

Discussion Paper – Setting aside settlement agreements for past child abuse claims

Factsheet

What is the Discussion Paper about?

The Discussion Paper seeks your views on potential reforms that would allow the NSW courts to set aside a settlement agreement between a survivor of past child abuse and a responsible institution in specific circumstances.

This would then allow the survivor to sue the responsible institution for further damages.

Why is the NSW Government looking into these possible reforms?

In 2016 and 2018, the NSW Government introduced reforms to make it easier for survivors of child sexual abuse to sue institutions which were responsible for that abuse. These reforms implemented recommendations by the Royal Commission into Institutional Responses to Child Sexual Abuse.

Two of these reforms removed limitation periods for child abuse cases and introduced a requirement that institutions nominate a proper defendant for court proceedings relating to child abuse claims.

However, some survivors may have signed a settlement agreement with the responsible institution before the 2016 and 2018 reforms. Sometimes agreements were made for very low amounts as survivors may have thought that their claim would not be successful in court because of legal defences that are now no longer available. This might include situations where the survivor would not have been able to sue the institution because the limitation period had expired, or because the institution was an unincorporated association with no 'legal personality' (meaning there was no 'proper defendant' to sue).

Some of those settlements might now be considered unfair. However, some survivors cannot bring a claim now because their settlement agreements have clauses that say if the survivor accepted the settlement, they cannot bring any further court proceedings.

What is a 'settlement agreement' and what does it mean to set it aside?

The Discussion Paper uses the term 'settlement agreement' to refer to the agreement reached between a survivor and the responsible institution in relation to the survivors' claim for compensation. A 'settlement' might refer to a payment or some other form of compensation to the survivor.

The settlement agreement may have been reached as a part of negotiations relating to court proceedings, from discussions without involving any court proceedings, or a payment scheme run by the institution. The document that gives effect to a settlement is often referred to as a

'deed of release'. A deed of release usually prevents a survivor from bringing any further court proceedings once they have signed the deed.

Setting aside a settlement agreement means to overturn it. If a settlement agreement is set aside, it no longer has effect and cannot be used to stop a survivor from commencing court proceedings against the responsible institution.

What is being considered?

The Discussion Paper considers the key features of possible reforms. This includes what the reforms might cover and how they might work. The Discussion Paper asks questions on:

- whether the courts should be able to set aside settlement agreements in relation to past child abuse claims,
- the types of abuse that should be covered,
- the types of settlements that should be covered,
- what test the courts should follow to determine if a settlement agreement was unfair or unjust, and
- other related issues.

What effect would the potential reforms have?

This will depend on the results of consultation on the reforms.

However, the proposal in the Discussion Paper is not to allow every settlement agreement to be set aside. Under the proposal, a settlement agreement could only be set aside if the court determined that it should be set aside. This may be where the court considered that the settlement was 'unfair' or 'unjust' (or some other test to be used).

These circumstances might include where the limitation period had expired, or because there was no 'proper defendant' to sue. This would allow the survivor to bring a new claim for compensation against the responsible institution.

When are submissions required and what happens next?

Submissions are required by **15 April 2020**. Submissions should be sent to:

Policy Reform & Legislation, Department of Communities and Justice, GPO Box 6, Sydney NSW 2001, or

policy@justice.nsw.gov.au

The Department will consider all submissions and develop options for the NSW Government to consider.

For more information about the Discussion Paper, please visit www.dcj.nsw.gov.au/setting-aside-settlement-agreements or email policy.@justice.nsw.gov.au