27 August 2019

The Hon Connie Bonaros MLC
Parliament House
North Terrace
ADELAIDE SA 5000

By email: connie.bonaros@parliament.sa.gov.au

Dear Ms Bonaros

Limitation of Actions (Actions for Child Abuse) Amendment Bill 2019

1. I refer to your letter of 2 July 2019 in relation to the Limitation of Actions (Actions for Child Abuse) Amendment Bill 2019 (“the Bill”).

2. The Bill proposes to insert a new section (3B) into the Limitation of Actions Act 1936 (“the Act”) which would allow a court, on application to set aside a previously settled right of action on the grounds that it is just and reasonable to do so.

3. The Bill also provides that a court can take into account any amounts already paid or payable under a voided agreement when awarding damages as well as any costs paid or payable.

4. The Society makes the following suggestions as to how the drafting of the Bill could be improved to achieve its stated objectives, in particular, providing the court with the power to set aside settlements that were reached as a result of misleading, coercive or other improper conduct. The comments below have been informed by the Society’s Civil Litigation Committee.

What constitutes “just and reasonable”? 

5. The common law already permits agreements entered into in certain circumstances to be declared unenforceable by a court (e.g. on grounds of fraud, duress, unconscionable, common mistake). The Bill seeks to modify the common law and the circumstances in which an agreement can be set aside, by introducing an additional statutory test.

6. Clause 3 of the Bill provides that an action may be brought on a previously settled right of action if a court, by order on application, sets aside the agreement effecting the settlement on the grounds it is just and reasonable to do so.

7. The Society considers the proposed test of “just and reasonable” is too broad, of likely uncertain application and may go further than the suggested purpose of the Bill. It suggests some further guidance would be useful in defining or limiting what circumstances would constitute “just and reasonable”. In particular, the Bill does not expressly direct a court to consider the factors
identified as the objective of the Bill, which is to address/remedy settlements reached as the result of misleading, coercive or other improper conduct.

8. The Bill’s failure to provide guidance as to the interpretation of “just and reasonable” presents a number of difficulties and may lead to different approaches and inconsistency in interpretation between the various courts. This will consequently make it difficult for solicitors to meaningfully advise clients (plaintiffs and defendants alike) as to whether or not a settlement agreement is liable to be set aside under the proposed legislation.

9. The recent decision of the Queensland Supreme Court in TRG v The Board of Trustees of the Brisbane Grammar School [2019] QSC 157 demonstrated the wide variety of factors which are likely relevant to the exercise of the discretion in this context. The case involved similarly worded Queensland legislation, in which the subject settlement agreement was not set aside.

10. In TRG, the Court engaged in an extensive examination of the settlement negotiations and the relationship between the parties in those negotiations, and considered a range of factors including changes to relevant law since the original settlement, the reasonableness of the original settlement figure, costs incurred by the defendant in the original proceedings, and prejudice to the defendant caused by, inter alia, the elapsing of time and delay. The judgment itself illustrates the complex proceedings which ensue when courts are given such a broad discretion with such limited statutory guidance.

Other matters arising under settlement

11. The Bill is silent on the effect of setting aside an agreement beyond the payment of the settlement amount. Settlement agreements often contain other benefits or obligations. For example, some in kind support may have been provided to a plaintiff, recoveries are made from settlement funds pursuant to various statutory charges in favour of Medicare and Centrelink, and judgment may be entered by the court, by consent, in favour of a party. The Bill does not deal with how these subsequent matters are to be treated.

12. Some of those subsequent matters may not simply be undone by the setting aside of the agreement. If, pursuant to the settlement agreement by which the parties provided consent orders to a court, a court has entered judgment that judgment would not be simply set aside when the settlement agreement is set aside. Rather the judgment (which typically is entered against the plaintiff in return for the defendant paying the settlement sum) would remain in force and a party could continue to rely on that judgment so as to prevent future litigation on the same topic. That may defeat the practical value of the settlement agreement being set aside.

13. While the agreement would be set aside, the defendant could continue to rely on the judgment as a complete bar to any future proceedings. Setting aside such a judgment is notoriously difficult as a perfected judgment of a court can only be set aside, once the appeal process has been exhausted, on the grounds of actual fraud in equity: Players v Clone [2018] HCA 12; (2018) 353 ALR 24. In that case the High Court emphasised the need for a “strict approach to finality” recognising

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1 Limitation of Actions Act 1974 (Qld), section 48.
2 See, in particular, TRG v The Board of Trustees of the Brisbane Grammar School [2019] QSC 157 at [272].
3 Pursuant to the doctrines of res judicata, issue and anshun estoppel and abuse of process. For a useful summary of these concepts see McDonald v State of South Australia [2011] FCA 297 at [36]ff (Besanko J).
the need to protect the certainty which is effected by the conclusion of litigation (be it by judgment or settlement).

14. Furthermore, the Bill in its current form does not speak to the situation of a survivor of abuse who entered into an unfair deed of release initially, and then applied to the National Redress Scheme for a small top up. It is unclear whether an accepted offer of redress could be set aside, and an accepted offer of redress has the effect of a deed of release, in releasing the institution from a civil claim against them.

Is the Act the appropriate legislative instrument?

15. The Society notes the purpose of the Bill is not to change time limits within which to issue proceedings. It therefore questions whether an amendment to the Act is the appropriate legislative mechanism to introduce such a significant change to the existing law.

16. The Society suggests that consideration be given to whether the matter be dealt with separately, or as perhaps an amendment to Civil Liability Act 1936 (SA), given that underlying cause of action is in tort.

Further litigation required

17. The Society notes that the remedy in the proposed Bill is to simply set aside an unjust agreement. Section 3B(4) of the Bill makes it clear that a successful application under the Bill would not result in the dispute being concluded, but rather would require the claimant to commence yet a further legal claim.

18. While the Bill proposes to give the Court significant powers on one hand (set aside unjust and unreasonable settlement agreements) it does not then give the Court similar or sufficient power to resolve the underlying dispute once and for all, and at the same time, without requiring further litigation. Therefore, an applicant who is successful in setting aside an agreement may still face considerable further litigation.

19. Notwithstanding the abolition of limitation periods for certain types of cases involving child sexual assault, it is likely that any such proceedings will be complicated by prejudice caused to both parties by the passage of time which may well result in applications to dismiss the proceedings, or applications seeking that certain items of evidence not be admitted due to prejudice to the other party’s ability to test the evidence due to the elapsing of time.

20. The Society suggests that consideration could be given to expanding the Bill to enable the Court to substitute a just and reasonable settlement (or make whatever orders that may be just and reasonable) to finally resolve the dispute which is the subject of the settlement agreement.

Finality in litigation

21. The Bill seeks to, in effect, open all relevant settlement agreements to re-negotiation and possible re-litigation. In doing so, the tension between the competing policies of ensuring finality of litigation by honouring settlement agreements (and the contractual bargain they contain), and allowing unfair settlement agreements to be set aside is highlighted. The legal system has historically and continues to place primacy on finality to litigation so as to avoid the unfortunate consequences of ongoing, unresolved litigation. In D’Orta-Ekenaite v Victoria Legal Aid the High Court noted: “the central justification for the advocate’s immunity is the principle that controversies, once resolved, are not be
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reopened except in a few narrowly defined circumstances. This is a fundamental and pervading tenet of the judicial system, reflecting the role played by the judicial process in the government of society.”

22. Given that the finality usually achieved by a settlement agreement is to be undone by the Bill, the circumstances in which that finality can be contravened ought to be very clearly defined and set out, noting that at common law parties are held to their contractual bargains except in certain narrowly defined circumstances.

23. The Society suggests that if the Bill is to be pursued, further consideration is given to including express criteria for which such agreements may be set aside. This may more appropriately balance the purpose of the Bill against the need for certainty and finality to the resolution of historical proceedings.

Yours sincerely

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5 D’Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12; (2005) 223 CLR 1 at 17.