

# An opportunity to narrow the access to justice gap – the user pays solution

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## Introduction

Very few of us aspire to dependency upon government or charity. Yet as a profession, our key responses to the access to justice gap have been

- To advocate for government funding for legal assistance services, and
- To provide our own services pro bono.

It is established beyond all doubt that additional government funding is urgently needed for adequate and appropriate legal assistance services. The Productivity Commission found that \$200 million a year was required to address only the most pressing civil law needs. Beyond all doubt, our advocacy for adequate levels of government funding for legal assistance services must continue. But that is not my focus today. Today, I want to focus on a response to the access to justice gap that does not leave our clients dependent upon our charity, because, in the words of the pioneer feminist writer Mary Wollstonecraft, *It is justice, not charity, that is wanting in the world*<sup>1</sup>

We know that the access to justice gap is wide. Adequate government funding for legal assistance services and enhanced pro bono efforts will narrow the gap, but they will never eliminate it.

There is room for, and in my view a dire need for, some market based solutions that are informed by an access to justice perspective. Market solutions will not solve all of the problems, but they can contribute to the solution. As Michael Porter, according to *Fortune Magazine*, “the most famous and influential business professor who has ever lived” points out, the advantage of a market solution to a social problem is that when business solves a problem it makes a profit, which lets that solution grow.

If we apply Porter’s thesis that “businesses acting as businesses, not as charitable donors, are the most powerful force for addressing the pressing issues we face”<sup>2</sup>, to the pressing issue of access to justice, we would do two things differently to how we have always done them.

1. We would develop new models of service for people who can afford to pay something, but can’t afford to buy what we have traditionally had to sell, and
2. We would ensure our regulatory framework and professional culture supports, rather than impedes, this endeavour.

Regulatory frameworks and the steps that professional associations can take to support new service models are topics for another day. Today, I will focus on:

- Where the gaps in the market are
- Common features of new service models
- Affording Justice as one example of a new service model
- The impetus for more of these models to develop, and the opportunity to use them to enhance access to justice.

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<sup>1</sup> Wollstonecraft, M, *Vindication of the Rights of Woman*, 1792

<sup>2</sup> Porter M E & Kramer M R, “Creating Shared Value” *Harvard Business Review* 89 (1/2), 62-77, 2011

## **Minding the gap**

Before considering new service models, it is necessary to narrow the focus to those parts of the civil justice system where there are the largest access to justice gaps. In my experience people have reasonable access to justice for:

- Legal information and initial advice. There are a range of publicly funded legal information and advice services that are accessible to many, and the private profession offers many low cost and no cost options for initial advice.
- Transactional matters. For most transactions that individuals and small businesses are involved in, legal costs are a manageable component of overall transaction costs.
- The pot of gold at the end of the rainbow cases, where various means are found to fund an action with the expectation that the proceeds of that action will fund the payment of costs, and
- The other people's money cases, where even if the pot of gold at the end of the rainbow is not large, there is a pool from which costs can be paid.

The gap occurs:

- When people need help beyond initial advice.
- The case is not about money at all
- The case is about a modest sum of money and legal costs are likely to be disproportionate to that sum.

The gap is greater than it need be because, although there may be appropriate services available, many people who could be helped by private lawyers do not approach us because they are fearful of incurring costs that they cannot afford to pay.

## **New service models**

The development of new models of service is already occurring, but unless it is being done by legal assistance programs, it is not something we traditionally think of as falling within our scope when we, as a profession, meet to consider access to justice issues.

Common features of new service models that service clients who might otherwise fall into the access to justice gap are:

- Use of technology to keep overheads down, streamline processes and offer services
- Use of limited scope retainers
- Use of fixed fees
- Use of a different style of communication about the service being provided than is traditionally used in legal practice.

## The Affording Justice example

Affording Justice is one example of a new service model. Our practice is in the areas of law that impact on the everyday lives of individuals and small businesses. Our main areas of practice are:

- Family Law
  - Parents in contentious matters - document preparation, advice, coaching, ADR representation
  - Low value property settlements – negotiation, ADR representation, document preparation, coaching for court
  - Domestic violence applications – document preparation, coaching
- Employment law
  - Advice, document preparation, conciliation conferences and small business compliance advice
- Debt and credit
  - Advice, document preparation and coaching for EDR schemes and negotiation for small business clients, and
- General dispute resolution including the range of matters in the CATs consumer, guardianship, administrative law, neighbour disputes, voluntary organisation disputes.

Our clients include:

- Social security recipients – often refused legal aid in family law cases on merit or guidelines and needing some help for court
- Low to moderate income earners
- Higher income earners for initial advice or for low value disputes, and
- Small businesses

Our work comes from referral from legal assistance services and other law practices that can't assist clients who approach them, personal referral networks, and from Google Ads.

Affording Justice does all of its work using the notional hourly rate of a junior solicitor to calculate fixed fees by stage. This is a fair rate for much of the work we do. However, we also do more complex work at this rate for low to moderate income earners in disputes that are not about money or are about modest sums of money. We do this instead of pro bono work.

Affording Justice is one brand of an incorporated legal practice that also operates Doyle Family Law, a specialist family law practice with some general practice work. The sustainability of the model depends on:

- keeping overheads low
- reasonably high volume of clients, and
- willingness to have a senior lawyer be less profitable than they might otherwise be to ensure an affordable service.

In many ways, what we do is very similar to how small legal practices have always operated, where, with a combination of good luck and good will we have found ways to support clients of limited means get the services they need. The significant difference is that our services are named, packaged and marketed so that people don't need to rely on good luck and good will to find the service they need. This offers real benefits to clients:

- Empowerment as paying customers who have information and choice about how much or how little of our services they purchase
- An opportunity for best value for the money that they can afford to spend on resolution of their dispute
- Transparency and predictability about costs
- Convenience of conducting business using technology (most consultations are by phone followed by emailed notes to client which also serve as file notes)

### **Barriers to new models are crumbling**

Legal practice occurs in the context of centuries of tradition governing the role of the lawyer and the nature of professional practice. Some elements of our tradition, for example the fiduciary nature of our obligation to our clients, are fundamental to our professional practice. Other aspects have served as barriers to innovation that could enhance access to justice. For example, in the late 1990s when I had to make the case to the Board of Legal Aid in Queensland for telephone legal advice to become a staple of our service offering, there was much anxiety about whether this was a proper way to deliver professional services.

In 2015, the new models of legal practice have not yet reached critical mass. However many of the barriers to innovation have slipped away in the course of the last 25 years and at the same time our profession has become subject to a range of competitive forces.

If we return to the most famous and influential business professor who has ever lived, Michael Porter, and apply his Five Forces Analysis<sup>3</sup> to the contemporary legal services market, we can see:

- There is a significantly increased threat of new entrants
- The bargaining powers of our customers is increasing
- The bargaining power of our suppliers is increasing
- There are a range of substitutes for our services
- And there is intensity of rivalry and competition within our market.

It is not uncommon for us to look at these competitive forces as threats to our profession, but another way to look at them is as opportunities to expand access to justice.

The delivery of legal services to people of modest means in cases involving modest amounts of money (or no money at all) will never achieve the same level of profit as high end legal work for corporate clients.

However we now experience a landscape where:

- There are many more lawyers than will ever be involved in high end legal work
- Technology makes it cheaper to deliver legal services
- The ownership of legal practices is open to capital that does not require the same return as that required by owners of legal practices in the past

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<sup>3</sup> Porter, M E "How competitive forces shape strategy" *Harvard Business Review* 21 (38), 21-38, 1979

- There are a range of providers of substitute services willing to fill any gap lawyers leave in the legal services market<sup>4</sup>.

This confluence of factors means that within a relatively few number of years there will be a proliferation of new models and new businesses, including those prepared to target their services at the currently underserved segment of the market.

## **Conclusion**

As lawyers interested in access to justice, we have the opportunity to enter this market bringing with us those elements of professional practice that are fundamental to the delivery of justice, or we can cede the field to those who approach the market from a purely commercial perspective.

I will be in the former group, and I hope that many of my colleagues interested in access to justice will join me there.

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<sup>4</sup> We need only to look at the proliferation of for profit services offered to people with personal debt problems to see that these substitutes often provide an inferior service at greater cost with a poorer outcome for the clients.