

LITIGANTS IN PERSON  
MANAGEMENT PLANS:

ISSUES FOR COURTS AND  
TRIBUNALS

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The AIJA is an incorporated association affiliated with the University of Melbourne. Its main functions are the conduct of professional skills courses and seminars for judicial officers and others involved in the administration of the justice system, research into various aspects of judicial administration and the collection and dissemination of information on judicial administration. Its members include judges, magistrates, legal practitioners, court administrators, academic lawyers and other individuals and organisations interested in improving the operation of the justice system.

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## **Foreword**

This publication was prepared under the supervision of the AIJA Courts and Public Committee with Paul Sheiner (BA, LLB) as the consultant research assistant.

It is to assist courts and tribunals in planning for and management of persons appearing or conducting matters in courts and tribunals without representation. It is not intended to be a guide for self-represented litigants to courts and tribunals.

Litigation in courts is a highly technical matter dependent upon the inter-related skills of persons of appropriate professional expertise, whether as judges, barristers, solicitors or court staff. This publication is not intended to diminish reliance upon such professional expertise or to suggest that litigants in person are not at risk when such skills are not available to them.

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# LITIGANTS IN PERSON MANAGEMENT PLANS: ISSUES FOR COURTS AND TRIBUNALS

## 1. BACKGROUND

In the AIJA report *Courts and the Public* by Professor Stephen Parker, he recommended:

All courts should have a litigants in person Plan that deals with every stage in the process, from filing through to enforcement, or the equivalent in criminal matters. This is recommended so that systematic attention is given to the issues. As part of the litigants in person Plan guidelines should be prepared by judicial officers so that best practice is identified and shared between them as to how to conduct a hearing where one or more of the parties are unrepresented.<sup>1</sup>

While lack of legal aid is one of the main reasons for people appearing unrepresented there is no one underlying cause. Reasons for persons being unrepresented differ both between and within different courts and tribunals.

This document seeks to raise the issues that need to be addressed in a model litigants in person management plan. It summarises the principles, issues, recommended strategies and precedent schemes relevant to such plans that have been extracted from material brought to the attention of the AIJA through its Courts and the Public Committee. It is intended to provide a range of information and ideas for courts and tribunals to draw on in formulating their own management plans.

It is recognised that the content of any management plan will depend on the nature of the jurisdiction of the particular court or tribunal, its history and its management practices. It is also recognised that there are institutional restraints on the capacity of courts to manage litigants in person.

Judicial independence requires that any assistance given by the judiciary to litigants in person is limited to matters of procedure. Curial dispute resolution is fundamentally based upon the adversarial process, a process in which each side, equally matched, presents its case to a non-interventionist judicial officer.

Furthermore the court system is designed to operate on a professional level with the participants in the process having various duties to the court. The courts and the legal profession are interdependent. Not being part of this system and bearing no duties to the court, litigants in person will inevitably create problems for courts that are not able to be easily or wholly resolved. They should be aware they face difficulties which may prejudice the proper presentation of their case. It should not be thought that the court system could operate effectively or efficiently unassisted by barristers and solicitors in most cases.

It is not envisaged that a management plan will eliminate all the problems experienced by the courts and tribunals in relation to litigants in person. It is hoped, however, that such a plan will prevent small problems from developing into larger ones by ensuring that they are responded to appropriately. A plan for the better management of the issue of litigants in person is important for both improving the efficiency of courts and tribunals, in terms of reduced time and resources dealing with litigants in person, and enhancing public access to the courts and judicial system.

Court managers will be familiar with the issues and problems raised by litigants in person. Various reports and papers have recommended appropriate strategies for courts and tribunals to adopt in respect of litigants in person. In preparing this document the Courts and the Public Committee also wrote to courts, tribunals, legal aid organisations and community legal centres asking for their experiences. For a summary of the responses, which provided strategies, schemes and recommendations in relation to litigants in person, see Appendix 1.

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<sup>1</sup> Professor Stephen Parker, *Courts and the Public* (AIJA, 1998) 166.

This document summarises from the reports, papers and correspondence the issues, problems, recommendations and precedent schemes with respect to litigants in person. The first part provides background information on the legal principles applicable to the treatment of litigants in person and to the question 'who are litigants in person?' It then outlines broad strategies, such as securing representation and providing information and advice. Finally it looks at managing litigants in person by reference to the following stages in the court or tribunal process:

- the initial stage of commencing proceedings, the impact of which is borne largely by court and tribunal staff;
- the pre-trial or case management stage;
- the hearing itself, including suggested guidelines for judicial officers recommended by the *Courts and the Public* report; and
- the appeals or review process.

It is intended that this summary could be used as a guide by judges, tribunal members and court and tribunal managers in the development of management plans in respect of litigants in person.

## 2. LITIGANTS IN PERSON

While little empirical research has been done on litigants in person the following is a summary of how they are commonly perceived.

### **Who are litigants in person?**

"Litigant in person" is a description of a diverse group of people who for a variety of reasons appear unrepresented in courts and tribunals. Litigants in person may be defendants as well as plaintiffs particularly in areas such as housing law and debt recovery.<sup>2</sup> The ability of such litigants to represent themselves varies greatly.

A recent report into the Family Court<sup>3</sup> found that some of the characteristics of litigants in person in that Court are:

- they are more likely than the population as a whole to have limited formal education, limited income and assets and to have no paid employment;
- that a significant group of them are dysfunctional serial litigants.

There are many possible reasons for a litigant's unrepresented status. Some of these reasons are detailed below.

### ***The cost of legal services***

Many reports have commented on the increasing costs of litigation.<sup>4</sup> There are a large group of people who cannot afford the cost of legal professionals yet fail the means test for legal aid.<sup>5</sup> Some jurisdictions directly address the issue of costs. For instance, in the Compensation Court of New South Wales, legal representatives for litigant workers can only recover party costs and costs orders against litigant workers are rare.

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<sup>2</sup> Lord Woolf *Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales*, Ch 17 ('the Woolf Report') (1995).

<sup>3</sup> Dewar, Smith & Banks *Litigants in Person in the Family Court of Australia* ('the Family Court Report') (2000) 1.

<sup>4</sup> For example see LRCWA Review of the Criminal and Civil Justice System in Western Australia: Final Report, 16.1.

<sup>5</sup> Bruce & Powles "Litigants in Person" ("AIJA Discussion Paper") (1993) 14.



### ***Legal aid may be unavailable or refused***

In some kinds of matters in particular jurisdictions legal aid is not available. There have been significant cutbacks in the availability of legal aid in certain areas. For example, the Tasmanian Supreme Court has advised the AJJA that there has been no legal aid available in new civil matters since July 1999. Further, some people do not apply for legal aid because of the perception that it is not available. The Family Court Report concluded that recent changes to Legal Aid guidelines in Family Court matters have intensified what was a pre-existing trend towards self-representation.

### ***Choice***

A person may deliberately choose to be self-represented,<sup>6</sup> believing that they do not need a lawyer and/or that they will obtain an advantage in being self-represented (for example obtaining an adjournment of a criminal trial). They may also be deeply suspicious or resentful of the legal profession or wish to use the court or tribunal as a soapbox to air grievances.<sup>7</sup> Where a person has declined legal representation there are ethical issues concerning the degree to which a person is deserving of assistance from court staff and judges.<sup>8</sup>

### ***No legal representative is willing or able to act***

Legal representatives may be unable or unwilling to act as a result of the perceived lack of merit in the person's case. The unwillingness may also result from perceived difficulties with the personal conduct or behaviour of the litigant. Such perceived difficulties may be the result of a disability, mental illness or an inability to communicate effectively in English.

Further, for a variety of reasons there may be a withdrawal of instructions from the representative, or they may cease to act, just before a matter is listed for trial or hearing. The litigant may take considerable time to find a representative willing or able to take up the matter at such a late stage, and in the interim period are forced to act on their own behalf.<sup>9</sup>

### ***Jurisdiction***

Some jurisdictions may discourage or prevent persons from using legal representation.

### **What are the needs of litigants in person?**

By definition litigants in person lack the skills and abilities usually associated with legal professionals. Most significantly, lack of knowledge of the relevant law almost inevitably leads to ignorance of the issues that are for curial resolution for the court or tribunal. A litigant in person may also lack comprehension of court procedures.<sup>10</sup> This ranges from lack of knowledge of courtroom formalities, to a lack of knowledge of how the whole court process works from the initiation of a proceeding to hearing. Litigants in person also lack familiarity with the language and specialist vocabulary of legal proceedings.

It would be wrong to assume that all litigants in person need legal advice.<sup>11</sup> The Family Court Report found that litigants in person in the Family Court have a wide range of needs for information, advice and support, both emotional and practical. While some litigants in person seek legal advice from lawyers, many seek advice from a range of non-conventional sources and others seek none at all. Some litigants in person may go to one advice agency, for example Legal Aid, and when their resources are expended move to another, for example a Community Legal Centre, where the process is repeated.

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<sup>6</sup> LRCWA, above n 4, 18.1.

<sup>7</sup> See Justice Mildren "Don't Give Me Any LIP - The Problem of the Unrepresented Litigant in Criminal Trials" (1999) 19(1) *Australian Bar Review* 30, 32.

<sup>8</sup> Bruce & Powles, above n 5, 26.

<sup>9</sup> See *Jarrett v Westpac Banking Corporation* [1999] FCA 425.

<sup>10</sup> Appleby "The Growth of Litigants in Person in English Civil Proceedings" (1997) 16(4) *Civil Justice Quarterly* 127.

<sup>11</sup> Dewar, Smith & Banks, above n 3, 62.

The problem of self-representation is not just a lack of legal skill - it is also a problem of a lack of objectivity and emotional distance from their case.<sup>12</sup> Litigants in person are not in a good position to assess the merits of their claim, and as a result they are more likely than represented litigants to be involved in frivolous or vexatious litigation.<sup>13</sup>

More of the specific needs of litigants in person are examined below in reference to the issues they raise for the court at various stages of the litigation process.

### 3. THE COURT AND TRIBUNAL SYSTEM

Courts and tribunals are statutory and rule based environments. Of particular importance in higher courts are the rules of evidence. The court and tribunal systems are to varying degrees designed around professional people able to work efficiently in these environments.

The efficient and effective operation of courts and tribunals relies on people having skills and expertise in particular roles. For instance, in ordinary civil litigation in courts, a solicitor is trained to take instructions from the litigant or potential litigant. A barrister will accept a brief from a solicitor and has the expertise to present effectively the litigant's case to the court. Trained court staff ensure that all necessary documents are filed in a proceeding and that a matter is efficiently managed to a resolution or a trial as soon as possible. The judge is responsible for making an impartial determination on the basis of the cases presented to the court.

Where resources are limited, the effective presentation of a case by a qualified person should lead to a more efficient and effective court system. This preserves the capacity of the court or tribunal to provide effective and speedy dispute resolution service to all users.<sup>14</sup>

#### **What is the impact of litigants in person on court and tribunal resources?**

There is a perception in the courts and tribunals that litigants in person place an increased drain on limited resources, particularly in terms of the time taken dealing with and resolving cases involving litigants in person. The extent to which litigants in person are perceived as a problem varies according to:

- the nature of the jurisdiction (for example whether it is a court or tribunal);
- whether a matter is regarded as routine or complex;<sup>15</sup> and
- whether the cost of legal advice is disproportionate to the amount involved in the claim.

For instance, in some jurisdictions an increase in the number of litigants in person is regarded as a success. For example, in divorce cases in the Family Court, in the South Australian Magistrates' Court and in small claims courts where legal representation is not allowed.<sup>16</sup> Similarly the perception that litigants in person are a drain on resources is not shared by all courts.

The experience of the Family Court as reported in the Law Reform Commission of Western Australia Consultation Paper<sup>17</sup> was that unfamiliarity with the system resulted in less resources because litigants in person did not know what to ask for in interim matters and trials were truncated because of lack of knowledge. However the Family Court Report points out that matters that fail at an initial stage

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<sup>12</sup> See *McInnes v R* (1979) 143 CLR 575 per Murphy J at 590.

<sup>13</sup> Bruce & Powles, above n 5, 11.

<sup>14</sup> Dewar, Smith & Banks, above n 3, 6-9.

<sup>15</sup> Bruce & Powles, above n 5, 8.

<sup>16</sup> ALRC, *Review of the Federal Civil Justice System: Discussion Paper* (1999), 11.162; Perry, "The Unrepresented Litigant" AIJA 16<sup>th</sup> Conference September 1998, above n 4 Recommendation 103.

<sup>17</sup> LRCWA, *Review of Civil and Criminal Justice System Consultation Paper - Litigants in Person: Unreasonable and Vexatious Litigants* (1999) 3.

for technical reasons may still consume significant time from staff and judicial officers, in dealing with defective paperwork and explaining matters to the litigant in person.<sup>18</sup>

In small claims courts it is said that representation increases the length of trial.

#### **Justice outcomes for litigants in person**

The data that has been collected in federal courts and tribunals suggests:

- representation is relevant to outcome;<sup>19</sup>
- settlement by negotiation is more effective with representation;<sup>20</sup>
- the failure rate of litigants in person is significant.<sup>21</sup>

The Family Court Report suggests a bifurcated pattern in that Court with some matters falling out at an early stage by default or demurrer and most of the remainder going on to a full hearing.<sup>22</sup>

## **4. LEGAL ISSUES**

The following is a summary of principles extracted from the case law dealing with litigants in person. This case law is also usefully summarised in an article by Byrne and Leggatt.<sup>23</sup>

### **A right to appear in person**

In the ordinary course, all litigants have a right to appear in person.<sup>24</sup> This right only extends to natural persons and not to companies.<sup>25</sup> In criminal proceedings the right to choose the manner and form of one's defence has been described as 'axiomatic'<sup>26</sup> or 'fundamental'.<sup>27</sup> In all courts exercising federal jurisdiction the right to appear in person is expressly provided for by s.78 of the *Judiciary Act 1903* (Cth).

### **Judicial assistance**

There are conflicting legal and ethical issues surrounding any form of judicial assistance to litigants in person. The duty of a court or tribunal to act impartially competes with the duty to provide a fair hearing.

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<sup>18</sup> Dewar, Smith & Banks, above n 3, 39, 43.

<sup>19</sup> ALRC *Managing Justice: A Review of the Federal Civil Justice System* (2000) 12.218.

<sup>20</sup> Ibid, 12.221.

<sup>21</sup> Dawson A, "Some Personal Litigants and the Federal Court of Australia" unpublished paper (1992) 13. See also Gamble & Mohr, Draft Report Concerning Litigants in Person in the Federal Court of Australia and the Administrative Appeals Tribunal: Their Impact on Management ("the Federal Court and AAT Draft Report"), University of Wollongong, May 1998, 16.

<sup>22</sup> Dewar, Smith & Banks, above n 3, 61.

<sup>23</sup> Byrne L and Leggat CJ, "Litigants in Person - Procedural and Ethical Issues for Barristers", (1999) 19(1) *Australian Bar Review* 41.

<sup>24</sup> *Collins (aka Hass) v R* (1975) 133 CLR 120 at 122 and *Burwood Municipal Council v Harvey* (1995) 86 LGERA 389; cf. *Bay Marine Pty Ltd v Clayton Country Properties Pty Ltd* (1986) 8 NSWLR 104 (CA) at 114 and O.69A r11 *High Court Rules*.

<sup>25</sup> Perry, above n 16, 3-4; *Co-operative Property Developments* [1979] Tas R 314; Rules of Court (Tas) R11.

<sup>26</sup> Mildren, above n 7, 30.

<sup>27</sup> *R v Zorad* (1990) 19 NSWLR 91.

Where a litigant appears in person they will ordinarily be at a disadvantage because of their lack of legal skill.<sup>28</sup> The court has an obligation to diminish this disadvantage<sup>29</sup> so as to ensure a fair and just trial.<sup>30</sup> However this obligation is subject to the need for the court to maintain its position of neutrality in the proceedings.<sup>31</sup> The court must not confer an advantage on the litigant in person over the represented party.<sup>32</sup>

The extent of the obligation on the court to assist litigants in person is contextual<sup>33</sup> and may depend on the litigant, the nature of the case and the litigant's intelligence and understanding of the case.<sup>34</sup> The court may also have regard to the position of the other party or parties concerned and the efficient conduct of the proceedings.<sup>35</sup>

### ***Pre-trial***

In interlocutory matters a court will be reluctant to strike out an application of an unrepresented litigant because the pleadings are defective. In *Wentworth v Rogers* (No 5) this reluctance was explained:

Persons unfamiliar with the rules of pleading and the technicalities which surround the drafting of a statement of claim in adequate and permissible legal form are inevitably, if unrepresented, at a disadvantage. Courts should approach the peremptory termination of the litigation with special care to ensure that... there is no viable cause of action which, with appropriate amendment of pleading and a little assistance from the court, could be put into proper form. If this can be done, the court should avoid the summary termination of the proceedings for this will prevent the court from examining any merits of the case...<sup>36</sup>

### ***Hearing***

In *Johnson v Johnson*<sup>37</sup> the Full Family Court set out the following obligations of a trial judge in that jurisdiction where one party was unrepresented.<sup>38</sup>

- outlining the procedures of trial;
- assisting by taking basic information from witnesses;
- explaining the possible effect of requests for changes to normal procedures such as calling witnesses out of turn and the party's right to object;
- informing an unrepresented party of the right to object to inadmissible evidence;
- informing an unrepresented party of right to claim privilege;
- attempting to clarify the substance of submissions of unrepresented parties.

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<sup>28</sup> *Rjaski v Scitec Corporation Ltd* unreported NSW (CA) 16 June 1986.

<sup>29</sup> *Ibid*, and *Minogue v HREOC* [1999] FCA 85.

<sup>30</sup> *Panagopoulos v Southern Healthcare Network*, unreported, SCT Vic 15 September 1997.

<sup>31</sup> *Minogue v HREOC* above n 29 and *Burwood Municipal Council v Harvey* above n 24.

<sup>32</sup> *Rjaski v Scitec Corporation Ltd*, above n 28.

<sup>33</sup> *Minogue v HREOC*, above n 29.

<sup>34</sup> *Abram v Bank of New Zealand* [1996] ATPR 41-507.

<sup>35</sup> *Corporate Affairs Commission v Solomon* unreported, CA (NSW), 1 November 1989, 8 and *R v Morley* [1988] 2 WLR 983.

<sup>36</sup> (1986) 6 NSWLR 534, 536; citing *Morton v Vouris* (1996) 21 ASCR 497, 513-514.

<sup>37</sup> (1997) 139 FLR 384.

<sup>38</sup> Australian Law Reform Commission *Review of the Federal Civil Justice System: Discussion Paper* August 1999, 62.

These guidelines will not be applicable to every court.<sup>39</sup> However, the list may be appropriate for consideration.<sup>40</sup> What a judge must do to assist a litigant in person depends on the litigant, the nature of the case and the litigant's intelligence and understanding of the case.<sup>41</sup>

In criminal matters the trial judge must give so much information as is necessary to enable a fair trial. This includes advice as to procedural rules such as the right to a *voir dire*.<sup>42</sup> The duty of the court to assist an unrepresented accused is likely to be more extensive than that required of a judge hearing civil proceedings involving an unrepresented party.<sup>43</sup> Notwithstanding these obligations, excessive intervention by a trial judge may amount to an error of law on the basis of denial of procedural fairness or reasonable apprehension of bias.<sup>44</sup> Importantly, it is no part of the role of a trial judge to provide the advice, guidance and representation that an accused would normally have if his or her case was being properly presented by a lawyer.<sup>45</sup>

A trial judge should not give legal advice as it would be unfair or give the appearance of unfairness and may be given without full knowledge of the facts.<sup>46</sup> Similarly a trial judge must recognise the distinction between explaining procedural choices available to an accused and advising as to what decisions to make.<sup>47</sup> Procedural misunderstandings by a litigant in person may provide the basis for an adjournment in the interests of justice.<sup>48</sup>

Finally, a judge cannot permit a litigant in person, even without objection, to give evidence from the bar table without oath or affirmation.<sup>49</sup>

### ***A right to representation***

In criminal matters an unrepresented accused has no right to representation at the public expense, only a right to a fair trial.<sup>50</sup> However, so as to protect that right to a fair trial, in the absence of exceptional circumstances, the trial of a person for a serious criminal offence may be delayed or postponed until legal representation is available.<sup>51</sup>

The practical result of this common law rule is that at the trial of serious criminal matters unrepresented accused persons may well be appearing unrepresented by choice.<sup>52</sup>

Where an accused person refuses an offer of legal assistance, or otherwise chooses to be unrepresented this does not disentitle him or her to a fair trial and such lack of representation may still result in unfair trial.<sup>53</sup> However, an accused who elects to appear unrepresented should not be given an advantage.<sup>54</sup>

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<sup>39</sup> *National Australia Bank v Rusu* [1999] NSWSC 539.

<sup>40</sup> *Santamaria v Secretary to Department of Human Services* [1998] VSC 107.

<sup>41</sup> *Abram*, above n 34 applying *Neil v Nott* (1994) 121 ALR 148, 150.

<sup>42</sup> *McPherson v R* (1981) 147 CLR 512.

<sup>43</sup> *Minogue v HREOC*, above n 29.

<sup>44</sup> *Burwood Municipal Council v Harvey*, above n 24, 395 and *R v Pirimona* unreported CCA (Tas) 136/1998.

<sup>45</sup> *Dietrich v R* (1992) 177 CLR 292, 334-5

<sup>46</sup> *Johnson v Johnson*, above n 37.

<sup>47</sup> *R v Zorad*, above n 27.

<sup>48</sup> *Titan v Babic* (1994) 49 FCR 546, 554-5.

<sup>49</sup> *Randwick City Council v Fuller* (1996) 90 LGERA 380.

<sup>50</sup> *Dietrich v R*, above n 45.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Mildren*, above n 7, 37.

<sup>53</sup> *McPherson v R*, n 42.

<sup>54</sup> *R v Zorad*, above n 27.

In civil matters a court will more readily grant an adjournment to an unrepresented person. This tendency was explained in *Titan v Babic*:

Where it is apparent that a party who does not have legal representation has misunderstood procedural requirements so that he or she is not in a position to complete the presentation of evidence, an adjournment might be considered in the interests of justice provided that no irreparable substantive or procedural injustice is done to the other party involved. In any such case the granting of an adjournment will be a matter of discretion. ... It may be that in some cases a tribunal should, to avoid possible injustice, inquire of an unrepresented person the reason for the failure properly to prepare his or her case. Again, that is a matter of discretion limited by the necessity that the tribunal be, and appear to be, impartial as between the parties.<sup>55</sup>

Further, a failure to grant an adjournment in a civil matter to allow a person sufficient opportunity either to procure alternative representation or to prepare themselves adequately to present their own case may amount to an error of law.<sup>56</sup>

### **Lay assistance**

In the United Kingdom the courts have allowed litigants in person to be assisted in a hearing by a friend, known as a 'McKenzie friend', to better present their case.<sup>57</sup> In *R v Bow County Court; Ex Parte Pelling*<sup>58</sup> the English Court of Appeal would have allowed a party to a custody dispute the assistance of a professional McKenzie friend. The constraints on the role of a McKenzie friend set out by the Court of Appeal in that case include the following:

- a McKenzie friend has personally no rights with regard to litigation, it is the litigant who has the rights;
- a McKenzie friend has no rights to be an advocate; and
- the court has a discretion to exclude a McKenzie friend.<sup>59</sup>

Australian courts have generally regarded such assistance as an 'indulgence'.<sup>60</sup> Nevertheless a discretion still exists to accept an application for such assistance.<sup>61</sup> Such an application will not be favourably regarded if the litigant has not applied for or has refused legal assistance.<sup>62</sup> In some cases persons other than legal representatives have been allowed to address the court on behalf of litigants in person.<sup>63</sup>

Some jurisdictions expressly provide for the right of lay representatives to conduct matters (for example industrial advocates and migration agents). Other jurisdictions expressly provide for a party to be represented by an agent in relation to a proceeding, for example s.84B of the *Native Title Act 1993* (Cth).

Interestingly, in *Wentworth v Rogers*<sup>64</sup> the New South Wales Court of Appeal held that the fact that a party appears as his or her own advocate, and has complete control of the litigation, does not mean that the solicitor on the record is protected against an order for indemnity costs.

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<sup>55</sup> *Titan v Babic*, above n 48, 554-5.

<sup>56</sup> *Jarrett v Westpac Banking Corporation*, above n 9.

<sup>57</sup> *Re v Leicester City Justice; Ex parte Barrow* [1991] 3 All ER 935.

<sup>58</sup> [1999] 4 All ER 751.

<sup>59</sup> *Ibid*, 757.

<sup>60</sup> *R v E J Smith* [1982] 2 NSWLR 608. See above n 7, 35-6.

<sup>61</sup> *Schagen* (1993) 65 A Crim R 500 and *Smith v R* (1985) 159 CLR 532, 534.

<sup>62</sup> Perry, above n 16, 7.

<sup>63</sup> *Galladin Pty Ltd v Aimworth Pty Ltd and Ors* (1993) 60 SASR 145.

<sup>64</sup> [1999] NSWCA 403.

## Role of opposing counsel

Counsel have a paramount duty to the court, which may require them to act to the possible disadvantage of their client.<sup>65</sup> This duty may have particular relevance where counsel appears against a litigant in person. For instance counsel has a duty to provide authorities to the court favourable to a litigant in person.<sup>66</sup> In *Laferla v Birdon Sands Pty Ltd*<sup>67</sup> Mildren J suggested that where a litigant in person has failed to bring evidence on a matter essential to their case, counsel has an obligation to bring it to the attention of the court.<sup>68</sup>

In criminal proceedings the prosecutor has more particular duties which may be tested where the accused is a litigant in person. These include a duty to fairly assist the court to arrive at the truth, a duty of disclosure of relevant evidence and a duty to assist the court with respect to appropriate sentencing ranges.<sup>69</sup>

Further, there are particular restrictions in some jurisdictions which arise when a litigant is unrepresented. For instance in Queensland the prosecutor will not be permitted to address the jury where the accused has led no evidence.<sup>70</sup>

## Costs

There is no power to award professional costs in favour of a successful litigant in person.<sup>71</sup> In contrast in the UK there is express statutory provision for awarding costs in such circumstances.<sup>72</sup>

It has been suggested that the lack of power to award costs in Australia acts as a disincentive for the opposing party to settle.<sup>73</sup> The Australian Law Reform Commission recommended law reform so as to entitle the litigant in person to recover costs as well as disbursements.<sup>74</sup>

## Vexatious litigants

Most states have legislation dealing expressly with litigants, whether or not represented, that habitually, persistently and without reasonable ground bring legal proceedings, for example the *Vexatious Proceedings Restriction Act 1930* (WA). On application, orders can be made limiting the ability of those litigants to commence fresh litigation. Concerns have been expressed over the workability of such legislation in Western Australia.<sup>75</sup>

## 5. ACCESS TO DATA

Until recently little has been known about litigants in person in court litigation.<sup>76</sup> Information on litigants in person is generally not readily accessible from court management systems and there have been few attempts by courts and tribunals to systematise or collect such data. This reflects an overall lack of statistical information about court users and their impact on court resources and time, which

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<sup>65</sup> *Giannarelli v Wraith* (1988) 165 CLR 543.

<sup>66</sup> Byrne & Leggat "Litigants in Person - Procedural and Ethical Issues for Barristers" (1999) 19(1) *Australian Bar Review* 41.

<sup>67</sup> Unreported, SC (NT), 21 August 1998.

<sup>68</sup> Cf Byrne & Leggat, above n 65.

<sup>69</sup> Ibid, and Mildren, above n 7, 34-5.

<sup>70</sup> s.619 *Criminal Code* (Qld) as cited in Mildren, above n 7, 34.

<sup>71</sup> *Cachia v Haynes* (1994) 179 CLR 403.

<sup>72</sup> *Litigants in Person (Costs and Expenses) Act 1975* (UK)

<sup>73</sup> Bruce & Powles, above n 5, 8.

<sup>74</sup> ALRC Report 75 "Costs Shifting - Who Pays for Litigation" (1995), 175-7, Recommendations 57-8 cited by Perry above n 16, 5.

<sup>75</sup> See LRCWA *Review of the Criminal and Civil Justice System in WA: Final Report*, Chapter 19.

<sup>76</sup> Professor Stephen Parker, above n 1, 107.

according to the *Courts and the Public* report is one of the contributing factors to the lack of a coordinated court system in Australia.<sup>77</sup>

The effective management of litigants in person within a court or tribunal will require access to information on the impact of litigants in person on court or tribunal resources and the needs of litigants in person. Such information is necessary for deciding upon strategies for dealing with litigants in person and monitoring the effectiveness of such strategies. It is important that any court management plan to have built into them provisions for evaluation of that plan.<sup>78</sup> There is also a broader public interest, including the interests of user groups, legal aid and government departments, in a better understanding of the impact of litigants in person on the legal system.

## **Recommendations from Reports**

### ***Data collection***

The need for data collection on litigants in person is widely acknowledged. There have been a number of suggestions as to how this could be achieved. Dawson in his paper “Some Personal Litigants and the Federal Court of Australia” recommended that personal litigants be coded on court computer systems so that information regarding them is accessible as a separate category.<sup>79</sup> He also recommended that cumulative court time spent on cases involving litigants in person should be recorded along with cumulative court time spent on cases involving litigants in person.<sup>80</sup>

The Law Reform Commission of Western Australia recommended that data should be collected by courts to:

- profile litigants;
- categorise their legal disputes;
- determine the cost of resolving matters; and
- record the quality of nature and of satisfaction with the results.<sup>81</sup>

The Australian Law Reform Commission recommended th courts and tribunals should seek opportunities for undertaking collaborative empirical research<sup>82</sup> and that the data collected by federal courts and tribunals should be published in their annual reports.<sup>83</sup>

### ***Research into needs of litigants in person***

Research into the needs of litigants in person, as well as the collection of empirical data on the use of court resources, is necessary so that appropriate services can be provided.

The Woolf Report recommended ongoing research into litigants’ needs, including the information needs of litigants in person.<sup>84</sup> Similarly, the American Judicature Society and State Justice Institute recommended that courts should study the composition and greatest needs of self-represented litigants and design services to effectively meet those needs.<sup>85</sup>

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<sup>77</sup> Ibid, 160.

<sup>78</sup> Ibid.

<sup>79</sup> Dawson A, above n 21, 16.

<sup>80</sup> Ibid, 16-7.

<sup>81</sup> See LRCWA *Review of the Criminal and Civil Justice System in WA: Final Report*, above n4, Recommendation 198.

<sup>82</sup> ALRC *Managing Justice*, above n 19, Recommendation 1.

<sup>83</sup> Ibid, Recommendation 40.

<sup>84</sup> Lord Woolf, above n 2, 134.

<sup>85</sup> Goldschmidt et al, Meeting the Challenge of Pro Se Litigation (1998) American Judicature Society, State Justice Institute, Recommendation II.



Client surveys and feedback forms are two of the ways in which this information can be collected. These and other mechanisms are discussed in detail in the *Courts and the Public* report.<sup>86</sup> That report recommended that all courts should have a communication plan which would include mechanisms for two way communication with its publics.<sup>87</sup>

The following two chapters look at two broad strategies for addressing the needs of litigants in person and managing their impact on court and tribunal resources – securing legal and non-legal assistance and information strategies.

## 6. STRATEGIES FOR REPRESENTATION

Courts and tribunals should consider what they need to do or could do to secure legal representation for litigants in person. Any strategies that they arrive at should be reflected in their litigants in person plan. Such strategies necessarily require collaboration and cooperation with the legal profession, including law firms and practitioners, the Bar, legal aid, government departments in the justice sector, and advice agencies. Litigants in person are not solely a problem or issues for the courts, and responsibility for litigants in person needs to be (and generally is) accepted by the broader legal community.

### Recommendations from Reports

#### *Collaborative schemes*

All reports brought to the attention of the AIJA have recommended collaborative schemes involving court and tribunal staff, the Bench, the Bar and the public, which aim to provide legal representation or assistance to litigants in person.<sup>88</sup> The proposed role of the court or tribunal will include, but is not limited to, providing a link between the litigant in person and the scheme participants, offering the service to them and will usually involve the coordination of the scheme.

There are a number of different possible types of schemes including:

- duty advice schemes which require:
  - proper funding;
  - more effort to ensure advice before day of court; and
  - court support in respect of accommodation, service and listing practises;<sup>89</sup>
- pro-bono legal representation where the litigant in person is not legally aided and is unable to afford legal representation;
- unbundled legal services offered pro-bono or for a fee, for example:
  - assigning a solicitor to give advice when called upon in a particular case. Such advice would be directed towards key points such as elements of defence as well as advice on how to conduct the case, thus enabling the accused to conduct their defence in a more efficient manner;<sup>90</sup>
  - legal aid for the purpose of settling unrepresented parties' pleadings and certifying.<sup>91</sup>

The concept of unbundled legal services is part of a broader movement towards a more accessible and affordable legal system.<sup>92</sup> It has a particular application to litigants in person in making legal

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<sup>86</sup> Professor Stephen Parker above n 1, Chapter 3.

<sup>87</sup> Ibid, Recommendation 1, 164.

<sup>88</sup> Goldschmidt et al, above n 84, Recommendations III, X and XII; and LRCWA, above n 4, Recommendation 200, and, ALRC, above n 19, Recommendation 37 and 38.

<sup>89</sup> Lord Woolf, above n 2, 127-8.

<sup>90</sup> Bruce & Powles, above n 5, 19-20.

<sup>91</sup> Ibid, 23.

<sup>92</sup> LRCWA, *Litigants in Person*, above n 17, 16.

assistance more affordable or more readily available on a pro-bono basis and assisting a court or tribunal to ensure that its obligation to provide a fair hearing is complied with.

Court sponsored legal advice, for example the giving of advice by rostered government lawyers or a court appointed counsel paid out of the justice budget has been suggested in reports and discussion papers.<sup>93</sup> In contrast, this does not have the advantage of a collaborative scheme of avoiding the possibility that a court or tribunal may be seen as other than impartial;

The LRCWA recommended against staff attorneys in favour of court resources to assist litigants in person to present and compile court documents in order to facilitate the adjudication of cases on merit.<sup>94</sup>

## **Precedents**

### ***Order 80 of the Federal Court Rules***

Order 80 of the Federal Court Rules provides for the establishment of a register of practitioners prepared to accept cases on a pro-bono basis. The Court can make an order referring a matter to a practitioner on the register for specific legal assistance, including unbundled services, such as assistance drafting pleadings.

### ***Legal Aid (NSW)***

Duty lawyer services are generally limited to summary criminal matters. Legal Aid (NSW) has established a model advice service at the Administrative Decisions Tribunal to provide court specific and court based advice to litigants in person.

Under this scheme the Duty Lawyer attends the Tribunal once a month and sees unrepresented litigants in a room provided by the Tribunal. Tribunal and registry staff are responsible for arranging appointments and making referrals to the Duty Lawyer. The Duty Lawyer provides general information about what is likely to happen, and advice on such matters as drafting pleadings, evidentiary requirements, the relevant tests under the legislation and what documents they should bring to the hearing. Duty Lawyers do not generally draft pleadings themselves or appear in court on behalf of the litigant in person. After seeing the Duty Lawyer, the litigant continues on in person.

### ***Unrepresented Criminal Appellant's Scheme (Court of Criminal Appeal (WA) and UWA).***

The Unrepresented Criminal Appellant's Scheme was launched in WA in July 1999. It provides for a co-ordinator and supervising solicitor to supervise senior students at the University of Western Australia law school, who in the course of their Sentencing and Criminal Procedure units will attend prisons under the guidance of the supervising solicitor. The students will interview unrepresented prisoners and take instructions, undertake research on likely grounds of appeal, obtain transcripts of trial proceedings, prepare draft grounds of appeal and an outline of submissions and prepare a brief for consideration by the supervising solicitor. The final step the students take will be the preparation of appeal books.

The second stage of the scheme draws on a register of practitioners who will act pro-bono to argue the appeal, as prepared by the students. To register, practitioners must be prepared to take on at least one brief per year.

### ***Dandenong Family Court initiative***

The Dandenong Family Court coordinates the presence of students from:

Monash University

Community Legal Centres

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<sup>93</sup> LRCWA, Review of the Criminal and Civil Justice System in WA, above n 4, Recommendation 208 and above n 5.

<sup>94</sup> Ibid, above n 4 Recommendation 20.1

Noble Park Mediation Centre

Legal Aid Duty Lawyers and other community organisations at the Family Court one day a week.

Litigants arriving at the Court are met by Court staff and interviews are arranged depending on their apparent needs. Students conduct many of the intake interviews and clients may be directed into counselling, mediation or to a duty solicitor to help prepare documents.

### ***Queensland Court of Appeal pro-bono scheme***

In Queensland appellants convicted of murder or manslaughter who have been refused legal aid will be represented pro-bono by an experienced barrister from a list of 25 volunteers who will be instructed where necessary by volunteer experienced criminal law solicitors. The Scheme has the co-operation of the Queensland Bar Association and Queensland Law Society.

## **7. NON-LEGAL SUPPORT**

The problems litigants in person pose for courts and tribunals may not be solved solely by trying to find legal representation for them.<sup>95</sup> Litigants in person have a wide range of emotional and practical needs.<sup>96</sup> Further they may have had legal advice, representation or access to legal assistance at one stage or another, but by choice or otherwise end up unrepresented.

Courts and tribunals should consider ways in which these needs could be met as part of a litigants in person plan. Strategies could include referrals and collaborative schemes at the pre-trial stage of a matter. Non-legal support may extend to the hearing itself. In some jurisdictions litigants may be entitled, as of right, to non-legal assistance or representation and, indeed, legal representatives may be excluded. Judges have a discretion to allow non-lawyers to assist a litigant as a McKenzie friend.<sup>97</sup> Another form of assistance is by *amicus curiae*, the court having an implied power to give leave to a “friend of the court”, to appear to represent an interest or make submissions on questions of law.<sup>98</sup>

In hearings under the *Native Title Act 1993* (Cth) the Federal Court has (having regard to the cultural and customary concerns of the claimant group) allowed witnesses to give evidence in a group and in other instances allowed family members to sit alongside the principal witness in the witness box.

## **Recommendations from Reports**

### ***Collaborative schemes***

The recommendations made in Chapter 6 apply equally to the provision of non-legal assistance.

## **Precedents**

### ***Court Network Services (Victoria)***

The Victorian Court Network Service offers assistance to unrepresented litigants, such as court orientation; information regarding court processes and procedures; referral to advice services and other resources such as emergency accommodation. It is funded by the Victorian Government, and is provided to all courts in Victoria including the Family Court. These services are largely staffed by trained volunteers, from a range of backgrounds trained for specific jurisdictions.<sup>99</sup> The ALRC Final

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<sup>95</sup> See Chapter 2.

<sup>96</sup> Professor Stephen Parker, above n 1, 50-4.

<sup>97</sup> See Chapter 4.

<sup>98</sup> Halsbury's Laws of Australia 10-1752.

<sup>99</sup> See ALRC Review of the Federal Civil Justice System, above n 38, Proposal 7.6.

Report has recommended that the Family Court should establish and fund court network schemes in all registries.<sup>100</sup>

### ***Mental Health Review Board of Victoria***

The Mental Health Review Board of Victoria, as part of its Courts and the Public Plan provides training material and seminars for lay advocates appearing in front of the Board.

## **8. INFORMATION STRATEGIES**

Another strategy for dealing with litigants in person is to focus on the kinds of information and advice that the court or tribunal has the capacity and ability to provide itself, without the need for collaborative schemes. This strategy may be particularly relevant to those courts and tribunals where litigants in person are the norm rather than the exception.

The *Courts and the Public* report recommended that each court's communication plan have both an information strategy that sets out the different mechanisms by which information is given to the court's publics and a community education strategy.<sup>101</sup>

The litigants in persons' need for information and advice of a procedural nature is highlighted in the literature. The types of information and advice that a litigant in person may need include:

- information and advice on different ways of resolving problems;
- information and advice on how to make a claim and how to respond to a claim as a defendant; and
- education about the legal system in a broader sense.

The provision of appropriate and accessible information and advice, particularly at the point of entry into the court or tribunal, may have the effect of discouraging rather than encouraging litigants from litigating without representation.

This chapter outlines some recommendations about the type of information and services that a court or tribunal should provide in order to meet these needs, subject to the duty of the court or tribunal to act impartially.

### **Recommendations from Reports**

#### ***Referrals***

It should not be assumed that litigants in person are aware of legal and non-legal agencies and organisations that are able to support or advise litigants in person. Reports have recommended that courts and tribunals liaise with, make referrals to and even play a role in the coordination of, key advice agencies.<sup>102</sup>

Recommendations as to how this could be achieved include:

- The appointment of court or tribunal officers as a links to advice agencies;<sup>103</sup> and
- The compilation of a comprehensive referral directory for legal and non-legal advice.<sup>104</sup>

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<sup>100</sup> ALRC Managing Justice, above n 19, Recommendation 59.

<sup>101</sup> Professor Stephen Parker, above n 1, Recommendations 2 and 3, 164.

<sup>102</sup> Woolf, above n 2, 122-3 and Dewar, Smith & Banks, above n 3, 2.

<sup>103</sup> Woolf, above n 2, 127.

<sup>104</sup> ALRC Managing Justice, above n 19 Recommendation 56.

### ***Information and facilities***

The information and facilities that it has been recommended that courts and tribunals provide are set out below:

- Information and services that enable litigants in person to use the court including:
  - explanatory videos;
  - leaflets;
  - access to telephones, faxes, copy machines and IT;
  - signposting in different languages, having regard to English as a second language requirements;
  - court facilities in private for filling out forms; and
  - facilities and support for duty advice schemes (discussed in Chapter 6).<sup>105</sup>
- Information and advice on the court or tribunal process including:
  - information and advice on how to make a claim and how to respond to a claim as a respondent;<sup>106</sup>
  - information relating to court procedures, including the function and purpose of duty lists and directions hearings and the nature and purpose of examination and cross-examination; court etiquette; support services; dispute resolution services and alternative means of resolving disputes; the role of the Family Court; legal terminology; rules relating to service of court documents and orders;<sup>107</sup>
  - information on the civil justice system;<sup>108</sup> and
  - clear written procedural instructions for different types of family litigation.<sup>109</sup>

The information must be realistic and it should not make the process look simpler than it is.<sup>110</sup>

- Information on alternatives to litigation. This can act as a filter mechanism to reduce the numbers of litigants in person.<sup>111</sup> Litigants in person should be made aware of alternative means of resolving disputes at an early stage.
- Access to legal research information and material including:
  - court libraries;
  - Information Technology, referred to in the Woolf Report, in the form of technology kiosks, web-sites and databases.
- A management plan for litigants in person may form part of a broader strategy for handling the relationship between a court or tribunal and the public it serves.<sup>112</sup>

It is not sufficient simply to produce printed information material. Courts and tribunals should provide the information to the public and that information must be accompanied by advice. Information alone is insufficient. Whatever information is produced must be made available to litigants in person in its entirety.<sup>113</sup> The information must be provided at appropriate times in the court or tribunal process.<sup>114</sup>

### ***Simplified procedure***

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<sup>105</sup> Woolf, above n 2, 124-5, & 134 and Goldschmidt et al, above n 84, Recommendation 1.

<sup>106</sup> ALRC Issues Paper 22, *Re-Thinking Family Court Proceedings* (1997), para 11.5.

<sup>107</sup> Dewer, Smith & Banks, above n 3, 34.

<sup>108</sup> Lord Woolf, above n 2, 123.

<sup>109</sup> Lord Justice Otton, "Litigants in Person in the Royal Courts of Justice: An interim report of the Working Party established by the Judges' Council under the Right Honourable Lord Justice Otton" ("the Otton Report"), June 1995, 30.

<sup>110</sup> Lord Woolf, above n 2, 123.

<sup>111</sup> *Ibid*, 121.

<sup>112</sup> A range of initiatives are discussed in Chapter 4 – Professor Stephen Parker, above n 1.

<sup>113</sup> Lord Woolf, above n 2, 123.

<sup>114</sup> Dewer, Smith & Banks, above n 3, 2.

Proper management of litigants in person may require simplified procedures and court forms.<sup>115</sup> However, two important qualifications have been made to this approach.<sup>116</sup> Firstly there must be expert advice given in conjunction with the simplified procedure. Secondly there is no advantage in creating forms that are simpler than the causes of action they are intended to try. Such forms may have the result of misleading litigants in person. The fact is that civil litigation is a complex process requiring the skills of professionals.

## **Precedents**

Listed below are various information strategies already being used in Australia and overseas.

- ***'How To' Publications***
  - The Federal Court has published Bankruptcy Information for Debtors who do not have a Lawyer and Commencing an Action in the Federal Court: A Procedural Guide For Litigants in Person.
  - The District Court and Legal Aid (WA) have published How to Apply to Have Your Driver's Licence Disqualification Removed and How to Apply to Have Your Criminal Conviction Declared Spent.
  - The Supreme Court of Victoria has published a guide to Commercial List practice.
  - The Family Court of Australia has published The Family Court Book 1999 setting out the workings of the Federal Family Court for the public.
  - The Social Security Appeals Tribunal has published an Information Handbook<sup>117</sup> and has an information sheet entitled About Your Hearing.
  - Overseas the Superior Court of Maricopa County in Arizona amongst other initiatives has published Tips on Self-Representation.<sup>118</sup>
  - Legal Aid Queensland has published about ten self-help kits which cover topics such as debt, domestic violence orders (also available from the LAQ web site), licence disqualifications, unfair dismissal, work licenses, motor vehicle property damage, and bail.
- ***Web-Site (Legal Aid Queensland)***

This is a comprehensive web-site ([www.legalaid.qld.gov.au](http://www.legalaid.qld.gov.au)) which contains detailed information on a wide range of topics. Legal advice may be obtained on-line. It details the publications and self-help kits which are available on-line.
- ***Web-site (Courts)***

The AIJA Legal Website Competition<<http://www.aija.org.au/tech2/COMPWEB.HTM>> run in conjunction with the Technology for Justice 2000 Conference, identified a number of court websites which provide assistance specifically designed for unrepresented parties. This includes general information about the courts, practice and procedure, forms, guides, judgments, library, publications and site services. These examples included:

  - Family Court of Australia - <http://www.familycourt.gov.au/>
  - Federal Court of Australia - <http://www.fedcourt.gov.au/>
  - Magistrates Court of Tasmania - <http://www.courts.tas.gov.au/magistrate/>
  - Queensland Courts - <http://www.courts.qld.gov.au>.

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<sup>115</sup> Lord Woolf, above n 2, 120-1.

<sup>116</sup> Gamble & Mohr, above n 21.

<sup>117</sup> October 1999.

<sup>118</sup> Professor Stephen Parker, see above n 1,10.

- ***Communications Project (Mental Health Board of Victoria)***

This project involves the following:

- redraft of notice of hearing in plain English;
- brochure to accompany notice of hearing;
- re-draft of general information pamphlet;
- posters for display created and distributed to mental health services;
- redevelopment of web site;
- service charter dealing with conduct of staff to clients and complaint mechanisms;
- training materials and seminars for lay advocates;
- session with Board members discussing effective communication;
- re-format Annual Report;
- head notes of Board decisions which were made available on web;
- staff training around frequently asked questions by public; and
- seminars and information sessions for stake holders whose work is affected by the Tribunal.

- ***Web-Site (ACT Government)***

This is a web-site explaining court and tribunal process, in its own words it sets out to explain the "meaning and implication of matters such as directions hearings, discovery, case status inquiries, injunctions, orders, conferences, judgments, enforcement of judgment debts and what decisions can be appealed to higher court". It also contains reference sources and links to advice agencies.

- ***Francis Burt Law Education Centre***

This Law Education Centre housed in a historic courtroom provides some practical courtroom experience to visitors and as part of a legal education program. Visitors are encouraged to take a hands-on approach trying on wigs and gowns and sitting in as various characters such as that of the judge and the accused. The education program provides a number of mock trial scripts which can be acted out during group visits. An annual mock trial competition is held for senior school students.

## **9. THE IMPACT ON COURT STAFF**

The information provided by courts and tribunals should be accompanied by advice. The recommendation of the Woolf Report was that the provision of advice and assistance be an invariable obligation of the courts.<sup>119</sup> The responsibility for giving this advice, particularly at the initial and pre-trial stages of the legal process, rests largely with tribunal and court staff.

There is a perception that litigants in person place significant demands on staff time and resources. The demand on resources is linked to the difficulties some litigants in person have in formulating a claim which include:

- following precedents that are not relevant to their situation;
- problems with the documents lodged; material documents maybe omitted;
- lodging irrelevant material;
- a failure to understand procedural issues in respect of non-compliance with orders made, for example default judgment;
- difficulty understanding the issue of costs and presuming that there will be no costs.

The result is often that court staff, including library staff:

- spend considerable time explaining to litigants in person issues or problems relating to the application or other documents which they seek to file at the court;

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<sup>119</sup> Lord Woolf, above n 2, 122.

- may have to deal with repeated requests for the same information; and
- experience high levels of stress and frustration in dealing with litigants in person.

There is an underlying tension in the relationship between court staff and litigants in person, caused by the fact that litigants in person often have a pressing need for the very information which court staff are unable to provide, namely competent legal advice. Court staff have to tread a fine line between providing a proper explanation, and giving advice on the merits of the claim. This distinction is regarded by some as legally and practically unworkable.<sup>120</sup>

The problems it creates include:

- litigants in person often fail to understand altogether the distinction between legal advice and advice on process;
- litigants in person are more likely to misunderstand the advice that is given;
- advice given may be misconstrued as advice on the merits, leading to considerable ill-will in the event an application is unsuccessful;
- litigants in person often refuse to accept procedural advice from registry staff, frequently wanting to speak to a registrar or judge;
- the perception that court staff as public servants should provide the same level of advice and assistance as an officer in any other government department.

Distressed litigants in person may become aggressive and abusive towards court staff. Particularly where the litigant in person has been unsuccessful at first instance they may see court staff as part of the system that has let them down.<sup>121</sup>

In the light of these problems, the question for courts and tribunals then becomes one of, how to most effectively fulfil their obligations. A litigants in person management plan may seek to ease the burden on court and tribunal staff and resources by:

- facilitating a more effective and efficient flow of information and advice between litigants in person and courts and tribunals;
- training and guidelines for court and tribunal staff aimed at clarifying and simplifying the distinction between procedural and substantive advice and developing measures to better manage stress and frustration.

## **Recommendations from Reports**

### ***Information***

Clearly the provision of the kinds of information and services referred to in the previous chapter would help to facilitate the flow of information between court and tribunal staff and litigants in person. In particular signs or other written material could clearly point out the restrictions on the ability of court staff to provide advice and assistance.

### ***An open approach***

The Woolf Report suggests an open approach to the giving of assistance, recommending that court staff should be able to advise on remedies, procedure for pursuing those remedies and the precise manner in which court forms should be completed.<sup>122</sup> That report argues that providing staff are prepared to assist any litigant on request there is no basis for any fear or accusation of impartiality.

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<sup>120</sup> Dewar, Smith & Banks, above n 3, 41.

<sup>121</sup> The Otton Report, above n 108, 3.1.6.

<sup>122</sup> Lord Woolf, above n 2, 122.



Linked to this approach are recommendations made by the AJS Guidebook that court staff be given qualified immunity in respect of assistance to litigants in person with information and services and rules governing unauthorised practice of law relaxed in respect of court staff assisting unrepresented parties.<sup>123</sup>

### *A focal point*

A number of reports have recommended that the impact on court and tribunal staff be minimised by providing focal points for advice within the court or tribunal to be provided by staff or independent agencies. Recommendations include:

- properly staffed information desks;
- court-based or duty advice and assistance and permanent advice centres in larger courts;<sup>124</sup>
- permanent independent advice agencies within the Royal Courts of Justice through enhancing the role of the Citizens Advice Bureau (discussed below);<sup>125</sup>
- point of entry advice to members of the public on dispute resolution options within the civil justice system and available community services.<sup>126</sup>

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<sup>123</sup> Goldschmidt et al, above n 84, 34-5.

<sup>124</sup> Lord Woolf, above n 2, 134.

<sup>125</sup> The Otton Report, above n 108, 1.2.5.

<sup>126</sup> Bruce & Powles, above n 5, 29.

## APPENDIX 1

### *Breakdown of Correspondence from Courts and Tribunals*

<b>Court</b>	<b>Problems/Issues</b>	<b>Programs</b>
Federal Court		Material: <ul style="list-style-type: none"> <li>• Bankruptcy information for debtors who do not have a lawyer</li> <li>• Commencing an action in the Federal Court: a procedural guide for litigants in person</li> </ul>
Supreme Court	<ul style="list-style-type: none"> <li>• Substantial rise in number of litigants in person – civil matters, civil appeals and criminal appeals (no statistics kept).</li> <li>• No Legal Aid available for new civil matters from July 1999.</li> <li>• Particular difficulty in distinguishing between procedural and legal advice – difficult to know how far applicant should be assisted at this procedural stage.</li> <li>• Lay person disadvantaged in evidentiary matters before the Court.</li> </ul>	
Supreme Court of ACT	Court staff: <ul style="list-style-type: none"> <li>• Litigants in person often seek advice but do not comprehend the difference between legal and procedural advice.</li> <li>• Litigants in person often follow precedents which may not be relevant to their situation.</li> <li>• Problems with documents lodged – material documents omitted, much irrelevant material lodged.</li> <li>• Litigants in person do not understand procedural issues in respect of non-compliance eg. default judgment.</li> <li>• Failure to accept procedural advice from registry staff; frequently wanting to speak to Registrar or judge.</li> </ul> Court: <ul style="list-style-type: none"> <li>• Lack of understanding procedures.</li> <li>• Lack of understanding relevance.</li> </ul> As a result of above complaints are frequently made to review body and many applications/appeals without merit are lodged.	
Court of Criminal Appeal (UWA)	<ul style="list-style-type: none"> <li>• Drafting of grounds of appeal.</li> <li>• Preparation of appeal book.</li> <li>• Judges should not be put in position of providing legal advice about notice of appeal.</li> </ul>	Unrepresented Criminal Appellants' Scheme: <ul style="list-style-type: none"> <li>• Co-ordinator and supervising solicitor supervise law students to take instructions, research likely grounds of appeal, obtain transcripts, prepare draft grounds of appeal and outline of submissions.</li> <li>• List of pro-bono lawyers prepared to take one case a year maintained, these lawyers argue the matter on appeal.</li> </ul>
District Court of Western Australia	<ul style="list-style-type: none"> <li>• Litigants in person take significantly longer to serve at the Registry counter.</li> <li>• Perception that staff are offering legal</li> </ul>	Information packages on spent convictions and civil process.

Court	Problems/Issues	Programs
	<p>advice, when in fact the advice is procedural, creating potential for litigants in person to blame the Court for bad advice.</p> <ul style="list-style-type: none"> <li>• Preliminary hearings in civil jurisdiction seem to take longer where party unrepresented.</li> </ul>	
Magistrates' Court Victoria	<ul style="list-style-type: none"> <li>• Litigants in person have no idea of court or court room procedures including: <ul style="list-style-type: none"> <li>- how to address the Magistrate;</li> <li>- what is hearsay evidence;</li> <li>- legal terminology;</li> <li>- cross-examination of witnesses, etc.</li> </ul> </li> </ul> <p>Problems are exacerbated when both parties are unrepresented.</p>	<ul style="list-style-type: none"> <li>• Brochures</li> <li>• Suggestions: <ul style="list-style-type: none"> <li>- video on how to appear in civil or criminal court;</li> <li>- attend court with similar group of litigants and be involved in/observe a moot court with convenor who can explain evidentiary requirements and procedure.</li> </ul> </li> </ul>

Tribunal/Commission	Problems/Issues	Programs
AIRC	<ul style="list-style-type: none"> <li>• Rise in litigants in person as a result of unfair dismissal (jurisdiction conferred in 1994 – no statistics available).</li> <li>• Typically problems arise from:               <ul style="list-style-type: none"> <li>- lack of familiarity with relevant law;</li> <li>- difficulty with language, prolixity and excess of emotion.</li> </ul> </li> </ul>	
Social Security Appeals Tribunal	Represented applicants are the exception. No technical rules of evidence or procedure. The government party to the appeals is not present at hearing.	<ul style="list-style-type: none"> <li>• Brochures/Information Handbook.</li> <li>• Staff trained to emphasise the independence of the SSAT.</li> <li>• SSAT’s desire to hear what the applicant has to say.</li> <li>• Informality of the hearing.</li> <li>• Expertise of the members.</li> <li>• Assistance with travel and accommodation where appropriate.</li> <li>• Availability of an interpreter, where relevant.</li> <li>• Opportunity to bring a friend, relative or companion for moral support.</li> <li>• Referral for advocacy assistance if appropriate.</li> <li>•</li> </ul>
Australian Competition Tribunal	Almost all parties legally represented.	Two parties who appeared unrepresented dismissed on preliminary points.
Migration Review Tribunal	<ul style="list-style-type: none"> <li>• Agent generally not entitled to address Tribunal or present arguments.</li> <li>• Main problems are:               <ul style="list-style-type: none"> <li>- not understanding difference between Tribunal and Department;</li> <li>- not understanding legal requirements;</li> <li>- desire to give lengthy and irrelevant information.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Clear explanation of proceedings at start of hearing.</li> <li>• Informal proceedings.</li> <li>• Information on Tribunal in other languages.</li> <li>• Advising applicants to ask questions if they don’t understand any part of the proceedings.</li> <li>• Staff with language skills.</li> <li>• Training for members and staff in cross-cultural awareness.</li> <li>• Links to community groups.</li> <li>• Client surveys.</li> <li>• Web sites.</li> </ul>
Anti-Discrimination Board (NSW)	Resource diminution, particularly in terms of staff time.	Courts and statutory bodies need adequate resources in order to be accessible.
Commissioner for Equal Opportunity (SA)	In the circumstances in which the Commission office operates contact with litigants in person is limited and therefore problems encountered with such litigants are rare.	

Tribunal/Commission	Problems/Issues	Programs
Mental Health Review Board of Victoria	<ul style="list-style-type: none"> <li>• 89% of litigants before the Board are unrepresented.</li> <li>• Need for mechanism to collect information about response of public including unrepresented litigants to the Board.</li> </ul>	<p>Communications Project involving:</p> <ul style="list-style-type: none"> <li>• redraft of notice of hearing in plain English;</li> <li>• brochure to accompany notice of hearing;</li> <li>• re-draft general information pamphlet;</li> <li>• posters for display created and distributed to mental health services;</li> <li>• redevelopment of web site;</li> <li>• service charter dealing with conduct of staff to clients and complaint mechanisms;</li> <li>• training materials and seminars for lay advocates;</li> <li>• session with Board members discussing effective communication;</li> <li>• re-format Annual report;</li> <li>• head notes of Board decisions which were made available on web;</li> <li>• staff training around frequently asked questions by public;</li> <li>• seminars and information sessions for stake holders whose work is affected by the Tribunal;</li> <li>• quarterly liaison meeting with Victoria Legal Aid and Mental Health Legal Centre; and</li> <li>• asking opposing party (Authorised Psychiatrist) to use non-technical language and respect needs of litigant in person.</li> </ul>
Guardianship and Administration Board (W.A.)	Pre-hearing and hearing procedure invariably take longer when parties not represented.	
AAT (ACT)	Difficulty in creating a level playing field in some kinds of cases (commercial development applications) between senior counsel and unrepresented objectors.	<ul style="list-style-type: none"> <li>• *To discourage government agencies from using legal representation for planning appeals.</li> <li>• ACT Government web-site explaining court and tribunal process, the “meaning and implication of matters such as directions hearings, discovery, case status inquiries, injunctions, orders, conferences, judgments, enforcement of judgment debts and what decisions can be appealed to higher court”. Also containing reference source (advice agencies).</li> </ul>

Tribunal/Commission	Problems/Issues	Programs
<p>Department of Natural Resources (QLD) – Commission for Body Corporate and Community Management Dispute Resolution Service</p>	<p>Parties mostly unrepresented. Matters largely dealt with on the papers without a formal hearing.</p> <p>Problems:</p> <ul style="list-style-type: none"> <li>• applications defective, omit relevant material; include irrelevant material, dealing with person and not legal matters; difficult to read;</li> <li>• some problem applicants bring multiple applications;</li> <li>• greater reliance on adjudicator to have knowledge of law; not to miss important point; examine and seek further information where necessary on all relevant issues; watch over lesser party where there is disparity and act fairly;</li> <li>• expectation that public servants should provide legal advice;</li> <li>• unaware of principles of procedural fairness, including need for other party to see and comment on material provided; and</li> <li>• surprise at time frames.</li> </ul>	
<p>Residential Tenancies Board (SA)</p>	<ul style="list-style-type: none"> <li>• Nearly all matters involve litigant in person.</li> <li>• Litigants in person not an amorphous group – great diversity of ability to represent case.</li> <li>• Vague or uncertain applications.</li> <li>• Need for adjournment of hearing for further evidence, obtaining interpreter or because of the addition of further claims.</li> <li>• Particular difficulty with litigants in person with mental illness, personality disorder or substance abuse problem.</li> </ul>	<ul style="list-style-type: none"> <li>• Applications are scrutinised by Deputy Registrar who can either request further information or refer applicant to advice agency.</li> <li>• User satisfaction survey.</li> <li>• Brochure.</li> </ul>

<b>Legal Aid/Community Legal Centres</b>	<b>Problems/Issues</b>	<b>Programs</b>
National Legal Aid	<p>Generally:</p> <ul style="list-style-type: none"> <li>Where represented party is legally aided there is a drain on legal aid resources because of extra court time required, etc.</li> </ul> <p>Family Law:</p> <ul style="list-style-type: none"> <li>Duty lawyer services in Family Court but difficulties in small jurisdictions where potential conflict if other party is legally aided.</li> </ul> <p>Criminal Law:</p> <ul style="list-style-type: none"> <li>Duty lawyer services in summary criminal courts but generally unable to assist with hearings and committals.</li> <li>Some Commissions unable to provide representation in committal proceedings for serious indictable offences, resulting in delays and inefficiencies in the committal proceedings and/or the trial.</li> </ul>	<ul style="list-style-type: none"> <li>Community Legal Education materials in criminal and family law.</li> <li>Material and training sessions targeting litigants in person.</li> <li>Consideration to classes for litigants in person in family law and video for that purpose.</li> </ul>
Legal Aid (NSW)	<ul style="list-style-type: none"> <li>Access to interpreters.</li> <li>Need for information, including detailed legal information in a comprehensible format provided at appropriate times.</li> <li>Need assistance in drafting pleadings.</li> <li>Need information on nature of remedies and defences available.</li> <li>Need for general legal advice to be provided at the court.</li> <li>Need help presenting and preparing case.</li> <li>Need for 'unbundled legal services'.</li> <li>Some people are simply unable to represent themselves – eg. intellectually disabled, mentally ill, poor literacy, non-English speaking.</li> <li>Need to minimise court attendances for case management which can overwhelm and overburden litigant.</li> </ul>	<ul style="list-style-type: none"> <li>Helpline providing legal information.</li> <li>Information sheets and brochures.</li> <li>Referrals.</li> <li>Model advice service at Administrative Decisions Tribunal where Duty Lawyer provides general advice but generally does not draft pleadings or appear in court on behalf of litigant in person.</li> <li>Courts should offer an interpreter free of charge when they anticipate a need.</li> <li>Information on court procedure and etiquette provided by court close to hearing date.</li> <li>Courts need to explain their orders to litigants in person.</li> <li>Courts should assist in drafting pleadings eg. Chamber Magistrates in NSW Local Courts, provide generic information or make referrals.</li> <li>Court registries could provide a checklist or questionnaire which could be handed up as or form the basis of the litigant's evidence.</li> <li>Possibility of general court support scheme for unrepresented litigants. Eg. Women's Domestic Violence Court Assistance Program.</li> <li>Active case management is helpful, with an information</li> </ul>

Legal Aid/Community Legal Centres	Problems/Issues	Programs
		session as the first step.
Northern Territory Legal Aid Commission	<ul style="list-style-type: none"> <li>• Litigants in person in complex matters often move to other sources such as Community Legal Centres when they have exhausted the resources of Legal Aid and the whole process starts again.</li> <li>• Unmeritorious appeal by litigant in person drains resources when other party legally aided.</li> </ul>	
Legal Aid Office (ACT)	<ul style="list-style-type: none"> <li>• Increased burden on work of child representation where one or both of the parties unrepresented.</li> <li>• Court inefficiencies dealing with litigants in person causes delays which affect Legal Aid lawyers waiting for their case to come on.</li> <li>• Drain on Legal Aid resources aiding person on the receiving end of vexatious litigation by litigant in person.</li> </ul>	
Legal Aid Western Australia	<ul style="list-style-type: none"> <li>• Unnecessarily complicated procedural requirements eg. for motor vehicle property claims.</li> <li>• Exclusion of legal representation may put less experienced party at disadvantage eg. landlord/tenant.</li> <li>• Failure by judicial officers to give directions that can be understood by litigants in person.</li> <li>• Need for courts to be 'user friendly'.</li> <li>• Need for courts to provide simple procedural advice eg. how to serve documents.</li> </ul>	
Federation of Community Legal Centres, Victoria.	<ul style="list-style-type: none"> <li>• Litigants in person as Plaintiff/Applicant in civil and administrative matters are usually: <ul style="list-style-type: none"> <li>- suspicious, mistrustful of and resentful towards the legal profession;</li> <li>- unable to distinguish between substantive law, civil procedure, rules of evidence and facts;</li> <li>- become upset when not allowed to adduce what they see as vital evidence;</li> <li>- have difficulty understanding costs, as they presume there will be no costs;</li> <li>- have unrealistic expectations of legal profession and resources of CLCs;</li> </ul> </li> </ul>	<p>Suggestions:</p> <ul style="list-style-type: none"> <li>• Specially trained and funded CLC solicitors to properly assist and guide litigant in person.</li> <li>• Court registrars appointed and trained to assist litigant in person.</li> <li>• Each jurisdiction to have someone overseeing that litigant in person plaintiff applicants are adequate and reveal a cause of action.</li> <li>• Independent solicitor to assess legal merit.</li> <li>• Psychological assessment and counselling to assist vexatious litigants.</li> <li>• Workshops conducted to explain</li> </ul>



<b>Legal Aid/Community Legal Centres</b>	<b>Problems/Issues</b>	<b>Programs</b>
	<ul style="list-style-type: none"> <li>- misunderstand advice.</li> <li>• Defendant litigants in person are rarely unrepresented by choice.</li> <li>• Risk that courts or officials may be seen to be favouring represented party.</li> </ul>	<ul style="list-style-type: none"> <li>rules of evidence.</li> <li>• Plaintiff litigants in person to provide an indemnity as to costs.</li> <li>• Civil duty solicitors to assist defendants.</li> <li>• Funds for continuing legal education to ensure CLC solicitors remain up to date.</li> </ul>
Bowden Brompton Community Legal Service	<ul style="list-style-type: none"> <li>• Problem with court staff providing only procedural advice as this can facilitate unmeritorious claims.</li> <li>• Legal advice on merits and procedure should really come from the one source.</li> <li>• Litigants in person have unrealistic expectation of what the courts can do for them.</li> </ul>	<ul style="list-style-type: none"> <li>• Adequate funding for legal aid; or</li> <li>• Making the whole legal system a more inquisitorial one where the judicial officer has greater responsibility for the conduct of the matter.</li> </ul>

## APPENDIX 2

### POSSIBLE GUIDELINES FOR THE TRIAL OF LITIGATION INVOLVING UNREPRESENTED PARTIES

1. Avoid at all cost any appearance of overt hostility to either party.
2. Indicate as soon as the nature and extent of the problem is clear the role that the judge believes he/she must play. For example, that the judge sees his role as requiring more questioning than normal, that the judge will where necessary put to the parties' witnesses questions intended not only to clarify, but also test their evidence because of the need to have a decision based on a proper examination of the facts if justice is to be done and to be seen to be done. Indicate also that it will be necessary from time to time to advise the unrepresented party of his or her rights, both procedural and evidentiary and to assist the unrepresented party at times in organising the presentation of his/her case.
3. Try to limit judicial questioning during cross-examination by counsel to minimise interruption of it and to avoid the appearance of trying to undo the effect of it.
4. Try to delay questions until after both sides have completed examination-in-chief and cross-examination.
5. Try to put questions in a neutral way - for example, "Dr X says .... Do you have any comment to make on that?"
6. Try to engage in a genuine questioning to elucidate the facts. This will in the end be seen to have produced answers that assist both sides and thus aid the appearance of neutrality.
7. If it be necessary to put hypotheses to experts for the parties which, if correct, will assist the unrepresented party, present the questioning on the basis of an exploration of the evidence already presented and an exploration of the theories being advanced.
8. Where the parties have different positions on facts that are in issue, put both positions to relevant witnesses, in particular experts, and seek their response.
9. Do not use leading questions unless it is reasonably clear that to do so will simply seek confirmation of what appears to be implicit in the evidence already led and/or it can be justified on the grounds of saving time. Also do not restrict use to questioning of represented parties' witnesses.
10. Avoid, if possible, any questions relating solely to the credit of witnesses. If, however, there is anything in the evidence of parties' witnesses which raises real concern and affects their credibility, it is proper and arguably necessary that they be drawn to the witness's attention in a non-aggressive manner - for example, evidence of one witness which appears to have been contradicted by other witnesses called by that party; an apparent inconsistency within the evidence given by the particular witness.
11. Where the pleadings in the case have been prepared by lawyers for the represented party, the parameters of the dispute as defined by the pleadings should be accepted. The judge should not suggest new ways of presenting the case. In that situation a judge could properly be accused of taking over the case. Where the case has not been pleaded by lawyers, what is to be done? Presumably at the outset steps would need to be taken to ensure that the issues were defined and that the unrepresented party was satisfied that they were adequately defined. In that situation again the judge should not attempt to later expand the parameters of the case.
12. It is necessary for the judge to be on the alert for the need to advise the unrepresented party of his or her procedural and evidentiary rights. For example, if objection is taken to evidence led by the unrepresented party on the ground that it is irrelevant and the judge is of the view that no relevant issue is raised on the pleadings, the judge should indicate to the unrepresented party that that is the case and that if the party wished to pursue that issue further the party would need to amend the pleadings to raise the issue. The judge would advise the unrepresented party that that party has a right to do so and apply for leave to amend and indicate to that party what would need to be done to exercise that right. The judge would need to make it clear that he or she is not urging the unrepresented party to do so, but simply advising that party of his or her rights.

13. In the course of running, it will be necessary to alert the unrepresented party to his or her rights and to some of the traps that exist in the laws of evidence. For example, it is necessary to alert the unrepresented party to the right to object to leading questions and hearsay and purported expert opinion evidence which may be outside the qualification of the expert giving evidence. The unrepresented party also needs to be alerted to his or her rights in the event that the other party does not comply with the rule in *Browne v Dunn*. The unrepresented party also needs to be alerted to the rule in *Jones v Dunkel*.
14. To minimise the need for advice on evidence, ensure counsel for the represented party endeavour to be scrupulous in the presentation of his or her client's evidence and warn counsel that if they appear to be overstepping the mark you may intervene.
15. To ensure that the facts are properly investigated, the judge will find that it is necessary to examine the evidence closely, with a view to being in a position to identify relevant points that need to be canvassed with witnesses in case the unrepresented party does not do so.
16. The need for judicial intervention in questioning is more likely to arise in areas of expert testimony than in evidence concerning events that are in dispute as to which the lay party has personal knowledge. In the latter situation the judge is likely to be able to take the position that both parties will in the end properly examine the evidence.
17. However annoyed the judge may feel about the complaints of counsel, the judge should try to avoid revealing that annoyance and should not say anything to tease or provoke counsel as it may be construed as an indication of hostility to counsel's client.
18. Query whether questions designed to test the represented party's case should be prefaced by statements such as: "If X were represented by counsel, that counsel would probably ask you ... What would you say in response?"

The Hon Justice T H Smith  
Supreme Court of Victoria