



Law Council
OF AUSTRALIA

Access to justice: meeting the need of ‘missing middle’

Speech delivered by Dr Jacoba Brasch QC, President, Law Council of Australia at the Annual Gold Coast Legal Conference, Gold Coast.

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Good afternoon, President Shearer, Law Society Council members, CEO Rolf Moses, distinguished guests, and fellow members of the profession.

I acknowledge the traditional custodians of the land on which we meet, and pay my respects to their elders: past, present and emerging.

I thank the Chair, and my friend, Simone Fraser for her warm welcome. I also acknowledge the Queensland Law Society, its partners and trade exhibitors, and all the hardworking organisers of the Annual Gold Coast Legal Conference for coordinating this stellar programme and inviting me to present.

We have gathered as a cohort for this conference, not just to further our own professional development, but because we are united by being a part of something much bigger – a broad profession, with duties to courts and clients, and as protectors of and advocates for the rule of law.

Of course, the rule of law has many aspects to it, one of which is equality before the law. In turn, equality before the law requires us to consider access to justice.

Often, our thinking around access to justice is dominated by Legal Aid funding, and a concern for those at the very margins of our society – the disenfranchised and the disempowered – facing the most complicated and compounded forms of social and economic disadvantage.

But my address this afternoon is not focused on this kind of disadvantage. It is the “missing middle” – those who are ‘too rich’ to secure legal aid, but ‘too poor’ to afford little other than the necessities of life... much less private legal assistance.

My challenge to you all then is to ask what should be our litmus test for access to justice? Instead of just conceiving that question in terms of the most disadvantaged, let’s re-frame the question to ask: whether any member of our society, whether or not they meet established or stereotypical definitions for disadvantage, is in a position to access legal assistance.

Before we delve into this question further, let’s define access to justice.

Professor Simon Rice has defined this concept as:

... the capacity to understand the law, to get legal advice, to get legal assistance and representation, and to use public legal institutions such as the courts. It requires an ability to understand, communicate, travel and pay, and also requires the means to overcome the inability to do any of those things.¹

Canadian Law Professor Trevor Farrow takes a philosophical angle, defining access to justice as:

... access to the kind of life ... people would like to live; accessing equality, understanding, education, food, housing, security, [and] happiness. It is about the good life.²

The role that solicitors and barristers play in acting as agents of justice and officers of the court depends on the realisation of access to justice as a principle.

Even if we, as lawyers, are delivering the most principled, correct and fearless brand of legal advice, if the justice we deliver as a profession is out of reach for many in society, the principle of equality before the law, which we fundamentally seek to uphold, will remain unrealised.

These principles of access to justice are theoretically infused throughout our courts and legal system. They are enshrined for all – constitutionally, legally, and across government. But what is the reality?

The then-Chief Justice of Western Australia, the Hon. Wayne Martin, once told the Productivity Commission:

The hard reality is that the cost of legal representation is beyond the reach of many, probably most, ordinary Australians ... In theory, access to the legal system is available to all. In practice, access is limited to substantial business enterprises, the very wealthy, and those who are provided with some form of assistance.³

¹ Simon Rice, 'Access to a lawyer in rural Australia: thoughts on the evidence we need' (2011) 16:1 Deakin Law Review 13, 17-18.

² Trevor CW Farrow, 'What is access to justice' [2014] 51 Osgoode Hall Law Journal 957, 983.

³https://www.supremecourt.wa.gov.au/_files/Creating%20a%20Just%20Future%20by%20Improving%20Access%20to%20Justice%20Martin%20CJ%204%20Oct%202012%20v.2.pdf

To measure the degree of the problem, we need to ask:

- how many Australians encounter legal problems;
- how many of those Australians are seeking help; and
- how many are able to secure legal advice – using either their own economic means, or the assistance available to them through the legal assistance sector.

In 2012, the Legal Australia-Wide, or 'LAW' Survey, was published. With over 20,000 respondents, it was the largest of its kind ever conducted in the world. The Survey researchers estimated that, each year, 8.5 million Australians encounter a legal problem of some kind.

It also found that 51 per cent of Australians who have a legal problem seek professional advice of some kind – legal or non-legal. Of those, only 30.3 per cent sought legal advice, and of those, only 21.3 per cent sought advice from the private profession.⁴

This means that of those thousands of Australians surveyed with legal problems, just 15.4 per cent sought legal advice at all, and only 3.3 per cent sought private legal advice as a first port of call.

This is despite the fact that we know Australians see legal advice as important. The Victoria Law Foundation found in 2019 that a cross-section of Australians, on average, rated seeking the advice of a lawyer as 'important' in more than 40 out of 60 '*justiciable scenarios*'.

These '*justiciable scenarios*' were typical life or work situations that might arise in the life of a citizen, from being unfairly evicted, to receiving a default notice from the bank, to being injured at work.⁵

So there is a significant gap between (a) the importance everyday Australians place on legal advice in life situations and (b) the extent to which they are securing it.

That begs the question: why?

⁴ P.96, [http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/\\$file/LAW_Survey_Australia.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/LAW_Survey_Australia.pdf)

⁵ <http://content.victorialawfoundation.org.au/wp-content/uploads/2019/10/Law-What-is-it-Good-For-Report.pdf>

Balmer, N.J., Pleasence, P., Hagland, T., & McRae, C. (2019). *Law...What is it Good For? How People see the Law, Lawyers and Courts in Australia*. Melbourne: Victoria Law Foundation.

The Productivity Commission recently found that complexity in the law can render it incomprehensible to the general public, preventing people from responding to legal problems or seeking advice, and can “*make it more difficult, time-consuming and costly to resolve problems.*”⁶

The LAW Survey further found multiple reasons for Australians taking no action despite significant legal problems:

Some said they ‘*didn’t know what to do*’ – this was particularly prevalent among those with a low awareness of not-for-profit legal services, people who had not finished school, and the unemployed.⁷

Some said ‘*it would be too stressful*’ – this response was common amongst women, people in disadvantaged housing, and people for whom English was not a first language.

Finally, some – and unsurprisingly often those on low incomes – responded, ‘*it costs too much*’.⁸

Enter the ‘*missing middle*’.

The ‘*missing middle*’ is a term that originated in housing economics – and originally described low-to-middle income earners who are ineligible for government assistance, such as public housing, but do not possess the *private* means to enter the housing market.⁹

It is also a phenomenon observed in mental health care delivery, to refer to those whose mental health concerns are too significant to be addressed by usual primary care, but are not ‘*severe*’ enough to warrant additional government-funded intervention.¹⁰

When it comes to accessing private legal advice, Australians who may not be disadvantaged in most everyday scenarios – such as getting their car replaced when they have an accident; accessing adequate healthcare in the case of an injury or unexpected

⁶ P. 130 Productivity Commission, Access to Justice Arrangements, 132-135.

⁷ Hugh McDonald and Julie People, ‘*Legal capability and inaction for legal problems: knowledge, stress and cost*’, (*Updating Justice No 41, Law and Justice Foundation of NSW, June 2014*)

⁸ P.56, Final Justice Project Report

⁹ <https://www.fool.com/millionacres/real-estate-investing/articles/what-is-the-missing-middle/> ; <https://journals.sagepub.com/doi/10.1177/0042098012470398>

¹⁰ <https://www.orygen.org.au/Policy/Policy-Areas/Government-policy-service-delivery-and-workforce/Service-delivery/Defining-the-missing-middle/orygen-defining-the-missing-middle-pdf.aspx?ext=>

illness; or funding their child's education – may be both unable to afford private legal assistance and be ineligible for government-funded legal assistance.

The Productivity Commission found in its Access to Justice Arrangements report that:

Even many relatively affluent Australians could not afford a lawyer if they had a serious legal issue. Legal assistance providers also indicated that those refused a grant of legal aid (on the basis of means) cannot necessarily afford to engage a private lawyer — there is a 'justice gap'.¹¹

I would argue that recourse and legal redress for violated *legal* rights, is no less important than housing, transport, health, and education for the fabric of our society.

Therefore, the fact that many low-and-middle income earning Australians are falling through the cracks of our justice system and legal assistance sector ought to be of urgent concern to us as a profession.

We often focus on the rights of the accused in criminal cases, and we have the High Court case of Dietrich, but how often do we count the cost of worthy civil claims that are never brought by ordinary citizens because of financial disincentives? And what about the costs to children – emotional wellbeing costs – where they are separated from a parent who cannot navigate the legal system on their own and is ineligible for legal aid?

Unlike ageing, school fees or the need to replace motor vehicles – legal problems can strike unexpectedly. In its submission to the Productivity Commission, Community Law Australia wrote:

People don't budget for legal fees for issues like marriage breakdown, unfair dismissal, eviction, discrimination, getting ripped off, or debt problems.

Northern Territory Legal Aid made the point in its submission to the same body that:

Centrelink recipients fall within the Commission's mean test, however, there are many other people who are 'working poor' with significant expenses who are not eligible for legal aid.

But we know that from our everyday lived experiences.

Unpacking the formal legal assistance landscape

There are principally four government-funded legal assistance providers:

1. Legal Aid commissions in each state and territory;
2. Community Legal Centres (**CLCs**);
3. Aboriginal and Torres Strait Islander legal services; and

¹¹ p. 639, Productivity Commission's Access to Justice Arrangements Report.

4. Family violence prevention legal services.

In an ideal world, government assistance would be able to fund legal advice for all those without the private means to afford market rates.

But as we know, the legal assistance sector has been historically underfunded by successive governments.¹²

Due to intense demand, community legal centres are turning away 160,000 people a year due to lack of capacity, while many Australians are choosing to self-represent in court.¹³

We know that more than 13 per cent of the population live under the poverty line, yet legal aid is only available for 8 per cent of Australians.¹⁴ Many more Australians outside of that 13 per cent, who may not technically live under the poverty line, are nevertheless unable to afford private legal representation.

The Law Council of Australia's Landmark Justice Project found that a minimum of \$390 million per annum would be required to fund the legal assistance sector.¹⁵ Importantly, this would include addressing the civil law needs of Australians.¹⁶

The Law Council and other bodies welcomed the additional funding of \$310m for the National Legal Assistance Partnership as part of the 2021-22 Federal Budget – but that is additional funding, not annual funding of the kind identified by the LCA.

Failing the Means Test: Human Stories

You might be listening to this thinking, well, if a person out there in society is not eligible for legal aid, there is probably a good reason for that – and they probably have the means to access legal advice in the private market, if they really wanted it.

Take these real life, anonymised, stories from the Productivity Commission.¹⁷

¹²https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/7599088/upload_binary/7599088.pdf;fileType=application%2Fpdf#search=%22media/pressrel/7599088%22

¹³ Fiona McLeod, *How the Justice System is Failing Vulnerable Australians*, ABC 2017

¹⁴ Ibid.

¹⁵ as part of Recommendation 2.1 of our Report

¹⁶ P.39, Final Justice Project Report.

¹⁷ P.718, Productivity Commission *Access to Justice Arrangements* Report

Angela* was a 35-year-old single mother to Jack*, aged 11. She was studying and working part-time. She sought legal aid for a serious credit and debt matter. Angela's weekly income was \$400 per week and she paid \$75 per week in board to her parents. Angela had \$6000 in an incentive saver account, a small inheritance she received after the death of her grandmother a short time before her application for legal aid. Because of this inheritance, Angela was not eligible for legal aid, after not satisfying the assets component of the means test.

Another client with children, **Sally***, was the victim of long-term domestic violence and her partner had recently committed suicide. Sally did not work and was in receipt of a pension. But Sally had a vehicle valued at \$25,000 and was therefore financially ineligible under the assets test. If the car was sold, Sally would have had to use the proceeds to cover existing debts.

Jacinta*, a full-time single mother in dispute with the father of her child, applied for legal aid for representation during a roundtable conference with the father of the child but was refused because she had saved \$14,000 for life-changing surgery for which she was on a waiting list.¹⁸

Helen's* partner was on Workcover and also on Newstart. He was earning about \$500 a week from Workcover, while Helen was only on Newstart. When she was evicted, because of this WorkCover income, Legal Aid wasn't able to help her. Helen went to the Supreme Court and moved an originating motion by herself.

She was only 30 years old and found it too hard to do on her own. In the end, in her own words, Helen was 'bulldozed'. She was evicted from her house and is still homeless. Helen described this situation as a 'nightmare' from which she is still recovering.¹⁹

The spiralling cost of unmet legal need

So, what do 'missing middle' Australians do when they realise that they will not be granted legal aid or help by a community legal centre and cannot afford private legal representation?

¹⁸ Case Study (provided by Victorian Legal Aid - Victoria Legal Aid, Submission No 252 to Productivity Commission, Access to Justice Arrangements, 28 May 2014, 8.)

¹⁹ (sub. DR252, p. 3)

Either,

- they self-represent, which has the capacity to be a stressful, confusing and dispiriting experience, and demonstrably has poorer prospects of success; it can also make trials or hearings longer than necessary with costs implications for your client ²⁰

Or,

- they give up altogether, potentially compromising safety or longer term health and wellbeing, as well as their rights and entitlements. The family lawyers here will know the untold harm that does to children.²¹

We should reject the prospect of living in a society in which even the strongest and most meritorious of civil claims, which are no less important to realising justice than criminal matters, are not pursued for economic reasons.

You hear in these stories the human costs of unaddressed legal problems.

We know that simple problems spiral into complex problems when legal assistance is not provided. We also know that unmet civil problems can also escalate into criminal matters.²²

Access to Justice academic Dr Elizabeth Curran has provided three concrete examples of ways that legal issues compound themselves into serious life issues:²³

- First, when people's utilities are cut off – there may be no electricity or gas for heating – and without warmth, children may get sick, cannot do homework, and fall behind in school. This affects future income security;
- Second, when people have unresolved debts or fines – there may be less money to live on or buy food and essentials for kids, including medication, clothes, shoes and school equipment. This affects income security; and
- Third, when people lose employment – this leads to less income to support the family, feelings of hopelessness and powerlessness, with individuals unable to complete daily tasks such as shopping and leaving the house, in turn affecting mental health and resulting in social exclusion.

²⁰ p.33, Law Council Justice Project, *People Experiencing Economic Disadvantage*

²¹ p.35. Law Council Justice Project, *People Experiencing Economic Disadvantage*

²² Productivity Commission, *Access to Justice Arrangements*, 24

²³ Liz Curran, Draft Working Paper for a Research and Evaluation Report for the Bendigo Health-Justice Partnership: A Partnership between ARC Justice Ltd and Bendigo Community Health Services (2016) 53.

Who are the missing middle?

As well as low-to-middle income earners generally, some other groups in Australian society are overrepresented in the missing middle, in particular: regional, rural and remote Australians; asylum seekers; and older Australians.

Regional, rural and remote Australians

Around 29 per cent of the Australian population lives outside major cities.²⁴

As well as cost, distance and lack of public transport, poor technological access or capability are also common access to justice barriers for this subset of Australians.

Many regional residents, such as farmers, can also be '*income poor and asset rich*', and may be unable to either afford private lawyers or meet Legal Aid means tests.

In 2016, despite the 29 per cent figure for regional Australians, only 10 per cent of solicitors practised in a regional setting.²⁵ then there is geography – one public legal assistance service in regional Western Australia covers a geographical area more than twice the size of the United Kingdom, with only one solicitor.²⁶

We have recommended that the Commonwealth Government look at minimum servicing standards for our regions, as well as rural placements, mentoring and incentive schemes, resourcing additional legal services, increasing legal aid rates, and strengthening practitioner referral networks, including to facilitate pro bono assistance.

Through the work of bodies such as the Council of Law Deans, we as a profession also need to promote RRR-focused curriculums in undergraduate law training.

Asylum seekers

In 2014, the government abolished publicly funded legal assistance for asylum seekers who arrive in Australia without a valid visa, except for very vulnerable persons, such as unaccompanied minors.²⁷

Most asylum seekers are therefore ineligible for mainstream legal aid.

²⁴ <https://www.aihw.gov.au/getmedia/0c0bc98b-5e4d-4826-af7f-b300731fb447/aihw-aus-221-chapter-5-2.pdf.aspx>

²⁵ P.32 Justice Project Final Report.

²⁶ P.33 Justice Project Final Report.

²⁷ <https://www.kaldorcentre.unsw.edu.au/publication/legal-assistance-asylum-seekers>

The very factors that drive people to seek asylum are likely to render refugees and asylum seekers incapable of affording private legal assistance.

Low English literacy, trauma, exclusion from income support or the withdrawal of government assistance as a consequence of the mode of arrival are all relevant factors precluding many asylum seekers from affording legal advice.

To government, the Law Council has consistently called for procedural fairness for asylum seekers regardless of mode of arrival; periodic reviews and safeguards; and a focus on the best interests of children.

Older Australians

Around 15 per cent of the Australian population is aged over 65 – approximately 3.7 million people. Australia has an ageing population, and this number is predicted to rise to 23 per cent by 2055.²⁸

The complex problems of elder abuse, digital exclusion, conditions such as dementia and social isolation compound the inability of some older Australians to access legal advice.

But studies in the United Kingdom and Canada have found that between 2 to 8 per cent of people aged over 65 experience at least one form of elder abuse in any given year.

Yet, financially, owning an asset such as a house often excludes older Australians from meeting means tests, even where they are relying on a pension for day-to-day funds.

The disincentives of stress, cost and delay also have a disproportionate deterrent effect on older Australians. We have advocated that the government establish a central referral service for older Australians.

Solutions

When I started, I spoke of us being here for CPD purposes, but also united as members of a broad profession. So, how can we, as a profession, address the problem of the missing middle?

Where resources are limited, innovation becomes crucial. We need to do more with less, targeting services and legal assistance to make our efforts stretch further. In this way, the private element of the legal assistance sector can work smarter, not necessarily harder.

²⁸ ag.gov.au

But let me pause to first observe that it is no answer to say – let’s do more pro bono work. We all, already do much of this and much of it is unsung and not realised by the wider, non-lawyer community. Yet, we cannot let Government Treasuries off the hook by allowing them to think where they do not provide, we will fill the gap.

Building Legal Capability

The first step is building legal capability amongst our general population. Often, those with a high level of legal capability are best equipped to navigate legal problems in the absence of professional support.

The Law Council envisions three pillars of ‘legal capability’:

1. First, basic legal knowledge;
2. Second, non-legal skills such as literacy; and
3. Third, the motivation and confidence to act.

Building legal capability and legal education go hand-in-hand. The Law Council has recommended that the government foster awareness of the justice system amongst our school children, as well as recognition of legal problems and available responses at the curriculum level.²⁹

Indeed, the Presidential Plan of my counterpart at the Law Society of English and Wales, the formidable I. Stephanie Boyce includes, as a high priority project, to have their schools’ curriculum include the study of law – as we discussed recently, rights are meaningless, unless you know you have them, and how to seek redress.

If we can build the overall core legal literacy of citizens, we can mitigate some of the challenges they may experience in the absence of full-scale professional legal advice.

This will also provide a solid grounding to those accessing hybrid, partial or discrete task legal assistance, knowing that their individual legal capability will assist them to navigate legal problems at the stages of their journey that do not involve traditional legal advice.

²⁹ P.2, Final Justice Project Report.

Innovation - market responses, NewLaw and new kinds of law firms

In the legal services market, conditional fee agreements and no-win, no-fee market models (where allowed) have long filled a gap in legal need.

I note from a brief survey that many of your own firms' websites refer to options for fixed fee billing, capped fees, free initial consultations, and 'legal advice that won't cost the earth', which are all market positions that meaningfully assist the missing middle.

This is just one kind of innovation in legal services, with technological innovation also playing a vital role. We have learnt a new way to offer our services, forced upon us by Covid. Indeed, I have clients saying to their solicitors, "let's meet by zoom; I don't need to drive the 6 hours to get to see you." I also routinely say to solicitors, 'don't drive down from, say, Toowoomba (and charge the client).

Then we have examples such as LegalVision, Justice Connect, SprintLaw, and LawAccessNSW's 'Guided Pathways'³⁰ are innovative online legal self-help tools. 'DIY' and legal-adjacent service tools are also commonly provided in the fields of conveyancing, intellectual property, workplace relations, taxation and migration.

We have a role to play in deploying easily accessible, rigorous content and logically structured tools that can be applied by citizens to everyday legal problems.

Yet, whilst technological innovation has its place, we cannot forget the digitally poor – no computer, limited bandwidth, poor IT literacy – we don't need to create another group within the missing middle; the digitally excluded.

Further, just as there are problems with consulting *Dr Google*, we must acknowledge there are real risks when a consumer consults '*Google QC*'.³¹

Pro-bono and 'low-bono'

Whilst I said earlier that doing more pro-bono work is not the answer, there are innovations within that service model which are worth noting.

³⁰ <https://legalhelp.lawaccess.nsw.gov.au/>

³¹ Law Council, Submission, *Inquiry into Financial Technology and Regulatory Technology Senate Select Committee on Financial Technology and Regulatory Technology*, 26 June 2020

The Law Council has endorsed the Pro Bono Tool, a project of the Australian Pro Bono Centre, which will function as a mapping exercise listing the services available to each of the thirteen groups we identified as disadvantaged as part of our Justice Project.³²

However, firms will naturally prioritise pro bono cases that are considered meritorious or particularly disadvantaged. The quandary of the *missing middle* of low-to-middle income Australians, thus remains.

In Queensland, we have our excellent Law Right – formerly QPILCH – matching certain legal needs with willing lawyers. But I suspect, from the reminders we receive, that the ‘sexy’ matters get taken up quickly, whilst others languish.

‘*Low bono*’ fee arrangements embrace the idea that lawyers should make legal services affordable for those who cannot afford market rates. It is a system of billing that takes into account the financial constraints and legal needs of average-means-citizens, while still charging a fee for service.³³ I accept thought that not every firm would have the resources to provide such financial accommodation.

‘Unbundled’ legal services

Shifts in the way lawyers offer their services have been dominated by the advent of unbundled legal services.

Also known as Discrete Task Assistance or Limited Scope Representation, unbundled services represent a half-way house between full representation and no representation at all.

Unbundling means that a lawyer undertakes some, but not all, of the legal work involved in a client’s case, with clients performing some tasks themselves.

Via unbundling, as one legal journalist has put it, ‘*lawyers could be cheaper a la carte*’.³⁴ That said, I have concerns about exposure to negligence claims, but that will be part of the assessment whether to take a matter on, or not.

³² <https://www.probonocentre.org.au/research/justice-project-report-rural-regional-and-remote-australians/>

³³ P.3 <https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1779&context=facscholar>

³⁴ https://www.thestar.com/news/gta/2008/09/18/lawyers_could_be_cheaper_agrave_la_carte.html; (2012, pp. 199–200) - Productivity Commission Access to Justice Arrangements, p.644)

Potential benefits of Unbundling could include³⁵ simplified litigation proceedings, filling a gap in the demand for legal services, consumers being better informed about the process, and increased quality and effectiveness of court and tribunal submissions.³⁶

Overseas, the American Bar Association has developed Model Rules specifically permitting lawyers to limit the scope of their representation. Approximately 40 different US states have adopted amendments to their professional conduct rules to implement the ABA Model Rules.³⁷

It is important to note that unbundled services are not suited to every matter, and conflict of interest issues, where lawyers have represented clients only on very discrete tasks. Court rules can also act as a barrier, with some courts requiring a single lawyer to be listed for the entirety of a matter.

Large funds, loan schemes and insurance models

A few years ago, I chaired the ABA's inaugural A2J committee – we were asked to look at the viability of Litigation Insurance – something big in, for example, Germany. Where we landed was that most people don't think they will need a lawyer ... until they need a lawyer.

I doubt this is a product ripe for the Australian market – and it makes me worry about people becoming more litigious, just because they can.

However, as a market intervention, private litigation funding, where a commercial entity contracting with potential litigants to pay litigation costs and accept the risk of adverse cost orders, is becoming more prevalent.

If the litigant is successful, the commercial entity is paid a consequent share of the proceeds (where permissible), usually after the reimbursement of costs. Or, interest is charged.

Though this concept has had a mixed reception, the practice is gradually gaining acceptance in common law countries, both through a series of decisions by the High Court and, most recently, in the *Corporations Amendment Regulations (No. 6)* (Cth) legislation.

³⁵ Productivity Commission, report p.645

³⁶ Beg and Sossin 2012.

³⁷ (RMIT Centre for Innovative Justice p.28)

The Productivity Commission has recommended that the Australian Government establish a licence for third party litigation funding companies to ensure they hold adequate capital relative to their financial obligations and properly inform clients.

There have also been Public Litigation Funding Scheme proposals, with the Victorian Law Reform Commission in 2008 developing a detailed proposal for a more expansive litigation funding mechanism known as the Justice Fund. The Commission imagined that this Fund would operate as a public litigation funder.³⁸

In South Australia, the Law Society has established the South Australian Litigation Assistance Fund,³⁹ a charitable trust which assists plaintiffs to proceed with civil litigation where they would otherwise be unable to afford to proceed. To qualify, an applicant can have a gross household income of up to \$150 000, and assets such as a house and a car of 'reasonable value', and must pass a merit test.

Interestingly, when I used to teach advocacy in Bangladesh, I spent considerable time studying their Private Legal Aid model. In the early 1970s, the intellectuals were able to harness enough capital to run a private legal aid system – they do have state legal aid, but it is parlous. That private system still runs today. I wonder if Twiggy Forrest or Gina Reinhardt would do the same.

Another conceptual funding model that may make justice more accessible for the everyday Australian is "LECS" – a Legal Expenses Contribution Scheme. This is a conceptual complementary funding model in the form of an income-contingent interest-free loan scheme. It is akin to the Higher Education Contribution Scheme (HECS) and would be repaid in instalments out of one's pay packet. LECS would be open to applications from those who do not pass means tests for legal aid.

Another market innovation, After the Event insurance, protects the insured against the risk of an adverse cost order.

Unlike traditional insurance, ATE insurance is only purchased by a party once a dispute has arisen. If the insured is successful in their action and no costs are payable, the policy is not triggered. If an adverse costs order is made, the policy covers the insured's exposure to the order.⁴⁰

³⁸ Centre for Innovative Justice - Affordable Justice

⁴⁰ KWM.com

Joined-up services

The final and perhaps most interesting concept is that of joined-up services. In joined-up services, clients should move swiftly, easily and seamlessly between the services they actually need. In many cases, clients benefit from a consolidated point of entry or 'front door' rather than as many entry points as there are providers. This avoids referral fatigue and focuses on problem resolution rather than technicalities.

There is growing recognition of the need to link legal services with other services under a holistic, interconnected and client-centric view of the profession to better suit consumers' needs.

It's fundamentally about looking at the whole of the person and their needs, not just the specific legal problem. As I described earlier, there is often a social crisis, such as job loss, unpaid fines or utilities cut off, that then lead to a legal problem.

The scope for converging different services is enhanced when information technology systems talk to each other, and professions have the ability to meld legal and other professional services within multi-disciplinary structures,⁴¹ albeit maintaining our obligations under our regulatory requirements.

Health-Justice Partnerships form one encouraging development in the area of joined-up service models, including Aboriginal community-controlled collaborations.

The Law Council has recommended that legal assistance peak bodies and Health Justice Australia should, supported by the Law Council, pursue sector-to-sector partnerships to expand the delivery of multi-disciplinary collaborations to address legal and non-legal needs, and identify how key challenges can be overcome.⁴²

Not every problem needs a legal solution.

Conclusion

Transparent, predictable, sustainable and long-term funding models are essential to underpinning successful legal assistance service delivery into the future.

⁴¹ Both above from Submission to Inquiry into Financial and Regulatory Technology, Law Council

⁴² As part of Recommendation 2.15 of the Justice Project.

But even with significantly increased funding for the Legal National Assistance Partnership, the 'missing middle', who encounter obstacles in accessing private legal advice, remain.

There is much governments could do, but I am not speaking to them right now.

Instead, as a profession, we must creatively augment the legal assistance sector by meeting our annual pro bono targets and considering 'low-bono' ventures targeted directly at the missing middle.

We should be open to multi-disciplinary servicing collaborations, which just might be able to deal with the initial challenge, before that problem cascades into a myriad of other problems, as so too often happens.

We need to look at the whole of the person, and the whole of their needs, not just their immediate legal crisis. And when we look at the whole of the person, we must be innovators and problem solvers. As lawyers, "Going to court" may be our natural inclination but may not be the best fit for the client.

Indeed, we do not need to see a client as a vehicle to prove you are the smartest lawyer in the room; that you can out-plead the other side with tricky technicalities; or that you see the legal problem in terms of win-loss against the other lawyer – all of this forgets the human cost to clients ... and often their families.

Ours is a noble profession. But let's not forget it is a service profession where we serve society... a society that has a missing middle of unmet need.

Do your own thinking about innovation, joined-up services and legal assistance funding models. Do your own thinking about pro bono and low bono.

But please: Look at the whole person, as opposed to seeing a situation or an isolated legal problem, this is the key to truly addressing unmet legal need.

When we consider every facet of a person – their capacity to work, life priorities, mental health and family dynamics – and we do this shoulder-to-shoulder with health, education and human services providers, we see the whole picture of legal problems in their proper context.

This will enable us to break through to the missing middle in a way that will be most meaningful in the lives of those whom we serve.

Thank you.

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