

A white icon of an envelope with a curved arrow pointing upwards and to the right, symbolizing email or digital communication.

# email law

A planning guide for the delivery  
of free legal assistance via email

A stylized blue icon representing an email, consisting of a curved arrow pointing upwards and to the right, enclosed in a circular shape.

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A planning guide for the delivery  
of free legal assistance via email

Law and Justice Foundation of New South Wales  
L14, 130 Pitt Street  
Sydney NSW 2000  
GPO Box 4264, Sydney NSW 2001  
Phone: (02) 9221 3900  
Fax: (02) 9221 6280

<http://www.lawfoundation.net.au>

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National Library Cataloguing-in-publication entry

Email law : a planning guide for the delivery of  
free legal assistance via email.

Bibliography.

ISBN 0 909136 76 9.

1. Legal aid - Australia. 2. Electronic mail messages. I.  
Law and Justice Foundation of New South Wales.

347.017

July 2001

# Foreword



Electronic mail is revolutionising the way in which we communicate with one another. It has become possible for individuals to easily send and receive information and to communicate with colleagues and customers anywhere and anytime. It is one very tangible area where we can see how technology is improving communication and enhancing relationships with family, friends and colleagues across large distances and national borders.

For government, email is an important way in which we can strive to maintain a constant dialogue with the community and for government departments to provide services and receive community input into service provision.

This resource, *Email Law: a Planning Guide*, prepared by the Law and Justice Foundation of NSW, is a timely and important contribution to the developing policy framework surrounding new technologies. It reminds us of the importance of respecting the traditional values of the justice system – reliability, confidentiality and integrity – while enhancing community access to justice through the use of email.

Importantly, the *Guide* is written in plain language, cutting through the legal and technology jargon that often makes this area inaccessible for many organisations. It identifies the issues, such as privacy, reliability and confidentiality, that organisations must consider before they begin providing legal services using email.

The *Guide* will be invaluable for my Department and for the large number of legal service providers examining ways to enhance customer services through online service delivery. I congratulate the Law and Justice Foundation on their work.

A handwritten signature in black ink, appearing to read 'Bob Debus'.

**Bob Debus, MP**

**NSW Attorney General**

Minister for the Environment

Minister for Emergency Services

Minister Assisting the Premier on the Arts

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## Acknowledgements

A number of organisations and individuals have contributed to this guide through meetings, discussions and individual contributions. The Law and Justice Foundation of New South Wales would particularly like to thank the following organisations and individuals for their assistance:

The Victorian Government (Multimedia Victoria <<http://www.mmv.vic.gov.au>>), for providing permission to use sections of *Counselling Online: Guidelines for the Development of Online Counselling Services and Crisis Management*.

David Watts, of Virtual Insight, who assisted with writing this guide, in particular the legal and regulatory framework section. David was also engaged by Multimedia Victoria to write *Counselling Online*.

Members of the Legal Information Standards Council <<http://www.lawfoundation.net.au>>, in particular Mark Burdack (New South Wales Attorney General's Department), Jill O'Meara (Legal Aid Commission of New South Wales), Lorna McKenzie (New South Wales Department of Fair Trading), Sally Kay (Law Society of New South Wales), and Trish Luker (Legal Information Access Centre) for their detailed and insightful comments.

John Corker, Manager and Principal Solicitor, Oz NetLaw (The Internet Law practice of the Communications Law Centre), for advice on the legal and regulatory framework section of the guide.

Gilbert & Tobin, for comments on the legal and regulatory framework.

Rhonda Fadden, who carried out the initial research.

The National Children's and Youth Law Centre for their innovative work and generous sharing of their experience.

Sue Scott, Director of the Online Legal Access Project at the Law and Justice Foundation of New South Wales, initiated and co-ordinated this project.

# 1 Introduction

## Background and context

→ “I am trying to seek information about the family law and consent orders (contact and residency). I need information focusing on contempt of court regarding the consent order. Can you give me any directions on how to seek this information...if you would like to know more about my situation so as to help I would only be glad to... ”  
*email sent to the Law and Justice Foundation of New South Wales*

The number of Australians with email access is rapidly increasing, with an estimated 50 per cent of Australian adults having accessed the Internet in the twelve months to November 2000.<sup>1</sup> Many service providers find that more people are using email to seek help with their legal problems. This is especially the case for organisations that provide legal information via web sites. The National Children’s and Youth Law Centre, for example, receives 30 per cent of inquiries via LawMail, its email legal advice service.<sup>2</sup>

Email is fast and convenient; it may increase access for those who are isolated or have limited mobility, and it is relatively anonymous. An evaluation of users of an Australian email network found that “email provided them with a level of physical and emotional safety not afforded by face-to-face communication. This was particularly true for domestic violence victims. In addition, users were able to communicate in an environment free of stereotypical judgments made on the basis of disability, appearance or race.”<sup>3</sup>

People’s legal problems, however, are often complex, and rarely occur in isolation: they may also need emotional support, housing or other physical support. The nature of the problems might not be immediately apparent. Because of this complexity, the use of email needs to be considered as a component of a service delivery mix, rather than the total solution.

1 Australian Bureau of Statistics 2000, *8147.0 Use of Internet by Householders, Australia*, Australian Bureau of Statistics, Canberra.

2 National Children’s and Youth Law Centre, *Lawstuff* <<http://www.lawstuff.org.au>>.

3 Scott, M., Diamond, A. and Smith, B. 2000, *Opportunities for Communities: Public Access to Networked Information Technology: a Report on the DSS Community Information Network Pilot*, Department of Social Security, Canberra.

## Scope

This guide has been developed primarily for government and community organisations that provide free legal assistance where a client relationship has not been established. These organisations might include community legal centres, government help lines and specialist community sector providers such as tenancy workers. However, parts of the guide will also apply where a client relationship already exists or where there is a charge for services.

The guide has been designed to help organisations considering how to incorporate email into their delivery of free legal assistance. It sets out issues for them to consider including the needs of clients, benefits and limitations of email, policies and procedures, and the legal and regulatory environment. It does not lay down a set of fixed rules that should apply rigidly to all legal services delivered by email. In particular, the section on legal and regulatory issues is only a guide. Organisations needing legal advice about these issues should seek it from a qualified practitioner.

In many cases, using email to deliver services brings to the foreground difficult and complex issues, none of which are new. For example, email needs to be as secure as conventional correspondence. For this reason, the guide should be considered in conjunction with an organisation's existing policies, procedures and guidelines for the delivery of legal information and advice.

The guide does not address issues involved in providing legal information via web sites. Appendix A: Best Practice Guidelines for Australian Legal Web Sites provides guidelines for developing quality legal web sites.

Organisations are welcome to use this guide to help them develop email policies and procedures specific to their own needs.

## 2 Issues to consider

Email is relatively new, with its own strengths and weaknesses. To decide on the nature and extent of an email service requires careful planning. Organisational objectives must be kept in mind. Consideration needs to be given to whether such a service will improve the provision of service to clients, and whether the organisation has the necessary resources. For example, an email service might drain resources from phone and face-to-face services or produce more requests from ineligible clients.

Even if an organisation decides not to provide legal assistance by email, it will still need to develop policies and procedures for dealing with individuals who make contact via email. This is particularly an issue for organisations with web sites.

In deciding whether to provide legal assistance via email, there are a number of factors to consider. These include possible benefits and limitations of using email, client needs and characteristics, how services will be delivered and what resources are needed.

### Benefits of email

- An email service can supplement generic information on a web site and offer clients personalised help with specific inquiries.
- Email is convenient and fast. Clients do not have to wait in a phone queue, find a stamp, envelope and post box or travel to an office.
- Clients can be directed quickly to appropriate sources of referral and information.
- Email is informal and offers clients a degree of anonymity.
- Clients and organisations have written records of transactions.
- A broader or different range of clients may take advantage of email.

- Records and statistics can be automatically generated from email.
- Online inquiry forms allow organisations to structure inquiries.
- Standardised responses can be sent to frequently asked questions.
- Staff do not need to be present at the time of the call.
- Staff answering inquiries can work from remote locations and have flexible working hours.
- Inappropriate inquiries can be screened out.

## Limitations of email

- Clients may not include all the elements of their particular problem in an email, especially if the problem is complex. Incomplete or irrelevant responses could result if the client is not adequately questioned.
- It might be difficult to carry out an adequate assessment of the nature of the client's problem via email. Email communication lacks many of the cues that help a service provider better understand the scope of a client's problem. A client's address, age, gender or other characteristics are not always obvious from an email. Because of this some organisations follow up all email requests with phone contact.
- Clients with legal problems often have a range of other needs, including emotional and physical needs. This might mean that the needs of a particular client are not adequately identified or addressed using email alone.
- Clients can have unreasonably high expectations, both of the speed of response and of the type of support that the organisation can provide.
- Increased demand might put a strain on organisational resources.
- There might be more irrelevant inquiries (for example, from overseas or interstate); more hoax or nuisance inquiries; and more requests from students for help with assignments.

## Client needs and characteristics

Whether email is suitable for delivering a particular service will depend on the needs and characteristics of the service's clients. To establish these, the following questions could be considered:

- Who are the organisation's clients? Would they be prepared to use email to communicate with the organisation?
- Do clients have the necessary skills as well as adequate access to computers and the Internet?

➔ Younger age groups have the greatest proportion of Internet users with 74 per cent of 18–24-year-olds accessing the Internet. There is a steady decline over the remaining age groups down to 52 per cent of persons aged 55 years and over using the Internet.<sup>4</sup>

An Australian study of barriers to Internet take-up suggests that economic and social circumstances rather than geography are the main factors in lack of access.<sup>5</sup>

- Do the organisation's clients have the literacy skills necessary to communicate via email?
- Would clients with limited mobility or who are in remote locations have improved access through an email service?
- Would access to an email service be of benefit to clients who need anonymity or an unobtrusive means of contact because of their home environment or other factors?
- Is there an unmet need for the organisation's service that can be satisfied via email?

<sup>4</sup> Australian Bureau of Statistics 2000, *8147.0 Use of Internet by Householders, Australia*, Australian Bureau of Statistics, Canberra.

<sup>5</sup> Lloyd, R. and Hellwig, O. 2000, *Barriers to the Take-Up of New Technology — The Nature of the Digital Divide*, paper presented at 'The Great Digital Divide — ACOSS National Congress', Canberra.

## Delivery of services

The following questions indicate some of the issues to be considered:

- Is email appropriate for the type of service the organisation provides?
- How will an email service be integrated with other services?
- Can the quality of existing services be maintained if email is introduced?
- How will email be prioritised in relation to other forms of contact such as phone or mail?
- How will the service be managed and what strategies are needed to ensure consistent and high-quality service?
- What training will staff need to operate the service effectively?

## Resources

The cost of delivering services by email needs to be carefully considered. Responding to emails in writing may be more time-consuming than making a phone call. The following questions can help determine resources required for providing an email service:

- What are the set-up and ongoing equipment, software, maintenance and support costs?
- Providing an email service may increase the overall number of people contacting an organisation. Will additional staff be required or will staff need to be redeployed?
- How will the organisation balance resource allocation between different service delivery methods such as face-to-face, phone and email?

## Research and evaluation

The use of email to deliver legal assistance is relatively new and little is known about its effectiveness. Gathering and sharing information about resource demands and the needs, satisfaction and demographics of users can provide valuable data to inform planning.

The following data might be useful in assessing email services:

- Who are the main users of the service, broken down by factors such as age, location and gender?
- What types of inquiries are received?
- How useful is the service to clients?
- How did users find out about the service?
- What are the development and maintenance costs?
- Have there been any negatives, such as time and resources wasted on hoax or nuisance inquiries?

→ The National Children's and Youth Law Centre carried out an evaluation of LawMail, its email service for young people with legal problems. Results of the survey of 56 users of the service indicated a positive opinion of the service by young people. 94% said they would use the service again if they had a legal problem and 71% rated the advice they received as either 'quite useful' or 'very useful'. Most criticism of LawMail focused on the speed of response.<sup>6</sup>

<sup>6</sup> Jan Willett Research 2000, *Youth Speaks — an Evaluation of the 'LawMail' Service*, prepared for the National Children's and Youth Law Centre, <<http://lawfoundation.net.au/resources/lawmail/lawmail.html>>.

## 3 Policies and procedures

Setting out service standards, and how they are to be achieved, is an essential component in the delivery of legal assistance via email. Organisations must establish clear policies and procedures for dealing with email inquiries which incorporate quality standards and legal requirements. The New South Wales Ombudsman's Office, for example, has highlighted the need for public agencies to establish performance standards for clients contacting an organisation via email.<sup>7</sup>

### Service description

→ Welcome to LawMail. Use LawMail to send your legal questions to the National Children's and Youth Law Centre. Lawyers at the Centre will reply to your message as quickly as possible, usually within 10 days. Unfortunately, due to limited resources, we can't help with school projects or research. The Lawstuff site now has hundreds of research links sorted into alphabetical categories. Just go to the Find Out About section and choose More Sites on Youth Participation. The LawMail service is only available for under 18 year olds.  
*Lawmail <<http://www.lawstuff.org.au/LawMail.asp?state=nsw>>*

It is important to clearly describe the exact nature of the service being offered via email. This provides clients with information about the limits of the service and helps to manage client expectations. It reduces the risk of clients misunderstanding the nature of the service.

<sup>7</sup> NSW Ombudsman, *Annual Report 1999/2000*,  
<<http://www.nswombudsman.nsw.gov.au/publications/annrep2000/pdfs/annrep2000.pdf>>.

The service description should be included on the organisation's web site. An effective way to bring it to the attention of the user is to link to it before the user reaches the email inquiry form, or to include it as part of the inquiry form. The service description from the Family Court of Australia is included in Appendix B. If the organisation doesn't have a web site, the information can be provided as part of the email response.

Consider including the following information in the service description:

- aims and scope of the organisation and its services
- extent of the assistance provided by the organisation, for example, 'This service does not provide lawyers who can represent you in court proceedings'
- service restrictions or limitations, for example, if the service is restricted to certain client groups, particular areas of law or particular jurisdictions
- estimated response time
- confidentiality and privacy policies
- qualifications of the staff providing the service
- referral policy
- phone number for urgent inquiries
- contact details of other relevant services
- information about making a complaint and review procedures.

## Inquiries

Structured inquiry forms can help to manage email requests by encouraging clients to provide necessary information; they can also ensure that clients are aware of the services provided. Structured forms and appropriate software can be used to streamline requests, provide auto-responses and automate data collection. For example, a response form can stipulate that users provide the name of the country and state or territory they live in, thereby allowing a service to identify inquiries that are outside their jurisdiction.

Organisations will need to develop forms to suit their own particular purposes, but including the following information might be useful:

- Name
- Phone
- Postal address (including state)
- Age
- Gender
- First language
- Nature of the problem
- Menu of subject areas

### → Examples of inquiry request forms

New South Wales Department of Fair Trading Enquiry or Complaint form

<[http://www.fairtrading.nsw.gov.au/dft\\_complaints.nsf/Complaints?OpenForm](http://www.fairtrading.nsw.gov.au/dft_complaints.nsf/Complaints?OpenForm)>

National Children's and Youth Law Centre

<<http://www.lawstuff.org.au/LawMail.asp?state=nsw>>

New South Wales Department of Industrial Relations Awards Online

<<http://www.dir.nsw.gov.au/awards/enquiry/helpform.jsp>>

Incoming email needs to be checked regularly, and clients should know how often this occurs.

## Responses

→ My firm has had an extensive web site for several years. We receive several thousand 'hits' per week, and answer several hundred emails every week from people all over the United States as well as some outside the U.S. We have an 'Internet Coordinator' who drafts the initial answers from a combination of 'stock' paragraphs that we wrote. When an unusual issue arises, she contacts one of the lawyers here to request a draft answer. Then each draft is forwarded to me for review and modifications in order to be sure that it answers the question asked and that we are complying with the underlying ethics rules...for example, that we are not practicing law in any state where we are not admitted without a license!

*Bonnie Moses, Dessen, Moses & Sheinoff, <<http://www.dms-lawyer.com>>*

*Personal email communication*

Policies and procedures for responding to email inquiries need to be established.

Some issues that could be considered include:

- setting response time standards, for example, 'all emails will be answered within 10 days'
- deciding which staff are responsible for answering inquiries
- deciding whether the response will be via email, phone or some other means
- deciding how staff are identified and which email addresses are used for outgoing email
- setting up procedures for checking conflict of interest
- using automated responses
- using formatted responses including information such as disclaimers and explanations about jurisdiction
- using prepared responses with answers to commonly asked questions

- developing style guidelines, for example plain language usage, respectful language
- developing quality assurance procedures
- developing procedures for dealing with urgent inquiries such as when a person is in danger or in crisis
- dealing with nuisance or hoax emails
- developing procedures for dealing with attachments including virus checking procedures
- developing policies for the use of written materials from other sources, for example the provision of web addresses which may contain information relevant to the inquirer's needs.

Some of the following could be included in email responses:

- name and position of the author
- a summary of the client's question clarifying what the information relates to
- date of the response
- currency of the information
- acknowledgement of any written sources used in answering the request
- jurisdiction of the information
- recommendations to seek further assistance
- referral to other services where appropriate
- disclaimer (see Section 4).

## Auto-responses

An auto-response is a standard, automated message that is sent to all inquirers upon initial receipt of their email.

The near instantaneous transmission of email can create expectations of immediate attention. Automated responses can help to manage these expectations. It is unlikely that organisations will be able to respond to emails immediately, so it is important to provide clients with some basic information about the service provided, the anticipated response time and alternative ways of contacting the organisation. This is particularly important during periods when the service is not staffed, such as during holidays and weekends.

Auto-responses could include information about:

- the expected time the organisation will take to respond
- relevant information about the service offered including the extent of the assistance provided by the organisation and service restrictions or limitations
- a phone number for urgent inquiries
- contact details for other relevant services
- general information about appropriate web resources; these could include a list of sources of assistance or answers to frequently asked questions.

→ Thank you for contacting our service. We try to respond to email inquiries within 3 days of receipt but this is not always possible. If your inquiry is urgent, you can contact our help line on... between the following hours... We only deal with inquiries from clients in New South Wales and we do not provide a service for students.

You may wish to check our web site at <<http://www.example.org.au>> for general information about discrimination and other organisations that may be able to assist you.

## Authorship

It is important that clients know the qualifications of the person providing the information or advice. This allows them to assess the authority of the person to deliver the information or advice.

Providing personal identifying details may not be appropriate. For example, telephone-based information and advice services routinely limit the amount of private information about their staff available to callers. This prevents inappropriate repeat calls to particular staff and limits the occurrence of personalised harassment, or the misuse of information. This may mean that staff are identified only by their first name, and policies are adopted to deny access to personal information.

Similar procedures might need to be adopted for email services. Email responses can be delivered and sent via an organisational rather than personal email address. Ensuring that one person signs all responses, or information is provided under an organisational authorship may also protect individual staff.

Responses might be signed off under the name of a particular person, such as the principal solicitor, along with their title and qualifications, or be supported by a general authorship statement, such as 'This has been prepared by staff of the — who are legally qualified and admitted to practise law in New South Wales and are accredited as specialists in family law'.

## Referrals

Because of the complex nature of legal problems, clients might need to be referred to other organisations. It is essential that these referrals are appropriate. Inappropriate referrals are frustrating and inefficient for both the client and the organisation to which the referral is made.

Developing referral policies and procedures will help reduce inappropriate referrals. Organisations could consider the following issues:

- developing strategies for identifying the referral needs of clients, for example, the organisation may need to speak to certain clients to identify all their needs
- ensuring staff have adequate knowledge of relevant services to make appropriate referrals
- developing guidelines for when to refer clients
- developing policies for referring requests to appropriate organisations such as establishing referral protocols with other services and ensuring referrals are not made without prior permission from the client
- developing procedures for monitoring referrals from, and to, other organisations such as inviting clients to provide feedback on the usefulness of the referral
- providing contact details of appropriate organisations including web addresses, phone numbers and email addresses (this information could also be provided via a web page which is linked to from the email inquiry form)

→ The Immigration Advice and Rights Centre web page, *Who Else Can Help?* <<http://www.iarc.asn.au/help.html>>, provides details of a range of organisations who provide assistance to people with immigration inquiries.

## 4 Legal and regulatory issues

### Setting the rules

It is vital, from both an operational and legal point of view, to explicitly inform clients of the policies of an email service at the time of initial contact or as soon as possible afterwards. This minimises the chance for misunderstandings. (See Section 3 of this guide for a detailed discussion of issues relating to policy.)

To be effective, these policies must be read and understood by the client. To acknowledge that they have done this, clients could be required to either click on an acknowledgement button on a web page, or to send an acknowledgement by email as a prerequisite to the provision of services.

### Negligent advice and information

Caution should be exercised about the level of legal information or advice provided via email.<sup>8</sup> It is difficult to ascertain the full details of a client's situation via email alone, and as a result, incorrect or inappropriate information or advice may be given.

A person who provides advice or information may be liable for negligence if:

- they owe a duty of care to the person to whom the advice or information is given
- they breach that duty of care when the advice or information is wrong and it is reasonable that the person giving it should have known it was wrong, for example, they fail to make proper inquiry, overlook a relevant consideration, or rely on out-of-date material
- damage results from the negligent advice or information.

It is not good practice to be careless about the risk of negligence just because an inquirer is unlikely to suffer sufficient damage to warrant making a claim or because an inquirer would find it difficult to get the advice and assistance necessary to pursue a negligence claim.

<sup>8</sup> Once a special relationship is established a person can be liable for providing negligent advice or information. *Hedley-Byrne v Heller* (1964) AC 465.

Lawyers who provide legal advice or information must do so with due care, skill and diligence. Other professional advisers must bring to their task the competence and skill usual amongst persons practising their profession and taking proper care in what they do. The obligation is to take reasonable care.

Legal assistance provided by paralegal staff should conform to normal standards of skill and competence and should comply with the relevant provisions of the Legal Profession Act in their state or territory.

→ Under Section 48 of the Legal Profession Act 1987 (NSW) a person must not act or represent themselves as a barrister or solicitor unless they hold a current practising certificate. While the Act specifies that only practising barristers or solicitors may undertake the preparation of legal documentation or probate work for a fee, it does not explicitly cover who may provide legal advice.

Staff without legal qualifications should be appropriately supervised when providing online assistance. Staff should make it clear to clients that they are not qualified lawyers.

→ I cannot advise what would happen in your particular case because I am not a lawyer and have no expertise in the area. However, I can refer you to this general information about immigration laws in Australia.

Staff who provide online information or advice should be equipped with at least the same standard of training given to telephone and face-to-face staff.

## Consumer protection

Consumer protection issues are becoming increasingly important when designing and operating online services. There have been various national and international initiatives designed to develop regulatory frameworks to ensure that consumers receive the same protection when they do business online as when they do business face-to-face with a local service provider.<sup>9</sup>

The following principles should be taken into account when providing online services:

- **Identification**

Clients should know the identity and whereabouts of the service provider. This should include a street address and phone number(s). Clearly identifying the jurisdiction or country of the service provider is important for email inquiries.

- **Information**

The terms and conditions on which the service is provided and the rules that apply to the use of the service should be supplied.

- **Payment**

If a charge is made for any service, then it is essential to provide a secure payment system. Details of measures taken to minimise risks should be made available to clients. If there is a fee involved, client agreement should be obtained and payment mechanisms specified.

- **Complaints and dispute resolution**

Client inquiries and complaints should be dealt with fairly and effectively. Service providers should provide clients with information about dispute resolution mechanisms and how to use them.

- **Jurisdiction and privacy**

These issues are discussed under the relevant headings as follows.

<sup>9</sup> Consumer protection standards developed by the Department of the Treasury 2000, *Building Consumer Sovereignty in E-commerce: A Best Practice Model for Business*, <<http://www.ecommerce.treasury.gov.au/html/ecommerce.htm#>>, draw on OECD guidelines.

Apart from these specific online consumer standards, there are consumer protection laws at federal and state or territory level that prohibit misleading or deceptive conduct in trade and commerce. Lawyers who provide services misleadingly or deceptively can be liable under these laws.<sup>10</sup>

These laws generally apply irrespective of whether or not there is intent to mislead or deceive. In determining whether conduct is misleading or deceptive courts look at the audience in relation to which the conduct occurs. The audience for email legal assistance is likely to vary considerably and will cover a variety of people ranging from those who are well resourced to those who are disadvantaged. Accordingly, in order to ensure that a service complies with consumer protection standards, it would be wise to adopt a conservative approach and to err on the side of safety when dealing with any potential consumer issues.

If fees are charged for an email service, there is little doubt that these laws apply. While it is unclear whether a free service constitutes 'engaging in trade or commerce', best practice requires that any statements made about a service, how it operates and what its rules are should be true and unambiguous, and be stated in advance before any services are given.

In addition, any email service needs to be aware of, and comply with, relevant professional codes of conduct, including those that may be developed to cover online delivery of legal information and advice. Email services should provide links to, or information about, all relevant certification bodies, licensing boards or professional standards associations to facilitate consumer protection.

For lawyers this would mean providing links to the relevant Law Society or Bar Association in their state or territory.

<sup>10</sup> See *Argy v Blunts and Lane Cove Real Estate Pty Ltd* (1990) 94 ALR 719 and *Bond Corporation v Theiss Contractors* (1987) 71 ALR 615.

## Disclaimers

### → Be Careful!

The information contained on this site is general and is not intended to be advice on any matter. It is for information only and is not legal advice. You must not rely on the information contained in this site. If you have a legal problem you must talk with a solicitor.

To the extent permissible by law, the National Children's and Youth Law Centre disclaims all liability for anything contained on or accessed via this site and any use you make of it.

The information in this site is presented on a State by State basis. The information presented for one State or Territory is only applicable for that State or Territory. OK (link)

Lawstuff <<http://www.lawstuff.org.au/disclaimer.asp>>

Disclaimers help manage client expectations and set the boundaries for service responsibility and liability. Care needs to be exercised in designing and using disclaimers. If a disclaimer is ambiguous, an organisation is unlikely to be able to rely on it. This applies irrespective of whether the service is information based via a web site, interactive via email, or delivered using a combination of services.

Some online services include disclaimers that purport to disclaim any responsibility whatsoever for the service they provide. It is highly doubtful whether a disclaimer can be effective in absolving a service provider from all liability for the service provided.

A disclaimer will only be effective to the extent that it is enforceable. To be enforceable, the disclaimer must be brought to the attention of the user. This is generally achieved by placing the disclaimer in full at the bottom of the email accompanied by a notice at the top of the email to the following effect: 'The following information is provided subject to the Disclaimer located at the bottom of this email.'

A disclaimer needs to be designed for the particular service to which it applies. Depending upon the nature of the service, consideration could be given to including some or all of the following in a disclaimer:

- a statement that the information provided is general and is not intended to be professional legal advice
- a statement that the information is made available on the understanding that the organisation has no intention of creating a solicitor–client relationship with the user
- a recommendation that the user seek professional legal advice from a lawyer before acting on the information that is provided
- a warning about the limitations on the level of information or advice that can be provided via email and the need to seek assistance in person
- a warning that while the information has been formulated with all due care, the organisation does not warrant or represent the information as being free from errors or omission, or that it is definitive
- a warning that the law changes frequently and that changes in other circumstances after the time of sending may affect the accuracy of the information
- a statement of the limitation of the organisation's liability arising from the use of the information, to the maximum extent permitted by law
- a statement disclaiming responsibility for the accuracy of links or references to outside information
- identification of the jurisdiction to which the information or advice applies.

## Conflict of interest

The general rule is that a lawyer cannot act for both parties to a dispute or transaction. If a client seeks to give instructions online, it will be necessary to carry out a conflict of interest check. It may, however, be difficult to verify the identity of the client online. For this reason caution should be exercised when entering into a client relationship via email.

## Jurisdiction

Email greatly increases the ability of clients to communicate across state and national borders. This raises issues in relation to the provision of services across jurisdictions.

A number of precautions can be taken to minimise the risk of being challenged in a 'foreign' jurisdiction:

- Restrict the service to a particular jurisdiction or a particular class of clients or both. For example, state that the service is only available to the residents of New South Wales and ask clients to provide an assurance that they live in that state. In practice, it is impossible for an email advice service to be absolutely sure that the restriction is effective.
- State in the email policy that the law applying to a service is the law of the state or territory in which the organisation operates, and that the organisation will not be responsible for any consequences that arise from the use of the service by clients who reside outside the service area.
- If a client resides outside the service area, offer alternatives or suggestions for obtaining help. This could include providing contact details for services that deal with clients in that area.
- For specialist services that are providing a national service, care should be taken to examine the law in the relevant state or territory, and to clearly state which laws are the basis for the information or advice.

## Legal status of email and online transactions

*The Electronic Transactions Act 1999* (Cth) is part of a uniform national legislative framework designed to recognise electronic transactions. New South Wales and Victoria have enacted similar legislation<sup>11</sup> and the other states and territories are expected to enact similar laws.

In general terms, this legislation permits certain legal requirements to be satisfied by means of an electronic communication. A requirement to give information in writing, which includes making an application, lodging a claim, sending a notification, or making a request, can be satisfied electronically.

So too, in specified circumstances, can a requirement to provide a signature, to produce a document and to record or retain information and documents. The legislation also introduces default rules that define the time and place of dispatch and receipt of electronic communications.

It is important to note that the legislation is facilitative — no-one is forced to transact business electronically. Both parties to the transaction must consent to the use of electronic communications in order for the benefit of the provisions of the Act to apply to the transaction.<sup>12</sup>

The legislation should not directly affect the provision of online legal services other than defining the time and place of dispatch and receipt of emails between client and service provider, and recognition that the requirement to keep records under Legal Profession Practice Acts (in those states and territories that have an Electronic Transactions Act) can be satisfied electronically.

11 The *Electronic Transactions Act 2000* (NSW) and the *Electronic Transactions Act 2000* (Vic).

12 While this is true of the uniform state and territory legislation, the federal legislation embodies a number of principles of the federal government's online government policy that dilute the consent principle at a federal level. Thus, federal government agencies are compelled, under the *Electronic Transactions Act 1999* (Cth), to accept electronic transactions from 1 July 2001, unless they have been exempted under regulation. The state or territory model legislation has no counterpart to these provisions.

In relation to signatures, the legislation does no more than state that a signature can be provided electronically if:

- a method is used to identify the signer and to indicate the person's approval of the information to which the signature relates
- the method is as reliable as is appropriate having regard to all the relevant circumstances
- the person to whom the signature was given consents.

A digital signature will be recognised at law in the same way that a written signature is now recognised.

## Privacy

Lack of adequate privacy protection is one of the most frequently expressed reasons why individuals choose not to use online services. A survey of 100 Australian web sites carried out by Arthur Andersen found that 72 per cent collected personal information but only 51 per cent published a privacy policy. Only 28 per cent of the sites collecting personal information notified their users that this information was being collected.<sup>13</sup>

Privacy embraces a number of concepts. These include the expectation that information collected about an individual is kept private, that a person's communications will be private, and that information a person provides to an organisation about him or herself will not be passed on to a third party.

The commonwealth and many state and territory parliaments have passed laws dealing with the privacy of personal information by the public sector. *The Privacy Act 1988* (Cth) applies to the federal public sector, to consumer credit reporting and certain tax details. In New South Wales, the *Privacy and Personal Information Protection Act 1998* (NSW) applies to the New South Wales public sector. Other states and territories are actively considering their own privacy legislation.

<sup>13</sup> Arthur Andersen / Andersen Legal 2000, *Internet Privacy Survey 2000: a survey of the privacy practices of Australia's most popular websites*, <[http://www.lia.net.au/Survey\\_P.PDF](http://www.lia.net.au/Survey_P.PDF)>.

The *Privacy Amendment (Private Sector) Act 2000* (Cth) regulates the way that private sector organisations<sup>14</sup> can collect, use, keep secure and disclose personal information. The amendments will not come into force until 21 December 2001.

The National Privacy Principles (NPPs) are an important component of this legislation. These principles are available in full on the Australian Privacy Commissioner's website.<sup>15</sup> A summary of these principles is outlined below.

## ➔ National Privacy Principles — Summary Only<sup>16</sup>

### NPP 1 — Collection

Collection of personal information must be fair, lawful and not intrusive. A person must be told the organisation's name, the purpose of collection, that the person can get access to their personal information and what happens if the person does not give the information.

### NPP 2 — Use & Disclosure

An organisation should only use or disclose information for the purpose it was collected unless the person has consented, or the secondary purpose is related to the primary purpose and a person would reasonably expect such use or disclosure, or the use is for direct marketing in specified circumstances, or in circumstances related to public interest such as law enforcement and public or individual health and safety.

### NPP 3 — Data Quality

An organisation must take reasonable steps to make sure that the personal information it collects, uses or discloses is accurate, complete and up-to-date.

14 See <<http://www.privacy.gov.au/publications/fs1.html>> for discussion of which organisations will be covered by the legislation.

15 Australian Privacy Commissioner, *National Privacy Principles (Extracted from the Privacy Amendment (Private Sector) Act 2000)*, <<http://www.privacy.gov.au/publications/npps01.html>>.

16 Office of the Federal Privacy Commissioner, *Fact Sheet 2 — National Privacy Principles (NPPs), Summary Only*, <<http://www.privacy.gov.au/publications/fs2.html>>, last modified December 2000, last accessed 1 March 2001.

#### **NPP 4 — Data Security**

An organisation must take reasonable steps to protect the personal information it holds from misuse and loss and from unauthorised access, modification or disclosure.

#### **NPP 5 — Openness**

An organisation must have a policy document outlining its information handling practices and make this available to anyone who asks.

#### **NPP 6 — Access & Correction**

Generally speaking, an organisation must give an individual access to personal information it holds about that individual on request.

#### **NPP 7 — Identifiers**

Generally speaking an organisation must not adopt, use or disclose an identifier that has been assigned by a Commonwealth government 'agency'.

#### **NPP 8 — Anonymity**

Organisations must give people the option to interact anonymously whenever it is lawful and practicable to do so.

#### **NPP 9 — Transborder Data Flows**

An organisation can only transfer personal information to a recipient in a foreign country in circumstances where the information will have appropriate protection.

#### **NPP 10 — Sensitive Information**

An organisation must not collect sensitive information unless the individual has consented, it is required by law — or in other special specified circumstances, for example, relating to health services provision and individual or public health or safety.

It is recommended that organisations develop a privacy policy based on these principles. This policy should be set out on a web page linked to from the organisation's home page. The privacy policy of the New South Wales Attorney General's Department web site, Lawlink NSW™, is included as an example in Appendix C.

## Confidential communications

Confidentiality concerns keeping information secret when it is disclosed in confidence, and not using that information for unauthorised purposes. The professional obligations that apply to normal client relationships, such as codes of ethics, also apply to the online environment.

In the case of a solicitor–client relationship, confidentiality issues are covered as part of the contractual duty of confidentiality that applies when the relationship is formed. Even if this contractual duty does not exist, confidentiality should be considered as part of the service policy.

### ➔ Solicitor's Rules, Law Society of New South Wales

#### 2 Confidentiality

2.1 A practitioner must not, during, or after termination of, a retainer, disclose to any person, who is not a partner or employee of the practitioner's firm, any information, which is confidential to a client of the practitioner, and acquired by the practitioner during the currency of the retainer, unless —

2.1.1 the client authorises disclosure;

2.1.2 the practitioner is permitted or compelled by law to disclose; or

- 2.1.3 the practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a felony.
- 2.2 A practitioner's obligation to maintain the confidentiality of a client's affairs is not limited to information which might be protected by legal professional privilege, and is a duty inherent in the fiduciary relationship between the practitioner and client.<sup>17</sup>

For email delivery of services, some specific issues need to be considered.

Clear procedures need to be established defining who can have access to email inquiries so that clients can be assured that their messages will be treated and kept confidentially.

These should include:

- use of passwords and a system of authorities amongst staff
- ensuring network administrators are aware of confidentiality requirements and procedures
- sending standardised electronic reminders about confidentiality to relevant staff
- reviewing the security of related electronic processes such as back-ups and storage of email addresses
- ensuring contractors and consultants have signed 'confidentiality clauses' with specified penalty provisions in their contracts.

<sup>17</sup> Law Society of New South Wales, *Solicitors Rules*, <<http://www.lawsocnsw.asn.au/profreg/solrules/print-index.html#Heading44>>, last accessed March 2001.

## Anonymity

In some situations clients may want to be able to communicate anonymously. Systems are available which strip the inquirer's email address from the message and reattach it after the message has been dealt with.

- We can provide you with emotional support via email. The Samaritans 'listen' in total confidence without judgement, whatever your situation. Email us now: [jo@samaritans.org](mailto:jo@samaritans.org) — your email address is known.  
[samaritans@anon.twwells.com](mailto:samaritans@anon.twwells.com) — your email address is kept confidential from us.  
Samaritans <<http://www.samaritans.org.uk/textonly.html/textmail.html>>

Anonymity is generally not appropriate where a client wishes to instruct a legal representative to act in a specified matter.

## Clients receiving emails

Confidentiality may also be an issue for clients receiving email. For example, a domestic violence victim sending an email from their home computer may not want the response sent back to that computer in case their abuser can access it. This can be addressed by alerting clients to alternative delivery mechanisms or by asking the client to nominate an email address to which replies can be sent.

- How do you want us to reply to your enquiry?  
Please pick one of the two options below, and put your details in the space provided.  
(1) Email — what is your email address? or  
(2) Post — what is your postal address?  
Lawstuff <<http://www.lawstuff.org.au/LawMail.asp?state=nsw>>

## Referring inquiries

Inquiries should not be referred to another organisation without obtaining the permission of the client.

## Email security

Communicating via email carries security risks, as does communicating via phone, post or facsimile. Security is a matter of common sense and sensible risk management. For most situations, the use of a properly protected password on a computer and email program will provide a reasonable measure of security.

The American Bar Association Standing Committee on Ethics and Professional Responsibility has, for example, issued a formal opinion in relation to their Model Rules of Professional Conduct (1998), that secure email is not needed for normal client correspondence:

### ➔ American Bar Association Standing Committee on Ethics and Professional Responsibility

A lawyer may transmit information relating to the representation of a client by unencrypted email sent over the Internet without violating the Model Rules of Professional Conduct (1998) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The same privacy accorded U.S. and commercial mail, land-line telephonic transmissions, and facsimiles applies to Internet email. A lawyer should consult with the client and follow her instructions, however, as to the mode of transmitting highly sensitive information relating to the client's representation.<sup>18</sup>

<sup>18</sup> American Bar Association Standing Committee on Ethics and Professional Responsibility 1999, *Formal Opinion No 99-413, March 10, 1999, Protecting the Confidentiality of Unencrypted Email*, <<http://www.abanet.org/cpr/fo99-413.html>>.

Where additional security is required, it might be necessary to use encrypted email and secure computer access and data storage systems. It should be borne in mind, however, that the use of encryption slows communications and requires both parties to be able to encrypt and unencrypt messages. Where a high level of security is required, proper advice should be sought from a reputable information technology professional.

## Record keeping

Solicitors are required to keep records under the relevant Legal Profession Practice Act in each state or territory. This requirement can be satisfied electronically in those states and territories that have an Electronic Transactions Act.

### → Solicitors Rules, Law Society of New South Wales

- 16 Inspection of registers
- 16.1 A practitioner must, upon receipt of a request from a Trust Account Inspector, or an investigator appointed in accordance with Section 55 of the *Legal Profession Act*, produce for inspection any file register, safe custody register or financial register maintained by the practitioner in accordance with Rules 13, 14 or 15. The information and records prescribed in Rules 13, 14 and 15 may be maintained in electronic form, provided that they can be produced in visible form on demand.
- 16.2 For the purposes of this Rule, 'visible form' means production of information in permanent legible form in the English language.<sup>19</sup>

<sup>19</sup> Law Society of New South Wales, *Solicitors Rules*, <<http://www.lawsocnsw.asn.au/profreg/solrules/print-index.html#Heading44>>, last accessed March 2001.

For public sector organisations, electronic messages are generally classified as records and must therefore be treated in the same way as other records.<sup>20</sup>

Issues about record-keeping requirements for email that need to be considered include:

- legal requirements of document management, storage and archiving
- the length of time that email records need to be retained
- the criteria for which email records should be kept
- preservation of the structure, context and content of the email
- maintenance in a system that prevents them from being changed
- being readily accessible to meet business and accountability requirements
- storage methods, for example whether messages are downloaded and stored with other paper-based filing, and then deleted from the computer system, or are stored as part of a secure electronic filing system
- back-up and disaster recovery.

20 State Records New South Wales 1998, *Policy on Electronic Messages as Records*, <<http://www.records.nsw.gov.au/publicsector/erk/polem/messag.htm>>. National Archives of Australia, *Electronic Records*, <<http://www.naa.gov.au/recordkeeping/er/summary.html>>, last accessed March 2001.

## 5 Conclusion

Email is now commonly used by many sectors of society for many different reasons. Email can, potentially, increase people's access to legal assistance by offering an additional way to communicate.

In particular, services can be provided faster and with more flexibility. Email is not limited by distance, and has the potential to provide remote and regional communities with more options for accessing legal assistance. It may also assist service providers reach a new audience who may be more comfortable seeking out assistance via email than they would via the phone or in person.

However, using email raises its own challenges, which must be factored in to service-delivery models. Email services might not be the most effective way of delivering services to people who are emotionally distressed. Many people still do not have access to email. In practice, an email service may function as a gateway to the provision of more traditional services, such as phone or face-to-face help.

There are no simple answers for organisations looking at how email can be used to deliver legal assistance. Each organisation needs to develop its own email policies and procedures based upon the needs and capabilities of its clients.

The challenge for organisations is to use this technology in a way that both increases efficiency and meets client needs, without reducing the quality of the service offered. In order to do this it is essential to base service-delivery models on the needs and characteristics of the organisation's client group, and to develop and communicate clear policies and procedures for the delivery of these services.

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# Appendix A

## Best Practice Guidelines for Australian Legal Web Sites<sup>21</sup>

1. The person(s) or organisation(s) responsible for the information on a site is clearly indicated on all pages of the site. Full contact details are provided including address, phone, fax and email.
2. Legal content is checked by a lawyer with expertise in the area.
3. The currency of the information is clear.
4. The jurisdiction to which any information relates is clear.
5. The content is written and presented in a way that makes a clear distinction between legal information and legal advice.
6. Where appropriate, users are directed to other quality sites and sources that contain related information. An annotation that briefly indicates the authorship, content or relevance of these sites enhances the usefulness of these links.
7. Consider providing links to relevant legislation and case law.
8. For sites where links to primary legislation and case law are considered useful, use the correct form of citation.
9. Where appropriate, users are provided with information on how and where to obtain legal advice or further information. Referral information includes name, address, telephone and fax numbers, and email and web addresses where available.
10. Permission is obtained to use content sourced from other providers. The source of the content is acknowledged on the site.
11. Links are not made to other sites by framing them within the original site, unless permission has been obtained.
12. The site addresses usability and accessibility guidelines.

<sup>21</sup> Legal Information Standards Council 2000, *Best Practice Guidelines for Australian Legal Web Sites*, Law Foundation of New South Wales, Sydney, <<http://www.lawfoundation.net.au/lisc/recommend/bpguide.html>>.

# Appendix B

## Family Court of Australia

Instructions for contacting the court by email <<http://www.familycourt.gov.au/html/email1.html>>

1. You may contact the Family Court of Australia using email to ask for: —
  - a) general information about services of the Court; and
  - b) administrative procedures
2. The Family Court of Australia does not provide legal advice. If your inquiry is considered by the Court to be a request for legal advice, the Court will recommend that you obtain that advice from a legal practitioner or some other community or legal service.
3. The Family Court of Australia does not provide: —
  - (a) a response to email requests for; or
  - (b) by email;information about specific proceedings.
4. If the issues raised by your email are considered to be complex you may be requested to provide your contact details to enable a Court officer to contact you directly to discuss your query.
5. Do not attempt to file any documents by email, they will not be accepted.
6. Please note that when you contact the Court using email the content of your message as it is transferred across the Internet may not be secure. If you have a concern about the security of your message you are advised to contact the Court directly by phone, facsimile or post. If you contact the Court using email the Court may respond by email and does not take responsibility for the security or privacy of the content of the message as it is transferred over the Internet.

# Appendix C

## The New South Wales Attorney General's Department

Privacy policy for visitors and users of LawLink NSW<sup>TM22</sup>

<[http://www.lawlink.nsw.gov.au/disclaimer.nsf/pages/privacy\\_policy](http://www.lawlink.nsw.gov.au/disclaimer.nsf/pages/privacy_policy)>

Our customers are entitled to expect that Business Units will treat any information provided it by a customer within the terms of relevant privacy responsibilities. LawLink NSW<sup>TM</sup> has developed a general Privacy Policy that is adhered to by all Business Units.

This Policy applies to all pages on LawLink NSW<sup>TM</sup>, unless otherwise indicated.

### Does LawLink NSW use cookies?

No. LawLink NSW<sup>TM</sup> does not use cookies.

### What information do we collect?

When you look at LawLink NSW<sup>TM</sup>, the Attorney General's Department computers record information that identifies, for each page accessed on LawLink NSW<sup>TM</sup>, the IP (Internet Protocol) address of the machine that has accessed it.

### What will we do with the information?

To improve the services provided by LawLink NSW<sup>TM</sup> the Department will extract and publish aggregated information about usage patterns from these records. For example, our usage reports will examine trends based on the following information — your server address, your top level domain name (for example .com, .gov, .au, .uk, etc.), the date and time of visit to the site, the pages accessed and documents downloaded, the previous site visited, the type of browser used and operating system.

### What won't we do with the information?

The New South Wales Attorney General's Department will not disclose or publish information that identifies individual machines, or potentially identifies *sub-groupings of addresses*, without consent.

22 This material is subject to Crown copyright and reproduction is made with the permission of the Crown

### **Who has access to information within the Department?**

The Attorney General's Department is an Internet Service Provider and captures this information on its own computers. Access to the raw data is restricted to a limited number of officers in the Department for the purpose of analysis and to report on the success of LawLink NSW™ in meeting the Department's communication and access objectives. The officers who can access this data are:

- The Director General,
- The Director, Information Technology Branch,
- Manager, Electronic Media, and
- Web Manager.

### **Is the raw data stored in a secure way?**

Yes. The raw data is stored in a secure format and held by the Attorney General's Department for archival purposes.

### **What exceptions are there to this rule?**

The New South Wales Attorney General's Department will gather more extensive information than stated above in the following circumstances:

- unauthorised attempts to access files which are not published LawLink NSW™ pages;
- unauthorised tampering or interference with files published on LawLink NSW™;
- unauthorised attempts to index the contents of LawLink NSW™ by other web sites;
- attempts to intercept messages of other LawLink NSW™ users;
- communications which are defamatory, abusive, vilify individuals or groups or which give rise to a suspicion that an offence is being committed;
- attempts to otherwise compromise the security of the web server, breach the laws of the state of New South Wales or Commonwealth of Australia, or interfere with the enjoyment of LawLink NSW™ by other users.

The Attorney General's Department reserves the right to make disclosures to relevant authorities where the use of LawLink NSW™ raises a suspicion that an offence is being, or has been, committed.

In the unlikely event of an investigation, the Attorney General's Department will provide access to data to any law enforcement agency that may exercise a warrant to inspect our logs.

**What will we do with information provided in feedback forms?**

Feedback forms are provided by the New South Wales Attorney General's Department on LawLink NSW™ to allow users to provide valuable input into the future development of the site and to comment on the provision of service by the Department.

The provision of personal details on feedback forms is optional.

Users may provide personal details for the purpose of receiving a reply to their feedback. This information will only be used for the purpose for which it was provided. We will not add your email address or name to any mailing list.

The New South Wales Attorney General's Department may publish aggregated information about feedback on the site, to the extent that it does not identify or cannot be used to identify individual users.

**Does this policy apply to online transactions?**

No. In some cases, LawLink NSW™ permits users to submit information or conduct transactions (e.g. submission of comments on law reform proposal) for official government or legal purposes.

As there may be specific legal provisions relating to the use of information submitted for the purpose of conducting an official transaction with the New South Wales Attorney General's Department or one of its agencies, the scope of the user's privacy in those cases will be explained on the transaction page.

**Will this policy be updated over time?**

Due to the developing nature of privacy principles for online communication, this policy may be modified or expanded in light of new developments or issues that may arise from time to time.

We would be pleased to receive any comments or suggestions on this policy.

Please email comments or suggestions to LawLink NSW™.

Last updated 14 March 2001

# Notes



# Notes

