

RESEARCH PAPER

Civil Assistance and Dispute Resolution Services

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1. The Justice Statement identifies several issues for civil justice. Most pertinent is the limited availability of first tier advice services and legal aid and the dispersed growth in ADR – industry schemes, courts and neighbourhood dispute centres.
2. The Statement advances several principles on which strategies might be built to overcome these issues. They include: that early advice increases early resolution, before disputes become entrenched or they escalate and that different types of dispute need different resolution processes. A more coordinated approach is sought to the provision of civil advice and dispute resolution services. Coordination will improve access at critical points and increase resolution opportunities.
3. In this regard, the Statement nominates five strategies. Cast in general terms, they are ambitious goals. They will require not just to be implemented but practical means of ‘operationalisation’. We believe that action-oriented research can help make a good start on them. We have a proposal for research that will assist with this task.
4. Two of the Government’s own strategies reflect this need. They recommend examining the role of continuing legal education in changing legal culture and improving skills and strengthening civil justice research and policy capacity.
5. The key strategies are to:
 - Identify more precisely the extent and nature of unmet legal need
 - Expand advisory services (including opportunities provided by new technology)
 - Strengthen and expand ADR

Unmet legal need

6. How to identify this need is an enduring question. The most systematic and scientifically sound effort recently is the Pathways to Justice research in the United Kingdom led by Professor Hazel Genn of the University of London. We appreciate that this research, which is based on the administration of representative surveys, requires a major commitment of resources. In Australia, consultants to the Commonwealth Government pursued only a truncated version and the Law and Justice Foundation of New South Wales is still in the early stages of a similar exercise.

7. We can provide State policy makers with an accessible and critical appraisal of the United Kingdom findings and developments. The researchers are cognisant of the difficulties and limitations associated with defining 'unmet legal need (eg. Curran and Noone, forthcoming). This experience can help refine the inquiries to be made here in the field.

8. We propose research that would make use of this ground breaking work, but at the same time move policy making ahead. In the United Kingdom, Genn's foundational work has been followed by a series of periodic surveys. A permanent unit, the Legal Services Research Centre, has been established in the Legal Services Commission. It draws from a group of academics in the University of London and University of Westminster.

9. The periodic surveys are recognition that need changes over time. Changes in the economic and social environment, including adjustments to government policy and revision of the law, produce new problem complexes. Fresh solutions may be required.

10. So too, in the United Kingdom, the development of an operational response has turned attention to the identification of local legal need. Broad structural sensibilities are linked to a bottom up approach in which local knowledge and experience shape priorities. We would expect, in any case, that the pattern will vary from one jurisdiction to another, from a United Kingdom region to an Australian state.

Advice and ADR

11. Our prime proposal is a piece of action research with a limited time frame – six months. The object of the research would be to identify the potential in the local field for a more coordinated approach. It would recommend where some additional State funding for civil justice could most productively be applied. The intelligence from the field can shape criteria for rationing funds in competition with other government responsibilities.

12. There are several reasons for favouring action research at this time. The United Kingdom work has itself led to the formation of particular operational response, the Community Legal Service. In many ways, the advisory and dispute resolution services in this State are already in advance of the United Kingdom (one disparity is the community advice bureaux) and we are in a position to build on the efforts here.

13. We shall analyse what is working and see what can be improved. In particular, two innovations will come under consideration, the community legal service partnership and the pre-action protocol. These concepts are briefly outlined in an attachment.

14. While the research will be conducted with an open mind, we believe these hypotheses are worth investigating:

- Problems tend to come in clusters (such as employment and money or accommodation and money). There are certain critical events, such as injury and ill-health or family separation, that will trigger compound problems unless an early, purposeful intervention is made
- Among the vulnerable groups of people, advice seeking and dispute resolution strategies vary. There is a group who will not seek out help at all without prompting. They are deterred not simply by the cost of services but the remoteness from their lives.
- Even with the best will, the present structures for service delivery (prescriptive limits on aid, professional and bureaucratic demarcations) mean that some

clients are turned away. Others are referred onwards, and the more this occurs, the greater the rate of drop-out.

- The best solutions are by no means simply legal or judicial. So, networks are important to coordinating services and fashioning solutions. In particular, lawyers and non-lawyers should be connected in advance of individual problems arising to ensure the most holistic solutions are forthcoming.
- Some problems will require legal representation and access to the courts and tribunals, which is not to say they cannot be resolved pre-action or be resolved non-determinatively.
- The solutions lie immediately with the parties and their advisors, but governments can play a constructive role. In the background, law reform may help ameliorate the structural causes of disadvantage.

Research Method

15. The project is designed to:

- Formulate useful hypotheses and indicators for gauging the extent and nature of unmet local need, together with the capacity most effectively to meet that need.
- Test those hypotheses and trial those indicators in the Heidelberg/Greensborough region, a comparison being made with a western suburbs area such as Melton.
- Evaluate and refine the benchmarks for use in a broader collaborative research and development project.

16. In Stage one, the quantitative research findings elsewhere will be used to develop hypotheses and indicators that are informative both system-wide and in local situations. The researchers will also draw on their own extensive experience in the field and the experience of others. They will look for local sources of socio-demographic data that are likely to indicate a civil justice need.

17. Research has found that the quantitative studies of need (of the Pathways to Justice kind) are best complemented by selective qualitative studies. Without qualitative studies, little of the human and institutional stories that lie behind the

successes can be told. Elsewhere, surveys, histories, interviews and focus group methods have been used to capture the complex of problems and networks of solutions (eg. Pleasence, Buck, Goriely, Taylor, Perkins and Quick, 2001).

18. Stage two will be an investigation of current practices and the trial of indicators using the West Heidelberg/Greensborough region. A comparison will be made with a western suburbs area where it is expected the need is as great but the infrastructure is not so strong.

19. The researchers will tap their networks to keep a register over a two-month period. Among the potential access points and service providers are community legal services, Legal Aid Victoria offices, Victoria Law Foundation, community health centres, mediators, Magistrates Courts, duty lawyers, local solicitor firms, financial counsellors, police, transport officers, Centrelink offices, domestic violence support agencies, youth workers, school counsellors, Salvation Army, general medical practitioners, libraries, local government, housing agencies, local parliamentarians, energy companies, nursing homes, and ethnic community leaders.

20. An advisory committee should be established to facilitate and guide the project, including for example representatives of the Department, Victoria Legal Aid, Victoria Law Foundation, the Federation of Community Legal Centres and the Magistrates Court.

21. The survey will record the requests for civil information and assistance. Service providers will be asked to note those who are turned away or not referred productively to other agencies. We know that civil cases are largely excluded from legal aid at present.

22. Where assistance is provided, the researchers will follow up by working with the main provider to construct case studies. These studies will be developed in order to characterise the category of the problems, the characteristics of the clients, the immediate responses, the priorities established, the networks used, the obstacles met, and the pathways of successful dispute resolution. In particular, the research will map the networks of assistance.

23. The survey and studies will be backed by face to face interviews and focus group consultations. Their aim will be to tap the deeper experience available locally. The first group consulted will be the service providers and other local agencies who see those with a problem (general practitioners, mps, schools, hospitals, energy companies, police, etc.).

24. The second group will be those community members whose needs have not been met. These consultations will be handled delicately, with the aid of trained facilitators and carefully constructed questions. Questions will use realistic scenarios and allow for open-ended responses.

25. It is hoped first the service providers and then some of these community members will lead the researchers on those who are not seeking help at all within the current structures. Reaching those who fall outside the existing frameworks is a critical component of the research. It will likely require work with homeless and transient, people in distress, the mentally ill, and people with disabilities.

26. Under the guidance of the chief investigators, the project will employ a mature researcher/administrator to arrange the logistics of the trial.

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Attachment

Community legal service partnerships

1. Partnerships are a 'third way' approach enjoying much currency. For governments with limited resources (for instance, financial, regulatory, consensual), partnerships have the capacity to enlist the cooperation of business, charitable and professional groups in civil society.

- 2.. Rationing of government services may lead to fragmentation and exclusion. Partnerships are said to foster communication between key groups and promote reflexive decision making. They help re-establish more integrated and responsive systems.

3. First, they can act as a source of hard, timely information about the nature of local need, distinguishing, for instance, those problems with the most serious consequences, where self-help on its own is likely to be inadequate. Genn confirms the insights of the CLC movement that problems come in clusters and that the solutions are not just legal ones. Furthermore, they are not so much the product of people types as the circumstances in which they find themselves, given certain triggers, such as injury and ill-health, unemployment, separation, housing problems, and debt.

4. By connecting providers, suppliers, and users proactively, they should produce more problem solving advice and assistance. They go beyond simple referral systems. Ideally, the members of the partnerships: (1) contribute complementary assets, (2) develop trust and cooperation, (3) plan and gear services to different needs, (4) support local networks, and (5) adjust performance according to feed-back. They decide the appropriate mix of services, rather than this being prescribed by rule, or contract, from the centre.

5. On a visit to Victoria University, the public activist and law academic, Gary Blasi explained how services for the homeless missed the mark - until they were offered in places and at times when need arose. This approach takes account of the different advice seeking practices of different people.

6. In a recent article, Phillip Lynch identified seven such 'lessons'. They stress the involvement of homeless people and their advocates in both service provision and policy formulation, a holistic approach to problem solving (including a specialist court), targeting of legal services, a close working relationship with law enforcement agencies, a human rights framework, and public education (Lynch, 2003).

7. Partnerships may embrace government agencies, social services, court and tribunal registries, local government, community centres, legal workers (law societies, city and local firms, legal services, public interest law advocates, members of the independent bar), other professionals (such as general practitioners), charitable and not-for-profit organisations, rights groups, and court networks.

8. Possibly they might engage those organizations with which the problems arise, though their involvement might be best left to the domestic dispute resolution and pre-action protocols stages (see below). Such organisations include major employers, energy companies, bank, finance and insurance, and Centrelink agents, all of which have an impact at critical points on people's lives.

9. We should build on those nascent forms and ad hoc experiments found locally. Among the sources are: (1) legal services in community centres, church organisations, tertiary education institutions, (2) CLC networks with private legal practitioners, other professionals, government agencies, (3) specialist advocacy centre link-ups with government agencies and philanthropic foundations, eg in consumer protection, mental health, (4) pro bono clearing houses, law firms, welfare and charitable organisations, and the pro bono resource centre, (5) family law pathways, including VLA family law primary dispute resolution service, Dandenong Court self-help support services, (6) VLF information extension points and access centres, eg local libraries, medical practices and hospitals, on-line media, (7) specialist and problem-solving courts and local court diversion programs and (8) State Government/local government Communities pilots (such as the DOJ/Darebin Council project).

10. Under closer scrutiny, it may well be that some of these will not qualify as appropriate models. In such research, there are legitimate issues to be explored

regarding role conflicts, public and private responsibilities, adequate funding, appropriate expertises, and genuine client participation.

11. Part of the exercise is then to develop criteria for recognizing and funding partnerships, including the benefits that should be expected of them. Realistically, they would be drawn with an eye to Treasury support. Moorhead and Pleasence observe that: 'A serious issue facing policy makers and academics in the access to justice field is how to understand and articulate a persuasive case for the value of law, legality and access to justice when health and education dominate public interest and public spending concerns' (2003: 3).

12. Partnerships should also be situated within the bigger scheme of service funding and supply. For example, in the United Kingdom, it is still the case that most of the Community Legal Service funding still goes to representation by private practitioners. So too, while it plays a smaller part in the sum total of services, conditional fee arrangements may be more responsive to particular types of problem, eg, injuries and dismissals. Which is not to say that these arrangements cannot benefit from public support, say for disbursements (Arup, 2001).

13. For such strategic research, another factor to be taken into account is the relationship between State and Commonwealth Government contributions. The Commonwealth will be a presence in this field in a variety of roles, as a funder of legal aid, for instance, a provider of social security payments, and the source of certain key legal jurisdictions. Reading the reports of partnership services in the UK, it is evident too that immediate assistance with social security benefits is vital to problem solving.

Private dispute resolution and pre-action protocols

14. While emphasis is being given to alternatives, we still know that tribunals and courts have a role motivating and guiding domestic and private dispute resolution. Research of the potential for further coordination should take into account this role.

15. Certain high volume jurisdictions already require the parties to attempt internal dispute resolution, before they are permitted access to the tribunal or court. Examples

are the specialist compensation and employment jurisdictions. Some institutional litigants, such as the energy and finance providers, offer such facilities of their own initiative or pursuant to an industry code of conduct.

16. A key question for the study is how the civil advice and assistance suppliers could productively connect with the institutions (public or private, the lines are blurred these days) that are, repeatedly, on the other side of disputes.

17. Elsewhere, the courts have applied pre-action protocols in order to stimulate parties to develop their own systems. In the United Kingdom, the protocols have been prominent in areas of need, such as personal injuries and public housing disputes. Less experience is available here in Australia, one relevant example worth studying is the civil jurisdiction of the South Australian magistrates court (Cannon, 2000).

18. Pre-action protocols require the parties to make contact, exchange information and attempt a settlement of their issues. They create an early point at which alternative dispute resolution services may be utilised. Pre-action in particular, alternative dispute resolution can accommodate a range of creative and purposeful solutions to problems.

19. To focus such study, we should take note of Genn's finding that, if they were to find their way into the formal adjudicatory system, nine out of ten disputes would fall within the small claims jurisdiction. Locally, this makes the Magistrates Court a crucial reference point, but so too the Victorian Civil and Administrative Tribunal. Certainly, this holds true for finance and consumer problems, others like mental health and residential tenancy problems are channeled to VCAT too.

20. The UK research indicates that pre-action protocols will work better with some kinds of disputes than others (Goriely, Moorhead and Abrams, 2000). If early resolution is a worthy objective, it is vital that the research remains alert to the situations in which legal representation and access to the courts and tribunals is still productive, indeed essential (Hunter, 2003). All the more so, should the Government be contemplating full cost recovery in cases that do issue.

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