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

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

Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to the discussion paper on setting aside settlement agreements for past child abuse claims.

Please do not hesitate to contact us via the contact details below if we can further assist with the Department's important work.

Yours faithfully,

[redacted]

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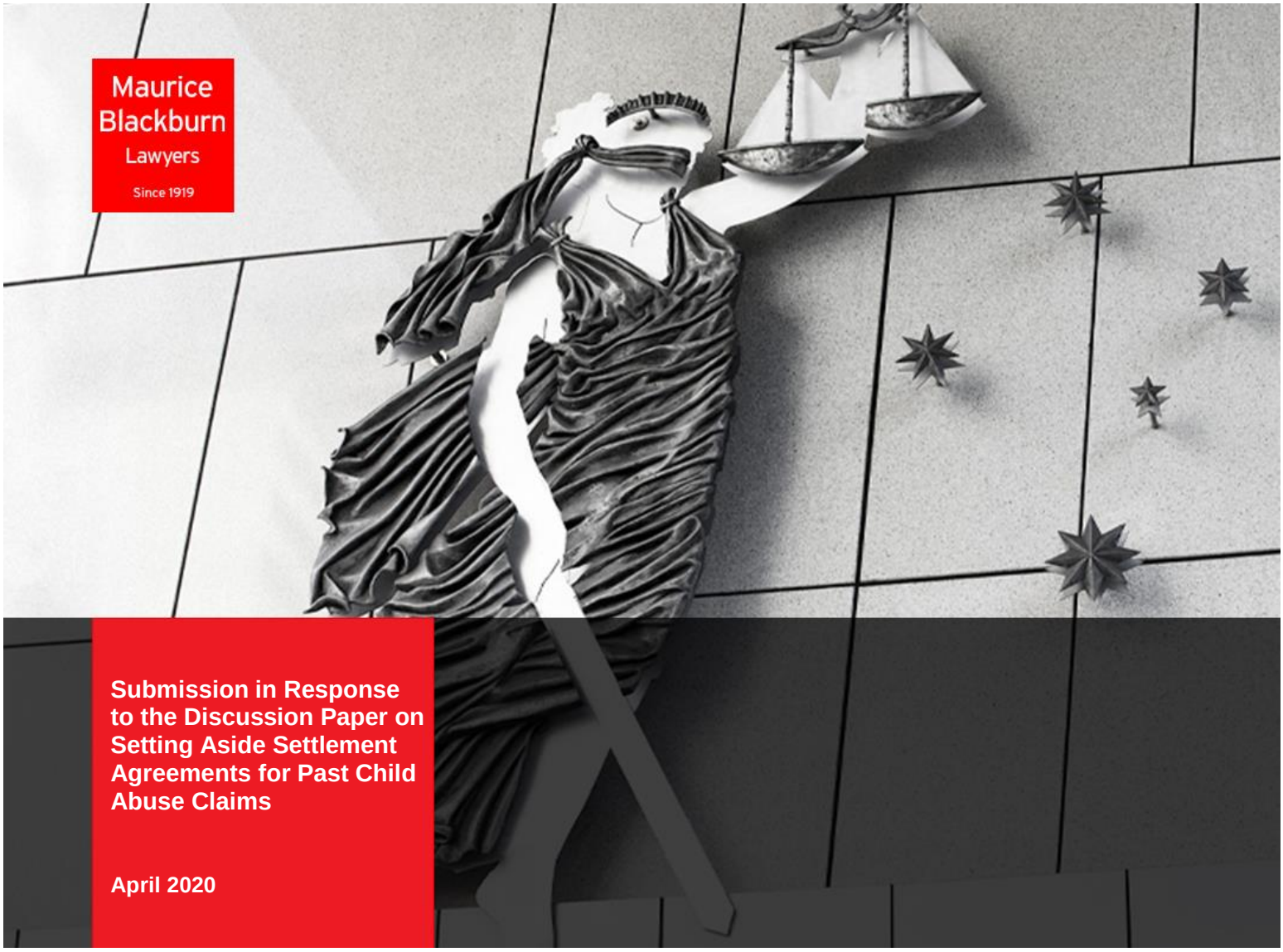

Submission in Response to the Discussion Paper on Setting Aside Settlement Agreements for Past Child Abuse Claims

April 2020

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Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Our NSW Abuse Law practice has represented 100s of survivors of historic child sexual and physical abuse endured in government, religious and other institutions. All staff in the practice are specially trained to observe trauma informed care and practice principles when dealing with survivors.

All Maurice Blackburn responses to public policy inquiries are based on the lived experience of those we represent, and the experiences of our staff in supporting them.

Our Submission

Maurice Blackburn commends the NSW government on the steps it has taken to date to implement the recommendations of the Royal Commission, including:

- *Limitation Amendment (Child Abuse) Act 2016*, retrospectively removing limitation periods for both sexual and physical abuse and any connected abuse, in response to recommendations 85 to 88 of the Redress and Civil Litigation Report.

- *Premier's Memorandum M2016-03 Model Litigant Policy for Civil Litigation* and the *Guiding Principles for Civil Claims for Child Abuse*, in response to recommendations 96 to 99 of the Redress and Civil Litigation Report.

- *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018*, which imposes a statutory duty on certain organisations to take reasonable steps to prevent child abuse, with a reverse onus of proof, the extension of vicarious liability, and the removal of the Ellis defence, in response to recommendations 89 to 95 of the Redress and Civil Litigation Report.

While these forward looking amendments are welcome in ensuring that these evil practices cannot continue into the future, much work still needs to be done to ensure that those who have suffered past abuse achieve adequate access to justice. We welcome this draft Bill as a positive next step in helping survivors of childhood institutional abuse achieve this result.

Maurice Blackburn, through this submission, offers our observations and experiences of similar legislation which has been implemented in other jurisdictions. There is much we can learn from observing the experiences of others in their attempts to implement this important reform.

Maurice Blackburn reinforces the importance of seeking national consistency in providing courts with the ability to set aside settlement claims.

Much of the evil which was perpetrated by institutions (both in the abuse itself and in the way complaints were managed and responded to) was enabled by inconsistencies and the consequent unfairness in the various state, territory and federal legislative processes.

We encourage the Department to seek, wherever possible, harmonisation with the actions of other jurisdictions in the rectification of these gaps.

Responses to Discussion Questions

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

Yes.

The Royal Commission noted[1]:

> *In our view, the current civil litigation systems and past and current redress processes have not provided justice for many survivors.*

The report goes on to say:

> *Survivors have given evidence in a number of our case studies about the monetary payments they were offered and their opinions of them. Many survivors have told us that they considered the amounts available as monetary payments were far too low and the process for calculating them was unfair or difficult to understand.*

And:

> *Where civil litigation has settled, many survivors have told us that the settlement payments were inadequate and that legal technicalities forced them to accept these settlements without ever having their claims determined on their merits.*

The Discussion Paper notes[2] the power imbalance which often existed at the time a survivor was settling their claim with an institution.

The above demonstrates compelling reasons for introducing a capacity for the setting aside of past settlement agreements. Paragraphs 4.9 to 4.15 of the Discussion Paper clearly articulate that such a capacity does not currently exist within the NSW jurisdiction.

We agree, then, that a legislative 'fix' is required to give courts the discretion to set aside settlement agreements in relation to historical child abuse claims.

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?

Maurice Blackburn supports option c.

We believe that, just because the Royal Commission was limited to inquiring into childhood sexual abuse, the legislative response to the findings need not have the same limitations. *Any related abuse* should be captured by the legislative adjustment.

We believe that using option c would ensure consistency across any new legislation and the *Limitation Act*. This would help remove uncertainty for survivors seeking advice on their rights.

[1] https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_redress_and_civil_litigation.pdf
[2] Para 4.3

The laws that determine the rights of abuse survivors are complex. Any new legislation should seek to reduce (or at least not overly contribute to) that complexity.

Please also refer to our response to Question 7 in relation to this matter.

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?

All of the above.

We agree with paragraph 5.14 of the Discussion Paper which reads:

> *The main goal of the potential reforms would be to give people who entered into unfair or unjust settlement agreements the opportunity to have that agreement set aside and to bring a further claim (or seek further settlement) against the responsible institution(s). In particular, some of those agreements might now be considered unjust or unfair in light of the fact that legal barriers which existed at the time of settlement no longer exist due to the reforms to civil liability in 2016 and 2018.*

We also agree with paragraph 5.15 of the Discussion Paper, which reads in part:

> *It would appear that any reform in NSW would need to include these statute barred settlements*

To this end, Maurice Blackburn argues that the current legislative reform should provide courts, as a minimum, with the discretion to set aside settlements for claims that were statute barred at the time the settlement was entered into (option a).

We also agree with paragraph 5.16 of the Discussion Paper, which notes that cases where the victim's cause of action was prevented by there being no proper defendant to their claim up until 1 January 2019, should also be included (option b)

We also see, however, merit in including settlements entered into in other circumstances that might mean the settlement was unjust or unfair (option c).

In our experience, significant compromises were made by a number of survivors on settlements to take into account the legal limitations relating to time lapsed since the abuse, the lack of an appropriate entity to sue (the Ellis Defence) or difficulty with satisfying the tests that determine the level of proof that the event occurred.

Maurice Blackburn is aware of circumstances where the survivor has been unrepresented in the settlement of their original claim, and as a result of the power imbalance noted elsewhere in the Discussion Paper, achieve a poor settlement result.

Further, we are aware of a number of survivors who have accepted lesser settlements due to duress and emotional distress and shame that the abuse imposed on them. This was enabled by the lack of legal representation afforded to victims in the redress schemes instigated by the institutions.

Maurice Blackburn notes the reform options outlined in paragraphs 5.18, 5.19 and 5.20. We believe that, as a stand-alone response, each has limitations.

For example, the reform suggested in 5.18 does not take into account those individuals who have not sought legal advice in resolving their claim post 1 January 2019. This creates a two tiered system and as such is unfair to a particular cohort of clients who may have been particularly vulnerable financially or emotionally post 1 January 2019. (Please refer to our response to Question 4 for further discussion on 5.18).

The reform suggested in 5.19 is also not ideal as it precludes those who were under compensated due to a lack of legal representation or particular personal vulnerability which forced them to accept a lower amount than was otherwise appropriate.

Maurice Blackburn urges the Department to seek out a test which encompasses each of the three aspects – that is, a test that courts could apply to set aside claims which were statute barred OR no proper defendant OR no legal representation at time of settlement OR the settlement was unjust or unfair.

Maurice Blackburn would be pleased to discuss this in more detail with the Department, if that would be beneficial.

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?

We note paragraph 5.18 of the Discussion Paper, which reads:

> *Potential reforms could allow applications to set aside settlement agreements entered into before 1 January 2019, being the date on which the proper defendant reforms commenced. This would ensure that the potential reforms cover all settlements that were entered into at the time they were statute barred claims or where there was no proper defendant for the claim.*

We understand the logic of taking the date that the proper defendant reforms commenced in structuring this Bill.

Notwithstanding the logic, we draw the Department's attention to an issue which has been identified in the parallel Victorian legislation, which has unintentionally created a black hole for a number of survivors.

The *Children Legislation Amendment Bill 2019* passed both houses of Victorian Parliament on 10 September 2019. The Bill had four key objectives:

1) Expanding mandatory reporting of child abuse and harm to include religious ministries;
2) Removing the exemption for the confessional seal to mandatory reporting requirements;
3) Strengthening working with children checks; and
4) Removing civil litigation barriers for survivors of institutional child abuse for unjust and inadequate judgements and settlements.

The overall intention of the Bill as a whole is a positive one seeking to make amends for deficiencies in the legislation for survivors of historic abuse and to protect future generations. In many ways it is in line with similar bills going through the parliaments of most states and

territories. However, the way in which the fourth objective was drafted unfairly penalises a cohort of abuse survivors.

The drafting of Section 27QA (2) stipulates that it only applies to settlements that took place before 1 July 2015. This means settlements signed after 1 July 2015 will continue to act as a bar for survivors who are seeking to revisit settlements which were often reached in unfair circumstances where the survivor was at a strategic disadvantage.

For example, the Victorian *Legal Identity of Defendants (Organisational Child Abuse) Act,* which put an end to the Ellis Defence, did not commence 5 June 2018. Unfortunately, the Victorian Government did not publicly announce that previous settlements and barred actions might be set aside, where it is just and reasonable to do so, until June 2019.

So for the period 1 July 2015 to date, anyone negotiating settlements did not know whether the Government would follow the Royal Commission's recommendations in full and, if it did, how the changes would be structured and operate in practice. This has resulted in significant uncertainty and risk.

In Victoria, Maurice Blackburn has seen survivors accept reduced settlements post 1 July 2015 in the face of institutions:

- Continuing to argue survivors are bound by confidentiality clauses and clauses barring the making of future claims, where a previous payment has been made, regardless of the amount or circumstances of the earlier payment;

- Acting evasively in relation to confirming perpetrators' relevant details and naming the appropriate defendants; and

- Otherwise not behaving as model litigants in the manner recommended by the Royal Commission.

By way of comparison, Queensland's equivalent law, the *Transitional provision for Limitation of Actions (Child Sexual Abuse) and Other Legislation Amendment Act 2016*, removes the requirement that a claim be made within a certain timeframe and allows for the setting aside of unjust and unreasonable settlements in the same Act and, in doing so, does not disadvantage survivors in the manner the Victorian Bill does.

Giving the courts the power to set aside unjust previous settlements is a significant improvement for survivors in Victoria. But, in limiting the benefit to those survivors who signed settlements before 1 July 2015, it prejudices vulnerable individuals who, for a variety of reasons, were at an unfair disadvantage when entering into the settlements.

Maurice Blackburn urges the Department to ensure that the nomination of 1 January 2019 in any future draft NSW Bill does not create a similar black hole as created by the Victorian legislation.

Our suggestion is that, like in the Queensland Act, the date be left undefined.

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?

Maurice Blackburn favours option a.

Our experience with the *Contracts Review Act* (NSW) echoes the tenor of paragraph 5.26 of the Discussion Paper, that it: "…*is not an appropriate mechanism for a settlement agreement for a child abuse claim to be set aside*". In our experience, the test in the *Contracts Review Act* (NSW) is simply too steep to be useful in setting aside past settlements.

Maurice Blackburn submits that one of the most important consideration in this question is the availability of jurisprudence.

Option (a) would give NSW courts a far broader, national scope of jurisprudence to draw on in making their decisions in relation to the setting aside of past settlement agreements.

If the Department were to choose an option which is quite different to that used in other major jurisdictions, it would mean that survivors would have to wait until sufficient local jurisprudence is built up, in order to confidently predict whether their request to set aside a past settlement is likely to succeed. It would also mean that the cases of a number of victims would be 'guinea pigs' in the development of precedent. This does not reflect a survivor-focused response to current deficiencies in the courts system.

By adopting similar arrangements to those in place in Victoria, Queensland and WA, Maurice Blackburn argues that the second benefit option (a) provides is the opportunity for uniformity and equality for survivors, regardless of the jurisdiction in which they live.

Option (a) would offer NSW courts the benefit of judicial decisions in cases such as those described in paragraphs 5.31 and 5.33 of the Discussion Paper.

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

Maurice Blackburn believes that this should be a matter of jurisprudence – adding further weight to the selection of option (a) in response to Question 5, as above.

The criteria for applying tests is, and should be, a matter for the common law to determine.

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?

In our response to question 2, we noted that just because the Royal Commission was limited to inquiring into childhood sexual abuse, the legislative response to the findings need not have the same limitations. *Any related abuse* should be captured by the legislative adjustment, as was included in the amendments to the Limitation Act.

Question 7 demonstrates the importance of allowing this legislative reform sufficient scope to capture 'any related abuse'.

If the reforms resulting from this discussion produce legislation which only focuses on childhood sexual abuse, it will make the unravelling of past settlements difficult and speculative, if not impossible, creating unfairness and uncertainty.

We agree with paragraph 5.42 of the Discussion Paper, which reads:

> *If potential reforms adopt a definition that covers sexual abuse, physical abuse and other connected abuse, the majority of unjust or unfair settlement agreements will likely be able to be set aside in full.*

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?

Maurice Blackburn argues that the core issue here is national consistency.

If it is the case that insurance contracts and agreements are excluded from being set aside in other major jurisdictions, that would be the most appropriate course of action in NSW.

Maurice Blackburn urges the Department to consider that the reduction in state by state differences in achieving justice for survivors should be a core objective of this process.

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

Maurice Blackburn agrees with the tenor of paragraphs 5.59 and 5.60 in that potential reforms should not seek to apply to settlement agreements entered into as a result of a payment under the National Redress Scheme.

We have not identified any further issues related to this interaction.

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?

Maurice Blackburn is assuming that statements such as:

> *The possible reforms would only allow the person who received payment under a settlement agreement to apply to have the settlement agreement set aside*

refer to the person who received payment and their representative.

While Maurice Blackburn is sympathetic to the impact that abuse has on the family of the survivor, we understand that these reforms must have limitations. We agree that if the person who received a determination and payment under a settlement agreement is deceased, the settlement agreement should not be able to be set aside.

The scenario where a survivor makes an application, but passes away *before the determination can be made* may need special consideration by the Department. We note that given the age and general health of many survivors, this scenario is not unheard of.

The important factor is to avoid the retraumatising of survivors through offering defendants/institutions an opportunity to frustrate or delay a legal process in arguments of who paid what and to whom.

Maurice Blackburn urges the Department to seek out the most victim-focused response to any of these reform questions.

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

Maurice Blackburn reinforces the importance of seeking national consistency in providing courts with the ability to set aside settlement claims.

Whilst we congratulate NSW on the positive steps it has taken in response to the recommendations of the Royal Commission, it has proven difficult to keep track of the comparative success of the various states and territories in achieving these wins for survivors.

Much of the evil which was perpetrated by institutions (both in the abuse itself and in the way complaints were handled) was enabled by inconsistencies in state/territory/federal legislative processes.

We encourage the Department to seek, wherever possible, harmonisation in the rectification of these gaps.

We need to make processes nationwide as user-friendly and equitable as possible. To do otherwise would be to the benefit of the institutions, and undermine attempts at becoming more survivor focused and trauma informed.