



Policy, Reform & Legislation
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Discussion Paper – Overturning prior unjust child abuse settlements

The work of Beyond Abuse

Beyond Abuse has been supporting survivors of child abuse since 2005. This includes: delivering direct support to survivors; assisting survivors to access appropriate health care and other support services; providing advice regarding systemic reforms to institutions with a history of perpetrating abuse; working with Governments, Oppositions and Parliaments on policy and legislation development; and, presenting to media on relevant topics. Beyond Abuse receives financial and infrastructure support from government as well as private corporate sponsorship.

Discussion Paper

Beyond Abuse congratulates the New South Wales Government for the Discussion Paper and for conducting important stakeholder consultation on this issue. Beyond Abuse agrees with the rationale for allowing settlement agreements to be set aside as described in section four of the Discussion Paper.

Beyond Abuse's position

- Beyond Abuse supports the passing of legislation in NSW to allow survivors of abuse to set aside past unjust settlements and to allow those survivors the opportunity to have the evidence of their damages properly assessed.

As the discussion paper correctly describes, many survivors were denied the opportunity to participate in a proper assessment of the evidence of damages and were forced into settlements which do not reflect true damages.

- Existing common law mechanisms in NSW are inadequate as has been tragically exposed by the recent judgment in *Magann v Trustees of the Roman Catholic Church of the Diocese of Parramatta* [2019] NSWSC 1453. This judgement exposes that a statutory remedy is necessary.

Also, a statutory remedy is the most safe and sensible approach for the wider law as it allows for the legislative approach to be as bold as is required to achieve the policy objectives, while at the same time safeguarding the wider law from unintended over-reach by narrowly restricting the reforms to only cases of child abuse.

- Beyond Abuse recommends that it should not be a hard process to get a settlement overturned. At the time that victims were forced or coerced into settlements there was no other way to access compensation. Entering the settlement was something the survivor had to do, there was no other reasonable option. This reform is intended to correct that situation.

Therefore any legislation should actively prevent the application process from becoming an expensive or complex or legally uncertain obstacle for survivors in having their damages properly reassessed. The application process should not be a barrier to the victims of abuse from accessing justice.

- The effect of the legislation should be that a survivor who came forward previously should now have the same rights as a survivor coming forward for the first time today.

For example, Beyond Abuse supports the wisdom of with the Western Australian Court's determination in *JAS v the Trustees of the Christian Brothers* [2018] WADC 169 in finding that the extent of the applicant's damages 'had never been properly assessed on its merits' and that granting leave was 'consistent with the broad intention of the enabling legislation that claims be decided on their merits'.

This is exactly the spirit in which such past settlements should be properly 're-opened' and allowed to be reassessed and resettled, free from the tyranny of time

limits loopholes, and with the current safeguards around liability.

By contrast, the Queensland judgement in *TRG v Board of Trustees of the Brisbane Grammar School* [2019] QSC 157 is an example of the court basing its decision on legal technicalities resulting in ignoring its own assessment that the survivor's damages today would be higher than the past settlement. Such a determination is out of step with the intention of the enabling legislation.

NSW legislation should be worded so as to avoid NSW courts taking the Queensland path and to instead ensure NSW courts take a path similar to that in Western Australia and consistent with the intent of the reform.

- Beyond Abuse supports that the legislation should apply to all forms of child abuse. This includes sexual, physical and psychological. There should be no arbitrary exclusion of victims based on the type of abuse suffered. The usual safeguards for defendants will continue to exist in that survivors are required to prove the abuse occurred and also to prove the extent to which the abuse impacts their health.
- Beyond Abuse supports that past unjust settlements be set aside, or 're-opened' in a variety of circumstances in which the past unjust settlement was entered into, this includes: time limitations; where there was no proper defendant; and a range of other circumstances. The reform should not be limited to only time limitations.
- Beyond Abuse acknowledges the potential motivation of Participating Institutions that settlements entered into through the National Redress Scheme be binding, however Beyond Abuse is concerned about the potential impact of this upon the fair treatment of survivors who may have entered into a settlement through the National Redress Scheme *prior* to the commencement of any NSW legislation allowing for a past unjust settlement to be set aside. There may be survivors who have only entered into a National Redress Scheme settlement because they were, at that time, deprived of a right in NSW to set aside an unjust past settlement.

Beyond Abuse's position is that survivors who enter into a settlement through the National Redress Scheme should not be arbitrarily excluded from having a right to have their settlement set aside, if the settlement is unjust for any reason. The sole consideration on whether or not to overturn any settlement should be whether the settlement was just or unjust. The consideration should not be based on which scheme the survivor went through.

- Beyond Abuse supports that a right of action should continue following the death of a survivor of abuse in cases where it is appropriate. Beyond Abuse acknowledges the complexities with this issue and welcomes further discussion amongst stakeholders about how best to implement this.

The cause of death should not be required to be directly associated with the abuse for a right of action to continue. While it may be obvious in a case where a survivor commits suicide as a direct symptom of the abuse, Beyond Abuse supports that the right of action should also continue where a survivor had died of any cause with the action unresolved for any reason, for example having been deprived of a right of action for decades by unjust laws, or by unjust practices of institutions.

The NSW legislation should not create an incentive for institutions to drag matters out in anticipation of the survivor dying. Institutions should know that the right of action will continue beyond death and therefore no advantage is afforded to the institution from delaying matters unreasonably.

Beyond Abuse understands that it would be reasonable for certain protections to continue apply for defendants such as the standards of proof would still apply and defendants' rights to stay proceedings would still apply in cases where the death of the survivor results in the unavailability of evidence resulting in prejudice to defendant.

However, it is not absolute that death of a survivor automatically results in the unavailability of evidence or prejudice to the defendant, for example in cases where the evidence has already been sufficiently adduced (eg in *McKnight v Estate Judd (No.4)* [2018] NSWSC 1489). In a number of cases, survivor's evidence will be well documented and the institution will have had plenty of opportunity to interrogate the evidence prior to unfortunate death of the survivor.

Yours sincerely

A handwritten signature in black ink, appearing to read "Steven Fisher". The signature is written in a cursive, flowing style.

Steven Fisher
CEO
Beyond Abuse