

WEstjustice

Submission on Essential Services
Commission draft strategy
Getting to fair: Breaking down barriers to
essential services

BY

WESTJUSTICE (WESTERN COMMUNITY LEGAL CENTRE LTD)

20 JUNE 2021

Acknowledgements

We acknowledge the Traditional Custodians of the land on which we work, the Wurundjeri people of the Kulin Nation, and pay our respects to their Elders past, present and emerging, noting that sovereignty was never ceded.

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Publication

We consent to this submission being published on the Essential Services Commission webpage.

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1. Introduction

WEstjustice appreciates the opportunity to make this submission on the Essential Services Commission's (ESC) draft strategy – *Getting to fair: Breaking down barriers to essential services*, 6 May 2021 (the draft strategy) in its capacity as a community legal centre (CLC) operating in the Western suburbs of Melbourne.

We would like to congratulate the ESC on its collaboration with the community to develop the draft strategy and commend the ESC on identifying eight important themes that accurately reflect how consumers can experience barriers to accessing essential services.

Overall, we welcome the draft strategy. It is clear that the ESC is leading a commitment to better practice for consumers experiencing vulnerability. However, in addition to this leadership, we are of the view that the true indicator of successful engagement with all consumers, including those experiencing barriers, will be ongoing cultural and attitudinal change across all regulated services, not just within the ESC.

In drafting and implementing this strategy, the ESC has the opportunity to be leaders in the space and set the standard for retailers and other regulators. Only through this collaboration will we be able to achieve positive outcomes for consumers who are experiencing vulnerability, which has only been exacerbated by the COVID-19 pandemic.

This is why it is so critical to get this right.

While we endorse the current goals and initiatives already identified by the ESC, we believe that there are some critical areas that would strengthen the practical implementation of the draft strategy. The areas that we have identified which can be strengthened are:

- local government and rates hardship;
- debt collection practices;
- enforcing retailer compliance; and
- engagement with First Nations consumers.

This submission is informed by the stories and experiences of our clients who have accessed the assistance of our Economic Vulnerability Program, including from our Consumer Law Clinics, Mortgage Wellbeing Service, and Economic Abuse Clinic.

2. About WEstjustice

WEstjustice (Western Community Legal Centre Ltd) was formed in July 2015 as a result of a merger between the Footscray Community Legal Centre, Western Suburbs Legal Service and Wyndham Legal Service.

WEstjustice is a generalist CLC with offices in Werribee, Footscray and Sunshine. We provide free legal advice, representation and education to people experiencing vulnerability or systemic disadvantage in the Western suburbs of Melbourne. Relevantly, our specialised Economic Vulnerability Program offers consumer, debt and financial services legal clinics, which combined have successfully challenged or waived over \$830,000 of debt and obtained over \$480,000 in compensation for our clients in the past year.

The Local Government Areas (LGAs) we offer our services to have historically experienced the most disadvantage in Melbourne, characterised by low Socio-Economic Indexes for Areas (SEIFA) scores and higher unemployment rates than the Victorian average. The cities of Wyndham, Maribyrnong, Melton and Brimbank had further COVID-19-related decreases in employment which significantly exceeded both the Greater Melbourne and state averages, even when allowing for JobKeeper payments.

3. Feedback regarding themes

Overall, we commend the ESC on working with the community sector to identify eight key themes that reflect how consumers can experience barriers to accessing essential services. The goals and initiatives linked to these themes are equally important and we endorse all of them as important measures in addressing the barriers identified in the key themes.

Across our work, accessibility is a key issue that contributes to our clients' experiences of vulnerability and disadvantage. This includes:

- Lack of digital literacy to enable clients to proactively engage with retailers when in the initial stages of a dispute;
- Lack of access to telecommunications (i.e. internet or phone) to enable clients to engage with retailers to communicate their issue; and
- Language and cultural barriers.

This is why we consider the draft strategy has come at a critical time for our clients and consumers.¹

Clients' experience of retailers post COVID-19 lockdowns

Recently WEStjustice, in collaboration with the Wyndham Humanitarian Network – Legal, Consumer and Housing Working Group, held its successful Bring Your Bills Day as part of Law Week 2021. As our first in-person client engagement event post the COVID-19 lockdowns, it enabled us to get a good snapshot of some of the key barriers that were affecting our clients. With over 150 attendees, many of whom were non-English speaking, some of the key barriers we identified were:

- Lack of understanding of how to read their bills and a lack of explanation from their retailers as to how the bills are calculated;
- Lack of access to bills as many retailers are now moving towards digital statements. Many of our newly arrived refugee clients did not have access to the internet or email and were not able to receive fully itemised bills that explained bill calculation, causing frustration and confusion amongst our clients; and
- Retailers refusing to take our clients' complaints seriously due to language barriers or other communication barriers and only properly addressing our clients' concerns and issues when we took the time to call the retailers themselves.

Many of these barriers are at the very early stages of a dispute between consumers and their retailers. Because they are not adequately addressed at this early point, by the time the issues make their way to our legal clinics, the disputes which may have been easily resolved through effective and proactive engagement have already progressed to the point of debt collection and recovery proceedings through the Magistrates' Court, both of which pose significant long-term consequences for our clients.

¹ Centre Policy Research Centre has produced a recent report regarding the effects of COVID-19 on culturally and linguistically diverse (CALD) consumers. See further Consumer Policy Research Centre, *Covid-19 and Consumers: Key insights series - CALD consumers* (March 2021).

As such, we applaud the ESC's efforts in this draft strategy to set the tone for how retailers can work proactively and collaboratively with consumers experiencing vulnerability in order to prevent such disputes from occurring.

However, we believe that there are four areas where the ESC can strengthen and build upon the identified goals and initiatives, which may affect significant changes in the way these areas currently manage consumers experiencing vulnerability. These key areas are local government, debt collection, enforcement and compliance, and engagement with First Nations consumers. Our comments and recommendations in regard to each are outlined below.

3.1 Increasing Accountability for Local Government – Goals 2 and 4

We welcome the ESC's inclusion of local government in meeting the objectives of goals 2 and 4 of the draft strategy. Across our specialised Mortgage Wellbeing Service (**MWS**), a persistent emerging issue is that local councils have not kept up with the evolving understanding and community expectations around financial hardship and vulnerability. A review of local councils' policies and practices demonstrates a shallow understanding of consumer vulnerability, which continues to have a detrimental effect on ratepayers. It is important to note that the ESC should not assume that local councils are coming into this space with the same level of knowledge, training or experience regarding consumers experiencing vulnerability as the water and energy sectors. Accordingly, it is crucial that local government practices are also addressed as part of any strategy around consumer vulnerability.

The MWS has given us a solid foundation to understand the operation of local council hardship practices in relation to ratepayers. One of the most common issues to arise from the MWS is rates hardship and our lawyers and financial counsellors frequently make requests for hardship assistance on behalf of our clients to local councils. Unfortunately, what we have found is that councils are far behind in their hardship practices when compared to other industries.

This sentiment was also expressed by the Victorian Ombudsman in their *Investigation into how local councils respond to ratepayers in financial hardship* report released in May 2021. Many issues that we have consistently raised with respect to the poor practices of local councils were identified in the Ombudsman's investigation. These include:

- Failing to inform ratepayers about all of their available options;
- Blanket refusals to consider requests for a waiver or deferral of rates both in practice and in written hardship policies, which is contrary to the *Local Government Act 1989 (the Act)*.
- Underuse of deferrals – especially where a property is about to be sold pursuant to a mortgage default, a family law property settlement or relationship breakdown, where a ratepayer is awaiting a claim for WorkCover, Total & Permanent Disablement or other benefit related to health or mental health, or where a ratepayer is moving from their own home into aged care. Deferral is available under the Act but has not been contemplated thoroughly by councils;
- Charging penalty interest to people in hardship;
- Overuse of debt collectors and not enough effort to engage the ratepayer to understand their circumstances before referring rates debts to debt collectors;
- Failing to ensure debt collectors are subject to clear and enforceable standards regarding ratepayers in financial hardship;
- Restricting options available to ratepayers in financial hardship once a matter has been referred to a debt collector;

- Lack of family violence policies and training;
- Hardship policies which vary greatly from council to council; and
- Councils are a secured creditor but are frequently using unnecessary and harsh measures such as suing, creditor's bankruptcy, and lodging caveats on the title of the ratepayer's property. This places unnecessary stress and hardship on ratepayers and it is not a smart use of council resources, as councils have a first statutory right to recover a rates debt from the proceeds when a property is sold. Councils do not need to take such harsh measures and should only take legal action as a last resort.

We commend the ESC on the three possible initiatives outlined in the draft strategy including:

- *We will work collaboratively with local government sector to promote better practice in direct engagement with consumers;*
- *We will support a consistent understanding of vulnerability across the local government sector; and*
- *We will work collaboratively with local government to identify and promote best practice approaches to consumer outcomes.*

We support the three initiatives outlined above and believe that these provide a preliminary basis for keeping local government accountable. We consider it would be an incongruous position for private retailers to be subject to more regulation and accountability than local government, particularly given local government's role in serving the public interest. However, the draft strategy can go further in addressing the concerns raised in the Victorian Ombudsman's report.

We recommend that the ESC consider incorporating the following further initiatives for local government in line with the recommendations by the Victorian Ombudsman:

- **Recommendation 1:** The Essential Services Commission should work with the Municipal Association of Victoria to issue standards (in the form of a code of practice) for rates hardship relief, including:
 - Where rates debts are associated with family violence; and
 - Limitations on councils' ability to charge penalty interest on unpaid rates debts when a ratepayer is experiencing hardship.
- **Recommendation 2:** The Essential Services Commission should require local government to identify appropriate standards for considering applications for waiver or deferral of rates as set out in sections 170, 171 and 171A of the *Local Government Act 1989*, including but not limited to:
 - Where the property is about to be sold pursuant to a mortgage default, a family law property settlement, relationship breakdown, or family violence;
 - Where a ratepayer is awaiting a claim for WorkCover, Total & Permanent Disablement or other benefit related to health or mental health;
 - Where a ratepayer is moving from their own home into aged care.

- **Recommendation 3:** The Essential Services Commission should work with local councils and the community sector to co-design model hardship policies and training material on dealing with rates hardship applications and debt recovery, including in relation to:
 - Identifying indicators of financial hardship;
 - Assessing financial hardship applications and determining the most appropriate relief options; and
 - Identifying indicators of family violence and responding to ratepayers who have disclosed family violence.

- **Recommendation 4:** The Essential Services Commission should work with councils to build regular and ongoing consultation with financial counsellors, community legal groups and other sectors and organisations that work with people in financial hardship.

3.2 Debt Collection – Goals 1, 2, 4, 5 and 6

The referral of a utility or local government debt to a debt collector (or other enforcement action that commences a process external to a retailer or local government’s hardship scheme) can often be a source of significant distress to our clients. Moreover, a negative experience with an agency collecting a debt on a creditor’s behalf can undo a number of the commendable goals that the Essential Services Commission has set itself.

We note that the involvement of debt collectors can potentially:

- *Diminish the accessibility of the communications consumers receive (Goal 1);*
- *Fail to take a universal and inclusive approach to engagement (Goal 2); and*
- *Undermine efforts to build partnerships and lasting relationships to improve outcomes for First Nations consumers and communities (Goal 6).*

Debt collection activities (and debt collection agencies) are not wholly subject to any sector-wide external dispute resolution (**EDR**) scheme, and are effectively bound only by legislation (the *Australian Consumer Law and Fair Trading Act 2012*, specifically its provisions on prohibited debt collection activity) and the ACCC & ASIC *Debt collection guideline: for collectors and creditors*. Communications from debt collectors have few prescriptive guidelines as to their form and content. Compared to the higher standard the sectors regulated by the ESC are working toward, collectors:

- Rarely offer plain English specificity as to exactly what the nature of the original debt was and what it pertains to (i.e. account numbers rather than addresses, or no information about when the debt accrued and how it breaks down);
- Do not offer the details of services that may assist such as financial counsellors;
- Generally offer deadlines by which full payment is required and omit details about the possibility to negotiate settlements or instalments;
- Will never, in our experience, proactively offer interpreter services for consumers who have limited or no English who try to communicate.
- Do not all have protocols to engage with consumers in a culturally safe manner (i.e. in dealing with debts owed by Aboriginal and Torres Strait Islander consumers) or with consumers experiencing or escaping family violence.

Debt collectors can also:

- *Inhibit practices to effectively identify consumers who need support and in a timely manner (Goal 4); and*
- *Fail to ensure support provided is flexible and suited to needs (Goal 5).*

There is presently a lack of clarity as to whether EDR schemes (such as the Energy and Water Ombudsman Victoria (**EWOV**)) and guidelines set for industry in dealing with hardship (such as the ESC's) expressly apply to debt collectors. This can risk creating an environment where a consumer who 'slips through the cracks' and ends up subject to debt collection activity moves from an environment where there are obligations and processes to provide support to one where there may be none at all.

It has been our infrequent, but unfortunate, experience to encounter participants in the sectors regulated by the ESC who will consider that they have no obligation to consider a consumer's situation once a debt has been sold to another party or legal action has been initiated. This obviously generates major inconsistency across a sector for a consumer.

We consider that debt collection should be a last resort after substantive and proactive engagement by a retailer or local council has not produced an appropriate and fair outcome. This means that a matter should only proceed to debt collection where:

- (Where relevant) A retailer has met regulatory requirements, such as communicating its best available offer and pre-contract terms and conditions;
- An ESC-regulated body has identified non-payment and it first made appropriate and fair attempts to engage with the consumer; and
- Hardship policies are appropriately applied by trained staff (i.e. with experience and knowledge in family violence or First Nations communities) when a consumer is engaging.

Additionally, where there are concerns this did not take place, a matter should be remitted back from a debt collector to the originating creditor.

In the absence of comprehensive and complementary EDR for the debt collection industry, we support industry codes and guidelines that clearly extend certain obligations to service suppliers such as debt collectors. For example, the *General Insurance Code of Practice 2020* makes it explicit that service suppliers must share the obligations of an insurer in the supply of documents and the provision of hardship processes.

- **Recommendation 5:** The Essential Services Commission should strongly encourage and where necessary mandate the standards in line with its goals that retailers and local government (in line with our Recommendations 1-4) should use in engaging debt collectors, including a requirement to have appropriate hardship schemes and forms of communication with consumers that clearly indicate the source, circumstance and options to resolve a debt.
- **Recommendation 6:** Recognising that the original creditor (and if need be, access to EWOV) will often be best placed to review its processes in a way that is both flexible and consistent, the Essential Services Commission should strongly encourage that where there is a dispute, creditors will readily engage with a consumer even once a matter has been referred to a debt collector.
- **Recommendation 7:** The Essential Services Commission should consider that any future guidelines or rules for the sectors it regulates extend any relevant obligations concerning

communication, accessibility and hardship (including family violence) to service suppliers of a retailer or local council.

3.3 Proactive and Visible Compliance and Enforcement – Goals 3 and 5

We welcome goal 3 of the draft strategy which seeks to improve consumer trust and support them to feel empowered, make choices and seek support. In order to achieve this goal we consider it integral to address any regulatory gaps by enforcing retailer compliance with the aims of the draft strategy and any other regulatory codes ancillary to this. The draft strategy provides an opportunity for the ESC to strengthen its role in holding retailers and local government accountable and take a more proactive approach to compliance.

Across our legal clinics, we have observed that despite the various policies and codes of practice retailers are subject to, there appears to be a lack of coordinated and proactive enforcement response when retailers are acting in breach of these rules. This is particularly the case with our clients experiencing vulnerability who have faced disconnections in circumstances where retailers have not taken any active steps to engage with our clients prior to taking this significant step.

Specifically, we have seen clients whose mental health has deteriorated considerably as a result of the poor practices and persistent breaches by regulated services. Beyond the emotional trauma this inflicts, these consumers are faced with additional financial stress and the challenge of seeking appropriate mental health support.

While we understand that the ESC already has a suite of enforcement powers and does exercise these upon investigation, we would like to see more consistent and proactive enforcement to ensure that retailers and local government are complying with their obligations to consumers. The reality is that even seemingly small indiscretions amount to real and significant harm for the people and communities we service. We know that those most at risk of experiencing vulnerability are likely to be the last to seek out and engage a regulator, which is why it is critical for the ESC to think of more creative ways to proactively monitor compliance in the industries it regulates. If the ESC is seen to be proactive and increases its visibility of enforcement action, it will go a long way toward gaining consumer confidence and trust and therefore empowering them to seek support.

We recommend that the ESC include the following further initiatives to reflect the concerns raised by consumers, to empower them to assert their rights and develop a stronger trust in the market overall:

- **Recommendation 8:** The Essential Services Commission should include an initiative to be more visible in its enforcement action against retailers and local government who engage in prohibited behaviours so that consumers are more confident in the ESC's regulation and thus feel empowered in the market (including committing to using its increased powers should the *Energy Legislation Amendment Bill 2021* pass parliament).
- **Recommendation 9:** The Essential Services Commission should include an initiative to consider creative and proactive compliance measures it can undertake to discourage poor practice and prohibited behaviour by retailers and local government.

3.4 Engaging with First Nations Consumers – Goal 6

We further welcome the inclusion of goal 6 in the draft strategy, which is a preliminary step in encouraging the ESC and retailers to turn their minds to the barriers faced by First Nations consumers. However, we consider that the goal and initiatives outlined in the draft strategy can be strengthened through further consultation with Aboriginal community controlled services, such as the Victorian Aboriginal Legal Service and Victorian Aboriginal Community Controlled Health Organisation Inc. This will enable the ESC to better understand the unique challenges faced by First Nations consumers as a result of systemic racism.

Furthermore, while it is acknowledged in the draft strategy that Indigenous consumers are disproportionately facing higher rates of disconnection by their energy retailers, there is no clear initiative to address this. We are of the view that the goal and initiatives should be built upon and made clearer, so that the ESC's commitment to improving First Nations consumers' experiences in the market can be operationalised and taken seriously by retailers and local government.

- **Recommendation 10** – The ESC should include an initiative that aims to decrease the disproportionately high levels of energy disconnections experienced by First Nations consumers.
- **Recommendation 11** – The ESC should include an initiative to consult with Aboriginal community controlled services to better understand the unique challenges faced by First Nations consumers as a result of systemic racism.

We thank you again for the opportunity to comment on the draft strategy. Please contact Matthew Martin at WEstjustice on (██████████) or at ██████████ if you have any questions about this submission.

Yours sincerely,



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