

Submission to the Attorney-General on the *Bankruptcy Legislation Amendment Bill 2009*

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1. Introduction and Executive Summary

1.1 Overview

This submission is made by the Public Interest Law Clearing House (**PILCH**) Homeless Persons' Legal Clinic (**HPLC**) in response to the *Bankruptcy Legislation Amendment Bill 2009* (Cth) (**Bill**).

The HPLC welcomes the Government's proposed reform of the bankruptcy laws to protect vulnerable and marginalised individuals. However, in the HPLC's view, these changes do not go far enough to protect the interests of individuals who are, and will continue to be, severely disadvantaged by the harsh and enduring penalties contained in the bankruptcy laws.

1.2 Recommendations

The HPLC makes the following recommendations for reform:

Recommendation 1

The Bill should be amended to provide that the first filing by an individual of a declaration of intention to file a debtors petition is not an act of bankruptcy.

Recommendation 2

The Federal Government must make amendments to the Bill to enable the discharge of infringements and non-provable Centrelink debt as part of bankruptcy or a debt agreement for people in recognised categories of special circumstance (ie. low income, assets and debt).

Recommendation 3

The Federal Government must make amendments to the Bill so that no entries relating to debt agreements are recorded in the National Personal Insolvency Index.

Recommendation 4

The Federal Government must make amendments to the Bankruptcy Regulations so that a person's entry on the NPII is removed after 7 years.

Recommendation 5

The Federal Government must make amendments to the Bill to reduce the period of bankruptcy from 3 years to 12 months for less complex bankruptcies.

Recommendation 6

The Federal Government must make amendments to prohibit bankruptcy, debt agreements or an entry on the NPII being used as the sole basis for a retailer of essential services requesting a security deposit prior to connection.

Recommendation 7

The Federal Government must make amendments to prevent first time bankrupts with low levels of debt being automatically subject to the ordinary statutory restrictions on employment. The trustee in bankruptcy should be given power to recommend these types of bankrupts be subject to employment restrictions if necessary.

2. Background

2.1 Overview of the HPLC

The HPLC is a project of PILCH and was established in 2001 in response to the great unmet need for targeted legal services for people experiencing homelessness.¹ The HPLC is funded on a recurrent basis by the Victorian Department of Justice through the Community Legal Sector Project Fund, administered by Victoria Legal Aid. This funding is supplemented by fundraising and donations. While the HPLC recently received confirmation of a one-off funding boost from the Federal Government, it does not currently receive recurrent funding from the Federal Government.

The HPLC has the following aims and objectives:

- to provide free legal services to people who are homeless or at risk of homelessness, in a professional, timely, respectful and accessible manner, that has regard to their human rights and human dignity;
- to use the law to promote, protect and realise the human rights of people experiencing homelessness;
- to use the law to redress unfair and unjust treatment of people experiencing homelessness;
- to reduce the degree and extent to which homeless people are disadvantaged or marginalised by the law; and
- to use the law to construct viable and sustainable pathways out of homelessness.

¹ See <http://www.pilch.org.au>.

Free legal services are offered by the HPLC on a weekly basis at 13 outreach locations that are already accessed by homeless people for basic needs (such as soup kitchens and crisis accommodation facilities) and social and family services.² Since its establishment in 2001, the HPLC has assisted over 4000 people at risk of, or experiencing, homelessness in Victoria.

The HPLC also undertakes significant community education, public policy advocacy and law reform work to promote and protect the right to housing and other fundamental human rights. In 2005, the HPLC received the prestigious national Human Rights Law Award conferred by the Human Rights and Equal Opportunity Commission in recognition of its contribution to social justice and human rights. In 2009 it received a Melbourne Award for contribution to community in the City of Melbourne.

The HPLC operates and provides its services within a human rights framework. Central to the human rights framework is the right to participate, including individual and community participation and consultation, which creates an empowering environment for individuals to assert their rights and contribute to the democratic process. The HPLC recognises the right to participate by working and consulting directly with a range of key stakeholders, the most important of which is the Consumer Advisory Group (**CAG**). The CAG was established by the HPLC in 2006 and is comprised of people who have experienced homelessness or who are currently homeless. The role of the CAG is to provide guidance and advice, and make recommendations to the HPLC with a view to enhancing and improving the quality of the HPLC's service delivery, policy, advocacy, law reform and community development activities. The CAG not only provides feedback and guidance to the HPLC but also gives people who have experienced homelessness a voice to actively represent their interests and build the participation and engagement of the general community around the issue of homelessness.

2.2 Homelessness and bankruptcy

On any given night in Australia approximately 105,000 people are experiencing homelessness.³ Between 2001 and 2006 there was an increase in homelessness of almost 5 per cent.⁴ That five-year period also saw an increase in the number of people sleeping rough, the number of homeless family households and the extent of homelessness in the indigenous population.⁵

For people experiencing homelessness, problems with debt are common. A 2007 survey conducted by Wesley Mission found that 88% of those who became homeless entered the pathway through

² Host agencies include Melbourne Citymission, Café Credo The Big Issue, the Salvation Army, Anglicare, St Peters Eastern Hill, Ozanam House, Flagstaff Crisis Accommodation, Salvation Army Life Centre, Hanover, Vacro, Koonung Mental Health Centre, Homeground Housing Service and St Kilda Crisis Centre. Legal services are provided at our host agencies by volunteer lawyers from law firms: Allens Arthur Robinson, Arnold Dallas McPherson, Baker & McKenzie, Blake Dawson, Clayton Utz, Corrs Chambers Westgarth, DLA Phillips Fox, Freehills, Mallesons Stephen Jaques, Minter Ellison and Stella Suthridge & Associates.

³ Australian Bureau of Statistics (ABS), *Counting the Homeless 2006* (2008).

⁴ Compare ABS 2001 data (99,900) with ABS 2006 data (104,676) and shows an increase of approximately 4.78% in the homeless population in Australia

⁵ Australian Bureau of Statistics, *Counting the Homeless 2006* (2008), viii - xii; see also Australian Bureau of Statistics, *Counting the Homeless 2001* (2003).

accumulated debt and unforeseen financial crises.⁶ Many face problems in making repayments on credit cards, mobile phone bills, utilities, rent and other everyday items. This often leads to people experiencing homelessness being subjected to various credit management or debt recovery procedures causing them stress and anxiety. The HPLC often receives requests for advice on how to voluntarily enter bankruptcy so that clients can put an end to these procedures. Whilst the HPLC advises that bankruptcy should be a last resort, many still choose to voluntarily enter bankruptcy despite the severe consequences.

3. The proposed reforms

3.1 Purposes

One of the policy objectives of *Bankruptcy Legislation Amendment Bill 2009* (Cth) (**Bill**) is said to be to make amendments to the bankruptcy process which "*recognise that the majority of bankruptcies relate to consumer debts and involve bankrupts with relatively few assets and little income*".⁷ The Explanatory Memoranda to the Bill states that small bankruptcies "*tend to involve a bankrupt who has simply fallen on hard times rather than misdeed*".⁸

According to the Explanatory Memoranda, the main objects of the reforms are:

- (a) to provide a more streamlined process for fixing trustee remuneration and a more transparent process for reviewing that remuneration;
- (b) to strengthen the penalties for some offences and ensure these are in line with the penalties for other similar offences;
- (c) to remove the outdated concept of Bankruptcy Districts in order to provide more flexibility in personal insolvency administration;
- (d) to increase the minimum debt for a creditor's petition to reflect changes in the economic environment;
- (e) to increase the stay period that follows a declaration of intent to file a debtor's petition to allow debtors to better assess their options; and
- (f) to increase the debt, income and asset tests thresholds for debt agreements to ensure the thresholds keep pace with increasing wages and the increasing availability of credit.

Sections 3.2 and 3.3 outline the two most relevant changes for the homeless.

⁶ Wesley Mission, *More than a bed: Sydney's homeless speakout* (2007)
⁷ Explanatory Memorandum, *Bankruptcy Legislation Amendment Bill 2009* (Cth) .
⁸ *Ibid*, 3

3.2 Increasing the minimum debt for which a creditor can petition for a bankruptcy to \$10,000

The Bill proposes to increase the minimum debt amount required for creditors petition in bankruptcy from its present level of \$2,000 to \$10,000. An increase to the minimum amount is long overdue given that the amount has been \$2,000 since 1996 and was proposed as the minimum amount as early as 1988 in the *Harmer Report*.⁹

The HPLC strongly supports this change and believes it brings the system into line with the rising costs of living and the more generous provision of credit (particularly credit cards) in the last 20 years. The change also ensures that debtors with small debts do not suffer the severe long term consequences of bankruptcy. The proposed minimum is consistent with the overall policy of encouraging the use of Part 9 Debt Agreements which are "*principally aimed at consumer debtors with lower levels of income, assets and debts*".¹⁰

3.3 Increasing the moratorium after filing a debtors petition to 28 days

The Bill also proposes to increase the stay period from when a declaration of intention to file a debtor's petition is filed to when a creditor may commence action to recover debts from seven to 28 days. The HPLC also strongly supports this change. The current short seven day period meant that the declaration of intention procedure has been of little use to debtors and not commonly used.¹¹ This extra time or 'breathing space' from creditors provides a valuable opportunity for debtors to gain further advice about the serious consequences of bankruptcy and the alternatives to it. This is particularly important for the homeless who often have limited access to advisory services and who may have to wait a longer period of time to obtain professional advice.

Lodgement of an intent to file a debtor's petition is however classified as an act of bankruptcy.¹² This acts as a great deterrent to any debtor considering lodging a declaration. The HPLC submits that this is contrary to the purpose of the declaration of intention in allowing the debtor time to consider the alternatives to bankruptcy.¹³ In trying to obtain some time to consider options, at present a debtor is making themselves more vulnerable to a creditor's petition and subsequent bankruptcy. The HPLC recommends that the first filing of by an individual an intention to file a debtor's petition no longer be an act of bankruptcy. Subsequent filings of an intention to file a debtor's petition could remain an act of bankruptcy so as not to encourage abuse of the moratorium.

⁹ Explanatory Memorandum, *Bankruptcy Legislation Amendment Bill 2009* (Cth), 23 .

¹⁰ Ibid, 25 .

¹¹ Only 441 Declarations of intention to present a petition were filed 2007-08: *Annual Report by the Inspector-General in Bankruptcy on the operation of the Bankruptcy Act*, page 11. See also Duns 2002, *Insolvency Law and Policy*, Oxford University Press, South Melbourne.

¹² *Bankruptcy Act 1966* (Cth), s 40(1)(da)

¹³ Explanatory Memorandum, *Bankruptcy Amendment Bill 1987*, paras 5, 127

Recommendation 1

The Bill should be amended to provide that the first filing by an individual of a declaration of intention to file a debtors petition is not an act of bankruptcy

4. Disputes with trustees

Complaints about trustees can be made to the Bankruptcy Regulation division of Insolvency and Trustee Service Australia (**ITSA**). They are able to handle complaints about the trustee's actions in relation to:

- filing of a notice of objection to discharge;
- issuing an income contribution assessment;
- rejecting a hardship application with respect;
- an income contribution assessment;
- using a supervised account for recovering; and
- income contributions.

However, the Bankruptcy Regulation division cannot handle complaints in relation to actions about:

- Selling an asset
- Admitting or rejecting a proof of debt

The only avenue of complaint for these actions is to apply to the Court for review.

ITSA's procedure for handling these complaints is firstly to contact the trustee and discuss the complaint via telephone, and then if necessary conduct an investigation. ITSA can "*also facilitate meetings between parties with a view to quicker resolution of disputes*".¹⁴ It aims to resolve the matter within 60 days, after which a trustee's decision is automatically confirmed if no other decision is made by ITSA.

A person then has the option of making an application to the Administrative Appeals Tribunal, the Federal Court or the Federal Magistrates Court if they are still not satisfied with the decision.

¹⁴ ITSA fact sheet *Resolving Complaints about Trustees and Administrators*, March 2008

While bankrupts can seek the direction of the court or make a complaint to ITSA, there is no provision for a negotiated resolution between a bankrupt and their trustee. As noted above, ITSA can facilitate meetings between parties with a view to quicker resolution of disputes; however, this is not a formal step in the grievance process. The HPLC suggests that Government review this area of regulation, to ensure that appropriate dispute resolution options are available where a bankrupt has a grievance against a trustee.

5. Infringements and Centrelink Debt

5.1 The homeless and infringements

Infringements are a major problem for people experiencing homelessness, as a recent Law and Justice Foundation of NSW Report concluded:

...fines [are] a major problem for many homeless people who, because of their lack of private housing and economic disadvantage, were more likely to be publicly visible. They consequently accrue multiple fines for street offences such as drinking in public spaces and public transport fines.¹⁵

It is not just the incurring of fines, but also the further debt that accumulates when people experiencing homelessness are unable to pay these fines which present problems, as the report found:

Further, homeless people may be unable to afford to pay the original fine, or, without a regular address, they may not receive notification of the fine. As penalties and interest are added to the original fines, homeless people accumulate fine-related debt.¹⁶

Failure to pay fines leads to further legal problems for people experiencing homelessness and disadvantaged such as government debt recovery procedures and importantly loss of drivers licence or car registration.

Due to the high proportion of people experiencing homeless who are on some form Centrelink payment, Centrelink debt and/or penalties are also common. Most Centrelink debt is incurred through people receiving payments they were not entitled to. Often this was because they failed to report employment income to Centrelink or because their circumstances changed and they were no longer entitled to the payment.¹⁷

¹⁵ Law and Justice Foundation of NSW 2005, *No Home, No Justice*, 105

¹⁶ *ibid*

¹⁷ *Ibid*, 103

5.2 Bankruptcy and infringements

Currently fines and penalties are not provable in bankruptcy, meaning that these debts survive the process and are not discharged.¹⁸ This policy has been enforced strictly by the courts, which have held that a penalty or fine is not discharged by bankruptcy "*irrespective of what the seriousness of the particular offence might be thought to be*".¹⁹

It is submitted that this hard line approach to infringements unfairly disadvantages people experiencing homelessness, who, as discussed at 5.1, often incur more fines due to their public visibility and also accumulate further penalties and interest on their original fines due to not having a fixed address. In Victoria, the State Government has to some extent recognised the difficulty that infringements pose to the homeless by implementing special circumstance procedures for dealing with fines under the *Infringements Act 2006* (Vic).²⁰ Powers under that Act allow an enforcement authority or a court to discharge or withdraw the fines on the basis of homelessness.²¹

Whilst they should be commended, systems such as that under the Victorian *Infringements Act* often require applications to be made to enforcement agencies or a Court for each infringement. Given the many fines and penalties that the homeless may accumulate, it is very difficult for a homeless person or help agencies to make an application on each and every fine. Furthermore, the regulation of infringements varies from state to state. A more universal approach to the discharge of fines would reduce the burden on the Court systems and benefit people experiencing homelessness and disadvantage, who simply do not have access to the resources required to gain discharge of these debts where it is warranted. The HPLC recommends a federal approach to the discharge of infringements on the basis of special circumstances as part of bankruptcy or a debt agreement. Dealing with multiple penalties or fines in one process would provide a more streamlined and cost-effective means for the disadvantaged to deal with infringements along with their other debts and gain the 'fresh start' they are in need of.

Recommendation 2

The Federal Government must make amendments to the Bill to enable the discharge of infringements and non-provable Centrelink debt as part of bankruptcy or a debt agreement for people in recognised categories of special circumstance (ie. low income, assets and debt).

¹⁸ *Bankruptcy Act 1966* (Cth), s 82(3)

¹⁹ *State of Victoria v Mansfield* [2003] FCAFC 154 at 51

²⁰ See *Infringements Act 2006* (Vic), s 3 (definition of "special circumstances")

²¹ *Ibid*, s 25, 65, 160

6. Consequences of bankruptcy

6.1 Introduction

There are serious consequences for a person who becomes bankrupt. A permanent lifetime entry on the publicly accessible National Personal Insolvency Index (NPII) means that bankrupts and former bankrupts face difficulty in many facets of life long after discharge of their debts. In line with the policy objective of these reforms in recognising that many small bankruptcies involve "a bankrupt who has simply fallen on hard times rather than misdeed"²² the HPLC recommends that a number of changes be made to ensure that persons in small bankruptcies are not burdened in the longer term.

6.2 National Personal Insolvency Index (NPII)

The NPII is a publicly available register of all persons who have been bankrupt or who have entered into a debt agreement. It is one of the most severe consequences of bankruptcy or a debt agreement. The HPLC recommends that a number of changes be made to the use of the register.

Currently the entry into a part 9 debt agreement is recorded on the NPII. Debt agreements are designed to provide an alternative to bankruptcy and are aimed at consumer debtors with lower levels of income, assets and debts.²³ They provide an important alternative to bankruptcy for people experiencing homelessness and disadvantaged and can often be of benefit to creditors due to the lower costs involved. The fact that debtors voluntarily enter the process also provides benefits to creditors. The recording of these agreements on the NPII and the harsh consequences that follow from this seems at odds with the purpose of debt agreements in providing an attractive alternative to the more expensive and onerous requirements of bankruptcy.

The HPLC recommends that no entries relating to debt agreements be recorded in the NPII. This is in line with the overall policy of the *Bankruptcy Act* in encouraging alternatives to bankruptcy. The HPLC notes that similar recommendations have also been made by the Debt Agreement Practitioners Association²⁴ and the Consumer Action Law Centre.²⁵

Recommendation 3

The Federal Government must make amendments to the Bill so that no entries relating to debt agreements are recorded in the National Personal Insolvency Index.

At present an entry on the NPII is permanent, meaning that persons on the register can face difficulties for the rest of their life in obtaining employment or credit should any potential employer or

²² Explanatory Memorandum, *Bankruptcy Legislation Amendment Bill 2009* (Cth), 3

²³ Explanatory Memorandum, *Bankruptcy Legislation Amendment Bill 2009* (Cth), 25 .

²⁴ *DAPA submission to the Bankruptcy Law Reform Committee* available at <http://dapa.org.au/latest-news/dapa-submission-to-the-bankruptcy-law-reform-committee-2> (accessed 10 September 2009)

²⁵ Consumer Action Law Centre, *e-bulletin no. 36*, December 2005 available at <http://www.consumeraction.org.au/downloads/DL39.pdf> (accessed 10 September 2009)

credit provider choose to search the register. This is inconsistent with the idea of giving a debtor a 'fresh start' and means that a person who may have simply "fallen on hard times" is punished for life if they enter bankruptcy or enter into a debt agreement. A permanent entry on a public record is also inconsistent with a person's right to privacy.

In line with the overall policy objectives of these amendments, the HPLC recommends that a person's entry be removed from the NPII after 7 years, in line with the current credit reporting practices. This balances the need for creditors to be aware of potential credit risks against the need to give debtors a fresh start and not burden them for life with the stigma of bankruptcy.

Recommendation 4

The Federal Government must make amendments to the Bankruptcy Regulations so that a person's entry on the NPII is removed after 7 years.

6.3 Reduction of the period of bankruptcy to 12 months

The present bankruptcy period is three years. It is possible for the trustee in bankruptcy to extend this period if they are dissatisfied with the bankrupt's conduct. A bankrupt's ability to obtain credit or employment is heavily restricted during this three year period.²⁶ Whilst the administration of a large complex bankruptcy may take the entire three years, small estates such as those involving people experiencing homelessness and other disadvantaged persons require substantially less time. For people experiencing homelessness a three year period of bankruptcy is an unnecessarily long period of time.

The HPLC notes that a discussion paper released by the Attorney General's Department earlier this year suggested introducing a maximum bankruptcy period of 12 months for first time bankrupts with the possibility of earlier discharge.²⁷ It was noted in the paper that "[a] three year bankruptcy period serves little purpose when the vast majority of bankrupt estates have few assets and provide no return to creditors." The Insolvency Practitioners Association gave in principle support for this proposal for less complex bankruptcies.²⁸ However, the HPLC understands that the Government has recently rejected this proposal. The HPLC strongly supports a 12 month period of bankruptcy and asks that this proposal be reconsidered. A 12 month bankruptcy period represents a much fairer system, especially for those who are experiencing homelessness or disadvantage with little or no assets to distribute to creditors.

²⁶ An undischarged bankrupt must disclose his or her bankruptcy status when obtaining credit of \$3,000 or more – s 269 *Bankruptcy Act 1966*. Employment restrictions include for example those under the *Estate Agents Act 1980* (Vic), *Liquor Control Act 1987* (Vic) and *Commonwealth Constitution s 44(iii)*.

²⁷ Attorney General's Department, *Discussion Paper – Proposed Amendments to the Bankruptcy Act 1966*, 28 May 2009

²⁸ Insolvency Practitioners Association, *Bankruptcy Legislation Amendment Bill 2009 – IPA submissions to be made available at <http://www.ipaa.com.au/default.asp?menuid=258&artid=719>* (accessed 2 September 2009).

Recommendation 5

The Federal Government must make amendments to the Bill to reduce the period of bankruptcy from 3 years to 12 months for less complex bankruptcies.

6.4 Security deposits or bonds for utilities

Persons who have an entry on the NPII (whether through bankruptcy or a debt agreement) or other bad credit history are often asked for a security deposit before they are provided with utilities such as power, gas, water and telephone. Having to provide a large lump sum of money up front, which can be up to 37.5% of the average annual bill,²⁹ is often a barrier to those with little or no income obtaining connection of these services. Of the 242 families assisted in the two year *Commonwealth Family Homelessness Prevention Pilot* which was aimed at preventing homelessness among families, it was found that only 5% had sufficient funds to cover bonds or emergencies.³⁰

Currently each state regulates to some extent the taking of security bonds for essential services (power, gas and water). In Victoria, under the *Energy Retail Code* if an energy retailer considers that a customer has an "unsatisfactory credit rating" it can request that they enter into an instalment plan and if that is refused they can request a security bond.³¹ Similar provisions apply in New South Wales.³²

The HPLC submits that better regulation is required to specify when bankruptcy, a debt agreement or an entry on the NPII can be used as the basis for imposing extra requirements such as the payment of a security deposit for connection of essential services. Given that these services are necessary for basic standards of living, it is critical that they are easily and readily available to those with an entry on the NPII or with bad credit history.

Recommendation 6

The Federal Government must make amendments to prohibit bankruptcy, debt agreements or an entry on the NPII being used as the sole basis for a retailer of essential services requesting a security deposit prior to connection.

6.5 Insurance, bank accounts and employment

Bankrupts and former bankrupts often find it difficult to obtain insurance, open bank accounts, and obtain employment in certain positions.

The statutory restrictions placed on former bankrupts with regards to employment appear discriminatory and unnecessarily prolong the bankrupt's reprimand. Considering the recognition by

²⁹ Essential Services Commission, *Energy Retail Code*, clause 8.1(c)
³⁰ RPR Consulting, *FHPP Interim Evaluation Report*, pp. 5–6.
³¹ Essential Services Commission, *Energy Retail Code*, clause 8.1(a)
³² See Independent Pricing and Regulatory Tribunal of NSW Website at <http://www.ipart.nsw.gov.au/>

the government in these reforms that many small bankruptcies "*tend to involve a bankrupt who has simply fallen on hard times rather than misdeed*"³³ it is surprising to find, for example, that an undischarged bankrupt cannot be a member of the police force, be a security guard or hold a builders license. These statutory employment restrictions appear to be based on the outdated notion that all bankrupts are immoral and dishonest. Whilst there is still a need for these restrictions for complex bankruptcies where an element of dishonesty may be involved, those with few assets and small levels of debt who may simply have "fallen on hard times" should not be punished by these restrictions.

The HPLC recommends that amendments be made to prevent first time bankrupts with low levels of debts being automatically subjected to any statutory restrictions on employment. The trustee in bankruptcy could be given power to recommend that a bankrupt with lower levels of debt be subject to the employment restrictions if necessary.

Recommendation 7

The Federal Government must make amendments to prevent first time bankrupts with low levels of debt being automatically subject to the ordinary statutory restrictions on employment. The trustee in bankruptcy should be given power to recommend these types of bankrupts be subject to employment restrictions if necessary.