of the Evidence Act 1995.