Litigants in Person in the Family Court of Australia

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A report to the Family Court of Australia

Research Report No. 20

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Contents and List of Appendixes

Page

APPENDIXES

Executive Summary

Reasons for self-representation

- Most litigants in person in the Family Court of Australia (FCA) do not have legal representation because they cannot afford it, although a significant minority said that they did not need, or did not want, to be represented by a lawyer.
- Many litigants in person who said they did not want or need a lawyer exhibited high levels of distrust of lawyers and the legal profession.
- Recent changes to legal aid have intensified what was a pre-existing trend towards self-representation. Just under half of those in our sample who had been refused legal aid were refused on grounds that are attributable to the 1997 change in legal aid guidelines.
- A significant minority in our sample had not applied for legal aid at all, because they had been advised that they were ineligible. The size of this group, which was comparable to those who had applied but been refused, is striking, and suggests that official legal aid refusal rates should not be taken as an accurate guide to the availability of legal aid in family law matters.

Characteristics of litigants in person in the FCA

- Litigants in person are more likely than the population as a whole to have limited formal education, limited income and assets and to have no paid employment.
- Litigants in person are disproportionately concentrated in children's matters as opposed to property matters.
- Slightly more than half of all litigants in person are men[1].
- There is a significant group who are dysfunctional 'serial' litigants.

Litigants in person's need for, and sources of, assistance and advice

- Litigants in person have a wide range of needs: for information (eg, about relevant support services, court procedures, the stages of the litigation process); for advice (eg, on form-filling, court etiquette, the preparation of documents, the formulation of legal argument, the rules of evidence); and support (both emotional and practical).
- While some litigants in person seek and obtain legal advice from a qualified lawyer, many seek advice from a range of less conventional sources, and some seek none at all.
- Many litigants in person do not know what resources are available, either for legal or procedural advice.

Effects of self representation

- Judicial officers[2] and registry staff experience high levels of stress and frustration when dealing with litigants in person, because of the litigants' lack of legal and procedural knowledge, and the difficulty of holding a fair balance between the represented and unrepresented parties.

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[1] See also B. Smith, *1998 Study of the Effects of legal aid cuts on the Family Court of Australia and its Litigants*, Research Report No.19 (FCA, 1999), p. 4 - 64% of litigants in person in that study were men.
[2] Throughout this Report, we use this term to include Judges, Judicial Registrars *and* Registrars exercising delegated judicial functions.

- The perceived tension between judicial impartiality and the need to help litigants in person meant that a number of Judges and Registrars thought that their role as presiding officer was compromised by the presence of a litigant in person.
- It is impossible to generalise about the effects of self-representation on litigants in person themselves – much depends on their confidence and abilities, the nature of the matter, the support services available locally, the style of the judicial officer hearing it and whether there are other lawyers participating. However, it is certain that there is a significant number who are intimidated by the experience, and who suffer objective injustices as a result. Others, however, may receive preferential treatment, and there may be instances of injustice to the represented party in consequence.
- In 59% of cases reported in the questionnaires completed by judges, judicial registrars and registrars, it was thought that the unrepresented party (or parties) was disadvantaged by the lack of legal representation; in 41% of cases it was thought that the other party was disadvantaged by the litigants in person's lack of legal representation; in only 34% of cases it was thought that the unrepresented party participated in the proceedings with competence; and in 73% of cases it was thought that judge, registrar or the Court would have been assisted if one or more of the parties had been represented.

Use of resources

- Although matters involving a litigant in person have shorter disposition times than those where parties are represented, there was almost unanimous agreement that *so long as they remain in the system* those matters are more demanding of the time of judicial officers and registry staff, and can be wasteful of the time of the other party and their legal advisers.

Responding to the needs of litigants in person

- The distinction between information and advice, a cornerstone of appellate judicial guidance in relation to litigants in person, is seen by many judicial officers and Court staff as logically and practically unworkable.
- The Full Court guidelines in *Johnson v Johnson* were often seen as involving a conflict, or at best being hard to fit into the realities of the court.
- There is currently an unevenness in the way judicial officers and registry staff respond to the needs of litigants in person, suggesting a need for the development of a more consistent policy.
- The support services available to litigants in person vary from one registry to another, suggesting a need for greater consistency and co-ordination in the provision of such services.
- Although some litigants in person do not trust lawyers, most saw duty solicitors as the source of assistance in greatest shortage, and were critical of the unsympathetic attitude shown by some registry staff to incorrectly completed paperwork.

Summary of recommendations

- There should be more and better timed information and assistance to litigants in person in running their own matters.
- Although the Family Court cannot be the chief provider of the support needed by litigants in person, the Court does have a role in coordinating those agencies who are able to offer such support. The initiative at the Dandenong Registry, in which litigants in person are offered a range of services on Court premises on the day of the hearing, may offer a model for other Registries to follow; while early intervention under the Integrated Client Services model being piloted at Paramatta offers further opportunity to assess an unrepresented party's need for support.
- The Court should consider developing a clearly articulated policy, applicable to all Court personnel and judicial officers, setting out clearly the Court's approach to litigants in person from filing to disposition, and practices and procedures for assisting them. In particular, any such policy must deal explicitly with the balance to be struck between the provision of information and assistance, especially by registry staff, and should provide guidance to judges on a wider range of ethical, procedural and other matters than those dealt within the existing *Johnson* guidelines. Any such policy should be reinforced by opportunities for discussion and reflection on best practice.
- There should be better coordination at a local level of information regarding support services (such as Court networkers, duty lawyer schemes or support programs sponsored by community legal centres), relevant to the needs of litigants in person.
- There should be better coordination and funding of those services themselves. This will require funding and active management by the federal government and legal aid bodies.
- The research findings support the argument that greater investment in legal aid funding will result in cost savings to the Court system. There is an identifiable link between the unavailability of legal aid and self-representation; and litigants in person consume more Court resources than represented parties. However, on the basis of this research, we cannot prove conclusively that the efficiency gains arising from greater investment in legal aid would outweigh the costs of providing the aid itself.

Introduction and Acknowledgments

This is a report of research conducted jointly by the Family Law Research Unit of the Faculty of Law at Griffith University and the Family Court of Australia (FCA). The researchers were Professor John Dewar (Faculty of Law, Griffith University), Barry Smith (FCA) and Cate Banks (Faculty of Law, Griffith University). The original version of Chapter 2 of this report was written by Christine Michael, formerly a Research Assistant in the Griffith Law Faculty.

In December 1998, the FCA released the findings of its research into the effects of legal aid cuts on the FCA and its litigants[1]. One of the findings of that research was that 35% of Family Court matters (including defended hearings, duty matters and directions hearings, but excluding appeals) involved at least one party who was unrepresented. That research also canvassed the views of judges and registrars, by questionnaire, as to the effects of the lack of representation on the unrepresented party, the other (represented) party, the Court itself and (where relevant) the subject child of the proceedings. In brief, the research indicated a significant degree of concern amongst judges and registrars as to the effects of self-representation, and in particular that it caused injustice, usually (though not exclusively) to the unrepresented party, and that it added considerably to the burdens on the Court.

In the light of this, the FCA decided to commission further, more detailed, and qualitative research into the causes and effects of the phenomenon of self-representation in the Family Court of Australia. This research is the result.

We have accumulated numerous debts of gratitude in the course of conducting this research. A number of people commented on the research design. We are especially grateful to Dr Kathryn Cronin and the staff at the Australian Law Reform Commission; Professor Rosemary Hunter, formerly of the Justice Research Centre (now Director of the Socio-Legal Research Centre, Griffith University); and Dr Sandy Caspi Sable of Monash University.

Finally, our thanks are due to the many people who generously assisted during the field work: judges, judicial registrars, registrars, practitioners, the litigants themselves and many staff in the five registries visited. Court officers deserve particular thanks. They have a key role in the smooth running of courtrooms, and were especially helpful.

[1] B. Smith, *1998 Study of the Effects of legal aid cuts on the Family Court of Australia and its Litigants*, Research Report No.19 (FCA, 1999)

Chapter 1
Litigants in person: Some conceptual issues

In this chapter, we attempt to clarify some conceptual and definitional issues that arise in connection with litigants in person in the FCA. This chapter seeks to clear the conceptual ground by way of background to the research questions forming the core of this project.

We begin by attempting a more precise definition and description of litigants in person.

1.1 Who is a litigant in person?

The answer to this question may seem obvious: a litigant in person is a litigant without a lawyer. Yet both elements of the term, 'litigant' and 'in person' (or 'without a lawyer'), bear closer examination.

Litigant - It may seem trite to say so, but a litigant in person is a *litigant* - that is, someone who is pursuing Court proceedings as a way of resolving their dispute. The reason for drawing attention to this obvious fact is that there is nothing inevitable about becoming a family law litigant: there are, after all, many other ways of resolving disputes without resort to litigation, especially in the Family Law arena. Some parties, especially those on legal aid, may have no choice but to pursue these alternatives. A litigant in person, by definition, has been unable to resolve matters by these means, or has chosen not to do so.

This is not intended to imply that litigation is an inappropriate way of resolving family disputes, or that there is something improper about litigants in person pursuing litigation. There are clearly some disputes that cannot be resolved by any other means, and some litigants in person (e.g. those who are respondents to applications) may have no choice in the matter. Yet it is possible, as we shall see, that matters involving litigants in person are matters requiring formal litigation precisely *because they are matters involving litigants in person* rather than because of the substance of the matter in dispute - in other words, that litigants in person are more resistant than represented parties to attempts at settlement[1]. This is a hypothesis we explore in this research.

It may help to sharpen our understanding of litigants in person if we contrast them with two other closely related categories of unrepresented parties. The first consists of those who achieve no resolution at all of issues arising from divorce or separation, but who have instead simply 'walked away' and abandoned legitimate claims against their partner[2]. Such people never become litigants at all (or remain litigants for only a very short space of time). This is a useful reminder that a litigant in person, again by definition, is someone who has made a conscious decision to pursue his or her claim in Court.

[1] There is some empirical support for this suggestion. For example, the ALRC found that matters in which parties are unrepresented were less likely to be resolved by negotiation than matters involving represented parties, and were more likely to be listed for hearing and resolved either by dismissal or by default: see ALRC, *Review of Federal Civil Justice System,* Discussion Paper No.62 at paras 11.41-2 and Tables 11.9 and 11.10.

[2] Abandonment of claims seems especially likely in relation to property, where legal aid is available in a very narrow range of cases: see N. Seaman, *Fair shares?: Barriers to equitable property settlements for women* (WLSN/NACLC, Canberra 1999), pp.33-4.

The second category consists of those who make applications for consent orders. Those in this category are litigants only in the very formal sense that they seek an order from a Court. Yet it is an order that can be made without a Court appearance and is unlikely to be contested, and therefore will not require a formal proceeding before a judicial officer. Indeed, this is related to a wider point that filing an application is a step that may often be taken by parties even though they have no real intention of ultimately taking the matter to Court. The Family Court is a jurisdiction characterised by very high rates of out-of-court settlement of applications made to it. Where parties are legally advised, it is likely that court applications are a standard part of the lawyers' armory in pursuing a strategy of 'litigotiation'[3] - that is, of seeking settlement while at the same time pursuing litigation in case negotiations fail[4]. Matters may be settled before any court appearance is necessary, even for an interim order or directions hearing. Parties who are not legally represented may also settle their disputes by this means – although, as we shall see, they are statistically less likely to do so than parties who are legally represented.

For the purposes of this study, the primary focus is on litigants who are seeking orders that require a formal procedure before a judicial officer, and who have actually made an appearance in the FCA, either for interim orders, directions hearings or full trials. The reason for this is that litigants in person appearing in Court (as opposed to those that file but never appear) are likely to present the Court with a more significant challenge than those who file but who either settle or abandon their application before any formal court appearance takes place. However, we have also tried to obtain some idea of effects of unrepresented parties (including those who file but never appear) on the Family Court *outside* the courtroom, especially on registry staff. Even so, the experiences, motivations and strategies of the non-appearing litigants in person must remain a matter of speculation, educated guesswork and inference from other related research findings.

in person - from the point of view of a Court, a litigant in person is someone who appears without legal representation. This need not mean, however, that the litigant in person has not had legal assistance or advice in preparing their matter at some stage, nor that they will not have had assistance in the Court itself (e.g., from a 'McKenzie friend'[5]). On the contrary, it is possible that a litigant in person will have received assistance from a variety of sources - community legal centres (CLCs), legal aid authorities, duty lawyer schemes (where they exist), support groups (such as Court Networkers) or from lawyers in private practice[6]. The common denominator is that,

[3] This term comes from M. Galanter, 'Worlds of deals: Using negotiation to teach about legal process' (1984) 34 *Journal of Legal Education* 268.

[4] This has been found to be an accurate characterisation of family lawyers' behaviour in the United Kingdom: see R. Ingleby, *Solicitors and Divorce* (OUP, 1992).

[5] A McKenzie friend is a legally unqualified person who may, with the permission of the Court, support and assist a litigant in Court. That assistance will usually not extend to speaking on the litigant's behalf, although there are rare instances where that permission has been granted.

[6] There is evidence to suggest that community legal centres in particular have experienced a recent and significant increase in the numbers of unrepresented parties seeking assistance with litigation: see J. Dewar, J. Giddings, S. Parker *The impact of changes in legal aid on criminal and family law practice in Queensland*, Report for the Family Law Practitioners Association/Queensland Law Society (1998), Ch.6. For a discussion of 'unbundling' of legal services by private practitioners, see F. Mosten, 'Unbundling of legal services and the family lawyer' (1994) 28 *Family Law Quarterly* 421; and for a discussion of 'men's groups' and the support services they offer, see M. Kaye and J. Tolmie, 'Fathers'

while that support may have been detailed and well informed, it does not extend to representation in a formal Court proceeding. Equally, it is possible that a party has been represented at some stage in proceedings, but not at others. This may be a deliberate strategy of cost containment, or a result of a 'capping' of legal aid funding. Thus, the term 'in person' may refer to a spectrum of possibilities, ranging from the well supported and well advised, through to those who have never consulted anyone.

What these perhaps rather obvious remarks are leading to is the observation that an individual becomes a litigant in person when they are engaged in litigation and are without legal representation when in Court. Individuals may move in and out of this category according to whether they initiate and remain engaged in litigation, and whether they remain without representation in Court. Furthermore, the factors influencing their decision to pursue litigation, and the paths taken in the course of getting to it (and during it) are likely to be varied, and may turn on factors such as personal confidence, competence in English, amount of spare time, motivation or personal contacts[7]. Even so, in spite of the fluidity of the category and the variables that go to make it up, it may be possible, by 'freezing' a group of litigants in person in time, to ask - who are they and why are they here? - and so arrive at a clearer picture than we have been able to form hitherto.

1.2 Self-representation in an adversarial system: Some theoretical issues

The Family Court of Australia, like other Australian Courts, applies an adversarial model of justice. The term 'refers to the common law system of conducting proceedings in which the parties, and not the judge, have the primary responsibility for defining the issues in dispute and for investigating and advancing the dispute'[8]. Under this model, the judge is a passive participant in the conduct of the proceedings and relies on the parties, through their legal representatives, to frame the issues in dispute clearly, to present the evidence relevant to that dispute and to advance relevant legal arguments. However, there are a number of respects in which the Family Court, through its emphasis on case-management, primary dispute resolution and the flexible application of rules of evidence, could be said to have departed to some extent from a strict adversarial model[9]. In addition, it has been suggested that the Family Court in practice operates a 'modified' adversarial system in matters involving litigants in person, under which the judge takes a more active role in these matters[10]. Nevertheless, the underlying premise of the system remains adversarial in nature.

From a theoretical point of view, it may be worth considering the arguments justifying legal representation in an adversarial system, so that we can assess the weight to attach to them in the present context. If we can establish that there are strong justifications for legal representation, then we can regard those who are not represented as being *prima facie* at risk of unfair treatment. In considering these arguments, we have assumed that parties are unrepresented as a matter of necessity

rights groups in Australia and their engagement with issues in family law' (1998) 12 *Australian Journal of Family Law* 19.

[7] As Rosemary Hunter has pointed out, 'there may be different reasons for a party appearing in person, and correspondingly different needs or issues that arise': 'Litigants in person in contested cases in the Family Court' (1998) 12 *Australian Journal of Family Law* 171 at 171.

[8] Australian Law Reform Commission, *Review of the Federal Civil Justice System, DP No.62* (1999), para. 2.25.

[9] *Ibid*, para. 2.28.

[10] Hunter, *op.cit.*, at pp.176-8.

rather than of choice[11]. The issues may be different when a party has deliberately chosen not to be represented [12].

There are three commonly made arguments for legal representation in an adversary system – those of *fairness*, of *legitimacy* and of *efficiency*. Each has to be understood in the context of an adversarial system - they may lose some or all of their force against a background of a different system.

According to the *fairness* argument, legal representation is justified because, in an adversarial system, the parties have to do most of the work in presenting and arguing their case. This requires specialist skill that the parties themselves generally do not possess. Legal representation is therefore required to ensure that the case is presented effectively; and if one party is represented, so the argument goes, then the other party should also be represented, in order to ensure equality of treatment or a level playing field. The fairness argument focuses on fairness *between the parties*.

The *legitimacy* argument is that equality is one of the principles that gives our system of liberal-democratic government its legitimacy – that is, a principle that persuades the population at large to accept the power and authority of government as proper[13]. Equal access to law is an important aspect of the equality of citizens in our system of government. It follows, therefore, that a denial of equal access to law undermines the legitimacy, or claims to popular acceptance, of our form of government. However, 'equal access to law' for these purposes means more than just equal access to the Courts. In view of the complexity of legal procedures and argument characteristic of the adversarial system, it is equated with 'access to legal services' - if equal access to law is to be a practical reality, it must mean equal access to legal services. On this view, then, there is thus a right to legal services, including legal representation in Court, because our system of government demands it. The legitimacy argument focuses on fairness *between citizens and the state*.

The *efficiency* argument is more instrumental. It points out that the effective presentation of a case is also one that is more efficient for the Court system as a whole; and that efficiency is a good thing if it means that the capacity of the system as a whole to provide speedy and effective dispute resolution is preserved[14]. The efficiency argument focuses on *the needs of the court 'system'*.

How strong are these arguments in the context of the Family Court?

Fairness: As far as the fairness argument is concerned, its force may be weakened by a number of factors:

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[11] We justify this assumption on the ground that most litigants in person do not have a lawyer because they cannot afford one, not because they do not want one. Our research supports this assumption: see Chapter 4. The concept of choice is, admittedly, a difficult one to apply in this context: see the discussion in Chapter 4.

[12] If a party has a genuine choice, but chooses to self-represent, then it could be argued that they have waived the right to complain about any ensuing unfairness (subject to the difficulties surrounding the concept of choice in this context). It has been suggested that those who are unrepresented by choice should have fewer allowances made for them: see Hunter, *op.cit.*, p.173.

[13] D. Luban, *Lawyers and justice: An ethical study* (Princeton UP, 1988), pp. 240-266.

[14] See, e.g., J. Masson and M. Oakley, *Out of hearing: Representing children in care proceedings* (Wiley/NSPCC, 1999), pp.21-6.

(a) First, it could be argued that having legal representation may not always be the guarantee of fairness, or of a level playing field, that it is assumed to be. The best example of this is where the lawyer is paid for by Legal Aid. In such a case, it could be argued that the assisted party is disadvantaged in many respects by comparison with a privately funded litigant party[15]. Indeed, it could be argued that the legal aid system as a whole has abandoned the 'level playing field' philosophy, in practice if not in theory[16]. This is not to suggest, of course, that we should no longer take the fairness argument seriously – merely that we should be aware that legal representation is not always a guarantee that fairness is being realised in practice. The fact that legal aid policy appears to have abandoned one of the premises underlying the adversarial system cannot be ignored in assessing the characteristics of that system, given the close connection between the two.

(b) Second, the fairness argument would seem to have little purchase where *both* parties are unrepresented, because both parties are arguably in the same boat. However, parties may vary greatly in their capacities as advocates in their own cause, which is one of the very discrepancies that legal representation is designed to iron out. This argument, then, may reinforce rather than undermine the fairness argument.

(c) Third, it could be argued that litigants are given plenty of opportunity to resolve their disputes by other means, and that if they pursue litigation by choice then there should be no obligation to ensure that they are represented. There are, however, two difficulties with this. The first is that a party may have no choice but to go to Court to defend applications brought by their former partner - for example, where the other party has refused all offers of settlement. Second, it could be argued that, subject to measures to deal with vexatious litigants and to rules and conventions concerning the award of costs of court proceedings, it would be improper and perhaps unlawful to penalise someone for choosing to go to Court by denying them legal representation on the grounds that they have failed to pursue alternatives [17].

(d) Finally, as we have seen, it has been suggested that the Family Court in practice operates a 'modified adversarial system' where a matter involves an unrepresented party. In the light of this, it could be argued that the fairness argument becomes weaker as more allowances are made for a party's lack of legal representation. However, this argument assumes that there has been a uniform response by the

[15] Dewar *et al*., *op.cit*., Ch.4.

[16] C. Caruana, *Hitting the ceiling: Springvale Legal Service Report on funding limits in legally aided Family Law matters* (1998, Springvale Legal Service); N. Seaman, *Fair shares? Barriers to equitable property settlements for women* (1999, WLSN/NACLC), especially Chs. 7 and 8; Dewar *et al*., 'The impact of changes to legal aid on the practice of family law' (1999) 13 *Australian Journal of Family Law* 33; Keynote address by the Attorney-General, *Legal Aid Forum - Towards 2010,* 'A Modern Legal Aid Framework - the Commonwealth Government's Strategy for Reform of Legal Aid Services in Australia', 21 April 1999.

[17] While there is no express constitutional right of access to the Courts, it could be argued that any attempt by Parliament to restrict access to the Courts would abrogate the exercise of judicial power under Chapter III of the Constitution and would thus be unconstitutional. The exercise of judicial power may also entail a litigant's right to a fair trial. However, this falls short of a constitutional guarantee of legal representation in *all* matters before a Court.

Family Court, and by individual judicial officers, to litigants in person. Our research suggests that this is not always the case, and that some judicial officers go further than others in adapting their practices to an unrepresented party.

On balance, then, it seems that the fairness argument for representation remains intact, at least so long as the premise underlying, or the practice of, the Family Court is at bottom an adversarial one. We can say, therefore, that those who are unrepresented are, *prima facie*, at risk of unfairness (at least where the lack of representation is not a matter of choice). The question that then arises is whether this theoretical unfairness translates into practical disadvantage.

Legitimacy: The legitimacy argument suffers from two potential weaknesses.

(a) It equates access to law with access to legal services, on the basis that effective access to the legal system requires professional assistance. Yet this assumption may not hold true in relation to the Family Court, in view of the simplification of its procedures, and the evidence that its judges (or some of them) operate a 'modified' adversarial system in matters involving litigants in person so as to try to avoid the unrepresented party suffering disadvantage. Assuming that 'simplification' has made the Court's procedures easier for lay people to understand, and assuming also that judges are indeed successful in seeking to prevent disadvantage, this may weaken the legitimation argument for legal representation, because access to lawyers may no longer be necessary for effective access to law. There is a clear parallel with the arguments made under (d) above in relation to the fairness argument. Yet these assumptions may turn out to be wildly optimistic. In the end, these are empirical questions that it is one of the purposes of this research to investigate. Once again, we come up against the dilemma facing the Family Court: while it has, in effect, been seeking to make good the promise of equality implicit in liberal democracy by means other than relying on lawyers, it may in doing so have weakened the case for proper funding of legal representation for litigants.

(b) By elevating access to legal services to the status of a 'right', the legitimacy argument betrays a strange sense of priorities. From the point of view of distributing limited state resources, paying for a lawyer may rank lower as a priority in most people's minds than paying for decent housing, education or health; yet claiming legal services as a 'right' suggests that it is on a par with those other rights or claims. Much may depend on what 'legal services' are taken to mean for these purposes. All will agree that state funding for individual lawyers for all litigants is hopelessly ambitious, but may also agree that other models of service delivery could be justified as a priority of state expenditure. This is slightly outside the scope of the present discussion, although we will return later to consider what sort of legal services the legitimacy argument may demand.

One way of thinking about the legitimacy argument is to avoid assuming that equality of access to law necessarily entails equal access to lawyers, and think instead in terms of ensuring a equal right to all litigants to 'a meaningful opportunity to be heard'[18].

[18] See J. Goldschmidt, 'How are Courts handling pro se litigants?' (1998) 82 *Judicature* 13 at p.22. This assumes, of course, that the party in question has something meaningful to *say*. The case for assuring a party a 'meaningful right to be heard' presupposes that they have a legitimate claim or

The precise content of that right will vary from case to case. While some litigants will certainly require someone to speak for them if they are to have a meaningful hearing (e.g., those who cannot speak English), others may not. The case studies in Chapter 9 of this Report show just how varied the needs of litigants in person can be, and how, in the light of that, there may not be a uniform method of securing a right to a meaningful hearing.

Efficiency: The efficiency argument appears to have considerable weight, at any rate in a system where resources are not limitless (such as a court system). It certainly seems irrational that a court system should tie up resources in dealing with a particular type of litigant, where one effect of that is likely to be to impair the effectiveness of the system as a whole to deal with others, or to vindicate the claims of other litigants. Of course, there is a possibility that policies, such as changes to legal aid, which may have the effect of increasing numbers of litigants in person, may themselves have been stimulated by efficiency goals. The virtue of the efficiency argument is that it requires a holistic view of the system, to ensure that efficiency gains in one part of the system do not reappear as costs elsewhere. The problem though is that, like many instrumental arguments, it requires evidence to support it (e.g., that the costs to the Court of dealing with litigants in person are greater than the savings generated by the relevant changes in legal aid). To date, that evidence has not been available.

Our preliminary conclusion, then, is that the arguments for legal representation remain strong, so that we can say that someone who is unrepresented is at risk of suffering unfairness. However, we need to enter two qualifications to this provisional conclusion. The first is that a party who has made a conscious and deliberate choice to do without representation may also waive their right to complain of any consequent unfairness[19]. The arguments that have been made here are ones in support of legal representation for those who want it and who have a meritorious claim, not of a system that should be accessible by all lay people on their own terms[20]. The second is that 'legal representation' should be understood as a variable benchmark, of assuring parties who have legitimate interests at stake to a meaningful opportunity to be heard. Understood in that sense, it need not mean only providing litigants with the services of private practitioners at public expense, but could embrace a much wider range of service provision. We explore later in this report what those services might include.

1.3 Factors affecting levels of self-representation

There is a number of factors that could be responsible for an individual's decision to represent themselves in Family Court proceedings:

- difficulties in obtaining legal aid either at all, or for representation in Court proceedings;
- the cost of legal services: these may be such that a litigant is unable to afford them at all, or that an individual may be encouraged to make a cost/benefit calculation that the costs incurred in employing a legal representative outweigh the risks of pursuing litigation without a lawyer;
- disenchantment with lawyers;

interest to defend; it does not extend, for example, to assisting a party whose case has no merit in using the court process as a way of harassing a former partner.

[19] See Chapter 4 for a discussion of the difficulties surrounding the concept of choice.

[20] This is not to suggest that such an argument could not be made.

- related to the above, a view that family law is not 'real law' and therefore the skills of a lawyer are not really necessary;
- a wish to use the Court as a forum to air grievances, to seek revenge or as an instrument of harassment;
- the growth in other sources of advice or assistance, such as Community Legal Centres, support groups or Legal Aid bodies; or
- the simplification of Court procedures.

These possible explanations are consistent with a gloomy view (that many litigants or potential litigants are being denied access to legal services that fairness demands they should have) and with a positive view (that courts and legal services are becoming more accessible, comprehensible and user-friendly, so that self-representation is a more feasible alternative[21]). One of the purposes of this research is to find out more about the reasons for, or causes of, self-representation, and to assess whether the gloomy or positive view is the more appropriate one in light of the evidence.

In the next chapter, we review the existing literature, which includes a discussion of the possible causes of the increase in litigants in person.

1.4 Effects of self-representation

Finally, it is possible to speculate as to the possible effects of litigants in person on themselves and others. It is possible to hypothesise the following groups of effects:

- **on the litigant in person** - an obvious hypothesis is that the litigant in person will be disadvantaged by their lack of representation. Yet working out what 'dis-advantaged' might mean in this context is not straightforward. One definition would be that a litigant in person is disadvantaged wherever they obtain a less favourable result than they would have done if they had been represented. The problem for research is verifying that disadvantage because we shall never know what the outcome would have been if there had been representation. The next best substitute is to rely on professional assessments of judges, registrars and lawyers of whether disadvantage accrued, but even here there are difficulties in framing the questions properly. We address these methodological issues further in Chapter 3 where we discuss the research questions investigated in this study. It is also possible that there are advantages to being unrepresented (e.g., that the other party is disadvantaged - see below - or that there are intangible rewards and satisfaction to be had from running one's own case).

- **on the represented party** - another possibility is that the presence of a litigant in person in proceedings has a disadvantageous effect on the other party (assuming that party to be represented). This could arise from the judge leaning too far in the litigant in person's favour, or from the increased workload being cast on to the represented party's lawyer. It is also possible that the represented party will be advantaged.

[21] See also C. Greenhouse, 'Nature is to culture as praying is to suing: Legal pluralism in an American suburb' (1982) 20 *Journal of Legal Pluralism* 17 for the argument that increased participation in the legal system may be a sign of public acceptance of the social system and the increasing integration of society.

- **on the Court** - there may be greater use of resources by those who appear unrepresented than by those who have lawyers. The question of what 'resources' might mean for this purpose is discussed further in Chapter 3. It is equally possible that litigants in person use fewer Court resources because they abandon claims at an earlier stage than represented parties would.

Chapter 2
Themes from existing literature, research and practice

2.1 Introduction

Concern in recent years over perceived increases in the number of litigants in person in the court system and the burdens they place on the justice system have led to a number of reports in Australia and overseas jurisdictions.

Some of the most important overseas research on litigants in person includes Lord Woolf's report on access to justice in the United Kingdom[1] and Lord Justice Otton's report on litigants in person in the Royal Courts of Justice in London[2]. Although Lord Woolf's report recommends more general reforms to the civil justice system, both reports contain a series of recommendations and initiatives for providing litigants in person with greater access to the justice system.

In the United States a significant amount of research on *pro se* litigants (the US term for litigants in person) has been undertaken. The American Judicature Society has published a report and guidebook for judges and court managers dealing with litigants in person[3] and some US courts and bar associations have formed task forces or committees consisting of representatives from the bench and bar to tackle the issue[4]. There have also been numerous commentaries in US law reviews, judicial journals, and bar journals addressing *pro se* related legal and ethical issues which face judges and court staff.

In Canada, the issue of litigants in person has been addressed in the context of a comprehensive review of the civil justice system. The Ontario Civil Justice Review and the Canadian Bar Association's National Task Force on Systems of Civil Justice have recommended a number of initiatives to assist litigants in person, including simplifying court procedures and improving the provision of information and advice to litigants in person[5].

Until recently there had been comparatively little research into litigants in person in Australia. The Australian Law Reform Commission (ALRC), as part of its review of the adversarial system of litigation, has examined the issue of litigants in person[6] and the Australian Institute of Judicial Administration (AIJA) has issued a series of discussion papers identifying issues relevant to litigants in person and recommending

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[1] Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, (London, HMSO, 1995) Chapter 17 – Litigants in Person

[2] Lord Justice Otton, *Litigants in Person in the Royal Courts of Justice, London*, Interim Report of the Working Party established under the Right Honourable Lord Justice Otton (London, Judges Council, 1995)

[3] Goldschmidt, J; Mahoney, B; Solomon, H; Green, J; 'Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers', American Judicature Society, Chicago, 1998

[4] For example, the *Minnesota State Bar Association Pro Se Task Force*, established by the MSBA Executive Committee in 1996

[5] Canadian Bar Association 'National Task Force on Systems of Civil Justice Report' The Canadian Bar Association 1996; Ontario Civil Justice Review "Civil justice review: First report" 1995

[6] ALRC, *The Unrepresented Party* (ALRC Background Paper 4, December 1996); *Issues Paper 22 Review of the Adversarial System of Litigation: Rethinking Family Law Proceedings* (AGPS, November 1997, Chapter 11 – The Litigant in Person); *Review of the Federal Civil Justice System: Discussion Paper No.62* (AGPS, 1999), especially Chapter 11 at paras.11.160-11.173.

various measures to assist them[7]. Research conducted for the Commonwealth by the Justice Research Centre into legally aided family law matters also casts some light on litigants in person[8]. Other significant contributions to the Australian literature concerning litigants in person have come from the Family Court of Australia, which recently conducted a study of the effects of legal aid cuts on the Family Court and its litigants[9], and from the Law Reform Commission of Western Australia[10].

The Administrative Appeals Tribunal (AAT) and the Federal Court of Australia together with the Centre for Court Policy and Administration at the University of Wollongong and the Justice Research Centre have recently conducted a study aimed at evaluating the impact of litigants in person on the management of their business[11]. The aims of the project were to investigate whether there has been an increase in the numbers of litigants in person in the Federal Court and AAT, to assess litigants in person's perceptions of the court system and to propose policy directions to improve litigants in person's access to justice.

2.2 Issues identified in the literature

Several common themes and issues emerge from both the Australian and overseas literature on litigants in person:

Reasons for increase in number of litigants in person

Restrictions on legal aid, combined with prevailing economic difficulties, are the most commonly cited factors contributing to the increase in the number of litigants in person[12]. Increases in fees for private legal services and escalating court fees in some jurisdictions have also been blamed for the rising number of litigants in person[13].

The ALRC has suggested that the increasing volume and complexity of legislation may be contributing to an increase in the number of litigants in person by forcing parties into court more frequently in order to clarify their rights and duties under the law and to review discretions exercised by administrative agencies[14].

The Commission has also noted that a correlation exists between self-representation and the extent to which people are able to obtain legal assistance through *pro bono* schemes, access to speculative and contingency fee arrangements and other forms of legal and litigation assistance[15].

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[7] AIJA, "The Litigant in Person: Discussion Papers", AIJA, 1993

[8] R. Hunter, *Family Law Case Profiles* (Justice Research Centre, 1999)

[9] B. Smith, *1998 Study of the Effects of legal aid cuts on the Family Court of Australia and its Litigants*, Research Report No.19 (FCA, 1999)

[10] Law Reform Commission of Western Australia, *Consultation Paper: Litigants in person, unreasonable and vexatious litigants* (March 1999)

[11] Gamble, H.; Mohr, R: 'Litigants in Person in the Federal Courts of Australia and the Administrative Appeals Tribunal: A Research Note' *Paper presented to the 16th AIJA Annual Conference, Melbourne, 4-6 September 1998*

[12] AIJA, *op.cit.*, at 8; ALRC, *Review of the Federal Civil Justice System: Discussion Paper No.62*, at para.11.163.

[13] Brown, Justice S. 'Litigants rules – whose interests do they serve?' *Paper presented for the 8th National Family Law Conference, Hobart, 24-28 October, 1998* at 1

[14] ALRC, 'The Unrepresented Party' at 10

[15] ALRC, 'The Unrepresented Party' at 10

Extent of the phenomenon

There is a perception expressed throughout the literature that the number of litigants in person is increasing in the court system. There is, however, little available information about the precise numbers of litigants in person and how their numbers have varied over time. Many commentators have noted this lack of available statistics and have highlighted the need to quantify and monitor litigants in person numbers in future[16].

Commentators have suggested that one of the main reasons for the difficulty in obtaining precise information is that litigants in person are not a constant factor throughout the system. It appears that although a large number of actions are begun by litigants in person, very few of these proceed far and that those who do proceed usually persist to a decision and go on to appeal (if the litigant in person is unsuccessful)[17].

The ALRC's survey of Family Court files found that 41% of matters involved at least one party who was unrepresented or partially represented. The ALRC also noted, however, that there was no evidence to suggest that this represented an increase in the numbers of litigants in person[18]. The Family Court's survey puts the figure at 35%[19].

Reasons for self-representation

Some reasons for self-representation commonly cited in the literature include:

1. Financial necessity

It appears that in the majority of cases litigants in person are forced to represent themselves because they cannot afford the high costs of legal representation and do not qualify for legal aid or have exhausted legal aid[20].

2. Choice

Some choose to represent themselves because they:

- distrust lawyers or believe they can fight their own case more effectively;
- believe that a legal aid lawyer could not satisfactorily represent them;
- have blind faith in their own cause and believe that the courts will do what is right;
- feel representation is not necessary because the procedure is relatively simple;
- do not want to spend money on legal representation;
- feel they have a personal stake in the outcome that a lawyer will not; or
- believe self-representation is a useful trial strategy, i.e. to invoke the sympathy or to make themselves appear more credible[21].

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[16] Lord Woolf at 1

[17] JUSTICE 'Litigants in Person' *Committee of the British Section of the International Commission of Jurists, Stevens & Sons, London, 1971* at 3-4; Gamble and Mohr, *op.cit*., at p.3.

[18] ALRC, *Review of the Federal Civil Justice System* at para. 11.160. The Justice Research Centre's analysis of the same files suggests a slightly lower figure: see R. Hunter, *Family Law Case Profiles* at paras. 354-6.

[19] B. Smith, *1998 Study of the Effects of legal aid cuts on the Family Court of Australia and its Litigants*, Research Report No.19 (FCA, 1999)

[20] The ALRC estimate that over half of all litigants in person in the Family Court are without representation because of lack of funds or refusal of legal aid: see *Review of the Federal Civil Justice System: Discussion Paper No.62*, at para.11.163.

[21] JUSTICE at 5-8

3. No willing legal representative

Another reason is that no lawyer is willing to represent them (e.g. because they have a mental illness or a personality disorder)[22].

One commentator has noted that others are unable to participate in the court system at all because they lack advice or assistance and therefore do not know of their rights or cannot enforce them[23]. This echoes the point made in Chapter 1 that there may be many parties without representation who never become 'litigants' at all.

Needs of litigants in person

In the United Kingdom, Lord Woolf has identified some of the key needs of litigants in person as:

- a system which is understandable and responsive to their needs;
- information and advice on different ways of resolving problems;
- information and advice on how to make a claim and how to respond to a claim, as a defendant/respondent; and
- advice and assistance on preparing and presenting their case[24].

Lord Woolf also identifies a need for education about the legal system in a broader sense so that the public are informed about their rights and obligations.

In Australia, the ALRC has suggested that 'the major problem faced by unrepresented parties, and by the [Family] Court in trying to assist them, is a difficulty in identifying the issues in dispute and a lack of access to relevant, independent information'[25]. The ALRC has also suggested that, in the context of family law, litigants in person may also need counselling support in difficult cases[26]. The Commission has noted that the information and assistance needed by litigants in person should be considered in both the pre-trial and trial or hearing context as some litigants may be represented in preliminary processes but not at the hearing, and *vice versa*[27].

The areas where litigants in person may need help at a hearing have been identified as:

- understanding the procedure followed during the hearing;
- presenting and closing their case;
- testing by cross-examination the evidence of an opponent; and
- preparing for and presenting an appeal[28].

The ALRC has highlighted the need for further data so that the needs of litigants in person can be properly assessed and addressed. It has also suggested that the needs of litigants in person and challenges they present the court will depend on the complexity

[22] Mullane, Justice G. 'In Person Litigants' *Family Court of Australia, Queenscliff Conference, April, 1998* at 1
[23] Lord Woolf at 1
[24] Lord Woolf at 2
[25] ALRC, *Review of the Federal Civil Justice System: Discussion Paper No.62*, at para.11.169.
[26] ALRC 'Rethinking Family Law Proceedings' at 2
[27] ALRC 'The Unrepresented Party' at 13
[28] Lord Woolf at 120

of the matter concerned so that there is a need for information on the types of matters in which litigants in person appear[29].

Disadvantages of self-representation

Some of the disadvantages associated with self-representation were identified by a committee of the British Section of the International Commission of Jurists. The committee, which was formed for the purpose of investigating the issue of litigants in person, found the main disadvantages to arise from:

- complexity of the substantive law;
- complexity of pre-trial practice and procedure, including: preparing and presenting the required notices and documents for a case in the required form and with the correct number of copies, and drafting pleadings;
- ignorance of trial procedure and tactics e.g. calling witnesses, production of documents, rules of evidence, and the manner in which witnesses may be questioned;
- hostility from the court;
- vulnerability to unfair or oppressive tactics by opposing counsel; and
- risk of financial ruin if the case was lost because of the high opportunity costs associated with self-representation[30].

Other disadvantages identified in the literature include[31]:

- inability of litigants in person to identify issues in dispute;
- litigants in person's poor understanding of the purposes of litigation, i.e. failure to view litigation as an adjunct to settlement;
- inability of litigants in person to assess the merits of their claim; and
- the difficulties facing litigants in person in family law matters when they have to cross-examine, or be cross-examined by, a former partner.

The AIJA has noted that another disadvantage associated with self-representation is that the costs recoverable by a successful litigant in person are limited. Litigants in person are not entitled to costs for the time spent conducting and preparing their case, only for out-of-pocket expenses. This also means that there is less incentive for the other party to settle because if the opposing party loses they only have to pay the litigant in person's out-of-pocket expenses[32].

Advantages of self-representation

The committee of the International Commission of Jurists has suggested that some possible advantages of self-representation might be:

- financial/cost savings;
- control over conduct of case;
- knowledge of own case;
- freedom from anxiety and pressure exerted by legal representative; and
- indulgence from the court.

However, the Committee goes on to point out that many of the perceived advantages of self-representation are in fact illusory. For example, the litigant in person may save

[29] ALRC 'The Unrepresented Party' at 11
[30] JUSTICE at 29-41
[31] Gamble, H. & Mohr, R. at 8; Dewar *et al*., *The impact of changes to legal aid*, *op.cit*., Chapter 6.
[32] AIJA at 7. The relevant rules are different if the litigant in person is also a solicitor.

the expense of paying his or her own legal costs; however, if the litigant in person loses then he or she is likely to bear the cost of the other side (and the final costs are likely to be higher than if the litigant in person had been represented)[33].

Disadvantage to the represented party

Many commentators have highlighted the disadvantages occasioned to a represented party when opposing a litigant in person. Those disadvantages are seen as follows:

- litigants in person are granted indulgence in relation to the conduct of their case which results in a corresponding disadvantage to the represented party;
- litigants in person are more inclined to bring frivolous or untenable applications before the court which result in expense and inconvenience to the represented party;
- assistance to litigants in person by the judge (to ensure fair trial) and represented party's own counsel (to progress the case) creates anxiety and resentment for the represented party; and
- costs orders are usually on a party-party rather than solicitor-client basis and the represented party is therefore out of pocket[34].

Impact on the justice system

Many commentators have drawn attention to the implications of litigants in person for the efficient functioning of the justice system. Some of the common concerns expressed in the literature relate to:

Cost and delay

The AIJA has expressed concern that without legal representation on both sides the real issues for determination in a case may not emerge for some time. This can impact adversely on the costs of litigation and on the time taken to complete proceedings. There is also a risk of a miscarriage of justice occurring because the full merits of the case may not have been put before the court[35].

The cost and delay associated with self-representation are seen to arise from:

- more time spent in directions hearings, motions, hearings and requests for adjournments;
- costs incurred in responding to the 'broad brush' approach that may be relied on by litigants in person;
- a reduction in trial certainty and inability to advise properly on probable costs;
- increased costs incurred as a result of poor definition and clarification of issues[36];
- increased demands on court administrators and court staff, including registry and library resources; and
- adverse impact of litigants in person on the success of conciliation attempts because litigants in person are less likely to cooperate in settlement negotiations and feel disadvantaged by the process[37].

[33] JUSTICE at 8-10
[34] JUSTICE at 14; ALRC, *Review of Federal Civil Justice*, at para.11.170.
[35] AIJA at 5
[36] ALRC 'Rethinking Family Law Proceedings' at 3
[37] Brown, Justice S. 'Litigation Rules – whose interests do they serve?' *Paper presented for the 8th National Family Law Conference, Hobart, October, 1998* at 1

However, it has also been suggested that the presence of an unrepresented respondent may *reduce* case disposition time; and that a high proportion of such cases result in a default judgment or in undefended orders[38]. This has led to the suggestion that a more accurate picture is one in which 'unrepresented respondents [are] unwilling or unable to contest their cases, and consequently spending relatively little time in the Family Court system, rather than, as might be assumed, dragging out their cases and consuming a disproportionate amount of the court's resources'[39].

Development of the law

The ALRC has suggested that an increase in the numbers of litigants in person in superior courts can have an adverse impact upon the development of the law[40]. Without the benefit of submissions by competent counsel the court's ability to determine important issues of principle may be compromised.

Adversarial culture

Litigants in person pose problems for the court because the adversarial system of litigation is premised on two equally matched sides able to present their cases with skill and in full to a detached and impartial adjudicator[41]. The availability of comparable skills on both sides is essential for the fair and efficient working of the system.

While the role of the judge as an impartial arbiter between contesting parties limits the scope of judicial intervention to assist the litigant in person, the judge also has an overall responsibility to ensure that the proceedings are fair. Thus, a conflict arises between the need to maintain judicial impartiality and the need to ensure a litigant in person's procedural rights are observed.

Lawyers are also placed in an unenviable position when confronted with an unrepresented opponent. In such a situation, conflicts are likely to arise between the lawyer's duty to protect the interests of his or her own client and the lawyer's overriding duty to the court. Professional ethics dictate that a legal representative has a duty to give some assistance to the litigant in person, or at least not take unfair advantage of an opponent's inexperience[42].

Role of the judge

Much of the US literature regarding *pro se* litigation focuses on the issue of the proper role of the judge in proceedings in which one of the parties appears unrepresented.

US commentators have questioned the extent to which judges should afford *pro se* litigants procedural leniency. They highlight the concern expressed by judges that if they extend too much procedural leniency to litigants in person they may be perceived as being an advocate for that litigant. At the other end of the scale, some US judges have taken a more hardline approach and have held litigants in person to the same procedural standards as a represented party[43].

[38] R. Hunter, *Family Law Case Profiles*, para. 357.
[39] *Op.cit*.
[40] ALRC 'Rethinking Family Law Proceedings' at 4
[41] ALRC 'The Unrepresented Party' at 19
[42] JUSTICE at 10-14
[43] Rubin, H.M. 'The Civil Pro Se Litigant v. The Legal System' *(1989) 20 Loyola University Law Journal 999*; Burrows, J.M. 'Procedural Due Process Rights of Pro Se Civil Litigants' *(1988) 5 U Chi L Rev 659-683*; and B. Wright 'The Formal Inquiry Approach' (1993) 76 *Marquette Law Review* 206.

Other commentators have questioned whether the procedural treatment currently given the *pro se* civil litigant conforms with due process requirements or whether more leniency is required to preserve the litigant's right to a meaningful opportunity to be heard.

One US commentator asserts that due process requires not only that the courts give the *pro se* civil litigant a liberal construction of pleadings but that the court should go on to determine what further process is due, based on the individual facts and circumstances of the case[44].

The problems faced by US judges in achieving a proper balance between the constitutional right to representation and the right to proceed *pro se* have also been addressed in the literature. Much of the discussion focuses on the issue of the appropriate standards to be used in evaluating whether the litigant in person has made a knowing and intelligent waiver of counsel.

One commentator has suggested that judges should be required to conduct formal inquiries with defendants before permitting them to exercise their right of self-representation. In the course of such an inquiry defendants would be explicitly warned of the dangers and disadvantages of proceeding *pro se*[45].

In Australia, Justice Ipp has noted an increase in the incidence of judicial intervention in the trial process and suggests that one factor contributing to this phenomenon is the increasing prevalence of litigants in person. He asserts that appropriate judicial intervention requires skills not previously exercised and that there may be a need for additional training for judges and court staff and a modification of the role of the judge[46].

2.3 Recommendations for Reform

Recommendations for reform are frequently made in the literature on litigants in person. These include the following:

Information resources and technology

Information on court processes and procedures should be made more readily available and understandable.

Some specific recommendations include:

- information sessions, public seminars, video and audio tapes, tapes and brochures in community and indigenous languages, and the provision of kits, court forms, precedents and other explanatory material;
- provision of information on alternatives to litigation and sources of professional advice;
- computerised information kiosks in courthouses, public libraries, and community centres to provide access to basic legal system information and court forms; and

[44] Bradlow, J.M. 'Procedural Due Process Rights of Pro Se Civil Litigants' *(1988) 5 U Chi L Rev 659-683*
[45] B. Wright, 'The Formal Inquiry Approach' (1993) 76 *Marquette Law Review* 785
[46] Justice D.A. Ipp 'Judicial Intervention in the Trial Process' (1992) 69 *Australian Law Journal* at 384

- exploration of the use of the Internet and other computer technology (e.g. software modules) to facilitate the public's access to: i) the court system and ii) legal representation options.

Some of these recommendations have already been implemented in various jurisdictions, including the Family Court of Australia[47].

Court-based assistance

One of Lord Woolf's principal recommendations was that courts should take a more pro-active role in relation to litigants in person, both in giving information about sources of professional advice and other outside help, and in themselves providing direct assistance[48]. He has recommended the establishment of court-based or duty advice and an assistance scheme funded by legal aid.

In the United Kingdom a Citizens Advice Bureau has been established to provide basic advice to litigants in person and Lord Justice Otton has recommended that the Family Division of the Royal Courts of Justice in London be given its own specialised Citizens Advice Bureau.

Some other recommendations for court-based assistance include:

- Court staff advising litigants on the outcomes available in relation to a particular claim, the procedure for pursuing those outcomes and the precise manner in which court forms should be completed; and
- Court staff specifically employed to assist litigants in person to prepare court documents and to make courtroom presentations.

Simplification of court rules and procedures

Lord Woolf has noted that too often the litigant in person is regarded as a problem for the court system, whereas the real problem is that the court system and its procedures are inaccessible and incomprehensible to ordinary people. One of the aims of Lord Woolf's Inquiry was to simplify the rules and procedures of civil litigation so that they will be more easily understood and followed by litigants as well as their advisers[49].

Judiciary initiatives

The Minnesota State Bar Association has made a number of innovative recommendations directed at the judiciary, including:

- establishing a special litigants in person day or a block of time on the court's calendar to hear exclusively matters involving litigants in person;
- creating uniform simplified courtroom procedures, practices, and policies for all litigants;
- examining and recommending changes to existing laws that hinder the courts in the efficient and effective administration of justice;

[47] ALRC 'Rethinking Family Law Proceedings' at 2. See also below.
[48] Lord Woolf at 1
[49] Lord Woolf at 119

- establishing a tracking system to determine the number of litigants in person going through the court system; and
- conducting a broader-scope survey of self-represented litigants in order to obtain a more detailed profile.

Procedural reform

Lord Woolf has proposed a case management regime including a 'fast track' for straightforward cases with limited procedures. He has also recommended that judges should have the power to direct a preliminary hearing for the purpose of assisting litigants in person to prepare their case[50].

One commentator has suggested that a possible approach the courts might take in dealing with litigants in person is to limit the time for oral argument. If a litigant in person appears to be taking excessive time, a time limit should then be imposed, in the same way as in a corresponding situation a time limit can be imposed on excessively tedious barristers or solicitors[51].

Bar/lawyer initiatives

The Minnesota State Bar Association has also made extensive recommendations as to bar/lawyer initiatives which might be implemented:

- launch a public awareness initiative to educate the public and litigants in person about i) their rights and obligations in legal and courtroom proceedings; ii) the complexity of legal and courtroom proceedings; iii) the value lawyers bring to the legal process; and iv) alternative models of legal representation and services;
- establish a 'moderate-income attorney panel' consisting of new, senior, under-utilised, and other attorneys willing to provide full and select legal services ('unbundling') to self-represented litigants on a reduced fee or sliding income scale basis;
- promote full legal representation to self-represented litigants, and in addition promote alternative models of legal services such as alternative dispute resolution (ADR), the moderate-income attorney panel, select legal services, sliding fee scales, *pro bono*, 'low bono', etc;
- work with continuing legal education (CLE) providers to develop CLE programs that explore and address issues related to assisting litigants in person and the provision of alternative models of legal representation including select legal services;
- develop an 'alternative legal services directory' listing legal services organisations and containing a listing of attorneys willing to i) provide services to self-represented litigants, including select legal services and ADR, and/or ii) serve on a moderate-income attorney panel;
- encourage attorneys to contribute to the reduction in the numbers of litigants in person by i) providing 50 hours of direct *pro bono* services to those who clearly cannot afford legal services, and ii) making direct financial contributions to legal services organisations pursuant to rules of professional conduct; and

[50] Lord Woolf at 33

[51] Olsson, Justice L.T. 'Civil Caseflow Management in the Supreme Court of SA' *(1993) 3 Journal of Judicial Administration 3* at 4

- explore more fully the legal, ethical, and professional liability issues surrounding the provision of select legal services[52].

Alternative sources of representation
Some commentators have suggested using alternative sources of representation such as:

- extending the use of specialist paralegals or other non-lawyer representatives;
- 'unbundling' legal services, i.e. where work is taken apart and shared between the adviser and litigant; and
- permitting litigants in person more readily to receive 'quiet assistance' from a 'McKenzie friend'.

The ALRC has noted that encouraging the use of specialist paralegals or other non-lawyer representatives raises questions about the ethical and professional standards that should apply to them[53].

Referral directory and better co-ordination of services
The ALRC, in its *Review of Federal Civil Justice*, has proposed that a comprehensive referral directory for legal and non-legal advice be created and made available to advisers and the public in printed form and over the Internet. Such a directory would include information about sources of legal advice, dispute resolution services and related referral agencies. It also proposed better co-ordination and exchange of information between legal service providers[54].

Guidelines and training
It has been suggested that Courts draw up a Litigants in Person Plan, dealing with every stage in the Court process from filing to enforcement[55]. Similarly, it has been suggested that guidelines or protocols be developed for judicial officers and registry staff, backed up by a training program[56].

2.4 Developments in the Family Court of Australia relevant to litigants in person
The Family Court has already adopted many practices or procedures that directly or indirectly address the needs of the unrepresented party. These include:

- simplification of procedures[57];
- information sessions;
- the publication of self-help kits;
- the publication of 'The Family Court Book', a plain English guide to the law and Family Court processes;
- the creation and maintenance of a web site with easily downloadable information on various aspects of the Family Court;

[52] MSBA at 4
[53] ALRC "Rethinking Family Law Proceedings" at 6
[54] ALRC, *Review of Federal Civil Justice*, Proposal 7.7.
[55] S. Parker, *Courts and the public* (AIJA, 1998)
[56] Law Reform Commission of Western Australia, *Consultation Paper: Litigants in person, unreasonable and vexatious litigants* (March 1999), pp. 8-9.
[57] *Report to the Chief Justice of the Evaluation of Simplified Procedures Committee*, FCA, August 1997.

- the introduction of the Integrated Client Services (ICS) project at Parramatta; and
- the introduction of the Family Court Support Program at the Dandenong Registry.

The aim of the ICS is to provide an early appraisal of a case so that parties can be referred to appropriate agencies for assistance. Although not aimed specifically at the needs of litigants in person, the procedures established under the ICS may prove useful in identifying litigants in person at an early stage in a matter, and referring them to relevant support services [58]. The Family Court continues to work on improving its case management practices.

In November 1999, the Dandenong Registry introduced the Family Court Support Program, aimed specifically at litigants in person. The Program, which involves Victoria Legal Aid and staff from the Family Law Assistance Program run jointly with Monash University Law Faculty, aims to provide support and assistance to litigants in person. The Program offers support directly to litigants in person on Court premises, and acts as a link with other relevant agencies, such as Court Networkers, mediators and the Court Counselling Service. The program, in other words, is one in which the Court acts as a focal point for the co-ordination of a range of support services relevant to the needs of unrepresented parties. The Program will be formally evaluated, but early indications are that the Program has achieved significant reductions in the numbers of matters proceeding to a hearing.

2.5 Summary

The literature surveyed identifies a number of issues regarding litigants in person and discusses them in relation to the litigant in person, the opposing party and his/her legal representatives, judges, court staff, and the justice system as a whole.

In respect of the litigant in person some of the main issues include:

- reasons for increase in numbers of litigants in person;
- extent of the phenomenon;
- reasons for self representation;
- needs of litigants in person;
- disadvantages of self-representation; and
- advantages of self-representation.

The major issue which arises in respect of the other party concerns the disadvantage occasioned to them by reason of the other party's lack of legal representation and the role of their own legal representative in such a situation.

The presence of litigants in person in the court system also raises issues as to the proper role of the judge (given the adversarial nature of litigation) and the impact of litigants in person on the justice system as a whole, in particular the cost and delay associated with litigants in person.

The literature also contains numerous recommendations for providing litigants in person with greater access to justice and highlights the need for more statistical data concerning litigants in person and the impact they have on the activities of courts.

[58] ALRC 'Rethinking Family Law Proceedings' at 3. See also Integrated Client Services - Evaluation of Parramatta Pilot, Kearney McKenzie & Associates (internal report).

Chapter 3
Outline of the research: Questions and methods

3.1 Introduction and Background

3.1.1 Background: previous research

Since the Commonwealth Government introduced changes in 1997 to the funding arrangements for legal aid and new guidelines for the granting of aid in Commonwealth matters, the Family Court has undertaken two major surveys relevant both to the effects of changes in legal aid and to the number of litigants in person in Family Court matters. The first was in November 1996 and covered all registries during a two-week period. It obtained information used in the Court's submission to the Inquiry of the Legal and Constitutional References Committee on Matters Pertaining to the Australian Legal Aid System[1]. The survey involved questionnaires completed by judges, judicial registrars and registrars which asked whether litigants were legally represented, and what effects a lack of representation had on the Court, and by unrepresented litigants, to determine if they had applied for and been refused legal aid.

Statistics were also obtained from the Legal Aid and Family Services Division of the Attorney-General's Department and from National Legal Aid.

A further survey was held over two weeks from 20 to 31 July 1998 and in the Family Court of WA from 10 to 21 August 1998. This was broadly similar in nature to its predecessor, but had a much higher response rate from judges, judicial registrars and registrars, although a disappointing response from litigants in person. The survey revealed a greater problem than in November 1996, with more unrepresented litigants (in 35% of duty list matters, directions hearings and defended hearings one or more parties were unrepresented), more being refused legal aid (of self-represented litigants who had applied for legal aid, 84% were unsuccessful), and consequently greater difficulties experienced both by the Court and its litigants.

The final report of the survey was published as FCA Research Report No. 19[2]. The Chief Justice referred to key results in his opening address to the Third National Conference of the FCA in October 1998, and on other occasions.

Academics and others have carried out considerable research into the effects of legal aid funding changes and the apparently growing number of litigants in person (see also Chapter 1). More is under way. Among the major contributions, referred to in the previous chapter, are those by the Justice Research Centre (JRC; with Associate Professor Rosemary Hunter as principal investigator), the Australian Law Reform Commission (ALRC, as part of its Review into the Adversarial System of Litigation), Professor John Dewar (together with Mr Jeff Giddings and Professor Stephen Parker) and the Fitzroy Legal Service in Victoria. There are other pieces of research and judges, academic workers, professional legal bodies and others have also presented papers on the topic.

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[1] FCA, 1996

[2] B. Smith, *1998 Study of the effects of legal aid cuts on the Family Court of Australia and its litigants*, Research Report No. 19, Family Court of Australia, 1999 (preliminary version released in 1998)

3.1.2 Background: Decision by the Chief Justice

Despite the research endeavours to date, much is still unknown about the effects of increased numbers of litigants in person on the Court, lawyers or the litigants themselves.

In December 1998 the Chief Justice approved this project and its methodology. It has been a joint venture between Professor John Dewar and Cate Banks of the Griffith University Faculty of Law and Barry Smith, the FCA Research Analyst. The design of questionnaires, semi-structured interview schedules and interviews was undertaken jointly. The analysis and preparation of the final report were also undertaken jointly by Professor Dewar and Barry Smith.

3.2 Research questions

The project set out to discover more about the causes and effects of self-representation, to identify the needs of litigants in person and to suggest ways in which those needs might be met more effectively.

The research centred on the following research questions:

(1) Why do litigants appear unrepresented in the Family Court?

(2) What are the demographic and other characteristics of litigants in person? (Do these differ and, if so, in what ways, from those who are represented?)

(3) What needs for assistance do litigants in person have, and what sources of assistance (if any) do they use?

(4) What are the effects of a party being unrepresented:
- on the judge or registrar?
- on the Court system more generally?
- on the other party?
- on lawyers appearing in the matter?
- on the litigants in person themselves?

(5) Do cases involving litigants in person use more resources (the time of judges, registrars, other Court staff) than matters in which both parties are represented?

(6) If so, and if it is also true that cases involving litigants in person present the Court and both the unrepresented and represented parties with features[3] different from those in other cases:
- how might the Court be able to assist litigants in person more effectively; and
- how can the Court cope with the problems that litigants in person present the Court?

Parenthetic notes on questions raised by the research questions

There was a limit to which the methodology could answer question (2) (since resources did not permit a careful comparison of unrepresented and represented

[3] In the initial formulation of the list of research questions the word 'problem' was used, but it was not used in interviews and questionnaires, as it would lead the respondent.

parties); however, judicial officers and registry staff made many relevant comments, and some cases involving represented parties were observed.

Questions 3 and 6 are closely related, but distinct. Question 3 looks at the needs of litigants in person generally, and at ways in which they might be met from whatever source. Question 6, by contrast, looks specifically at the actual and possible role of the Family Court itself in this respect.

In relation to question (4), we hoped to gain some sense of the impact of a litigant in person on delays in Court processes in a particular matter, and on the opportunities for settlement. This is difficult to do because there may be many variables in a particular matter that will have a direct bearing on these aspects. It should also be noted (as discussed above) that the effects of a litigant in person may be different in different cases. However, our methodology enabled us to assemble the views of experienced judicial officers and Court staff with experience of many different matters and types of litigant.

There was a limit to which the largely qualitative methodology could answer question (5). For example, how does one cost the use of Registry staff time? However, observation of cases and the remarks of judges and others provided a clear indication.

3.3 Methodology and data sources

The researchers spent a week in each of five different Family Court Registries (Canberra, Brisbane, Melbourne, Parramatta and Dandenong) and collected information by a variety of means (detailed below) relating to duty list matters, in which one or both parties were unrepresented, being heard in the relevant Registry during the week of the researchers' visit. The sample of matters investigated was therefore a random one. The project concentrated on duty lists and direction hearings rather than defended hearings, as trials may run over several days. However, trials were examined in a second week in Melbourne. The project was extended once it had begun to include a week of fieldwork in the Dandenong Registry, which has a very high proportion of litigants in person.

A two-person team, Cate Banks of Griffith University and Barry Smith, visited each of the three large registries for five working days (in the case of Melbourne, for two weeks). This provided consistency and continuity, and avoided problems with two or more consecutive litigants in person in a list. Unfortunately it proved impossible for Cate Banks to join for the fieldwork in Dandenong. This somewhat limited the amount of data that could be collected.

We used a mix of quantitative and qualitative approaches, primarily questionnaires and semi-structured interviews with judges, judicial registrars, registrars and litigants in person in relation to the research questions. Most effort was devoted to obtaining more detailed qualitative information from and about litigants in person. Each matter involving an unrepresented party was observed by one or both of the researchers. We also interviewed a small number of legal practitioners, and convened focus groups with Registry Staff. The methodology was pre-tested in Canberra.

3.3.1 Questionnaires completed by judges, judicial registrars and registrars

In each of three large registries (Melbourne, Parramatta and Brisbane, in order to sample from the three largest States) and later in Dandenong, one or more judges and judicial registrars and one or more registrars were asked to fill in questionnaires for two days each, i.e. four days in all in each registry. Judges, judicial registrars and registrars were asked to complete questionnaires only for hearings in which one or more parties was unrepresented (See Appendix B for the questionnaire).

A total of 79 questionnaires was received from judges, judicial registrars and registrars in relation to specific hearings in which one or more parties was not represented, a response of nearly 100%. There were 27 questionnaires received from judges, 18 from judicial registrars and 34 from registrars. There were 43 judicial duty matters, 13 registrars' duty matters, 20 directions hearings and three defended hearings. Contact was involved in 46 hearings, residence in 30, specific issues in 11, property in 8, as well as various other issues.

In 55 cases in the sample there was one litigant in person, in 19 there were two litigants in person, and in five cases the situation was ambiguous, e.g. where there was no appearance by the litigant in person or a litigant apparently in person had not been served. In 47 hearings the applicant was not represented, in 48 the respondent was not represented, and in four cases (where relevant) the child was not represented. In six cases it was known that legal aid had been refused or withdrawn before or during the hearing; often it was not known if this was the case. In those cases in which only one party was represented, in 38 cases the litigant in person was male, in 21 the litigant in person was female. In fourteen cases the litigant in person was assisted by a duty solicitor, and in four cases a practitioner acted *pro bono* and/or as *amicus curiae*.

For the purposes of the following analysis presented below, fifteen questionnaires were excluded for various reasons. These included that the matter was almost immediately transferred from a judicial registrar's or a registrar's court to the judicial duty list; that because, although there was a litigant in person, there was no appearance by the litigant in person; that by the time of the interview the judicial officer could not recollect a very brief hearing; or that for other reasons questions 11 to 19 were not completed.

The remaining 64 questionnaires, as with the other data sets in the study, represented only a limited sample of all cases in the Court that involve litigants in person. In addition, they require the application of judgment by the person on the Bench, and several questions are couched in the terms 'in your opinion …?' Nevertheless, the data, which come from several registries and span different types of hearings and issues, can be seen as highly indicative of the situation in which the Court finds itself. Further these data are highly consistent with those from the Court's 1998 Legal Aid Survey[4], which used nearly identical questions.

[4] B. Smith, op. cit.

3.3.2 Observation of Hearings

With the permission of the judge, judicial registrar or registrar, the researcher(s) sat in on the hearings involving litigants in person, and made notes. In addition, for purposes of comparison, some cases in which both parties were represented were observed. (See Appendix E for the schedule for notes of observation).

One of the key elements of the methodology was the (non-participant) observation of many of the hearings covered by the field work. In all, 72 hearings were observed, of which 52 involved a single litigant in person, and 15 involved two litigants in person. In two cases the status of the litigant(s) was somewhat ambiguous, and three cases were observed in which both parties were represented.

The hearings observed ranged in duration from just a few minutes to 15 hours over several days for part of a defended hearing. Of the 72 hearings, 35 were observed by both research workers, 27 by Barry Smith alone, and ten by Cate Banks alone.

There was little difficulty in obtaining the permission of judges, judicial registrars, and registrars, although one judicial officer expressed reservations about the perceptions that litigants might have if the research workers were seated in the front of the court. There was little indication that the presence of observers intruded unduly into proceedings, although parties and practitioners were aware of them and usually understood the reason for their presence.

The methodology benefited from the experience of Dr Sandy Caspi Sable in her doctoral research, which relied greatly on non-participant observation. Every effort was made to record observations as objectively as possible, although inevitably some subjective elements were unavoidable.

The observations provided a rich source of qualitative information and yielded considerable insights into the effects of litigants in person appearing in hearings. Chapter 9 summarises some of the themes emerging from these observations, and contains four detailed case studies designed to illustrate some of the challenges presented by litigants in person.

3.3.3 Interviews with litigants in person

The unrepresented litigants in the cases observed were invited to take part in semi-structured interviews after their hearing. The unrepresented litigants were offered a free double movie pass as an incentive to participate. If litigants in person were unwilling to be interviewed at this time (for example, if they were too stressed or emotional), an attempt was made to set up alternative arrangements, such as an interview by telephone (See Appendix C for the letter given to clients seeking their cooperation, Appendix D for the consent form, and Appendix F for the interview schedule). All respondents were informed that their information would remain confidential and would eventually be destroyed.

There were 49 interviews with litigants in person (excluding one case in which the registrar and solicitors believed that the respondent was not legally competent to give informed consent). These related to 43 hearings. Very few litigants in person declined to be interviewed. Interviews typically took between 15 and 20 minutes, in which time

it was possible to elicit much relevant information. Some interviews were held by telephone.

Despite the relatively small number of interviews, the results seem highly indicative of the experiences of litigants in person.

3.3.4 Interviews with judges judicial registrars and registrars

Brief interviews were held after the hearings with the judges, judicial registrars and registrars. This allowed any anomalies or ambiguities in the questionnaires to be clarified, and comments to be obtained on individual cases involving unrepresented litigants, and on any problems that unrepresented parties caused (See Appendix I for the interview schedule).

There were 17 interviews with judges, judicial registrars, Senior Executive Service Band 2 and Band 1 registrars and deputy registrars, in which their general comments were obtained on predefined general questions about litigants in person, as well as on aspects of the specific cases heard.

While the answers given to the questions were general and qualitative, they represent the informed reflections of a group of people who collectively have scores of years of experience sitting on the Bench in the FCA.

In addition, there were 62 hearings for which the presiding judge, judicial registrar or registrar was asked for comments in relation to specific cases. Some of these comments were extensive and some very brief (and the hearings ranged from one or two minutes to several hours).

3.3.5 Brainstorm sessions with registry staff; other people contacted and/or interviewed

Discussions were held with a cross-section of people at the beginning of each visit to a registry. (See Appendix J for details). This proved to be a very effective way of getting a diverse group of people to contribute many ideas in a short time.

The number present (apart from the research workers) ranged from five to ten. The time taken ranged from 45 minutes to a little over an hour.

In Canberra, there was a judge, the Registry Manager, a Deputy Registrar, the Acting List Manager, a Court Officer and a lawyer from ACT Legal Aid.

In two other registries the Deputy Registry Manager, Listings Manager, Client Service Coordinator or Manager, and the Court Officer in Charge were present. In Brisbane the Supervisor, Counselling Administration and three other Client Services staff also attended. In Dandenong ten people attended: the Registry Manager, Deputy Registry Manager, a Deputy Registrar, the Local Systems Manager, the Team Leader - Court Support (Listings), two Team Leaders - Client Service, two other Client Service Officers and a Court Officer.

A barrister and a solicitor (both family law specialists) were interviewed after hearings in which they appeared for a party opposed to a litigant in person. In addition to asking them questions (similar to those asked of judges, judicial registrars and

registrars) about the effect of there being a litigant in person in these particular cases, they were asked some general questions about the effects of litigants in person in family law matters. (See Appendix K for the interview schedule).

In addition three duty solicitors were interviewed as a group in one registry.

Several informal discussions took place with barristers, solicitors, duty solicitors and volunteers with the Court Network scheme.

It was hoped to interview representatives of the legal aid commissions in the various jurisdictions in which field work was done. A representative of ACT Legal Aid took part in the Canberra focus group. Efforts were made to contact other legal aid commissions to arrange interviews, but without success.

3.4 Profiling

It became clear as the methodology evolved that what was planned in effect was a partial approach towards *profiling cases*. A master record was established for each case containing data obtained from various sources (the questionnaire completed by the judge or registrar, the interview with the litigant in person, the interview with the judge or registrar, and possibly an interview with the other party's solicitor). For any hearing, one or more associated records could be missing (see Appendix L for details of the database design).

3.5 Peer Review

The methodology described above was subjected to peer review by staff of the FCA, JRC and ALRC.

3.6 Timetable

Key dates in the project were as follows:

December 1998	Approval of the project by the Chief Justice
29-30 March 1999	Pilot test in Canberra Registry (two days)
6 April 1999	Further pilot test in Canberra Registry
12-16 April 1999	Field work – Brisbane (one week)
19-23 April 1999	Field work – Parramatta (one week)
3-14 May 1999	Field work – Melbourne (two weeks)
6-10 September 1999	Field work – Dandenong (one week)
October-December 1999	Finalise and submit report.

Chapter 4
Research Question 1: Why do litigants appear unrepresented in the Family Court?

The results and conclusions presented in this and the next four chapters derive from various data sources. Details of these and some key characteristics are given in section 3.3 above, while the data collection instruments are shown in appendixes. Conclusions from the observation of hearings are given in Chapter 9.

4.1 Interviews with litigants in person

Slightly more than three-quarters of the litigants in person interviewed said that they could not afford a lawyer and/or had been denied legal aid. The remainder said that they did not need or want one, and in elaboration gave various more detailed reasons. One was a lawyer. Four had previous bad experiences with lawyers (and some were quite vehement about these).

Several of those who said that they could not afford a lawyer also reported negative experiences with the profession. One thought that he could do better than any solicitor he had used, and three complained that it was not good value for money in the matters being heard. One said that her lawyer's advice was to do it herself; he had said that she was quite competent and should not spend money on representation. One said that he wished to say things personally in court.

Only one respondent said that the Court's Simplified Procedures and other efforts to help litigants had influenced the decision to act without a lawyer.

Sixteen respondents said that they had applied for legal aid. One did not yet have a decision. Only two were successful, but in both cases for only part of the case (hence their status as litigants in person). The reasons for refusal were that they could afford a solicitor (2) and a variety of miscellaneous reasons. These included too many assets (5), that he could win on his own, conflict of interest, insufficient merit, because it was a property matter, and one case where legal aid was granted for final but not for interim matters. In this small group there were none who said that they were refused legal aid because they had exceeded the 'cap'.

Of those who had not applied for legal aid, ten were told that they were not eligible and nine did not think that they were eligible, while one preferred to be self-represented. Other reasons given for not applying were varied, including insufficient time (2), did not need a lawyer, did not think of it, wanted to be in person, and the fact that the partner had legal aid preventing access under conflict of interest rules. Another respondent with a physical and intellectual disability had been told that it was pointless to apply for legal aid because she had been given legal aid for a barrister in a five-day trial within the last two years. She said that she may seek a review. Some respondents seemed to have limited knowledge of the availability of legal aid: one, whose previous experiences of legal aid were in a different court, said 'It's not an indictable offence, is it?'

A few expressed satisfaction with legal aid bodies, but many were quite negative. Two had major complaints and one planned to report alleged professional misconduct. Another said that a Legal Aid solicitor acting in a local court for about ten clients

could not keep track of which case she was currently appearing in. A further said that Legal Aid told her to sell her house or she would not be represented, despite the fact that it is the only form of security that she has for six children.

4.2 Interviews with judges, judicial registrars and registrars

In summary, judges, judicial registrars and registrars interviewed believe that:

- **Lack of money is a major and probably the dominant reason**. This has several elements:
  - Many are ineligible for legal aid because of income or assets tests.
  - Others cannot get legal aid because of the merit test.
  - Some have reached the cap of their legal aid or are denied legal aid because of recent assistance from legal aid.
  - There is a fairly substantial group which is not poor enough to qualify for legal aid and yet not rich enough to afford representation, especially for defended hearings and protracted matters.
- **Some have had unfortunate experiences with legal practitioners**. They may not have got the advice they wanted or have received poor advice, and in some cases believe that they can do better themselves. (A subset of these shown from observation is those who are themselves legally qualified.)
  - Some of these know that there will be a greater opportunity to harass the other party; and/or that they will get away with things that lawyers would not normally get away with. The former group includes some vexatious litigants and those who engage in 'tit for tat' applications to waste the respondent's time and/or money.
  - Some have been rejected by solicitors because of their personality and/or (as shown from interviews) have been advised to save their scarce money.
- **Others prefer to represent themselves**. They may have the confidence and/or determination to 'do it themselves'; for others there may be someone in the Court (e.g. a duty solicitor) who will assist them. (Some may be, as claimed by those whom we interviewed, arrogant and conceited, overly self-confident; others are probably not.) A further subset seen from interviews with litigants is those who indeed consult practitioners for assistance with the preparation of documents and with procedural advice, but choose to conserve funds by avoiding representation, especially in children's as opposed to property matters. It was also noted by those interviewed that the Court itself may have helped promote the view through kits, etc. that family law is easy and that a 'do it yourself' approach is possible [which is probably true for uncontested divorces and settlements, but not for contentious issues].
- A significant number are considered to be **dysfunctional 'serial' litigants**, many of whom may be emotionally disturbed or mentally ill. Some serial litigants would seem to be vexatious. Some judicial officers observed that there is no provision in the Act for a judge to declare someone vexatious on his or her own motion[1]. However, the Family Court Rules (Order 40 Rule 6(2)) allows the Court to make an order of its own motion to prevent the bringing of vexatious proceedings. Further, someone declared vexatious may apply for the order to be revoked.

[1] *Family Law Act 1975*, S.118(1)(c)

- **Some responses referred to those who are unrepresented by default:** These include those who have had no time to get a solicitor because of short notice of a hearing or who are rushed and know that orders will be made unless they appear. Some also commented that quite a few litigants believe that 'if they ignore the awful situation that it will go away', and that resistance to the process may make some want to block out the horror of the proceedings so that they have not even filed a response.

4.3 Brainstorm groups

All registry groups referred to economic factors and lack of money, as well as to refusal of legal aid and lack of faith in or disenchantment with the legal profession, as reasons why litigants appear unrepresented. In Parramatta the group added that there was a perception that all lawyers 'charge like wounded bulls' and do not deliver; and that, although solicitors advertise in many local papers that they will give a free first consultation, many people are reluctant to use this service because there is an inherent distrust of solicitors and the legal profession in general.

In two registries it was said that client choice was an element (they think that they can handle the process themselves). One mentioned that some clients have many appearances. In Melbourne the unavailability of family lawyers in the area they come from was given as a factor, especially for clients from the country.

In Dandenong various other reasons were suggested: respondents think that they should not have to pay for legal representation; some litigants are vexatious; some are unaware of existing services that provide alternative means of resolving their dispute, such as primary dispute resolution; they do not understand the value of lawyers or have had previous bad experiences with lawyers; and a lack of education.

4.4 Interviews with practitioners

Both family law practitioners believed that cost was the main factor. This includes those who think that they cannot afford representation, and those who cannot obtain legal aid. Most of the rest are disillusioned with the legal profession (some of whom were described as hopeless litigants), hate lawyers or think that they can do it themselves. Some wish to stir the other party (with 'tit for tat' applications).

The group of duty solicitors cited money; urgency; the belief that they are better than lawyers; a choice to save money (including those with a history of litigation); and that some do not want to accept the advice of lawyers.

4.5 Analysis of findings

The predominant reason given for self-representation is lack of funds. Just over three-quarters of the litigants in person we interviewed cited this as the primary reason. The remainder made a decision to represent themselves on other grounds, with a distrust of the legal profession strongly evident in many responses.

The role and significance of choice in unrepresented status

In Chapter 1, it was suggested that there was a distinction between those who have no lawyer by choice and those who are self-representing by necessity. We suggested that a number of consequences flow from this distinction – in particular, that those who self-represent by choice can be said to have waived any right to complain about the

unfairness that might flow from that choice. However, this distinction may be hard to apply in practice, because all litigants presumably exercise some degree of choice in appearing without a lawyer, even where the decision to initiate Court proceedings was not their own. For example, the alternative to appearing unrepresented is not to appear at all. Further, a person may have resources to pay for a lawyer but may take the view that paying for a lawyer is not a high priority for them. The responses provided by our sample suggest that the reasons leading to the conclusion that a lawyer's services were not affordable may be complex and cumulative. All of this points to the fact that the concept of choice is not an easy one to apply in these circumstances.

In spite of these complexities, we have assumed in this research that the distinction between those who are and are not unrepresented by choice is drawn according to the *primary* reason given by the parties themselves for their self-representing status. If parties give lack of funds as their primary reason, then we can assume that they had little choice in the matter, and certainly less than those who claimed to have taken a positive decision to do without a lawyer. On that assumption, then, we can say that only a quarter of our sample was unrepresented by choice. The remainder, the majority, could therefore *not* be said to have waived the right to complain about any unfairness that might flow from their status.

The role of legal aid

One question that is frequently debated is whether the changes in the funding arrangements for legal aid, which took effect in 1997, have increased the number of self-representing parties[2]. One way of testing for this is to assess the reasons given for legal aid not being available to fund representation. Where the reason given relates to the party's means, the chances are that those reasons would have held true before the 1997 changes, since means tests have remained relatively stable for some time. On the other hand, where the reasons given are merits-related, there is a higher likelihood that they may be attributable to the 1997 changes.

In our sample, only a few (16) had applied for legal aid, so that it is hard to attach too much weight to their experience. Of the 13 who had applied for and been refused legal aid, seven gave means-related reasons for being refused**.** These applications would probably have been refused before 1997 on this ground. The remaining six of the 13 gave reasons that are probably directly attributable to the Commonwealth guidelines introduced in 1997. It is obviously dangerous to base any conclusions on so small a sample, but we can hypothesise that the 1997 changes have added to the numbers of litigants in person coming before the Court.

The fact that only a small number in our sample had applied for legal aid should not be interpreted as suggesting that legal aid refusals account for only a small number of litigants in person. Ten of those who did not apply had been advised that they were ineligible for legal aid, and nine did not think that they were eligible, and had therefore not bothered to make an application. Indeed, it is striking how many fell into the category of litigants who have never sought legal aid, which suggests that legal aid

[2] For a description of the changes, and of the terms of the Commonwealth guidelines, see J. Dewar, J. Giddings and S. Parker, *The impact of changes in legal aid on criminal and family law practice in Queensland*, Report for the Family Law Practitioners Association/Queensland Law Society (1998), Ch.2.

refusal rates may not on their own be adequate measures of the impact of changes to legal aid funding.

The legal aid 'cap' does not appear to have been a significant factor in determining levels of self-representation. However, this could be explained by that fact that so few in our sample had been granted legal aid in the first place. Of all those we spoke to, only two had made successful legal aid applications. Their status as litigants in person was explained not by the cap, but by the fact that the grant of aid only covered one aspect of their case.

Those who choose to be unrepresented

Our data confirms the existence of a minority group of litigants in person who have made a conscious choice to represent themselves. They also suggest that this group is a heterogeneous one, and includes those who have a meritorious case that (with appropriate support) they are largely capable of pursuing themselves, to those referred to by some respondents as 'dysfunctional serial litigants'. In the latter group, there is a suggestion that some litigants have deliberately avoided consulting lawyers because they know that a lawyer would advise against bringing or defending an application.

Views of the legal profession

A striking feature of many responses to our questions was the low opinion in which the legal profession is held in some quarters. This was true of both groups of litigants in person (ie, those who chose to represent themselves, and those who did not). In the latter group, a low opinion of lawyers may have persuaded the litigant that a lawyer's services were not sufficiently cost-effective to be affordable.

Chapter 5
Research Question 2: What are the demographic and other characteristics of litigants in person?

This Chapter summarises our data from sources relevant to this research question: interviews with litigants in person; interviews with Judges, Judicial Registrars and Registrars; the brainstorm groups with Registry staff; and interviews with practitioners. We also refer to the data from the questionnaires completed by judicial officers, set out at 3.3.1 above.

5.1 Interviews with litigants in person

The 49 interviews with litigants in person gave us an opportunity to explore their demographic and other characteristics in more detail. The interview schedule used is set out at Appendix F.

Gender and age

Slightly more litigants in person interviewed were male than female. There were more litigant in person applicants interviewed (28) than respondents (21)[1].

Two-thirds of those interviewed were in their thirties and forties, but ages ranged from under 20 to over 60.

Education and employment

Just over half the litigants in person interviewed had completed Year 12 at school or less.

Just over half were not in paid work. Of these, four were unemployed, two were invalid pensioners, and seven were full-time sole parents. Another had given up work temporarily to look after children. Two were in the work force but were temporarily unemployed at the time of the hearing. Two were full-time students. Four were retired, semi-retired or engaged only in voluntary work. Others (including a male) were engaged in full-time home duties. The 25 litigants in person in paid work were roughly evenly divided between managerial and professional occupations, self-employed work and relatively low status work. One was about to become un-employed.

Income

Of the 47 who answered the income question, 21 had a net income of less than $15 000 p.a., and in total 33 had a net income of less than $30 000 p.a. The median net income range of those who answered was $15 000 to $20 000 p.a. The assets of respondents ranged from zero to over half a million dollars. It should be noted that the assets question was difficult for some respondents to answer, as all their assets were jointly held and their personal assets depended upon judgments not yet made in property cases. However, of the 45 respondents for whom there were meaningful assets answers, 13 said that they had no assets and another six that they had assets of $10 000 or less. The median assets were $30 000.

[1] See also the data in 3.3.1, above, which shows a similar preponderance of male litigants in person in the matters in respect of which judicial officers completed questionnaires.

Ethnicity
Three-quarters of those interviewed were Australian born. About one tenth were of a non-English-speaking background, and in two cases an interpreter was necessary in order to conduct the interview.

Type of matter
By far the greatest proportion of litigants in person interviewed had had hearings related to children's issues. Some 31 (well over half) had only children's issues, including related enforcement and contravention matters, while three had both children's and property issues, and two had both children's and other issues. There were seven litigants in person with property issues only, and three with child support matters. There were three 'other' cases (spouse maintenance and 'extend time for review').

Litigants in person were not evenly spread across the workload of the Registries visited: there was a markedly higher concentration of litigants in person in children's matters than property matters.

Attempts at settlement
The ALRC has found that 'unrepresented or partially represented parties were less likely to resolve their case by negotiation, and more likely to have their case dismissed by default or resolved by judgment, than parties with full representation'[2]. By definition, those we interviewed had failed to achieve resolution by means other than litigation, but we were interested to learn whether attempts had been made at earlier stages to settle the matter by other means, and whether litigants in person conformed to the statistical pattern of being resistant to settlement.

Our data from interviews are equivocal. Some had made seemingly genuine attempts at settlement or had agreed to them in the hearing - usually conciliation counselling, and sometimes negotiations between lawyers. A very substantial proportion of those interviewed reported previous attempts at settlement, including mediation and conciliation counselling, but also reported that these were of no value. Often it was said that this was because the other party was uncooperative: repeatedly refusing to attend joint counselling, reaching agreement on consent orders but then refusing to sign them, or walking out of counselling. It is hard to know how much weight to attach to these self-reports of a matter's previous history.

5.2 Interviews with judges, judicial registrars and registrars

Not all judges, judicial registrars and registrars interviewed believed that there were substantial differences between litigants in person and other litigants. Some said that it would depend on the stage of the proceedings or the type of issues. However, **a majority believed that**:

- There were generally more men who are not represented than women[3].
- There were generally more unrepresented respondents than applicants[4] (notably in children's matters).

[2] ALRC *Discussion Paper 62, op.cit.*, p. 377
[3] See also 3.3.1, above.
[4] This is consistent with the findings of the JRC: *Family Law Case Profiles, op. cit.*, p. 171.

- Litigants in person tended to be of lower income and socioeconomic status than those who were represented, with professional people who *choose* to represent themselves being an exception.

5.3 Brainstorm groups

The group in one registry at first said that there were no obvious differences in the demographics of litigants in person, but some in this group said later that they thought that there may be fractionally more men, and perhaps more applicants in person, adding that respondents in person often consent to things so as to 'not rock the boat'.

The groups in two other registries both said that litigants in person were mostly men. It was noted in one registry that more women can get legal aid when they are on social security benefits, yet it was also noted that many women do not pursue their cases, but simply give up.

The groups in three registries also agreed that litigants in person tended to have low income and low levels of education. In Brisbane it was said that men are usually middle to low income earners and the women are usually low income earners; in Parramatta, which has a large client catchment of low socioeconomic status, it was observed that most litigants in person are from social security belts such as St Marys and Cabramatta; that many were of non-English-speaking backgrounds and had poor literacy, reflecting the highly multicultural population. In Dandenong, which would seem to have an even more disadvantaged catchment than Parramatta, it was said that in addition to low socioeconomic status and ethnic diversity, poor literacy, high un-employment, drug use, prevalence of abuse and violence issues and a high proportion of 'bloody–minded' (do it yourself) litigants were factors.

Other comments in various registries included that some litigants in person seem to be irrational; that often litigants in person are respondents rather than applicants; and that the lack of legal aid is often explained by the fact that some cases just go on and on and use up all the available dollars which could be used for other cases (which would be shorter).

5.4 Interviews with practitioners

Both family law practitioners believed that there was no difference between litigants in person and those who are represented.

The group of duty solicitors thought that there may be a difference, saying that more often than not they are on an average wage or unemployed (although some are really well off), and perhaps more often are respondents than applicants. They saw no obvious gender difference.

5.5 Analysis of findings

The characteristics of litigants in person can be analysed along a number of different axes:

Gender: Although the gender balance of the litigants in person interviewed was roughly even, the data set out in 3.3.1 above (which is based on questionnaires

completed by judicial officers in relation predominantly to duty matters and directions hearings) suggest that there are more male than female litigants in person[5].

The JRC's analysis of Family Court files suggests that the gender balance may vary according to the stage of proceeding and according to whether the party in question is an applicant or respondent. Thus, unrepresented applicants were more likely to be men; and while there were no noticeable differences in the gender balance of respondents in matters that went to hearing, there were more male than female respondents who were unrepresented in the pre-hearing stages[6].

Socioeconomic status: The pattern that emerged from interviews with litigants in person is not typical of the adult population as a whole. The interview responses would seem to confirm that litigants in person include a disproportionate number of those with limited formal education, who do not have paid work and who have quite limited income and assets. These attributes of course are associated with each other.

Ethnicity: The proportion of litigants in person in our sample from a non-English speaking background (NESB) is low by comparison with the national picture. (Staff in the Dandenong Registry, however, suggested that the cases that we saw there may not be typical in that respect.) There is a real possibility that those from a NESB background who cannot afford a lawyer are less likely to pursue litigation on their own than those from an English-speaking background. The difficulties of running a Family Court matter in a language other than one's first language only have to be stated to be appreciated.

Respondent/applicant: The data set out in 3.3.1 above suggest that there was no noticeable difference in the numbers of respondents and applicants who were litigants in person. This contrasts with JRC's findings, which suggest that there are more unrepresented respondents than applicants[7]. The JRC's findings are consistent with what judicial officers, registry staff and duty solicitors told us in interview.

Type of matter: Litigants in person are disproportionately concentrated in children's matters, as opposed to property matters. There are several possible reasons for this. Litigants may more readily employ a lawyer in property matters because the benefits of doing so are more obviously apparent where money is at stake. It may also be possible to fund the cost from the proceeds of an eventual settlement. Alternatively, parties who cannot afford a lawyer may more readily settle or abandon property claims than applications relating to children. Indeed, for some couples, the children may be the only 'asset' of the relationship there is to dispute; and we were told several times, usually by men, that they felt an obligation towards their children to be seen to be doing something to retain a role in their lives.

[5] This is consistent with the Court's previous study - see B. Smith, *op. cit.*, p.4.
[6] R. Hunter, *Family Law Case Profiles*, *op.cit.*, para.358.
[7] *Op.cit.*, para 356.

Chapter 6
Research Question 3: What needs for assistance do litigants in person have, and what sources of assistance (if any) do they use?

The focus of this Chapter is on the forms of assistance (if any) actually used by litigants in person, and the sources of assistance they need. There is a close link with the theme of Chapter 8, which focuses on the actual and possible role of the Family Court itself in meeting those needs.

6.1 Interviews with judges, judicial registrars and registrars

Several of those interviewed, notably judges and judicial registrars, said unequivocally that litigants in person need to have competent representation, one saying that it is 'better to have a bad barrister than no barrister at all'. The need for arms length representation, particularly in contested hearings, was emphasised.

Many respondents referred to the need for legal advice and for information about procedures. It was thought that duty solicitors would be an appropriate source of this advice, but it was noted that while some registries have excellent support from duty solicitors, in others there is no duty solicitor scheme at all. A duty registrar service is also available, but not widely known. It was suggested that quick oral advice is often needed, rather than written information. Language and cultural difficulties frequently compound the problem; one respondent referred to the need for interpreters. It was also suggested that it would help if both a counsellor and a registrar were on stand-by.

It was also widely observed that litigants in person need information, a need partially met by FCA information sessions and by self-help kits. These kits generally seem to be proving to be useful. The information needed relates to procedures, the function of directions and the duty list, simply knowing what to do in court, how to address the court, and what to do prior to hearings, especially in relation to preparing documentation, which can be a major problem. Information sessions suffer from limitations because litigants get the information early in the proceedings, often when they are emotional, and many litigants retain only a small amount of information. Staged delivery might be better. Special classes for litigants in person, possibly run by legal aid, were suggested by two respondents.

6.2 Brainstorm groups

There was general agreement among the groups in all registries that there is a real need, at an early stage and again at the time of a hearing, for both legal and procedural advice (including assistance with forms, court formalities, information on other services, step-by-step information, better presented information in lay terms and advice on other sources of information). Counter and other registry staff cannot give legal advice, and there is no duty solicitor in Brisbane or in Parramatta. There is a real need for procedural advice: 'They don't have any idea what to do when it comes to the procedure in court', for example 'they don't even understand what a call-over is.' Many need help with filling in forms. It was suggested that forms should be more user-friendly, and that handwritten affidavits should be acceptable, as there is no client access to typewriters, and clients often do not own their own computer and find it difficult to get access to one.

It was observed that many do not know what resources are available. For example, while registry staff cannot give legal advice they do have a list of community legal centres and lists of accredited family law practitioners. Where there is no duty solicitor, there is a perception by many clients that once someone has done *pro bono* work for them there is a sense of ownership; they cannot understand that a solicitor or barrister will not represent them without payment in a later matter. The availability of duty registrars is often not known.

There were various other comments in individual registries about clients' needs for emotional support; the lack of understanding of the differing roles of the FCA and the Child Support Agency; and the need for the judiciary to talk to litigants in person on 'their own level': Litigants in person often have no understanding of the legal terminology used in court, nor of the court process, and the judiciary often fails to take this into consideration when addressing them. The manner of judicial officers can alienate the litigant in person.

Groups in all registries mentioned many sources of assistance, including:

- Information sessions
- Counter and other Client Services staff, court officers, duty solicitors, duty registrars, counsellors, judicial officers and the FCA registry libraries (where access to the public is allowed, although this service is not widely publicised)
- Other agencies, including Legal Aid (½ hour advice free), the Law Society, State Departments of Community or Human Services, the Police, Magistrates courts, various support groups (e.g. men's groups), the Court Network in Victoria and community legal centres (but many people complain that they get the wrong procedural advice, or they are just too busy to assist them. There is a problem with the consistency of information from these centres.)
- Friends, pamphlets, the Internet, 1800 numbers (which are not well known), the legal profession, schools and the media.

Such advice is in relation to basic procedures, referrals, what happens in Court, filling in and processing documents, and checking documents.

6.3 Interviews with litigants in person

Of the 49 litigants in person interviewed, 33 said that they knew where to get [relevant] information, while 16 said that they did not.

Some of those who said that they did not know where to get information nevertheless specified sources of information. Many sources of information were given, with some respondents mentioning many different sources.

Eighteen had advice from a solicitor before a hearing – sometimes advice that was paid for, sometimes advice given *pro bono* and sometimes from a friend (six giving this as the only source of information). Seven mentioned a community legal centre (including two Women's Legal Centres); and five mentioned legal aid or a duty solicitor (three giving this as the only source).

Fifteen obtained advice from the Court including duty registrars, registrars, deputy registrars and counsellors, as well as counter and other client services staff (seven giving this as the only source).

Three consulted law libraries (one using the Australian National University Law Library and the Mitchell Library in Sydney, while two used the FCA Library at Parramatta).

Many other sources of information were mentioned, including friends and relatives, support groups, books and pamphlets, the Internet, the Law Society, the police, and reading the law in jail.

While less than half of respondents said that they had found the help that they had received from the Court useful, there were few specific complaints. Most comments were that more help was needed with forms or with understanding procedures.

6.4 Interviews with practitioners

One of the family law practitioners said that if litigants want to be unrepresented, 'they should sink or swim'. The other said that they need to know about documents since the registry cannot give legal advice. It was said that much litigation would be avoided if there were a community tribunal (as in the English system of a community tribunal with a lawyer and lay people - 'Joe Bloggs types'). Mediation and counselling do not work in all cases. This practitioner asked how litigants in person could get access to such a tribunal, and whether the Court could provide this assistance.

The group of duty solicitors mentioned: needs for legal advice; that some parties need representation; others need both procedural and legal help with their documents; some need referrals to lawyers; in fully contested matters and in preparing consent orders litigants really need help; sometimes they also need this in final matters.

One family law practitioner thought that a consultant at the registry (even a duty lawyer) - just for say three hours each morning - could well be cost-effective because there would be fewer appearances. (She speculated whether the FCA could fund it, and thought maybe not because of the separation of powers, but that the Commonwealth could and should fund it.)

The group of duty solicitors suggested several possibilities for providing assistance to litigants in person:

- Organising an interpreting service to ensure that people are on hand; there should be someone in the counter area with a list of interpreters who are at the ready.
- A screening process at the filing stage.
- Most really need to have at least a duty solicitor.
- There should be a written document on how to go about things – litigants just do not know what the law is.
- Clients do not know the requirements of personal service, and therefore often need an adjournment: The court must provide information on service; this is critical with urgent orders.

- There is a Court Network system in Victoria, but more people like this are needed who can assist with emotional support, and some layperson's advice about what to do in court.
- There is a need for team effort: if the Registry staff worked more together with the duty solicitors then they could all give advice and assistance. There is a need for co-operation, but there seems to be some resistance to the needs of the duty solicitors.

6.5 Analysis of findings

The needs of litigants in person

Drawing all of this together, we suggest that the needs of litigants in person can be grouped together as follows:

Information[1] relating to:

- Court procedures, including the function and purpose of duty lists and directions hearings and the nature and purpose of examination and cross-examination
- Court etiquette such as the order of events, and how to behave in Court
- Support services available to unrepresented litigants
- Primary dispute resolution services and alternative methods of resolving a dispute
- The respective roles of the Family Court and the Child Support Agency
- Commonly used legal terminology
- The rules relating to service of orders and other Court documents

Advice and assistance relating to:

- The preparation of Court documents and completion of forms
- The preparation of oral arguments in Court
- The rules of evidence
- Preparation of consent orders

It was also suggested that some rules and practices of the Court should be amended, for example, to permit the acceptance of handwritten affidavits.

It was also suggested that litigants in person need emotional and practical support.

Court personnel identified other needs related to judicial style and to Court forms. So far as style is concerned, there seems to be some variation between judicial officers in the extent to which they make allowances for a party's lack of representation. Thus, while some will make conscious efforts to speak in simple and non-technical language, others seemingly make little or no allowance for a party's lack of representation. This implies that there is no homogenous judicial style in matters involving litigants in person. The duty lawyers suggested that co-operation between duty lawyers and registry staff could be improved.

[1] Much of the information listed here now appears in *The Family Court Book* (FCA, 1999), which was published after the fieldwork for this research was completed.

What sources of advice and assistance (if any) do litigants in person currently use?
So far as the litigants in person themselves are concerned, a significant number had obtained legal assistance and advice from a recognised source (including from the Court, although there may have been some confusion in the minds of our respondents as to the distinction between information on the one hand and advice on the other). Yet an equally significant number relied on a wide range of other, probably less reliable, sources; and some said that they had received no information at all. There is little evidence to suggest that men's rights groups played a big role in advising or encouraging male litigants in person, although they were mentioned by a few respondents.

Relatively few litigants in person said that they had found the help that they had received from the Court useful, and some asked for more help with forms and in understanding procedures.

Chapter 7

Research Question 4: What are the effects of a party being unrepresented:

- **on the judge or registrar?**
- **on the Court system more generally?**
- **on the other party?**
- **on lawyers appearing in the matter?**
- **on the litigants in person themselves?**

and

Research Question 5: Do cases involving litigants in person use more resources (the time of judges, registrars, other Court staff) than matters in which both parties are represented?

7.1 Interviews with judges, judicial registrars and registrars

Judges, judicial registrars and registrars were interviewed in relation to 72 specific cases. Before the questions about the effects of having one or more litigants in person, they were invited to make **general comments on the cases heard.** There were several themes:

(a) The involvement of a solicitor acting *pro bono*, or the assistance of a duty solicitor or of a child representative can make a great difference to the task of the judicial officer and to the time taken for a hearing[1] [2] [3]. Conversely, in the absence of any lawyers the hearing can become quite protracted[4].

(b) Litigants in person frequently fail to understand the procedures and legal requirements of the Court[5]. This can be a particular problem in contravention applications[6], and in child support cases[7]. It is compounded if one or more parties does not speak English[8].

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[1] For example: 'This case could have been extremely difficult, and in fact it was according to the file; but with the assistance of the child representative consent orders were drafted and the difficulties were all sorted out.'

[2] 'If they were represented they would have definitely settled earlier. The litigant in person was assisted by a duty solicitor, but if there had been none then it would have taken up more time. This case just reflected a relationship issue, not a legal issue. This could have been better dealt with in mediation and maybe in conciliation rather than in the court.'

[3] 'The last time this case took 3½ hours; both had to give evidence just as they did today, and it is still not resolved. Now the same issues have taken 4½ hours of time.'

[4] 'The respondent was elusive and so it was set up as an undefended hearing; if there had been a solicitor then it could have been sorted out.'

[5] 'This case was ridiculously complicated and unnecessary. The litigant in person didn't understand why he was here and that nothing could be done; it was a classic example of a non-lawyer not knowing what to do - wrong forms, no service of affidavits.'

[6] 'The mother could not explain in the circumstances what amounted to the breach of an order [in a contravention application]. She read the order in her own way and not what was on the page in front of her. I tried to suggest to the mother that she should adjourn the matter because it would be much better for her case, but she refused and wanted to have her say anyway.' This was a difficult matter because, within the limitations of remaining impartial, the presiding officer tried to assist someone and they interpreted this as him trying to impede her right to have her say. She insisted on having the matter determined and ultimately she failed; the application may not have been filed if the party had been represented because of the way she read and interpreted the order made by the court.

[7] 'This matter was a waste of time. There was no understanding of the court process, and the role of the court in relation to Child Support Agency decisions. It demonstrated that there is a need to have someone from the Child Support Agency on hand because the Act is quite difficult to understand and this would assist the court and the clients, and it would be in the interest of the Child Support Agency

(c) Cases involving litigants in person can give rise to dilemmas for the presiding officer because of the potentially conflicting duties of impartiality and to ensure a fair hearing[9].
(d) Children's matters involving two litigants in person can give rise to concerns about the child or children[10].
(e) Lack of representation can not only increase the time for the current hearing, but also result in more time and work at subsequent stages[11].

Judges, judicial registrars and registrars reported **the effects on them of having litigants in person appear before them:**

(a) Many reported frustration, stress[12] [13], annoyance and irritation. This may be exacerbated if the litigant is unable adequately to present and explain his or her case[14].
(b) In a few cases there were no significant effects, but only because of a *pro bono* solicitor.
(c) Often the judge, judicial registrar or registrar faced a considerable dilemma in deciding how to hear the matter in a way which accorded both parties procedural

to have these matters sorted out. This case demonstrated how time can be wasted by everyone trying to work out what the legislation requires of the parties and what the court can do or cannot in the circumstances. This woman brought the matter to court because she did not understand what else to do. Judges have a problem with what the *Child Support Act* says and means; so that you can imagine how difficult it is for someone who has limited legal knowledge.'

[8] 'This case was awful. … It is so hard … when the wife clearly did not want a divorce.' The added difficulty in this case was that she was unrepresented and she was not fluent in English. This adds to time and stress: 'You have to be so careful in all these things'.

[9] 'This case put me in an unenviable position; it was impossible position and I had to walk a tightrope. No matter what you do in a situation like this you feel you are being unfair to someone.' The judicial officer thought that the litigant in person would have gone away thinking that his case was dismissed only because of a technicality rather than the court wanting to enforce its own orders. But in essence that is what it was about. He was beaten on a technicality because of the lack of adequate form in his applications. The judicial officer was worried that the parties had a distorted perception of the court - the mother may think that she could break court orders with impunity, while the father may think that the court has no desire to enforce its own orders.

[10] 'This case raises grave concerns about the child. There has to be a child representative in a case where there are two litigants in person and one of the litigants in person is so clearly disadvantaged, and, more than that, legal aid needs to fund a child representative and a representative for the mother. It is just an awful scenario.'

[11] 'If both parties had been represented then there may have been an issue about the cost order and about the quantum of costs; if they had been represented the judicial officer may have ordered the costs and fixed them. 'But now there is an issue of taxation, which a registrar will have to do. It will take a day of a registrar's time and an hour of the judge's time. If they had been represented then there would have been submissions about the costs. This is going to take a lot of administrative time; neither of these parties did justice to their documents, and it appears to be that there has been some mess up with the counter advice, showing that the rigid bureaucratic structures end up leaving unqualified people giving wrong advice instead. … It made me extremely angry.'

[12] For example, 'It was very stressful. You have to be so careful about what you are doing, and you can just see the day seeping away from you; it would not be as bad if she was represented.'

[13] 'It was stressful. I got much more information than I should have because of the unrestrained exchanges between the parties.'

[14] 'I was assisted by the Court Officer locating the (previous) judgment. If he had not brought the file at lunch I would have been lost. I had no idea what she was talking about.'

fairness[15] [16] [17] [18]. Frequently the judge or registrar believed that one or more parties felt that they had been treated harshly or inappropriately[19].

The effects on the Court of having litigants in person were reported by judges, judicial registrars and registrars, in similar terms:

(a) There is often an increase in the time taken for a hearing[20] [21] [22]; and
(b) There frequently are more mentions and return dates[23], and additional administrative tasks.

The effects on the *other* party of having litigants in person were reported by judges, judicial registrars and registrars as:

(a) Waste of time and inconvenience, frustration caused by unnecessary court appearances, and stress on the children of the parties.
(b) Additional legal fees[24].
(c) Confusion, suffering and emotional burdens[25].
(d) On occasions, a less favourable outcome.

The effects on the lawyers of having litigants in person were reported as:

(a) Waste of time and inconvenience.
(b) Cost and loss of income because of protracted proceedings.
(c) Reduced chances of settlement.
(d) The need for a different style: the lawyer must be less aggressive, more conciliatory and show more latitude.

[15] 'I had to explain everything to him and he was better than some litigants in person; his application made more sense than most applicants. The difficulty here is that you have to be impartial and *not* favour the professional advocate who is making more sense; you have to give litigants in person a lot of latitude. You have to be so much more on your mettle, and you must be able to ensure that he perceives that he is getting "a fair go" - this is a real balancing act.'
[16] 'This was an acute problem because of the nature of the contravention: Someone could go to jail, and I felt in an impossible position and could not give legal advice, although I had to anyway.'
[17] 'The fact that the mother was unrepresented made the decision almost an impossible one to make'.
[18] 'It was hard; I had to grapple with the problem without inflaming the issue, I had to explain so much to him, and had to basically ask him to file an adequate response.'
[19] 'I had no jurisdiction to deal with the case, but understood the litigant in person did not understand this. I felt bad because I had to effectively "cut off" the litigant in person from making his submissions.'
[20] For example, 'On this day I happened to get through the list but there are some days when this sort of case would have been catastrophic' [because of the extra time].
[21] 'His first effort was faulty and he has to do everything again. Really time-consuming.'
[22] 'More time, and it does not reflect well on the court when there is a difficulty maintaining decorum. I had to ask so many questions, to some of which there was no response.'
[23] 'The case wouldn't have gone so far if both were represented: There were more appearances because he was in person. It should have been nipped in the bud, and would have been with lawyers.'
[24] 'It really disadvantaged her because it should have been resolved and knocked on the head today and she will also incur more legal fees.'
[25] 'He didn't get his divorce, which was quite an emotional imposition; because she could not communicate what was going on he had no idea of what the case is against him; and he will also incur more legal fees.'

The effects on the litigants in person themselves were said to be various:

(a) In some cases because of the efforts of a *pro bono* solicitor or a child representative, and in others where the party had had advice and was well prepared, there were no significant effects.
(b) Some litigants were obviously stressed[26], and in one case the litigant was said to experience 'long-term suffering'.
(c) Many were thought to have been seriously disadvantaged in various ways as to the substantive outcome [27] [28] [29] [30] [31] by being unrepresented. Lack of understanding of the law can also lead to frustration[32].
(d) Litigants in person may have an apprehension that the court is biased.

In fifteen cases it was said that there was no significant difference in **the time taken because one or more parties was unrepresented**. Often this was because it was a short hearing. In another case there was no significant difference in the time taken, but only because of the *pro bono* solicitor.

Occasionally, a case can take longer with parties represented: 'The hearing would have been longer with solicitors, but it would have been a different kind of hearing'. And again: 'If the husband had been represented the wife would have been cross-examined much more thoroughly about things like working capacity and there would have been much more fodder on which to make a decision.' As one respondent said in a side comment, it all depends on how things pan out what effect having a litigant in person has on the time taken. And in relation to yet another case, it was said that it may not have taken as long with representation, but it may have also taken a long time because of the presence of counsel.

In three cases it was said that there was some (small) increase in time, and in one that it took 20 minutes more.

In ten cases it was said that there was a large increase in time, with comments like:

- 'much longer';
- 'so time consuming - this case has taken up way too much of the court's time'; and
- 'This case would have taken ten minutes if there had been representation, they would have sought an adjournment to sort this all out; it took so long; there were

[26] 'She was highly stressed, and the more I asked her to speak up, the more stressed she became.'
[27] 'He may have got a better deal in the consent orders had he been represented.'
[28] 'His closing statements were so weak, and that can make the case so weak. He could have taken so much longer in cross-examination and strengthened his case, but had no understanding of how to go about this, and thus the cross examination of the wife took much less time.'
[29] 'He did not explain things well - there was no chronology.'
[30] 'The husband needed advice about the rules of evidence and thus the case had to be dismissed. The wife probably has a case to put forward, but could not show that either. Thus neither of them could get "past go"'.
[31] 'The litigant in person probably didn't have a clear understanding of what and why things were going on.'
[32] 'He wanted to "give the goods" right there, and so he tried in vain to make his submissions and present his application, with no understanding about jurisdictional difficulties; it would have been frustrating to the litigant in person.'

so many journeys back into court again and again during the day because he had no idea of what he was doing'.

The extreme case was a defended hearing in which the appearance of a litigant in person in an already complex and much delayed case added at least one or two days to the time taken.

One judge after a very full duty list said that collectively the time for nine matters with litigants in person would have reduced by more than three hours (i.e., would have taken about half the time) if they had been represented. One particular case might have taken perhaps 30 to 40 minutes (instead of 1 hour and 40 minutes). He said that an enormous amount of time and emotional energy goes into duty lists with litigants in person (The hearing time for the one day was equivalent to two regular full sitting days.)

7.2 Brainstorm groups

Groups in all registries said that the principal effect on the **judge or registrar** of a party being unrepresented was increased time spent on the case, both before and during the hearing. Other effects reported included more delays, more adjournments, more judicial work, cases not being heard, frustration, anger at staff (for example, for errors in documents), increased stress and raised blood pressure for judges. Cases can become protracted because the judge has to tell litigants in person how to run their case.

It was also said that the judge has to be multi-skilled (and act as a mediator); that judges have to use plain English in court to accommodate litigants in person, that the system is clogged up because it does not cost the litigants in person anything but their time, and that having litigants in person compromises the role of the presiding officer (because of the tension between judicial impartiality and the need to help litigants in person).

In all cases the principal effect **on the Court system** more generally was again reported as considerably increased time and hence cost. It was said in some registries that matters take longer at all stages, including at the counter, and that filing a document takes three or four times as long as normal because a person has to explain all the forms and court procedures in great detail. In addition documents which are incorrectly filled in, have missing information or supporting jurisdictional documentation or are out of time must be sent back. Other related comments were that further resources were needed because litigants in person need to have decisions documented; that staff have to explain how to conduct file searches; and that they cannot ask litigants in person to engross orders as solicitors can - the court has to do this, which takes much more time; and that staff have to provide explanations to litigants in person at every step of the way.

Other comments from one or more registries were that:

(a) The Court has a more educative role.
(b) There is liaison between both sides.
(c) There is stress, tension and frustration. Litigants in person are considered to be the main source of aggravation for the counter staff and other people in the court.

(d) They clog up the system and multiply the number of return dates. Security problems are increased.
(e) Litigants in person exhibit both overconfidence *and* under confidence.
(f) There is a problem with not being able to give legal advice while at the same time having to explain procedures.

Various effects **on the other party** of having litigants in person were reported by different registries, including:

(a) Considerably increased time in Court (as the issues are more confused); more appearances; increased costs.
(b) Frustration, stress and anger; violence and security problems.
(c) Injustice.
(d) Reduced settlement chances.
(e) Confusion at the proceedings; parties are unclear as to what is going on and why they are there.
(f) Litigants in person can be vexatious litigants, continually filing applications and protracting disputes.

The presence of a litigant in person was seen as having various **effects on lawyers appearing in the matter.** These included:

(a) Increased time and more protracted proceedings; unnecessary filing or processing by litigants in person (e.g. subpoenas); and delays in settlement.
(b) Confusion, stress and frustration (but this depends on the lawyer; litigants in person are often in the wrong mindset to negotiate). Solicitors act as 'buffers', as they are not emotionally involved; with a litigant in person this buffer can be lost. Lawyers may be more *or* less prepared to settle.
(c) Greater difficulty and a need for much more skill; there is a bigger burden because often the litigant in person will rely on solicitors for the other party to assist them in their matter, even if it is explained to them that they are acting for the other party. However, more often than not, lawyers are not prepared to assist the litigant in person.

A wide range of effects was reported on **the litigants in person themselves**, including:

(a) Increased stress, frustration, desperation, heightened emotions, feeling intimidated; litigants in person feel disadvantaged, angry, fearful, anxious and bitter, and may become violent. The judge or registrar seems 'like God' and litigants in person are often frightened and intimidated. Litigants in person are suspicious of the independence of judges and lawyers - often counsel are invited to chambers for morning tea, in front of the clients. It is hard for them when witnessing this form of social interaction between the judiciary and the lawyers to believe that there is impartiality and objectivity.
(b) Sometimes litigants in person will agree to almost anything – they want to go to mediation because they feel that at least there is a third party who may be able to help them with their matter. Some just give up.
(c) The system is not adequately equipped to deal with litigants in person whose personalities are such that they do not accept that a decision may not go their way.

In fact the system allows them to persist with repeated applications unless they are declared vexatious. There is a small percentage who keep coming back because they do not believe that the system is right or that they have not had their say. There is a group of 'problem litigants', usually associated with children's matters. Litigants in person may lodge lengthy affidavits.

(d) Litigants in person may be put on the defensive when the other party is represented and there is a perception of unequal chances.
(e) Litigants in person are confused about the status of orders which can be made without their appearance; they may believe that if they do not attend in court nothing can be done in their absence.
(f) Many litigants in person may not understand that an interim matter is not the final hearing and express frustration that they are unable to elaborate on matters which would be dealt with in a trial.
(g) They try to get legal advice from the other party's solicitor (they play what the groups called 'piggy in the middle').
(h) They may be lazy and expect the judge or registrar to do their job.

Groups in all registries were absolutely unanimous in saying that cases involving litigants in person use more **resources** (the time of judges, registrars and other Court staff) than matters in which both parties are represented. It is not only Court time that is involved; resources are used at every stage from filing onwards. One group estimated that litigants in person take four or five times more resources, and said that they 'clog' up the system. For example, when documents are on subpoena, a solicitor may take one or two looks at the documents, but litigants in person would take a week, looking at the documents every day.

One group however qualified its answer, saying that it depends on the point in the case management pathway, and that sometimes litigants in person will agree to almost anything because of the difficulties associated with being a litigant in person.

7.3 Interviews with litigants in person

Most litigants in person considered their case to be strong or very strong when it began. Very few considered it to be weak. By contrast, litigants in person were not as confident about conducting their cases, with nearly a third of those who gave clear answers saying that they were not confident at all.

Twelve said that they were coping well, were 'fine', 'taking it in their stride' or were having no problems, while two said that they had coped only because of support from their new partners. Four expressed frustration and twenty-two reported mild to acute stress, lack of sleep and/or health problems. Comments included:

- 'It has totally destroyed my life. I've lost my work, all my money; I've been depressed. I'm totally obsessed.'
- Health failing and worn out, emotionally drained and now very poor financially.
- No sleep, just holding things together.
- 'I have come to the end of the line; this has been a long struggle and I am prepared to put everything I have worked for on the line now. '
- 'I didn't like it much - I didn't know it was going to happen'.
- Not coping well; stressed (took the day off work); it was hard to keep his temper with the counsellor when she gave evidence in court.

Three others referred to depression, high blood pressure and/or needing medication. One said that he 'prayed a lot'.

About three-quarters said that they had experienced difficulties representing themselves. Common comments were that:

- The courtroom scenario is overwhelming and daunting. Some found the judge quite intimidating.
- The preparation of documents is difficult and hard to understand. One said that he had 'worked out how to trick the staff into giving legal advice without asking them directly for it'.
- The legal language is confusing and difficult to follow. One very young client said 'I didn't understand any of what they said'. Another client said that he could not understand what the judge was saying, adding that in criminal courts judges use language that is easier to understand.
- They did not know what to do in court. They did not know what to say; they did not know how to make objections; were tongue-tied; were nervous and felt in a power trap. 'I was a complete ignoramus.' 'I was made to look an idiot in there.' It is difficult to deal with solicitors for the other party.

Fourteen said that there were no advantages to being a litigant in person, while 33 said that there were. Two were equivocal. Of those who saw advantages to being a litigant in person, nineteen said that you know your own case, can speak your own mind, can say what you want, get to be heard and get to be seen (or expressed similar views). Some added that litigants in person may be given more leeway than a solicitor. Eight respondents referred to cost savings, one to fathers' rights, and three referred to bad experiences with a barrister or solicitor.

7.4 Questionnaires completed by judges, judicial registrars and registrars in relation to specific hearings

Data from the 64 questionnaires completed by judges, judicial registrars and registrars that were not excluded from analysis were analysed. The questionnaire is set out as Appendix B, and related to the particular matters heard by the relevant judicial officer.

The responses may be summarised as follows:

Question	Yes	No	Not applicable	Not sure	Total
In your opinion was the unrepresented party (or parties) disadvantaged by the lack of legal representation?	40	18	2	4	64
In your opinion was the other party disadvantaged by the unrepresented party's lack of legal representation?	28	27	6	3	64
In your opinion did the unrepresented party (or parties) participate in the proceedings with confidence?	28	27	5	4	64
In your opinion did the unrepresented party (or parties) participate in the proceedings with competence?	20	36	4	4	64
Would you or the Court have been assisted if one or more of the parties had been represented?	49	15	0	0	64

It can be seen that in 40 of the 64 cases (63%) judges, judicial registrars and registrars thought that the unrepresented party (or parties) was disadvantaged by the lack of legal representation, and in 28 cases (44%) they thought that the *other* party was disadvantaged by the litigant in person's lack of legal representation. In only 20 cases (31%) was it thought that the unrepresented party participated in the proceedings with competence. In 49 cases (77%) judges, judicial registrars and registrars thought that they or the Court would have been assisted if one or more of the parties had been represented. In relation to the latter, frequent comments were that the matter would not have taken as long, parties would not have needed help in court procedures, documents would have been better prepared, and the matter might have been resolved with help from lawyers.

If the answer to the question, 'Would you or the Court have been assisted if one or more of the parties had been represented?' was yes, the presiding officer was asked 'in what ways?' (Usually more than one answer was given). The answers were:

Response	No.	Percentage of questionnaires
The matter would not have taken as long	29	45.3
Alternatively, the matter would not have been resolved so quickly	9	14.1
Documents would have been better prepared	29	45.3
The matter might have been resolved with help from lawyers	29	45.3
Party/ies have language or communication difficulties or disabilities	11	17.2
Party/ies would not have needed help in court procedures	33	51.6
Fewer documents would have been needed	6	9.4
Party/ies were unable to present case, cross-examine, etc.	22	34.4
Other (please specify)	5	7.8

Judges, judicial registrars and registrars considered that the children's best interest would have been promoted if one or more of the parties had been represented in 28 out of the 43 cases where it was applicable.

7.5 Analysis of findings

The effects of litigants in person on the Family Court and other parties can be summarised from the point of view of 'the system' and of the litigants in person themselves:

Effects on the system

The comments of judicial officers on specific matters involving litigants in person, recorded above, suggest a high degree of frustration arising from a lack of representation. The chief sources are:

- a litigant in person's inability to state clearly the issues in dispute or to produce evidence relevant to those issues;
- a litigant in person's lack of knowledge of procedural and documentary requirements, which often means that matters have to be dismissed or adjourned; and related to this, that litigants in person frequently cannot understand why a judge must refuse to hear a matter (e.g., for want of jurisdiction), or why the matter cannot be proceeded with; and
- the difficulty of 'walking the line' between assisting the litigant in person so as to enable some progress to be made, while ensuring that this does not unduly prejudice the represented party.

One of the chief effects of all this is that matters involving litigants in person are frequently more consuming and wasteful of the time of judicial officers, registry staff, other parties and their representatives, than matters where both parties are represented. A saving of time was one of the most commonly cited benefits of representation. However, the extent to which litigants in person prolong matters in court clearly depends on the nature of the proceeding.

Effects of litigants in person on the Family Court's resources

A recurrent comment from judicial officers and registry staff was that litigants in person often increase the amount of time required to deal with a matter.

At first glance, this may be difficult to square with the JRC's finding that the presence of unrepresented parties reduces case disposition time[33]. We would suggest that matters involving litigants in person remain in the system for shorter periods of time, but *while in the system* they are more time-intensive than matters where both parties are represented. It is impossible, however, to assess at present whether the two effects balance or cancel each other out overall – that is, whether litigants in person's seeming propensity to abandon matters prematurely, which may lead to a saving in court time, is outweighed by their greater consumption of time while their matters are ongoing. Yet even if it turned out that litigants in person are resource neutral in this sense, it can hardly be a source of comfort that many have probably abandoned meritorious applications. It is difficult to weigh the potential for injustice in this calculation.

[33] R. Hunter, *Family Law Case Profiles*, para.357.

How did being unrepresented affect the litigants in person themselves?

One of the implications of our data is that it is impossible to generalise about the effects of lack of representation on the litigants in person themselves. Litigants in person vary in their self-confidence and actual abilities (and there may be no link between the two); and much will depend on the nature and complexity of the matter, the availability of support services, the style of the judicial officer hearing it and the presence of other lawyers (especially separate representatives) to assist the Court and the litigant in person. It is clear that some feel intimidated, exposed and unconfident – and it is not surprising that some of those fitting this description should feel unfairly treated, and indeed may objectively have suffered serious injustice. On the other hand, some will have received preferential treatment by the Court to the extent that the other side may have been disadvantaged. In addition, there are those for whom a Court appearance has been a therapeutic experience, and who may have done as good a job as a lawyer in presenting their case. There are, no doubt, many other possible combinations of subjective perception and objective result.

Chapter 8

Research Question 6: If it is true that cases involving litigants in person use more resources, and if it is also true that cases involving litigants in person present the Court and both the unrepresented and represented parties with problems:

- **how might the Court be able to assist litigants in person more effectively; and**
- **how can the Court cope with the problems that litigants in person present the Court?**

The focus of this Chapter is on the challenges posed to the Family Court itself by the presence of unrepresented litigants, and on the effectiveness of the Court's existing practices and procedures in assisting unrepresented litigants. The material in this Chapter is closely related to the material in Chapter 6, which looked more generally at the needs of litigants in person.

8.1 Interviews with judges, judicial registrars and registrars

The distinction between information and advice

The issue that appeared to exercise judicial officers more than any other was the workability of the Full Court guidance on litigants in person set out in the case of *Johnson* (see Appendix A), and in particular the supposed limitation that the Court should not provide legal advice to unrepresented litigants.

It was suggested that Court staff (although not necessarily judges) are frequently involved in giving legal advice, but that this was inevitable given that it may in practice be very hard to draw a line between providing information and giving advice. As one put it, 'people need to know about [the] content [of forms], so that people tend to give some form of legal advice when telling [parties] about procedures and how and why to go about things; but this is very unwise and leaves the court wide open.' For many, this merely pointed to the practical unworkability of the *Johnson* guidelines, which were seen by some to contain logical contradictions: for example, as simultaneously requiring and prohibiting the giving of legal advice (eg, in relation to the rules of evidence, such as privilege or admissibility). Indeed, one described this contradiction as 'dishonest'. Others saw the guidelines as requiring the judicial officers to lean too far in favour of the unrepresented party, so compromising the impartiality of the judicial role. There was a widespread view that the guidelines needed to be revisited (although probably little concensus as to what revised guidelines should say).

Attitudes to litigants in person

Not all respondents agreed that it was appropriate for the Family Court to seek to adapt to the needs of unrepresented parties. Indeed, several said that litigants in person should *not* be encouraged by the Court, and that the Court should not bend over backwards to help them. Some thought that the Court could not and should not go further than it already does. Instead there should be more legal aid; if people cannot afford representation they should be granted legal aid.

8.2 Brainstorm groups

Groups in all registries considered that the Court might be able to assist litigants in person more effectively by providing better information and advice. There is a need for legal advice (sometimes provided by legal aid) and for referrals. It was suggested that a Chamber Magistrate would be useful.

However, like judicial officers, staff recognised that there is a grey area between advice that can be given (procedural advice) and what is considered to be legal advice. Often staff find themselves overstepping the mark because clients are insistent, or just do not understand why staff cannot provide this information to them. It was noted that men in particular do not like the sort of answer that is given to them when they seek what is actually legal advice. In one registry it was suggested that staff should be allowed to provide more information and advice (including paralegal advice).

Suggestions for better information included written material, visual/IT and static displays, orientation, better signage, and better information about the existing sources of assistance such as information sessions. It was suggested that the present information sessions provide information right at the beginning of a matter, and may come too early. Instead, litigants in person are probably in need of more detailed information sessions further down the track when emotions may have settled and they have more of an understanding of what they have to do. These may need to be customised for litigants in person. It was said that the court needs to set up some forum in which to explain to litigants in person that they may not always be successful and create a more realistic set of expectations than is sometimes the case at present.

Many other comments were made in specific registries, including:

- *Improved services and facilities for litigants in person*: have a 'hot line' just for litigants in person; have a duty solicitor all day; have more staff to give litigants in person more time; redesign forms. There should be an attempt to reduce the number of forms and have multi-purpose forms, so that they are user-friendly. The problem with the present forms is that they have to be sent back much more often than forms which are completed by a solicitor. There should be a facility to refer clients to specific databases of similar cases, e.g. library facilities - it was said that you can send them to a law library but they don't know what to do once they get there.
- *Better physical facilities* and better building accessibility. The court should give litigants in person more time and more privacy than the current counter system requires or allows; there are real concerns about their confidential information being revealed because of the way the present system operates.
- *The judiciary* should:
  - show greater tolerance and understanding;
  - 'de-legalise' language;
  - have more education: some judges are out of touch and have stereotypes about litigants in person (e.g. marijuana smoking, making value judgments about different socioeconomic groups);
  - refocus on access to justice; and
  - abandon the perception that matters are not real unless they have solicitors and barristers.
- Judges and barristers both appear in wigs and gowns, and people ask 'what is the difference?' - they find it hard to understand that it does not mean that they are 'in cahoots'.

8.3 Interviews with litigants in person

Some litigants in person took the opportunity at various questions in the interviews to make comments and suggestions about services that they would have found helpful. These included:

- *Legal advice and other support*: Several said that there need to be more duty solicitors. Others said that there need to be more court networkers as well. It was also said that there should also be easier access to counselling during the day when needed.
- *Better information*: There should be information specifically for litigants in person. They need better information about forms. A list of forms should be available. There should be documentation as well as information sessions about processes, times, what to expect, what to do, etc. It could be clearer what the various stages and steps are[1].
- *Documentation*: One litigant in person said that the court demands perfection in documents and checks that you have dotted the i's and crossed the t's. 'But they won't tell you what to do about it. If the document is not perfect then it gets thrown out. They don't seem to realise that you don't know how to fill them out.'
- One litigant suggested that there is a need for a 'liaison officer' to facilitate contact between parties [which is antithetical to the adversarial basis of most court proceedings].

8.4 Interviews with practitioners

One of the family law practitioners said 'More resources - more registrars - more judges - the Government should put more money into the Court', while the other said that 'this really is a growing problem - We have to get matters into order *before* they come into court - there is a need for simple legal advice'.

In answer to the question: 'How might the court be able to assist litigants in person more effectively?', one of the family law practitioners said 'They do a pretty damn good job now. I wouldn't like to be a judge or registrar'.

The group of duty solicitors responded by saying that we should continue to provide duty lawyers and a court network system, and that it would help if the language used was simpler, or at least if legal terms were explained.

When asked 'Do you have any views about the value and relevance of existing Full Court guidance on litigants in person?' one of the family law practitioners answered by saying 'I have seen it. It annoys me, but it's a fact of life', and the other said 'It's right - what else can we do?'

8.5 Analysis of findings

The Johnson guidelines

The Family Court is an important source of information for many unrepresented parties, and is the sole source for many. As a result, there is enormous pressure on Court staff and judicial officers to cross the boundary between information and advice

[1] One litigant in person had to lodge an appeal in a limited time. He was told that it could not be lodged in Parramatta, but had to be lodged in Sydney. He took the train to Sydney and queued. He lodged the appeal with just ten minutes to spare. Only then was he told that it could have been lodged by fax.

– a boundary which, according to judicial guidance, it is forbidden to cross[2]. Many comments from interviewees reported in this chapter refer to the near impossibility of observing this distinction in practice. Some pointed to the logical contradictions of the *Johnson* guidelines (which seemingly require abstention from advice giving while at the same time requiring it), while others pointed to the practical difficulties and potential injustices that would arise if legal advice were not offered. Yet others pointed to the logical impossibility of separating information (e.g., on form filling or evidence) from advice-giving.

The role of the Family Court and other service providers

The Family Court itself is confined to providing information, and cannot (in theory at least) offer legal advice to those appearing before it. Those we interviewed suggested that although the self-help kits provided by the Family Court were useful, the Court's information sessions were not always effective in delivering the necessary information because they came too early in the process. Those we spoke to made a number of suggestions for targeting litigants in person more precisely as a significant element of the Court's clientele with clearly identifiable needs.

The tasks of providing legal advice and other assistance also falls to other agencies, such as duty lawyers, support volunteers (such as Court Networkers), legal aid commissions, community legal centres and private practitioners. Yet in order to access these services, litigants in person need clear information about where they are and how they can be accessed. The Court personnel we spoke to suggested that the necessary information was not always readily available. The duty solicitors interviewed echoed many of these views. This lends support to the ALRC's suggestion that there should be properly coordinated and maintained directories of the legal and dispute resolution services available to assist litigants in person (and others) in Family Court and other matters[3].

There may also be a case for the Court to act as a coordinator of these services, and perhaps linking litigants needing the services with the service providers. The Family Court Support Program at Dandenong, and the Integrated Client Services project at Paramatta (described in Chapter 2) may provide suitable models for co-operation between service providers and early assessment of needs. We return to this later.

Judicial style

As discussed more fully in Chapter 9, there appeared to be wide variations in judicial style. This was remarked on in particular by Registry staff, but is further supported by the evidence that there is no consensus amongst judicial officers as to the appropriate policy for litigants in person.

The litigant's perspective

The litigants in person themselves saw a duty solicitor as the source of assistance currently in greatest shortage. They were critical of the lack of information concerning basic form-filling, coupled with what seemed to be an unsympathetic attitude in some registries to incorrectly completed paperwork.

[2] *Sadjak*; *Johnson*

[3] ALRC Discussion Paper 62, *op. cit.*, p.211.

Chapter 9
Observation of Hearings and Case Studies

9.1 Introduction

As noted in chapter 3 above, the observation of hearings formed a major part of the study. A total of 72 hearings was observed. They were a rich source of qualitative information. In this chapter some of the more striking findings are discussed. Sections 9.8 to 9.11 present four case studies from the registries visited by the research team. Each gives a brief outline of the parties, the type of hearing and the court in which the hearing took place. The case studies also outline the issues involved in the case and how these may or may not have affected the process of the case.

The hearings observed exhibited great variety on almost every dimension. The time taken ranged from one or two minutes to several hours. There were duty list matters in judicial and registrars' courts and some defended hearings. There were children's, property, child support, contravention and many other issues involved. Those appearing in person ranged in age from less than twenty to over seventy, in financial resources from extremely wealthy to almost destitute, in occupation from middle class professional to unemployed or social security beneficiary, and in intellectual capacity. As most cases heard were in duty lists, the matters were usually first mentioned at a call-over and then stood down; in some cases a matter came before the court five or six times in the one day.

Because of this variety, it is not possible to make many generalisations about hearings that involved unrepresented parties. However, there are several themes worth highlighting, as well as challenges which parties, presiding officers and others face.

9.2 Unrepresented litigants – confidence, competence and interactions

Not surprisingly, those appearing in person varied greatly in their demeanour and in their ability to participate effectively in proceedings. A very young woman, who had travelled by bus for over 1000 kilometres to appear and had had no opportunity even to contact Legal Aid, appeared tense and utterly at a loss. She did not seem to understand at all what was being said (as she herself said in interview). Another woman, an applicant, was clearly very nervous, with her hands tightly clasped, and blushed when spoken to by a helpful female judge. Later she was tearful. An older woman, on her feet for thirty minutes, was, by contrast, very confident to the point of being quite assertive in response to questions. A man aged 75, who was on his feet for forty minutes in a sixty minute hearing, lacked confidence at the beginning and spoke with hesitancy at times, but, with courteous and sympathetic assistance from the judge, became much more confident and spoke clearly and concisely.

An applicant mother seeking recovery and residence seemed very fearful and alleged that the father (who was not present) had used a shotgun to threaten her. She was obviously under great stress when the matter was brought urgently before the judicial registrar. The presence on this occasion of the duty solicitor was crucial, and clearly the matter would not have been resolved quickly but for this assistance. Especially in Dandenong and Melbourne, it was commonplace that the intervention of a duty solicitor made a considerable difference – so that even though the party was technically in person he or she did not have to make submissions or interact directly with the other party or his or her legal representatives.

The behaviour of litigants in person varied similarly. The respondent in case study one (see below), who from the evidence was known to be intellectually impaired, was sullen and unresponsive most of the time but later became quite aggressive. At the other extreme, an applicant father, who had that day threatened to shoot the respondent mother if she came to court and who had a long history of violence, was assertive and belligerent. He tried to interrupt the registrar while she was explaining the situation to him, had conversations with friends in the body of the court while she was speaking, and exhibited aggressive body language. His behaviour was more subdued after the court officer spoke to him very forcefully during an adjournment.

Where one and sometimes two parties are in person, who by definition as litigants are in conflict with each other, the interaction between them can be difficult. In many cases there is no eye contact between the former partners and sometimes the body language is clearly hostile. One hearing involved two litigants in person, each of whom had taken out apprehended violence orders against the other. An Australian Federal Police officer was in attendance, as often is the case where violence is involved. The respondent father had to give evidence and the applicant mother was extremely hostile in cross-examination. The judge said that she had to control a potentially animated series of exchanges, and to restrict the parties firmly to topics that were relevant. In another case the respondent father (in person) was in good control while sitting at the bar table, but there were angry exchanges in court with his former partner (who was in custody on serious criminal charges) during a brief recess.

By contrast, some parties appeared relaxed with and civilised towards each other, at least while in court. Sometimes they sat close to each other, exchanged documents and were generally amiable.

Some litigants in person were very well prepared for their hearing. There was a dispute over interim spousal maintenance between two parties who had been in partnership in a small business, a matter which proved to be very complex and convoluted financially. The former husband was examined under oath, had what appeared to be his entire filing system with him, and was able readily to identify all the documents he needed. Similarly, the litigant in person in case study four had many folders marked with coloured tabs. Others were similarly well organised. By contrast, some litigants in person were unable even to locate the application that they had before the court or the affidavits which supported their application.

9.3 Judicial style

Judges, judicial registrars and registrars varied greatly in their judicial style and in the extent to which they adapted their language and approach in cases involving litigants in person. This was clear also from the remarks that they made when they were interviewed.

Some judges took care to use simple language when asking litigants in person questions: not ‘what applications do you have before the court today?’ or ‘upon which affidavits do you seek to rely?’, but ‘what is it that you wish to achieve today?’ and similar straightforward questions devoid of legal terms. While all judges, judicial registrars and registrars were courteous (one judge even calling an elderly litigant ‘Sir’), some took great pains to explain the steps and processes they were working

through and to keep asking a litigant in person if he or she understood what was being said.

One judge had a very direct and facilitative style and used simple, direct language, showing a realistic understanding of family realities: 'The 20th of September - the day after the Grand Final!' … 'home in time for afternoon tea'.

Despite being patient, often fairly informal and helpful in taking those litigants in person who were poorly versed in legal matters carefully through their documents, judicial officers could nevertheless be firm when necessary, for example, in striking out material in affidavits that was not clearly fact, in questioning submissions or seeking to clarify the nature of orders sought and the rationale for them.

Some registrars were not only very helpful, but also made a point of congratulating parties on agreeing to consent orders and thanking practitioners who had acted *pro bono* and had thus assisted both the parties and the court to achieve resolution. Similarly they made simple, direct and encouraging remarks such as: 'Presumably at some point these people lived together and were in love', 'Look within yourself for compromises ... Or there will be a stand-off', 'Look to yourself to get something happening … you need to rebuild the trust between yourselves', 'I encourage you, Mr and Mrs B, to take my words and have good use of the counselling. And good luck!'

In Dandenong and Melbourne, judges, judicial registrars and registrars frequently suggested the involvement of the duty solicitor, for example: 'Mr W, I cannot give you advice … and I repeat there is a duty solicitor.'

By contrast, some judicial officers, while at all times courteous and impeccably fair, continued to use legal terminology and to maintain a formal courtroom approach. They appeared to be stern, very precise and particular. They did not ask litigants in person as often as some judges if they understood what was said and why processes had to follow the particular path that they did. Whereas some judges not only had a more relaxed style with litigants in person but had also consciously moved some way from the role of the independent adjudicator in an adversarial process towards that of a mediator, these more traditional judicial officers did not. They often explained, very carefully and properly, that they could not offer parties any advice, although frequently adding (in those registries where it was true) that there were duty solicitors who could be consulted.

9.4 Cross-examination and submissions to the bench

The need for a litigant in person to appear in the witness box or to have a litigant in person cross-examine a former partner arises most often in trials (as in case study four), but sometimes it occurs in duty list matters. When a litigant in person gives evidence there is no solicitor representing him or her to interject, object or give comfort in any way.

In the case involving interim spousal maintenance and a couple's partnership in a small business, referred to in 9.2 above, both parties gave evidence. The former husband initially showed considerable equanimity when cross-examined, but his ex-wife's solicitor persisted for a considerable time with questions about the banking of cash takings from the business and the amount of household expenses in his new *de*

facto relationship. The husband eventually faltered and became flustered, which seemed to affect his subsequent ability to make final submissions to the bench.

The points made in his submission were lucid and seemed relevant, but they were not in any logical sequence. The net effect was quite confusing and muddled. As the Registrar observed, he attempted to introduce new evidence in his closing submission. He rambled and was unable to be concise. Significantly, he failed to address his wife's ability to earn income in his submission.

There seems little doubt that in this case the litigant in person was disadvantaged both by being unrepresented while being cross-examined (because he appeared unprepared for the kind of questions that were put to him), and then when he had to address the bench at a time when he was flustered and nervous.

By contrast, a young woman, who was on her feet for 35 minutes in all, exhibited considerable poise, making persistent and cogent arguments to the judge about the admissibility of her affidavit material and presenting clear arguments against the admissibility of the other party's affidavits, without any signs of faltering.

An interesting case was that of a man appearing in person to respond to an application for residence and contact from his wife (a known drug user already referred to, who was in custody on serious criminal charges). The maternal grandmother was an intervener, and was represented, as was the mother. The subject child had previously had shared residence with the father and the grandmother. The hearing took nearly 80 minutes in all, but was stood down several times during the day. In the morning evidence was given by a court counsellor. While she said that allegations of abuse needed to be tested in court, on the basis of her observation of the father and the grandmother and perusal of the affidavits she recommended that the child reside with the grandmother and that the father should have contact. While the case was stood down the father saw the duty solicitor and discussed his cross-examination of the counsellor with her. In the afternoon, with the benefit of her advice, he cross-examined the counsellor most effectively:

> Mr W: Did you consult with anybody after examination of the affidavits?
> Counsellor: No.
> Mr W: Is your evidence based solely on the affidavits?
> Counsellor: No.
> Mr W: Did you read the [State welfare department] report?
> Counsellor: No.
> Mr W: Have you spoken to me about the truth of these affidavits?
> Counsellor: No. I didn't have the phone number.
> Mr W: Can you detail the abuse which occurred on changeover?
> Counsellor: It was verbal (swear words).

In subsequent cross-examination by the child representative it emerged that the counsellor was not aware of Mr W's pending change of address and employment. The father was able to use this fact to weaken the effect of her evidence. He now lives with his daughter, and was leaving his job at least partly to have time to care for his son, who has special needs. The father was very effective in making his points to the

judicial registrar hearing the case in his cross-examination. Later in his final submission he made the telling point that the allegations in his wife's affidavit were unproven and made only in revenge.

9.5 Language, culture and special needs

Special problems arise when litigants are not only in person but speak a language other than English, come from a different culture or have special needs.

A Russian born young man, with limited English and who had an interpreter, had applied for contact with his three children whom he had not seen for over two years. He seemed passionate and anxious, and not to understand the court procedures in our system. For example, he did not at first understand that he could not approach the bench. The matter had to be transferred from a registrar's court to the judicial list because of a lack of jurisdiction. He could not understand this, nor could he understand why he could not make his application then and there, believing that as he was in court he should be able to make his application and present his arguments.

Case study two describes a situation in which a litigant was not only in person, from a non-English-speaking background and a different culture, but in addition clearly had no appreciation of the basis in Australian law of divorce and separation.

Reference has already been made to a litigant in person who was unrepresented despite it being known that he was delusional and hence not legally competent to act for himself. Case study one describes a hearing with an unrepresented party of at best borderline legal capacity. The judge called the denial of legal aid to this woman 'outrageous'.

Case study three refers to a matter which took much judicial time and patience, with both parties from a different language and culture, although long-term Australian residents, both unrepresented and lacking either any understanding of or any respect for the legal traditions of the Western world.

Yet another brief hearing involved two parties who were ethnically Chinese, in which the man required an interpreter. He was very tense, saying (through the interpreter) that he was emotionally and spiritually exhausted. While the registrar was facilitative and helpful, the litigant in person did not seem to understand what was happening. The registrar explained that she could not give legal advice and had to adjourn the matter.

9.6 Legal niceties and pitfalls

Even when litigants in person seem confident and apparently competent and well prepared, when they appear before a judge or registrar who is sympathetic and helpful, and when they do not come from a different language or culture or have special needs, they may still encounter pitfalls. These are greatest in defended hearings or where witnesses must be cross-examined, but they can arise in what may seem to be relatively straightforward cases.

At the most trivial level, but nonetheless a problem for many, are matters of court etiquette and procedure. How does one address the court? Even practitioners moving between family and magistrates' courts often get this wrong, calling judges 'Your

Worship' or registrars 'Your Honour'. For some the practice of standing while addressing the bench or being spoken to is confusing. Many on the bench insist upon litigants in person standing when addressed or when speaking, not as a mark of personal respect, but as a sign of respect for the court. In turn, having learnt that they must stand, some litigants in person do not know when they should sit until they are told 'You may sit down now'. Some judges, however, are much more relaxed and do not object if a party addresses the bench respectfully while seated at the bar table. As one judge said, it is more of a problem with the legal profession, who seem unable to think or speak unless they are on their feet.

More fundamental are the traps for litigants in person when cases are inadequately prepared or lack proper documentation. In some instances surprise was expressed from the bench that a matter was even listed for hearing (not that this is the fault of the litigant). One woman appeared to be seeking to have a matter re-heard. She had not brought all the relevant documents, including previous judgments in the same matter. She did not understand and became most anxious when told that her case could not be heard again. The judge refused to hear her: 'I don't understand your application ... There comes a time, Mrs S, when a case has to end.'

Another case took a long time and was eventually dismissed after the applicant had been on his feet for twenty minutes over four mentions in the day. He did not have all his documents with him, and had subpoenaed a school principal for no clear reason. He became irritated and flustered when asked to submit his application succinctly and when the judge asked him to explain what he was doing in court. He referred to 'an appeal' when he had actually made a further application for review (out of time and not in the correct form).

On some occasions a matter may come before the court without any documents at all. A young couple (aged 20 and 23) came late to court without any applications on file, after an impasse in counselling in a dispute about a 5-year-old boy. There were many difficulties – there were security concerns because of the firing of a gun at a car with the mother and child in it, allegations of drug abuse, and the presence in the court of the father's parents with whom the child currently lived, but who were not interveners (nor were they represented). Both parties were unrepresented and neither was assisted by a duty solicitor. In the absence of any documents, the registrar took oral evidence from both parties. The father who was unemployed was tense and not at all confident in court. The mother appeared distressed, overwrought at first, tearful and incoherent. The grandparents tried to address the registrar from the body of the court and, when they were refused permission to speak, made an angry outburst about the mother being a 'junkie'. After nearly half an hour, and well after 5 p.m., the registrar, who was calmly in control trying to reach an interim solution, made holding orders. These gave the mother overnight residence and required her to deliver the child to Counselling childcare the next morning when an adjourned hearing would be held. There was another outburst from the grandparents. At the adjourned hearing there were still no written Form 7 or Form 8 applications before the Court.

Some litigants in person are confused and upset when there are several applications before the court, but only some are dealt with, or some must be dealt with first – for example, if only interim contact orders are made and the judge refuses to discuss substantive matters on residence.

Form 49 applications for contravention orders can cause litigants in person great confusion in two respects: the contravention application must be dealt with first and quite separately from any other applications for orders; and many parties fail to understand that a contravention order is not an enforcement order but an application for penalties to be imposed on the other party.

One such case took about 70 minutes of hearing time, and a litigant in person (the applicant father) was on his feet for about an hour. In addition, it had to be adjourned temporarily several times because of the vast amount of affidavit material. There were four mentions, and two breaks of 15 and 30 minutes for the judicial registrar to read material. The judicial registrar was meticulously fair, and he refused to read any of the material seeking a change of orders until the alleged breach of orders and contravention had been dealt with. He eventually dismissed the application because the applicant was not able to show evidence on the contravention.

The judicial registrar led him through the process, and explained the procedure in detail and methodically. He was helpful but direct to the point of bluntness. '[I] need to identify each individual contravention.' He carefully explained that contraventions, while not criminal, attract similar penalties; and that he could deal only with specific contraventions mentioned in his application (not in affidavits). He explained that a Form 49 application and a variation of contact orders are quite separate proceedings, and cannot be dealt with together. 'The difficulty that I have is that I can't become a legal adviser. I can't get to the point of advising either of you what to do'. He required two potential witnesses for the respondent mother to withdraw unless and until they gave evidence (in the end they were not called, nor did the parties need to take the witness box.) He asked if either party had any questions about procedure. After reading the papers he formally varied the contraventions alleged because of the difference in the dates of the orders that had been contravened. He also explained that the litigants in person could make objections, but only on the basis that the evidence was inadmissible, not that he or she disagreed with it. He further explained that comments and observations like 'it was a very special moment for me' were not admissible as evidence and must be disregarded. He ruled several parts of the affidavit inadmissible on this basis or because they were conclusions. There was an exchange with the applicant father about the date of the terms of settlement not being the same as the date of the orders by the Court. Then there was legal argument between the judicial registrar and the applicant whether the respondent mother abided by the conditions because she knew of the terms of settlement or because she knew of the Court order. 'To be fair, Mr S, I'm not trying to catch you out on a technicality' (As he dismissed the Form 49 application).

While the applicant father understood the matters being discussed, he did not seem to understand the procedures fully. He had not completed his documentation properly to support his application, but knew what he wanted in relation to the contravention of specific orders. He did not appear to realise that there were two distinct applications, nor was there any apparent understanding that contravention meant that it was a breach of a court order which would have serious penalties attached to it. He therefore had no idea of what he wanted in relation to the penalty.

In a busy duty list when the judicial officer may not have had time to read the material on file (and indeed matters may not even have been listed on the registry's court list for the day), litigants in person do not always understand why the judge or registrar may have to read material.

Costs and taxation can also be confusing for parties. A registrar was very helpful, taking both parties through their papers. She explained the process of costs and taxation (repeating and expanding this further). However, they still did not understand the difference between a decision whether costs should be paid and a decision about the quantum.

Yet again the number of parties may be an issue. In one case a judge chose not to rule upon the standing of one person present at the bar table, the reason for whose presence was ambiguous. In another hearing the absence of parties was a major difficulty. The grandmother made an application, and the daughter was represented and accompanied by her parents. The grandmother (in person) was not aware of the gravity of the omission of the other co-applicant who was not present:

> 'These orders have four parties … I only have two before me … How can I make these orders?'

The judicial officer asked whether the other parties had been discharged: 'I can't treat the application as being by consent' [if two parties are not present]. A barrister later came back with papers signed by the grandfather and consent orders were eventually made.

Finally, it may be noted that child support legislation often causes difficulties, it having been observed to us that family law practitioners and even judicial officers find it difficult at times to be fully versed in all aspects of the legislation as well as the *Family Law Act*. A complex child support case was referred by a registrar to a judge, relating to the amount of time that the children spend with each parent. After thirty minutes, the application was dismissed because the Child Support Agency had not in fact made a decision. The applicant did not understand that she had brought an application to court that was not within the court's jurisdiction because there had been no decision. This case demonstrates how easy it is to come to court with an application that may not even be justiciable. The applicant could not understand why she could not use the court to sort this problem out.

Most of the material in this chapter necessarily concentrates on the interactions between litigants in person, those on the bench, and others at the bar table. Court officers, however, have a very important role, not least in hearings with litigants in person. In a busy duty list, especially at call-over, they have great demands placed on them. Often if the judicial officer's associate or secretary is busy in chambers transcribing and preparing urgent orders or engaged in other tasks, they have multiple functions. It has already been noted that on some occasions a court officer must admonish a litigant in person about unacceptable behaviour. Equally they can be and often are of great assistance to litigants in person, explaining before an appearance or during an adjournment things that may not be obvious, such as where to sit, when to stand, and how to address the Bench.

9.7 Court Network

In Melbourne and more particularly in Dandenong we were aware of the positive role played by the Court Network (more formally the Victorian Court Information and Welfare Network Inc.) The ALRC Paper also refers favourably to their work[1]. It is a Statewide service, and while for other courts their funding is from the Victorian Department of Justice, the Attorney-General's Department supports its activities in the FCA by providing funding for an office, the salary of the Coordinator, and overheads[2].

In some registries in other States groups provide tea and coffee, and in some cases 'handholding', but there is no provision of information or referrals. The Court Network is unique in the range of its services.

In each quarter it helps about 700 people in the Melbourne and Dandenong registries. Thirty volunteers work in the two Victorian registries of the FCA, and in Dandenong they are very much considered to be part of the Court. It is a fairly small registry, and most court staff have been there a long time. The Network takes referrals from the Domestic Violence Service and the legal profession and makes referrals to community legal centres (CLCs). The telephone service (with an 1800 number) allows clients to ring before or after a hearing, e.g. if they need to have orders explained.

Trainees are obtained through a rigorous selection process and receive 24 days of training including twelve days of 'apprenticeship' in which they are shown how to be impartial and non-judgmental before they operate on their own. Volunteers do not give legal advice but refer clients to CLCs, and work closely with Victoria Legal Aid (There is a fine dividing line). They try to defuse the tension, listen and encourage people to talk. They often sit in court (usually in the body of the court, not at the bar table), but do not speak.

In Dandenong two Court Network people were heavily involved in one case in particular, which helped the parties achieve some temporary resolution. Their role was almost entirely behind the scenes, talking to the Counselling Section, providing support to the parties and advising them to consult the duty solicitor, and to apply for legal aid as soon as possible. Both parties were very young and initially tense. This case came on first before the judicial registrar two days before the hearing that was observed, with a dispute about a two year-old child and the applicant mother applying for a recovery order. There had been a 'domestic' with the police called on the Sunday before. There was a very limited affidavit. A senior member of the bar assisted on that occasion, as did a duty solicitor, and a holding order was made. As the judicial registrar explained, in the end the father could not comply with the order to deliver the child by 9.45 a.m. There were virtually no documents. The judicial registrar was unwilling to put these parties in the witness box. There was a complaint by her about him pulling a knife, and a long history of violence. It would have been very difficult to proceed without the assistance of the duty solicitor, the barrister and a solicitor acting *pro bono*.

At the hearing observed in the field work, at the call-over the father had not read the applications served on him and the mother was advised to see the duty solicitor. At

[1] ALRC, *Discussion Paper 62, op. cit.*, pp.208-209.
[2] Court Network, *Annual Report 1997-98*.

the second mention both were represented (with the same barrister appearing as *amicus* and another solicitor acting *pro bono*). At the time we noted that the hearing was greatly assisted by (1) the duty solicitor; (2) the Court Network; and (3) the services of the practitioners who were *amicus curiae* and *pro bono* and that otherwise it would almost certainly have been a disaster. The judicial registrar agreed with this assessment. The mother clearly needed but had not yet applied for legal aid, and was urged to do so by the duty solicitor and the Court Network volunteers.

9.8 Case study one (both parties unrepresented)
This hearing involved an application for a change in contact and residence orders for one child. The application was heard in the judicial duty list. Both parties were in person. The time taken was approximately 35 minutes.

The maternal aunt of the child brought the application. The aunt was in her early thirties, educated, married with her own family and in part-time employment with a moderately high income and asset pool. The aunt was unrepresented at this proceeding but had been represented in the past. In fact, she had been represented right up until the final trial, one year ago. She had conducted the trial as a litigant in person, and believed that she had been doing this for so long now that she knew what she was doing. She said that she believed lawyers were so expensive and that they 'were only doing it for themselves'. The aunt was ineligible for legal aid because of her asset pool. The aunt was accompanied and assisted by her sister who had had some legal training.

The respondent to the application was the biological mother of the child. The mother was in her late twenties. In the hearing it was said that she had some intellectual impairment and suffered from a severe medical condition. She was emotionally labile. She had never been to school, was an invalid pensioner and had never worked. She had a history of violent behaviour in court in previous matters. Her boyfriend and a volunteer from a community organisation accompanied her in court and in the subsequent interview. The respondent mother had no legal representation, could not afford to pay for legal assistance and had applied for legal aid but was denied because of the two-year rule.

In the final orders, the aunt had been given residence of the child, although contact with the mother was regular (every second weekend). The applicant now requested a change in those court orders because of the alleged difficulties arising from the child's behaviour after the ordered contact periods with the respondent. The applicant had contravened the order by unilaterally reducing the contact with the mother because of these difficulties.

The applicant appeared nervous but poised. She looked well organised and spoke clearly and fluently, making her arguments to the judge convincingly. Initially, the respondent appeared anxious. She was unresponsive to many questions posed to her by the judge, and allowed long periods of silence when questioned. She made no eye contact with the judge. At some point she requested that her boyfriend assist her at the bar table. Predominantly throughout the proceedings she appeared withdrawn; however nearing the end of the proceedings she became increasingly aggressive, her voice became louder and at one point she raised her fists.

Given the nature and complexity of the issues in the case and the acrimonious relationship between the sisters, the judge decided to order the appointment of a child representative. She also decided that the residence and contact orders should be altered in favour of the aunt, until the matter could come back to court with a child representative.

The judge in this matter was highly facilitative. She attempted to secure some assurance that the respondent mother had knowledge of what was going on, and did this by allowing the boyfriend effectively to speak on her behalf, and by repeatedly asking questions about whether the mother understood what she was saying. Despite this, the mother became angry and aggressive when she realised the gravity of the decision made by the judge. She became increasingly hysterical and stormed out of the courtroom.

The case demonstrated how difficult it is for the judiciary and the court process to administer fair proceedings when a party is unrepresented and lacks education. The case is an example of how power imbalances may exist between parties. It also demonstrated the difficulties the judiciary has in balancing the rights of the parties, issues of justice and fairness, and the application of the law while remaining an impartial adjudicator. The judge commented in this case that it was outrageous to have someone with such a lack of understanding of what was going on in court representing himself or herself. The case raised grave concerns about the safety and welfare of a child, yet one party was clearly at a disadvantage when it came to making her case to Court. Coupled with this is the fact that she had to come to court this day to respond to an application, which was effectively reducing the amount of contact she was to have with her son. The judge commented that the fact that the mother was unrepresented made the decision an almost impossible one to make. The case also illustrates how important a child representative may be where there are no other lawyers appearing in the matter.

9.9 Case study two (one party represented, one party unrepresented)
This matter involved a contested divorce. The matter had begun in the divorce list but was transferred to the duty list of the judicial registrar. The wife was unrepresented but accompanied by an interpreter. The husband was represented. The time taken was approximately 46 minutes.

The husband was of South Pacific Islander origin, appeared well dressed, neat, and was represented by legal counsel. The husband had made an application for decree nisi, and was seeking the divorce in order to remarry. He was not required to interact at all during the proceedings, and appeared to become quite frustrated at the number of delays during the matter and at the resultant adjournment so that the wife could seek legal advice.

The wife, aged in her thirties, was also of South Pacific Islander origin, and appeared well dressed and neat. She did not want the divorce, stating that she wanted to ‘honour her marriage covenant’. She repeatedly refused any suggestions that she may want to consider obtaining some legal advice. She spoke softly, to the point of being inaudible and was requested repeatedly to speak more loudly so that her statements could be recorded. She looked shy and confused much of the time. On numerous occasions when the judicial registrar asked particular questions the wife and the interpreter

would have extensive discussions between themselves, which did not appear to be communicated to the court. She stated later in interview that she had not expected that it would be so technical. It also demonstrated her lack of understanding about the cultural and legal basis of the law of separation and divorce in Australia. She strongly believed that one sexual encounter was sufficient to resume marital relations and that honouring her marriage vows was paramount.

It appeared throughout the matter that the interpreter and the respondent wife might have been having conversations about the relevant issues rather than the interpreter directly translating the wife's answers to questions. It was established that the interpreter was not accredited by NAATI (the National Accreditation Authority of Translators and Interpreters), had no knowledge or experience in court interpreting, and may have been anticipating the litigant in person's response rather than translating what she said. While the judicial registrar was courteous and patient, it became obvious during the matter that the case was particularly frustrating, and potentially unfair to the other party. He needed to stop the proceedings to explain what the role of the court interpreter was, that the wife may not be participating properly in the proceedings and that he was addressing the wife via the interpreter; he was not addressing the interpreter – 'Again, I must insist that you interpret everything that she says. You may not be an expert in the law of divorce or separation. You must interpret what she is saying without comment and without embellishment'.

The judicial registrar commented that 'this case was awful', adding that it is so hard when the wife clearly did not want a divorce. The hearing took 45 minutes or so and still had no result. This was purely because the wife was unrepresented and needed to have an interpreter.

The Judicial Registrar found it very stressful, saying later in interview that '[y]ou have to be so careful about what you are doing', and 'you can just see the day seeping away from you'.

The Judicial Registrar said that he recognised that the wife was really very stressed and, although he may have appeared stern, he was doing this for her own protection. He observed that the more he asked her to speak up, the more stressed she became.

The husband did not get his divorce, and it was quite an emotional and financial imposition on him; he incurred legal fees. The wife may also have to pay his costs.

This case demonstrated the difficulties faced by the court when an interpreter is required, and there are conflicting cultural, social and legal issues which need to be explained through an interpreter, and how legal representation may help to resolve these.

9.10 Case study three (both parties unrepresented)

This case was complicated and time-consuming, taking approximately 136 minutes. The matter originated in the judicial registrar's duty list but was transferred to a judge. The matter involved various issues including an injunction to stop the sale and removal of marital property in Australia, the Middle East, the United States, Canada and the United Kingdom. The matter also involved the residence and contact of two sons and child support. Both the wife and the husband were in person. Both had

interpreters during the morning but were not assisted by interpreters in the afternoon (because they had been booked for only half a day) when the substantial part of the case was heard. Both were assisted by the duty solicitor and both had assistance and support from the court networkers.

The mother was the applicant and was in her early forties. She was the resident parent of the children and was on a sole parent pension. She had been married since she was 16 years of age. She looked nervous at times but spoke with confidence. She became emotional and cried several times throughout the hearing, but collected herself well. The mother was well organised and well spoken but appeared to have no idea about court etiquette; she constantly interrupted the respondent father and the judge and was told to sit down several times. She said that she was unable to afford legal representation, and had applied for legal aid but had been refused because her asset pool was too high. She had never been represented by legal counsel for these matters.

The respondent father was an elderly gentleman, possibly in his early seventies, of Middle Eastern origin. He spoke with a very heavy accent but had an obvious grasp of English, although this appeared to be selective. The father had control of the substantial family wealth which possibly amounted to a billion dollars tied up in property and bank accounts in Europe, the Middle East, the UK, the USA, Australia and Canada. He looked confident but was obviously confused about the nature of the applications. He had applied for a divorce in his country of origin, despite the fact (noted by the judge) that he had been residing in Australia for over ten years, presumably because he knew that he would do more favourably in that country in terms of a property settlement. Although he was polite at times during the court proceedings he made several verbal and physical threats to the wife throughout the proceedings. He was quietly reprimanded several times by the court officer. As the matter progressed he began to yell and plead language difficulties – '… I don't understand properly … and anyway I am not in the mood.' While the language difficulties may have been a problem, the lack of legal knowledge was a definite problem, and the judge tried several times to bring this to the attention of the litigants:

> 'You have signed an affidavit of full and frank disclosure of your financial circumstances under the Family Law Act - Order 17 Rule 3 of the Family Law Rules. You will see if you read them that you are required to disclose everything. You would know this if you had legal representation. I think you need legal representation… I think unless this gets in order you are going to find the proceedings very strenuous...'

> 'Don't think this court operates in a vacuum [about disclosure of financial circumstances]; the Court will make a decision that is less than favourable. If you leave gaps and don't provide evidence, don't be surprised if the court does not believe you.'

This case was difficult because there were so many unwarranted exchanges between the parties and there was no respect for court etiquette. Notwithstanding the procedural problems the legal issues in the case were fairly clear-cut. There were several emergency matters such as injunctions to deal with because of the likelihood of people, money and assets leaving the country. While the case was reasonably simple in legal terms, it highlighted how difficult it is when both parties are un-

represented, have difficulty with English and have no understanding of the law or the legal system, and how legal representation would have facilitated quicker and more satisfactory proceedings. The judge believed that the father appeared to have a perception that the court was biased in favour of the mother and reacted accordingly. The judge suggested that the case demonstrated how it would be productive for the Court to train judicial officers on how to deal with difficult litigants.

9.11 Case study four (respondent unrepresented)
This case involved the trial for final orders on the residence and contact of one child. The case was observed for a total time of 900 minutes (15 hours) and had not concluded at the time of our departure. The case was a complex track matter which had been set down for 6 days but took 13 days in total. The matter had been ongoing since 1992 but had not before come to a final trial because of many applications for interim orders and changes in the circumstances of the parties and of the subject child. The mother was represented by a barrister. The child was represented by a child representative funded by legal aid. The father was in person. Counsel for the mother was not accompanied by an instructing solicitor because of legal aid funding restrictions.

The child representative was accompanied by an instructing solicitor. She positioned herself early in the proceedings close to the counsel for the applicant mother. There was clearly a familiarity between both counsel which appeared to exclude the litigant in person. At some point in the first day the judge conveyed a request to the child representative to position herself in a more central position to reduce the perception of bias between legal counsel.

The applicant mother was in her late twenties, was neatly dressed and accompanied by her husband. For most of the observed proceedings she sat impassively, staring straight ahead. During the proceedings, she appeared street wise, fairly intelligent but not well-educated. She had a limited vocabulary and was often malapropos. She appeared quite aggressive and agitated at times.

The respondent father was in person, and was unaccompanied. He was neatly dressed and appeared to be well organised. The father spoke slowly and clearly. Initially he appeared quite hesitant and nervous, but his confidence increased as the matter proceeded. He had a number of folders which he had organised, tagged and laid out on the bar table. He was polite and deferential to the judge at all times. The father appeared to know his documents well.

As the case proceeded it was obvious the father was trying to rely on affidavit material that was out of date. He had refused to attend the compliance hearing and, as he was relying extensively on old affidavit material, the process became more convoluted. The father told us in interview that he had been given legal advice in the past but had chosen to be unrepresented, although with assistance from a friend who was his solicitor leading up to the trial. He had ceased formal legal representation because he found it to be too expensive and thought that as he had been involved in the case for so long no one could possibly know the issues better than he could. He said that the advantage in not being represented was that he could ask questions about things that he thought were relevant, make the points he wanted to make and felt that he was therefore in a more powerful position. He thought it was a good experience in self control, discipline and communication skills.

Despite his organisation, the litigant in person was still unfamiliar with court procedure. In addition, the applicant mother's counsel needed to communicate with her instructing solicitor via a mobile phone during adjournments. This resulted in a tardy start and proved to be frustrating and time consuming, leading the judge to observe:

> 'This matter has already limped along all morning procedurally for a variety of reasons, not to mention that Mr X has not provided the court with up-to-date affidavits… - this matter is not ready… It is a disgrace; there may have been some improvement if Mr X had been represented, but he is not, and I am not prepared to adjourn this again. It has been hanging around for too long...'

The judge commented here that this made the conduct of the trial very difficult, and noted that the costs saved were less than the other costs (court time, judicial time, etc.) which would now blow out.

Despite initial frustration, the judge was patient, flexible and sensitive to the difficulties that were experienced by the parties. He recognised that there were some serious difficulties attached to conducting a trial in person, and observed that this is especially a problem when the litigant in person is (unlike this case) the applicant, because the ability to start and build a coherent case is very difficult without legal knowledge.

Throughout the trial the judge was highly sensitive to the plight of the litigant in person, for example saying:

> [Judge interrupts during the opening address of counsel for the applicant mother]
> 'May I interrupt you. Mr X, you **must** take notes...'

> 'I appreciate your lack of forensic knowledge and you are in person, so I should change my language. Your lack of court knowledge is such that as this arises and as the case unfolds you may want to cross-examine the mother for much longer [than you anticipated]'

The judge recognised that the grey area between giving procedural advice and legal advice is highly problematic especially when adjudicating. He indicated that sometimes it is almost impossible to explain things without one of two results. Firstly, it may give the appearance that the litigant in person is halfway towards winning the case. Secondly, any judicial interference may appear to be a sign that the judge is indicating a deficiency in their case and/or that the judge has made up his or her mind about the outcome before the case has been completed. As the case proceeded, it was evident how difficult it is for a judge to maintain impartiality when allowing the matter to be heard before him or her:

> 'Mr X... we have heard quite a lot of evidence this morning… Do you think you need some witnesses? … I am not suggesting you do… but this is a matter for you to decide; if you want to seek leave for me to issue a subpoena, then you must ask me. I am saying all this because you are a litigant in person and you may not know what to do.'

The judge also recognised that cross-examining a former partner (in often acrimonious circumstances) and an insufficient knowledge of the laws of evidence can create difficulties.

While the proceedings were greatly enhanced by the demeanour and manner of the litigant in person, the judge told us in interview that cross-examination was difficult. However, if a litigant in person is hostile the process can be extremely tricky. He said that it is not uncommon for a litigant in person who is cross-examining to be rude and insulting, which requires judicial intervention and may lead to subsequent discordance and enmity in interactions between the litigant in person and the judge. Alternatively, a judge has to intervene and then has to formulate the questions for the unrepresented party, thus blurring the lines of judicial impartiality and providing legal advice.

The case highlighted how time consuming and difficult it is for a litigant in person to conduct their own trial. While the litigant in person in this case was highly organised, responsive and amenable to assistance by the court, the case took a long time to get started because of procedural hiccoughs and lack of experience in court processes and law in general. The process was also hindered considerably by a reduction in legal aid funding for the applicant mother.

9.12 Implications

The evidence presented in this Chapter may give some hint of the diversity, and hence the challenge, of the phenomenon of unrepresented parties. Parties differ in their abilities, and have a wide range of differing needs in consequence. It is also striking how varied are the support services currently available to unrepresented parties, frequently depending on geography or luck, or both. There are also differences in the extent to which the presiding judicial officer makes allowances for their self-representing status.

Chapter 10
Conclusions and Implications of the Research

The key findings of this research have been summarised in the Executive Summary and in the concluding sections of chapters 3 to 9. This chapter draws out some of the implications of the research. We start by looking at the findings from the perspective of the unrepresented party, then from that of the Family Court. We conclude with some suggestions for change.

The litigants in person's perspective

Appearance unrepresented is more often than not a function of lack of resources to fund legal representation; it therefore comes as no surprise that litigants in person are seemingly drawn from the less privileged social strata. They are those who are not poor enough for legal aid, but nevertheless cannot afford to pay for a lawyer themselves. Changes to legal aid policy have had an effect on the incidence of litigants in person, and this effect has become more marked since the changes to legal aid funding in 1997 (especially the new 'merits' guidelines).

Our findings also suggest that litigants in person are concentrated in children's matters, probably because an inability to fund a lawyer is associated with there being few or no assets worth disputing, or because property matters are considered more important and therefore more deserving of a lawyer's attention. Equally, if there is property worth disputing, it is always possible that legal representation can be funded from an eventual settlement (perhaps under a speculative fee arrangement), whereas this won't be true in children's matters.

In Chapter 1 we argued that being unrepresented in an adversarial system ought in theory to result in unfairness, because of the characteristics of that system. We suggested that one issue for this research is whether that theoretical disadvantage translates into a practical one. This research suggests that it is hard to generalise, because the extent of disadvantage in practice depends on many variables.

One of these variables is the support services available to litigants in person. We were struck by the geographical variation in the levels of such support. Some registries, such as Melbourne and Dandenong, are relatively well equipped with duty lawyers, Court Networkers and student volunteers. Our observations suggested that these services were invaluable in many cases in assisting litigants in person to reach settlement in their matters, or in negotiating a court process more efficiently. Other registries have none of these supports in place, while others fall somewhere in between; and even where support services exist, our findings suggest that there is no guarantee that litigants in person will know about them. All of this lends weight to the suggestion that there should be more consistency in the provision of such services and better arrangements for providing information about their existence.

Another important variable is the style of the judicial officer before whom the litigant in person appears. It was suggested to us that there are wide variations in the style and approach of judges, judicial registrars and registrars, so that some may truly operate a 'modified' system of adversarial justice, while others make few allowances for a party's representation status. This variation in style suggests a need for some Court-wide guidance or protocols, or at least an opportunity for discussion and reflection on best practice. The *Johnson* guidelines (see Appendix A) go some way to addressing

this, but they deal with largely technical issues of evidence and cross-examination and are directed almost exclusively at judges. They were also widely regarded as unrealistic, and more honoured in the breach than the observance. There is, we suggest, a need for a broader and more detailed set of guidelines dealing with all aspects of a matter, and applicable to all Court personnel.

What this adds up to, then, is the conclusion that while some litigants in person have done as well as they would have done if they had a lawyer, others are likely to have suffered injustice (especially those whose cases have been dismissed for non-compliance with a technicality that could have been spotted by a lawyer). The mere fact, though, that there is such a variation in the experiences of litigants in person is surely inconsistent with fundamental principles of legality, such as equality of treatment, and ought to be of serious concern to those in government responsible for the administration of justice.

Just as important, but impossible to judge from this research, are the effects of a lack of legal assistance and advice on those who *never* initiate court proceedings at all (i.e., those who never become litigants). In Chapter 1 we hypothesised that this was likely to be a numerically significant group, and that one effect of an inability to afford legal advice and assistance was likely to be abandonment of claims, perhaps meritorious ones, rather than appearance unrepresented.

The system's perspective

There can be little doubt that the chief impact of litigants in person on the court itself is the greater time taken in dealing with and resolving litigant in person matters. This is true for registry staff, who find that they are called on to assist litigants in person to complete and file documents correctly, and who often walk a very fine line between information and advice-giving. It is also true for judicial officers, who find that hearings of litigant in person matters take longer because of the unrepresented party's lack of legal expertise and procedural knowledge. Increased stress levels was another frequently cited effect of the presence of litigants in person.

We have already noted the research evidence suggesting that litigant in person matters remain in the system for shorter periods of time than matters in which both parties are represented. We have also noted the evidence suggesting that litigant in person matters are more likely to be resolved by default or dismissal, and to proceed to a hearing, than matters in which both parties are represented. This suggests a bifurcated pattern, according to which litigant in person matters either fall out of the system at an early stage for technical reasons, or proceed all the way to a hearing. The effect of a lawyer's presence seems to be to moderate both tendencies – to avoid a matter failing for technical reasons, while assisting a party to arrive at a negotiated settlement before a full hearing is reached.

These findings are not inconsistent with ours that litigants in person are more demanding of time than represented parties, for a number of reasons. First, the fact that a matter fails at an initial stage for technical reasons does not mean that it uses no Court or registry time. On the contrary, a defect in paperwork may be discovered only once a matter has become before a judicial officer; and incorrectly completed documents will often have to be sent back and re-checked by registry staff. Second, our findings suggest that so long as litigant in person matters remain within the

system, they are considerably more demanding of Court time because registry staff and judicial officers must often (so far as the guidelines allow) do the work that lawyers would have done (although this varies according to the availability of alternative sources of assistance for litigants in person). Besides which, we should not forget that litigant in person matters are more likely to proceed to a hearing, thereby consuming court resources in a more obvious sense[1]. Of course, we cannot prove conclusively that litigants in person's greater use of time while they remain in the system outweighs the objective fact that they remain in the system for less time; but we can caution against assuming that a shorter time to final disposition automatically means that there are fewer demands on time being made.

Implications

Our findings suggest that litigants in person's experiences of family litigation are likely to vary significantly according to a range of variables. Two policy conclusions could be drawn from this. One is that there should be more funding for legal representation of a traditional sort through the legal aid system. This would help to alleviate the injustices and inconsistencies that currently arise. Indeed, as we saw in Chapter 1, equal access to legal services is a cornerstone of legitimacy in a democratic system of government.

Our research lends support to the argument that greater investment in legal aid funding will result in cost savings to the Court system, and therefore to the taxpayer. This is because we have shown that (a) there is an identifiable link between the unavailability of legal aid and self-representation; and (b) that litigants in person consume more Court resources than represented parties. It follows that there is at least a prima facie case that more legal aid would reduce costs elsewhere in the system. We cannot prove conclusively, however, that the efficiency gains arising from greater investment in legal aid would outweigh the costs of providing the aid itself. We would note, however, that there are costs associated with legal aid not being available that are hard to quantify – such as the injustice flowing from an individual abandoning a meritorious case.

In the current political climate, however, it seems unlikely that legal aid funding will be restored to levels sufficient to provide all disadvantaged litigants with legal representation. In any case, as we saw in Chapter 1, there is no reason to suppose that equal access to legal services necessarily means equal access to the services of a practitioner in private practice. Instead, we suggested that there should be an equal 'opportunity to be meaningfully heard', and that the resources or assistance necessary to realising this in practice may vary from case to case. So, some litigants will continue to require legal representation – those who cannot speak English, for example, or those whose matters are extremely complex. Others, though, will not need that level of assistance.

The alternative conclusion, then, is that litigants in person will remain a permanent feature of the litigation landscape. This means that governments and relevant agencies will have to follow the Family Court's lead[2] in acknowledging this and develop policies and target resources accordingly.

[1] ALRC
[2] See the material at 2.4, above.

A first step in this would be to reconceptualise litigants in person and their needs. At present, there is a tendency to see litigants as either represented or unrepresented, with litigants in person as 'lacking' something possessed by the former – namely, a legal representative[3]. This then leads to the perception that any disadvantages suffered by litigants in person are only remedied by making good the 'lack', that is, by providing them with a lawyer. We suggest that this mis-states both the problem and the potential solution to it. It mis-states the problem, because litigants in person, as we have shown, may already receive support from a wide range of sources. Some may be very well advised and supported, and may only have dispensed with a lawyer's services at the last minute. To see litigants in person as occupying one category, and to label it as a disadvantaged one, may be to oversimplify the reality. It mis-states the solution, because some matters are relatively straightforward, and could be conducted by a properly supported litigant in person, while others are not. Similarly, the 'solution' to the 'problem' of litigants in person may not lie solely in providing conventional representation (although there are undoubtedly cases in which that will be the only solution), but may also lie in ensuring that there are properly coordinated and publicised support services. Once again, the benchmark is that of the meaningful opportunity to be heard.

Conclusion

Our findings offer a snapshot of a system in transition. The transition in question is one necessitated in large part by a declining government commitment to fund legal services for those who cannot afford to pay for their own legal representation and advice.

In spite of numerous modifications, and of a public commitment to assist unrepresented parties[4], the Family Court remains largely premised on the assumption that parties will be represented. While the majority are indeed represented, the proportion of unrepresented parties is now very significant. The issue now is whether the modifications to the adversarial system of justice that have already been made are adequate to the scale of the phenomenon of unrepresented parties. Our findings suggest that more needs to be done.

We have suggested that a way forward is to adopt the benchmark of the 'meaningful opportunity to be heard'. The precise requirements set by this benchmark would vary according to the circumstances of each case, and according to the needs and capacities of each litigant. This is the least, we believe, that can be asked of a legal system in the light of the legitimating principles of our system of government, and the political realities of public funding of legal services. Yet, as the material presented in Chapter 9 illustrates, the current system sometimes (and perhaps often) fails to meet even this modest benchmark. Many litigants pass through the Family Court without having that opportunity, frequently in spite of the best efforts and sympathies of those in the Court system.

[3] Hunter calls this the 'deficit' model for thinking about litigants in person: Hunter, 'Litigants in person', op.cit., at p.174.

[4] The publication of *The Family Court Book* (FCA, 1999) is evidence of this.

We have suggested the following classification of need where litigants in person are concerned:

Information relating to:

- *Court procedures, including the function and purpose of duty lists and directions hearings and the nature and purpose of examination and cross-examination;*
- *Court etiquette such as the order of events, and how to behave in Court;*
- *support services available to unrepresented litigants;*
- *primary dispute resolution services and alternative methods of resolving a dispute;*
- *the respective roles of the Family Court and the Child Support Agency;*
- *commonly used legal terminology; and*
- *the rules relating to service of orders and other Court documents.*

Advice and assistance relating to:

- *the preparation of Court documents and completion of forms;*
- *the preparation of oral arguments in Court;*
- *the rules of evidence; and*
- *preparation of consent orders.*

In the light of this, we suggest that the following measures are the minimum necessary to ensure the fundamental rights of equal access to law for unrepresented parties:

- more and better timed information and assistance, as detailed above, to litigants in person in running their own matters, timed to coincide with the approach of a Court hearing date. The early identification of a party's need for such assistance could be linked to new case-management strategies, such as the Integrated Client Services Scheme introduced at the Parramatta Registry;
- the better coordination at a local level of information regarding support services (such as Court Networkers, duty lawyer schemes or CLC-sponsored support programs) relevant to the needs of litigants in person. The Family Court Support Program, recently initiated at the Dandenong Registry, may offer a model for the co-ordination of locally available support;
- the better coordination and funding of those services and improved levels of information about their availability; and
- the development of a clearly articulated policy within the Court, applicable to all Court personnel and judicial officers, setting out clearly the Court's approach to litigants in person, and practices and procedures for assisting them. In particular, any such policy must deal explicitly with the balance to be struck between the provision of information and assistance, especially by Registry staff, and should provide guidance to judges on a wider range of ethical, procedural and other matters than those dealt with in the existing *Johnson* guidelines. The promulgation of such as policy should be accompanied by opportunities for discussion of, and reflection on, best practice.

One of the effects of implementing these changes would be that the Court would cease to be the sole or primary bearer of the needs and demands of litigants in person (as at present), but would instead have a proactive role in coordinating the provision of those services by other agencies. They should be regarded as steps necessary to ensure that all litigants, irrespective of means, would be given the meaningful opportunity to be heard that principles of equality, fairness and legitimacy suggest they should have.

Acronyms and Abbreviations

AAT	Administrative Appeals Tribunal
ADR	alternative dispute resolution
AIJA	Australian Institute of Judicial Administration
ALRC	Australian Law Reform Commission
CLC(s)	community legal centre(s)
CLE	continuing legal education
FCA	Family Court of Australia
JRC	Justice Research Centre
LIP(s)	litigant(s) in person
NESB	non-English speaking background
US	United States (of America)
WA	Western Australia

Appendix A: **Judicial guidance on litigants in person**

In *Johnson v Johnson*[1] the Full Court of the Family Court of Australia identified some of the court's obligations towards unrepresented litigants.

The case concerned an appeal and cross-appeal in respect of orders, inter alia, refusing a husband contact with the child of the marriage and granting the wife a sole residence order.

The husband was unrepresented at the trial. At an early stage of the proceedings, following discussions between the trial judge, the child representative and the wife's counsel, it was agreed that a child psychiatrist who had prepared a number of family reports would be interposed. The trial judge did not inform the husband of the consequences of this action nor seek submissions from him regarding it.

The husband subsequently sought to recall the expert for the purpose of cross-examining him in relation to parental alienation syndrome as an explanation why the child was resisting contact. The trial judge refused the husband leave to further cross-examine the expert. The trial judge also refused the husband's application to amend his application during the trial, to enable him to seek an order for residence in relation to the child.

On appeal, the husband claimed he had been denied procedural fairness by the trial judge.

The Full Court held that the trial judge had failed to afford the husband procedural fairness in relation to the interposition of the expert witness before the parties' evidence had been given. In particular:

> 1. By failing to explain to him the consequences of and the possible undesirability of the expert being called before the conclusion of the evidence from both the husband and the wife; and
> 2. By failing to advise him that he had a right to object to the early interposition of the expert's evidence, and of the possible consequences of his failure so to object.

The Court also found that the trial judge had erred in refusing the husband the right to recall the expert and to amend his application during the trial.

In the course of upholding the husband's appeal, the Court stated:

> 'We think it necessary for the guidance of judges and of the legal profession generally, to explain what was said in *C and O* (supra) and set out in some detail the obligations which we consider trial judges have when hearing cases involving unrepresented litigants and we now do so, as follows:-

[1] (1997) FLC 92-764 per Ellis, Baker & Lindenmayer JJ

1. To inform the litigant in person of the manner in which the trial is to proceed, the order of the calling of witnesses and the right which he or she has to cross examine the witnesses;
2. To explain to the litigant in person any procedures relevant to the litigation;
3. To generally assist him or her by taking basic information from witnesses called, such as name, address and occupation;
4. If a change in the normal procedure is requested by the other parties, such as the calling of witnesses out of turn, to explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course;
5. If evidence is sought to be tendered which is or may be inadmissible, to advise him or her of the right to object to inadmissible material, and to enquire whether he or she so objects;
6. 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;
7. To ensure as far as possible that a level playing field is maintained at all times;
8. To attempt to clarify the substance of the submissions of unrepresented parties, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated.'

The Court went on to say:

> 'It is undesirable for legal advice to be given to the litigant in person, essentially for the following reasons;
>
> (a) It may be unfair or have an appearance of unfairness to the other parties; and
> (b) The advice given may not be with full knowledge of the facts.'

The Court referred to the unreported decision of *C and O*[2] where the Full Court held:

> 'This ground does however raise the wider issue as to under what circumstances the Court is able to give assistance to an unrepresented litigant in the course of proceedings before it. Clearly a trial judge would be obliged to inform a litigant in person of the manner in which the trial is to proceed, the order of the calling of witnesses and the right which he or she has to cross examine witnesses. Similarly, I am of the opinion that a trial judge should explain to a litigant in person any matters of procedure relative to the litigation and generally assist him or her by taking basic information from witnesses called, such as, name, address and occupation and then indicating to him or her as the trial proceeds when he or she may ask questions, whether in chief or in cross-examination and when final submissions are to be made.
>
> Trial judges in my view should not give litigants in person legal advice, essentially for the following reasons: (a) It would be unfair to the other litigants in the proceedings, and; (b) Such advice may be given without full

[2] 18 March 1997 (unreported), Full Court of the Family Court of Australia, Adelaide Registry, at p 22

> knowledge of the facts and therefore be of dubious assistance or perhaps even plainly wrong.'

In an earlier case, *Sadjak and Sadjak*[3], the Full Court acknowledged the potential for an injustice to occur when a court is confronted with an unrepresented party who possesses the additional disadvantage of being unable to speak English.

The case concerned an appeal against the decision of a trial judge to refuse a wife's application for an order permitting her to travel outside Australia with the child of the marriage. At the hearing of the application the wife was unrepresented. She was Polish, unable to speak English and was forced at the hearing to rely on an interpreter. The wife claimed that she had been denied a fair trial because of her lack of knowledge of legal proceedings coupled with the fact that she had been denied legal representation, and that because of her lack of knowledge of the proceedings, relevant evidence had not been submitted to the court.

The Full Court held that the combination of the circumstances that the wife did not speak English, was not legally represented, and had not had an opportunity to put all her evidence before the court, prevented the wife from receiving a fair trial.

The Court said:

> 'The likelihood of an injustice occurring is greatly exacerbated where a party is unable to properly present their case because of lack of legal representation, particularly where the party is a person for whom English is not a first language. A party who does not speak English should not be expected to present a reasoned argument to an appellate court without legal representation or, at the very least, an independent source of legal advice.'

The Court went on to say:

> 'In this regard there is very little that a court can do. Its role is to decide cases as between litigants and it cannot perform that role and retain the confidence of litigants if it is proffering advice to one side or another.'

In *Skoubourdis v Junski*[4] the appellant relied upon the decision in *Sadjak and Sajdak* to argue that the circumstances of the trial were unfair to him by reason of the fact that he was unrepresented and had no legal qualifications and had language difficulties.

In rejecting the appellant's appeal, the Court made the following observations:

> 'Given the fact that the appellant was unrepresented, the trial judge was patient with him throughout the hearing and gave him such assistance as she was able to in the course thereof…
>
> In the present case, although English was clearly not the appellant's first language, he nevertheless acquitted himself reasonably well before the trial

[3] (1992) 16 Fam LR 280 per Nicholson CJ, Nygh and Purdy JJ
[4] 21 July 1994 (unreported), Full Court of the Family Court of Australia, Sydney Registry, per Baker, Finn and Barry JJ

> judge and had no difficulty in either making himself understood or putting his views to the court. He was able to tender particulars of his medical condition and appeared to have a reasonable grasp of the nature of the proceedings.
>
> It must be said that there is no general right of litigants in the Family Court to be legally represented. Many litigants appear in person in our Court, some out of sheer economic necessity and other for other reasons. Some are able to conduct their case competently; others do not, and, indeed, the same could be said for members of the legal profession.
>
> The appellant, had he wished, could have sought an adjournment to enable him to obtain legal representation, but he chose not to.
>
> Her Honour's conduct of the trial in our opinion, was impeccable and therefore the appellant cannot, in our view, establish procedural unfairness of any kind.
>
> Although, had the appellant been legally represented, the trial may have been conducted in a somewhat different fashion and perhaps additional evidence may have been adduced, we are not convinced however, that such a course would have made any difference to the ultimate result.'

The problematic position of a court operating under an adversarial system in dealing with litigants in person was noted in *McCarthy v McCarthy*[5].

In that case a husband appealed against the pronouncement of a decree nisi for dissolution of marriage, and submitted, inter alia, that the trial judge had a duty to afford positive guidance to a litigant in person as to the method of conducting proceedings.

The Full Court held, dismissing the appeal:

> 'The role of the trial judge was to hear and determine a justiciable issue as presented to him by the parties to adversarial litigation. The court does not have an inquisitorial role in proceedings for principal relief.'

The Court went on to say[6]:

> 'Firstly, it is contended that his Honour should have entered the arena, as it were, and afforded positive guidance to the appellant in his conduct of the proceedings. This ground must fail, simply because it depends upon a fundamental misunderstanding of the role of courts in the Australian justice system.
>
> His Honour's role in the proceedings at first instance was to hear and determine a justiciable issue as presented to him by the parties to the litigation. The court, unlike its European counterparts, does not have an inquisitorial

[5] 11 October 1993 (unreported), Full Court of the Family Court of Western Australia, at p 2 per Barblett, Lindenmayer and Rourke JJ
[6] at p 4

> role. Proceedings before it are adversarial proceedings, to be determined according to law. It was never part of his Honour's role to "intercede" or to give "directions or guidance" to either of the parties to the litigation before him.'

The question of the extent of assistance a court should afford a litigant in person was also considered in *Scott (PW & CE), In the Marriage of*[7]. The case concerned an appeal by a husband from orders made in child maintenance proceedings.

The husband claimed, inter alia, that, when assessing the appellant's evidence, the Court did not give due regard to the difficulties confronting a lay person appearing without representation.

The Court, in rejecting the husband's appeal, stated:

> 'His Honour's manner may well have been stern, and perhaps even brusque at times and it is clear, as we have earlier noted, that he was at pains not to be seen to be rendering advice or assistance to the husband in the presentation of his case, in the absence of the wife. However, merely because the husband chose to appear before the court unrepresented, his Honour was not obliged to treat him with kid gloves.'

In *C v C*[8] a husband appealed, inter alia, against a trial judge's orders for property distribution. In dealing with the numerous grounds of appeal, the Full Court made a number of comments consequent on the husband's appearance in person including the following:

> 'A trial judge who summarily rejects an apparently outrageous proposition does so at some risk of a retrial being ordered if an appellate court finds possible merit in the proposition but is hamstrung by a lack of findings necessary to decide it. If the right to be heard is denied then an appellant ought to be afforded, at peril as to costs, the opportunity to put the proposition to an appellate court. If the appellate court finds no merit in the proposition then there has been no miscarriage of justice and the appeal will not succeed merely because the point was not allowed to be argued at first instance.
>
> The court is obliged by the provisions of s 97(3) of the Act to ensure that proceedings are not protracted. While the laws of evidence clearly entitle a party to challenge evidence which is in dispute by cross-examination aimed at matters of credit, those rights have to operate within the broad framework of s 97(3) of the Act. In this case, while there were occasions when another judge may have given more latitude to the cross-examination than was allowed by Moss J, we perceive no or insufficient examples of his Honour having overstepped the boundary and placed unreasonable restrictions upon the husband so as to hamper the proper presentation by the husband of his case.
>
> The imposition of arbitrary time limits offended the rules of natural justice (*In the Marriage of Collins (1990) 14 Fam L R 162 at 174*) but, consistent with

[7] (1994) Fam L R 17-420 per Baker, Lindenmayer and Bell JJ
[8] (1998) Fam L R 23-491

the High Court's decision in *Vakuta and Kelly ((1989) 167 CLR 568)*, the failure of a party to the litigation to object to the imposition of the time limit at the time it is applied or subsequently during the case, amounted to a waiver of any breach of the rules of natural justice. Generally speaking, the harshness of the imposition of a waiver rule may be alleviated by a court when dealing with a litigant in person. The husband is no ordinary in-person litigant. A significant part of his case was based upon the extent to which he has been able to appear in superior courts of record, including the highest court in the land, in order to protect the assets that he accumulate during the course of the marriage. Even though Moss J appears to have applied arbitrary time limits to the husband's case, at no time did the husband seek to have those time limits enlarged nor was any objection taken in respect of the time limits when imposed. In our view, no injustice was done to the husband by the imposition of time limits in the circumstances of the case.'

Appendix B: **Questionnaire for Judges, Judicial Registrars and Registrars**

Note:

There were some blemishes and ambiguities in the various research instruments, despite the pre-test in Canberra. These were overcome by appropriate changes to the design of the database.

A box was not included in the questionnaire for judicial registrars.

Question 18 in this questionnaire inadvertently included two answers numbered (2).

Completion of some schedules required some modification when there were more than three parties.

LITIGANT IN PERSON STUDY

Questionnaire for Judges, Judicial Registrars and Registrars

PLEASE DO NOT COMPLETE IF ALL PARTIES ARE REPRESENTED. PLEASE DO COMPLETE IF PARTIES IN PERSON DO NOT APPEAR (NOTE AT QUESTION 7) & COMPLETE AS FAR AS RELEVANT. PLEASE INCLUDE CASES WHICH ARE ADJOURNED OR HAVE CONSENT ORDERS.

1. **Registry** ☐

2. **Date** ☐ day ☐ month

3. **Judge or Registrar** ☐ Judge ☐ Registrar **(please tick one)**

4. **Name of Party or Parties (for reference purposes only) …….**
…….. ☐

FOR RESEARCH TEAM USE ONLY: Reference No.

---

5. **Is the matter before you a: (tick one box only)**

(1) Defended Hearing ☐
(2) Judicial Duty Matter ☐
(3) Directions Hearing ☐
(4) Registrar's Duty Matter ☐
(5) Registrar's Defended Hearing ☐

---

6. **What Issues were raised in this matter? (tick all that apply)**

(1) Residence ☐
(2) Contact ☐
(3) Specific Issues ☐
(4) Property ☐
(5) Spouse Maintenance ☐
(6) Child Maintenance ☐
(7) Injunction ☐
(8) Child Support ☐
(9) Hague Convention ☐
(10) Contact Enforcement ☐
(11) Contempt ☐
(12) Enforcement Summons ☐
(13) Costs ☐
(14) Other (please specify) ☐
…….....

---

7. **Who did not have Legal Representation? (tick all that apply)**

(1) Applicant ☐
(2) Respondent ☐
(3) Child/Children (if applicable) ☐
(4) Third Party (if applicable) ☐
(5) None of the above ☐

PLEASE NOTE BELOW IF ANY PARTIES DID NOT ATTEND

…….

PLEASE TURN OVER

8. **What changes (if any) are you aware of with respect to representation (e.g. parties losing lawyers during the case)?**……..…….
……..……..

9. **Was either party's legal aid refused or withdrawn before or during the hearing?**

☐ 1 YES ☐ 0 NO ☐ 7 Not Applicable ☐ 9 Not Known

10. **What was the gender of the unrepresented party/parties?**

☐ 0 FEMALE ☐ 1 MALE ☐ 2 Both parties unrepresented

11. **Did a party withdraw from the proceeding when legal aid was withdrawn or refused?**

☐ 1 YES ☐ 0 NO ☐ 9 Not Known

12. **Was the party assisted by a Duty Solicitor or did his/her legal representative act pro bono?**

☐ 1 DUTY SOLICITOR ☐ 2 PRO BONO ☐ 3 NEITHER ☐ 9 Not Known

13. **In your opinion was the unrepresented party (or parties) disadvantaged by the lack of legal representation?**

☐ 1 YES ☐ 0 NO ☐ 7 Not Applicable ☐ 9 NOT SURE

14. **In your opinion was the other party disadvantaged by the unrepresented party's lack of legal representation?**

☐ 1 YES ☐ 0 NO ☐ 7 Not Applicable ☐ 9 NOT SURE

15. **In your opinion did the unrepresented party (or parties) participate in the proceedings with <u>confidence</u>?**

☐ 1 YES ☐ 0 NO ☐ 7 Not Applicable ☐ 9 NOT SURE

16. **In your opinion did the unrepresented party (or parties) participate in the proceedings with <u>competence</u>?**

☐ 1 YES ☐ 0 NO ☐ 7 Not Applicable ☐ 9 NOT SURE

17. **Would you or the Court have been assisted if one or more of the parties had been represented?**

☐ 1 YES ☐ 0 NO **IF NO, GO TO QUESTION 19 OVERLEAF**

PLEASE TURN OVER

18. **If you answered 'Yes' to Q.17, in what ways?**
(tick all that apply)

(1) The matter would not have taken as long ☐
(2) Alternatively, the matter would not have been resolved so quickly ☐
(2) Documents would have been better prepared ☐
(3) The matter might have been resolved with help from lawyers ☐
(4) Party/ies have language or communication difficulties or disabilities ☐
(5) Party/ies would not have needed help in court procedures ☐
(6) Fewer documents would have been needed ☐
(7) Party/ies were unable to present case, cross-examine, etc. ☐
(8) Other (please specify) ☐

.....

19. **Would the children's best interest be promoted if one or more of the parties had been represented?**

☐ 1 ☐ 0 ☐ 9

YES NO Not Applicable

THANK YOU FOR YOUR ASSISTANCE

Appendix C: Letter to Clients

FAMILY COURT OF AUSTRALIA

OFFICE OF THE CHIEF EXECUTIVE

GPO Box 9991
Canberra City ACT 2601
Telephone: (02) 6243 8651
Facsimile: (02) 6243 8711

3rd Floor
15 London Circuit
Canberra City ACT 2601

7 April 1999

The Family Court of Australia wishes to improve the services it provides to clients. In particular, the Court is examining the services it can provide to people who do not have a lawyer at all stages of their cases. To this end, the Court is conducting a research project involving people who represent themselves in the Court. The general aim is to collect information about our clients who are unrepresented, including the reasons why they choose to be unrepresented, any special needs that they may have and how the Court may be able to help them in the future.

The research project is being conducted by Professor John Dewar of Griffith University and Mr Barry Smith, Research Analyst, Office of the Chief Executive, Family Court of Australia, with assistance from Ms Cate Banks, Faculty of Law, Griffith University.

I understand that you have a matter listed to be heard in your local Registry shortly, and that you may be appearing without a lawyer. If this is the case I seek your cooperation in assisting us to gain more information on your needs.

Barry Smith and Cate Banks may wish to interview you after you have completed your hearing. Interviews are entirely voluntary. They will take about half an hour.

All the answers given are strictly confidential. No names will be used in any reports. The results will be presented in such a way that it will not be possible to identify any of the participants in the research, and all the records of the interviews will be destroyed after the research project has been completed.

In recognition of the time and trouble of those who agree to be interviewed, a free double movie pass will be given to each person who is interviewed.

We hope that you will be able to participate.

Yours sincerely

Ron Eather
General Manager Client Services

Appendix D: Consent Form

FAMILY COURT OF AUSTRALIA

LITIGANT IN PERSON STUDY

Consent form and undertaking of confidentiality

The Chief Justice of the Family Court of Australia has agreed to a research project on people who represent themselves in the Court. More and more people coming to the Court now do not have a lawyer at all stages of their case. Sometimes this can lead to difficulties both for them and the Court. This is an important research project, which we hope will provide information about who these unrepresented people are, why they do not have lawyers, what their special needs are, and how the Court may be able to help them in the future.

Interviews with some people who are not represented by a lawyer are an essential part of the study. Interviews are entirely voluntary.

All the answers given are strictly confidential. No names will be used in any reports. The results will be presented in such a way that it will not be possible to identify any of the participants in the research, and all the records of the interviews will be destroyed after the research project has been completed.

The research project is being conducted by:

Professor John Dewar, Faculty of Law, Griffith University, Nathan, Qld 4111 (currently overseas); and
Mr Barry Smith, Research Analyst, Office of the Chief Executive, Family Court of Australia, GPO Box 9991, Canberra ACT 2601, telephone (02) 6243 8622;

with assistance from:

Ms Cate Banks, Faculty of Law, Griffith University, Nathan, Qld 4111, telephone (07) 3875 6480.

The Project Manager for the Court is Ms Judi Robinson, Manager Information Services, Office of the Chief Executive, Family Court of Australia, GPO Box 9991, Canberra ACT 2601, telephone (02) 6243 8620.

Any of the above people may be contacted if there are any queries.

In recognition of the time and trouble of those who agree to be interviewed, a free double movie pass will be given to each person who is interviewed.

If you agree, please sign the consent form below and keep the spare copy for your reference.

I, _____ [*insert name*], agree to be interviewed for this research project.

_____ ____/____/1999

(Signature) Date

Appendix E: Schedule for observation of hearings

Note:

There were some blemishes and ambiguities in the various research instruments, despite the pre-test in Canberra. These were overcome by appropriate changes to the design of the database.

Completion of some schedules required some modification when there were more than three parties.

LITIGANT IN PERSON STUDY

Schedule for (non-participant) observation of hearings involving litigants in person (and some not involving litigants in person)

Reference Number ☐

Name of parties (cross-check) ……

Gender of LIP ☐ ☐ ☐ ☐

0 **FEMALE** 1 **MALE** 7 **BOTH LIPs** 9 **BOTH REPRESENTED**

Date ☐ ☐

Day Month

Time began ☐ (24-hour format) **Total time** (mins) ☐

Registry CA BR PA ML (circle one)

Name of **observer** Barry Cate Both (circle one)

Name of **Judge or Registrar** ……

Were there any difficulties in obtaining the permission of the judge or registrar and the party or parties to observe the hearing? ☐ ☐

Yes 1 No 0

(If Yes, give details) ……..

Did the hearings involve LIPs, or were both parties represented?

☐ ☐

LIPs 1 Both represented 0

Was there a child representative?

☐ ☐ ☐

Yes 1 No 0 Ordered Today 6

Note names of solicitor firms and practitioners

……..

NOTES (Memory jogs, issues, etc.)

Notes of observation

ON (Observational Notes)
These should contain as little interpretation as possible and comprise mainly recorded speech; record also significant non-verbal behaviour. If relevant, observations, as objective as possible, should be noted which cast light on the following aspects of the hearing:
(If space insufficient, key to numbered pad pages)

Demeanour LIP or party (e.g. tears, mannerisms, body language)

Demeanour of LIP's partner/other LIP/party (e.g. tears, mannerisms, body language)

Reactions of solicitors (e.g. body language, relevant remarks)

Style of judge or registrar (e.g. were there interventions to assist the LIP or was he/she mainly silent during remarks by the LIP?)

Time spent by LIP on his/her feet

Time spent by other LIP on his/her feet (*if applicable*)

Apparent confidence of LIP (note relevant body language, fluency)

Apparent confidence of other LIP (*if applicable* note relevant body language, fluency)

Apparent competence of LIP (note especially language)

Apparent competence - other LIP (*if applicable* note relevant body language, fluency)

Significant remarks or exchanges

Significant non-verbal behaviour

TN (Theoretical Notes)
(Interpretative; attempts to construct meaning from what is observed)
(If space insufficient, key to numbered pad pages)

MN (Methodological Notes)
(Comments on procedures performed or planned)
(If space insufficient, key to numbered pad pages)

Appendix F: Schedule for litigant in person interviews

Note:

There were some blemishes and ambiguities in the various research instruments, despite the pre-test in Canberra. These were overcome by appropriate changes to the design of the database.

Completion of some schedules required some modification when there were more than three parties.

The interview schedule for litigants in person initially had ‘Year 10 or less’ followed by ‘Year 12’ – not a comprehensive range of educational qualifications. Question 7 contained an implied double negative, making answers ambiguous unless they were clarified. Some questions were occasionally answered ‘yes and no’, requiring further dissection. Some respondents found it difficult to distinguish the time and costs involved in the hearing just held from those for their matter over a period of time. Many, if they had property disputes, were unable to estimate the value of their assets as this depended on the outcome of litigation.

LITIGANT IN PERSON STUDY

Schedule and script for Semi-structured interviews with LIPs

The following items should be filled out in advance:

Reference Number ☐

Name of LIP and other parties (cross-check)

……

Gender of LIP ☐ ☐

0 FEMALE 1 MALE

Date ☐ ☐

Day Month

Time ☐ (24-hour format)

Registry CA BR PA ML (circle one)

Name of **interviewer** Barry Cate Both (circle one)

Was the interview held immediately after the hearing or later?

☐ ☐

1 immediately 2 later

If later, how was it conducted? (In person or on the telephone?)

☐ ☐

1 in person 2 phone

Were other people present?

☐ ☐ If so, who? ……...

0 NO 1 YES

Note whether there were any communication or language problems.

Refer to consent form, with undertaking of confidentiality, as necessary.

Thank you for agreeing to be interviewed. The Family Court has more and more people coming to it now who do not have a lawyer at all stages of their case. Sometimes this can lead to difficulties both for them and the Court. These interviews are part of an important research project, which we hope will provide information about who the unrepresented people are, why they don't have lawyers, what their special needs are, and how the Court may be able to help them in the future.

Let me assure you at the beginning that all the answers you give are strictly confidential. No names will be used in any of our reports, and all the records of the interviews will be destroyed after the research project has been completed.

---

1. Would you mind telling us **something about yourself?**

What is your highest **education**al qualification?

☐ 0 Year 10 or less ☐ 1 Year 12 ☐ 2 Trade Qual. ☐ 3 Diploma ☐ 4 Degree

Do you have paid **work**?

☐ 1 YES ☐ 0 NO

If so, what do you do? ……..

ABS ASCO Code [to be added later] ☐

Where in [Canberra or the southern region/Sydney/Brisbane/Melbourne] do you live?

……..

(suburb or town name)

What is the postcode? ☐

Were you born in Australia?

☐ 1 YES ☐ 0 NO

If not, where were you born? ……..…….. (country)

ABS Code [to be added later] ☐

Do you speak English at home?

☐ 1 YES ☐ 0 NO

If not, what language do you speak? ……..…….. (language)

ABS Code [to be added later] ☐

2. Obtain a **brief history of the matter**: What are/were the issues?

Have any of them been resolved?

What attempts have there been (and at what stages) to reach settlement through conciliation counselling, mediation, settlement discussions between lawyers, etc.?

How long has the matter been running?

Were child representatives ordered, and if so was legal aid provided?

If there were no attempts to settle, why was this?

3. **Why don't you have a lawyer** for your present matter in the Family Court?

☐ 1 Didn't need/want one, etc ☐ 2 Couldn't afford one (including denied legal aid) **Go to Q5**

4. Why not? [e.g., matter is a simple one; I am a lawyer; previous bad experiences with lawyers, etc.]

……..……..……..

5. Have you used lawyers before in any other legal cases that you have had, or for other purposes, such as buying or selling a house or preparing a will?

☐ 1 YES ☐ 0 NO

6. The Court has recently tried to simplify its procedures, redesign its forms to be more user-friendly, and provide information packs for people making applications to it. Have these influenced you to act on your own without a lawyer?

☐ 1 YES ☐ 0 NO

7. Now that you have represented yourself do you still think that you do not need a lawyer?

☐ 1 YES ☐ 0 NO

8. Have you applied for **legal aid** to assist you with the application before the Court today? [**If yes, go to Q.10**]

☐ 1 YES ☐ 0 NO

9. [**If no to Q.8**] Why didn't you apply for legal aid? [If necessary, prompt:] Was it that you:

(a) were told that you were not eligible; ☐ 1

(b) did not think you were eligible; ☐ 2

(c) prefer to represent yourself; or ☐ 3

(d) some other reason? [If so, what?] ☐ 4

……..

[**Go to Q.17 on next page; no more legal aid questions**] ⟶

10. [**If yes to Q.8**] Have you been informed of the result of your legal aid application? [**If yes to Q.10, go to Q.12**]

☐ 1 YES ☐ 0 NO

11. [**If no to Q.10**] How long have you been waiting for a decision

……..

How has this affected you? [**Go to Q.16 on next page**] ⟶

……..

12. [**If yes to Q.10**] Was your application to Legal Aid successful? [**If no, go to Q.15 on next page**]

☐ 1 YES ☐ 0 NO

13. [**If yes to Q.12**] Did Legal Aid pay for all or only part of the case?

☐ 1 ALL ☐ 2 PART

14. Did your lawyer work in a Legal Aid office or was he/she in a private firm? [**Go to Q.16**]

☐ 1 L/Aid ☐ 2 Private ☐ 9 Don't Know

15. [**If not successful: i.e. no to Q.12**] Why did Legal Aid refuse your application? [If necessary, prompt:] Did they say that:

(a) you could afford to pay for your own solicitor; ☐ 1

(b) you have exceeded the limit of aid granted to you; or ☐ 2

(c) some other reason (If so, what?) ☐ 3

……..……..

16. [**If relevant**] What was your experience with legal aid bodies? Do you have any comments?

……..……..……..……..

……..……..……..

17. **At what stage are you in your case?**
Did you get advice from a lawyer at an early stage?

Have you been unrepresented at all stages?

(If he/she has had legal representation, at what stages? – before contact with the Court, during early and/or later pre-hearing appearances, etc.)

(If he/she has had legal representation at earlier stages, but is not now represented, why did representation stop? e.g., legal aid funding stopped, legal aid cap reached, could not afford to pay any more, not happy with lawyer, no lawyer would represent him/her, etc.)

18. Did you know where to get **information or advice** about family law [for your matter]?

☐ 1 YES ☐ 0 NO

What sources of assistance did you use? Who else has helped you? [community legal centres, women's or Aboriginal law centres, LIAC, a counsellor or mediator, a duty solicitor, friends or family, women's or men's support groups, pamphlets, videos, books, Do-It-Yourself information kits, the Internet, etc.]

……..……..……..……..

……..……..……..……..

[If any assistance was obtained] What was this assistance or advice about? [e.g. your rights, understanding and drafting documents, what to do in Court, trying to settle, the evidence needed, etc.]

……..……..……..……..

Did you consult any experts to help you in your case? (e.g., psychologist, doctor, social worker, property valuer, accountant)

……..……..……..……..

19. **What was your experience of being unrepresented?**

How strong or weak did you consider your case to be when it began?

……..……..……..……..

How confident were you about conducting your own case?

……..……..……..……..

How have you been coping?

Did you experience any difficulties representing yourself?

[Prompt as necessary, e.g. preparing documents, knowing what to do in Court, cross-examining, presenting arguments, etc.; and refer to observation of the hearing if relevant.]

Were there any advantages to being a litigant in person?

……..……..……..……..

……..……..……..……..

What were your costs in preparing the case? (roughly) $ ☐

How much time did you spend in preparing the case and attending Court?

Approx. (hours) ☐

20. Do you have any other comments about your experience in Court today [or with legal aid]? [**Do not prompt**. Possible responses include: anti-male bias, anti-female bias, racism, the presence of domestic violence as an issue, allegations of perjury, dissatisfaction with lawyers, judges or Court staff, continuing tit-for-tat litigation, vexatious litigation, lack of continuity in the judge or registrar hearing the case, etc.; and suggestions for changes in the system.]

……..……..……..……..

……..……..……..……..

……..……..……..……..

Did you get any help from the Court?

☐ 1 YES ☐ 0 NO

Was it useful?

☐ 1 YES ☐ 0 NO

Why? (what was it about?)

……..……..……..……..

Do you have any other comments?

……..……..……..……..

What (if any) additional information would you have liked?

……..……..……..……..

---

21. Would you mind telling us roughly what **income** you have? [Show prompt card with a broad set of income ranges, both annual and weekly] After tax, which of these ranges would you say that your take-home income is in?

☐ Range

Do you own any property, like a house, a block of land, shares or a car? Roughly, what would you say that these assets are worth? $ ☐

What is your age range? [Show prompt card with a broad set of age ranges] ☐ Range

Actual age if stated ……..

Thank you very much. It will be a great help to have your answers. As I said, all the answers are strictly confidential. No names will be used in any of our reports, and all the records of the interviews will be destroyed after the research project has been completed.

Here is your free movie pass. Thanks again for your help.

Comments by interviewer

For example, was the LIP stressed or emotional? Co-operative, etc.?

General Observations

Appendix G: Income prompt

Would you mind telling us roughly what **income** you have?
After tax, which of these ranges would you say that your take-home income is in?

Code	Per annum (net)	Per week (approx.)	Per fortnight (approx.)
1	Less than $15 000	Less than $300	Less than $600
2	$15 000 - $20 000	$300 - $400	$600 - $800
3	$20 000 - $25 000	$400 - $500	$800 - $1000
4	$25 000 - $30 000	$500 - $600	$1000 - $1200
5	$30 000 - $35 000	$600 - $700	$1200 - $1400
6	$35 000 - $40 000	$700 - $800	$1400 - $1600
7	$40 000 - $50 000	$800 - $1000	$1600 - $2000
8	$50 000 - $75 000	$1000 - $1500	$2000 - $3000
9	$75 000 - $100 000	$1500 - $2000	$3000 - $4000
10	Over $100 000	Over $2000	Over $4000

Appendix H: Age prompt

What is your age range?

Code	Age last birthday
0	Less than 20
1	20 - 29
2	30 - 39
3	40 - 49
4	50 - 59
5	Over 60

Appendix I: Schedule for interviews with Judges, Judicial Registrars and Registrars

LITIGANT IN PERSON STUDY

Schedule and script for interviews with judges and registrars

The following items should be filled out in advance:

Date ☐☐ ☐☐

Day Month

Registry CA BR PA ML (circle one)

Judge or Registrar? Judge Registrar (circle one)

Name of Judge or Registrar ……

Name of **interviewer** Barry Cate Both (circle one)

First, **check the questionnaires** for matters involving LIPs. Check and resolve any problems (anomalies or ambiguities). [If possible check the questionnaires beforehand.] **Note below, and also amend the questionnaires in a different colour.**

Reference Number (1) ☐☐☐

Name of LIP and other parties (cross-check) ……

Query and resolution:

Reference Number (2) ☐☐☐

Name of LIP and other parties (cross-check) ……

Query and resolution:

Reference Number (3) ☐

Name of LIP and other parties (cross-check) ……

Query and resolution:

Reference Number (4) ☐

Name of LIP and other parties (cross-check) ……

Query and resolution:

Reference Number (5) ☐

Name of LIP and other parties (cross-check) ……

Query and resolution:

(Some spare sheets to be available if there are more questionnaires with queries)

Preliminary Questions

How many cases have you had in your list(s) today? (including adjournments, no appearances and hearings which resulted in consent orders) ☐ n1

In how many hearings were both parties represented? [so that a proportion of cases with LIPs can be calculated]

☐ n2

In how many hearings were both parties unrepresented?

☐ n3

Individual cases

I would like now to turn to the individual cases today that involved unrepresented litigants. If you think that this is proper and appropriate, I would appreciate your comments on individual cases involving litigants in person, and on any special features that these cases with unrepresented parties have.

Can we please go through them quickly?

For each case: (The schedule for the first case is below. There will be a separate one-page sheet to use for each extra case.)

Reference Number ☐

Name of LIP and other parties (cross-check) ……

Do you have any **comments**?

What were the **effects of a party being unrepresented**:

- on you?

- on the Court system more generally?

- on the other party?

- on lawyers appearing in the matter?

- on the LIPs themselves?

- on the time taken? (was it too short to present the case, or did it take longer?)

(Invite discussion of individual cases as appropriate, and of any particular features that arose because of having unrepresented parties. If it is said that parties were disadvantaged, ask for their meaning of 'disadvantage'.)

(Where it was stated that cases took longer because there were unrepresented litigants) Can you please estimate how much longer the case took to finalise?

(**Alternatively**, if cases were too short, what deficits were evident?)

Repeat the above section for each relevant case. See the pro forma at the back for further cases.

General Questions

Let me ask you a few **general questions** about litigants in person.

Why do you think litigants appear unrepresented in the Court?

Do you think that LIPs differ from those who are represented?

☐ 1 ☐ 0

YES NO

If so, in what ways? [If necessary, prompt: gender, socioeconomic status, particular groups, etc.]

If litigants are to appear unrepresented, what needs do they have for assistance?

How can they get this? Could the Court provide this assistance?

Are there specific problems with LIPs in drafting consent orders?

- **How might the Court be able to assist LIPs more effectively?**

[If they talk about Legal Aid, press them. Ask **WHAT ELSE CAN THE COURT DO?]**

- **How might the Court be able to assist judges cope with LIPs?**

- **How best can the Court accommodate to the number of LIPs now presenting in the Court?**

Do you have any views about the value and relevance of existing Full Court guidance on LIPs?

Individual cases - *pro forma*

For each case:

Reference Number ☐

Name of LIP and other parties (cross-check) ……

Any **comments**?

What were the **effects of a party being unrepresented**:

- on you?
- on the Court system more generally?
- on the other party?
- on lawyers appearing in the matter?
- on the LIPs themselves?
- on the time taken? (was it too short to present the case, or did it take longer?)

(Invite discussion of individual cases as appropriate, and of any particular features that arose because of having unrepresented parties. If it is said that parties were disadvantaged, ask for their meaning of 'disadvantage'.)

(Where it was stated that cases took longer because there were unrepresented litigants) Can you please estimate how much longer the case took to finalise?

(**Alternatively**, if cases were too short, what deficits were evident?)

Repeat the above section for each further case.

Appendix J: Outline of focus groups in registries

LITIGANT IN PERSON STUDY

Outline of focus groups in registries

In each registry, try to assemble a group including at least:

the List Clerk,
one or two counter staff,
a Court Officer, and
the Deputy Manager.

Others, including the Registry Manager, other Operations staff, registrars, judges' associates, etc., would be welcome if they are interested and available.

Where possible, this would be scheduled for early in the morning on the first day (Monday) at the registry. This implies that the registry must be aware well ahead of our arrival of our plans. We will need at least half an hour; an hour would be much better. An electronic whiteboard (or else butcher's paper) will be needed.

Both Barry and Cate would attend, one primarily as the facilitator and the other as note-taker and back-up. (Normally, Barry will do the introduction and Cate will process-manage through the questions with Barry taking notes.)

Introduction:

The Chief Justice has agreed to this research project on litigants in person (LIPs). As you know, more and more people coming to the Court now do not have a lawyer at all stages of their case. Sometimes this can lead to difficulties both for them and the Court. We hope that this research project will provide information about who these unrepresented people are, why they don't have lawyers, what their special needs are, and how the Court may be able to help them in the future.

Outline the **methodology**: In each of the Brisbane, Melbourne and Parramatta registries, there will be the following activities:

- questionnaires completed by a judge and a registrar for two sitting days each;
- semi-structured interviews with unrepresented litigants after their hearing in these cases; and
- brief interviews subsequently with the judges and registrars.

In addition discussions will be held with a few registry staff, legal aid bodies and some solicitors acting for parties in cases in which the other party is unrepresented.

Each registry will be visited for one week, except for Melbourne where there will be a second week. We will be concentrating on duty lists and directions hearings, but in the second week in Melbourne will look at LIPs in trials.

Any questions on the methodology?

Research questions

It is proposed in the research project to address the following simple questions:

- Why do litigants appear unrepresented in the Family Court?

- What are the demographic and other characteristics of LIPs? (Do these differ and, if so, in what ways, from those who are represented?

- What needs for assistance do LIPs have, and what sources of assistance (if any) do they use?

- What are the effects of a party being unrepresented:
  - on the judge or registrar?
  - on the Court system more generally?
  - on the other party?
  - on lawyers appearing in the matter?
  - on the LIPs themselves?

- Do cases involving LIPs use more resources (the time of judges, registrars, other Court staff) than matters in which both parties are represented?

- If so, and if it is also true that cases involving LIPs present the Court and both the unrepresented and represented parties with challenges:
  - how might the Court be able to assist LIPs more effectively; and
  - how can the Court cope with the challenges that LIPs present the Court?

We realise that most of you have limited time and have to get to your normal duties before long. What we would like to do is run fairly quickly through the research questions, and ask you to **brainstorm** each of them until we run out of contributions. Remember that in a brainstorm it is quite O.K. for people to say conflicting things. We don't argue the toss at the time, but at the end if there's time we can revisit what has been said, and discuss it.

Run through each question (about 5 minutes maximum per major question). If time permits, get the group to talk through any points of contention.

(Transparency foils)

- Why do litigants appear unrepresented in the Family Court?

- What are the demographic and other characteristics of LIPs? (Do these differ and, if so, in what ways, from those who are represented?

- What needs for assistance do LIPs have, and what sources of assistance (if any) do they use?

- What are the effects of a party being unrepresented:
  - on the judge or registrar?
  - on the Court system more generally?
  - on the other party?
  - on lawyers appearing in the matter?
  - on the LIPs themselves?

- Do cases involving LIPs use more resources (the time of judges, registrars, other Court staff) than matters in which both parties are represented?

- If so, and if it is also true that cases involving LIPs present the Court and both the unrepresented and represented parties with challenges:
  - how might the Court be able to assist LIPs more effectively; and
  - how can the Court cope with the challenges that LIPs present the Court?

Appendix K: Schedule for solicitor interviews

LITIGANT IN PERSON STUDY

Schedule and script for interviews with legal practitioners

The following items should be filled out in advance:

Date ☐ ☐

Day Month

Registry CA BR PA ML (circle one)

Name of **Practitioner** ……

Name of **interviewer** Barry Cate Both (circle one)

Interview by phone? ☐ ☐

Court Phone

Name of **Party or Parties** (for reference purposes only)

☐

……..……..……

FOR RESEARCH TEAM USE ONLY: Reference No.

(**Note**: details of the nature of the hearing, issues, etc. should be in the Observation Notes and/or Judge's questionnaire)

Individual case

May I ask you first about the particular case today in which you appeared against an unrepresented litigant.

What were the **effects of a party being unrepresented**:

- on you as the lawyer for the other party?

- on the Court system more generally?

- on the unrepresented party?

- on the Judge or Registrar?

- on the time taken? (was it too short to present the case, or did it take longer?)

Do you have any other **comments**?
(If it is said that parties were disadvantaged, ask for their meaning of 'disadvantage'.)

Let me ask you a few **general questions about litigants in person**.

Why do you think litigants appear unrepresented in the Court?

Do you think that LIPs differ from those who are represented?

☐ 1 YES ☐ 0 NO

If so, in what ways? [If necessary, prompt: gender, socioeconomic status, particular groups, etc.]

If litigants are to appear unrepresented, what needs do they have for assistance?

How can they get this? Could the Court provide this assistance? How might the Court be able to assist LIPs more effectively?

How best can the Court accommodate to the number of LIPs now presenting in the Court?

What (if anything) might the Court be able to do to help practitioners when parties appear unrepresented?

Do you have any views about the value and relevance of existing Full Court guidance on LIPs?

THANK YOU FOR YOUR HELP

Appendix L: Database design

In the research proposal, it was proposed to establish a master record for each case containing data obtained from various sources (the questionnaire completed by the judge, judicial registrar or registrar, the interview with the litigant in person, the interview with the judge, judicial registrar or registrar, and possibly an interview with the other party's solicitor).

Barry Smith prepared and developed a database in Microsoft Access to hold nearly all the data obtained. This facilitated the transfer of data between other elements of the Microsoft Office suite, notably Excel and Word.

The structure of the database is as follows:

Master Table for each case with litigants in person (always completed)
Unique reference (serial) number for the study
Registry
Date of (first) hearing
Names of parties (for convenience and checking only; not to be quoted)
Code indicating litigant in person (i.e., not a represented litigant)
Judge or Registrar code
Number in the judge's or registrar's list for that day

Table for Questionnaire completed by the judge or registrar (usually completed)
Link to unique reference number
Questionnaire responses (See the questionnaire for details included)

Table for Observation of Hearing: notes (usually completed)
Link to unique reference number
Notes of observation (mostly free-format; see the schedule for details included)

Table for Interview with the litigant in person (frequently completed)
Link to unique reference number
Interview responses (See the schedule for details included)

Table for Interview with judge or registrar (usually completed)
Link to unique reference number
Interview responses specific to individual cases heard (mainly queries resolved and comments; see the schedule for details included)

Table for Interview with the other party's solicitor (sometimes completed)
Link to unique reference number
Interview responses specific to individual cases heard (see the schedule for details included)

Table for Details from file (if completed)
(Free format notes)

In addition there were data for a few litigants who were represented. These were also recorded in the database, but with a code indicating that they are not litigants in person.

Note: The following *additional data* were gathered but did not form part of the (partial) profile of cases:

- Interviews with judges and registrars (that part that is not specific to individual cases).
- Brainstorm and other discussions with Judge Administrators, List Clerks, Court Officers, Counter Officers, Registry Managers, etc.

As is implicit from the description of the database, the project acquired a complex array of data. Some did not relate to hearings involving litigants in person – a few hearings in which both parties were represented were observed to provide a basis for comparison. In these cases there was only a master record and the notes of observation. For each hearing in which there were litigants in person there was at least one other data record apart from the master record. In some cases there was a questionnaire from the judge or registrar, notes of observation of the hearing, an interview with one or possibly two litigants in person, an interview with the judge, judicial registrar or registrar, and an interview with a practitioner for the other party. Any of these might be missing – sometimes a questionnaire was received from a judge, judicial registrar or registrar for a case not observed, and sometimes for various reasons no questionnaire was received for a case that had been observed.

Appendix M

Litigant in Person Study

Schedule of Reference Numbers

No.	Registry	Date of hearing	Parties	Litigant in person?	List No.	Observed by	Interviewed by	Q'aire from J or R?	Intv J/R?	Intv other solcr?	File seen?	Movie tickets	Notes

F father M mother A applicant R respondent H husband W wife B Barry C Cate J Judge R Registrar N questionnaire recd but not specifically discussed