Cameron Akehurst and Gabrielle Overton***

THE (SETTLEMENT) DEED IS DONE — UNLESS YOU HAD LEGAL REPRESENTATION: *JENS V THE SOCIETY OF JESUS* [2024] VSC 329

I Introduction

In 2015, the Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission') published the 'Redress and Civil Litigation' report, examining the historical and current legal framework surrounding claims of child sexual abuse, as well as the remedial options and barriers for survivors seeking redress.[1] Civil law limitation periods historically prevented survivors from pursuing damages for personal injury against perpetrators or institutions, typically only allowing actions to be commenced within three years from the accrual of the cause of action.[2]

The Royal Commission identified, amongst other things, a systemic failure to protect children across a number of generations, making clear the pressing need for accessible avenues through which survivors could seek redress for historical abuse.[3] Key recommendations advocated for the retrospective removal of limitation periods for personal injury claims related to institutional sexual abuse.[4] These reforms were fundamental in circumstances where, often, the nature and impact of such abuse is not fully realised until decades after its occurrence.[5]

---

* LLB (Hons), BIntBus; Student Editor, *Adelaide Law Review* (2024); Associate Editor, *Adelaide Law Review* (2025).

** LLB (Hons); Student Editor, *Adelaide Law Review* (2024).

1 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Redress and Civil Litigation Report, September 2015) ('*Royal Commission Redress and Civil Litigation Report*').

2 Ben Mathews and Elizabeth Dallaston, 'Reform of Civil Statutes of Limitation for Child Sexual Abuse Claims: Seismic Change and Ongoing Challenges' (2020) 14(2) *UNSW Law Journal* 386, 391–2.

3 *Royal Commission Redress and Civil Litigation Report* (n 1) 85–8.

4 *Royal Commission Redress and Civil Litigation Report* (n 1) 52–3. See generally Alex Collie and Bill Madden, 'The Limits of No Limitation: How Prejudice Affects the Removal of Limitation Periods' (2019) 155 *Precedent* 25.

5 See generally Joseph H Beitchman et al, 'A Review of the Long-Term Effects of Child Sexual Abuse' (1992) 16 *Child Abuse and Neglect* 101; Paul E Mullen et al, 'The Effect of Child Sexual Abuse on Social, Interpersonal and Sexual Function in Adult Life' (1994) 165(1) *British Journal of Psychiatry* 35.

The Royal Commission's recommendations have since been adopted in every Australian state and territory.[6] Given the retrospective operation of the removal of limitations periods, settlements entered into by survivors of child sexual abuse in contemplation of elapsed limitation periods can be reopened where just and reasonable to do so.[7]

Since these reforms, there have been an influx of claims brought by survivors of child sexual abuse against unincorporated associations, with many cases resulting in substantial court-ordered compensation.[8] The recent decision of *Jens v The Society of Jesus*[9] ('*Jens*') follows this trend, though the quantum of damages has not yet been determined. *Jens* concerned two instances of alleged sexual abuse by a priest, Noel Bradford, against the plaintiff, Peter Jens, while he was a boarding student at a Melbourne College in the 1960s.[10] The plaintiff settled his claim in 2011 by way of deed, under which he received $150,000 and tuition for his two sons in full and final satisfaction of his claim.[11] The plaintiff, now aged 69 years old, sought to have the settlement set aside pursuant to ss 27QD and 27QE of the *Limitations of Actions Act 1958* (Vic) ('*Limitations Act*').[12]

This case note first examines the factual background of *Jens* and the substance of the relevant settlement instruments. It then analyses the Supreme Court of Victoria's decision, which considered the relevant factors for determining whether overturning the settlement was 'just and reasonable'. Finally, it considers the judiciary's treatment of knowledge of legal barriers as a factor in its consideration of whether to overturn settlement instruments in child sexual abuse claims executed pre-reforms.

---

6 *Limitation Act 1985* (ACT) s 21C; *Limitation Act 1969* (NSW) s 6A; *Limitation Act 1981* (NT) s 5A; *Limitation of Actions Act 1974* (Qld) s 11A; *Limitation of Actions Act 1936* (SA) s 3A; *Limitation Act 1974* (Tas) s 5B; *Limitation of Actions Act 1958* (Vic) s 27P; *Limitation Act 2005* (WA) s 6A.

7 *Limitation of Actions Act 1958* (Vic) s 27QA ('*Limitation Act*'); *Civil Liability Act 1936* (SA) pt 7B ('*Civil Liability Act*'); *Civil Liability Act 2002* (NSW) pt 1C; *Civil Law (Wrongs) Act 2002* (ACT) pt 8A.3; *Limitation of Actions Act 1974* (Qld) s 48; *Limitation Act 2005* (WA) s 92; *Limitation Act 1981* (NT) s 54; *Limitation Act 1974* (Tas) s 5C. See generally Hassan Ehsan, 'Setting Aside Settlement Deeds: Historical Child Sexual Abuse Claims' (2019) 155 *Precedent* 30.

8 See e.g: *Erlich v Leifer* [2015] VSC 499; *Hand v Morris* [2017] VSC 437; *MC v Morris* [2019] NSWSC 1326; *Lawrence v Province Leader of the Oceania Province of the Congregation of the Christian Brothers* [2020] WADC 27; *O'Connor v Comensoli* [2022] VSC 313; *S, M v S, RK* [2019] SADC 184; *TJ (A Pseudonym) v Bishop of Roman Catholic Diocese of Wagga Wagga* [2023] VSC 704; *SR v Trustees of De La Salle Brothers* [2023] NSWSC 66.

9 [2024] VSC 329 ('*Jens*').

10 Ibid [17]–[19].

11 Ibid [1], [10].

12 Ibid [3]. See also *Limitation Act* s 27QA; *Civil Liability Act 1936* (SA) pt 7B ('*Civil Liability Act*'); *Civil Liability Act 2002* (NSW) pt 1C; *Civil Law (Wrongs) Act 2002* (ACT) pt 8A.3; *Limitation of Actions Act 1974* (Qld) s 48; *Limitation Act 2005* (WA) s 92; *Limitation Act 1981* (NT) s 54; *Limitation Act 1974* (Tas) s 5C.

II Facts

In 2008, Jens disclosed the abuse he had suffered to a friend, who suggested he consult a lawyer. That lawyer then referred Jens to Mr Lombard, a personal injury lawyer. Neither practitioner had significant experience working on historical abuse claims.[13] Mr Lombard provided only 'basic advice' as to the barriers imposed by the statute of limitations and the '*Ellis* defence'[14] arising out of *Trustees of the Roman Catholic Church v Ellis* ('*Ellis*').[15] *Ellis* concerned allegations of child sexual abuse by a priest, where difficulties arose in identifying an appropriate defendant to the claim. This was due to the unincorporated nature of the Roman Catholic Church and because church trustees did not manage the appointment and removal of priests.[16] Consequently, there was no legal entity to be sued in respect of misconduct, apart from the perpetrator themselves. Until the reforms were enacted, this decision remained a significant legal barrier for claimants, particularly in cases where perpetrators were deceased or otherwise lacked the resources to satisfy a monetary judgment.[17] Following Mr Lombard's advice, Jens did not pursue further legal action.[18]

Jens had an initial conversation with Father Peter Hosking, on behalf of the defendant, in July 2008. Later, Father Michael Head, responsible for the College's professional standards, met with Jens to discuss his complaint and suggested he engage with Towards Healing — a pastoral response group established in 1996 to address clergy sexual abuse complaints.[19] Jens did not contact the school again until 2011, when he met with Fathers Curtin and Head, requesting an opportunity to speak with Bradford, who admitted the abuse but cited his own personal struggles at the time.[20]

Subsequently, Jens met with Father Head again and discussed compensation.[21] Father Head suggested Jens consult his brother, a barrister of senior counsel, about drafting a deed of release.[22] Jens' brother provided some basic terms typically featured in settlement agreements, but did not discuss Jens' legal entitlements or attempt to

13 *Jens* (n 9) [23].

14 Ibid [23]–[24].

15 (2007) 70 NSWLR 565 ('*Ellis*').

16 Ibid 587 [94]. See also Laura Griffin and Gemma Briffa, 'Still Awaiting Clarity: Why Victoria's New Civil Liability Laws for Organisational Child Abuse are Less Helpful than they Appear' (2020) 43(2) *UNSW Law Journal* 452, 454.

17 Ibid 603 [194].

18 *Jens* (n 9) [25].

19 Ibid [27]–[29]. See also Timothy Matthews, 'Evaluating Towards Healing as an Alternative to Litigation as Redress for Survivors of Clerical Child Sexual Abuse' (2015) 26(3) *Current Issues in Criminal Justice* 333.

20 *Jens* (n 9) [29]–[30], [36].

21 Ibid [40].

22 Ibid.

formulate his claim.[23] In August 2011, Jens executed a settlement deed, receiving $150,000 and boarding positions for his two sons with all related fees covered.[24]

In 2013, Jens contacted the College again, requesting financial support for his sons' school fees at another institution, including uniform and textbook costs as well as an additional $50,000 and funds for counselling.[25] Following mediation, the Society of Jesus ('the Society') agreed to reimburse Jens for nine counselling sessions, subject to receipt of invoices.[26] Jens informed the Society he no longer wished for his sons to attend the College, estimating the value of the deed covering their tuition and boarding at approximately $500,000. Jens further expressed that the $150,000 settlement was inadequate compensation for the abuse and its lasting impact.[27] At mediation, Jens was represented by his brother and other counsel who advised of the risks of instituting proceedings.[28] The Society maintained that the nature of the abuse did not warrant a higher payout, relying on the settlement deed as a binding agreement and rejecting Jens' request for further compensation.[29] The Society agreed to continue funding his counselling,[30] and approved the further provision for tuition, but stipulated it was to be paid directly to Jens' sons' school.[31]

In 2016, further settlement discussions resulted in the execution of a variation deed under which the defendant paid to Jens approximately $260,000, comprising the original $150,000 settlement sum, $3,500 for counselling, and $107,000 for school expenses.[32] Importantly, the settlement deed was executed prior to legislative reforms. Meanwhile, the variation deeds were executed after legislative amendments removing the limitation defence in Victoria, but before the removal of the *Ellis* defence which occurred in 2018.[33]

III Decision

Sections 27QA, 27QD, and 27QE of the *Limitations Act* allow a plaintiff to apply to the Court for an order setting aside a settlement agreement concerning a previously settled cause of action on the basis that it is 'just and reasonable' to do so.[34] The Court

23 Ibid [41].
24 Ibid [42].
25 Ibid [45].
26 Ibid [47].
27 Ibid [50].
28 Ibid [56].
29 Ibid [54], [59].
30 Ibid [61].
31 Ibid [62]–[63].
32 Ibid [75]–[76].
33 Ibid [91].
34 Ibid [92]–[93].

in *Jens* followed the decision of *Trustees of the Christian Brothers v DZY*,[35] which restated the criteria of which the Court must be satisfied to set aside a settlement agreement. These factors comprised, generally:

- the centrality of the actual influence of the time and legal barriers;[36]
- that one of those barriers, in an ordinary case, would play some part in explaining why the claimant entered into the settlement agreement;[37] and
- if a finding is made that one or more legal barriers had some material impact on the claimant's decision to settle their claim, a cogent ground exists to conclude that it is just and reasonable to set aside the settlement. This is subject to the balancing of any prejudice to the respondent in setting aside the deed.[38]

The Court was satisfied that legal barriers materially impacted Jens' decision to enter into the settlement deed and ruled it just and reasonable to set aside the settlement instruments.[39]

A *Central Factor*

Associate Justice Ierodiaconou primarily considered the central question of whether legal barriers materially impacted Jens' decision to enter into the deeds. It was accepted that Jens had knowledge of the legal barriers, including an elapsed statutory time limit, which influenced his decision to seek compensation directly from the defendant and accept settlement.[40]

Jens' evidence was corroborated by Mr Lombard, who believed he would have, at some stage, advised Jens of those legal barriers. No available evidence refuted Jens' belief that legal barriers existed at the time of the settlement.[41] Her Honour noted Jens gave evidence that 'seeking compensation was his only option and he believed he was engaged in a glorified begging process'.[42] In addition to this central factor, several other findings supported her Honour's decision.

B *Supporting Factors*

1 *Imbalance of Bargaining Power*

It was accepted that the plaintiff received legal advice from Mr Lombard regarding legal barriers before negotiating the settlement deed, but not during negotiations

35 [2024] VSCA 73 ('*Trustees of the Christian Brothers*').

36 *Jens* (n 9) [94]; Ibid [109].

37 *Jens* (n 9) [94]; *Trustees of the Christian Brothers* (n 35) [110].

38 *Jens* (n 9) [94]; *Trustees of the Christian Brothers* (n 35) [110].

39 *Jens* (n 9) [120], [131].

40 Ibid [121].

41 Ibid [125].

42 Ibid [127]. See also [102].

or in regard to the quantum of settlement.[43] Conversely, while the defendant knew Jens had obtained legal advice, it did not clarify whether that advice accounted for the defendant's public undertaking to no longer rely on legal barriers.[44] Her Honour found Jens had significantly less bargaining power than the defendant in negotiating the settlement deed and was even more disadvantaged when negotiating the variation deed, despite having legal representation.[45]

2 *Prospects of Success*

When Jens entered into the settlement in 2011, he had strong prospects of success at trial, absent the legal barriers.[46] The defendant admitted the abuse allegations in part and acknowledged that the abuse was reported in July 2008. Additionally, there were multiple other credible complaints against Bradford connected to his tenure at the College.[47] Her Honour found the settlement amounts of $150,000 and later $261,000 under the variation deed to be 'modest' sums compared to what Jens would have received had the matter proceeded to trial in 2011.[48] The compensation paid was 'heavily discounted' relative to the damages Jens could now potentially be awarded.[49]

3 *Conduct of the Defendant*

Her Honour acknowledged that the defendant provided pastoral care to Jens and afforded him some agency through the settlement deed, arranging the meeting with Bradford, and negotiating the variation deed.[50] However, her Honour found the defendant failed to adequately support or inform Jens while negotiating the settlement deed.[51]

4 *Unfair Prejudice*

While her Honour acknowledged that the general passage of time had caused some prejudice, the defendant failed to identify any material prejudice so as to render setting aside the settlement deed unjust or unreasonable.[52] The defendant had been on notice since 2008 of the plaintiff's allegations of sexual abuse by Bradford (who admitted to the abuse), yet there was no evidence that the defendant investigated Bradford's conduct.[53]

---

43 Ibid [150].

44 Ibid [151]–[153].

45 Ibid [153], [155], [160].

46 Ibid [184].

47 Ibid [187].

48 Ibid [196].

49 Ibid [199].

50 Ibid [214].

51 Ibid [213].

52 Ibid [242].

53 Ibid [237].

5 *Findings*

Her Honour concluded that the limitation period materially influenced Jens' decision to enter into the settlement deed, and, upon 'synthesising' the supporting factors, deemed it just and reasonable to set aside both the settlement and variation deeds.[54]

IV Comment

This discussion examines the assessment undertaken by the courts in determining whether settled historical child abuse claims impacted by limitation periods should be reopened in favour of judicial assessment. *Jens* illustrates a key factor in determining whether it is 'just and reasonable' to overturn a settlement deed — whether the claimant received legal advice or was represented during negotiations and, as such, was aware of legal barriers to their claim.[55]

A *Legislative Intent*

A key consideration in both the assessment of damages and any decision to overturn settlement instruments lies in the enduring and severe impact of abuse-related injuries.[56] Conditions such as post-traumatic stress disorder, depression, and anxiety are recognised as lifelong afflictions for many survivors, who often do not fully comprehend the trauma's effects until decades later.[57] An understanding of the latency in the disclosure of sexual abuse has underscored the need to abolish limitation periods and scrutinise settlements formed where barriers prevented fair recourse.[58]

The legislatures' intent in removing limitation periods is clear.[59] Settlements should not be set aside merely because a claimant perceives the terms as unfavourable compared to potential judicial awards.[60] Where access to justice has been compromised by unfairness in the operation of the law, reforms have sought to balance

54 Ibid [266].

55 Ibid [262].

56 See generally Heather Y Swanston et al, 'Statutory Compensation for Victims of Child Sexual Assault: Examining the Efficacy of a Discretionary System' (2001) 8(1) *International Review of Victimology* 37.

57 Australian Institute of Family Studies, 'The Long Term Effects of Child Sexual Abuse' (Child Family Community Australia Paper No 11, 2013) 23; *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 15 December 2017) vol 3, 11.

58 See Judy Cashmore et al, *The Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases* (Report, August 2016).

59 South Australia, *Parliamentary Debates*, Legislative Council, 24 August 2021, 3955 (Rob Lucas, Treasurer).

60 Ibid 3952.

the principle of finality with the need for recourse for survivors. This is done so as to not broadly allow any settlement to be reopened.[61]

In South Australia, reforms abolishing limitation periods were not intended to create mechanisms for claimants to revisit settlements that, with the benefit of hindsight, may appear disadvantageous.[62] In some instances, settlements should not be reopened for litigation. This is particularly so when claimants have willingly settled and consciously opted not to litigate despite their awareness that litigation may have been viable. In such cases, the principle of finality prevents claimants, who expressly and 'justly' forego their opportunity to litigate, from seeking greater remuneration.[63] Permitting all settlements to be overturned on the basis that a greater award of damages could have been made by the courts would be inconsistent with the principle of finality and could place a significant burden on institutions.[64]

In any event, claimants inevitably, and to their detriment, face an uphill battle in bringing historical sexual abuse claims. Institutions can seek to rely on the inability to have a fair trial, pointing to a lack of evidence, particularly where persons involved in the offending are no longer accessible.[65] In any event, the legal right to a fair trial is fundamental and remains an important consideration in balancing the rights of the claimant and the defendant.[66]

The value of finality and certainty in historical settlements must be balanced against the imperative of affording child sexual abuse survivors their rightful day in court and just compensation.[67]

---

61 Ibid.

62 Ibid.

63 Ibid 3955. See generally: Mayo Moran, 'Cardinal Sins: How the Catholic Sexual Abuse Crisis Changed Private Law' (2019) 21(1) *Georgetown Journal of Gender and the Law* 95; Kathleen Daly and Juliet Davis, 'Civil Justice and Redress Scheme Outcomes for Child Sexual Abuse by the Catholic Church' (2021) 33(4) *Current Issues in Criminal Justice* 438.

64 See generally: George Spencer Bower, *The Doctrine of Res Judicata*, ed Kenneth Handley (Butterworths, 3rd ed, 1996); Michael Legg and Samuel J Hickey, 'Finality and Fairness in Australian Class Action Settlements' (2019) 41(2) *Sydney Law Review* 185.

65 *Royal Commission Redress and Civil Litigation Report* (n 1) 52; Louise Milligan, Mary Fallon and Jessica Longbottom, *The Extraordinary Legal Tactics Institutions are Using to Fight Compensation Claims by Abuse Victims* (Online, ABC News, 12 February 2025) <https://www.abc.net.au/news/2023-05-29/legal-tactics-to-fight-abuse-compensation-claims-four-corners/102392184>.

66 Tom Bingham, *The Rule of Law* (Penguin Books, 2010) ch 9; Mathews and Dallaston (n 2) 387.

67 Bruce Feldthusen, Olena Hankivsky and Lorraine Greaves, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' (2000) 12(1) *Canadian Journal of Women and the Law* 66, 112–13.

The Victorian legislature has acknowledged that historically, by the time survivors were prepared to pursue legal action, expired limitation periods were prohibitive, forcing survivors to seek judicial discretion to even have their claims considered.[68] Additionally, during settlement negotiations, institutions could respond questionably, including in some instances, by leveraging expired limitation periods to secure lower settlements.[69]

B *Test*

Given this legislative intent, the court retains broad discretion in deciding whether it is 'just and reasonable' to set aside settlements — a vital discretion when adjudicating complex and fact-intensive complaints.[70]

1 *Relevant Considerations*

Parliament has refrained from exhaustively defining the relevant considerations for this determination, though relevant statutes provide guidance.[71] The *Civil Liability Act 1936* (SA), for example, lists relevant factors for assessing the fairness of an agreement, including: (1) whether there was a power imbalance in negotiations; (2) whether the applicant was legally represented; and (3) whether the defendant engaged in oppressive or unfair conduct.[72] As *Jens* demonstrates, courts can consider the factor of legal representation together with the claimant's awareness of legal barriers, to find that limitation periods affected the settlement. This standard may be supported by evidence of legal advice obtained, assuming the hurdle of the limitation period would have been explored in its provision.[73]

2 *Application in Jens*

In *Jens*, the Court closely considered whether the time limitation barrier was adequately conveyed to Jens in the legal advice he received.[74] Jens' claim to cast aside the settlement was supported by evidence that he had received legal advice before settling. However, the consideration of this factor raises questions about the status of survivors who, unable to access legal services, settled without an

68 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 February 2015 (Martin Pakula, Attorney-General) 404.

69 Ibid. See also: Milligan, Fallon and Longbottom (n 65); *Jens* (n 9) [213].

70 See Julie Somerville and Kerry Hogan-Ross, 'Historical Child Abuse Claims: Setting Aside Past Settlements' (2020) (December) *Australian Alternative Dispute Resolution Bulletin* 36.

71 See generally: Allison Silink and Pamela Stewart, 'Tort Law Reform to Improve Access to Compensation for Survivors of Institutional Child Sexual Abuse' (2016) 39(2) *UNSW Law Journal* 553; Michelle James, 'Legislative Responses to Royal Commission Recommendations: Where are We at?' (2019) 69 *Precedent* 14.

72 *Civil Liability Act* (n 12) s 50W(3)(b).

73 See e.g., *Jens* (n 9) [113].

74 Ibid.

awareness of time limitations.[75] If knowledge was strictly required, such a case, theoretically, may not be reopened. Alongside this, a claimant's decision to settle may be induced by an imbalance of power or other circumstances producing unjust outcomes.[76] Although the courts, importantly, must retain and exercise discretion, the varying applications of this test warrants caution. From one perspective, courts should ensure that a plaintiff's lack of understanding of time barriers, or previous failure or inability to engage counsel, does not unjustly impede their right to retrospectively litigate.

3 *Judicial Divergence*

While maintaining judicial discretion is integral, with limited legislative guidance regarding the scope or application of the 'just and reasonable' standard, diverging judicial approaches could prove problematic — a difficult balance must be struck in contemplation of the legislative intention and public interests. An overly narrow interpretation could undermine the legislative intent, while an overly broad application risks unfairness to defendants, subjecting institutions to unpredictable liabilities.[77]

The first judicial consideration regarding the revival of settled claims was by the Western Australia District Court in *JAS v Trustees of the Christian Brothers* ('*JAS*').[78] In that case, the Court held that it was just and reasonable to set aside the settlement agreement.[79] The deed purported to extinguish all claims against the defendant in exchange for the settlement sum of $100,000.[80] Chief Judge Sleight emphasised that the primary focus should be on the parties' circumstances when the settlement was reached, not merely on evidence of the claim itself.[81] At the time, the plaintiff's claim was statute-barred, severely undermining his bargaining position and leaving him with little choice but to accept the settlement offered.[82] The Court also noted that the plaintiff's claim had not been assessed on its merits and allowed him to proceed, in line with the legislative intent to remove legal barriers and enable claims to be heard on their merits.[83]

---

75 See generally Mathews and Dallaston (n 2).

76 See generally Katie Wright, 'Remaking Collective Knowledge: An Analysis of the Complex and Multiple Effects of Inquiries into Historical Institutional Child Abuse' (2017) 74 *Child Abuse and Neglect* 10.

77 Matthews and Dallaston (n 2) 406.

78 (2018) 96 SR (WA) 77

79 Ibid 84–5 [27].

80 Ibid 81–2 [12].

81 Ibid 83 [21].

82 Ibid 84–5 [27].

83 Ibid.

Later, the Queensland Supreme Court addressed similar issues in *TRG v The Board of Trustees of the Brisbane Grammar School* ('*TRG*'),[84] involving alleged repeat abuse between 1986 and 1987.[85] The plaintiff filed a personal injury claim in 2001 which settled for $47,000.[86] Notably, the plaintiff received legal advice during settlement negotiations, and the Court found that limitation issues did not materially impact the settlement's value.[87] Justice Davies considered that the 'just and reasonable' standard must be assessed from the standpoint of both affected parties.[88] His Honour held that the settlement was a product of fair, arms-length negotiations between parties on equal footing, both 'appropriately represented' by counsel.[89] His Honour considered that when settlement negotiations were underway, the plaintiff appreciated he would need to prove liability under the law as it stood.[90] Although the plaintiff might have recovered more by court award, like the Court in *Jens*, Davies J considered the fact that both parties had legal representation,[91] a factor not considered by Chief Judge Sleight in *JAS*. However, unlike in *Jens*, the fact the parties were both represented in *TRG* supported the finding that the parties were on equal footing in negotiations, which was construed in the defendant's favour.[92] Justice Davies also examined factors like potential insurance loss to the defendant, which had not been discussed in *Jens*.[93] This decision was subsequently upheld on appeal by the Court of Appeal[94] and special leave to appeal to the High Court was refused.[95]

It is clear that there is no single judicial approach to the question of whether it is just and reasonable to reopen a settlement. Justice Davies found that the limitation period did not materially affect the quantum of settlement, whereas Chief Judge Sleight did not consider this issue and afforded significant weight to the disadvantage imposed by time barring generally. In *Jens*, the Court engaged in lengthy consideration as to whether the claimant obtained meaningful legal advice to infer that the limitation period materially affected the settlement. To an extent, the different approaches in the case law in determining when it is 'just and reasonable' reflects varying judicial perspectives across Australian jurisdictions. It highlights the difficulties with which the courts must grapple in striking such a balance.

84 [2019] QSC 157 ('*TRG*'), discussed in Matthews and Dallaston (n 2).

85 Ibid [2].

86 Ibid [57].

87 Ibid [229]–[230].

88 Ibid [96].

89 Ibid [278].

90 Ibid [184], [220].

91 See *EXV v Uniting Church in Australia Property Trust (NSW)* [2024] NSWSC 490.

92 *TRG* (n 84) [278].

93 Ibid [261]–[262].

94 *TRG v Board of Trustees of the Brisbane Grammar School* [2020] QCA 190, discussed in Matthews and Dallaston (n 2).

95 Transcript of Proceedings, *TRG v Board of Trustees of the Brisbane Grammar School* [2021] HCATrans 085.

Putting this difficulty to one side, the close focus of the court in *Jens* on the provision of legal advice appears to indicate that knowledge of limitation periods is necessary to show that a limitation period had a material impact on settlement. This seems to be reliant upon whether the claimant received legal advice. If this approach were to be closely followed, it could become more difficult for applicants to demonstrate just and reasonable cause for settlements to be set aside, prejudicing lesser-resourced survivors. This is particularly relevant in the context of the broader issues surrounding access to justice generally.[96]

C *The Court's Exercise of Discretion*

Cases following reforms, including *Jens*, can be generally construed as being beneficial to survivors of child sexual abuse, enabling claimants to seek justice even where the harmful effects of the offending are not experienced for some time after its occurrence.[97] Consistent with this, a claimant's lack of knowledge regarding the expiration of a limitation period should not immediately preclude the setting aside of historical settlements. In many cases, decisions to settle and the amount agreed upon would have inevitably been influenced by the legal barriers at the time. As the Royal Commission highlighted, conventional limitation periods unjustly prevented claims from being heard on their merits,[98] and statutory reforms aimed to address these injustices by enabling previously barred or settled claims to be adjudicated.[99] In doing so, it is important that the courts exercise their discretion and assess every case on its individual merits.

It is widely understood that survivors often face immense personal barriers in coming forward to disclose their abuse and undoubtedly face considerable difficulties in seeking legal counsel.[100] The long-term effects of child sexual abuse on survivors — particularly in terms of their economic capacity and mental well-being — hinders their ability to pursue justice.[101]

In *Jens*, her Honour noted the importance of considering the nature of the power being exercised and the specific mischief it ought to remedy.[102] In this context, the

96 Australian Government Productivity Commission, *Access to Justice Arrangements* (Inquiry Report, No 72, 5 September 2014).

97 See generally Dafna Tener and Sharon B Murphy, 'Adult Disclosure of Child Sexual Abuse: A Literature Review' (2014) 16(4) *Trauma, Violence and Abuse* 391.

98 *Royal Commission Redress and Civil Litigation Report* (n 1) 85–8.

99 Mathews and Dallaston (n 2) 387.

100 See: Wright (n 76); Ben Mathews, 'Optimising Implementation of Reforms to Better Prevent and Respond to Child Sexual Abuse in Institutions: Insights from Public Health, Regulatory Theory, and Australia's Royal Commission' (2017) 74 *Child Abuse and Neglect* 86.

101 See generally Simona Ghetti, Kristen Weede Alexander and Gail S Goodman, 'Legal Involvement in Child Sexual Abuse Cases: Consequences and Interventions' (2002) 25(3) *International Journal of Law and Psychiatry* 235.

102 *Jens* (n 9) [95], citing *Trustees of the Christian Brothers v DZY* [2024] VSCA 73.

'mischief' is the unfairness to claimants who were subject to judgments or settlements where their legal rights or bargaining power were unduly constrained by legal barriers.[103] The court must also assess the claimant's prospects of success. This analysis involves: (1) evaluating whether a court award might surpass the settlement figure; (2) examining the conduct of the respondent during settlement negotiations; (3) considering any imbalance in bargaining power; (4) the claimant's potential guilt or shame; and (5) any prejudice to the respondent.[104] These reforms acknowledge that, in the pre-reform era, claimants often lacked the opportunity to have their claims fairly adjudicated due to limitation periods and power imbalances between individuals and institutions, frequently causing claimants to accept inadequate settlements. The reforms further recognise that claimants may have been pressured into accepting settlements in cases where liability was clear, but the expiration of time forced the acceptance of nominal compensation to avoid the complete dismissal of their claims. The policy underpinning the 'just and reasonable' standard allows for more equitable compensation, free from the influence of unjust reliance on the expiry of time or power imbalances.

V Conclusion

Jens serves as a reminder of how the consideration of legal advice can influence judicial decisions regarding whether a settlement should be overturned. So long as courts continue to diverge in the weight attributed to various aspects of settlement negotiations, the outcomes for claimants standing in similar positions to Jens may become inconsistent. If legal advice is one of these factors, disadvantaged claimants with fewer resources or facing other barriers might suffer disproportionately, limiting the benefit of uniform reforms. To assert that a limitation period or other legal barrier has no material effect on a claimant's decision to accept an offer due to a failure to obtain legal advice would not be just. It would risk discouraging survivors from bringing claims, while asserting that their inability or failure to obtain legal counsel early in the process of a claim is detrimental to their cause.

Jens also serves as a reminder of the difficult balance which the court is asked to strike. Courts must weigh the interests of a survivor of historical sexual abuse with legal principles including finality and a defendant's right to a fair trial. As the court in *TRG* identified, the discharge of this duty becomes more difficult as time goes on.[105] Courts should maintain broad discretion in determining when it is just and reasonable to overturn settlements and this should not be unduly constrained by knowledge of legal barriers. While evidence of legal advice may still inform a court's finding, it should not be viewed as a strict requirement. Such evidence should support, rather than limit, a claimant's potential for reconsideration, particularly in cases where mental health or resource constraints have hindered the claimant's capacity to engage meaningfully with the legal process.

103 Ibid.

104 Ibid.

105 *TRG* (n 94) [149].

From a broader perspective, while the Australian case law demonstrates positive outcomes for claimants, in many instances, these remedies come too little, too late.[106] Mr Jens endured a lifetime of drug dependency and significant difficulties in both family and work life. This reflects the experience of many survivors and demonstrates the need for continued recognition of such issues and ongoing support for survivors.[107]

106 Elizabeth A Wilson, 'Child Sexual Abuse, the Delayed Discovery Rules, and the Problem of Finding Justice for Adult-Survivors of Child Abuse' (2003) 12(2) *UCLA Women's Law Journal* 145, 214.

107 *Jens* (n 9) [50], [110]. See: Shanta Dube et al, 'Long-Term Consequences of Childhood Sexual Abuse by Gender of Victim' (2005) 28(5) *American Journal of Preventative Medicine* 430; Mullen et al (n 5).