SELF-REPRESENTED LITIGANTS: TACKLING THE CHALLENGE

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INTRODUCTION

1. Most judges tend to couple the word self-represented litigant (SRL) with an expletive. It is customary to regard them as difficult, time-consuming, unreasonable, and ignorant of processes of the law.[*]

2. Some twelve years ago I wrote a paper in which I proposed that courts should regard self-representation by litigants as a challenge rather than as a problem. In revisiting the subject over a decade later, I find that my views about the matter have not changed substantially. There have been some developments in all courts in relation to SRLs but the challenge remains.

3. It has been said there are three things that can be done in relation to self-representation by litigants: one is to **get them lawyers**, the second is to **make them lawyers** and the third is to **change the system**. Self-representation has reached a level in many courts where it is common for at least one of the parties to be unrepresented for one half of the time. This means that courts are no longer dealing with a minority aberration but are being obliged to contend with change which may require altering the way in which courts operate. If it becomes the norm for many litigants to be self-represented, the justification for retaining existing court procedures based on parties' being legally represented may no longer be valid.

4. This paper explores how each of the three suggestions could assist SRLs' interaction with the court system and improve the conduct of litigation where an SRL is involved. This paper does not purport to provide the answers. It is acknowledged that the challenges presented by SRLs have existed for some time and solutions have been difficult to find. His Honour, Justice Geoffrey Davies (as he then was) said:

> I believe that the question of how to cope with [the plight of the unrepresented litigant] is the greatest single challenge for the civil justice system at the present time.

[*] I acknowledge the invaluable assistance I have received in the preparation of this paper from my Legal Associate, Ms Carrie Gan, and also from Mr Callum Musto. Many of the good things result from their research on my behalf. They are, of course, in no way responsible for any of the shortcomings in this paper.

> … Cases in which one or more of the litigants is self-represented generally take much longer both in preparation and court time and require considerable patience and interpersonal skills from registry staff and judges.[1]

5. What this paper aims to do is generate ideas and discussion about possible ways to improve the situation.

THE CHALLENGE OF THE SELF-REPRESENTED LITIGANT

THE CHALLENGES PRESENTED BY SELF-REPRESENTED LITIGANTS

6. The Australian court system is an adversarial system. In this system, the court has a substantially passive role and relies on the parties to present all material that will be relevant/necessary to enable the court to make its decision. An SRL is not a qualified legal practitioner and usually does not have the expertise to provide the assistance to the court that a solicitor or barrister would. In the adversarial system, this lack of assistance from parties hinders the court in discharging its function[2] – that is, to make decisions about disputes parties cannot themselves resolve.

7. Because SRLs are not properly qualified and are not officers of the court, they are:

> independent of, and not governed by the duties owed to a court by a legal practitioner upon which the operation of the court system is so highly dependent. Those duties are duties of disclosure to the court, of avoidance of abuse of the court process, to not corrupt the administration of justice and to conduct cases efficiently and expeditiously.[3]

8. Moreover, when a dispute involves one party who is self-represented and another who is represented by a legal practitioner, this appears to create an unlevel playing field. This in turn raises issues "about the fairness of the legal

[1] Geoffrey Davies, 'The reality of Civil Justice Reform: Why we must abandon the essential elements of our system' (2003) 12(2) *Journal of Judicial Administration* 155,168.
[2] Richard Stewart, 'The self-represented litigant: A challenge to justice' (2011) 20(3) *Journal of Judicial Administration* 146, 155.
[3] Hon Justice Robert Nicholson AO, 'Australian experience with self-represented litigants' (2003) 77(12) *The Australian Law Journal* 820, 821.

process facilitated by the court."[4] It might be said that the "playing field" of litigation is never truly level, even when both parties are represented, because of the varying skills and abilities between solicitors and counsel. However, the field is more markedly uneven in cases where a lay-person is on one side and a qualified practitioner is on the other. The disparity in skill and knowledge raises issues as to a court's duty to assist the SRL. This is explored in more detail later in this paper. The obligation of the court to provide some advice (if not assistance) to SRLs[5], and an SRL's lack of understanding of the process, necessarily means more time is required to finalise the proceedings.

9. An SRL does not only present challenges for the court; the court proceedings present challenges for the SRL. He or she is dealing with foreign and complex rules and processes (many of which might feel counter-intuitive to a lay person) and a language that sounds like English but nevertheless does not make any sense to him or her.

10. In addition to the procedural barriers, the SRL also faces administrative barriers which lawyers are generally not troubled by. Unlike lawyers, SRLs are not familiar with the appropriate forms to fill out and knowledge of such basic things as where the court building is located. They do not have working relationships with court staff. All of these can make the litigation process much harder to navigate.[6]

11. The process of presenting a case before the court is also unfamiliar to SRLs and, again, may feel counter-intuitive:

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

[4] Richard Stewart, above n 2.
[5] *In Re F: Litigants in Person Guidelines* (2001) FLC 93-072.
[6] Duncan Webb, 'The right not to have a lawyer' (2007) 16(3) *Journal of Judicial Administration* 165, 172.

> term, or that the plaintiff first breached the contract by failing to deliver on time due to unavoidable external matters. …[7]

WHY ARE PEOPLE SELF-REPRESENTING?

12. There are a variety of reasons why people are self-represented. Some may not be able to afford to pay a lawyer. Some may feel they do not need a lawyer. For example, in uncontroversial matters such as an uncontested divorce the value of the dispute is seen to be disproportionate to the lawyer's fees. Some may be disenchanted with the legal profession and hold the view that involving a lawyer will only make the dispute more acrimonious whereas they could resolve it themselves in an amicable fashion.[8]

13. But, regardless of the reasons as to why someone is self-represented, it is clear from available data that SRLs continue to make up a significant proportion of litigants. In the 2011-2012 financial year, 27 per cent of finalised cases in the Family Court involved at least one SRL. In 2007-2008, the figure was the same.[9] In the High Court, 41 per cent of special leave applications in the 2011-2012 financial year was filed by SRLs.[10] In 2007-2008, that figure was 67 per cent.[11]

14. The significant number of SRLs coupled with the types of challenges they present to the court system should cause everyone in the court system to think about what can be done to tackle those challenges.

TACKLING THE CHALLENGE

WHAT HAS ALREADY BEEN DONE?

15. In 2001, the AIJA published the *Litigants in Person Management Plan: Issues for Courts and Tribunals* ("*Litigants in Person Management Plan*").[12] This

[7] Ibid, 171.
[8] Ibid, 170-171.
[9] Family Court of Australia, Annual Report 2011-2012, 62.
[10] High Court of Australia, Annual Report 201-2012, 15.
[11] High Court of Australia, Annual Report 2007-2008, 18.
[12] *Litigants in Person Management Plan: Issues for Courts and Tribunals,* AIJA Courts and the Public Committee (2001).

document was "intended to provide a range of information and ideas for courts and tribunals to draw on in formulating their own management plans."[13]

16. Since the publication of *Litigants in Person Management Plan*, regardless of whether courts have adopted the ideas discussed in that document, courts in Australia have "increasingly undertaken initiatives designed to assist [SRLs] and to ease their impact on the court system."[14]

17. The Family Court, for example, has implemented various strategies to streamline the process for SRLs. These include providing do-it-yourself kits for guidance and assistance on completing some of the most common forms, including consent orders, financial statements and affidavits; providing compulsory training for all client service staff to help them recognise the need to spend more time with SRLs and assisting staff in tailoring services to meet the needs of the Court's different client groups; and providing information on the Family Court website including electronic versions of information brochures, kits and court forms which can be downloaded by SRLs; interactive information including a virtual tour of the Court, a step-by-step guide to proceedings in the Court and links to legislation and Rules of the Court.[15]

18. The Queensland Courts website has a specific section for SRLs. That section provides information about advice and support available to SRLs, possible avenues where SRLs can obtain legal advice, obtain a trial date, forms and practice directions.[16]

19. Institutions other than courts have also implemented strategies to improve the plight of SRLs. In 2008, Victoria Legal Aid published a DIY kit for family law matters, *How to run your family law case*. Unlike the Family Court's DIY kits which relate only to specific forms such as an application for consent orders form or an application for divorce form, the Victoria Legal Aid DIY kit covers family law proceedings more broadly, including information on areas such as

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[13] Ibid, 1.
[14] *Forum on Self-Represented Litigants*, AIJA and the Federal Court of Australia (2004), 3.
[15] Family Court of Australia, *Self Represented Litigants* (29 January 2013) Family Court of Australia <http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Media/Fact_Sheets/FCOA_SRL>
[16] Queensland Courts, *Representing yourself in court* (29 January 2013) Queensland Courts <http://www.courts.qld.gov.au/representing-yourself-in-court>

alternatives to litigation, making an application and choosing the right forum for the application, preparing an affidavit and preparing for a trial or hearing.[17]

20. The Queensland Public Interest Law Clearing House Incorporated operates a (unique) service that provides free, confidential and impartial legal advice to SRLs.[18] This service is discussed later in this paper and it is argued that such a service could be established nationally to assist SRLs in all jurisdictions.

21. Despite the efforts to date to assist SRLs in the court system, the challenge remains and from the statistics available, it would seem that SRLs continue to form a significant proportion of litigants in the system. Therefore, it is necessary to explore what more can be done to address the challenge.

GETTING THEM LAWYERS

Legal Aid

22. If a person is self-representing because he or she cannot afford a lawyer, the State may assist through the provision of Legal Aid. However, there is always a finite limit to the amount of Legal Aid available. Although governments might view Legal Aid as a funding black hole, the funding provided to Legal Aid is always perceived as not enough. In the 2011-2012 financial year, New South Wales Legal Aid had a total income of $243.6 million and a total expenditure of $244.7 million[19], leading to a deficit of $1.1 million. In the 2011-2012 financial year, Victoria Legal Aid received total income of about $153.8 million and total expenses of about $160 million – a deficit of $6.2 million.[20] Even when Legal Aid operates at a "surplus", it is not a big one. Legal Aid Queensland achieved a budget surplus of $3.025 million in the 2011-2012 financial year.[21]

23. The strain on Legal Aid funding is demonstrated by the recent changes to Legal Aid in Victoria. Victoria Legal Aid changed some of their eligibility guidelines. Some of these changes came into effect on 7 January 2013. In family law

[17] Victoria Legal Aid, *How to run your family law case: A do-it-yourself kit to help you prepare a family law case and represent yourself in court* (February 2008).
[18] Queensland Courts, *Representing yourself in court* (29 January 2013) Queensland Courts <http://www.courts.qld.gov.au/representing-yourself-in-court/legal-advice-qpilch>
[19] Legal Aid New South Wales, Annual Report 2011-2012, 68.
[20] Victoria Legal Aid, Annual Report 2011-2012, 55.
[21] Legal Aid Queensland, Annual Report 2011-2012, 38.

matters, "funding of parents who do not resolve matters through mandatory family dispute resolution will be limited to trial preparation". Victoria Legal Aid say that they are not funded to meet the growing demand in the family law courts and their priority is to fund Independent Children's Lawyers in matters where the court has identified that this is important. Changes to eligibility guidelines in criminal matters mean that "appeals in the Victorian Court of Appeal and the High Court that do not have a reasonable prospect of resulting in a lesser effective sentence or non-parole period will not be funded." Legal Aid is "prioritising conviction and sentence appeals that would have a bearing on the overall period of imprisonment the client would be liable to serve."[22]

24. There are also changes to eligibility guidelines which will come into effect later in 2013. In family law, clients who are "found to have contravened orders in the Federal Magistrates Court, the Family Court and/or the Magistrates Court without reasonable excuse will not be eligible for funding or will have their funding removed". Independent children's lawyers will appear personally for children in final hearings in the Federal Magistrates Court and the Family Court rather than instructing counsel. In relation to summary crimes, "only those facing actual imprisonment will be eligible for a grant of legal assistance". However, duty lawyers will continue to provide advice and representation to people charged with less serious offences who are not eligible for Legal Aid.[23]

25. Whatever may be the system for supplying Legal Aid the State cannot provide legal assistance to every litigant because there is a limit to the amount of funding that the State can inject into Legal Aid. In my opinion, the State also **should** not provide legal assistance to every litigant. To do so would almost inevitably encourage litigation or prolong it.

26. In addition, within the concept of providing Legal Aid the question of proportionality must inevitably arise. Lack of means should not ensure that a case that lacks merit is pursued interminably at tax payers' expense. Moreover, priority should probably (and properly) be afforded to some classes of cases

[22] Victoria Legal Aid, *Overview of eligibility guideline changes that came into effect 7 January 2013* (29 January 2013) Victoria Legal Aid <http://www.legalaid.vic.gov.au/4922.htm#>
[23] Victoria Legal Aid, *Overview of eligibility guideline changes to come into effect during 2013 – dates to be confirmed* (29 January 2013) Victoria Legal Aid <http://www.legalaid.vic.gov.au/4923.htm#>

rather than others. Criminal cases involving the serious risk of incarceration would feature on most priority lists – as would cases involving children and child abuse.

27. While Legal Aid is an important and established means of obtaining lawyers for SRLs, there are clearly limits to its availability both because of funding issues and eligibility criteria.

***Pro bono* lawyers**

28. SRLs may obtain legal representation from a lawyer who does *pro bono* work. There are a variety of organisations who provide *pro bono* legal services – Law Societies, Bar Associations or some community legal services.

29. It is arguable that lawyers should not be expected to provide free legal services any more than plumbers might be expected to provide free plumbing. However, the professionalism of lawyers and the community-centric nature of Australian society mean that lawyers, as with other trades-people and professionals, will frequently provide services to those who cannot afford to pay for them and who do not qualify for Legal Aid. It would be a mistake for Government to impose the **institutionalisation** of such free services (other than through the provision of government-funded Legal Aid). Governments ultimately must wear the responsibility for providing what the individual cannot and for making policy decisions about who is to be assisted and who is not. This is a community obligation which must be subject to the priority allocated to it by the elected government.

30. There are also **ethical and practical issues** associated with *pro bono* services. One is the issue of liability and accountability when a client is dissatisfied. Consider, for example, a client who is not able to pay for a lawyer and who is ineligible for Legal Aid, but who has been able to obtain legal assistance through a centre that provides *pro bono* services. If the client feels the service may not have been up to the standards he or she would have received from a paid lawyer, should the *pro bono* lawyer be held accountable? The service may have put the client in a better position than if he had no legal assistance whatsoever, but the client may not feel that the level of service was equal to that

which would have been provided by a privately retained lawyer.[24] The ethical questions raised by this issue are articulated by a US article about the ethical issues of *pro bono* advocacy:

> It seems dangerous for the profession to chastise those who are willing to provide help when others will not, but whose performance does not meet a client's expectations. On the other hand, it is very important that the assistance provided to individuals in these settings be held to an objective standard, and failure to meet that standard means something must be done. Determining this standard, however, may be more difficult …[25]

31. A pro-bono lawyer may suffer a moral conflict when providing *pro bono* services. Helping a client who has drug issues, for example, may cause moral conflict for some lawyers.[26] This raises the question of what it means to "do the public good":

> … it might be necessary to shift the perception that pro bono work should align with the moral interests of those who are performing it, and rather advocate the position that "doing public good" means assisting all those in need, regardless of whether the volunteer sympathises with their plight.
>
> The issue then becomes whether a lawyer would be able to perform a service competently if he or she had a moral conflict with the outcome. … Normally money is a good way to bridge this gap, but in the pro bono sector, it may be far more difficult.[27]

32. Lawyers who undertake *pro bono* work provide a commendable and important service. *Pro bono* lawyers are an excellent avenue through which SRLs can obtain advice and representation. However, the availability of the service depends on the availability of lawyers who are volunteering and, furthermore, there are ethical and practical issues which may mean that *pro bono* services are not suitable for every SRL.

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[24] Elliot A. Anderson, 'Unbundling the ethical issues of pro bono advocacy: Articulating the goals of limited-scope pro bono advocacy for limited legal services programs' (2010) 48(4) *Family Court Review* 685, 694.
[25] Ibid.
[26] Ibid, 695.
[27] Ibid.

Unbundled legal services

33. One way of expanding legal services available to SRLs, whether through Legal Aid or *pro bono* services, is to provide **unbundled legal services**, that is, to provide legal services for **part** of the legal proceedings rather than for the whole. A litigant may be able to obtain legal advice initially "just to know where [I] stand" or a litigant may obtain legal advice for the preparation of court documents or obtain representation just for the trial.

34. There are advantages and disadvantages associated with unbundled legal services. The most obvious advantage is that an SRL who lacks financial resources can obtain legal assistance for **some** of the proceedings, if not for all of the proceedings. An obvious disadvantage of unbundled legal services is that the lawyer will not have as good a working-knowledge of the matter as a lawyer who provides the "whole service". If a lawyer has carriage of a matter from beginning to end, he or she has a good working-knowledge of the facts of the whole case (rather than segments of it). This means the lawyer is in a good position to provide competent advice about the litigation. If a lawyer is consulted only for one particular stratum of the litigation, he or she may be given inadequate information or instructions which can, in turn, lead to less than optimal advice – or possibly to negligent advice.

The Queensland Self Representation Service

35. In Queensland, the Queensland Public Interest Law Clearing House has set up the Self Representation Service ("the SRS"). The SRS provides *pro bono* unbundled legal services to SRLs and was modelled on the Citizens Advice Bureau at the Royal Courts of Justice in London.[28] This paper suggests that the SRS is model of how unbundled legal service can and should be provided nationally in Australia.

36. The SRS started operation in 2007. It initially assisted SRLs whose matters were in the Queensland Supreme Court, District Court and Court of Appeal. The SRS

[28] Andrea de Smidt and Kate Dodgson, 'Unbundling our way to outcomes: QPILCH's Self Representation Service at QCAT, two years on' (2012) 21(4) *Journal of Judicial Administration* 246, 247.

expanded into the jurisdiction of the Queensland Civil and Administrative Tribunal in 2010. More recently, a pilot service has been implemented in the Federal Court and Federal Magistrates Court in Brisbane.[29]

37. The SRS provides one initial appointment to **all** SRLs.[30] However, for clients who are unable to afford private legal assistance and who are ineligible for Legal Aid, the SRS provides any number of appointments (as necessary) to legally assist those clients.[31] The type of unbundled assistance provided to SRLs usually falls within the following categories:

    - Legal advice, including advice about commencing proceedings, pre-hearing and compulsory conference advice, advice about making interlocutory applications and complying with or enforcing decisions;

    - Assistance to draft documents, including forms, submissions and affidavits;

    - Referral to non-legal support services.[32]

38. The SRS model is unlike the traditional client-solicitor relationship as the clients are not "represented" by the SRS solicitors. The SRL clients "remain responsible for the conduct of their proceedings" – they are responsible for appearances before and communications with the court, the other parties and the other parties' lawyers.[33]

39. The existence of the SRS is dependent on a non-recurrent grant of $127,882 from the Department of Justice and Attorney-General. That budget is sufficient to employ one full-time solicitor and one part-time paralegal.[34] However, the

[29] Ibid, 246.
[30] Tony Woodyatt, Allira Thompson and Elizabeth Pendlebury, 'Queensland's self-representation services: A model for other courts and tribunals' (2011) 20(4) *Journal of Judicial Administration* 225, 226.
[31] Andrea de Smidt and Kate Dodgson, above n 28, 247.
[32] Ibid.
[33] Ibid, 247.
[34] Ibid.

SRS is also assisted by member firms whose practitioners provide *pro bono* services.[35]

40. The SRS is beneficial to SRLs in various ways. By giving SRLs advice and assistance about all aspects of litigation, including how to commence proceedings, make interlocutory applications, complete forms, and draft affidavits and submissions, SRLs are better prepared and have a better understanding of the court process. The SRL can "better communicate their case to the court and other party" and the court benefits from a better prepared participant.[36]

41. However, the operation of the SRS also presents challenges.

42. One recognised challenge of operating the SRS is how to disseminate information about the SRS to people who need it most. To that end, the SRS has taken an "active approach" and "identif[ied] the [SRS] to key stakeholders and thus ensure that appropriate referrals to the [SRS] are made."[37] Referrals to the SRS are made by the courts, Legal Aid, legal practitioners, government departments, the Queensland Bar, community organisations and other sources. By far, the greatest number of referrals come from the courts. An annual email is sent by the SRS to the new intake of judges' associates so they are aware of the service and judges can make appropriate referrals.[38]

43. One problem which the SRS, or a similar *pro bono* unbundled legal service provider, might face is how to properly limit the scope of assistance provided. When a person retains a lawyer, the parameters of the service are usually set out in an engagement letter or a costs agreement. However, when someone is providing unbundled legal services (especially when this is done *pro bono*), the process of limiting the scope of the representation/assistance can be difficult because "individuals are not guided by payment parameters". If a service similar to the SRS is established across Australia, the organisations providing the service should have signed agreements with the SRLs that clearly detail the

[35] Tony Woodyatt, Allira Thompson and Elizabeth Pendlebury, above n 30.
[36] Ibid.
[37] Ibid, 227.
[38] Ibid, 228.

parameters of the service to be provided and the relationship that will be formed. Other important information that should be included in the signed agreements include information about confidentiality and follow-up procedures.[39]

44. Another issue with *pro bono* unbundled legal services is that of lawyer/ "client" privilege. Where the person privately pays for and retains a lawyer, privilege applies to lawyer/client communications. However, where a lawyer is providing *pro bono* unbundled legal services, that lawyer is not "representing" the "client". The person is not a "client" in the traditional sense of the word. Rather, the lawyer is providing the person with assistance in discrete tasks. The issue of privilege in relation to lawyer/ "client" communications should probably be the subject of legislative prescription.

45. There is also the question of whether the services provided are covered by professional indemnity insurance.

46. If the issues outlined above are properly addressed by Government, it would be extremely beneficial for SRLs, the courts and the legal profession if a similar service were implemented nationally across Australia.

MAKING THEM LAWYERS

47. If an SRL is not able to obtain any sort of legal assistance, an alternative means of assisting SRLs is to provide them with some sort of training or information so they can undertake their own litigation. (The SRS is one way of doing this.) Obviously, the type of assistance provided to the SRL will depend on the needs of the individual SRL. "[N]ot all [SRLs] are created equal" and some need more guidance than others.[40]

48. Information and assistance can be provided to SRLs from a variety of sources – court website, information sessions, and the Bench, to name a few. This section examines each of these and the issues surrounding them.

[39] Elliot A. Anderson, above n 24, 689.
[40] John M. Greacen, 'Self-Represented Litigants: Learning from Ten Years of Experience in Family Courts' [2005] *The Judges' Journal* 24, 25.

Court websites

49. It has been mentioned above that the Family Court website provides a vast amount of information for SRLs.[41] The benefit of this website is that the SRLs can access the information at their leisure and the information can help familiarise SRLs with court processes so they have a better idea of what to expect.

50. However, providing information on a website is clearly not going to assist SRLs with every issue that confronts them during the litigation process. While website information can provide SRLs with a basic understanding of the court and trial process, websites cannot provide detailed information in relation to the substantive aspects of the SRL's case. For example, website information cannot advise the SRL about his or her prospects of success nor can it draft affidavits in accordance with the rules of evidence. An SRL requires more assistance than a website can provide to run his or her own case.

51. The effectiveness of website information is also dependent on how easy it is to access and how the information is organised so that the SRL can identify what information is relevant for their matter. Providing a link to different pieces of legislation will not be very effective if the SRL does not know the name of the relevant legislation, or does not know the relevant section and has to trawl through a long Act in order to find the law relevant to their matter.

52. The Alaska Court System Self-Help Centre for Family Law website is an example of a website that effectively provides information for SRLs.[42] Information is divided into different categories such as "child custody for unmarried parents", "child support", "property and debt when ending marriage" and "grandparents – visitation and custody". Each category is, helpfully, a link to the more relevant information. For example, the "grandparents – visitation and custody" link leads to relevant information such as "what rights do grandparents have regarding their children?", "what forms are used to ask for

[41] Family Court of Australia, above n 15.
[42] Alaska Court System, *Self-Help Center: Family Law* (1 February 2013) Alaska Court System <http://courts.alaska.gov/selfhelp.htm>

grandparent visitation?", and "how do grandparents try to get visitation with a grandchild?".

53. While Australian courts provide information for SRLs, it is important that the information is set out in a way that is easily accessed by SRLs and organised in a way that is easy for SRLs to identify what is relevant for them.

Information sessions run at a court registry

54. Face-to-face information sessions held at the relevant court registry can be an effective way of providing SRLs with the relevant information. Face-to-face information sessions can be particularly beneficial because they give the SRL the opportunity to ask questions of a real person if there is an issue in need of clarification or explanation.

55. Alternatively, information sessions can by conducted by video, that is, SRLs attend the court registry in groups and view an information video. This is done in the family law jurisdiction in Indiana in the US. The "Family Matters" video is:

> intended to help litigants make an informed decision regarding legal representation, provide resources for securing representation if they so desire, and provide important information about the legal process and the responsibilities they will be expected to fulfil if they represent themselves.
>
> To avoid "information overload" for litigants, the video is broken down into 30 short chapters which are designed to be easily understood by the viewer. Chapters range from approximately one to three minutes in length. … Although it is possible to view the entire video at one time, it is suggested that litigants view it in sections as they progress through the stages of their case.[43]

56. This paper will focus only on face-to-face information sessions.

57. The information sessions should not simply give SRLs an overview of the different stages of court proceedings and the various forms that may need to be

[43] Hon. Randall T. Shepard, 'The Self-Represented Litigant: Implications for the Bench and Bar' (2010) 48(4) *Family Court Review* 607, 612-613.

completed. People may find it difficult to retain information in bulk and any information that is not needed for immediate processing may be easily forgotten.[44] Instead, the information sessions should ideally be targeted at specific areas of the litigation process. For example, how to prepare an affidavit, subpoenas, cross-examination, court-etiquette. That way, SRLs can attend the information session(s) relevant to them and apply that knowledge immediately.

58. A question that arises in relation to face-to-face information sessions is whether they will be run by court staff or by volunteers from the legal profession. There are issues with both.

59. If the sessions are run by court staff, staff will need to be trained to ensure the information provided is correct. The question arises as to whether/how much funding will be provided for this. Training staff will require funding and, if some staff are occupied with providing information sessions, additional staff will be required to perform the court's routine administrative work.

60. Some topics, such as cross-examination and preparing affidavits, raise further issues. First, these topics require staff to undertake some sort of legal training. In that case, it would be more appropriate for information sessions on these topics to be run by volunteer lawyers rather than by court staff.

61. However, a question arises as to whether information sessions on such topics should be run by the court registry at all. Topics such as cross-examination and preparation of affidavits fall into a grey area where **information** provided might constitute legal **advice**. A court must be impartial and independent and must not provide legal advice to a litigant. If a court were to run information sessions, whether through staff or volunteer lawyers, it would have to be careful to ensure the content does not constitute advice.

62. If the information sessions are run by volunteer lawyers, conflicts of interest can arise.[45] For example, if the volunteer lawyer represents one party to litigation in his paid employment as a lawyer, and the opposing party is an SRL attending an information session run by the same lawyer, then that lawyer may be precluded

[44] John M. Greacen, above n 40, 25 and 26.
[45] John M. Greacen, above n 40, 30.

from providing information to the SRL or from continuing to represent his or her client. This is even more so in circumstances where the information is on a topic which can cross the boundary of information into the area of legal advice.

63. The likelihood of conflicts of interest arising can be diluted by having at least two independent lawyers participate in the information sessions.[46]

Assistance from the Bench

64. Where there is an SRL in proceedings before the court, the court has a role in providing the SRL with information. This role of the court has been the subject of some discussion in case law.

65. In *Re F: Litigants in Person Guidelines*[47] *("Re F")* the Full Court of the Family Court considered the principles in *Johnson v Johnson*[48] and set out revised guidelines for judges when dealing with SRLs. Those guidelines are:

    1. A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial;

    2. A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross examine the witnesses;

    3. A judge should explain to the litigant in person any procedures relevant to the litigation;

    4. A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation;

    5. If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and

[46] Ibid.
[47] (2001) FLC 93-072.
[48] (1997) FLC 92-764.

perhaps the undesirability of the interposition of witnesses and his or her right to object to that course;

6. A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise;

7. If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights;

8. A judge should attempt to clarify the substance of the submissions of the litigant in person, expecially in cases where, because of garrulous or misconceieved advocacy, the substantive issues are either ignored, given little attention or obfuscated …

9. Where the interests of justice and the circumstances of the case require it, a judge may:

    - draw attention to the law applied by the Court in determining issues before it;
    - question witnesses;
    - identify applications or submissions which ought to be put to the Court;
    - suggest procedural steps that may be taken by a party;
    - clarify the particulars of the orders sought by a litigant in person or the bases for such orders.[49]

66. The concept of the judicial officer's role when assisting an SRL in court has been more recently considered in *Kenny v Ritter:*[50]

[49] *In Re F: Litigants in Person Guidelines* (2001) FLC 93-072, [253].
[50] [2009] SASC 139.

> The courts have recognised that when faced with a litigant in person, a measure of judicial intervention is not simply permissible but necessary, in order to ensure a fair hearing. The nature of the duty of a judge conducting a trial with a self-represented party has been the subject of a number of authoritative discussions. The general approach which a court should take to a litigant in person in civil proceeding was addressed by Samuels JA in *Rajski v Scitec Corporation Pty Ltd:*
>
> > In my view, the advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which our adversary procedure offers to the unwary and untutored. **But the court should be astute to see that it does not extend it auxiliary role so as to confer upon a litigant in person a positive advantage over the represented opponent**. …
>
> …
>
> The scope of the duty of the court to the litigant in person is constrained by the fact that the judge must endeavour to maintain the appearance of impartiality.
>
> …
>
> … when the self-represented litigant is before the court, the judge must ensure that a fair trial takes place. In order to achieve this, the judge is required to assist the self-represented litigant. However, the judge must equally ensure that despite any assistance to the litigant in person, the perception of impartiality is maintained.[51]
>
> [footnotes omitted, emphasis added]

67. Both *Re F* and *Kenny v Ritter* recognise that when an SRL appears in court, there is a need for the court to provide the SRL with some assistance. However, what is also recognised is the conflict between assisting the disadvantaged SRL

[51] *Kenny v Ritter* [2009] SASC 139, [17], [19] and [23].

(the principle of fairness) and maintaining an appearance of impartiality and independence (the principle of impartiality)[52] and, of course, **being** impartial.

68. Impartiality is a fundamental characteristic of the court system:

> The court, as one of the three arms of government, is the institution ultimately and specifically charged with the function of resolving disputes and imposing penalties for breaches of the rules of society (i.e. laws) …
>
> …
>
> It is suggested that public confidence in the court exists because there is a presumption that the court is independent, impartial, fair and competent.[53]
>
> [footnotes omitted]

69. In an adversary system like ours, SRLs need assistance from the Bench because they are at a disadvantage. In an adversary system, it is up to the parties to run their case, to present the necessary evidence in order for the judge to make a finding in their favour. SRLs are required to do this as well, but their task is much more difficult because they are not familiar with the processes, the language is foreign, the rules are complex and the SRL has an emotional investment in the proceedings before the court which makes his or her task less objective and more difficult.

70. A judge can attempt to "level the playing field" by assisting the SRL in accordance with the principles set out in *Re F* and *Kenny v Ritter*. But the judge must take care not to assist the SRL so much so as to appear to be partial towards the SRL or to create **disadvantages** for the represented party. This is almost always easier said than done. The difficulty in achieving this balance is aptly summarised by the Full Court in *Re F*:

> … neutrality is a key feature of the adversarial system. Judicial assistance cannot make up for lack of representation without an unacceptable cost to matters of neutrality.

[52] Richard Stewart, above n 2, 159.
[53] Ibid, 149 and 151.

…

> It is simply not possible to create a level playing field where one party is represented by a professional and the other is not. Thus, to provide a guideline to judges of this type, if applied literally, not only sets the judge an impossible task but is likely to create unreal expectations on the part of the litigant in person and at the same time give a false impression of lack of impartiality by the judge to the party who is represented.[54]

71. The presence of SRLs in our adversary court system represents a conflict in the fundamental principles upon which our court system is predicated – namely fairness and impartiality. It is possible for the judicial officer to provide the SRL with some assistance while at the same time preserving an appearance of impartiality, but the assistance which the judicial officer can provide is extremely limited. In circumstances where SRLs are a significant proportion of all litigants, perhaps the most effective way to assist manage SRLs is **not to help** the SRLs better understand and adapt to the existing system, **but to change** the system to reflect the needs of the SRL.

CHANGING THE SYSTEM

72. It is so much more comfortable to play the game with people who know the rules and play by the rules, for knowledge to prevail over ignorance, experience over naivety and skill over bumbling. However, what we should ask ourselves from time to time, is whether the practices we follow, the laws we make, the laws we interpret and apply, and the processes by which we reach decisions need to be as complicated as someone "on the outside" might find them to be.

73. There are three areas, or perhaps three targets, that I want to address under this general heading. They are the courts, the Government (the legislature) and the profession.

A less adversarial system

74. A big part of the reason why SRLs are such a problem in our court system is because our court system is an adversarial one where the judge is passive and

[54] *In Re F: Litigants in Person Guidelines* (2001) FLC 93-072, [221] and [242].

relies on the parties to present all the relevant matters to the case in order for the judge to make a decision. For reasons discussed above, the SRL does not fit well in this system.

75. Perhaps one way to tackle the challenge of SRLs is to change the system and make it less adversarial.

76. The Family Court introduced the Less Adversarial Trial ("LAT") in relation to children matters to provide an opportunity for a more understandable process, a fairer process, and a process where the litigants themselves have a more direct involvement in the proceedings and have a sense of ownership. The LAT was designed to enable litigants to understand the proceedings better and for the proceedings themselves to be more directive and hence more focused on the matters that had to be decided, rather than on the multiple issues that the parties may have felt were worthy of being dealt with.

77. There are several features of the LAT which would make the court system somewhat easier for SRLs to participate in.

Speaking directly to the judge

78. In the Family Court, on the first day of the LAT, both of the parties are usually given an opportunity to speak directly to the judge about what they would like for their children. When a party speaks directly to a judge, rather than through a lawyer, this may elicit admissions and concessions which would not ordinarily have been made by lawyers, whose principal job (appropriately in the adversary system) is to be the champions of their clients. By taking control away from the lawyers and speaking directly with the parties, judges are able to get a much clearer picture of the relationship between the parents and the aspirations the parents have for the children.

79. Of course, the benefits of having a party speak directly to a judge are premised on the SRL being an articulate and reasonable person. A querulous litigant who speaks directly to a judge may complicate the proceedings rather than simplify them.

Judge finalises and settles with the parties the issues in dispute

80. Unlike a conventional trial where it is up to **the parties** to identify the issues in dispute, in the LAT **the judge** identifies the issues in dispute early on in the proceedings. The judge settles the issues in dispute (and in need of judicial determination) before the finalisation of the LAT or hearing/trial commences. This approach focuses the SRLs attention on what needs to be resolved, instead of allowing the SRL to canvas matters which are not relevant to the issues in dispute.

81. This approach also allows the judge to identify to the parties what sort of evidence is required in order to assist him or her in determining the dispute. Again, this approach helps to focus the SRL's attention on adducing evidence that **is** relevant rather than allowing the SRL to drive the proceedings and adduce evidence that the SRL **thinks** is relevant.

Judicial consistency

82. This is an aspect of the LAT that is helpful to both SRLs and to lawyers. In a LAT, one judge presides over the whole proceedings, from beginning to end. This allows the SRL to become familiar with the judicial style. There is consistency in the way the proceedings are conducted, and the SRL does not have to repeat the history of the proceedings to a different judicial officer every time the matter comes before the court.

Litigants sitting at the Bar table

83. Most judges prefer to have a **triangle of dialogue** that involves a judge and two lawyers, preferably counsel, at the Bar table. In my opinion this is a perpetuation of the "old boys club"-like environment associated with litigation. The triangle of dialogue should be at least as broad as the litigants. After all, it is their matter which is the subject of deliberation. When I conduct a LAT, I prefer litigants to sit at the Bar table. This brings them within the triangle of dialogue and enables them to have a better understanding of what is occurring. It also tends to discourage the "old boy chat" that sometimes occurs between counsel and the judge and *vice versa*.

84. This applies also when one of the parties is self-represented. These days it would be difficult to imagine a judge excluding an SRL from the Bar table. If an SRL is at the Bar table and, at the same time, the other litigant is sitting further back in the court, there may be a temptation for that person to regard the process as excluding him or her in favour of the SRL.

85. Others will judge the success of the LAT - but it represents at least a bold step in reviewing the court processes that have been in place for decades. It is not simply accepting that change is a bad thing and that what has been for a long time "tried and true" should never change.

The Government

86. Legislation is often complicated and sometimes incomprehensible – even to judges. The law is there to govern all of society, not just lawyers. It is therefore important that all of society, not just lawyers, understand the law.

87. It is arguable that a law that is not easily understood, or understood with difficulty, should not be a law. How is it that a person, a citizen, is expected to comply with something which is extremely complicated or incomprehensible? Each of you will have a different favourite piece of incomprehensible legislation but let me share one of mine with you.

88. The *Income Tax Assessment Act* has grown from a relatively thin pamphlet to a two-volume Act – the 1936 Act and the 1997 Act. The 1997 Act was enacted in an attempt to simplify the 1936 Act which had been amended so many times that it became thousands of pages long and very complex with subsection after subsection being created. An example of how complex the *Income Tax Assessment Act 1936* had become is s 102AAZBA which concerns the modified application of CGT, in particular the effect of certain changes of residence:

> For the purposes of applying this Act in calculating the attributable income of a trust estate of a year of income (in this section called the attributable income year), where:
>
> (a) disregarding the assumption in paragraph 102AAZB(b), at any time (in this section called the residence-change time) during

the attributable income year or an earlier year of income, the trust estate ceased to be a resident trust for CGT purposes, and became a non-resident trust estate; and

(b) the trust estate owned a CGT asset at the residence-change time; and

(c) a CGT event happens in relation to the asset during the attributable income year; and

(d) section 104-170 of the Income Tax Assessment Act 1997 (CGT event 12) applies to the asset in respect of the change of residence for the purposes of the application of this Act apart from this Subdivision;

then sections 411 to 414 (inclusive) apply to the asset as if:

(e) those sections had effect for the purposes of calculating attributable income under this Subdivision instead of Part X; and

(f) any reference in those sections to an eligible CFC were a reference to the trust estate; and

(g) any reference in those sections to a commencing day asset were a reference to the asset; and

(h) any reference in those sections relating to the eligible CFC's commencing day or the day following the eligible CFC's commencing day were a reference respectively to the residence-change time or a time immediately after the residence-change time; and

(i) subsections 412(2) and (3), and paragraphs 414(3)(b) and (4)(b), referred only to the market value of the asset concerned.

89. A lawyer might find this provision difficult to understand. A lay person would almost certainly find this provision difficult to understand. There are some

things which contribute to this. First, the section is **number 102AAZBA**. The numbering shows how complicated the tax rules are and how often they have been amended – there are so many rules in place and the rules have been changed so often that legislators had to resort to numbering the section with five different letters. Second, there are many words in the section which have legislative definitions. For example, "attributable income", "trust", and "resident for CGT purposes". In order to understand what these terms mean and to understand s 102AAZBA itself, the lay person must flick back and forth between this section and the interpretation section of the Act. Third, the interpreter must read and understand sections 411 to 414 and then apply those sections to the asset in the manner stipulated by s 102AAZBA. Finally, there are terms which are technical terms whose definitions are not easily found in the Act. For example, "an eligible CFC" is not defined in s 102AAZBA nor is it defined in the interpretation section of the 1936 Act. Difficulty in finding the meaning of this term will make it difficult for any reader to understand this section.

90. Legislators and drafters might reasonably say they have been forced to be more complicated in their drafting and obliged to amend the Act again and again to prevent lawyers from finding ways of circumventing what is there. What seems to happen is that an initially relatively straightforward concept has accretions of complications plastered onto it as, increasingly, clever lawyers find increasingly complicated ways of getting around the original provisions. When an accretion is added to an accretion the interaction between the various laws becomes difficult, if not impossible to follow.

91. I suggest that there should be a new statutory office created of a **"Legislation Ombudsman"**. This would be a person to whom bad drafting or incomprehensible parts of legislation can be referred. The Legislation Ombudsman's job would be to report such legislation to Government, which might reasonably accept an obligation to do something about bad pieces of legislation. I am not sufficiently naïve as to believe that there would be a rush to fix the problems revealed. In fact, I suspect they would receive a very low legislative priority. Nevertheless, Governments ought to take some pride in

their work and the institutionalising of a process of identifying bad or difficult legislation may serve to bring the need to draft comprehensible legislation to the forefront of the minds of legislators and drafters.

92. Drafting less complicated and more comprehensible legislation ensures that lay-people and not just lawyers can understand it. SRLs who are able to understand the law will be able to better present their case in court.

The profession

93. The legal profession is one which guards its turf jealously. To an SRL, being in a court room feels somewhat like being in an old-boys' club where members of the club are speaking to each other in a strange language known only to them, where the members know each other quite well and are disparaging and discouraging of interlopers.

94. There are some judges and lawyers who strive to explain proceedings to SRLs and to provide appropriate assistance where needed. However, there are others who might resent the presence of SRLs and who "wish to turn back the clock to a time when they did not exist in large numbers".[55] In order to better manage SRLs, it is necessary to change this attitude.

95. Training would play an important role in doing so. Training on the handling of SRLs should become a standard part of the orientation of new judges. This training should address the ethical issues in assisting SRLs and equip judges with the skills to manage SRLs in the court room.[56] Training about SRLs should also form part of the curriculum of the courses required for admission to practise. Practitioners should be aware of their obligations when involved in proceedings where an SRL is the opposing party.

CONCLUSION

96. There is no silver bullet to the challenge of self-representation in our courts. There are a number of suggestions in this paper which may or may not find favour with the community, Government, lawyers or judges. However, if courts

[55] John M. Greacen, above n 40, 26.
[56] Ibid, 27.

remind themselves that access to justice requires that it should be to all "without fear or favour, affection or ill-will"[57] then it follows that we should place all of our processes, language, practices and assistance under the microscope of that access to justice to determine whether, in a world in which the self-represented are a large proportion, we are showing sufficient awareness, courtesy, consideration and ultimately fairness and justice to those who appear before the court without a lawyer. After all "Sir Gerard Brennan used to say that we may never attain perfect justice, but that doesn't mean we can't aspire to it".[58]

[57] Oath of Office.
[58] ABC Radio National, 'The Law Report', *Judges Lose Sleep Over Work Stress,* 5 February 2013 (Sally Brown).