



The Australian Institute of  
Judicial Administration Incorporated

Australian Institute of Judicial  
Administration and the Federal Court  
of Australia

**Forum on Self –  
Represented Litigants**

Sydney, 17 September 2004

*Report*



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# Forum on Self-Represented Litigants

## *Report of Proceedings*

### BACKGROUND

In recent years, an increasing number of litigants appear to be entering the court system without engaging lawyers to represent them. As Justice Murray Wilcox noted in his opening speech at this Forum, the numbers of self-represented litigants (SRLs) appearing in some courts now exceeds 50%.

This phenomenon has been observed and commented on by law reform commissions, parliamentary committees, and other bodies,<sup>1</sup> in reports for government<sup>2</sup> and court's,<sup>3</sup> in academic studies, court annual reports and statistics,<sup>4</sup> and newspaper and journal articles. It has been a topic for discussion at various conferences and seminars. The problems of unrepresented litigants receive increasing attention in media representations of the courts, for example, in the documentary series 'DIY Law' screened on ABC television in 2001.

The category of self-represented litigants (SRLs) is not a homogenous one. A distinction can be drawn between litigants who are forced to represent themselves (usually because they are unable to afford legal representation) and those who choose to do so, perhaps for a variety of reasons. There has also been much discussion in recent years about a small proportion of self-represented litigants who may be classified as "querulous" litigants, that is, litigants whose approach to advancing their cause or matter is irrational or obsessive.

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<sup>1</sup> Senate Legal and Constitutional References Committee, *Legal Aid Report 3*, AGPS, Canberra, 25 June 1998, [3.21-45], Professor Stephen Parker, *Courts and the Public* (1998) ALJA 106-111, Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (2000), Report No. 89, [5.51-67], [5.147-157] ('ALRC'), The Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia – Final Report* (September 1999) Project No. 92 ('WALRC'), Family Law Council, *Litigants in Person* (2000) at <<http://www.law.gov.au/www/flcHome.nsf/Web+Pages/C40B3532575784A2CA256B49001CF823?OpenDocument>>, Rosemary Hunter, *The Changing Face of Litigation* (2002), Law Society of New South Wales, *Position Paper: Self-Represented Litigants* (27 May 2002).

<sup>2</sup> Standing Committee of Attorneys-General Working Group on Criminal Trial Procedure, *Report* (September 1999) 63 at <[http://www.ag.gov.au/WWW/rwpattach.nsf/viewasattachmentPersonal/FC8FCFE8B2E7838ECA256B9800046CF3/\\$file/SCAG.pdf](http://www.ag.gov.au/WWW/rwpattach.nsf/viewasattachmentPersonal/FC8FCFE8B2E7838ECA256B9800046CF3/$file/SCAG.pdf)>.

<sup>3</sup> Dewar, J., Smith, B and Banks, C, *Litigants in Person in the Family Court of Australia*, Research Report No. 20, Family Court of Australia, [2.1].

<sup>4</sup> High Court of Australia, *Annual Report 2001-02*, Part III, High Court of Australia, *Annual Report 2000-01*, Part III, High Court of Australia, *Annual Report 1999-00*, 5, High Court of Australia, *Annual Report 1998-99*, 7, High Court of Australia, *Annual Report 1997-98*, 9, Federal Court of Australia, *Annual Report 2001/02* [2.4], Federal Court of Australia, *Annual Report 2000/01* [2.4], Family Court of Australia, *Annual Report 2001-2002* 38, Supreme Court of Victoria, *Annual Review 2000*, 11, The Hon Chief Justice David Malcolm AC, *2001 Annual Review of Western Australian Courts*, Supreme Court of Queensland, *Supreme Court Annual Report 2000/2001*, 20, Supreme Court of Queensland, *Supreme Court Annual Report 1999/2000*, 22.

## Impact of SRLs

A number of senior members of the judiciary have drawn attention to the implications for the administration of justice of increasing numbers of SRLs.<sup>5</sup> The increase in numbers of SRLs is said to affect the operations of courts and tribunals in various ways.

### Effects on court staff

Courts report that SRLs:

- Take up more of the time of court staff (explaining procedures, providing assistance and support);
- Require court staff (in providing that assistance and support) to tread a difficult line between providing procedural advice and avoiding the provision of legal advice. This difficulty is reportedly exacerbated by the inability of some SRLs to understand that limitation; and
- May become emotional, confused and occasionally abusive – creating stress and security concerns.

### Effect of SRLs in relation to the hearing

In matters which proceed to hearing, courts report a number of consequences of lack of representation, some of which are cumulative:

- SRLs are likely to have more difficulty in understanding and complying with procedural requirements applying to the preparation of their case. This may result in a longer preparation time, the need for more directions hearings and greater judicial supervision in the pre-trial process.
- Hearings tend to take longer, because judges need to take more time in explaining court procedures to SRLs who are sometimes unable (or unwilling) to comprehend and comply with those procedures and whose cases are not as well-prepared as those of represented litigants.
- SRLs are more likely to have difficulty in presenting their case in an effective way and in a way that complies with the rules of evidence. This may also result in longer hearing times.
- In jury trials it is said there is an increased risk of mistrial, as a result of SRLs' difficulty in understanding and complying with rules of evidence and procedure.

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<sup>5</sup> See, for example, the remarks of Mason CJ in *Cachia v Haines* (1994) 120 ALR 385, 391, the Hon Chief Justice Murray Gleeson AC, 'The State of the Judicature' address to the Australian Legal Convention, Canberra, 10 October 1999 at <[http://www.highcourt.gov.au/speeches/cj/cj\\_sta10oct.htm](http://www.highcourt.gov.au/speeches/cj/cj_sta10oct.htm)>, Chief Justice Alastair Nicholson AO 'The State of the Court', *Australian Family Lawyer* 13(2) Summer 1998, 9-17, and evidence to the Senate Legal and Constitutional References Committee, above n 1, 3.28, The Hon Chief Justice David Malcolm AC, *Address at the Closing of the 1997 Legal Year of the Supreme Court of Western Australia*, 14, Evidence of the Chief Judge of the Family Court of Western Australia, the Hon Justice Michael Holden to the Senate Legal and Constitutional References Committee, above n 1, 3.30, Evidence of the Chief Justice of the Australian Capital Territory, the Hon Jeffrey Miles to the Senate Legal and Constitutional References Committee, above n 1, 3.32, The Hon Justice Robert Nicholson AO, *Litigants in Person*, presented to the Supreme and Federal Court Judges' Conference, Hobart, 25 January 2001 and published in (2001) 5(2) *The Judicial Review* 181, *Australian Experience with self-represented litigants*, paper presented to the Fifth Worldwide Common Law Judiciary Conference in Sydney, 10 April 2003 and published in (2003) 77 *Australian Law Journal* 820, *Can Courts cope with self-represented litigants?*, presented as Public Lecture for the 2003 Federal Court Visiting Judicial Fellow, Flinders University Law School, 16 September 2003 to be published in the *Flinders Law Journal*, The Hon Justice Geoff Davies AO, *The Reality of Civil Justice Reform: 'Why We Must Abandon the Essential elements of Our System'*, (February 2003) 12(3) 168-9.

- The consequence of all these factors may not only be increased cost and inconvenience to the court, but disadvantages (increased cost and delay) to other parties involved in the case.
- In cases involving SRLs who are frustrated, confused or abusive, there may be additional security concerns.

The particular difficulties associated with querulous litigants, who, it should be stressed, are a minority of SRLs, further exacerbate many of these effects.

### The Study of SRLs

As previously mentioned, there have been a number of reports and studies commissioned about the phenomenon of SRLs and its effect on the court system. In 1998 the AIJA commissioned Professor Stephen Parker to undertake a report on *Courts and the Public*. That report reviewed some of those findings. It included a discussion of the needs of SRLs and suggested a number of measures which courts might consider.

One of the Parker report's recommendations was that,

“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 the judicial officers so that best practice is identified and shared between them about how to conduct a hearing where one or more of the parties are unrepresented”.<sup>6</sup>

By way of follow-up to Professor Parker's recommendations, the AIJA Courts and the Public Committee produced a document entitled “Litigants in Person Management Plan: Issues for Courts and Tribunals” in 2001.<sup>7</sup> This was intended to provide a guide to courts to assist them in preparing litigants in person plans.

The preparation of a plan was designed to provide a systematic framework within which the needs of SRLs might be addressed. Regardless of whether courts have adopted such a framework, they have increasingly undertaken initiatives designed to assist SRLs and to ease their impact on the court system.

The AIJA feels that it is critical for courts and tribunals to have the opportunity to share information about those initiatives, to hold discussions about their work practices and innovations in relation to SRLs and to have the opportunity to learn from each others' experience. With this in mind, the suggestion of a forum on SRLs conceived by Philip Kellow of the Federal Court was enthusiastically received by the AIJA's Project and Research Committee.

## AIMS AND OBJECTIVES

The aim of the Forum was to bring courts and tribunals together for the purposes of identifying initiatives taken by them in relation to SRLs with a view to:

1. Exchanging information on policies and strategies concerning SRLs at all stages of the litigation process, including the control of vexatious and serial litigation adopted by each court and tribunal; and
2. Identifying the prospect of common future action, policies and strategies for dealing with SRLs.

<sup>6</sup> Professor Stephen Parker, *Courts and the Public* (1998) AIJA 166.

<sup>7</sup> *Litigants in Person Management Plan: Issues for Courts and Tribunals*, AIJA Courts and the Public Committee (2001)

It was intended that the Forum:

1. Would focus on practical aspects of measures implemented by the courts;
2. Might lead to subsequent for a on issue-specific aspects, involving all participants in the justice system, including in particular initiatives being taken by tribunals, governments and legal aid; and
3. Would be low cost.

## **METHODOLOGY**

### **Participation**

The following courts and tribunals were invited to send a representative to the Forum:

- The High Court of Australia;
- The Federal Court, Family Court and Federal Magistrates Court;
- The Supreme Court of each State and Territory;
- The District Courts and County Court;
- The Magistrates Court in each State and Territory;
- The High Court of New Zealand and District Court of New Zealand;
- The Commonwealth Administrative Appeals Tribunal; and
- State peak body tribunals.

A number of groups were also invited to send observers to the Forum. They included:

- The Council of Australasian Tribunals;
- The Commonwealth Attorney-General and the Attorney-General for each State and Territory;
- The National Civil Justice Review;
- The National Association of Community Legal Centres;
- The Law Council of Australia;
- National Legal Aid; and
- The National Pro Bono Resources Centre.

### **Summary papers**

Each of the participating courts and tribunals were invited to prepare a summary of information relevant to the aim of the Forum. It was suggested that items to be addressed in those summaries include:

- Systems for collecting data (including the type of data collected, but not the data itself) on SRLs and the impact they have on the cost and efficiency of the court and tribunal system;
- SRL management plans;
- Rules and practices for accommodating SRLs;
- Rules and practices for dealing with vexatious and querulous litigants;
- Rules and practices for dismissing litigation not being advanced;

- Registry guides, information kits and other publications;
- Website design and content;
- Use of other technology;
- Judicial education;
- Training of staff;
- Court-based and tribunal-based pro bono schemes;
- Other initiatives; and
- Evaluation (assessing what has worked and what has not).

Respondents were encouraged to be informative but concise and to deal with both successes and failures.

The summaries provided were summarised and collated into an overview documents a copy of which was provided to all participants. (The detailed individual summaries are available for participants, but a decision was made not to distribute them at the Forum in order to avoid overloading participants with written material. It was felt that this might inhibit the discussion and sharing of experience which was the primary purpose of the Forum.)

### **Agenda**

The topics covered in the summary papers were used as the basis for the agenda for the Forum. A convenor was nominated in relation to each topic, whose task it was to introduce the subject, with reference to the collated summaries, and generate discussion.

## **TOPIC SUMMARIES**

The following summaries represent a précis of the responses on each topic provided by the participating courts and tribunals in their summary papers, supplemented by the discussion at the Forum. They are not intended to provide a verbatim account of the proceedings, but rather to summarise the findings on each topic and identify any particular issues.

### **Systems for collecting data (including the type of data collected, but not the data itself) on SRLs and the impact they have on the cost and efficiency of the court and tribunal system**

#### **Summary papers:**

A significant number of the participants indicated that their court of tribunal kept no, or only minimal, data in relation to SRLs.

Where data was collected:

- Less than half the participating courts and tribunals record the numbers of SRLs (In one court – in civil cases only; in another – in crime only); and
- Only a very few courts or tribunals indicated that they kept records of the types of matters in which SRLs are involved.

Several courts reported difficulties with existing case management systems. These included:

- Inability to record self-representation at different stages of the proceedings;

- Failure by staff to record/enter data consistently, so that while a system may have the ability to record self-representation, the fact that it had been used inconsistently meant that the statistics it generated were unreliable; and
- Inaccuracies in extracting reports where a system does not distinguish between different appearances on same matter.

Seven courts indicated that they were developing or implementing new case management systems which could provide better data collection in relation to SRLs; and

Several summary papers reported other strategies or practices in their court or tribunal that provide information on SRLs to supplement that provided by their case management system. These included:

- A client survey to get feedback from SRLs.
- A management system that allows tracking of a client's progress for each visit to court, for example, to measure the amount of time a SRL spends waiting for assistance at the registry counter.

No court or tribunal reported the ability to record information about the impact of SRLs on the court, although several reported plans to introduce new case management facilities which could provide this facility.

**Discussion:**

Questions posed for discussion included the following:

- (a) What data on SRLs do we need to collect?
  - numbers?
  - type of matter?
  - stage at which unrepresented?
  - outcome?
  - effect on workload e.g. hearing times?
- (b) Is there a "benchmark" for data collection on SRLs, or do requirements vary between courts?

Discussion focused on the following issues:

- There was general agreement that courts should collect data on SRLs. There is a consensus that SRLs take up more court resources than represented litigants and it is crucial that courts have the ability to measure such in order to put a case to government for increased resources.
- It can be difficult to know what to measure. For example, in the Family Court people are often serially represented, i.e. they are represented or unrepresented at different points in the process and it can be difficult to count that. The Family Court's new case management system is now getting to a point where it is possible to do this; however, that is a fairly sophisticated system that does not necessarily have an equivalent in all jurisdictions.
- The difference between quantitative and qualitative data collection was referred to. Even with more sophisticated case management systems it is still difficult to measure the impact on staff of dealing with SRLs. This impact has a crucial affect on the Court.
- The AAT noted that it was now measuring representation at each case event and it was attempting to measure the impact of SRLs on the process. These reports will provide the ability to cross reference so that it would be possible, for example, to identify SRLs in relation to specific types of matters and to try and assess their impact at different stages of the process.

It was agreed that it was enormously helpful to be able to provide that type of detailed information to agencies that need to make recommendations to government for funding for reforms to the court process.

- It was agreed that there would be benefit in pursuing a project to develop a more detailed analysis of what data needs to be collected from courts and in relation to SRLs and what data collection is feasible. It was agreed that this needed to be a combined exercise (involving Commonwealth, States and Territories).

## **SRL management plans**

### **Summary papers:**

Only one court reported that it had an SRL Management Plan. One other court reported that it had factored the needs of SRLs into its case management model. Four others are either considering developing a SRL Management Plan or would like to do so.

### **Discussion:**

The following points emerged during discussion:

- It was noted that a judge-endorsed self-represented litigant plan offers some advantages to coordination and support for initiatives within the court and provides a disciplinary framework within which to develop various initiatives.
- An important aspect of having a plan is for it to have an evaluative component, in order to review how it is working and measure results.

## **Rules and practices for accommodating SRLs – at the registry and pre-hearing**

### **Summary papers:**

#### *General*

Three courts reported no provisions for SRLs; one was developing a ‘best practice’. One court reported that it has recognised SRLs as a significant client group and was attempting to factor their needs into all planning. Others reported a range of rules and practices. A couple of courts reported no rules and practices specifically for SRLs.

Overall strategies that were mentioned included:

- Adoption of simpler, less formal procedures either generally or in a specific part of the court, e.g. small claims divisions.
- Doing away with legal representation, so as to negate any advantage to a represented party e.g. in small claims divisions. Also cost rules that discourage legal representation (a practice in a Tribunal).
- Use of ADR.
- Reduction in the use of forms.
- New Rules that are simplified and in plain English.

#### *At the Registry*

According to the summaries received, rules and practices at the registry level involve primarily the provision of information about the court and its processes, information about, and referral to, sources of legal assistance, and providing advice about and assistance with some of the basic procedural requirements, e.g. filling in forms. Many respondents mentioned the need to make SRLs aware of the limitations on the role of court staff in providing assistance to them e.g. their inability to provide legal advice.

Strategies that were reported include:

- Provision of advice and information about
  - Sources of legal assistance;
  - Applying for waiver of fees etc.;
  - Court practices and procedures;
  - Mediation, case management etc.;
  - Listing procedures and court lists;
  - Interpreters; and
  - Fees/charges.
- Explaining role of court staff – what they can and can't do;
- Providing guidance and assistance on completing forms;
- Referring SRLs to a Chambers Magistrate for more complex procedural advice;
- Referral to sources of legal assistance;
- Waiver of fees etc.;
- Welcoming inquiries;
- Access to files, registers, documents;
- Access to and assistance in using a law library;
- Duty registrar scheme;
- Interpreting assistance (informal);
- Referral to senior specially trained staff;
- Initial assessment of inquiry type at registry counter;
- Use of paralegal provided by Legal Aid for basic advice and referrals.

#### *Pre-Hearing*

Several responses suggest that in cases involving SRLs, close supervision and early intervention in the case management process can be helpful. However, this obviously requires greater court resources and it would appear from the responses that only a minority of courts are adopting such an approach specifically targeted to SRLs. In some tribunals, where SRLs are perceived as much more the norm, there are a number of case management strategies specifically geared to their needs.

Strategies that were reported include:

- Early case management practices, e.g. case conferences, directions hearings – to explore settlement and narrow issues;
- Outreach Program – staff contact SRLs to provide information, referral and assistance;
- Aboriginal and Torres Strait Islander program (dedicated officer/s);
- Contact prior to hearing to confirm details and arrangements;
- Modified correspondence for use with SRLs – in plain English, with more details;

- Senior staff closely monitoring matters involving SRLs – view to direction/mentions hearing;
- No consent orders where a party unrepresented;
- Certain rules and practice directions not applied so strictly;
- Require SRL to attend directions hearings in person;
- 6 week adjournment for legal aid (unsuccessful pilot);
- Referring SRLs for legal assistance or advice;
- Information sessions (compulsory);
- One appeal court about to amend rules to provide for abridged procedure for SRLs (to filter out unmeritorious appeals) and to provide that they cannot serve process without an order of the Court.

**Discussion:**

The following points were noted during discussion:

- Court assistance in the pre-hearing phase is necessarily focused very much on providing procedural assistance, whereas the litigant is often seeking substantive assistance. There is an inherent tension in this.
- It may be useful to broaden the range of options to assist the SRL at this stage, including making provision for substantive advice, if that can be done in a way that is consistent with the court’s duty of impartiality.
- The extent to which ADR offers a solution to resolving this tension was discussed, particularly the systems of conferencing that operate in some of the administrative tribunals such as the AAT and the ADT. It was noted that referral to ADR, such as that operating in the New South Wales Local Court, often shows higher settlement rates in matters involving SRLs. New Zealand also has a similar experience. However it was also noted that ADR was resource intensive and its costs needed to be factored into the discussion.
- The Family Court reported that its pilot project in relation to children’s cases showed that judicial intervention was the only factor that appeared to make a difference in promoting early settlement and the cost of that needed to be weighed against the cost of not resolving a matter at an early stage. However it was clear that the more authoritative the intervention the more effective it was.

**Rules and practices for accommodating SRLs at the hearing**

**Summary papers:**

Several of the responses directed to rules and practices to accommodate SRLs discussed the difficulties that arise for judicial officers dealing with SRLs at the hearing, attempting to tread the fine line between trying to ensure that the SRL is able to put forward his/her best case and avoiding the appearance of any partiality. Difficulties associated with the need to provide procedural information for SRLs were also discussed.

Strategies that were reported include:

- Court officer providing information in the courtroom about procedure.
- Judges having regard to case law and guidelines and bench book information concerning SRLs.
- Assisting SRLs to access transcript.

- Modifying the hearing procedure, e.g.:
  - Use of self-executing orders;
  - Directing written submissions;
  - Limiting time for oral submissions;
  - Time limits on cross-examination;
  - Where opening speech includes evidence in chief, directing it to be adopted as sworn evidence and allow cross-examination;
  - Use of trial without pleadings/by affidavit; and
  - Directing that evidentiary objections be dealt with in final addresses.
- Trying to ensure that a SRL provides all relevant evidence.
- The absence of evidentiary rules (Tribunal).

**Discussion:**

The following points emerged during discussion:

- Many SRLs want a hearing, they find it valuable and the court has to be able to accommodate that;
- The major difficulty in a hearing is the inability of an SRL to identify issues clearly. This creates difficulty for judges in writing a judgment after a hearing involving as SRL; finding the ‘nuggets’ amongst all the illogical badly structured material.
- There are also particular difficulties in dealing with SRLs in relation to expert evidence. At the outset, there can even be difficulties in explaining to a SRL the need to call an expert witness. There was discussion about the use of more written material as a way to obviate some of these difficulties. It was noted that some courts provide provision for expert reports to be exchanged before trial but it can be hard to explain that requirement to SRLs. There may be a role for court appointed experts to solve this problem.
- There are particular difficulties in cross-examination, e.g. How do you put the rule in *Brown v Dunn*? One possibility may be to get both parties to give evidence in chief first.
- It may be necessary for the bench to exercise greater control over the order and manner of the presentation of the evidence by SRLs than would normally be the case.
- Querulous litigants pose particular difficulties in hearings and there is a need to distinguish between their needs and those of SRLs who do not fall into the querulous category.
- Closing addresses in jury trials are a particular area of difficulty for SRLs where there may be the risk of inappropriate things being said before the jury which can result in a mistrial. In one case it was noted that a judge tried to settle the form of his closing address to the jury but this course is fraught with difficulties for the judge.
- The need to prepare the unrepresented person for the hearing. Suggestions include:
  - Making available an SRL kit or written guidelines;
  - A further step in that process might be to enable a court officer to sit down with the person and go through the kit. That may require additional funding. It was noted that booklets and information are good but it is very beneficial to be able to sit down with a person

and make sure that they have understood the written information. Once a person has acknowledged that they have received the material and understood it, it also can then help to obviate the possibility of them appearing in court and saying that they didn't understand the material. This can also assist in revising written material and improving it;

- Running information sessions;
- Screening a video;
- Encourage SRLs to come in beforehand to have a look at the courtroom generally and familiarize themselves;
- Have someone to specifically case manage cases involving SRLs;
- Use of schemes run in association with law schools to provide assistance to SRLs in preparing their cases for hearing. There is a scheme working in Western Australia which works well under which the advice is supervised by a qualified lawyer; and
- Training programmes for SRLs e.g. run by a university.

## **Rules and practices for dealing with vexatious and querulous litigants**

### **Summary papers:**

Responses in this category touched on two aspects:

1. Provisions to prevent litigants from bringing, or pursuing, litigation unnecessarily; and
2. Dealing with security issues which may arise in dealing with certain SRLs.

As far as 1. is concerned, all jurisdictions appear to have a provision allowing for a person to be declared a vexatious litigant (in the States and Territories this is usually by application by the Attorney-General to the Supreme Court. In the Family Court it can be on the application of another party.) The effect of such an order is that the person then requires leave of the court to institute proceedings. A list of such persons is usually kept in registry – in one jurisdiction it is also posted on the courts' website.

Several responses pointed out that this traditional provision has limitations in dealing with SRLs, e.g. it does not deal with the situation where SRLs continually appeal against interlocutory orders, or with a SRL who is successful at first, but then becomes a querulous litigant.

Another response suggested that the courts should be reluctant to use these provisions in relation to SRLs and should instead have processes that are robust enough to accommodate them without singling them out

In one State, legislation has been fairly recently amended (WA 2002) to allow the Supreme or District court itself to stay proceedings, or prohibit a person from commencing proceedings without the leave of the Court. Application for such an order can also be made by Registrar, as well as by Attorney-General. It would seem to be too early to say what effect this amendment has made. The provision in the High Court is somewhat similar.

Another court also has power to prohibit litigant from issuing interlocutory applications without leave, or to prohibit litigants from bringing proceeding relating to certain subject matter or certain respondents (another court is considering a rule amendment to provide general litigation 'restraint orders'). Some courts and tribunals also have power to dismiss an application (or strike out all or part) if satisfied that it is frivolous or vexatious.

To date, these provisions appear to be used sparingly.

Another (family) court provides a more interventionist approach, e.g. a team which supervises litigants with a history of intractable problems in relation to disputes over children, with a view to heading off unnecessary litigation.

In relation to 2. above, one issue that was adverted to quite often in the responses was of security concerns that can arise as a result of the behaviour of some 'querulous' or 'difficult' SRLs. One court provided information about measures taken at registry to deal with 'difficult' SRLs, e.g. those who may pose security risk. These included special training and security devices e.g. duress alarms.

#### **Discussion:**

The following points emerged during discussion:

- There is a need to be clear about labelling people as querulous or vexatious litigants and the terms should not be used lightly.
- There is also a clear distinction between querulous and vexatious and this should also be borne in mind.
- There is a need for the courts to be aware of the suffering that a vexatious litigant or querulant can cause to other parties and court staff.
- There is a proposal for national legislation on vexation litigants before the Standing Committee of Attorneys-General.
- The use of orders of the type made in *Bhamjee v. Forsdick* (No 2 [2003] EWCA Civ 1113), to restrain a person from litigation, was discussed and it was noted that such an order had been made recently by the New South Wales Court of Appeal: *Wentworth v Graham & Anor* [2003] NSWCA 307, *Wentworth v Graham & Anor* [2003] NSWCA 229.
- The power to declare someone a vexatious litigant is the ultimate point of control. There are other points in the litigation process where the court has the opportunity to control abuse of the process.
- However, it was noted that in some jurisdictions, lower courts feel hamstrung in exercising powers such as the grant of summary judgment, because of appeal court decision that they feel force them to indulge vexatious litigants. In other jurisdictions, it seems possible to take a more robust approach.
- Another strategy may be to minimize interlocutory procedures so that there is less opportunity for SRLs to abuse the process.
- Another strategy may be to use the power under the court rules to limit times for cross examination and to limit the number of witnesses (it may only be necessary to refer the parties to it in order to have the desired effect).
- In the ACT a superior court can make a referral to the Guardianship Tribunal for an assessment of a person who may be a querulous litigant. However, it was noted that in some states, e.g. New South Wales, it would be difficult to make a guardianship order in relation to litigation only.

#### **Rules and practices for dismissing litigation not being advanced**

##### **Summary papers:**

The responses indicated that most jurisdictions have rules that allow a matter to be struck out for want of prosecution, either upon application or on the court/tribunal's own motion.

However, these provisions are generally not designed with SRLs in mind and tend to be used sparingly.

One jurisdiction is planning to amend its default judgment rules to allow a stay or dismissal where the applicant is in default. In another, a Court officer has power to list a matter as inactive in certain circumstances and then dismiss it.

Several courts reported attempts to combine early case management practices with SRLs, and a power under case management processes to have a matter struck out where orders are not complied with. Several case management systems provide for self-executing finalisation e.g. case management system automatically deems matter finalised after certain period. A court officer, usually a registrar, may have discretion to extend time. These procedures, again, may not be specifically directed to SRLs.

#### **Discussion:**

Discussion focused on the following issues:

- SRLs often overload the court with information – there is a need to force them to define or articulate their issues.
- Is there a need for a filtering system to force the party to articulate their case? E.g. in the ACT the Court of Appeal has a filtering process in that the appellant must file a statement about what the appeal is about in no more than 250 words. Could this also be achieved by requiring a SRL to file a list of issues or a list of questions they want the court to answer?
- Do pleadings achieve their objectives? It was noted that there can be difficulty in defining what the issue is. Can this really be achieved in the pleadings, or is it better to use statements of evidence instead?
- Are there existing rules which can be used, e.g. trial on affidavit dispensing with the pleadings?
- Is there a need to rethink the rules about striking out and/or the way they are applied?
- Some courts report difficulty in using summary judgment procedures because an appeal will inevitably be successful. In others it appears there is less scope for appellate review and the power is more extensively used.

### **Registry guides, information kits and other publications**

#### **Summary papers:**

The provision of information would appear to be the main focus of activity by both courts and tribunals in relation to SRLs. According to the summaries received, this includes the provision of:

- Brochures:
  - specific to different type of matters before that court – stages, rules, procedures;
  - about the court itself – general overview, location, procedures, personnel, terminology;
  - about ADR options;
  - providing general overview of legal system in that jurisdiction and basic terminology;
  - about interpreting services;

- about appearing in various roles in the court, e.g. juror, witness;
  - explaining the role of court staff – what assistance they can and cannot provide.
- Court forms – and guides to completion.
  - Brochures/information sheets from other organisations.
  - Brochures/information sheets compiled with assistance from University Law Schools.
  - List of sources of legal assistance.
  - Copies of relevant Court Rules.
  - Information about legal costs.
  - Access to court library.
  - Access to criminal bench book.
  - Litigants in Person Kit/Information Package.
  - Detailed procedural advice on case management requirements.

Several responses suggested that information also be made available in:

- Plain English.
- Large print.
- Languages other than English.
- On audio tape.
- On video or DVD - captioned for people with hearing disability.
- Poster form, e.g. to explain court process.

Other issues also reported included:

- A need (particularly in larger courts) to consolidate material created by different registries.
- The importance of brochures/information sheets being regularly reviewed and updated.

Some courts and tribunals report that they are pro-active in relation to their use of this material, e.g. information is mailed out to a SRL as soon as a proceeding is filed. In other courts, the information is supplied when requested.

In most cases, the information provided is designed to be used either by the SRL alone, or with some assistance provided by a court officer. In one case, the provision of information is supplemented with the provision of assistance from volunteer law students.

It was noted that there is general agreement that courts should provide more information to SRLs. However, in introducing the discussion, Justice Faulks noted research by the Family Court that suggested that the possession of information does not perhaps always achieve the effect that the courts think it has. A survey the Family Court had undertaken of their SRLs which indicated that SRLs generally complained of a lack of information, but also that information provided was too non-specific and did not always help them with their problem.

**Discussion:**

Discussion focused on the following points:

- It can be beneficial to provide information in different forms e.g. the Family Court has a big poster which explains the stages and times for its matters which has been very successful with SRLs;
- The distinction between information and advice is one Australian courts have not yet fully explored. It was noted that in California there have been the development of self help centres in conjunction with the courts and other legal bodies such as legal aid offices, e.g. a court based attorney-supervised centre which operates like a triage centre where a legal problem can be diagnosed and referred to the appropriate body. This development has not yet occurred here;
- It was noted that many litigants prefer information in hard copy i.e. 'something in the hand';
- The importance of collaborative efforts and information guides was also noted, particularly in areas like family law where there may be a number of bodies preparing guides to the same areas, for example, legal aid agencies;
- The role of legal aid in providing services and information to SRLs; and
- The unbundling of legal services - more effective targeting of the provision of legal assistance.

**Website design and content****Summary papers:**

The provision of information on a court, or Department of Justice, website has emerged as a major strategy for providing information and assistance to SRLs in recent years.

The responses indicate that:

- Most courts have websites; a couple that do not refer SRLs to a Ministry of Justice website for relevant information and forms.
- One court reports that it uses its website as the main focus of its assistance to SRLs.
- A number of courts have recently re-vamped websites (or are in the process of doing so) with an emphasis on improving navigation and access.

In terms of website content, of those courts with websites:

- Most place electronic versions of their information brochures and kits on the website (or, in one case, the brochures are printed versions of what was placed on the website).
- Many provide their court forms on the website, so they can be downloaded by litigants.
- Websites also include links to other sources of information - an advantage of providing information on the Internet.
- Several are planning to build a specific SRL section on their website.
- A couple have, or are developing, more interactive information on their website e.g. Virtual tour of court, online video presentation, PowerPoint presentation.

- One includes step-by-step guide to proceedings in the court.
- Most provide information on case-law.
- All include contact details.
- Several make no specific provision for SRLs on their website.
- Most include practice material e.g. Case management guidelines, practice directions.

Several responses noted the importance of ensuring that information on the website is continually updated/under review.

The fact that some SRLs may not have computer/Internet access is addressed by several courts who providing dedicated personal computers within the court building for use by litigants, who may obtain Internet access. (One provides Wireless Internet access.)

#### **Discussion:**

The following points were noted in discussion:

- Online information with SRLs is popular, e.g. the County Court's "Litigants in Person Guide" is one of the most downloaded parts of its web site.
- Information designed for SRLs is also popular with community agencies providing assistance to SRLs, e.g. legal advice clinics.
- The importance of evaluating and assessing how the website is used by SRLs;
- Most sites provide an email address for litigants to provide feedback on the information that they are provided with.
- The use of interactive features on websites to assist SRLs in better understanding information in written form, e.g. stories / videos / multi-media can be beneficial.
- The possibility of links to legal aid and community legal centre sites – for sources of further assistance.

#### **Use of other technology**

##### **Summary papers:**

Responses indicate that, in addition to the provision of information on court websites, there are a number of other technologies that courts and tribunals can use that may assist SRLs.

As previously mentioned, there are a number of other technologies that can be used to provide information to SRLs, including:

- Video.
- DVD.
- Audio tape.

At the hearing, or directions hearing, a number of courts and tribunals use:

- Video-conferencing.
- Telephone Conferencing.

One court has introduced electronic filing (enabling litigants to file process over the Internet). Three other courts report plans to introduce e-filing. Another court has provision in its rules to permit the use of electronic communication.

Some other courts reported the provision of older, but none the less useful, technology aids for SRLs. These included:

- Access to photocopier; and
- Provision of an electronic typewriter.

**Discussion:**

The following point was noted in discussion:

- The potential for the use of technology such as video and DVD to enhance SRLs understanding of information in written form.

**Judicial education**

**Summary papers:**

Nearly half of the summaries received either did not address this issue, or reported that there was no judicial education program relating to dealing with SRLs in their court or tribunal.

Of those who reported initiatives in relation to judicial education and SRLs:

- Nine reported sessions on SRLs and topics relevant to dealing with them were either included in induction or continuing education programs, or were likely to be so in the future.
- Four reported that SRL issues were addressed in a manual or bench book (either existing or under development).
- Two relied on material in their court library to assist judges in this area.
- One tribunal noted that the background and pre-existing training of members would qualify them to deal with SRLs.

**Discussion:**

The following points were noted during discussion:

- There are a variety of institutions now offering different approaches in the area of judicial education.
- There may also be a number of different steps that could be taken in devising programmes or providing information to judges, e.g. formal programmes, written material such as the County Court of Victoria's *Self-Represented Parties: A Trial Management Guide for the Judiciary*, continuing education programmes, bench books, induction programmes.
- It was noted that in California it has been suggested that the courts have a duty to SRLs. If so, does that have a need for education about this?
- There was a note of caution sounded in relation to the question of a duty to SRLs:
  1. If the court is found to have departed from such a duty, it could give rise to grounds for appeal.
  2. The courts should have the same duty to all litigants whether they are represented or not, although perhaps the method of implementing that duty may be different in the case of SRLs.

- There is awareness training occurring but there is also a need for training in how to assist SRLs. Techniques such as simulations involving role plays might be more useful than simply providing judicial officers with more information.
- It was also noted that it might be useful for judicial officers to hear from the perspective of a SRL.
- There was discussion about the preparation of glossaries explaining court terms. The New South Wales Guardianship Tribunal, New Zealand Family Court and the Federal Court have developed these.
- There is a proposed Queensland equal treatment benchbook under preparation which includes information on SRLs.

## **Training of staff**

### **Summary papers:**

Training designed to assist staff dealing with SRLs would appear to be either minimal or non-existent in the majority of courts and tribunals.

Of those who reported training initiatives for court staff in relation to SRLs:

- Three reported it was included in an induction program;
- Three reported ongoing training;
- Three were considering or developing training – in one case, including a ‘train the trainer’ package;
- One reported general training on customer service and conflict management, but none specifically on SRLs; and
- One reported that staff were able to attend relevant training as and when it was available.

Six courts or tribunals reported the development and use of (or development of) training booklets, checklists or guides on SRLs for staff.

### **Discussion:**

Several points emerged during discussion on this topic:

- The meeting endorsed the critical importance of staff in dealing with SRLs and the need for training and support.
- There is a need for constant reinforcement and support for staff who bear a substantial burden associated with providing assistance to SRLs.
- It was noted that it is not necessarily the same SRLs who are problems for judges who are the problems for registry staff;
- There was discussion about the type of training, e.g. information-sharing, debriefing, techniques to deal with stress.
- Who should do the training – in house, experts, departmental, outsourcing?
- It can be valuable to bring staff together (e.g. where you have a network of client service officers), for regular meetings to enable them to share their experience.
- It is important for court staff to understand the whole litigation process and how their role impacts on that process.

- Staff need feedback and training from other staff members and more senior staff.
- A mentoring system involving senior registry staff can be important.
- A nationally recognized course for court administrators to start in the next few years which will include training on dealing with SRLs.
- It was noted that in New Zealand there have been complaints to the Law Society that court staff are being too supportive of SRLs.

## **Court-based and tribunal-based pro bono schemes**

### **Summary papers:**

Over one third of the responses reported existing pro bono schemes. These included arrangements with local bar associations, law societies or law schools.

Several others reported other links with relevant legal service providers, including methods of informal referral. One court reported a pilot scheme and two others of having run unsuccessful pilot schemes. Only one response indicated there was any attempt to track the outcome of referrals.

One jurisdiction is running a pilot scheme in which SRLs are getting free advice on merits and the lawyer can give them a quote for a fee service.

### **Discussion:**

- It was noted that most existing schemes are fairly limited and there is little in the way of evaluation.

## **SELF-REPRESENTATION – IS IT ALWAYS A ‘PROBLEM’?**

While much of the discussion at the Forum focused, as it was designed to, on methods of addressing the difficulties that self-representation causes, it was clear in discussions that the view that self-representation is a problem is not a universal one.

Indeed, some tribunals and some jurisdictions within courts (e.g. small claims) operate on a basis which assumes certain advantages to self-representation and discourage (or bar) legal representations. ‘Doing away with lawyers’ is said to encourage quicker and more cost-effective solutions in these jurisdictions and to ensure that all parties operate on a ‘level playing field’.

Even in jurisdictions where legal representation is permitted, there may be good reasons to encourage unrepresented parties to appear. For example, Justice Stuart Morris, President of the Victorian Civil and Administrative Tribunal, noted VCAT’s Planning and Environment List has a strong emphasis on reducing legalism and encouraging participation from community groups and objectors.

While the Forum illustrated the values of co-operation, collaboration and sharing ‘best practice’ in relation to dealing with SRLs, this discussion also noted the danger of a ‘one size fits all’ approach in relation to dealing with SRLs. For many jurisdictions, where an increasing number of SRLs is a reality, the best approach may be to view the task of dealing efficiently and fairly with them as a challenge rather than a difficulty. That challenge may involve re-examining some of the basic assumptions as to whether or not court processes should always be designed on the assumption that parties will be legally represented.

## THEMES AND FUTURE DIRECTIONS

The following themes were identified in discussion:

### 1. Jurisdictional sensitivity

Propositions as to what is desirable when dealing with SRLs in courts or tribunals cannot be prescriptive or proscriptive; there is an overriding need for processes to be adapted to the particular jurisdiction, the nature of the case and the parties to the proceeding.

### 2. Data Collection

There is also a need for all courts and tribunals to keep an accurate profile on the involvement of SRLs in each of their jurisdictions. This requires collection of appropriate data. Such data should relate to matters such as the occasions on which SRLs appear, the consequences in time of their appearances, whether they are successful or not, the impact of their presence on costs orders, and any other relevant factors. The collection of data can involve a partnership between courts and tribunals on the one hand and Government on the other in order that the collection of data is appropriate not only for the strategic planning of the court or tribunal, but also for the purposes of public strategic planning.

### 3. Discretion to waive fees

There is a need to document and analyse the impact of fee increases and the factors taken into account by those with power to waive fees in the exercise of their discretion to do so.

### 4. SRL Management Plans

Courts and tribunals should continue to consider adopting a SRLs management plan (including provision for review of the plan from time to time and any provision for special case management). The purpose of the plan is to bring a longer-term strategic approach to all issues relating to SRLs arising in the court or tribunal.

### 5. Early intervention

The impact of early judicial intervention or the application of ADR/conference procedures when SRLs are involved should be examined.

### 6. Expert evidence

The role of SRLs in relation to expert evidence also needs examination and should be the subject of further study.

### 7. Cross-examination

The role of SRLs in relation to cross-examination needs consideration. This could include consideration of the suggestion that evidence in chief from each party should be called prior to any cross-examination when SRLs are involved. This should be the subject of further study.

### 8. Oral tradition

Consideration be given to varying the application of the oral tradition when SRLs participate in a proceeding by requiring greater reliance on written submissions.

## **9. Clearinghouse function**

The AIJA could establish a clearinghouse of information and of websites containing information concerning initiatives undertaken in relation to SRLs. These should include, inter alia, reference to cases, rules and bills before Parliament. This information could be kept on the AIJA website and regularly updated.

## **10. Querulous litigants**

In the case of querulous litigants, there is the suggestion that the guardianship jurisdiction should be used to obtain limited orders in respect of querulous litigants in a particular proceeding.

## **11. Summary decisions**

Consideration needs to be given to the proposal that a summary decision involving a SRL as a party should be given on points of claim and defence rather than on pleadings.

## **12. Advice/Guidance**

There is scope for further articulation of the distinction between the delivery of advice and the provision of guidance. This articulation would assist both those involved at the registry level and members of the public.

## **13. Jury trials**

The topic of jury trials and SRLs needs examination.

## **14. Security**

The sheriffs could consider the topic of security issues raised in relation to SRLs, including access to legal libraries at courts, and those arising when SRLs are present in court.

## **15. On-going liaison with SCAG**

The AIJA should ensure there is ongoing liaison with the Standing Committee of Attorneys General on the issues in relation to the way the justice system deals with unrepresented parties.

## **16. Unmeritorious claims**

Criteria for identifying unmeritorious claims could be further explored.

## **17. Court assistance**

Consideration should be given to the extent to which courts can themselves be the drivers of assistance schemes to SRLs, for example, by establishing self-help centres.

## **18. Websites**

Assessment needs to be made of websites and their usage and of the associated issue of public knowledge of their existence.

## **19. Education**

Matters could be identified which would assist the further development of judicial education and staff training programs of an ongoing nature. This could form part of

the examination of the role of SRLs in relation to the appellate jurisdiction as suggested by the recent Appellant Judges' Conference.

**20. Staff skills**

There needs to be an awareness of the development of accreditation of senior staff qualifications relevant to registry work in relation to SRLs. There is also a need for appropriate training for all staff.

**21. Consultation with SRLs**

There is the possibility of consultation with SRLs to obtain their perceptions of the process through which they have been.

**22. Recognition of Existing Experience**

Recognition needs to be given to the substantial existing experience of tribunals and lower courts in managing SRLs.

**23. Other institutions**

It is desirable that the AIJA and courts and tribunals remain in communication with established institutions, the work of which is relevant to SRLs. For example, SCAG, the Chief Justices Council, the Chief Magistrates Council and so on.