

Centre for  
Innovative Justice

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# Affordable Justice

– a pragmatic path to  
greater flexibility and  
access in the private  
legal services market

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October 2013

# Centre for Innovative Justice

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*The Centre for Innovative Justice was established by RMIT University in October 2012. RMIT is a global University focused on creating solutions that transform the future for the benefit of people and their environments.*

*The Centre's objective is to develop, drive and expand the capacity of the justice system to meet and adapt to the needs of its diverse users.*

*The Centre is dedicated to finding innovative and workable solutions to complex problems that manifest in the justice system. Our analysis is not limited to problem definition; we strive to develop practical ways to address problems. The Centre's focus is on identifying alternatives to the traditional approaches to criminal justice, civil dispute resolution and legal service provision. Our mission is to identify strategies that take a holistic approach and address the reasons people come into contact with the justice system.*

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# Contents

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|  |           |
|--|-----------|
| <b>Executive Summary</b>   | <b>4</b>  |
| <b>Scope, Limits and Methodology</b>   | <b>6</b>  |
| <b>Introduction and Context</b>  | <b>7</b>  |
| The Story So Far   | 7         |
| <b>The Fundamental Problem</b>   | <b>10</b> |
| <b>1. Certainty and Choice for Consumers</b>                                   | <b>14</b> |
| 1.1 Increasing Overall Transparency  | 14        |
| 1.2 Increasing Price Certainty   | 16        |
| No-win, No-fee/Speculative/Conditional Fee Arrangements                        | 16        |
| Fixed Fees   | 17        |
| 1.3 Reducing Overheads   | 20        |
| 1.4 Increasing Sources of Funding  | 24        |
| Limited Funding or Loan Schemes  | 24        |
| Legal Expenses Contribution Scheme   | 25        |
| Private Litigation Funding Assistance  | 25        |
| Public Litigation Funding Scheme Proposals                                     | 26        |
| 1.5 Opting in to Legal Assistance – Discrete Task Assistance                   | 27        |
| 1.6 Increasing Pro Bono  | 32        |
| 1.7 Subsidised Legal Practices   | 32        |
| <b>2. Increasing Competition in the Market</b>                                 | <b>36</b> |
| Legal Expenses Insurance   | 39        |
| <b>3. Common Sense in Legal Practice – a Comparison</b>                        | <b>41</b> |
| <b>4. Beyond this Report</b>   | <b>46</b> |
| <b>Discussion – Effective, not Exclusive: Reconceiving the Role of the Law</b> | <b>48</b> |
| <b>Steps to Affordability – Pragmatic Suggestions for the Road Ahead</b>       | <b>50</b> |
| <b>Appendix A – Consultation List</b>  | <b>54</b> |

# Executive Summary

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The law, and the system that is structured around it, are designed to protect the interests of ordinary people. Yet the conventions and expense associated with this system mean that the majority of the population feel shut out from its redress – sandwiched between eligibility for public assistance and a realistic capacity to meet the costs of the private legal market.

This is despite ongoing government efforts to address and understand acute legal need in the community; and despite the fact that the majority of private practitioners work outside the environment of the larger corporate firms, many putting considerable time and energy into increasing access to the law. Equally, some practitioners have developed new and innovative ways of facilitating this access, from conditional fee arrangements and representative class proceedings, to the increased use of technology and more strategic provision of pro bono services.

Overall, however, these innovations have not reached a full range of consumer legal matters, nor have they been developed by the profession in any co-ordinated way – with the basis on which most legal fees and associated expenses are charged continuing to drive consumers away. As such, legal practice is falling behind other professions in terms of its readiness to adapt, and to dismantle the unsustainable division between public or pro bono assistance on the one hand, and prohibitive expense on the other.

This Report, commissioned from the Centre for Innovative Justice ('the CIJ') by the Commonwealth Attorney-General's Department, aims to break down this division – highlighting existing and emerging innovations and proposing their adoption on a more widespread basis; supported, in turn, by government and regulators.

In doing so, the Report argues that legal practice needs to be structured in a way that makes it a more realistic prospect for a larger proportion of the population – shaped around the delivery of what is, in effect, an essential and very ordinary service, rather than as an overblown luxury that is beyond most people's reach.

Categorised into broad themes of *certainty and choice for consumers; competition in the market; and common sense in conceptions of the law*, the Report addresses such issues as:

- The lack of transparency and predictability about what lawyers actually do charge, rather than just what they can charge
- The need for a greater consumer focus on the legal services market through the potential establishment of a Legal Consumer Advocate
- The need for greater analysis of areas that would adapt to forms of price certainty, as well as for governments to lead the way in purchasing legal services on this basis
- The benefits of reducing overheads and passing efficiencies on to clients
- The benefits of offering limited scope representation, or discrete task assistance, to consumers who may only have enough funds to 'opt in' to legal advice at certain points in proceedings
- The need to increase the provision of pro bono services to individual, rather than just organisational, clients through a combination of incentives
- The potential for subsidised private and public legal services
- The need for co-ordinated business model development and a focus on entrepreneurship, including linking the continuing excess of law graduates to an increase in sole or small legal practices

- The need for greater consideration of regulation as it relates to risk
- The need for greater consideration of legal expenses funding sources, from co-contribution and loans schemes, to Legal Expenses Insurance
- The need for more targeted use of legal skills – both through direct briefing to barristers so that consumers may make strategic decisions about how they spend their limited means and through more considered engagement of mediators and non-legal professionals in certain fields.

Rather than turning huge profits, therefore, the CIJ believes that an affordable justice system means turning equations on their head – targeting lawyers' time more efficiently; reducing overheads; reducing unnecessary regulation; dispensing with time-based billing models; increasing client intake; and, most importantly, improving consumer confidence in the market.

Clearly, not all legal problems require recourse to the court system, or to private legal assistance, and the CIJ also encourages the development of a more widespread dispute resolution culture which does not rely exclusively on lawyers and formal mechanisms. Where these mechanisms are essential, however – and in many cases they are – they should also be affordable to all.

As such, the CIJ asks whether private practitioners have lost perspective about what remuneration should be considered reasonable; and challenges persistent assumptions that private legal practice is immutable – a fixed point around which government and others must build reform.

Rather than decry the profession's willingness to reform, however, the Report aims to demonstrate that innovation *is* possible – that initiatives already exist and are emerging that, with support and facilitation, can reach a greater number of consumers; while other proposals, long sitting on the sidelines, demand pragmatic engagement and genuine community debate.

In short, this Report's aim is to start to bridge the gap between the majority of Australians and the real and fundamental value of the law – reconnecting individuals with legal advice, and legal advice with individuals. Governments have long recognised the social imperative to build this bridge, while practitioners have a commercial imperative to see it constructed. Responsibility for reform, then, does not lie with one sector over another, but must be supported by government, the courts, professional associations and practitioners alike, in acknowledgment that change which is in the interests of consumers is, in fact, a win-win scenario for all.

# Scope, Limits and Methodology

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This Report by the Centre for Innovative Justice ('the CIJ') was commissioned by the Attorney-General's Department (Cth) as part of a suite of investigations into the affordability of the civil legal system. These investigations include the current and wide-ranging Inquiry by the Productivity Commission into Access to Justice Arrangements,<sup>1</sup> and are part of a broader, commendable effort by government in recent years to tackle wider questions of legal need across the community. They also reflect an acknowledgement that this area is comparatively under-scrutinized when contrasted with the publicly funded sphere.

At the other end of the spectrum, a substantial amount of the legal profession's attention has been consumed by market pressures which are sparking innovation in service delivery to the corporate sector. Rather than rehearse the comprehensive work occurring in these very different spheres, the purpose of this Report is to draw broadly on their lessons, and focus specifically on approaches which may benefit a less scrutinized sector of consumers caught in the middle.

In doing so the ambition of the CIJ's report is very much preliminary. This is in part because of a reasonably tight timeline of four months, necessarily limiting the scope of the CIJ's inquiry. Accordingly, the CIJ has confined its report to a high level scan of relevant literature – from government and non-government reports through to broadsheet and online media. The CIJ also conducted a series of consultations with a range of invited representatives from the private legal market and the wider justice system. A list of participants is at Appendix A.

The purpose of this approach was to identify a sample of current and emerging initiatives that should spark both further discussion and concentrated inquiry. These initiatives fall under broad themes, the first including those current developments which may increase certainty, transparency and choice, and which warrant a broader reach across areas of legal practice.

The second trend identified is that characterized by a greater emphasis on competition in the legal market, one which is currently apparent in the context of the UK.

The third is featured for brief comparative purposes only – a way of conceptualizing legal practice that has seen the market in Germany nominated as particularly affordable and accessible for consumers. Though such systemic restructure is unlikely in Australia, the CIJ believes this environment nevertheless offers a useful prompt for challenging assumptions about legal practice.

Many of these trends, of course, have emerged in combination, some reforms depending on the existence of others to be genuinely successful. Throughout the report, a sample of programs and/or law practices which exhibit one, or a number of innovations, are featured. This is done not as any form of endorsement but, rather, as demonstration that innovations *are* occurring. Equally, it is done as indication that information about innovation is publicly available – potentially offering more affordable services for clients and, arguably, an example for the rest of the profession.

Throughout, the terms 'law practice', 'practitioners' and 'consumers' are generally preferred, the latter to distinguish fee-paying clients from other parties or litigants, although these terms are also used where appropriate.

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<sup>1</sup> See Access to Justice Arrangements, Productivity Commission Issues Paper, September 2013 for Terms of Reference and scope of inquiry. At <http://www.pc.gov.au/projects/inquiry/access-justice>.

# Introduction and Context

## The Story So Far

For a great many in the Australian population, the prospect of seeking professional help to resolve a civil legal problem can be too costly to contemplate. In fact, many people perceive professional assistance in some areas of the law to be out of reach to all but those with either the greatest, or the least, economic resources.<sup>2</sup> Longstanding complaints directed at state and federal legal systems, meanwhile, have criticised them as unwieldy and inaccessible, with complexity, risk and delay all commonly accused of contributing to the law's prohibitive expense.<sup>3</sup>

Consecutive governments at all levels, of course, as well as leaders across courts, tribunals and the profession itself, have made concerted efforts to improve the affordability of the legal system. As in many developed countries, however, their understandable focus has been on those experiencing the most significant disadvantage and, within this category, those in the most acute legal need.<sup>4</sup> Although the subject of ongoing criticism because of fluctuating allocations and their inevitably finite nature, Australia's legal aid system and its companion network of independent Community Legal Centres ('CLCs') has become an indispensable part of the national legal landscape.

Beyond this, of course, governments have reformed legislative and procedural regimes to combat complexity.<sup>5</sup> They have merged jurisdictions and created statutory compensation schemes. They have commissioned reviews and worked for national reform.<sup>6</sup> They have encouraged pro bono work.<sup>7</sup> They have emphasised the value of *preventing* disputes and worked to better understand legal need.<sup>8</sup> Courts, too, have tried to decrease costs by improving the efficiency and flexibility of proceedings.<sup>9</sup>

In short, a range of initiatives over recent decades has strived to increase understanding of the legal need of Australians, as well as the system's capacity to meet it. Despite these efforts, those in low to moderate income brackets – described by some as the 'sandwiched class'<sup>10</sup> meaning neither rich nor poor, but sandwiched in the middle – are being increasingly left out of the market.

2 For example, a survey conducted by The Australia Institute found that 83% of respondents believed that 'only the very wealthy can afford to protect their legal rights', while only 43% said they 'could afford a good lawyer if they had a serious legal issue'. R Dennis, J Fear and E Millane, 'Justice for all: Giving Australians greater access to the legal system', The Australia Institute, Institute Paper No. 8, March 2012, ISSN 1836-8948, p 22. At <http://www.tai.org.au/node/1831> (viewed 18 August 2013).

3 The judiciary are often the system's harshest critics, with heads of jurisdictions frequently identifying problems with a system that, in the words of The Hon John Doyle, has 'strangled itself'. See 'Commercial Litigation and the Adversarial System – Time to Move On', The Hon J Doyle, AC QC, 9 September 2013, p 14; and 'Managing Change in the Justice System', The Hon W Martin AC, Chief Justice of Western Australia, 18<sup>th</sup> AJJA Oration, 14 September 2012.

4 For example, Victoria Legal Aid focuses on people who cannot afford a private lawyer, have an intellectual disability or mental illness, are experiencing or are at risk of homelessness, children and young people, Indigenous Australians and those in custody or facing a serious penalty. Most Legal Aid Commissions offer a gradation of services prior to a formal grant of assistance and may also require a contribution from individuals on occasion. Victoria Legal Aid, 'Who is eligible for help', at <http://www.legalaid.vic.gov.au/get-legal-services-and-advice/who-is-eligible-for-help>.

5 This includes recent important restrictions on the extent and costs chargeable for discovery.

6 See Council of Australian Governments (COAG) draft Legal Profession National Law. At <http://www.ag.gov.au/Consultations/Pages/NationalLegalProfessionalReform.aspx> (viewed 15 September 2013).

7 The National Pro Bono Resource Centre was established to promote and support the provision of pro bono services by the profession. See <http://www.nationalprobono.org.au/home.asp>.

8 For example, the Access to Justice Taskforce of the Attorney-General's Department (Cth) put considerable effort into understanding legal need, noting that this allows policy makers to better target resources – identifying systemic problems and preventing them before they arise. *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009. At <http://www.ag.gov.au/LegalSystem/Documents/A%20Strategic%20Framework%20for%20Access%20to%20Justice%20in%20the%20Federal%20Civil%20Justice%20System.pdf> (viewed 25 July 2013).

9 These range from diversion programs at local court level to Judicial Mediation in the superior courts.

10 Goh Kian Huat, 'High litigation costs: do more to help "sandwiched class"' The Sunday Times, 13 February 2013. At <http://www.straitstimes.com/premium/forum-letters/story/high-litigation-costs-do-more-help-sandwiched-class-20130213> (viewed 31 July 2013).

In other words, people whose income is sufficient to exclude them from a grant of public or pro bono legal assistance, yet insufficient to fund a team of private lawyers, are missing out. This is, potentially, a significant proportion of the population. As the UK Civil Justice Council recently noted:

*It is a reality that those who cannot afford legal services and those for whom the state will not provide legal aid comprise the larger part of the population of England and Wales... The thing that keeps that reality below the surface is simply the hope or belief on the part of most people that they will not have a civil dispute...<sup>11</sup>*

This reality suggests that, as David Edmonds, Chairman of the UK Legal Services Board, has observed:

*...the biggest market failure in legal services is that, for a large proportion of the population, including many small businesses, there is no affordable supply.<sup>12</sup>*

This is especially so in areas of the law that have not benefited from widespread use of cost innovations, such as the speculative arrangements that are now a common feature in personal injury litigation; or the economies of scale and long-term professional relationships that drive competition in the corporate sector.

Many individuals with problems in areas of law such as family, employment, migration, consumer matters, personal injury outside statutory compensation schemes, or even matters of professional regulation, therefore, are struggling to afford private legal assistance. This is particularly the case in matters involving defendants in cases where the litigation does not involve a potential pool of funds on their part; in matters that do not involve a monetary dispute, such as guardianship disputes and matters of administrative law; or where the quantum in dispute is relatively small.<sup>13</sup> Small businesses, too – many of which involve a sole operator – experience similar problems when faced with small commercial disputes or business debt problems.<sup>14</sup>

This problem is attributable to a range of factors. At a global level, the recent financial crisis has resulted in decreases to legal aid budgets.<sup>15</sup> These pressures have been felt by individuals, too, with a growing number in the US, for example, declaring bankruptcy, fighting foreclosure, or in employment disputes without means for representation.<sup>16</sup>

11 UK Civil Justice Council, *Access to Justice for Litigants in Person (or self-represented litigants)*, A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice, November 2011, p 8. At [http://www.judiciary.gov.uk/JCO%2FDocuments%2FCJC%2FPublications%2FCJC+papers%2FCivil+Justice+Council+-+Report+on+Access+to+Justice+for+Litigants+in+Person+\(or+self-represented+lit](http://www.judiciary.gov.uk/JCO%2FDocuments%2FCJC%2FPublications%2FCJC+papers%2FCivil+Justice+Council+-+Report+on+Access+to+Justice+for+Litigants+in+Person+(or+self-represented+lit) (viewed 27 July 2013).

12 UK Legal Services Board, *A blueprint for reforming legal services regulation*, September 2013, p 5. At [http://www.legalservicesboard.org.uk/what\\_we\\_do/responses\\_to\\_consultations/pdf/a\\_blueprint\\_for\\_reforming\\_legal\\_services\\_regulation\\_lsb\\_09092013.pdf](http://www.legalservicesboard.org.uk/what_we_do/responses_to_consultations/pdf/a_blueprint_for_reforming_legal_services_regulation_lsb_09092013.pdf) (viewed 20 September 2013).

13 For example, practitioners in Singapore have identified a real need for 'professionals, managers, executives and technicians' who have genuine workplace issues, such as wrongful dismissal, but are unable to seek redress because the costs of a civil suit would far outweigh the benefits of winning the case. See Goh Kian Huat, above, note 10.

14 'Like Juggling 27 Chainsaws: understanding the experience of default judgment debtors in Victoria'. A report prepared for Consumer Law Action Centre by Dr Eve Bodsworth, Brotherhood of St Laurence, June 2013. At <http://www.consumeraction.org.au/wp-content/uploads/2013/07/Like-Juggling-27-Chainsaws-June-2013-eVersion.pdf> (viewed 26 July 2013). See also Professor P Pleasence & Dr N Balmer, *In Need of Advice? Findings of a Small business Legal Needs Benchmarking Survey*, Report to the Legal Services Board, April 2013; and comments by Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report*, December 2009, s 5.2-5.3. At <http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf> (viewed 25 September 2013).

15 These include widely protested cuts in the United Kingdom which are the subject of ongoing furor. See <http://www.theguardian.com/law/legal-aid> for some of the commentary. (viewed 10 October 2013).

16 N Koppel, 'More Strapped Litigants Skip Lawyers in Court', *Wall Street Journal*, 22 July 2010. At <http://online.wsj.com/news/articles/SB10001424052748704229004575371341507943822> (viewed 27 July 2013).

This phenomenon, however, predates the economic downturn (a factor which is, arguably, less relevant to Australia) and has been evidenced by the increase in litigants appearing before courts without legal representation.<sup>17</sup> Further to this, research indicates that many people are not always aware that the problem they are experiencing is legal in nature; or, alternatively, elect not to take action or engage legal help if, in fact, they are aware.<sup>18</sup> In part, this is as much to do with the fear of the unknown – of what legal costs *might* be, given so much uncertainty is attached; as well as perceptions of the legal market as designed only to service the ‘big end of town’.

These perceptions exist despite the fact that the majority of legal practitioners in Australia are sole or small practitioners. In fact, a 2011 Law Society Survey revealed that 83.4% of private law firms in Australia were sole practitioner firms, with a further 12.9% having 2 to 4 partners. In contrast, only 0.5% of firms had over 20 partners.<sup>19</sup> Obviously these large firms employ a greater number of solicitors, with just over one fifth (21.4%) working in large firms, another fifth (20.7%) working in small firms with 2 to 4 partners and over a third (37.5%) working as sole practitioners.<sup>20</sup>

Over half (57.2%) of these solicitors were practising within the capital city of their jurisdiction, over a quarter (26.7%) in a suburban location, with 12.8% working in a country or rural area.<sup>21</sup> Of the almost 60,000 solicitors throughout Australia, 73% were employed in private practice.<sup>22</sup>

In comparison, barristers account for a relatively small proportion of overall numbers in the legal profession.<sup>23</sup>

These figures mean that the scope of this Report is relevant to nearly three quarters of solicitors in Australia. Perhaps most strikingly, they also mean that the affordability of legal services for individual and small business clients (rather than the corporate, international or government clients serviced by large firms) is directly relevant to a vast majority of private practices.

Most of all they mean that supply in itself is not necessarily the problem and that the majority of practitioners do not necessarily share the marble foyers and panoramic views enjoyed by the small percentage of ‘mega’ firms. Rather, most lawyers are ordinary people, doing ordinary jobs, often helping people in need with little or no fanfare, particularly in the areas of criminal or welfare law. When almost half of the population still consider private legal services to be out of reach, however, clearly there are other factors at work.

17 This increase is being documented in Australia and overseas. See, for example, E Richardson, T Sourdin and N Wallace, *Self-Represented Litigants: Literature Review*, Australian Centre for Court and Justice System Innovation (ACCJSI), Monash University, at <http://www.law.monash.edu.au/centres/acji/projects/self-represented-litigants/self-rep-litigant-lit-review-accjsi-24-may-2012.pdf> (viewed 10 September 2013); UK Civil Justice Council above, note 11; and Judicial Council of California Task Force on Self-Represented Litigants, *Statewide Action Plan for Serving Self-Represented Litigants*, February 2004, at <http://www.courts.ca.gov/documents/selfreplitsrept.pdf> (viewed 28 July 2013).

18 C Coumarelos, D Macourt, J People, H M McDonald, Zhigang Wei, R Iriana & S Ramsey, The Legal Australia-Wide Survey (LAW Survey) [http://www.lawfoundation.net.au/ljf/site/templates/LAW\\_AUS/\\$file/LAW\\_Survey\\_Australia.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/LAW_Survey_Australia.pdf) (viewed 27 July 2013). Similar trends have been noted in the United Kingdom, see UK Legal Services Board above, note 12, p 16.

19 Urbis, 2011 *Law Society National Profile* (July 2012), p 14. At <http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/640216.pdf> (viewed 4 October 2013).

20 Above, note 19.

21 Above, note 19, p 17.

22 Above, note 20, p 12.

23 In a survey conducted by the Australian Bureau of Statistics in 2007-2008, barristers accounted for only 5.2% of the Australian legal profession. At <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/8667.0Main%20Features32007-08?opendocument&tabname=Summary&prodno=8667.0&issue=2007-08&num=&view=> (viewed 4 October 2013).

# The Fundamental Problem

What, then, is the underlying contributor to this problem? Clearly, competing demands on the taxpayer's purse will always limit legal aid and CLC budgets, while pro bono services, themselves limited, are often confined to clients experiencing acute disadvantage; cases deemed to involve an element of broader public interest; or to organisational clients, rather than to individuals caught in more standard civil disputes. Procedural reform can only go so far to stem costs, while changes to court fees, too, have been found to make comparatively little difference to overall affordability.<sup>24</sup>

In other words, though critical to addressing legal need, legal assistance funding, pro bono services and legislative reforms can never entirely mitigate the fact that private legal representation is perceived as too expensive for the majority of people to afford. This is despite the fact that little information is available about the actual costs of legal representation, and that multiple factors contribute to their accumulation.<sup>25</sup> Though a great deal of work has gone into streamlining processes that contribute to these costs, meaningful data is difficult to come by, in part because of the variability of legal proceedings, while requirements around costs disclosure only reveal a broad range within which clients might be charged and how, rather than the likely cost or previous cost of comparable matters.<sup>26</sup>

Certainly, some information is available, such as estimates from the Federal Court that average legal fees for an applicant in that jurisdiction (a relatively efficient one) exceed \$62,000,<sup>27</sup> while the former Chief Justice of South Australia recently reported that an average two day commercial case in the SA Supreme Court would cost at least \$150,000 on each side.<sup>28</sup> Equally, the significant costs of discovery in civil litigation are reasonably well documented.<sup>29</sup> What is more widely known, of course, are the hourly rates charged by high end solicitors, many partners in large firms charging upwards of \$800 per hour, while a highly experienced barrister such as Queen's or Senior Counsel may charge \$10,000 a day or more for an appearance in court.<sup>30</sup>

24 This was a finding by the Senate Legal and Constitutional References Committee in their June 2013 Report, *Impact of Federal Court Fee Increases Since 2010 on Access to Justice in Australia*, p 41. At [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/courtfees/report/~media/wopapub/senate/committee/legcon\\_ctte/completed\\_inquiries/2010-13/court\\_fees\\_report/report.ashx](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/courtfees/report/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2010-13/court_fees_report/report.ashx) (viewed 20 July 2013).

25 The relative paucity of research in this area is noted in a range of studies. See Dr R Sheen & Dr P Gregory, *Civil justice system framework and literature review Report*, Prepared for the Australian Government's Attorney-General's Department, 3 September 2012, p 66 and pp 70-71. At <http://www.ag.gov.au/LegalSystem/Documents/2012%20Report%20Civil%20Justice%20System%20Framework%20and%20Literature%20Review%20Report%20Shina%20Consulting.PDF> (viewed 20 July 2013). See also Legal Fees Review Panel, *Legal Costs in New South Wales*, December 2005, p 4-5. At [http://www.lpcldr.lawlink.nsw.gov.au/agdbasev7wr/lpcldr/documents/pdf/final\\_costs\\_paper\\_and\\_recommendations\\_summary.pdf](http://www.lpcldr.lawlink.nsw.gov.au/agdbasev7wr/lpcldr/documents/pdf/final_costs_paper_and_recommendations_summary.pdf) (viewed 8 October 2013).

26 See, for example, *Legal Profession Act 2006* (ACT) section 269.

27 Strategic Framework, note 8, p 24.

28 Doyle, note 3, p 8.

29 For example, the Victorian Department of Justice estimated that recent amendments to Victorian court rules to narrow the test for discovery would result in costs savings of \$67.5 million per year. Department of Justice (Victoria), *Reducing the Cost of Discovery, Regulatory Change Measurement Report*, January 2012. At [http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/DOJ-CostofDiscoveryRCMfinalreport/\\$File/DOJ%20-%20Cost%20of%20Discovery%20RCM%20final%20report.pdf](http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/DOJ-CostofDiscoveryRCMfinalreport/$File/DOJ%20-%20Cost%20of%20Discovery%20RCM%20final%20report.pdf) (viewed 4 October 2013).

30 In particular, the Australian Bureau of Statistics indicates that, though amounting to only 17% of the Bar, Counsel at this senior level earn 36.1% of all Barrister income. Almost a third of this is from commercial law. ABS, note 23.

Meanwhile, despite the commendable – and often unheralded – efforts of many criminal practitioners, legal fees in criminal jurisdictions operate under comparatively little scrutiny or regulation.<sup>31</sup> Although not the direct focus of this Report, this is a subject the CIJ believes worthy of separate and immediate consideration.

Regardless of the jurisdiction, however, members of the judiciary have long decried the existence of excessive costs, observing on numerous occasions that they belie the principle of proportionality well established as fundamental to the rule of law.<sup>32</sup> Further, costs continue to feature as one of the most common sources of complaints to many Legal Services Commissions.<sup>33</sup>

A range of factors has been traditionally attributed to the intractable nature and associated expense of the legal environment. These include:

- the labour intensive nature of much legal work due to the growing complexity of the law
- the inherently unpredictable nature of the litigation process and common law system alike
- an adversarial system that encourages a ‘warrior mentality’<sup>34</sup>
- the risk of adverse costs orders in litigation
- a progressive move away from the more standard use of scales of costs
- Australia’s comparatively insular legal market<sup>35</sup>
- the lack of national uniformity
- a comparative lack of awareness amongst individual or small business clients
- costing methods that continue to be based on rates x people x time
- the culture around legal practice that presents exclusive offices and expensive fees as commensurate to the expertise on offer
- the costs that accumulate as a result of work duplicated by solicitors and barristers
- the relative dearth of data and research about the actual cost of legal services.

As mentioned earlier, this latter barrier is well recognised,<sup>36</sup> and is one of the challenges that the current inquiry by the Productivity Commission has been established to address.

Equally, ‘the tyranny of the billable hour’ has also long been acknowledged, criticised by an increasing number within and outside the profession as discouraging efficiency and collaboration; encouraging procrastination and mediocrity; preventing any concerted investment in other approaches; and demoralising legal practitioners.<sup>37</sup>

31 The CIJ was advised during the course of consultations that some less scrupulous practitioners were charging \$5,000 for a simple first offence drink driving plea, for example, when the certainty of the law in this area would see the client receive the same result unrepresented.

32 See, for example, Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (HMSO, 1996). Cited in Australian Law Reform Commission, *Managing Discovery: Discovery of Documents in Federal Courts* (ALRC Report 115), 2.66. At [http://www.alrc.gov.au/publications/2-framework-reform/principles-reform#\\_ftnref87](http://www.alrc.gov.au/publications/2-framework-reform/principles-reform#_ftnref87) (viewed 7 August 2013). See also Chief Justice of NSW JJ Spigelman, ‘Access to Justice and Access to Lawyers’, Address to the 35<sup>th</sup> Australian Legal Convention, 24 March 2007, p 8. At [http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/spigelman\\_speeches\\_2007.pdf](http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/spigelman_speeches_2007.pdf) (viewed 8 August 2013).

33 See Victorian Legal Services Commissioner, Complaints Data, at <http://www.lsc.vic.gov.au/complaints/complaints-data/> (viewed 11 August 2013); and Annual Report 2011-2012, The Office of the Legal Services Commissioner, NSW, Chapter 2, p 14. At [http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/2011\\_2012\\_annrep.pdf](http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/2011_2012_annrep.pdf) (viewed 8 October 2013).

34 Justice LT Olsson, ‘Combating the Warrior Mentality’ in C Sampford, S Blencowe and S Conlin (eds) *Educating Lawyers for a Less Adversarial System* (Federation Press, 1999) 2 at 3, cited in A Marfording with A Eyland, *Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany*, p 15. At <http://ssrn.com/abstract=1641554>, (viewed 27 August 2013).

35 Hon Michael Kirby AC CMG, ‘Efficiency and cost in different legal cultures – relevance for civil litigation and ADR’ (2011) 1 *Journal of Civil Litigation and Practice*, p 20.

36 See also Marfording, note 34, p 38-39.

37 I Campbell and S Charlesworth ‘Salaried lawyers and billable hours: a new perspective from the sociology of work’, *International Journal of the Legal Profession*, 19:1, 89-122; and S Harper, ‘The Tyranny of the Billable Hour’, *New York Times*, 28 March 2013. At [http://www.nytimes.com/2013/03/29/opinion/the-case-against-the-law-firm-billable-hour.html?\\_r=0](http://www.nytimes.com/2013/03/29/opinion/the-case-against-the-law-firm-billable-hour.html?_r=0) (viewed 23 August 2013).

Despite these condemnations, and claims that the ‘billable hour is dead,’ commentators suggest that it endures because there is little incentive for decision makers to dispense with it.<sup>38</sup> This is reflected in a recent survey of law firms in the US which noted that, while firms are experiencing a decreased demand for their services, as well as growing pressures of competition from non-legal service providers, there is little will to reform beyond tinkering at the edges.<sup>39</sup> Reports suggest that the law is slow to innovate when compared with other professions,<sup>40</sup> while one roundtable participant remarked: ‘the profession is still squeezing all it can out of the traditional model.’<sup>41</sup>

The adversarial culture of law firms has also received much criticism, the now notorious scandal involving emails between attorneys at international firm DLA Piper that urged colleagues to ‘churn that bill’ being an extreme illustration of what many in the profession had understood for years – that sometimes, the other side is not the only party seen as the opponent in a legal proceeding.<sup>42</sup>

Certainly, it is often the conventions of legal practice itself that can inhibit the development of genuine alternatives, one commentator describing traditional work patterns in law firms as:

*Partners with little management training deploying expensive associates in a haphazard manner against ill-defined tasks within an incentive structure that motivates waste and anti-client behaviour...*<sup>43</sup>

Many in the profession would rightly protest that this model is changing. Certainly, the pressures of the global financial crisis have seen the demise, to an extent, of what has been described as ‘BigLaw’,<sup>44</sup> the economic downturn forcing top tier firms to improve operational efficiencies,<sup>45</sup> and, increasingly, to move to more competitive fee structures.<sup>46</sup> Further, the emergence of ‘legal outsource processors’, as well as a workforce seeking better work/life balance, has prompted many firms to embrace new ways of working.

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- 38 John Chisholm, commentator and costs consultant in this area notes that, despite the increasing number of alternatives being offered, these alternatives continue to be based on and prop up this time-based model. ‘The Billable Hour is Dead – Sort of’, 20 May 2013. At <http://www.verasage.com/blog/the-billable-hour-is-dead-sort-of/> (viewed 28 July 2013). See also D Mandell, ‘What will be the fate of the billable hour?’ *The Lawyer*, 25 April 2013, At <http://www.thelawyer.com/analysis/the-lawyer-management/what-will-be-the-fate-of-the-billable-hour/3004207.article> (viewed 18 October 2013).
- 39 TS Clay, *Law Firms in Transition: Altman Weil Flash Survey*, May 2013, p ii. At [http://www.altmanweil.com/dir\\_docs/resource/2d831a80-8156-4947-9f0f-1d97eec632a5\\_document.pdf](http://www.altmanweil.com/dir_docs/resource/2d831a80-8156-4947-9f0f-1d97eec632a5_document.pdf) (viewed 2 August 2013).
- 40 S Roper, C Hales, J Bryson & J Love, *Measuring sectoral innovation capability in nine areas of the UK economy*. Report for NESTA Innovation Index project. November 2009, p 5. At <http://www.nesta.org.uk/library/documents/measuring-sectoral-innovation.pdf> (viewed 14 October 2013).
- 41 Roundtable participant, Tuesday 24 September, 2013.
- 42 M Neil, ‘DLA Piper settles fee dispute that saw ‘churn that bill, baby!’ email brought to light’, *ABA Journal*, 18 April 2013. At [http://www.abajournal.com/news/article/dla\\_piper\\_settles\\_fee\\_dispute\\_case\\_that\\_brought\\_churn\\_that\\_bill\\_baby\\_email/](http://www.abajournal.com/news/article/dla_piper_settles_fee_dispute_case_that_brought_churn_that_bill_baby_email/) (viewed 18 August 2013). See also J Grimley, ‘Why the billable hour is not the issue: How law firms can become their clients business allies, not their adversaries’, *International Business Development*, 29 March 2013. At <http://internationalbusinessdevelopmentblog.com/2013/03/29/why-the-billable-hour-is-not-the-issue-how-law-firms-can-become-their-clients-business-allies-not-their-adversaries/> (viewed 23 August 2013).
- 43 M Harris, ‘Law Firms and Overcharging: The System Itself is Rotten’, *Forbes Leadership Forum*, 4 March 2013. At <http://www.forbes.com/sites/forbesleadershipforum/2013/04/03/law-firms-and-overcharging-the-system-itself-is-rotten/> (viewed 23 August 2013).
- 44 See, for example, G Beaton, ‘The Last Days of the BigLaw Model’, *The Global Legal Post*, 20 September 2013. At <http://www.globallegalpost.com/blogs/global-view/the-last-days-of-the-biglaw-model-70515817/#.Ulo6n9y4Yic> (viewed 27 September 2013).
- 45 C Merritt, ‘Six Sigma is on the way’, *The Australian*, Friday 28 June 2013, p 30, describes how models of operational efficiency that were born in the manufacturing context are being increasingly employed in large corporate firms. Meanwhile, the same edition notes that all but a handful of Australia’s largest law firms are cutting their legal workforce, while the growth is occurring in mid-tier and ‘niche’ firms. C Merritt, ‘Top firms trim fat as mid-tier beefs up’, *The Australian*, Friday, 28 June 2013.
- 46 Some firms have engaged consultants to help them completely restructure their fee arrangements and move towards putting value on ‘output’, meaning results for clients, rather than ‘input’, meaning time spent on a file. See, for example, Harwood Andrews, at [http://www.harwoodandrews.com.au/about-us\\_client-information.aspx](http://www.harwoodandrews.com.au/about-us_client-information.aspx) (viewed 2 August 2013).

This means that, in certain circumstances, innovations have emerged to increase access to legal redress and to respond to consumer expectations. Outside the important realm of pro bono work, however, the majority remain confined either to specific areas of clientele, or specific areas of the law.<sup>47</sup> This is a consequence of market forces – with ‘sophisticated’ or repeat institutional players more capable of demanding competitive practice from their lawyers than uninitiated individual claimants. It is also a consequence of certain areas of the law lending themselves more easily to the manageable assumption of risk by practitioners; or offering a resource pool from which costs may be recovered at the conclusion of proceedings.

All of this means that, while it may be possible for some in the ‘sandwiched class’ to meet their legal need in theory, too often the reality involves an unacceptable financial cost. Sometimes this means that even successful disputants are left with little but vindication once they have settled their legal bills, which cannot reasonably qualify as genuine access to justice when what most parties are looking for is something fairly simple. In fact, it is arguable that the needs of *any* litigant at the outset of their legal problem mirror those of the self-represented litigant, who, as the Civil Justice Council of the United Kingdom identified, have minimum needs of:

- Information or intervention that helps identify the nature and merits of the issue
- Information or intervention that helps to identify the best means of resolution
- Good early advice on merits and on litigation risks
- Help for the more difficult and complex matters
- Clarity about what to do and how to do it at all stages of any court process
- Early and continuing effective judicial case management.<sup>48</sup>

Incentive must be found, then, for law practices to increase affordability for those individual and small business clients who, without a decrease in costs, may walk away from the market and justice system altogether. What is surprising is that – though leaders and innovators are developing alternatives – overall, little has been done by the broader profession to re-engage this sector of potential legal service users, or at least in a way that is readily identifiable by consumers.

Rather than decry the willingness of the private legal market to embrace change, however, the task is to acknowledge that the Australian legal profession is, in fact, highly capable of innovation: that many new practices are occurring, both in our courts and in the private market which, if applied more widely, can make a difference to a broader reach of clientele. Equally, there are ways of conceiving and offering legal services which have, until recently, been inhibited perhaps more by convention than by necessity.

This task must occur, of course, within a framework that ensures that options *increase* access to justice, rather than simply offer a second-rate model to those who cannot afford the real thing. Identifying potential innovation need not mean a dismantling of valuable protections or a disregard for individual rights. Nor should it mean discounting the role of independent and expert legal advice, or of formal legal mechanisms in providing authoritative statements of the law.<sup>49</sup>

Rather, a strategic approach to how legal expertise may best be employed is needed – an analysis of when and where legal advice is most valuable and where other approaches are more appropriate; of which rules of practice are too narrow and which are necessary; of how potential costs may be both identified and managed; and of whether squeezing the current model dry is really the most sustainable approach for consumers and suppliers alike.

Equally, the task demands that a bridge be built between the imperative of government to increase access to justice, and the objective of private legal practices to function as viable commercial operations. This Report is about starting to bring these areas of understanding together.

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47 Largely these are limited to transactional matters, such as conveyancing, or personal injury claims.

48 Civil Justice Council, note 11, p 29.

49 See, for example, observations by The Hon W Martin AC, note 3.

# 1. Certainty and Choice for Consumers

## 1.1 Increasing Overall Transparency

Some of the most strident critics of conventional costing regimes come from within the profession itself, with many concerned that existing models remain based on a time x rate x people model, rather than an estimation of the value to the client.<sup>50</sup>

Further, though legal practice rules in Australian jurisdictions allow for a huge breadth of flexibility in the way in which practitioners can charge – from time-based models to fixed and capped fees, through to event-based fee structures and phased payments<sup>51</sup> – a common complaint by consumers and commentators alike is the lack of predictability and transparency that surrounds these costs. Despite stringent requirements in legal profession regulation for cost disclosure by practitioners, the traditional billable hour model can mask the work that is actually undertaken, its six-minute units an unrealistic reflection of the way in which practitioners are deployed.

Meanwhile, separate – and often inflated – figures charged for discovery and disbursements have long been criticised, with recommendations that practices be prohibited from profiting from them.<sup>52</sup> Equally, alternative arrangements can be just as vulnerable to a lack of transparency if the price of the service does not correlate in the client's mind with the value that they are receiving.<sup>53</sup>

Further to this, no source of consolidated information exists for legal consumers regarding what or how firms charge – even in a generic or de-identified form. Accordingly, consumers have almost no way of comparing like services with like, of knowing whether there are alternate charging models on offer, or of ascertaining whether they have received or been quoted value for money. This contributes to the fear and uncertainty around costs that one practitioner consulted by the CIJ has suggested is as much of a problem associated with legal costs as the final figure itself.

Some of these challenges have been recognised by governments in their efforts to develop a National Legal Profession. In fact, the Reform Taskforce recommended that the proposed National Law impose an obligation on practitioners to charge clients no more than fair and reasonable costs. In particular they must be 'proportionate and reasonable in amount' with regard to whether they reasonably reflect such things as the level of skill, experience, specialisation and seniority of the lawyers concerned, the complexity of the issue, labour and responsibility involved, the urgency of the matter, time spent and quality of the work.<sup>54</sup>

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<sup>50</sup> See John Chisholm, note 38.

<sup>51</sup> While statutory scales of costs exist in a variety of jurisdictions (the most significant exception being the absence of any separate scale of costs specifically applicable to criminal proceedings), in Australia these are generally relied upon only in the absence of a Costs Agreement signed upon a practitioner being formally engaged by the client.

<sup>52</sup> See Legal Fees Review Panel, note 25, p 63. See also R Burcher, 'Should we Charge for Paperclips?' [www.validatum.com/blog/what-do-paperclips-tomato-sauce-have-in-common](http://www.validatum.com/blog/what-do-paperclips-tomato-sauce-have-in-common) 10 April, 2012. See also Victorian Law Reform Commission, *Civil Justice Review*, 2008, pp 683-4. At <http://www.lawreform.vic.gov.au/sites/default/files/VLRC%2BCivil%2BJustice%2BReview%2B-%2BReport.pdf> (viewed 10 August 2013).

<sup>53</sup> D Denis-Smith, 'How to make legal services affordable: no need to kill the billable hour' Lexis Nexis. <http://www.lexislegalintelligence.co.uk/intelligence/blawg/2013/06/how-to-make-legal-services-affordable-no-need-to-kill-the-billable-hour/> (viewed 15 August 2013).

<sup>54</sup> See draft Legal Profession National Law, note 6, Division 2 of Part 4.3, s 4.3.4.

The question remains, however, whether these requirements do anything to challenge the inherent problems associated with time-based costing, or to improve consumer awareness of what costs are fair and reasonable. The CIJ therefore suggests that consumers be better informed about whether practitioners are complying with requirements such as those proposed by the Legal Profession National Law; or offering affordable fees regardless. Certainly, consumers would prefer to know at the outset, rather than *after* a costs dispute, whether costs were in fact fair and reasonable, with comparable examples available.<sup>55</sup>

As such, it is desirable that greater sources of information be developed for consumers. These sources should include data not just about what and how practitioners *can* charge, but what, in reality, they *do* charge – including, for example, what range of figures was considered reasonable by costs assessors in different types of matters in different areas of law. The inclusion of an opportunity for consumers to rate lawyer affordability may also be useful.

Beyond this, it is equally important to raise the profile of sole or small practitioners servicing their local communities, including any discounted work they may do. It may be, for example, that further incentives could be developed to encourage more small or sole practitioners to service suburban or regional locations, with greater transparency regarding the nature and cost of the work that they do. To this end, it is worth noting that the proposed Legal Profession National Law does not contain any restriction on advertising by qualified lawyers,<sup>56</sup> though presumably professional associations will continue to issue guidelines about what is considered appropriate.<sup>57</sup>

Finally, to assist in the increase of this transparency, it is important to remember that, while professional associations act in the interests of their members, as well as in the interests of the rule of law; and while Legal Service Commissions act as independent bodies to investigate concerns about the legal market, there is no person or body directly charged with considering, or advocating for, the interests of legal consumers.

In various contexts, of course, a range of proposals has been made to develop greater, broad-based oversight of costs arrangements. This includes the establishment of an independent Costs Council, which would have an ongoing role in monitoring costs reforms, and proposing further reform after appropriate research and consultation.<sup>58</sup> Proposals such as this have yet to be adopted, perhaps because various forums for regulating costs or setting costs policy, albeit with different functions, already exist.

However, it is possible that something more pragmatic and consumer focussed may be achievable. Though the CIJ does not consider a statutory or Governor-in-Council appointment necessary, it may be that the establishment of a Legal Consumer Advocate – potentially within the regulators of the new National Legal Profession, or in partnership with the Australian Consumers Association – would provide the necessary focus to drive this increase in transparency across the market.

The CIJ therefore urges all professional associations to work with their respective Legal Service Commissioners or equivalent bodies to consider how these greater sources of information may be developed. As well as increasing consumer confidence and awareness of the range of costs that can be realistically charged across different areas of law, these sources of information should also incorporate information about the availability of the various other innovative approaches that will be highlighted throughout this Report.

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55 The Hon J Doyle AC QC has also called for the clear identification of 'fair figures' for costs, note 3, p 9.

56 See draft Legal Profession National Law, note 6.

57 The Law Institute of Victoria, for example, has produced guidelines which set out those advertisements that may be considered undesirable.

58 Victorian Law Reform Commission note 52, p 629, p 677-8, p 692. Similar recommendations were made in the United Kingdom in Lord Justice Jackson's review but were ultimately not adopted by government. Written Ministerial Statement by Helen Grant, Parliamentary Under-Secretary of State, Ministry of Justice, 30 October 2012. At [http://www.parliament.uk/documents/commons-vote-office/October\\_2012/30-10-12/7.Justice-AdvisoryCommitteeCivilCosts.pdf](http://www.parliament.uk/documents/commons-vote-office/October_2012/30-10-12/7.Justice-AdvisoryCommitteeCivilCosts.pdf) (viewed 12 October 2013).

## 1.2 Increasing Price Certainty

Arguably, consumers can also be better prepared for the costs they will incur through the use of what have come to be known as Alternative Fee Arrangements. An increasing number of these 'AFAs' are being offered as standard, at least in the corporate context.<sup>59</sup> In fact, a recent national survey of in-house lawyers describes AFAs as 'old news', noting that, while overall cost remains a concern for many corporate clients, price *certainty*, rather than the final amount, is in fact the most important consideration.<sup>60</sup>

### **No-win, No-fee/Speculative/Conditional Fee Arrangements**

Meanwhile, no-win no-fee, conditional or speculative costs arrangements are offered by an increasing number of firms to individual claimants, usually in the personal injury context. These arrangements enable parties to pursue claims from which they would likely otherwise be precluded, by engaging solicitors on the basis that no legal fees will be charged if the claim is unsuccessful. Where successful, legal fees will be charged in addition to a 'success' or 'uplift' fee – currently limited across Australian jurisdictions to no more than 25% of the legal fees due.

Though speculative arrangements are now recognised as a standard feature of the Australian legal market, their use is prohibited in some international jurisdictions,<sup>61</sup> while the broader application they have enjoyed in others has been recently curtailed. Recently announced reform in the UK, for example, will mean that practitioners may still charge 'success fees', but these will now be limited to no more than a 25% uplift, instead of the previously permitted 100% uplift. Commentators differ in their assessment of the potential impact of these reforms.<sup>62</sup>

In the majority of Australian no-win, no-fee arrangements, of course, it should be noted that clients are still required to pay for disbursements throughout the course of the claim, including substantial costs for third-party experts, for example; as well as sometimes being required to take out a loan to fund the overall arrangement.

By comparison, what are known as 'percentage contingency fees' are currently prohibited in all Australian jurisdictions and were again rejected in the development of the National Legal Profession law.<sup>63</sup> This is because the concept of lawyers having a proportionate pecuniary interest in the outcome of litigation has been traditionally assumed to present a conflict of interest – risking the pursuit of unmeritorious litigation, for example, of ethical standards being undermined, or the value of settlements being driven up, with little incentive for early resolution. They have also been said to mask the actual work performed.

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59 Some observers suggest that, if approached properly, law firms can even increase their profits under these arrangements. C Cameron, 'Win-Win Alternative Fee Arrangements', *ABA Law Practice Magazine*. At [http://www.americanbar.org/publications/law\\_practice\\_magazine/2012/july-august/win-win-alternative-fee-arrangements.html](http://www.americanbar.org/publications/law_practice_magazine/2012/july-august/win-win-alternative-fee-arrangements.html) (viewed 6 August 2013).

60 Lawyers Weekly, Compass Report 2013; C Merritt, 'Challenge to time-charge firms', *The Australian*, Friday 26 April 2013.

61 Marfording, note 34, p 79.

62 A comparative lack of restrictions on personal injury claims meant that, while no-win no-fee arrangements were recognised as increasing access to justice, they were also criticised as encouraging an overly litigious environment. E Simon, 'End of No-Win, No-Fee Lawsuits', *Telegraph*, 29 March 2013 at <http://www.telegraph.co.uk/finance/personalfinance/consumertips/9959646/End-of-no-win-no-fee-lawsuits.html>

63 Draft Legal Profession National Law, note 6, s 4.3.14.

Increasingly, however, the terrain is shifting. The Victorian Law Reform Commission, for example, has called for reconsideration of the prohibition on percentage contingency fees, albeit with appropriate safeguards.<sup>64</sup> Meanwhile in the UK, 'Damages Based Agreements'<sup>65</sup> are now permitted subject to safeguards, following recommendations from a review by Lord Justice Jackson<sup>66</sup> – a step which has been supported, in particular, by class action law firms.<sup>67</sup> Arguments in favour of these arrangements include that, in fact, they offer greater certainty and that time-based models can produce fees which are out of all proportion to the matter in dispute.<sup>68</sup>

Restrictions on percentage contingency fees are currently being considered by the Productivity Commission. Overall, however, conditional fee structures remain a tool which can open the door to legal redress for many clients who may otherwise consider themselves excluded. The question for reformers, and for the profession, then, is whether their use can be made available across a wider spectrum of legal matters beyond personal injury matters, opening the door for a greater number of individual legal consumers.

### Shine Lawyers

This practice distinguishes itself by advertising no-win, no-fee arrangements as available to clients in all its areas of practice, which include personal injury, but also extend to coal seam gas claims, human rights, and environmental matters. The practice's website further emphasises that clients are not expected to pay up front for third party costs, nor to take out a loan to fund the litigation.<sup>69</sup>

It is interesting to consider what it is that limits the use of conditional fee arrangements across a wider range of areas for the majority of legal practices.<sup>70</sup> Obviously the decision to offer speculative fees involves taking on a significant element of risk, something which must be managed against either economies of scale, or an identifiable pool of funds from which fees may be expected to be drawn. Nevertheless, the CIJ believes that there is merit in investing in analysis to identify a wider range of legal matters that may adapt themselves to alternative fee arrangements, including no-win, no-fee arrangements.

### Fixed Fees

Other options available to an increasing number of clients in the corporate sector are that of fixed, capped, or event-based legal fees. This is where a price for a legal service is either set by the practice as standard, agreed between the lawyer and the client at the outset of the engagement, calculated at an hourly rate but capped at a certain level, or offered on the basis of particular stages or 'events' in a claim.

This is, understandably, a less attractive option for practitioners when claims involve the uncertainty of litigation. Unsurprisingly, these arrangements tend to be offered more commonly in non-litigious matters. Equally, the CIJ's observation is that, beyond the purely corporate environment, price certainty is more likely to be offered in 'niche' or 'specialist' firms, rather than in general practice.

64 Victoria Law Reform Commission, note 58, p 684-686.

65 UK Ministry of Justice, Civil Justice Reforms. At <http://www.justice.gov.uk/civil-justice-reforms/main-changes> (viewed 8 October 2013).

66 Lord Justice Jackson, note 14, Chapter 12.

67 C Merritt, 'Contingency fees on the agenda as firms push for US-style billing', *The Australian*, 27 September 2013.

68 Victoria Law Reform Commission, note 58, p 684-686.

69 Shine Lawyers, <http://www.shine.com.au/service/no-win-no-fee-guarantee/>.

70 It should be noted that conditional costs agreements cannot usually apply to criminal or family law proceedings.

### **Kay & Hughes Entertainment Lawyers**

This practice services the arts and entertainment industry and has distinguished itself by offering fixed quotes for all services, with the exception of litigation. This can include drafting of contracts and intellectual property matters.<sup>71</sup>

In some areas of the law, however, price certainty is becoming more common. For example, in the criminal jurisdiction, fixed fees based on court events are becoming more widely used.<sup>72</sup> Meanwhile, in the civil arena, family law is an area that, like personal injury law, affects a significant proportion of consumers, frequently at one of the most vulnerable points in their lives. Some practices are therefore beginning to offer fixed fee services in their practice of family law. Matters are usually assessed to see whether they are relatively straightforward or too complicated to suit a fixed fee arrangement. Many fixed fee proposals then set out the work that is to be included (or excluded) in discrete stages and the fee that is to be paid for the completion of each stage.

### **Slater & Gordon**

This practice offers fixed fees in family law matters. Its website indicates that the practice's research suggests that people considering separation or divorce expect private legal assistance to cost between \$20,000 and \$50,000. It goes on to note that this is only likely in complicated matters, and suggests that, by offering fixed fees, the firm can reduce consumer anxiety.<sup>73</sup>

### **Gibsons Family Law**

This family law practice also offers fixed fees, and quotes may include all stages of the matter, or only the earlier stages if it is anticipated that the matter will settle early.<sup>74</sup>

These arrangements clearly offer an element of price certainty for clients at a time when they need it most. Arguably, and in contrast to billable hour arrangements, they also encourage efficiency on the part of practitioners, as well as potentially a more expeditious and early resolution of the dispute – a primary objective of any client.

Proponents of price certainty advocate for a move towards value-based billing, something which requires fees to be determined on the value given to the client, with a written agreement to cover billing schedules and such things as who will work on the matter (and in what capacity). Value will depend on the effectiveness, efficiency, urgency, complexity and predictability of the work. In this way value billing is said to encourage negotiations between practitioners and clients, and to focus on 'results, efficiency and reward, not hours billed'.<sup>75</sup>

A significant barrier for the more widespread adoption of fixed fees, of course, is an overall legal system that is structured around time-based calculation. It is difficult to adjust only one component of legal costing to be based on fixed costs when other components, such as the recovery of party-party costs, are often still calculated according to time.

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71 At <http://www.kayandhughes.com/fees> (viewed 2 August 2013). See also C Merritt, 'Duo Embraces the Art of Certainty', *The Australian*, 26 April 2013.

72 Roundtable Consultation, Tuesday 24 September, 2013.

73 At <http://www.slatergordon.com.au/areas-of-practice/victoria/general-legal-services/family-law/fixed-fees#10> (viewed 8 September 2013).

74 At <http://www.gibsonssolicitors.com.au/FamilyLaw/family-laws-fixedfees.php> (viewed 8 September 2013).

75 Steve Mark, NSW Legal Services Commissioner, quoted in Victoria Law Reform Commission, note 58, p 648-9.

While the focus of this Report is on solicitor-client costs, it is important to note that potential imbalance has been identified as a particular problem in respect of fixed or capped recoverable fees.<sup>76</sup> For example, as the Victorian Law Reform Commission has observed:

*If wealthier parties are allowed to cause delay or use non standard procedures, their position might, if anything, be strengthened by fixed costs, because they could put their opponents to extra costs that they would in future be unable to recover, even if they eventually won the case....<sup>77</sup>*

The question remains, then, how the benefits of certainty – whether through no-win, no-fee, fixed fee or value-based arrangements – can reach clients more effectively, and in a wider range of legal matters. The CIJ believes that, overall, the profession is beginning to respond to need in the market but may need more support to take this response further, both by the system facilitating, rather than undermining the use of fixed fees and through business development initiatives.

Given that employment law has been identified in consultations, and reported by the Fair Work Commission,<sup>78</sup> as an increasing sphere of unmet legal need, this may offer an opportunity for price certainty to expand. Other areas experiencing an increase in self-representation may hold similar potential, as might unopposed guardianship and administration applications, probate applications, debt recovery or powers of attorney matters, all suggestions which emerged from consultations.

Work is needed to support practices in determining whether offering price certainty in various forms is viable in different areas of law. This could occur in collaboration between professional associations, potentially with the assistance of an external, co-ordinating body, and with the financial support of government – though private practices themselves must be ready to become involved, recognising the potential market edge. This proposal is linked to later suggestions in this Report, which also urge support for private practices to develop a more competitive and efficient business model.

Equally, consumers need to become more aware that alternative fee arrangements are an option, and be able to identify easily those practices that offer them. Again, collaboration between professional associations, Legal Services Commissioners and equivalent bodies may facilitate this, building on proposals regarding transparency to offer an easily accessible source of information to consumers seeking certainty of fees.

Meanwhile, entities that have a large legal spend and an interest in access to justice, such as governments, can foster a greater use of price certainty through their own legal arrangements, purchasing legal services on a fixed or ‘value’ basis to encourage the wider use of this approach.

In addition to the above proposals, separate work is needed to ensure that cost assessment mechanisms across jurisdictions do not undermine efforts to increase the availability of alternative fee arrangements. An example of a concern nominated during consultations includes Appeal Costs Boards insisting on information being provided in terms of billable hours, despite the relevant cost agreement being drafted in terms of fixed fees. Government may support regulators to see this work occur.

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76 For example, in respect of NSW provisions which set maximum costs which can be recovered in personal injury claims at, for plaintiffs, 20% of the amount sought to be recovered, or \$10,000, whichever is the greater. While the provisions also set the costs supposed to be chargeable by practitioners, a complying costs agreement can overcome this requirement. This in effect means that costs recoverable are potentially significantly less than the costs chargeable by practitioners, creating a potential gap.

77 Victoria Law Reform Commission, note 58, p 662-3.

78 Fair Work Commission, Future Directions Progress Report, May 2013, p 5. At <http://www.fwc.gov.au/documents/resources/FD-BreakingDownBarriers-May-2013.pdf> (viewed 25 September 2013).

### 1.3 Reducing Overheads

As well as moving away from traditional models of charging for their services, many legal practitioners are finding new and more efficient ways of conducting their business behind the scenes. This is especially relevant to this Report, as a study in NSW in 2005 assessed overheads as consuming up to 69% of a sole practitioner's gross income.<sup>79</sup> These efficiencies are, in many cases, being passed on to clients, theoretically increasing access to the legal market, as well as contributing to greater satisfaction in its workforce. Again, the CIJ's observations are that these innovations are largely benefitting corporate clients.

One such trend, unsurprisingly, is in the increased use of technology – specifically, in the emergence of virtual legal practices. This is in addition, of course, to the many ways that technology facilitates access to court and government legal services which, though invaluable, are outside the scope of this Report.<sup>80</sup>

Virtual practices are not to be confused with an expanding market of online non-legal service providers who prepare legal documents for a discounted fee, or provide do-it-yourself-kits.<sup>81</sup> Rather, virtual law firms are practices which have opted to invest in secure technology, instead of expensive offices and, as a result, have a predominantly online presence, with practitioners working largely from home, or as temporary in-house counsel. Virtual assistants are used for administrative support, while many practices hire dedicated meeting spaces – available specifically for use and shared by a range of virtual businesses.

Legal-specific online practice management tools, meanwhile, have been developed and are expanding.<sup>82</sup> With this technology, practices can operate on a primarily mobile basis, while document systems can, in theory, be more securely managed. Benefits of practising this way can be reflected in significantly reduced overheads and by collaboration between practitioners, as well as increased flexibility for lawyers and clients alike, who need not take time away from their own employment to attend appointments, but can ask and answer questions online after hours.

#### Bespoke Law

This virtual practice predominantly services the business sector and provides a network of lawyers to offer a 'scalable service', usually in-house, according to the client's needs. Bespoke offers flexible, fixed, and value-based pricing and makes a point of dispensing with the billable hour.<sup>83</sup>

<sup>79</sup> Legal Fees Review Panel, note 25, p 5.

<sup>80</sup> Some of these benefits are listed in a recent report from the Australian Government, *Harnessing the benefits of technology to improve access to justice*. At [http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/harnessing\\_the\\_power\\_of\\_technology\\_analysis\\_paper.pdf](http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/harnessing_the_power_of_technology_analysis_paper.pdf) (viewed 10 October 2013).

<sup>81</sup> For example, AussieLegal is an online provider of paralegal and do-it-yourself legal kits. At <http://www.aussielegal.com.au/> (viewed 8 August 2013). Many consumers are happy to use paralegal or non-qualified support for the preparation of basic documents such as standard wills, for example.

<sup>82</sup> For example, Clio Online Legal Practice Management Tool. At <http://www.goclio.com/> (viewed 8 August 2013). See also *Direct Law's Virtual Law Firm Platform*, which claims to help firms compete with non-legal service providers. The platform is built on a secure, password-protected client portal, which includes access to online libraries and enables clients to prepare documents online, pay invoices online, store documents and communications virtually, with 24 hour password protected access. At <http://www.directlaw.com/> (viewed 8 August 2013).

<sup>83</sup> At <http://www.bespokelaw.com/Home> (viewed 6 August 2013).

### **Plexus**

This online network of 280 lawyers was founded by a barrister and consultant and describes its employees as 'law firm refugees'. Lawyers often work from home, or in-house at clients' premises. Plexus claims it charges 70% less than many law firms.<sup>84</sup>

There are also examples, particularly internationally, of small practitioners running profitable virtual firms. Observers suggest that the success of these enterprises depends on choosing or creating a niche, ensuring that overheads remain low (for example, avoiding renting office space), effective marketing, secure technology, and making fees sufficiently predictable and transparent for an online clientele more likely to want to know upfront what they will be paying.<sup>85</sup>

### **Stephanie Kimbro**

This US practitioner specialises in estate planning and small business, but also provides online information for other sole/small practitioners considering establishing a virtual practice. She emphasises the need for high quality and secure technology.<sup>86</sup>

Practices servicing both individual and small business clients can offer particular flexibility for lawyers, as well as for clients.

### **Scott-Moncrieff & Associates (scomo)**

This UK practice works from a small office, with an online network of over 50 lawyers providing services to private and legally aided clients in areas including human rights, mental health law, prison law and child protection. Lawyers are not employees, but consultants who can nominate how much work they want to do through the firm and receive 70% of any fees charged.<sup>87</sup>

### **Lexxon Lawyers Online**

The primary focus of this Australian virtual practice appears to be the business sector, but it also offers consumer services. Its website explains that the practice offers different levels of service from which clients can choose and makes a point of compensating clients for hours spent learning by junior lawyers and of avoiding over-servicing by emphasising practical outcomes. As above, lawyers work from their own location for nominated hours.<sup>88</sup>

Generally, the only requirements for operating a virtual legal practice are admission to practice and the existence of a physical business address for the purposes of business name registration, copyrighting, website ownership and even incorporation, although it should be noted that bodies such as the Office of the Legal Services Commissioner, NSW, have developed specific guidelines which attach to the greater use of technology in the provision of legal services.<sup>89</sup>

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84 At <http://plx.com.au/> (viewed 6 August 2013). It should be noted that Plexus does not run litigations or advise on mergers and acquisitions.

85 R Rogers, Her Virtual Law Office, 2 September 2013. At <http://hervirtuallawoffice.com/> (viewed 8 September 2013).

86 Stephanie Kimbro advises that secure technology is essential, with password protected homepages allowing her clients to access their documents on a 24/7 basis. See generally S Kimbro, Virtual Law Office. At <http://virtuallawpractice.org/> (viewed 8 September 2013).

87 At <http://www.scomo.com/> (viewed 4 October 2013).

88 At <http://www.lexxon.com.au/> (viewed 15 September 2013).

89 Office of the Legal Services Commissioner, NSW, 'A Guide on Practice Issues: Cloud Computing'. At [http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/practice\\_guideline\\_cloud\\_computing\\_jan2013.pdf](http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/practice_guideline_cloud_computing_jan2013.pdf) (viewed 10 October 2013).

Beyond formal legal practice, of course, there are an emerging number of online mechanisms which enable potential clients to connect with legal representatives, albeit not directly. Some of these provide answers to legal questions online,<sup>90</sup> some act as sources of basic information about areas of law and relevant lawyers.<sup>91</sup> Others enable consumers to feed in information about their particular matter. 'Legal Reports' are then generated which can be referred to a network of legal practices or printed out for consumers to take away with the relevant information having been prepared for them.<sup>92</sup>

The quality and reliability of these sites presumably varies considerably, with little accountability, in the CIJ's view, in respect of the online question and answer sites. The CIJ believes that more consumer information is warranted about the differing implications of the level of service offered online and encourages the provision of greater consumer awareness in this area.

More recently, however, platforms that create an online 'legal marketplace' are emerging. These enable clients to 'post' their legal problem or job online, often nominate a maximum price and then have lawyers compete for the work. Established examples that exist in the US include:

#### **UpCounsel**

This platform is directed towards small businesses and 'start-ups', particularly in the technology and real estate industries. It also helps practices find part-time lawyers for large projects and has seen lawyers team up to create ad hoc firms to conduct work for particular clients.<sup>93</sup>

Promising examples have also recently emerged in the Australian environment. These distinguish themselves from other online legal referral and directory platforms by giving consumers the opportunity to compare and rate the legal services on offer.

#### **Easy Law**

Established in July 2013, EasyLaw identified a gap in online information about lawyers. Like the US platforms, lawyers from different practices sign up to be members and post a profile which clients can view. The platform then offers a simple Q&A service, as well as a service in which users post a specific job, for which member lawyers then quote. Prospective clients and lawyers can see all quotes given, encouraging competition. Clients provide a review of the lawyer's performance which is included in the lawyer's online profile, encouraging further competition.

The CIJ was advised that, in the first three months of operation, most clients have posted questions to do with migration, employment, family law and consumer law. Of additional note, the platform encourages small practitioners to accept pro bono work on a case by case basis – expanding the reach of pro bono work and contributing to these lawyers' profiles.<sup>94</sup>

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90 JustAnswer. At <http://www.justanswer.com/australian-law/> (viewed 10 August 2013).

91 FindLaw Australia. At <http://www.findlaw.com.au/> (viewed 10 August 2013).

92 Love Law Australia. At <http://www.lovelaw.com.au/> (viewed 10 August 2013).

93 UpCounsel. At <https://www.upcounsel.com/> (viewed 10 August 2013). See also RocketLawyer in the US and UK, which encourage ongoing membership, offer document preparation services, and links to and discounts with associated law practices. At <http://www.rocketlawyer.com/>; and <https://www.rocketlawyer.co.uk/> (viewed 11 October 2013).

94 At <https://www.easylaw.com.au/#!/aboutus> (viewed 16 September 2013); and Roundtable 24 September 2013.

### **LawyerSelect**

Launched in Western Australia in September 2013, LawyerSelect has indicated that it intends to expand to other parts of Australia. Clients anonymously post a brief description of their legal issue, lawyers submit brief proposals in response; clients then compare profiles and proposals and choose a lawyer. LawyerSelect enables virtual firms to be created via alliances between lawyers in different practices for particular jobs. The site is free for clients and after a three-month free trial costs \$500 per year per lawyer.<sup>95</sup>

### **RocketLegal**

RocketLegal is another Australian online legal marketplace that makes a point of emphasising the efficiency of posting a job and having a lawyer 'come to you', as well as the benefits, and potential savings, of getting a fixed price quote upfront.<sup>96</sup>

Online practice of this nature, with its relatively low overheads and direct client contact, represents a potential area for the expansion of more affordable legal services. In fact, given the leadership and support that professional associations already provide their members, the CIJ considers this to be a vital opportunity for these bodies, as well as the supporting legal infrastructure, to seize. Facilitation of well managed virtual practices can assist sole or small practitioners to develop vital experience, and increase access for consumers in certain areas.

As such, it would be beneficial to consider collaborations between legal educators and professional associations to encourage the inclusion of business skills in professional legal training programs; as well as to develop models of greater professional support for practitioners starting out. This could include government or professional association support for a virtual office space.

Other reforms which may support the operation of practices online include the examination of public liability insurance and whether the level of regulation should be targeted at the level of risk undertaken. This issue will be considered further in later sections of the Report.

In considering how the benefits of online practice – as well as other initiatives highlighted throughout this Report – might be extended to more clients, one option is to examine how more junior practitioners and recent graduates could be encouraged to seek sole or small practice experience.

In particular, the CIJ believes that there is merit in linking the current expanding number of law graduates with a potential increase in sole or small practitioners, albeit with appropriate support, mentoring and training. Such services could have a particular emphasis on providing affordable services for clients with modest means.

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95 At <http://www.shoestring.com.au/2013/09/first-ever-online-legal-marketplace-for-clients-to-select-lawyers/> (viewed 20 September 2013).

96 At <https://rocketlegal.com.au/#>; [https://rocketlegal.com.au/?doing\\_wp\\_cron=1381701624.2431459426879882812500](https://rocketlegal.com.au/?doing_wp_cron=1381701624.2431459426879882812500) (viewed 10 October 2013).

### Justice Bridge

This US initiative is in the running for an innovation prize and is an ‘incubator’ which supports law graduates to start small scale, low overhead practices to service clients with modest means. Law firm incubators are an emerging model in the US which provide mentors (drawn from Senior Partners for Justice, a network of senior, retired, and semi-retired lawyers and judges) and oversight to support law graduates in developing business skills and accumulating legal experience – designed to address the significant number of law graduates who are unable to find full time legal work.

Justice Bridge distinguishes itself from these models by designing its services to meet the needs of the increasing numbers of self-represented litigants in the US. Fees charged to clients are significantly less than standard legal fees.<sup>97</sup>

Rather than law students assuming that the career path to which they should aspire is a large firm, therefore, law students need to be exposed to the spectrum of opportunities that, while not necessarily offering high end salaries, may offer other benefits, including career satisfaction and breadth of experience. Public and community law are important examples, but another may be encouraging a sense of entrepreneurship as part of professional legal training.<sup>98</sup>

Finally, it is essential that consumers have increased information about the kinds of services that are being offered online. Legal Service Commissioners, and any Legal Consumer Advocate or equivalent proposed in this Report, should seek to improve consumer awareness not only of the fact that services are available, but of the differences in the types of services offered – distinguishing, for example, between the provision of qualified legal advice and pro forma documentation. These bodies should also consider whether increased monitoring of the quality of the services offered is warranted.

## 1.4 Increasing Sources of Funding

One strategy for enabling people of limited means to access the services of a private lawyer on a paid retainer is through funding assistance. Beyond the provision of legal aid, funding assistance may take a variety of forms, ranging from assistance to pay for disbursements only,<sup>99</sup> through to litigation funding for full legal representation in a contested litigious matter. Several initiatives and proposals in this category are discussed below.

### Limited Funding or Loan Schemes

These include schemes established by professional associations, some of which offer assistance for the payment of disbursements in civil law matters, or assistance for funding legal representation in civil law matters including commercial disputes, inheritance claims, or insurance contract disputes in return for a levy of the amount awarded where the matter is successful.

Generally applicants must satisfy a means and/or a merits test, with applicants permitted a ‘reasonable’ income and assets in order to qualify. Merits are generally assessed to take into account the prospects of success.

<sup>97</sup> Innovating Justice, ‘Scaling up the business of community lawyers’. At [http://www.innovatingjustice.com/innovations/justice-bridge?view\\_content=details](http://www.innovatingjustice.com/innovations/justice-bridge?view_content=details) (viewed 16 October 2013). See also Senior Partners for Justice <http://www.spfi.org/> (viewed 16 October 2013).

<sup>98</sup> See also P Weister, ‘Five Initiatives that legal education needs’, The New Normal: 5 Years of Legal Rebels, 26 September 2013. At [http://www.abajournal.com/legalrebels/article/five\\_initiatives\\_that\\_legal\\_education\\_needs/](http://www.abajournal.com/legalrebels/article/five_initiatives_that_legal_education_needs/) (viewed 30 September 2013).

<sup>99</sup> For example, Law Aid in Victoria pays for disbursements in certain matters where a client is being represented on a no-win, no-fee or pro bono basis. At <http://www.lawaid.com.au> (viewed 15 October 2013).

### South Australian Litigation Assistance Fund

This is a charitable trust established by the Law Society of South Australia which aims to assist plaintiffs, both individual and business, to proceed with civil litigation where they would otherwise be unable to. Types of matters with which the Fund may assist include inheritance claims, personal injury and professional negligence, but assistance does not extend to family law or de facto disputes. Applicants may have a family income of up to \$130,000 gross and assets 'of reasonable' value. Merits are considered by a panel of three senior practitioners. If successful, the Fund will pay 'solicitor/client costs' (not 'solicitor/own client' costs) on the scale appropriate to the jurisdiction. The Fund is made viable by way of a deduction of 15% of any monies awarded by the court or upon settlement of each case. In such instances, the Fund also receives reimbursement of the legal costs and disbursements already paid for it.<sup>100</sup>

### Legal Expenses Contribution Scheme

Other ideas proposed in policy circles include a government funded, income-contingent interest-free loan scheme akin to Australia's Higher Education Contribution Scheme.<sup>101</sup> A Legal Expenses Contribution Scheme, or 'LECS', would involve a person who did not qualify for legal aid applying for a loan if they were earning under the top-tax bracket and their case had a 'reasonable prospect of success'. The recipient would then repay the loan through a percentage of income over the period of the loan.

While co-contribution schemes already exist within some Legal Aid structures, with upfront and/or ongoing payments able to be made to contribute to the costs of representation, the LECS proposal would apply to a larger range of legal work and give people a longer period over which to repay.<sup>102</sup>

Proponents of the LECS scheme argue that it would discourage unfounded claims, but still allow claims with merit, providing greater access to justice for those who are currently excluded by the present legal aid system. Further work is needed in this area, with the Productivity Commission well placed to conduct this work during the course of its current inquiry.

### Private Litigation Funding Assistance

Private litigation funding involves a commercial entity contracting with potential litigants to pay litigation costs and accept the risk of adverse cost orders. If the case succeeds, the funder is paid a share of the proceeds, usually after reimbursement of costs.<sup>103</sup> Though initially contentious, the practice has gradually gained acceptance, both through a series of decisions by the High Court<sup>104</sup> and, most recently, in the *Corporations Amendment Regulations (No. 6) (Cth)*.<sup>105</sup>

100 In the alternative, the Disbursements Only Fund is available for court filing fees, expert report, witness fees and the like, although barrister's and solicitor's costs are excluded. If a DOF matter is successful, a Fund fee will be levied, being repayment of the disbursements paid by the Fund together with an uplift of 25% to 100%. If unsuccessful, the Fund will pay solicitor/client costs, but not party/party costs awarded against the assisted person. See Legal Services Commission of South Australia. At <http://www.lawhandbook.sa.gov.au/ch26s04s03.php> (viewed 25 August 2013).

101 See generally, The Australia Institute, note 2.

102 Existing co-contribution schemes generally require repayment within a year and often means people still have to liquidate, or place a caveat over their assets.

103 This payment is as agreed between the parties and is typically between one and two thirds of the proceeds, though has been known to be 75% of the award in some insolvency cases.

104 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41; *Brookfield Multiplex Ltd v International Litigation Partners Ptd Ltd* [2009] FCAFC 147; *International Litigation Partners Ptd Ltd v Chameleon Mining NL* [2011] NSWCA 50. In the *Fostif* decision, Kirby J observed that 'The importance of access to justice, as a fundamental human right..., is clearly a consideration that stimulates fresh thinking about representative of 'grouped' proceedings...' *Fostif* at 451 and 468.

105 Upon introduction, the Commonwealth Government noted its support for class actions and litigation funders as increasing access to justice. Explanatory Statement, *Corporations Amendment Regulations 2012 (No. 6)*, 12 July 2012.

Litigation funding is said to provide an opportunity for creditors to pursue redress without further financial loss, to level the playing field for vulnerable plaintiffs against powerful defendants, as well as to harness the experience of funders in negotiating greater accountability from lawyers.<sup>106</sup> Some litigation funders also use their resources to support work done in the public interest.<sup>107</sup>

Born in Australia, litigation funding is a growing practice around the world, though different environments make for divergent backdrops.<sup>108</sup> With a range of jurisdictions still exploring this terrain, it is arguable that its limits are yet to be fully tested. As such, some commentators advocate further movement towards total claim alienability.

Under this concept, a legal claim constitutes a right to a remedy that the claimant may transfer to a party who is better placed to exploit it.<sup>109</sup> While currently unlawful, the argument suggests that fully opening the door to market forces would give claimholders a cheap, low-risk means of obtaining redress – increasing access to justice while avoiding expensive litigation.<sup>110</sup> However, the alienation of legal claims risks creating a second class justice system, misconceiving access to justice simply as access to pecuniary redress. As was argued earlier, any reform must be careful to protect fundamental principles of the law, including the value of authoritative statements and vindication by a court, as well as the maintenance of due process.

In the absence of this more contentious step, some Australian practices are offering avenues to litigation funding for individual litigants. This seems to be particularly the case in the area of family law, where a matrimonial home offers security for funders,<sup>111</sup> akin to the caveats that many Legal Aid bodies place on family homes as security for offering assistance.

A further, untested measure is funding by community members on a non-commercial basis. Recently a Canadian group, 'JustAccess' proposed a crowdfunding platform onto which parties could upload case profiles, enabling individuals to identify litigation they might wish to support. The platform was awarded the Centre for Social Innovation's 'pitching' competition. However, a 30 day campaign to raise \$10,000 to support three initial cases raised only \$650 and its founders are re-considering their approach.<sup>112</sup> Though the crowdfunding idea is certainly innovative, the idea suffers the same disadvantage of large-scale litigation funding, or even the provision of pro bono legal services, being that it is likely that only either high-return/low-risk or high-profile cases would attract funding, with less incentive for supporters to fund a more standard legal claim.

### Public Litigation Funding Scheme Proposals

The Civil Justice Review conducted by the Victorian Law Reform Commission in 2008 developed a detailed proposal for a more expansive litigation funding mechanism it referred to as the Justice Fund.<sup>113</sup> The Commission envisaged that this Fund would operate in effect as a public litigation funder, with a range of statutory protections, funding commercially viable meritorious litigation and reinvesting any profits in public interest cases without the expectation of any financial return.

106 See, for example, Gordon Legal at <http://www.gordonlegal.com.au/index.php/work-we-do/advising-litigation-funders> (viewed 23 August 2013) and Slater & Gordon at <http://www.slatergordon.com.au/areas-of-practice/victoria/general-legal-services/commercial-litigation/litigation-funding> (viewed 23 August 2013). Resources of litigation funders, as well as the potential for substantial damages awards, can put pressure on defendants to settle.

107 IMF Australia, a prominent litigation funder, has made the point that '[a]s IMF has become an integral part of the litigation process in Australia it is important that the company should also take on the burdens as well as the advantages of litigious work by involving itself in pro bono work.' At <http://www.imf.com.au/funding/pro-bono-publico> (viewed 14 October 2013).

108 In the UK, for example, the Civil Justice Council has released a Code of Conduct for Litigation Funders which requires, amongst other things, transparency and disclosure of capital adequacy. At [http://www.judiciary.gov.uk/JCO%2fDocuments%2fCJC%2fPublications%2fCJC+papers%2fCode+of+Conduct+for+Litigation+Funders+\(November+2011\).pdf](http://www.judiciary.gov.uk/JCO%2fDocuments%2fCJC%2fPublications%2fCJC+papers%2fCode+of+Conduct+for+Litigation+Funders+(November+2011).pdf) (viewed 16 September 2013).

109 Dr V Waye, *Trading in Legal Claims: Law, Policy & Future Directions in Australia, UK & US* (Presidian Legal Publications, 2008), p 79. Cited in L Adams, 'A New Market for Thinking About Legal Funding', (2011) 21 JJA 126.

110 Above, p 126.

111 At [http://www.gibsonssolicitors.com.au/FamilyLaw/litigation\\_funding.html](http://www.gibsonssolicitors.com.au/FamilyLaw/litigation_funding.html) (viewed 23 August 2013).

112 At <http://www.csicatalyst.org/projects/28-justaccess#updates> (viewed 25 September 2013).

113 Victorian Law Reform Commission, note 52, pp 614-623.

A number of similar proposals were advanced during Lord Justice Jackson's review of civil litigation costs in the UK. Lord Justice Jackson considered the potential for the establishment of a Contingency Legal Aid Fund ('CLAF') or Supplementary Legal Aid Scheme ('SLAS'), both forms of self-funding, not-for-profit litigation funds, as sources of additional legal assistance funds.<sup>114</sup>

While supporting such mechanisms in principle, ultimately Lord Justice Jackson concluded he was not sufficiently convinced of their financial viability, recommending that they be kept under review.<sup>115</sup> The CIJ therefore suggests that, in any analysis of the role of litigation funding, including by the Productivity Commission, consideration should be given to the potential for the establishment of funding mechanisms that have a public interest, or not-for-profit, objective.

### 1.5 Opting in to Legal Assistance – Discrete Task Assistance

As was observed in the introductory section of this Report, the growing legal need amongst low to middle income people is evidenced, in part, by an increase in self-represented litigants appearing before courts and tribunals. In responding to this phenomenon, courts are acknowledging that early access to legal advice, as well as to assistance at important stages of a proceeding, can not only increase access to justice for litigants, but also the overall efficiency for courts.<sup>116</sup>

As a result, a range of valuable services is being offered to self-represented litigants – whether provided by the courts themselves, through other publicly funded organisations, or pro bono schemes provided by the private profession.

Some of these services, such as the comprehensive service offered by the Family Court of Australia, focus on improving information provision and training judicial and court staff to better the experience of self-represented litigants.<sup>117</sup> Other programs emerging in the US offer support to litigants in preparation for the court process, much of this by volunteer staff, including students. This does not extend, however, to court appearances.<sup>118</sup>

Services of this kind, and the phenomenon propelling them, have been the subject of considerable research. Though detailed exploration of them is beyond the scope of this particular Report, these services contribute enormously to access to justice and the expeditious resolution of disputes. In some cases, however, there is no substitute for individual advice and assistance on the merits and details of a particular claim or defence, nor sometimes for legal representation in court.

For this reason, an important feature that is very much within the scope of this Report is that of 'discrete task assistance' – alternatively known as 'unbundled services', or 'limited scope representation' – which confines advice or assistance to certain defined tasks, rather than offering the traditional model of full and ongoing legal representation. This enables a person who is unable to afford legal representation, or who has chosen to go without it, to elect to obtain professional help for certain important stages of proceedings, while retaining overall control of their own file.

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114 Lord Justice Jackson, note 14, Ch 13.

115 Lord Justice Jackson, note 14, pp 140-1.

116 For example, see the discussion in the CIJ's review of the Fair Work Commission's General Protections Pilot, July 2013, p At <http://www.fwc.gov.au/index.cfm?pagename=adminresearch> (viewed 2 October 2013).

117 The Family Court of Australia's efforts in this regard are nominated as a positive approach by the New Zealand Law Reform Commission, *Self-Represented Litigants*, Report 82. At <http://www.nzlii.org/nz/other/nzlc/report/R82/R82-16.html> (viewed 8 August 2013).

118 See 'Self-Help Centers', California Courts, at <http://www.courts.ca.gov/selfhelp-selfhelpcenters.htm> (viewed 8 August 2013). See also discussion in B Hough, 'Self-Represented Litigants in Family Law: the Response of California's Courts', *California Law Review Circuit* Vol 1, January 2010, p 15; and Law Help New York, at <http://www.lawhelpny.org/> (viewed 17 August 2013).

Though this practice runs counter to the convention of engaging a lawyer for the duration of a legal problem – a convention that is supported by a range of professional conduct rules – this is actually a practice that has been common in the Australian community law sector for some time,<sup>119</sup> while it is also growing in some sectors of corporate practice.<sup>120</sup> Again, however, its use has not been widely employed or marketed as an available option in the provision of services to individual, fee-paying clients in Australia.

Where its use *has* been explored, however, is in some jurisdictions in Canada,<sup>121</sup> as well as in the broader US context, where the American Bar Association has developed Model Rules which specifically permit lawyers to limit the scope of their representation. Approximately 40 different US states have adopted amendments to their professional conduct rules to implement the ABA Model Rules – amendments which involve the inclusion of new provisions and the removal of barriers which would otherwise expose practitioners to certain risks.<sup>122</sup>

Broadly, these amendments address such issues as:

- Whether the client’s consent to limited representation should be in writing
- What disclosure is required when a lawyer prepares a document but does not appear
- How a lawyer withdraws from a case when he or she makes a limited scope appearance
- How practical issues are addressed, such as communications with opposing counsel
- How to protect clients from unscrupulous lawyers offering limited scope representation.

Several US jurisdictions have implemented pilot projects offering limited scope representation, with evaluations reporting a range of benefits. In Massachusetts, for example, judges reported seeing ‘better pleadings from self-represented litigants...[who] were more realistic about their cases.’<sup>123</sup> Professional associations also offer training to their members on offering these services.<sup>124</sup>

While the aim of the reform is to provide support to people who could not otherwise afford legal services, it also appears to offer a significant benefit to legal practices, who are able to attract more clients by offering such services, and still be paid for their time, making it a ‘win-win’ scenario for all involved.<sup>125</sup>

### Utah Bar

This professional association has developed a Modest Means Lawyer Referral Program. This allows people whose income is too high to qualify for public assistance, but too low to pay a lawyer’s standard rates, to be referred to a lawyer at a discounted rate, and with the opportunity for limited scope representation.<sup>126</sup>

119 G Renouf, J Anderson and J Lovric, ‘Pro bono opportunity in Discrete Task Assistance’, 54 *Law Society Journal* July 2003.

120 R Burcher, ‘Unbundling: The New/Old Kid On The Block’, *Validatum* blog, 17 May 2013. At <http://www.validatum.com/blog/unbundling-the-new-kid-on-the-block> (viewed 8 August 2013).

121 Developments in Canada are mirrored in the US context. See overall description from Law Society of Upper Canada. At <http://www.lsuc.on.ca/unbundling/> (viewed 14 September 2013).

122 American Bar Association, *Model Rules of Professional Conduct*, Rule 1.2. At [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_2\\_scope\\_of\\_representation\\_allocation\\_of\\_authority\\_between\\_client\\_lawyer.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_2_scope_of_representation_allocation_of_authority_between_client_lawyer.html) (viewed 15 September 2013). See also ‘ABA Standing Committee on the Delivery of Legal Services Encourages Practitioners to Consider Limiting Their Scope’ (House of Delegates Resolution and Report, No 108, American Bar Association, February 2013).

123 JT Eaton & D Holtermann, ‘Limited Scope Representation is Here’, *CBA Record*, 36 April 2010, p 39. At [http://apps.americanbar.org/legalservices/delivery/downloads/feature\\_eaton.pdf](http://apps.americanbar.org/legalservices/delivery/downloads/feature_eaton.pdf) (viewed 15 October 2013).

Cited in Greacan Associates Report, *Resources to Assist Self-Represented Litigants: A Fifty-State Review of the ‘State of the Art’*, National Edition, June 2011, p 30. At <http://www.msf.org/selfhelp/GreacenReportNationalEdition.pdf> (viewed 8 August 2013).

124 Greacan Associates Report, note 123, p 34.

125 JT Eaton & D Holtermann, note 123, p 39.

It is also described as a ‘potential boon to practices’, N Cudiamat, ‘Improving Access to Justice – “Unbundling” Legal Services in Illinois’, *National Law Review*, At <http://www.natlawreview.com/article/improving-access-to-justice-unbundling-legal-services-illinois> (viewed 20 August 2013).

126 At <http://www.utahbar.org/public-services/modest-means-program/> (viewed 15 October 2013).

In the UK, meanwhile, the Civil Justice Council has also identified the need for lawyers to perform defined pieces of work.<sup>127</sup> This has been recognised in the context of family law, largely in response to recent cuts which mean that legal aid is no longer available for most matters where there is no history of family violence. The UK's Law Society has released a Practice Note to offer guidance to lawyers, including consideration of relevant case law.<sup>128</sup>

Like the US Model Rules, the Practice Note explores issues of duty of care to clients;<sup>129</sup> clearly defining and staying within the retainer's limits;<sup>130</sup> professional conduct duties to client and the court, professional indemnity insurance and fees, suggested schedules of services provided and not provided, and limited representation at court as a 'McKenzie friend' (discussed later).

Provision for formal limited scope representation, therefore, is only just being explored in international jurisdictions, and is yet to be properly addressed in Australia. Two examples of where it *is* being used to assist low to middle income consumers, however, are described in some detail below.

### **QPILCH Self-Representation Service**

Operating across a range of jurisdictions in Queensland, the Self-Representation Service run by the Queensland Public Interest Law Clearing House (QPILCH) offers clients 'discrete task assistance' at the early stages of a self-represented party's civil litigation – from initial advice and explanations of the court process, to the drafting of specific documents, access to technology and, more recently, a free mediation service. The Service does not, however, go on the court record. The results of this Service have been extremely positive, with significant savings estimated and all parties benefiting from the more efficient conduct of proceedings. Evaluations reveal overwhelming support from participants and court staff alike, with registry personnel pleased to refer applicants to a source of assistance, and applicants equally pleased to receive free legal advice that they perceive as both expert and genuinely impartial.<sup>131</sup> This year, former Federal Attorney-General Dreyfus announced \$4 million to expand the program on a national basis, providing support to self-represented litigants in matters in the Federal Court and Federal Circuit Courts, including social security, discrimination, consumer law, judicial review, bankruptcy, and employment law matters.<sup>132</sup>

Though the above example does not involve the payment of fees, the CIJ believes it offers valuable lessons in terms of the benefits of discrete task assistance, and the need for its availability to be formalised and facilitated. In fact, it is through this service that calls for the authorisation of limited scope representation have most publicly arisen in the recent Australian context, as discussed on the following page.

127 Civil Justice Council, note 11, p 43.

128 The Law Society, *Unbundling family legal services*, Practice Note, 1 May 2013. At <http://www.lawsociety.org.uk/advice/practice-notes/unbundling-family-legal-services/#un1> (viewed 8 August 2013).

129 UK case law has illustrated the importance of advising a client properly and exercising duty of care even if acting on a limited basis. *Padden v Bevan Ashford Solicitors* [2011] EWCA Civ 1616.

130 *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm)* [1978] 3 ALL ER 571 confirmed that solicitors should not be expected to assume a duty of care beyond the scope of what they've been requested to do. Other cases confirm that practitioners must ensure there is no inference that a full retainer was created in the first place. *Richard Buxton v Mills Owen* [2010] 1WLR 1997 and *Cawdrey Kaye Fireman & Taylor v Minkin* [2012] EWCA Civ 546. Cited in Law Society Practice Note, note 128.

131 An evaluation of the service estimates that, in a 9 month period, the service diverted three matters away from a hearing in the court and a further seven from being commenced, resulting in an approximate saving to the court of over \$175,000. Dr Cate Banks, *Evaluation of effectiveness of Queensland Public Interest Law Clearing House Self-Representation Service in Federal Court and Federal Magistrates Court Brisbane*, June 2012, pp 14-15 At [http://www.qpilch.org.au/dbase\\_upl/QPILCH\\_Federal\\_Court\\_Pilot\\_Evaluation\\_June\\_2012.pdf](http://www.qpilch.org.au/dbase_upl/QPILCH_Federal_Court_Pilot_Evaluation_June_2012.pdf) (viewed 31 May 2013).

132 Australian Government, Attorney-General's Department, *National Rollout of the Self-Representation Service*. At <http://www.ag.gov.au/LegalSystem/Legalaidprograms/Pages/NationalRolloutoftheSelfRepresentationService.aspx> (viewed 15 October 2013).

A further Australian example, however, demonstrates how the value of early diagnosis and advice, or ‘triage’, as well as other forms of discrete task assistance can be offered on a fee paying basis. This example features a combination of the innovations so far identified in the Australian context, from price certainty through to virtual practice.

### **Affording Justice – Helping Use the Law to Solve Problems**

Formed by two high profile Queensland practitioners, Affording Justice is a law practice that aims to be ‘an affordable and independent first step for everyone’ and to give ‘step by step guidance to people who can’t afford full legal representation’.

Affording Justice is a predominantly virtual firm with low overheads, and its website offers three forms of service. The first is Legal Diagnosis, which provides advice about the law that applies to a person’s situation and the processes available to help. Where a person can resolve the matter themselves, they can elect to use the Legal Advice and Legal Task Help services, which offer assistance with defined tasks for fixed prices. Where it is apparent that a person needs full representation, they are offered a referral to another solicitor, or to an associated practice, Doyle Family Law.

Affording Justice makes a point of keeping its services affordable, but does not provide any free services. Services are provided over the phone, by web-conference and by email and frequently outside business hours. The practice deals with a wide range of everyday legal problems, including consumer credit and debt matters, industry dispute resolution schemes, family law and small value property claims.

This practice distinguishes itself from many other virtual law practices because its own staff members provide the diagnosis and advice, rather than being conducted by referrals; because they speak directly with clients before providing services and because the practice does not offer any do-it-yourself kits. Initial concerns from its insurer about liability for discrete task assistance were alleviated by consultation with the insurer, and by the development of standard form advices. The CIJ was told that the practice does not go on the court record.<sup>133</sup>

Many legal practices perform this kind of discrete task assistance, of course, without consumers being aware of it, or without any other form of transparency. For this kind of limited scope representation to enjoy the full confidence of the profession and become more widely known, therefore, certain barriers may need to be addressed.

For example, as in the US context prior to the development of the ABA Model Rules, courts require that solicitors that have gone on the court record must seek leave to withdraw once the matter has been set down for trial. Courts have noted that, without leave being granted, the duty owed by practitioners to the court can demand that they continue to perform certain functions in relation to the matter in order to satisfy the proper administration of justice.<sup>134</sup>

Equally, concerns have been raised about practitioners becoming liable for costs. This has been accentuated by recent changes to federal immigration law which specifically provide for costs awards against practitioners who represent a client in matters with no reasonable prospects of success. This is relevant to discrete task assistance because of the heightened possibility that a lawyer may not be privy to all the relevant information in a matter.<sup>135</sup>

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133 Affording Justice. At <http://affordingjustice.com.au/> (viewed 8 August 2013). Consultations in Brisbane on 12 September 2013.

134 For example, see *Investec Bank (Australia) Limited v Mann & Anor* [2012] VSC 81 (13 March 2012) At <http://www.austlii.edu.au/au/cases/vic/VSC/2012/81.html> (viewed 4 October 2013).

135 *Proposal for Protection of Community Based Lawyers Providing Discrete Task Assistance to Parties in the Same Proceedings*, QPILCH. At [http://qpilch.org.au/dbase\\_upl/Submission%20on%20Unbundling.pdf](http://qpilch.org.au/dbase_upl/Submission%20on%20Unbundling.pdf) (viewed 16 September 2013).

A further area to consider is the fact that many practitioners, particularly in CLCs, provide one-off advice to clients. Current conflict of interest provisions demand that, where the other party to the dispute subsequently seeks advice from the same centre, the Centre must decline to provide the same level of discrete assistance – even where the other party seeks advice at a different location.<sup>136</sup>

While adequate protections from conflict of interest are, of course, essential to the proper administration of the law, it is reasonable to ask whether there are certain situations in which the current provisions are simply overkill.

If these rules mean that parties are denied initial, early advice on the merits of their dispute, for example – advice that CLCs often provide regardless of a party's means – these same parties are propelled unnecessarily towards the private legal market, or are forced to proceed with the matter themselves. The combination of these factors means that the wider availability of discrete task assistance, or 'triage' services – either from the private legal market or from other publicly funded bodies – is even more necessary.

Accordingly, the CIJ encourages professional associations to collaborate in developing Model Rules to be adopted across all Australian jurisdictions which specifically provide for the availability of limited scope representation. These should address, amongst other things, issues of practitioner liability; scoping of retainers; inclusion and removal of practitioners from the court record; and disclosure and communication with clients. This work could also include the development of standard forms of advice for certain areas of the law, as well as negotiation with insurers regarding adequate forms of protection. It would also, of course, involve consultation with courts so that court rules may accommodate any proposed change.

During this work, professional associations and regulators may also consider the scope of conflict of interest provisions, and whether they can be refined so as not to prevent parties from benefitting from discrete, one-off forms of advice from CLCs.

Further, practitioners will require information and training to be confident in offering this kind of work, as well as support to identify areas that may be easily adapted to 'legal diagnosis' or 'triage' services. Consumers, too, need to be made aware that this kind of service is available, and have information about who may be offering it. Those developing mechanisms for greater transparency regarding costs and alternative fee arrangements, therefore, could also consider providing information about practices offering discrete task assistance/limited scope representation.

What is valuable about the above examples is that, in giving potential consumers access to services from which they would otherwise be excluded, this approach also gives consumers greater control over an otherwise disempowering legal process – electing not just where, but how to spend what limited funds they have.

This should not be seen, of course, as a substitute for full legal representation or a form of 'second class justice'. It is important to acknowledge, however, that governments cannot provide an infinite source of publicly funded assistance. This means that options must be provided which allow people who are currently excluded from the legal market to access it, at least in part, and on a more strategic basis. In turn, this can relieve some of the burden that falls to the courts as a result of the additional time and resources that are often required in matters involving self-represented litigants, as well as the pressures on publicly funded services that are intended for those of very little means.

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<sup>136</sup> As above.

## 1.6 Increasing Pro Bono

A significant number of Australian legal practitioners perform legal work on a pro bono basis each year. These efforts are increasingly well co-ordinated, spurred on as they are by government initiatives,<sup>137</sup> though many practitioners have, of course, provided services pro bono with comparatively little recognition for years. In fact, the value of pro bono services to access to justice right across Australia cannot be underestimated.<sup>138</sup>

The limits of pro bono work, however, also need to be recognised. For example, just as governments should not assume that pro bono work should plug the gap in access to justice, nor should the profession assume that pro bono work justifies charging fees that are inherently unaffordable for ordinary fee paying clients. This is particularly the case when over 60% of pro bono services by large law firms are provided to organisations, not individuals;<sup>139</sup> with many of these individuals nevertheless ineligible for assistance from the publicly funded sector.

This means that, despite their valuable contributions, even the combination of the pro bono sector and the publically funded sector cannot meet the needs of those individuals who fall through the gaps. It is worth asking, then, whether further incentives can be created for practices to offer pro bono services to individual clients.

Incentives could include a mechanism for better publicising any work performed and, in turn increasing the profile of small practices that perform it, both amongst clients and prospective graduates who are traditionally attracted by the pro bono practices of the larger firms. Building on a previous section of this Report, a further initiative could include a requirement for litigation funders to meet a certain pro bono target, with a focus on benefiting individual or small business clients.

An additional incentive could be a tax deduction for pro bono work conducted in particular areas of legal need. The CIJ therefore suggests that, during the course of its Inquiry, the Productivity Commission considers the broader question of tax deductions in relation to legal work – both in terms of deductions that law practices may be able to claim for pro bono work, and in terms of the justification of large corporate clients claiming legal expenses as a deduction.

Given that many practitioners performing pro bono also nominate insurance coverage as an ongoing concern, further work may need to be done in this area. Further consultation needs to occur with the National Pro Bono Legal Resource Centre, and with professional associations, to identify any additional barriers that could be removed, ensuring that concerns about liability do not prevent legal practitioners – whether in large or small practices – from performing work on a pro bono basis for individual and small business clients.

## 1.7 Subsidised Legal Practices

Further to this, it is important to ask whether highlighting the pro bono work done by the profession simply perpetuates a dichotomy of ‘good works’ by legal practices on the one hand, and substantial fees on the other. It is worth examining, therefore, whether this dual model can be disassembled – whether the informal subsidisations and reductions that are offered by practitioners on a case by case basis can be delivered on a more systemic basis.

<sup>137</sup> For example, the National Pro Bono Resource Centre, funded by government, has developed a National Pro Bono Aspirational Target in consultation with the profession. The Target is a ‘voluntary target that law firms, individual solicitors and barristers can sign up to and strive to achieve the target of at least 35 hours of **pro bono legal services** per lawyer per year.’ At <http://www.nationalprobono.org.au/page.asp?from=8&id=169> (viewed 20 September 2013).

<sup>138</sup> Back in 2008, the NPBRC estimated that 25 of the nation’s largest law firms undertook \$48.5 million worth of legal work on a pro bono basis. At <http://www.nationalprobono.org.au/page.asp?from=0&id=209#1> (viewed 20 September 2013). According to the **Sixth Annual National Pro Bono Aspirational Target Performance Report** released this year, reporting signatories provided 294,329 hours of pro bono legal work in 2012/2013, which is over 70,000 more hours than it was two years ago. At [http://www.nationalprobono.org.au/news\\_detail.asp?id=107](http://www.nationalprobono.org.au/news_detail.asp?id=107) (viewed 20 September 2013).

<sup>139</sup> At [http://www.nationalprobono.org.au/news\\_detail.asp?id=100](http://www.nationalprobono.org.au/news_detail.asp?id=100) (viewed 10 September 2013).

Certainly, there are examples of legal practices in Australia that provide a co-ordinated free service which is subsidised by the other areas of its practice, and which have the potential to meet the needs of individuals who do not qualify for legal aid, free or pro bono assistance in other arenas.<sup>140</sup>

The example, below, however, specifically fills a gap in the pro bono market, incorporating a range of innovative practices to increase access to justice for individuals who fall through the gaps.

### Salvos Legal

Founded in 2010, Salvos Legal is an incorporated commercial and property law practice, fees from which (less expenses) fund its sister firm, Salvos Legal Humanitarian. Salvos Legal Humanitarian is a full service free law firm offering assistance in areas such as criminal law, children's and family law, a range of welfare law and refugee and immigration services. Both practices are wholly owned by The Salvation Army.

Salvos Legal acts for clients from the corporate, government and not-for-profit sectors. Clients of Salvos Legal Humanitarian are on government support or low incomes but have not qualified for Legal Aid. If an individual does not meet the merits test, they are referred to a 'Friends of the Salvos' network of practitioners who offer services on a reduced or no-win, no-fee basis. The service is also supported by an Inhouse Pro Bono Desk and does intake alongside other service providers at various locations.

Salvos Legal does not receive any government funding and no distribution of dividends occurs, other than for the funding of Salvos Legal Humanitarian. It is now, however, financially self-sustaining. The practice has received two industry awards, Young Gun and Managing Partner of the Year in the 2013 Australian Law Awards, run by Lawyers Weekly.<sup>141</sup>

Further afield, a UK charity has established a low fee paying practice to meet the needs of legal consumers on moderate incomes, including those affected by the recent cuts to legal aid.

### Castle Park Solicitors

The Community Advice and Law Service is understood to be the first not-for-profit charity to establish its own law firm, Castle Park Solicitors, under reforms which allow the creation of Alternative Business Structures. The practice charges modest fees then returns profits to the charity to help provide free advice in other areas of social welfare law. Castle Park is run as a business separately to the charity. Employees are paid at a more modest level than people in private practices.<sup>142</sup>

140 For example, Maurice Blackburn Queensland has recently launched a free disability helpline to provide advice on issues such as employment, insurance and superannuation. See <http://msqld.org.au/disabilityhelpline>. Slater & Gordon also offers a free Advice Line on a wide range of areas of law. See also the Cancer Council Legal & Financial Referral Service at <http://www.cancercouncil.com.au/31192/get-support/practical-support-services-get-support/legal-financial-support/pac/> (viewed 1 October 2013). See also Gilbert and Tobin's Third Sector Advisory Group which, although not a free service, provides advice specifically to charitable and not-for-profit organisations. At <http://www.gtlaw.com.au/services/third-sector-advisory-group/> (viewed 5 September 2013).

141 The CIJ was told during consultations (13 September 2013) that solicitors in the commercial and property practice are attracted by the firm's ethos and supportive working environment. See also <http://www.salvoslegal.com.au/> (viewed 10 September 2013) and <http://www.salvoslegal.com.au/news/show/80> (viewed 3 October 2013).

142 T Pegden, 'Charity launching low-cost legal services at solicitors', *Leicester Mercury*, 25 July 2013. At <http://www.thisisleicestershire.co.uk/Charity-launching-low-cost-legal-services/story-19565870-detail/story.html#axzz2gwihJqef> (viewed 25 July 2013).

This practice can be distinguished in that fees charged by the private practice also appear to be substantially reduced, as the private practice is specifically targeted at consumers of modest means.

The CIJ was informed during consultations that a substantial amount of business development went into the establishment of Salvos Legal, as well as into the establishment of Affording Justice, the practice featured in an earlier section of this Report, and which uses a combination of virtual practice, fixed fees and discrete task assistance to target its services specifically at the consumers who are the subject of this Report.

The question for the wider legal profession is why the practices cited in this and previous sections of this Report are the exception, rather than the rule; why more practices do not design their services to offer the affordable supply that consumers are seeking.

One simplistic answer, of course, is that a supply of competitive, affordable services is assumed to mean a reduction in salary for the lawyers delivering them. Certainly, while many lawyers opt for a career that is concerned with public service over private gain, the salaries of some others are out of all proportion with the majority of the population. It is therefore hard to imagine that those in traditional private practice would want to diminish their comparatively larger remuneration.

To a certain extent, progress cannot occur until we acknowledge that some in the profession have lost perspective on what might be considered a reasonable income; and on how this perspective matches with their original motivation to enter the law. As one contributor to a Law Institute of Victoria blog on this subject noted:

*Legal services will be affordable when lawyers, together with everyone else in the world... are happy to make a modest living.*<sup>143</sup>

Beyond this, however, the CIJ believes that, in many ways, lawyers do not necessarily know *how* to deliver more affordable services – trapped in a model that works against their delivery and, in the process, drives consumers away from an over-engineered supply. Support is therefore needed for practices to develop a different strategy – recognising that a higher number of clients, even when they are low-fee paying clients, may well be a far more sustainable and rewarding approach.

As former Chief Justice of South Australia, the Hon John Doyle AC QC, has recently observed in proposing quite substantial changes to the civil litigation system, our collective aim should be greater access to litigation, meaning a turnover of a greater number of cases, even where costs recoverable from each one will be reduced.<sup>144</sup> Beyond this, he noted:

*The prospect of lesser remuneration has to be accepted as part of the price to be paid for revising the system.*<sup>145</sup>

If this general premise is accepted, law practices need to be supported in developing a more consumer friendly business model. Building on the proposals offered earlier in this Report, government could support the development of business models that not only offer price certainty, discrete task assistance and reduced overheads, but which pass the efficiencies derived from these changes on to an expanding clientele.

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<sup>143</sup> Law Institute of Victoria, President's Blog, 27/09/2013, 11:09:06pm. At [www.liv.asn.au/LIVPresBlog2013/September-2013/Innovation-needed-to-deliver-accessible-justice.aspx](http://www.liv.asn.au/LIVPresBlog2013/September-2013/Innovation-needed-to-deliver-accessible-justice.aspx) (viewed 28 September 2013).

<sup>144</sup> Doyle, note 3, p 22.

<sup>145</sup> As above.

To this end, external funding sources may offer a small level of support for those moving to establishing this model by providing grants for initial start-up resources. Practitioners in these operations would need to accept a lower level of remuneration than they, or their colleagues may have become accustomed to expect but, as Salvos Legal advised the CIJ, the attractions of a rewarding workplace culture and service delivery ethos can often outweigh the financial incentives for many practitioners, particularly those entering the profession.

The above model is, in a way, a private model effectively supported or subsidised by external or government support. There may also be merit in investigating whether public models can be further supported or subsidised by fee-paying clients, without any diminution in the services they provide to those without means. One example may be the provision of fee-paying services through the expanded Self-Representation Service described above. Where litigants have the means to pay a modest, fixed amount for a discrete task or 'unbundled' service, this may in turn support the ongoing work of the service to assist other unrepresented parties. Given that this service has recently been expanded on a national basis, it might be that government could support the development of a pilot of this model at one specific site to trial the value of fee subsidisation.

Equally, legal aid commissions have, at various times, accepted a level of fee or contribution from some clients for a limited range of services or, as mentioned above, taken out a caveat over a home. It is feasible, then, for legal aid commissions to investigate the development of a fee for service model on a wider basis – in which clients with moderate means, who would otherwise be ineligible under Legal Aid guidelines, can elect to pay for representation by a legal aid lawyer, or a private lawyer who conducts legal aid work, on the basis of the relevant statutory scale.

This is particularly relevant given recent cuts made by legal aid commissions to the types of services that they provide, such as no longer representing people in the Magistrates' Court who wish to plead not guilty, but who are not at risk of custody if found guilty. Under new guidelines, such people could be eligible for legal aid on the basis of their means, yet be ineligible due to their matter not being sufficiently serious. This class of people would particularly benefit from the type of low-fee service proposed.

This type of service would have a number of benefits in terms of access to affordable justice. An added benefit would also be the creation of a transparent fee scale so that low income earners are not over-charged for straightforward work.

In offering these suggestions the CIJ makes clear that they are not intended to replace or cut into the existing work of publicly funded services in any way, nor to excuse governments from meeting their essential responsibilities to the public arena. Rather, these suggestions are about augmenting, or bolstering, this essential public work – acknowledging that it is in this sphere that some of the greatest public need is met.

## 2. Increasing Competition in the Market

The legal system in the UK has undergone dramatic change in recent years. Like Australia, a series of wide-ranging reviews has repeatedly identified the need for significant reforms to court procedure, damages awards and costs recovery mechanisms.<sup>146</sup> In particular, reforms introduced in 2007 via the *Legal Services Act 2007* were aimed at changing the UK's legal regulatory regime:

...from one that protected suppliers to one with the consumer at its heart...<sup>147</sup>

Apart from significant cuts to legal aid, further change has included restraint of the use of conditional fee arrangements and a ban on the use of referral fees – reforms designed to curb what is seen as a litigious culture, but which have been decried by many in the sector as eroding access to justice.<sup>148</sup> Meanwhile, as referred to in the introductory section of this Report, the global economic downturn has increased demand for more flexible pricing models and has also seen frequent consolidation of practices, with many medium and smaller firms struggling to realise a reasonable return.<sup>149</sup>

This combination of factors has seen an emerging emphasis on competition, and therefore consumer affordability, as well as sustainability for suppliers.<sup>150</sup> Certainly, the 2007 reforms were designed to foster this competition, allowing non-lawyers to invest in and own legal businesses; enabling barristers, solicitors and non-lawyers to collaborate to manage risk; and for legal services to be offered alongside other services, thereby reducing overheads and increasing flexibility.

Known as 'Tesco Law' because of its 'shopfront' emphasis, as at September this year, 214 of these Alternative Business Structures (ABS) are now operating, with over one hundred currently being considered under what is a fairly protracted registration system.<sup>151</sup> Most of the established ABS structures have been operating for a short time, however, meaning that it is perhaps too early to determine whether their potential will be fully realised. Nevertheless, early signs are promising, with commentary suggesting that legal users are set to benefit from more affordable services and from greater transparency in their delivery.<sup>152</sup>

146 Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (HMSO, 1996); Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales*, Final Report, December 2004. At [http://www.jambar.org/clement\\_report.pdf](http://www.jambar.org/clement_report.pdf) (viewed 8 September 2013); and Lord Justice Jackson, note 14.

147 UK Legal Services Board, note 12, p 5.

148 In fact, government attempts to promote other forms of dispute resolution as alternatives to litigation in the wake of these cuts are reported as failing. O Bowcott, 'Mediation services hit by legal aid cuts, Ministry of Justice figures reveal', *The Guardian*, Monday 30 September 2013. At <http://www.theguardian.com/law/2013/sep/30/mediation-services-legal-aid> (viewed 4 October 2013). See also E Simon, 'End of "no win, no fee" lawsuits', *The Telegraph*, 29 March 2013. At <http://www.telegraph.co.uk/finance/personalfinance/consumertips/9959646/End-of-no-win-no-fee-lawsuits.html> (viewed 8 August 2013). T Judd & K Gander, 'Legal aid cuts "put a generation of children in danger"', *The Independent*, 2 June 2013. At <http://www.independent.co.uk/life-style/health-and-families/health-news/legal-aid-cuts-put-a-generation-of-children-in-danger-8640801.html> (viewed 8 August 2013).

149 A recent report indicated 1.6% recent growth in the UK legal services market. Research and Markets: UK Legal Services Market Report 2013, 22 August, 2013. At [http://www.researchandmarkets.com/research/bt7r95/uk\\_legal\\_services](http://www.researchandmarkets.com/research/bt7r95/uk_legal_services) (viewed 9 September 2013).

150 The UK Law Society has released a *Law Firm Marketing Toolkit* to help the 'high street' firms harder hit by this combination of factors appeal to and attract a wider client base. See J Rayner, 'Lucy Scott-Moncrieff', *Law Society Gazette*, 8 July 2013. At <http://www.lawgazette.co.uk/71654.article> (viewed 15 October 2013).

151 UK Legal Services Board, note 12, p 5.

152 See, for example, O Bowcott, 'Co-op to hire 3,000 lawyers in challenge to high street lawyers', *The Guardian*, 28 May 2012. At <http://www.theguardian.com/law/2012/may/28/co-op-3000-lawyers-challenge-solicitors> (viewed 15 September 2013). A Sampson, 'Lawyers must do better', *The Guardian* 19 July 2012. At <http://www.theguardian.com/law/2012/jul/19/future-of-legal-insurance> (viewed 8 September 2013). It should be noted that the 'start-up' nature of the business model has been attributed to losses experienced in the first half of this year. At <http://www.lawgazette.co.uk/practice/co-op-legal-services-plunges-into-the-red/5037181.article> (viewed 15 October 2013).

### The Co-Operative

A longstanding institution in the UK, The Co-Operative owns and runs a network of businesses including supermarkets, banks, funeral services and pharmacies. Members earn points when they make a purchase from a Co-operative owned business, which are then converted into a share of membership profits, distributed twice a year. A joining fee of one pound is deducted from the first distribution.

Recently the business has introduced face-to-face legal services, including employment, personal injury and a fixed-fee family law service, into its network of banks. The emphasis of the initiative has been on access and affordability, and on promoting values of social responsibility. In response to the cuts to UK legal aid which are said to be impacting particularly on the area of family law, it has made a point of emphasising that they will continue to offer affordable services and 'might well be the last man standing when it comes to legal aid.'<sup>153</sup>

However, concerns exist that, while affordability may increase, quality and independence may be compromised. This has led to some new practices and collaborations being launched in response – themselves the consequence of greater flexibility in the market, and contributing to greater competition as a result.<sup>154</sup>

### QualitySolicitors

This is a network of traditional 'high street' firms attempting to distinguish themselves from the 'supermarket' brand by combining marketing forces under one banner to compete against the buying power of The Co-Operative and other 'Tesco Law' practices. QS itself is not a law firm, and so does not need to be an ABS. Of particular note, it launched a multi-million pound advertising campaign and aims to build the first national legal brand with a traditional service model.<sup>155</sup>

Interestingly, both these examples target their services to what would be understood in the Australian dynamic as 'working families' – the individual or small business consumers that are the subject of this Report and those who, in the UK context, will potentially be hit by the curtailment of legal aid. The CIJ will therefore be amongst many watching with interest to see whether the increased competition emerging in the UK will lead to greater affordability without compromising standards or quality.

As it is, the UK Legal Services Board – a body created under the 2007 reforms – is now calling for wider reform to a system it describes as 'over-engineered and exceptionally complex'.<sup>156</sup> In essence, the Board is concerned that the liberalisation of the 2007 reforms was incomplete, that regulatory duplication is burdening practitioners with unnecessary costs and undermining affordability; and that the overall conservative nature of the legal profession and its regulators continues to hold back innovation. As such, the Board proposes greater simplification of what are currently multi-agency regulatory bodies; a greater emphasis on consumer redress and information; and movement towards regulation that matches the level of risk assumed by the practitioner, rather than regulation that operates as 'a cross-subsidy of bad firms by good'.<sup>157</sup>

153 See J Robins, 'Where does publicly-funded law fit into the new world of Tesco Law?', *The Guardian*, 22 September 2012. At <http://www.theguardian.com/law/2012/sep/21/alternative-business-structures-family-law> (viewed 10 August 2013). See also The Co-Operative, Legal Services, at <http://www.co-operative.coop/legalservices/> (viewed 14 September 2013). For details about membership, see <http://www.co-operative.coop/membership/what-is-membership/> (viewed 14 September 2013).

154 See J Robins, note 153. See also N Rose, 'Wait for ABSs is over: Tesco law is here', *The Guardian*, 2 April 2012. At <http://www.theguardian.com/law/2012/apr/02/abs-tesco-law-here> (viewed 8 August 2013).

155 See <http://www.qualitysolicitors.com/> and <http://www.qualitysolicitors.com/media-centre/about-us/our-history>

156 UK Legal Services Board, note 12, p 6.

157 Above, p 7.

Leaders in the Australian legal environment should observe further reform in the UK environment closely. While there are many aspects of the UK legal services market that differ from the Australian environment, particularly in the context of personal injury, the CIJ believes separate and detailed consideration should be given by professional associations and regulators to whether regulation should be tailored more closely across legal practice to varying levels of risk.

Beyond this, leaders must also ask why increased competitiveness and affordability for consumers has not been more of a feature in the Australian legal market – an environment which already enjoys aspects of the same structural flexibility now available in the UK. For example, Australian legal practices can be owned and operated under a corporate structure, with some of the practices sampled throughout this Report operating accordingly. Often this is done primarily to offer principals greater flexibility than the traditional partnership structure.<sup>158</sup>

One prominent example involves a well-known Australian practice becoming the world's first publicly listed law firm – a step taken prior to national expansion and one which in turn enabled the practice to offer economies of scale.<sup>159</sup> Interestingly, public listing may offer consumers an unusual level of transparency about the practice's profits. This practice is also licensed in the UK as an ABS.

What particularly interests the CIJ, however, is where operational flexibility can increase efficiencies, in turn reducing the costs that are passed on to clients. Certainly, economies of scale can enable law practices to charge more affordable fees, or offer price certainty.

Equally, however, flexibility of practice can enable lawyers to target their work, and their energies, more efficiently – again, potentially saving on costs. Where legal services are offered alongside other services (such as social work or financial counselling), clients can receive the assistance they need, but not be charged for a lawyer to perform tasks that are, essentially, non-legal.

#### **Slater & Gordon**

This practice offers various Support Services, including a network of social workers, to whom lawyers can refer clients who need non-legal assistance related to their claim, such as counselling, negotiation with social services, and advice regarding benefits.<sup>160</sup>

This signals that it is possible for the flexibility that exists in the current Australian environment to be harnessed to a much greater extent. As previously mentioned, what has become apparent during the development of this Report is that careful and considered development of an appropriate business model is needed for this to occur – development that reduces overheads and maximises efficiencies which can, in turn, be passed on to clients. There may be real benefit, then, in law practices receiving greater support to develop these models – taking time out from their day to day practice to conduct workflow analysis and establish more affordable, more sustainable, ways of operating.

Professional associations already provide support to members and have a track record of leadership in a range of important areas, including, most recently, the welfare of the profession. The CIJ therefore encourages professional associations, government and regulators to collaborate to provide this further level of support, as part of the efforts encouraged under previous sections of the Report.

<sup>158</sup> Kay and Hughes and C Merritt, note 71.

<sup>159</sup> At <http://www.slatergordon.com.au/investors/> (viewed 8 October 2013).

<sup>160</sup> <http://www.slatergordon.com.au/support-services/social-work-services#1>.

The CIJ also calls for greater consideration to be given to establishing more flexibility in regulation of the legal profession, including insurance requirements, to reduce unnecessary overheads and pass these efficiencies on to clients. The CIJ believes that this is something that could occur in the course of the Productivity Commission's inquiry, in consultation with relevant professional bodies, to investigate whether there is value in establishing restricted practising certificates, for example – either specific to a chosen area of practice or, alternately, excluding certain high risk areas of practice, with commensurate reduction in premiums.

## Legal Expenses Insurance

Just as the flexibility heralded in the UK environment could be applied more broadly in Australia, other elements of competition and choice in international jurisdictions are worth examination. While insurance already plays an important role in the legal environment, providing protection for various types of liability through car insurance, house insurance and even professional indemnity insurance, many individuals and families in the UK, European and even the US context also take out specifically designed legal expenses insurance. These 'LEI' schemes offer a range of cover to protect individuals and families from the consequences of costly legal expenses, though with notable exceptions in terms of the areas of law they cover.<sup>161</sup>

Cover includes both 'before the event' (sold through insurers, often as an addition to household or motor insurance and underwritten by separate insurers) and 'after the event' (sold through solicitors). 'After the event' policies are usually taken out in conjunction with no-win, no-fee arrangements and often pay disbursements unless recoverable from the other party; as well as the other party's costs should the claim be unsuccessful. Generally they involve a large premium, which can sometimes be deferred, or paid with a loan. The premium is a recoverable legal cost.

A barrier to the wider adoption of LEI in Australia has been identified in the uncertainty of legal costs, the more predictable nature of legal costs in the European environment being a greater incentive for insurers.<sup>162</sup> This context will be discussed in more detail in the Report's next section.

This does not entirely explain, however, why LEI is a feature of the UK environment, a common law landscape which is burdened by the same uncertainty as the Australian legal context, yet has met with little overall enthusiasm in the Australian context, despite being repeatedly raised as an idea.<sup>163</sup>

Attempts at establishing legal expenses insurance schemes in Australia have had mixed results.<sup>164</sup> In particular, a scheme established by the Law Foundation of NSW and the GIO in NSW, running from 1987 to 1995, did not ultimately prove viable. This was in part because the scheme's hopes to sell legal expense insurance primarily on a group basis to employees were met with reluctance from unions to promote it as an employee benefit. Individual consumers, meanwhile, failed to perceive the benefits of purchasing the insurance, in part because of a widely held – and perhaps exaggerated – perception about the general availability of legal aid.<sup>165</sup>

<sup>161</sup> For example, most policies exclude cover for pre-existing matters, defamation, conveyancing, family law and serious criminal matters.

<sup>162</sup> LEI is a standard feature in European legal environments, with The Council of the European Communities issuing a Directive to provide for its co-ordination. See The Council of the European Communities, Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance. At <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31987L0344:EN:HTML> (viewed 15 August 2013).

<sup>163</sup> Some international LEI providers have broken into the Australian market. See Brit Insurance, at <http://www.britinsurance.com/brit-global-specialty/legal-expenses> (viewed 27 August 2013).

<sup>164</sup> F Regan, 'Whatever happened to Legal Expense Insurance? Recent successes and failures of legal insurance schemes in Australia and overseas', *Alternative Law Journal*, Vol 26 (6), pp 293-297.

<sup>165</sup> A Goodstone, *Legal expenses insurance: an experiment in access to justice*, Law and Justice Foundation, 1999. At <http://www.lawfoundation.net.au/report/lei> (viewed 27 August 2013). See also Law Council of Australia, *Erosion of Legal Representation in the Australian Justice System*, February 2004, p 22, para 78. At <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload079a.pdf> (viewed 27 August 2013).

The scheme concluded that the Australian legal system, with its adversarial nature, unscheduled fees and potential for adverse cost orders, was not conducive to offering affordable legal expense insurance.<sup>166</sup>

A question for the purposes of this Report, therefore, is whether the wider adoption of LEI should be re-examined in Australia; and what factors might need to change in order for this to be achieved. Drawing on the model of The Co-Operative's Legal Services, a further question is whether a similar co-operative membership-based model can translate to the Australian context.

Certainly, despite the reluctance encountered by the scheme described above, it is important to remember that various Australian trade unions do offer discounted or free legal services for their members, as do many unions internationally.<sup>167</sup>

With declining union membership worldwide, however, this would seem to provide a limited solution.<sup>168</sup>

Further work must therefore occur around the question of a co-contribution, or legal expenses insurance scheme, in the Australian context. The question should be broadened, however, to consider what other kind of membership schemes, such as superannuation or health schemes, might be suitable as an avenue for providing legal services. This is another area that could be given particular attention in the course of the Productivity Commission's Inquiry.

Again, what must be emphasised about such schemes and services is the increased availability of early, initial advice or diagnosis – removing some of the fear around the act of seeking legal advice, giving people somewhere straightforward to turn to in order to prevent a dispute from escalating, or perhaps resolving it as efficiently and affordably as possible – confident in the knowledge that members' contributions entitle them to a certain level of assistance.

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166 The Law Foundation made a number of policy proposals as a result of its conclusions, including recognising LEI as a tax deductible expense, and that governments should advocate for its use, educate brokers and agents, and introduce schemes in the public sector through enterprise bargaining. Goodstone, note 165.

167 See, for example, Union Plus in the United States, at <http://www.unionplus.org/legal-aid-services> (27 August 2013); and the Australian Education Union, at [http://www.aeuvic.asn.au/36\\_13\\_26295846.html](http://www.aeuvic.asn.au/36_13_26295846.html) (27 August 2013).

168 For example, the ABS has noted that, '...from August 1992 to August 2011, the proportion of those who were trade union members in their main job has fallen from 43% to 18% for employees who were males and 35% to 18% for females. There was, however, a small rise in trade union membership during the Global Financial Crisis (GFC) period (2008-2009)'. Australian Bureau of Statistics, at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/6310.0main+features3August%202011> (viewed 28 September 2013). See also J Moylan, 'Union membership has halved since 1980', BBC News, 7 September 2012. At <http://www.bbc.co.uk/news/business-19521535> (viewed 28 September 2013).

### 3. Common Sense in Legal Practice – a Comparison

Legal expenses insurance is also a relatively standard feature in many European jurisdictions.<sup>169</sup> This is partly because the civil law tradition of these environments – that is, a body of law developed by civil codes, rather than predominantly judicial precedent – lends itself to greater cost predictability than the common law tradition. Amongst other things, this means that insurers and legal assistance schemes alike are far better able to manage risks, in turn reducing the fear of prohibitive costs, or of falling through the gap, for many users of European legal systems.<sup>170</sup>

Beyond this, however, some jurisdictions offer greater certainty in other ways. For the purposes of this Report, the CIJ has chosen to draw on a recent comprehensive study, the Marfording Report,<sup>171</sup> to highlight aspects of the German legal environment, in part because it offers such a marked comparison to the Australian market.

Broadly, the German civil justice system offers a significant level of certainty as it is regulated by federal law with respect to civil procedure, court organisation and fees, the judiciary, lawyers and lawyers' fees, legal aid and legal advice. Similarly, German civil law, including tort, contract and accident compensation, is federal.<sup>172</sup> In particular, however, the study examined by the CIJ (and supported by other literature) indicates that legal costs are structured very differently in the German environment.<sup>173</sup>

For example, a uniform approach applies in which a statutory scale allocates a certain number of cost units to a matter according to the stage of proceeding reached, as well as the value of the dispute involved.<sup>174</sup> Practitioners are permitted to charge above the scale upon clients signing a Costs Agreement but, where this occurs, the difference cannot be recovered from the other party. Where the scale is charged, no difference exists between solicitor/client and party/party costs.<sup>175</sup>

Further, where a claimant is unable to nominate the value of the claim, or it has no monetary value, a value is nominated by the relevant court.<sup>176</sup> Ambit claims are discouraged by recoverable costs being awarded according to the extent of the claim's success.<sup>177</sup>

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169 The Council of the European Communities Directive, above, n 162.

170 Sweden and Denmark are described as operating under a 'subsidiarity' principle, in which legal claims are primarily financed through legal expenses insurance, with legal aid only available to those without insurance. European Union Agency for Fundamental Rights, *Access to Justice in Europe: an overview of challenges and opportunities*, 2011, para 4.3, p 53. At <http://fra.europa.eu/en/publication/2011/access-justice-europe-overview-challenges-and-opportunities> (viewed 15 October 2013).

171 Marfording, note 34, p 16. See also European Commission, *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union*, Country Report – Germany, 30 December 2007. At [https://e-justice.europa.eu/content\\_costs\\_of\\_proceedings-37-en.do](https://e-justice.europa.eu/content_costs_of_proceedings-37-en.do) (viewed 14 September 2013).

172 Marfording, note 34, p 5.

173 The European Commission Country Report cited above describes the cost of legal proceedings in Germany as generally very 'clear and transparent'. European Commission, note 171, p 22.

174 Marfording, note 34, p 57.

175 Above, p 62.

176 Above, p 57.

177 Above, p 58.

Compilations are published that allow probable damages for non-material harm to be assessed,<sup>178</sup> in keeping with an overall emphasis on transparency and availability of data about court proceedings, including legal costs.<sup>179</sup> Court fees, too, are scaled to the value in dispute and also depend on the method of resolution, with disputants encouraged to resolve their dispute at the earliest possible stage in proceedings,<sup>180</sup> while consistency in damages awards is, in fact, a legal requirement.<sup>181</sup>

Some aspects of this system are echoed in the Australian context to varying degrees. Particular attention should be given, however, to the effect that this application of statutory scales has on legal practice across Germany. For example, the study mentioned above suggests that, by and large, practitioners charge according to scale – very different from the Australian environment and from the current emphasis in the UK, where recent consideration of further regulation of practitioners' fees in the UK was rejected as anti-competitive.<sup>182</sup>

Meanwhile, a restriction on lawyers working in combination also means that clients are only charged for work by one lawyer, rather than a team – practitioners usually working entirely independently and perhaps in a manner more akin to the Bar in Australia – their only duties being to the courts and their clients, rather than also to a firm of colleagues.<sup>183</sup> Equally, a lack of distinction between appearance and preparation work (that is, the lack of a distinction between barristers and solicitors) means that clients have a continuity of service, and do not pay for duplication in the way that Australian legal users often do.<sup>184</sup>

These differences mean that, when asked to nominate any concerns about the legal process, a comparison between civil litigants in Germany and NSW found that German litigants did not nominate costs at all, while NSW litigants nominated them as their greatest concern. Equally, a comparison between similar cases found costs in the NSW cases to be 18 times higher than the costs charged in the German cases; that delay was a far bigger factor in NSW; and, more broadly, that the proportionality of costs to what was at stake in the litigation was more in balance in the German context than in the NSW environment.<sup>185</sup>

This suggests that the role of the law appears to be conceived quite differently in the German context – arguably as less exclusive and therefore less entitled to charge substantial fees; equally with independent practitioners less inclined to succumb to the tribalism that saw those ill-fated associates urge each other to 'churn that bill'.

The predictability of the civil law system, and of costs charged by scale, meanwhile, may result in less drama being attached to perceptions of legal proceedings; with practitioners viewed instead as a very pragmatic part of the community.

Equally, an emphasis on transparency and data collection (for example, detailed statistics for the regional courts in Germany as a whole and in all its states are published on the internet)<sup>186</sup> keep the prospect of legal costs in the realm of certainty. In combination, this transparency, reduced costs and delay, and availability of legal expenses insurance makes the idea of engaging a lawyer a source of considerably less fear than it is in the Australian environment, in turn offering an interesting comparison to consider.

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178 Above, p 51.

179 Above p 38.

180 Above, p 59.

181 Above p 51.

182 Lord Justice Jackson, note 14, p 51.

183 Marfording, note 34, p 48.

184 As above.

185 Above, p 54.

186 Above, p 39.

While the CIJ recognises that the civil law traditions and federal oversight of the German context lead to inevitable distinctions, it is important not to let this somewhat overinflated dichotomy excuse inaction, or mask possibilities for change. This is particularly the case when Australia's common law, in reality, is heavily influenced by a significant body of legislation and a push towards codification,<sup>187</sup> while German law also gives a lot of weight to judicial precedent. In other words, we must stop assuming that differences in history and development prevent us from drawing on the lessons of other jurisdictions, particularly as it is often only by accident, rather than intent, that habits have developed.

The German example is also further fuel to the well-established call in the Australian civil justice system for more detailed, reliable and accessible data about the costs of legal proceedings.<sup>188</sup> The scope of the Productivity Commission inquiry may begin to rectify this imbalance.

Perhaps most vitally, however, the German example is an illustration of how legal systems can be structured, at least in intent, in such a way as to make private assistance a more realistic prospect for a larger proportion of the population. It is also an example of how legal culture and convention can be shaped around the delivery of what is, in effect, an essential and very ordinary service, rather than as an overblown luxury that is beyond most people's reach.

The CIJ does not suggest, of course, that the German legal landscape is without flaw, nor that most Australian practitioners are not motivated by principle over profit. What it *does* suggest, however, is that it is time to give robust consideration to how legal culture and convention, as well as the institutions that support them, are structured in a way which locks people out – supplying the Rolls Royce model when all most consumers want is something far more modest.

For example, it is worth questioning the value to consumers of a model in which legal costs are inflated by the engagement of multiple practitioners – either via a team of solicitors, or via the divided profession. Certainly, the law is a unique occupation in terms of the established convention that a small army is required to meet the client's requirements. Though the profit margins may be rewarding for the suppliers, it is an important factor in driving consumers away.

While it is controversial in some circles, therefore, to suggest that it is not always necessary for a team of lawyers of varying experience each to master the intricacies of a case; or for an instructing solicitor to accompany a barrister to court; or, in fact, for a barrister to conduct the appearance at all – the reality is that the latter conventions are not formally provided for in every Australian jurisdiction, and are already being dismantled to an extent in others.<sup>189</sup>

For example, Victoria has one of the strictest restrictions on direct briefing of barristers in matters listed in the County Court and above, but allows for this to occur when briefing is through Victoria Legal Aid,<sup>190</sup> while an increasing number of criminal practices now have in-house counsel. Most other jurisdictions do not explicitly prevent direct briefing, although most have rules allowing a barrister to return or refuse a brief if not briefed by a solicitor. Provision for appearances by non-lawyers, meanwhile, varies across jurisdictions, although most prevent non-lawyers from charging fees if they do appear.<sup>191</sup> Victoria is alone in making specific provision<sup>192</sup> to ask for leave to appear, with courts having full discretion to refuse.<sup>192</sup>

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<sup>187</sup> Above, p 9.

<sup>188</sup> Attorney-General's Department, note 8, p 57 and recommendations 5.2 and 5.3, p 73.

<sup>189</sup> In fact, one roundtable participant suggested that the criminal jurisdiction was unlikely to be served by a divided profession in a decade's time. Roundtable consultation, Tuesday 24 September, 2013.

<sup>190</sup> *Legal Profession Act 2004* (Vic) s 3.2.3.

<sup>191</sup> For example, see *Legal Profession Act* (2006) NT, s 18.

<sup>192</sup> *Legal Profession Act 2004* (Vic) s 3.2.3.

This inconsistency alone gives rise to questions as to when, or whether, the division in Australia's legal profession is always necessary. Posing these questions does not mean that the value of the independent Bar has to be undermined. Rather, what it *can* mean is that the skills of the Bar are more effectively employed. Equally, loosening restrictions on direct briefing of Barristers can allow clients to elect how to spend their limited means – taking charge of the preparation of their case themselves, for example – or perhaps with limited assistance along the way – and saving their budget to fund the specialist knowledge so often needed to appear before a court. As the present Chief Justice of NSW has stated recently:

*An individual should not need a senior counsel, junior counsel, and a small army of solicitors to tell them what the law they must comply with is...*<sup>193</sup>

The CJJ therefore encourages professional associations to give more detailed consideration to whether restrictions can be loosened around the direct briefing of barristers in a wider range of cases.

Equally, development of best practice models around more effective targeting of legal skill and experience in legal practices should be encouraged, with information provided to consumers about the circumstances in which duplication may be reasonable.

Concurrently, in considering flexibility in the Australian environment, it is legitimate to ask whether the exclusivity of the legal market is necessary in every circumstance. In making this point, however, the CJJ cautions against an indiscriminate increase in legal work performed by non-lawyers.

Certainly there is undeniable value in preparation, and even some straightforward appearance work, being conducted by lawyers in training – both to reduce costs for the client, and to provide valuable experience for law students. This is a trend occurring both here and overseas.<sup>194</sup>

Given, however, that a wide discretion currently exists for courts to grant leave for non-lawyers to appear, the CJJ believes there is significant value to consumers in the development of a more considered and uniform approach. Concerns have been expressed by various leaders in the profession during the development of this Report about the definition and use of 'McKenzie Friends' a concept that is particularly well known in the UK context, in which a lay person offers assistance to a self-represented litigant prior to, and sometimes during, their court appearance.<sup>195</sup>

While this is a concept that seems to have been generally well accepted in the UK, greater consideration of its definition and scope is being urged.<sup>196</sup> For example, there may be value in better defining the circumstances in which a layperson may assist a litigant before the court, as well as extending the notion of advocates who are non-legally qualified but otherwise experts in a field.<sup>197</sup>

<sup>193</sup> Bathurst CJ, 'Lawyers and Commercialism: help or hindrance' *Bar News* Winter 2013 53 at 57.

<sup>194</sup> The *JusticeCorps* initiative in California, for example, uses students from a range of disciplines to provide assistance at the Self-Help Centres described earlier in this Report, although this does not extend to appearance work. See California Courts, JusticeCorps, at <http://www.courts.ca.gov/programs-justicecorps.htm> (viewed 27 September 2013). See also the Family Law Assistance Program based at Monash University Law School, a program specifically designed for final year law students to provide assistance for self-represented litigants. All students are supervised by qualified lawyers. See generally <http://www.law.monash.edu.au/about-us/legal/flap.html> (viewed 20 August 2013).

<sup>195</sup> The Civil Justice Council has developed a draft Code of Conduct for McKenzie Friends, while the head of Civil Justice and the Head of Family Justice have developed similar Guidelines. Civil Justice Council, note 12, p 8. See also Practice Note 3/2012 McKenzie Friends (Civil and Family Courts). At <http://www.courtsni.gov.uk/en-gb/judicial%20decisions/practice%20directions/documents/practice%20note%20003-12/practice%20note%20003-12.htm> (viewed 10 October 2013). Further, the

<sup>196</sup> For example, the Judicial Working Group on Litigants in Person urges that the concept of McKenzie Friends be reviewed and far more clearly defined. *Judicial Working Group on Litigants in Person: Report*, July 2013, section 6. At [http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/lip\\_2013.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/lip_2013.pdf) (viewed 25 September 2013). By contrast, legal representation is compulsory in Germany's regional courts, although not in small civil claims in local courts. Marfording, note 34, p 84. See also Milieu, *Comparative study on access to justice in gender equality and anti-discrimination law*, Synthesis Report, February 2011, p 31, for description of the varied requirements for legal representation in other EU countries. At [http://ec.europa.eu/justice/gender-equality/files/conference\\_sept\\_2011/final\\_report\\_access\\_to\\_justice\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/conference_sept_2011/final_report_access_to_justice_final_en.pdf) (viewed 15 October 2013).

<sup>197</sup> See also Judicial Working Group on Litigants in Person, above, section 2.11.

Rather than encouraging an indiscriminate increase in legal work performed by non-lawyers, it is more useful to focus on effective identification of the work that requires qualified legal knowledge and the work that does not. The benefits of better targeting of legal knowledge and expertise are, as mentioned above, that consumers' resources are more efficiently directed.

Existing examples include the jurisdiction of the Fair Work Commission, a tribunal designed to be used by parties without legal representation, with lawyers only encouraged in certain circumstances, such as where matters are particularly complex.<sup>198</sup> The Commission is piloting a program which provides pro bono legal representation to litigants in such circumstances.<sup>199</sup> Examples also exist at the Tribunal level, such as the occupational experts that appear as professional advocates in jurisdictions such as Planning.<sup>200</sup> CLCs, too, have demonstrated the value of referring clients to financial planners, for example, in appropriate cases, rather than immediately pursuing a purely legal path.<sup>201</sup>

The CIJ therefore suggests that separate inquiry be undertaken to identify further areas of the law which may operate successfully – and potentially more efficiently – without legal representation.

Equally, rather than simply increasing the use of mediation on an indiscriminate basis, the CIJ suggests that governments should continue to investigate options for expanding the use and availability of community-based dispute resolution services, and for continuously enhancing the capacity and quality of accredited mediators and other dispute resolution practitioners.<sup>202</sup> In doing so, it is important to note, again, that these accredited mediators do not necessarily need to be lawyers. In fact, it is arguable that those previously steeped in the adversarial process will not always adapt effectively to a different model of dispute resolution.

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198 In fact, section 596(1) of the *Fair Work Act 2009* (Cth) provides that a lawyer or paid agent may only represent a person with the permission of the Commission. See also Fair Work Commission, *Fair Hearings Practice Note*, 22 July 2013. At <http://www.fwc.gov.au/index.cfm?pagename=practicefairhearings> (viewed 25 September 2013).

199 Fair Work Commission, note 78, p 5.

200 The CIJ was advised during consultations that this practice is increasing. See also *Victorian Civil and Administrative Tribunal Act 1996*, s 62(8)(d). At [http://www.austlii.edu.au/au/legis/vic/consol\\_act/vcaata1998428/s62.html](http://www.austlii.edu.au/au/legis/vic/consol_act/vcaata1998428/s62.html) (viewed 15 October 2013).

201 See, for example, the National Bulk Debt Project. At <http://www.bulkdebt.org/public/HomePage.aspx> (viewed 15 October 2013).

202 See, for example, work undertaken by the National Alternative Dispute Resolution Advisory Council (NADRAC), an independent advisory council charged with:

(a) providing the Commonwealth Attorney-General with coordinated and consistent policy advice on the development of high quality, economic and efficient ways of resolving or managing disputes without the need for a judicial decision, and (b) promoting the use and raising the profile of alternative dispute resolution. At <http://www.nadrac.gov.au/about/NADRAC/Charter/Pages/default.aspx> (viewed 14 October 2013).

## 4. Beyond this Report

More broadly, it is essential to acknowledge that increased flexibility in the legal profession, as well as certainty and transparency in the way that it charges, will always be constrained by the court and wider processes in which the profession operates; influenced by the choices and decisions that people and institutions make; and by the actions that they choose, or choose not, to take.

Though this Report is specifically concerned with improving the relationship between practitioners and consumers, the context in which that relationship arises and proceeds, if it does, will also have a significant impact on the affordability of legal services.

Throughout consultation for this Report, practitioners consistently emphasised that multi-layered and overly complex court processes were a major barrier to the supply of more affordable fees. For example, the CIJ was told that the criminal jurisdiction has seen a significant increase in court events in recent years.

As one solution, many have called for a corresponding increase in judicial control, beyond the case management strategies already adopted. In the July 2013 report of the UK's Judicial Working Group on Litigants in Person, proposals include provisions that enable the judiciary to move to a more inquisitorial process where a self-represented litigant is involved.<sup>203</sup> Suggestions raised during the course of the CIJ's consultations also included moving to an inquisitorial process in civil disputes involving matters under a certain value in the Magistrates' Court; excluding lawyers from appearing in such matters and imposing strict time limits on hearings. Conversely, others involved a reduction in judicial involvement in pre-trial activity, such as changes to requirements that accused persons go before a Magistrate upon every adjournment.

Additional suggestions raised during consultations involved removing more matters from the conventional court system – in the criminal jurisdiction, increasing the scope of offenders who are 'diverted' from the criminal justice process, for example; and in the civil arena, examining what further areas of law might be transferred to the sole jurisdiction of tribunals.

The pragmatism of these suggestions, of course, has been echoed in the substantial body of inquiries and commentary that have concerned access to the civil justice system in recent years. For example, it has been observed that an adversarial model which tests every detail and exhausts every avenue is not in the interests of a client who simply wants to resolve a dispute quickly and reasonably; to maintain the relationship where appropriate; to resume or continue operation in the case of small businesses; and, of course, to do it all as cost effectively as possible.<sup>204</sup>

They are also mirrored in the substantial number of initiatives that aim to support, encourage and sometimes require parties to resolve their disputes through non-litigious channels, such as industry ombudsman schemes, consumer redress and complaint channels, community based dispute resolution services, contractual mediation and arbitration clauses, statutory conciliation schemes, pre-action protocols, and court-based referral to ADR services.<sup>205</sup>

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<sup>203</sup> Judicial Working Group on Litigants in Person, note 196, s 2.10.

<sup>204</sup> Doyle, note 3, p 2.

<sup>205</sup> See Tania Sourdin, 'Civil Dispute Resolution Obligations: What is Reasonable?' 35(3) *UNSW Law Journal*, 89.

It is equally important to recognise that, amongst the entirety of disputes and legal matters encountered within the community, only a relatively small number result in action taken in courts or tribunals, or even in contact being made with legal assistance services, whether private or public. For example, the Legal Australia-Wide Survey published in 2012 produced extensive data that revealed the breadth of advice seeking behaviour of people encountering legal issues, the pathways that lead them to the variety of available legal assistance services and dispute resolution options and the diverse ways in which people resolve their disputes both through formal and informal justice processes.<sup>206</sup> An increase in services that bridge these resolution paths should therefore be encouraged.

#### **Dispute Settlement Centre of Victoria**

Community based dispute settlement centres in Victoria offer parties an opportunity to resolve disputes locally, and do so in as low key, early and common sense a manner as possible. This service offers early dispute assessment and advice, with Dispute Assessment Officers (DAOs) offering practical suggestions about how to proceed. Where appropriate, the service can contact the other party to the dispute and, if amenable, offer them suggestions about how they might approach resolution of the matter. Where resolution cannot be reached on an informal basis, the matter is assessed to see if it is suitable for a free mediation by an accredited DSCV mediator to help parties resolve the claim. Mediation is also offered to disputants referred by Magistrates' Courts in various locations around the state in defended civil claims under \$40,000 and in some intervention order applications not involving family members, otherwise known as 'stalking' matters. It also offers onsite intake and assessment, as well as mediation, at the Neighbourhood Justice Centre, a community-based, therapeutic court model.<sup>207</sup>

This very localised and practical approach is about resolving disputes early, and without the need for escalation. Where linked with court referral, this approach diverts matters out of the adversarial system where consuming the time of the parties and court alike is simply not proportionate to the sum or issue in dispute.

Examples such as this reflect how parties can be given a greater sense of ownership and choice over the resolution of their dispute, even without the benefit of legal representation. In other words, they are examples of how a dispute resolution culture can begin to emerge.

As stated at the outset, the purpose of this Report is not to re-examine the breadth of inquiry across the legal system, but to emphasise the value of a legal culture and practice that supports people to resolve their disputes, or deal with legal issues in the most affordable and effective way possible. Such a culture should not aim to propel people into unnecessarily complex court proceedings that require expert legal assistance, nor to exclude them from formal legal redress simply by virtue of their lack of means to afford legal fees.

Clearly, the legal system is constantly undergoing change, with courts, practitioners and governments alike continuously in pursuit of improvement, and fully aware that justice is out of reach for too many people who need it. Like the fee structures that surround the legal profession, reform *is* possible. Only broader cultural change, however, will see this reform delivered.

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<sup>206</sup> LAW Survey, note 18; and *Strategic Framework for Access to Justice*, note 8.

<sup>207</sup> See generally Dispute Settlement of Victoria at <http://www.disputes.vic.gov.au/> (viewed 24 September 2013).

# Discussion – Effective, not Exclusive: Reconceiving the Role of the Law

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This Report has been about bringing together a range of innovations that exist and are emerging in the private legal market.

None of the suggestions contained within it is about undermining the value of the legal profession or the protections of the law. A push for greater competition or economic analysis, for example, does not equate to putting a price on justice, or on any individual right. Equally, a call for a subsidised and affordable legal practice does not devalue the role of the publicly funded sector.

Rather, the suggestions and discussion contained in this Report are about asking whether the over-engineered model that has developed in so many common law traditions is in the interests of every consumer, every time – whether it is necessary to throw every bell and whistle at our disposal in the direction of every dispute, or whether we can take a more strategic approach.

To do this we need to reconceive legal practice – not eroding its fundamental value, but ensuring that the practice of law is not pulling against the rest of the community. Rather than sitting outside the rest of the community, we need to find pragmatic ways to cement its relevance, and to re-engage ordinary people with the valuable service that the law can provide.

The concept of affordable housing is fairly well-established in the Australian environment, as is affordable healthcare. There is therefore no reason why the private legal market should not be the same – structured to provide more services, at a more competitive cost, to more people.

To do this, the role of lawyers also needs to be conceived differently. In saying this, the CIJ does not dispute that lawyers are a vital part of any democracy – protecting fundamental principles, testing evidence and argument, scrutinising potential excesses of power, defending people's liberty and assisting the vulnerable. Equally, lawyers need to undertake extensive study and gain substantial experience to perform this role and are entitled to earn a decent living for their efforts.

This does not need to be conducted, however, in a framework that shuts out consumers – an overinflated model that, in its determination to prove its expertise, excludes the very people that need it. Just as importantly, lawyers cannot point to their separate and quite unique duties to the rule of law without also acknowledging their duty to enable people to access this system.

In other words, effective reform depends in part on more lawyers taking a modest, realistic and sustainable approach to how they charge for their services. Certainly, a key to this involves harnessing other motivations for people to enter and stay in legal practice – whether through providing flexible workplaces, interesting files, or the satisfaction of independent careers.

It also demands, however, lawyers shedding some of their sense of financial entitlement. In fact, something that struck the CIJ during the development of this Report was the widespread and somewhat contradictory belief expressed by practitioners that legal services should be much more accessible, but that lawyers should still be highly remunerated. An additional challenge includes the fact that the profession's perceptions of reasonable remuneration do not match those of the consumers they seek to serve.

Rather than turning huge profits, the CIJ believes that an affordable justice system means turning equations on their heads – targeting lawyers' time more efficiently; reducing overheads; reducing unnecessary regulation; dispensing with time-based billing models; increasing client intake; and, most importantly, improving consumer confidence in the market.

This, in turn, can be done by increasing transparency and certainty about costs; by offering choice in terms of limited scope representation/discrete task assistance; and by being clear about which tasks require legal expertise and which do not. Overall, it means giving consumers genuine cause to believe that they have received and been quoted value for money.

All of these things are possible. In fact, the necessary innovation already exists – innovation that needs to be more widely broadcast not only to change the perceptions of consumers, but of practitioners about what can be achieved.

Given that the legal market is awash with strategic thinkers, the profession cannot lament the demise of access to justice, yet put the burden entirely on government, the courts or community sector to deliver. Rather, the profession must be part of the solution – one that does not simply prop up or propel the existing model, but which returns common sense to the legal market instead.

To this end, it should be remembered that progress will not depend on one magic bullet, but on a combination of reforms – greater transparency and predictability enabling choice and confidence in the market; and greater flexibility increasing access and removing pressure from the court and publicly funded system. For example, price certainty supports the provision of legal expenses insurance, while a better understanding of the services that genuinely require a lawyer assists in the development and provision of discrete task assistance.

All of these approaches are about acknowledging that the model currently on offer has become bloated – the essential protections of the original design overshadowed by convention. Instead, the emphasis should be on pragmatic assistance, on getting people back to work or back in business as quickly as possible without exhausting their resources. In short, the emphasis should be on encouraging a healthy, functioning legal profession with an engaged source of clients – recognising the benefits not only for consumers, but for the relevance and viability of a unique, yet very ordinary, profession.

In pursuing this emphasis, reformers must emerge from their traditional opposing camps – those which assume that an emphasis on competition means that the vulnerable are ignored; or that an emphasis on public or community services means that pragmatics, or economics, are disregarded.

While justice itself can never be framed in terms of a business case, this does not mean that legal consumers should be left stranded in the middle – that we cannot bring together the best of what we know from every sphere and identify innovations that can make a genuine difference.

It is time, therefore, for governments and the profession to stop assuming that responsibility lies elsewhere. Just as it is within the power of government to encourage and, where relevant, enable greater flexibility and certainty in the way that legal services are provided, equally, it is within the power of practitioners to deliver reform – developing a market that is competitive and sustainable, all because it offers an affordable supply.

# Steps to Affordability – Pragmatic Suggestions for the Road Ahead

So what can governments, professional associations, regulators and practitioners do to move further towards this pragmatic conception of the law?

The CIJ has developed a series of proposals aimed on the one hand at assisting consumers to identify and access affordable legal services, and on the other at supporting practitioners to provide such services.

## Proposals to Assist Consumers

1. Government, professional associations and Legal Service Commissioners should collaborate to develop greater sources of information for consumers. Ideally this would involve a dedicated website specific to each State and Territory which includes information about:
  - what and how practitioners can charge
  - what, in reality, they do charge – including what range of figures was considered reasonable by costs assessors in different types of matters in different areas of law
  - whether practices offer price certainty
  - whether practices charge according to a published schedule of fees, for example based on legal aid rates
  - where the use of multiple lawyers for a task may be justified
  - whether practices offer discrete task assistance or limited scope representation
  - whether practices have secure online systems
  - whether they offer pro bono assistance to individual clients
  - the distinction between law practices which operate online, question and answer services, referral services and pro forma documentation preparation.

The inclusion of a function for consumers to rate lawyer affordability is also proposed. Private practices can collaborate by providing prompt and comprehensive information on a regular basis.

2. To support the above initiative, the CIJ proposes the creation of an obligation on Legal Services Commissioners (or equivalent) and formal cost assessment mechanisms to report on outcomes of solicitor-client costs disputes and the final figures considered reasonable. Such outcomes would be de-identified and categorised according to the nature and complexity of the matter. This could occur in Annual Reports and in specifically developed data to include in the websites proposed above.
3. Government should consider the establishment of a Legal Consumer Advocate – potentially within the new regulatory body to be created under the proposed National Legal Profession, charged with advocating for increased transparency about legal costs across the legal market. This appointment should have a practical, consumer focus and need not have a statutory basis.

4. Professional associations should invest in analysis to identify a wider range of legal matters that may adapt themselves to alternative fee arrangements, including no-win, no-fee arrangements, fixed fees and value-based pricing. Potential areas may include:
  - employment law
  - discrimination matters
  - unopposed guardianship and administration applications
  - probate applications
  - debt recovery
  - powers of attorney matters
  - other areas in which an increase of self-represented litigants has been identified.

This work could occur in collaboration between professional associations, potentially with the financial support of government – though private practices themselves must be ready to become involved, recognising the potential market edge that may come from being supported in offering a more competitive fee model.

5. Entities that have a large legal spend and an interest in access to justice, such as governments, should foster a greater use of price certainty through their own legal arrangements, purchasing legal services on a fixed fee or 'value' basis to encourage the wider use of this approach.
6. Separate work is needed to ensure that the various cost assessment and regulation mechanisms across jurisdictions do not undermine efforts to increase the availability of price certainty and alternative fee arrangements. Government may support regulators to see this work occur.
7. In any analysis of the role of litigation funding, including by the Productivity Commission, consideration should be given to the potential for the establishment of litigation funding mechanisms that have a public interest, or not-for-profit objective.
8. To increase access to funding for legal expenses, as well as to pro bono legal assistance, the Productivity Commission should investigate the merits and feasibility of:
  - A legal expenses loans scheme for consumers
  - Options for co-contribution membership schemes
  - Legal Expenses Insurance
  - Tax deductions for practitioners for pro bono work performed.

During consideration of this last question, broader questions of tax deductions for legal expenses on the part of corporate clients may also be considered as, arguably, the capacity of corporate clients to claim legal expenses as a tax deduction may work against efficient resolution of claims.

9. Professional associations and regulators should collaborate in the development of Model Rules to be adopted across all Australian jurisdictions which, informed by comparable Model Rules and Practice Notes in other jurisdictions, specifically provide for the availability of limited scope representation or discrete task assistance. These should address, amongst other things, issues of:
  - practitioner liability
  - scoping of retainers
  - inclusion and removal of practitioners from the court record
  - adequate disclosure and communication with clients, and with opposing parties.

This work could also include the development of standard forms of advice for certain areas of the law, as well as negotiation with insurers regarding adequate forms of protection. It would also, of course, involve consultation with courts so that rules may accommodate any proposed change.

10. During this work, professional associations and regulators may also consider the scope of conflict of interest provisions, and whether they can be refined so as not to prevent parties from benefitting from discrete, one-off forms of advice from CLCs.
11. Incentives should be created to enable more practices to offer pro bono services to individual and small business, as well as to organisational, clients. These could include a mechanism for better publicising any work performed, in turn increasing the profile of small practices that perform it.
12. Consideration should be given to mechanisms for encouraging and supporting private litigation funders to meet certain targets for funding pro bono or public interest cases or initiatives, with a focus on enhancing access to justice for individual or small business clients of limited means.
13. Investigation should occur into whether new models of service provision can be developed, building on existing free legal assistance models but servicing subsidised fee-paying clients. One example may be the provision of fee-paying services using a similar approach to that of QPILCH's Self-Representation Service. Given that this service has recently been expanded on a national basis, government could, in close consultation with QPILCH and other equivalent bodies, investigate the development of a pilot of a new model at one jurisdictional site to trial the value of fee subsidisation. State and Territory Governments could also be encouraged to explore the feasibility of such a service.
14. Legal Aid Commissions should investigate the adjustment of guidelines to their in-house practices in order to provide services for more clients from a wider range of income brackets on the basis of a contribution.
15. Professional associations should give more detailed consideration to whether restrictions can be loosened around the direct briefing of barristers in a wider range of cases.
16. Regulators and professional associations should develop best practice models for efficient targeting of legal skills and experience within private practices, to avoid unnecessary duplication.
17. Separate inquiry should be undertaken to identify further areas of the law which may operate successfully – and potentially more efficiently – without the need for legal representation before courts or tribunals.
18. Governments should continue to investigate options for expanding the use and availability of community-based dispute resolution services, and for continuously enhancing the capacity and quality of accredited mediators and other dispute resolution practitioners.

## Proposals to Support Practitioners

19. Governments and professional associations should support the development of business models which facilitate:
  - transparency around costs
  - price certainty
  - reduced overheads, potentially through virtual practice, and the establishment of small/sole practitioner practices including by junior practitioners, with appropriate support and mentoring along the lines of 'law firm incubator' models
  - discrete task assistance and/or limited scope representation, with an emphasis on 'triage', early advice on the merits and legal diagnosis
  - pro bono on a case by case basis to individual and small business clients
  - targeted use of legal advice supported by other services, such as social work and financial counselling, including clear delineation of the lawyer/client relationship and appropriate governance of consumer arrangements.

Practitioners working in these business models should be supported by secure and sophisticated information technology and by the use of flexible and collaborative work practices which encourage further innovation. Potential may also exist for these practices to be supported through the provision of initial funding for virtual office spaces, or other forms of administrative support.

20. To support this, legal educators and professional associations should encourage the inclusion of business skills as an optional part of any professional legal training to encourage innovation in small and emerging practices.
21. Professional associations should develop information and training to accompany the release of new Model Rules around discrete task assistance and limited scope representation, as well as direct briefing to Barristers.
22. The Productivity Commission should, in consultation with professional associations, examine questions of regulation and professional indemnity insurance to consider whether levels of regulation should be targeted at the level of risk undertaken. This could include consideration of:
  - restricted practising certificates – either specific to a chosen area of practice or excluding certain high risk areas of practice
  - what concerns – on the part of insurers and practitioners – need to be addressed to facilitate more widespread pro bono work on a case by case basis.

# Appendix A – Consultation List

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During the development of this Report, the CIJ consulted a range of representatives from private practice and the wider legal system. Some participated in a Roundtable Discussion at the CIJ's premises in Melbourne on Tuesday, 24 September 2013. Others were consulted individually.

## Roundtable Participants

- Rob Hulls, Director, Centre for Innovative Justice
- Elena Campbell, Project Leader & Report Author, Centre for Innovative Justice
- Mary Polis, Manager, Policy & Research, Centre for Innovative Justice
- Geoff Bowyer, President Elect, Law Institute of Victoria
- John Cain, Managing Partner, Herbert Geer
- Alon Cassuto, Director & Co-founder, Easy Law
- John Chisholm, Chisholm Consulting
- Russell Daily, Acting Legal Services Commissioner (Victoria)
- Peter Gordon, Gordon Legal
- Julie Grainger, Member, VCAT
- Liz Harris, Harris Costs Lawyers
- Tim Lee, Commissioner, Fair Work Commission
- Rob Stary, Rob Stary and Associates.

## Individuals Consulted

- Elizabeth Shearer and Bruce Doyle (Brisbane, 11 September 2013)
- Tony Woodyatt and Andrea de Smidt, QPILCH (Brisbane, 11 September 2013)
- Luke Geary, Salvos Legal (Sydney, 12 September, 2013)
- John Corker, National Pro Bono Resource Centre (Sydney, 12 September, 2013)
- Professor Peter Cashman, University of Sydney (Sydney, 12 September, 2013)
- Julie Ligeti, Manager, Policy and Government Relations, Slater & Gordon (Melbourne, 24 September 2013)
- Carolyn Bond, Community Law Australia & former Co-CEO, Consumer Action Law Centre (Melbourne, 27 September 2013).





[www.rmit.edu.au/innovativejustice](http://www.rmit.edu.au/innovativejustice)