

Law Council of Australia

# Addressing the legal needs of the missing middle

Position Paper

November 2021



Law Council  
OF AUSTRALIA

# Table of Contents

<b>Identifying the missing middle.....</b>	<b>3</b>
<b>The key areas of legal need for the missing middle.....</b>	<b>3</b>
<b>Strategies for meeting the legal needs of the missing middle .....</b>	<b>4</b>
Increase funding to legal assistance services.....	4
Pro bono services .....	5
Prevention and limiting of legal need.....	5
Unbundling legal services.....	6
Joined-up services .....	6
Low-bono services .....	6
Third-party litigation funding .....	6
Reducing the costs of disputes.....	7
Alternative dispute resolution .....	8
Self-help and self-representation resources .....	8
Ombudsmen services.....	9
Incentive schemes for lawyers to practice in RRR areas .....	9
Legal expenses insurance.....	9

## Identifying the missing middle

Effective access to justice often depends upon the assistance of a legal adviser or representative. While some people may have the ability to navigate the justice system effectively without a lawyer, many require intensive legal assistance due to their personal circumstances, a lack of understanding of the legal issue involved in the problem or legal remedy available, the seriousness or complexity of the legal issue, or a combination of these.

The group of individuals who do not meet eligibility criteria for publicly funded legal services yet lack the resources to afford a private lawyer's assistance for all or part of their legal matter, make up the 'missing middle'. Particular sectors of the community may be more likely to fall within the missing middle. These include older persons, people living in rural, regional and remote (**RRR**) areas, and a range of other groups, including:

- people with disability;
- people with health or mental health issues;
- women;
- single parents;
- children and young people;
- Lesbian, Gay, Bisexual, Transgender, Intersex + people;
- people experiencing family violence;
- part time, casual and temporary workers;
- small-business owners;
- people from culturally and linguistically diverse (CALD) backgrounds; and
- migrants.

## The key areas of legal need for the missing middle

Given that certain groups are overrepresented in the missing middle, understanding their legal needs may assist in addressing the needs of the missing middle more broadly. There are limitations with the existing data set and with any attempt to identify the requirements of a constantly evolving group. Further, there will be variations in legal need according to the particular service provider and its geographical region. However, the following themes have consistently emerged as key areas giving rise to unmet legal need for the missing middle:

- Emergency responses. Natural or human-generated disasters may have particular impacts for RRR residents, older persons and small-business owners. In addition, the COVID-19 pandemic has precipitated shifts, for example, to online court proceedings, which pose both advantages and disadvantages in accessing justice for vulnerable people particularly.
- Family law. There is a strong correlation between families experiencing disadvantage and/or with complex needs, and those who require the courts as a form of dispute resolution to resolve their legal disputes. Costs in accessing

the underfunded and resource-strained family law system are prohibitive for those families who cannot afford private legal representation and who do not qualify for a grant of Legal Aid.

- Wills, estates, probate and elder abuse. Older persons are overrepresented in the missing middle. Their diverse legal needs are affected by a multiplicity of factors, such as stage of life, age, socio-economic and family circumstances, health, geographic location and cultural and linguistic background.
- Litigation. The costs of litigation can be exacerbated by the prospect of an adverse costs order. This can make litigation prohibitive for people who have a meritorious claim but do not qualify for legal aid services. One policy which compounds this issue is that Legal Aid Commissions are required to prioritise funding for serious criminal cases, potentially at the expense of civil and family law matters. Bail and coronial proceedings are frequently areas of legal need.
- Certain other categories of civil matters. Where there is moderate or greater complexity, consumer credit and debt matters, and employment law matters represent a large area of legal need for the missing middle. Any matters involving abuse, violence, assault or harassment, as well as human rights, discrimination or child protection, are also a particular area of legal need.

## Strategies for meeting the legal needs of the missing middle

The laws and policies exacerbating access to justice barriers for the missing middle and the areas of unmet legal need outlined above make clear the need for a multifaceted approach and support from both policymakers and the legal profession. They also indicate possible strategies to meet the needs of the missing middle.

Through consultations with its Constituent Bodies, the Law Council has identified what it identifies as the key strategies for meeting the needs of the missing middle. While no one strategy by itself will sufficiently address the unmet legal need of this cohort, these areas may serve to complement existing arrangements and ultimately tighten the legal assistance safety net to reduce the prospects of those in the missing middle from slipping through without support.

The proposed role for the Law Council, as the peak representative body for the national legal profession, is also set out in relation to each strategy.

### **Increase funding to legal assistance services**

Current means testing and funding arrangements for legal assistance services have the effect of exacerbating access to justice barriers for the missing middle in Australia. Publicly funded legal assistance services have faced underfunding for many years, with the practical result that services must impose strict eligibility criteria to prioritise those in the community most in need of free legal support. The inadequacy of public funding for civil law services is of particular concern.

Where legal need is not met, matters may not be resolved appropriately and justly and an array of rights (including those which Australia has committed to providing under international law) may not be realised. There are also flow-on effects. Existing issues are entrenched, and governments face increased costs associated with adverse social, economic and health outcomes linked to unresolved legal issues.

The Law Council will continue to communicate with the Australian Governments as to the need for increased funding to the legal assistance sector, including adequate amounts for

casework services and joined-up services. Long-term, sustainable disaster relief funding should also be provided to individuals who have suffered the effects of a natural or human-generated disaster and require legal assistance.

## **Pro bono services**

Pro bono legal assistance services remain a primary source of support for the missing middle in Australia and have been described as the other key part of the best 'legal ecosystem', in addition to a well-funded legal assistance sector. Australian lawyers provide hundreds of thousands of pro bono work hours every year in a contribution of great value to the community, and a celebrated aspect of Australia's legal culture.

Measures to ensure the missing middle is benefitting from pro bono services include:

- ensuring the use of adequate insurance and education for legal practitioners wishing to undertake pro bono work;
- promoting awareness of the disbursement funds that practitioners can claim from, including for pro bono matters;
- increased support for pro bono intermediaries and 'clearinghouses' to identify, prioritise and allocate pro bono matters; and
- support for bodies such as the Australian Pro Bono Centre to encourage, promote and recognise the pro bono contribution of the legal profession.

The Law Council will consider projects aimed at ensuring the missing middle benefits from pro bono services, while reinforcing the view that pro bono should never be relied upon by governments as a replacement for an adequately funded legal assistance sector.

## **Prevention and limiting of legal need**

The Law Council recognises that many legal problems are preventable if individuals can identify earlier the need for legal advice, and where access to such advice is more easily accessible. It is noted that most of the Law Council's Constituent Bodies operate referral schemes to solicitors who are willing to provide advice on a fixed fee basis – or for no fee at all. These schemes are vital to early intervention.

Constituent Bodies should liaise with both the legal assistance sector, funders of access to justice initiatives (such as those administering funds receiving interest on solicitors' trust accounts) and government to ensure the widest possible advertising of these effective referral services, with heavier promotion to those whose needs are greatest. The cost of that promotion should be borne by the government bodies with primary responsibility for those likely to need the referral service the most.

As a further strategy for prevention and limiting of legal need, governments should consider implementing further policies which require certain entities or persons (for example, Justices of the Peace or financial institutions) to encourage individuals to seek tailored legal advice at a more preliminary stage, when administering certain activities which commonly give rise to legal need at a later point in time.

## Unbundling legal services

The Law Council recognises that unbundled legal services, namely those provided through the performance of discrete tasks rather than end-to-end assistance, can make costs more manageable and predictable for consumers. In the litigious context, unbundling can be used to give self-represented litigants understanding and a sense of empowerment in relation to their rights, responsibilities and ability to resolve a dispute.

The Law Council will continue to consider the ethical, legislative, general law and practical constraints and opportunities for meeting the needs of those who may benefit from unbundled legal services, especially those falling within the definition of the missing middle.

## Joined-up services

Holistic, multi-disciplinary service collaborations which seek to address clients' legal and non-legal needs comprehensively and seamlessly play a key role in supporting those in the missing middle. These include integrated services which employ legal and non-legal professionals under the same banner, co-located services in which legal services operate from the same location, and Health Justice Partnerships. Such services may benefit clients in a variety of areas of law, from elder law, to victims of family violence (for example, through access to shelter, medical services, police assistance and civil legal assistance).

The Law Council supports the growth of joined-up services as an important component in increasing legal awareness and directing those currently within the missing middle towards identifying and addressing legal issues.

## Low-bono services

Increasingly, providers of 'low-bono' services – where clients receive a deeply-discounted fixed fee for legal work – are emerging to offer solutions to the legal need of low- and middle-income earners. While there is growing sophistication around how low-bono services may be accessed, the availability of reduced fee legal work in many cases remains *ad hoc* and inconsistent.

Noting the potential for low-bono services to assist in meeting the legal needs of the missing middle, it may be appropriate for the following focus areas to progress with the support of the Law Council and its Constituent Bodies:

- encouraging members of the profession to consider formalising costs arrangements for where a client is incapable of paying full fees; and
- considering how structured reduced fee practices can be incentivised through access to financial subsidies and/or tax concessions.

## Third-party litigation funding

Third-party litigation funding typically involves a 'funder' agreeing to cover the costs of litigation and to indemnify the applicants against the risk of paying the costs incurred by the respondent if the case fails. In most circumstances, if the case is successful, the funder is reimbursed for the costs of the litigation and for bearing the financial risk of the case being unsuccessful through an agreed percentage of the sum recovered by the applicants.

Third-party litigation funding has the potential to improve access to justice in Australia, including for those in the missing middle. To remedy concerns regarding the regulation of funders in Australia and instances of large payments to funders significantly reducing the return to members of a class action, the Law Council has expressed in principle support for:

- the Australian Government legislating to address the lack of clarity in common fund orders; and
- giving the Federal Court greater power to oversee class actions.

Other options for third-party litigation funding models include charitable, not-for-profit models with relatively broad means tests, and providing that any regulation distinguishes between not-for-profit litigation funders and other funders.

## Reducing the costs of disputes

The COVID-19 pandemic has demonstrated that many case management initiatives which have developed *ad hoc* over the past decades (and which add to the number of appearances and documents in any litigation – and therefore substantially increase costs to litigants) can be done more efficiently. Online appearances are but one example.

The Law Council will advocate, in consultation with federal courts and tribunals, that these measures should be retained where efficiencies are not outweighed by competing interests, and that appropriate support for lawyers and their clients to use the necessary technology be provided.

Various other strategies are proposed for reducing the costs of litigation and the impediments they can pose to accessing justice for the missing middle. These strategies include:

- deciding more cases on the papers, noting that this raises concerns in relation to the principles of natural justice and the rule of law should opportunities to present a case be unduly limited;
- capping the cost and length of certain hearings;
- encouraging the courts to adopt costs-conscious processes, which may reduce the cost barrier of litigation for those in the missing middle; and
- avoiding undue complexity when drafting legislation, noting that the increasingly complex nature of certain pieces of legislation has been observed to give rise to proceedings of longer duration.

Given natural justice and rule of law concerns, the Law Council will consider advocating for deciding cases on the papers only in limited circumstances (for example, where the amount of money in dispute is low and time and legal costs are reduced).

In consultation with the federal courts, the Law Council will also consider further the possibility of capping the cost and length of hearings, and of encouraging the courts to adopt ‘costs-conscious’ processes where appropriate and where the principles of access to justice and open justice are upheld.

## Alternative dispute resolution

The increased use of alternative dispute resolution (**ADR**) processes has a number of advantages that can assist the missing middle, chief among them being improved cost efficiency compared to traditional court processes. ADR processes should not be overly formalised. They should generally be initiated at an early stage in proceedings when the issues are clear, the information and evidence is available, and there has not yet been a significant investment in the adjudicative process.

The Law Council will continue to advocate for the use of ADR processes to assist the missing middle in accessing justice and for strategies (including the mandating of legal assistance) to facilitate this, where appropriate. Regard will be had to risks, including the possibility of depleting an individual's resources such that they cannot afford an adjudicated decision where that is ultimately required. Advocacy will promote, amongst other things:

- ADR programs that are fixed rate, low cost and tailored to the specific area of law; and
- pro bono or low-bono ADR services.

## Self-help and self-representation resources

The provision of self-help resources is comparatively low-cost and, as such, an increasingly prominent and valuable method for improving access to justice for those who may not otherwise be able to obtain legal assistance. Examples of areas where self-help resources may be appropriate include in-court or tribunal assistance by volunteers, or online self-help resources and legal apps. The sale of appropriately prepared and tested template documents, for example a standard template loan document or standard consent orders for family matters, could be considered as another possibility.

It is critical that self-help tools not be seen as a complete solution to access to justice issues or to replace the provision of specific and tailored legal advice, as these tools may at times be an ineffective strategy for people with poor legal knowledge, literacy, language and communication skills, and for people with multiple and complex legal and non-legal needs. Self-representation in some matters carries the potential for miscarriages of justice (particularly in criminal matters, and civil actions where the government or well-resourced private litigants are the opposing party) and the right to representation should be preserved for all persons in court and tribunal matters.

The Law Council supports resourcing and support for self-help initiatives as a key solution to meeting legal demand from the missing middle. This is particularly effective where resources complement the availability of tailored legal assistance schemes for those unable to effectively apply self-help material, or those requiring representation due to the complexity or significance of the matter. It is essential that any increased use of technology does not exclude individuals from accessing justice, and measures such as resourcing for non-lawyers to assist clients in using relevant technology may assist in this regard.

## Ombudsmen services

Ombudsmen have a potential role in improving access to justice, including through the provision of a practical mechanism for resolving disputes of low monetary value, providing simple options for complaint lodgement and addressing systemic issues, through their investigative function.

The Law Council will consider advocating for the use of Ombudsmen to improve access to justice for members of the missing middle, where appropriate.

## Incentive schemes for lawyers to practice in RRR areas

A significant proportion of those falling within the missing middle are located in RRR areas, where access to justice challenges are often acute.

The Law Council will continue to encourage policy options for promoting the recruitment, retention and succession of lawyers in RRR areas. Targeted rural placement, mentoring and incentive schemes, additional legal assistance services and increased legal aid rates are all relevant tools in this context. Specialist services and referral networks should be supported to expand their reach into RRR areas, and expanded adoption of RRR-focused curriculums in undergraduate law training may also attract RRR residents into legal practice, and better prepare lawyers for its realities and challenges.

Acknowledging that some of these schemes may take some time to be fully established, governments should also implement additional measures, such as technology grants, to incentivise private practitioners to offer pro bono or low-bono services in RRR areas in the shorter term.

## Legal expenses insurance

Legal expense insurance (**LEI**) is a purchasable product through which individuals can obtain legal assistance from a private provider with some or all expenses covered by an insurer.

The Law Council and its Constituent Bodies have an ongoing role to monitor LEI providers in the Australian market. Where appropriate, LEI providers could be encouraged to create policies responding specifically to access to justice issues for the missing middle, including policies that offer broad, general coverage at an affordable cost.

In the event that a LEI product market in Australia is deemed capable of addressing the needs of the missing middle, further work may need to occur in relation to:

- developing and publishing guidance material for consumers which provides information about the necessary elements of a quality LEI product, including distinguishing between 'before the event' and 'after the event' LEI, given the potential for associate costs rules to have significant implications on the effect of such insurance;
- engaging with the profession, including through Constituent Bodies, to inform members about the access to justice benefits of LEI and about how it can assist lawyers and their clients; and
- ongoing engagement with industry bodies such as the Insurance Council of Australia and the National Insurance Brokers' Association.