

Self-represented litigants - Key Literature

Anstie, Lara, 'Cross examination of victims of family and domestic violence by self-represented perpetrators in family law proceedings' (2016) 43(4) *Brief* 38.

Authored by a Western Australian family law practitioner, this article discusses the potential for cross-examination to be exploited by perpetrators to commit further emotional abuse against victims, and in that context, the court's obligation to ensure procedural fairness to an alleged perpetrator while protecting the interests of an alleged victim of domestic and family violence. Reference is made to the Family Court of Australia's Family Violence Best Practice Principles and the Family Court of Western Australia's Family Violence Policy, and recommendations are made for changes to the *Family Court Rules 1998 (WA)* and *Family Court Act 1997 (WA)* that provide for a process for the protection of victim witnesses in cross-examination and otherwise in giving oral testimony.

Chisholm, Richard, 'Family Courts Violence Review: A Report' (Canberra: Attorney-General's Department, 2009).

This report considers the issue of family violence in the family law system. Part 2 considers practices and procedures of the federal family courts in cases that include family violence issues. Part 3 discusses issues with the applicable legislation in force at the time. Part 4 considers other matters, mainly relating to support services, information sharing and legal representation.

In discussing appropriate legal representation (see p 168-169), the report notes that the 'importance of appropriate legal representation can hardly be overstated in parenting cases, especially those that involve issues of family violence'. The author notes that where one or more parties are unrepresented this jeopardises the ability of the court to receive appropriate evidence and to make decisions about the child's best interests. 'Settled cases, too, are a worry when parties are unrepresented, because they may reach agreements in ignorance of the legal situation, or because they know they cannot properly put their case before the court. It is universally agreed in the family law system that despite a lot of good work done to help unrepresented parties, such cases are the most likely to occupy the court's time unfruitfully, or, as sometimes happens, effectively collapse because one or both parties is unable to organise witnesses or present their case in a satisfactory way. One submission pointed out that in some circumstances, cross-examination of a victim by an unrepresented violent partner can be experienced as a continuation of the violence. In such cases children are at risk, because they do not have the protection of a well-informed judicial outcome'.

Dewar, John, et al, '[Litigants in Person in the Family Court of Australia: A report to the Family Court of Australia](#)', 2000).

(The findings of this report were summarised concisely in: Family Court of Australia, *Self-represented Litigants - A Challenge: Project Report* (December 2000-December 2002) and Family Law Council, 'Litigants in Person: A Report to the Attorney-General' (August 2000) - see below)

The methodology is set out at p28-32. This study employed quantitative and qualitative approaches, primarily questionnaires and semi-structured interviews with judges, judicial registrars, registrars and litigants in person; the researchers interviewed a small number of legal practitioners, and convened focus groups with various groups. 49 unrepresented litigants who had conducted their own matters at the interim stage were also interviewed. A number of hearings involving litigants in person were also observed

Findings Include:

- > Most unrepresented litigants were unrepresented because they could not afford legal representation. A significant minority of unrepresented litigants did not want to be represented by a lawyer, and a further significant minority had not applied for legal aid because they were advised that they were ineligible.
- > Unrepresented litigants are more likely to have limited formal education, limited income and assets and to have no paid employment.
- > The needs of unrepresented litigants vary, but include information, support and advice.
- > Courts are affected by unrepresented litigants with judicial officers and registry staff reporting high levels of stress and frustration, difficulty maintaining an appearance of impartiality, and balancing the needs of the unrepresented litigant and the opposing party.
- > Unrepresented litigants are more demanding of the time of judicial officers and registry staff than represented parties, although matters involving unrepresented litigants tend to have shorter disposition times.

Family Court of Australia, [Self-represented Litigants - A Challenge: Project Report](#) (December 2000-December 2002).

In a context where the number of partially or fully self-represented litigants before the Family Court is increasing, the Court launched the *Self-represented Litigants – A Challenge* project in December 2000. The goals of the project included developing a nationally consistent approach to providing services to self-represented litigants and improving court services (including practices, procedures, protocols and proformas) (p 3).

'The Family Court recognises that self-representing and other litigants are entitled to all reasonable information and assistance from the Court, so far as is possible, to enable a person to understand what is

required to present his or her case to the Court or to engage in dispute resolution processes under the Court's auspices' (p 5).

Family Law Council and Family Law Section of the Law Council of Australia, 'Best Practice Guidelines for Lawyers Doing Family Law Work' (2017).

Part 4 (pp 15-16) discusses self-represented litigants. The following general guidance is provided:

'Generally, cases involving self represented litigants are more difficult and require more interpersonal skills, including patience and adaptability, on the part of the lawyer. Lawyers should keep the following matters in mind:

- > the client will be disadvantaged if consent orders or a judgment in defended proceedings are obtained that are capable of being the subject of a successful appeal on the grounds that there was some procedural unfairness to the self represented litigant, and
- > lawyers should be familiar with decisions which define the duties of the court in proceedings involving a self represented litigant.

Lawyers should be aware of, and take steps to avoid, the risk that they may, by their dealings with a self represented litigant, become a witness in the proceedings.'

Specific guidance is then provided in relation to: lawyers acting against an unrepresented party; lawyers engaged by an otherwise self-representing litigant for specific aspects of the matter (i.e. partial self-representation) and lawyers acting as Independent Children's Lawyers where either or both parents are self-represented.

Family Law Council, 'Litigants in Person: A Report to the Attorney-General' (August 2000).

This commissioned report extensively considers the issue of litigants in person in the family law context. The report was written in the broader context of the number of self-represented litigants increasing. It contains discussion of the reasons for the increase in unrepresented litigants as well as general characteristics of unrepresented litigants.

Various theoretical issues are considered from p 14.

See also from p 30 which deals with 'The Effects of Unrepresented Litigants' discussing effects on the current system.

See generally chapter 3 which deals with responses to the needs of self-represented litigants.

See further at p 72 – 'The vexatious, persistent or relentless unrepresented litigant, who chooses to proceed unrepresented, must be distinguished from the first time unrepresented litigant with no knowledge

or experience of court procedures and family law. However, even this apparently polarised example is fraught with difficulty. Unrepresented litigants vary in their demeanour, background, knowledge, skills, personality, knowledge of English, culture, intentions, socio-economic status and more. This diversity illustrates the fundamental need for flexibility and adaptability by courts and legal service providers when dealing with unrepresented litigants.'

Kaspiew, Rae et al, [Evaluation of the 2006 Family Law Reforms](#) (Australian Institute of Family Studies, 2009).

This evaluation of the impact of the 2006 changes to the Family Law Act involved the collection of data from some 28,000 people involved or potentially involved in the family law system - including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers - and the analysis of administrative data and court files. Of relevance here see:

- > Chapter 9: 'Legal system professionals regularly made the point that women felt pressured to agree to outcomes in negotiations that they didn't feel were in their children's interests. While this was said to be happening frequently, particular concerns were expressed about the nature of the agreements reached in two different situations. The first concerned cases where there had been a history of family violence. The second situation causing concern involved matters where a lack of legal representation at all, or a perceived imbalance in the quality of the legal representation, failed to alleviate the apparent pressure caused by the imbalance in bargaining power, resulting in women agreeing to inappropriate arrangements' (p 221).
- > See 14.4 which discusses the Family Court of Western Australia Model.
- > Also see '15.1.2 Consent orders' (from p337).