

Mr Hamish Hansford

Secretary

Senate Legal and Constitutional Affairs Committee

By email: legcon.sen@aph.gov.au

1 November 2010

Civil Dispute Resolution Bill 2010

Dear Mr Hansford

I write on behalf of the Federation of Community Legal Centres (Vic) Inc, regarding the Civil Dispute Resolution Bill 2010 ('the Bill').

About the Federation

The Federation of Community Legal Centres (Vic) is the peak body for over fifty community legal centres (CLCs) across Victoria. The Federation leads and supports CLCs in pursuing social equity and access to justice.

The Federation:

- provides information and referrals to people seeking legal assistance;
- initiates and lobbies for law reform to develop a fairer legal system that better responds to the needs of the disadvantaged;
- works to build a stronger and more effective community legal sector;
- provides services and support to CLCs; and
- represents CLCs' priorities and interests.

CLCs are independent community organisations that draw on volunteers to provide free legal services to the public. CLCs provide free legal advice, information and representation to more than 100,000 Victorians each year.

General comments

The Federation broadly supports greater use of alternative dispute resolution (ADR). We consider that in many cases, ADR offers a cheaper, less stressful and more effective means of resolving disputes than a formal court hearing. However we are concerned that mandatory ADR could, in certain circumstances, be contrary to the interests of our clients and other parties from low-income or disadvantaged backgrounds.

We believe that if the Government enacts the Bill in its current form, it will inadvertently penalise people who cannot engage in ADR on an equal footing, due to their financial circumstances or other personal attributes such as gender, age or non-English speaking background.

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The Federation strongly endorses the joint submission of the PILCH Homeless Persons' Legal Clinic and the Human Rights Law Resource Centre, particularly the section entitled 'Potential risks faced by unrepresented parties.'

Specific recommendations

a) Access to legal advice and other support

The Bill should acknowledge that if ADR is to deliver truly just outcomes, parties require access to legal advice and, in some cases, support services such as translators and cultural liaison officers. This is particularly important where low-income and socially disadvantaged parties engage in disputes with well-resourced and legally sophisticated opponents.

Despite the best efforts of legal aid commissions, community legal centres and lawyers acting pro bono, many low-income and disadvantaged people cannot obtain legal representation when they need it.

In recognition of this fact, there should be an exemption under Part 4 or elsewhere in the Bill, stating that people who cannot obtain legal representation are exempt from the 'genuine steps' requirement.

b) The court's discretion and the meaning of 'genuine steps'

Part 3 of the Bill confers a very broad discretion on the court, regarding the filing of 'genuine steps statements' and substantive compliance with the 'genuine steps' requirement. The Bill should provide more guidance to the court, to ensure that the discretion is exercised appropriately.

The Bill should state that when a court exercises its discretion under ss 11 or 12 of the Bill, the court should take account of:

- the parties' financial circumstances;
- the parties' capacity to obtain legal advice; and
- any other factor that might prevent the parties from taking genuine steps to resolve the dispute, such as age or language difficulties.

c) Public interest litigation

While the Federation supports the principle of 'cultural change... away from adversarial litigation',¹ we also strongly endorse public interest litigation as an essential component of access to justice.

In 1994, the Access to Justice Advisory Committee chaired by Ronald Sackville said that legal aid providers should 'promote social, political and economic change through the legal system.' The committee affirmed that '[i]t is important that issues of concern to disadvantaged groups be litigated...so that it is not just the interests of the wealthy that direct the development of the common law.'²

¹ Commonwealth of Australia, Civil Dispute Resolution Bill 2010, Explanatory Memorandum, 3.

² Commonwealth of Australia, Access to Justice Advisory Committee, *Access to justice: an action plan* (1994) 227.

The National Alternative Dispute Resolution Advisory Council (NADRAC) has recognised that litigation provides 'public accountability' in a way that ADR does not. In a 1997 report, *Issues of fairness and justice in alternative dispute resolution*, NADRAC warned that where public interest matters are resolved through confidential settlements, important social issues 'may effectively be privatised'.³

Accordingly the Federation believes that Part 4 of the Act should set out an exemption from the 'genuine steps' requirement, in cases where there is a public interest in a transparent process and an adjudicated outcome.

In the alternative, Part 3 should be amended, to require the court to consider the public interest when exercising its discretion under ss 11 and 12.

Further discussion

I would be very happy to elaborate on any of these points at the public hearing in Melbourne on Thursday 4 November, if it would assist the Committee.

For a more comprehensive discussion of these issues, I refer the Committee to the Federation's report, *Activist ADR: Community lawyers and the new civil justice*, released in October this year. The report is available at www.communitylaw.org.au and I attach a copy to this submission.

Thank you for the opportunity to contribute to this inquiry.

Sincerely

Lucinda O'Brien
Policy Officer

Attachments: 1

³ National Alternative Dispute Resolution Advisory Council, *Issues of fairness and justice in alternative dispute resolution* (1997) 25-26.
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