

Self-represented litigants

The question of the extent to which a judicial officer is obliged to intervene in proceedings involving a party or parties who are self-represented (here called **self-represented litigants** – SRLs) was addressed comprehensively by the Full Court of the Family Court in *Re F: Litigants in Person Guidelines* [2001] FamCA 348. The Court set out a number of guidelines regarding interventions judicial officers may make without raising an apprehension of bias. The overriding task of the judicial officer is to ensure procedural fairness to all parties [FLC BP Guidelines 2017].

The **guidelines** are expressed as not exhaustive, and are intended to assist judicial officers in their exercise of discretion in any particular case, rather than prescribe how proceedings should be conducted. They include:

- informing the SRL of procedural matters;
- generally explaining the SRL's right to object and claim of privilege;
- questioning witnesses;
- clarifying the relevant issues;
- clarifying the substance of the SRL's submissions and orders sought; and
- identifying submissions and applications that ought to be made.

In the early 2000s, the Family Court of Australia recognised the challenge of increasing numbers of litigants who are self-represented at some stage or stages in family law proceedings. Findings of court-commissioned research included:

- The majority of SRLs cannot afford legal representation, however a significant minority said they did not need or want representation;
- SRLs are likely to need information about court procedures and support services; advice about completion of court forms, preparation of documents, formulation of legal argument, and court etiquette; and other forms of practical and emotional support;
- Judicial officers and registry staff experience difficulties when dealing with SRLs who lack legal and procedural knowledge;
- SRLs consume more of the Court's resources than represented clients;
- Giving assistance to SRLs may compromise judicial impartiality;
- A need for consistent approaches by judicial officers and registry staff to responding to the needs of SRLs; and
- A link was identified between the unavailability of legal aid and self-representation [FCA SRL Project 2002].

Further research conducted at the time noted the diversity in skills, knowledge, cultural background, socio-economic status, personality and motivations of SRLs; and the need for courts to be flexible when dealing with SRLs and aware that the manner in which SRLs engage in litigation may be influenced by their lack of knowledge and experience of court procedures and family law. However in some cases an SRL's behaviour may be designed to harass or annoy or for another wrongful purpose, which may be considered **vexatious**. The study observed that:

- > matters involving SRLs are more likely to go to a hearing than be resolved by out-of-court settlement;
 - > SRLs experience significant difficulties cross-examining their former partner; and
 - > judicial officers, in addressing the needs of SRLs, must consider and weigh both the need to redress any power imbalance between the parties due to lack of representation or a history of domestic and family violence and the need to avoid any perception of leniency or unfair advantage towards the SRL
- [[FLC LIP Report 2000](#)].

Later research also indicated that where one or both parties are unrepresented, the Court's ability to receive appropriate evidence and make decisions in the child's best interests may be jeopardised [[Chisholm 2009](#)].

An extensive Australian Institute of Family Studies evaluation [[Kaspiew et al 2009](#)] of the 2006 changes to the *Family Law Act* reported that women regularly felt pressured to agree to outcomes in negotiations that they didn't feel were in the children's interests. There were particular concerns regarding the suitability of agreements reached in cases where there was a lack of representation at all and the parties agreed to shared or equivalent care, or there was a perceived imbalance between the parties in the quality of legal representation, and cases where there had been a history of domestic and family violence. Where a self-represented party had also experienced violence, there were additional concerns that the party found it difficult to speak personally to the judicial officers. The circumstances surrounding consent orders raised similar concerns where orders were made to formalise agreements made either outside the court process or sometime after court proceedings had been initiated.

In some cases where consent orders are proposed it may be appropriate for the judicial officer to ask questions or request further information in order to closely scrutinise the suitability of the proposal, or to appoint an **Independent Children's Lawyer** or order a **Family Report or expert report** to determine what is in a child's best interests.

Where an application is made to the Family Court of Australia or the Federal Circuit Court of Australia for a parenting order by consent, the parties must formally advise the Court whether any allegations had been made in the proceedings of family violence or child abuse or neglect (or risk thereof), or of mental ill-health, drug or alcohol, serious parental incapacity or any other allegation involving a risk to the child concerned AND whether a party considers that the child concerned has been or is at risk of abuse, neglect or family violence, and whether a party considers that he or she or another party to the proceedings has been or is at risk if family violence. Should any of these circumstances be advised, the parties must explain to the Court how the parenting order attempts to deal with the allegations (see [Rule 10.15A Family Law Rules 2004](#) and [Rule 13.04A Federal Circuit Court Rules 2001](#)).

Research has shown the value to the court and parties of self-represented parties receiving advice and information on appropriate conduct and language in the courtroom prior to any court appearance or hearing . Legal assistance providers deliver duty lawyer services to self-represented litigants at many locations of the Family Court of Australia and Federal Circuit Court of Australia, including providing legal advice and information about court processes, help with the preparation of documents, and in some cases, representation.

Important note: The expression “self-represented” is used in this bench book to refer to any situation where a party is not represented by a lawyer. It is acknowledged that the expression may be inappropriate in some contexts. It may, for example, suggest that a party has exercised a choice to represent themselves, when in fact they do so due to lack of financial resources or access to legal assistance. On the other hand, some parties choose to represent themselves because they believe they are best equipped to do so and may object to the use of an expression such as “unrepresented” on the basis that it may, for example, be interpreted to suggest that they are unable to properly or fully participate in the proceedings in their own right.