‘WITH A LITTLE HELP FROM A FRIEND’: UNREPRESENTED LITIGANTS, FRIENDS AND THE QUESTION OF PAYMENT

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I INTRODUCTION

My paper focuses on Queensland law in relation to tasks and activities which constitute legal work and the people who are authorised to carry out such work. These topics are considered in the context of Wilson v Raddatz [2006] QCA 392, an application which came before the Court of Appeal in Queensland.

The paper explains the circumstances of Wilson v Raddatz and asks whether preparing a friend’s written submissions for a court hearing in return for payment is ‘legal work’. If it is and the person who prepared the written submissions is not a lawyer, has that person breached legal professional practice law in Queensland? To answer these questions, my paper considers how the relevant legal practice legislation and case law apply to Wilson v Raddatz.

The paper also examines the broader issue of self-represented litigants, who reportedly appear in substantial numbers in courts and tribunals across Australia. Many self-represented litigants do not rely on legal advice and support and so are particularly vulnerable as they prepare for litigation. In the absence of legal representation, if a self-represented litigant asks a friend for help to prepare for an upcoming court proceeding, is the friend limited in the help which may be provided? Should the litigant be able to pay the friend for his or her time or assistance?

In this context, the paper considers whether legal practice law unfairly disadvantages a self-represented litigant by preventing him or her from paying a friend for time and effort expended to help the litigant to prepare.

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1 This paper is based on an article published in The Queensland Lawyer; see “‘With a Little Help From a Friend’: Self-Represented Litigants, Payment and Legal Profession Regulation” (2013) 33 Qld Lawyer 52.

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The case in which these issues arose was an application which came before the Queensland Court of Appeal in 2006. The substance of the application is irrelevant for the purposes of this paper, but the key feature of the case was that the Court of Appeal learned during the proceedings that the applicant, Gregory Wilson, had accepted help from a friend, David Walter, who had prepared Mr Wilson’s written submissions in return for payment. The judges of appeal expressed concern over whether Mr Walter had breached Queensland legal profession law regulating legal practice. McMurdo P ordered that a transcript of the proceedings be prepared and sent to the Court of Appeal’s principal registrar and administrator to be reviewed and referred on to the appropriate authorities for further action if warranted.\(^3\)

II LEGAL PROFESSION REGULATION

A Queensland Legislation

In Queensland, the \textit{Legal Profession Act 2007} (Qld) (‘LPA’) regulates legal practice and the work carried out by legal practitioners. Section 3 states that the main purposes of the LPA are ‘to provide for the regulation of legal practice in this jurisdiction in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally’.

Section 24(1) of the LPA sets out the prohibition on legal practice, stating simply that a person must not engage in legal practice unless s/he is an Australian legal practitioner. Sections 24(4) and 24(5) also prohibit payment for anything done in breach of the prohibition and allow any payment which has been made to be recovered. A person found guilty of breaching this prohibition is liable to be imprisoned for up to two years or fined up to $33,000.\(^4\) Such a finding could significantly damage the financial or professional status and reputation of a prospective lawyer or other unqualified person.

On the face of it, the assistance provided by Mr Walter to his friend Mr Wilson may readily be described as ‘legal practice’ since it included tasks which might ordinarily be described as legal work: Mr Walter prepared written submissions for Mr Wilson to present in court and

\(^3\) \textit{Wilson v Raddatz} [2006] QCA 392, 5.

\(^4\) This amount is based on the current monetary value of a penalty unit ($110): see \textit{Penalties and Sentences Act 1992} (Qld), s 5. Other penalties may also be imposed: in 2011, the Supreme Court ordered an injunction under s 703 of the LPA to restrain Mr Walter from engaging in legal practice in Queensland when not a legal practitioner in contravention of the LPA: see \textit{Legal Services Commissioner v Walter} [2011] QSC 132.
those submissions contained advice on what Mr Wilson should say during the proceedings. On this basis, it is likely that Mr Walter’s assistance breached s 24(1) of the LPA. Any such breach might be further compounded by Mr Walter’s acceptance of payment for his assistance in contravention of s 24(4) of the LPA.

Clearly, the legislation requires that a person must be a properly-qualified legal practitioner before she or he can engage in legal practice. But what work constitutes legal practice for the purposes of the legislation? The LPA does not provide a relevant definition of the term ‘legal practice’ so guidance must be sought from relevant case law.

B Common Law

Common law indicates that a court is likely to find that a person undertaking tasks or activities of a kind usually undertaken by a solicitor (such as giving legal advice or preparing legal documents adapted to particular facts or circumstances) has engaged in legal practice. Factors such as whether the person has purported to be a legal practitioner or accepted payment for her or his work will assist that conclusion.

1 Acting as a Solicitor

First of all, the question of which tasks or activities constitute legal work or legal practice must be considered. In 1927, Cussen J set out the following practical test of whether a person has engaged in legal practice in Re Sanderson, Ex parte Law Institute of Victoria [1927] VLR 394:

if a person does a thing usually done by a solicitor, and does it in such a way as to lead to the reasonable inference that he is a solicitor – if he combines professing to be a solicitor with action usually taken by a solicitor – I think he then does act as a solicitor.6

This test was endorsed in Victoria in Cornall v Nagle [1995] 2 VR 188,7 and in Queensland in 1998 when the Supreme Court considered the question of what amounted to legal practice and commented approvingly on the Sanderson practical test.8

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5 Although the Sch 2 Dictionary defines ‘legal practice’, this is only for the purposes of Pt 2.5 of the LPA, which is concerned with suitability reports for applicants for registration as local legal practitioners: see Legal Profession Act 2007 (Qld), ss 4 and 85.
6 Re Sanderson, Ex parte Law Institute of Victoria [1927] VLR 394, 397.
2 Preparing Documents and Giving Advice

Whether a person has drafted a legal document or given legal advice has also been found to be relevant to a determination of whether he or she has engaged in legal practice. This is particularly so in relation to the preparation of wills, which courts have consistently ruled must be done by a legal practitioner: see Attorney-General (WA) v Quill Wills Ltd (1990) 3 WAR 500 at 509-510 and 514; Australian Competition and Consumer Commission v Murray (2002) 121 FCR 428 at 448; and Legal Practice Board v Ferguson [2006] WASC 250 at [9].

It also applies where a person has prepared other legal documents, such as affidavits or letters of demand: see Cornall v Nagle [1995] 2 VR 188 at 208.

In Legal Practice Board v Adams [2001] WASC 78, Michael Adams, who was not a legal practitioner, drew up documents relating to legal proceedings, such as notices of default, a writ of summons and a statement of claim. Hasluck J found that Mr Adams had acted as a solicitor, noting that

> where an instrument is to be shaped from a mass of facts and conditions, the legal effect of which must be carefully determined by a mind trained in the existing laws in order to ensure a specific result and to guard against others, more than the knowledge of the layman is required.

According to Hasluck J, where a person bringing documents into existence exercised his mind as to what was the appropriate form of words to accommodate the particular case, this could be regarded as drawing up or preparing a legal document. His Honour concluded: ‘A process of that kind goes beyond mechanical or clerical tasks and is of a kind required to be performed by a solicitor.’

3 Payment for Services

Another relevant circumstance is whether a person has accepted payment for performing services amounting to legal work. Indeed, in some cases, this has been regarded as a determining factor. For example, in Barristers’ Board (WA) v Palm Management Pty Ltd [1984] WAR 101, Brinsden J considered relevant 19th century English statutes, as well as

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9 Legal Practice Board v Adams [2001] WASC 78, [28]-[30].
cases from the United States and Canada, before concluding that if a person charges a fee for shaping an instrument from a mass of facts and conditions, carefully determining its legal effect in order to ensure a specific result and to guard against others, then the person’s work is brought ‘definitely within the term “practice of the law”’.  

Brinsden J’s conclusion was affirmed in later cases such as Legal Practice Board v Adams [2001] WASC 78 at [29] and Legal Practice Board v Giraudo [2010] WASC 4 at [13].

Although payment may be a determining factor, it is ‘not a necessary precondition to a finding that a person has engaged in legal practice’, as Daubney J stated in Legal Services Commissioner v Walter [2011] QSC 132. His Honour went on to note that the fact that a person is engaged in the business of providing legal services is indicative of that person practising law, but a person may be practising law without being in business.’

Interestingly, the question of payment made to a McKenzie friend arose in Scott v Northern Territory of Australia [2005] NTCA 4, in which the Northern Territory Court of Appeal had granted leave to Daniel Taylor, a friend of the self-represented applicants who was neither an admitted legal practitioner nor a legal clerk but was a student, ‘to appear as a McKenzie friend for the purposes of presenting the applicants’ submissions’. When the applicants were successful, they sought costs to pay ‘[f]ees for the professional legal services provided by Mr Taylor as their legal friend’. The court refused to award costs for fees for services provided by Mr Taylor, ruling that although 

litigants in person are entitled to costs by way of out of pocket expenses, they are not entitled to costs in the nature of preparation and court presentation such as are normally awarded for professional legal services. Mr Taylor […] is not entitled to recover from the applicants any professional legal fees.

However, the NT Court of Appeal did not appear to consider or object to the question of whether or not Mr Taylor should be paid for helping the self-represented litigants or whether such a payment might breach legal professional practice law.

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11 Legal Services Commissioner v Walter [2011] QSC 132, [20].
12 Scott v Northern Territory of Australia [2005] NTCA 4, [3]-[7].
4 Conclusions

So what does this mean in the context of Wilson v Raddatz? Common law does not provide a straightforward conclusion. Mr Walter did not claim to act as Mr Wilson’s attorney or agent, hold himself out to be a legal practitioner, or give legal advice of a kind which would suggest that he was acting or practising as a solicitor, as described in Cornall v Nagle.

On the face of it, the Sanderson practical test appears to apply here, since the task of preparing written submissions for a court proceeding may be described as ‘[practising] law’ or work done ‘in the ordinary course of legal practice’. However, even if this task were defined as work ‘usually done by a solicitor’, Mr Walter had neither professed to be nor invited the inference that he was a solicitor. On that basis, Wilson v Raddatz may be distinguished from the case of Sanderson and the practical test may not apply.

Nonetheless, Mr Walter had drawn up documents relating to legal proceedings, and those documents affected Mr Wilson’s legal rights and were tailored to his particular needs. As a result, drawing on Hasluck J’s conclusion in Legal Practice Board v Adams, Mr Walter could be regarded as having prepared a legal document and engaged in a process ‘required to be performed by a solicitor’. Indeed, merely advising Mr Wilson that he needed written submissions for court and then preparing the written submissions might have meant that Mr Walter breached legal practice legislation.

In view of the case law, it is likely that Mr Walter’s preparation of Mr Wilson’s court submissions and his acceptance of payment for doing so would be regarded as legal work which should be reserved to a legal practitioner. If so, Mr Walter engaged in legal practice in breach of legal professional practice law. Such a breach might render him liable to repay the money to Mr Wilson, who would be entitled under s 24(5) of the LPA to sue to recover the payment.
III SELF-REPRESENTED LITIGANTS

Numbers of self-represented litigants have reportedly risen in all Australian courts and jurisdictions over the past decade, although it is difficult to find consistent and reliable data which enables comparisons to be made across courts and tribunals over time. A recent study of the available literature on self-represented litigants by the Australian Centre for Court and Justice System Innovation at Monash University in 2012 states that the increased numbers are largely attributed to rising legal costs and changes or cuts to legal aid funding. It also indicates that the increase in self-represented litigants is not restricted to Australia; similar reports have come from New Zealand, the United States, Canada and the United Kingdom.

According to the High Court’s most recent annual report, self-represented litigants filed 44% of all special leave applications in 2012-2013, compared with 41% in 2011-2012, and 75% and 84% of all immigration applications in those years were filed by self-represented litigants.

The Federal Court collects limited data in relation to self-represented litigants: in 2012-2013, 406 applicants to proceedings were identified as self-represented, up from 314 self-represented applicants in 2011-2012, with the majority of those litigants being appellants in migration appeals.

The Federal Circuit Court also captures limited data in relation to its self-represented litigants: in 2012-2013, the Federal Circuit Court recorded at least one self-represented litigant in 5,741 (or 32.6%) of the finalised applications for final orders in family law matters, compared with 5,407 (or 31.14%) in 2011-2012.

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Finally, in 2012-2013, at least one party (and sometimes both) was self-represented in 28% of finalised Family Court matters, up from 27% in 2011-2012.\(^8\)

In Queensland, self-represented litigants made up 11% of litigants in civil matters and 21.5% of litigants in criminal matters appearing in the Court of Appeal during 2012-2013, which was down from 20% and 27% respectively in 2011-2012. This decrease in self-represented litigant numbers has been attributed to the success of the Self-Representation Service which is offered by the Queensland Public Interest Law Clearing House (‘QPILCH’).\(^9\)

Despite limitations and inconsistencies in the recording of the data, on the whole self-represented litigants appear to constitute a significant minority, at around 30-40% of all litigants.

### IV Conclusion

This paper has discussed relevant sources of law to answer the following questions: by preparing the applicant’s written court submissions, and accepting payment for preparing the submissions, did Mr Walter engage in legal work? If so, did Mr Walter contravene legal practice law?

The first question has already been considered. The legislation and case law suggest that by preparing written submissions for the upcoming court hearing, Mr Walter undertook legal work and engaged in legal practice. The fact that he accepted payment for his work adds weight to this conclusion.

The answer to the second question flows from that conclusion. If Mr Walter engaged in legal practice without being a legal practitioner, then he arguably breached the prohibition in s 24(1) of the LPA on engaging in legal practice.

However, this paper also wishes to consider the broader question of whether Queensland law governing legal work and the legal profession may disadvantage self-represented litigants

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such as Mr Wilson. If, for example, a self-represented litigant is unable to prepare his or her own submissions and asks a friend for help, how may that friend assist the litigant without breaching legal practice legislation? If, in the course of discussing upcoming legal proceedings, the friend gives an opinion, suggests a course of action or helps the litigant to write down thoughts or ideas, does such assistance amount to legal work which must only be performed by a lawyer? If the litigant pays the friend, does the payment alter the nature of the friend’s assistance? Does it matter if the litigant intends the payment to represent a nominal reimbursement of the friend’s time and expenses rather than a commercial transaction?

Is the assistance which a non-lawyer friend may offer a self-represented litigant substantively different from other ‘self-help’ resources such as websites dedicated to issues relating to self-represented litigation, commercial services selling pre-made legal forms so that self-represented litigants can have formally correct documents, or will kits which offer general guidance on how to draw up a will?

The legislation and case law do not provide clear answers to these questions, but they suggest that the friend is strictly limited in the help which he or she can provide. In effect, a self-represented litigant must not accept services from a friend which might represent work done in the ordinary course of legal practice, nor pay a friend for any assistance provided.

The research and case law also suggest that self-represented litigants are less likely to be successful in their matters and more likely to discontinue them, have them dismissed and be ordered to pay costs, than litigants with legal representation.20

Certainly, it is important that legal profession law and regulations protect members of the public from unscrupulous and unqualified people offering unsatisfactory legal services. The potential risks involved in allowing – and paying – friends to help self-represented litigants with their legal proceedings are the basis for restrictions on legal work which are in legal profession legislation and regulations.

At the same time, there are limited supplies of other and better forms of assistance for self-represented litigants provided by legal aid offices, duty lawyer schemes, community legal centres, dedicated court or registry officers or services such as the Self-Representation Service offered by QPILCH in Queensland, all of which call for more funding.

QPILCH itself acknowledges that its Self-Representation Service is based on

an acceptance of the reality that not everyone can be represented by a lawyer on their day in court. Funding of community legal centres and Legal Aid is not adequate, and the generosity of private practitioners working on a pro bono basis cannot fill the whole gap.21

In their absence, restrictions on legal work may also prevent self-represented litigants from drawing on resources which are available to help them prepare their arguments, submissions or other documents. In view of the numbers of self-represented litigants appearing in Australian courts and tribunals, restricting the assistance which can be provided to litigants who are already disadvantaged and vulnerable may simply be unfair and unrealistic.