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**Submission to Senate Legal and Constitutional Affairs
Committee Inquiry into the provisions of the
*Civil Dispute Resolution Bill 2010***

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Summary

Our submission examines the Civil Dispute Resolution Bill 2010 with reference to Australia's human rights obligations. Comparable legislation in the United Kingdom and Victoria is examined in light of its compatibility with human rights. In light of the benefits likely to emanate from the Bill, there is scope for advancing human rights. The Bill will not limit the right to a fair hearing unless the pre-action steps it entails bring about increased costs and delay. The pre-action disclosure requirements do, however, present the prospect of a breach of the right to privacy, which can be addressed by the inclusion of an implied undertaking that documents disclosed pursuant to the Bill's provisions may only be used for the purpose of resolving the dispute at hand.

Introduction

There is a tension between the just resolution of disputes and case management. The conflicting objectives of efficiency and cost on the one hand and rigorous procedures promoting correct resolution of disputes on the other, have been the subject of judicial attention¹ and academic writing² and have underpinned reforms to civil procedure in Australia, including the *Access to Justice (Civil Litigation Reforms) Act 2009*. Concerns about human rights, which are the focus of our submission, are a concomitant of this tension.

The English Civil Procedure Rules (CPR) which commenced in 1999 following Lord Woolf's final report on Access to Justice³ require courts to engage in 'active case management.'⁴ The CPR's commencement coincided with the enactment of the *Human Rights Act 1998* which sought to introduce obligations under the European Convention of Human Rights and Fundamental Freedoms (ECHR) into English domestic law. The English civil justice system has consequently been subject to scrutiny for compliance with human rights. English jurisprudence with respect to CPR provisions which are analogous with the *Civil Dispute Resolution Bill 2010* (the Bill) will be analysed in our submission.

¹ *Queensland v JL Holdings*, (1997) 189 CLR 146; *AON Risk Services v Australian National University* [2009] HCA 27.

² See for example Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (2nd ed, 2006) 16

³ Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996)

⁴ CPR 1.4(1)

The Bill builds upon existing court powers which already permit courts to order parties to submit to ADR. It coincides with and pursues some common objectives with recently passed legislation in Victoria. The comparable provisions and overlapping objectives of the *Civil Procedure Act 2010* (Vic) will be examined with reference to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter). We will also consider the operation of alternative (or appropriate) dispute resolution (ADR) within the area of human rights and discrimination based complaints in Australia and consider the scope for the Bill to advance human rights more generally in the context of civil disputes at the federal level.

1. Australia's human rights obligations

Australia is a party to the International Covenant on Civil and Political Rights (ICCPR). Article 14(1) of the ICCPR, insofar as it applies to civil disputes, provides that 'in the determination of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.' Article 17(1) of the ICCPR provides that '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy...' and article 17(2) declares that 'everyone has the right to the protection of the law against such interference...' The United Nations Human Rights Committee has provided the following guidance with respect to the interpretation of article 17:

the expression "arbitrary interference" can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.⁵

Despite the absence of a legislative bill of rights at the federal level, the *Human Rights (Parliamentary Scrutiny) Bill 2010*, if enacted, will require the scrutiny of bills for compatibility with human rights. In the event that the Bill is not enacted, the ICCPR requires state parties to take steps to respect and ensure that the rights in the covenant are recognised and to take the necessary steps to adopt laws or other measures necessary to give effect to those rights.⁶ The ICCPR's First Optional Protocol, which came into effect for Australia in

⁵ United Nations Human Rights Committee, General Comment 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation, (Article 17), Thirty-second session, 1988.

⁶ ICCPR, article 2(1) and 2(2).

December 1991, enables individuals alleging violations of their rights under the covenant to have their complaints determined by the United Nations Human Rights Committee which supervises the implementation of state parties' obligations. The Committee has made findings in two cases that Australia has violated its obligations under Article 14.⁷ Another matter alleging a violation of article 14(1) is pending before the committee.⁸

2. The English Position

2.1 Case management and the CPR

Building on increasing support for ADR by English courts, Lord Woolf's report supported ADR as a significant element of active case management. The CPR introduced as a result of Lord Woolf's report require courts to engage in 'active case management'⁹ which relevantly includes 'encouraging parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure'.¹⁰ Another of Lord Woolf's recommendations which has been adopted in the UK is pre-action protocols. These protocols are implemented through Practice Directions which currently apply to 11 specific areas of civil litigation, including personal injury and construction and engineering disputes.

Pre-action protocols concern the exchange of information prior to the issue of proceedings in order to facilitate early settlement and resemble the current Bill in their key aims and objectives. The Bill requires parties to a dispute to file a statement outlining the 'genuine steps' they have taken to resolve a dispute. The Bill is not prescriptive with respect to the steps to be taken and allows litigants and their legal representatives to tailor the steps to the circumstances of the case. Examples of genuine steps are enumerated in section 4 and include considering whether the dispute could be resolved through ADR. While there is some uncertainty as to the parameters of 'genuine steps', there is a possibility that in some circumstances it may be seen to require parties to submit to ADR against their will. It has been observed that '[w]hile a court is able to encourage participation in reasonable settlement negotiations or in ADR (including imposing adverse costs orders), the court needs to be

⁷Article 14(1) was found to be violated in the context of the criminal process in *Dudko v Australia* CCPR/C/90/D/1347/2005 (29 August 2007) which concerned an unrepresented prisoner who was denied the right to appear in court. The refusal was found to violate the fundamental principle of equality before the courts. In *Rogerson v. Australia* CCPR/C/74/802/1998 (3 April 2002) a delay of almost two years to deliver the final decision in a contempt proceeding was found to violate the right to be tried without undue delay in accordance with article 14(3) (c).

⁸ The 'communication' of Sheikh Mansour Leghaei was lodged with the Committee in recent weeks.

⁹ CPR 1.4(1)

¹⁰ CPR 1.4(2)(e)

careful that the encouragement does not impinge on a litigant's right to insist on court determination of the dispute as this may amount to a denial of the right to access the court or the right to a fair hearing within a reasonable time.'¹¹

Concerns about the compatibility of compulsory ADR with the right to a fair hearing have received the imprimatur of English courts in the context of the ECHR. Article 6(1) of the Convention largely echoes the wording of the ICCPR's article 14(1) and relevantly provides that '[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

2.2 The scope of the right to a fair hearing under the ECHR

The right to a fair hearing in article 6 of the ECHR has been determined to extend to a right of access to a court. Judge Rozakis of the European Court of Human Rights has observed that '[i]f we make the distinction between the institutional aspects of Article 6 and the procedural ones, institutional being e.g. the independence and impartiality of a tribunal, procedural being the fairness of a hearing, then the access question is, of course, one fundamental institutional aspect.'¹²

In *Golder v United Kingdom* (1979) 1 E.H.R.R. 524, [1975] E.C.H.R. 4451/70, the European Court of Human Rights found that the Home Secretary's refusal to permit a prisoner to consult a solicitor in relation to his right to bring civil proceedings against a prison officer amounted to a violation of article 6. The court rejected the UK's submission that article 6 does not extend to a right to access to courts and remarked that 'in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.'¹³ The court found as follows:

It would be inconceivable, in the opinion of the Court, that Article 6 para. 1...should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious

¹¹ Michael Legg and Dorne Boniface, 'Pre-action Protocols in Australia' (2010) 20 *Journal of Judicial Administration* 39, 54.

¹² Christos Rozakis, 'The Right to a Fair Trial in Civil Cases' 4: 2 *Judicial Studies Institute Journal* 2004, 96-106 at 98.

¹³ At [34].

characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.¹⁴

The Court thus concluded that Article 6 ‘secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal’. The article was thus seen to embody ‘*the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para. 1 (art. 6-1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing*’.¹⁵

Judge Rozakis has observed that the notion of a right of access to a court has ‘developed into one of the fundamental guarantees of Article 6, both in civil - par excellence -and, sometimes, in criminal cases.’¹⁶ It is this ‘fundamental institutional aspect’¹⁷ of the right to a fair hearing that is of interest with respect to the Bill.

2.3 Human Rights scrutiny of the CPR

The introduction of the *Human Rights Act 1998* (UK) has resulted in a greater level of judicial scrutiny with reference to the protection of human rights. English courts have been generally supportive of ADR. Compulsory referral to ADR has been considered part of the armoury of case management tools applied to resolve proceedings. English courts have ordered stays of proceedings to facilitate mediation without reference to the ECHR.¹⁸ Lightman LJ, writing extra judicially, warned that ‘[l]itigation is a high-risk gamble and the risks and burden of costs today are so substantial that for any well-advised client, litigation must be the course of last resort if any reasonable alternative is available...In litigation there is only one winner and that is generally the lawyer.’¹⁹ A notable exception to the generally supportive stance of English courts to ADR is the Court of Appeal’s judgment in *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, [2004] EWCA Civ 576 (11 May 2004). This matter raised the question of when costs sanctions should be imposed on a successful litigant who had refused to submit to mediation. After noting the strong support

¹⁴ At [35]

¹⁵ At [36]

¹⁶ Rozakis, note 12 above, at 98.

¹⁷ Ibid.

¹⁸ *Guinle v Kirreh* [2000] CP Rep 62, *Muman v Nagasena* [2000] 1 WLR 299 CA.

¹⁹ Sir G Lightman, ‘Litigation: the last resort’ (2004) *NLJ* 154, 185

for ADR in general and mediation in particular in a series of cases, the court found as follows:

It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court...it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6. Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it. We would adopt what the editors of Volume 1 of the White Book (2003) say at para 1.4.11:

“The hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are a process voluntarily entered into by parties in dispute with outcomes, if the parties so wish, which are non-binding. Consequently the court cannot direct that such methods be used but may merely encourage and facilitate.”

Dyson LJ considered that compulsory mediation against the will of a party would be futile:

If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.²⁰

Nevertheless, the court found that parties may need to be encouraged to embark upon ADR:

²⁰ *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, [2004] EWCA Civ 576 (11 May 2004) per Dyson J at [9]-[10].

Parties sometimes need to be encouraged by the court to embark on an ADR. The need for such encouragement should diminish in time if the virtue of ADR in suitable cases is demonstrated even more convincingly than it has been thus far. The value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR. But we reiterate that the court's role is to encourage, not to compel.

The ‘strongest form of encouragement’ considered by the Court of Appeal is a form of ADR order made in the Admiralty and Commercial Court which requires parties to exchange lists of neutral ADR practitioners, to endeavour in good faith to agree upon such a practitioner and take ‘such serious steps as they may be advised to resolve their disputes by ADR procedures’ and, failing settlement, to inform the court what steps towards ADR have been taken and why they have failed. Despite being identified as the ‘strongest form of encouragement’, this directive, which is comparable to the provisions of the Bill, was seen to ‘[stop] short of actually compelling parties to undertake an ADR’.²¹

The Court of Appeal’s dicta with respect to compulsory ADR and article 6 of the ECHR has been called into question. In rejecting the approach in this decision, Arthur Marriott QC notes that ‘[t]he argument is not that a litigant is being denied his day in court, but rather that mediation is a prerequisite to a day in court.’²² Similarly, Professor Hazel Genn, notable for her opposition to the proliferation of ADR, has made the following observation with respect to article 6:

*Referral to mediation is a procedural step along the way to a court hearing if the case does not settle at mediation. It does not exclude access to the courts and to require parties to attend a three hour low-cost mediation session does not order them to compromise their claim. Having attended the mediation meeting, the parties are free to terminate and leave at any point and to continue with the litigation.*²³

²¹Ibid at [30].

²² Arthur Marriott QC, ‘Breaking the dispute resolution deadlock: Civil litigation and ADR in the United Kingdom and beyond’ (2006) 17 *Alternative Dispute Resolution Journal* 157, 160.

²³ Dame Hazel Genn et al, *Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure*, Ministry of Justice Research Series 1/07 (2007) 15

While agreeing that compulsory mediation is, on its face, a limitation on the right to a fair hearing only to the extent that parties are required to first undertake a negotiation process, Astor and Chinkin consider mandatory mediation in the following terms:

*On the face of it, parties are not denied trial as they may choose to settle in mediation. However, for some litigants mandatory mediation may effectively deprive them of trial if they do not have the financial or emotional resources to pursue their dispute through both processes.*²⁴

Astor and Chinkin note that where parties ‘must pay for mediation they are mandated to attend’, it may present a financial barrier to the right to a fair hearing. Litigation is a costly enterprise and we do not believe that any reasonable fee paid by disputants with respect to pre-action ADR would present a barrier to accessing court proceedings. Astor and Chinkin consider that ‘[f]or other litigants, it defers the exercise of the right to a fair trial until the parties have attended mediation. Whether mandatory mediation involves a denial, or a delay, of constitutional rights must be a situated judgment that takes into account the individual case characteristics.’²⁵

Where ADR may cause unreasonable delay or expense, it may present a significant incursion into the right to a fair trial under article 14(1) of the ICCPR. In *Shirayama Shokusan Co Ltd v Danovo* [2003] EWHC 3006 (Ch) Blackburne J ordered the parties to a large commercial dispute to submit to mediation as a concomitant of active case management authorised by the CPR and noted that he did not believe any *Human Rights Act* issue to be engaged by the order to mediate. He subsequently decided that an order staying the proceeding until a person who was not named a party to the proceeding attend the mediation would engage article 6 of the ECHR.²⁶ Indeed, where the issue of proceedings may be delayed or significant costs incurred by pre-litigation ADR, the right to a fair hearing may be limited. We nevertheless see significant cost and delay as unlikely to flow from the broad, non-prescriptive provisions of the Bill.

²⁴ H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd Edition), LexisNexis Butterworths, 2002 at 273.

²⁵ *Ibid.*

²⁶ *Shirayama Shokusan Co. Ltd v. Danovo Ltd* [2004] EWHC 390 (Ch) ("*Shirayama (No. 2)*"), per Blackburne J.

3. The Bill's impact on Human Rights

3.1 Does the Bill limit the right to a fair hearing?

The Bill does not represent a radical change to the litigation landscape. Courts regularly refer parties to ADR after proceedings have commenced. The introduction of the 'genuine steps' requirement imposes an additional process obligation upon prospective parties. It introduces a further step into the process. If the genuine steps do not yield a settlement, proceedings may be commenced and determined. A failure to file a genuine steps statement does not invalidate the application instituting the proceedings, the response thereto or the proceedings themselves. While the failure to provide a genuine steps statement may result in the court making a range of orders, including costs orders, the parties' access to court and the fair determination of their rights and obligations is not compromised. Costs orders may emanate from the conduct of parties in relation to a range of procedural steps and are made in relation to a range of factors to which 'genuine steps' have been added. While it is arguable that the mere possibility of adverse costs orders may limit the right of access to courts, we do not endorse this position. In circumstances where genuine steps themselves do not entail disproportionate costs or delay, we do not believe that the right to a fair hearing, including its concomitant right of access to court, is limited by the Bill. It is merely directing parties to take steps to narrow issues and to endeavour resolution of disputes prior to resorting to litigation. Provided that the form of ADR employed does not determine the rights of the parties without their agreement, the parties' right to a fair hearing is preserved. If the parties are unable to resolve their dispute, their right to access the court and to have their dispute determined is preserved.

Nevertheless, any contention that the threat of costs sanctions may limit the right of access to the courts may be countered by the argument that such a minimal limitation is justified in light of the significant objectives pursued by the Bill. The European Court of Human Rights has recognised that human rights such as the right to a fair hearing are not absolute and are subject to a 'margin of appreciation' which permits reasonable restrictions upon the right which serve legitimate aims and are applied in a manner proportionate to those aims.²⁷ A similar approach has been adopted in Victoria under section 7(2) of the Charter. The *Civil*

²⁷ *Golder v United Kingdom* (1975) 1 EHRR 524; *Ebert v Official Receiver* [2002] 1 WLR 320; *Ashingdane v United Kingdom* (1985) 7 EHRR 528.

Procedure Act 2010 (Vic) has been subject to parliamentary scrutiny pursuant to ss 28 and 30 of the Charter which is examined below.

3.2 The potential for increased costs and delay

While we believe that the Bill is unlikely to limit the right to a fair hearing, such a limitation may arise where the genuine steps undertaken by the parties effect unreasonable costs or delay. This may arise from the particular steps taken (though, as noted above, we consider this to be unlikely) or with respect to the uncertainty around the parameters of ‘genuine steps.’ The process of determining the parameters of genuine steps, particularly in the context of ‘satellite litigation’ in which one party alleges that their opponent has failed to comply with the provisions, may see the Bill operating in a counter-intuitive way; prolonging and increasing the complexity of disputes. Further clarification within the legislation may address this danger. Questions of past conduct, including any alleged failure to take genuine steps to resolve the dispute, should occur at the conclusion of proceedings. At that stage, the judge is fully informed about the conduct of the parties down to trial and will have determined the merits of the case. With this information, the court will be properly placed to gauge the genuineness of steps taken by the parties. The determination of these issues at the conclusion of proceedings reduces the danger of satellite litigation at the pre-trial stage.

3.3 Does the Bill breach the right to privacy?

Section 4(1)(c) of the Bill cites as examples of genuine steps, the provision of ‘relevant information and documents to the other person to enable the other person to understand the issues involved and how the dispute might be resolved’. If a disputant feels compelled, by the genuine steps obligation, to reveal private information, there may be an interference with their right to privacy. Article 17 of the ICCPR prohibits arbitrary or unlawful breaches of privacy. An authoritative statement concerning the concept of privacy is that of Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats* [2001] 208 CLR199 :

Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved.²⁸

²⁸ At [42].

There is a well-established common law principle that, in the context of litigation, documents obtained through compulsory court processes are subject to an implied undertaking that they will only be used for the purposes of the proceeding. The principle was established in *Home Office v Harman* [1983] 1 AC 280. When it comes to litigation, the right of a litigant to keep their documents and information confidential is considered subordinate to the interests in obtaining just outcomes in the court process itself. Parties are thus required to disclose private documents in the process of discovery. The implied undertaking gives litigants forced to hand over their documents an assurance that they will not be used for any purpose other than the purposes of the proceeding. Use of documents for any purpose outside the litigation renders a party liable to committal for contempt of court.

The common law rule in *Home Office v Harman* confers parties with a protection that ameliorates the incursion into their privacy. This can be seen as the common law's response to ensuring that the interference is proportionate to the aims pursued by the interference.

In light of the benefits associated with the early resolution of disputes, the breach of the right to privacy represented by the Bill may be capable of justification. Whether a breach may be justified will involve a balancing of interests, including the objectives sought to be achieved by the incursion into the right and whether the incursion is necessary in the circumstances. The dispute resolution aim is significant to the operation of the justice system and, as considered below, may promote the right to a fair hearing. This purpose may nevertheless be equally served by maintaining section 4(1)(c) in a manner which does not limit the right to privacy. The introduction of an obligation on disputants subject to the Bill, comparable to the implied undertaking, would not diminish the Bill's aims while maintaining the same privacy protection afforded to litigants. We therefore recommend the inclusion of a proviso to that effect.

The possibility of a disputant disclosing privileged documents, in carrying out genuine steps, should also be noted.

4. The Victorian position

The *Civil Procedure Act 2010* (Vic) which will commence on 1 January 2011 introduces a range of procedural reforms which have flowed from the Victorian Law Reform

Commission's Civil Justice Review.²⁹ Like the federal Bill, the Victorian Act is ultimately concerned to facilitate the just resolution of disputes in an efficient and cost-effective manner³⁰ and to reduce the incidence of tactical litigation,³¹ which disproportionately consumes court resources. The reforms include the liberalisation of the summary judgment procedure and introduction of sanctions for failure to comply with disclosure obligations. The Bill allows courts to refer parties, whether willing or not, to non-binding ADR processes.³² Processes which determine the parties' rights, such as arbitration or expert determination, are excluded from the compulsory referral provision. Parties who fail to reach an agreement pursuant to non-binding ADR processes can have their proceeding determined by a court.

Under the new Act, litigation will become a 'measure of last resort.'³³ Part 3.1 governs pre-action requirements. Prior to commencing civil proceedings, parties in a dispute must take reasonable steps to resolve the dispute by agreement, or to clarify and narrow the issues in dispute in the event of a decision to proceed to trial.³⁴ Reasonable steps include, but are not limited to, the exchange of documents, participation in genuine negotiations, or appropriate dispute resolution.³⁵ Furthermore, the Act prohibits parties from unreasonably refusing to participate in ADR.³⁶

Prima facie, the 'reasonable steps' requirement in Victoria is more prescriptive than the 'genuine steps' obligation in the Bill. The federal Bill's requirement that parties take 'genuine steps' to resolve a dispute³⁷ is to be read broadly³⁸ and contemplates a wide range of permissible actions in order to satisfy the genuine steps requirement.³⁹ The Bill does not require parties to take any specific step. Notifying the other party of the issues and offering to discuss those issues may alone be sufficient to satisfy the clause, depending on the circumstances of the dispute.⁴⁰

²⁹ Victorian Law Reform Commission (2008) Civil Justice Review: Report, Melbourne March 2008.

³⁰ *Civil Procedure Act 2010* (Vic) s 7(1).

³¹ *Civil Procedure Bill 2010* Explanatory Memorandum..

³² Section 66.

³³ Explanatory Memorandum, note 29 above.

³⁴ Section 34.

³⁵ Section 34(2) paragraphs (a)-(b).

³⁶ Section s 34(3).

³⁷ Section 4.

³⁸ Explanatory Memorandum, *Civil Dispute Resolution Bill 2010* (Cth), 2.

³⁹ S 4(1).

⁴⁰ S 4(1)(a).

4.1 The right of access to the court

Like the federal Bill, the Victorian Act does not prevent non-compliant litigants from commencing or continuing proceedings but permits the court to take non-compliance into account in exercising its discretion to award costs or make other orders. If it is reasonable to do so, the court may order that a party pay another party's costs of compliance. In recommending the pre-litigation requirements now enacted in the *Civil Procedure Act*, the Victorian Law Reform Commission noted that the protocols 'do not seem to be incompatible with the provisions of the Charter'.⁴¹ Although disputing parties would be expected to meet the requirements of the pre-action protocols, there would be no bar to the commencement of proceedings in the event of non-compliance. Accordingly, the protocols would not deny access to the courts'.⁴²

In the Statement of Compatibility tabled in accordance with section 28 of the Charter, Attorney-General Rob Hulls stated that the 'reasonable steps' requirements engaged the right to a fair hearing in section 24(1) of the Charter. Section 24(1) is based upon article 14(1) of the ICCPR and provides that 'a party to a civil proceeding has the right to have the ...proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.' The Attorney-General makes the following statement with respect to article 24 in the Statement of Compatibility:

Although parties are not prevented from commencing proceedings due to non-compliance with the requirements (cl 36), where a party does not comply, the party is vulnerable to sanctions, including costs orders, or any other order the court considers appropriate (cl 38-39). In light of this I am of the view that the introduction of the prelitigation requirements limit the implied right to access the courts.

We are not persuaded by these reasons. The prelitigation requirements in the Victorian Act impose no preclusion of an access right. They merely pre-condition access to the court to taking an earlier step. If the practical impact of the step does not impose an unreasonable financial burden or undue delay, we believe that the right of access to the court is not curtailed.

⁴¹ VLRC, *Civil Justice Review*, 109.

⁴² Ibid. Furthermore, the Charter concerns parties to a proceeding while the pre-action protocols are intended to apply to persons in a dispute before legal proceedings have commenced. The key objective is to resolve the dispute using non-court based means.

Having reached a different conclusion to our own, the Statement of Compatibility outlines the exercise of determining whether the limitation is reasonable and proportionate with reference to section 7(2) of the Charter. In determining whether the limitation was reasonable, Mr Hulls made reference to the significant objectives pursued by the Bill which were supported by the Victorian Law Reform Commission, including the following:

- the facilitation of early dispute resolution,
- the resolution of disputes without resort to litigation in an efficient, timely and cost-effective manner likely to promote durable solutions
- reducing costs and delay in litigation by encouraging parties to narrow the issues in dispute.

These objectives were contrasted with the minor nature and extent of the limitation. Although sanctions may follow from a failure to comply with the reasonable steps requirement, such failure does not present a bar to litigation. The requirements were seen to be proportionate and carefully tailored to their purpose in requiring parties to take steps which are reasonable in light of the ‘person’s situation’ and nature of the dispute, with sanctions only attaching to unreasonable conduct.

While we do not believe that the right to court access is limited by the Victorian Act, we nevertheless agree that if there is were any limitation on the right as noted in the Statement of Compatibility, it would be reasonable and proportionate to the legitimate aims pursued by the legislation. In light of the less directive wording of the federal Bill, we believe that the pre-litigation steps do not limit rights under article 14(1) of the ICCPR. In any event, if they do impose a limitation, it can be justified on the same grounds as the *Civil Procedure Act* in light of its comparable objectives.

The limitation on article 24(1) presented by the courts’ power to order parties to attend ADR was considered to be consistent with the right to access the courts. The Attorney-General noted that a contrary position is arguable with reference to *Halsey v Milton Keynes* but concluded that there is ‘no risk of [the power] being used in a manner that limits the right’ on account of the discretionary nature of the power and its limitation to non binding ADR processes. While the relevant provisions have no parallel in the federal Bill, we agree with the statement of compatibility with respect to the compulsory ADR power.

Interestingly, the Scrutiny of Acts and Regulations Committee raised only one concern pursuant to its requirement to report on the compatibility of bills with human rights under s 30 of the Charter. Section 32(1)(b) of the Civil Procedure Act exempts proceedings brought under the Charter from the Bill's pre-litigation requirements. The Committee raised concerns that in light of the broad range of civil proceedings which may raise Charter questions, litigants who seek an early resolution of their dispute may be deterred from relying on the Charter and respondents to Charter claims may continue to force proceedings to litigation. The Committee's concern was thus not that the Act limits human rights but rather that proceedings involving Charter questions are excluded from benefits of pre-litigation requirements.

4.2 The right to privacy

For the purposes of the Victorian Act, Section 34(2)(a) provides that reasonable steps include the exchange of appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute. This is comparable to section 4(1)(c) of the Bill which includes among examples of genuine steps 'providing relevant information and documents to the other person to enable the other person to understand the issues involved and how the dispute might be resolved'. Section 26 of the Victorian Act introduces a further overarching obligation to disclose the existence of documents that parties consider critical to the resolution of the dispute. There is no comparable provision in the Bill. The Statement of Compatibility considers whether ss 34 and 26 of the Victorian Act limit the right against arbitrary incursions with privacy as set out in section 13 of the Charter, implementing article 17 of the ICCPR into Victorian law. The statement concludes that the disclosure requirements do not constitute an arbitrary interference with privacy and serve the legitimate aim of ensuring efficient dispute resolution and are proportionate in that they set a high threshold and apply only to 'critical' documents.

Once again our position differs somewhat to the Statement of Compatibility. If taking reasonable steps includes the provision of private information, this would constitute a prima facie breach of privacy. Such a breach may be an arbitrary or unlawful interference with the right to privacy if it does not serve a legitimate aim in a reasonable and proportionate manner. In determining whether an interference with a human right can be demonstrably justified under section 7(2) of the Charter, relevant factors include the importance and purpose of the limitation, the relationship between the limitation and its purpose and whether any less

restrictive means are available to achieve the purpose of the limitation. The purpose of ensuring efficient dispute resolution is significant, and flows clearly from the limitation imposed by pre-action disclosure. There are less restrictive means available for achieving the purpose. We refer to our discussion under 3.3 above.

5. Can the Bill advance human rights?

5.1 Preventing harms which may flow from litigation and facilitating more timely access to courts.

Heydon J has commented thus on the process of judicial dispute determination:

Leading cases involve grim, harrowing and painful human dramas. For the Court the question is: Is it necessary to ruin Mr Hamilton? Must Mr Mothew's reputation be destroyed?...When the conflict is sharpened by judicial testing, an intense friction can build up. That in turn generates a terrible energy capable of illuminating the law.⁴³

The civil justice system is, perhaps excepting the Parliamentary process, virtually unique in our society. While other sectors of society tend to focus on collaboration and the achievement of a common outcome, the adversarial nature of litigation and the conflicting aims brought to the process are not well understood by the lay person or novice litigant. Furthermore, a proliferation of legislation has rendered the interaction between common law principles and equitable doctrine with statute law has become ever more complex. The interpretation of principles in the context of legislation brings about significant uncertainty, which judges and barristers deal with on a daily basis. In light of solicitors' relationships with their clients and the commercial nature of modern legal practice, solicitors are not always ideally equipped to assist their clients in steering clear of the court system. It is thus increasingly important that parties are independently apprised of the pitfalls of litigation before embarking upon its stressful and costly processes. We believe that an independent mediator is well-placed to provide that independent appraisal.

The Bill seeks to facilitate cultural change within the legal system, requiring parties to explore alternative options prior to embarking upon litigation. If the reforms have the effect of easing the courts' caseload, then they may facilitate more timely access to courts for

⁴³ JD Heydon, 'Are the Skills of Company Directors to Exercise Skill and Care Fiduciary?' in S Degeling and J Edelman (Eds), *Equity in Commercial Law* (Lawbook Company 2005), 185-238 at 214.

contests which do not lend themselves to resolution outside the court system. For those disputes that go before the courts, the narrowing of the issues in dispute afforded by genuine steps taken prior to commencement may minimize the cost, complexity and duration of the proceeding.⁴⁴

ADR methods such as mediation are widely recognised as decreasing costs and delays while facilitating lasting solutions which extend beyond the strict action-based remedies which can be ordered by a court. Furthermore, in fashioning the solution themselves, parties are able to maintain relationships which may be irreparably harmed by the litigation process and are less likely to be left with a sense that they are the loser, or the victim of an unjust process.

The September 2009 report by the National Alternative Dispute Resolution Advisory Council observes that ADR based research ‘has demonstrated that [the] benefits [of ADR] can be articulated into broad cost, relationship and productivity savings. Also, they appear to produce better outcomes and longer-lasting results’⁴⁵ Furthermore, with respect to lasting outcomes which are considered by the parties to be fair, it is observed that ‘research into the use of mediation in family disputes indicates that there are higher compliance rates and less re-litigation for disputants using mediation versus litigation.’⁴⁶

In light of the benefits which flow from resolving disputes without recourse to litigation, the Bill may be seen to ameliorate the impacts of civil litigation. These impacts may broadly be described as antithetical to the realization of human rights. There is a growing body of work concerning the emotional impact of litigation on the parties. Clinical psychologist Gary Fulcher posits that litigation either induces or exacerbates the trauma response in victims of traumatic injury.⁴⁷ Gutheil et al have observed that the nature of the litigious process renders some degree of psychological harm inevitable⁴⁸ and note that ‘[t]here is an inherent

⁴⁴ This observation has been made in the context of the Pre-action Protocol for Construction and Engineering Disputes in the UK in P Gerber and B Mailman, ‘Construction Litigation: Can we do it better?’ (2005) 31(2) *Monash University Law Review* 237 at 245.

⁴⁵ NADRAC; The Resolve to Resolve- Embracing ADR to improve access to justice in the Federal Jurisdiction: A Report to the Attorney-General’ September 2009 at 79.

⁴⁶ Ibid at 29.

⁴⁷ Gary Fulcher, ‘Litigation-induced Trauma Sensitisation (LITS) – A Potential Negative Outcome of the Process of Litigation’ (2004) 11(1) *Psychiatry, Psychology and Law* 79.

⁴⁸ Thomas Gutheil et al, ‘Preventing “critogenic” harms: minimizing emotional injury from civil litigation’ (2000) 28 *The Journal of Psychiatry and Law* 5, 6.

irony in the judicial system in that individuals who bring suit must then endure injury from the very process through which they seek redress; the legal process itself is a trauma'.⁴⁹

While we believe that the research of Fulcher and Gutheil et al is largely untested, we accept that engagement in litigation is an inherently stressful process which does not promote the mental health of participants. This is especially significant for inexperienced litigants and those who do not engage in the process on an organisational basis. Without putting too fine a point on it, we believe that it is fair to conclude that an indirect benefit likely to flow from the kind of cultural change promoted by the Bill is the prevention of mental harm which may flow from involvement in court proceedings.⁵⁰ Parties who may stand to be scarred by their involvement in the court process would be well served by being presented with less costly alternatives.

5.2 The pre-litigation model in the context of discrimination based claims

In the work of Australia's federal and state based human rights agencies, methods of ADR are the principal mode of dispute resolution of human rights and discrimination based disputes. The Australian Human Rights Commission can only resolve alleged breaches of human rights by conciliation because there is currently no recourse to the justice system for this type of claim. Complaints of unlawful discrimination are generally submitted to the pre-litigation process of conciliation in a manner not dissimilar to the form which may emanate from the Bill. Most complaints of unlawful discrimination are submitted to conciliation as a first step but conciliation is not mandatory. The Commission may terminate a complaint on a number of grounds, for example where the matter is of public importance and should be determined by a court or where there is no reasonable prospect of settlement.⁵¹ If a complaint is terminated by the Commission or conciliation fails, it may be submitted to the Federal Court or Federal Magistrates Court for determination. The majority of discrimination complaints are determined by conciliation. The recent settlement at conciliation of the David Jones sexual harassment claim (which did not proceed in the usual 'Commission to Court' order) is testament to the ability of the ADR process to resolve a range of difficult claims.

⁴⁹ Ibid at 10.

⁵⁰ Article 12 of the International Covenant on Economic, Social and cultural Rights, to which Australia is a party, recognises the right to enjoyment of the highest standard of physical and mental health. An indirect benefit which may flow from diverting people from the court system is the advancement of mental health.

⁵¹ Section 46PH (1) (h) and (i).

The work of the Australian Human Rights Commission provides an example of how a conciliatory body can further social change objectives in areas of anti-discrimination and promote awareness of individual rights and discriminatory attitudes through alternative dispute resolution mechanisms. Studies of the Commission's conciliation process have echoed the abovementioned advantage of ADR in the context of civil dispute resolution generally. One study found that parties perceived the conciliation process to be fair and experienced high levels of compliance and satisfaction with the terms of settlement.⁵² Another study reinforced the view that ADR procedures can advance anti-discriminatory practices through individual recognition of rights, the reinforcement of public norms, and through systemic change incited by individual complaints.⁵³ Many respondents to a discrimination claim heard by the commission were motivated to initiate training and policies involving discriminatory practices.⁵⁴ These policies included programs designed to alter employee attitudes as well as modification of buildings and facilities to accommodate disabilities, both of which promote anti-discriminatory norms and have positive effects on particular social groups.⁵⁵ The interest-based nature of ADR was thus seen to facilitate outcomes which are less likely to emanate from a court order.

The benefits of pre-litigation ADR in the anti-discrimination context may be translated to civil litigation more generally. John von Doussa QC has concluded from the Australian Human Rights Commission's experience of conciliation that the work of mediators in all sectors are critical to the functioning of the justice system and assists 'in giving others the ability to exercise their fundamental right to a fair hearing and an effective remedy by an independent tribunal.'⁵⁶ In an address to mediators, Mr Von Doussa QC makes the following observation:

Every day you empower individuals to make their own decisions. You provide them with a greater understanding of their legal rights, as well as knowledge of the various

⁵² T Raymond and S Georgalis, "Dispute resolution in the changing shadow of the law: a study of parties' views on the conciliation process in federal anti-discrimination law", 6(2) ADR Bulletin 2003 at 33.

⁵³ T Raymond, Australian Human Rights Commission, *Alternative Dispute Resolution as a Tool for Social Change: A Discussion of Issues and Evidence* (2008) available at <http://www.hreoc.gov.au/complaints_information/publications/ADR_social_change2008.html> accessed 24 October 2010.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ John von Doussa QC, 'ADR: an essential tool for human rights', Address to the National Mediation Conference, 30 June 2004.

options to implement and enforce those rights. Perhaps most important of all, you equip them with the means to defend those rights from a more equalised power base.⁵⁷

In this sense, mediators are characterised by von Doussa as defenders of human rights, whether they operate in the family law, industrial relations or other spheres of the justice system. We agree that the benefits of pre-litigation steps which lend themselves so readily to the resolution of disputes in the anti-discrimination sphere may have the effect of enhancing human rights in the civil justice system

Conclusion

Our submission has addressed itself to the human rights implications of the Bill. We believe that the Bill does not limit the right to a fair hearing unless the genuine steps taken by parties precipitate disproportionate costs and delay. A caveat to this view is the potential for satellite litigation over whether a party has in fact taken genuine steps. For this reason we would recommend that the Bill be clarified to ensure that questions of past conduct, including any alleged failure to take genuine steps to resolve the dispute, occur at the conclusion of proceedings when the judicial officer has the benefit of hindsight. A problem arises in the context of the pre-action disclosure requirement which we recommend be amended to include the same limitations on use of documents for purposes extraneous to the dispute at hand as are extended to litigants in the discovery process.

In striving to ensure that parties attempt to resolve their dispute prior to the issue of proceedings, the Bill may in several respects enhance human rights by presenting individuals with less stressful and costly modes of dispute resolution which empower them to make their own decisions with which they are more likely to feel satisfied. If the reforms have the effect of easing the courts' caseload, then they may facilitate the more timely access to courts for contests incapable of resolution outside the judicial process. Litigation may also be simplified and shortened by the narrowing of issues afforded by pre-litigation steps. Such benefits would in fact enhance the right of access to court proceedings.

⁵⁷ Ibid.