

A proper safety net for legal help in Australia

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I never thought I'd start a community law talk with economic theory about market failure, but the starting point for looking at a proper safety net for legal help in Australia is recognising that the market isn't addressing the community's need for legal services – and that these legal services are vital to upholding the public good of a fair and accessible justice system.

The fact that legal services are not affordable for many Australians – particularly where litigation is involved – has been widely recognised.

The high cost of private lawyers has led various commentators, such as former Attorney-General Robert McClelland to say: "If you are from middle Australia and you want to embark on a substantial piece of litigation, you really have to put your house on the line".

Costs like these are also a significant factor behind high rates of self-representation – around 30 per cent in the Family Court and higher in other jurisdictions.

Mechanisms such as no-win-no-fee agreements, litigation funding and class actions alleviate the unaffordability for a few whose legal issues fit the right criteria.

But the reality is, for many Australians, the private market for legal services is beyond their reach.

The Australia Institute earlier this year conservatively estimated that around half a million Australians miss out on the legal help they need each year, mainly for financial reasons.

Given the moral imperative of ensuring that justice is accessible for all, governments need to ensure that where legal services are required to obtain a just outcome, those legal services are available to people who otherwise can't access them due to cost or other factors.

In other words, just like we have safety nets for education and health, we need a legal safety net.

Imagine if you started building a safety net for legal help in Australia. What would it look like?

In terms of the principles that should underpin the safety net, I think we've broadly got it right under the current National Partnership Agreement – the overarching agreement for legal assistance in Australia. The NPA, for short, focuses on early intervention, prevention and five access to justice principles.

These principles are:

Accessibility

We should aim to reduce the complexity of the system and allow people to understand and enforce their rights.

Appropriateness

The system should encourage people to resolve disputes at the most appropriate level – and should direct attention to underlying causes of legal problems.

Equity

The system should be fair and accessible for all. Access shouldn't depend on your capacity to pay.

Efficiency

The system should deliver outcomes in the most efficient way possible.

Effectiveness

The system should work so as to deliver the best outcomes.

But how do we fare when we examine the current system against these principles?

Equity

Not very well on the equity front.

When people who can't afford a private lawyer turn to legal assistance services for help, they find services either strictly limited in their eligibility or their scope.

For example, to get a grant of legal aid, you basically have to have a poverty-line income, with few assets and the right type of legal matter – either a criminal law matter where you're facing jail or a family law dispute only involving kids – not property.

Interestingly, analysis by national CLC Women's Legal Services Australia highlights a problem with equity even within this limited eligibility.

The bulk of legal assistance funding nationally goes to legal aid commissions. The bulk of this funding in turn goes on grants of aid. But because of the heavy focus on legal aid for crime, and the fact that most perpetrators of serious crimes are men, across the country around 60–70 per cent of legal aid grants go to men.

In other words, there is a systemic bias in the funding arrangements that denies women an equitable share of funding.

To some extent, CLC services alleviate this. Because only 7 per cent of our work is crime and we focus on family law, family violence prevention and civil law, around 60 per cent of our clients are women.

But CLC funding is around one seventh of legal aid commission funding – so the overall bias remains, particularly when Indigenous legal service funding, with its crime focus, is taken into account.

So an equitable legal safety net would target its eligibility in a way so as to ensure a fairer distribution of assistance for legal issues affecting both men and women.

In terms of geographic equity, an equitable legal safety net would seek to ensure that regions had similar access to services.

Even looking just at Victoria – we know this isn't the case. Peter is going to talk about his experiences in Bendigo and the Goulburn Valley, but there are sadly more examples of areas with little or no CLC access.

Gippsland CLC has poor funding relative to its huge service area.

The Yarra Ranges are only served by infrequent outreach services and areas affected by the bushfires, like Marysville and further afield in Mansfield, still have no local CLC service.

Parts of Western Victoria around Horsham and Hamilton have little or no access.

Mildura stands out as the main region which, although it has access to a local CLC, has no access to a local Victoria Legal Aid office.

What's required in terms of funding to establish proper equity of access is difficult to ascertain. The Community Law Australia campaign is calling for a doubling of the current Federal Government legal assistance spend and we think this is achievable, particularly given the Federal Government currently spends around twice as much on its own lawyers as it does for Australians who can't afford a lawyer.

But the release of the National Legal Needs Survey report tomorrow in Canberra and the current review of the NPA by the Allen Consulting Group provide a crucial opportunity to analyse the best available evidence and quantify what is required in terms of funding to provide proper access.

Efficiency and effectiveness

In terms of efficiency and effectiveness, again I think the NPA has got it right with its focus on early intervention and prevention – and CLCs have a strong track record of delivering these services.

The National Association of Community Legal Centres (NACLC) commissioned an independent economic cost benefit analysis of CLC services this year that found an average ratio of 1:18 – in other words, every government dollar of funding invested returns 18 times that in economic benefit – leaving aside the moral imperative of ensuring equitable justice access.

One of the interesting things to come from the analysis was that the time taken on particular legal services didn't necessarily return an equivalent economic benefit – or put simply – a little information and advice can go a long way.

So the current bias in government spending on courts and tribunals relative to legal assistance services needs to be considered. As Robert McClelland said, there is mismatch in the justice system between supply and demand. \$1 million in government funding gets you only 60 Federal Court cases, compared with 10,000 legal advices or 60,000 legal information services.

So an efficient and effective legal safety net would have a strong focus on early intervention and prevention, ensuring that the equivalent of services like the Fitzroy Law Handbook online, currently getting around 1 million visits a year, and the successful NSW Law Access telephone service – are available for free in every jurisdiction.

A final word on early intervention and prevention – it's critical that we recognise the preventative value of law reform work.

As Michael Kirby said in a foreword to a CLC report: "I learned 30 years ago that to provide effective laws and lawyering, it is necessary to go beyond solving immediate problems. Lurching from one problem to the next, without examining the underlying causes of difficulty, leads to a band aid mentality".

I'd encourage you to read our Annual Report – and in particular the Chairperson and Executive Officer's report and our policy project summary – which highlight the role of law reform in preventing legal problems.

I'm running out of time but I wanted to end with two comments.

Pro bono

Firstly, on pro bono. There's a myth out there that pro bono is the answer to meeting the huge unmet demand for legal assistance. Together with a few people in the pro bono world, we've been crunching the numbers to show that pro bono can't possibly meet the demand created by government underfunding of legal assistance services.

The National Pro Bono Resource Centre (NPBRC) large law firm survey results came out on Friday. They showed that the pro bono by 36 of the nation's 51 largest law firms equates to 191 lawyers working full time for free each year.

Impressive – and rightly commended.

Add to that the NACLC's volunteer survey results based on which we estimate that lawyer (not law student) volunteers in CLCs add another 123 lawyers working full time for free each year.

Again – a great contribution and rightly commended.

But let's put those 300 plus extra free lawyers in context.

There are about 60,000 lawyers in Australia. There are over 2000 lawyers working in CLCs, legal aid and Indigenous legal services across Australia (some part time). Legal aid work by private lawyers is equivalent to another 1000 legal aid lawyers.

So the pro bono and volunteer contribution are significant, but are only a fraction of the work by funded legal assistance services. Further, more than half of the law firm pro bono is done for

organisations, not individuals, so there is a big discount factor in those 300 extra pro bono lawyers, not to mention the expertise gaps in pro bono around areas like family law.

So even if the pro bono and volunteer contribution of lawyers doubled, it would still only fractionally increase the overall capacity of legal assistance services – it would of course be a welcome increase, but it wouldn't be the foundation for a proper legal safety net.

Legal assistance sector

I wanted to end by talking about the complementarity of the legal assistance sector – and it's an issue I've given a lot of thought to and which I won't fairly deal with in the last two minutes.

But I'll end by saying that I think a proper legal safety net has the current four pillars of the legal assistance sector: legal aid commissions, CLCs, Indigenous legal services, and the private profession either doing legally aided work or acting pro bono.

Yes, there is ongoing discussion about the relative share of funding and the need to improve integration, coordination and data collection, but the current framework is a critical part of a proper legal safety net, with each arm playing a distinct but important role.

For CLCs, that unique role relates to issues like our use of volunteers and pro bono, our focus on legal education and law reform and our holistic service delivery – integrating legal services with non-legal services such as health, housing and financial counseling.

Of the 50 Victorian CLCs, around 20 are organisations that themselves deliver allied non-legal or paralegal services, and the vast majority of the remainder are either co-located with allied non-legal services or deliver outreach services in those locations – such as West Heidelberg being located at Banyule Community Health Centre – and North Melbourne CLC with its outreaches to Royal Women's Hospital, Centre Against Sexual Assault House and Ozanam Community Centre.

Thanks for your time today – in ending I want to publicly acknowledge the great work done by the staff of the Federation. I'm lucky to work with a highly talented staff team with a real passion for achieving justice for the clients community legal centres serve.

Now, to talk more about the unique and vital role CLCs play within this framework, I'd like to introduce Peter Noble.

Information about the Community Law Australia campaign can be found at www.communitylawaustralia.org.au