National Legal Aid Secretariat
GPO Box 1422
Hobart TAS 7001

Executive Officer: Louise Smith

t: 03 6236 3813
f: 03 6236 3811

National Legal Aid

Julie Dennett
Committee Secretary
Senate Standing Committee on
Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

28th October 2010

Dear Ms Dennett,

RE: Inquiry into the *Civil Dispute Resolution Bill 2010*

About National Legal Aid

National Legal Aid (NLA) represents the Directors of the eight State and Territory legal aid commissions (commissions) in Australia. The commissions are independent statutory authorities established under respective State or Territory enabling legislation. They are funded by State or Territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:
- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the Federal and State and Territory legal systems; or
- obtain adequate information about access to the law and the legal system.

The commissions work co-operatively with the other main legal service providers in Australia to maximise access to justice for people. At a national level this cooperation is facilitated through the Australian Legal Assistance Forum (ALAF) comprising representatives of the Aboriginal and Torres Strait Islander Legal Services, the Community Legal Centres, the Law Council of Australia and NLA.

Each of the commissions provides some level of legal aid assistance to people with civil law disputes, although the type and extent of assistance varies between commissions.

Civil Dispute Resolution Bill 2010

NLA welcomes the opportunity to make a submission to the Committee in relation to the *Civil Dispute Resolution Bill 2010*, and supports the introduction of legislation that aims to encourage the early resolution of civil disputes outside of the courts.

We believe that the Bill's requirement that parties take "genuine steps" to resolve a civil dispute before proceedings are commenced in the Federal court or the Federal Magistrates Court is appropriate and has the potential to improve the early resolution of disputes.

We also support the introduction of a duty upon lawyers to advise people of the "genuine steps" requirement.

We are concerned however, that without certain additional safeguards in the legislation, the new requirements could create a barrier to justice, especially for disadvantaged and/or unrepresented litigants.

Recommended additional safeguards

In order to ensure that the new requirements do not create a barrier to justice for litigants, we recommend that the following changes are made to the Bill before it is enacted:

1. An amendment to clause 6(1), to ensure that a failure to comply with the procedural requirement to file a "genuine steps" statement does not result in claims not being able to be filed in Court.

2. An amendment to clauses 11 and 12, to ensure that the sanction provisions, including the provisions relating to adverse costs orders, do not unfairly prejudice unrepresented litigants, particularly those who are disadvantaged.

3. An amendment to the factors included in clause 4(1), to articulate that participation in either Internal Dispute Resolution or External Dispute Resolution amounts to compliance with the "genuine steps" obligation.

These recommendations are addressed in further detail below.

1. Amendment to clause 6(1)

The current drafting of clause 6(1) prescribes that an applicant who institutes civil proceedings *must* file a genuine steps statement "at the time of filing the application."

While clause 10(2) later states that "a failure to file a genuine steps requirement in proceedings does not invalidate the application instituting the proceedings", the wording of clause 6(1) creates a potential barrier for people seeking to file an application without a genuine steps statement. This is because when read on its own, clause 6 provides no scope for the acceptance of an application without such a statement.

Our concern is that clause 6(1) will lead to courts refusing to allow the filing of applications without genuine steps statements. If this occurs, it will have the potential to create a barrier to justice for disadvantaged persons who are unable to comply with the procedural rule for reasons such as mental incapacity, a lack of English language skills, a lack of awareness about the new provisions, and difficulty in communicating with the respondent.

It is our view that disallowing a person from instituting a claim not because of a lack of merit in the claim but because of a failure through no fault of their own to comply with a pre-trial procedure would be an undesirable outcome and contrary to the

Australian Government's *Strategic Framework for Access to Justice*, which promotes the reduction of such barriers to justice.

We further note that the object of the Bill, set out in clause 3, is to ensure that: "*as far as possible,* people take genuine steps to resolve disputes before certain civil proceedings are instituted' [*emphasis added*].

This statement clearly anticipates particular circumstances where it will not be possible for litigants to take pre-trial steps to resolve the dispute. Given this scope for non-compliance, it makes little sense to then prescribe that a failure to comply *procedurally* is so significant as to be fatal to the ability of a litigant to lodge a claim.

2. Amendment to clauses 11 and 12

Clauses 11 and 12 of the Bill empower the court to take into account a person's failure to file a genuine steps statement in exercising its powers and performing functions including the awarding of costs. Whilst we understand the rationale for sanctions for failure to comply with the provisions of an Act we are concerned that the sanctions not operate to unfairly penalise a person. It will therefore be important to ensure that people who need the remedies available through the courts, are able to get information about the sorts of preliminary steps required. There will of course be some people who will need help to understand and act on the information provided.

One way to address the potential unfairness of the sanctions would be to require the courts, when exercising the powers set out at clauses 11 and 12, to consider "any differences in the circumstances of the parties" that may have affected their ability to file a genuine steps statement.

In the context of unfair dismissal laws it has been observed that a requirement to consider "any differences in the circumstances of the parties" [1] necessitates consideration being given to differences in the parties' resources, understanding of the legal system, whether the other party has legal representation and educational differences.[2] We believe that these considerations would be appropriate in the context of clauses 11 and 12.

3. Amendment to clause 4

We agree with the flexible approach the legislation adopts in relation to the definition of "genuine steps", because it recognises that what amounts to "genuine steps" will depend upon the circumstances of the case. We also agree that it is useful to include a list of examples of steps that could be taken. Along these lines a standard form could also be developed to provide guidance regarding the level of detail required in the genuine steps statement. In this regard we note that we have some concern that currently clause 6, which compels the specification of steps, might in some cases produce the unexpected consequence of complicating rather than simplifying the initiation of civil proceedings, particularly in the respondent takes issue.

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[1] s 398, *Fair Work Act 2009* (Cth)

[2] "When can an employee claim a Dismissal is Unfair?", *Law Society Journal of NSW*, September (2009) 62 at p.65

The list of examples as currently drafted is appropriate, although we would like to see a reference to internal dispute resolution (IDR) and external dispute resolution (EDR) included in the list to ensure that lodgement at an IDR or EDR scheme is recognised as a "genuine step".

In a number of submissions to the National Alternative Dispute Resolution Advisory Council (NADRAC), including our recent response to its inquiry into the integrity of ADR processes commissioned by the Attorney-General, we have noted the importance of IDR and EDR within the wider context of ADR in Australia. EDR schemes are now considered so important in the financial services sector that it is not possible to obtain a financial service license without belonging to an EDR scheme.

EDR schemes can be very useful in assisting disadvantaged consumers to resolve disputes in a cost-effective manner. Examples of EDR schemes include the:

- Financial Ombudsman Service (FOS);
- Credit Ombudsman Service Ltd (COSL);
- Telecommunications Ombudsman Service (TIO); and
- Energy & Water Ombudsman NSW (EWON).

Such schemes are free of charge and relatively easy to use. They reduce the cost of dispute resolution for consumers, legal aid commissions and the court system. They also provide consumers with the option of commencing litigation if they are not happy with the outcome at EDR.

Specific recognition within the legislation that use of an IDR or EDR scheme complies with the genuine steps requirement would also increase the level of general awareness of IDR and EDR among the legal profession and judiciary.

We therefore recommend that participation in IDR and/or EDR is included in the list of examples of what may constitute "genuine steps."

Conclusion

NLA thanks you for the opportunity to make this submission. Please do not hesitate to contact us if you require any further information.

Yours sincerely

Alan Kirkland
Chair