Productivity Commission "Access to Justice" enquiry 2013-2014.

Public Submission

Families, the Family Law Act, and acts that families deplore.

"The virtuous need but few laws;
for it is not the law which determines their actions,
but their actions which determine the law."
(Theophrastus 372-286 B.C.)

Australian Families

For an Australian couple, married or defacto for 10 years or so, there was probably some kind of wedding or commitment ceremony with a range of $10,000 to $50,000 in yesterday's dollars, and you've got the photo album to remind you how much of a great time your 100 guests had. What a wonderful result as the end product of your **courtship**. But at current levels, about 40% of marriages end in divorce, and the cost of the divorce or marital separation is more likely between $50,000 and $250,000. You might say that's the cost of four weddings and one big funeral, but there's no photo albums, nor the joy of invited guests! That's the end product of a different kind of courtship.

The above cost ranges are cast before acknowledging the losses of personal income, the losses of business prospects, the losses of employee productivity, and the losses of momentum and personal energy associated with multiple mandated court events post-separation. These are injustices, in the form of exit fees for any couple who has previously entered into a domestic relationship together. Add two or three children as products of the relationship, and there's an even higher magnification of these costs and losses.

In legal terms, the above losses are foreseeable but that doesn't justify them. It's just **not just** to impose such a levy on marital separation, especially when we have created a "no-fault system" by the introduction of the Family Law Act in 1975. It's a divorce tax, of sorts. A hidden, illegitimate one. But the monies feed the lawyers' overseas holiday accounts, not put to the community's benefit like other taxes. There is little recognition of the full costs and drastic negative effects that these legal **events**, legal **suspense** and legal **expense** have on the functional abilities of our society and its value system.

Contents

This submission responds to the following items of the Commission's enquiry:

1.1…WHAT IS ACCESS TO JUSTICE

"Today we must recognise that courts are courts of law, not courts of justice" (ref submission)

What the above quotation suggests is that we have lost our way in providing a forum for justice. Even without a detailed study into the historical origins of today's court system, the community would recognise that the desire for equity and equality pre-dated such a system. The desire for fairness and a fair go also pre-dated the court system. The recognition of reward for effort and a merit-based community pre-dated the court system. We would recognise the concept of justice as merely a mechanism for maintaining balance and order for these societal values within the community fabric. The courts evolved much later in our communities' histories, in fact they are a product of a very modern world where we are capable of recording the written word, and therefore capable of replicating the judgement results of certain similar sets of dispute circumstances. We conveniently labelled this as the Doctrine of Precedent. As the court system evolved larger, the searches for precedents became more involved. Increased amount of search effort could and would be ploughed into such quests for "justice", limited only by the community's capacity to put money into it.

Digressing for a moment…..What if you wanted to put your money into a bathroom renovation project? For any project, you have three objectives to balance up. They are Time, Quality, and Cost. This "project triangle" for your bathroom project looks like this:

- Time, from when you stop using your old bathroom to the time your new one is ready to use. The time factor influences the energy you have available for other things in your life, and the inconveniences incurred during the renovation process.
- Quality, including the standard and type of finishes you choose and how those choices make you feel at the end of the project. It can also be measured based on the longevity of the components chosen, and how soon they will need to be replaced (at further cost).
- Cost, is largely a financial measure, hence quantifiable in dollar terms. Other indirect costs might be incurred in parallel, and whether or not to measure these properly depends on their relative significance to the expected direct cost.

Back to the pursuit of justice……the justice quest can be treated like any other project, similarly to the above example. From the point of dispute through to the point of resolution, there is a project triangle of the same three objectives to balance,: Time, Quality and Cost. To the first and third of these aims, Time and Cost: these are covered in more detail at item 3.1 below. To the second aim, Quality: we expect that the quality of any quest for justice lies in the effectiveness of the outcome. If the outcome of a court action is a set of court orders that are accurate, intelligible and immediately applicable within the community then we are well on-track. If the court orders are full of wording errors and ambiguity, if they date rapidly against changing circumstances, or if they are simply irrelevant to their intentions, then we can expect the need to attend further court events just to fix the problems created. Such eventualities would of course have further cost and time implications.

Access to justice is really about maintaining and restoring the harmony of societal values within the community, with respect to individual attitudes and perspectives when they conflict against these values.

"I decided that Law was the exact opposite of sex: Even when it was good, it was lousy."
(Mortimer Zuckerman)

2.3 HOW MANY AUSTRALIANS EXPERIENCE LEGAL NEED?

Unmet legal need could be defined as the difference between true legal need and the capacity to meet that need. To perform the arithmetic we first must assess the level of need for legal services, and similarly assess the capacity question. However something to ponder is whether some of the capacity of the legal industry is currently being consumed on "want" rather than "need"? We are speaking of matters where the parties, if left alone and fully informed of all the avenues available to them to resolve their dispute and the costs of each of those avenues, would choose NOT to engage the legal system or at least not at the level that they have done. And the "want" emanates from the lawyers who are wanting the client to take particular steps, perhaps in excess of what they would otherwise.

So, to a casual observer, it might seem a little outside the scope of the Access to Justice enquiry, but for those who are familiar with root-cause analysis, the Family Tax Benefit system of welfare payments has a lot to answer for in relation to marital separation disputes. There is a significant imbalance between primary carer and secondary carer as a result of these welfare payments, and this equity imbalance is something that competent and communicative separating parents ought to be able to sort between themselves. Enter the lawyers. Because of their sheer quantum, these payments will fuel the fire for a legal case. A lack of common sense and ethical restraint will allow lawyers to create claims over these cashflows, by promoting a client's "right" to receive these payments to the exclusion of the other parent. At that stage we've lost sight of the intention of these FTB payments to reward working families for their contributions to the economy and to the community. The legal trap is set.

Worked example:

> Two parents share the care of their three, primary-school-aged children: 50%/50% in the school holidays, 50%/50% on weekends from Friday afternoons through until Monday mornings during the school terms, and a difference of one night per week on the other weeknights during school terms. For 40 weeks of school, this difference equates to about $30,000 per annum of income in handouts to one parent more than the other parent. That's $750 per night, free money! For 10 years or so, that means a total of $300,000.

It is imperative to act immediately, and put an end to this biased sense of entitlement for separating parents. We need to scrap entirely, or equalise the FTB payments between parents when the direct costs of their children's shared care are similar. An alternative is to consider equitable means-testing and assets-testing of these allowances.

The above viewpoint turns the unmet legal need question back-to-front. It seeks to question the true need of the end-user by reference to naturally-occurring issues, and not by reference to the solicitors who profit from the contrived arrangements.

> *"Why don't lawyers play hide-and-seek? Because nobody will look for them!"*
>
> (Monogamous)

3.1 HOW MUCH DOES IT COST TO RESOLVE A DISPUTE

The Cost element of the "project triangle" described earlier is measurable in dollar terms, and includes direct, indirect, and other intangible costs. As for direct cost, the first element that springs to mind is the direct cost of lawyer representation in a court. The following comments from other submissions were entertaining to say the least:

"Lawyers are pricing themselves out of the market." (sub 017, Prue Vines, Prof at Law UNSW)

"There is a lack of competition: barristers 60% profit margin, solicitors 30% profit margin". (ref TBA)

"The flaw of the system is to make business for itself."(sub 015, Paul Evans)

"Litigation is a make-work scheme for lawyers."(sub 010, Enright)

Direct costs are not limited to the hourly rate of lawyers. There's also the reality that lawyers' office processes are hugely inefficient with little incentive to change because the full cost is passed onto the client in a non-transparent way. This is the first sting in the tail. Enter the Productivity Commission.

Other direct costs include:

- costs of experts, whether necessary or not.
- cost of court time, subdivided into the court fees recovered from the users of the system, and the balance of costs not recovered directly from the users, but paid for by the community's taxpayers.
- Costs thrown away when the court is overbooked.

Indirect costs are incurred during and after court actions, including:

- loss of personal incomes;
- loss of business prospects;
- loss of employee productivity;
- loss of community momentum;
- loss of personal energy associated with mandated court events

The above indirect costs may amount to a significant percentage of the "total" cost of the dispute, in fact they may exceed the total direct cost of lawyers. Lawyers don't advise re these costs even though they are intimately familiar with such outcomes. To do so might reduce the lawyers' revenue streams. And rarely would these indirect costs be identified up-front by clients themselves, because the tendency is to for a client to under-estimate the time factors involved; and to over-estimate their own ability to get back on track when the dispute finally ends.

"What's the difference between a good lawyer and a bad lawyer? A bad lawyer can let a case drag out for several years, but a good lawyer can make it last even longer."

(Monogamous)

Time factors for family matters

"No-one is able to justify a 12-18 month delay between setting the case down for trial and the trial of it." (Dennis Mahoney QC)

"Justice delayed is justice denied." (sub 010, Enright).

When applied to family law matters, the above quotations are not only accurate, but even more important than for other types of litigation. Family law matters are extremely time-sensitive, because children grow and keep growing, and family dynamics change rapidly. If it takes two to three years to get into and out of the family court system, then for a marital separation involving children, there can be a big difference between the circumstances at the time of the separation and the circumstances towards the end of the process. Lawyers don't mind because it simply self-justifies the re-writing of affidavits with the updated sets of facts, for which they bill again. These actions translate into additional costs for the clients, without any increase in the value of the final outcome. Clients pay for these additional costs begrudgingly because they are held captive within the system until a result drops out the bottom.

Is it any surprise that adjournments are the game of choice for lawyers?: They allow for the revenue of an individual case to be doubled or trebled without any commercial downside for the lawyer. These adjournments are sold to the client on the basis of tactical advantage, but really they are just there to add revenue and to disguise a few of the lawyer's omissions and mistakes in the process.

The smartest clients are the ones who could sort out the dispute themselves without the need to rely on inefficient and greedy lawyers. Strangely these people do not become clients at all. But some of the smart ones get stuck in the system too, because they are caught up against those with less commercial nouse, who are sold a sales-pitch from their lawyer that they will be better off inside the system. Yes, some of those individuals do benefit financially from the system, but those selfish individuals' small financial gains are too regularly offset by larger losses to the community in the form of direct financial losses by their opponents and the other types of indirect losses mentioned earlier. Time is a big loser here. Time represents the quality relationship time that the client and their children could be spending together. What spins the wheel full-circle is that the quest for justice in the form of quality time is often the reason for pursuing a family law matter in the first instance!

Notwithstanding that the net benefit of these actions to the legal industry is positive by way of revenue, the net benefit to the community is generally negative in these circumstances by way of the total indirect losses in Time and Cost and Quality. This is not something the community should allow to continue. It is unsustainable.

Ideas for change:

Efficiency of justice should create actions proportionate to the matters in dispute, but in family law the issue might be as minor as the brand of toothbrush that one parent desires the other parent to buy, and yet the rational parent is forced along for the ride. If you are forced to follow the steps of discovery, affidavits, conferences and hearings - that's potentially a $25,000 toothbrush! The system should not be determined by the opponent's lack of self-control, rather it should reward pragmatism and results-focus.

The LCA doubts the wisdom of a legal triage nurse. The nurse analogy presents a point for consideration – non-lawyers triaging the clients' needs rather that the lawyers funnelling and filtering clients based on the lawyers' needs/desires. The adversarial nature of lawyers generally has tendency to exacerbate disputes.

Our community functions well when people have the integrity to tell the truth, something we have previously valued enough to create punishments for those who told lies. But now it would seem that we have removed the penalties for lies, and eroded the rewards for telling the truth. Without the naughty corner for lying parents, we have created a system of legalised anarchy. The cost of this is borne by those who retain their integrity to tell the truth. Let's restore proper penalties for lying and restore the rule of the Rule of Truth.

"Morality cannot be legislated, but behaviour can be regulated.
Judicial decrees may not change the heart, but they can restrain the heartless."
(Martin Luther King Jr.)

6.3 REFORMS REQUIRED TO PROTECT CONSUMERS

A different avenue of reform is the issue of "advocates' immunity". Members of our community are generally aware of the adage "Ignorance of the law is no excuse". Compare this to the reality that lawyers' ignorance of the law is not punished, and their indesire to evolve to a more efficient level is not incentivised. In other words, lawyers purport to act on an 'all care-no responsibility' basis, with two exceptions: The first exception is that they don't advise you of the "no-responsibilty" basis beforehand. That is, they don't advise you of the principle of advocates' immunity which leaves them immune to suit for their failures of duty to care. The second exception is to the "all-care" basis, because generally they don't care. Again for a similar reason, because they are immune from the downside consequences of their failures to care. Not very professional, is it?

When we think of professional duty, we think of someone who professes to be an expert in their field, and who can achieve an outcome that we couldn't without extensive specialist training and skill. We rely upon those professionals for their professed skill and knowledge, and we can sue against the downside breaches of that professional duty. Think medical practitioner, structural engineer, accountant and you are safe to rely upon their professed skill. Not so however for lawyers. Their professed skill is knowledge of a slow and unwieldy court system, but unlike other professionals, it unsafe to rely upon their professed skill. Damage incurred by their errors cannot be recovered from them or their insurers to the same extent. So how have we evolved a higher price point for their services by comparison to the medical practitioners, engineers and accountants? Enter the inelastics of the legal fabric, the withholding of legal knowledge, and the hubris associated with both. Some say "power corrupts", but really it is a lack of power that corrupts. Lawyers, it seems, are powerless in the face of the stuff called money, and they will use unethical and unsavoury methods to maintain their sources of supply of the stuff. Vultures do the same will their meat.

"They say a divorce lawyer is like a cyclone:
A few huffs, a few puffs, then the house is gone, and you're sitting in a pile of mud, worried for your kids!"
(Monogamous)

The bottom line is that we seek a system of checks and balances. What we have so far is a system whereby we keep paying the cheques, while the kids' futures hang in the balance. Our community needs to rid itself of the advocates' immunity principles and follow the lead of other civilised nations. Let's start thinking forward for the benefit of the 21st century we live in. One with a community overflowing with accountability for our actions.

The barrier to change here is the threat that this reform puts on the price of legal services. The mere act of properly informing the community of the current reality, that the clients themselves bear the ultimate downside risk of legal practitioners who pretend to be "professionals", will have a downward pressure on the price of a solicitor. To change nothing here is to continue to promote misleading and deceptive conduct.

Accountability to professional ethical conduct is the key for efficient justice within a legal system.

"Lawyers' creed: A man is innocent until proven broke."

(Monogamous)

10.4 HOW MIGHT TRIBUNAL PERFORMANCE BE IMPROVED

Two main issues spring to mind for tribunal effectiveness: The first is legalisation creep. The rules of evidence are infamous in the court system, and they produce delay, cost, and procedural innocence. They depart from truth-based systems. The tribunal system that we have created, with its aims for a faster, cheaper access to justice therefore allows a more inquisitorial role for the sitting Member. The aim is to get to the truth as fast as possible, and then make determinations and dispose of the dispute. The tribunal therefore needs to be tough on those who desire to behave as though they are in just another adversarial court. It needs to be tough on those who abuse the imbalance that a legally-educated party (e.g. solicitor) seeks to impose upon an unrepresented person. It is, after all, one of the characteristics of the tribunal system to create a level playing field. DR 10.1 covers this issue and is supported. The inclusion of non-lawyer Members in VCAT is also a significant positive influence in this regard.

The second improvement is the elimination of repeat performances on the same issues, by supporting the feedback loop which would allow would-be disputants to understand the likely result of their dispute. But also, if similar issues are being run, and run, and run again then there is a need to legislate those issues out. It is unclear how effective the tribunal is at closing this feedback loop back to the legislature. This process commences with documenting the decisions, but short-cuts are often taken with this process step. Maintaining the focus on this will pay dividends within the community.

"A tribunal is a place where they dispense with justice."

(Arthur Train)

11.4 CASE ALLOCATION

If there is no negative consequence for a particular type of undesired behaviour, then that behaviour will recur. In relation to case allocation, is important that the court system pick up the cost of any overbooking, because the court is the entity best-placed to solve the problem. This is well-known as the "Abrahamson principle" which allocates responsibility to the entity best able to mitigate the risk of seeing that consequence arise. If the risk of the court messing up its case allocation system is a financial cost to the court instead of being passed off to the client parties, then next time the court will be more diligent in its allocations.

DR11.2 covers the measurement of case allocation and case management processes, and suggests the collaboration between different jurisdictions as to what methods are effective. However it is recommended those courts look well beyond the legal industry for answers here. Two industries which may serve as analogies for court case management are the manufacturing industry and the hospital industry. That is, what do we need to do to get this case OUT of the system as efficiently as possible, mindful of the project triangle of objectives mentioned earlier. There are software system that could automate a lot of these processes, in what presently appears to be largely a manual allocation system.

"The difficult task, after one learns how to think like a lawyer, is re-learning how to think like a human being."

(Floyd Abrams)

11.5 DISCOVERY

Traditionally, discovery processes are a sizeable part of legal costs incurred on a matter. With the advent of the photocopier, entire floors of lawyer offices were dedicated to this. Prices have come down, per page, but photocopying documents and preparing them in the correct format is not really a complex job for the majority of family property matters. Enter the lawyers who are concerned for their shrinking bottom-line, and these tasks will still be shrouded with some mystery.

DR 11.6 covers the scope of discovery and the possibility that it may be codified. These aims are supported. For family law property matters, all that is really required here is a pro-forma which defines all marital assets and the timing and quantum of contributions by the parties. It's nothing more complicated than a checklist, and any documents that would support any item on the checklist is a document that would be turned up. Providing documents outside of this framework is a waste of resources, resources which ought to be preserved "in the best interests of the children". A standard form document template would streamline this process considerably, and prevent lawyers from billing their clients for producing one as if they had never seen such a thing before.

Assessment of a standard-form statement of assets and liabilities also lends itself toward a tribunal approach for the split of marital assets between parties. This ought to be a transparent, repeatable process for the high majority of marital separations.

"Law students are trained in the case method, and to the lawyer, everything in life looks like a case."

(Edward Packard, Jr.)

11.6 EXPERT EVIDENCE

The need for experts within the family law system seems to have introduced an unwanted layer of duplicity. Experts for financial matters are engaged on threat that the other party will be engaging an expert. Each party goes shopping for their expert, then ultimately they need to produce a joint statement of the experts. That's three reports from one set of facts. How about an assessment process which involves one report from one set of facts? DR 11.8 covers this ground, and is supported.

In childrens' matters, "experts" come in the form of family psychologists. For cases involving violence issues or neglect, perhaps the involvement of such psychologists is warranted. But for run of the mill cases of marital separation, the necessary process steps can be stated far more simply: the family dynamic needs to shift from a one-household model, to a two-household-model. That's it! The community continues to encourage fathers to participate actively in the direct care of their children, and the uptake of this paradigm is ground-shifting in recent years. But when it comes to the point of a marital separation, fathers are still being shut out and shot down, both physically, emotionally and financially. This is the result of a slow-moving court system which is working to the post-war ethos of male provider and female nurturer. Our community speaks out loudly that this model expired years ago, everywhere except within the labyrinth of the family court system. Therefore the experts who would qualify for this process need to be relevant to the community's trends and awake to the factors which influence lawyer-promoted competitive behaviours between separating parents. It may be appropriate for these family psychologists to be court-appointed, and DR 11.9 covers this issue.

13.4 WHO SHOULD COST AWARDS APPLY TO?

Many disputants within the family law system self-represent because of the cost saving, or to avoid pertinent issues of their circumstances of their case from being lost in translation by a clumsy lawyer or barrister tag-team. For the self-represented litigant (SRL), there are however still costs attaching to the court appearances by way of loss of direct earnings during hearing days, and time and energy spent on preparation before and after.

Currently the predicament faced by an SRL who wins against a vindictive opponent is that will be denied an award of costs, on the basis that they did not incur any costs. It might be that the SRL did not incur "legal costs" by way of lawyers and barristers, but they did indeed suffer losses by way of loss of income etc. Take the example that a non-working parent initiates a trivial action against a working parent. The working parent incurs losses of income preparing for the matter, attends the hearing day/s, then debriefs after the hearing and resumes their paid work. The non-working parent loses no income during this process, and continues to receive extensive government benefits such as FTB, and continues to receive child support payments. The working parent loses income, but is required to continue paying their child support obligations. If we reflect on the public interest intention of the costs award system, it is to dis-incentivise spurious claims to the expense of the losing party. But since the Family Law Act interprets the provisions in relation to costs to mean that each party bears their own costs, then this dis-incentive is lost. Add to that the absence of a dis-incentive for a low-income parent against a higher income parent, and the tendency is for the courts to have more trivialised cases without penalty.

The DR 13.5 solution is to pay SRLs the scheduled rates, and this recommendation is fully supported. This would balance up the dis-incentives on both sides, and there are no arguments as to efficiency of the litigant since the scheduled amounts are already events-based lump sums.

A further example of the inequities created by the costs award system, is the exception for legal practitioners to be able to recover costs when they are self-representing. This means they are allowed to generate work for themselves, and collect a paycheck for whichever cases they win. Some do this, and the recent High Court result of a barrister collecting $100,000 in costs for an underlying dispute of $4,000 quantum is a disgraceful example.

"The latin for attorney – 'attorn' - meant to turn over to another. Originally not performed by a lawyer, this opportunity was for anyone designated to take place of another in a transaction."
(David Feldman)

14.4 WHAT ARE THE IMPACTS OF SELF-REPRESENTATION?

"The system needs to account for client needs, which are at odds with the lawyers' revenue desires."
(Refer Sackville J comments on lack of competition)

There are negative perceptions on the impact to the courts of self-representation by individuals. In 31% of family law final applications (2012) one or both parties were unrepresented. Some of these might have resulted from sacking an incompetent lawyer. A party to litigation cannot even specify a new mailing address to the court and resume control of correspondence not being provided by a lax lawyer, without sacking their lawyer from the court's record, potentially causing detriment to their case.

One of the most atrocious acts that a sacked lawyer can do is to withhold the client's files on the premise that "monies are owing". This currently has the full sanction of the justice system in its entirety, a system built by lawyers, for lawyers. For family law matters which are by their nature, time-sensitive, it is recommended to dis-allow the ability for a solicitor to hold the files. These files are a product of the client's case, not a chattel to be used as security at the whim of the practitioner. In our modern world, there are plenty of other methods that could secure a payment due, if indeed it is 'due'. Keeping someone's files in a time-sensitive childrens' matter adds no value to a solicitor's wrongful claims, it simply destroys value at the client's end, and destroys value for the community. Such behaviour is so churlish it should be punished by jail sentences!!

Attending court is an incredibly daunting process for the un-initiated. In response to IR 14.1: the best method to mitigate any adverse impact of SRLs upon the court system would be to provide them with preliminary training for their self-representation events (in advance of their hearing days). Filing deadlines, court rules, court documents, the process of a case, cross-examination, judgements, written decisions and 'McKenzie friend' seem like the necessary elements for such training. If the ability to self-represent effectively is waged against the disputant's cost-savings for lawyers, then this is a service which would support a cost-recovery model on a training fee basis. Third party trainers could easily fill this space.

Re DR14.1: It is certainly necessary to increase the amount of SRL procedural information available on the internet, but accessing the court system could be likened to wading through waist-high reeds in a swamp before a bomb explodes. SRLs have a sense of urgency as a result of imposed deadlines, and for some they may be in varying states of panic in relation to looming outcomes. The current reluctance for the courts providing relevant information seems to be based on a fear of treading on lawyers' toes, e.g. the court is unable to provide 'legal advice'. Considering the court protocols regarding advocates' immunity, what is the downside of the court dispensing with incidental legal information which may be construed as 'advice'?. It would seem that ultimately the risks are being borne by the end-user, and the court is already immune to any exposure here.

For family law matters, it's clear that the kids are the losers when the system is inefficient and ineffective and filled with lawyer incompetence. If SRLs can upskill themselves to fill this void, then the kids and their community will emerge the winners.

16.2 THE IMPACT OF COURT FEES ON ACCESS TO JUSTICE

The following example represents a fuller view of a client's cost of attaining 'court-time'. The costs in this example far exceed the court fee charged by the court. So the cost of accessing justice is not just about the court's fee schedule.

Worked example 3.1:

> Parents of children are in a care dispute regarding the shared care of their children.. After paying $25,000 each for affidavits, solicitors, barristers, court fees…..the day has arrived for the hearing. But the judge is too busy and they get bumped for six months. Not the judge's fault, they say (fair enough) because there is a priority case that needs to be slotted in. But there is no compensation from the Court for this, hence no incentive for the system to be improved. The Court ultimately received payment of its court fee, the solicitors got paid (and have slated some more future work to re-write materials), the barristers got paid to appear (even though they didn't perform). The client footed the entire bill for that planning error, overbooking or whatever you call it.

Does this really happen? Yes it is happening today in our front yards, with no incentive to fix the inefficiencies.

"Why does the law society prohibit sex between lawyers and their clients? It is to prevent clients from being charged twice for what is essentially the same service."

(Monogamous)

19.2 THE UNBUNDLING OF LEGAL SERVICES

IR 7.5 poses the unbundling of legal services within the regulated legal industry and how the concept of 'limited licences' for non-lawyers doing specific tasks might be used to best effect. The building industry provides a simple comparison for how these limited licences can function effectively when coupled with specific training objectives. Within the building industry there is a whole gamut of building codes and Australian Standards applying to every component of construction. But in practice there is clustering of skill sets into the traditional "trade-skills" and "professional skills". Trade examples include plastering, plumbing, roof framing, bricklaying etc. Professional examples include structural engineering, airconditioning plant design etc. Hence within the building industry, a skilled individual may perform a standard subset of works, without needing to spend four years at university to generalise in the entire industry and master in none of its subsets.

On a similar basis to the building industry analogy, some allied services are already endorsed within the limits of the existing legal profession legislation e.g. for conveyancing work. Extending this logic, family law matters are well placed for limited licences because most of the initiating considerations are within one piece of legislation, the Family Law Act. Many ADR services providers need to be versed in the Family Law Act to provide their existing non-legal offerings effectively. But because of the phraseology of the Legal Profession Act, there remains a separation between legal work and non-legal work at the expense of the end-user through semantic double-handling.

Moving beyond the family law examples, other professions such as accountants and engineers would easily handle the rigours of contract law or tax law, with suitable post-graduate subjects for those who are so-inclined. The relevant post-graduate courses already exist for these specialisations, and are already well subscribed by accountants, engineers and similar professionals. Law graduates also take these same post-graduate courses to create the same level of speciality. So it could be said that the only reason for maintaining the prohibition on "legal work" being done by "lawyers" is for the benefit of price and profit margins. Compare this to the entitlement mentality of those who studied four years of undergraduate law some while ago, and who desire a specific return on that prior investment. These are not reasons to deny the industry a higher level of efficiency. Mediators and debt collectors are further examples of cottage industries which could benefit from a more flexible regulatory scheme.

DR 19.1 covers liability equations that might result for practitioners, and the development of guidelines to produce clients' informed consent for any unbundled arrangements. The only plausible justification of maintaining the separation of legal and non-legal work is to define the standard of care we should expect from a legal practitioner. But if the lax standards of conduct endorsed by the LSC, and the inability to sue against a legal practitioner's failure of duty to care are the only differentiating factors, then we have not successfully created a legal "profession". Rather we have unwittingly endorsed a fanciful monopoly, one which is now ripe for dismantling. What the legal industry has to fear by allowing engineers to write construction contracts for construction activities, or by allowing divorce coaches to write consent orders for marital separations is a downward pressure on the price point of legal services, and upward pressure on the professional standard of such services. The Productivity Commission already knows this, but no pain, no gain.

"Of the three old professions: Doctors purge the body, preachers the mind, lawyers the purse."
(German proverb)

24.1 DATA AND EVALUATION

The suggestion is that data collection and evaluation within the court systems are recognised as important but underutilised. What other industries recognise is that if you can't measure it, then you can't improve it. The steps identified here involve measurement, collection of data, analysis, identification of alternative solutions, and benchmarking.

For family law matters involving marital separation, recording of the following key data would be very useful for transparency and benchmarking purposes.

> Children's dispute: number of children, % care of children before and after dispute, time to resolve, costs.
>
> Property dispute: number of years married, value of marital property pool, % contributions, % final split, time to resolve, costs.

Collecting the above data would be of benefit to the legal industry participants, but more importantly these data would properly inform prospective litigants before using (or avoiding!) a system which is clearly inefficient and costly. For as long as it remains so inefficient, those properly-informed would-be users will more likely direct their time, energy and money elsewhere within the community. The community will be better for it.

"If you laid all of the lawyers in the world end to end around the equator, it would be a good idea to leave them there."

(Monogamous)

TABLE OF RECOMMENDATIONS

1.1…Take account of time, and quality factors in assessing 'access to justice'.

2.3 Scrap the Family Tax Benefit.

3.1 Recognise that Time is also a cost. Triage and re-triage, promote methods to downgrade a case to ADR when suitable. Reward a results focus. Restore the rule of Truth.

6.3 Eliminate the defence of advocates' immunity for solicitor negligence. Promote accountability.

10.4 Restrict legalisation of tribunal hearings. Close the feedback loop from tribunal to legislative fixes, for recurrent themes.

11.4 Look outside the legal industry for efficiency of case allocation. Use the Abrahamson principle for allocation of cost penalties to the court.

11.5 Codify discovery for marital pool assets. Consider a tribunal-based approach.

11.6 Eliminate duplicity of experts. Consider court-appointed family psychologists for children's cases.

13.4 Allow costs award at scheduled rates to self-represented litigants in family law cases.

14.4 Encourage and promote basic legal process training for first-time self-represented litigants. Dis-allow the solicitors' holding of client files for Family Law cases.

16.2 Look wider than scheduled 'court fees' for their effect on access to justice.

19.2 Create "limited licences" for family law, mediations, tax law, construction law, debt recovery.

24.1 Measure key statistics for every case:

- Children's matters: No. of children; % care of children before/after; legal costs; time to resolve.
- Property matters: Value of assets; no. of years married; % contributions; % final split; legal costs; time to resolve.

CONCLUSION

This submission has discussed issues and examples within the family law system:

- Court delays, and the effect on access to justice.
- Direct and indirect costs associated with legal events.
- Time factors and their impact upon children and families.
- Inefficient processes within the court system and the offices of solicitors.
- Unaccountability of advocates' services
- Unrepresented litigants in family law.
- Unbundling of legal services for specific sub-industries.
- Measurement of performance.

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