CHAPTER 10

SELF-REPRESENTED LITIGANTS

> The current [legal aid] arrangements are unfair and do not make the justice system accessible. On the contrary the perception is that legal aid is broadly unavailable and most people are not able to instruct lawyers to represent them throughout the litigation process. The result is that many people abandon their legal rights and others will be forced to pursue them as litigants in person. Neither of these results is satisfactory.[1]

10.1 This chapter discusses:

- evidence of a growth in the number of self-represented litigants across the legal system;
- the extent of any link between the level of legal aid funding and the numbers of self-represented litigants;
- the adverse effects of lack of representation on access to justice; and
- measures to minimise any detrimental effects on access to justice.

Increasing numbers of self-represented litigants

10.2 A key issue for the legal system in recent years is the growing number of self-represented litigants and the impact that development is having on legal service providers and the administration of justice generally.

The Third Report

10.3 In its *Third Report*, the Committee commented that changes over time in the percentages of self-represented litigants could be used as indicators of how well the legal aid system is working.[2] The Committee noted that comprehensive data was not available on self-represented litigants, and recommended that the Government collect, analyse and publish data on unrepresented litigants in the Family Court, Federal Court, state and territory Supreme and District Courts and courts hearing appeals from those courts.[3]

10.4 The *Third Report* also noted that, while the Committee was relying on partial statistics and anecdotal information, the 'predominant view' in submissions to it was that there had been a significant increase in unrepresented litigants and that this was

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1 Law Institute Victoria, *Submission 87*, p. 13.

2 *Third Report*, p. 29, paragraph 3.21.

3 *Third Report,* Recommendation 3, p. 30.

largely attributable to restrictions on legal aid funding.[4] The Government's response stated that the Government was 'supportive' of the recommendation, but that implementation was a matter for the courts and tribunals and would depend on their respective processes.[5]

The current situation

10.5 In 2004 there is still no comprehensive information across the legal system on the number and proportion of self-represented litigants. However, attention to this issue has grown, with most of the federal courts reporting in various levels of detail on self-represented litigants in their most recent annual reports.[6]

10.6 While there is no comparative data, the court statistics that are available show an increase in self-represented litigants in recent years.[7] Anecdotal information supports that view. The Family Law Council concluded in August 2000 that 'there can be no doubt that the number of unrepresented litigants is increasing' in the Family Court.[8] The Committee heard similar sentiments from the Chief Justice of the Family Court of Australia in March 2004:

> When I came to this bench in 1988, it was comparatively rare to have a case go ahead with someone who was unrepresented. If it did, they would normally be someone who was deliberately wanting to be unrepresented, who really had a bee in their bonnet or thought that they could do better than anybody else. You did not find people of the sort we are talking about at the moment coming to the court unrepresented.[9]

10.7 The Chief Justice cited new statistics indicating that nearly half (about 47 per cent) of litigants in the Family Court were unrepresented at some stage in

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4 *Third Report*, p. 31, paragraph 3.27.

5 Government Response to *Third Report*, p. 6.

6 High Court of Australia, *Annual Report 2002-2003*, p. 9. Federal Court of Australia *2002-2003 Annual Report;* Federal Magistrates Court *2002-2003 Annual Report*. The Family Court of Australia did not provide statistics in its 2002-2003 annual report, but noted the release of the project report *Self-represented litigants: a challenge* in 2003. The first phase of the project has been completed and the development of a national strategy for ensuring access to justice is ongoing.

7 For example, the High Court of Australia, *Annual Report 2002-2003*, p. 9, which noted that the proportion of self-represented litigants in applications for special leave to appeal increased to 42 per cent from 40 per cent in 2001-02 and 33 per cent in 2000-01.

8 Family Law Council, *Litigants in person: A report to the Attorney-General prepared by the Family Law Council*, August 2000, p. 81.

9 *Committee Hansard*, 10 March 2004, pp. 5-6.

proceedings.[10] This represented a substantial increase from statistics provided to the Committee in the Family Court's earlier submission.[11]

10.8 The Federal Court of Australia noted in its most recent annual report that the 'growing number' of self-represented litigants in recent years had presented a range of problems, and that in 2002-03, about 38 per cent of matters involved at least one party who was unrepresented at some stage in proceedings.[12] This figure had steadily increased from about 28 per cent in 1998-99 to a peak of 41 per cent in 2001-02.[13]

10.9 An analysis of data collected in the Federal Magistrates Court since 1 July 2002 indicated that about 19 per cent of applicants seeking final orders in relation to children or property did not have a lawyer, while 60 per cent of applicants alleging that a child order has been contravened were not represented.[14] While no comparison with previous years was provided in that court's most recent annual report, the figures present compelling evidence of the extent of the problem, particularly in light of the implementation of measures to address the needs of self-represented litigants.

Is there a link with the level of legal aid funding?

10.10 The Committee notes that many submissions to this inquiry linked the growing number of self-represented litigants to restricted availability of legal aid funding.[15] Some of those submissions acknowledged, however, that certain

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10 *Committee Hansard*, 10 March 2004, p. 1.

11 Family Court of Australia *Submission 85*, p. 2, citing 1998 court-sponsored research conducted by Smith which found that 35 per cent of Family Court matters involved at least one party who was unrepresented at some stage in proceedings.

12 Federal Court of Australia *2002-2003 Annual Report*, p. 46.

13 ibid, p. 48.

14 Federal Magistrates Court *2002-2003 Annual Report*, p. 41.

15 Federation of Community Legal Centres (Vic) Inc, *Submission 50*, pp. 4-5; NSW Young Lawyers Human Rights Committee, *Submission 59*, p. 3; Law Council of Australia, *Submission 62*, p. 16; Castan Centre for Human Rights Law, Monash University, *Submission 76*, p.2; Australian Council of Social Service, *Submission 83*, p. 8; National Network of Women's Legal Services, *Submission 86*, p. 22; Law Institute of Victoria, *Submission 87*, p. 13; NSW Legal Aid Commission, *Submission 91*, p. 42; CLC Association (WA) Inc, *Submission 93*, p. 15; West Heidelberg Community Legal Service, *Submission 21*, pp.7-8; Family Law Practitioners Association of Tasmania, *Submission 37*, pp. 2-3; Tasmanian Association of Community Legal Centres, *Submission 45*, pp. 1-2; Fitzroy Legal Service, *Submission 48*, p. 16; Hobart Community Legal Service, *Submission 49*, pp.3-5; Welfare Rights Centre, *Submission 55*, p. 3; NSW Combined Community Legal Centres Group, *Submission 60*, pp. 13, 33; Women's Legal Service SA Inc, *Submission 72*, p. 6; The Law Society of New South Wales, *Submission 79*, p. 3; National Legal Aid, *Submission 81*, p. 15; CLC Association (WA) Inc, *Submission 93*, p. 20; Professors Hunter and Giddings, Griffith University, *Submission 24*, pp. 4-5; Queensland Association of Independent Legal Services Inc, *Submission 73*, p. 32; NT Legal Aid Commission, *Submission 82*, pp. 15, 17; Family Court of Australia, *Submission 85*, p. 3; National Network of Women's Legal Services, *Submission 86*, pp. 9, 14; CLC Association (WA) Inc, *Submission 93*, p. 30.

individuals may choose not to be represented, for reasons discussed later in this chapter.

10.11 In addition, several community legal centres and lawyers' associations referred to an increased demand for their services from people who have been denied or who have exhausted legal aid funding.[16]

10.12 Research to date also gives various possible explanations for the increase in self-representation. The Family Law Council observed in 2000 that no single cause could be identified. While changes to legal aid funding and an inability to afford a lawyer were significant reasons for being unrepresented, the Council suggested that more empirical data was needed to determine the reasons conclusively.[17]

10.13 As the ALRC explained in its 2000 report on the federal civil justice system, *Managing Justice*:

> Some litigants choose to represent themselves. Many cannot afford representation, do not qualify for legal aid or do not know they are eligible for legal aid, and are litigants in matters which do not admit contingency or speculative fee arrangements. They may believe that they are capable of running the case without a lawyer, may distrust lawyers, or decide to continue unrepresented despite legal advice that they cannot win.[18]

10.14 The ALRC commented that while both anecdotal evidence and qualitative research suggested the numbers of unrepresented litigants in federal civil jurisdictions were increasing, this increase was:

> … not entirely attributable to legal aid changes. Some of these unrepresented litigants might, under former guidelines, have secured legal assistance. Others are outside the means test for legal aid and are unable to afford legal services.[19]

10.15 The ALRC cited rising costs of litigation and simplification of court processes as contributing factors to the increase in self-represented litigants.[20] However, the report noted that more than half (54 percent) of respondents to the ALRC's 1999

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16 Macquarie Legal Centre, *Submission 9*, pp. 1-2; West Heidelberg Community Legal Servic,e *Submission 21*, pp. 7-8; South West Sydney Legal Centre, *Submission 34*, pp. 3-4; Family Law Practitioners Association of Tasmania, *Submission 37*, pp. 2-3; Tasmanian Association of Community Legal Centres, *Submission 45*, pp. 1-2; Fitzroy Legal Service, *Submission 48*, p. 16; Marrickville Legal Centre, *Submission 53*, pp. 6 and 9; The Law Society of New South Wales, *Submission 79*, p. 3.

17 Family Law Council, *Litigants in Person: A report to the Attorney-General prepared by the Family Law Council*, 2000, p. 82.

18 ALRC, *Managing Justice – A review of the federal civil justice system*, Report No. 89, 2000, pp. 359-360.

19 ibid, pp. 302-303.

20 ibid, p. 303.

survey stated that the main reason they did not have a lawyer was either their inability to pay or the unavailability or cessation of legal aid.[21] This shows a strong link.

10.16 The Family Law Council observed that even if a direct causal link between cuts to legal aid and the incidence of unrepresented litigants cannot be established, a perception has emerged in the legal and general community that there is such a link. Moreover, it is clear there have been indirect effects leading to hardship within the community.[22]

Other reasons for self-representation

10.17 Other factors that may cause people to appear without a lawyer include individual choice; the prohibition on legal representation in certain jurisdictions; and lack of available lawyers.

10.18 Each of these is discussed in turn below.

Individual choice

10.19 The NSW Legal Aid Commission suggested that the simpler initiating procedures in the Family Court are the reason for some self-represented litigants in that court.[23] Generally speaking, individuals are not required to have legal representation (subject to certain exceptions).[24] The Committee notes that in recent years, several courts have reported significant efforts to simplify their procedures, rules and information so as to improve access to justice.[25] In addition, some legal service providers run information sessions to assist individuals with low-level matters such as divorce applications and traffic infringements

10.20 Submissions also noted that people may perceive they will have a tactical advantage if they do not have a legal representative. They may hope to obtain a stay of proceedings indefinitely[26] or to exhaust the other party's resources.[27]

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21 ALRC, *Review of the Federal Civil Justice System - Discussion Paper 62*, 1999, p. 376.

22 Family Law Council, *Litigants in Person: A report to the Attorney-General prepared by the Family Law Council*, August 2000, p. 11. The argument about community perception of such a link is also referred to in the quote at the beginning of this chapter.

23 NSW Legal Aid Commission, *Submission 91*, p. 42.

24 Section 78 of the *Judiciary Act 1903* (Cth); *Collins (aka Hass) v R* (1975) 133 CLR 120 at 122 and *Burwood Municipal Council v Harvey* (1995) 86 LGERA 389; cf. *Bay Marine Pty Ltd v Clayton Country Properties Pty Ltd* (1986) 8 NSWLR 104 (CA) at 114 and O.69A r11 *High Court Rules*.

25 Chief Justice Nicholson*, Committee Hansard* 10 March, p.3.

26 Australian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals*, AIJA, 2001, p. 7.

27 Family Court of Australia, *Submission 85*, p. 19; Fitzroy Legal Service, *Submission 48*, p. 16.

10.21 In criminal matters it is well-established that the accused person's right to a fair trial must be protected. Some defendants may perceive they will have a tactical advantage in refusing representation, since this may result in an unfair trial.[28]

Prohibition on representation

10.22 In some jurisdictions such as the Migration Review Tribunal, legal representatives may not appear. This prohibition attracted some criticism.

10.23 Some submissions noted that litigants who are corporate entities or government departments are not prevented from allowing an employee who is an in-house solicitor to represent them.[29] Thus there may be a disparity in power.

10.24 The Castan Centre for Human Rights Law noted that unrepresented complainants may be deterred from taking action in federal anti-discrimination matters because of the disparity of resources and the risk of costs orders against them:

> Many claims are brought against governments and large companies, who will have access to effectively unlimited resources in defending a claim, thus incurring a substantial legal bill which a losing complainant will be ordered to pay. This is too big a risk for most unrepresented complainants, and operates as a very substantial deterrent to any litigation.[30]

10.25 Advocacy Tasmania also pointed criticised the prohibition on legal representation where involuntary detention may result:

> Tasmanians who can be deprived of their liberty and involuntarily detained in mental health facilities and drug and alcohol facilities for period blocks of six months are not provided with representation but a person before the magistrate's court with a likelihood of a two month prison sentence can receive representation. This is unjust and inequitable.[31]

Unavailability of legal practitioners

10.26 The Community Legal Centres Association (WA) Inc commented that the lack of available lawyers in regional and rural areas may force litigants to represent themselves:

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28 Where an accused person refuses an offer of legal assistance, or otherwise chooses to be unrepresented this does not disentitle him or her to a fair trial and such lack of representation may still result in an unfair trial: *McPherson v R* (1981) 147 CLR 512. In order to protect the right to a fair trial, a trial for a serious criminal offence may be delayed or postponed until legal representation is available: *Dietrich v R* (1992) 177 CLR 292, 334-5.

29 NSW Combined Community Legal Centres Group, *Submission 60*, p. 41; Federation of Community Legal Centres (Vic) Inc, *Submission 50*, p. 26.

30 Castan Centre for Human Rights Law, Monash University, *Submission 76*, p. 3.

31 Advocacy Tasmania, *Submission 39*, p. 7. This issue is discussed in more detail in Chapter 8.

> Many people are unable to access legal advice in their own regional centre or town due to the fact that the legal aid services has already advised the other person to the legal matter. The options for advice might be to access a legal aid service over the telephone, or travel a significant distance to seek legal advice. This situation regarding conflict of interest can also lead to one person to a legal matter being represented, and the other having to self-represent.[32]

These issues are discussed in more detail in Chapter 6.

Committee view

10.27 The Committee notes that despite its 1998 recommendation that the Government collect, analyse and publish data on the levels of self-representation in courts and tribunals, there is still a lack of comprehensive data. Consequently, it cannot be proven that changes to legal aid funding in 1997 are directly and solely responsible for the increase in numbers of self-represented litigants.

10.28 However, there is much anecdotal evidence, both during this inquiry and the reports of the ALRC and the Family Law Council, to suggest that lack of access to legal aid is at least one of the major reasons for increased numbers of self-represented litigants.

10.29 The Committee commends those courts and tribunals that have adopted the ALRC's recommendation to report publicly on the numbers of self-represented litigants. However, the Committee is concerned that some courts and tribunals have not done so and considers it to be of the utmost importance that they do, in order to allow for a more comprehensive assessment of the extent and impact of self-represented litigants on the legal system.

Recommendation 53

10.30 The Committee recommends that all Federal courts and tribunals should report publicly on the numbers of self-represented litigants and their matter types, and urges state and territory courts to do the same.

Effects of self-representation on access to justice

10.31 Many submissions argued that self-represented litigants adversely affect access to justice by increasing the costs of litigation and impairing the efficient and effective administration of justice. For example, the National Council of Single Mothers and their Children Inc cited 1999 Family Court research which reported views amongst judges, judicial registrars and registrars that:

- 81 percent of the self-represented litigants would have benefited from representation;

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32 Community Legal Centres Association (WA) Inc, *Submission 93*, p. 15.

- 75 percent of represented litigants would have benefited by the other party being represented; and

- 80 percent of child interest cases would have benefited from representation.[33]

Increased costs

10.32 In the *Third Report*, the Committee commented that unrepresented litigants imposed 'significant additional costs on the courts and other parties in the proceedings, quite apart from whatever injustice they did to their own cause'.[34] The Committee recommended that the Government examine and report on whether savings made by denying legal aid are outweighed by the extra costs imposed on the public purse by unrepresented litigants.[35]

10.33 In response the Government stated that it was considering the findings of two reports published after the Committee's *Third Report*, the Family Law Council's *Litigants in Person* and the ALRC's *Managing Justice*.[36]

Economic cost not quantified

10.34 The two reports on which the Government response relied have not quantified the economic costs of self-representation. The ALRC commented in 2000 that any additional costs caused by self-representation 'remain unsubstantiated and unquantified'.[37] The ALRC suggested that further research may actually find that self-represented litigants impose fewer demands on lawyers for opposing parties or on judges, but noted judicial statements about the difficulties courts face where parties are unrepresented.[38] Similarly, the Family Law Council did not quantify the economic effect of self-represented litigants, but commented generally that in the Family Court they increased costs for the courts, other litigants and pro bono lawyers.[39]

10.35 In this inquiry, submissions to the Committee generally argued that self-represented litigants increased the costs of litigation by increasing the time spent by

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33 National Council of Single Mothers and their Children Inc, *Submission 19*, p. 4, citing Family Court of Australia *Study on the effects of legal aid cuts on the Family Court of Australia and its litigants,* Research Report no. 19, 1999.

34 *Third Report,* p. 33; Youth Legal Service of Western Australia, *Submission 1*, p. 18.

35 *Third Report*, Recommendation 4.

36 Government Response to *Third Report; Senate Hansard*, 16 May 2002, pp. 1767-1773, at p. 1769.

37 Australian Law Reform Commission, *Managing Justice – A review of the federal civil justice system*, Report No. 89, 2000, p. 304.

38 ibid, p. 304.

39 Family Law Council, *Litigants in Person - A Report to the Attorney-General prepared by the Family Law Council*, 2000, p. 34.

judicial officers, registry staff and opposing counsel on their cases, and the possible increased likelihood of further litigation.

10.36 However, the Committee found little evidence of attempts to quantify the costs. One submission from Westside Community Lawyers Inc estimated the additional costs of self-represented litigants in the South Australian court system at $4.8 million.[40]

Demand on court and registry time

10.37 In its *Third Report*, the Committee observed that self-represented litigants generally require more assistance from registry staff and often take more hours of court time to conduct their case. The Committee commented that the argument that extra costs imposed on the public purse due to the denial of legal aid outweigh the costs that would have been incurred in providing that aid was 'highly plausible', but there was no empirical study to confirm that argument.[41]

10.38 Subsequent research by Dewar, Smith and Banks confirmed that self-represented litigants are more demanding of the courts' time.[42] They commented that judicial officers may experience frustration in dealing with someone with lack of legal or procedural knowledge.[43] The Chief Justice of the Family Court of Australia gave the Committee an example of a recent case where extra assistance for one party was needed in court:

> … quite often the unrepresented litigant just has no hope of complying with the procedural requirements. I was sitting on a case in Cairns a couple of weeks ago in which the father had not sworn an affidavit—he had been given numerous opportunities to do so; obviously English was not his first language and he did not attempt to do it—and I thought the only thing to do was get on with it. I simply called him, took the evidence verbally … That is quite a difficult issue.[44]

10.39 The Federal Court reported that unrepresented parties 'often take more time to present their appeal than those who are represented'.[45] The High Court has recently estimated 'around 50 per cent of the time of the Registry staff is taken up with self-represented litigants'.[46]

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40 Westside Community Lawyers Inc, *Submission 58*, p. 2.

41 *Third Report*, pp. 33-35.

42 Dewar, Smith and Banks, *Litigants in Person in the Family Court of Australia*, 2000, p. 2.

43 ibid, p. 1.

44 Chief Justice Nicholson, *Committee Hansard*, 10 March 2004, p. 3.

45 Federal Court of Australia, *Annual Report 2001-2002*, p. 12.

46 High Court of Australia, *Annual Report 2002-2003*, p. 9.

Other parties' costs

10.40 Research has shown strong indications that a self-represented litigant also often wastes the other party's time.[47] Submissions to this inquiry stated that lawyers found communicating with self-represented litigants difficult on more complex issues and that judges tended to rely more heavily on the legal representatives present.

Committee view

10.41 The Committee is disappointed that the Government has not commissioned research to quantify the economic costs to the justice system of self-represented litigants. The ALRC and the Family Law Council reports to which the Government response referred do not quantify the economic effects of self-represented litigants.

10.42 The Committee is disappointed that the Government continues to avoid collecting empirical data on a fundamental issue in the legal aid funding debate: whether the costs saved by reducing legal aid funding are outweighed by the costs potentially caused by an increasing number of self-represented litigants. Certainly there is strong anecdotal evidence during this inquiry, as well as research, to suggest that such might be the case, particularly in complex matters and in higher level courts.

Recommendation 54

10.43 The Committee recommends that the Commonwealth and state/territory governments commission research to quantify the economic effects that self-represented litigants have on the federal justice system, including the costs these litigants impose on courts and tribunals, other litigants, community legal centres and the social welfare system.

Effective administration of justice impaired

10.44 Submissions to the Committee argued that self-representative litigants impaired the effective administration of justice by:

- potentially compromising the role of the judicial officer;
- being less able to assess the merits of their case objectively, or to enforce their rights;
- being less able to adduce relevant evidence and provide cogent argument;
- being less able to comply with accepted procedure without direction;
- forcing opposing counsel to act contrary to their own client's best interests; and

47 Dewar, Smith & Banks, *Litigants in Person in the Family Court of Australia*, 2000, p. 2.

- increasing the likelihood of appeal.

Compromising the judicial role

10.45 The judiciary must limit the assistance it gives to litigants to procedural matters. Dispute resolution in the courts relies on the adversarial system, 'a process in which each side, equally matched, presents its case in a non-interventionist judicial officer.'[48]

10.46 In cases involving a self-represented litigant judicial officers may need to take a more active role, one which could give rise to perceptions of impartiality:

> When only one party is unrepresented, a primary difficulty can be maintaining the perception of impartiality. Judges need to ensure that all relevant evidence is heard, relevant questions asked of witnesses, and that the unrepresented party knows and enforces their procedural rights. The represented party may see such judicial intervention as partisan, and judges must ensure they do not apply different rules to unrepresented parties. Where both parties are unrepresented, the parties may be difficult to control, the case disorganised and wrongly construed. The difficulties associated with lack of representation have been set down in several judgments and reports on the justice system.[49]

10.47 In the Family Court, the Full Court in *Johnson v Johnson* (1997) 139 FLR 384 laid down guidelines on the assistance that the trial judge should give to self-represented litigants. These are to: outline the procedures of the trial; assist by taking basic information from witnesses; explain the possible effect of requests for changes to normal procedure such as calling witnesses out of turn, and the party's right to object; advise the party of his or her right to object to inadmissible material; inform the party of his or her right to claim privilege if this may exist; to ensure as far as possible that a level playing field is maintained at all times; and to attempt to clarify the substance of the submissions of unrepresented parties'.[50]

10.48 However, the research by Dewar, Smith and Banks on self-represented litigants in the Family Court concluded that the 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.'[51] This research also concluded that:

> Judicial officers and registry staff experience high levels of stress and frustration when dealing with litigants in person, because of … the

48 Australian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals*, AIJA, 2001, p. 1.

49 Australian Law Reform Commission, *Submission 26*, p. 13.

50 Australian Law Reform Commission, *Review of the Federal Civil Justice System - Discussion Paper 62*, 1999, p. 380.

51 Dewar, Smith & Banks, *Litigants in Person in the Family Court of Australia*, 2000, p. 2.

> difficulty of holding a fair balance between the represented and unrepresented parties.
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> 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.[52]

10.49 The Family Court of Australia told the Committee that the significance of the impacts of self-represented litigants on the adversarial model of justice was 'considerable':

> The Family Court emphasises case management and primary dispute resolution techniques, and plays a more active role in proceedings involving children than it does when determining financial disputes. This can reduce some of the obligations and responsibilities placed on litigants in a strictly adversarial system, but a number of access to justice issues and concerns about a 'level playing field' remain.[53]

Objectivity in assessing own case and non-enforcement of rights

10.50 The High Court has stated:

> an unrepresented accused is always at a disadvantage not merely because they might lack sufficient knowledge or skills but because they can not assess their own case with the dispassionate objectivity as the crown.[54]

10.51 The Family Law Council stated that:

> Unrepresented litigants are often at a particular disadvantage in family law as direct emotional involvement in proceedings can impede the ability to reason clearly and objectively, and can also provide barriers to settlement.[55]

10.52 Submissions to the Committee echoed these views, arguing that self-represented litigants' lack of awareness of their rights and emotional attachment to their case can lead to them not enforcing their rights,[56] taking inappropriate action[57] or pursuing unnecessary litigation.[58]

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52 ibid, p. 1; Cairns Community Legal Centre Inc, *Submission 14*, p. 4.

53 Family Court of Australia, *Submission 85*, p. 6.

54 *McInnes v R* (1979) 143 CLR 575 at 590, cited in Legal Aid Queensland, *Submission 31*, pp. 21-22.

55 Family Law Council, *Litigants in person: A report to the Attorney-General prepared by the Family Law Council*, August 2000, p. 5.

56 Cairns Community Legal Centre Inc, *Submission 14*, p. 3; Homeless Persons' Legal Clinic, *Submission 13*, p. 24; Domestic Violence Advocacy Service, *Submission 18*, p. 4; Redfern Legal Centre, *Submission 61*, p. 6; Legal Aid Queensland, *Submission 31*, pp. 15-16; Kingsford Legal Centre University of NSW, *Submission 36*, p. 10; Professors Hunter and Giddings, *Submission 24*, p. 5.

Quality of evidence and argument

10.53 The adversarial process relies on competing litigants informing the decision-maker of all relevant facts and arguments. As the Kingsford Legal Centre observed:

> In many cases, clients really cannot properly put their submissions before the court without assistance from a lawyer due to language, comprehension and fear of the court system.[59]

10.54 The Chief Justice of the Family Court of Australia expressed similar views:

> … quite often the unrepresented litigant just has no hope of complying with the procedural requirements …When you go to the actual courtroom situation it depends so much on the capacity of the individual concerned.
>
> So often people are inarticulate; so often they are nervous. They may be fearful of the other party or they may be so emotionally engaged that they really cannot sit back and take an objective viewpoint. Indeed, you often find, where people are unrepresented, that the same buttons that they have been able to press during their relationship are pressed again in the course of the courtroom situation and you get quite confronting situations between the parties that are not of great help to the person determining the issue, so it is a real problem. Of course, once you put English as a second language into the context, it becomes worse. You may have someone who is not at the point of normally needing an interpreter but who really is not able to grasp the concepts as readily as someone who is a native English speaker, so there are a number of problems there. We supply interpreters where necessary but again that is of limited value if the person is not able to present their case.[60]

10.55 The Family Court's submission observed that in family law matters:

> Self representation is almost inevitably associated with parties who have poor knowledge of the substantive and procedural law. In disputes involving children, where the parties must present their cases in terms which best promote children's best interests recent research indicates that [self-represented litigants] find this difficult to do.[61]

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57 Illawarra Legal Centre, *Submission 12*, p. 3; Shoalcoast Community Legal Centre, *Submission 28*, pp. 6-7; Fitzroy Legal Service, *Submission 48*, pp. 16, 18; Hobart Community Legal Service, *Submission 49*, p. 3; Federation of Community Legal Centres (Vic) Inc, *Submission 50*, pp. 28, 30; Welfare Rights Centre, *Submission 55*, pp. 4-5; NSW Combined Community Legal Centres Group, *Submission 60*, pp. 32-33, 35, 41; Advocacy Tasmania, *Submission 39*, p.3.

58 NSW Combined Community Legal Centres Group, *Submission 60*, pp. 32-33; Professors Hunter and Giddings, *Submission 24*, p. 5; Australian Law Reform Commission, *Submission 2*6, p. 10.

59 Kingsford Legal Centre University of NSW, *Submission 36*, p. 8.

60 *Committee Hansard*, 10 March 2004, p. 3.

61 Family Court of Australia, *Submission 85*, pp. 9-10.

10.56 The National Council of Single Mothers and their Children submitted that the consequences for children in family law matters was significant:

> The National Council of Single Mothers and their Children continues daily to hear of situations where parents are unrepresented in very serious proceedings in the Family Court, where they believe their children are exposed to serious harm and they themselves are exposed to serious harm. Their capacity to do anything about that using the legal processes of the Family Court is very limited because they do not understand the legal proceedings. They do not understand how to get evidence into the court, how to subpoena evidence and get it produced. They do not know how to require certain procedures that would inform the court about the child's safety. The consequence is that the children—or any target of violence—continue to be exposed to serious harm. That is happening every day in the Family Court. It would be better for those people if they could at least have access to a lawyer who understood the proceedings and could help them.[62]

10.57 Other submissions also argued that inappropriate decisions can be made where one side is unable to put forward effectively all relevant evidence and argument.[63] As Advocacy Tasmania explained in relation to criminal law matters where only the most serious charges will qualify a person for legal assistance:

> This means that persons facing the courts on lesser offences are often unrepresented, poorly represented by themselves or plead guilty to put an end to the matter whether they consider themselves innocent or guilty.
>
> The consequences often are;
>
> - the increasing criminalisation of the disadvantaged
> - possible receipt of a financially burdening heavy fine
> - unnecessary social and family stresses
> - stigma associated with a prior record
> - loss of a just outcome through technicalities such as improper documentation
> - loss of employment
> - loss of good character and standing
> - loss of self esteem through failure to understand legal and judicial requirements

62 Dr Elspeth McInnes, National Council of Single Mothers and their Children, *Committee Hansard*, 11 November 2003, p. 2.

63 Cairns Community Legal Centre Inc, *Submission 14*, pp. 3-4; West Heidelberg Community Legal Service, *Submission 21*, p. 4; Public Interest Law Clearing House, *Submission 54*, p. 16; Refugee Advice and Casework Service (Australia) Inc, *Submission 66*, p. 6; Queensland Association of Independent Legal Services Inc, *Submission 73*, p. 32; Family Court of Australia, *Submission 85*, pp. 6-7, 9; Law Institute of Victoria, *Submission 87*, p. 7.

- disempowerment due to unfamiliar legalisms.[64]

10.58 The National Network of Women's Legal Services commented that inappropriate consent orders in family law matters lead to 'lengthy and intractable' litigation. The Network referred to research which examined 100 enforcement applications in 1999: 88 applications were to enforce a consent order, with 32 cases resulting in more restrictive contact arrangements. [65]

Counsel acting to disadvantage of own client

10.59 A legal practitioner has an overriding duty to the court which may require him or her to act more favourably to an opposing litigant who is unrepresented than he or she otherwise would.[66] For example, counsel has a duty to bring the court's attention authorities favourable to and evidence essential to the unrepresented litigant's case.

10.60 Dewar, Smith and Banks reported that judges, judicial registrars and registrars believed that in 41 per cent of family law cases where one party was self-represented the other party was disadvantaged.[67]

Minimising the adverse effects of self-represented litigants

10.61 The Committee heard many suggestions to minimise the adverse effects that self-represented litigants have on the justice system. These included re-prioritising and targeting legal aid funding (discussed in Chapter 2) and increased use of pro bono schemes (discussed in Chapter 9).

10.62 Other suggestions discussed in more detail below are:

- improving community information;
- expanding the duty solicitor scheme;
- unbundling legal services;
- increasing the use of lay assistance; and
- initiatives by the courts.

Improving community information

10.63 Self-represented litigants have access to a range of legal information to assist them - for example, self-help kits, telephone advisory services and websites. This

64 Advocacy Tasmania, *Submission 39*, p. 3.

65 National Network of Women's Legal Services, *Submission 86*, p. 21.

66 *Giannarelli v Wraith* (1988) 165 CLR 543.

67 Dewar, Smith & Banks, *Litigants in Person in the Family Court of Australia*, 2000, p. 2.

assistance is provided not only by community legal centres, legal aid commissions and law societies, but also various courts and tribunals.

10.64 The Federal Magistrates Court, for example, has employed a project officer to develop programs relevant to people representing themselves, as well as establishing a pro bono scheme similar to that operating in the Federal Court.[68] The Family Court has also recently reviewed information about court processes and procedures and amongst other measures has developed new brochures and launched a website with a step-by-step guide to court proceedings.[69] As the Chief Justice of the Family Court of Australia explained:

> … it always seems to me that you can help a self-represented litigant a lot by simplifying your procedures, which we are trying to do, and by giving them more information about how the system works. Again, we are trying to do that. We have a web site which has an interactive capacity with a lot of information on it and people are finding that very helpful. We also have pamphlets. For example, we recently put out a Family Court book in Chinese and Arabic.[70]

10.65 Submissions to this inquiry were divided on the benefits of improving the provision of legal information to self-represented litigants.

10.66 Supporters argued that such information goes some way to mitigate vulnerability by equipping self-represented litigants to run their case better.[71] However, critics pointed out that disadvantaged people are often unable to obtain or understand the information, let alone apply it to their specific circumstances.[72] For example, Professors Rosemary Hunter and Jeff Giddings commented that:

> Research on self-help services suggests that only some litigants in person are sufficiently educated and empowered to make effective use of such assistance (Giddings and Robertson, 2002b, 2003b) We believe that there may be a critical difference in the value of self-help services depending on whether the consumer has freely chosen to be a self-helper, or whether the 'choice' is thrust upon them. Self-help services are likely to be more

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68 Federal Magistrates Court *2002-2003Annual Report*, p. 15. The pro bono scheme is generally confined to migration matters.

69 Family Court of Australia *Self-represented litigants: a challenge*, 2003, pp. 6-7, 12-14.

70 *Committee Hansard*, 10 March 2004, p. 3. The Chief Justice noted, however, 'You can do all these sorts of things, but once you get to the actual courtroom it is a very different situation.'

71 See for example, Legal Aid Queensland, *Submission 31*, pp. 4, 22; Community Legal Service (Albury Wodonga), *Submission 41*, p. 4; Victoria Law Foundation, *Submission 64*, p. 3 and Victorian Legal Aid, *Submission 87*, p. 5.

72 Legal Aid Queensland, *Submission 31*, pp. 22-23; Shoalcoast Community Legal Centre, *Submission 28*, p. 10; Blake Dawson Waldron Lawyers, *Submission 63*, p. 6; Freehills, *Submission 75*, p. 5; National Legal Aid, *Submission 81*, p. 23; National Network of Women's Legal Services, *Submission 86*, p. 5; Petrie Legal Service, *Submission 88*, p. 2; NSW Legal Aid Commission, *Submission 91*, p. 3.

> successful when self-representation is freely chosen, but much less helpful to disadvantaged people for whom these services are a poor – and often the only – substitute for the services of experts (Robertson and Giddings, 2001; Giddings an Robertson, 2003b)
>
> Further, it seems clear that the provision of generic legal information on its own is of limited use to consumers. It makes many assumptions about the capacity of non-experts to interpret and deploy legal data in a legally meaningful way.[73]

10.67 QAILS also pointed to a review commissioned by Legal Aid Queensland on the provision of services by video-conferencing. The review found that these services needed to be supplemented with face to face meetings and recommended that circuit solicitors be used for this purpose.[74] The National Network of Women's Legal Services also pointed to USA evaluations which generally concluded that legal information services do not lead to the favourable resolution of legal problems.[75]

10.68 Mr Mark Woods on behalf of the Law Institute Victoria supported the provision of information and training in relation to simple matters, denying that it was a form of 'second-best justice':

> Victoria Legal Aid have for some time run excellent programs on divorce applications, traffic prosecutions and those sorts of cases where the ordinary paying member of the public would not necessarily decide they need a solicitor but what they do need is some assistance to understand what the hell is going on in the forum they are going to find themselves in. The programs are hugely popular and the people who give the instruction are well regarded. So people come to court in circumstances where they would not ordinarily need to go to the expense of a lawyer and they are able to properly present their case. They can understand the terminology that is used, the practice that is going to go on, the limits to what they can say in court and all those sorts of things. That obviously meets an unmet need, and it is crucial that those sorts of programs continue and indeed flourish.[76]

10.69 Mr Woods stated that he believed Victoria Legal Aid would like to expand those programs but ' they simply do not have the money'. However, he argued that such matters must be distinguished from more complex matters:

> Those cases should be contrasted with the sort of litigation for which an ordinary member of the public—who could afford it—would in fact engage a lawyer. Justice John Faulks of the Family Court, who has chaired in person the court's inquiry into litigants, has come to the conclusion that you have either got to get the person a lawyer, make them a lawyer or change

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73 Professors R Hunter and J Giddings, Griffith University, *Submission 24*, p. 5.

74 *Submission 73*, pp. 45-46.

75 National Network of Women's Legal Services, *Submission 86*, p. 5.

76 Mr Mark Woods, Law Institute of Victoria, *Committee Hansard*, 12 November 2003, pp. 29-30.

> the system, and no amount of instruction at a particular point in time in the law and the legal process will equip a person to properly litigate a family law matter to the nth degree.[77]

Committee view

10.70 The Committee believes that moves to simplify routine court processes and procedures and to improve public knowledge of such matters should be applauded. However, undue reliance on legal information services is ill-conceived without ongoing evaluation of the extent to which they actually assist self-represented litigants in resolving their matters. Such evaluation must focus on the extent to which they contribute to resolution of the legal problem and not merely the user's satisfaction with those services.

Recommendation 55

10.71 The Committee recommends that the Commonwealth Government fund and publish an evaluation of the legal information services that it funds, in order to determine the extent to which those services assist in resolving self-represented litigants' legal problems.

Recommendation 56

10.72 The Committee urges providers of legal information services to evaluate the contribution that those services make in resolving self-represented litigants' legal problems.

Expanded duty lawyer schemes

10.73 Duty solicitor schemes operate in some courts to provide advice to self-represented litigants on their matters. The Committee heard different views on the merits of expanding such schemes.

10.74 Legal Aid Queensland, in supporting the duty solicitor scheme, commented that self-represented litigants were better able to run their case where a duty solicitor had assisted.[78] The PILCH commented that duty solicitor schemes may alleviate problems with inadequate pleadings and preparation of evidence.[79] The Committee also notes the Federal Magistrates Court's description of the duty solicitor scheme as an 'essential adjunct to efficient operation of the Court'.[80] The Director of the Legal Services Commission of South Australia, Mr Hamish Gilmore, told the Committee:

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77 ibid, pp. 29-30.

78 Legal Aid Queensland, *Submission 31*, pp. 4 and 22.

79 Public Interest Law Clearing House, *Submission 54*, p. 24.

80 Federal Magistrates Court, *Annual report 2001-2002,* p. 12.

> There is an urgent need for the establishment of a duty lawyer advice scheme to operate in every family court registry and all magistrates' courts. The number of unrepresented litigants in both the magistrates' court and the Family Court is resulting in highly inefficient and potentially inequitable court proceedings, with court delays for everyone being inevitable.[81]

10.75 The Legal Aid Commission of NSW stated that in August 2002 it had established a pilot duty solicitor scheme at the Parramatta Family Court and Federal Magistrate's Service complex. A pilot at Newcastle was also commencing.

> The aim of these services is to assist a client on a particular day at court in drafting simple court documentation, assist in a simple court appearance, assist in negotiating a settlement of the matter if possible and/or refer the client to appropriate services.
>
> This can include alternate dispute resolution, counselling, and referral to a private practitioner or assistance with a legal aid application for continued representation by LACNSW.
>
> The scheme is quickly becoming a necessity, as demonstrated by the large numbers of matters that are being resolved on a final basis through the service. For many of those assisted, it also avoids all the associated personal cost and stress associated with ongoing litigation and saves the Court both time and cost.[82]

10.76 The Northern Territory Legal Aid Commission stated that it was considering implementing a duty solicitor scheme, but that potential conflicts of interest may make it hard to identify suitable lawyers to advise self-represented litigants.[83]

10.77 Due to limited resources, duty solicitor schemes cannot assist all self-represented litigants. Availability is often restricted, for example, to only those accused who are likely to be imprisoned if convicted. The Kingsford Legal Centre argued that the decision as to who should receive assistance should be left to the duty solicitor, as he or she would be best placed to determine which people could not adequately represent themselves.[84]

10.78 Other submissions argued for increased funding to enable duty solicitors to represent all matters at first instance and all family law cases.[85] However, the Legal Services Commission of South Australia noted that its duty solicitor scheme would need to be greatly expanded to advise all clients on their first occasion before the

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81 Mr Hamish Gilmore, Legal Services Commission of South Australia, *Committee Hansard*, 11 November 2003, p. 11.

82 Legal Aid Commission of NSW, *Submission 91*, pp. 30-31.

83 Northern Territory Legal Aid Commission, *Submission 82*, p. 17.

84 Kingsford Legal Centre, *Submission 36*, pp. 7-8.

85 The Law Society of South Australia, *Submission 92*, p. 2; Legal Services Commission of South Australia, *Submission 51*, p. 6 and 26; Law Council of Australia, *Submission 62*, p. 2; Riverland Community Legal Centre, *Submission 11*, pp. 4-5.

Magistrates Court. Of the 29,065 cases before the South Australian Magistrates Court in 2001, 16,579 involved self-represented litigants at some stage in the proceedings.[86]

10.79 Several submissions argued that reliance on the duty solicitor scheme to fill the gaps in legal aid funding was not a satisfactory solution.[87] Generally, their criticisms related to the lack of time that duty solicitors had to prepare their cases—some submissions cited five minutes—and the claim that because duty solicitors only assist with guilty pleas, pressure is therefore placed on self-represented litigants to plead guilty.[88]

10.80 The NSW Law Society observed that the rates for duty solicitors are significantly below market rates. This has two effects: junior solicitors with limited experience fill those positions and solicitors can assist clients with very little of their case preparation or negotiations.[89]

Committee view

10.81 The Committee considers that an expanded duty solicitor scheme would provide benefits to the justice system by assisting self-represented litigants to prepare their evidence better and narrow the issues in dispute. However, a duty solicitor scheme which merely performs a role as a mouthpiece, with solicitors consulted only minutes before the matter is heard, will not adequately address the problems raised by lack of legal representation.

10.82 As discussed in Chapter 6, the Committee considers that the duty lawyer scheme suggested by the Legal Services Commission of SA in relation to rural, regional and remote areas could usefully be adopted in all states and territories. The Committee believes that the Commonwealth Government has a fundamental responsibility to lead by example in this area and to assist with the provision of funding to the LACs for a duty lawyer scheme. It would also be appropriate for the state/territory governments to contribute funding to such a scheme.

Recommendation 57

10.83 The Committee recommends that the Commonwealth Government and the state/territory governments provide funding to establish a comprehensive duty solicitor scheme in all states and territories of Australia. The scheme should offer, at the very least, a duty solicitor capacity in courts of first instance (criminal, civil and family) and should provide legal advice and representation

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86 Legal Services Commission of South Australia, *Submission 51*, p. 26.

87 Victorian Legal Aid, *Submission 87*, p. 8; Federation of Community Legal Centres (Vic) Inc, *Submission 50*, p. 28.

88 Fitzroy Legal Service, *Submission 48*, p. 18; Federation of Community Legal Centres (Vic) Inc, *Submission 50*, p. 28.

89 New South Wales Law Society, *Submission 79*, pp. 6-9.

on all guilty pleas, not guilty pleas in appropriate matters, adjournments and bail applications, and assistance for self-represented litigants to prepare their evidence and narrow the issues in dispute.

Unbundling legal services

10.84 'Unbundling' legal services refers to giving legal assistance and support at various stages of proceedings without providing full legal representation. As the ALRC explained:

> Clients often prepare their own documents with the assistance and oversight of lawyers, gather their own evidence and appear for themselves at interlocutory case events. Such clients are more likely to reserve their limited funds for representation at the hearing if this becomes necessary.[90]

10.85 The Family Court of Australia described the potential advantage of unbundling:

> Limited legal assistance can then be applied most effectively and strategically … Availability of 'unbundled' services would increase access to advice and possibly targeted representation [for self-represented litigants].[91]

10.86 However, there are concerns about unbundling within the legal community. The Shoalcoast Community Legal Centre highlighted the following:

> - professional legal liability issues. Solicitors providing such services do not have full carriage and control of a legal matter and could expose themselves to the risk of a professional negligence where a client is unhappy with the ultimate outcome of a matter.
>
> - Ethical and Statutory Legal obligations on practitioners which do not currently recognise the concept of unbundled legal services. Lawyers have a duty to act in the best interests of their clients and under the NSW Legal Professional Act and the Civil Liability Act, a solicitor or barrister must not act for a client if there are not reasonable prospects of success. Such obligations may be difficult to ascertain and fulfil in the provision of limited or discrete task services.[92]

10.87 The Family Court referred to possible solutions explored by Professor Dewar, including amendment of lawyers' ethical rules and statutory immunity for work not

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90 Australian Law Reform Commission, *Submission 26*, p. 15.

91 Family Court of Australia *Self-represented litigants: a challenge*, 2003, p. 22.

92 Shoalcoast Community Legal Centre, *Submission 28*, pp. 10-11; Family Court of Australia, *Submission 8*5, pp. 4-5; National Legal Aid, *Submission 81*, p. 18; Australian Law Reform Commission, *Submission 26*, pp. 15-17.

covered by a retainer. The Attorney-General's Department is said to be 'actively considering' these matters.[93]

10.88 The Shoalcoast Community Legal Centre also referred to concerns about access to justice and the quality of legal services:

> Unbundled and self-help services are more suited to simple and/or standard form documents and discrete areas of work that can be completed in isolation.
>
> Moreover, we believe they are rarely suitable to most CLC clients who have difficulty in dealing with the legal system or self representing due to such factors as language and literacy skills, limited education and analytical skills and lack of resources to access such things at library research facilities and the internet etc. Some clients are facing particularly emotional issues concerning family law and domestic violence and need ongoing support to deal with the legal system. In our adversarial system of litigation, full service representation is still necessary for litigants to interpret and manage legal data and to properly adduce evidence.[94]

Lay assistance

10.89 Some jurisdictions specifically allow lay representatives to conduct matters.[95] In others, courts have the discretion to allow a 'McKenzie friend', that is, a lay person to assist an unrepresented litigant in presenting his or her case.[96] A McKenzie friend has no rights as an advocate or in relation to the litigation, and may be excluded by the court.[97] Applications for such assistance tend not to be received favourably if the litigant has not applied for or been refused legal aid.[98]

10.90 During this inquiry there was some criticism of reliance on these schemes. For example, the Fitzroy Legal Centre commented that the use of 'amicus curiae', or

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93 Family Court of Australia *Self-represented litigants: a challenge*, 2003, p. 22, referring to Professor J Dewar *'Unbundling (or 'discrete task representation'): Ethical and liability issues, a brief discussion paper,* 2002.

94 Shoalcoast Community Legal Centre, *Submission 28*, pp. 10-11; Family Court of Australia, *Submission 8*5, pp. 4-5; National Legal Aid, *Submission 81*, p. 18; Australian Law Reform Commission, *Submission 26*, pp. 15-17.

95 For example, section 42 of the *Workplace Relations Act* 1996 allows litigants to be represented in proceedings in the Australian Industrial Relations Commission by, amongst others, an employee of a peak council to which the litigant is affiliated. In others, litigants may be represented by an agent: for example, section 84B of the *Native Title Act 1993* allows parties to appoint an agent for the purpose of representing them in proceedings under that Act.

96 *Schagen* (1993) 65 A Crim R 500 and *Smith v R* (1985) 159 CLR 532 at 534.

97 *R v Bow Country Court; Ex Parte Pelling* [1999] 4 All ER 751 at 757.

98 Perry, *The Unrepresented Litigant,* AIJA 16th Conference, September 1998.

friends of the Court, and limited assistance through duty lawyer schemes were 'nothing more than a stop gap and measures of last resort'.[99]

Measures taken by federal courts

10.91 In recent years various courts have developed strategies both to assist self-represented litigants and to manage them more effectively.

10.92 In August 2002 the Federal Court adopted a Self Represented Litigants Management Plan that includes various strategies, including improving the collection of information; reviewing rules, forms, brochures and guides to ensure they are clearly written and simple to use; providing further staff training on dealing with self-represented litigants; and improving the rules and practices in relation to vexatious, frivolous or repeat litigants.[100]

10.93 As noted throughout this chapter, the Family Court of Australia has also devoted considerable time and resources to examining the needs of self-represented litigants and the measures that might assist them. As discussed in Chapter 4, the Chief Justice of the Family Court informed the Committee of a new trial that has been commenced in Parramatta and Sydney 'to experiment with a less adversarial method of conducting proceedings':

> That is not just driven by the unrepresented litigants; that is driven by the desirability of examining the way we conduct proceedings anyway to see if there are better ways of doing it. We have opened in Parramatta and Sydney a pilot which involves this less adversarial process. It started last week [March 2004]. Just to explain it briefly, it is done by consent; no-one is forced into it. If they agree upon it, it gives the judge much greater control of the way the case is conducted. The judge determines the issues and determines what evidence he or she wishes to hear, in consultation with the parties. The judge will, where necessary, direct that other evidence be obtained that parties may not have sought to call before the court, so it is a more inquisitorial process which has really borrowed to some extent from those in Germany and France—more so Germany. It does not exclude lawyers; in fact, we encourage lawyers to be involved. It is in its early days, because it has only been running for a week, but we have had about six references in Sydney and three in Parramatta. Most of them have been represented, so it suggests that there is a take-up by the profession, which I find heartening in the sense that this means the project will have a better chance of working.[101]

99 Fitzroy Legal Service, *Submission 48*, p. 13.

100 Federal Court of Australia *2002-2003 Annual report*, pp. 46-47.

101 *Committee Hansard*, 10 March 2004, p. 1.

10.94 The Chief Justice told the Committee that Professor Hunter would be evaluating the project based on the first 100 cases but that because of the take-up for the program to date, that figure might be revised.[102]

Committee view

10.95 There is much evidence to demonstrate a strong link between restrictions on legal aid funding and the growing numbers of self-represented litigants. The Committee is concerned about this increase and the impact it may have on the administration of justice. The Committee is also disappointed that the Commonwealth Government has not quantified the effect that self-represented litigants have on the administration of justice and whether this cost is outweighed by savings created by the limits imposed on legal aid funding.

10.96 The Committee considers the lack of empirical evidence on numbers of self-represented litigants, their matter types, their needs and the costs they add to the administration of justice is unacceptable. Effective policy development is impaired without a clear objective understanding of the areas of need.

10.97 The Committee urges governments to reconsider their commitment to legal aid funding in light of the true economic effects and adverse impact on the administration of justice that self-represented litigants impose.

102 ibid, p. 3.