

### **Sarah's Story**

*Sarah is 35, married to Pete for about 10 years. She has two kids – both at primary school. The couple rent a place in West Auckland.*

*Pete works full-time. Sarah has two part-time jobs – one in the morning and one at night.*

*Their relationship has always been pretty rocky. There've been a few Police callouts over the years. Things have been getting worse recently. Pete is pretty controlling and possessive. They've got a flash car which Pete bought. He traded Sarah's car and made her sign the loan agreements.*

*Pete kicked Sarah out of the house yesterday. He's still there and won't give her any of her belongings. Sarah is staying with the kids at her cousin's place but they're all sleeping on the floor. She doesn't have any other family in Auckland.*

*She thinks Pete is going to get charged. The Police have been around and want her to testify but she doesn't want to. She doesn't trust the Police. She's been in violent relationships in the past and the Police made things worse. The Police have told Sarah to get a protection order but she can't afford a lawyer and can't get legal aid. She's also got heaps of other debts which she's staying on top of but she's not sure what she's going to do now.*

*Sarah could go on the benefit but it won't be enough to pay her bills and the costs of getting into a new flat. She really needs to keep her job, but she no longer has a car. She can't use public transport because there isn't any from her night job.*

*She also hates her job. She used to like it but she's been bullied for months. Sarah is feeling so stressed out. She tried to talk to the boss but he just said she's over sensitive. She feels sick every time she has to go – she's on medication for depression and receives counselling – she just feels invisible.*

In responding to the provocation of this symposium – barriers to participation – I suggest that the main barriers Sarah faces have little to do with the Employment Relations Act, her minimum rights, and the formal mechanisms of dispute resolution and enforcement. The barriers that Sarah faces are a function of her social, economic and personal circumstances.

For many people their lives are like a house of cards. The integrity of the whole structure depends on all the other bits remaining stable, but the structure is forever under threat of collapse.

When a rupture occurs – like Sarah's separation - her house of cards is starting to collapse. Her focus will shift to shoring up her life. Her likely choices at this point are: buy a car, find a house, try to get her property back, think about a protection order and hope the work thing goes away.

### **Legal Capability, Good Faith, and Participation**

Legal capability refers to a person's ability to prevent or arrest a collapse.

What we know about legal capability is that it's not the same for all people. Legal capability is affected by a wide variety of factors, such as whether or not a person is healthy, is literate, has a well-paying

job, lives free from violence, has confidence and is self-possessed, or has trust and confidence in institutions.<sup>1</sup>

When we look at Sarah through this lens it is apparent that her legal capability is low. She is experiencing poor health, financial difficulties, housing instability, family violence, lack of trust in institutions, and her confidence has been eroded.

Having acknowledged that many barriers to participation have nothing to do with formal structures of the employment system, the object of the Employment Relations Act is to build productive employment relationships through the promotion of good faith.<sup>2</sup> Good faith, as we know, is a way of being together in an employment relationship that is characterised by parties who are “active and constructive in establishing and maintaining that relationship through being, among other things, responsive and communicative”.<sup>3</sup>

Unfortunately, the extent to which Sarah can discharge her duties is a function of her legal capability. If a person experiencing an employment problem lacks the legal capability to be active, constructive, communicative, or responsive then how can they discharge their duties?

If Sarah lacks the legal capability to even think about work, how can we expect her to confront her employer, effectively manage a mediation, or prosecute a claim in the authority.

### **A System with Few Barriers**

The challenge to overcoming barriers to participation, in my view, is to build systems that recognise the reality of people’s lives - we take the people as we find them – and we design our system around that. And what we aim for is a system that mitigates as much as possible the effect of external barriers to participation, provides support that is appropriate to a person’s circumstances, and as a bottom line does not make things worse.

Having introduced you to Sarah, I’d like to share some insights that are drawn from my work and the work of Auckland Community Law Centre. The primary goal of our centre is to get legal services to someone like Sarah – to build, increase or provide her with legal capability.

The Legal Australia Wide Survey (LAW)<sup>4</sup> was published in 2012. It is the largest legal needs survey ever conducted, involving 20716 households. The survey showed that 9% of the population account for 65% of legal problems. A follow-up paper called *Reshaping Legal Assistance Services*<sup>5</sup> did further analysis of the responses and made some clear recommendations about the future directions of travel for public legal service innovation and design – the intention being to get legal services to that 9% and build legal capability as a result. These insights have increasingly informed our work and will be my focus for the rest of this paper. I wish to acknowledge the work of the researchers and authors of the Australian research – what follows is essentially a restatement of their ideas.

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<sup>1</sup>[http://www.lawfoundation.net.au/ljf/site/articleIDs/D76E53BB842CB7B1CA257D7B000D5173/\\$file/Reshaping\\_legal\\_assistance\\_services\\_web.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/D76E53BB842CB7B1CA257D7B000D5173/$file/Reshaping_legal_assistance_services_web.pdf)

<sup>2</sup> <http://www.legislation.govt.nz/act/public/2000/0024/latest/DLM58323.html>

<sup>3</sup> Employment Relations Act, section 4(1A)(b)

<http://www.legislation.govt.nz/act/public/2000/0024/latest/DLM58328.html>

<sup>4</sup> [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)

<sup>5</sup>

[http://www.lawfoundation.net.au/ljf/site/articleIDs/D76E53BB842CB7B1CA257D7B000D5173/\\$file/Reshaping\\_legal\\_assistance\\_services\\_web.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/D76E53BB842CB7B1CA257D7B000D5173/$file/Reshaping_legal_assistance_services_web.pdf)

## Targeting

The first recommendation is better targeting. We need to know how to find Sarah. She doesn't use lawyers and doesn't trust institutions. She gets her help and support from her community - family, friends, and non-legal professionals (hospitals, schools, refuges). These are the people she will go to for help to solve problems, including legal ones.

The research recommends these contact points are used as "gateways". The support Sarah needs flows to her through those gateways. When referrals to legal professionals are made there are fewer but clearer referral points. Engagement should occur proactively and away from a primary office.

In the employment context this means:

- Work out who the target population is (i.e. who is not participating)
- Work out where they seek help to resolve legal problems (perhaps friends or colleagues?)
- Attempting to engage them through those points of contact

## Joined-Up

The second recommendation is to join up services so clients can move swiftly, easily and seamlessly between the legal and social services they need. This idea responds to the fact resolution of legal problems is dependent on resolution of non-legal problems, and vice versa.

For Sarah, a timely referral from her GP to a law centre may have stopped the bullying, which in turn might have led to early resolution of her depression. In Australia we are starting to see community lawyers in places like schools and hospitals. In the context of this symposium, community law duty lawyers operating from mediation services is something worth considering.

Joined-up services offer unique opportunities to engage a person and tackle the interconnected nature of legal and social problems.

It's important to recognise "joining-up" is difficult to get right - it takes considerable time and resources. There are plenty of failed ventures out there.

Community law centres already have considerable success with this way of working. However, there are further opportunities in which community law, MBIE, unions, and advocates can connect more and collaborate more with agencies that people are already using. We need funding to explore and develop these opportunities further.

## Timely:

Perhaps the most challenging change in thinking that is required is around the concept of early intervention.

The traditional definition is something like: "*Less intensive assistance earlier in the legal process to resolve problems sooner, at lower cost*".

This definition reflects our understanding that legal problems tend to play out in a linear fashion – in the sense that small problems escalate into larger problems as the relationship disintegrates. As the

enlarged problem moves through the dispute resolution system the system becomes more complex, more costly, with more skin in the game for all concerned. From this perspective, the earlier you intervene the better. From this framework, it follows that *earliest in time* is the place to focus resources.

But this traditional definition does not reflect the realities of people's lives. As we have already discussed, legal capability refers to the substantive options available to a person at a given point in time. A person will engage in dispute resolution when they are able – not when it might be most prudent to do so.

A more nuanced definition of early intervention is "*Timely, responsive legal assistance, provided at the earliest point practicable, relative to the client's experience of problems and help seeking*".

An example of this approach in our work is our litigant in person initiative in the bankruptcy jurisdiction. Several stakeholders have suggested the best place to target resources is at the judgment phase, not the execution phase. For a lawyer, that seems obvious. But many bankruptcy clients are wholly unwilling to participate in the court process. Many don't engage at all, and those who do typically engage with us only at the 11<sup>th</sup> hour. Low legal capability is probably the reason they find themselves before a bankruptcy judge, and expecting them to engage earlier may be unrealistic, and therefore a poor place to locate resources.

This shift in our understanding of what is possible is highly challenging. Firstly, a personal grievance will be out of time if the grievant does not get cracking, and support services can offer very little if they arrive at the 11<sup>th</sup> hour for support. In other words, there are inherent tensions between the legislative framework and the reality of people's lives. As we saw with Sarah, how can she be active and responsive when her life is falling apart?

Secondly, this reframing of early intervention may well involve some acceptance that services will have an inherent inefficiency. At our law centre we often have to engage with people many times or for extended periods before they are ready to deal with the issues that we see are legally most critical. But such *inefficiencies* just might be the cost of providing access to justice.

Thirdly, the challenge of early intervention may suggest the right strategy is the long-game. Building legal capability across the system and the community will take time. Initially putting resources where the people are might mean putting them at the end of a legal the process. But over time will learn more about how people access justice, improve our approaches, and, perhaps, slowly shift the point of intervention earlier in time.

### Appropriate

The final ingredient is the issue of appropriate services. This returns us to the concept of legal capability. Services need to match the capability of the client. There is no single solution – no *one size fits all*. Where legal capability is low, needs are likely to be more complex, cases to have longer lifelines, be less amenable to self-help strategies, and demand specialised skills from staff.

For some people, simply understanding their rights is enough for them to advocate for themselves. For others, they will need a script to go off. For Sarah, she may well have needed someone to attend a disciplinary meeting, and ongoing support to ensure any improvement strategies were implemented.

## Final Comments

There is a school of thought, to which I probably subscribe, which says demand for public legal services (i.e. free or subsidised) will grow in accordance with supply. If we increase the supply of free legal services, this will lead to increased consumption. Increasing supply, through additional funding, is necessary and healthy in the current environment because supply is grossly inadequate.

However, there are two challenges with the elastic nature of free legal services. Firstly, the insatiable demand for services means those supplying services have a tendency to move towards capacity. Services tend to become stretched and the burden of managing this falls to the people working in public legal services. The risk of burnout is inherent in the work we do.

Secondly, there are important policy considerations about the appropriate supply levels: how much access to justice is the right amount of access, from a funding standpoint. From a funding point of view there will never be enough to meet an insatiable demand. Understanding this helps to focus our thinking on issues such as, who is missing out, which initiatives will have a significant impact, and what other levers, such as legislative change, do we have to improve participation.

The challenge of increasing participation is important to our democracy. Our jurisprudence will be richer and more just when Sarah's reality is better reflected in the rights and obligations of parties to employment relationships. I am grateful for the invitation to share our perspective, although I need to caution that it is really just my personal reflections on the work of others and my own experiences. Addressing these enormous challenges will take robust debate, empirical evidence, provocation and collaboration – attributes which have all been on display today.