



**Legal Educators' State Conference Keynote Address
Friday 13 August 2003, 9.10am
Parliament House**

Chief Justice Paul de Jersey AC

Summary

The right to represent oneself in court proceedings is fundamental to accessible justice. But in many instances, exercising that right will inevitably reduce your chance of securing justice. Without legal training, you will struggle to identify the issue and lack the capacity to present it. If faced with lawyers on the other side, your problems will be compounded. You will depend largely on the judge for help. But the judge will have to be circumspect to avoid a charge of unequal treatment.

Self-litigants are often blinded by an intractable commitment to the rightness of their cause, and display an obsessional attention to peripheral detail. They often lack an objective view of legal and factual reality.

Throughout my legal career of more than three decades, the accessibility of justice has been the system's heaviest albatross. As you have heard, the doors of the courthouse, like those of the Hotel Ritz, are open to all. As a subset of that macro problem, self-representation raises contemporary courts' most obvious "micro" challenge. When parties represent themselves, the risk of injustice is accentuated. But in an adversarial system when fairness to both sides is the hallmark, how far can a judge go to minimise that risk? This problem has developed only over the last decade or so, and it has necessitated our refining some new skills, including transcendent patience.



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As the phenomenon of self-representation becomes more marked – in about 1/3 of cases before the Court of Appeal for example, at least one party now lacks lawyers – judges are refining their capacities to deal with these situations. Even-handedness and patience are critical. Limitations on the availability of legal aid have substantially contributed to the problem, and relief in that area seems unlikely. It is now basically a problem for the judges to ‘fix’, and it does I believe constitute our greatest contemporary challenge.

Introduction*

The incidence of self-representation is steadily increasing in Australian courts. This trend is particularly manifest in the Family Court, and there are considerable increases in most other jurisdictions.¹ The Chief Justice of the High Court reported last year that more than one-third of special leave applications are made by self-represented litigants.² Davies JA, has described the question of how to manage self-represented litigants as ‘the greatest single challenge for the civil justice system at the present time’.³ I agree.

Our common law adversarial system has been described as having a ‘gladiatorial dimension’.⁴ Civil action has notably been expressed as ‘civilisation’s substitute for vengeance’.⁵ There is of course a degree of overstatement in those colourful sentiments, but their grain of truth highlights the difficulty facing those who appear without lawyers. The judge presides as an impartial arbiter, making a decision based on the respective parties’

* I am indebted to my Associate, Miss Clare Eardley, for her substantial assistance in the preparation of this paper.

¹ John Dewar, Bronwyn Jerrard, Fiona Bowd, ‘Self-Litigants: A Queensland Perspective’ (2002) 23(3) *Queensland Lawyer* 65.

² Hon Chief Justice Gleeson AC, ‘State of the Judicature’ (2003) 77 *Australian Law Journal* 505.

³ G L Davies, Judge of Appeal, Court of Appeal, Queensland, ‘The reality of civil justice reform: why we must abandon the essential elements of our system’ (Paper presented at the 20th AIJA Annual Conference, Brisbane, 12-14 July 2002) 14.

⁴ Richard Moorhead, ‘Access or Aggravation? Litigants in Person, McKenzie Friends and Lay Representation’ (2003) 22 *Civil Justice Quarterly* 134.

⁵ *Ibid*; Couture, ‘The Nature of Judicial Process’ (1950) *Tulane Law Review* 7.



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arguments as,⁶ '[t]he basic theoretical framework of our ... [adversarial system] ... relies on the ability of a party to advance their own case'.⁷ Most self litigants dramatically lack that ability.

All litigants have the right to appear in person,⁸ and it is an important right. Section 209 of the *Supreme Court Act 1995* (Qld) expressly permits the appearance of a litigant in person. But the exercise of that right spawns a raft of problems. The prevalence of self-representation creates many conflicting issues in an adversarial system as these litigants are extremely unlikely to be able to present a case according to the relevant law or to comply with the required procedural elements.⁹ In particular, a judge faces many dilemmas in deciding to what extent to assist a litigant in person without compromising the judge's position of impartiality.¹⁰

Incidence of self-represented litigants in the Supreme Court of Queensland

What is the incidence of self-representation in the Supreme Court of Queensland?

The Court of Appeal experiences a higher proportion of unrepresented litigants than in matters before the Trial Division.¹¹ As can be seen in the table, the percentage of unrepresented litigants involved in civil and criminal matters in the Court of Appeal over the past three years has been approximately 30-35%.

⁶ Moorhead, above n 4, 134.

⁷ Ibid 135.

⁸ *Collins (aka Hass) v R* (1975) 133 CLR 120, 122; *Cachia v Haines* (1994) 179 CLR 403.

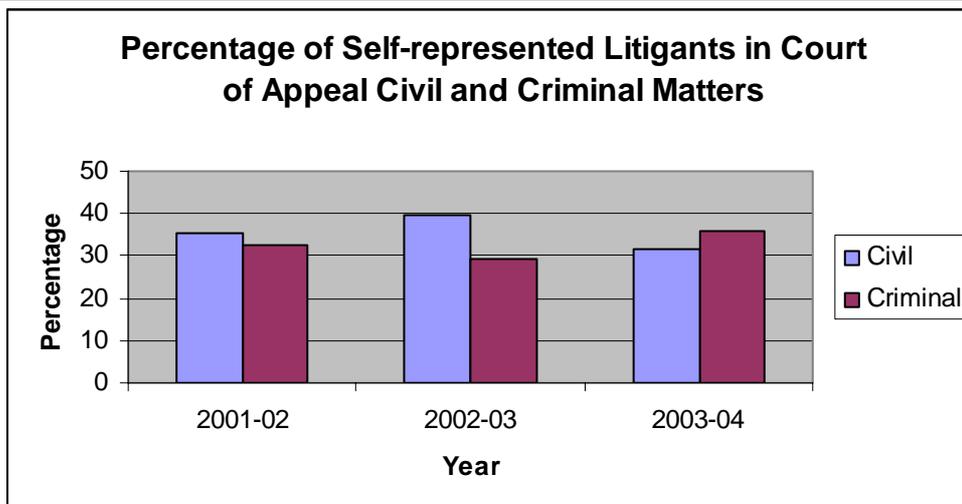
⁹ Moorhead, above n 4, 135.

¹⁰ Hon Justice Robert Nicholson AO, 'Australian experience with self-represented litigants' (2003) 77 *Australian Law Journal* 822.

¹¹ Supreme Court Annual Report 2003-2004.



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The number of matters heard, where one or both parties have been unrepresented, has steadily increased over the past four years, save for civil matters over the past year, where there has been a decrease.

Matters heard where one or both parties unrepresented: Court of Appeal

| | 2000-01 | 2001-02 | 2002-03 | 2003-04 |
|-----------------|------------|------------|------------|------------|
| Civil | 82 | 85 | 100 | 73 |
| Criminal | 78 | 109 | 105 | 119 |
| TOTAL | 160 | 194 | 205 | 192 |

The proportion of self-represented litigants in the Trial Division of the Supreme Court was approximately 15% in 2002-2003, with an increase to 17.6% in 2003-2004. The District Court experiences a lesser level, some 7%.

Is an unrepresented person likely to suffer a prima facie disadvantage?

While it is unfashionable these days to be seen to promote the involvement of lawyers in dispute resolution, and governments sometimes yield to the temptation of excluding their skills in certain areas, the capacity of the skilled lawyer to identify, refine and present complex issues must not be downplayed.



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What are the conceptual and jurisprudential arguments in favour of parties having legal representation?¹² Three arguments have been presented in favour of legal representation in the adversarial system: fairness, legitimacy and efficiency.¹³

The adversarial system requires specialist skills in order for parties to present and argue their case effectively. Therefore, both parties need to be represented 'in order to ensure equality of treatment or a level playing field'.¹⁴

The legitimacy argument centres on 'fairness between citizens and state'.¹⁵ This argument maintains there is 'right to legal services, including legal representation in court, because our system of government demands it'.¹⁶ There is not only a need for equal access to the courts. The complex nature of the adversarial system requires that there be equal access to legal services.¹⁷

Representation for both parties means a case has enhanced prospects of being presented more effectively, thereby ensuring the capacity of the court system 'to provide speedy and effective dispute resolution is preserved'.¹⁸

¹² Dewar, Jerrard and Bowd, above n 1, 65.

¹³ *Ibid* 66.

¹⁴ *Ibid*.

¹⁵ *Ibid*.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

¹⁸ *Ibid*.



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Who are litigants in person?

The Australia of Judicial Administration ('AJA') published a management plan dealing with litigants in person in 2001. The report found that litigants in person are a diverse group of people, being both defendants and plaintiffs, and of considerably varied ability to represent themselves.¹⁹ A report into the Family Court identified some of the following characteristics in relation to litigants in person:

- 'they are more likely than the population as a whole to have limited formal education, limited income and assets and to have no paid employment;
- that a significant group of them are dysfunctional serial litigants.²⁰

Reasons for the increase in litigants in person:

The cost of legal services

Litigation costs have been progressively increasing. There are many people who are unable to afford the services of legal professionals, however, they fail the means testing required for legal aid.²¹

Unavailability of legal aid

Legal aid is only available for certain kinds of matters as there have been significant cutbacks in the provision of legal aid. A Family Court report demonstrated that self-representation has increased substantially since the changes to their Legal Aid guidelines.²²

¹⁹ Australian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals* (2001) 2.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid* 3.



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Choice

The AIJA identified that many litigants in person choose to be self-represented. Reasons for this include suspicion and resentment towards the legal profession, the opportunity to use the court as a 'soap-box to air grievances', the belief that they do not need a lawyer to present their case and the perception that there may be an advantage in being self-represented.²³ All of those positions, I suggest, are completely misguided.

Other factors

Other less obvious factors raised include the increase in public awareness of legal rights²⁴ and the 'demystification of law and ... growth in a self-help culture through information kits, Internet sites and clinics'.²⁵ Similarly, there is, thanks to the Internet, a greater frequency of self-diagnosis and treatment of medical ailments.

Duty to the court

Legal practitioners are governed by the duties they owe to the court. The duties comprise: 'disclosure to the court; avoidance of abuse of the court process; to not corrupt the administration of justice; and to conduct cases efficiently and expeditiously'.²⁶

Self-represented litigants, while having the right to appear, are not subject to the duties owed by a legal practitioner. They are independent of the duties 'upon which the operation of the court system is so highly dependent'.²⁷

²³ Ibid.

²⁴ Hon Justice Robert Nicholson AO, 'Litigants in Person' (Paper presented at the 21st AIJA Conference 2003, Fremantle, 20 September 2003) 3.

²⁵ Dewar, Jerrard and Bowd, above n 1, 65.

²⁶ Justice Nicholson, above n 10, 821; D Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63.

²⁷ Justice Nicholson, above n 24, 4.



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Accordingly, their morality may not move them to avoid selectiveness in recounting the facts, or to refer the judge to circumstances or legal decisions adverse to their claim.

Nicholson J commented:

'By those [duties] courts are enabled to function properly and the significant diminution of their application could impact on the effective operation of common law courts as we now know them'.²⁸

'The provision of a right of appearance to a litigant in person creates an exception which, if the number of those litigants became substantial, has the potential to result in the non-application on a large scale of the seminal principles upon which the system operates'.²⁹

Difficulties faced by litigants in person

Unless themselves lawyers, litigants in person are without the skills and abilities acquired by legal professionals. This lack of legal knowledge means an inevitable ignorance of the relevant legal issues which need to be brought before the court.³⁰

A litigant in person lacks understanding of court procedures including: courtroom formalities; 'the whole court process from the initiation of a proceeding to hearing; and ... the language and specialist vocabulary of legal proceedings'.³¹

²⁸ Justice Nicholson, above n 10, 822.

²⁹ Justice Nicholson, above n 24, 4.

³⁰ AIJA, above n 19, 3.

³¹ Ibid.



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Another identified problem with litigants in person is a 'lack of objectivity and emotional distance from their case'.³²

Judicial assistance

The extent to which judges may assist unrepresented parties is measured by reference to the fundamental principle that all parties have the right to a fair hearing regardless of whether they have legal representation.³³ This is balanced by the limitation that the court needs to avoid compromising its impartial stance.³⁴ Of course, in matters involving self-represented litigants the degree of judicial intervention will depend very much on the particular circumstances of each case.³⁵

An examination of the case law presents attitudes to judicial intervention which run the gamut from 'a pro-active ... approach of intervening actively for or on behalf of an unrepresented party, to a minimal one of merely guarding against excessive unfairness ...'.³⁶

Samuels JA in *Rajski v Scitec Corp Pty Ltd*³⁷ held:

'... the advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which our adversary procedure offers to the unwary and untutored. But the court should be astute to see that it does not extend its auxiliary role so as to confer upon a litigant in person a positive advantage over the represented opponent ...

³² Ibid 4.

³³ Dewar, Jerrard and Bowd, above n 1, 68.

³⁴ Justice Nicholson, above n 24, 6.

³⁵ Dewar, Jerrard and Bowd, above n 1, 69.

³⁶ Ibid.

³⁷ (Unreported, Court of Appeal, NSW (FC), CA 146 of 1986, 16 June 1986) [7].



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... An unrepresented party is as much subject to the rules as any other litigant. The court must be patient in explaining them and may be lenient in the standard of compliance which it exacts. But it must see that the rules are obeyed, subject to any proper exceptions. To do otherwise, or to regard a litigant in person as enjoying a privileged status, would be quite unfair to the represented opponent.'

A different position has developed in recent years with the Full Court of the Family Court setting out guidelines for assisting self-represented litigants in the decision *In the Marriage of F.*³⁸ The Federal Court has also adopted these guidelines.³⁹ These guidelines are more clearly delineated and accommodating in respect of a judge assisting a self-represented litigant.⁴⁰

1. 'A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial.
2. A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross-examine the witnesses.
3. A judge should explain to the litigant in person any procedures relevant to the litigation.
4. A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation.
5. If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course.

³⁸ (2001) 161 FLR 189.

³⁹ *Brehoi v Minister for Immigration & Multicultural Affairs* [2001] FCA 931 (10 July 2001).

⁴⁰ Dewar, Jerrard and Bowd, above n 1, 70.



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6. A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise.
7. If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights.
8. A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated: *Neil v Nott* (1994) 68 ALJR 509, 510.
9. Where the interests of justice and the circumstances of the case require it, a judge may:
 - draw attention to the law applied by the court in determining issues before it;
 - question witnesses;
 - identify applications or submissions which ought to be put to the court;
 - suggest procedural steps that may be taken by a party;
 - clarify the particulars of the orders sought by a litigant in person or the bases for such orders.

The above list is not intended to be exhaustive and there may well be other interventions that a judge may properly make without giving rise to an apprehension of bias'.⁴¹

⁴¹ (2001) 161 FLR 189.



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There are similar broad principles in relation to judicial assistance in criminal trials.⁴²

'The duty of a trial judge to ensure that every accused has a fair trial obliges him to give an accused who is unrepresented such information and advice concerning his rights as is necessary to put him in a position where he can make an effective choice whether he should exercise those rights but the trial judge must make it clear that he is not advising the accused either that he should exercise those rights or how he should conduct his case'.⁴³

These principles could be said to reflect the more minimalist approach previously adopted in civil cases. It has been suggested that 'the obligation on a judge to assist an accused ha[s] been stated to be stronger in criminal than civil matters' therefore, guidelines in relation to criminal cases may eventually be reconsidered as well.⁴⁴

Further, it may be the 'category of the unrepresented accused will in practice be confined to the undeserving or unmeritorious' due to the principle established in *Dietrich v R*.⁴⁵

'Where an indigent accused charged with a serious offence, who through no fault on his or her part is unable to obtain legal representation, applies to the trial judge for an adjournment or stay, then, in the absence of exceptional circumstances, the trial should be adjourned, postponed or stayed until legal representation is available'.

⁴² Dewar, Jerrard and Bowd, above n 1, 70.

⁴³ *R v Gidley* [1984] 3 NSWLR 168.

⁴⁴ Dewar, Jerrard and Bowd, above n 1, 70.

⁴⁵ (1992) 177 CLR 292.



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The impact of litigants in person on court and tribunal resources

The impact of self-represented litigants is not only felt in the court room. Court staff are under considerable pressure when dealing with them. Preparation time and court time are both lengthened, and dealing with self-represented litigants requires 'considerable patience and interpersonal skills from registry staff and judges'.⁴⁶ Court staff also face potential security concerns from aggressive and belligerent litigants.⁴⁷

The AIJA report identified particular problems faced by court staff as including:

- following incorrect precedents;
- lodging irrelevant material or omitting material documents;
- failure to understand procedural issues; and
- problems with comprehending the issue of costs.⁴⁸

A review of court files in the Supreme Court of Queensland during 2001-2002 revealed the following problems and patterns:

- 'incorrect use of forms;
- detailed correspondence with the registry, often containing applications;
- misdirection of correspondence containing formal submissions or requests;
- requests for extensions of time; and
- wrongly framed requests for relief, particularly judicial review'.⁴⁹

⁴⁶ Justice Davies, above n 3, 14.

⁴⁷ Anne Wallace, 'Self-Represented Litigants: What do we know? What do we need to know?' *Australian Institute of Judicial Administration*.

⁴⁸ AIJA, above n 19, 17.

⁴⁹ Dewar, Jerrard and Bowd, above n 1, 68.



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Training of registry staff

A comprehensive training booklet has been produced by the Principal Registrar of the Queensland Courts entitled *Unrepresented Litigants: A Guide for Registry Staff*. Topics included in the booklet include:

- identifying client needs;
- approaches, required attitudes and techniques for dealing with self-represented litigants;
- dealing with sensitive inquiries;
- the provision of legal advice;
- handling complaints;
- inappropriate client behaviour;
- reporting and recording incidents; and
- telephone courtesy.

Court staff expend a great deal of time explaining issues to self-represented litigants in circumstances of stress and frustration.⁵⁰ This situation then leads to the greater concern of court staff treading a 'fine line between providing a proper explanation, and giving advice on the merits of the claim'.⁵¹

Immunity for court staff

The subject of immunity for court staff has been raised in the AIJA report and in the last two Supreme Court Annual Reports. They have identified that there is a 'need for court staff to be given qualified immunity in respect of assistance to litigants in person with information and services and from rules governing unauthorised practice of law'.⁵² What is in mind is a statutory immunity – akin to that accorded judges, and I repeat that call.

⁵⁰ AIJA, above n 19, 18.

⁵¹ Ibid.

⁵² Supreme Court Annual Report 2002/2003, 20.



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Vexatious litigants

A correlation has been identified between self-representation and vexatious litigants.⁵³ There are currently 11 persons who have been declared vexatious litigants in Queensland pursuant to the *Vexatious Litigants Act 1981* (Qld) and all were self-represented litigants. The Principal Registrar has an obligation, under rule 15 of the Uniform Civil Procedure Rules, to guarantee that frivolous and vexatious matters are not filed. Last year in the Queensland courts, a number of matters were referred by the Principal Registrar to a judge, and 'the Registrar was directed not to receive the documents for filing due to their frivolous or vexatious nature'.⁵⁴

Once again, demands are placed on registry staff as many declared vexatious litigants attempt to file documents contrary to the provisions of the *Vexatious Litigants Act*. In many instances, the Principal Registrar and Senior Deputy Registrars have to handle these matters personally.⁵⁵

Recent cases

Two recent cases from other jurisdictions illustrate the adverse impact of litigation of this character. In *Scott v Pedler*,⁵⁶ unrepresented litigants, after losing an 'unmeritorious case they had already lost against the relevant government agency', were attempting to re-run the action against individual public servants from within the agency.⁵⁷ Gyles J commented '[t]his case is a good illustration of the havoc that can be wreaked by determined and resourceful but impecunious litigants with a sense of grievance. Orders for costs are no deterrent'.⁵⁸

⁵³ Dewar, Jerrard and Bowd, above n 1, 73.

⁵⁴ Supreme Court Annual Report 2002/2003, 65.

⁵⁵ Supreme Court Annual Report 2002/2003, 65.

⁵⁶ [2004] FCAFC 67 (29 March 2004).

⁵⁷ Justice R I Barrett, 'Recent cases' (2004) 78 *Australian Law Journal* 445.

⁵⁸ [2004] FCAFC 67 (29 March 2004) [5].



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A case which took 23 hearing days, *National Australia Bank Ltd v Walter*,⁵⁹ featured several arguments by self represented litigants described as 'so devoid of merit that any responsible lawyer would have refused to represent them'.⁶⁰

AIJA recommendations

The Australian Institute for Judicial Administration made recommendations for dealing with self-litigants in their 2001 report. Key recommendations include:

- the need to collect statistical data about litigants in person and their impact on court resources and time to enable effective management plans to be implemented;⁶¹
- research into the needs of litigants in person;⁶²
- the initiation of collaborative schemes involving court and tribunal staff, the Bench, the Bar and the public to provide assistance and legal representation. Suggested schemes include: duty advice schemes; pro-bono legal representation; and unbundled legal services. Elements of these schemes have been adopted in other states.⁶³ The Queensland Court of Appeal established a pro-bono scheme in 1999-2000 to represent appellants convicted of murder or manslaughter who had been refused legal aid. The scheme was extended last year to juveniles and those under an apparent legal disability.⁶⁴ There are 25 volunteer barristers in the scheme.
- Information strategies which could take any number of forms: referrals to advice agencies; information and advice on the court or tribunal process; information on alternatives to litigation; and simplified procedures.⁶⁵

⁵⁹ [2004] VSC 36 (25 February 2004).

⁶⁰ Justice Barrett, above n 57, 445.

⁶¹ AIJA, above n 19, 9-10.

⁶² Ibid 10.

⁶³ Ibid 11-13.

⁶⁴ Supreme Court Annual Report 2003-2004.

⁶⁵ AIJA, above n 19, 14-16.



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Supreme Court Fact Sheets

The Queensland Courts already collect data on self-litigants, have a pro-bono scheme and have adopted strategies to train staff. There are also fact sheets available for self-litigants which are available at the registry counter and on the Queensland Courts website – www.courts.qld.gov.au.

The Court of Appeal has provided a thorough information document for self-represented litigants. Material includes:

- where the registry is;
- where the court rooms are;
- who will be present in court;
- times and dates;
- the basic procedure of the court;
- how to get a copy of the judgment;
- tips for self-represented litigants (such as studying the appeal record book, dressing neatly, being courteous and on time, speaking slowly and clearly, listening carefully to questions being asked etc); and
- frequently asked questions (such as 'can I talk to judges about my matter?', 'can court staff provide me with legal assistance?' etc).

The Court of Appeal registry also advises self-represented litigants (along with many lawyers!) to consider carefully the other information sheets available including: preparing appeal record books; civil applications; general civil appeals; appealing against a criminal conviction; applications for leave to appeal against sentence and Practice Direction 26 of 1999 which deals with Court of Appeal procedure.

The other two relevant fact sheets provide details of how to make a bail application when self-represented and how to apply for an order exempting the payment of filing fees.