Self-representation

CHAPTER CONTENTS

Introduction

Not everyone involved in legal proceedings is represented by a lawyer. Some courts and tribunals require people to represent themselves. Where legal representation is allowed, people may not be able to afford to pay a lawyer or may not be able to access free help from Legal Aid Queensland, a community legal centre or a lawyer willing to provide their services on a pro bono (free) basis.

This chapter sets out some general information for people representing themselves in civil and family law proceedings. It is advisable for defendants to criminal proceedings to seek legal representation.

What is Self-representation?

When a person involved in legal proceedings does not have legal representation, they will be representing themselves. There are number of terms used to describe people representing themselves, including 'litigant in person', 'unrepresented litigant', 'pro se litigant' and, most commonly in Australia, 'self-represented litigant'. A self-represented litigant is responsible for the conduct of their legal proceeding, including liaising with the court or tribunal and other parties involved in the proceeding, and speaking for themselves during any hearings.

A self-represented litigant will need to notify the court or tribunal that they are representing themselves and provide the court or tribunal and all parties involved with a postal address (usually a street address) where documents for the court proceeding can be sent (called 'service').

Who Can Self-represent?

While anyone can try to represent themselves, it may be difficult for some people to successfully do so. It may be preferable for a person to have legal representation where:

- they are involved in cases that are complex or heard in superior courts
- they have a physical or intellectual disability
- they have a mental illness
- they have been impacted by domestic violence
- English is not their first language.

Even in the absence of these circumstances, self-representation is generally not recommended. The structure of civil litigation is typically designed in a way that disadvantages self-represented litigants, and self-representation status does not entitle a party to any special treatment during legal proceedings.

Other options to self-representation are:

- unbundled (or discrete task) legal assistance—most lawyers can be engaged for a particular task (e.g. to provide advice on the likelihood of succeeding with legal action or to prepare a court document)
- direct briefing of a barrister—it is sometimes possible to engage a barrister directly without instructing a solicitor on what is called a 'direct-brief basis'. Not all barristers are willing to work

on a direct-brief basis, especially in complex matters. A community legal centre may be able to assist a person to find and liaise with a barrister willing to work on a direct-brief basis

- speculative and contingency fees—in cases where an order for compensation or other payment is likely (e.g. in personal injury cases or will disputes), lawyers may agree to provide representation on a 'no win, no fee' basis. This means that lawyers will deduct their professional fees from any eventual settlement (the Legal Profession Act restricts the amount a lawyer can recover).

Litigants who engage a lawyer in one of the above ways should ensure they understand the terms of any agreement entered into with the lawyer. For more information, see Employing a Lawyer in the *Accessing Legal Assistance and Resolving Disputes* chapter.

Help for Self-represented Litigants

Assistance from a friend or relative

Being in court is a stressful experience for many people so it can be helpful for a self-represented litigant to have someone to attend the hearing with them. Most courts and tribunals will allow parties to have a non-lawyer, sometimes called a 'McKenzie friend', assist them during a hearing. Whether a McKenzie friend is allowed, and the type of help they can give to a party, is subject to the discretion of the judicial officer hearing the matter.

Assistance from a judicial officer

Although a judicial officer is able to provide some assistance to help a self-represented litigant understand the proceedings, the need for impartiality dictates that they cannot give preferential treatment or legal advice to self-represented litigants regarding the application of the law and procedural rules. There is no obligation on a judicial officer to act as an advocate for a self-represented litigant or to waive the need for a self-represented litigant to comply fully with any procedural or legal rules that apply to their case.

In civil law proceedings guidelines for judicial officers are provided in the Supreme Court of Queensland's *Equal Treatment Benchbook*.

There have been a number of cases in which the Family Court of Australia has discussed the assistance that a judicial officer is to provide a self-represented litigant. The guidelines that were developed include that a judicial officer should:

- tell self-represented litigants of the manner in which the trial will be conducted, including the order of witnesses and the right to cross-examine
- explain any procedures relevant to the litigation
- inform self-represented litigants that they have the right to object to inadmissible evidence and to claim privilege
- suggest any procedural steps that may be taken
- draw attention to any relevant law.

Assistance from registry staff

Registry staff may provide procedural information, but not legal advice. Procedural information may include advice about court rules and available forms, but does not extend to assistance with completing forms.

Queensland courts publish a factsheet outlining the differences between legal advice and procedural information.

For self-represented litigants in the Brisbane Supreme and District courts, there is a Self-Represented Litigants Service operated by registry staff at the Queen Elizabeth II Courts of Law.

Assistance from services

The Queensland Public Interest Clearing House Incorporated provides legal help to self-represented litigants in QCAT, the civil jurisdictions of the Supreme and District courts, the Queensland Court of Appeal, and the Federal Court and Federal Circuit Court.

Court Network, a non-profit organisation, provides non-legal support and assistance to self-represented litigants (including those involved in criminal hearings), and operates out of the Queen Elizabeth II Courts of Law (for litigants in the District and Supreme courts), the Magistrates Court and QCAT in Brisbane. Court Network also operates regionally in Townsville and Cairns in the Magistrates, District and Supreme courts.

Caxton Legal Centre Inc. provides a free Family Law Duty Lawyer service at the Commonwealth Law Courts to assist self-represented people, and a free Domestic and Family Violence Duty Lawyer service at the Brisbane Magistrates Court for self-represented respondents.

Practical Tips for Self-represented Litigants

- Seek legal advice—there are many community legal centres and Legal Aid Queensland offices that provide free legal advice about the applicable law and procedural steps required to pursue or defend proceedings (see the *Accessing Legal Assistance and Resolving Disputes* chapter).
- Sit in on a similar type of hearing—the rules of most courts and tribunals allow people to watch proceedings although sometimes the court or tribunal room will be closed to the public if a matter is sensitive.
- Access information from community legal centres, websites of courts or tribunals or law libraries—the Supreme Court of Queensland Library is open to the public.
- Make contact with a duty lawyer service, if one is available, on arrival at the court or tribunal on the day of a hearing to obtain assistance and legal advice; in the family law jurisdiction such a service is provided in the Family Law Courts, by Caxton Legal Centre and Legal Aid Queensland.
- Make enquiries about the correct manner of addressing the judicial officer to whom you will be required to speak (e.g. 'Your Honour' or 'Registrar').

Resources for Self-represented Litigants

There are a number of courts and tribunals that have jurisdiction to determine civil proceedings. These include the:

- Supreme and District courts
- Magistrates Court
- Queensland Court of Appeal
- Queensland Civil and Administrative Tribunal
- Federal Circuit Court
- Federal Court.

The courts and tribunals publish various factsheets, guides and procedures that address commonly asked questions to assist self-represented litigants.

The Queensland Public Interest Clearing House Incorporated has a number of publically available factsheets and resources that provide guidance on the different steps involved in civil litigation.

Family Law Proceedings for Self represented Litigants

Family law matters are heard in the Family Court of Australia or the Federal Circuit Court of Australia. Each court has rules and procedures, some of which are intended to help make the courts more accessible to self-represented litigants. Family law matters usually proceed through the following steps (although the procedure can vary depending on the circumstances of the case). If agreement is reached, final consent orders will end the matter.

Prior to making an application

Prior to making an application, attempted mediation is compulsory in all parenting matters, including contravention applications, unless an exemption is granted. The existence of domestic or family violence is a ground for such an exemption. There are compulsory steps in property (financial) matters to be commenced in the Family Court.

Interim hearings

In general, the following applies:

- The hearing should not exceed two hours.
- The parties are called into court and stand at opposite ends of the bar table and remain standing.
- When requested by the judicial officer, each party announces their appearance (e.g. ‘My name is Fred Smith and I am the applicant father’).
- The parties take it in turns to tell the court what documents they want the judicial officer to read (e.g. ‘I am relying upon the affidavit of myself filed 17 June 2015 and the application filed 12 May 2015’).

- The court will read the documents each party relies on and may ask questions to clarify the issues in dispute.
- No oral evidence is given, except in exceptional circumstances.
- Evidence is presented by affidavit and admissible subpoenaed documents.
- Hearsay evidence can be allowed.
- A self-represented litigant should alert a court officer or the court if there are any subpoenaed documents that may be relevant to the matter. All parties need permission from the court to review subpoenaed material. Inspection of documents should be completed before the interim hearing commences.
- The applicant then makes submissions to the court (see Submissions below).
- The respondent then responds to those submissions and presents their evidence.
- The court then gives a decision, or the decision may be reserved for a short period of time.
- The court makes an interim or temporary order.

Procedural and other steps

In property matters, a mediation or compulsory conference will usually take place after an interim hearing.

In parenting matters, a family report may be done, an independent children's lawyer appointed or other information obtained (e.g. filing of affidavits, medical assessments or subpoena applications).

In all matters, there may be further interim hearings if new information comes to hand, circumstances change or urgent orders become necessary. If no final agreement can be made, the court will make trial directions (listing the trial date and the steps required before trial).

The court rules provide that all parties have an ongoing duty of disclosure to the court and the other party, up until the final hearing (trial). Trial directions are made either at an interim hearing or on another day, perhaps when a judge is holding a 'trial callover' and providing trial directions at procedural mentions in a list of matters. When trial directions are made, the court will determine how long the hearing will take and set the matter down for however many days are needed. The trial directions will also set out the filing dates for affidavits and other documents.

The final hearing

By the time a matter reaches a final hearing, the issues to be determined and the evidence that will be presented should be very clear. The *Family Law Act 1975* (Cth) sets out various rules in relation to the giving of evidence in family law proceedings. Essentially, the intention of the rules is to permit parties to rely on evidence that is relevant to the matter without a strict application of the *Evidence Act 1995* (Cth). The court will generally allow evidence that is directly relevant to determining a relevant factual issue in dispute.

At the beginning of the final hearing (trial), the parties:

- take their places at the bar table
- take it in turns to announce their names with the applicant going first
- each identify for the court those documents that have been filed and upon which they intend to rely
- raise any preliminary points for instance arguments over inadmissible evidence, arrangements for witnesses or any late requests to inspect subpoenaed material that has not previously been produced at court.

It is not common for the court to ask for a party to make an opening statement, but this has happened on occasion. Usually the process is for each party to formally read (state) the material being relied upon. If there is an Independent Children's Lawyer appointed in the case, they may also have witnesses who are to give evidence. The Independent Children's Lawyer's witnesses currently give their evidence first. Then the applicant's witnesses are called to be available for cross-examination. After the applicant's witnesses have completed their evidence, the respondent's witnesses are called and cross-examined. Sometimes a witness is not required for cross-examination, and in that case their evidence is put before the court unchallenged. It is important to cross-examine a witness if a party wants to make a submission to the court that the evidence the witness gave, either in their affidavit or in oral testimony, is incorrect or contrary to the evidence of another witness in the matter.

Testing the evidence

The process for presenting evidence is essentially the same as that for a civil trial.

Submissions

Once the parties have presented all of their witnesses, the evidence in the matter is complete. Each party will then be invited to make final submissions to the court. If there is an Independent Children's Lawyer involved, they will normally make their submissions first, followed by the applicant and then the respondent.

The purpose of submissions is to give the parties an opportunity to summarise the evidence they say supports their case or defeats the other party's case. It also gives the parties an opportunity to detail for the court any precedent decisions that support their case that may be persuasive to the court. Although there is no prescribed approach to submissions, the following suggestions may be helpful:

Make notes about any points that arose from the evidence or cross-examination that may be helpful to prove the case.

Prepare a written summary that can be handed up to the court.

Start with a statement and then identify the points that support that proposition for example 'Your Honour, my position is that the children live with me. The main issues for determination by Your Honour are:

- whether the presumption of equally shared parental responsibility are rebutted
- the children's wishes

- my parenting capacity
- the other party's parenting capacity'.

Outline for the court evidence that supports the proposition using those issues as a framework, for example 'Your Honour, in relation to the second issue, the children's wishes, I rely upon the evidence of Dr Smith, the psychologist who prepared the family report'.

Make the submissions short and relevant to the issues to be determined.

If referring to previous decisions, ensure copies of those decisions are available to give to the court and the other parties.

Legal Notices

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