CHAPTER 5

Measures to reduce the length and complexity of litigation and improve efficiency

5.1 Submissions and evidence addressing term of reference (d) universally agreed that reducing the length and complexity of litigation and improving efficiency within the judicial system would increase access to justice. Submissions and evidence therefore endorsed measures aimed at accomplishing these objectives.

5.2 In particular, this chapter discusses measures relating to:

- civil law litigation;
- family law litigation; and
- self-represented litigants.

5.3 The committee acknowledges the important role of extra-judicial measures to reduce the length and complexity of litigation and improve judicial efficiency. These measures are discussed in Chapter 6.

Measures in civil law litigation

5.4 Litigation can involve considerable time and expense, factors well illustrated by the recent phenomenon of mega-litigation. However, people with limited financial resources cannot afford lengthy, complex and inefficient litigation. For this reason, some targeted measures have been considered or introduced in civil law litigation, for example, litigation funding and case management.

Litigation funding

5.5 In its report *Costs Shifting: Who pays for litigation?*, the Australian Law Reform Commission stated:

> Cost is a critical element in access to justice. It is a fundamental barrier to those wishing to pursue litigation. For people caught up in the legal system it can become an intolerable burden.[1]

1 Australian Law Reform Commission, *Costs Shifting: Who pays for litigation?*, Report No. 75

5.6 Litigation funding is one means of reducing the cost of civil litigation, and a potential means of improving access to justice for some members of the Australian community.[2] The Law Council of Australia (Law Council) submitted that civil litigation funding has been endorsed for this purpose in certain circumstances. It argued:

> There is public interest in a robust litigation funding market where sufficient capital is available to underwrite the risks associated with large group claims. These benefits could extend, for example, to people injured in major industrial accidents or mass latent injury claims against corporations or other entities, where there is evidence of negligence or recklessness as to employee or community safety.[3]

5.7 However, the committee received no further evidence regarding civil litigation funding and is therefore not able to draw any conclusions.[4]

Case management

5.8 Another measure to reduce the length and complexity of civil litigation and improve judicial efficiency is case management. This option is currently being explored and implemented by both the Australian Government and the courts.

5.9 On 18 and 19 November 2009, the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Bill) passed the House of Representatives and Senate, respectively. It is currently awaiting Royal Assent.

5.10 One of the Bill's aims is to strengthen and clarify the case management powers of the Federal Court of Australia (Federal Court), ensuring more efficient and thus less costly civil litigation.[5] This builds on changes to be effected by the Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008. As at the date of writing, this bill is awaiting Royal Assent.

5.11 The Attorney-General's Department (department) told the committee that the *Strategic Framework for Access to Justice in the Federal Civil Justice System* aims to simplify and focus court procedures on the resolution of disputes:

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2 A useful description of litigation funding is provided by the Law Council of Australia: see *Submission 12*.

3 Law Council of Australia, *Submission 12*, pp 27 & 28; and *QPSX v. Ericsson (No. 3)* (2000) 66 IPLR 277 per French J at 289 – 90.

4 The Women's Legal Centre (ACT and Region) also commented on litigation funding in the context of family law but did not endorse its increasing replacement of contingency fee arrangements: see *Submission 51*

5 Access to Justice (Civil Litigation Reforms) Amendment Bill 2009, Explanatory Memorandum, p. 3.

> We know that most matters do not go to final judicial determination as the outcome. One way or another matters drop out. But most of the court rules and procedures pretend you are preparing for a judge to hear the matter. All of those things impose costs, distress, time and expense, so we proposed that as a general issue court procedures should be directed to resolving the issue. We had a big attraction to procedures being directed to alternative dispute resolution, simplifying the issues and making it much more accessible on that front.[6]

5.12 In addition to legislative reform, the Federal Court has independently instituted measures aimed at reducing the cost of proceedings, including: active case management; the allocation of cases to individual dockets; and a comprehensive program of court-annexed mediation and other forms of assisted dispute resolution.[7]

5.13 In particular, the Federal Court has introduced a range of case management initiatives directed toward reducing the length and complexity of litigation. The initiatives focus upon early judicial involvement in the identification of real issues in dispute, and careful management of discovery and other procedural matters.

5.14 By way of example, the Federal Court submission cited two recent initiatives: Practice Note No. 30 – Fast Track Directions; and Practice Note No. 17 – The Use of Technology in the Management of Discovery and the Conduct of Litigation:

- the first provides a framework in which cases may be heard and finalised within five to eight months from the date of filing, and to reduce costs by initiating discovery and avoiding lengthy interlocutory disputes; and
- the second encourages and facilitates the effective use of technology in the conduct of proceedings before the court, and recommends a framework for the electronic management of documents in the discovery process and the conduct of trials.[8]

5.15 Submissions endorsed the Federal Court's existing case management powers and welcomed proposals contained within the Bill.[9]

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6 Mr Matt Minogue, Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 43.

7 Federal Court of Australia, *Submission 57*, p. 2.

8 Federal Court of Australia, *Submission 57*, pp 2-3.

9 Access to Justice (Civil Litigation Reforms) Amendment Bill 2009, Federal Court of Australia, *Submission 4*, p. 1; Law Council of Australia, *Submission 12*, p. 26; and NSW Young Lawyers, Human Rights Committee, *Submission 28*, p. 15.

Measures in family law litigation

5.16 The Family Court of Australia (FCA) has been at the forefront of measures to reduce the length and complexity of litigation, developing and implementing processes designed to minimise costs to family law litigants. The most significant of these initiatives are contained in the Family Law Rules 2004 (Rules).[10]

5.17 Submissions briefly described some of the FCA's initiatives, including: pre-action procedures and family dispute resolution (FDR); single expert rules; the less adversarial trial; and the docket system.

Pre-action procedures and family dispute resolution

5.18 Rule 1.05 requires each prospective party to family law litigation (with some exceptions) to comply with 'pre-action procedures' prior to commencing an action. These procedures are set out in Schedule 1 of the Rules.[11]

5.19 The Australian Lawyers Alliance submitted that:

> In many cases, creating obligations for 'pre-action procedures' has been a positive step that has allowed many matters to resolve without recourse to litigation.[12]

5.20 The 'pre-action procedures' established by the Rules apply to financial disputes, whereas section 60I of the *Family Law Act 1975* requires parties to a parenting dispute to undertake FDR or obtain a court-ordered exemption from that requirement before issuing legal proceedings.[13]

5.21 The Attorney-General recently released the *Family Dispute Resolution Services in Legal Aid Commissions* evaluation report. This report highlighted the cost-effectiveness of FDR services in Legal Aid Commissions, finding that for every $1 invested, approximately $1.48 is saved in court time and related costs:

> FDR is effective in reducing cost and time to individuals and government by providing an appropriate alternative to litigation. FDR is also effective in achieving other outcomes such as narrowing of issues in dispute, participatory negotiated agreement making for disadvantaged individuals, and ensuring agreements are child focussed.[14]

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10 Family Court of Australia & Federal Magistrates Court, *Submission 31*, pp 9-11.

11 Family Court of Australia and Federal Magistrates Court, *Submission 31*, pp 11-12.

12 Australian Lawyers Alliance, *Submission 27*, p. 15.

13 Family Court of Australia and Federal Magistrates Court, *Submission 31*, p. 12.

14 Attorney-General's Department, *Family Dispute Resolution Services in Legal Aid Commissions: Evaluation Report*, April 2009, pp 77 & 92; and National Legal Aid, *Submission 34*, p. 26.

5.22 The Attorney-General commended the report's findings, stating:

> FDR services provide families who would not otherwise be able to afford legal assistance with access to a timely, less adversarial and low cost option for resolving their legal disputes.[15]

5.23 The Women's Legal Centre (ACT and Region) cautioned however that it is imperative for women to have the option of accessing legal advice prior to participating in FDR, as women are then better placed in negotiations for parenting plans or consent orders.[16]

Single expert rules

5.24 Part 15.5 of the FCA Rules concerns the use of expert evidence. According to the family law courts, these rules are highly successful and widely considered to overcome some significant issues that have arisen historically in the consideration of expert evidence, for example: potential partisanship and lack of objectivity; experts exceeding their areas of expertise; lack of clarity in expert evidence; cost and delay.[17]

The less adversarial trial

5.25 The FCA conducts children's cases as Less Adversarial Trials (LAT), an approach which is flexible, comparatively quicker and cheaper, inclusive and less formal than the traditional common law (adversarial) approach.[18]

5.26 The National Alternative Dispute Resolution Advisory Council recognised the benefits of the LAT approach shortly after its introduction:

> A formal two-part evaluation was undertaken of the pilot program that led to the Less Adversarial Trial. Those evaluations were supportive of the initiative. The final evaluation found that it resulted in a faster court process, that the parties were generally more satisfied with the process than parties whose dispute were determined using a traditional adversarial approach and that it has the potential to encourage a more cooperative approach between the parties (in this case usually separated or divorced parents).[19]

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15 The Hon. Robert McClelland MP, Attorney-General, 'Family dispute resolution keeps families out of court', Media Release, 2 April 2009

16 Women's Legal Centre (ACT and Region), *Submission 51*, pp 7-8.

17 Family Court of Australia and Federal Magistrates Court, *Submission 31*, p. 12.

18 http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/publications/All+Publications/D+to+M/FCOA_br_Less_Adversarial_Trials (accessed 7 August 2009)

19 National Alternative Dispute Resolution Advisory Council quoted in Family Court of Australia and Federal Magistrates Court, *Submission 31*, pp 12-13; and Division 12A Part VII of the *Family Law Act 1975* (Cth)

The docket system

5.27 The FCA and the Federal Magistrates Court (FMC) allocate and manage cases through a judicial docket, meaning that one judge or federal magistrate handles each case from commencement to disposition. The judicial docket is designed to dispose of cases in the most efficient manner possible by ensuring early judicial intervention and active judicial case management.[20]

5.28 As indicated, the federal courts are currently considering, introducing or expanding, to various degrees, measures to reduce the length, complexity and cost of litigation, and increase judicial efficiency. These measures are intended to enhance access to justice.

5.29 Evidence presented to the committee did not encompass measures at the state/territory level, and the committee cannot draw any conclusions about practice and procedure in those jurisdictions.

5.30 Nonetheless, the committee regards access to justice as an issue which transcends jurisdiction, and encourages all courts to implement measures to reduce the length and complexity of litigation, and improve judicial efficiency. By implementing such measures, more Australians should be better able to afford to access the courts and the justice it metes out. The committee acknowledges that such measures do not act in isolation but in conjunction with a myriad of factors comprising and effecting access to justice.

Measures relating to self-represented litigants

5.31 As indicated in Chapter 2, not everyone is able to access legal representation, with self-represented litigants appearing before the courts for a number of reasons, for example: inability to afford legal representation; a lack of awareness of, or inability to access, publicly funded legal services; geographic considerations; physical or mental disability; and by choice.

5.32 In 2003-04, the committee comprehensively examined the issue of self-represented litigants,[21] and submissions to this inquiry continued to refer to the 'well-documented difficulties and costs associated with the swelling pool of unrepresented litigants.'[22]

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20 Family Court of Australia and Federal Magistrates Court, *Submission 31*, p. 14.

21 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Chapter 10

22 National Pro Bono Resource Centre, *Submission 49*, p. 8.

The 'swelling pool' of self-represented litigants

5.33 In 2004, His Honour Justice Murray Wilcox believed the number of self-represented litigants to exceed 50 per cent in some courts,[23] and two years later, Her Honour Chief Justice Diana Bryant wrote:

> It is beyond doubt that the numbers of self-represented litigants in the Family Court has markedly increased in the last ten years. Cuts to the legal aid budget for family law, the cost of legal services, the introduction of simplified procedures to reduce complexity and cost, changes to the substantive law in the area of children's cases, the rise of the father's rights movement and the perception that family law is not 'real' law such that the services of a lawyer are not required have all been identified as factors contributing to this increase.[24]

5.34 In 2007, the FCA reported that in 27 per cent of its cases at least one party was self-represented.[25] The most recent statistics from the FMC – 2008-09 – indicate that in 9.8 per cent of its family law cases neither party had legal representation and in 26.7 per cent of cases at least one party was self-represented.[26]

Impact of self-representation on court resources

5.35 In addition to the high proportion of self-represented litigants, the family law courts testified that family law matters are becoming increasingly complex and lengthier. Her Honour Chief Justice Diana Bryant attributed this to commingled issues, such as: serious abuse allegations; serious conflict; mental health issues; drug addiction issues; and serious family violence.[27]

5.36 The FMC provided the committee with recent data illustrating the length of time taken to finalise family law applications, compared with general law applications for the same period. Most family law applications are finalised within three months of filing, and most general law applications are finalised within three to six months of filing.

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23 Australian Institute of Judicial Administration and the Federal Court of Australia, Forum on Self-Represented Litigants, *Forum on Self-Represented Litigants*, 17 September 2004, p. 1.

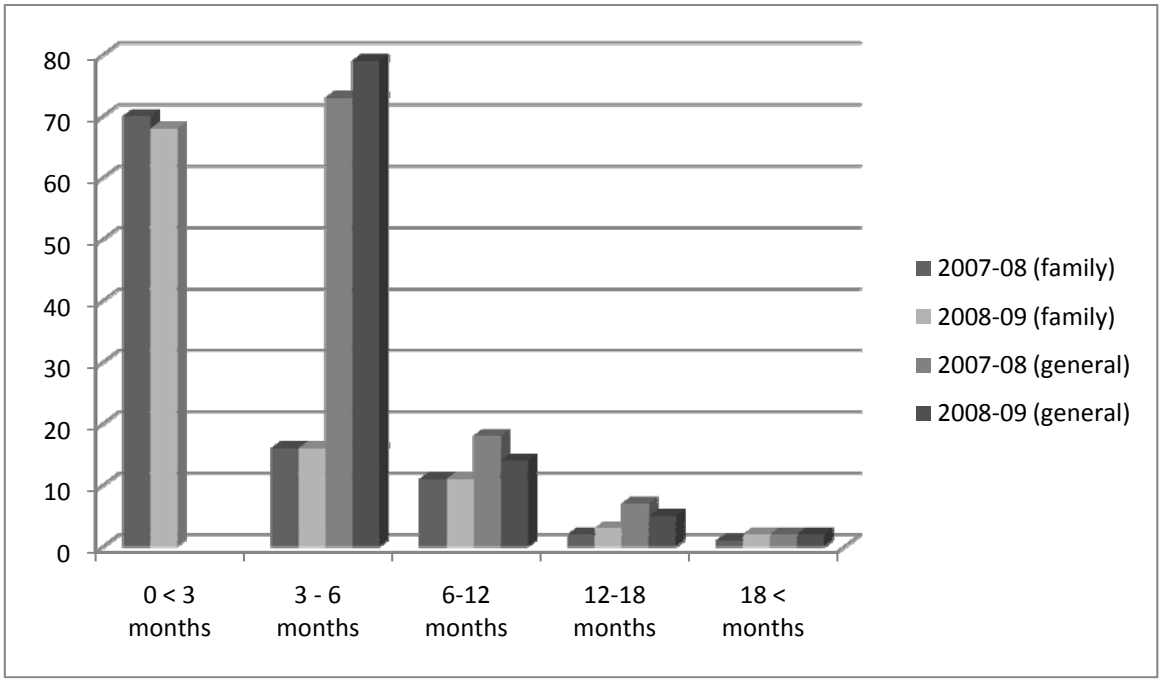
24 Chief Justice Diana Bryant, *Self Represented and Vexatious Litigants in the Family Court of Australia*, 2006, p. 2; and Family Court of Australia and Federal Magistrates Court, *Submission 31*, pp 4-5.

25 Family Court of Australia, Annual Report 2007-08, p. 58.

26 Federal Magistrates Court, Answer to Question on Notice (7 August 2009) p. 1.

27 Chief Justice Diana Bryant, Family Court of Australia, *Committee Hansard*, Melbourne, 15 July 2009, pp 2-3; and Chief Federal Magistrate John Pascoe, Federal Magistrates Court, *Committee Hansard*, Melbourne, 15 July 2009, pp 2 & 4.

Figure 5.1 – Applications in the Federal Magistrates Court: Finalisation Timelines: 2007-09



Source: Federal Magistrates Court, Answer to Question on Notice (7 August 2009) pp 2-3.

5.37 The committee notes that the FMC and other available data do not specifically identify self-represented litigants within court systems, making it difficult to determine the extent of and trends in self-representation, as well as the impact of self-represented litigants on court users, courts and their resources.

5.38 The committee therefore endorses Recommendations 53 and 54 from its 2004 Report (now labelled Recommendations 16 and 17), noting also Recommendation 56.

Recommendation 16

5.39 The committee recommends that the federal, state and territory governments commission research to quantify the economic effects that self-represented litigants have on the Australian justice system, including court, tribunal, other litigant, legal aid system and social welfare system costs.

Recommendation 17

5.40 The committee recommends that the 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 likewise.

Effect of self-representation on access to justice

5.41 In 1998, the committee's *Inquiry into the Legal Aid System (Third Report)* considered that the percentage of self-represented litigants and changes in this percentage over time can be used as indicators of how well the legal aid system is operating.[28]

5.42 Although there is a lack of empirical data, submissions argued that the legal aid system is under-performing and contributing to the high proportion of self-represented litigants who do not always fare well in legal proceedings.[29]

5.43 In particular, the FCA and FMC argued that legal aid is instrumental to facilitating access to justice.[30] The *Litigants in Person in the Family Court of Australia* report, for example, found that 63 per cent of judges, judicial registrars and registrars interviewed considered an unrepresented party disadvantaged by the lack of legal representation: only 31 per cent of self-represented litigants were considered to have participated competently in the proceedings.[31]

5.44 Liberty Victoria agreed, submitting:

> Anecdotally, most lawyers have encountered members of the public who have not been able to afford legal representation, who have not been eligible for legal aid, and whose encounter with the system has left them feeling as though they have not had justice. Often enough, their perception that they did not get a just result is accurate...It is not uncommon to see wrong results achieved when one party is unrepresented.[32]

5.45 The problem identified by the NSW Young Lawyers was that the justice system assumes equality of resources, and an understanding of complex areas of law, practice and procedure. In many instances, individuals, and particularly disadvantaged people, cannot engage with the justice system on a level playing field, requiring:

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28 Legal and Constitutional References Committee, *Inquiry into the Legal Aid System (Third Report),* June 1998, para 3.22.

29 For example, Law Council of Australia, *Submission 12*, p. 6; and Law Society of NSW, *Submission 41*.

30 Family Court of Australia & Federal Magistrates Court, *Submission 31*, pp 6-7.

31 Prof. John Dewar, Barry Smith & Cate Banks, *Litigants in Person in the Family Court of Australia*, 2000: see http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/publications/Papers/archived/FCOA_pr_Litigants_in_person (accessed 10 August 2009)

32 Liberty Victoria, *Submission 25*, pp 2-3.

> …measures to reduce unnecessary complexities, encouragement of alternative means of resolving disputes, a greater recognition of the imbalance between a litigant against the state or business, more effective case management and better funding of community legal service.[33]

5.46 As noted earlier in this chapter, some of these measures are already being enacted for the benefit of all court users. However, submissions suggested that additional targeted measures should be considered, introduced and expanded for the specific benefit of self-represented litigants whose lack of knowledge and/or experience inhibits their access to justice.

Specific measures to assist self-represented litigants

5.47 Submissions described some of the measures currently assisting self-represented litigants, and suggested certain reforms, including: expansion of duty solicitor schemes; expansion of the Self-Represented Litigants' Co-ordinator role; development and provision of further written information; and prompt access to legal advice.

Expansion of duty solicitor schemes

5.48 Throughout Australia, most courts have a duty solicitor scheme where people without having received legal advice or legal representation can seek some basic advice from a solicitor prior to appearing in court.

5.49 Previous reviews have found that the duty solicitor schemes coordinated by courts, legal aid bodies, professional associations and groups of local solicitors are of enormous assistance to self-represented litigants.

5.50 Duty solicitors typically: provide initial advice; identify cases which may be eligible for legal aid; refer matters to another solicitor; explain proceedings; resolve problems with inadequate pleadings and the preparation of evidence; and reduce self-represented litigants stress and anxiety.

5.51 However, duty solicitors rarely have the resources to represent individuals in court, and duty solicitor schemes cannot assist all self-represented litigants. Assistance is often restricted to those individuals who are likely to be imprisoned if convicted (that is, serious criminal matters). The problem is exacerbated in rural, regional and remote (RRR) areas where there are shortages of legal practitioners.

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33 NSW Young Lawyers, Human Rights Committee, *Submission 28*, pp 10 & 13.

5.52 The Public Interest Law Clearing House (PILCH) submitted that duty solicitor schemes should be expanded, arguing that expansion would assist self-represented litigants to access justice and improve the operation of the judicial system.[34] The National Pro Bono Resource Centre agreed but called for public funding of the schemes in areas of identified legal need:

> Where there is a real identified need for duty lawyer schemes (an indicator for which would be a large number of unrepresented litigants) the need should be met by publicly funding regular schemes rather than relying on the goodwill, availability and capacity of the private profession to provide the service pro bono.[35]

5.53 In sharp contrast, while acknowledging the valuable function performed by duty solicitor schemes, the NSW Young Lawyers, Human Rights Committee suggested that their role be limited on practical and qualitative grounds:

> Duty solicitors are extremely busy, and a five minute advice session in the rushed and stressful surrounds of a bustling court is no substitute for proper, considered legal advice and where appropriate, professional representation from a well-prepared practitioner.[36]

5.54 In view of this evidence, the committee endorses part Recommendation 57 of its 2004 Report (now labelled Recommendation 18) with the proviso that the duty solicitor schemes be established in areas of high need.

Recommendation 18

5.55 The committee recommends that the federal, state and territory governments jointly fund and establish a comprehensive duty solicitor scheme in identified high need areas throughout Australia with a view to reducing the length of litigation and increasing judicial efficiency in self-represented matters.

Expansion of the Self-Represented Litigants' Coordinator role

5.56 In Victoria, various courts have introduced the role of a Self-Represented Litigants' Co-ordinator:

- in the Court of Appeal, the Self-Represented Litigants' Co-ordinator acts as a contact point, explaining procedures and helping manage the expectations of self-represented litigants; and

34 PILCH, *Submission 33*, pp 39-40; and Australian Lawyers Alliance, *Submission 27*, p. 12.

35 National Pro Bono Resource Centre, *Submission 49*, p. 7.

36 NSW Young Lawyers, Human Rights Committee, *Submission 28*, pp 6-7; and Russo Lawyers, *Submission 58*, p. 3.

- in the Supreme Court, the Self-Represented Litigants' Co-ordinator provides procedural and practical advice, assists with the completion of court forms and documents, liaises with court staff to expedite proceedings, maintains statistics, monitors best practice in other jurisdictions, and refers self-represented litigants to appropriate legal aid service providers.

5.57 PILCH submitted that the Victorian Supreme Court model provides important and necessary assistance to self-represented litigants, as well as ensuring the more efficient administration of justice. It argued that a similar initiative should be funded in Victoria on an on-going basis and implemented in other courts across Australia.[37]

Development and provision of written information

5.58 In 2000, judges, judicial registrars and registrars reported that self-represented litigants frequently fail to understand the procedures and legal requirements of the court.[38] As a result, self-represented litigants often file wrong or incorrectly completed court documents, and adopt approaches that not only impede the efficient conduct of court proceedings but have the potential to adversely affect the proceedings.

5.59 PILCH submitted that the development of written and online material, including self-help kits is an effective method of assisting self-represented litigants. It recommended:

- the development and implementation of materials aimed at improving self-represented litigants' effective participation in the court system; and
- the exploration of available models and other technological solutions to improve access to services for self represented litigants.[39]

5.60 The committee notes that, in New South Wales at least, there is a wide variety of self-help material available in a variety of formats and across a number of legal areas.[40] However, this material does not appear to address practice and procedural issues.

Recommendation 19

5.61 The committee recommends that judicial and court officers receive training in relation to assisting self-represented litigants.

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37 PILCH, *Submission 33*, pp 40-41.

38 Prof. John Dewar, Barry Smith & Cate Banks, *Litigants in Person in the Family Court of Australia*, 2000, p. 47.

39 PILCH, *Submission 33*, pp 42-43; NSW Young Lawyers, Human Rights Committee, *Submission 28*, p. 14; and Mr Ian Chivers, *Submission 63*

40 NSW Young Lawyers, Human Rights Committee, Answer to Questions on Notice (22 September 2009) pp 2-3.

5.62 The committee agrees in principle with Recommendation 55 of its 2004 Report and urges federal, state and territory courts and tribunals to consider, develop and implement user-friendly practice and procedural guidelines for use within their specific jurisdictions with a view to promoting the efficiency of self-represented litigation.