



Access to Justice Review

A submission to the Department of Justice and Regulation

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WEstjustice

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The aim of the Access to Justice Review is to improve access to justice for Victorians with an everyday legal problem or dispute, and ensuring the most disadvantaged and vulnerable in our community receive the support they need when engaging with the law and the justice system.

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*Names have been changed to protect the privacy of individuals

Summary of Recommendations

Accessible Information

- Collaboration:** Work with local agencies to better understand and gauge the needs of the local community
- Education:** To support and allow Community Legal Centres (CLCs) to offer targeted community legal education programs as a preventative measure where there is an unmet need
- Leaders:** To utilise community workers/leaders to act as a link to vulnerable groups
- One Point:** To support improvement of technology to have an interconnected phone system, allowing for warm referrals and ability to transfer calls directly to and from the VLA helpline

Alternative Services

- Quality Control:** There be improved quality control on complaints filed with the Magistrates' Court
- Referral:** Unrepresented litigants in MVA mediations in the Magistrates' Court be referred to a CLC or duty lawyer for legal advice on their options
- Funding:** To CLCs and Victoria Legal Aid to deliver these additional legal services
- ADR:** Complaints be referred to ADR early in the civil litigation process

Expansion of Alternative Dispute Resolution

- Pilot Scheme:** A pilot ADR scheme for small claims and/or civil disputes be established, with a pilot group of 100 new small claims and/or civil disputes to be considered and resolved without the need for a hearing
- Evaluation:** An evaluation of the pilot civil law ADR scheme be conducted, reviewing its timeframes, outcomes and stakeholders' feedback
- Pending Success:** Ongoing civil law ADR schemes be established with jurisdiction to determine small claims and civil disputes less than \$40,000 without the need for hearings;
Government produces clear and accessible information about the ADR schemes for public and community sector use; and

Scoping be undertaken to expand the ADR scheme's jurisdiction or establish a new ADR scheme to cover small claims and tenancy disputes without the need for a hearing.

VCAT Reform

- Representation:** Allow legal representation or an Advocate to represent a litigant where there are clearly power imbalances – review of the VCAT Act to expand current criteria to appropriately eligible parties for representation (ie. mental illness)
- Mediation:** Referrals to mediation should only be made when both parties are willing to negotiate
- Lower Fees:** Reduce fees to a reasonable level
- Assessment:** Add a question to the Application form on client disadvantage or vulnerability, providing reasons, to flag to staff there is an obligation to then refer for advice
- Training:** Improve staff training on vulnerability factors and what to do
- Transparency:** Have a more transparent system to remove discretionary decision making for fee waivers
- Enforcement:** Have a dedicated lawyer to pursue enforcement across Victoria – benefits would be twofold; gained knowledge/expertise and consolidate data for further improvement
- Benchmarks:** Apply Industry External Dispute Resolution (EDR) Benchmarks when assessing the performance of VCAT and taking appropriate measures to improve raised concerns
- Support:** Offer language help to complete forms by VCAT staff (where clients are unable to access it)
- Duty Service:** Provide access to a Duty Lawyer upon request or observed need

Pro Bono Legal Services

- Commitment:** Request a minimum time commitment and offer incentives to do so
- Match skills:** Have clearly defined roles and match skills and expertise to the requirements
- Consistency:** Roster students/lawyers consistently to get the most from both parties
- Opportunities:** Offer more secondments/opportunities to shadow barristers and develop partnerships with law firms doing pro bono work
- CPD:** Expand CPD credit criteria to include defined pro bono activities

Costs Orders: Pro bono/CLC lawyers should be able to claim costs via conditional cost agreements

Encourage: Government should continue to facilitate pro bono relationships

Duplication

Collaboration: Collaborate with other agencies to effectively respond to community needs

Distribution: Fund the adaptation of resources nationally

Self-Represented Litigants

Interpreters: Government should provide greater investment into interpreter services for civil law proceedings

Quality Control: There be improved quality control on complaints filed with the Magistrates' Court

Referral: Unrepresented litigants in MVA mediations in the Magistrates' Court be referred to a CLC or duty lawyer for legal advice on their options

Funding: To CLCs and Victoria Legal Aid to deliver these additional legal services

ADR: Complaints be referred to ADR early in the civil litigation process

Pilot Scheme: A pilot ADR scheme for small claims and/or civil disputes be established, with a pilot group of 100 new small claims and/or civil disputes to be considered and resolved

Evaluation: An evaluation of the pilot civil law ADR scheme be conducted, reviewing its timeframes, outcomes and stakeholders' feedback

Pending Success: Ongoing civil law ADR schemes be established with jurisdiction to determine small claims and civil disputes less than \$40,000;
Government produces clear and accessible information about the ADR schemes for public and community sector use; and
Scoping be undertaken to expand the ADR scheme's jurisdiction or establish a new ADR scheme to cover tenancy and small property disputes.

1. Introduction

1.1. About WEstjustice

WEstjustice is a not for profit, community organisation that provides free legal assistance and financial counselling to people who live, work or study in the City of Maribyrnong, Wyndham and Hobsons Bay.

WEstjustice (Western Community Legal Centre) was formed in July 2015 as a result of a merger between the Footscray Community Legal Centre, Western Suburbs Legal Service, and the Wyndham Legal Service. The merger followed extensive research culminating in the *Western Community Legal Centres Reform Project* which has received broad recognition for its innovation. The Productivity Commission has highlighted cost savings including reduced mirroring of activity across Centres and enhanced support services as efficiencies.¹ The Productivity Commission's *Access to Justice Arrangements Report* supported this model for necessary sector reform. It references the amalgamation as a positive solution to "reducing administrative costs and freeing up resources for front line services".²

1.2. Access to Justice For All

Community Legal Centres (CLCs) were built on the premise that they be "community-based organisations that provide free legal and related services to the public, focussing on the disadvantaged and people with special needs".³

Our continued existence relies on us being able to meet this need; to ensure the most disadvantaged and vulnerable in our community receive the support they are after.

The amalgamation of the three Centres is not the only successful initiative that we have implemented. The predecessors of WEstjustice also have an extensive history of responding to community needs in innovative ways. WEstjustice works with a range of disadvantaged clients, and has a particular focus on working with refugee and newly arrived clients. More than 40% of our clients over the last four years spoke a language other than English as their first language. Further, approximately 57% of our clients during that period were newly arrived, having arrived in Australia in the last five years. Over the years, extensive work has been done by our Centre to highlight the

¹ Catriona Lowe, *Western Community Legal Centres Reform Project: Summary Report* (2014)

² Productivity Commission, *Access to Justice Arrangements, Inquiry Report* (2014) 733

³ NALC website, http://www.nalc.org.au/cb_pages/clcs.php

experiences of newly arrived communities in relation to the consumer, housing, energy and telecommunications markets.⁴

WEstjustice are excited to have the opportunity to put forth its ideas on how to improve access to justice for Victorians. Throughout our submission, we will highlight areas that we believe need improvement based on our experiences. We will provide examples of what has worked for us and provide recommendations in the pursuit to improve access to justice for the most disadvantaged and vulnerable clients in our community.

⁴ Reports are available on our website: <http://www.footscrayclc.org.au/brochures-publications/>

2. Accessible Information

The availability of easily accessible information on legal assistance services and the Victorian justice system, including advice on resolving common legal problems

2.1. Reaching Our Target Audience

There is no dispute that there are many resources and publications offered on common legal problems, predominately available in English and online⁵, but are they accessible by the most disadvantaged and vulnerable in our community?

Based on our experience, particularly vulnerable groups require different approaches and more support than a website referral or a publication which they may not understand. The value of face-to-face contact cannot be understated. It enables us to build relationships and empower individuals through knowledge. It also means we can connect to people who do not have access to telephones and the internet, but also for people who have low literacy, poor English skills or are unfamiliar with new technology.⁶ This idea was echoed at a past Access to Justice Roundtable where the consensus was that ‘one size does not fit all’.⁷ Community workers, lawyers and policy makers that were present agreed that the most successful approach to improving access to justice for socially and economically disadvantaged people required, “local and culturally sensitive solutions based on community participation and leadership”.⁸

We have used this approach to develop more tailored support. The most appropriate solution we believe is to offer information and educational programs aimed at building legal capacity to assist clients to identify their legal problems, when self-help strategies are not suitable.⁹ The *Legal Australia-Wide Survey* found that people from a non-English speaking background or low education levels had significantly lower prevalence of legal problems reported reflecting a failure to recognise legal problems.¹⁰ The work of CLCs plays a prominent role in reaching those in need. They act as the

⁵ Examples include Victoria Law Foundation website, <http://www.victorialawfoundation.org.au/publications> and Victoria Legal Aid website, <https://www.legalaid.vic.gov.au/find-legal-answers/all-publications-and-resources> which have resources on fines, debts and family violence – common issues we see

⁶ Law and Justice Foundation of New South Wales, *Access to Justice Roundtable*, (2003) 153-154.

⁷ *Ibid*, 153-154.

⁸ *Ibid*, 153-154.

⁹ See the CLEAR online database, which showcases some CLE and law reform projects undertaken by Australian CLCs: http://www.naclc.org.au/cle_database.php

¹⁰ Law and Justice Foundation of New South Wales, *Access to Justice and Legal Needs: Legal Australia-Wide Survey* (2012) xxii-xv.

link to the community; responding quickly to unmet local need. In order to increase a person's legal understanding and capability, WEStjustice has developed some unique approaches in our community.

2.1.1. Refugee and Newly Arrived Community

Our Centre has a long history of working with newly arrived communities. Due to their history, they are a particularly vulnerable group. A focus group with community leaders from Burma (Myanmar), Sudan, DRC Congo, India and Iran highlighted that many recently arrived and refugee communities have had adverse experiences with legal systems in their home countries.¹¹ These past experiences can deter them from seeking assistance from government agencies – the Refugee Council of Australia states that “prior to arriving in Australia, refugees have often experienced years of persecution and injustices at the hands of corrupt government officials, police and bureaucracies. It is understandable, then, that many refugees arrive with a wariness of police and government bureaucracies and it takes time to rebuild trust and understanding”.¹² We have developed specialty advisory services and education programs that address the particular legal and social problems that newly arrived and refugee communities encounter.¹³

Some common threads to the models we use at the Centre reflect the specialisation of our work:

- Outreach focused and proactive – to make consideration for complex barriers experienced by these communities to access the legal system and legal support
- Trust building strategies – includes engaging with community leaders and other organisations that work with these client groups
- Interpreter/community leader support – ensure our approach to advice takes into consideration cultural differences/different knowledge bases and that the support we provide considers education levels and illiteracy

Our experience from our Refugee Legal Service indicates that illiteracy and cultural/political/social differences are huge barriers to access to justice for newly arrived refugee and asylum-seeker communities – any materials developed must take this into account. We have found the use of

¹¹ Catherine Hemingway, *Submission to Victorian Inquiry into Labour Hire Industry and Insecure Work*, (2015) 25.

¹² Refugee Council of Australia, *Legal and Financial Issues Fact Sheet*, <http://www.refugeecouncil.org.au/fact-sheets/settlement-issues/legal-and-financial-issues/>

¹³ Our Refugee Legal Service evolved from the African Legal Service which set up by our Centre in 2007. Common legal problems are highlighted in the Report; applicable to all newly arrived groups. Katie Fraser, *Out of Africa and Into Court: The Legal Problems of African Refugees* (2009): http://www.footscrayclc.org.au/images/stories/docs/Out_of_Africa_and_Into_Court.pdf

audio-visual materials and also making efforts to understand context and address misunderstandings has been highly beneficial.¹⁴

Example: Train the Trainer Program to empower Community Leaders and in turn their community

It has been established that one of the four pillars of successful refugee settlement is employment, along with housing, education and health.¹⁵ Following a period of consultation and research, we found that face-to-face, targeted employment law services and community legal education (CLE) programs were urgently required for refugees and recently arrived communities,¹⁶¹⁷ hence the Employment Law Project was established to improve employment outcomes for culturally and linguistically diverse (CALD) communities in Melbourne's Western suburbs.

Newly arrived communities face significant barriers to entering the labour market and maintaining sustainable employment. Many of our clients do not understand Australian laws and processes, do not speak English, and would not have enforced their rights without our assistance. With targeted support, many of the following obstacles can be overcome:¹⁸

- Communication and language barriers: leading to misunderstandings
- Low understanding of rights and services: Can lead to exploitation from lack of awareness
- Cultural barriers, lack of networks, fear of government officials and no Australian experience
- Low income and precarious work: Characterised by casualisation and insecurity
- Temporary migrant worker status: Particularly vulnerable to exploitation due to the nature of their visa

As part of the CLE program, the most innovative method we have used was to engage six part time community leaders from different new and emerging refugee and newly arrived communities to

¹⁴ Federation of Community Legal Centres (Victoria) Inc, *Productivity Commission Inquiry into Access to Justice Arrangements: Supplementary submission* (2014) referred to our work with recently arrived refugees and strategic CLE work and partnership as a positive example of how to prevent common legal problems. It also acknowledges exploration of DVDs materials.

¹⁵ Alistair Ager and Alison Strang, *Understanding Integration: A Conceptual Framework*, *Journal of Refugee Studies* (2008) 21(2) 170.

¹⁶ Catherine Dow, *Employment is the Heart of Successful Settlement* (2014) 19: http://footscrayclc.org.au/images/stories/Footscray_CLC_Employment_Law_Project_-_Preliminary_Report.pdf documents the initial findings from the consultation stage.

¹⁷ Jobwatch is the only specialized CLC in Victoria that offer employment advice via telephone: <http://www.jobwatch.org.au/>

¹⁸ For more information: Catherine Dow, *Employment is the Heart of Successful Settlement* (2014) 13-18: http://footscrayclc.org.au/images/stories/Footscray_CLC_Employment_Law_Project_-_Preliminary_Report.pdf

participate in a *Train the Trainer Program*. Supported by the Helen Macpherson Smith Trust and Victorian Women's Trust, the Program offered comprehensive training in employment law and key services, assisting participants to develop and distribute CLE sessions to their communities in the West.

By empowering community leaders, whom are trusted sources of information in newly arrived and refugee communities, these bilingual community workers were able to connect to vulnerable communities in a way would have been unachievable without them. They were able to deliver the education programs to their communities in a culturally appropriate and targeted way.

The Project successfully developed a suite of education resources that target newly arrived and refugee communities. The resources aim to provide useful tools for agencies, educators, community leaders and others working with vulnerable communities to explain employment and anti-discrimination laws and services available and strengthen their understanding of workplace rights in Australia.

The resources (which can be found on our website)¹⁹ were divided into six topics which relate to common legal issues observed through our linked legal service:

- Wages and Other Entitlements
- Employees, Contractors and Sham Contracting
- Workplace safety
- Discrimination
- Sexual harassment & Bullying
- Unfair dismissal and Other Protections if your employment ends

We have found that the development of resources/legal information is best coupled with targeted outreach such as interactive CLE with groups, training with, or involvement of community leaders.

The Train the Trainer model has had many positive outcomes – greater information sharing (of accurate information) and the creation of strong support networks within migrant communities. Evidence shows that leaders now act as an important link between their communities and agencies by raising awareness of referral agencies including WEstjustice, when they have an employment problem. Evidence also supports an increase in understanding of laws and services among target

¹⁹ Resources include PowerPoint presentation, key terms and concepts summary, common employment legal issues video clips produced by Tandem Media, activities and question/answer sheets:
www.footscrayclc.org.au/train-the-trainer-project

JILL
Is it good pay?

ANDREA
Depends on whether it's a busy
night.

JILL
(concerned)
Really?

ANDREA
If they can't pay me much they give
me a meal, so...

JILL
(concerned)
But a meal is *not* pay! Don't you
have an hourly rate?

ANDREA
If nobody comes in, how can they
pay me?

JILL
But they *have* to pay you the Award
rate.

ANDREA
They said they opted out of the
Award...

JILL
They can't do that. What about
overtime?

ANDREA
No.

JILL
Penalty rates, for weekends?
Holidays? Superannuation?

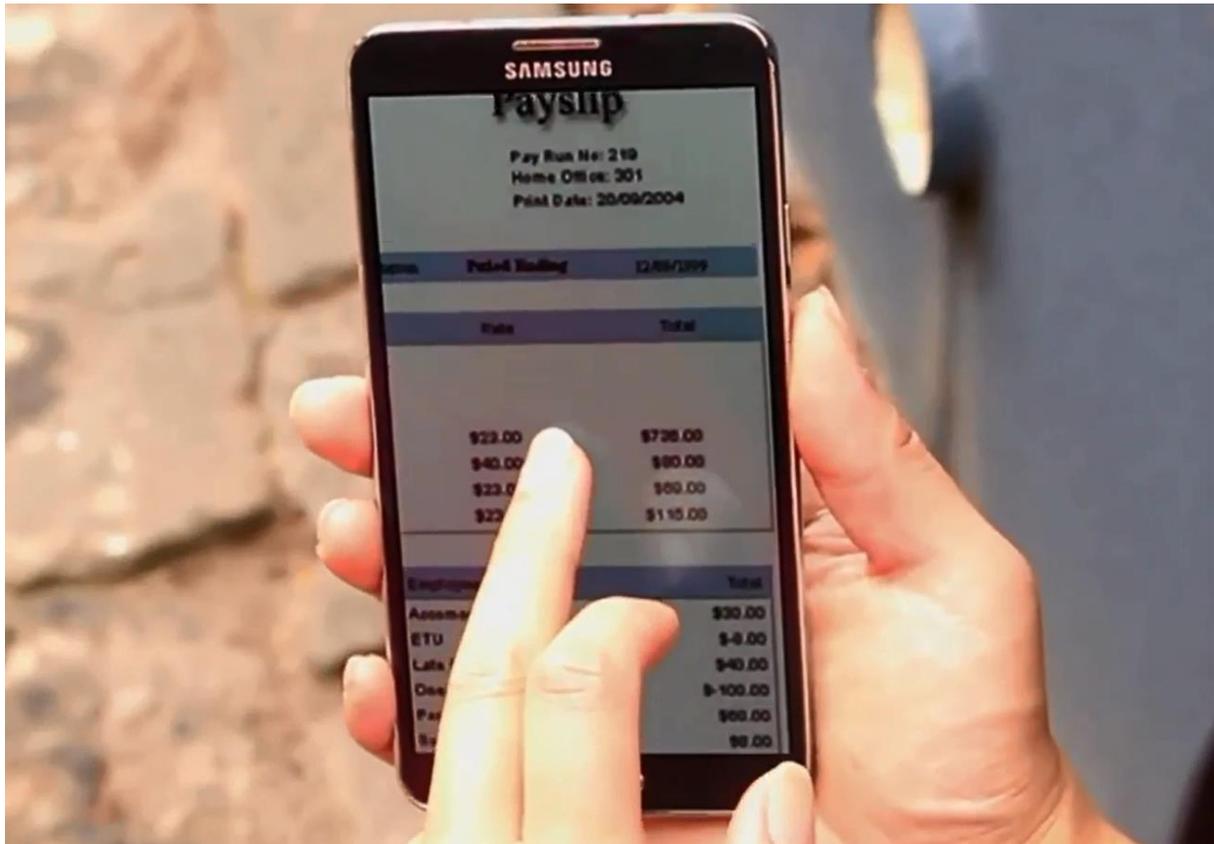
ANDREA
I know it sounds bad... but they're
really nice people.

JILL
(thinking, but with
caution)
Listen... do you have a pay slip I
could have a look at?

ANDREA
What's a pay slip?

JILL
It's a document that you get every
time you get paid. It sets out the
hours you worked, your payment and
how much you've been taxed. I get
mine by email.
(showing Andrea an example
on her phone)
Look, I'll show you.





ANDREA
I don't get those.

JILL
You have rights in the workplace,
you know! You should get some
advice about your pay.

ANDREA
Who can I speak to?

JILL
There are legal services that can
help for free - and they're
confidential, so they're not going
to tell your boss unless you want
them to. And then later, if you
feel like it, you could talk to
your boss or you could get a lawyer
to write a letter.

Example: My Name Project – reclaim my name, reclaim my identity

This model of working closely with community leaders and local agencies has been valuable in the development of the *My Name Project* which emerged as a result of discussions with Karen, Karenni and Chin community leaders as well as the settlement agencies that work closely with these communities in the West.

These close working relationships allowed our Centre to identify an issue that affects the large communities of Burma that have been resettled as refugees in Melbourne's West. The Chin, Karen and Karenni communities, as well as many more of Burma's ethnic groups, have cultural naming practices that differ from the 'first name family name' structure that we use in Australia. They are only given a first name at birth, usually comprising of two or more parts and they do not have family names.

The problems arise during the refugee resettlement process and are mainly caused by registration systems utilised by agencies such as the UNHCR, the Department of Immigration and Border Protection and other services providers in Australia that are unable to recognise and accommodate different cultural naming practices.

In our experience, due to language barriers, low literacy and cultural differences, newly arrived communities struggle to navigate and understand Australia's administrative systems. Ultimately these processes result in incorrect recordings of names and discrepancies across both primary and secondary forms of identification. For newly arrived refugees from Burma this means that their cultural identity is routinely denied and they face many barriers to accessing services in Australia as a result of their name structures (including renting a home, connecting utilities, opening a bank account, applying for a driver's license and accessing a doctor).

In order to work towards addressing these issues, the *My Name Project* has formed strategic partnerships with the Victorian Registry of Births, Deaths and Marriages, settlement agencies in the West and community leaders. In collaboration with these organisations, we are assisting community members through a bulk pilot casework service, the 'My Name Clinics' to remedy administrative mistakes across their documents and reclaim their respective names and cultural identities. By way of follow-up, we will seek to engage in advocacy and education with relevant agencies to address the root causes of this issue.

The *My Name Project* offers a clear example of the benefits of developing project work that is directly responsive to community needs. This can only be achieved through close connections with communities and close working relationships with their leaders and day-to-day support workers. In addition, it also demonstrates the importance of forming strategic partnerships with community sector organisations and government in order to kick-start processes that could lead to system-level reform to address complex and widely misunderstood issues.

Similarly, another group that requires more tailored support is young people who also demonstrate lack of knowledge on legal rights, referrals and remedies.²¹

2.1.2. Young People

Example: School Lawyer pilot project to target vulnerable and disengaged youth in a non threatening environment

Following extensive research and legal needs analysis, our Centre found that youth in the western suburbs were largely unaware of their legal rights and had poor access to legal information and assistance. Our research highlighted the need for open and interactive program delivery in order to successfully engage young people. The common barriers we needed to overcome for youth accessing legal services included:

- Lack of trust in authority, often referring to an ‘us’ versus ‘them’ mentality;
- Fear and suspicion of lawyers and the legal system;
- Awareness of what services were available in the community or how to access them;
- Financial concerns and the assumption that all legal services were costly;
- Awareness of their legal rights and responsibilities;
- Geographical isolation;
- Concern for their reputation and that their family would find out;
- Accessing services means acknowledging there was a problem.²²

With this in mind, WEstjustice (formerly Wyndham Legal Service) launched a two year *School Lawyer Pilot Project* in mid 2015 which we believe to be an Australian first. Funded by Newsboys Foundation, Slater and Gordon Community Fund, RE Ross Trust, Helen Macpherson Smith Trust and

²¹ Law and Justice Foundation of New South Wales, *Access to Justice and Legal Needs: Legal Australia-Wide Survey* (2012) 30.

²² Shorna Moore, *An Invisible Demographic: Youth and the Law in Melbourne’s West*, (2012) 15.

Jack Brockhoff Foundation, this new and innovative project was developed with the overarching objective of improving accessibility and promoting early intervention for the students and parents/guardians of The Grange P-12 College (The Grange) and Warringa Park School in Hoppers Crossing, Victoria.²³

The School Lawyer Project uses a new and innovative gateway to address hidden problems within a public school community and aims to build the confidence of that community to effectively engage with the justice system in order to improve the stability of school families and the attendance and performance of the school students.

The Project partnered with The Grange and key public and community agencies in the western suburbs of Melbourne, creating an inclusive relationship with students, parents/guardians and teachers that went beyond the traditional solicitor/client relationship.

Anecdotal evidence shows that many of the students and their families have been involved with the justice system however they did not know where to go for help and struggled to attend appointments with lawyers due to poor public transport and an overarching distrust of lawyers and authority.

The School Lawyer, Vincent Shin has an office within the school grounds for the benefit of the 1,723 primary and secondary school students at The Grange (plus students at Warringa Park School), and also the parents/guardians of the students. The benefit for the students and the parents/guardians is twofold: free legal advice and representation; and legal education sessions on legal rights and responsibilities. We also believe that the Project is indirectly assisting partners, dependants and members of their community.

Providing the drop-in service within the school for the students is providing unprecedented access to legal services, whilst building relationships and engaging youth. The service is free and available for students and families before, during and after school hours.

²³ In the prior six months, our Centre provided a weekly outreach drop-in clinic at The Grange. We found that many of the students were from low socio-economic backgrounds, geographically and electronically isolated, were not engaged in the wider community, had very low levels of literacy and high levels of engagement with the justice system.

The School Lawyer is delivering CLE on a regular basis to inform the students, parents and staff of their legal rights and responsibilities – aimed at early intervention and preventative strategies. The format of delivery varies from structured sessions with PowerPoints and activities to the distribution of flyers from Victoria Legal Aid, Victorian Law Foundation, Magistrates’ Court of Victoria, the Office of the Public Advocate, Tenancy Union and Consumer Affairs Victoria.

Recommendations

- To collaborate with local agencies to better understand and gauge the needs of the local community
- To support and allow CLCs to offer targeted legal education programs as a preventative measure where there is an unmet need
- To utilise community workers/leaders to reach vulnerable groups

2.2. One Entry Point

Although we cannot replace direct personal contact, there is widespread recognition of need for a central referral point that directs clients to appropriate services.²⁴ LawAccess NSW is a valuable model providing legal information, referrals and in some cases, advice for people who have a legal problem in NSW.²⁵ Locally, Victoria Legal Aid (VLA) legal helpline offers a similar service and is available in other languages too.²⁶

The VLA helpline is a useful tool alongside CLC access points, but there is room to improve collaboration between the two. Our Centre is currently looking to restructure our phone system following the merger to have one reception point. Currently we have two referral points based out of our two offices. This can lead to some confusion for our clients²⁷. It also then necessitates an experienced Administrator at both offices to manage the phones and make appropriate referrals and appointments. With approximately one-quarter of incoming calls being referrals (due to conflict of interest, area of law or catchment), significant time is spent on this task. By having direct access to the VLA helpline and an interconnected phone system, this could help reduce the referral merry-go-round. Research has found that people rarely seek assistance from more than one source for each

²⁴ Law and Justice Foundation of New South Wales, *Access to Justice Roundtable*, (2003) 153-154.

²⁵ LawAccess NSW: <http://www.lawaccess.nsw.gov.au/Pages/about-us/about-us.aspx>

²⁶ Victoria Legal Aid: <https://www.legalaid.vic.gov.au/get-legal-services-and-advice/free-legal-advice/get-help-over-phone>

²⁷ Traditionally these offices were that of Footscray Community Legal Centre and Wyndham Legal Service. As the phone number is currently still different, there is confusion that they are still separate entities.

issue therefore it is important to get referrals right the first time.²⁸ Referral fatigue can mean that the client will give up on trying to resolve their legal problem, escalating the matter.

Although groups such as newly arrived communities will not generally access services through a phone line for reasons already discussed, there is a class of the community that would benefit from having access to a quick and accessible service. The value of the helpline is dependant on experienced staff to triage. If the phone system can be connected, clients would no longer be referred to another phone number, rather they could be warmly referred by staff after the one call, reducing the risk of unresolved matters.

Recommendations

- To support improvement of technology to have an interconnected phone system to VLA allowing for warm referrals and ability to transfer calls directly to and from the helpline

²⁸ Law and Justice Foundation of NSW:
http://www.nationalprobono.org.au/ssl//CMS/files_cms/296_Lovric_J.pdf

3. Alternative Services

*Options for diverting people from civil litigation and into alternative services
where appropriate, such as a 'triage' model*

3.1. Misconceptions about the Respondent

An enormous percentage of respondents to civil litigation in the Magistrates' Court have no choice but to appear and respond to a claim or receive adverse judgment in default of appearing. In the latter situation, many respondents are summonsed before the Court and their finances scrutinised as part of the enforcement process. The system means a respondent – often the vulnerable and unrepresented party to the dispute – can't avoid his or her 'day in court', even where the claim is baseless or misconceived.

Although the background papers approach this issue from the complainant's view, most of our clients involved in civil litigation are respondents. We therefore approach this Term of Reference largely from the respondent's perspective.

3.1.1. Triage Model

WEstjustice practices extensively in the Magistrates' Court and VCAT. Our comments relate to our experience assisting clients involved in civil litigation from our Motor Vehicle Accident (MVA) Clinic, specialist Taxi Legal Service and attendance at Summons for Oral Examination (SOE) hearings in the Magistrates' Court.

We argue that a triage model is needed to:

- Prevent baseless or misconceived complaints from being heard;
- Refer vulnerable respondents to a community lawyer for advice; and
- Divert civil litigation into Alternative Dispute Resolution (ADR).

3.1.2. Improved Quality Control Over Cases Accepted into the Magistrates' Court

Case study 1: Molly – Inappropriate cases reaching SOE stage*

Molly is a single parent, reliant on Centrelink benefits and a minimum wage part time job to make ends meet. She has no assets in her name and has a number of other outstanding debts. We see Molly at the Magistrates' Court for a SOE when judgement is entered into for \$760.00 by City West Water.

This case is not unique to Molly. We have seen a number of matters that should have been dealt with outside of Court; including matters for less than \$1,000 (costs end up being more than one-quarter of the original debt), where clients have no assets or are dependent on Centrelink as their sole income.

Case study: Eugene

WEstjustice assisted Eugene through our duty lawyer at the Werribee Court where he appeared for a Summons for Oral Examination for a MVA debt. Eugene is a 31 year old male who was involved in a MVA with a 3rd party. Eugene holds a Comprehensive Motor Vehicle Insurance Policy with an Insurance Company.

After the Accident, Eugene lodged a claim with his Insurance Company (IC) and paid the excess. Eugene's vehicle was assessed as a total loss and was paid a sum of \$24,883.00. Eugene assumed that his IC would also settle the 3rd party claim who was seeking damages of \$41,972.86. Eugene's IC however appointed an investigation service to investigate the circumstances surrounding the claimed damages, instead of paying the 3rd party claim.

In the meantime, the 3rd party had initiated proceedings against Eugene including entering judgment. While Eugene's IC were requesting documents such as mobile phone records, home loan statements, bank savings account statements, vehicle registration documents, purchase documents for the subject vehicle, vehicle finance documents, service documents, tyre purchase receipts and copy of all incoming/outcoming mobile calls and also requested that Eugene participate in interviews conducted by the investigators.

We assisted Eugene to obtain a stay of the third party proceedings in the Magistrate’s Court. We issued a complaint at FOS against his insurer for the failure to provide an indemnity for the third party claim.

We assisted Eugene with providing the requested documents to IC and organized the second interview as required by IC. The insurance company finally accepted the claim and paid damages claimed by the 3rd party. The complaint was resolved outside the Magistrate’s Court jurisdiction at no cost to our client.

At no stage in the Magistrate’s Court process did anyone question the failure of our client’s insurer to provide an indemnity for the disputed claim.

Better quality control over complaints filed with the Magistrates’ Court (or a ‘triage model’) would be useful in vetting many baseless civil litigation claims at the “earliest opportunity”, and could involve:

- Senior Court staff rejecting baseless or misconceived complaints;
- Senior Court staff referring matters for early ADR and legal advice;
- A self-represented litigant coordinator providing legal information or referring complainants to other services; and
- In some cases, Registrars or Magistrates determining whether the complaint has any merit before filing (similar to Victorian Supreme Court processes).²⁹

To facilitate the quality control process, we also support the Productivity Commission’s suggestion of greater training for Court staff and judicial officers in relation to matters with self-represented litigants.³⁰³¹

3.2. Providing Advice to Vulnerable Respondents

Many civil litigation matters would resolve sooner if respondents received legal advice during civil litigation, ADR or at least at SOE stage. Very often our legal advice to clients is to avoid litigation and look for an alternative solution.

²⁹ More research needs to be done on possible checks for vulnerable applicants who may not be in a position to advocate or verbalise their matter themselves

³⁰ Productivity Commission, *Access to Justice Arrangements, Inquiry Report*, (2014) 507-508.

³¹ Department of Justice and Regulation, *Self-Represented Litigants, Background Paper*, 7.

Expanding duty lawyer services to assist unrepresented respondents in civil litigation – such as MVA disputes and SOE matters – would go some way to achieving this end. We note the model’s potential shortcomings outlined in Chapter 14 of the Productivity Commission’s *Access to Justice Arrangements Report*. However, in our view and as outlined below, the benefits of providing legal advice to more respondents outweigh the drawbacks.

3.2.1. Clarification of Claim and Process (or Abuse of Process)

Over the last five years, the Taxi Legal Service had provided legal advice and representation to hundreds of drivers who did not understand the legal claim against them, or that civil litigation was even being conducted or defended in their names. It was only after our lawyers unravelled the complex legal issues, often late in the civil litigation, that drivers could resolve their cases.

Example: Solicitors abusing the right of subrogation

Many cases involving Magistrates’ Court litigation revealed a number of lawyers acting for taxi clubs and purporting to act for the taxi driver under a right of subrogation. However, we believed the clubs did not have that right, as the clubs had failed to indemnify the taxi drivers. Further we believed that a number of these lawyers had consistently failed to protect the interests of the taxi driver as the subrogated party. In many cases the lawyer allowed the taxi club “to step into the shoes” of the taxi driver and issued or defended legal proceedings against the other driver in a MVA. However, when the lawyer lost the case, costs and damages were awarded against the taxi driver and the club failed to indemnify the taxi driver.

A high proportion of these taxi drivers were from non-English speaking backgrounds, many from the Horn of Africa and the sub continent – groups that were often drawn to taxi driving. Many drivers presented to the Taxi Legal Service having received threats of enforcement action but with no knowledge of the civil litigation having taken place or that there was an issue in dispute (most drivers believed that they were covered by accident ‘insurance’ as taxi drivers paid money to ‘taxi clubs’ for repair of the taxi or other vehicle in the event of an accident).

Ultimately the Taxi Legal Service provided legal advice and representation to reopen or negotiate a resolution to many of these complex cases. We also undertook advocacy work to respond to this systemic issue, as described below.

Legal advice through a duty lawyer service would be invaluable to clarify the claim and process for less complicated matters, especially where respondents are vulnerable, experience language barriers or are the less powerful party to the dispute. It is important to be mindful that more complex matters require ongoing casework and support.

Case study: Taxi owner and driver

Our clients were the owner and driver of a taxi that was involved in a MVA in 2010. Police attended the scene and stated the taxi driver was at fault for the accident.

Our clients had been members of the Victoria Taxi Club and had paid the \$1,400 annual premium. After the accident, the owner reported the accident to the taxi club and provided details as required by the insurance policy. Our clients paid a double excess of \$3,000.

The taxi club paid our client \$6,430.70 as compensation for the loss of his taxi as it was a write off. Unbeknownst to our clients, the taxi club did not pay the loss/damage caused by the accident to the other party.

The driver of the other vehicle issued proceedings against our clients for damages and loss caused by the accident. The Solicitor representing the Victoria Taxi Club in this proceeding also purported to represent both our clients under right of subrogation. However neither our clients were advised of the court proceedings nor were instructions sought by the solicitor purporting to act for them.

The proceeding resulted in the Magistrate making an order that our clients pay the other party \$33,141.71 damages in the absence of our clients and the solicitor purporting to act did not appear in the matter. It was not until our clients received the letter advising them that judgment had been entered that they became aware of the proceedings.

After the judgment, a Creditor's Petition was filed with the court, seeking a Sequestration Orders against our clients' to effect payment of the judgment debt and interest, totalling \$37,012.47. Both clients were at risk of losing their homes.

Our clients attended our office seeking advice in relation to the bankruptcy proceedings. We confirm that we negotiated with the Victorian Taxi Club and the Solicitor for the other party. The taxi club

agreed to pay the judgment debt to the other party in instalments and the solicitor consented to the instalments payments, with the final instalment to be paid by June 2013.

We then applied to the Court for a series of adjournments to the hearing of the bankruptcy proceedings until the debt was paid. On payment of the final instalment, proposed minutes of consent orders requesting that the bankruptcy proceedings against both our clients be discontinued were signed by both parties and were filed with the Court.

3.2.2. Using Clients' Experiences to Advocate for Law and Policy Reform

The Taxi Legal Service achieved much more than assisting individual clients with civil litigation. These cases highlighted a number of concerning issues and formed the basis for our significant advocacy and ultimately law and policy reforms including new legal requirements for taxi owners to obtain third party insurance for their vehicle with an APRA approved insurer . Now we rarely see civil litigation of this nature in the Magistrates' Court as a direct result of our legal assistance and also our complaints to the Legal Services Board & Commissioner, involvement in the Taxi Industry Inquiry and advocacy with individual insurers and the Taxi Services Commission.

The Taxi Legal Service is a good example of the broader work that Community Legal Centres undertake to improve access to justice for classes of clients. Systemic work that achieves reforms is efficient and effective in diverting civil litigation from the Magistrates' Court on a large scale.

3.2.3. Improving Negotiations: The "Bugger Off" Letter

Over the past nine years, WEstjustice has saved vulnerable clients over one million dollars in outstanding debts using the "bugger off" letter.³²

The "bugger off" letter describes the financial and personal circumstances of a client and argues that it would be in the creditor's interest to save time and expense of litigation by waiving the debt owed to it. The letter relies on section 12 of the *Judgment Debt Recovery Act 1984* protecting a vulnerable client's income from enforcement of a debt, and has proven effective with insurance, utility and telecommunication companies, banks, debt collection agencies and even private individuals. The letter is widely accepted by the above sectors and used extensively by financial counsellors and community lawyers.

³² Ali Yildiz, *Motor Vehicle Accident Manual*, (2015) 68.

http://www.footscrayclc.org.au/images/stories/Motor_Vehicle_Accident_Manual_July_2015.pdf

Example: Dispute Settlement Centre of Victoria

The Dispute Settlement Centre of Victoria (DSCV) recently commented on the substantial drop in disputes for MVA mediations under \$40,000³³. We believe that the reduction is caused by a combination of the:

- Significant number of debt waivers sought by CLC lawyers and approved by the insurance industry; and
- Massive reduction in taxi motor vehicle accident litigation resulting from the legislative reforms achieved by our Centre in 2014.

If more respondents were referred for legal advice, more would be advised on the protection of section 12 of the *Judgment Debt Recovery Act 1984* which we believe leads to more effective settlement negotiations, as evidenced by our experiences with industry and the DSCV.

3.3. Referring Cases to Alternative Dispute Resolution Schemes

We refer to our response to the following Term of Reference (on ADR). A triage approach would ensure more matters are referred to ADR. Robust ADR has very high resolution rates, and often resolves the dispute quicker, for a smaller cost (if any) and less stress for respondents. Legal advice on the availability of ADR schemes would also divert cases from the justice system as ADR schemes can consider complaints at very late stages of civil litigation and enforcement.

*Case study: Mya**

Mya is a single mother and arrived in Australia from Myanmar in 2007. Mya accidentally collided into a tree causing \$3,200 worth of damage to her vehicle. Mya had taken out comprehensive car insurance, however the insurance provider refused to compensate Mya and also cancelled her insurance policy on the basis that she had failed to provide them with the names of all the people she had spoken to on the date of the accident. Mya provided the insurance provider with a copy of the phone records of the day of the accident and the phone numbers in which she called, however this was determined by them to be not sufficient.

An application was made to the Financial Ombudsman Service through our office, on behalf of Ms. Y, for a determination as to whether failure to provide the names of the people that Mya had spoken to on the date of the accident enables the insurance provider to deny her claim and cancel her insurance

³³ Discussion with WEstjustice staff January 2016

policy. The financial services provider then reviewed this matter and reimbursed our client for the amount of \$3200 and also refunded the premium in the amount of \$847.47 to her.

Recommendations

- There be improved quality control on complaints filed with the Magistrates' Court
- Unrepresented litigants in MVA mediations in the Magistrates' Court be referred to a CLC or duty lawyer for legal advice including the advisability of proceeding and options for settlement (CLC advice is usually to avoid litigation and look for an alternative solution)
- Government funds CLCs and Victoria Legal Aid to deliver these additional legal services
- Complaints be referred to ADR early in the civil litigation

4. Expansion of Alternative Dispute Resolution

Whether and how alternative dispute resolution mechanisms should be expanded so that more Victorians can make use of them

4.1. ADR Works

With respect to many civil law disputes, we ask why is there a Court at all?

We are a strong supporter of ADR schemes and believe robust ADR schemes could effectively deal with substantially more civil law cases. Many ADR schemes, especially those supported by industry codes of practice, help balance the power between parties in dispute and thus improve access to justice for our clients. We particularly support the process of regular independent review applied to the most effective schemes.

We note with concern that most forms of State ADR, including VCAT, Dispute Resolution Centre of Victoria and Consumer Affairs Victoria are not currently the subject of independent external review. Our support for an expansion of ADR processes is predicated upon an acceptance of the need for such external review to be applied to all forms of ADR.

We recommend the pilot of a new ADR scheme to consider and resolve a sample of small claims and/or civil disputes currently determined by hearings. WEstjustice regularly assists clients with disputes or potential disputes in the Financial Ombudsman Service (FOS), Fair Work Ombudsman (FWO), Consumer Affairs Victoria, DSCV and Family Relationship Centre.

4.1.1. Simplifying the Process

Some ADR schemes are largely conducted ‘on the papers’ and attract no cost orders for parties to the dispute. It is far easier for our clients to bring a claim in an ADR scheme where there is no hearing and case managers of the ADR scheme can help clients navigate the system. Clients can use interpreters when dealing with ADR schemes, and can also take paperwork to Community Legal Centres for advice and guidance on the process.

A simplified process means that ADR schemes have a substantial capacity to consider and determine large numbers of disputes. For example, FOS resolved 34,714 disputes in the last financial year, up

four per cent.³⁴ They also have a number of working groups aimed at improving access for vulnerable and disadvantaged applicants seeking help.³⁵

We however, reiterate the importance of particularly vulnerable groups such as newly arrived or illiterate clients needing more assistance from a CLC or other legal advisor. These are a few examples from our dealings with FWO that demonstrate that without our assistance, their claims may have gone unresolved.

Case study: Pavel*

Pavel is a newly arrived refugee. He does not speak much English and cannot write. He got his first job as a cleaner. He often worked 12 or 14 hour shifts but was only paid for five hours' work each shift. He was also paid below the minimum pay rate. Pavel came to our Centre because he had not been paid his last two weeks' pay. A community worker had tried to assist Pavel to complain to the Fair Work Ombudsman, but because they didn't know what to complain about, the complaint was closed. WEstjustice helped Pavel make a new complaint to the Fair Work Ombudsman and negotiated with his employer to receive back payment. We later learned that Pavel assisted two of his friends to negotiate back pay and legal pay rates going forward.

Case study: John*

John is from South Sudan. He worked at a factory and was not paid the minimum wage. He is illiterate and does not speak much English. WCLC assisted John to calculate his underpayment and write a letter of demand. When this was not successful, they helped John fill out the FWO complaint form. Inspectors from the Overseas Workers team worked with John and WEstjustice, and helped John recover his wages.

4.1.2. Addressing the Power Imbalance

Too often our legal advice to clients is that it's not worth pursuing or defending your claim in Court, given the time, stress and threat of legal costs. Similarly, almost all of our clients do not want to

³⁴ FOS, *Annual Review 2014-2015*, (2015) 3. <https://www.fos.org.au/custom/files/docs/20142015-fos-annual-review.pdf>

³⁵ *Ibid*, 36. FOS have improved guidelines for staff and have also introduced a priority call system.

pursue or defend a legal claim because of fear and inaccessibility of the law and court, the threat of legal costs from the other party and the cost of their own legal representation.

The Publicity Monster example below illustrates how 'frequent flyers' and their representatives can manipulate the court or VCAT system to the vulnerable party's detriment.

Example: Publicity Monster Pty Ltd

Publicity Monster is renowned for its abuse of process and power in litigation. In a large number of cases in VCAT and the NSW Consumer, Trader & Tenancy Tribunal, the company's representatives had used a range of different addresses making service difficult and protracting proceedings when they fail to appear due to an apparent lack of notice. This time, the vulnerable party is the applicant to the proceeding, and the applicant is forced to attend multiple delayed and postponed and hearings and re-hearings where Publicity Monster fails to turn up. If the applicant isn't put off from the multiple inconveniences (or tactics) of Publicity Monster, he or she is likely to win as the Company appears to have never won a substantive case.

On the other hand, in our experience, ADR schemes combined with Industry codes of practice and Internal Dispute Resolution can prevent abuse of the power imbalance.

Case Sue's Story

Sue, who arrived from Vietnam several years ago, found herself a victim of being misled by a loan contractor into signing a loan contract for an expensive car. The creditor bank pursued her for approximately \$35,000.00.

This loan contract had been facilitated by a broker and approved by the bank despite the fact there were a number of issues that were unacceptable about the agreement. Notably, the bank and the broker involved had not taken adequate steps to ensure that Sue understood the contract, and given her financial and personal circumstances was not in a position to service the loan.

We wrote a letter of complaint to the bank stating it was in breach of section 128-131 of the National Consumer Credit Protection Act 2009 (Cth), that the bank had engaged in unconscionable conduct, and that the loan was an unjust transaction within the meaning of section 76 of the National Credit Code.

Although the bank did initially reject our request to waive the debt based upon these grounds, upon appeal to the bank customer's advocate, our request for waiver of the \$35,000.00 was successful.

Sue's case highlights the ability of a CLC, relying on an Industry code of practice and an IDR process within a major financial institution to resolve the problem without the recourse to either the courts or formal ADR.

In the event that civil disputes cannot be resolved through the use of industry codes and IDR, consumers have access to effective ADR schemes such as FOS. FOS is an industry-based ombudsman service with investigative powers and a determinative function. The case managers take active roles in liaising with the parties and exerting some influence where actions fall below the industry standard. Case managers are also not swayed by the size or power of FOS' members. FOS' determinations are publicly available, ensuring public interest determinations can be made and relied upon as precedent.

Case study: Gemma* – Successful legal assistance

Gemma had fallen behind in her mortgage repayments and the bank had initiated court proceedings to repossess her property and demanded payment of the loan in full because she had fallen into arrears. Gemma is a single mother with adult children living at home who do not contribute to the day to day living expenses. Gemma's sole source of income is her Centrelink benefits.

Gemma had been served with a writ for repossession. In order to stay the legal proceedings, we made a complaint to the FOS on the grounds that the bank had not genuinely considered Gemma's hardship. The FOS complaint stayed the proceedings in the Supreme Court. The FOS complaint resulted in the bank offering a resolution to the complaint and allowing Gemma to continue with her repayments and also allowed her time to pay off the arrears. The agreement was for her to continue with her contractual repayments and also make a one off payment of \$500 and then \$40 per fortnight towards the arrears until she had paid off the arrears. If the client complied with this arrangement, the bank would stop all legal proceedings.

We were able to successfully come to an arrangement with the bank which allowed the client to keep her home and continue on with the previous arrangement.

As proposed in our response to *Alternative Services* above, where the ADR process requires mediation between the parties, those parties who fall within community legal sector guidelines should first be referred to a CLC or duty lawyer for advice.

4.1.3. Quality Control

One significant control on the ADR schemes supported by industry codes of practice is that they are annually reviewed against strict national benchmarks, and produce Annual Reports. Every three years these ADR schemes are also assessed for continuing relevance and currency. A pilot ADR scheme for small claims and/or civil disputes should be evaluated and recommendations should shape any future ADR scheme established following the successful pilot. Also see *section 5.3*.

Our clients' overall high levels of satisfaction with ADR schemes mirror the 70-80% satisfaction rate outlined in chapter 8.2 of the Productivity Commission's *Access to Justice Arrangements Report*. In stark contrast, our clients' feedback following appearances unrepresented in Court or tribunals is often that the entire system is unfairly stacked against the vulnerable party, as illustrated in our response to *Alternative Services* and the Publicity Monster example above.

The Magistrates' Court's current practice of referring to mediation certain civil proceedings where a notice of defence has been filed is a good start. Yet anecdotally we have heard that these mediations can be conducted in favour of the represented party, and in one case the mediator had no knowledge of section 12 of the *Judgment Debt Recovery Act 1984* protecting a vulnerable respondent's income from enforcement action. We therefore support the Productivity Commission's suggestion in chapter 8.4 of its *Access to Justice Arrangements Report* for quality control, training – even compulsory accreditation of mediators. We believe an external ADR body with stricter benchmarks would be more effective in ensuring quality control of its case managers and mediators.

4.1.4. Keeping Cases Out of Court and VCAT

We support the Productivity Commission's Recommendation 8.1 in its *Access to Justice Arrangements Report*, calling for more default dispute resolution mechanisms and targeted pilots of such ADR processes. Where IDR is unsuccessful or unavailable, ADR should be the preferred model of dispute resolution for most small claims, tenancy, civil litigation (less than \$50,000) following the successful pilot civil law ADR scheme.

The ADR process would preferably take place before the court or tribunal process begins. However, where a complaint or claim that fits within the ADR scheme's jurisdiction is filed without ADR having been attempted, the complaint or claim should be referred to ADR (or at least the ADR process remain open until a reasonable time after judgment is entered). Any referral to ADR should stay the litigation until the dispute is resolved by the ADR scheme.

In addition to the Magistrates' Court and VCAT referring matters to ADR, it is the joint-responsibility of the legal profession, government agencies and other advisory or community support services to inform the public of the right to have a matter determined through ADR. We already do this with respect to the relevant ADR schemes outlined in Attachment B to the discussion paper, and we advise clients on benefits and drawbacks of such schemes. We expect that Government would produce and make available accessible information about any ongoing ADR scheme(s) it develops.

Recommendations

- A pilot ADR scheme for small claims and/or civil disputes be established, with a pilot group of 100 new small claims and/or civil disputes to be considered and resolved
- An evaluation of the pilot civil law ADR scheme be conducted, reviewing its timeframes, outcomes and stakeholders' feedback
- If the pilot is successful:
 - Ongoing civil law ADR schemes be established with jurisdiction to determine small claims and civil disputes less than \$40,000;
 - Government produces clear and accessible information about the ADR schemes for public and community sector use; and
 - Scoping be undertaken to expand the ADR scheme's jurisdiction or establish a new ADR scheme to cover tenancy and small property disputes.

5. VCAT Reform

Potential reform to the jurisdiction, practices and procedures of the Victorian Civil and Administrative Tribunal (VCAT) to make the resolution of small civil claims as simple, affordable and efficient as possible

5.1. Our Clients Need Assistance

WEstjustice is the recipient of funding from Consumer Affairs Victoria (CAV) to provide advocacy services through the provision of advice, CLE, negotiation, support and representation at the Victorian Civil and Administrative Tribunal (VCAT), on consumer and tenancy matters for vulnerable and disadvantaged clients.³⁶

Our consumer service is available to all clients of WEstjustice and consumers referred from CAV and Consumer Action Law Centre (CALC) covering the following Local Government Areas: Banyule, Brimbank, Darebin, Hobsons Bay, Hume, Maribyrnong, Melbourne, Melton, Moonee Valley, Moreland, Nillumbik, Whittlesea, Yarra and Geelong. Referrals are assessed against a number of vulnerability factors before they are deemed appropriate to be referred to our service. Factors include victim of family violence, intellectual or physical disability, limited English proficiency, mental health issues and substance abuse. We are funded to provide one-on-one assistance to vulnerable and disadvantaged consumers and are able to offer representation in the Civil Claims List. Our Advocate will only offer representation to clients that are the most needy; where there are recognised barriers and self-representation can lead to further disadvantage.

5.2. We Need Change

Over the years, we have witnessed VCAT moving away from their core principle of providing “Victorians with a low cost, accessible, efficient and independent Tribunal”.³⁷ Similar concerns were raised in submissions to the Productivity Commission over timeliness, affordability and ‘legalism’.³⁸

Warranted concerns over VCAT becoming overly legalistic have made it even more difficult for vulnerable clients to help themselves. In turn, it has led to situations where clearly one party is at a significant disadvantage even before appearing in front of the Tribunal member (such as matters

³⁶ CAV funds us for two services – Tenancy Advice and Advocacy Program (TAAP) and Consumer Advice and Advocacy Program (CAAP)

³⁷ VCAT Service Charter: https://www.vcat.vic.gov.au/sites/default/files/vcat_service_charter.pdf

³⁸ Productivity Commission, *Access to Justice Arrangements, Inquiry Report*, (2014) 364.

between a trader/owner of a business and consumer or a landlord and tenant). Mediation also needs to take this into consideration. The experience of our Consumer Advocate has been documented below, stressing some of our concerns.

5.2.1. Failure to Recognise Imbalance and Vulnerability of Consumers

Case study: Boris* – Failure to recognise imbalance and vulnerability of consumers

The following case highlights issues of:

- Timeliness
- Inappropriate referral to mediation
- Lack of impartiality
- Imbalance of power
- Undue duress on an unrepresented litigant

Boris who is in his 70s and has some difficulties with English, engaged a trader to install an air-conditioning unit at his home for an agreed price. After the trader removed roof tiles and commenced work on the roof he was told there would be additional costs to complete the work. He felt he had no choice but to agree on the spot or he would be left with a hole in his roof.

After the installation, Boris noticed his roof was now leaking. He also had the unit inspected and was advised it was faulty. Boris tried unsuccessfully over three years to have the issues addressed and was referred to our Centre by CAV for assistance, claiming he was being pursued for a debt he had fully paid.

After 12 months of negotiations, including face-to-face discussions and agreements reached that were not honoured by the trader, we issued in VCAT. VCAT scheduled a hearing over 10 months later and then on the day of the hearing VCAT offered a mediation first, which the consumer attended with the Advocate. At the mediation, the company refused to discuss the claim or make any offer to settle the claim; mediation failed to settle the matter. The mediator told the Advocate and the consumer without reading the application that there is no merit in the claim or basis in law and the trader will not be making an offer. Prior to the hearing, the Advocate requested permission to represent the consumer, which was denied and the hearing was then adjourned. The consumer attended the re-scheduled hearing alone without representation and the Tribunal member insisted that the consumer

and trader spend time alone to try and reach agreement first. During that time, the consumer felt pressured to settle and agreed to reinstate the old unit which no longer met safety standards as it had been exposed to the weather for a period of over five years.

Recommendations

- Allow legal representation or an Advocate to represent a litigant where there are clearly power imbalances – review of the VCAT Act to expand current criteria to appropriately eligible parties for representation (ie. mental illness)
- Referrals to mediation should only be made when both parties are willing to negotiate

5.2.2. Lack of Transparency

We have also observed issues in relation to inconsistent decisions on fee waivers. One criterion is to be a concession card holder. To be in receipt of Centrelink benefits, one must meet Centrelink's rigorous test of financial hardship. Although VCAT seemingly accepts that card holders are eligible to apply for fee waivers, it is still at their "discretion" to deny applications, which can lead to prolonged application processes.

Case study: Tan* – Fee waiver process not transparent

Our Centre submitted an application to have Tan's matter heard in the Civil Claims list. This application included a Concession Fee Waiver Application and copy of his current health care card. Five weeks later, Tan was advised that for his application to progress he must either pay the fee or complete a second VCAT application form for fee waiver.

Our client again completed the application for fee waiver form and also provided additional information including a bank account balance print out and a brief letter of support from our Centre. The provision of any other information that may show further evidence of financial hardship is offered as an option not a requirement.³⁹

³⁹ VCAT, Fee Waiver Guidelines and Forms:
https://www.vcat.vic.gov.au/adv/system/files/Fee_waiver_guidelines_and_forms.pdf

Days later, in response to this second submission for fee waiver, our Centre received a phone call from the VCAT registry and was advised that in addition to the “Concession Fee Waiver Application” our client was required to also complete a second application “Application for Fee Waiver – Financial Hardship”. Our Advocate queried this, as the full financial hardship application was only for those not eligible for the Concession Fee Waiver Application, which we believed our client was eligible for.

In the interest of expediency for our client who was trying to simply lodge his application in a timely manner so that his matter could be heard, we again arranged for the additional form to be completed and returned to VCAT. We found this process both unnecessary and time consuming, which is contrary to the fee waiver process in place at VCAT.

We wrote to the Senior Registrar and asked if the eligibility criteria to include the financial situation of the applicant at the time the fee is payable, had changed and if we had not been informed as the information is not available on the VCAT website.

In response we were advised that the standards had not changed and that our clients’ fee waiver application should have been accepted initially and that VCAT registry staff would be trained to ensure issues like this would not occur again. However, we are aware other consumers have since had the fee waiver application for concession rejected as described above.

Recommendations

- Reduce fees
- Add a question to the Application form on client’ disadvantage or vulnerability, providing reasons, to flag to staff there is an obligation to then refer for advice
- Increase staff training on vulnerability factors and what to do
- Have a more transparent system to remove discretionary decision making for fee waivers

5.2.3. Enforcement Concerns

Where a client is successful in navigating the VCAT process and has a decision made in their favour, there can potentially still be issues where the other party does not comply. As VCAT does not

enforce Orders, escalation to Court can be a huge burden to the client, both timewise and financially.⁴⁰

Case study: Mohammed* – Without enforcement, an order is not meaningful

Mohammed is an independent contractor on a building site. He has not been paid over \$10,000 owing for work he did last year. Our Centre assisted Mohammed in preparing for his VCAT hearing. His employer did not appear (claiming he was sick, however no evidence was provided to VCAT). Mohammed won but has not paid. He was forced to further waste his time and money trying to go through the system for what was owed to him. He has been unsuccessful.

There is scope for specialisation, with a third of decisions in favour of consumers going unpaid by traders. Enforcement of Orders could be a specialist role, whereby a case worker could provide specialist advice and assistance where clients are successful in obtaining a VCAT or court order, but cannot get the respondent to comply.

We believe such a model would see the local CLC assist clients with the first phase of enforcement by sending letters of demand for compliance of orders, registering the orders in the Magistrates' Court, investigating the company to ensure it is still operating and other relevant enforcement information. But when these processes fail to yield results, the ability to refer the matter to a specialist enforcement area for assistance with enforcement which would include assessing of best approach of the available enforcement options, including issuing summons for oral examination, sheriffs warrant and/or in limited cases that warrant it, proceedings for bankruptcy.

This team could also receive referrals from VCAT and Magistrates' Court referring vulnerable members of the public who require assistance with enforcement.

Recommendations

- Have a dedicated lawyer to pursue enforcement across Victoria – benefits would be twofold; gained knowledge/expertise and consolidate data for further improvement

⁴⁰ VCAT, Guide to Enforcing a Monetary Order:
https://www.vcat.vic.gov.au/system/files/guide_to_enforcing_a_monetary_order.pdf

5.3. Assessing Performance Against Industry Benchmarks

Along with CALC and the Tenants Union of Victoria, WEStjustice proposes that VCAT be assessed against benchmarks used to measure the performance of industry External Dispute Resolution (EDR) schemes.

There are growing concerns that low income, disadvantaged or vulnerable consumers lack access to VCAT. Key reasons for these concerns are:

- The recent increases to application fees make VCAT unaffordable to low income applicants;
- The process for applying for fee waivers on the basis of financial hardship are unnecessarily complex and seem open to arbitrary decision making;
- The procedural requirements for applicants are complex and burdensome;
- VCAT requirements to produce expert reports and witnesses, and the need for applicants to self-represent against respondents, whom have a better knowledge of the jurisdiction, fails to account for the imbalance of power between disadvantaged applicants and respondents. In a recent example, VCAT required a large number of elderly applicants in a retirement village dispute to attend a preliminary hearing in the city, despite being represented. Also see *Boris' case study* (page 37) where an unrepresented elderly applicant was required to mediate with a tradesman despite many months of unsuccessful negotiations prior to the hearing;
- The inability of the VCAT legislation and systems to identify systemic problems with traders. This leaves individual applicants to pursue matters as one off disputes against traders with a known record for exploitative behaviour; and
- The difficulty in consumer enforcement of VCAT decisions. Funded consumer advocacy groups report up to 33% of decisions in favour of consumers are unpaid by traders.⁴¹

The following benchmarks are used to approve and monitor industry EDR schemes and are directly transferrable to VCAT:

- *Accessibility*: The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.
- *Independence*: The decision-making process and administration of the scheme are independent from scheme members, to ensure they are objective and unbiased.

⁴¹ A letter from the three aforementioned Centres was sent to Martin Pakula MP, Attorney-General on this research proposal on 28 October 2015

- *Fairness*: The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.
- *Accountability*: The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems to ensure public confidence and allow assessment and improvement of its performance
- *Efficiency*: The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.
- *Effectiveness*: The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.⁴²

Industry EDR schemes must meet these benchmarks before they can be approved and are measured against them at regular reviews. They provide an accepted standard, or at least a starting point, for assessing VCAT.

Recommendations

- Apply Industry External Dispute Resolution (EDR) Benchmarks when assessing the performance of VCAT and taking appropriate measures to improve raised concerns

5.4. Online Technology

The Productivity Commission has found that use of information technology has had a positive impact for administrative and back-of-office functions and the adoption of greater use of online resources will assist those that are able to self-represent/need minimal support.⁴³

However, the clients that WEstjustice commonly assist are unable to represent themselves. We provide a level of service appropriate to specific clients, including home visits to isolated and vulnerable consumers and tenants, arranging interpreters and a strong focus on providing face-to-face client contact to improve communications and support when necessary. A large proportion of our clients require an interpreter, adding to the complexity of casework and time spent on each

⁴² ASIC Regulatory Guide 139: <http://download.asic.gov.au/media/1240742/rg139-published-13-june-2013.pdf>

⁴³ Productivity Commission, *Access to Justice Arrangements, Inquiry Report*, (2014) 375

matter. Most of our clients are from non-English speaking backgrounds, with limited English, are elderly or disabled. A large percentage of our client group are unable to navigate online information portals or other phone based services and requires the intense level of assistance our program provides.

Recommendations

- Offer language help to complete forms by VCAT staff (where clients are unable to access it)
- Provide access to a Duty Lawyer upon request or observed need

6. Pro Bono Legal Services

The provision and distribution of pro bono legal services by the private legal profession in Victoria, including:

- *Ways to enhance the effective and equitable delivery of pro bono legal assistance*
- *Opportunities to expand the availability of pro bono legal services in areas of unmet need*
- *Options for expanding existing incentives for law firms within the Victorian Government Legal Services Panel*

6.1. Our Experience

Similar to all Victorian CLCs, our Centre has limited funding which is stretched to its capacity in trying to assist the most vulnerable and disadvantaged clients. The work of WEstjustice relies heavily on the contributions of our pro bono partners to enhance and supplement our work and we have successfully maintained a number of positive relationships. However, this does not come down to luck. Fostering partnerships requires resources from our end too. These are some of our experiences.

Example: Students Clinics

WEstjustice offers two forms of student clinics. We have a close working relationship with Victoria University (VU) who funds the Sunshine Youth Legal Centre (SYLC), auspiced by our Centre. In return, we provide VU students with the opportunity to gain valuable practical experience through SYLC and a number of other clinics we offer, including the Refugee Legal Service and Fines Clinic out of our Werribee Office. SYLC is located in the Visy Cares Hub, which houses a number of non-legal service providers to support young people. Co-location in the same building has allowed for a more holistic service, allowing direct and almost instant referrals to other services, including Headspace, YouthNow and Youth Support+ Advocacy Service (YSAS) for employment, mental health and substance dependence support services. This co-operative approach has allowed for better outcomes for our vulnerable clients.

Our VU student placements change every semester and are on a voluntary basis. These student clinics require a huge time commitment from the supervising staff member in terms of training and

supervision and often, once we've put in the time to get the students to reach a helpful standard, they then move onto other opportunities or commitments in their lives.

We also have a partnership with Deakin University for our Family Law Clinic, where the students can choose to do an internship, forming part of their course and gaining credit (30 days of practical legal experience are a hurdle requirement before they are eligible to graduate), and their work is assessed by the host organisation (WEstjustice), which makes up a portion of their end mark. This again, requires even more resources, but better commitment from the students. Some students stay on to volunteer at the WEstjustice Family Law Clinic or assist duty lawyers in Intervention Order matters at Werribee Magistrates' Court.

Students are hugely helpful for administrative or paralegal tasks but there are challenges in quality when it comes to more substantive tasks such as drafting letters. For law students it is important to have a clear training and supervision structure; manage expectations from the beginning in terms of time commitment and the kind of work they will be doing; and foster more formal partnerships with Universities to recruit exceptional students.

Example: Employment Law Service

WEstjustice works largely on a clinic based model. This allows for specialisation and expertise in a key area of law. With this, we have been able to attract experienced pro bono lawyers to support our services in areas of legal need. Corrs Chambers Westgarth Lawyers have provided experienced employment lawyers from their Employment, Workplace Relations and Safety team who have been an enormous support, in an area that can be quite complex. K&L Gates have also been vital in strategic advice and CLE to staff and community members. We wish to thank them both.

We have found that for the assistance to be of most value, roles must be clearly defined and the skills of the pro bono lawyers must be matched to the task at hand. Ongoing training and supervision on our end is also important to produce the best returns. Periodically, training is offered to new and current volunteers on employment law matters and the refugee experience.⁴⁴ Our volunteers attend the service on a rostered basis – this consistency allows them to develop their skills and follow through to the end of a matter.

⁴⁴ Speakers range from the Fair Work Ombudsman, Victoria Legal Aid, private law firms and local settlement agencies

Our position as a CLC allows us to identify systemic issues that may not be privy to the private sector. By working with a CLC, it offers private lawyers the opportunity to give back and administer justice for those that need it most. It also helps improve their client contact skills, advocacy experience (for example in conducting Fair Work Commission conciliations) and overall satisfaction.

Example: Refugee Fines Clinic

The Refugee Fines Clinic has been around for almost 10 years. We wish to thank HWL Ebsworth Lawyers and King & Wood Mallesons for their pro bono assistance. Managed by a Senior Lawyer from each firm, a roster of lawyers attends our office to see newly arrived clients in relation to infringements. They are able to offer resources that we are unable to internally. In turn, they have gained valuable knowledge and a rewarding experience by assisting this vulnerable group which would be far removed from private practice.

Example: Barristers and Specialists

Assistance for advice and court representation forms part of our pro bono partnerships. We are able to refer complex matters and seek barrister assistance for significant legal cases. Our Taxi Legal Service has litigated at least 12 complex matters in the Magistrate's Court over the past 18 months with the assistance of Counsel. These matters generally involved multiple parties, re-hearings, counter claims, third party notices and contested hearings and could not have been pursued without that assistance.

Recommendations

- Offer incentives to continue volunteering and request a minimum time commitment (ie. variation in role, more responsibility, updates on matters to show contribution)
- Have clearly defined roles and match skills and expertise to the requirements
- Volunteer consistently – ad hoc work does not add value to the service
- More secondments/opportunities to shadow barristers/partnerships with law firms doing pro bono work

6.2. Expansion of Pro Bono Legal Services

The use of pro bono services is entrenched in the work of CLCs. They offer support in the CLC space, giving us the capacity to respond to systemic issues in our community. There is a limit to how much pro bono assistance a service can attain, therefore it is essential to think of ways to expand the pool in a strategic way.

6.2.1. Addressing Unmet Need

As part of this Review, the Department is looking into whether continuing professional development (CPD) credit could be extended to pro bono activities. Currently, CPD activities include lectures, conferences, published legal publication and membership of a legal committee.

These activities must:

- Be of significant intellectual or practical content and must deal primarily with matters related to your practice of law;
- Be conducted by persons who are qualified by practical or academic experience in the subject covered; and
- Extend your knowledge and skills in areas that are relevant to your practice needs or professional development.⁴⁵

We argue that pro bono activities where legal expertise of the pro bono agent is matched with an area of law, does add to professional development. This is particularly relevant for areas of systemic issues and areas of unmet need, such as the taxi driver industry, door to door sales, and suing ratepayers experiencing financial hardship which have been areas impacting on vulnerable clients that allow for improved legal knowledge and outcomes (also see *Employment Law Service example*, page 45).⁴⁶ This sentiment was also shared by the Lawyers Weekly 30 under 30 finalists who suggested lawyers have “an obligation to give back”.⁴⁷

6.2.2. Costs Orders

The use of pro bono lawyers and barristers has become more prevalent at our Centre, particularly for taxi litigation matters where we issued and defended proceedings against taxi clubs, operators, owners and insurers. The number of files requiring court representation has tripled from the previous year. Hours of work and resources are put into each matter – having conditional cost agreements would mean recognition of success and may act as further incentive for smaller firms.

⁴⁵ Law Institute of Victoria, Continuing Professional Development (CPD) Compliance, <http://www.liv.asn.au/For-Lawyers/Regulation/CPD-compliance>

⁴⁶ Reports are available on our website: <http://www.footscrayclc.org.au/brochures-publications/>

⁴⁷ Stefanie Garber, *Young Lawyers call for compulsory pro bono*, Lawyers Weekly (2015), <http://www.lawyersweekly.com.au/news/16546-young-lawyers-call-for-compulsory-pro-bono>

Cost orders can be awarded at the discretion of the courts to compensate the successful litigant. Although there is no legislation stating that all pro bono matters should allow for cost orders, there is a push for it.⁴⁸ The decision made by the Victorian Court of Appeal, in *Manieri & Anor v Cirillo* [2014] VSCA 227, favoured that a party who is represented on a pro bono basis can be awarded costs.⁴⁹ The risk of having to pay the other parties legal costs, could also incentivise the parties to negotiate an offer earlier, further reducing strain on the court system.⁵⁰

Recommendations

- Expand CPD credit criteria to include defined pro bono activities
- Pro bono/CLC lawyers should be able to claim costs via conditional cost agreements
- Government should continue to facilitate pro bono relationships

⁴⁸ Australian Pro Bono Centre, Recovery of Costs, <http://www.nationalprobono.org.au/page.asp?from=3&id=271>

⁴⁹ *Ibid*

⁵⁰ David Hillard, *Lawyers acting pro bono for successful litigant can recover costs from losing party* (2014), http://www.claytonutz.com/publications/edition/02_october_2014/20141002/lawyers_acting_pro_bono_for_successful_litigant_can_recover_costs_from_losing_party.page

7. Duplication

Whether there is any duplication in services provided by legal assistance providers, and options for reducing that duplication, including the development of legal education material

7.1. We Need Community Development and Legal Education

Community development (CD) and community legal education (CLE) are integral to the role and functions of a Community Legal Centre.

CD and CLE enable CLCs to:

- Develop close relationships with local communities and the service providers working to support them, thereby enhancing their accessibility;
- Undertake prevention and early intervention work with newly arrived and vulnerable communities, who are more likely to be impacted by the justice system;
- Build the legal capacity of newly arrived and vulnerable communities;
- Monitor, assess and respond to emerging legal need; and
- Build the evidence base required to undertake effective law reform.

Good CLE is guided by a community development framework. If it is to achieve its desired outcome, CLE must:

- Build upon the strength of local community relationships;
- Address identified legal need;
- Be consultative, participatory and flexible; and
- Respond to the particularities of a target audience's learning needs, legal capacity and lived experience.

CLE encompasses a broad range of approaches and methodologies, with the development and delivery of face-to-face legal information workshops and the publication of legal information resources being the most widely utilised of these.

7.1.1. Different Audience, Different Context

Given the above CD framework, face-to-face CLE workshops must necessarily be specifically adapted to the needs of any given target audience. While the law is the law and the legal content in a CLE workshop may remain static, the lived context in which this material is presented will differ from

audience to audience. As such, a CLE workshop on tenancy, for example, may require several different iterations depending on the particular audience at any given time. This does not constitute 'duplication'. Rather, it represents good CD practice.

Legal educators often rely on existing legal information resources to supplement face-to-face CLE workshops or respond to legal need outside the framework of face-to-face delivery. These resources come from a range of sources including but not limited to Victoria Legal Aid, courts, ombudsman services and government departments. These resources must often be adapted in order to respond effectively to the particular learning needs, legal capacity and lived experience of a given audience. Again, this does not constitute 'duplication'.

At times, a CLC will identify a gap in the provision of legal information resources. This is particularly the case where the CLC is actively working on the ground in local communities, in direct response to emerging legal need. In these limited circumstances, the CLC may develop new legal information resources to meet that emerging need. In such cases, funding for this work more often than not comes from non-CLSP sources including, notably, philanthropic foundations.

As these newly developed legal information resources respond to emerging need, they are often relevant across geographic areas and are thus expanded or 'upscaled' by larger providers including Victoria Legal Aid. In this way, what began as the localised work of a CLC comes to benefit a much wider audience, often on a state-wide basis. Two case studies drawn from the former CLCs which now constitute WEstjustice are presented below to illustrate this fact:

Example: Your Legal Rights: A Practical Guide to Everyday Legal Issues

This resource for Communities of Burma was developed in 2011, at a time when language specific legal publications for non-Burmese ethnic minorities living in the West of Melbourne were limited. The resource was funded by the Victorian Multicultural Commission, Hobsons Bay City Council and Melbourne Community Foundation. The publication constituted a series of stand-alone, plain language fact sheets on relevant areas of the law, which were translated into community languages. Its development was preceded by intensive consultation with local members of Communities of Burma. After completion of an initial distribution strategy by the publishing CLC, all copies of the publication were distributed state-wide through Victoria Legal Aid's online ordering system. Victoria Legal Aid also used the publication in its own face-to-face community legal education.

Example: Getting to Know the Law in my New Country / What's the Law?

This resource was developed in response to emerging legal need amongst newly arrived migrants in the West of Melbourne. It involved extensive consultation and collaboration with English language teachers, was funded by the Legal Services Board and developed in partnership with AMES settlement agency. After becoming involved in the distribution of the resource, Victoria Legal Aid upscaled 'What's the Law?' to the national level. It is now produced by the National Legal Aid Community Legal Education Working Group, is used by legal educators across the country and has been endorsed as an effective onshore education program by the Commonwealth Department of Immigration and Border Protection.

Recommendations

- Collaborate with other agencies to effectively respond to community needs
- Fund adaptation of resources nationally

8. Self-Represented Litigants

Options for providing better support to self-represented litigants throughout the Victorian justice system.

8.1. Distinction Between Self-Represented and Unrepresented Litigants

The significant issue is that many of our clients find themselves as respondents to civil litigation – it is not a choice. Many of our clients do not understand what they were agreeing to or cannot afford to pay a debt or afford legal representation. Our clients want a solution, not their day in Court.

We also think there is a real distinction between self-represented litigants and unrepresented litigants or respondents. Some self-represented complainants or plaintiffs are acting out of principle whereas many unrepresented respondents are experiencing significant hardship, and the hardship worsens as a result of the litigation. We note that for particular matters such as employment where we would assist the applicant, self-representation may act as a barrier for vulnerable groups. Being quite a complex area of law, clients with low literacy may have difficulty filling out forms, or articulating their problem. This is where they need legal assistance to help enforce their rights. Having a duty lawyer may be beneficial if prior face to face support cannot be obtained.

We refer to and repeat our submissions and recommendations made above in response to Terms of Reference 2 and 3 (see *Alternative Services & Expansion of Alternative Dispute Resolution*), that will go some way to providing better support to unrepresented litigants.

8.2. Accessing interpreters

A discrete difficulty many of our clients experience is the challenge in accessing interpreters for civil litigation matters. Currently interpreter access in the Magistrates' Court is limited to criminal and family violence matters, not other civil law matters where the law, issues and process can be extremely complicated and daunting.

On site and experienced interpreters are clearly the preferences for complicated legal proceedings involving parties with limited or no English. However, in the absence of resources, some compromise may be reached with occasional telephone or Skype interpreting.

Recommendations

- Government should provide greater investment into interpreter services for civil law proceedings
- See *recommendations for Terms of Reference – Alternative Services & Expansion of Alternative Dispute Resolution*