

Submission Addressing the Productivity Commission's Issues Paper: Access to Justice Arrangements

1. Introduction

Shearer Doyle Pty Ltd is an incorporated legal practice providing three distinct services:

- Affording Justice – providing Legal Diagnosis, Legal Advice and Legal Task Help services, predominantly to people who are self-representing in dispute resolution processes in civil and family law matters
- Doyle Family Law – providing advice and representation in the full range of family law matters and other areas of personal law
- Managing Justice – a consulting practice working in the access to justice field providing consulting services to government, legal assistance agencies, and peak bodies.

Bruce Doyle and Elizabeth Shearer are the directors. Bruce is a former president of the Queensland Law Society and a member of the Law Council of Australia's Access to Justice Committee. Elizabeth is the former Director of Information, Advice and Civil Justice Services at Legal Aid Queensland. The views expressed in this submission are their own.

2. The scope of this submission

We are aware of a comprehensive submission by the Law Council of Australia, and support the contents of that submission. The purpose of this submission is to provide comment in relation to several questions on which we have additional information, based on our experience in legal and consulting practice.

3. How can the Commission best add value?

There have been many inquiries and research investigations in recent decades that have highlighted gaps in access to justice. The recent LAW survey has mapped the level of legal need in the community.

We believe that it would be useful for the Productivity Commission to look at the issue from a different perspective, and to answer the question: *What is the proper scope of the role of government in providing access to civil justice?*

Clearly the legislative, executive and judicial arms of government each have a role in access to civil justice, which at its core requires:

- Laws that are fair and known in the community
- Accessible forums to resolve disputes fairly
- Access to legal help in appropriate cases.

The role of government in funding criminal defence services for the indigent has been long recognised on human rights grounds (for example Article 14 of the *International Covenant on Civil and Political Rights*).

The role of government in funding legal help for people in civil justice processes where fundamental human rights are at stake is less recognised and has not been clearly articulated. In some areas of disputes between individuals, such as family law, there is an extensive system of legal aid (albeit insufficient to meet demand), whereas legal aid is not routinely available in many other civil justice areas. For example, in Queensland where we practice, there is very limited legal aid for parents who are responding to applications to have their children placed in the care of the state, or for people facing involuntary treatment in the mental health regime. In both cases, it is clear that fundamental human rights are at stake. The individual, who, frequently in such cases experiences a significant level of financial and social disadvantage, is required to respond to an application by government, without legal assistance.

In addition to the human rights case for the funding of legal assistance, we are aware of various arguments for funding of legal assistance services, because of:

- The efficiency benefits to the court system of providing legal representation
- The economic benefits of a strong rule of law as a foundation for consumer and commercial activity
- The social benefits of dispute resolution that avoids people resorting to violence
- The economic and social benefits of solving legal problems before they compound and escalate into intractable social problems.

We consider that the Commission could add considerable value by providing micro-economic policy analysis of the proper scope for government in the provision of, or in funding of the provision of, legal services to people seeking to participate in the civil justice system. That analysis could include consideration of an appropriate means test for legal aid services.

4. The costs of accessing civil justice

There is a clear link between the nature of the forum for dispute resolution, the need for legal help, and the costs of accessing civil justice. To access formal dispute resolution forums using an adversarial model, most people will consider that they need legal representation in order to achieve a fair hearing and a just outcome.

However, most civil justice dispute resolution happens:

- Through informal negotiation in the shadow of a formal process,
- Through a process of facilitated negotiation (mediation or conciliation) which may occur independently of or be annexed to formal process, or
- In the case of many personal legal matters, in a forum designed to be accessible without legal representation (civil and administrative tribunals and external dispute resolution schemes)

In our experience of family law practice, costs of legal representation for accessing justice are manageable and proportionate for clients with:

- Disputes where the level of conflict is low, and an outcome can be negotiated within a reasonable time at a reasonable cost, and
- Property settlement disputes where the asset pool is of sufficient size to warrant the costs of resolving the dispute, even if this requires a litigated outcome.

Costs can become a barrier in:

- Children's cases where there is a high level of conflict and lengthy court proceedings involving multiple court events are required
- Contested domestic violence protection order cases, where affidavit material is required by the court prior to final hearing
- Property settlements with low value property pools.

Our Affording Justice practice is an initiative to provide some assistance to people who are representing themselves, and our clients range from people on government benefits and low incomes unable to get legal aid assistance through to people on well above average incomes who cannot afford full representation for their case.

We are certainly aware of some cases where clients have opted not to pursue their case because of a decision that the cost outweighed the benefit. In many cases, particularly those involving the recovery of a sum of money, this is a rational and sensible decision.

However, there are cases (for example family law children's cases and domestic violence protection order cases) where the outcome is not related to money. The factual bases of such cases are often complex and strenuously contested. This means that the costs of legal representation to conduct the case are high. The client often feels compelled to continue the case because of concerns for their own and/or their child's safety and wellbeing, and so will use whatever resources they have at their disposal to pay for legal representation. The significant driver of cost of resolving the dispute is essentially the nature of the dispute and the level of conflict between the parties. In such cases it is difficult to weigh the cost against the benefit. It is noted that difficult children's cases are the ones most likely to attract legal aid funding, but this is only available to people who meet the legal aid means test.

5. Alternative dispute resolution

Alternative dispute resolution provides a valuable mechanism to the resolution of many disputes. However, in our experience, it can also impose additional cost and delay for little benefit when it is used in inappropriate cases, or mandated at a stage of the dispute before the case is ready for resolution.

6. The use of technology

Technology is a key enabler of our Affording Justice practice in three respects:

- It assists us to keep overheads low using cloud based software . This means lawyers can work from any location reducing the need for office space
- It creates efficiency in practice (automatic document generation etc.) to keep costs lower, and
- It allows us to provide services to people irrespective of location by use of telephone and Skype. In particular we have provided services to people in regional, rural and remote Queensland who would have difficulty accessing other legal services.

7. Billing practices

Discrete task services are described in the issues paper under the discussion in relation to billing practices. Our Affording Justice Practice provides only discrete task services. Discrete task services are a staple of legal aid and community legal centre practice, but there are many disincentives to private lawyers providing discrete task services including:

- Risk management concerns that attempts to limit the scope of the retainer may not be effective in limiting liability for matters outside the scope of retainer
- Lack of recognition of the legitimacy of the role of discrete task services in courts and tribunals where parties are either “represented” or “unrepresented”
- Little guidance in professional conduct rules about practising in this manner.

The provision of discrete task services has enormous potential in increase access to civil justice in appropriate cases where:

- There are less complex legal and factual issues in the case
- The client has the capacity to conduct parts of the case themselves, and
- The dispute resolution forum is one that has procedures in place to support people conducting their case in this manner.

In our Affording Justice practice, we provide most services on a fixed fee basis, as we believe this alleviates clients’ concern about the affordability of the service.

It is our experience that the Costs Disclosure regime, under which lawyers provide clients with lengthy disclosure documents and costs agreements, can act as a barrier to client’s understanding of costs. This is because clients treat these documents in the same way as other consumer contracts that they are asked to sign - that is they rarely read them. Despite our best efforts to produce concise plain English versions of these documents, our Costs Disclosure Notice, Costs Agreement and Retainer Letter for matters where fees are in excess of \$1,500 together run to 12 pages. We use a two page Terms of Service document for matters where fees are less than \$1,500 (and hence we are not obliged to comply with the costs disclosure regime) as we believe this is more likely to be read by clients, and hence give them a better understanding of the costs that will apply to their case.

8. Pro bono legal services

The development of formal Pro Bono programs by large law firms has highlighted an important contribution to access to justice. Equally important is the pro bono contribution of small firms practising in personal law who frequently provide discounted and free services to clients. This contribution was recently highlighted in the National Pro Bono Resource Centre’s publication on pro bono in family law cases. In our view, many small firms operate an informal version of the Salvo’s Legal model, where we subsidise the provision of some free and discounted services to clients in need. Our Affording Justice practice seeks to make this transparent, offering discounted rates for legal services in a range of matters.