

# SELF-ADVOCATES IN CIVIL LEGAL DISPUTES: HOW PERSONAL AND OTHER FACTORS INFLUENCE THE HANDLING OF THEIR CASES

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*This article examines how some self-advocates handle their own civil legal disputes in circumstances where legal representation is not available. A combination of influences helps explain why some users of a specialised dispute resolution process were more likely to be effective and successful in their self-advocacy endeavours. Most importantly, the more effective users displayed positive attitudes, motivation and self-belief. They also demonstrated abilities in organisation, research and preparation. These attributes appeared to position them strongly to engage with and effectively manage the legal matters at hand. By contrast, other users in the same study were negatively disposed towards the challenges they faced. They lacked confidence and avoided seeking advice, conducting research, or preparing for their hearing.*

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## I INTRODUCTION

This article is about citizens who handle their own legal matters. It examines, through the analysis of interview data, the performances of a number of users who undertook self-advocacy in a specialised tenancy tribunal. The aim of the article is to contribute to an understanding of how these self-advocates’ personal attributes, as well as other factors, influence the way in which they handle their own civil legal disputes.

Our central suggestion is that a combination of influences helps to explain why some users of the specialised dispute resolution services considered in the study were more likely to be effective and therefore successful in their self-advocacy endeavours. These influences cannot be articulated with complete certainty, but they can be identified under three categories. First, users of the services benefited from positive features of the self-advocacy environment, such as user support and information resources. Second, the legal tasks that they encountered appeared in the main to be manageable to them. But third, and most importantly, the more effective and therefore potentially most successful users displayed positive attitudes, motivation and self-belief, and also exhibited certain abilities, such as organisation, research and preparation. These positive personal attributes appeared to position them strongly to engage with and effectively manage the legal matters at hand. By contrast, other users in the same study tended to be negatively disposed towards their challenges, lacked confidence, and avoided seeking advice, conducting research, or preparing.

We commence in Part II by providing some background information to the particular study which is the focus of this article, as well as explanatory notes on methodology. Part III refers to a selection of the relevant literature, noting some recent developments in the area. The following three sections report on data extracted from the case study interviews, with emphasis on respondents’ perspectives on the environment in which they conducted their legal work (Part IV); on their perceptions and experiences of the legal tasks and processes (Part V); and on the abilities, skills, experience and attitudes manifested by the respondents themselves (Part VI). The penultimate section, Part VII, contains a discussion of the meaning and significance of the interview data and draws some tentative conclusions about what conditions may be necessary to enable meaningful, if not necessarily successful, self-advocacy

in a civil justice dispute resolution setting. Concluding observations are contained within Part VIII.

## II BACKGROUND AND METHODOLOGY

This article reports on some of the findings from one of four case studies in a larger funded project.<sup>1</sup> The goal of the wider project was to contribute through the literature to a clearer understanding of: (1) the possibilities and limitations of legal self-help in a variety of settings; and (2) the kinds of documentary and other resources most likely to support people who, for various reasons, are unable or choose not to purchase professional legal services.<sup>2</sup> But we were interested to learn more about both the positive *and* negative aspects of legal self-help, predominantly from the perspective of the self-helper. This aim distinguishes our research from much of the wider literature in the area, in which the focus has often been on the negative impact of legal self-help on the justice system, or on the particular problems faced by litigants in person.<sup>3</sup>

Given what we had learned from our earlier research,<sup>4</sup> as well as from some limited but growing literature in the area,<sup>5</sup> we approached this research project on the assumption that legal self-help at least sometimes provides

<sup>1</sup> This was an Australian Research Council Discovery Project, in which the authors were joint chief investigators. Much of the initial research for the project was undertaken between 2005 and 2008.

<sup>2</sup> For a comprehensive report on the larger project, see Merran Lawler, Jeff Giddings and Michael Robertson, 'Opportunities and Limitations in the Provision of Self-Help Legal Resources to Citizens in Need' (2012) 30 *Windsor Yearbook of Access to Justice* 185. See also Merran Lawler, Jeff Giddings and Michael Robertson, "Maybe a Solicitor Needs to Know That Sort of Thing but I Don't" — User Perspectives on the Utility of Legal Self-Help Resources' in Alexy Buck, Pascoe Pleasence and Nigel J Balmer (eds), *Reaching Further: Innovation, Access and Quality in Legal Services* (Stationery Office, 2009) 26; Jeff Giddings, Merran Lawler and Michael Robertson, "It's More Like Judge Judy" — Self-Help in a Hybrid Legal Forum' (Paper presented at the International Legal Aid Group Conference, Wellington, 2 April 2009).

<sup>3</sup> See, eg, E Richardson, T Sourdin and N Wallace, 'Self-Represented Litigants: Literature Review' (Australian Centre for Court and Justice System Innovation, 2012) 14–18.

<sup>4</sup> Jeff Giddings and Michael Robertson, "Lay People, for God's Sake! Surely I Should Be Dealing with Lawyers?" Towards an Assessment of Self-Help Legal Services in Australia' (2002) 11 *Griffith Law Review* 436; Jeff Giddings and Michael Robertson, 'Large-Scale Map or the A-Z? The Place of Self-Help Services in Legal Aid' (2003) 30 *Journal of Law and Society* 102; Jeff Giddings and Michael Robertson, "Informed Litigants with Nowhere to Go" — Self-Help Legal Aid Services in Australia' (2001) 26 *Alternative Law Journal* 184.

<sup>5</sup> See Part III below.

helpful opportunities for those who act for themselves in dealing with their legal problems, and yet also often presents significant challenges or limitations. Through this research we were therefore interested to understand more about these opportunities and limitations in legal self-help, and the nature of the influences most likely to have a bearing on the quality, and thus the efficacy, of legal self-help performance in the various areas we chose to study.

Our strategy in this case study, as well as in the wider project, was to utilise mainly qualitative research techniques. This included drawing upon the actual experiences of the legal self-helpers,<sup>6</sup> as reported by them through the use of interviews. The case study that supports this article examined the legal self-help performances of parties to tenancy disputes before a specialist statutory tribunal in Queensland, Australia.

Tenancy dispute resolution through Queensland's Small Claims Tribunal ('SCT') was, until recently, regulated pursuant to two pieces of state legislation.<sup>7</sup> Responsibility for administration of the legislation was entrusted to the Residential Tenancies Authority ('RTA'),<sup>8</sup> a self-funded regulatory body for Queensland's residential rental sector. The legislation permitted legal representation only in limited circumstances.<sup>9</sup> There were two ways in which tenants or landlords could try to have their disputes resolved. The first was a

<sup>6</sup> We note the possibility that the underlying methodology of this research has some connection with 'legal consciousness' research, which also 'seeks to understand people's routine experiences and perceptions of law in everyday life': Dave Cowan, 'Legal Consciousness: Some Observations' (2004) 67 *Modern Law Review* 928, 929.

<sup>7</sup> *Residential Tenancies Act 1994* (Qld) ch 5; *Residential Services (Accommodation) Act 2002* (Qld) pts 10–12. Soon after this study was conducted, the tenancy jurisdiction of the SCT was transferred to the larger Queensland Civil and Administrative Tribunal ('QCAT'): see *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 11, sch 3 (definitions of 'minor civil dispute' para 1)(e), 'tenancy matter').

<sup>8</sup> *Residential Tenancies Act 1994* (Qld) s 289(a). This responsibility still resides with the RTA pursuant to *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 468(a). This Act combined and amended the provisions of the *Residential Tenancies Act 1994* (Qld) and the *Residential Services (Accommodation) Act 2002* (Qld): Explanatory Notes, Residential Tenancies and Rooming Accommodation Amendment Bill 2008 (Qld) 1.

<sup>9</sup> *Residential Tenancies Act 1994* (Qld) s 237. This rule still exists in the new legislation: *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 405. See also *Small Claims Tribunals Act 1973* (Qld) s 32, which provides for legal representation only when one party requires an agent as a matter of necessity, all parties agree and the SCT referee considers that the other party or parties would not be unfairly disadvantaged. For research showing that legal representation of 'low-income tenants' makes a very significant difference to success rates in housing disputes, see Carroll Seron et al, 'The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment' (2001) 35 *Law & Society Review* 419.

conciliation service provided by the RTA.<sup>10</sup> Conciliators appointed by the RTA conducted telephone or face-to-face conferences in an attempt to negotiate a binding agreement.<sup>11</sup> The conciliation process was voluntary, and the conciliator acted as an impartial third party.<sup>12</sup> The second process, which followed the first, was normally available only when the conciliation process had run its course. This second process involved a hearing before the SCT itself, in which a referee, an official similar to a magistrate, heard evidence and ultimately made an order that was binding on the parties.<sup>13</sup>

Both processes required proper completion of prescribed forms and paperwork by the parties to the dispute.<sup>14</sup> The SCT could entertain disputes up to an amount of \$7500 in value.<sup>15</sup> Typical matters before conciliators and the SCT included disputes around rental payments, bond deposits, termination of leases, and various alleged breaches of the terms of leases. More than 15 000 cases were lodged with the SCT annually,<sup>16</sup> prior to its replacement by the Queensland Civil and Administrative Tribunal ('QCAT').

This article reports mainly upon the interview data collected for the tenancy case study.<sup>17</sup> A total of 26 semi-structured narrative interviews were conducted with respondents who were or had very recently been involved in the tenancy dispute processes but for various reasons, only 17 of the original 26 transcripts were analysed for the purpose of this article. Four participants were landlords, while the remainder were tenants. Eleven were applicants in the processes, and the remaining six were respondents to claims including, for example, eviction and unpaid rental.

<sup>10</sup> On the use of conciliation processes in tribunals, see Frances Gibson, 'Alternative Dispute Resolution in Residential Tenancy Cases' (2007) 18 *Australasian Dispute Resolution Journal* 101.

<sup>11</sup> RTA, *Handling Tenancy Disputes in the Small Claims Tribunal: A Guide for All Parties Involved in Renting in Queensland* (3<sup>rd</sup> ed, 2007) 4–5.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Small Claims Tribunals Act 1973* (Qld) ss 18, 33.

<sup>14</sup> *Residential Tenancies Act 1994* (Qld) ss 233, 248–9.

<sup>15</sup> *Small Claims Tribunals Act 1973* (Qld) ss 4(1) (definitions of 'prescribed amount', 'small claim'), 16(1).

<sup>16</sup> Magistrates Court of Queensland, *Annual Report 2007–2008* (2008) 68.

<sup>17</sup> This case study also included an analysis of the documentary and other textual resources available to the users of these dispute resolution processes. These self-help resources, which are not directly relevant to the main findings presented in this article, included a 30-page tenancy guide developed and distributed by the RTA: see RTA, above n 11. Further details of this guide are available in our commentary on and analysis of the utility of this resource, as compared with self-help resources encountered in other case studies: see Lawler, Giddings and Robertson, 'Opportunities and Limitations', above n 2, 201–2, 214–21.

Participants were recruited through various forms of local advertising, as well as by collaborating with SCT personnel to identify potential research participants. The shortcomings of this recruitment approach are readily acknowledged, but we note that there was no other effective way of identifying participants who met the criterion of current or recent involvement in tenancy dispute processes. Interviews were usually conducted in the homes or workplaces of those who agreed to participate, while some were conducted by telephone. Most interviews were digitally recorded and all were transcribed for the purpose of analysis.

Interview questions were designed to elicit responses in the form of a narrative account of: participants' experiences of the particular circumstances of the legal problem; the steps undertaken, if any, in gaining information and support to be better able to address the problem; the participants' understanding of the legal processes; and reflections from the participants upon their own performance throughout the handling of their matter. Participants also completed a questionnaire which sought demographic data of age, education levels and other socio-economic indicators. Nearly all participants in this study fell within the 18–50 age range, and most had completed mid- to late-level secondary schooling. Just over half drew their primary source of income from paid employment.

To facilitate our approach to this case study, and others in the broader project, we devised an underlying conceptual framework to structure and aid the design and implementation of the data gathering activities, as well as the interpretation and analysis of interview and other data. The conceptual framework was formulated following our earlier exploratory research in the area, and assumed the form of a hypothesis which we expressed in the following terms:

In situations where citizens act in legal matters without representation by lawyers or other professionals, the quality, conduct and experience of their self-help legal work will be positively or negatively influenced by a large number of potential variables, which can be grouped into three main factor sets:

- 1 The context/environment, which refers to the general setting in which the self-help legal activity is carried out. Contextual factors include the utility of the physical environment from the self-helper's perspective; the quality and levels of information; support or assistance available to self-helpers; and the attitudes and practices of the officials and other players who inhabit the spaces in which this work is performed.
- 2 The legal work itself, or the kind of 'legal transaction' being undertaken, including its nature and the type of legal activity required to complete it; in

other words, its level of difficulty from the self-helper's perspective (to which we refer in shorthand as its degree of 'legal complexity').

- 3 The variable personal characteristics of the users of the legal transactions themselves: for example, their age group, gender, vocation, income level, skill set and language abilities. Some of these characteristics, such as skills and language abilities, might significantly facilitate or hinder the conduct of the matter at hand. Personal characteristics also include *attitudinal* characteristics of the users, such as levels of motivation, engagement and commitment. We refer to this set throughout the article as the 'personal factors'.

It should, however, be emphasised that these three groups of factors are no more than an aid to understanding and analysis of interview and other data. Moreover, it is important to recognise the likelihood that these factors are often interconnected as far as the self-helper's own performance is concerned. For example, even when users of particular legal processes are extremely well-served with documentary and other resources (an environmental factor) that help them to understand and manage their dispute more effectively, their ability to do so will often also depend upon: (1) whether or not they find the legal tasks and process daunting (complexity factors); and (2) their own skills and approach to the tasks and processes at hand, including whether or not they approach these with a positive and constructive attitude (personal factors).

We believe that recognising the interplay of these factors is important in conducting research of this kind. At the very least, it is a constant reminder that while it is possible to identify *particular* factors as helpful in explaining the quality of performance of given self-help legal work, the reality is probably that in most circumstances the quality of individual self-help performance is attributable simultaneously to a wide variety of both positive and negative influences. Some of these may not be evident immediately, or at all, from interview transcripts or the available research data more broadly. Nevertheless, for the purposes of analysis and discussion, we have found it helpful to try to articulate and classify these multiple influences under the three broad categories outlined above, and to try to identify which factors, on their own or in combination with others, may help to explain the quality of legal self-helpers' efforts in different situations. We have adopted this approach in order to aid our central purpose, which is to contribute to a better understanding of both the opportunities available, and the limitations inherent, in self-help legal work.

## III A SELECTION OF RELEVANT LITERATURE

The general area of literature in which this article is located is, broadly speaking, the citizen's relationship with the legal system and the civil justice system in particular.<sup>18</sup> More specifically, it involves an examination of voluntary or involuntary involvement by the citizen in the civil justice system, but without legal representation. Citizens self-represent in a variety of civil legal settings involving many different 'justiciable problems'<sup>19</sup> and for a variety of reasons, including the expense or unavailability of professional legal services. Self-representation is variously referred to in the literature as legal self-help, self-advocacy, legal DIY, *pro se*, litigants in person<sup>20</sup> and, in some contexts, 'unbundled' legal services.<sup>21</sup>

Self-representation has become a significant area of research inquiry, as reflected in a growing body of research.<sup>22</sup> For example, a comprehensive recent British report that examines the phenomenon of self-represented litigants notes that '[t]he most important thing for self-represented litigants is access to objective advice that can be trusted' and goes on to state that 'every effort should be made to increase the availability and accessibility of early advice'.<sup>23</sup> A closely related issue, also at the core of a growing literature, concerns whether citizens understand enough about the legal issues that affect

<sup>18</sup> For a detailed empirical account of the citizen's involvement with the civil law and social justice domain, see Pascoe Pleasence, *Causes of Action: Civil Law and Social Justice* (Stationery Office, 2<sup>nd</sup> ed, 2006). For a Canadian perspective, see Ab Currie, 'The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians' (Report, Department of Justice (Canada), 2009).

<sup>19</sup> Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (Hart Publishing, 1999) 12.

<sup>20</sup> It is worth noting that some forms of involvement with the civil justice system, without professional assistance, do not involve 'litigation' in any form, in which case this term may not always be appropriate.

<sup>21</sup> See Andrea de Smidt and Kate Dodgson, 'Unbundling Our Way to Outcomes: QPILCH's Self-Representation Service at QCAT, Two Years On' (2012) 21 *Journal of Judicial Administration* 246.

<sup>22</sup> See, eg, Richardson, Sourdin and Wallace, 'Self-Represented Litigants: Literature Review', above n 3; E Richardson, T Sourdin and N Wallace, 'Self-Represented Litigants: Gathering Useful Information' (Final Report, Australian Centre for Justice Innovation, June 2012); Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) ch 9.

<sup>23</sup> Civil Justice Council, 'Access to Justice for Litigants in Person (or Self-Represented Litigants): A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice' (Report, November 2011) 9 [20(4)].

them most directly.<sup>24</sup> This leads to a consideration of the potential of public legal education in the citizen's quest for civil justice.<sup>25</sup> Public legal education has recently been described as 'the tool we need to achieve legal capability' and 'the missing element in the creation of the legally-enabled citizen'.<sup>26</sup> However, our own previous research leads us to suggest a qualification to one assumption that lies behind this sentiment. We have, for example, detected evidence to suggest that legal self-helpers are not necessarily interested in broadening their understanding of the law in general terms, as opposed to acquiring timely and strategic legal information and assistance that will help them deal with the particular legal transaction at hand.<sup>27</sup>

In another recent report, based upon data from the English and Welsh Civil and Social Justice Survey, researchers examined the ways in which citizens dealt with law-related problems.<sup>28</sup> They used the data 'to assess the impact of a lack of legal capability'.<sup>29</sup> One of their findings was that '[w]hile many respondents successfully obtained advice or handled their problems alone, a significant proportion did nothing or tried and failed to obtain advice'.<sup>30</sup> Amongst those who 'did nothing' was a group who felt unable to help themselves because of a 'lack of knowledge, confidence or capacity'.<sup>31</sup> On this, the researchers concluded that the data demonstrated that 'knowledge, skills and confidence gaps in the population ... are barriers to achieving legal capability'.<sup>32</sup> The report also noted the need for further research in a number

<sup>24</sup> See, eg, Alexy Buck, Pascoe Pleasance and Nigel J Balmer, 'Do Citizens Know How to Deal with Legal Issues? Some Empirical Insights' (2008) 37 *Journal of Social Policy* 661.

<sup>25</sup> For recent Australian research that examines the potential importance of legal information being readily available to members of the community, see Johann Kirby, 'A Study into Best Practice in Community Legal Information' (Report, Victoria Law Foundation, October 2011).

<sup>26</sup> Public Legal Education and Support Task Force, 'Developing Capable Citizens: The Role of Public Legal Education' (Report, July 2007) 9 [15].

<sup>27</sup> See Lawler, Giddings and Robertson, 'Maybe a Solicitor Needs to Know That Sort of Thing', above n 2; Lawler, Giddings and Robertson, 'Opportunities and Limitations', above n 2.

<sup>28</sup> Nigel J Balmer et al, 'Knowledge, Capability and the Experience of Rights Problems' (Research Report, Public Legal Education Network, March 2010).

<sup>29</sup> *Ibid* 4.

<sup>30</sup> *Ibid* 5.

<sup>31</sup> *Ibid* 5–6. For a very recent contribution to this literature, see Hugh M McDonald and Julie People, 'Legal Capability and Inaction for Legal Problems: Knowledge, Stress and Cost' (Updating Justice No 41, Law and Justice Foundation of New South Wales, June 2014). On 'doing nothing', see Rebecca L Sandefur, 'The Importance of Doing Nothing: Everyday Problems and Responses of Inaction' in Pascoe Pleasance, Alexy Buck and Nigel J Balmer (eds), *Transforming Lives: Law and Social Process* (Stationery Office, 2007) 112.

<sup>32</sup> Balmer et al, above n 28, 6.

of areas such as self-help, including on ‘the utility of different legal self-help resources and support’.<sup>33</sup>

The notion of ‘legal capability’, related to earlier work by economists on ‘financial capability’, is a useful concept for researchers in this area.<sup>34</sup> According to Martin Jones in an exploratory paper:

Legal capability can be defined as the abilities that a person needs to deal effectively with law-related issues. These capabilities fall into three areas: knowledge, skills and attitudes, emphasising that capability needs to go beyond knowledge of the law, to encompass skills like the ability to communicate plus attitudes like confidence and determination.<sup>35</sup>

Jones also suggests that the attitudes required by self-advocates in a civil law context are confidence, determination, a belief in the process, and detachment.<sup>36</sup> Further, a legally capable person should be able to recognise and react, find information and help, manage and plan, and be an active citizen — which includes understanding the role of law in society.<sup>37</sup>

In this context, it is worth noting some limited literature on subjective legal empowerment and self-efficacy, associated with the work of Martin Gramatikov and Robert Porter,<sup>38</sup> which builds upon self-efficacy theory developed by Albert Bandura.<sup>39</sup> Subjective legal empowerment is a concept that may help to measure legal empowerment, and provide answers to questions such as ‘[w]hy do some people feel able to act to deal with legal problems when others don’t?’<sup>40</sup> As to self-efficacy theory itself, Heslin and Klehe, interpreting Bandura’s theory, point out that self-efficacy has to do with

<sup>33</sup> Ibid 60.

<sup>34</sup> See, eg, Howard Gannaway, ‘Dimensions of Public Legal Education: What Would a Legally Capable Person Look Like?’ (Paper presented at Developing Capable Citizens: Civil Justice and Public Legal Education Conference, Cardiff, 13 November 2008).

<sup>35</sup> Martin Jones, ‘Legal Capability’ (Discussion Paper, Public Legal Education Network, March 2010) 1.

<sup>36</sup> Ibid 4.

<sup>37</sup> Ibid 7.

<sup>38</sup> Martin Gramatikov and Robert B Porter, ‘Yes I Can: Subjective Legal Empowerment’ (2011) 18 *Georgetown Journal on Poverty Law & Policy* 169.

<sup>39</sup> See, eg, Albert Bandura, ‘Self-Efficacy Mechanism in Human Agency’ (1982) 37 *American Psychologist* 122.

<sup>40</sup> Law for Life, *Subjective Legal Empowerment and Self Efficacy* (6 January 2013) <<http://www.lawforlife.org.uk/index.php/research-and-theory>>.

‘a person’s belief in his or her capability to successfully perform a particular task’.<sup>41</sup> In the employment setting, for example:

High self-efficacy improves employees’ capacity to collect relevant information, make sound decisions, and take appropriate action, particularly when they are under time pressure. ... In contrast, low self-efficacy can lead to erratic analytic thinking, which undermines the quality of problem solving ...<sup>42</sup>

According to Bandura himself, ‘[j]udgments of self-efficacy ... determine how much effort people will expend and how long they will persist in the face of obstacles’.<sup>43</sup> He goes on to state that

[w]hen beset with difficulties people who entertain serious doubts about their capabilities slacken their efforts or give up altogether, whereas those who have a strong sense of efficacy exert greater effort to master the challenges.<sup>44</sup>

Other literature of relevance to what follows in this paper touches on the question of whether self-advocates necessarily perceive what they are doing as ‘legal’. Recent research on this issue in a civil justice context found that a very small proportion of survey respondents characterise their problems as legal ones, even though they were problems involving ‘justiciable issues’.<sup>45</sup> An allied question, which has also received some attention, is the extent to which self-advocates actually know what is going on in the courtroom itself.<sup>46</sup> Finally, we note that one of the objectives of recent research by Michael Adler was ‘to identify the effects of education, sex, age, class, race, “administrative competence”, social capital, literacy, free time and pre-hearing advice on appellants’ experiences and outcomes’.<sup>47</sup> This, together with other literature referred to in this overview, reflects a research orientation that is similar to our own project, details of which are reported below.

<sup>41</sup> Peter A Heslin and Ute-Christine Klehe, ‘Self-Efficacy’ in Steven G Rogelberg (ed), *Encyclopedia of Industrial and Organizational Psychology* (Sage Publications, 2007) vol 2, 705, 705.

<sup>42</sup> Ibid.

<sup>43</sup> Bandura, above n 39, 123.

<sup>44</sup> Ibid.

<sup>45</sup> Pascoe Pleasence et al, ‘Civil Justice in England and Wales: Report of Wave 1 of the English and Welsh Civil and Social Justice Panel Survey’ (Report, Legal Services Research Centre, 2011) 37.

<sup>46</sup> See, eg, Greacen Associates, ‘Effectiveness of Courtroom Communication in Hearings Involving Two Self-Represented Litigants: An Exploratory Study’ (Report, Self-Represented Litigation Network, April 2008).

<sup>47</sup> Michael Adler, ‘The Potential and Limits of Self-Representation at Tribunals’ (Report, Economic and Social Research Council, 2007) 2.

#### IV USERS' PERSPECTIVES ON THE SMALL CLAIMS AND TENANCY ENVIRONMENT

As explained above, we consider that contextual (or environmental) factors make up one of three sets of variables that positively or negatively influence users' experiences of a particular legal process. This section draws attention to some notable features of the contextual matrix in this study, as reported by users in the interviews. This brief review of a selection of interview responses helps set the scene for consideration of the legal task or complexity factor variables in Part V, and then for the more detailed examination of the personal factor variables in the section that follows in Part VI. In Part VII we offer further discussion and analysis of each of these three sets of factors.

We begin by noting that most users — that is, participants in this study — commented on both the accessibility and usefulness of the documentary and other resources available to them.<sup>48</sup> For some, these resources were crucial. For example, User 12 relied substantially upon the RTA website for information about how to dispute a rental increase. The site 'definitely' provided all the information and resources that he needed, but he also obtained additional help in the form of oral advice from a tenancy information service. User 10 also commented positively on the advantages of the information appearing on the RTA website: 'It's all there. Information for tenants and for people like us, the landlords, and all the forms you might need'. User 2 found the online resources useful, except that they did not really 'cover' the case at hand, which was a dispute *between* tenants. However, User 2 improvised: 'it was a bit of following the guide and then cobbling together to fit the situation'. User 6 did not find *Handling Tenancy Disputes in the Small Claims Tribunal: A Guide for All Parties Involved in Renting in Queensland* ('RTA Guide') at all helpful, although she read it. She saw her case involving an 'out of the box' dispute, meaning that the *RTA Guide* was of limited or no use to her particular needs. This User found the process frustrating; she stated that although there was a great deal of online information about the steps involved, there was 'no real information about the law. I really felt I was flying in the dark'.

Many users received advice from the RTA and other providers, being part of the resource environment. For example, User 16 stated: 'sometimes I felt like I just got sent from one place to another but once I got to the right place, the RTA or the Tenants' Union, I think I got enough help from them to get me through'. User 5 received significant support from a university housing service

<sup>48</sup> For a more detailed account of these particular documentary resources, see Lawler, Giddings and Robertson, 'Opportunities and Limitations', above n 2, 215, 220–1.

for students, which advised him about his rights as a tenant in his circumstances and how to lodge a claim before the SCT. Asked how he might have coped without this support, User 5 stated that he would have been anxious. Although the process was not very complicated, he would not have known where to start, and there was 'comfort' in knowing what he was doing before he began.

Some users commented on the helpfulness, or otherwise, of SCT staff and other players. For example, User 2 did not find the SCT staff particularly helpful, referring to them as 'morons' because of their officiousness. However, User 5 encountered a sympathetic and diligent referee, who contributed to his sense of satisfaction with the resolution of his claim. User 4 stated that a friendly agent representing the opponent landlord made the tasks at hand much easier, while User 16 reported that a less than friendly agent for the opponent added to the challenges.

On the atmosphere of the conciliation and SCT proceedings, User 4 stated that the conciliation meeting 'sort of felt friendly and not threatening which is really the opposite of what I imagine real legal cases are about'. User 16 was one of only three users in the study whose dispute progressed to a formal hearing in the SCT itself. Of that experience, she explained: 'I was feeling really shaky. I don't like speaking in public much and I wasn't looking forward to having to deal with [the opposing party]'. Nevertheless, User 16 prepared carefully for the hearing, which 'was a bit more formal than I expected. I thought we'd all just be sitting around a table but it was set up a bit like a courtroom'. User 1 commented on the SCT hearing in this way: 'It's relaxed in there, even a bit friendly. Oh, the Magistrate is all authority-like, but no worse than talking to your boss about being late for work'.

In summary, many (but not all) users referred to the self-help advocacy environment in positive terms. In particular, those who researched and prepared their cases were mainly satisfied with the documentary and other resources available to assist and support them. Most users who approached agency staff found them helpful, and few found the experience of the SCT especially daunting. Some of the implications of these findings, in the context of the study as a whole, are considered further in Part VII below.

## V USERS' PERCEPTIONS AND EXPERIENCES OF THE LEGAL TASKS AND PROCESSES

The second set of variables we identified in this and other case studies concerned the complexity or simplicity of the legal tasks, as perceived by the users themselves. We took as a starting point the characterisation of tenancy

disputes before the SCT as essentially legal in nature, being concerned at their core with contractual and statutory rights and obligations as between landlord and tenant. Moreover, the SCT's processes were also largely legal in character, but also partly administrative, designed to resolve disputes in proceedings — both conciliatory and adversarial — managed and controlled by state officials. In some cases these disputes were determined ultimately by referees, state officials akin to magistrates.

In the interviews, users were asked whether they saw their engagement with and efforts in their own tenancy disputes as 'legal', and to what extent they found the tasks challenging. We were interested to know whether, in their experience, the legal aspects of their disputes before the SCT were relatively straightforward, just manageable, complex, daunting, or even overwhelming. We recognised at the outset that perceptions of the levels of complexity would be affected by the individual user's particular attitudes and abilities. Hence, this set of variables is likely to have a close connection with the personal factors considered in the next section.

User 5 thought that the entire process for resolving his tenancy problems was most certainly a 'legal' one. As he put it: 'firstly, it was about my rights. Secondly, it was about the law'. User 9 described his experience in conciliation proceedings about a bond dispute as 'legal I guess because ... it involves laws'. But at the same time it 'wasn't like a legal thing. There wasn't a court case or anything'. He thought it was 'more just a process'. User 1 did not see his dispute about non-payment of rent as a legal one. Asked why, he stated: 'Maybe because I didn't do anything wrong. It's just the situation'. User 2, when asked to outline the different legal steps involved in the process that he had followed, responded: 'God, you make it sound so complicated. Isn't it pretty much set up so that anyone can do it? It's just filling out a form'. Other respondents like User 4 echoed this view: 'it's all set up in a way that you don't need to see a solicitor ... I knew it was legal in terms of just working through the steps but I guess I just didn't think it was a serious legal problem'.

User 12 also found the process 'simple' and was not in any way intimidated by the sense of responsibility he had in advancing his arguments to reduce a proposed rental increase. He stated: 'Maybe it's just the way it is set up. If you just follow the steps and the information from the RTA, from the webpage, you can't go wrong'. On being asked whether he would have liked to employ a solicitor to handle his matter, he stated:

It would seem to be a waste of money to employ a solicitor ... It's quite routine, isn't it? ... The hardest information was perhaps not even something that a solicitor would have the skills to work out, more likely an accountant.

By way of summary, most users seemed not to regard the legal dimensions of their matters as unduly complex, while some had not apparently reflected at all on the fact that they were navigating a legal domain. Some of the implications of these findings, in the context of the study as a whole, are considered further in Part VII below.

## VI THE USERS THEMSELVES: ABILITIES, SKILLS, EXPERIENCE AND ATTITUDES

We consider now the third factor set in our underlying conceptual framework, which we referred to earlier as the 'personal factors'. These are the personal characteristics of the users who participated in this study, and include matters such as gender, age, education and occupation. However, these characteristics also include their abilities, skills, experience and attitudes, some of which became evident from our analysis of the interview data. These attitudinal factors, manifested in users' levels of commitment or disengagement as the case may be, are the main focus of what follows.

An analysis of the interview transcripts soon suggested two main user types, as concerned overall levels of commitment to and participation in the tenancy dispute of which they were part. The first group consists of users who participate strongly and personally in their tenancy matter, as well as those who engage less strenuously, but who nevertheless do so in an effective way. Together they represent what can be referred to as an 'engager' category.<sup>49</sup> They tend to be capable, diligent, resourceful, determined, at least reasonably well-educated and in receipt of regular incomes. About half of the participants whose interview transcripts we analysed demonstrated *some* engager characteristics, but less than half of this group exhibited these characteristics strongly. However, we place little significance on these percentages given the qualitative orientation of this research as well as the sample size.

The second user type comprises those who tend to avoid meaningful engagement with the issues they are facing and minimise their own involvement as far as possible. They appear not to be committed to finding an acceptable

<sup>49</sup> In a previous article that emerged from the research of which this case study was a part, we noted that some participants in this and other studies in the same project became 'immersed' in their self-help legal work, but that this did not necessarily mean that this increased their familiarity with the legal system: Lawler, Giddings and Robertson, 'Opportunities and Limitations', above n 2, 212–17. Our main conclusion in that article was that most users in different legal self-help settings seem to prefer 'quick, cheap and straightforward mechanisms for the resolution of their own legal problems', and therefore as little engagement as possible with the legal system overall: at 217.

solution to their problem, and represent what we choose to call an ‘avoider’ category. They also tend to be somewhat reluctant and detached from the matters at hand; for the most part, they appear to have little or no interest in taking personal responsibility in matters that could affect them quite directly and even adversely. They often present as somewhat cynical, frustrated or disappointed. Whether they are always as disinterested as they appear, or say they are, is difficult to discern with certainty.

In the remainder of this Part, we describe the two main user types in more detail by reference to the interview transcripts. We have chosen in some instances to include quite detailed examples from these transcripts in an effort to support and illustrate our conclusions about characteristics and types. Although we provide an initial summary of each of these groups after presenting the relevant data in this section, we return to these findings in a more detailed discussion in Part VII.

We begin with an account of those users whom we see as genuine and committed engagers, providing some details of their disputes but emphasising the qualities and abilities they appeared to exhibit in handling these matters, whether or not they were successful in achieving the outcomes they desired.

#### *A Engagers*

User 16, a female in the 26–35 age group, had completed high school and received a reasonable income. She initiated a conciliation meeting with her landlord and then subsequently defended a claim before the SCT. Both processes involved a protracted dispute about whether or not she was breaching the terms of her lease by allowing her dog into the rented accommodation. User 16 obtained early advice from the RTA, as well as from the Tenants’ Union, the two main agencies that provide support in tenancy disputes. Ultimately, the SCT made an order in her favour. User 16 was adamant that what she was doing was not only reasonable but permissible under the lease, and she was determined to have the matter resolved in her favour. To this end, she was committed, resourceful, thorough, passionate, and even occasionally displayed some anger at what she perceived to be the unreasonableness of the landlord’s agent. She engaged vigorously at every stage of the dispute process; undertook extensive research into available online and other resources; sought and obtained advice from a number of available sources; was willing and able to act on that advice; and made decisions and judgement calls on how best to progress her interests for the duration of the dispute.

User 5, a foreign male student in the 18–25 age group, studied engineering at a Brisbane university. He displayed a similar level of determined engage-

ment to that of User 16 in the management of his dispute with his landlord. He had rented accommodation via a website before leaving his home country. However, upon arrival, he discovered that 'the property was not of a good standard'. The rooms were 'run-down' and the furniture was inadequate for his purposes. His efforts to have the owner improve the facilities led to further difficulties, which resulted in him being locked out of the accommodation. This user, who had not previously had any experience of courts or tribunals in Australia or elsewhere, obtained advice from a university student housing service. Subsequently he lodged a claim before the SCT in which he asked for various forms of relief, and achieved a successful outcome. His approach throughout was careful, precise and measured. For example, when asked by the interviewer to comment upon the grounds on which he had chosen to terminate the lease, his response was precise and articulate:

Firstly, the owner did not undertake essential repairs. Secondly, the owner did not allow the quiet enjoyment. Thirdly, the owner locked me out of the rooms even though I had paid rent in advance. Fourthly, the owner would not let me collect my belongings. Fifthly, the arrangement had broken down because I could not stay there safely anymore.

When asked what he meant by the phrase 'quiet enjoyment', he replied: 'It means the owner is not to enter the rooms without my permission or without giving notice'. User 5 reported on what he asked of the referee when he appeared in the SCT: 'Firstly, I wanted to be allowed to collect my belongings. Secondly, I wanted for the owner to return my bond money. Thirdly, I wanted to be sure that I did not have to pay any more rent'. When asked by the interviewer to comment on his success in the process he pursued, he stated: 'I feel good. I think it is a good legal system'.

The interview responses from User 5 also showed that he understood exactly what the legal issues had been, and what he had to do in order to resolve them. He presented as highly intelligent, capable, resourceful, motivated, and with high-level English language skills despite his foreign nationality. He had quickly developed a sound understanding of his legal rights as a tenant in Australia. He was also able and willing to seek and take advice, which he used to great effect in completing paperwork and moving the dispute process forward. His responses to our questions also indicated that he was able to exercise effective judgement in his dealings with the SCT in, for example, a decision not to press for return of rental money (a small amount) as this might involve further dealings with the landlord, which he was keen to avoid. User 5, a visitor to Australia, had succeeded in overcoming the difficulties

associated with an exploitative landlord — and did so largely through his own efforts and personal resources.

Similar personal attributes and characteristics were evident in the approaches taken by Users 18, 12, and 10. User 18, a tenant, brought a claim before the SCT after a parking shed on the rented premises was demolished on the instructions of the landlord without any consultation. In preparing her case she used the internet, the telephone, and made use of various forms and checklists. She also sought some guidance from a person at the SCT itself. She presented as someone very capable who also learned quickly as she progressed. She was also highly motivated, focused and diligent. Although she reported that she simply followed the procedures ‘because that’s what you have to do’, she probably understated the extent of her own resources and abilities in dealing with her dispute. Her responses indicated that she took and considered advice; made effective judgement calls; conducted research on a number of occasions; rehearsed her arguments in advance; and came fully prepared to the SCT hearing. In summary, she was a very good example of someone who gave herself the best possible opportunity to have the dispute resolved in her favour.

User 12 also prepared carefully for the conciliation meeting and displayed unusual resourcefulness as a researcher in assembling information relevant to his rental dispute on rent being paid by other tenants as well as rental statistics over a three-year period. Like other engagers, User 12 had a positive mindset, confidence that he could deal with the problem he faced, and was persistent and determined.

User 10 was a retired male businessman in the over-70 age group. Together with his partner, who possessed considerable research, administrative and typing skills, he was successful in reaching an agreement with a tenant to vacate premises they owned, after issuing a notice to the tenant to leave. Working as a team, this retired couple were experienced and comfortable in dealing with documents and processes, and they were organised, diligent and motivated — not least of all by the fact that they had a considerable financial interest in the property that they leased. Both believed without hesitation that they were morally and legally in the right, and this seemed to explain a large part of their commitment and diligence. And they possessed another valuable resource; as User 10 put it: ‘we are a couple of older people with nothing but time on our hands’.

Some of these qualities were evident in the accounts provided by Users 2, 4, 6 and 14, although their levels of engagement were on the whole not as extensive. User 2, a tenant, received a claim through the SCT from a former housemate for a refund of a security deposit of \$800. According to User 2:

I couldn't believe that he'd have the hide to ask for bond money when he knew, knows, that he still owes [\$1000] for rent ... But then I started to think, I'm not going to let that bastard get away with it so I went online and Googled everything I could think of, tenants, bonds, landlords in Queensland ...

User 2 was notable for his feisty determination, against the advice of his partner, not to allow his former housemate to obtain a refund of the bond unless outstanding rental was paid. Like other users, he was strongly motivated by the prospect of an unjust outcome.

User 4, a female in the 18–25 age group, initiated a claim against her former landlord who refused to return bond money, retaining what seemed an excessive amount for cleaning of the premises. The dispute was eventually settled in a conciliation meeting. However, User 4 was exemplary in her use of the available processes: she researched carefully; made full use of the available RTA resources; carefully completed the necessary paperwork; lodged this with the proper authority; took advice about what would happen at conciliation; familiarised herself with the issues; and was careful to take all necessary documentation to the meeting. She too was motivated by a sense of unfairness at what was happening — in this case, the fact that the bond money was being withheld. She was committed to ensuring that she was not taken advantage of by a greedy landlord and her actions were fuelled to a significant degree by an implacable belief in the correctness of her position.

User 14, an unemployed female in the 26–35 age group on welfare benefits, experienced problems with a staircase in her rented accommodation and lodged a claim against her landlord for not properly maintaining the property. She too was resourceful and committed, and her case demonstrated that the RTA support systems work well for those who are prepared to take advice and receive assistance, and to focus on and engage carefully with the tasks at hand.

In summary, the engagers we identified in this study tended to be highly motivated and took their disputes seriously. They were generally committed, skilful, resourceful, conscientious and determined to achieve a result that was acceptable to them. They were willing to conduct research and to seek information from the online and written resources available to them. In this sense they were active participants in the process they were engaged in. They had confidence in their own abilities to engage effectively, including being able to recognise the relevance of helpful information when they come across it, and being able to trust it and use it productively. They were also willing to seek and to take advice from service providers familiar with the system. They tended to demonstrate the skills of organisation, planning and preparation, while many were also passionate about their causes. Finally, they almost invariably pursued their cases as matters of principle, believing strongly in the

correctness of their positions. We provide further observations about these findings in Part VII.

### B *Avoiders*

We turn now to report on a selection of users who displayed characteristics that presented quite differently from those we detected amongst the engagers. For reasons that will emerge, we refer to them as avoiders. As before, we have also chosen to provide some relevant details from the interview transcripts in an effort to illustrate our conclusions about these user types.

User 1 was a male in the 18–25 age group who exemplified those in the avoider category. He had not completed high school, had recently lost his job and fell behind in his rental payments. The landlord sought termination of the tenancy agreement. User 1's way of dealing with the claim against him was to take a somewhat resigned and detached position. He obediently followed the instructions to attend at the SCT, but did not prepare in any way. Nor did he research his problem or seek advice on his options. The only guidance he received was from the agent for the landlord, who advised him that he should attend the hearing. He had not heard about the RTA, and did not show any interest in the resources they offered to tenants in difficult situations. He was in most material respects the opposite user type to that which we have referred to as the engager: in attitude, in motivation, and therefore in a willingness to engage and to take steps to address his predicament — in short, to take responsibility for his problem. However, he did deploy his own skills in at least one important way: he negotiated an agreement with his opponent to postpone the matter, to give him time to sell his car so that he could meet his outstanding rental obligations. When asked whether he was concerned about being ordered to leave the property, his response was: 'not really, no. No point sweating the petty stuff in there. So they could have kicked me out. It's no biggie, I would have just gone back to my folks for a bit'.

User 7, a male labourer in the 26–35 age group who had achieved a mid-level high school qualification, displayed a similar mindset. He received a notice to attend the SCT to answer a claim by the landlord to evict him for non-payment of rent. A 'repeat player', he made it clear that he understood the system well, because he had been in the situation of being evicted before. On this occasion he called a tenants' advisory service who allegedly told him it was 'tough luck. I either had to pay up or get out'. He attended the SCT resigned to his fate. Asked why he attended, given that he knew he would be evicted, he said: 'well I just thought I'd give it a fly. Try explaining to the judge that I did pay my rent'. Although User 7 was detached and somewhat blasé,

his attitude and lack of engagement seemed related to his own experience as a repeat player in these circumstances, and his belief that he would be unable to defeat the argument for eviction.

User 11 was also a repeat player. A female in the 26–35 age group who had left high school at an early age, she was unemployed. She explained her circumstances: ‘this is maybe the fourth place where I got kicked out for rent so I know how [the system] works. But I’ve never been here before, in the [SCT]. I know to just go when you get that notice to leave’. Like User 7, this person appeared to be unwilling to explore ways to improve her predicament. She was resigned to her fate, and her lack of engagement can be attributed to her own sense of her circumstances, which was that she was in no position to dispute the claim against her. She had no interest whatsoever in researching, finding out and seeking advice in order to be better equipped to deal with the issues she was facing. Similarly, User 15 did not believe that he had any basis upon which to dispute the claim. His niece, on whose behalf he had rented accommodation, defaulted on payment. He accepted the legal consequences, saying ‘it is the law’. A pensioner and an immigrant, his English language abilities were limited. This would, in any event, have made it difficult to research and read the information resources available to users of the SCT and its processes.

User 17, a male in the 35–50 age group, was also an experienced renter. He became embroiled in a dispute with a new neighbour who complained about noise and smell from his spray painting. He quickly accepted the need to move on to other rented accommodation, seeing no point in having to put up with ‘aggro and idiot neighbours’, as he put it. He chose not to do any research, obtain advice or even prepare for the hearing; in fact, he seemed unwilling to use his own resources in any way in order to contest the claim. User 9 was also detached and seemingly disinterested in the outcome of a dispute over a bond. But in his case, as an experienced tenant, he had reason to believe (correctly, as it turned out) that ultimately he would be refunded his bond money even if he chose to avoid becoming closely involved in the dispute.

User 3, a female in the 26–35 age group, displayed an overwhelmingly negative attitude in her dispute with her landlord concerning the return of her bond money at the end of the lease. She seemed transfixed on the challenges before her, as she saw them, and this seemed to disable her from being anywhere close to an effective self-helper. She dismissed, for example, the suggestion that she might have been better prepared for the hearing. Her attitude was one of irritation and indignation, which meant that she was unable even to understand her predicament adequately. She witnessed what

she regarded as a high degree of familiarity and friendliness between SCT officials and the agent for the landlord, which led her to believe that she could not possibly receive a fair hearing.

In summary, the group whom we refer to as ‘avoiders’ exhibited characteristics quite different from those in the engager category. They tended to lack the motivation and commitment routinely displayed by the high-end engagers in particular. Their detachment was often fuelled by a general lack of belief or trust in their own abilities, in their own position, in the other players in the system such as other parties or officials, and therefore in the system itself. Their general negativity manifested in attitudes such as cynicism, suspicion, feeling resigned to the outcome, and even sometimes anger. Avoiders tended not to engage in ways that might have assisted them: typically, they did not seek advice, conduct research, prepare, or conscientiously undertake any of the other tasks that might lead to better outcomes for themselves. We provide further observations about these findings in Part VII.

## VII DISCUSSION AND FINDINGS

### *A Environmental Factors*

In this study, the environmental, or contextual, circumstances of these tenancy-related disputes had a significant bearing on the experiences of some of the users, together with the outcomes they received. The most influential environmental factors referred to in the interviews of those whom we subsequently categorised as engagers were undoubtedly the information and advisory resources available to them. All engagers were to a large extent successful in obtaining helpful information and advice about their tenancy matters. They all made productive use of this assistance in the various tasks that they undertook, even if they did not ultimately achieve the outcome they were seeking.

Taken together, the interviews of the engagers therefore suggest that in legal self-help contexts such as this one, users of legal processes stand to benefit substantially from a combination of expert oral advice (but not necessarily from a lawyer) together with a thorough set of customised written resources, such as those available on the RTA website. This finding is consistent with some of the literature referred to earlier.<sup>50</sup> These resources appear to a very large extent to allow some users to deal with their matter without legal representation. The only occasion when the users who actually used the

<sup>50</sup> See, eg, Civil Justice Council, above n 23, 10 [20(7)].

RTA website, for example, were critical of these resources was when their claim, or defence, was out of the ordinary. It also seems that some of the most successful users, in terms of the favourable outcomes they obtained, were successful at least partly because of the availability of these resources. There is some evidence to suggest that the resources contributed to these users' satisfaction with their overall experience.

By contrast, the cynical, detached users appeared not to place any importance upon the opportunity to obtain advice or assistance from sources available to them. Some seemed predisposed not to seek assistance, apparently believing that they were better off unaided. This suggests that in proceedings such as these, those who are disinclined, for whatever reason, to access the available resources are also less likely to have a positive experience, whether they are ultimately successful or not. Further, we suggest that no matter how good the supporting resources, these will not be productively utilised by users who are negatively disposed to the matters at hand, an aspect considered further below.

One additional environmental aspect worth noting concerns the possible significance of human contact with an expert advisor during the currency of the dispute. Comments made by some of the engagers suggest that direct and timely oral communication with an advisor, even by telephone, was in itself a valuable if not necessary part of the overall process for them. In other words, while the content of the advice or information was certainly important, it seemed equally important for some users to be able to speak directly with somebody who was able to affirm the legitimacy of what they were trying to achieve. Affirmation of this kind, which carries with it an element, at least implicitly, of personal encouragement, cannot be provided by guides and documents alone, no matter how sophisticated they are.<sup>51</sup>

### *B Legal Tasks: Questions of 'Complexity'*

In general, a message that emerged from the interview transcripts was that those users who chose active participation in the dispute process rather than avoidance or detachment, appeared to be able to manage the inherent legal processes and tasks (or legal transactions, as we also refer to them). Moreover, most respondents were not at all intimidated by the legal dimensions of the dispute in which they were involved. Some did not even think about their

<sup>51</sup> We are not aware of any comparable published research that has noted this particular possibility.

dispute as a legal one and, of those who did, some also believed that solicitors would not necessarily have handled the matter any better. However, this does not mean that every dispute was necessarily straightforward.

The fact that some users felt that they were not dealing with ‘law’ in the true sense suggests an interesting question, which we note without exploring fully: what amounts to a ‘legal’ matter from the point of view of an ordinary member of the public? From a lawyer’s perspective, many of the tasks and processes managed by these users were legal ones. This, after all, is a dispute resolution domain involving both conciliation and adjudicatory interventions around legal rights and responsibilities, involving matters such as presenting one’s case, evidence and sufficiency of proof. Yet this study suggests that many users were not thinking ‘law’ at all, but rather saw the problem that they faced as something quite ordinary, involving a normal but infrequent challenge — like disputing a proposed rent increase — which they needed to confront and deal with before moving on to other matters in their busy lives. It also seems likely that few of these users, if any, perceived these tasks and responsibilities as being much different from those they might face in dealings with federal or state government agencies in a range of essentially administrative areas, including welfare and tax.<sup>52</sup>

This ‘non-law’, or perhaps ‘law not an issue’, perspective may of course be a distinct advantage for users likely to be less intimidated when entering a domain that might otherwise carry or imply the confronting label of ‘legal’ or ‘lawyers’ work’. The denial of legal representation in the SCT itself<sup>53</sup> also probably helps to reinforce the belief that these matters can be satisfactorily addressed without professional assistance, and that the presence of ‘law’ is not to be regarded as an obstacle to the attainment of good outcomes. It follows that it is not necessarily the spectre of ‘the law’ itself that ought to be our focus in contemplating how unrepresented litigants or users will cope in proceedings or processes like these, but rather whether they have direct access to relevant and helpful resources and advice to engage meaningfully with the particular process, and — as this study highlights — are sufficiently skilled and positively disposed towards the tasks at hand.

Another observation, based on our reading of at least three of the transcripts, is that some engagers tended to exhibit what may be called a ‘legal consciousness’, even if they themselves were not fully aware of this. This is manifested in a predisposition, for whatever reason, to a basic understanding

<sup>52</sup> This invites some comparison between the needs and experiences of users in this study, about which some observations are included below: see below nn 60–4 and accompanying text.

<sup>53</sup> See above n 9 and accompanying text.

of the functions and purposes of legal tasks and processes, even when users themselves did not see them as inherently legal. It follows that some engagers seemed to bring to their dispute a degree of confidence in the ability of the system to respond positively to the circumstances of their case. They appeared to hold a more or less positive expectation that the institution in which they were engaged might assist them, as ordinary citizens, to meet their needs (and possibly even vindicate their position), given their own willingness to take personal responsibility for — and provide personal energy in — presenting their cases effectively.

Put simply, some engagers demonstrated a measure of confidence in the system and its ability to respond to their needs and efforts. By contrast, avoiders almost invariably appeared to come to their disputes with an apparent lack of understanding, suspicion, or even a deep mistrust of the processes in which they were often decidedly reluctant players. This general observation, based on our interpretation of some of the interview data, is comparable to the suggestions by Jones, reported above, to the effect that ‘legal capability’, in the context of civil proceedings, includes being an ‘active citizen’, which means having some understanding about the role that law plays within a legally organised society.<sup>54</sup>

### *C Personal Factors*

This leads us to some final observations about the third broad category of variables, which we have referred to above as ‘personal factors’ or ‘personal characteristics’. In this study, these factors in particular seemed to have a considerable bearing on the ways in which these users of the tenancy dispute resolution processes approached their tasks. As we previously noted, engagers tended to be committed and resourceful, were willing to conduct research, were able to seek out and take advice, demonstrated skills in organisation, planning and preparation, and tended to exude a high degree of self-belief. Avoiders, by contrast, tended not to engage in ways that might assist them, such as by conducting research, seeking advice, or planning and preparing. They tended to be detached and lacked confidence in the system, its players and often even in themselves.

Unlike avoiders, engagers were almost always committed to and sometimes even passionate about their causes, whether they were prosecuting or defending the claims. This positive and determined attitudinal dimension

<sup>54</sup> Jones, above n 35, 7, 9.

tended to define the high-end engagers in particular, while negativity and resignation to one's fate were common amongst avoiders. Engagers invariably adopted an 'I can do this' or 'I can win this' attitude, even when (or perhaps especially when) they were annoyed or even apprehensive about what lay ahead. Some negative or antagonistic feelings towards the opposing party, or the dispute resolution system itself, might therefore increase their determination to tackle their problem and to find an outcome with which they could be satisfied. Avoiders, on the other hand, tended to bring to the dispute an attitude of 'I can't possibly win this' or 'the system is against me', and their attitudes aligned closely with their general lack of engagement. Most believed, rightly or wrongly, that they were in a weak or even hopeless position as far as the merits of the dispute were concerned, and became observers of, rather than participants in, the processes that often affected them so closely. At least one user in the study was so angry and negative about the actions of the landlord's agent that she became completely disabled from playing any constructive part in seeking a solution to her problem.

These findings are comparable to the observations made by Balmer et al on the English and Welsh Civil and Social Justice Survey, referred to above.<sup>55</sup> That report noted that '[w]hile many respondents successfully obtained advice or handled their [legal] problems alone, a significant proportion did nothing',<sup>56</sup> suggesting that 'knowledge, skills and confidence gaps in the population ... are barriers to achieving legal capability'.<sup>57</sup>

A question that arises from the conclusions of this study is whether it is possible to improve the levels of engagement of users who do not engage sufficiently or at all in processes that require or rely upon reasonable attempts at effective self-advocacy. In our opinion, the avoider characteristics presented here are not essentially a problem of learning styles, for example, or even necessarily about inadequate skills and abilities. The difficulty is that some users who avoid the issues and seemingly choose to disengage from insufficient or any meaningful involvement do so as a result of their own negative attitudes and beliefs. As we have suggested, these include a lack

<sup>55</sup> Balmer et al, above n 28.

<sup>56</sup> Ibid 5.

<sup>57</sup> Ibid 6 (emphasis altered).

of confidence<sup>58</sup> or even a sense of alienation from processes ostensibly designed to provide them with opportunities to help themselves.<sup>59</sup>

In this vein, some initial comparisons can be made between the users in this study, being users of a specialist Queensland tribunal, and unrepresented users of administrative tribunals in general.<sup>60</sup> It is noteworthy that the variable needs of users of administrative tribunals have been explicitly recognised in some official reports on the aims and functions of the administrative tribunal system. For example, reference has often been made to the need for these tribunals to be more user-friendly,<sup>61</sup> and to be able to cater effectively for users with disabilities and incapacities.<sup>62</sup> Some tribunals themselves, including those that exercise court-like functions, publish statements to the effect that they recognise and cater specifically for all kinds of users, principally by providing various forms of support and assistance.<sup>63</sup> However, the forms of support currently available seem to rely upon users being willing to some degree to help themselves and do not appear therefore to be designed to address the problem of disengagement itself.<sup>64</sup>

Amongst engagers, the strongly positive attitudinal factors included another noteworthy feature. Some engagers were motivated at least in part by a

<sup>58</sup> As also noted by Balmer et al: *ibid* 5–6.

<sup>59</sup> Although we have not considered the predicament of unrepresented defendants in the criminal justice system as part of this study, we believe that it is possible that ‘avoider’ characteristics may also be present amongst those who appear in that environment.

<sup>60</sup> However, we are unaware of any published empirical studies of users of administrative tribunals that are directly comparable, in terms of aims, methodology and findings, to the study that forms the basis of this article. Cf Lorne Sossin, ‘Access to Administrative Justice and Other Worries’ in Colleen M Flood and Lorne Sossin (eds), *Administrative Law in Context* (Emond Montgomery Publications, 2008) 391.

<sup>61</sup> Ministry of Justice (UK), ‘Administrative Justice and Tribunals: A Strategic Work Programme 2013–16’ (Policy Paper, December 2012) 20–2, 24.

<sup>62</sup> See, eg, Sir Andrew Leggatt, ‘Tribunals for Users: One System, One Service’ (Report, Ministry of Justice (UK), March 2001) [4.22] <<http://www.tribunals-review.org.uk>>.

<sup>63</sup> See, eg, New South Wales Civil and Administrative Tribunal, *Access and Support* (31 December 2013) <[http://www.ncat.nsw.gov.au/ncat/access\\_support.html](http://www.ncat.nsw.gov.au/ncat/access_support.html)>.

<sup>64</sup> Other disciplines might assist in understanding these issues more fully. For example, questions of engagement, including what engagement means from an individual perspective, are addressed within the field of psychology in a number of different contexts: see, eg, Irene Lorenzoni, Sophie Nicholson-Cole and Lorraine Whitmarsh, ‘Barriers Perceived to Engaging with Climate Change among the UK Public and Their Policy Implications’ (2007) 17 *Global Environmental Change* 445. Citizen engagement in particular is also addressed in public administration: see, eg, Carolyn J Lukensmeyer and Lars Hasselblad Torres, ‘Public Deliberation: A Manager’s Guide to Citizen Engagement’ (Report, IBM Center for the Business of Government, 2006).

belief that what they were doing or seeking was right and fair, and that what the opponent was seeking was wrong and unfair. In short, these users were strongly motivated by what they saw as a matter of principle.<sup>65</sup> For example, some felt that the treatment they had received from the other party (usually the landlord or the landlord's agent) was morally wrong, or that the claim made against them was plainly unjust and therefore had to be resisted. These sentiments of feeling wronged or unfairly treated, coupled with a sense that the 'correct' outcome (as they saw it) was achievable through their own efforts, combined to form a powerful set of ingredients for active and determined engagement in a case they thought was worth fighting.

Our final observations and comments, before we conclude, are about what could be referred to as the learning capabilities of the engagers. As already noted, the engager interview data reveal that these particular users of the SCT's processes were able to engage meaningfully in their disputes by drawing both on their own resources and those available via advice-givers, websites and information brochures. In this sense they were very successful in their efforts, and most also achieved what they regarded as good outcomes to the disputes themselves. But when they initially entered this particular dispute domain, all but one or two 'repeat players' did not possess anything like the level of knowledge required to undertake the kind of self-help legal work that the circumstances called for.

This leads to an observation about the extent to which users of these dispute resolution services were able to learn in situ in order to advance their causes. It certainly seems that the engagers in this study needed to possess, and probably always did possess, the ability to acquire specific knowledge and also to use this understanding skilfully and in ways that advanced their positions in the dispute (whether or not they were ultimately successful in achieving what they sought). They therefore often needed to learn quite quickly not only what was required of them but also *how* to perform the various tasks in an effective way.

The extensive literature on learning styles is relevant to explain why some users were able to equip themselves in time with levels of understanding

<sup>65</sup> Similar observations have been noted in research elsewhere: see, eg, Pleasence, above n 18, 136; Ab Currie, "A Lightning Rod for Discontent": Justiciable Problems and Attitudes towards the Law and the Justice System' in Alexy Buck, Pascoe Pleasence and Nigel J Balmer (eds), *Reaching Further: Innovation, Access and Quality in Legal Services* (Stationery Office, 2007) 100.

needed to engage effectively with the process.<sup>66</sup> The theory of andragogy may also help to explain this (adult) learning ability, in that generally ‘adults have a readiness to learn those things that they need to know in order to cope effectively with real-life situations’.<sup>67</sup> This leads us to suggest that in these particular circumstances, and whether they were conscious of it or not, engagers were often involved in a process of “‘just in time” learning’<sup>68</sup> — about particular laws, processes, sufficiency of evidence, how to prepare particular documents and present one’s case, etc — without which they would not have been able to engage with and manage the tasks they were required to complete.

Learning of this kind, followed by the performance of specialised legal activities, seems to require a level of understanding and engagement that is qualitatively different from what is needed to complete largely pre-determined and formulaic steps found in less demanding legal transactions, like those involving applications for probate, for example. In those matters, self-help support resources such as kits and guides can minimise, if not obviate, the need for any thoughtful engagement, judgement and decision-making, largely because the legal transaction lends itself to formulaic completion and minimal engagement.<sup>69</sup> However, what this study suggests is that the formulaic, somewhat disengaged approach to self-help legal work is not always possible or effective. If they are to have any chance of being successful, self-advocates involved in dispute settlement processes need to be able to cope with situation-dependent variation and uncertainty, brought about by changing demands and circumstances as the dispute runs its course. Their contributions sometimes call for the exercise of careful evaluation and judgement about what to do now.

<sup>66</sup> For a helpful review of 13 more significant learning style models, including the work of David A Kolb, see Frank Coffield et al, ‘Learning Styles and Pedagogy in Post-16 Learning: A Systematic and Critical Review’ (Report, Learning and Skills Research Centre, 2004).

<sup>67</sup> Malcolm S Knowles, Elwood F Holton III and Richard A Swanson, *The Adult Learner: The Definitive Classic in Adult Education and Human Resource Development* (Gulf Publishing, 5<sup>th</sup> ed, 1998) 72.

<sup>68</sup> To use a phrase from some exploratory work conducted by the National Institute of Adult Continuing Education, on behalf of the Public Legal Education Network, in which the authors comment upon the possibility that citizens who are already experiencing legal difficulties are provided with opportunities for ‘just in time’ learning: Howard Gannaway and Lorraine Casey, ‘Potential for Public Legal Education in Adult Learning: Report on a Consultation with Adult Learning Experts’ (Report, National Institute of Adult Continuing Education, September 2009) 2.

<sup>69</sup> See generally Lawler, Giddings and Robertson, ‘Maybe a Solicitor Needs to Know That Sort of Thing’, above n 2; Giddings and Robertson, ‘Lay People, for God’s Sake!’, above n 4.

An interpretation of the relevant interview data in this case study suggests that despite having access to helpful guides, forms and advice, the engagers would not have been able to undertake their tasks as effectively as they did without learning about what was required of them, a contemplation of the unique requirements of their case, and some situational decision-making, such as how best to present their claim or defence, or prepare and marshal evidence for the conciliation or SCT hearing. Engagers in this study seemed able and motivated, to varying degrees, not only to learn what was required of them, but also how best to adapt to the unexpected challenges that might come their way.

### VIII CONCLUSION

By way of summary, our conclusions about user characteristics drawn from this empirical study can be presented in table form, showing the most positive user characteristics in comparison with the most negative. Many of these are attitudinal in nature. The high-end engagers, representing only about a quarter of the participants whose transcripts we analysed, exhibited many or all of the characteristics appearing in the first column in the table below. Others exhibited only some of these characteristics. By contrast, the avoiders demonstrated few or none of these and they also tended to exhibit a negative mindset, reflecting the characteristics appearing in the second column.

*Table 1: Contrasting Approaches to Self-Advocacy*

'Engager' Characteristics	'Avoider' Characteristics
Highly motivated and committed to helping themselves through the dispute	Lack motivation and commitment; display negativity and sense of resignation to their fate; appear reluctant or unwilling to undertake any tasks that might lead to better outcomes for themselves
Actively engage with their dispute and take its challenges seriously	Tend to be detached and choose not to engage in ways that might assist them
Conscientious, positive, purposeful and resilient, determined to achieve an acceptable result for themselves	General negativity manifested in cynicism, suspicion, feeling resigned to the outcome; sometimes angry

'Engager' Characteristics	'Avoider' Characteristics
Possession of self-belief and confidence in their own abilities to engage effectively	Lack self-belief in their own abilities and in their own position in relation to the dispute
Skilful and resourceful, such as in researching and seeking out information and advice	Tend not to engage in ways that might assist them, such as by conducting research, or seeking information or advice
Able to recognise, trust and utilise helpful information productively	Unable to access and utilise information constructively
Organise information and prepare effectively for meetings or hearings	Tend not to plan or prepare for meetings or hearings
Conduct their case, sometimes with passion, with a belief in the correctness or fairness of their position in the dispute, or as a matter of principle	Tend to be observers rather than participants in the processes
Demonstrate a measure of confidence in the dispute resolution system and in its ability to respond positively to their needs and efforts	Lack confidence in the system, its officials and other parties; come to their disputes with an apparent lack of understanding, suspicion, or even a deep mistrust of the processes
Able to engage in 'just in time' learning and to utilise this understanding to tackle or meet the challenges presented to them	Unable to engage sufficiently to learn what the circumstances may require from them
Able to cope with situations of uncertainty and unpredictability that may arise in their case	Tend to avoid having to confront uncertainty; allow matters to take their course with little or no input from themselves
Demonstrate capacity for evaluation and judgement around case issues that call for situational decisions	Insufficiently engaged in or committed to the process to make informed and considered decisions

We conclude with some general reflections about the potential for effective self-help legal work in a civil dispute setting without legal representation. This study shows that even when (1) the contextual factors (such as information

support systems) tend to encourage and assist rather than inhibit self-advocacy, and (2) the legal tasks are not inherently complex or difficult to handle, meaningful self-representation in civil disputes also requires that self-advocates exhibit a substantial set of positive personal characteristics. These are what we have referred to as engager characteristics, as summarised in the table. The results of this study also tend to confirm our original hypothesis, which is that legal self-help presents both opportunities as well as limitations and challenges for users — all within a complex mix of both positive and negative variables, represented in the three main sets of factors that have aided this study: environmental factors, legal complexity and the personal characteristics of the users themselves.

Finally, it seems reasonable to speculate that many self-advocates in comparable civil dispute settings would probably not exhibit many of the engager characteristics we have identified in this study, and that only a small minority would likely exhibit all of them. If this is correct, then this must raise a question about the efficacy and utility of self-advocacy in other civil justice dispute situations, in which the support systems are often sparse or even non-existent and where the legal issues are altogether more complex and demanding than the tenancy laws and processes at the heart of this study. Future research into the actual performances and experiences of self-advocates in other civil dispute processes may confirm whether or not this is the case. This would help to shed more light on the important question of whether there is a common tendency nowadays to assume too much about the capacity of citizens to handle their own civil disputes without legal representation.