

**Joint Submission to the
Senate Legal and Constitutional Affairs Committee
on the
Civil Dispute Resolution Bill 2010**

29 October 2010

1. About this Submission

1. Thank you for the opportunity to make this submission to the Senate Legal and Constitutional Affairs Committee for its inquiry into the Civil Dispute Resolution Bill 2010 (**Bill**). The PILCH Homeless Persons' Legal Clinic (**HPLC**) and the Human Rights Law Resource Centre (**HRLRC**) make this joint submission in recognition of the importance of improving laws for the purpose of enhancing access to justice.
2. Both the HPLC and HRLRC have considerable experience advocating for improved access to justice for marginalised and disadvantaged individuals. We consider that the Bill contains important measures for encouraging the focused identification of issues in dispute between parties and, in turn, the early resolution of disputes and potential avoidance of costly litigation. While these are important purposes, they must be balanced against an individual's access to justice and right to a fair hearing.
3. This submission highlights potential risks faced by individuals involved in legal disputes that may result from the operation the Bill. Specifically, the HPLC and HRLRC consider that the fundamental right to a fair hearing must guide the content and operation of the Bill. Such an approach is essential to reduce the risk of potential litigants being disadvantaged during negotiations as a result of any power imbalance that may exist between the parties.
4. The major recommendation of this submission is that the provisions contained in the Bill must ensure that right to a fair hearing is afforded to *all* individuals, including *potential* parties to a proceeding. The civil justice system must operate in a way that does not exclude individuals from being able to access justice on an equal basis with others. This includes ensuring that no individual is disadvantaged prior to instituting proceedings.

2. Operation of the Bill

5. The object of the Bill is to ensure that, where appropriate, people take genuine steps to resolve disputes before instituting proceedings. It seeks to do this in the following way:
- (a) The Bill does not prescribe what is required in order for parties to take “genuine steps” to resolve a dispute; rather, it sets out a list of example steps that could be taken for the purpose of taking “genuine steps” to resolve a dispute. The list includes:
 - (i) notifying the other person of the issues in dispute and offering to discuss these issues;
 - (ii) providing relevant information and documents to the other person to enable them to understand the issues involved; and
 - (iii) attempting to negotiate with the other person, including consideration of mediated alternative dispute resolution.
 - (b) Applicants are required to file a “genuine steps statement” at the time of instituting civil proceedings, setting out the steps that have been taken by the parties in an attempt to resolve the dispute without resorting to litigation.¹
 - (c) The genuine steps statement is not required in all cases. Exceptions include proceedings concerning a civil penalty provision.
 - (d) The failure to file a genuine steps statement will not invalidate an application or a response to an application. However, there are two potentially significant consequences of failure to file a genuine steps statement or failure to take genuine steps to resolve a dispute:
 - (i) In exercising *any* of its powers, the Court may take account of whether a person required to file a genuine steps statement did so, and whether a person actually took genuine steps to resolve the dispute. We note that the Bill is not clear as to which powers may be used and in what circumstances these powers may be used. It may be anticipated that powers of dismissal, strike out and summary judgment are available where parties have been found not to have conformed with genuine steps requirements.
 - (ii) The court may also take genuine steps provisions into account when exercising its discretion to award costs.

¹ In this submission we refer to the need to take genuine steps to resolve a dispute, the examples of genuine steps and the genuine steps statement as the ***genuine steps provisions***.

6. We note that many pieces of legislation likely to involve disadvantaged individuals have been excluded by the Bill, including matters arising under the *Fair Work Act 2009*, *Migration Act 1958* and *Native Title Act 1993*. While our organisations have limited experience with federal legislation that will be affected by the operation of the Bill, for the purpose of this submission we wish to emphasise that, where cases involving disadvantaged individuals arise under relevant federal laws,² the Bill's provisions should operate in a manner that ensures those individuals enjoy the right to a fair hearing.

3. Potential risks faced by unrepresented parties

7. The HPLC and HRLRC regularly assist vulnerable and disadvantaged individuals in proceedings where there is often a power imbalance between the parties. Such an imbalance may result from one party having greater resources available to them and a better understanding of the legal system and their legal rights. In our view, there may be some circumstances in which disadvantaged litigants and people with limited access to legal advice and representation may be adversely affected by the Bill.
8. The HPLC and HRLRC have three broad concerns regarding the operation of the Bill and its potential to unfairly limit an individual's right to a fair hearing:
- (a) first, potential disadvantages could arise where parties are compelled or encouraged to negotiate (and potentially provide documents and information) in circumstances where they do not understand the legal ramifications of such actions;
 - (b) second, due to the inherent power imbalance that often exists between litigants, the relatively "weaker" party is, in the absence of legal advice, at risk of succumbing to the pressure of a better resourced adversary and may forgo rights during negotiations that would have been upheld by a court had the matter proceeded; and
 - (c) third, conferring the Court with a broad discretion to take account of a party's failure to engage in genuine negotiations may have a significant impact on litigants who are unable to access or afford legal advice and/or representation during pre-trial negotiations. It is likely that any parties without legal advice and representation will struggle to satisfy the genuine steps provisions and might as a result be penalised through the exercise of the broad discretion of the court when exercising any of its powers and awarding costs.

² Legislation that may be affected by the operation of the Bill that ordinarily involves potentially disadvantaged parties include: Part V of the *Trade Practices Act 1974* (consumer protection), any actions involving small business owners arising under the *Corporations Act 2001* or the *Australian Securities and Investments Commission Act 2001*; and the *Bankruptcy Act 1996*.

4. Right to a Fair hearing

9. The right to a fair hearing is a fundamental right. It is enshrined in the Australian common law and is contained in article 14 of the *International Covenant on Civil and Political Rights (ICCPR)*, a treaty to which Australia is a party. The HPLC and HRLRC submit that the operation of the Bill must ensure that the right to a fair hearing is protected and promoted for all individuals. This section outlines the most relevant aspects of the right to a fair hearing relating to the operation of the Bill.

4.1 Content of the right to a fair hearing

10. Access to justice and equality before the law are fundamental values underpinning not just the right to a fair hearing, but also the civil justice system. At its essence, the content of the right to a fair hearing means that a civil justice system must reach an appropriate balance between the need for an efficient justice system with the fundamental right of all individuals to have access to justice regardless of their means. The right of an individual to receive a fair hearing must not be compromised in the interests of mere cost and convenience.³
11. The right to a fair hearing is comprised of a number of fundamental aspects, including most relevantly to the Bill:
- (a) the right to legal advice and representation where required;
 - (b) the right of equal access to, and equality before, the courts;
 - (c) the right to procedural fairness; and
 - (d) the right to have the free assistance of an interpreter where necessary.
12. Each of these aspects is addressed in further detail below.

4.2 The right to legal advice and representation

13. The right to a fair hearing requires the state to make the court system accessible to everyone. While this does not amount to an obligation on the state to provide free legal assistance in all civil matters, the complexity and importance of some cases may actually require legal aid to be provided to ensure a fair hearing.⁴
14. All individuals must be able to meaningfully participate in legal proceedings. In some circumstances, issues such as disability (including mental health and substance misuse), education, age, language and cultural background may all have a significant bearing on

³ See, eg, *R v McBride* [2007] ACTSC 8, [7] (Connolly J).

⁴ UN Human Rights Committee, *General Comment No 32: Article 14: Right to equality before courts and tribunals and to a fair hearing*, UN Doc CCPR/C/GC/32 (2007), [10]. See also *Airey v Ireland* [1979] 6289/73 ECHR 3 (9 October 1979); *Kay v Victorian Attorney-General & Anor* (Victorian Court of Appeal, Unreported, 19 May 2009).

whether a party is able to participate meaningfully and equally in proceedings and place them in a position of disadvantage.

15. The HPLC and HRLRC are concerned that, in some circumstances, a party to a dispute may be significantly disadvantaged when seeking to undertake “genuine steps” (such as during pre-proceeding negotiations) because they are unable to access legal advice or legal representation. Ensuring that individuals are able to access legal representation in circumstances where it may be required would greatly assist in achieving the following outcomes:

- (a) where settlement is in the genuine interests of each party, it would help channel people away from the courts and towards settlement and thus provide for a more efficient justice system;
- (b) preventing the relatively “weaker” litigant from unnecessarily forgoing rights during negotiations by succumbing to the pressure of a better resourced adversary; and
- (c) reducing the likelihood of disadvantaged litigants being penalised by the courts for a failure to take genuine steps to settle a dispute.

4.3 Equal access to, and equality before, the courts

16. Article 14 of the ICCPR has been interpreted to signify that all persons must be granted, without discrimination, the right of equal access to the justice system. The administration of justice must “effectively be guaranteed in all cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice”.⁵ Courts have consistently determined that equal access to the courts requires the legal system to be set up in such a way as to ensure that people are not excluded from the court process.⁶
17. The Bill confers the Court with a broad discretion when exercising *any* of its powers to take account of the fact that an individual has failed to take genuine steps to resolve a dispute prior to instituting proceedings. The Bill does not specify the orders that a Court can make in such circumstances. If the failure to take genuine steps can result in a strike out or dismissal of a proceeding where an individual may have a meritorious or at least arguable claim, then such an outcome could breach the right of equal access to the courts, particularly where an individual has not had access to legal advice prior to instituting proceedings.

⁵ UN Human Rights Committee, *General Comment No 32: Article 14: Right to equality before courts and tribunals and to a fair hearing*, above n 4, [9].

⁶ *Ibid*, [9] – [11]. See also UK Department for Constitutional Affairs, *Human Rights: Human Lives* (2006) www.dca.gov.uk/peoples-rights/human-rights/pdf/hr-handbook-public-authorities.pdf, [21].

18. Further, unrepresented individuals who follow the process as required may be vulnerable to succumbing to the pressure of a better resourced adversary and may forgo rights during negotiations that would have been upheld by a court had the matter proceeded. If the Bill's requirements have the potential to exclude individuals from the court processes in this way, this could constitute an unjustifiable limit on the right to a fair hearing.
19. In our view, in circumstances where pre-trial negotiations are effectively mandated, such an outcome may in some cases breach the principle that all individuals have the right to equal access to the courts. Again, in order to avoid such an outcome, legal advice or representation may be required for individuals engaged in pre-trial negotiations.

4.4 The right to procedural fairness

20. Article 14 of the ICCPR provides procedural guarantees as to the conduct of a hearing. Essentially, the right ensures litigants have the opportunity to present their case in conditions without substantial disadvantage compared to the other party.⁷ The same procedural rights must be given to each party involved unless distinctions can be justified on objective and reasonable grounds.⁸
21. The explanatory materials to the Bill make it clear that, even if the parties do not settle, it is expected that the pre-trial negotiations facilitated by the requirement to lodge a genuine steps statement will help the parties narrow down and focus on the actual issues in dispute. This in turn will result in a more efficient hearing before the Court.
22. In our view, if one of the parties to that negotiation is disadvantaged during pre-trial negotiations, then this disadvantage may be perpetuated in the process of narrowing down the issues in dispute. If the matter does not settle, the ultimate issues presented to the Court may end up reflecting the unequal negotiation process.
23. Also, if an unrepresented party discloses sensitive documents to the other party during negotiations, without fully comprehending the legal consequences of doing so, that party may face disadvantages should the matter proceed to trial.
24. Such situations would raise concerns with the right to a fair hearing if a litigant does not have the opportunity to present their case in conditions without substantial disadvantage compared to the other party.

⁷ *BdB v Netherlands*, UN Doc CCPR/C/35/D/273/1988.

⁸ UN Human Rights Committee, *General Comment No 32: Article 14: Right to equality before courts and tribunals and to a fair hearing*, above n 4, [9] and [13]. See also *Ragg v Magistrates' Court of Victoria and Corcoris* [2008] VSC 1 (24 January 2008).

4.5 The right to have the free assistance of an interpreter where necessary

25. A potential litigant who is not fluent in the English language is particularly vulnerable to the disadvantages identified above, even where they do have access to legal assistance during negotiations. It is essential that interpreting services be made available to potential litigants undertaking “genuine steps” in an attempt to settle a dispute in accordance with the Bill.⁹

5. Recommendations

26. The HPLC and HRLRC are concerned that the Bill, in its current form, may have potentially adverse affects for some litigants that undermine the fundamental right to a fair hearing. Accordingly, we make the following recommendations, which are aimed at ensuring that the Bill operates in a manner that more adequately upholds the right to a fair hearing:
- (a) The efficiency measures encapsulated by the Bill should be balanced by consideration of the fundamental need to ensure that disadvantaged litigants are afforded a fair hearing.
 - (b) All potential litigants who are required to undertake pre-trial negotiations should be able to access legal advice and representation in circumstances where it is required for access to justice, equality before the law and a fair hearing. This is the most efficient and effective away of ensuring that such individuals enjoy the right to a fair hearing on an equal basis. It also ensures that the Bill meets its stated objectives to achieve a fairer and more efficient legal system.
 - (c) In its current form, the Bill does not clarify how unrepresented and potentially disadvantaged litigants will be assisted to understand their rights and obligations. Sufficient procedures and guarantees must be in place to ensure that potential litigants are not disadvantaged by the operation of the Bill's provisions.
 - (d) The Bill should clarify the costs implications of any failure to take genuine steps to negotiate disputes. The Bill should also clarify whether these costs implications apply to parties who have been unable to obtain legal advice and representation. Indigent persons unable to afford legal representation must not be further disadvantaged by costs orders.
 - (e) There should be clarification of the orders that a Court can make following a party's failure to take genuine steps to negotiate disputes. The Bill should clarify whether these orders can be made where parties may have been unable to obtain legal advice and representation.

⁹ UN Human Rights Committee, *General Comment No 32: Article 14: Right to equality before courts and tribunals and to a fair hearing*, above n 4, [13].

- (f) The Bill should be amended to require the Court to take into account the relative position of the parties in terms of resources and legal representation when considering the consequences of failing to take “genuine steps”.
- (g) It is essential that interpreting services be made available, where required, to potential litigants when undertaking “genuine steps” to ensure access to justice and equality before the law.

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About the PILCH Homeless Persons' Legal Clinic

The HPLC is a project of PILCH and was established in 2001 in response to the great unmet need for targeted legal services for people experiencing homelessness. Free legal services are offered by the HPLC on a weekly basis at 15 outreach locations that are accessed already by homeless people for basic needs (such as soup kitchens and crisis accommodation facilities) and social and family services. Since its establishment in 2001, the HPLC has assisted over 4,000 people at risk of, or experiencing, homelessness in Victoria.

The HPLC also undertakes significant community education, public policy advocacy and law reform work to promote and protect the right to housing and other fundamental human rights. In 2005, the HPLC received the prestigious national Human Rights Law Award conferred by the Human Rights and Equal Opportunity Commission in recognition of its contribution to social justice and human rights.

About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre is a non-profit community legal centre that promotes and protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society. The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.