COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Reference: Civil Dispute Resolution Bill 2010

THURSDAY, 4 NOVEMBER 2010

MELBOURNE

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WITNESSES

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

LEGISLATION COMMITTEE

Thursday, 4 November 2010

Members: Senator Crossin (Chair), Senator Barnett (Deputy Chair) and Senators Furner, Ludlam, Parry and Pratt

Participating members: Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Coonan, Cormann, Eggleston, Faulkner, Ferguson, Fierravanti-Wells, Fielding, Fifield, Fisher, Forshaw, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Macdonald, McEwen, McGauran, Marshall, Mason, Milne, Minchin, Moore, Nash, O'Brien, Payne, Polley, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Sneators Barnett, Boswell, Brandis, Crossin, hanson-young, McGauran, Pratt and Trood,

Terms of reference for the inquiry:

To inquire into and report on: Civil Dispute Resolution Bill 2010

Committee met at 2.11 pm

CHAIR (Senator Crossin)—I declare open this public hearing of the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the provisions of the Civil Dispute Resolution Bill 2010. This inquiry was re-referred by the Senate to the committee following the election on 30 September 2010—not that the election was on 30 September; it was re-referred to us on 30 September—for inquiry and report by 22 November 2010. We have received six submissions for the inquiry. They have been authorised for publication and they are on our website.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to the committee, and such action may be treated by the Senate as a contempt. It is also, though, a contempt to give false or misleading evidence to the committee.

[2.12 pm]

O'BRIEN, Ms Lucie, Policy Officer, Federation of Community Legal Centres—Victoria

PENOVIC, Ms Tania, Associate, Castan Centre for Human Rights Law, Monash University

CHAIR—Our first witnesses are from the Federation of Community Legal Centres in Victoria and the Castan Centre for Human Rights Law—again today; it is a busy centre in relation to our committee and its work. I welcome you both to our inquiry. We have received submissions from the Castan Centre for Human Rights Law and the Federation of Community Legal Centres. I ask you both to make an opening statement to begin with, and then we will go to questions.

Ms Penovic—Thank you. I understand that this committee conducted a hearing this morning on the Human Rights (Parliamentary Scrutiny) Bill. Our submission on the Civil Dispute Resolution Bill really contemplates the kind of inquiry that would be engaged in under the former bill. So our submission is narrow in the sense that it focuses on human rights alone. It is a long time since I practised law in the civil litigation area, and I do not feel that I am equipped to talk about suitability of certain categories of action for genuine steps, so I confine myself to human rights.

Broadly, we are supportive of the bill and certainly of the objectives that it pursues. Access to justice is a public good, and the process of litigation is fraught and costly. So, in the sense of promoting early resolution of disputes and easing the caseload of the court system, I think that this bill may in fact enhance access to the courts. There are some concerns about the right of access to courts in relation to this bill, but we believe that if it does not give rise to disproportionate costs and delays then it will in fact enhance access to justice. A caveat we have in this regard is the possibility of satellite litigation over whether 'genuine steps' have been taken, and I have a proposal for dealing with that.

The other concern that we have is with respect to the right to privacy in the context of providing documents and information before proceedings have been commenced, and I think that that can be readily addressed too. I think that the objectives of the bill mean that, really, we do support it, it should be enacted and these concerns can readily be addressed.

CHAIR—Thanks. Ms O'Brien, do you want to say anything or add to that?

Ms O'Brien—Yes, I would. The Federation of Community Legal Services is also broadly supportive of the bill. We agree that alternative dispute resolution has an important role to play in making the courts more efficient and in enabling more people to get their matters resolved with the least possible cost and delay. However, as I have outlined in our submission and as we explain in more detail in the attached report, which was recently released, we think that there are some specific issues faced by low-income and socially disadvantaged people in the context of ADR. ADR works very well for most people, but if you suffer from some kind of disadvantage, most obviously the inability to retain a lawyer or to get free legal representation—also things like language difficulties, age or a general unfamiliarity with the Australian legal system—you can be disadvantaged by ADR, particularly if you are engaged in a dispute with someone who does not suffer from those disadvantages.

So we think that the bill could be amended slightly to take into account those factors and ensure that it does not inadvertently disadvantage those kinds of people—while admitting that those people very rarely make it to the Federal Court and most of our experience is derived from other jurisdictions, like the Victorian Civil and Administrative Tribunal or the Magistrates Court here in Victoria.

CHAIR—So are you suggesting that there is a section of the bill that needs to be amended by adding the word 'inadvertently'?

Ms O'Brien—In the submission I outline the sorts of changes we think might help. For one, we think that the discretions conferred on the court in relation to the genuine steps statements could be guided somewhat by the legislation. They are very broad at the moment. We think, for example, the court should be asked to take into account the parties' financial circumstances and their ability to obtain legal representation when they are deciding what to do as a result of a party not filing a genuine steps statement or not complying with the terms of the statement.

CHAIR—So you could add a section, for example, that said, 'When a court exercises its discretion under section 11 or 12, the court should but might not necessarily take into account the following (1), (2) and (3).'

Ms O'Brien—Yes, something that perhaps just suggests that the court take account of those factors, without directing how the court should respond, because of course it is for the court to decide in the individual cases.

CHAIR—Okay, so more of a guide. An act could guide but not restrict or transpose, I suppose—

Ms O'Brien—That is right. We certainly do not want to fetter the court's discretion in any way; we just want to make it clear that the intention of the legislation is not to penalise people simply because they do not have legal advice or the capacity to take genuine steps to resolve the matter beforehand.

CHAIR—All right. Senator Barnett, do you have some questions?

Senator BARNETT—Yes, I do, Chair. What if we replaced 'genuine steps' with 'reasonable steps', as is set out in the Victorian legislation? Would that help satisfy you—if 'reasonable steps' were taken?

Ms O'Brien—I think that would probably be an improvement, particularly if the legislation said that what constitutes reasonable steps might include, or might be determined by reference to, parties' financial circumstances and their ability to obtain legal representation. The word itself is probably a little bit more flexible and allows the court to take into consideration those factors. From our point of view it would be better if those were spelt out in the legislation.

Senator BARNETT—I can see your point. Let us go back a step to the merits of one or the other—genuine steps and reasonable steps. Victoria have inserted 'reasonable steps' in their legislation. This is genuine steps—there is a difference. Do you prefer one over the other? That is a question for both of you at the table, if you would like to respond. Should it not be consistent across the country? This is a federal law. Every state and territory has laws that support mediation. Why should we not have a consistent regime across the country? Why are we setting up a regime which is different?

Ms Penovic—I think that there are all manner of hurdles to securing consistent legislation around the country. It is very difficult. Whilst I would say it is a good idea, I think achieving that end is easier said than done. I do prefer the Victorian formulation of reasonable steps. I think it is broader and it is a more meaningful way of gauging the steps that have been taken. Genuine steps may extend to steps that are genuinely taken by parties but may not fall within the threshold of reasonableness. In terms of nomenclature, I think reasonable is probably more meaningful in the context of civil—

Senator BARNETT—They may be reasonable but in fact not genuine, or the other way around: they may be genuine but not reasonable.

Ms Penovic—Yes. A genuine step might be something is really quite minimal and inadequate in the circumstances; whereas, a reasonable step—

Senator BARNETT—In terms of evidence and precedence, I understand that there is a common law set of precedents that define reasonable steps. Is that accurate, to your understanding?

Ms Penovic—Yes. The concept of reasonableness permeates many areas of the law.

Ms O'Brien—I also like the term 'reasonableness' because it seems to have a more subjective element in line with the common law. It takes into account the individual circumstances of the parties. So what is reasonable to expect one party to do might not be reasonable to expect another party to do; whereas, the term 'genuine' does not really take that into account.

Senator BARNETT—Alright. I will move onto another area. Do you think the exemptions under the bill are broad enough? I am advised that there are other types of legal proceedings which should be excluded. For example, the Insolvency Practitioners Association said in their submission that:

Insolvency proceedings that may not be suitable for mediation …

I am not an expert in insolvency. Do you have views about that?

Ms Penovic—I do think the exclusions in section 15 are quite narrow. They probably do need to be broadened. Insolvency is one example. I did have a glance at that submission. I think Lucie's concern has also been public interest proceedings being excluded. In the Victorian act we have matters that raise charter of human rights and responsibilities questions, so that feeds into the public interest point.

Senator BARNETT—Can I say that everybody is so much busier now in assessing the Victorian charter and seeing whether they are infringing it or not, but, of course, that is another matter.

Ms Penovic—Yes, I think it is a valuable inquiry to undertake.

Senator BARNETT—Do you have anything to say, Ms O'Brien?

Ms O'Brien—I simply reiterate that we think there should be an exemption for public interest litigation, and it would be for the judge to determine in each individual case whether a matter did have a public interest element or not. Some types of public interest litigation will no doubt fall within the exclusions under section 16, because of the legislation that governs them, but I think it would be safer and better to have a broad category of exemption for public interest litigation.

Senator BARNETT—I want to go to another area, and I am being a devil's advocate, I suppose, supporting mediation and trying to resolve things. The question is: will it have an impact on cost and/or delays? Is there a possibility that imposing this new test or new requirement will add to costs and/or delays for litigants? What is your view on that?

Ms Penovic—It is a big question. The Jackson inquiry in the UK made some observations in that regard. I do not feel equipped to judge. I think that the reasonable steps are so broad that it is difficult to predict whether they would increase costs and delay. Any increased costs and delay in a given proceeding obviously need to be balanced against the benefit of proceedings being resolved at an early stage and not litigated. It is a difficult question to answer.

Senator BARNETT—Ms O'Brien, did you want to add anything?

Ms O'Brien—Again, I would not say I am particularly well qualified to address this issue, but in our report which I attached to our submission we do make the point that, by increasing the opportunities or necessity for people to go through ADR procedures, you also increase legal need; you increase the number of instances where people are going to need to seek legal advice and possibly have a lawyer supporting them in a negotiation. So in that sense it might increase costs to the legal aid system, if you are putting people in situations where they have to go through lengthy negotiations before they can get to the door of the court.

Senator BARNETT—Thank you. I do not have any further questions.

CHAIR—As there are no further questions, we thank you both very much for your submissions. Do you have anything that you want to say in summing up?

Ms Penovic—I just have a couple of things I want to add. I am just thinking about the suggestions I made with respect to the powers of the court and the danger, which feeds into your question, Senator Barnett, about costs and delay. I think that there is a potential of costs and delay within proceedings if we have satellite litigation, interlocutory litigation, dealing with whether genuine steps have actually been taken. That is something to be avoided at all costs. It would be quite counterintuitive when we consider the objectives of the bill. So I would suggest perhaps adding a subsection (c) to section 11 saying, 'save in exceptional circumstances, compliance with part 2 is to be determined at the conclusion of the proceeding.' I think when the judge has the benefit of hindsight, they are able to assess all relevant matters, including whether genuine steps have been taken, so that we do not have a stoush at the interim stage over whether genuine steps have been taken, which simply increases costs and delay.

I have another suggestion, and this is potentially a bit of a can of worms. I have a concern with respect to privacy arising out of section 4(1)(c), about the provision of relevant information and documentation to enable understanding of the issues. While I think my concern is much smaller than the objectives of the bill, I do think that introducing a Harman v Home Office type implied undertaking—that any documents disclosed are not to be used for any purposes outside the resolution of the dispute at hand—would be valuable. I have a suggested formulation there: 'A person who inspects or copies the document of another produced by reason of this paragraph is subject to an obligation not to use or permit to be used any such copy or any knowledge acquired for any such inspection other than for the purpose of taking genuine steps to resolve a dispute.' What you have then is a question of: 'What if someone does not comply? What if someone does use it for another purpose? Do you then impose penalties?' I think that is a highly problematic question, given the objectives of the bill.

Senator PRATT—In the event that the dispute is not resolved, and you have shared that information, what is the next stage?

Ms Penovic—The next stage is that if you proceed to litigation then you have disclosure requirements and those disclosure requirements are subject to that implied undertaking.

Senator PRATT—I would imagine that in some of these instances this could be one interlinked legal dispute going on at times. I think that probably underscores the wording of the bill that they should not be used for other purposes until, of course, the matter is before the court and full disclosure is required.

Ms Penovic—Yes.

CHAIR—Thank you. That was very helpful and useful. Ms O'Brien, just before you go, is this a paper that you have just completed yourself about activists, ADR?

Ms O'Brien—Yes.

CHAIR—Is it to inform us how this bill might act out?

Ms O'Brien—It sets out recommendations which could probably have been better described as general principles because they are not specific to any jurisdiction. They are more just general recommendations for making sure that the move towards ADR in both state and federal jurisdictions does not compromise the rights of low-income people, and the case studies will illustrate how that relates to our work. May I just add one thing.

CHAIR—Yes, sure.

Ms O'Brien—In our submission we do not really talk about the practical way in which people can be disadvantaged in ADR because of their status or lack of legal advice. That is because the Human Rights Law Resource Centre and PILCH Homeless Persons Legal Clinic submission sets that out very well. I want to draw the committee's attention, if I may, to section 3 of that submission and we strongly endorse that formulation. We think that that is very important.

CHAIR—Thank you both for assisting us with our inquiry.

[2.32 pm]

POVEY, Mr Chris,, Senior Lawyer, PILCH Homeless Persons Legal Clinic

SCHOKMAN, Mr Ben,, Director, International Human Rights Advocacy, Human Rights Law Resource Centre

CHAIR—Good afternoon. Nice to see you both again. Thank you for your submissions and also for assisting us with our inquiry this afternoon. We have got submission No. 3 from you. Do you need to make any changes to that before you make an opening statement?

Mr Schokman—No.

CHAIR—Then I will invite you to make an opening statement and then we will go to questions. Who is going to do that for us?

Mr Schokman—I will do that very briefly. I presume you have had the opportunity to read our submission. We have not received confirmation that you had received it. I do not think there is a lot more to add to our submission. It was a reasonably short and discrete one. I would just like to emphasise the general thrust of our submission, which is that an efficient and cost-effective civil justice system is certainly a very legitimate and important aim, but that needs to be counterbalanced with the fundamental rights of access to justice and the right to a fair hearing. In this sense we want to point out today that these are not two mutually exclusive concepts; in fact, they are quite interrelated. As you will have noted, our submission is focused on the right of access to justice and the right to a fair hearing, and the necessity to ensure that, in particular, potentially disadvantaged litigants are not disadvantaged from participating in the civil justice system on an equal basis as others.

Our submission has outlined what we see as being potential risks that are faced by disadvantaged litigants. We note in particular during pre-trial negotiations, as envisaged by the operation of the bill, there may be, for example, power imbalances that perpetuate why the dispute was brought in the first place and why it has ended up being potentially litigious and also where they may be individuals who do not understand what legal consequences there might be in disclosing information or conceding particular points.

The other general concern that we have is that if the courts do have a broad discretion regarding this failure to take genuine steps then some people may be arbitrarily deprived of the right to access the court and the civil justice system in the first place. In this respect in some circumstances we consider there will be additional steps that may need to be taken to ensure that all individuals are able to access the civil dispute system and receive a fair trial. As you will have seen in our submission, we have identified the issues of the right of access to legal advice or representation in circumstances where it is required, the right of equal access to the court and equality before the court, particularly in terms of procedural fairness where there may be complex proceedings involved, and the right to an interpreter where required. I do not think I will waste any more time and we are certainly very happy to be part of the inquiry.

CHAIR—Mr Povey?

Mr Povey—I have nothing much further to add other than to say that our submission does set out three points that we think are of concern in relation to the bill. They are disadvantages where parties are compelled or encouraged to negotiate and in doing so they give certain material or make certain statements which have ramifications for the ongoing conduct of the matter. A second point is where people potentially forgo rights during negotiations. A third point is the consequences of genuine steps provisions and the outcome for those for the conduct of matters. These are all provisions and potential outcomes that the drafters would have been aware of, I imagine, but in our view obviously there is a significant impact for disadvantaged or vulnerable individuals who are faced with these particular issues because they do not have the ability or have a far lower ability to obtain access to advice and/or representation.

CHAIR—Do you believe the bill actually does that, it does suggest you forgo rights and it does not consider consequences? Or do you think the three points you raised may be consequential actions that flow from the bill when it is implemented?

Mr Povey—I do not think it compels that at all. I think it creates a space for that. That might be a consequence of people being encouraged to take genuine steps.

CHAIR—How do you avoid that in legislation?

Mr Povey—That is a terrific question because also some of these risks or issues do have a potential legislative solution and others, as do many access to justice type issues, need a response that requires legal education and written materials, access to duty solicitors and lawyers and those sorts of things, and potentially has ramifications for the provision of legal aid—not getting into the jurisdictional issues here and what sort of clients are likely to be before the court and requiring this assistance.

CHAIR—Given what you said, what implications does this have for lawyers who then have to advise their clients to take genuine steps and to assist them to comply with this requirement? How do you balance that and how does that affect the relationship between lawyer and client?

Mr Povey—I think that this more or less exclusively applies in circumstances where clients are unrepresented. For a lawyer and a client I think they have got no problems or they should not have any trouble in advising their clients about the source of examples of genuine steps and provisions and what is appropriate in negotiation. I think that is something that lawyers are eminently well-trained in and able to achieve. But how to navigate what to give away and what not to and what is appropriate for negotiation and disclosure from material and those sorts of things is far harder for people who have limited education or limited opportunity and so are not familiar with these kinds of issues.

Mr Schokman—The key question and issues that we are trying to raise in our submission are what happens when there are individuals who are not able to access legal representation, who, due to circumstances that they may face—whether they be literacy, ethnicity or mental health issues—are not able to access legal advice and representation? There may be some adverse consequences for them in the operation of the bill in its current form.

CHAIR—What are your thoughts on the requirement to file a genuine steps statement? Do you think that it would just become routine or just another bump in the road for parties who might be intent on litigation anyway?

Mr Povey—From my perspective, that is a bit hard to tell. It depends on the development of jurisprudence or decisions and outcomes in relation to the consequences of failure to meet the genuine steps provision. I imagine that, if the court were to take a rigorous approach to penalising people by imposing costs or other court process ways, and if genuine steps is given a fairly broad ambit, failure to take genuine steps will not become a bump in the road. I think it will become a substantive and meaningful requirement. Obviously that is the aim, and we would not be here and the legislation would not be in existence if that were not the intention. That said, the greater the scope or the expansion of those kinds of obligations and consequences the greater the risk for people who are self-represented or disadvantaged.

Senator BARNETT—Thank you very much for being here and for your submissions. I want to go the question that I asked earlier about the merits or otherwise of 'genuine steps and 'reasonable steps' and the arguments for and against both. What are your views?

Mr Schokman—Are you asking your question in the context of whether the language should be changed to use the term 'reasonable'?

Senator BARNETT—And I do it in the context of the Victorian legislation, which uses 'reasonable steps', and the merit of a consistent approach around the country.

Mr Schokman—You will have to excuse us for not being party to the previous discussion you had and maybe that is a good thing. I think our preliminary view on that would be that 'reasonable' would be a much better term to be used, for a range of reasons. I think the most important reason would be that courts generally are familiar with the concept of reasonableness and what it entails, and I think that probably addresses some of the concerns we have raised in our submission. It gives the court greater guidance on how it should use its discretion in terms of genuine steps or reasonable steps statements. Most importantly, it enables individual circumstances to be taken into account, particularly where you have, as Chris has been talking about, disadvantaged or self-represented litigants. It empowers the court to look into the individual circumstances.

So the thrust of our submission is that, in the majority of cases, it may well be that a lot of the issues that we have raised are not even relevant, but, in the circumstances in which they are relevant, in our submission, using a term such as 'reasonableness' would be a much more effective and useful way for the court to be able to look into individual circumstances.

Senator BARNETT—Mr Povey, do you wish to make a comment?

Mr Povey—I have nothing further to add to that.

Senator BARNETT—Do you support the merits of a consistent approach across the country?

Mr Schokman—From the fundamental principle perspective, yes. If we are talking about the fundamental principles of access to justice and the right to a fair trial, then, I would say yes. It may well be that, for certain reasons, as there are in other cases across a country as broad as Australia, there are particular nuances or ways in which particular jurisdictions develop. But I think 'reasonableness' would certainly enable that to happen in the most appropriate way.

Senator BARNETT—I asked questions of the earlier witnesses regarding the exemptions and whether they are broad. I do not know whether you have seen the submission from the insolvency practitioners association. They indicated that they have a concern with the respect to some insolvency proceedings in that they may not be suitable for mediation. I am not an expert in the field so can you shed some light on that and the merits of their view?

Mr Povey—My position to comment on insolvency proceedings as a homeless persons legal clinic lawyer is not actually fantastic, so I will hand that to Ben.

Mr Schokman—As much as I would love to handball it is well, I think we are probably in a similar situation. But I think it is fair to say that the principles are the same and that they should apply regardless of the circumstances. I think this is where something like 'reasonableness' would be the more appropriate step. It may well be that in many circumstances the court will look at the particular situation of the litigants and decide that there is no role for the court to play, or little role to look into the genuine steps or reasonable steps matter.

Getting back to the point Chris made earlier, we are talking about broad principles of making sure that our civil justice system is accessible, fair, balanced and equitable. In regard to exemptions that may apply, reasonableness would give scope to address any of those potential concerns. That is all in the context of not having had the benefit of seeing the insolvency practitioners.

Senator BARNETT—Is there a possibility that the requirements to undertake this mediation approach could increase costs and impose further delays in the system, or do you say that that is just part of the system and that is the best way to go?

Mr Schokman—As we briefly alluded to in our submission, there is also an important point to be made that the provision of legal advice or legal representation can lead to a more effective and more efficient civil justice system. Where legal advice or legal representation is required and needed, and is provided at an appropriate stage, then that might allow disputes to be settled at the pre-trial process. That would obviously lead to a more efficient system if that were to be the case. Or if the bill operates in the way that it is intended, parties would be able to narrow down the issues that are in dispute prior to trial then that would have the benefit of contributing to not only a more efficient but an equitable system in that sense. On one level you might think, 'Typical lawyers trying to say this is the way the legal system operates,' but I think that there are very important considerations around the way in which complying with this notion of access to justice and the rights of fair trial principles lead to a more efficient and effective system, which is obviously what we are all interested in achieving.

Mr Povey—I would add two points that. Firstly, the thrust of our submission is that the risks inherent in this legislation to our client group are based on the absence of advice and representation. Obviously, if that were to be remedied that would involve a cost. Of itself that would have a cost implication. Secondly, in the Lord Woolf report there is an indication that pre-action protocols increased costs and that people had to prepare themselves to a pre-trial level. Quite often in processes to initiate proceedings, parties file originating motions and other similar documents and by the time they get to pre-trial they have done a lot more preparatory work—they have prepared statements, submissions and those sorts of things. There was a suggestion that that level of preparation was required at the start rather than just slightly prior to trial. That obviously has a cost implication again, but we are not the best people to comment on that.

Mr Schokman—Another important principle is that the right to a fair hearing should not be compromised in the interests of cost and convenience, which is a point that we make in our submission. It is an important principle in and of itself for equal access to the court system, obviously where people have a meritorious claim. Alternative dispute resolution in and of itself is an important process, but quite often it can perpetuate, as we have pointed out, the power imbalance that exists between two parties, which is why they end up in potential litigation in a dispute in the first place. This can quite often lead to more inefficiencies within the system. A very quick example I would give is the case of vexatious litigants. There is clear evidence that,

generally speaking, litigants become vexatious due to their first interaction with the civil justice system and some idea that they have been treated unfairly by the system by being denied access to it. If people like that can at least feel as though they have access to the system and a fair trial then that can lead to a lot more efficiencies in the longer term from that perspective.

Senator BARNETT—Yes. You have mentioned equity and access to justice, and you are obviously aware of the report by our references committee, and made a submission to it, which we appreciate. That report was quite substantial, and we have made recommendations about that. We have your submission, with its recommendations regarding unrepresented litigants. Your point about costs is well noted. At the end of the day, who is going to pay? That is the issue, isn't it? Who do you think should pay?

Mr Schokman—There are a range of factors to take into account. In the context that we are talking about—quite often unrepresented litigants—there is an issue about legal aid commissions and community legal centres that may in those circumstances have to take up the slack. But, first of all, the principle remains important: access to justice is fundamentally important for the effective operation of an entire civil justice system. Obviously, we have to bear in mind that there is going to be a private-sector cost in some circumstances, where you have a potentially unrepresented litigant bringing a claim against a big company, bank or something like that. So there are a whole range of broad benefits to speak of in terms of reducing the inefficiencies of that system.

Senator BARNETT—Yes, most probably big banks, based on yesterday's decision! Thanks very much for that. I appreciate your input.

CHAIR—Senator Pratt.

Senator PRATT—Thank you, Chair. I understand clearly the difference between 'genuine' and 'reasonable'. What I am unclear about is the extent to which creating that substitution means that the bill needs to express more clearly how to avoid disadvantaging people. I think that substitution resolves it for the purposes of a reasonable, genuine prior attempt, but we also need to work out how to express more clearly that participation is not going to disadvantage the parties we are talking about.

Mr Povey—I agree. I certainly do not think that 'reasonableness' does it. I agree with you that that does not avoid the disadvantage that our submission is directed to. The recommendations in section 5 of our submission talk in part about the consequences of failure to abide by the 'genuine' statutory provision. There were two particular consequences. One is the cost implications, and there are discretionary issues. That is at large. It seems to be open to the judge in a particular instance to decide what the consequences are. The second issue is the various procedural type orders that the court might make. There is a drafting issue, certainly for anybody that requires assistance—not just extremely disadvantaged clients but even clients that are not lawyers or are unfamiliar with the system. People need to be able to understand the consequences of failure to do something. It seems to be good drafting and it seems a good idea for people to be able to understand what is a suggested or likely consequence of failure to take a particular step.

Another point I would make is that we would be particularly interested in seeing whether any specific provision might be made as to whether certain consequences will apply to parties that have not had the benefit of legal advice and/or representation. I do not see that provision as applying to everybody; it would be for people who are extremely disadvantaged and do not have access to advice about responsibilities—not only that; they do not have the ability to process or act on that advice.

Senator PRATT—I cannot think of where that is adequately demonstrated or expressed in any other laws. I understand your views. 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 have drafted.

Mr Povey—Certainly. If it would be of interest to the committee, we could take that on notice and consider some appropriate wording.

Senator PRATT—Yes.

Mr Povey—But I think there is a threshold issue, firstly, about what the consequences are for the failure to take what steps. I do not think that that is something we are in a terrific position to assess, but people who are engaged in the drafting process would be aware of or have in mind certain types of procedural orders or costs orders as a consequence of failure to take 'genuine' steps. In terms of the threshold requirement to take into account disadvantage when exercising that discretion, that is something that we would be happy to provide further input on.

Senator PRATT—Great. Thank you.

Mr Schokman—For example, if you look at clause 11, 'Court may have regard to genuine steps requirements', it is an enormously broad provision as currently drafted. We are not drafters either, as I think we are all clear on. The submission at least, on principle, would be that there needs to be further guidance provided in terms of the way in which courts should use that discretion but obviously not to a point where it determines the way in which a court may do that. Getting back to the discussion of 'reasonableness', I think that is certainly something along those lines that we would advocate should be included in such s a provision. A court is provided with guidance, things that it needs to take into account, but certainly isn't told the way in which it should use its discretion in certain circumstances.

Senator PRATT—Thank you.

CHAIR—I do not think we have any other questions, so can I thank you both for your joint submission and for making yourself available this afternoon to assist us with our inquiry into this legislation. The committee's hearing into this legislation is adjourned.

Committee adjourned at 2.56 pm