

10 November 2010

Dear Mr Griffiths

**Re: Question on notice - Civil Dispute Resolution Bill 2010**

A question was taken on notice during testimony given by the PILCH Homeless Persons Legal Clinic (the Clinic) and the Human Rights Law Resource Centre (the HRLRC) on 4 November 2010. This testimony was given in relation to the joint submission of the Clinic and the HRLRC (the joint submission) on the Civil Dispute Resolution Bill 2010 (the Bill).

**Background**

The question on notice arose in response to a discussion about disadvantage arising from the Bill. By way of background, the Bill establishes that a judge may have regard to the failure to take genuine steps to resolve a dispute in the following ways:

- exercising court powers and functions (clause 11); and
- exercising a discretion to award costs (clause 12).

Put simply, the joint submission of the Clinic and HRLRC is that disadvantaged parties without the benefit of legal advice and/or representation may be unduly penalised by these provisions. Further, the recommendations in paragraphs 26(d) and (e) of our joint submission broadly suggest that the Bill should clarify the way in which clause 11 and 12 of the Bill apply to parties who have been unable to access legal advice and/or representation.

**The question on notice**

At page 9 of the Hansard transcript of hearing there was discussion of the above recommendations. Senator Pratt stated, *I am unclear, if we recommend that this be pursued, how we as a committee should assert it be expressed. Clearly we are not parliamentary drafters, but I think we need to be sufficiently clear about what we are asking to be drafted.* This comment was taken as a question on notice.

In response to the comments of Senator Pratt, the Clinic and HRLRC have attempted to draft a potential amendment to clauses 3, 11 and 12 of the Bill. The complete clauses are provided in an attachment to this letter. The amendments suggested by the Clinic and HRLRC are underlined.

We would be happy to discuss this issue if required.

Yours sincerely

**Chris Povey**

Senior Lawyer

PILCH Homeless Persons Legal Clinic

**Ben Schokman**

Director . International Human Rights

Advocacy

Human Rights Law Resource Centre

## ATTACHMENT 1: Proposed amendments to the Bill

### 3 Object of Act

The object of this Act is to ensure that, as far as possible, consistent with the right to a fair hearing, people take genuine steps to resolve disputes before certain civil proceedings are instituted.

### 5 Definitions

**disadvantage** means whether a person has been unable to participate meaningfully in civil proceedings because they have been unable to access legal advice or legal representation. Other factors include the complexity of the proceedings and whether a person has been able to access interpretative services, where necessary.

### 11 Court may have regard to genuine steps requirements in exercising powers and performing functions

(1) An eligible court may, in performing functions or exercising powers in relation to civil proceedings before it, take account of the following:

- (a) whether a person who was required to file a genuine steps statement under Part 2 in the proceedings filed such a statement;
- (b) whether such a person took genuine steps to resolve the dispute.

(2) When performing functions or exercising powers in relation to civil proceedings before it, an eligible court must ensure that no person is at a disadvantage in the proceedings.

### 12 Exercising discretion to award costs

(1) In exercising a discretion to award costs in a civil proceeding in an eligible court, the court, Judge, Federal Magistrate or other person exercising the discretion may take account of:

- (a) whether a person who was required to file a genuine steps statement under Part 2 in the proceedings filed such a statement;
- (b) whether such a person took genuine steps to resolve the dispute.

(2) In exercising a discretion to award costs in a civil proceeding in an eligible court, the court, Judge, Federal Magistrate or other person exercising the discretion may take account of any failure by a lawyer to comply with the duty imposed by section 9.

(3) If a lawyer is ordered to bear costs personally because of a failure to comply with section 9, the lawyer must not recover the costs from the lawyer's client.

(4) When exercising a discretion under this section, the court, Judge, Federal Magistrate or other person must ensure that no person is at a disadvantage in the proceedings.