Law Council of Australia

Addressing the legal needs of the missing middle

Research Paper

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Introduction

1. In 2018, the Law Council identified in the Final Report to *The Justice Project* (**Justice Project Report**) a number of areas where there is a high degree of unmet legal need experienced by vulnerable Australians. These included debt resolution, workplace rights, retention of housing, elder abuse, family violence, resolving medical treatment, addressing discrimination, accessing income support, and having a fair hearing when charged with criminal offences.[1]

2. While a number of recommendations were made in the Justice Project Report as to how the above needs could be addressed (with an emphasis on improved resourcing for publicly funded legal services), it was noted that even if these recommendations are implemented, a 'missing middle' of people who may be ineligible for access to publicly funded legal assistance, however have difficulty affording private services, will remain.

3. As such, the Law Council committed to undertaking further research leading to the development of a Position Paper focusing on the needs of the missing middle, as well as the most effective strategies available to both the legal profession and policymakers to assist this group to access legal assistance. The Position Paper is intended to be used to inform future advocacy by the Law Council and its Constituent Bodies in relation to addressing the needs of missing middle.

4. This Research Paper examines the key issues surrounding the legal needs of the missing middle and supports the development of future advocacy and initiatives by the Law Council and its Constituent Bodies designed to meeting these needs.

Current context

5. The immense challenges faced by Australians throughout 2020 and 2021 have clarified the importance of a strategic focus by the Law Council on meeting the legal needs of the missing middle. Constituent Bodies have reported a rise in the legal issues faced by this cohort as a result of the COVID-19 pandemic, including in the areas of credit and debt, industrial relations and family law, amongst many others. The bushfires of the 2019/20 summer also evidenced the importance of accessible legal services in areas such as insurance, social security, and property law.

6. In emergency situations, publicly funded legal services remain the primary source of legal help for the most vulnerable and marginalised individuals and communities. This has been complemented by coordinated pro bono contributions from the private legal profession. The legal assistance sector has shown great adaptability in these difficult circumstances, reinforcing the value of accessible legal support to society both in times of crisis and beyond. Further commentary on this response and how it might inform the profession in addressing problems faced by the missing middle is set out at Part 5 of this paper.

[1] Law Council of Australia, Justice Project (Final Report, August 2018), Legal Services Chapter ('*Justice Project Legal Services Chapter*') 4.

Part 1: Identifying the missing middle

Who are the missing middle?

7. Effective access to justice often depends upon the assistance of a legal adviser or representative. While some individuals may have the ability to navigate the justice system effectively without a lawyer, many require intensive legal assistance due to their personal circumstances, the seriousness or complexity of the legal issue, or a combination of both.

8. Affordability was identified in the Justice Project Report as a frequent and formidable barrier to accessing appropriate legal services where they are required, particularly for groups experiencing disadvantage and for whom no-cost or minimal cost services are a critical necessity.[2]

9. Under the National Legal Assistance Partnership (**NLAP**), Australia's Commonwealth, State and Territory Governments have recognised their responsibility to address this issue and, specifically, to provide 'legal assistance services which help vulnerable people facing disadvantage, who are unable to afford private legal services, to engage effectively with the justice system in order to address their legal problems'.[3]

10. Publicly funded legal assistance services have been somewhat obstructed from achieving their stated purpose under the NLAP by underfunding over the course of many years. In this regard, the Justice Project Report found that government-led funding allocations to these services was chronically insufficient.[4] The practical result of an underfunded legal assistance sector is that services must impose strict eligibility criteria to prioritise those in the community most in need of free legal support. The Productivity Commission has noted that strict means and asset testing undertaken by Legal Aid Commissions (**LACs**) has resulted in a situation where a significant number of people falling below the poverty line are ineligible for grants of legal aid.[5] Further, National Legal Aid stated in its submission to the Productivity Commission's *Access to Justice Arrangements* inquiry that the cost of a lawyer at market rate is notably higher than the legal aid rate, resulting in a 'significant justice gap'.[6]

11. The group of people who do not meet eligibility criteria for publicly funded legal services, while lacking the resources to afford a private lawyer for the entirety or a part of their legal matter, make up the 'missing middle'.

12. The Productivity Commission's final report on *Access to Justice Arrangements* noted that legal assistance during litigation is a particular area of need for the missing middle:

> *The capacity of individuals to deal with the costs of significant litigation is regarded as particularly problematic for the 'missing middle' — those on high incomes are thought to be able to manage the costs, while those on*

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[2] Law Council of Australia, *Justice Project Legal Services Chapter* 6.
[3] *National Legal Assistance Partnership Agreement 2020-25* (entered into force 1 July 2020), 2 <https://www.ag.gov.au/legal-system/legal-assistance-services/national-legal-assistance-partnership-2020-25>.
[4] Law Council of Australia, Justice Project (Final Report, August 2018), Recommendations and Group Priorities Chapter ('*Justice Project Recommendations and Group Priorities*'), Recommendation 2.1.
[5] Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) 713-41 <https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf> ('*Access to Justice Arrangements'*).
[6] National Legal Aid, Submission 123 to Productivity Commission, *Inquiry into Access to Justice Arrangements* (22 November 2013) 22.

lower incomes are thought to be covered by publicly funded assistance schemes such as legal aid.

These costs, which sometimes need to be met upfront, combined with the risk of an adverse costs order, can represent significant barriers to accessing justice for litigants who lack (liquid) financial resources but have meritorious claims.[7]

13. The International Bar Association (**IBA**) has similarly drawn attention to the challenges faced by a group it describes as the 'forgotten middle',[8] being: 'those who lack the disposable income to spend on services from a private provider at will, but earn too much money or have too many assets to qualify for legal aid or pro bono assistance'.[9]

14. The fact that the missing middle is defined from the perspective of affordability is not to deny that barriers to access to justice come in many forms beyond the financial.[10] However, economic disadvantage particularly was found to operate as an intersectional barrier across each of the groups of vulnerable people canvassed in the Justice Project Report.[11] While some individuals in each group will have greater financial capacity than others to afford private services, a common theme (particularly for people with complex and intersectional disadvantage) is that cost is a frequent and formidable barrier.[12]

15. Particular sectors of the community may be more likely to fall within the missing middle. For example, the Justice Project Report found that older persons and people living in rural, regional and remote (**RRR**) areas are overrepresented in this cohort.[13] In order to develop tailored solutions to the missing middle, it is first necessary to recognise the diversity of this group and the underlying reasons why particular communities face affordability concerns.

Older persons

16. As noted above, the Justice Project Report found that older persons are disproportionately represented in the missing middle. There are several reasons for this. First, older persons may be more likely to have a low income or restricted access to funds, creating a financial barrier to accessing private legal services.[14] A substantial proportion of older people experience some level of economic deprivation and rely heavily on social security payments.[15] Additionally, older persons may have restricted

[7] Productivity Commission, *Access to Justice Arrangements*, 20.
[8] Anna McNee, International Bar Association, 'Legal Expenses Insurance and Access to Justice' (August 2019) <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=abe0d548-8f00-4d5a-a5d9-b4c3a2e449e7> ('*LEI and Access to Justice*') 5.
[9] Ibid.
[10] It is noted that failure to identify the existence of a legal issue at an early stage and failure to seek legal help when needed are also key drivers for unmet legal need. Many Australians may not seek help because of non-financial reasons, for example: competing life pressures, limited legal capacity, language barriers, and negative perceptions of lawyers (believing that lawyers are too expensive, too complex, too 'out of touch' with 'everyday Australians').
[11] Law Council of Australia, *Justice Project Legal Services Chapter*, 6.
[12] Ibid.
[13] Note, small and medium-sized organisations and businesses have also been identified as belonging to the missing middle. See, Law Society of New South Wales, *The Future of Law and Innovation in the Profession* (Report, 2017) 59.
[14] See, Law Council of Australia, Justice Project (Final Report, August 2018), Older Persons Chapter ('*Justice Project Older Persons Chapter*') 17.
[15] Note, in 2015, the main source of income for two-thirds (62.9 per cent) of Australians aged 65 years and over living in households was a government pension or allowance, similar to the rate in 2012 (64.7 per cent). Older people with disability were more likely to receive a government pension or allowance as their main source of income than those without disability (72.7 per cent compared with 53.6 per cent). See, Australian Bureau of Statistics, 4430.0, as cited in Law Council of Australia, *Justice Project Older Persons Chapter*, 17.

access to personal funds because they are subject to a guardianship order or are experiencing financial elder abuse.[16] As a result, older persons who fall into a low income or low assets category and cannot afford private legal fees are often referred to Community Legal Centres (**CLCs**) or pro bono services, 'despite chronic underfunding and under-resourcing in the community legal sector'.[17]

17. Further, despite typically relying on superannuation, a pension or other government benefit as their main form of income, a significant number of older persons fail to meet the Legal Aid means test for ongoing advice and representation because they own an asset, such as a house.[18] This asset is often the person's primary residence and therefore may not translate an ability to pay for private legal services. However, it is often effectively treated as evidence of this ability.

People living in RRR areas

18. People in RRR areas also form a notable part of the missing middle, particularly property owners and small business owners who may have non-liquid assets and comparatively low incomes. There are also general shortages of both public and private legal practitioners in RRR locations. Community legal services have reported being stretched thin in these areas, with staff often facing significant caseloads where centres are funded to service a wide geographical region. One public legal assistance service in regional Western Australia, for example, has reported engaging a single solicitor to cover a geographical area more than twice the size of the United Kingdom.[19]

19. The Law Council is aware of a lack of other legal infrastructure in locations outside capital cities too, commonly resulting in difficulty accessing courthouses, non-court dispute resolution services, and relevant government services such as offices of Fair Trading, where applicable. A shortage of Legal Aid offices in less populated centres has also been noted. While these can be viewed as separate causes of unmet legal need, they also inflate the cost of accessing legal services by requiring extra travel and/or time off work.

20. The missing middle in RRR areas also face unique challenges, in particular, with respect to the issue of privacy and confidentiality of legal matters. Clients have in some cases reported a reluctance to seek legal advice out of concern that this could be brought to the attention of the broader community.

Other groups overrepresented in the missing middle

21. The Law Council understands that the following demographic groups tend to be overrepresented in the missing middle, amongst others:

    - people with disability;
    - people with health or mental health issues;

[16] See, Aged and Disability Advocacy Australia, Submission No 59 to Law Council of Australia (September 2017); Consumer Credit Legal Service, Submission No 60 to Law Council of Australia, *The Justice Project* (29 September 2019).
[17] See, Slater & Gordon, Submission No 80 to Law Council of Australia, *The Justice Project* (30 September 2017).
[18] See, House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older people and the law* (September 2007) 171 ('*Older people and the law*'). See also Council on the Ageing, Submission No 114 to Law Council of Australia, *The Justice Project* (6 October 2017).
[19] See, House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older people and the law*, 171. See also Council on the Ageing, Submission No 114 to Law Council of Australia, *The Justice Project* (6 October 2017).

- women;
- single parents;
- children and young people;
- Lesbian, Gay, Bisexual, Transgender, Intersex + people;
- people experiencing family violence;
- small-business owners;
- part time, casual and temporary workers;
- people from culturally and linguistically diverse (**CALD**) backgrounds; and
- migrants.

22. The COVID-19 pandemic, and public health responses to it, have the potential to create new groups in the missing middle. These include employees in industries which have been particularly impacted (such as aviation and hospitality) as well as members of communities that have also been particularly impacted by the pandemic (such as those in tourist destinations where there has been a significant decline in income generated throughout their local economy).

Part 2: Laws and policies exacerbating access to justice barriers for the missing middle

23. Having identified the missing middle, this paper now gives consideration to key laws and policies which have the effect of exacerbating access to justice barriers for the cohort. These same laws and policies will also be critical to addressing unmet legal need for the missing middle, and as such, it is critical that the Law Council and others identify problematic areas and develop strategies to improve accessibility concerns.

Means testing and funding arrangements for legal assistance services

Operation of means tests

24. In Australia, eligibility for legal assistance varies with the nature and provider of the service, government priorities, and areas of perceived legal need. In the Legal Aid context, for example, some free services, such as legal information, discrete legal tasks and community legal education, are not means tested. However, other grants of Legal Aid for dispute resolution and representation require means testing which members of the profession regard as very restrictive.[20] They may also depend upon the class of matter.[21]

25. The criteria for meeting a means tests vary as between Legal Aid providers. For instance, Legal Aid NSW excludes an applicant's equity in their principal home, up to the value of $521,100, from an assessment of their net assessable assets.[22]

26. A person may become part of the missing middle where they have a significant asset, such as a farm property, which 'on paper' may be worth well over the value of a principal home excluded from consideration in Legal Aid means tests – making them

[20] National Legal Aid, Submission No 128 to Law Council of Australia, *The Justice Project* (25 October 2017). Note, National Legal Aid stated that the availability of means tested services is 'necessarily curtailed by limited funding'.
[21] Legal Aid ACT, 'Guidelines for Assistance in Territory matters'(updated August 2017) <la_act_guidelines_aug_2017.pdf (legalaidact.org.au)> 6. See also, *Legal Aid Act 1977* (ACT).
[22] See, Legal Aid New South Wales, 'Means Test Policy' 7.6.

ineligible for Legal Aid. Circumstances, such as drought, may arise which make the individual less able to generate an income from the property in question, to access equity in it or even to sell it. This may undermine their ability to afford legal services, while the value of the underlying asset continues to make them ineligible for Legal Aid.

27. The significant cohort of Australians who do not meet the means test for Legal Aid and/or whose matters fall outside the funding guidelines are commonly referred to CLCs. Many CLCs have limited capacity to provide casework services and must, therefore, target their services at the most disadvantaged in the community, referring those whom they cannot assist to the private profession. The private profession may in turn assist through pro bono or reduced fee arrangements, noting that this will largely be at the discretion of practitioners, and will predominantly be prioritised for individuals experiencing particular disadvantage or where there are significant matters of public interest involved.

Consequences of means tests for the missing middle

28. The Law Council understands that individuals whose fundamental legal and human rights are at stake may experience unmet legal need under the existing system, including those:

- charged with criminal offences attached to a sentence which threatens their liberty;
- whose children are at risk of removal by child protection authorities;
- whose liberty is curtailed by involuntary mental health regimes;
- whose right to make decisions for themselves is being determined in guardianship and administration proceedings;
- whose right to know and spend time with their children is being determined in family law proceedings;
- whose entitlement to access public services such as health, education, disability support, income support is being determined in appeal processes;
- who are impacted by a decision affecting their livelihood in employment law matters or occupational regulation cases; and
- tenancy or consumer credit matters, where their housing is at risk.

29. When legal services are unavailable in the circumstances listed above, particularly at the early stages of an issue, the consequences can be grave. Matters may not be resolved appropriately and justly, and legal and human rights may not be realised. In addition, the following flow-on effects may arise:

- existing legal issues become more complex, entrenched and difficult to resolve;
- new legal problems emerge because of the failure to address earlier problems, noting that clusters of problems are clearly identified in existing legal needs research;
- there are more self-represented litigants in the courts, resulting in additional costs and delay; and
- governments face increased costs in other areas, because of the need to provide ongoing support to those whose legal issues are not resolved and who experience further difficulties as a result.

30. In relation to the final point above, a recurring theme throughout the Justice Project Report is the costs (personal, community, social and economic) that arise and/or grow when people cannot access justice. While legal assistance services are not a 'cure-all' for all of these issues, the importance of these services in minimising the multitude of costs associated with failure to adequately access justice has been consistently recognised in Australian and overseas research.[23]

Possible policy changes to means testing and funding arrangements

31. Noting that an individual's financial circumstances are the dominant focus of eligibility for publicly funded legal assistance services, an obvious mechanism for assisting the missing middle to access justice is to change the application and content of the means test so as to increase the availability of legal assistance services for those who cannot afford private legal services. This would directly reduce the number of people in the missing middle by removing the financial barrier to accessing legal assistance which is essential to the definition of the cohort.

32. Alternatively, more flexibility in applying the property equity test for Legal Aid could assist certain individuals who face specific periods of financial vulnerability, for example those impacted by bushfire or drought. Reform in this area could be considered on an annual basis, where exemptions or increased equity allowances could be given to certain defined groups. This could be particularly helpful, for example, for those who have had their incomes severely impacted by COVID-19 restrictions. Consideration could also be given to developing alternative mechanisms for determining eligibility, that take account of such changing circumstances.

33. The particular kinds of disadvantage which some peoples face in addition to financial considerations, family and other responsibilities should also be factored into a consideration of their means. On this subject, the Law Council acknowledges the particular difficulties which may be faced by First Nations women in respect to accessing justice in the area of family law, including in the context of family violence.

34. Ultimately, however, the question of means testing is inextricably linked with funding. Legal assistance services will be unable to relax eligibility criteria without a significant injection of funds to cope with the increase in clients they would experience under such a shift. As such, the possibility of greater support for the missing middle is inseparable from the need for increased government spending on legal assistance services.[24]

35. The Justice Project Report included a key recommendation that Commonwealth, state and territory governments should invest significant additional resources in LACs, CLCs, Aboriginal and Torres Strait Islander Legal Services (**ATSILS**), and Family Violence Prevention Legal Services (**FVPLS**) to address critical civil and criminal legal assistance service gaps.[25] Further, as noted by the Productivity Commission in relation to civil legal assistance, currently, 'the total quantum of funds allocated is not

[23] While the global justice evidence base is not well resourced, international studies also support findings that unresolved legal problems have social, economic and health consequences. See, eg, Pascoe Pleasence et al, 'Mounting Problems: Further Evidence of the Social, Economic and Health Consequences of Civil Justice Problems' in Pascoe Pleasence, Alexy Buck and Nigel J Balmer (eds), *Transforming Lives: Law and Social Process* (The Stationary Office, 2007) 67.

[24] The Productivity Commission's recommendation for legal assistance services to receive more funding was designed to enable these services to address the most pressing needs, including by relaxing the means test applied by LACs so that more households are eligible to receive grants of legal aid. See, Law Council of Australia, *Justice Project Legal Services Chapter*, 10; Productivity Commission, *Access to Justice Arrangements*.

[25] Law Council of Australia, *Justice Project Recommendations and Group Priorities*, Recommendation 2.1.

sufficient to achieve governments' stated priorities'.[26] Logically, and as identified by the Productivity Commission, the appropriate funding amount should be set by reference to the cost of meeting these priorities.[27]

36. In respect to decision-making about funding, the Justice Project Report suggested that consideration should be given to governments agreeing upon targets regarding the proportion of the Australian population that should be assisted by the respective legal assistance services, keeping in mind that the differing roles, services and objectives may justify different targets.[28] In forming targets, the Justice Project Report recommended considering groups which may be asset-rich but cash poor, as well as those who live under the poverty line.[29]

37. In respect to the process and conditions for funding provision, the Justice Project Report also noted that funding arrangements for Commonwealth, state and territory legal assistance services left significant room for improvement.[30] For example, a key deficiency of the lapsed National Partnership Agreement on Legal Services (**NPA**) (now replaced by the NLAP) was the fact that it simply bound state and territory governments to spend Commonwealth funding for LACs and CLCs in certain ways. This funding offer appeared to lack an evidence base or rationale.

38. Over the course of 2018 and 2019, following publication of the Justice Project Report, the Australian Government undertook separate, concurrent reviews of the NPA and of the Indigenous Legal Assistance Partnership (**ILAP**), which funded ATSILS.[31] The resulting Final Reports were released by the Attorney-General on 28 March 2019 and, in the 2019-20 Federal Budget, the Australian Government announced that as of 1 July 2020, Commonwealth funding for the legal assistance sector was to be delivered through a new, single mechanism for legal assistance funding.[32] The NLAP is that mechanism and has been in operation since 1 July 2020.

39. The Law Council contributed extensively to the NLAP consultation process and notes that the final agreement is less restrictive than the now-defunct NPA and ILAP, in terms of the uses that may be made by state and territory Governments of Commonwealth funding. The NLAP also has a greater focus on collaboration and transparency in the funding allocation process. This is evident in the following clauses:

    - subclause 30(b), which provides for the Commonwealth and states and territories to meet biannually to 'discuss the operation of the NLAP';
    - subclause 30(c), which provides that the Commonwealth, states and territories have joint responsibility for 'ensuring the ongoing collection and transparent reporting of agreed nationally consistent data'; and

[26] *Access to Justice Arrangements*, 741.
[27] Ibid.
[28] See, Law Council of Australia, *Justice Project Legal Services Chapter*, 10.
[29] Law Council of Australia, *Justice Project Legal Services Chapter*, 10.
[30] Law Council of Australia, *Justice Project Recommendations and Group Priorities*, 4.
[31] See, Cox Inall Ridgeway, *Review of the Indigenous Legal Assistance Program (ILAP) 2015-2020* (Final Report prepared for the Attorney-General's Department, February 2019) <https://www.ag.gov.au/system/files/2020-07/Review-of-the-ILAP.PDF>; Urbis, *Review of the National Partnership Agreement on Legal Assistance Services 2015-2020* (Final Report prepared for the Attorney-General's Department, 19 December 2018) <https://www.ag.gov.au/legal-system/publications/review-national-partnership-agreement-legal-assistance-services-2015-2020>.
[32] Hon Christian Porter MP, Attorney-General (Cth), *Budget increase provides funding certainty for legal assistance services* (Media Release, 2 April 2019) <https://www.attorneygeneral.gov.au/media/media-releases/budget-increase-provides-funding-certainty-legal-assistance-services-2-april-2019>.

- clauses 55 to 75 which, while placing restrictions on the uses of Commonwealth funding, focus on areas of legal need identified in consultation with the legal assistance sector and provide a degree of flexibility for services.

40. However, the NLAP raises potential impediments to the missing middle accessing justice, most critically in relation to the quantum of funding provided under the mechanism. Levels of funding under the NLAP will have a clear impact on the missing middle, with the 'justice gap' likely to be wider where there are systemic deficiencies in legal assistance funding.

41. As stated in June 2016 by then Law Council President, Stuart Clark, the popular case for increasing the quantum of Legal Aid funding had already been made from an access to justice perspective (by the legal profession) and from an economic perspective (by the Productivity Commission).[33] 81.4 per cent of the 1,019 Australians surveyed in the Law Council's *Legal Aid Matters* campaign in 2016 considered that anyone facing a serious legal issue and unable to afford a lawyer 'should be able to rely on legal representation being provided through legal aid'.[34] This expectation simply cannot be met without a properly resourced legal assistance sector.

42. Further, it is noted that most of the Law Council's Constituent Bodies have referral schemes to solicitors who are willing to provide advice on a fixed fee basis – or for no fee at all.[35] These schemes are both a public service, and a member service by the Constituent Bodies concerned. Ensuring the widest possible advertising of referral services will help ensure they reach those most in need, with the cost of promotion properly to be borne by the government bodies with primary responsibility for those likely to need the services the most.

43. In addition, it has been suggested that governments should consider implementing further policies which require certain entities or persons (for example, Justices of the Peace or financial institutions) to encourage individuals to seek tailored legal advice at a more preliminary stage, when administering certain activities which commonly give rise to legal need down the track. For example, requirements may be imposed on:

- Banks, to issue an information sheet to any relatives or persons who 'gift' money for the purpose of a house deposit. This standard information sheet could incorporate a warning about the implications of giving such a 'gift' and a suggestion to obtain legal advice. The Law Council is not aware of examples of warnings currently being required in this regard; and
- Justices of the Peace, to further emphasise the importance of parties receiving legal advice in relation to a range of documents. This could be practically effected by requiring JP's to provide information sheets with the relevant 'warnings' and referrals to providers who can offer free or fixed fee advice, prior to witnessing documents such as home drafted gift letters, loan documents and powers of attorney.

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[33] Law Council of Australia, *Eight out of ten believe legal aid should be there in times of need* (Media Release, 2 June 2016) <https://www.lawcouncil.asn.au/media/media-releases/eight-out-of-ten-believe-legal-aid-should-be-there-in-times-of-need>. Indeed, in 2014, the Productivity Commission recommended bringing the means test employed by legal aid commissions into line with other ways that disadvantage is currently measured: see, Productivity Commission, *Access to Justice Arrangements*, Recommendation 21.4.

[34] Ibid.

[35] See, for example, the scheme offered by the Law Society of South Australia: The Law Society of South Australia, 'Need to see a lawyer?'.

Cost of legal fees

44. The expansion of the legal assistance sector is a critical part of addressing the unmet legal needs of the missing middle, however there is also a role for the private legal profession to consider how it can assist. The definition of the missing middle is, after all, intrinsically linked to the affordability – or not – of private legal services.

45. Legal fees in Australia vary considerably based on a multitude of factors. These include levels of complexity, market forces and the cost of proceedings and litigation, among others. However, in all cases, the Legal Profession Uniform Law (**Uniform Law**) stipulates that law practices must not charge more than fair and reasonable amounts for legal costs.

46. The factors for assessing what constitutes 'fair and reasonable' in the circumstances are set out in the Uniform Law[36] and in the equivalent legal profession legislation in non-Uniform Law state and territory jurisdictions (for example, in provisions relating to the assessment of practitioner-client costs), as well as in case law.

47. Every Australian jurisdiction also provides for the assessment of disputed legal fees and the referral of practitioners who are alleged to have charged excessive legal fees to the designated regulatory authority, Court or Tribunal for investigation and/or disciplinary action. Such action may result in a finding of unsatisfactory professional conduct or professional misconduct.

48. While market forces are the dominant factor in determining the costs of private legal services, the legal profession has a strong tradition in embracing pro bono and low-bono support for those in need. These sources of support are largely at the discretion of legal professionals, often motivated by a recognition of the public interest in access to justice and the unique role of the legal profession in facilitating this.

49. Pro bono and low-bono support can be viewed as critical for ensuring the private profession can meet the legal needs of members of the missing middle, and as such, it is important that regulatory frameworks and polices encourage rather than hinder these services. These issues are explored further at paragraphs 104 to 118 below.

Part 3: Areas of legal need within the missing middle

50. Having considered the laws and policies which may be exacerbating the inability of the missing middle to access justice, another key step in understanding how to improve access to justice for this cohort is to identify its key areas of legal need.

51. By the definition set out at paragraphs 7 to 13 above, the common factor among all members of the missing middle is a financial inability to access legal services of some sort, regardless of the particular area of legal need. Given that certain groups are overrepresented in the missing middle, understanding the areas of legal need they face may assist in finding solutions to the problems facing the missing middle.

52. Given the current data set, these areas are a guide only. The Productivity Commission has observed that there is strong qualitative evidence indicating unmet legal need in

[36] See, *Legal Profession Uniform Law (NSW)* s 172, which states that whether costs are 'fair and reasonable' is considered in all the circumstances and, in particular, by reference to whether they are proportionately and reasonably incurred, and proportionate and reasonable in amount. Subsection 172(2) then lists a range of factors that must be considered in determining whether the requirements of proportionality and reasonableness are satisfied.

several different areas of law and among different groups in society (concentrated among the most vulnerable and disadvantaged cohort), however attempting to quantify unmet legal need in a consistent manner is much more difficult.[37] This is compounded by the fact that the membership of the missing middle and their legal needs are constantly evolving. Nonetheless, as a starting point, some qualitative and quantitative evidence is collected below.

Legal need in emergencies

53. As highlighted above, emergencies such as natural or human-generated disasters and public health incidents generate particular areas of legal need for the missing middle. Existing legal problems are often exacerbated, problems stemming directly from the emergency – such as credit and debt or insurance issues – arise, and typically, there is a concurrent decrease in the accessibility of community legal assistance and pro bono services.[38] This has been illustrated most recently (and graphically) by the Australian bushfires in the summer of 2019/20, and by the COVID-19 pandemic.

Natural or human-generated disasters

54. In respect of bushfires or floods, members of the missing middle who are particularly vulnerable to experiencing direct legal issues, or have existing issues exacerbated, include those living in RRR areas.

55. More generally, older persons are disproportionately affected by natural disasters and the consequential legal problems that flow from disasters such as insurance disputes.[39] Factors such as restricted mobility, diminished sensory awareness or general ill-health, and social and economic constraints, contribute to older persons' vulnerability in emergency and disaster situations.[40] The impacts of disasters, notably increased legal need and disadvantage, can be overwhelming for vulnerable older people.

56. Further, the impacts of the COVID-19 pandemic, particularly in Victoria, New South Wales and Queensland, have been linked to an inability on the part of many small business to afford lawyers, concurrently with requirements for advice about small business matters ranging from disputes with landlords about rent arrears, to lending matters and credit/debt issues.

Public health emergencies

57. The introduction by Australian governments of far-reaching public health and emergency management responses has posed particular challenges for the missing middle cohort throughout 2020 and 2021, with strong prospects that some of these

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[37] Productivity Commission, *Access to Justice Arrangements*, [98].
[38] For example, the incidence of family violence during the COVID-19 pandemic. See, Law Council of Australia, 'Principles for Facilitating Access to Justice for Marginalised and Vulnerable Groups as a Result of the COVID-19 Pandemic' (May 2020) <https://www.lawcouncil.asn.au/docs/143756f2-74ac-ea11-9434-005056be13b5/Principles%20on%20Marginalised%20Groups.pdf> ('*Marginalised groups principles*') 1; Rick Morton, 'Family Violence Increasing During Covid-19 Lockdown', *The Saturday Paper* (online, 4-10 April 2020) <https://www.thesaturdaypaper.com.au/news/law-crime/2020/04/04/family-violence-increasing-during-covid-19-lockdown/15859188009641>.
[39] Law Council of Australia, *Justice Project Older Persons Chapter*, 15.
[40] Victorian Council of Social Service, *Disaster and disadvantage: Social vulnerability in emergency management* (2014) 12.

challenges will endure.[41] The rapid introduction of remote hearings by Australian courts and tribunals is a key example. By mid-March 2020, most courts were moving to delay hearings in all but the most urgent cases and subsequently, most adopted digital solutions to allow remote or 'virtual' hearings.'[42] As at the date of this paper, the extent to which court processes have returned to their pre-pandemic, primarily in-person format continues to be highly State or Territory-specific.

58. The Law Council outlined the possible advantages and disadvantages of online hearings for members of the missing middle in its *Principles for Facilitating Access to Justice for Marginalised and Vulnerable Groups as a Result of the COVID-19 Pandemic*.[43] Possible disadvantages include reduced accessibility to justice and legal services on the part of those with less ability to adapt to legal services moving online, including those with poor legal knowledge or limited technological capability or access.[44] This is likely to include older persons, who make up an identified part of the missing middle (as described at paragraph 14 above).

59. Other possible disadvantages of online hearings include reduced accessibility for people living in RRR areas where face-to-face legal services or courts have been cancelled (for example, regional circuits or bush courts), or for whom travelling to obtain these services has been made impossible or significantly more difficult or unsafe (for example, by reason of fewer flight routes, remote community closures and state and territory border closures).[45] This is compounded by the fact, as outlined above, that people living in RRR areas are strongly represented in the missing middle and are more likely to have limited technological capability or access.

60. The Law Council identified a particularly urgent new need for funding and resourcing to assist courts and tribunals in their efforts to address urgent matters and clear backlogs in trials and hearings which have resulted from COVID-19, especially in priority areas where further delays were likely to have significant mental health and/or human rights impacts.[46] In relation to the missing middle specifically, these include matters involving children in family proceedings.[47] The Law Council commended the increase in funding to the Federal Courts following the 2021-22 Federal Budget, however noted that further improvements to sustainable funding levels could be achieved through the Australian Government consulting closely with the Federal Courts and Tribunals and the legal profession, in order to undertake a full review of the resourcing needs of the judicial system, incorporating the challenges and benefits that have been identified in the context of the COVID-19 pandemic.[48]

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[41] See, Law Council of Australia, Submission 455 to Senate Select Committee on COVID-19, Parliament of Australia, *Inquiry into the Australian Government's response to the COVID-19 pandemic* (12 June 2020) [66], [70].
[42] Ibid; Joe McIntyre, Anna Olijnyk and Kieran Pender, 'Courts and COVID-19: Challenges and Opportunities in Australia', *Australian Public Law* (online, 4 May 2020) <https://auspublaw.org/2020/05/courts-and-covid-19-challenges-and-opportunities-in-australia/>; Law Council of Australia, *Marginalised groups principles.*
[43] See also Law Council of Australia, *Marginalised groups principles*, 3.
[44] Ibid 2.
[45] Ibid.
[46] Ibid 4-5.
[47] See, Law Council of Australia, Submission 101 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into family, domestic and sexual violence* (7 August 2020) [217]-[219].
[48] See, Law Council of Australia, 'Significant funding for Federal Courts applauded' (Media Statement, 12 May 2021) <https://www.lawcouncil.asn.au/media/media-statements/significant-funding-for-federal-courts-applauded>.

Family Law

61. As set out in the Law Council's submission to the Joint Select Committee on Australia's Family Law System, approximately three per cent of families require judicial determination to resolve their legal dispute.[49] Empirical evidence collated by the Australian Institute of Family Studies suggests a strong correlation between families with complex needs and those who require the courts as a form of dispute resolution.[50] This illustrates a crucial area of legal need for the missing middle.

62. Research indicates these families are experiencing disadvantage. These families are much more likely to have a history of family violence, concerns for their own or their children's safety as a result of ongoing contact with a particular parent, mental ill-health, substance abuse, gambling, problematic social media or pornography use.[51] The Law Council has identified a particular area of legal need for families from First Nations and culturally and linguistically diverse backgrounds, lesbian, gay, bi-sexual, trans, intersex and/or queer (referred to, for the purposes of this paper, as **LGBTI+**) persons and their families, persons with disability, and people living in RRR areas.[52] These persons may struggle with accessing family law services and courts to assist in the resolution of their disputes.[53]

63. Attempting to access the underfunded and resource-strained Federal Circuit and Family Court of Australia (**Family Court**) and family service system may only exacerbate stress and risk factors for families already presenting with various complexities.[54] Costs in accessing the system are prohibitive for those families who cannot afford private legal representation and who do not qualify for a grant of Legal Aid. These factors can lead to parties self-representing in family law proceedings or even relinquishing remedies available to them under the *Family Law Act 1975* (Cth).[55]

64. Finally, the degrees of inaccessibility to justice in the family law system, and the corresponding solutions available, may differ dramatically depending on the subject matter of the particular dispute – for example, whether it relates to children as opposed to property. The recently established 'small claim' Priority Property Pool pilot in the Federal Circuit Court of Australia (as at 1 September 2021, now part of the Federal Circuit and Family Court of Australia) for cases under $500,000 is a good example of the Courts streamlining process for lower value matters, with a potentially significant impact on the courts' responsiveness to family violence, and on the missing

[49] See, Law Council of Australia, Submissions 2 and 2.1 to Joint Select Committee on Australia's Family Law System, Parliament of Australia, (20 December 2019) 71 ('*Family Law System Submission*'). Note, Another six per cent use lawyer-based negotiation and about ten per cent use Family Dispute Resolution as other forms of dispute resolution. These figures were drawn from a summary of the empirical evidence by Rae Kaspiew, based upon a large research program conducted by Australian Institute of Family Studies. See, Rae Kaspiew, 'Separated Parents and the Family Law System: What Does the Evidence Say?' *Australian Institute of Family Studies – News & Discussion* (Web Page, 3 August 2016) <https://aifs.gov.au/cfca/2016/08/03/separated-parents-and-family-law-system-what-does-evidence-say>; Rae Kaspiew et al, 'Separation and Family Law' Australian Institute of Family Studies – Research Expertise (Web Page) <https://aifs.gov.au/our-work/research-expertise/laws-and-families>.

[50] Kaspiew, *What Does the Evidence Say?*.

[51] Ibid.

[52] Law Council of Australia, *Family Law System Submission*, 76.

[53] Ibid.

[54] See, Law Council of Australia, 'Submission to the Department of Social Services on Developing the next National Plan to Reduce Violence against Women and their Children' (13 August 2021) 21.

[55] Ibid.

middle.[56] However, this mechanism would be inappropriate if children were involved in a dispute.

Wills, estates, probate and elder abuse

65. As identified above, older persons are overrepresented in the missing middle. The legal needs of older persons are diverse and are affected by a multiplicity of factors, such as stage of life, age, socio-economic circumstances, health, geographic location and cultural and linguistic background.[57]

66. Many legal problems experienced by older persons are age-related and 'reflect the complex legal needs of ageing', such as losing a partner or spouse, grandparenting issues, age discrimination, issues associated with aged accommodation, superannuation, pension or social security issues, guardianship and enduring power of attorney, wills and being guarantors for loans taken out by family members.[58] Older persons experiencing disadvantage are more likely to face multiple types of legal problems and cumulative legal problems.[59]

67. The 2012 Legal Australia-Wide (**LAW**) Survey found consumer problems, followed by housing, government and crime, are the most common legal problems experienced by older Australians.[60] However, the LAW Survey may have failed to uncover lesser-known legal issues such as elder abuse, which is increasingly recognised as a wide-spread problem. In a global study of the legal needs of older persons, the Independent Expert on the Enjoyment of All Human Rights by Older Persons reported:

> *The most frequently mentioned rights were, in the order of frequency, the rights to: social protection, care, an adequate standard of living, equality and non-discrimination, dignity and integrity, in particular elder abuse, participation, education, independence and autonomy, work, accessibility, housing, transport, culture, access to justice, and rights in risk and emergency situations.*[61]

68. Of particular concern, older persons may also face difficulties making legal arrangements that can assist to prevent elder abuse. Many older persons, such as self-funded retirees (many with self-managed super funds with minimal assets), cannot easily afford to make arrangements which might prevent elder abuse from occurring – and may then be unable to afford to litigate against family members who have financially abused them. Similar complexities arise in respect of intra-family arrangements where one older spouse enters aged care, however is ineligible for the age pension due to an enduring asset base.

69. Adult children with a disability, those without jobs, recently separated, or living with chronic ill health or poor mental health are often dependent on older persons' income and assets structures, even if those assets are relatively modest.

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[56] See, Federal Circuit Court of Australia, *Information about Priority Property Pools under $500,000 cases* <www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/publications/family-law/ppp500-info>.
[57] See, Law Council of Australia, *Justice Project Older Persons Chapter* (n 9) at 9.
[58] See, Susannah Sage-Jacobson, 'Access to Justice for Older People in Australia' (2015) 33(2) *Law in Context* 142, 152.
[59] Christine Coumarelos et al, Law and Justice Foundation of New South Wales, 'Legal Australia-Wide Survey Legal Need in Australia' (2012) xxiii, 16 ('*LAW Survey*').
[60] Christine Coumarelos et al, Law and Justice Foundation of New South Wales, 'Collaborative Planning Resource – Service Planning' (2015) *Law and Justice Foundation of New South Wales* 24.
[61] Rosa Kornfeld-Matte, *Report of the Independent Expert on the enjoyment of all human rights by older persons*, 33rd sess, Agenda Item 3, UN Doc A/HRC/33/44 (8 July 2016) 18.

70. Litigation in the practice areas of wills and estates and guardianship is commonly problematic for older persons who may have a relatively modest asset base (i.e. enough money or assets to cause family/sibling discord over entitlement), but need to defend their own assets and living arrangements from allegations of incompetence. Complex litigation also includes family law property-related issues where one older person suffers a cognitive impairment such as dementia. In such cases, an otherwise routine property case becomes complex, with litigation guardians, costly medical evidence and intermingled family conflicts involved.

Litigation

71. Litigation has been identified by the Productivity Commission as an area of unmet legal need for those in the missing middle. The costs of litigation are often charged upfront and can be exacerbated by the prospect of an adverse costs order. Together, these factors may make litigation prohibitive for people who have a meritorious claim but do not qualify for legal aid services.[62]

72. Other processes and systems may affect the availability of legal assistance services in litigious matters. One of the implications of the *Dietrich* principle, for example, is that LACs must prioritise funding for serious criminal cases, potentially at the expense of civil and family law matters.[63] The Justice Project Report found that ATSILS and FVPLS are experiencing extremely high levels of unmet legal need for criminal, family and civil law services.[64] While ATSILS have had to prioritise criminal matters, despite evidence of the need amongst Aboriginal and Torres Strait Islander for civil assistance, they struggle to meet existing demand.[65]

Other

73. Certain other categories of civil matters are particularly prevalent areas of legal need for the missing middle. One large area of need includes consumer credit and debt matters, and employment law matters, which involve moderate or greater complexity. Matters involving abuse, violence, assault or harassment, as well as human rights, discrimination or child protection, also give rise to particular legal need for members of the missing middle.

74. The Justice Project Report also outlined a number of other areas of unmet legal for vulnerable people in Australia. Intuitively, these are also likely to exist for the missing middle. The areas in question tend to be associated with high costs and civil issues; they may often relate to debt, unstable housing or employment or medical circumstances. Further, as noted throughout this Research Paper, the Law Council understands that the prevalence of these issues has been exacerbated during the COVID-19 pandemic.

75. The areas in question include:

- resolving debts;
- protecting employment rights';
- retaining housing;

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[62] Productivity Commission, *Access to Justice Arrangements*, 20.
[63] See, Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, 'Inquiry into the Australian Legal Aid System' (Second Report, June 1997) Ch 4 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/Pre1999/legalaid/report/c07?>.
[64] Law Council of Australia, *Justice Project Legal Services Chapter*, 7.
[65] Ibid.

- resolving issues related to medical treatment;
- addressing discrimination;
- accessing income support; and
- receiving a fair hearing when charged with criminal offences.[66]

Part 4: Strategies for meeting the legal needs of the missing middle

76. The laws and policies exacerbating access to justice barriers for the missing middle highlighted at Part 2 above, and the areas of unmet legal need outlined at Part 3, indicate possible areas of focus for strategies to reduce these barriers and/or address the relevant needs. This context also makes clear the importance of a multifaceted approach and support from both policymakers and the legal profession. The Law Council outlines in this Part several strategies that are likely to have a role in pursuing the stated outcomes.

77. More generally, reference should also be had to the table at the **Appendix** below. Prepared by the Queensland Law Society, the table offers a useful guide to the four general categories of persons in the missing middle, the types of legal need they often experience, and general categories of measures to address them (or so-called 'system fixes').

Unbundling legal services

78. In the Justice Project Report, the Law Council acknowledged its role in promoting innovation in the delivery of legal services for those in the missing middle.[67] The Law Council did not discuss the different options for unbundling legal services in detail but recommended that it conduct further research in this area.[68]

79. 'Unbundling' refers to the provision of legal services through the performance of discrete tasks, rather than end-to-end assistance. The Productivity Commission describes this approach as a 'half-way house between full representation and no representation', a way of making costs more manageable and predictable for consumers.[69] In the litigious context, unbundling is used to give self-represented litigants understanding and a sense of empowerment in relation to their rights, responsibilities and ability to resolve a dispute.[70]

80. Justice Connect often provides unbundled services through volunteer lawyers who are secondees acting through the pro bono programs of private law firms.[71] Services are provided in the form of one-hour telephone or in-person appointments advising self-represented litigations on domestic building or employment disputes.[72] Advice

[66] Law Council of Australia, *Justice Project Legal Services Chapter*, 39.
[67] Ibid 16.
[68] Ibid.
[69] Productivity Commission, *Access to Justice Arrangements*, 644
[70] Justice Connect, 'Unbundling and the 'missing middle': Submission to the Law Council of Australia's Review of the Australian Solicitors' Conduct Rules' (July 2018) 3 <https://justiceconnect.org.au/wp-content/uploads/2018/08/Law-Council-of-Australia-Review-Justice-Connect-Submission-06-07-2018-FINAL.pdf%3e%20 ('*Unbundling and the 'missing middle'*).
[71] Justice Connect, Unbundling and the missing middle.
[72] Justice Connect, Unbundling and the missing middle, 1.

may be provided on prospects of success, the drafting of documents, and alternative dispute resolution (**ADR**) mechanisms.[73]

81. The Royal Melbourne Institute of Technology's (**RMIT**) Centre for Innovative Justice (**CIJ**) has noted that unbundled legal services may also be used at the most important stages of a proceeding in cases where a recipient either elects not to receive the services before that point or cannot afford to do so.[74]

82. In terms of how the provision of unbundled services could be facilitated or improved in order to assist the missing middle, Justice Connect explained in its submission to the Law Council's review of the Australian Solicitors' Conduct Rules (**ASCR**) that professional regulatory rules can, in some instances, impede the provision of services not amounting to full representation – and can actually contribute to the problems faced by the missing middle in accessing justice.[75] Accordingly, Justice Connect made several recommendations aimed at amending the ASCR to eliminate these impediments.[76]

83. These recommendations were not novel. As far back as 2014, the Productivity Commission called for changes to court and professional conduct rules to improve access to justice by facilitating the use of unbundled services.[77]

84. Broader issues have been raised which may extend beyond the scope of the ASCR to require legislative change to facilitate unbundling more broadly. These include:

- the risk of the duty of care owed by a lawyer to the client of unbundled services being found to be of a broad scope (in the context of liability for professional negligence);[78]
- challenges for a lawyer in assessing a case for suitability for unbundled service provision, and managing, communicating and judging a retainer's scope;[79]
- costs disclosure requirements which are predicated on a full comprehensive legal service. Practitioners must advise clients in relation to the 'proposed course of action' and the proposed costs in relation to the whole 'matter', not just one aspect of it; and
- risk of accepting liability for any unpaid filing fees and hearing set down fees. In NSW, for example, if a practitioner goes on the record as a legal representative for a client, they expose themselves to a liability for payment of court filing fees and hearing fees. A practitioner accepting an unbundled brief to appear on a motion arguably is at risk of accepting liability for any unpaid filing fees and hearing set down fees.

85. Concerns also arise in relation to unbundling and a lawyer's duty of care. The more vulnerable the client (for example, a person for whom English is a second language, a person with mental or physical disability, or very young or older persons), the more complex the task for a practitioner to assess the contents of their general law duty of care. Some stakeholders argue that existing legal professional obligations require a

[73] Ibid 2.
[74] Centre for Innovative Justice, RMIT University, 'Affordable Justice – a pragmatic path to greater flexibility and access in the private legal services market' (October 2013) <http://mams.rmit.edu.au/qr7u4uejwols1.pdf> ('*Affordable Justice*') 25.
[75] Justice Connect, Unbundling and the missing middle, 1.
[76] Ibid.
[77] Productivity Commission, *Access to Justice Arrangements*, 20-1.
[78] See, QLS Ethics Centre, Queensland law Society, *Guidance Statement No. 7 – Limited scope representation in dispute resolution* (June 2017) 3.
[79] QLS Ethics Centre, Queensland law Society, *Guidance Statement No. 7 – Limited scope representation in dispute resolution* (June 2017) 3.

practitioner to look at their client's legal matter in its entirety in order to discharge their general law duty of care, even if the retainer is limited in nature (for example, to explaining a mortgage document).

86. The Law Council commits to engaging in further work on the ethical, legislative, general law and practical constraints and opportunities for meeting the needs of those who may benefit from unbundled legal services, especially those falling within the definition of the missing middle.

Joined-up services

87. Joined-up services are holistic, multi-disciplinary service collaborations which seek to address clients' legal and non-legal needs comprehensively and seamlessly.[80]

88. It is widely recognised that legal problems may trigger non-legal problems and that it may not always be possible to disentangle one from the other.[81] In March 2019 the Organisation for Economic Cooperation and Development (**OECD**) suggested that providing 'joined-up' services is the 'next step' in improving access to justice.[82]

89. The Law Council noted in the Justice Project Report that services can be joined up in a continuum of ways and that many legal assistance services now provide joined-up services in some form.[83] These include integrated services which employ legal and non-legal professionals under the same banner, co-located services in which legal services operate from the same location, and Health Justice Partnerships.[84] Health Justice Partnerships in particular have been identified as an example of an initiative that is successfully addressing the needs of people who are vulnerable to intersecting health and legal issues.[85]

90. Peter Chapman and Zaza Namoradze note that the provision of joined-up services to address both legal and non-legal problems is one of the key principles of the current *National Strategic Framework for Legal Assistance 2015-20*.[86] Principle 3 states that non-legal services are frequently one of the first or only ways in which a person makes contact that could result in the provision of legal assistance; 'collaboration' between legal and non-legal services is, therefore, important.[87] However, it is also noted that 'fully' joined-up services are expensive and may not always be appropriate or practicable to implement.[88]

91. Another example of engagement with joined-up services in practice is found in Queensland. Legal Aid Queensland builds partnerships with other agencies via State-wide networks and forums and makes referrals to other community service agencies

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[80] Law Council of Australia, *Justice Project Legal Services Chapter*, 73.
[81] OECD, 'Chapter 6. Delivering and evaluating people-centred legal and justice services' (28 March 2019) *Equal Access to Justice for Inclusive Growth,* 165 <https://www.oecd-ilibrary.org/governance/equal-access-to-justice-for-inclusive-growth_597f5b7f-en>.
[82] Ibid.
[83] Law Council of Australia, *Justice Project Legal Services Chapter*, 74.
[84] Ibid.
[85] For more information, see, Suzie Forrell and Tessa Boyd-Caine, *Service models on the health justice landscape: a closer look at partnership* (Sydney, 2018), Health Justice Australia.
[86] Peter Chapman and Zaza Namoradze, 'A New Guide Shows the Way Forward on Expanding Access to Justice' (18 June 2019) *Open Society Justice Initiative* <https://www.justiceinitiative.org/voices/a-new-guide-shows-the-way-forward-on-expanding-access-to-justice>.
[87] *National Strategic Framework for Legal Assistance 2015-20,* Principle 3 <https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Documents/National-Strategic-Framework-for-Legal-Assistance.pdfhttps://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Documents/National-Strategic-Framework-for-Legal-Assistance.pdf>.
[88] *National Strategic Framework for Legal Assistance 2015-20,* Principle 3.

where appropriate.[89] It also prioritises the integration of community legal education and policy issues across services.[90]

92. In terms of how services may be joined up, Pascoe Pleasance has described the myriad of possibilities available, including through formal contracts or memoranda of understanding, and through informal practice.[91] Pleasance also discusses the variety of time periods over which these interactions may occur: from episodic to continuous, and from horizontal to vertical.[92]

93. In terms of joining up services via referrals by non-legal agencies, the Law and Justice Foundation has suggested that non-legal professionals could be taught to identify legal problems and to encourage clients to take steps to resolve them, for example, through referrals and the provision of basic information packages.[93] However, in 2012, it raised concern that non-legal professionals were poorly equipped to 'act as legal gateways', given gaps in knowledge of the law and how to make appropriate referrals.[94]

94. Technology can also increase the effectiveness of joined-up services, for example through facilitating effective referrals. One example of technology being used in this way is Justice Connect's Gateway Project.[95]

95. The Law Council acknowledges that joined-up services may be of little immediate value to those in the missing middle, given that axiomatically, members of the missing middle may not meet the eligibility requirements for accessing joined-up services. However, should eligibility criteria loosen (for example, through increased resourcing), joined-up services are likely to be an important component in increasing legal awareness and directing those currently within the missing middle towards legal assistance.

Expanding the scope of legal service provision

Generalists as well as specialists

96. Another strategy to reduce access to justice barriers for the missing middle focuses on the potential to expand legal service provision in order to better address diverse needs.

97. Some stakeholders argue that trends in traditional legal service provision may have indirectly compounded the unmet legal need of the missing middle. For example, the trend in the profession towards specialisation (and with it, a focus on meeting complex, rather than every day, legal needs) has arguably contributed to the development of substitute service providers as competitors to lawyers.

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[89] Legal Aid Queensland, *Communication Legal Education strategy 2019-21* (Web Page) <www.legalaid.qld.gov.au/About-us/Corporate-publications/Community-legal-education-strategy-2019-to-2021>.
[90] Ibid.
[91] Pascoe Pleasance, Law and Justice Foundation of New South Wales, 'Reshaping legal assistance services: building on the evidence base' (April 2014) 67-9 <www.lawfoundation.net.au/ljf/site/articleIDs/D76E53BB842CB7B1CA257D7B000D5173/$file/Reshaping_legal_assistance_services_web.pdf>.
[92] Ibid.
[93] Law and Justice Foundation of New South Wales, *LAW Survey*.
[94] Ibid.
[95] Justice Connect, 'Joined up justice' <https://justiceconnect.org.au/about/digital-innovation/joined-up-justice/>.

98. In the case of out-of-court dispute resolution, for example, it has been observed that the legal profession has tended not to focus on assisting clients to navigate the various non-court-based dispute resolution services, including non-legal mediation, tribunals and ombudsmen services, etc, which have developed in recent years. While these services have been designed for people to navigate themselves, they remain challenging to navigate without assistance. In the absence of lawyers offering such assistance, this has created demand for substitute, non-legally qualified service providers to effectively assist people to self-represent.

99. Addressing the tendency to specialise as a structural and/or cultural endeavour may take the profession closer to meeting the legal need of the missing middle. Particularly, it may be possible for the profession to re-envision general practice lawyering as a valuable service to the community, similarly to medical general practitioners. General practitioners who focus on everyday legal problems are well-placed to, and frequently do, assist clients who might otherwise fall in the missing middle in accessing diverse services. Indeed, these lawyers often offer unbundled services, as well as assistance to clients who are self-representing in court or in ombudsman service processes. General practitioners also give potential clients the opportunity to form a relationship with a trusted legal advisor who can assist with most everyday problems and provide specialist referrals when necessary.

100. Despite their value, general practice lawyers who effectively specialise in everyday legal problems are not always clearly visible as a group within the legal profession outside regional areas (where they are more frequently found). As a result, lawyers who may be drawn to this area of practice have no clear career pathway in metropolitan areas. Improving visibility and opportunities in this area of practice may be a critical step in addressing the needs of the missing middle.

Graduate lawyers

101. Another way to make structural changes to the legal profession to address the unmet legal needs of the missing middle may be to either require or actively encourage law graduates to undertake a full-time internship of a set duration (eg, 4 months) with a legal assistance service, as a pre-condition for obtaining their practising certificate.

102. This strategy may not only increase the number of ‘hands on deck’ at legal assistance services but may also foster a public interest attitude in all lawyers from the beginning of their career, even where they go on to practice in unrelated areas. Consideration could be given to funding such a program through Austudy, with the rationale that downstream savings will flow where people are assisted to avoid or resolve their everyday legal issues. The Law Council understands that a program of this nature would not be dissimilar to the current program for incentivising young doctors to work in RRR areas through reductions in their Higher Education Contribution Scheme (**HECS**) debts.

103. It is noted that funding would need to cover the considerable supervision burden which the program would impose upon CLCs, and it will be critical that the legal assistance sector is closely consulted in the development of any such proposals.

Pro bono services

104. Pro bono services remain a primary source of support for the missing middle in Australia and are a key element to meeting the needs of those that are unable to access legal help through a funded legal assistance sector, while lacking to the resources to afford private legal representation. The pro bono contribution of the Australian legal profession is substantial, of great value to the community, and a celebrated aspect of Australia's legal culture. Australian lawyers provide hundreds of thousands of pro bono work hours every year to those who have no other options and cannot afford to pay for legal services.[96]

105. In the *Access to Justice Arrangements* report, the Productivity Commission made several recommendations aimed at improving the effectiveness and availability of pro bono resources. These included, amongst other things:

    - making practising certificates free for lawyers no longer practising in their career, if limited to the provision of pro bono services through approved centres (still including relevant CPD requirements);
    - Commonwealth, state and territory governments appointing a pro bono 'coordinator' to approve firms' pro bono action, as in Victoria; and
    - for the Queensland, New South Welsh and Western Australian Governments, to consider adopting the National Pro Bono Aspirational Target.[97]

106. The CIJ argues that pro bono work may effectively perpetuate the missing middle, to the extent that the majority of pro bono services which large firms provide go to organisations rather than individuals.[98] The CIJ interrogated possible incentives for firms to offer pro bono assistance to individual clients, as distinct from organisations. Suggestions included presenting pro bono as a means of better publicising smaller practices' work (thereby improving the profile of these firms for graduates and clients), requiring litigation funders to meet a pro bono target involving individuals, and offering relevant tax deductions.[99]

107. Other options for assisting the uptake of pro bono work for the missing middle include:

    - promoting the idea of a so-called 'personal interest' test (as opposed to the 'public interest' test traditionally associated with pro bono service provision). The missing middle cohort encompasses a broad range of people and legal problems. It may take only one lawyer identifying or connecting with a prospective client on a personal level in order to be motivated to assist them;
    - promoting awareness of the various disbursement funds that are available for practitioners to claim from so they will not be out of pocket for any disbursements incurred for pro bono matters. Federally, this includes the Disbursement Assistance Fund administered by the Commonwealth Attorney-General's Department; and
    - recognising individual practitioners and firms for the pro bono work they perform in assisting the missing middle cohort.

108. Further, the provision of pro bono assistance should be safeguarded through adequate insurance and education. The Law Council understands that some practitioners may mistakenly believe that pro bono legal services may be provided

[96] Law Council of Australia, *Justice Project Legal Services Chapter*, 14.
[97] Productivity Commission, *Access to Justice Arrangements,* 67-8.
[98] Centre for Innovative Justice, RMIT University, *Affordable Justice*, 32.
[99] Ibid.

regardless of the category of practising certificate they hold. It is important that if the provision of pro bono legal services is promoted on a wide scale, practitioners are furnished with information about requirements for practising certificates and professional indemnity insurance. Practitioners should also be reminded that the ASCR apply irrespective of fees charged or not charged.

109. The Law Council is also aware of some confusion with respect to the ability to claim party/party costs on the successful outcome of a pro bono or low-bono matter, in instances where it had been agreed that costs would be paid in the event of recovery of the judgment sums/costs. It is argued that allowing such agreements serves as an incentive for practitioners to take on work on a low-bono basis.

110. Finally, and as noted in the Justice Project Report, pro bono services should be viewed as a finite resource and not as a replacement for proper public funding of the legal assistance safety net.[100] Whilst taking the steps outlined above may improve the availability or effectiveness of pro bono resources for members of the missing middle, it is acknowledged that pro bono work should not be considered a 'plug' for the access to justice gap. Lawyers are necessarily limited in how much work they can do without charge, given their concurrent responsibilities (eg, to perform work for their employer and with respect to their own financial security). Further, some lawyers, particularly in smaller practices, may be struggling financially themselves and are unlikely to have the capacity to provide further pro bono services.

Low-bono services

111. Increasingly, new service models and providers of 'low-bono' services are emerging to offer solutions to the legal need of those in the missing middle. The Australian Pro Bono Centre defines 'low-bono' services as offering clients 'a deeply-discounted fixed fee for...legal work'.[101]

112. One example of an Australian provider of low-bono legal services is the newly conceived Accessible Justice Project (**AJP**), run as a collaboration between private Adelaide-based law firm Lipman Karis and the University of Adelaide Law School. The AJP provides legal services in a number of areas, including debt recovery, employment and tenancy matters, at 'affordable rates'. Clients must meet a limited means and/or low assets threshold, which seeks to categorise them as part of the 'missing middle', in order to be eligible.[102]

113. The Law Council understands that the AJP can charge relatively low fees because the (qualified) lawyers at the clinic are students who can obtain credit, through their participation, for their Master of Laws at the University, and are therefore obtaining the benefit of practical experience as well as a salary for their work.

114. Another example is Affording Justice, a Brisbane-based law firm whose stated purpose is to resolve 'every day legal problems' in an efficient and cost-effective manner.[103] Different fixed prices apply for a variety of services of different

[100] Centre for Innovative Justice, RMIT University, *Affordable Justice*, 15.
[101] Australian Pro Bono Centre, 'Low bono' legal services for impact investment: How Corrs Chambers Westgarth is developing new pro bono initiatives' 111 (August 2016) *Australian Pro Bono News* <https://www.probonocentre.org.au/apbn/aug-2016/low-bono-legal-services-impact-investment/>.
[102] See, Legal Services Commission of South Australia, 'Accessible Justice Project' <https://lawhandbook.sa.gov.au/ch26s04s06.php>.
[103] See, Affording Justice, 'How are we different to traditional legal practice?' *Affording Justice: Helping people use the law to solve problems* <http://affordingjustice.com.au/how-we-are-different/how-are-we-different-to-traditional-legal-practice/>.

complexities, from an 'express advice' to 'family law specialist advice'.[104] A fee discount also applies automatically if the client uses an online form to provide initial information, or for repeat clients.[105]

115. The Law Society of South Australia also offers a Legal Advisory Service, which is conducted twice weekly and connects members of the community with experienced volunteer practitioners. The scheduled appointment sessions last 20 minutes and require a contribution of $35.00 per person (or $25.00 per pension and concession card holders). The service assists with a range of matters including neighbourhood disputes, traffic infringements, family law matters, workplace grievances and tenancy issues.

116. In 2013, the CIJ argued that to increase the provision of lower-cost legal services, it may be necessary to readjust the expectation by some members of the profession with respect to what a 'reasonable income' is by encouraging them to consider why they initially chose to study law.[106] The CIJ suggests emphasising the ethos and culture of low-bono service providers as a way of attracting practitioners.[107] The CIJ posits that this perspective shift, alongside an adapted system of service delivery which accommodates a larger number of clients, could improve access to justice.[108]

117. Beyond the challenge of tackling what some view as a long-standing profit maximisation culture in the legal profession, there are other challenges associated with encouraging low-bono practice. It is financially sustainable only where a firm makes a 'producer surplus' (for example, a medium or large law firm with a strong commercial client base).[109] Further, low-bono service provision may be difficult for firms, particularly smaller firms, who only participate in the market for individual legal services and/or whose client base is already composed of low and middle income earners.[110] That client base may face higher fees as a result of lower (or no) fees being offered to certain low-bono clients.[111] However, while these risks exist, low-bono service provision is not necessarily a 'zero sum' affair.[112]

118. Lastly, it should be noted that some commentators consider 'low-bono' to mean more than simply the offering of discounted fees. There is an argument that the concept extends to other concepts discussed in this paper, including the unbundling of services, improvement of efficiency through the use of technology, and publication by lawyers of self-help tools.[113] Whilst these options are considered elsewhere in this paper, it is clear that they are strongly linked to the aims and outcomes of low-bono service provision.

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[104] Affording Justice, 'How Much Does It Cost?' *Affording Justice: Helping people use the law to solve problems.*
[105] Ibid.
[106] Centre for Innovative Justice, RMIT University, *Affordable Justice*).
[107] Ibid.
[108] Ibid.
[109] Elizabeth Shearer, 'Pro bono: Can you low bono?: Sometimes you can't afford to work for free' ('Low Bono - Doing Pro Bono when you can't afford to work for free' (2019) 39(10) *The Proctor* 44.
[110] Ibid.
[111] Ibid.
[112] Ibid.
[113] Forrest Carlson, 'The Changing Contours of 'Low Bono'' (28 March 2016) *NWSidebar* <https://nwsidebar.wsba.org/2016/03/28/the-changing-contours-of-low-bono-2/>.

Legal expenses insurance

119. Legal expenses insurance (**LEI**) has been propounded as another potential tool for improving access to justice for the missing middle. As defined by the IBA, LEI is 'a purchasable product through which individuals can obtain legal assistance from a private provider with some or all of the expenses covered by an insurer'.[114]

120. Recognising the importance of LEI in improving access to justice, the IBA assessed whether certain elements common amongst LEI jurisdictions picked from case studies around the world (namely Germany, Japan and Sweden) were absent in jurisdictions where the LEI market is more limited (including Australia).[115] Ultimately, the IBA identified three main barriers for the profession to address: 'lack of awareness and information available to consumers; gaps in indemnity; family law and criminal law; and the perception of conflicting interests'.[116]

121. In terms of a more Australia-specific analysis, on 30 November 2019, the Law Council's LEI Working Group, which had been established for this purpose, released findings on the appropriateness of introducing a LEI scheme in Australia.[117] The Working Group concluded that the Law Council and/or its Constituent Bodies have an ongoing role to monitor LEI providers entering the market and noted that future consideration should be given to endorsing or promoting appropriate LEI products or providers.[118]

122. Specific to the missing middle, the LEI Working Group drew attention to the fact that a significant proportion of the legal issues affecting this cohort, as well as (or including) small businesses, are progressed through tribunals or other dispute resolution processes rather than litigation. These include administrative law matters, tenancy matters and consumer issues.

123. It was noted that in settings such as tribunals, the usual rule of costs following the event does not apply; rather, there is a schedule of fees and charges for applications and appeals. Further, only some tribunals allow a lawyer as of right. Therefore, the barriers to the successful implementation of LEI in Australia for litigated matters (i.e, uncertainty regarding legal fees and costs following the event) are not present in many of the areas of need of the missing middle, for which the complexity in calculating financial liability is comparatively low. Tailoring LEI policies to cover the advice required for individuals to pursue matters through tribunals and other dispute resolution processes could assist in improving access to justice for the missing middle and could also present less risk to insurers than providing cover for litigated court proceedings.[119]

124. Another significant finding by the LEI Working Group was that the availability of appropriate coverage beyond urban Australia, to meaningfully reach RRR areas, will be crucial to the effectiveness of LEI in improving access to justice outcomes for the missing middle.[120] A study by the Small Business Ombudsman has found that in comparison to their urban counterparts, small businesses in RRR areas placed more reliance on advice from other individuals and sources – such as other business

[114] International Bar Association, *LEI and Access to Justice*, 5.
[115] Ibid.
[116] Ibid 7.
[117] Legal Expense Insurance Working Group, 'Legal Expense Insurance in Australia - Final Report of the Legal Expense Insurance Working Group' 3.
[118] Ibid 4.
[119] Ibid 25.
[120] Ibid 31.

owners, industry associations, the ombudsman or regulator, accountants or tax agents – than on legal advice.[121]

125. The LEI Working Group suggested the Law Council and Constituent Bodies consider continuing to encourage the development of LEI policies that better address access to justice issues for the missing middle, including policies that offer broad, general coverage at an affordable cost to the consumer. It also suggested considering other forms of advocacy to promote improved products, including:

- developing and publishing guidance material for consumers which provides information about the necessary elements of a quality LEI product, in order for it to be of benefit;
- engaging with the profession, including through Constituent Bodies, to inform members of the access to justice benefits of LEI and about how it can assist lawyers and their clients; and
- engaging more broadly with industry bodies such as the Insurance Council of Australia and the National Insurance Brokers' Association.[122]

126. The findings set out in the LEI Working Group's report were based on assumptions which are likely to have been significantly challenged by the ongoing COVID-19 pandemic. The nature and extent of these challenges may not be fully apparent for some years. Further, the Working Group explicitly premised its findings on the importance of further examining the effect of:

- the legislative and policy reforms to the insurance industry which may take place in the wake of the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry; and
- the still unknown degree of commercial success of ARAG's introduction of new LEI products in Australia.

127. Given that almost two years have passed since the Working Group's findings, further examination of these two issues is likely to assist the profession's continued effective advocacy of LEI policies in Australia.

128. Stakeholders have also noted the potential value of collaborating with the relevant professional bodies in the United Kingdom about the successful implementation of LEI in that country and about potential entrants to the Australian market. Stakeholders have also emphasised the importance of distinguishing between 'before the event' and 'after the event' LEI, given the potential for associate costs rules to have significant implications on the effect of such insurance.

129. Finally, stakeholders have raised the need to consider the financial viability of maintaining LEI for members of the missing middle (given the cohort comprises, by definition, low and middle income earners who are unable to afford legal representation). As outlined above, policies to promote the affordability of LEI were considered by the LEI Working Group. The potential risk of conflict with the solicitor's obligation to the client if an insurer (or other third-party payer) is introduced has also been flagged for further consideration if the provision of LEI is ultimately facilitated as a strategy for addressing the unmet legal needs of the missing middle.

[121] Ibid.
[122] Legal Expense Insurance Working Group, 'Legal Expense Insurance in Australia - Final Report of the Legal Expense Insurance Working Group' 32.

Third-party litigation funding

130. Third-party litigation funding is another possible means for improving access to justice in Australia, including for those in the missing middle. Third-party funding is most commonly considered in relation to class actions litigation. However, it comes in various forms, including the relatively recent development of 'crowdfunding'.[123]

131. Third-party litigation funding typically involves a 'funder' agreeing to cover the costs of litigation and to indemnify the applicants against the risk of paying the costs incurred by the respondent if the case fails. In most circumstances, if the case is successful, the funder is reimbursed for the costs of the litigation and for bearing the financial risk of the case being unsuccessful through an agreed percentage of the sum recovered by the applicants.

132. In the Law Council's 2011 Position Paper entitled *Regulation of Third Party Litigation Funding in Australia*, it recognised that 'litigation funding promotes access to justice, spreads the risk of complex litigation and improves the efficiency of litigation by introducing commercial considerations that will aim to reduce costs'.[124] However, concerns have been raised about the regulation of third-party litigation funders in Australia and instances of large payments to third-party funders significantly reducing the return to class members. As a result, third-party litigation funding has been the subject of significant consideration in Australia.

133. The Law Council stated in a submission to the Australian Law Reform Commission (**ALRC**)'s *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* that third-party litigation funding can contribute to providing greater access to justice, recognising that many class actions members would not be able to cover their own legal costs, or contribute to the class action.[125] However, the Law Council also expressed support for greater court oversight and the introduction of a comprehensive licensing regime for litigation funders in order to better protect users of third-party litigation funding.[126]

134. In December 2020, the Parliamentary Joint Committee on Corporations and Financial Services (**Joint Committee**) released its report on an inquiry into 'litigation funding and the regulation of the class action industry' (**LF Report**).[127] The Law Council has expressed its agreement in principle (and subject to appropriate funding) with a number of the 31 recommendations made in the LF Report, including the

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[123] The Law Council's Crowdfunding Guidance Note, dated December 2019, offers a background to the operation of the practice in Australia. It also explains that crowdfunding is, *prima facie*, a subset of third-party funding: Law Council of Australia, *Crowdfunding: Guidance for Australian legal practitioners* (18 December 2019) <https://www.lawcouncil.asn.au/docs/b0042d15-be22-ea11-9403-005056be13b5/Crowdfunding%20Guidance%20Note%20Final.pdf> ('*Crowdfunding Guidance Note*') 15-7.

[124] Law Council of Australia, 'Regulation of Third Party Litigation Funding in Australia' (Position Paper, June 2011) [4].

[125] Law Council of Australia, Submission No 62 to Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders (DP 85)* (17 August 2018) 5.

[126] Ibid 5; Law Council of Australia, Submission No 65 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation funding and the regulation of the class action industry* (16 June 2020) [75] ('*Submission to Joint Committee*').

[127] See, Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, 'Litigation funding and the regulation of the class action industry' (Final Report, 21 December 2020). This inquiry followed the 2018 inquiry by the Australian Law Reform Commission (**ALRC**) into *Class Action Proceedings and Third-Party Litigation Funders*, the 2017 inquiry by the Victorian Law Reform Commission into *Litigation Funding and Group Proceedings* and the Productivity Commission's 2013-14 *Access to Justice Arrangements* inquiry, among others. See, Australian Law Reform Commission, Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (Report No 134, December 2018) ('*Integrity, Fairness and Efficiency*'); Productivity Commission, *Access to Justice Arrangements*.

recommendation for the Australian Government to legislate to address the lack of clarity in common fund orders, and the recommendation for the Federal Court to be given greater power to oversee class actions.[128] However, the Law Council has also publicly opposed any further incursion into the regulation of Australian legal practitioners (as discussed in Recommendation 20, 21, 22 and 28 of the LF Report), noting that lawyers are already among the most regulated professionals in the country.[129]

135. The Law Council also notes that it is aware of charitable, not-for-profit litigation funding models in some jurisdictions, including the Litigation Assistance Fund (**SA LAF**) of which the Law Council's Constituent Body, the Law Society of South Australia, is trustee, which may offer an important model for addressing the issue faced by the missing middle.[130] The Law Council understands that the means test for the SA LAF is considered to be broader in scope than other legal assistance services and that as a result, the LAF is viewed as an important means of addressing the missing middle in South Australia, albeit with respect to a limited category of legal matters (being civil matters where a relatively substantial monetary outcome is being sought by the applicant). Presently, the LAF's funding is for disbursements only, with solicitors retained on a 'no win, no fee' basis.

136. On this subject, one proposed means of remedying concerns regarding the regulation of funders in Australia is to ensure that any regulation distinguishes between not-for-profit litigation funders and other funders.

Contingency fee agreements

137. Contingency fees are another way of funding litigation, by allowing access those who might otherwise be financially restrained to access the legal system. Contingency fee agreements, also known as 'percentage-based contingency fee agreements' and 'damages-based billing', are a form of speculative or 'no win no fee' cost agreement.[131] A key difference between contingency fee agreements and conditional costs agreements with uplift (whereby an agreed flat amount, or an amount constituting a percentage of a lawyer's usual fee, is payable if a matter is successful) lies in how the amount payable for legal costs is calculated. In contingency fee agreements, legal costs are determined by reference to the value of the damages awarded or the settlement amount.

138. At the time of its submission to the ALRC on third party litigation, the Law Council declined to comment on the appropriateness of 'contingency fees' in light of differing views between several of its constituent bodies and committees.[132] However, following a decision of the Law Council's Directors in March 2020, the organisation decided upon (and publicised) its opposition to contingency fees.[133] This position was provided in the Law Council's submission to the Joint Committee.[134]

139. The Law Council opposes contingency fees on the basis that 'enabling lawyers to hold a direct financial interest in the outcome of a case creates a serious risk of

[128] Law Council of Australia, 'Law Council response to Committee's final report into the Litigation and Class Action Industry in Australia' (Media Release, 22 December 2020).
[129] Ibid.
[130] See, The Law Society of South Australia, 'Litigation Assistance Fund'.
[131] Percentage-Based Contingency Fee Working Group, Law Council of Australia, *Percentage Based Contingency Fee Agreements* (Final Report, May 2014) 12.
[132] Ibid 5.
[133] It is noted that this view is not necessarily shared by all Law Council Constituent Bodies and Committees.
[134] See, Law Council of Australia, *Submission to Joint Committee,* [4].

compromising the practitioner's fundamental duty to the court, the overriding duty of candour and possibly the duty to their client'.[135]

140. Contingency fees have been supported by the ALRC, Victorian Law Reform Commission and Productivity Commission, on the basis that contingency fees have the potential to increase access to legal advice where lawyers take on claims they would not have accepted under other forms of billing and by creating greater competition for litigation funders.[136]

141. However, as noted in its submission to the Joint Committee (which subsequently reported its view in the LF Report that the potential benefits of permitting contingency fee arrangements do not outweigh the risks), the Law Council is not persuaded that potential marginal gains in access to justice are outweighed by the risks to the ethical duties of lawyers and the potential affect that compromise of these duties could have in respect of the interests of class members.[137] Given that the risks for a law firm conducting litigation on a contingency fee basis are so high (for example, they face the possibility of not being paid for significant work or, depending on the contingency fee scheme, of being required to cover an adverse costs order), it is unlikely that firms will conduct small or risky cases under such arrangements. This means that the potential for contingency fees to increase legal advice beyond what is already provided is, in the Law Council's view, minimal.

Reducing the costs of disputes

Deciding cases on the papers

142. The Law Council is aware of views in the legal profession that to conduct litigation less expensively, it may in some instances be appropriate to decide a contested cases on the papers. These views acknowledge that it is preferable to hold a hearing but that in some circumstances, making litigation affordable to more people (thereby reducing the size of the missing middle) may weigh more in the interests of justice.

143. Generally, the courts refuse to make a decision where the relevant persons have not been cross examined about competing facts.[138] The Law Council understands that some cases are, however, decided on the papers, for example in relation to claims regarding superannuation issues and contests on costs. This is sometimes the case even where large sums of money are involved, an approach which many members of the profession would likely consider unsatisfactory and an affront to the principles of natural justice. It may also conflict with the Law Council's Policy Statement on the Rule of Law, including the principle that the law should be applied to all people equally.[139]

144. However, it has been suggested that some claims – for example, claims for family provision where an estate is small (eg, less than $500,000) – may be considered appropriate candidates for decisions on the papers. Theoretically, paper decisions

[135] Michael Pelly and Liz Main, 'Lawyers unite to condemn contingency fees' *Australian Financial Review* (online, 13 March 2020) <https://www.afr.com/companies/financial-services/lawyers-unite-to-condemn-contingency-fees-20200311-p54953https://www.afr.com/companies/financial-services/lawyers-unite-to-condemn-contingency-fees-20200311-p54953>.
[136] See, Australian Law Reform Commission, *Integrity, Fairness and Efficiency* (n 73); Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings* (Report, March 2018); and Productivity Commission, *Access to Justice Arrangements*.
[137] See, Law Council of Australia, *Submission to Joint Committee*, [50].
[138] See, for example, *The Estate of Frances Kedesch Michell (No 2)* [2020] NSWSC 1513 at [59].
[139] See, Law Council of Australia, 'Rule of Law Principles' (Policy Statement, March 2011).

could be prescribed for such cases, provided that a court is able to order otherwise under specified, limited circumstances.

145. Proponents of this approach recognise that it may result in a lower standard of justice but argue that this may be justified where the amount of money in dispute is low and time and legal costs are reduced, such that litigation becomes affordable for members of the missing middle who might not otherwise have been able to utilise it.

Capping cost and length of hearings

146. Costs-capping has also been proposed as a way of making litigation more accessible for members of the missing middle. Under this approach, if the amount in dispute is less than a prescribed sum (eg, $500,000), the legal costs for each party are capped at prescribed amounts unless the court orders otherwise.

147. Another suggestion is to restrict the length of a hearing such that if the financial sum in dispute is less than a prescribed amount (eg, $500,000), the maximum length of hearing is, for example, 2 hours.

Cost-conscious approaches

148. It is further argued that the courts should generally be encouraged to adopt so-called 'costs-conscious' processes, in order to reduce the cost barrier of litigation for people in the missing middle. This may involve making appearances for directions and interlocutory hearings via telephone or Audio-Visual Link available and/or preferred, where appropriate and provided that the principles of access to justice and open justice are upheld.[140]

Reducing the complexity of legislation

149. Another possible strategy for reducing the costs of litigation and the impediments they can pose to accessing justice for the missing middle is to avoid undue complexity when drafting legislation, noting that the increasingly complex nature of certain pieces of legislation has been observed to give rise to proceedings of longer duration.

Considering scope for investigative processes

150. At least one Law Council stakeholder has noted the difficulty with the adversarial litigation model in heightening the costs of disputes, leading to preparation for a case that in accordance with legislative and court requirements involves detailed and extensive work, culminating in a trial. This raises the question as to whether there could scope for a more investigative process where the court and parties work through issues in a case over a period of time, and the court makes findings at each step along the way. The streamlining of such processes would be conditional on an emphasis on slightly more simplification within legislation into the future, in accordance with paragraph 149 above.

[140] See, on the importance of preserving access to justice and open justice, Speech by Pauline Wright, 'LAWASIA- Access to Justice and COVID-19' (LAWASIA Human Rights Webinar, 2 June 2020) 2-3.

Alternative dispute resolution

151. ADR may be thought of as 'people-centred justice'.[141] There is a strong evidence base for its effectiveness in some cases, as an alternative to traditional forms of dispute resolution.

Research by the Hague Institute of Innovative Law

152. In 2012, the Hague Institute of Innovative Law (**HIIL**) consulted with 100 access to justice experts to understand how legal service providers and courts can achieve solutions by harnessing user-centred innovation.[142] One of the HIIL's key findings was that adversarial litigation can lead to a cycle in which full responsibility is attributed to the 'accused' party who then inevitably seeks to avoid sanctions by engaging in 'serial denial'. This brings the parties further away from the understanding that is, in fact, their common goal.[143] For this reason, the HIIL likened formal court procedures to the 'elephant in the courtroom', because they fail to deliver the 'understandings people need' and must usually be departed from if successful solutions are to be reached.[144]

153. In the context of seeking improvements to access to justice, the HIIL framed traditional dispute resolution processes as the pursuit of sanctions and contrasted this with ADR as the pursuit of solutions. Examples of ADR that seeks solutions in the court process include the engagement of 'mediating bridge-builders' (in place of a lawyer dedicated to each party) and the use of 'specialised problem-solving judges, close to home'.[145]

154. With respect to the use of 'mediating bridge-builders' the HIIL proposed a number of potential models.[146] One is for paid or voluntary mediators to offer their services to disputing parties.[147] However, it was noted that this model is difficult to implement in practice as is it requires the parties to agree to meet and develop a solution together.[148] Another option is for mediation to be set as a pre-condition to pursuing a matter in court. The HIIL concluded that this is more effective if standardised and if mediation is accessible from early in the process.[149]

155. In addition, the HIIL suggested that for certainty and to encourage participation, it is important to make it clear that if the 'bridge-building' exercise does not lead to agreement, the matter can still proceed to a judge. To achieve this, 'smooth transitions' between ADR and more formal dispute resolution processes must be built.[150]

Views on alternative dispute resolution

156. The Law Council notes that the use of ADR processes has a number of advantages that can assist the missing middle, chief among them being improved cost efficiency compared to traditional court processes.

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[141] OECD, 'Equal Access to Justice for Inclusive Growth' (28 March 2019) 104 <https://www.oecd-ilibrary.org/governance/equal-access-to-justice-for-inclusive-growth_597f5b7f-en>.
[142] Hague Institute of Innovative Law, 'Understanding Justice Needs: the Elephant in the Courtroom' <https://www.hiil.org/wp-content/uploads/2018/11/HiiL-Understanding-Justice-Needs-The-Elephant-in-the-Courtroom.pdf> ('*Elephant in the Courtroom*').
[143] Ibid, 74.
[144] Ibid.
[145] Ibid 78.
[146] Ibid 90.
[147] Ibid 92.
[148] Ibid 92.
[149] Hague Institute of Innovative Law, 'Elephant in the Courtroom', 92.
[150] Ibid 95.

157. Some of the Law Council's stakeholders support requiring mediation or conciliation as a pre-condition to pursuing a matter in court or civil and administrative tribunal, on the basis that they may reduce the umber of issues then presented before the court or tribunal. They note that this measure would require appropriate funding, including for:

- internal court and tribunal mediators and conciliators who are legally trained and accredited under the National Mediator Accreditation Scheme (**NMAS**);
- the establishment of external NMAS Accredited Mediator and Conciliator Panels attached to courts and tribunals; and
- duty mediators who are present at the first Directions Hearing.

158. Other stakeholders prefer the position that all ADR should be considered on a case-by-case basis and throughout the course of litigation, guided by the concepts of flexibility and proportionality. Further, where ADR processes are considered appropriate, they must remain accessible and affordable. It is essential to avoid an outcome where a party's resources are exhausted such that they cannot afford an adjudicated decision where required. To affect this, ADR processes should not be overly formalised and should be initiated both:

- at an early stage (ie, before or just after filing); and
- at a point in proceedings where the issues are clear and the information and evidence is available, but there has not yet been a significant investment in the adjudicative process.

159. It is recognised that there are a range of options for harnessing ADR in assisting the missing middle to access justice. These include:

- providing ADR programs that are fixed rate, low cost and tailored to the specific area of law. An example in this regard is the Family Law Settlement Service (**FLSS**) which the Law Society of NSW runs in conjunction with the Family Court. The FLSS is a mediation program designed specifically for family law matters. There is a fixed fee payable by each party. The mediators are qualified solicitors with current family law experience. Solicitor mediators on the FLSS panel accept referrals at a fixed rate lower than their ordinary commercial rate. The set fee reassures participants in relation to cost, and allows them to budget for it;
- conducting ADR processes in a manner that minimises additional costs for the parties, for example by disallowing the use of expert witnesses, which can drastically increase the costs to parties;
- encouraging all levels of government, who are often parties to legal disputes, to use ADR more often across all jurisdictions;
- providing pro bono assistance for the purposes of legal representation at mediations, which can assist in levelling the playing field where the other party is legally represented; and
- providing pro bono or low-bono ADR services as an effective means of increasing access to justice for people otherwise unable to afford private ADR/legal services.

160. Stakeholders have commended the conferencing and ADR processes used in the General and Other Division of the Administrative Appeals Tribunal as one possible model for consideration. These processes involve Conference Registrars with legal experience and NMAS accreditation case managing and providing ADR in relation to

all matters. The Law Council understands from practitioner feedback that these processes have produced a consistently high average resolution rate which has been timely in most jurisdictions, with participants expressing a high level of satisfaction.

Conciliation

161. Conciliation is another form of ADR which may be leveraged in attempts to improve access to justice. In a recent discussion paper on conciliation, the Australian Dispute Resolution Advisory Council (**ADRAC**) defined the practice as:

> *... a confidential, non-determinative dispute resolution process usually established by legislation. A conciliator is expected to ensure that the terms upon which a dispute is resolved accord with a particular set of norms or principles applicable to the dispute. Conciliators normally possess expertise in the area under dispute and provide advice to disputants when considered appropriate.*[151]

162. ADRAC noted it is 'very difficult, if not impossible' to pinpoint why some types of disputes have conciliation available to them and others do not.[152] However, laws which provide for conciliation processes are generally regulatory in nature, relate to a right or entitlement for a private person to force adherence to a particular standard, and reflect a 'legislative judgment that the public interest is served' by enabling a person to do so.[153]

163. According to ADRAC, higher proportion of adjudicated outcomes appear to spring from conciliations compared to mediations.[154] Conciliations were seen to reach a 'very high level' of resolution and to be 'very effective'.[155] ADRAC noted that conciliation pursuant to a set of principles under a law is more likely to result in outcomes consistent with the norms in the statutory scheme, whereas agreements made in mediation and other forms of ADR may be considered by some as unfair.[156]

164. The survey and research on conciliation in Australia which ADRAC undertook did, however, expose some areas for improvement to this form of ADR. One was that many of the bodies which provide conciliation services do not publish primary contact information on their websites (which is a simple service suggested in the Australian Government Digital Service Standard and World Wide Web Consortium's Web Content Accessibility Guidelines 2.0 Level AA).[157] They also publish limited information about conciliation and what is provided does not comprehensively outline the possibilities and limitations of this form of ADR.[158]

165. In terms of possible areas for improvement to conciliation as a form of ADR that could be used to increase access to justice for the missing middle, there appears to be a lack of clarity around the concept. Conciliators were themselves unable to agree on the essential differences between mediation and conciliation.[159] Other findings by ADRAC included that a number of laws bundle different types of ADR processes

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[151] Australian Dispute Resolution Advisory Council, *Conciliation: a discussion paper* (October 2019), 23 <https://f77b663a-db93-4dd8-823d-909937839d69.filesusr.com/ugd/34f2d0_c5795480dc3f4becaf94bb700ed1578a.pdf>.
[152] Ibid 25.
[153] Ibid 26.
[154] Ibid 31.
[155] Ibid 42.
[156] Ibid 27.
[157] Australian Dispute Resolution Advisory Council, *Conciliation: a discussion paper* (October 2019), 20.
[158] Ibid 23.
[159] Australian Dispute Resolution Advisory Council, *Conciliation: a discussion paper* (October 2019), 30.

together but fail to identify which is being used or what factors must be taken into account in making the selection.[160]

166. The findings from both the HIIL and ADRAC research suggest the potential of existing ADR processes, if properly utilised, for improving access to justice for the missing middle.

167. While ADR is an important component to reducing the costs of legal services and increasing the availability of services to those in the missing middle, it should be noted that ADR requirements can also act as a barrier to accessing justice for the missing middle. In certain circumstances, ADR processes may deplete a person's resources such that they cannot afford an adjudicated decision where that is ultimately required.

Self-help and self-representation resources

168. The provision of self-help resources is an increasingly prominent method for attempting to improve access to justice for those who may not otherwise be able to obtain assistance. Self-help tools are comparatively low-cost to provide, both in terms of time spent by staff and in terms of financial resources.

169. The Justice Project Report found that self-help tools may be 'an ineffective strategy for people with poor legal knowledge, literacy, language and communication skills, and people with multiple and complex legal and non-legal needs'.[161] However, unlike the cohort of people experiencing these types of disadvantage, those in the missing middle may have higher legal literacy and communication skills which may mean that in some circumstances, self-help tools which are well designed may be an effective strategy in increasing access to justice.[162] It has also been suggested that non-legal professional could be drawn upon as a resource to assist individuals in utilising certain technologies.

170. Appropriately prepared and tested template documents available for purchase has also been suggested as a self-help resource. Standard template loan documents or standard consent orders for family matters are examples of documents which may be utilised in this way.

171. It is critical that self-help tools not be seen as a complete solution to access to justice issues or replace the provision of specific and tailored legal advice. Such tools must form only part of a wider set of strategies. As recognised by the Law and Justice Foundation of New South Wales in the LAW Survey report:

> *The aim of these [self-help] strategies cannot be to convert lay people into de facto lawyers who have the comprehensive knowledge to resolve, on their own, every potential legal problem. A more feasible aim is to equip the general public with sufficient knowledge to recognise their legal needs, and to readily identify where to obtain appropriate legal advice and assistance.* [163]

Online assistance

172. An increasingly popular and effective way to deliver self-help resources is online. For example, the LawAccess NSW website offers individuals a holistic and free database

[160] Ibid 28-9.
[161] Law Council of Australia, *Justice Project Legal Services Chapter,* 10.
[162] Ibid 10-1.
[163] Law and Justice Foundation of New South Wales, LAW Survey, 209-10.

of legal information.[164] This includes the 'Guided Pathways' webpage, which guides individuals through options to address a common range of legal problems (including 'Unpaid Council Rates' and 'Mortgage Stress') depending on their answers to preliminary questions about their particular experience of the problem.[165] In Queensland, the newly developed Queensland Law Handbook, an online resource developed by the Caxton Legal Centre inc,[166] the and other legal apps are also reported to have assisted in meeting the legal needs of the missing middle.

173. Information has shown to be best received and digested by users where it is clear, tailored to the particular problem, and provided contemporaneously to them first addressing problem.[167] Other findings indicate that it is best if two or three 'good options' are offered and if there is a help desk or support group available to give the recipient 'reassurance', if necessary.[168] Users have also been found to appreciate government-certified information.[169] It has, however, been recognised that there are substantial costs in designing information that is not only informative of rights but also provides actionable advice.[170]

Wills

174. Practitioners have identified wills as a particularly difficult area of legal need for members of the missing middle. They report difficulties in encouraging people who are 'cash poor' to make a will, however note that wills are instruments requiring specialist, thorough legal assistance and so may not be appropriate subjects for pro bono legal assistance. In addition, the Law Council understands that Public Trustees in some jurisdictions have greatly reduced the scope of and eligibility criteria for their free will service,[171] and it can be difficult to arrange appointments with them.

175. The Law Council's National Elder Law and Succession Law Committee has suggested the need for more targeted assistance for individuals making wills. The Committee encourages the active consideration of establishing payment options such as payment over time, or lien over Centrelink benefits over time, and of any law reform required for lawyers to accept such payment methods.

In-court or tribunal assistance

176. In-court assistance to self-represented litigants has also proved successful in facilitating access to justice. One model in the family law context is the Court Network program. Until its services were defunded in March 2020, this front-line organisation arranged for over 450 highly trained volunteers to provide support, comfort, information and service referrals to victims of family violence who were navigating the Family and Federal Circuit Courts in Victoria and Queensland, and to advocate for the needs of court users.[172]

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[164] SW Department of Justice, *Civil justice action plan: Improving access to justice for everyday problems* (December 2018) <https://www.justice.nsw.gov.au/lsb/Documents/LSB/civil-justice-action-plan.pdf>.
[165] LawAccess NSW, *Guided Pathways* (Accessed 29 April 2020) <https://legalhelp.lawaccess.nsw.gov.au/>.
[166] See, Caxton Legal Centre Inc, 'The Queensland Law Handbook'.
[167] Hague Institute of Innovative Law, *Elephant in the Courtroom,* 83. Note, the HIIL reached this conclusion through research and consultation with experts in the field of access to justice.
[168] Ibid.
[169] Ibid.
[170] Ibid 85.
[171] For example, non-concession holders are charged at commercial rates in Western Australia: Public Trustee, 'Wills and Enduring Powers of Attorney'. Note, however, that the Public Trustee in Queensland appears to provide this free service for all Queenslanders: Public Trustee, 'How can I make a Will in Queensland?'.
[172] See, Court Network, *About Us* <https://courtnetwork.com.au/about/what-we-do/>.

177. A 2013 report by KPMG found that the Court Network program provided a benefit of $3.20 for every $1 funded in Victoria.[173] This value has been backed up by anecdotal reports by the Law Council's members that many of their clients, who are often isolated as a result of family violence, derived great utility and support from the program. When the service was defunded, its President and Royal Commissioner for the Victorian Royal Commission into Family Violence, the Honourable Marcia Neave AO, as well as former Family Court judge the Honourable Nahum Mushin, spoke of the 'tragedy' of a funding cut to an 'invaluable' and 'cost-effective' service.[174] The Law Council has called upon the Australian Government to reinstate funding for Court Network as a matter of urgency.[175]

178. Despite the legitimate place for self-help resources, it must be acknowledged that there are fundamental problems with self-representation in some matters. Australia's Magna Carta Institute referred in 2013 to comments by then Deputy Chief Justice Faulks of the Family Court with respect to the rise in the percentage of self-represented litigants (**SRL**) to 27 per cent in that year at the Family Court. The Magna Carta Institute highlighted the concern that self-representation in these instances may amount – at least in the case of serious criminal accusations – to a miscarriage of justice.[176]

179. In the Justice Project Report, the Law Council also found that often, even in tribunal settings, legal representation is an appropriate and necessary response for vulnerable people.[177] Tribunals deal with complex matters of significant importance to the lives of vulnerable individuals, including access to income support, tenancy and eviction.[178] For this reason, the Justice Project Report suggested that the policy and resourcing focus in this area should be on the relative importance of a matter to the client and on the client's disadvantage relative to that of other actors, regardless of the forum. All persons who approach tribunals should retain the right to be legally represented if they so choose.

180. In the alternative, tribunals should have the capacity to allow a party to be represented where necessary to ensure a fair outcome in the proceedings, including where:

- there is a power imbalance between the parties, for example the other party is evidently a 'repeat player' or a professional advocate;
- a party clearly lacks legal capability;
- a party is particularly vulnerable, such as a potential victim of family violence or elder abuse; or
- the consequences of decision-making are significant to individual lives.[179]

181. Finally, it is noted that there may be a role for the courts to play in mitigating the risks of self-representation. The Productivity Commission suggests initiatives such as drafting court and tribunal forms in clear language and training staff in how to assist SRLs.[180] This could be complemented by the drafting of guidelines for judges, staff

[173] See, Court Network, Submission to the Department of Justice and Regulation (Vic), *Access to Justice Review* (February 2016) 6.
[174] Ibid.
[175] See, Law Council of Australia, 'Submission to The Treasury, *2020-21 Deferred Pre-Budget Consultation*, 5.
[176] Australia's Magna Carta Institute, *Access to Justice, Legal Aid and Self-Represented Litigants* (3 June 2013) <https://www.ruleoflaw.org.au/self-represented-litigants-2013/'https://www.ruleoflaw.org.au/self-represented-litigants-2013/>.
[177] Law Council of Australia, J*ustice Project Legal Services Chapter*, 23.
[178] Ibid.
[179] Ibid 25.
[180] Productivity Commission, *Access to Justice Arrangements*, 56.

and litigants on how to assist SRLs and even the introduction of a form of 'qualified immunity' to allow staff to more confidently assist these clients.[181]

Ombudsmen services

182. The HIIL has named 'the ombudsman model' as one of seven possible strategies for confronting issues with a litigious system and improving access to justice.[182]

183. As stated in the *Ombudsman Act 1976* (Cth) (**Ombudsman Act**), the function of Australia's Office of the Commonwealth Ombudsman (**the Ombudsman**) is to investigate administrative action taken by a department or prescribed authority, either in response to a complaint or at the Ombudsman's own motion, and to perform other functions conferred by regulations.[183]

184. In the Ombudsman's words, their role is to 'safeguard' the Australian community in its interactions with governmental agencies, including by righting administrative deficiencies, assisting in complaint resolution and generally enhancing the accountability, transparency and fairness of agencies.[184] The Ombudsman is responsible for providing assurance that the Government acts with integrity and fairness and for promoting best practice in how complaints are handled and addressed.[185]

185. The Ombudsman's approach is predominantly one of dispute resolution through negotiation and in some cases, making recommendations to government (rather than overriding governmental decisions, which is not within its power).[186] The Ombudsman sees their value as being in 'interpreting policy and providing a better explanation' in relation to often complex or conflicting administrative messages.[187] One of the key features of Ombudsman systems is that they take responsibility for some fact-finding tasks, removing the burden that falls on a litigant in an adversarial process within tribunals and courts.

186. Colin Neave AM, then Commonwealth Ombudsman, spoke at a conference in 2014 about the role of ombudsmen in improving access to justice.[188] Mr Neave noted that an understanding of the courts as forming the justice system is 'excessively narrow': in fact, numerous options outside the court system also assist in resolving disputes.[189] He even went so far as to assert that there is no lack of services or of access to justice in Australia.[190]

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[181] Ibid 57.
[182] Hague Institute of Innovative Law, *Elephant in the Courtroom*, 91.
[183] See, *Ombudsman Act 1976* (Cth) s 5.
[184] Commonwealth Ombudsman, *What we do* (Accessed 30 April 2020) <https://www.ombudsman.gov.au/what-we-do>.
[185] Commonwealth Ombudsman, *Our responsibilities* (Accessed 21 April 2020) <https://www.ombudsman.gov.au/Our-responsibilitieshttps://www.ombudsman.gov.au/Our-responsibilities>. The areas overseen by the Commonwealth Ombudsman include law enforcement, immigration, overseas students and the postal industry, amongst others.
[186] Commonwealth Ombudsman, Submission to Productivity Commission, Access to Justice Arrangements (September 2013) 4 <https://www.ombudsman.gov.au/__data/assets/pdf_file/0018/31644/Submission-by-the-Commonwealth-Ombudsman-Access-to-Justice-Arrangements-Dec-2013.pdf>.
[187] Ibid 10.
[188] Colin Neave, 'Access to justice – where do Ombudsmen fit in?' (30 April 2014) *2014 ANZOA Conference Museum of New Zealand* <https://www.ombudsman.gov.au/publications/speeches/all-speeches/speech-and-presentation-documents/commonwealth-ombudsman/2014/30-april-2014-access-to-justice-where-do-ombudsmen-fit-in>.
[189] Neave.
[190] Ibid.

187. In relation to ADR as an option for accessing justice, Mr Neave reflected on the 1994 report prepared by the Australian Government's Access to Justice Committee, entitled *Access to Justice – an action plan*, which, in his view, had the effect of encouraging the development of dispute resolution and mediation services angled away from costly civil litigation.[191] This included making no-win, no-fee advertising permissible, and resulted in Legal Aid services developing an offering of telephone advice schemes and the service of interpreters.[192]

188. Mr Neave also referred with approval to the establishment of the National Alternative Dispute Resolution Advisory Council (now ADRAC, as referred to above), which is charged with providing thought leadership in better dispute resolution in Australia, and offering a voice to government for the ADR community.[193]

189. Mr Neave described ombudsmen as the 'vital, invaluable middle ground' in the 'justice spectrum'.[194] He referred to the improved accessibility and lower cost of ADR, as well as the shorter time taken; and to the inquisitorial process (in contrast to the adversarial court process) which is applied, in theory at least.[195] He then went on to list the four areas in which the Productivity Commission had identified ombudsmen as promoting access to justice, including:

- creating a practical mechanism for resolving disputes of low monetary value;
- overcoming power imbalances between consumers and large agencies or service providers;
- providing simple options for complaint lodgement (predominately over the phone or internet); and
- addressing systemic issues, through their investigative function.[196]

190. Mr Neave noted that one area for improvement is to raise the profile of ombudsmen.[197] As he noted, the Productivity Commission's *Access to Justice Arrangements* report had observed that: 'a significant proportion of unmet legal need could be served by greater knowledge of, and access to, ombudsmen services' – and that poor information about these services, especially amongst those clients who would benefit most from them, is partly to blame.[198]

Assistance of non-legal professionals

191. The HIIL has noted the use of employing non-legal professionals for improving access to justice in certain contexts. It cites the engagement of so-called 'grassroots lawyers' or 'community paralegals' by non-government organisations in certain regions, including Africa and South Asia, and of law students in clinics in North America.[199] Several Australian universities also employ this model, which allows students to refer to a pool of qualified lawyers for assistance and sign-off.[200] The HIIL commented that

[191] Ibid.
[192] Ibid.
[193] Ibid.
[194] Ibid.
[195] Ibid.
[196] Ibid.
[197] Ibid.
[198] Ibid.
[199] Hague Institute of Innovative Law, *Elephant in the Courtroom*, 90.
[200] Hague Institute of Innovative Law, *Elephant in the Courtroom*, 90. See, for example, Monash University's Monash Springvale Monash Legal Service Inc and the University of South Australia's Legal Advice Clinic.

this model is 'effective', with its main issues being funding, and that pro bono assistance by private firms is useful in this regard.[201]

192. Further, the HIIL has observed that funding or subsidising lawyers, especially for representing clients in court cases and particularly in criminal defence, would better be allocated to 'new types of services'.[202] This highlights another of its observations, being that the existing professional regulation framework for lawyers, particularly with respect to the prohibition on conflict of interest, may thwart attempts to act as 'bridge-builders', including with multiple clients or by working in company with therapists, financial experts or other services.[203]

193. Accordingly, the HIIL recommends changing the regulation of the profession and creating 'bridge-building' models, acknowledging the importance of having professional representative bodies (such as Bar Associations) onside in doing so.[204]

194. This would not be unprecedented. The Productivity Commission has cited the US system as an example of the relaxing of 'absolute notions of professional purity' in some instances in favour of improving access to justice.[205] For example, in Washington State, so-called Limited License Legal Technicians can perform activities explicitly outlined in their licenses, such as completing court forms and explaining procedures.[206] The Productivity Commission recommended the formation of a taskforce to consider creating such a limited license in Australia, using the US experience as a basis.[207]

195. A year before the Productivity Commission made the above observations, the CIJ had queried whether reducing controls on directly briefing barristers, for example, would be beneficial for clients financially and allow them to focus their funds on the specialist assistance they really require.[208] This was something the CIJ encouraged professional associations to consider.[209] The CIJ also advocated for the development of a 'more considered and uniform approach' around the circumstances in which non-lawyers may be granted leave to appear, and/or the use of 'McKenzie Friends'.[210]

196. As it stands, there are a range of alternatives to legal representation available in Australia, including McKenzie Friends, migration agents and, at the Fair Work Commission, paid agents. Other models include the provision by non-legal professionals of preliminary assistance under the guidance and supervision of fully qualified supervising solicitors, for example through law school outreach services or similar.

197. The Law Council notes a number of concerns with the provision of non-legal professional assistance, including:

- the risk of breaching section 10 of the Uniform Law (the prohibition on non-qualified entities engaging in legal practice);
- the absence of professional indemnity insurance (from a consumer protection perspective); and

[201] Hague Institute of Innovative Law, *Elephant in the Courtroom*, 91.
[202] Ibid 94.
[203] Ibid.
[204] Ibid.
[205] Productivity Commission, *Access to Justice Arrangements*, 21.
[206] Ibid.
[207] Ibid.
[208] Centre for Innovative Justice, RMIT University, *Affordable Justice*, 43-4.
[209] Ibid.
[210] Ibid.

- the fact that non-legal providers are not subject to the same fiduciary obligation as lawyers, meaning the client is not protected by the same ethical rules.

198. In the experience of the Law Council's members and in light of the above concerns, services are often provided by non-legal professionals at poorer value and higher cost than if they were provided by lawyers. Subject to some of the existing, specific exceptions outlined above, it is therefore considered important that legal services continue to be provided by Australian legal practitioners. On this subject, the Law Council notes the possible scope for developing models where services that focus on everyday legal problems are offered under the auspices of legal practices (as proposed at paragraphs 96 to 100 above).

199. In canvassing options for assistance by non-legal professionals, it is essential that proper consideration be given to the nature of the services that can be offered by these professionals. These may in some cases be more affordable than engaging a lawyer. Their suitability will depend on the legitimacy of the organisation and/or individual purporting to offer the particular service, including their compliance with all relevant laws and whether a matter properly requires legal advice by a practitioner. The Queensland Law Society states that it is very supportive of a number of well-established and productive partnerships between universities and CLCs, whereby undergraduate law students provide legal services to clients under the supervision of qualified lawyers. However, the Law Society notes that it is essential that CLCs and pro bono legal services are funded appropriately so that assistance from non-legal professionals is not seen as a substitute for permanently employed and qualified practitioners..

Legal expenses contribution scheme

200. The Australia Institute suggested in 2012 and as an alternative to the (implicitly preferable) injection of new funds into Legal Aid budgets, the introduction of a supplementary Legal Expenses Contribution Scheme (**LECS**).[211] This was proposed very much as a 'practical initial step' rather than as a 'final solution'.[212] It was envisaged to work similarly to HECS, whereby the Australian Government would provide interest-free loans based on income prerequisites.[213] The Australia Institute contended this scheme would offer the missing middle 'much greater' access to justice.[214]

201. Applications for the LECS scheme, at least if it took the form suggested by the Australia Institute, would be open to persons who do not qualify for means-tested Legal Aid.[215] Income-contingent loans would be available for applicants who earn less than the top tax bracket, only matters with a 'reasonable prospect of success' would qualify for funding, and repayment would occur either through a percentage of a person's income being paid 'over the length of the loan', or through immediate repayment if they received sufficient and advantageous damages following a civil action.[216]

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[211] Richard Denniss, Josh Fear and Emily Millane, 'Justice for all: Giving Australians greater access to the legal system' (March 2012) *The Australia Institute*, <https://www.tai.org.au/sites/default/files/IP8%20Justice%20for%20all_4.pdf>.
[212] Ibid.
[213] Ibid.
[214] Ibid.
[215] Ibid.
[216] Denniss, Fear and Milane.

202. The Productivity Commission indicated that similar schemes already operate on the level of individual LACs.[217] The Commission queried the utility of these schemes for people with very low incomes. Given the risk of significant debts needing to be written off in these cases, it preferred an extension to the means test for legal assistance services.[218] However, it did not discount the potential of a LECS for 'middle income earners' and explicitly declined to discuss its suitability for this group in detail.[219] This may, therefore, be an area for further consideration by the legal profession and policymakers.

Incentive schemes for lawyers to practice in RRR areas

203. In response to the barriers to the legal capabilities and resources of RRR Australians, as outlined above, the Law Council recommended in the Justice Project Report:

- support for specialist legal assistance services to expand their reach in RRR areas, particularly to overcome geographical and jurisdictional inequity of access, and including through outreach and referral networks and the increased use of technology; and
- the development of RRR access to justice strategies to ensure an appropriate and tailored mix of services and additional legal services, publicly funded and private, in areas of critical need – including through rural placement, targeted mentoring and incentive schemes.[220]

204. In terms of appropriate strategies to attract practitioners to RRR areas, Trish Mundy has recommended a 'holistic approach' to 'target key pathways in the student/practitioner lifecycle'.[221] Supporting RRR students to study law, including through better scholarship programs, and providing more RRR clinical placements in higher education and practical legal training placements, are some possibilities she has proposed.[222]

205. One example of an initiative currently under way to encourage practitioners to work in RRR areas is the Law Society of New South Wales' 'BushWeb Regional Issues Committee', which offers peer support to RRR members of the NSW Young Lawyers.[223] The Committee uses the internet as a way of connecting young lawyers through discussion and networking programs; it also has an advocacy function in relation to RRR issues.[224]

206. More recently, in November 2020 the Law Council launched its *National Strategic Plan on Rural, Regional and Remote Lawyers and Communities* (**RRR NSP**).[225] This document recognises the various access to justice challenges facing lawyers and communities in RRR areas, including those which have emerged since the publication

[217] Productivity Commission, *Access to Justice Arrangements*, 23-4.
[218] Ibid 23-4.
[219] Ibid.
[220] Law Council of Australia, Submission to the Statutory Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (20 April 2020) 49.
[221] Trish Mundy, 'Recruiting and Retaining Lawyers: A problem in rural, regional and remote communities' (2009) 1(34) *Australian Institute of Law Journal* <http://www.austlii.edu.au/au/journals/AltLawJl/2009/7.pdf>.
[222] Ibid 35.
[223] The Law Society of New South Wales, *Bush Web Regional Law Committee* (Accessed 14 April 2020) <https://www.lawsociety.com.au/legal-communities/NSW-young-lawyers/committees/bush-web-regional-law>.
[224] Ibid.
[225] See, Law Council of Australia, 'Rural, Regional and Remote Lawyers and Communities' (National Strategic Plan, 13 November 2020).

of the Justice Project Report, and sets out five key areas for action, with the corresponding projects to be implemented by the Law Council over 2021-23.[226]

207. Of particular relevance to the missing middle, the RRR NSP has a focus on developing policy options promoting the recruitment, retention and succession of lawyers in RRR areas (Strategy 2), addressing the provision and utilisation of technology in legal infrastructure from the perspective of RRR communities (Strategy 3) and developing options for promoting the recruitment and retention of lawyers in RRR areas (Strategy 4).[227]

Part 5: Innovation in times of emergency

208. As suggested at paragraphs 57 to 60 above, both the bushfires and COVID-19 pandemic will have an enduring impact on Australians' ability to access justice and on the justice system's ability to provide it, at least in traditional ways.

209. However, these emergencies also represent clear opportunities to springboard and address access to justice challenges for the missing middle, both during and beyond the emergency events themselves. For the purposes of this Research Paper, adaptations to the mode and nature of delivering legal assistance in these periods offer useful insights into how the profession can respond to the needs of the missing middle.

Potential for mobilisation

210. Some emergency responses (such as Government funding injections and pro bono pushes) may be specific and/or temporary measures with limited long-term consequences for the issues discussed in this Research Paper. However, even temporary measures are vital learning tools, revealing the potential for mobilisation and the scope of latent resources. Further, longer-term measures and opportunities arise in times of emergency, offering critical catalysts for change.

211. The move by the legal profession to support bushfire victims requiring legal advice, for example, shows the potential to rapidly coordinate the provision of public and pro bono legal assistance when there is a clear and well-communicated problem to solve.[228]

212. To address the needs arising from bushfires, the Law Council assumed a function as a centralised reference point for State and Territory-based legal assistance services.[229] The various jurisdictions also host organisations or helplines which specifically address emergency need, in addition to managing demand through existing services. These well-recognised and publicised entry points or gateways for legal assistance and referral at the State and Territory level assist people, including members of the missing middle, in navigating the system. A number were formed in direct response to bushfire events, including:

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[226] Law Council of Australia, 'Rural, Regional and Remote Lawyers and Communities' (National Strategic Plan, 13 November 2020) 13-21.
[227] Ibid 22-23.
[228] Law Council of Australia, *Australian legal profession support for bushfire victims* (7 January 2020) <https://www.lawcouncil.asn.au/media/media-releases/australian-legal-profession-support-for-bushfire-victims>.
[229] See, Law Council of Australia, *Australian bushfire victims – resources for assistance* <https://www.lawcouncil.asn.au/media/media-releases/australian-legal-profession-support-for-bushfire-victims/resources-for-assistance>.

- disaster/bushfire response legal hotlines in New South Wales, Victoria, Queensland and Western Australia;[230]
- the NSW Government's 'Disaster Response Legal Service', which constitutes a partnership between Legal Aid NSW, CLCs, the Law Society of NSW, Justice Connect and the NSW Bar Association. The service referred people needing assistance to Legal Aid NSW and CLCs. Then, if they were ineligible, they were referred to Justice Connect's purpose-built online referral tool;[231] and
- 'Disaster Legal Help Victoria' (**DLHV**), originally 'Bushfire Legal Help,' which formed as a collaboration between Victoria Legal Aid (**VLA**), the Federation of Community Legal Centres, the Law Institute of Victoria (**LIV**), the Victorian Bar Association and Justice Connect following the Black Saturday bushfires in 2009.[232] VLA organised, and the LIV hosted, an information session in January 2020 for lawyers wishing to assist bushfire victims pro bono.[233]

213. The active referral service run by Justice Connect also highlights the large part that the pro bono sector can and has played in the legal profession's response to emergencies. Justice Connect was key in leading legal assistance organisations and law firms through the pro bono response to bushfires in Victoria and NSW, through the partnerships outlined above. This included by focusing on the needs of small businesses and farms (as well as individuals), making its Pro Bono Portal free of charge for all legal practices wishing to take on pro bono matters for affected individuals and small businesses, and creating a dedicated online referral service.[234]

214. The availability of referral pathways was matched by willingness to assist, with numerous individual practitioners and firms making offers of pro bono help following the bushfires.[235] In Victoria alone, the DLHV recorded that as at April 2020, hundreds of lawyers volunteered to assist affected communities, that it triaged and referred 16 clients to pro bono lawyers, and that it provided legal assistance to more than 45 clients through local and specialist community legal centres.[236] The longevity of the DLHV, which originated in 2009, highlights the benefits of formalised collaboration in responding to emergencies.

215. The emergence of large volumes of goodwill by members of the profession in response to the bushfires also demonstrates the potential for mobilising individual practitioners, particularly, to offer pro bono work – not only in bushfire assistance but perhaps, more broadly, in relation to other legal matters. There may be opportunities to harness such offers of assistance and make better connections between those offering to assist and those needing the assistance, through targeted direction of communications and resources. The Law Council understands that its Constituent

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[230] Ibid; Australian Pro Bono Centre, *Bushfires – National Pro Bono Legal Support* (21 January 2020) <https://www.probonocentre.org.au/media/bushfires/>.
[231] The Law Society of New South Wales, *NSW Bushfires Legal Assistance* (January 2020) <https://www.lawsociety.com.au/news-and-publications/publications/monday-briefs-online/january-2020/presidents-message-7-january/legal-community-response-bushfires>; Justice Connect, *Refer someone to Justice Connect* <https://help.justiceconnect.org.au/referral/>.
[232] Law Institute Victoria, 'Free legal assistance is available through Disaster Legal Help Victoria for anyone affected by the recent Victorian bushfires' (7 January 2020) <https://www.liv.asn.au/Staying-Informed/General-News/General-News/January-2020/Free-legal-help-for-Victorian-bushfire-victims>.
[233] Karin Derkely, 'Hundreds of Victorian lawyers have volunteered to help bushfire victims, with more needed in affected areas' (20 January 2020) *Law Institute Journal* <https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/January-2020/Profession-rallies-to-help-bushfire-affected-commu>.
[234] Chris Povey, 'Australian bushfires: getting legal help to where it's needed' (16 January 2020) *Justice Connect* <https://justiceconnect.org.au/australian-bushfires-getting-legal-help-to-where-its-needed/>.
[235] Ibid.
[236] See, Disaster Legal Help Victoria, *Effective and co-ordinated legal assistance essential to disaster recovery* (26 May 2020) <https://www.disasterlegalhelp.org.au/about-us/news/effective-and-co-ordinated-legal-assistance-essential-to-disaster-recovery>.

Bodies may be able to assist in this regard by promoting pro bono work and inviting members to join their respective schemes.

216. The Royal Commission into National Natural Disaster Arrangements recently acknowledged the role of the legal profession in responding to legal needs arising from natural disasters. The Royal Commission recommended that Australian, state and territory governments should expedite the development of pre-agreed recovery programs, including those that address social needs, such as legal assistance.[237]

Innovative service delivery

217. Another consequence of the bushfires and, shortly after, the advent of the pandemic, is that certain organisations have greatly increased their rate of innovation. For example, Jane Cipants, Director Client Service at Legal Aid NSW, noted in April 2020 that Legal Aid NSW had already entered a 'transition' phase in the few years leading up to the advent of the COVID-19 pandemic in early 2020.[238] This manifested itself in the use of human centred design (**HCD**) in small trials which were, by and large, still dominated by face-to-face interactions, limited telephone use and the deployment of very few online services.

218. However, speaking at a seminar on the impact of COVID-19 on access to justice in Australia, Ms Cipants noted the acceleration in her organisation's use of HCD since the unprecedented disaster situation in NSW which flowed, first, from the bushfires of the summer of 2019/2020; and, shortly after, from the restrictions imposed under the pandemic. Ms Cipants attributed the following (at least temporary) developments in Legal Aid NSW's operations to the pandemic:

- their informative front-end, drop-in clinics were completely replaced by services that clients can access at home. Ms Cipants noted the large increase in demand following this shift, and the benefits of improved accessibility and comfort for clients' ability to access justice in this way;
- their 'Grants Tracker', an online tool currently in its pilot stage, was upscaled. The tool allows clients to track the status of their application for a legal aid grants and was developed on the basis of client feedback;[239] and
- there was a move to conduct some appearances by audio-visual link (**AVL**). This was previously resisted, because the organisation still holds some concerns in relation to clients' ability to participate in their own matters through this medium.[240]

219. The embracing of technology products also played a foundational role in the legal profession's pro bono disaster response, for example, Justice Connect's 'Pro Bono Portal' was used to match volunteer lawyers with communities in need in a remarkably short timeframe. By the end of January 2020, over 150 firms had joined up to this Portal to provide pro bono legal services to affected people across NSW and Victoria. In its submission to the Royal Commission into National Natural Disaster Arrangements, Justice Connect reported that in the three months following the 2019/20 bushfires, it had processed 78 bushfire-related requests from individuals and

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[237] *Royal Commission into National Natural Disaster Arrangements* (Report, 28 October 2020) rec 22.5 <https://naturaldisaster.royalcommission.gov.au/publications/royal-commission-national-natural-disaster-arrangements-report>.
[238] 'Seminar on Accessing Justice during COVID-19' (2 April 2020) *Portable* ('***Portable Seminar***').
[239] Legal Aid New South Wales, *Grants tracker – reducing stress for clients* (10 July 2019) <https://www.legalaid.nsw.gov.au/for-lawyers/news/news-for-lawyers/grants-tracker-reducing-stress-for-clients>.
[240] *Portable Seminar.*

organisations seeking pro bono support, and assisted 20 community groups with legal issues relating to the bushfires.

220. As to the opportunities they present for addressing issues faced by the missing middle, emergencies may do more than provide an imperative for legal assistance and pro bono providers to collaborate and innovate. They may also generate an important evidentiary base for change in the justice system more broadly.

221. Indeed, the Law Council has suggested that the profession's response to the COVID-19 pandemic be used as an opportunity to build the evidence base for the delivery of online courts, tribunals and dispute resolution forums for people experiencing disadvantage and with less ability to adapt to legal services moving online.[241] This includes members of the missing middle. A review of the collected data over time will be important in making any changes to the delivery of legal and justice services for marginalised and vulnerable groups post COVID-19, including in moving more services online, a step which should be approached cautiously and based equally on stakeholder consultation, and in the existence of measures to safeguard against unintended consequences.[242]

[241] Law Council of Australia, *Marginalised groups principles*, 5.
[242] Ibid.