DAVID SHOEBRIDGE
Greens NSW MP

Parliament House
Macquarie St
Sydney NSW 2000

Mark Speakman
Attorney General
by email: office@speakman.minister.nsw.gov.au

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Dear Attorney-General,

Re: Civil Liability Amendment (Child Abuse Settlement) Bill 2020.

I refer to the above and note that submissions are being sought on the pubic consultation draft of the *Civil Liability Amendment (Child Abuse Settlement) Bill 2020* ('the Bill'). Please consider this a formal submission regarding the current Bill.

The purpose of the Bill is stated to be to allow a pathway to set aside past unfair settlements or in regards past judgments on claims of child sexual abuse.

This is urgent law reform work as numerous cases have recently been dismissed in the Courts upholding past unfair deeds and judgments as complete bars to further proceedings. See for example Magann v The Trustees of the Roman Catholic Church for the Diocese of Parramatta [2020] NSWCA 167 and *GMW 1 v Salvation Army (NSW) Property Trust* [2020] NSWSC 1682 (Garling J).

My office has consulted with numerous stakeholders about the Bill and they universally reject the model proposed. It does not respect the direction of reform set out in your Department's 2020 discussion paper and it does not open a fair or workable pathway to justice for victims of child sexual abuse.

Your Department's own discussion paper set out the rationale for reform which I adopt. It is as follows:

> *4.3 In its Redress and Civil Litigation report, the Royal Commission found that many survivors entered into settlement agreements "under time pressure, and in some cases, without the opportunity to obtain independent advice and with little or no knowledge of what others in comparable positions had been offered or paid".16 The Royal Commission found there was often a power imbalance between the survivor and the defendant when negotiating claims, with the nature of the trauma suffered by the survivor creating a significant power imbalance during negotiations.17*
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> *4.4. The Royal Commission heard that many survivors found redress provided in past schemes was inadequate and the process for calculating payments was unfair or*

difficult to understand.18 The Royal Commission also found that, for survivors who made a claim against responsible institutions, legal technicalities often forced people to accept settlements without being able to have their claims determined on the merits.19

4.5. Many of the settlement agreements entered into by survivors might now be considered unjust or unfair, particularly where those legal barriers have been removed following the NSW Government's reforms to civil liability in 2016 and 2018. If those legal barriers had not existed at the time of the settlement, those survivors would have been in a better negotiating position and may have negotiated a higher settlement amounts.

The direction of reform across the Country has been to adopt a general discretion to allow past settlements or judgments to be set aside where a Court is satisfied that it is "just and reasonable" to do so. This is the core test in:

- Queensland, *Limitations of Actions Act 1974* s48
- Victoria, *Limitations of Actions Act 1958* ss27QB and 27QC
- The Northern Territory, *Limitation Amendment (Child Abuse) Act 2017* ss53(2) and 54(3), and
- Western Australia, *Limitation Act 2005* ss89 and 92

By way of completeness I note that neither the ACT or SA have yet enacted these reforms and that the Tasmanian model found in *The Limitation Act (Tas)* 1974 is more limited than the above.

In contrast to the mainstream direction of reform in Qld, Vic, WA and the NT the proposed NSW Bill has insurmountable limitations and legal technicalities that make it not fit for purpose. The core elements of the NSW Bill are as follows:

- Under the proposed s7A an application to set aside a past settlement can only be brought if the past settlement was made 'on unfavourable terms because the person could not reasonably pursue a legal cause of action at the time of the settlement'.

- The proposed s7B defines an 'affected agreement' as being an agreement in regards to an action which was 'not maintainable' or against an unincorporated association (where that in effect made the action unmaintainable).

- Section 7C then allows the Court only to set aside this limited set of judgments and agreements if it is in the interests of justice to do so.

This scheme fails entirely to deal with the thousands of cases where there may well have been a viable cause of action but the unfair bargaining positions of the parties, the mental harm suffered by the survivor and/or the dominant views of abusive institutions (and the legal profession) was such that unfair and inadequate agreements were accepted as normal.

It also fails to address the notorious fact that many institutions deliberately hid their knowledge of systemic abuse and also used their spiritual and religious hold on survivors and their families to deliver grossly unjust settlements that were favourable to the institutions.

The Bill must not progress in its present form, if it was to do so it would be an insult to victims and would also detract from the very real and meaningful reforms you have previously shepherded through Parliament that have provided genuine and meaningful reform for survivors.

There is a simple solution to this matter and that is to simply adopt the existing, fair and workable reforms already in place in Western Australia. As previously discussed, in the absence of a fair government Bill I will, on behalf of my party (but more importantly the thousands of survivors who deserve justice) bring such a proposal to the Parliament early in the New Year. Respecting your genuine reform intentions in this space I would hope instead to provide cross party support to a government bill that does the same.

I am of course available to discuss further.

Kind regards,

David Shoebridge
Greens Justice Spokesperson