



SUBMISSION:

*Submission to the NSW Government Consultation on the
Civil Justice System*

AUTHORS:

**Jenna McConnachie
Karyn Bartholomew
Kathryn Grimshaw**

DATE:

February 2017

Submission: Justice for everyday problems – civil justice in NSW

Table of contents:

Submission: Justice for everyday problems – civil justice in NSW	2
Table of contents:	2
Introduction: The Illawarra Legal Centre	3
ILC’s expertise in online legal information: <i>Searching Questions</i>	3
Current CLC climate: access to justice & funding cuts... Error! Bookmark not defined.	
Responses to Consultation Paper	3
1. Avoiding common problems	3
2. Dealing with problems early	5
3. Getting help to solve a problem.....	8
4. Enforcing judgements.....	12

Annexure: “*Searching Questions: a qualitative study of the accessibility and effectiveness of online information for communities living with disadvantage.*”

Introduction: The Illawarra Legal Centre

The Illawarra Legal Centre (ILC) is an independent Community Legal Centre (CLC), funded by State and Federal Governments to provide a comprehensive range of free legal services to residents of the Illawarra who experience social and economic disadvantage. We are committed to striving for equitable access to justice and the legal system, and to providing fast, fair and effective legal solutions for everyday problems.

We have read and endorse the Response prepared by Community Legal Centres NSW.

The focus of our submissions is on the key concepts covered in the consultation paper, and not on the specific survey questions.

ILC's expertise in online legal information: *Searching Questions*

In 2016 ILC received funding to conduct independent research on the effectiveness of online resources. The research was conducted by Dr Linda Tucker with the support of students from the University of Wollongong. Rather than interview participants on their thoughts about online self-help tools, Dr Tucker's team observed and recorded participants in real time as they worked through a legal problem using such resources. The results have been published in Dr Tucker's report, "*Searching Questions: a qualitative study of the accessibility and effectiveness of online information for communities living with disadvantage*".

Searching Questions concludes that online information is a poor substitute for frontline services, particularly for communities experiencing social and economic disadvantage. However, the report also acknowledges the increasing emphasis on this kind of service delivery and makes recommendations to overcome some of the barriers that people living with disadvantage experience in accessing online information.

We refer to the *Searching Questions* report in our responses to the questions raised by the consultation paper, and annex the full report and rely upon it as an important adjunct to our submission.

Responses to Consultation Paper

1. Avoiding common problems

1.1 Getting the right information to identify problems early

While various key sources already exist which contain useful early-intervention information, barriers to accessing those sources must be recognised and addressed.

Searching Questions cites several wide-ranging 'access to justice' surveys which caution against reliance on self-help resources, particularly in relation to access to justice for people living with disadvantage. The research

demonstrates that the ability to access legal resources is impacted by multi-faceted disadvantage arising from a range of socio-economic stressors including low literacy levels, physical and mental health, poverty, language and location.¹ The resulting inequality of access to the justice system further entrenches this disadvantage.

The report acknowledges the existence of a 'digital divide' in relation to access to computers and the internet and the capacity to take advantage of its content, noting that self-help resources are best targeted at demographic groups that already have high legal literacy, whilst online materials are a poor substitute for face-to-face help for disadvantaged groups.²

Low literacy, poor education, different learning styles and physical and mental health difficulties can also affect people's ability to absorb information. Our clients are often unable to access written information for a combination of these reasons and benefit greatly from the assistance of a solicitor to explain it to them.

Case Study 1:

ILC recently assisted an aged-care worker in his mid-50's who experienced significant difficulties in his workplace after it transitioned from written record-keeping to a computerised system. Our client had left school at 15 and had never used a computer. He even had difficulty using his phone, and had developed stress and anxiety which exacerbated his computer illiteracy. The client was unable to access existing online resources for a number of reasons and would never have been able to resolve his issues without the ongoing support of a solicitor.

1.2 We want to do more to help you prevent and avoid common problems

The consultation paper suggests a number of ways to get information to people before problems arise.

In our experience, people experiencing disadvantage are less likely to be proactive in seeking information to avoid legal problems and tend to seek assistance only after experiencing the consequences of their inactivity.

Social exclusion and lack of affordability also constrain consumer choice, further compounding disadvantage by forcing these people into informal and marginal consumer and housing arrangements. People experiencing disadvantage are therefore more likely to experience legal problems in relation to insecure housing and predatory providers of goods and services.

¹ L Tucker, *Searching Questions* (2016), http://www.illawarralegalcentre.org.au/images/stories/SearchingQs_final.pdf,

4.

² Ibid 5.

ILC currently delivers pre-emptive legal information designed to avoid legal problems through its Community Legal Education project. Whilst the aim of these activities is to equip people to avoid problems escalating into legal problems, the face-to-face manner in which they are conducted allows people to ask questions and familiarises them with our service, increasing the likelihood that they will seek help if and when a legal problems escalates.

Static resources (factsheets, checklists and ready-made contracts) cannot deliver the human interaction that our clients need in order to empower them to seek help.

We submit that whilst increasing the availability of plain-language information around consumer, financial and tenancy rights is a worthwhile endeavour, this should not be at the expense of face-to-face information delivered in a community context.

2. Dealing with problems early

2.1 Getting the right information to solve problems early

Disadvantage will often present barriers to accessing the kinds of self-help information identified in the consultation paper eg. low literacy, limited access to technology, mental health issues. The research referred to in *Searching Questions* observed a “head-in-the-sand” mentality when faced with legal problems, culminating in a reluctance to engage with legal issues:

Disadvantaged groups tend to have less legal knowledge, be more likely to ignore their legal problems and be less able to handle their problems without expert legal advice. Thus, disadvantaged groups are likely to benefit from legal information and education strategies that are specifically designed to direct them to appropriate legal advice services.³

Furthermore, a one-size-fits all approach very rarely answers all the questions necessary to resolve a legal problem. This is particularly so where disadvantage plays a role in creating and compounding intersecting legal issues. The benefit of face-to-face legal assistance is that other legal issues can be identified and resolved in a way that online factsheets cannot replicate.

Case Study 2:

A client presented to ILC for assistance to access her entitlements from Victims Services following a lengthy history of childhood sexual abuse. The client suffered from complex PTSD and her life was moderately chaotic. Her child had been diagnosed with ADHD and was having difficulties at school, which was a major preoccupation for her. As she developed more rapport with her solicitor, the client revealed that she was being pursued for a debt incurred by a previous partner (“sexually-

³ C Coumarelos et al, *The Legal Australia-Wide (LAW) Survey: Legal Need in Australia* (2012), www.lawfoundation.net.au/publications, 38.

transmitted debt”). The solicitor made a referral to ILC’s financial counsellors who were able to negotiate with the creditor to waive the debt.

2.2 Some ideas to help you get the right information

ILC recognises that online information is a useful and necessary resource to develop. However *Searching Questions* concludes that existing resources aren’t currently as accessible and effective as they could be, especially for users experiencing disadvantage.

The majority of participants in the *Searching Questions* research expressed a preference for face-to-face or phone advice from a lawyer rather than persevering with searching impenetrable websites to answer their own questions.⁴

For example, participants found the Law Access page to be visually cluttered with multiple tab menus across the top and side, photo-links and scrolling text.

Searching Questions makes some concrete suggestions for improving the effectiveness of these sites, including⁵:

- Balance simplicity with not being patronising. Participants in their mid to late teens were sensitive to what they saw as condescension in a youth-specific legal website.
- Older participants asked for bigger type.
- Predictive text within website search engines. Poor spelling often an issue so may exclude users from the site.
- Have one set of tabs for links, most participants were confused or overwhelmed by having two sets of tabs and generally disliked the side bars.
- Make the tabs as clear as possible.
- Make very clear that jurisdiction may be relevant – be upfront that many laws are specific to the State or national jurisdiction.
- Ensure the accessibility and profile of the websites as they are competing with international and commercial sites and there is little awareness of different jurisdictions and the US and UK sites frequently trumped local links.
- Explain the categories, it is important to be as clear as possible when providing links to indicate subject matter. Frustrations were most apparent when participants clicked a link then found it to be irrelevant or, frequently, got an error message for the link. They were then often prevented from going back to the previous page and quickly felt disengaged and/or overwhelmed.
- Everyone wants the ability to ask a question: most users had a preference for typing in a question/sending an email; not

⁴ Above n 5, 24.

⁵ Ibid 15.

knowing the category to search for and so being confused by the menus was a regular frustration for participants. There was very limited use of keywords.

- A mixed approach: some people are able to cope with lot of options and prefer to see everything available without having to click on links, often the biggest deterrent. Others don't want too many options and get overwhelmed by too many choices.
- Simple home pages with clear links to other options and explanations as to what those options will be, given reluctance to click on the menu/ links when there may be difficulty navigating back to the original page.
- Engage the active participation of members of your target community in creating resources.
- Follow the common directive to write for your audience.
- Be clear where people can go for help if they prefer to call for assistance.

ILC welcomes the suggestion of a network of online, telephone and walk-in information services across NSW.

2.3 Access to self-help tools

The consultation paper proposes to develop online tools that could help write letters to resolve a dispute, as well as artificial intelligence interfaces that could mediate to resolve disputes.

ILC supports the development of self-help tools of the type suggested but cautions against reliance on one-size-fits-all approaches to dispute resolution, and particularly those that are dependent on access to, and familiarity with, technology. As mentioned previously, disadvantaged groups – who are already disengaging from the civil justice system – are unlikely to access justice through these means. Furthermore, reduced contact with a real person reduces the opportunity to engage those clients with other supports or services, which is especially important for those with complex needs or who are experiencing disadvantage.

Online letter-writing and mediation tools that are reliant on written communications also assume an equality of power between disputing parties, and overlooks any underlying power imbalance which could make asserting rights very difficult, if not impossible for the weaker party. For example, it would not be realistic to expect a landlord and a tenant to mediate through a website on equal footing when the landlord has the power to issue the tenant with a notice of termination. In these situations, an experienced advocate is often needed to encourage a client to assert their rights as well as to improve the likelihood of a just outcome.

Case Study 3:

A tenant contacted ILC after a number of abusive threats from her private landlord to kick her out and change the locks immediately. The client had multiple mental health disorders, was fleeing family violence

and had a history of homelessness. Her poor rental history had made it difficult for her to find a rental property, and she had had to accept a small apartment above a mechanic's workshop. She rented directly from the business owner, who was a difficult and aggressive man. The landlord would frequently come to her place unannounced, invade her privacy and threaten to evict her, as a result she felt unsafe, powerless and feared becoming homeless again. ILC were able to reassure her that the landlord could not evict her without following due process. ILC also contacted the landlord and explained his legal obligations and convinced him not to commit an illegal lockout. The landlord-tenant relationship had clearly broken down and it was only through lengthy negotiations with ILC staff that a mutually agreed outcome was possible. Due to the complexity of this matter, the inequality of bargaining power and various personal characteristics of both tenant and landlord, it was highly unlikely that either party would have accessed an online tool to effectively resolve their dispute. In this instance, assistance from an experienced advocate was necessary to reach a just outcome.

Case Study 4:

ILC was contacted by a client who had been served with a statement of claim for outstanding rates. The client had recently become unemployed and was caring for their elderly mother. As a consequence of her unemployment the client had entered into an agreement with the council to make payments by instalments. Inexplicably, the debt was sent to an external debt collection agency which instructed solicitors, who in turn issued the statement of claim without notice to the client. Legal costs and interest were added to the amount owing, resulting in a total debt of more than double the outstanding rates. The client was extremely distressed. After difficult and protracted communications on the client's behalf, including filing relevant court documents and lodging a formal complaint with council, ILC was able to have the legal costs and interest waived and enter a new agreement to repay the remainder by instalments. The client would not have been able to resolve this matter with online resources for a number of reasons including the power imbalance between herself and council and council's solicitors, the complexity of the documents required, and the short time frames in which to respond.

3. Getting help to solve a problem

3.1 Access to advice and assistance

The consultation paper refers to a number of services that provide quality free advice and assistance in NSW

All of these services will be affected by the 30% cut to CLC funding in July 2017. This will have a direct impact on the ability of those services to provide advice and assistance and likely increase some of the barriers to service delivery including: gaps in available services, increased wait times, reduced access for clients and capacity to deal with complex matters.

ILC calls on the NSW Government to improve access to advice and assistance by reinstating lost CLC funding and increasing support for the CLC sector.

3.2 How to help you get the advice and assistance you want, when and how you need it

ILC welcomes a more connected approach between service providers to improve service delivery and a whole-of-person approach to problem solving. CLCs currently operate within this model and frequently make warm referrals to other connected CLC services (as seen in Case Study 2 above), or to services with whom we have a close working relationship (for example, drug, alcohol and other health services, local refuges/housing providers, charities and other social support services).

We caution against placing emphasis on information services/websites over frontline advice services. If frontline services are increasingly undermined and replaced by online services, their capacity to provide and receive referrals will be reduced. This could result in clients being bounced from service to service on a 'referral roundabout' without ever finding a service equipped to deal with their problems and contribute to greater unmet need as the most complex problems (ie those incapable of being solved online) will be sidelined.

Searching Questions demonstrates that users of web-chat services must be able to identify the legal issues in their problem and have some familiarity with legal language and terminology in order to be able to navigate online tools. For example, a hypothetical example of a stone-chip from a lawn mower saw participants searching literal meanings ('hit car with rock') and yielding no results.⁶ This demonstrates the difficulty in finding relevant information without knowing the right terms to search for.

Case Study 5:

Bob, a 78 year old tenant who is partly deaf, mostly illiterate, suffers from serious depression and has other health complications, rents a home in a small remote town and has no access to a computer. He has been renting from a private landlord for over 17 years, in which time the landlord has done little to no maintenance. The house is in an appalling state as a result. Bob is also the victim of elder abuse after his adult daughter and her family moved in and effectively trashed the house. The local council commenced action against the landlord due to

⁶ Above n5, 21.

the state of the premises, and consequently the landlord issued Bob with a notice of termination.

Bob could not see a way out of his predicament and contacted the ILC Tenants Service. ILC was able to work closely with Bob to get enough support around him to remove his daughter from his home. ILC also made referrals to a service that paid for the hoarding and squalor mess to be cleaned up. In this time, the landlord has applied to the Tribunal to terminate the tenancy on three occasions, and each time this was successfully defeated by ILC's advocacy.

Throughout this process ILC has worked with Bob to apply for public housing and has assisted Bob to seek alternative accommodation in the inevitable event that his tenancy comes to an end. Bob's personal characteristics – lack of literacy, infirm physical and mental health, lack of access to technology – would have made it impossible for him to access self-help or even web-chat advice services.

Furthermore, the added complexities of elder abuse, mental health and hoarding and squalor meant that ILC needed to work closely with other frontline services in order to resolve Bob's problem.

And finally, the situation demonstrates that legal solutions are often inadequate: whilst the landlord's current application has been defeated, it is only a matter of time before the landlord succeeds in terminating the tenancy in which case contingency planning (applying for public housing, securing alternative rental) will come to the fore.

Face-to-face legal services are able to deliver a whole-of-person solution that a website cannot replicate.

3.3 Access to quick, simple and cheap options for dispute resolution

ILC supports the establishment of alternative dispute resolution services for the types of problems covered by the consultation paper. The only comment we would make is that any service must be properly funded, staffed and maintained in order to be truly helpful.

3.4 Options to improve access to quick, simple and cheap options for dispute resolution

ILC supports the establishment of alternative dispute resolution services for the types of problems covered by the consultation paper. The only comment we would make is that any service must be properly funded, staffed and maintained in order to be truly helpful.

3.5 Going to court or a tribunal

The consultation paper refers to a number of services which provide assistance to people wanting to represent themselves.

ILC welcomes any reforms that would make courts and tribunals less adversarial, less formal, less confusing and less overwhelming for clients.

However, it is the experience of the ILC Tenants Service that NCAT is rarely navigable by unrepresented tenants. While claiming to be informal, tenants are often disadvantaged by a technical and bureaucratic process which is weighted towards real estate agents and Government landlords who are trained and familiar with the legislation, terminology and procedure. Very many tenants are so daunted by the process that they do not even attend. In addition, many real estate agents and social housing landlords actively advise tenants not to attend, meaning that NCAT effectively becomes a rubber stamp for landlords' uncontested applications.

The NCAT process also exerts pressure on parties who do attend to resolve disputes in the first instance by conciliation. Given that many tenants will be daunted by the process as well as suffer a power imbalance when negotiating with their landlord, a consent agreement produced in this setting does not always represent true consent. For example, often tenants feel pressured to agree to vacate in the heat of the moment, and once this consent agreement is converted to legally enforceable orders there is no recourse.

ILC Tenants Service has also experienced further barriers once an unresolved matter proceeds to hearing. The requirements for preparation and exchange of evidence can be daunting, there is often inflexibility in hearing dates (refusing to allow hearings by phone and rejecting adjournment requests), and the fact that NCAT is not governed by precedent means there is always uncertainty in the outcome. Other procedural anomalies – including dismissing a tenant's application due to the landlord's failure to appear – are unfortunately common.

While ILC welcomes measures to make courts and tribunals more accessible, we caution that the absence of a duty advocacy service would likely place a greater burden on the civil justice system.

Duty advocates provide invaluable advice and support to self-represented litigants, and also assist procedurally eg. by ensuring applications are properly drafted and within jurisdiction. Consequently they provide an invaluable service to the efficient running of the court.

3.6 Other options to simplify and improve our court and tribunal processes

1. Simplify the language used in courts and tribunals

ILC agrees with the suggestion to simplify the language used in courts and tribunals.

We also suggest a simplification of court processes overall to make them less intimidating for unrepresented parties.

We also suggest there be a requirement for parties to have at least attempted mediation to resolve their dispute prior to commencing litigation, as litigation should be a last resort.

2. Greater use of AV technology in civil matters

A key concern with this suggestion is an expectation that parties will have access to AV technology, and/or have proficiency and/or capacity in using it.

It must be noted that AV links have been effective in criminal matters because those links are directly between the court and the place where the accused person is being held. This would not be the situation in private matters and so we anticipate would be fraught with problems.

3. Explore online dispute resolution

A move to online dispute resolution raises a number of jurisprudential considerations with respect to transparency, open justice and the ability to ensure a fair hearing. Furthermore, there is a risk that unrepresented litigants would be further disadvantaged by the loss of duty services.

ILC Tenants Service provides duty advocacy services at the NSW Civil & Administrative Tribunal. Many of the clients we assist have never sought any assistance with their matter to determine their rights or to assist them with the hearing. It is only through the Service actively approaching individuals 'on the steps of justice' that these clients obtain assistance to assert their rights. Some of the most vulnerable clients would be further disadvantaged with the introduction of online and virtual courts and loss of face-to-face duty services.

We also note the consultation paper proposes pre-recording of submissions to provide more flexibility for participants. In our experience, tribunal matters are dynamic and a pre-recorded presentation would not permit the testing of an individual's evidence, nor could the recording party participate in the process, clarify their own statements or ask questions.

4. Enforcing judgements

4.1 Streamlining enforcement processes

We frequently observe the difficulty that our clients experience in attempting to enforce an order. For example, in tenancy matters the majority of orders are made against tenants and are generally enforceable by way of other legal processes eg. via debt recovery procedures for unpaid rent, or eviction by a

Sheriff. On the other hand, many tenant's applications require a specific action in performance from a landlord (eg repairs to the roof or to cease interfering with a tenant's privacy). It is the experience of the ILC Tenants Service that Government landlords frequently fail to comply with NCAT orders and it can be very difficult to enforce compliance with such orders, especially when the other party has control over the place where the applicant lives.

We occasionally make complaints against landlords to Fair Trading for prosecution. We have never seen Fair Trading proceed with a penalty against a landlord for failing to follow the legislation, even where express findings of illegality have been made by NCAT.

4.2 A single enforcement regime for courts and tribunals

ILC supports the concept of a single enforcement regime as a means of simplifying procedures for unrepresented parties.

5. Anything else?

While we are supportive of initiatives to simplify civil law procedures and make it easier for individuals to resolve their own disputes, we caution against under-stating the need for face to face advocacy services. We have identified many barriers to self-representation tools being entirely effective, especially for the types of clients who require our services. We are concerned that the reforms suggested will shift focus from the need to provide adequate funding for face to face services.

CLCs currently provide essential free legal help to over 216,000 of the most vulnerable and disadvantaged members of our community each year.⁷ It is our experience that the majority of clients who access our services benefit from having access to individual assistance, either via one of our telephone advice services or through face-to-face advice and/or advocacy.

In 2014 the Productivity Commission of Australia recognised the valuable work of CLCs and recommended that Australian governments provide an immediate funding injection of \$200 million per year to legal assistance services.⁸

We support initiatives which will assist individuals to resolve their own basic legal issues, however any such initiatives must allow for the many barriers which current self-help resources can present. Importantly, those initiatives must not replace face-to-face services such as community legal centres.

⁷ Community Law Australia, www.communitylawaustralia.org.au/get-the-facts/

⁸ Recommendation 21.4, Productivity Commission of Australia, *Access to Justice Arrangements Inquiry Report No 72* (2014), at 63.