Access to Justice: How Much Do We Really Care?

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The access to justice debate is dominated by the overwhelming cost of legal services. Legal aid, community legal centres and pro bono services have been described as 'current but incomplete answers' to the problem.[1] Proponents of economic rationalism support the use of litigation funders; the NSW government recently increased court costs to encourage people to choose alternative dispute resolution (ADR) over litigation, and courts will refer matters to mediation wherever possible to minimise their case load.[2] All of these solutions attract varying degrees of controversy within the legal profession. However, even the staunchest ideological opponents seem to agree on one thing: if people want access to justice they will have to go through a lawyer first. There are, however, other considerations beyond adding more lawyers. Access to information and legal empowerment both play an important role in promoting access to justice.

I. ACCESS TO JUSTICE MEANS ACCESS TO INFORMATION

The rapid decline of the newspaper industry shows how difficult it can be to capitalise on information that is already available to the general public. Similarly, if people already knew how to solve their own legal problems they would have no reason to pay for professional advice. According to Barendrecht, the legal profession has managed to overcome this problem by selling information 'in the form of tailor made advice … which makes it more difficult to copy, or by combining it with carrying out the advice.'[3]

Complexity is a common justification for this practice – the legal system is so complex that people need help understanding the law and navigating it. Although this is true in many circumstances, it is not a valid justification for a number of reasons. First, many problems that the legal system deals with are actually uncomplicated issues with simple solutions. Second, simple issues are often obfuscated by lawyers.

1. Uncomplicated legal problems are encountered on a regular basis.[4]

Legal advice is typically sought after an issue has escalated to an intolerable level. This makes it more difficult to resolve than if it was dealt with earlier. Moreover, people often recognise that an injustice has occurred but 'do not see it as a matter for which the law can provide redress'.[5] A national survey in Britain found that consumers 'lack a rudimentary knowledge of their legal rights, and are ignorant of official bodies, such as consumer agencies, which may be able to assist them.'[6] This research provides a strikingly accurate depiction of Australian consumers, even though the survey was carried out four decades ago. Mobile phone companies, for example, charge excess data fees at a rate that is several thousand times above market value and habitually fail to notify customers who are about to exceed their limit. Approximately 80 per cent of people who complain to the Telecommunications Industry Ombudsman (TIO) will have this issue resolved after the initial phone call; yet a majority of people have either never heard of the TIO or are unaware of its regulatory power.[7]

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Drei Anwälte im Gespräch by Honoré Daumier, 1843-1848

It is not just the private sector that exploits people's general lack of understanding about their own legal rights. The police will issue a hefty fine and a 3 month licence suspension for particular driving offences. This automatically results in an additional fine and suspension from the Roads and Maritime Services (RMS) under its demerit point scheme.[8] The select few who have enough time and patience to take this matter to their local court will discover that the penalty issued by the RMS is unenforceable because it breaches the double jeopardy rule.[9] The penalty can also be reduced by seeking an internal review, but this is likely to be done under the pretence of clemency rather than an acknowledgment that the penalty was issued without lawful authority.

These examples demonstrate how an understanding of basic legal principles and mechanisms can provide access to justice by balancing 'the skewed distribution of power' that is frequently responsible for creating conflicts within society.[10] Research that was conducted in five countries consistently showed that the power imbalances that exist in important relationships (including lawyer-client relationships) were responsible for generating 'disbelief in perceived personal capabilities for using the law to solve problems'.[11] Lawyers fail to effectively address this problem because they focus on the remedy stage of a dispute. Gramatikov and Porter argue that this 'is a form of treating the symptoms [of injustice] and overlooking the causes of the disease'.[12]

2. Lawyers create the complexity and then charge people for a simple explanation.

There is a viable argument that professional advice is not needed to resolve summary offences and consumer law violations because they are relatively simple matters. According to McBarnet, however, 'minor offences are characterised by simple facts and straightforward cases because lawyers are so rarely involved.'[13] Both of the examples discussed above could be easily obfuscated by considerations of statute and case law. If, for example, the issue of excess data fees were the subject of litigation, lawyers would carefully dissect the contract to assess whether the terms could be considered unusual or onerous. Both parties would also need lawyers to construct persuasive arguments about the specific knowledge and notice requirements of the transaction by examining the circumstances in painstaking detail. The outcome might turn on whether the red hand rule is satisfied if a salesperson says that excess data will by charged at 5.2c/MB; or whether sending an email notification to customers when they exceed their data limit amounts to reasonably sufficient notice. These issues were entirely constructed by the legal profession through the common law. Given the significant complexity this creates, it is not hard to understand why so many people assume that the law cannot provide redress to their problems.

Simply finding new ways of increasing the availability of lawyers or reducing the cost of litigation does not

improve access to justice because it 'ignore[s] the much more fundamental structural and ideological realities which lie behind the courtroom situation.'[14] This does not mean that lawyers do not have an essential role to play. After all, the ability for one person to avoid the effect of a widespread injustice does not amount to a just outcome. Complaining to the TIO or seeking a review of an RMS penalty does nothing to prevent these things from continuing to affect other people. It may, therefore, be argued that access to justice in such matters can only be achieved through the judicial process because a judgement can publicly declare that the conduct is unlawful and make such orders that are necessary for it to discontinue; in addition to providing a remedy to the complainant. However, this overlooks the practical realities of litigation where complaints can be easily 'bought off' in out-of-court settlements by an offending party so as to avoid an unfavourable judgment.[15] This is also true of representative proceedings which were intended, inter alia, to provide access to justice by making litigation a financially viable option for people with relatively minor claims.[16] Finkelstein J explains that representative proceedings usually end with a settlement, rather than a judgement 'because of the uncertainty of their result, difficulties of proof, complexities in the assessment of damages, as well as the expense of a long trial'.[17]

II. LEGAL EMPOWERMENT

Legal empowerment is broadly defined as 'the process through which the poor become … enabled to use the law to advance their rights and their interests [in] the state and in the market'.[18]

The notion that people cannot successfully comprehend or navigate the legal system without formal training or access to legal advice does not hold up to scrutiny. Although education and financial status are strongly correlated with the ability to invoke the law, it is by no means an essential requirement. The defining characteristic appears to be whether the litigant has had some prior experience in dealing with the legal system. This leads to 'better record keeping, more anticipatory or preventative work, more … skill in pertinent areas, and more control over counsel'.[19]

Prior experience, even in relatively minor areas, has also been shown to enhance procedural justice, as people are more likely to know what will happen in the process.[20] Unsurprisingly, the opposite appears to be true for people whose first experience in dealing with the legal system involves a serious issue that is not easily resolved. This tends to result in the lawyer 'tak[ing] over the process from the client, negotiating with [opposing counsel] and only asking the client for consent to the deal.'[21]

III. CONCLUSION

In the previous edition of *Court of Conscience*, Michael Legg stated that 'the main obstacle to access to justice in 2013 is cost.'[22] I respectfully disagree. The main obstacle – then, and now – is the legal profession and the monopoly it has on information.

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