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Defeated by high legal costs: the terrible injustice most of us could face



Ross Gittins ✉️ 📧 📧

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It's one of the most glaring gaps between theory and practice in our community, a huge disconnect between our democracy and our economy. A terrible injustice most of us could face. Everyone knows about it, but it's rarely discussed. What is it?

The prohibitively high cost of justice. We're all supposed to be equal before the law, but you ain't anything like equal if they can afford a lawyer and you can't.

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The president of the Law Council of Australia, Fiona McLeod, is running a campaign to highlight the plight of people who, in theory, should be receiving aid to help them with their legal problems but, in practice, often aren't.



People who include Indigenous Australians, those with disabilities, older people, children, the homeless and those experiencing economic disadvantage, prisoners and detainees, asylum seekers and other recent arrivals to Australia, people who have been trafficked and exploited, LGBTI people, those experiencing family violence and those in regional and remote areas.

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The sad truth is that, in these times of tight budgets, when federal and state governments of both colours lack the courage to tackle the powerful interest groups benefiting from the biggest swathes of government spending, legal aid is treated as a soft touch.

You can chop it back without outcry.

But the problem is bigger than that. Lawyers speak of the "missing middle" – people who aren't rich enough to afford lawyers, but aren't poor enough to be eligible for legal aid.

That's some middle. In the Productivity Commission's 2014 [report](#) on access to justice, it estimated that only the bottom 8 per cent of households were likely to meet income and asset tests for legal aid, leaving "the majority of low and middle income-earners" likely to struggle or miss out.



Illustration: Simon Letch

To give you an idea, a less complex family law case costs the parties between \$20,000 and \$40,000, with complex cases costing more than \$200,000.

And your chances of requiring legal help are higher than you may realise. A survey conducted in 2008 found that close to half of respondents experienced one or more civil (not criminal) legal problems, including family law matters, during a year.



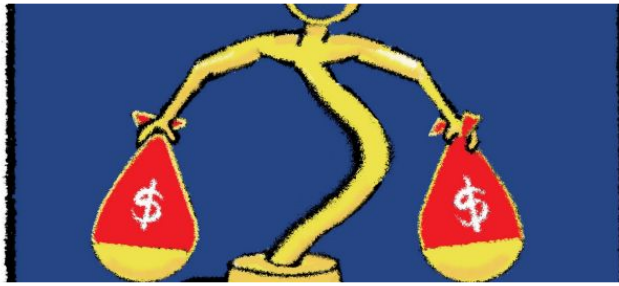


Illustration: Andrew Dyson

The report says that "the ability of individuals to enforce their rights can have profound impacts on a person's wellbeing and quality of life.

"For example, it can mean that someone who has sustained injuries due to the negligence of others can seek recompense for impairment and/or their reduced income-generating capacity."



Law Council of Australia president Fiona McLeod is highlighting the plight of people who should have more access to legal help. Photo: Andrew Meares

So what can we do to reduce this gap between what we're entitled to and what actually happens?

Short of nationalising the legal profession, there is no single, simple solution to the high level of lawyers' incomes and thus legal costs.



If lawyers can't do more to limit costs, one day governments will get tough with them. Photo: Jessica Shapiro

Apart from urging governments to spend more on legal aid, the Productivity Commission's answer is to chip away at the problem in as many places as possible.

More should be done to disseminate legal information (including self-help kits). States should establish a central, well-publicised point of contact for legal assistance and referral. The service would provide free telephone and web-based legal information, as well as actual advice on minor matters.

People need to be more aware of the ways to resolve disputes without using lawyers and courts. There are more than 70 government and industry ombudsmen and complaint bodies, covering telecom providers, banks and government agencies, which sort many matters with little cost or delay.

There are almost 60 federal and state tribunals, dealing mainly with challenges to bureaucratic decisions. The idea was that people would represent themselves and lawyers be avoided, but a legalistic approach is creeping in.

Then there's "alternative dispute resolution" where people such as retired judges can fix problems before matters get as far as court. More could be done to encourage this.

The courts have been doing more to manage their case load and push cases through, but they could do a lot more to reduce unnecessary cost and delay. They could make more use of technology to improve their performance.

The commission says there is "substantial scope to improve the efficiency and effectiveness of Australia's civil justice system" by curbing abuse of the adversarial system through a lack of co-operation and disclosure between the parties and the use of procedural tactics, and by discouraging disproportionate legal and other costs.

Rules about the awarding of costs could be toughened to discourage tactical delays and over-servicing.

As for the lawyers themselves, some of their longstanding rules of behaviour, supposedly intended to ensure clients get the best service, may be more about allowing them to charge more.

The commission says lawyer and client should be able to agree that the lawyer will do some, but not all, of the legal work involved.

It should be possible for more legal tasks to be performed by non-legal professionals.

It's permitted for lawyers to work on the basis that no fee is charged if a legal action is unsuccessful, but an extra percentage is added to the normal bill if it is successful.

But it's not permitted for lawyers to charge an agreed percentage of the damages their client receives. The commission believes that, with adequate protections, it should be.

If the courts and lawyers can't do more to limit the cost of legal proceedings, one day governments will get tough with them.

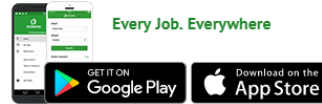
Ross Gittins is the *Herald's* economics editor.

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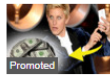
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