Donaldson LAW

Sydney Office
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submission.

Discussion paper
Setting aside settlement agreements for past child abuse claims
April 2020

working together for out of court solutions

Introduction

Donaldson Law welcomes the opportunity to provide this submission to the Discussion Paper Setting aside settlement agreements for past child abuse claims. This submission has been authorised by [redacted] Director of Donaldson Law.

This submission is endorsed by Rape & Domestic Violence Services Australia.

About Donaldson Law

Donaldson Law is a national practice specialising in assisting survivors of abuse obtain common law settlements for their injuries through a collaborative and trauma informed approach. Donaldson Law has extensive experience in the carriage of common law claims where survivors have suffered physical, sexual and psychological abuse. Donaldson Law has successfully resolved claims against dozens of institutions including the Australia Defence Force, religious organisations, schools, sporting clubs and various State government agencies. We do not limit the work we do to any particular institution, and are willing to consider claims for all survivors of abuse.

Donaldson Law attempts to resolve claims on an unlitigated basis directly with the relevant institution, building into the process the opportunity for claimants to participate in restorative engagement as well as obtaining financial compensation.

We represent claimants on a no win- no fee arrangement, where we cover the professional legal fees of running the claim, and clients are only charged if we are successful in obtaining a settlement. We do not charge an uplift or success fee on top of our hourly rates. As an added protection to clients we agree to cap the amount that clients contribute towards their professional fees. Unlike many firms, we also cover the disbursements on a no win-no fee basis and do not require clients to enter disadvantageous litigation lending arrangements with third parties.

Since its inception in 2016, Donaldson Law has acted for over 160 victims of institutional abuse. Our clients have lived with the devastating impact of abuse their whole lives. Frequently the disclosure of abuse occurs years later.

Rape & Domestic Violence Services Australia

Rape & Domestic Violence Services Australia is a non-government provider of services to those whose lives have been impacted by sexual, domestic or family violence. Services include telephone, online and face to face trauma counselling, behaviour change counselling for those who use violence and clinical and prevention training and projects targeting service providers and the broader community. Rape & Domestic Violence Services Australia has been providing telephone and face to face counselling for those engaged with the Royal Commission into Institutional Responses to Child Sexual Abuse for the six years that the Commission operated. Subsequently the organisation continues to provide telephone and face to face trauma counselling for those engaged in or considering engagement with the National Redress Scheme. Rape & Domestic Violence Services Australia works closely with Donaldson Law to ensure client have the best legal advice in relation to their legal options.

General Comments

Donaldson Law consider that any reform to allow settlement agreements to be set aside should be guided by principles of justice, fairness, and equity of treatment.

The retrospective removal of limitation periods for child abuse has had the consequence of disadvantaging those individuals who settled their claims before the removal of the limitation period. Donaldson Law say this is so because past settlements have inevitably been influenced by the expiration of limitation periods which prevented claims being pursued and resolved on their merits. Furthermore, deeds of release, including indemnity clauses, have usually been signed as part of such settlement agreements which prevent claimants from pursuing any further claims against the institution for the abuse.

Had claims been resolved on their merits, it is likely survivors would have been achieved higher settlement amounts which would provide survivors with the financial means to access support and services, as noted in the Discussion Paper.

Discussion Questions

We address the specific issues raised by the discussion questions below.

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

Donaldson Law supports Courts being given the discretion to set aside settlement agreements in relation to historical child abuse claims.

Settlement agreements entered into before the removal of the limitation periods were inevitably influenced by the limitation provisions then in force which would, in many cases, have prevented claims for child abuse being pursued in Court. In circumstances where a claim was statute barred, the survivor had little choice but to accept any settlement on offer or commence proceedings against legal advice. For those claims which were not statute barred, the simple existence of limitation barriers to be overcome informed the survivor's claim, the parties' negotiating positions and resulting settlement such that survivors accepted compensation discounted for limitation issues and without their claim being assessed on its merits.

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 Limitations Act (NSW)**
    d. **Some other definition?**

We say the definition of child abuse used in the Limitation Act should be adopted. Such a definition links the reform with retrospective removal of limitation periods and the equitable treatment of all survivors of abuse.

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?**

We submit the courts should be given discretion to set aside any settlement agreement for child abuse where it is just and reasonable to do so. The 'just and reasonable' test for the exercise of the discretion is an appropriate and effective mechanism, in itself, for determining which settlements should be set aside. Restricting the discretion based on classes of circumstance risks excluding some past settlements for child abuse, even where it may be otherwise just and reasonable for such a settlement agreement to be set aside.

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 the discretion?**

Donaldson Law submits the courts' discretion should not be fettered by date limitations. The 'just and reasonable' test for the exercise of the courts' discretion is an appropriate and effective mechanism, in itself, for determining which settlements should be set aside.

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?**

We say the legislation should adopt the test of 'just and reasonable'. for a number of reasons. First, fairness: the test of just and reasonable provides for a fair balance between competing interests. Secondly, the test is a reasonable response to the issue of settlements entered into before the removal of limitation periods for child abuse. Lastly, the 'just and reasonable' test is consistent with the majority of jurisdictions that have introduced similar reforms. In this way caselaw on the test of just and reasonable will build consistency across jurisdictions over time, which will enhance the fair treatment of survivors across jurisdictions, and build consistency in the law.

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

We consider that the discretion of the Court to determine the relevant considerations is best left unfettered. We note that the jurisdictions which have adopted the test of 'just and reasonable' do not include criteria to be taken into account.

Notwithstanding this, the parties to deeds are likely to benefit from some guidance about the factors that may be relevant to the exercise of the Court's discretion. Accordingly, and without limiting the Court's discretion, we submit that it would be beneficial to include a non-exhaustive list of factors to which the court may have regard. Given that every matter will turn on its own facts, we consider the better approach is not to prescribe criteria, but rather provide a list of circumstances which may be relevant considerations, in addition to any other matter the court considers relevant. The relative weight to be given to such considerations should be left to the Court's discretion.

Some examples of the non-exhaustive relevant factors include:

- Whether the claimant was legally represented,
- Whether the claim was statute-barred at the time of settlement,
- Any power imbalance between the parties,
- Whether the respondent institution exercised power and control over the abuse survivor at the time the settlement agreement was entered into.
- Whether the abuse survivor was in an abuse home or community environment at the time of settlement. We are aware of instances where survivors have entered into settlement agreements as a result of domestic violence.

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?

Donaldson Law recognise that a settlement payment pursuant a settlement agreement represents the combination of multiple factors into one monetary sum and that the relevant factors and constituent parts of the final sum are rarely, if ever, articulated in the settlement agreement. In our experience settlement sums are usually a single figure, inclusive of costs, for all aspects of the claim and not amenable to division. We further note that any theoretical allowance for a specific head of damage by one party in settlement calculations is not usually specified in the settlement agreement, let alone disclosed to the other party during settlement negotiations. Given this state of affairs, we submit that unless the settlement agreement provides a breakdown, the proportion of the settlement amount attributable to child abuse should be determined by the court on a case-by-case basis and on the evidence placed before it by the parties, representing the evidence relied upon by the parties in the determination of the settlement, the subject of the agreement.

8. If the Courts are given the discretion to set aside a settlement agreement, should they also have the discretion to set aside orders, judgements, and other contracts or agreements (excluding insurance contracts) giving effect to the set aside settlement agreement?

Unless the Courts are also given the discretion to set aside any order or judgement giving effect to the settlement agreement, the proposed reforms will be ineffective.

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?

Donaldson Law says survivors' estates should have the benefit of the proposed reforms in accordance with the Law Reform (Miscellaneous Provisions) Act 1944. Rather than limiting the people who may approach the court, we submit the 'just and reasonable' test for the exercise of the courts' discretion is a better means of determining the limits of the proposed reforms' operation. Further, any relevant considerations arising from the death of the survivor, and considerations of certainty for defendants are already incorporated into the test of just and reasonable. For this reason, we see no reason why an estate should be prevented from seeking to set aside a settlement agreement if the court determines is just and reasonable that the settlement be set aside.