

ADVOCACY AND ETHICS: THE SELF-REPRESENTED LITIGANT

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- 1 This paper will deal almost entirely with the position of self-represented litigants in civil proceedings and the challenges posed for judges and lawyers in such proceedings.
- 2 Currently, the NSW Supreme and District Courts do not compile or report on any statistics concerning self-represented litigants. It has been noted “as the impact depends on characteristics of the case, the need to collect the information is often not a priority at the start of the proceedings when initial data is collected”.¹ The most detailed data collection on self-represented litigants is at the Federal level.
- 3 Literature focusing on the presence of self-represented litigants in the courts has reported a greater increase of pervasiveness than in previous decades across all Commonwealth Courts and Tribunals.² Other countries have also reported on the increasing trend of self-represented litigants in their justice system.³ Proportions in Australia range between 17

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¹ Senate Legal and Constitutional Affairs References Committee, *Access to Justice* (Canberra: Commonwealth of Australia, December 2009).

² High Court of Australia, *Annual Report 2010-2011* (Canberra, High Court of Australia, 2011); Federal Magistrates Court of Australia, *Annual Report 2010-2011* (Canberra: Federal Magistrates Court of Australia, 2011); Family Court of Australia, *Annual Report 2010-2011* (Canberra: Family Court of Australia, 2011); Federal Court of Australia, *Annual Report 2010-2011* (Canberra, 2011), 43.

³ Richard Moorhead and Mark Sefton, *Litigants in person. Unrepresented litigants in first instance proceedings*. Department of Constitutional Affairs Research Series 2/05 (United Kingdom, 2005); Kim Williams, *Litigants in person: a literature review – Research Summary 2/11* (Ministry of Justice, United Kingdom, June 2011); Melissa Smith, Esther Banbury and Su-Wuen Ong, *Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions*. (Wellington, New Zealand: Ministry of Justice, New Zealand, July 2009); New Zealand Law Commission, *Dispute Resolution in the Family Court Report 82* (Wellington, New Zealand, 2003); Maria Barrett-Morris, Mike Aujla, and Hugh Landerkin, *The Self-Represented Litigant in the Courts: An Annotated Bibliography*. (Royal Roads University, 2004); M Stratton, *Alberta self-represented litigants mapping project final report*. (Edmonton, Alberta: Canadian Forum on Civil Justice, 2007); Canadian Forum on Civil Justice, *Alberta Legal Services Mapping Project, An Overview of Findings from the Eleven Judicial Districts Final Report* (Canadian Forum on Civil Justice, July 2011);

and 93 per cent depending on a number of factors which include, but are not limited by, the nature of the case, the informality of the forum and the availability of funded legal resources.⁴ From a personal perspective it appears that the number of self-represented litigants in civil proceedings in the Supreme Court has been increasing significantly over the years.

4 Self-represented litigants are “often consigned to one homogenous (largely problematic) group”⁵ and it is “assumed that they place a strain on the civil justice system”.⁶ Reports from the judiciary, legally qualified practitioners, government reports and journal articles have generally concluded that:

- (a) self-represented litigants require more court time;⁷
- (b) self-represented litigants are more likely to require a hearing; and⁸
- (c) self-represented parties increase costs for all parties due to a need for more pre-trial proceedings, poor issue identification, greater time responding to unclear and irrelevant evidence and more time spent in hearings.⁹

5 However, self-representation in the Supreme Court is a necessary reality and using stereotypes of any kind to describe self-represented litigants tends to over-simplify the position. Litigants represent themselves for a multitude of reasons.¹⁰ These include a lack of financial resources; a

⁴ High Court of Australia, *Annual Report 2010-2011* (Canberra, High Court of Australia, 2011), 28; High Court of Australia, *Annual Report 2009-2010* (Canberra, High Court of Australia, 2010), 14.

⁵ Australian Institute of Judicial Administration and the Federal Court of Australia, *Forum on Self-Represented Litigants* (Sydney, 17 September 2004).

⁶ Duncan Webb, ‘The right not to have a lawyer’ (2007) 16 *Journal of Judicial Administration* 165-178.

⁷ Federal Magistrates Court of Australia, *Annual Report 2003-2004* (Canberra: Federal Magistrates Court of Australia, 2004).

⁸ *Ibid.*

⁹ Law Reform Commission of Western Australia, *Review of the criminal and civil justice system in Western Australia – Final Report Project 92* (Law Reform Commission of Western Australia, 1999), 153.

¹⁰ Senate Legal and Constitutional Affairs References Committee, *Access to Justice* (Canberra: Commonwealth of Australia, December 2009). Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Australian Legal Aid System: First Report*. (Canberra, Commonwealth of Australia, 26 March 1997); Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Australian Legal Aid System: Second Report*. (Canberra, Commonwealth of Australia, June 1997); Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Australian Legal Aid System: Third Report* (Canberra, Commonwealth of Australia, July 1998);

limited understanding of the legal system and the costs and benefits of legal representation; higher costs of legal representation, greater public access to legal databases, the ability to often defer filing fees in the court, the death or incapacity of a lawyer initially retained; and a litigant's inability to give the necessary instructions to a lawyer by reason of language, culture, or intellectual or mental incapacity.¹¹

- 6 The High Court has noted in *Cachia v Hanes* (1994) 179 CLR 403 at 415 that "*whilst the right of a litigant to appear in person is fundamental, it would be disregarding the obvious to fail to recognise that the presence of litigants in person in increasing numbers is creating a problem for the courts.*"
- 7 In *Minogue v Human Rights and Equal Opportunity Commissioner* [1999] FCA 85 the court reviewed the authorities as to a primary Judge's duty to the self-represented litigant, and made the following observations:

"Whilst the right of a litigant to appear is fundamental, it would be disregarding the obvious to fail to recognise that the presence of litigants in person in increasing numbers is creating a problem for the courts (42). It would be mere pretence to regard the work done by most litigants in person in the preparation and conduct of their cases as the equivalent of work done by qualified legal representatives. All too frequently, the burden of ensuring that the necessary work of a litigant in person is done falls to the court administration or the court itself. Even so, litigation involving a litigant in person is usually less effectively conducted and tends to be prolonged (43). The costs of legal representation for the opposing litigant are increased and the drain upon court resources is considerable. On the other hand, there is no doubt that the inability of a litigant in person to obtain recompense for time spent

Senate Legal and Constitutional References Committee, *Inquiry into Legal Aid and Access to Justice*, June 2004. It was noted in Australian Law Reform Commission, *Managing Justice – A review of the Federal Civil Justice System Report No 89* (Canberra: Australian Government Print Services, 2000) that there was no clear statistical data to support the claim that SRLs were increasing. However the Law Council of Australia, *Erosion of Legal Representation in the Australian Justice System Research Report* (February 2004) found that there had been a rise in SRLs based on a survey conducted and some statistical data.

¹¹ Australian Law Reform Commission, *The unrepresented party*, Adversarial Background Paper 4, (Australian Law Reform Commission, December 1996); Law Council of Australia, *Erosion of Legal Representation in the Australian Justice System Research Report* (February 2004); Melanie Dye, *An Evaluation of Services for Self-Represented Litigants in the Federal Magistrates Court* (Canberra: Federal Magistrates Court of Australia, October 2004); Melissa Smith, Esther Banbury and Su-Wuen Ong, *Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions*. (Wellington, New Zealand: Ministry of Justice, New Zealand, July 2009).

in the conduct of successful litigation, must on occasions be a significant deterrent to the exercise of the right to come to court in person (44).”

- 8 Chief Justice Gleeson also noted that the lack of legal representation places burdens on the legal system:¹²

“What is not so well understood outside the court system and the legal profession is the cost to the system, and the community, in terms of disruption and delay, of the unrepresented litigant. If the work which the courts routinely leave to be done by lawyers is left in the hands of the litigants themselves, in most cases the work will either not be done at all, or it will be done slowly, wastefully, and ineffectively. If the judge or magistrate intervenes then his or her impartiality is likely to be compromised, and the time of the court will be occupied in activities which would ordinarily be unnecessary. The result is often confusion and delay in the instant case, with consequences for other litigants waiting their turn in overburdened court lists.”

- 9 For the purposes of this address my tipstaff interviewed some of my colleagues, whose identity remains unknown to me. She reports that one Judge said:

“When an unrepresented person is listed in a matter for a Directions hearing I always add around 30 minutes to the time that it would usually take a solicitor to present the matter. Most of my time is taken up with firstly, understanding what it is the unrepresented litigant wants from the court and trying to organise the matter for hearing whilst they at the same time they like to ‘information dump’ on what turns out to be irrelevant issues and often do not listen in return; and secondly, trying to organise a return date and instruct the litigant on what they need to prepare for their next appearance before me. I know of many others who leave the bench frustrated and irritated at having their time wasted by things that should be relatively straightforward”.

- 10 Another (or perhaps the same) Judge said:

“A greater burden is placed on the litigants and the court system by the reduced likelihood of settling outside of court. If the litigants are not able to supply the necessary evidence and legal argument, the judge’s task and the time required to perform it will be greater. These factors may result in the disappointed expectations of both the litigants and the judge—with the frustration that this naturally entails. The judge is disappointed to find that fewer cases on the list settle, that more cases require the judge’s decision, and that

¹² Chief Justice Gleeson, Speech to the Australian Legal Convention in Canberra on 10 October 1999: <http://www.highcourt.gov.au/speeches/cj/cj_sta10oct.htm>

more time is required to sift through evidence that the litigants have not properly organised, and to research the law that the litigants have not provided in their argument. The litigant is disappointed to find that the judge cannot decide the case immediately based on the evidence that has been tendered and the limited legal argument that has been made. These frustrations can result in an experience that is unsatisfactory to everyone.”

- 11 One must remember that a court does not have the power to require an individual to obtain legal representation. As Kirby P (as he then was) said in *Burwood MC v Hervey* (1995) 86 LGERA 389 at 395:

“Despite the efforts of the Court to explain the problems which she was facing in the appeal, the respondent might not have had a full understanding of the peril in which she stood, namely that she might lose the judgment entered in her favour by Bignold J. A court cannot require a party to have legal representation. So long as that party is a natural person, with apparent capacity to represent that party's own interests, he or she can do so: cf Bay Marine Pty Ltd v Clayton Country Properties Pty Ltd (1986) 8 NSWLR 104 (CA) at 114. The right of any natural person to advance, in person, a cause and to have access to the courts in that way is a valuable civil right. Advice may be given about the wisdom of securing legal representation. But such representation cannot be required, at least in the ordinary civil case and with a party apparently of full legal capacity.”

- 12 The Family Law Council in Australia concluded that “*the right to self - representation exists alongside a right to legal representation or at least the right to be meaningfully heard, which includes a right to legal services and possibly a right to alternatives to representation*”.¹³ However, it is this “right” which is asserted and championed that has led some academics to argue that self-represented litigants develop pre-conceptions and expectations of the functions and powers of the court system, which is often a poor reflection of the reality of how the court system operates.¹⁴ Many also carry with them a perception that once they are before a Judge and “have their day in court” they will obtain the order they are seeking, but

¹³ Family Law Council, *Litigants in Person: A Report to the Attorney-General prepared by the Family Law Council*. (Canberra, August 2000), 15.

¹⁴ E Richardson, *Self-represented parties: A trial management guide for the judiciary* (Melbourne: County Court of Victoria, 2004); Gamble, H & Mohr, R, *Litigants in Person in the Federal Court of Australia and the Administrative Appeals Tribunal- A Research Note*. (Paper presented to the Sixteenth Annual AIJA Annual Conference Melbourne. 4-6 September, 1998).

disillusionment quickly follows as they are met with procedural and administrative barriers or when a judgment is made against them.¹⁵ The Hon Justice Pierre Slicer has stated that:¹⁶

“A tension arises from an expectation that since all causes are important to the participant that there ought to be one first-class standard. As in all disciplines, such is impossible. The nature of the case, the seriousness of the outcome, and complexity of modern legislative and regulatory regimes require differing resources which, given the resources of even the average citizen, may be determined not by need but income.

Allied with this tension is the change in the self-perception of citizens. Australians no longer regard themselves as being subjects of the Crown, but as citizens with an increased expectation of rights which are obtained and held through the court process, rather than political or social demands and outcomes. Thus persons aggrieved see themselves as having been deprived of their ‘rights’. The courts are often at the fault lines of this tension made more difficult by a combination of motherhood statements appearing in legislation with a paradoxical requirement for mandatory penalties and the like.”

Challenges posed for self-represented litigants and opposing parties

13 The literature raises questions about whether self-represented litigants are automatically disadvantaged in the Australian adversarial system.¹⁷ The majority of judicial and academic opinion suggests that self-represented litigants are likely to be disadvantaged without legal representation.¹⁸ First, the ability of a litigant to successfully argue his or her own case is

¹⁵ John Dewar, Bronwyn Jerrard and Fiona Bowd, ‘Self-representing Litigants: A Queensland Perspective’ (2002) 23 *The Queensland Lawyer*, 65; Maria Barrett-Morris, Mike Aujla, and Hugh Landerkin, *The Self-represented Litigant in the Courts: An Annotated Bibliography*. (Royal Roads University, 2004).

¹⁶ Self-Represented Litigants: Paper presented to the Magistrates’ Conference Monday 14 June 2004; The Hon Justice Pierre Slicer - Supreme Court of Tasmania

¹⁷ Australian Law Reform Commission, *The unrepresented party*, Adversarial Background Paper 4, (Australian Law Reform Commission, December 1996); Law Council of Australia, *Erosion of Legal Representation in the Australian Justice System Research Report (February 2004)*; Melanie Dye, *An Evaluation of Services for Self-Represented Litigants in the Federal Magistrates Court (Canberra: Federal Magistrates Court of Australia, October 2004)*; Melissa Smith, Esther Banbury and Su-Wuen Ong, *Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions*. (Wellington, New Zealand: Ministry of Justice, New Zealand, July 2009).

¹⁸ Murray Hawkins, *Emerging Trends in the Provision of Legal Services: Some Australian Experiences* (Speech presented to the Commonwealth Law Association Conference, Nairobi, 7 September 2007); Robert Flannigan, ‘Costs for Self-represented Litigants: Principles, Interests and Agendas’ (2007) 33 *Advocates’ Quarterly* 447.

ultimately dependent on the litigant themselves, having regard to how sophisticated they are, how readily they can comprehend any legal information that is provided to them (if any is provided at all), and their ability to focus on the issue at hand.¹⁹ Chief Justice Gleeson in his speech to the Australian Legal Convention in Canberra stated that:²⁰

“Our system proceeds upon the assumption that a just outcome is most likely to result from a contest in which strong arguments are put on both sides of the question, and the court adopts the role of a neutral and impartial adjudicator. If parties are not legally represented, then the assumption is often invalidated, partly or completely. A senior English judge said that ‘the adversary system calls for legal representation if it is to operate with such justice as is vouchsafed to humankind”

- 14 It has been submitted that the legal system has not adapted itself to cope with self-represented litigants and that the legal system creates an alienating environment for them.²¹ Webb suggests that much of the Australian legal system is based on professionalism and many self-represented litigants find themselves at a disadvantage in not adequately understanding court procedures, rules of court, the language of the law and in presenting their cases in courts.²²
- 15 It is true that self-represented litigants must deal with foreign and complex procedural rules and processes as well as issues such as addressing the court appropriately, the admissibility of evidence and objections, the appropriateness of questioning and cross-examining witnesses, as well as identifying and addressing the legal issues. However, as Justice Flick said in *SZFR v Minister for Immigration and Citizenship* [2009] FCA 8511:

“The status of an (unrepresented) applicant confers no licence to place to one side or to disregard the procedural requirements imposed by the Rules”

¹⁹ *Australian experience with self-represented litigants*, Nicholson J (2003) 77 ALJ 820; *Courts and the Public* ALJA (1998) 107.

²⁰ Chief Justice Gleeson, Speech to the Australian Legal Convention in Canberra on 10 October 1999: <http://www.highcourt.gov.au/speeches/cj/cj_sta10oct.htm>

²¹ Duncan Webb, ‘The right not to have a lawyer’ (2007) 16 *Journal of Judicial Administration* 165-178.

²² Duncan Webb, ‘The right not to have a lawyer’ (2007) 16 *Journal of Judicial Administration* 172.

- 16 The process of conducting their case poses problems for self-represented litigants:²³

“... A plaintiff must frame the facts in a way which includes all legally relevant allegations, and is not obscured by extraneous material. Thus, in most civil claims, matters such as motive will be wholly irrelevant. This is counterintuitive. From a layperson’s perspective, the task of the court is to do justice. From such a viewpoint the malicious motivation of a contract breaker is highly relevant – much more so, it could be argued, than the fact that the breach is tenuously justified by a contractual force majeure term, or that the plaintiff first breached the contract by failing to deliver on time due to unavoidable external matters.”

- 17 Justice Phillip Misso noted that self-represented litigants often conduct their case in an “almost indescribable” manner when compared to the process that a legal practitioner would follow.²⁴ This may lead a Judge to consider saying to a self-represented litigant “*I think you do have a pretty good case, you just haven’t had the means by which you can pull it all together*”.²⁵ For this reason, Justice Misso says, self-represented litigants “*in the majority of cases ... don’t come off too well*”.²⁶ By self-representing, a litigant may have greater difficulty in demonstrating the merits of his or her case effectively to the court. That does not mean however that just because the litigant is representing himself or herself, the matter does, in fact, lack merit. However, many Judges believe, and international studies have supported this belief, that self-represented litigants generally achieve worse outcomes in regard to their matter than those with counsel.²⁷

²³ Duncan Webb, ‘The right not to have a lawyer’ (2007) 16(3) *Journal of Judicial Administration* 165, 171.

²⁴ Judge Phillip Misso, *Inquiry into vexatious litigants* (Submission Number VL/10, Law Reform Committee, 2008)
<http://www.parliament.vic.gov.au/images/stories/committees/lawreform/vexatious_litigants/Submissions/VL10_-_Judge_Misso.pdf>

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Woolf, The Right Hon the Lord (1995), *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London); Woolf, The Right Hon the Lord (1996), *Access to Justice: Final report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London); R Moorhead and M Sefton, *Litigants in person. Unrepresented litigants in first instance proceedings*. Department of Constitutional Affairs Research Series 2/05 (United Kingdom, 2005); Frances Gibb, *Austerity bites: rise of the DIY litigant is this year’s challenge; The new Association of District Judges’ president tells Frances Gibb his members face tough times*. (April 5 2012) *The Times* (London, England) p 77.

- 18 However, the disadvantages of self-represented litigants can be overstated. There are many cases in which self-represented litigants have won against opponents who have legal representation of the highest quality. A recent example is *Sidhu v Van Dyke* [2014] HCA 19; (2014) 308 ALR 232. Ms Van Dyke was represented in the High Court by senior counsel. But she appeared in person before the primary Judge (before whom she lost) and before the Court of Appeal (where she won).
- 19 Not all lawyers are competent. Even when both parties are represented there is often a mismatch in resources including in the competence of legal representation. I have had cases where the party has discharged his or her lawyer during the trial and handled the case more effectively by himself or herself.

The role of the Judiciary

- 20 Increasingly, self-represented litigants are seeking advice from the court with respect to what documents to file, what claims they can make in their statement of claim, how to proceed in their matter and even what they should be arguing. In one matter a self-represented litigant said to the court that he was “... *a litigant in person with no legal training and will seek appropriate guidance and directions from the court.*” This has raised the issue of what assistance, if any, a judge can provide to a self-represented litigant. In that particular case the Judge advised my tipstaff that:

“It is not uncommon for self-represented litigants to invite the court to act as a source of guidance. The court is under an obligation to do justice ... But the legal system is adversarial. The court generally employs no legally qualified staff to assist the judge. Not only is the court without any means to provide such assistance, the court is also obliged to be impartial. A litigant who explicitly seeks the guidance of the court in the way that Mr X does is seeking what he may suppose to be free legal advice. But he is seeking it from a source which is unable to provide it, and it is certainly not free. The hearing before me has generated very substantial lawyer’s fees, and someone has to pay them.”

- 21 Judges are required to balance on the one hand the leeway afforded to self-represented litigants, including considering what advice can or ought to be provided, whilst ensuring on the other hand that the proceedings are fair

to all parties involved and that they remain neutral. Kirby J (as he then was) noted that:²⁸

“It remains the duty of judicial officers, as best they are able, to resolve the problems self-represented litigants present. However, in approaching the problem, we should remember that we are neither social workers nor responsible for the general problems of our society. There is often a deep desire to help the ‘underdog’ or to make up for disadvantage. We ought recognise within ourselves that our powers and resources to redress wider problems is limited and we ought not travel with a cross or albatross because of our inability to so resolve.”

- 22 There is now a significant body of case law that examines the parameters and scope of a Judge’s duty to the self-represented litigant. Of assistance is the decision in the Full Federal Court of Australia of *Minogue v Human Rights and Equal Opportunity Commissioner* [1999] FCA 85, indicating that what was required in the Courts:

“depended on the litigant, the nature of the case (eg criminal versus civil) and the self-represented litigant’s intelligence and understanding;

(was that) a judge should not intervene so as to be unable to maintain a position of neutrality; and

should diminish the disadvantage of being unrepresented, but not so as to provide a positive advantage. It was accepted that the Court must explain matters and be lenient in standard of compliance – but this does not amount to a Judge’s responsibility to formulate and conduct the appellant’s case for them. A judge should continue to see that rules are obeyed with proper exceptions”

- 23 It is generally agreed that the principles governing the role of the Judge in civil proceedings involving a self-represented litigant have been aptly stated in *Rajski v Scitec Corporation Pty Ltd*, Butterworths unreported judgments, 16 June 1986, NSWCA where Samuels JA said (at 14):

“In my view, the advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which our adversary procedure offers to the unwary and untutored. But the court should

²⁸ *Judicial Stress an Unmentionable Topic*, Kirby J, Aust Bar Review (1995) 13 101.

be astute to see that it does not extend its auxiliary role so as to confer upon a litigant in person a positive advantage over the represented opponent ... At all events, the absence of legal representation on one side ought not induce a court to deprive the other side of one jot of its lawful entitlement ... An unrepresented party is as much subject to the rules as any other litigant. The court must be patient in explaining them and may be lenient in the standard of compliance which it exacts. But it must see that the rules are obeyed, subject to any proper exceptions. To do otherwise, or to regard a litigant in person as enjoying a privileged status, would be quite unfair to the represented opponent."

24 In the same decision, Mahoney JA made the following observation (at 27):

"Where a party appears in person, he will ordinarily be at a disadvantage. That does not mean that the court will give to the other party less than he is entitled to. Nor will it confer upon the party in person advantages which, if he were represented, he would not have. But the court will be careful to examine what is put to it by a party in person to ensure that he has not, because of the lack of legal skill, failed to claim rights or put forward arguments which otherwise he might have done."

25 Likewise the High Court stated in *Neil v Nott* (1994) 68 ALJR 509 at 510 that:

"A frequent consequence of self-representation is that the court must assume the burden of endeavouring to ascertain the rights of parties which are obfuscated by their own advocacy."

26 The exacting nature of the task imposed upon the judge in civil and criminal trials has been well summed up by Bell J of the Supreme Court of Victoria in *Tomasevic v Travaglini & Anor* [2007] VSC 337 at [139]-[141] where his Honour said:²⁹

"Every judge in every trial, be it criminal or civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process. Equality before the law and equal access to justice are fundamental human rights specified in the ICCPR. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected."

Most self-represented persons lack two qualities that competent lawyers possess - legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of great disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented

²⁹ *Tomasevic v Travaglini & Anor* [2007] VSC 337 at [139]-[141]

litigants due assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal access to Justice.

The matters regarding which the judge must assist a self-represented litigants are not limited. The judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case.”

- 27 In 2003 Justice Robert Nicholson of the Federal Court of Australia said in a paper entitled ‘Australian experience with self-represented litigants’ (2003) 77 ALJ 820 that there exist statutory and regulatory provisions grounding the right of any person to proceed in the court ‘in person’. However, he also noted that this:³⁰

“...set the stage for a conflict in principle in relation to self-represented litigants who are not governed by the duties owed to a court by a legal practitioner. It is these duties upon which the operation of the Court system is so highly dependent (including the duty of disclosure, to the Court, avoidance of abuse of court process, to not corrupt the administration of justice and to conduct cases efficiently and expeditiously.) If the number of self-represented litigants became substantial, the potential could exist for the non-application on a large scale of the seminal principles upon which the Australian curial system operates. This could impact on the effective operation of the common law courts as we now know them.”

- 28 He saw one “central dilemma facing a court” as being “how far a court can assist a self-represented litigant without losing the perception of impartiality so important to the discharge of the judicial function”:³¹

“A related issue is the extent to which duties fall on counsel for a represented litigant to assist the self-represented litigant and thus assist the court to progress the litigation ... There can be no bright line laid down. The principles are that the advice and assistance which the self-represented litigant receives from the court should be limited to that which is necessary as to diminish as far as possible the disadvantage which he or she would ordinarily suffer but without thereby conferring a positive advantage over the represented opponent and without disobedience to the applicable rules. What is important is that the court should be careful that there is not a failure to claim rights or an extinguishment of a possible claim...Clearly, the scope of the duty of the court to a self-

³⁰ Hon Justice Robert Nicholson AO, *Australian experience with self-represented litigants* (2003) 77(12) *The Australian Law Journal* 820, 821

³¹ Hon Justice Robert Nicholson AO, *Australian experience with self-represented litigants* (2003) 77(12) *The Australian Law Journal* 820, 826

represented litigant is determined by the particular circumstances of the case. However, the limits on how far the court may go in providing assistance to a self-represented litigant derive from the need to avoid compromise of impartiality or the appearance of partiality and the avoidance of substantive injustice to the other party (See Studdard v King (unreported, SC NSW, McLelland CJ in Eq, 4 June 1993)).”

29 In *Re F: Litigants in person guidelines* (2001) 27 Fam LR 517; FLC 93-072, the Full Court of the Family Court of Australia set out nine guidelines relating to cases involving self-represented litigants:

- “(1) A judge should ensure as far as possible that procedural fairness is afforded to all parties whether represented or appearing in order to ensure a fair trial.*
- (2) A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross examine the witnesses.*
- (3) A judge should explain to the litigant in person any procedures relevant to the litigation.*
- (4) A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation.*
- (5) If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course.*
- (6) A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise.*
- (7) If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights.*
- (8) A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated: Neil v Nott (1994) 121 ALR 148 at 150.*
- (9) Where the interests of justice and the circumstances of the case require it, a judge may:*

- i. Draw attention to the law applied by the court in determining issues before it;
- ii. Question witnesses;
- iii. Identify applications or submissions which ought to be put to the court;
- iv. Suggest procedural steps that may be taken by a party;
- v. Clarify the particulars of the orders sought by a litigant in person or the bases for such orders.”

30 The proper extent of a judge’s assistance and intervention will depend upon each particular case and each particular litigant in terms of the person’s intelligence and capacity to understand the effect of his or her conduct: *Abram v Bank of New Zealand* (1996) ATPR 41-507. By way of example, the tender of inadmissible evidence may be an occasion where the court should intervene and attribute an objection to the unrepresented party: see *NAB v Rusu* (1999) 47 NSWLR 309, whereas the court is not required to assist unrepresented litigants formulating questions in admissible form: *R v Zorad* (1990) 19 NSWLR 91. If a litigant in person is so disadvantaged that they lack competence to conduct their own affairs, the court ought appoint a tutor: *Murphy v Doman* (2003) 58 NSWLR 51.

31 Other options for judges in courts which operate a *pro bono* referral scheme will include referral out to a barrister or solicitor for advice and/or, subject to merit being found in the action taken by the self-represented litigant, active representation. The *Uniform Civil Procedure Rules* provide for such referrals under *Part 7 Division 9* (Court appointed referral for legal assistance). However, it is clear that the utility of such referrals is dependent upon the goodwill and willingness of legal practitioners to take up the load on a *pro bono* basis. The scheme should be used if it appears that the self-represented party’s case may have merit. But the goodwill of the profession should not be abused by referring to the panel vexatious litigants who will not listen to advice.

The Lawyers' Position

32 The Law Society and the Bar Association have published guidelines for solicitors and barristers dealing with self-represented parties.³² The guidelines published by the Bar Association include:

- "19 *Generally cases involving self-represented litigants are more difficult and require more inter-personal skills of patience and adaptability on the part of the barrister. Barristers need to retain their objectivity and commitment to their various duties and obligations notwithstanding the frustration experienced, for example, when the motives of a self-represented litigant may be seen to be other than the pursuit of justice. This can occur, for example, in a migration case where the objective of the self-represented party may be to purely delay the proceedings to delay and/or frustrate a final decision.*
- 20 *Similarly, where a self-represented litigant is obsessed by the litigation and is unable to exercise rational judgment in relation to the dispute, great care needs to be taken not to become embroiled in apparently personal attacks or criticisms which may emanate. In such circumstances, it is suggested that any refutations of comments made occurs in as professional and non-personalised way as is possible....*
- 36 *Research shows that, in cases involving self-represented litigants, a great deal of time of the courts (and often that of the opposing party) is taken up at preliminary /interlocutory stages when the self-represented litigant's lack of legal knowledge and, on occasions, lack of judgment about the case and the evidence become apparent.*
- 37 *It is suggested that to avoid future problems in the litigation pathway, the barrister ensure the self-represented litigant is sent a copy of the orders which have been made. Depending on whether there has been a history of difficulties either experienced or caused by the self-represented litigant – for example, of non-compliance with existing orders – it may also be advisable to ensure that the orders be accompanied by a letter setting out what action, orders etc, will be sought on the next occasion that the matter is before the court....*

³² The Law Society of New South Wales, Guidelines for solicitors dealing with self-represented parties (April, 2006)
<<http://www.lawsociety.com.au/cs/groups/public/documents/internetcostguidebook/008731.pdf>, and NSW Bar Association Guidelines on Dealing with Self-Represented Litigants 2nd ed 2011
www.nswbar.asn.au/docs/webdocs/self_reps_14112011.pdf

- 39 *Where the barrister comes to the view that the entire action by a self-represented litigant is misconceived or, for example, that there is no evidence to support the action being maintained by the self-represented litigant, a barrister may be asked to advise on whether a strike-out application should be brought. The barrister should be aware that the reluctance on the part of some judges to entertain such actions is often increased when the opposite party is a self-represented litigant. Depending on the circumstances, it may be better in such cases to seek that the hearing be expedited.*
- 40 *The barrister should be aware that some judges may suggest an amendment to a pleading necessary to establish a cause of action – for example, on a strike out/summary dismissal application – see *Wentworth v Rogers* (No 5) (1986) 6 NSWLR 534 at 536; *Morton v Vouris* (1996) 21 ACSR 497 at 513-4. The latter case also contains (at p 520) a practical outline of the difficulties barristers may experience when faced with a self-represented litigant who is prepared to make extravagant allegations without deigning to provide particulars (including allegations of misconduct on behalf of judicial officers). He is effectively immune from the constraints imposed by a potential or actual costs order. On his own evidence, he has no means to satisfy a costs order. In that case the trial judge, Sackville J, made orders granting the plaintiff leave to apply to amend a statement of claim, provided the application for leave was accompanied by affidavits in appropriate form showing there were facts which could probably be proved and which, if proved, would support the general statements made in the statement of claim....*
- 62 *Various appellate courts have set out the duties of judges and tribunal members at first instance in dealing with and giving assistance to self-represented litigants. One of the factors which will determine the extent of these duties is the existence of any particular evidentiary requirements binding on the court or tribunal – for example, if a tribunal or commission is bound by the rules of evidence or in the words of a formula often used, the court or tribunal can 'inform itself of any matter in such manner as it considers just.' – see s110(2) of the Workplace Relations Act 1996 (Cth).*
- 63 *The Full Bench of the Australian Industrial Relations Commission set out guidelines for members as to the assistance which could be provided by members of the Commission in *Davidson and Aboriginal and Islander Child Care Agency* (Unreported, AIRC, 12 May 1998) 534/98 as follows (at p 9): The assistance provided by a member may, depending on the circumstances, include:*

- (i) *identifying the issues which are central to the determination of the particular proceedings;*
- (ii) *drawing a party's attention to the relevant legislative provisions and key decisions on the issues being determined;*
- (iii) *asking a party questions designed to elicit information in relation to the issues which are central to the determination of the particular proceedings;*
- (iv) *assisting a party to conform to the Brown v Dunn principle and other procedural rules designed to avoid unfairness; and*
- (v) *drawing a party's attention to the relative weight to be given to bar table statements as opposed to sworn evidence. A member may also intervene, to an appropriate extent, by asking questions of witnesses. Such a role is appropriate in the following circumstances:*
 - (vi) *to clear up a point that has been overlooked or left obscure;*
 - (vii) *to obtain additional evidence to better equip the member to choose between the witnesses' versions of critical matters;*
 - (viii) *to exclude irrelevancies and discourage repetition;*
 - (ix) *to ask admissible questions which a party is unable, for the moment, to formulate; and*
 - (x) *to facilitate expedition in the progress of the proceedings....*

65 *The duties of trial judges in Family Court proceedings involving a self-represented litigant were set out by the Full Court in Johnson v Johnson (1997) FLC 92-764; (1997) 22 Fam LR 141. A barrister needs to be familiar with those obligations as it is clear that, unless they are complied with, a judgment emanating from a hearing carried out contrary to those guidelines is liable to be set aside on appeal...*

70 *The judge's obligation is to ensure that he or she does not intervene to such an extent that he or she cannot maintain a position of neutrality in the litigation - see Minogue v Human Rights and Equal Opportunity Commission (1999) 166 ALR 129.*

71 *The judge should not give legal advice to a self-represented litigant. This is because such an approach may not only give the appearance of unfairness to other*

parties but also it may be given without full knowledge of the facts - see Johnson v Johnson (op cit.)

- 72 *There is a distinction between explaining procedural choices available and advising what decisions to make. For example, a judge may explain the form of questions to be asked but should not put the questions into that form – see McPherson v R (1981) 147 CLR 512; R v Gidley [1984] 3 NSWLR 168*
- 73 *Excessive intervention by the trial judge may breach the judge's duty to observe procedural fairness to both parties, so constituting an error of law – see Burwood Municipal Council v Harvey (1995) 86 LGERA 389 per Kirby P. But what a judge must do to assist a self-represented litigant depends on the litigant, the nature of the case, and the litigant's intelligence and understanding of the case – Abram v Bank of New Zealand [1996] ATPR 41-507.*
- 74 *Failure to object to excessive intervention may constitute a waiver or may estop a subsequent complaint. The objection should be taken at the earliest opportunity. See Vakauta v Kelly (1989) 167 CLR 568 at 572, 577; Livesey v NSW Bar Association (1983) 151 CLR 288.*
- 75 *Making a disqualification application can be one of the most difficult and stressful tasks for a barrister. The difficulty can be exacerbated in a case where a self-represented litigant is involved, as the judge may feel compromised (even to the extent of 'walking a tightrope') by the need to help self-represented litigants and at the same time remain, and appear to remain, impartial – see Research Paper pp 45-49. It is suggested that this is one area where, if time permits, a barrister might outline the scenario in which he or she is involved to a senior colleague before making such a submission."*

33 The NSW Law Society and the NSW Bar Association has also provided other useful advice to legal practitioners on what procedures or actions they should implement when opposing a self-represented litigant in a proceeding , which includes:

- “(a) ensuring to record every communication with the self-represented litigant in writing;*
- (b) using plain language in all correspondence and interaction with a self-represented litigant;*
- (c) if using alternate dispute resolution schemes, ensuring the self-represented litigant has family or friends present for support, or use a mediator who can certify that the self-represented litigant puts their claim forward to the best of their ability;*

- (d) *ensuring there is no actual or perceived inequality of power;*
- (e) *consider asking for hearing to be expedited rather than seeking for claims to be struck out for being unmeritorious. An application to strike out a claim may simply delay the proceedings;*
- (f) *delays and misunderstanding often provide the self-represented litigant with ammunition or a further sense of grievance; and*
- (g) *treating the self-represented litigant with decency and respect.”*

34 As an officer of the court each solicitor and barrister has duties not only to the client, but also to the justice system as a whole. One duty is not to facilitate vexatious or unmeritorious litigation. The solicitor must have a reasonable belief that the matter has reasonable prospects of success in bringing the matter to court. A lawyer should not sign their name to a document they may believe will be irrelevant, delay the proceedings, or which they know to be untrue. A solicitor has a positive duty not to engage in a step that would ‘formalise’ (though typically in a legally irrelevant manner) any vexatious or querulous document.

35 Timetables should be kept. But it is not uncommon for there to be slippage. Often a judge’s reaction to a request for an extension will be enquire whether the extension can be granted without causing prejudice to the other party. It is here that lawyers for the represented party need to be very careful. Self-represented litigants who may already feel that they are battling a system loaded against them will be particularly aggrieved, and justifiably aggrieved, if documents are served on them late. Late service can cause unfairness which might not exist if the party were legally represented. The unrepresented party will often need more time to deal with his or her opponent’s evidence or submissions. Extensions of time may be refused which would be granted if the party were legally represented.

- 36 The guidelines quoted include the wise advice that a lawyer opposed to a self-represented litigant provide the opponent with a copy of an authority to be relied on in adequate time before the hearing. This courtesy must not be abused by dumping unnecessary material on the self-represented opponent.
- 37 The guidelines also emphasise the desirability of maintaining objectivity and formality in dealing with a self-represented opponent. It is both courteous and good tactics to ensure that the self-represented opponent is provided with a copy of interlocutory orders and is advised in writing of what orders will be sought at a forthcoming directions or other hearing.
- 38 A risk for a represented party is that the judge will consider whether the self-represented party's case has legal merits and may formulate the arguments that he or she considers that a lawyer would put. The passages cited at [25] and [26] show that this is proper. There are limits on how far that can be done whilst preserving impartiality and the appearance of impartiality, but they are not easy to apply. There is a danger for the party with legal representation, and it is a risk of which the judge must be aware, that an argument formulated by the judge himself or herself can carry greater attraction to the judicial mind than if it had been formulated by a party. Another problem, for which I can think of no satisfactory solution, is that the represented party will be aggrieved that whilst it is paying for its lawyer, its opponent is getting the benefit of the judge's formulating an argument for him.
- 39 An advocate opposed to a self-represented litigant should consider the arguments that might be put for the self-represented litigant and be ready to deal with them. If the opportunity arises it might be good advocacy to raise such a potential argument so as to rebut it before the judge raises it.

Querulous and vexatious litigants

- 40 There are many reasons why parties may not have legal representation. Often, probably usually, it is because they cannot afford it. Or they may be confident that they do not need a lawyer because the case seems

straightforward and they assess it as being within their competence. Such litigants' cases are as likely to have as much or little merit as that of represented parties.

- 41 But undoubtedly there are other self-represented litigants who pose particular difficulties for the courts and their opponents. Dr Grant Lester and others have written extensively in this area.³³ He describes a spectrum of complainants (beyond the “normal” complainant who can maintain perspective) to those who might be called “difficult” or “querulous”. Some of these suffer a recognised psychiatric condition. Lester describes “querulant” complainants as follows:

“At times, these chronic grumblers may become ‘querulant’ (morbid complainants). In general, they have a belief of a loss sustained, are indignant and aggrieved and their language is the language of the victim, as if the loss was personalised and directed towards them in some way. They have over-optimistic expectations for compensation, over-optimistic evaluation of the importance of the loss to themselves, and they are difficult to negotiate with and generally reject all but their own estimation of a just settlement. They are persistent, demanding, rude and frequently threatening (harm to self or others). There will be evidence of significant and increasing loss in life domains, driven by their own pursuit of claim. Over time, they begin to pursue claims against others involved in the management of claims, be it their own legal counsel, judges and other officials. While claiming a wish for compensation initially, any such offers never satisfy and their claims show an increasing need for personal vindication and, at times, revenge, rather than compensation or reparation.

Despite 150 years of psychiatric research into querulous paranoia, there is no consensus as to the underlying pathology. Theories range from an underlying organic disease process, similar to schizophrenia, through to psychogenic processes; that is, certain vulnerable characters are sensitised by certain life experiences and are then struck by a key event which triggers their

³³ See e.g. Lester, Grant, Griffin and Mullen, “Unusually Persistent Complainants” (2004) British Journal of Psychiatry 184; 352-356; Lester “The Vexatious Litigant” April 2005 Judicial Officers Bulletin vol. 17 No. 3; Lester and Smith “Inventor, Entrepreneur, Rascal, Crank or Querulant?: Australia’s Vexatious Litigant Sanction 75 Years On” 13 Psychiatry Psychol & L Vol. 13 No. 1 p 1; Mullen and Lester “Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour” (2006) Behavioural Sciences and the Law 24: 333-349.

complaining. Preceding the querulousness, they have often received some form of blow to their individual sense of self-esteem or security. This was often in the nature of a loss of relationship, through separation or death, ill health or loss of employment.

The key event is usually a genuine grievance and seems to echo previous losses. The key event is often of a type to threaten the (male) status symbols of prestige, position, power, property and rights. Environmental factors influence their complaint.

In general, these difficult complainants are middle-aged and males predominate 4:1.

Prior to the development of the complaint, they are reasonably high functioning, with a past history of education and employment. The majority of querulant complainants have had partners, however, their relationships or marriages are often failing or have ended. It is uncommon for them to have a past criminal history, psychiatric history or a history of substance abuse.

...

They present as highly energised with labile emotions. They will have an overflowing suitcase, briefcase or box. They will appear to have pressure of speech such that interrupting them is difficult and they will speak to you as if you already know all the details of the case. Their speech is vague and full of unnecessary and often confusing and irrelevant detail.

Written communications have the appearance of having been written in excitement with numerous notes of exclamation and interrogation. These are often like a legal document except the entire surface is covered with script (including the margins). The substance is repeated in several different ways with undue grammatical emphasis and underlining. They will often refer to themselves in a third person legalistic style, for example, as 'the defendant'. Coloured inks are used for emphasis as are the star asterisk key and the use of capitalisation."

- 42 Lester's key advice to judges is to maintain rigorous boundaries. He says that such litigants rapidly form attachments to those whom they believe favour them and will feel betrayed if the favourable treatment is not maintained.
- 43 Lawyers acting for parties who are being sued by such litigants should also maintain boundaries: by dealing with the opponent formally, by being courteous but not friendly, and by communicating in writing where possible.

- 44 There can be no general one-size-fits-all approach to dealing with a querulous litigant. Care needs to be taken to avoid proliferation of interlocutory disputes that could take a life of their own. On the other hand the court should be assisted in trying to identify any genuine issue. The object should be to attempt to bring the case to a final conclusion as soon as possible. An application for summary judgment may be appropriate if the case is without apparent merit, but the risk of proliferating interlocutory procedures will have to be weighed.
- 45 In some cases the only avenue will be by recourse to the *Vexatious Proceedings Act 2008*, but that avenue will not be open until the vexatious litigant, either alone or in concert with others, has frequently instituted or conducted vexatious proceedings.