

Report

National Conference on *Pro Se* Litigation

Scottsdale, Arizona,
18 to 21 November 1999.

Justice John Faulks and Judicial Registrar Jonathon Ramsden

1. We attended this conference at the request of the Chief Justice. It was an opportunity to participate in what we think will become regarded as a seminal conference on dealing with self-representing litigants.
2. The conference took place at Scottsdale in Phoenix in Arizona in the United States of America and was organised by the **American Judicature Society (AJS)** in conjunction with the **State Justice Institute (SJI)**. The meeting was also conducted under the auspices of the **Open Society Institute** and was co-sponsored by the **ABA Standing Committee on Delivery of Legal Services**.
3. Representatives attended the meeting from 49 of the States of America together with further representatives from Guam, the Northern Mariana Islands, American Samoa and Australia. In general, each of the States was encouraged to send a team of about 6 people. The teams included a mixture of Judges from various Courts, court administrators and some members of the Bar.
4. The conference was a recognition of the significant numbers and the significance of what are described variously as “*pro se*” or “*pro. per.*”¹. There is some controversy about the various names and the Australian version of “self represented litigant” seems to be favoured over “unrepresented litigant”. The use of the Latin (and even more, the use of abbreviated Latin) terms to describe litigants in person was remarked upon by John Graecian² as being anomalous. The move seems to be towards “self represented litigant” although the convenience and (in the USA) common usage of “*pro se*” will ensure that term’s survival for some time to come.
5. There were a number of reasons for the choice of Scottsdale for the conference. The first was that the weather in Phoenix particularly at this time of year is delightful. The average rainfall is about 6 inches and the temperature while we were there hovered between (at night) 50 degrees and up to 80 degrees Fahrenheit during the day. This was immensely appealing to those who came from the Northern States - already beginning their first shivers of winter.
6. However, more importantly, the conference was held close to the Maricopa Self Help Centre which is attached to the Maricopa Superior Court in Maricopa County.³ The Maricopa County Self Help Centre is regarded as an exemplar for assistance to *pro se* litigants. Conference attendees were given a tour of the self-

¹ In propria persona.

² The amazingly accomplished and impressive administrator of the New Mexico Superior Court

³ In which there are some 3 million people.

help centre during the course of the conference and Ramsden JR was able to attend that tour. The tour coincided with the “Showcase of *pro se* Assistance Programs” which was a display of about seven programs in some of the American States and Australia. Subsequently Ramsden JR and Faulks J visited the Maricopa Court House on Monday 22nd November at the conclusion of the conference.

7. The conference was superbly organised by universally cheerful and patient staff of the AJS and our reception was friendly, helpful and supportive. Other delegates were interested in hearing what we were doing in Australia. They were very supportive and complimentary of the Family Law Handbook⁴ and were anxious to obtain and commented favourably about the pamphlets and other publications of the Court. The Court’s website attracted interest. and as far as we could determine was the equal of anything on offer in the USA.
8. Some of the States have highly advanced programs to inform and assist litigants. Others have very little at all. Most are acutely conscious of the need to assist litigants who are unable to retain lawyers or who choose not to do so.
9. The American situation is somewhat complicated by the financing for the Courts. Some are financed in part by County resources and by State taxes. Others are financed by the State alone and the populations vary widely⁵. The ability to contribute to resources is relatively small in many cases. Obviously California with significant resources and a number of programs already in train was particularly significant in developing more sophisticated approaches.
10. The format of the conference involved a development, parallel to the lectures and workshops, by each of the teams of a State plan to assist *pro se* litigants. It also presented an opportunity to consider both strategies for and the implementation of such plans and impediments to its implementations.
11. We were “assigned” to the Californian team and enjoyed participating with them. They readily accepted us in the development of their quite extensive strategy and plans for the future⁶.
12. The mood and flavour of the conference is best conveyed in quotations from a number of the speakers.
13. Chief Justice Zlaket of the Supreme Court of Arizona suggested that for most of the community, lawyers had become irrelevant. He made the comparison with the *Lear Jet Company*. As a corporate jet was of no relevance to him or his family he commented that he would not care if the *Lear Jet Company* went out of business. He suggested that the majority of the people in the community regarded lawyers in the same way - except for their entertainment value through television programs such as *The Practice* and *Judge Judy*. He commented that the legal system had

⁴ We arranged for enough copies for each delegate to be sent to America prior to our departure.

⁵ For example Wyoming has only about 750,000 in total.

⁶ As members of their “team” we will of course be obliged to attend their next meeting which will occur in the second week of December in San Fransisco.

been designed with lawyers in mind. If we cannot provide lawyers to participate in the system it may be necessary to redesign the system.

14. Noreen L Sharp⁷ commented that the mission of those attending is *not just adjudication. It is justice.*
15. Chief Judge Myers of the Maricopa Superior Court said about his philosophy in the self-help centre at his Court “*We don’t want to help them. We want to help them to help themselves*”.
16. The team leader from Nevada on the last day of the conference in summarising his teams plan said that their motto should be “*..... and justice for all. An ideal can become real.*”
17. And the irrepressible John Graecian concluded by commenting “*the only true failure is not to try*”.
18. The general mood was one of optimism, enthusiasm and dedication to purpose.

THE NATURE OF THE PROBLEM

19. The problem appears to be the same in America as it is in Australia - if not even more profound. While the incidence of *pro se* litigants is markedly higher in some areas (for example Domestic Violence applications, domestic law generally and family law in particular), there is a growing appearance of *pro se* litigants in almost all Courts. There have been two recent surveys conducted in America, one in association with Maricopa project and the other in Florida. Each of them demonstrated rates of self-represented litigants of up to 60% and in some cases 80%. This was shown in Florida to be largely attributable to the poverty of the litigants or at least their inability to meet legal fees. This was not found to be so in Maricopa where a number of people were choosing to exercise what they saw as their constitutional right to represent themselves.
20. **The conference clearly recognised that *pro se* litigants far from being an annoying and barely tolerable minority, were likely to become the norm for the future. Disregarding them, pretending that they did not exist or even tolerating them were not accepted or acceptable as choices open to any of the Courts in America or we would suggest to the Courts in Australia.**
21. John Graecian suggested that there were in fact three choices for what was originally a lawyer-based system. These were;
 - Get more lawyers;
 - Turn the litigants into lawyers; or
 - Develop processes which do not require lawyers
22. Each of those solutions received some attention during the course of the conference.

⁷ Chief Counsel Division of Child and Family Protection Arizona Attorney General’s Office

ETHICAL CONSIDERATIONS

23. It is fair to say that the Americans were rather more concerned about some of the ethical problems with lawyers providing limited assistance to the litigants than appears to be the case in Australia. This process known to them as “unbundling” meant that the lawyer’s traditional position of total commitment to a client until a matter was finished was discarded in favour of the provision of such of the lawyer’s services as the client could afford for such time as the client could afford them. Much consideration was given to this proposition and apparently it represents a very large barrier in a number of States from, particularly, the legal profession - although in part also from the Judges.
24. Those who had been dealing with the problem for longer seem to take a much more pragmatic view particularly where (for example in Ventura County in California) there is advanced notice given of the limitations of the retainer and the circumstances in which it would occur.
25. The second ethical problem, which was considered at great length, was the extent to which Court staff or the employees of self help centres (facilitators) might provide assistance to litigants. **The distinction was drawn between the giving of advice and the giving of information.** The former was seen as an unauthorised practice of law, the latter as being a necessary way of ensuring that justice was done. A number of Courts had adopted rules or directions which prescribed the sorts of activities the Court staff might and might not do. It is readily acknowledged by those who are involved in these activities that the line is difficult to determine. Much depends upon the common sense and good will of the employee and although every precaution is taken in advance to ensure that no lawyer/client relationship is entered into, it was acknowledged that litigants frequently expect more than the facilitator is able to give. Again this seemed to be a problem perceived more by those who are not involved in the process than by those who had grasped the nettle and begun the process of providing that information (advice?).

STAGES AT WHICH ADVICE/HELP MIGHT BE PROVIDED MOST APPROPRIATELY

26. An area which did not receive lengthy consideration by the conference was the problem for those people in the community who do not engage in the pursuit of their rights because of their general fear of Courts. (A parallel might be drawn with some of our aboriginal or ethnic communities.) For such people the provision of self-help facilities at Court Houses may provide no assistance at all. The question of outreach and the provision of information of a more general nature is one which requires significant attention. In some counties in some States, a “**partnership**” has been entered into with local libraries for the provision of research facilities through an Internet connexion or some similar interactive facility.
27. The second stage which advice/information can and should be provided is prior to the filing of any material by a self-representing litigant. Such assistance is most readily and tangibly observed in the Ventura Self Help Winnebago Bus which travels to various parts of that vast county providing information and advice to

self-representing litigants. Equally the Maricopa County Self Help Centre provides a wide range of resources.

28. These facilities include:

- access to on-line forms and the ability to either download those forms or produce the relevant documents electronically,
- various kits for the production of documents for filing⁸,
- access to library including relevant law,
- pamphlets dealing with the nature of the application being sought by the litigant and the necessary information to establish the causes of action and the evidence required in relation to them and
- face to face advice where it is appropriate to do so.

In addition, depending upon the jurisdiction and the resources available,

- videos of relevant processes have been produced and seem from our observation to be of high and helpful quality.

In addition, in some cases,

- rosters and “phone books” were provided with lists of lawyers who were prepared to provide limited services or discounted services or
- simply lawyers and lawyers’ names and addresses and the areas of the expertise and their charges.

29. Although it may seem that this sort of information might be fairly readily available in the community generally, it was pointed out (and we accepted) that in many cases the litigants involved were either too upset or too confused to seek such help in their own right. **The availability through the self-service centre of such information would, in our opinion, create an easier access to lawyers and should be included in the review of services provided by the Family Court of Australia.** Of course, where it is appropriate to do so, self-representing litigants might be referred to the Legal Aid Services for direct representation.

The attitude and approach of Court staff to the Court’s clients

30. As something of a subset of this category is the approach to be undertaken by Court staff particularly those at the filing counter and generally. This is in part attitudinal but also an important illustration of the need to concentrate resources in one area and to ensure that those resources are adequately applied and the appropriate training given to those working there.

31. An example given in relation to one traffic court, was that the staff at one point both in public notices and in dealing with those attending in person referred to these people as “violators”. When, after consideration, this appellation was changed to “customers” both the attitude of the staff and the responding attitude of the customers changed. Staff need both training in customer service and support for and understanding of the limitations of their role in providing information to litigants.

⁸ The Family Court’s do it yourself kits receive universal acclaim and many requests were received for copies of the documents so that the format could be translated into the American context.

32. The third category in which litigants clearly require assistance is **during the actual conduct of Court proceedings**. This matter did not receive nearly as much consideration as one might have thought in a conference involving Judges. The conflict in this area is between the need for a Judge to preserve impartiality and the need to ensure there is fairness in the matter before the Court⁹. This in part is a question of degree as to the extent to which the Judge would “*lean over the bench*”¹⁰.
33. This is an area where there were obvious differences of judicial opinion at the conference. These ranged from those who saw no alternative to the existing (almost by definition “perfect”) arrangements and those who¹¹ saw the increasing number of *pro se* litigants as leading inevitably to changing the nature of court proceedings. . This metamorphosis was in the view of Justice Pariente almost inevitable.
34. It is obviously a discussion topic which makes nearly all Judges feel insecure. The paradigm under which all Judges have operated for many years is necessarily challenged. In our opinion, change in this area might only be achieved incrementally and after careful discussion and consultation with all Judges. One possible stopping place on a road to change is the development of a **protocol** for an agreed level of interference by a Judge¹².
35. However, even allowing for perhaps, unusual Judicial sensibilities about this matter, it is obvious that a conservative approach is warranted and sensible.

SUMMARY AND COMPARISON

36. As a result of the conference we make a number of recommendations for consideration by the Court including a suggestion for a wider initiative invoking the assistance of a number of other stakeholders in the area including other Courts.
37. It seems clear that the American Courts through their formal organisations, and individually,, have come to a realisation of the dramatic increase in *pro se* litigation and the profound effect this increase will have upon the entire system of justice. At one extreme, it may involve over a period, a complete rethink of the way in which Court processes are undertaken. At another level, the examination of the *pro se* revolution also provides insights into the way in which we conduct the Court systems in any event.
38. In this regard the Family Court has probably achieved a higher level of “customer support” than any of the relevant courts in the United States with the exception of the Maricopa County Court. However there are obviously some areas which we were not fully exposed to.

⁹ By intervention in the proceedings.

¹⁰ An evocative phrase used by several of the judicial participants.

¹¹ Such as Justice Barbara Pariente Associate Justice, Supreme Court of Florida

¹² It is to be noted that to some extent in this area the Family Court has already provided a warrant for such intervention in Johnson v. Johnson

39. Notwithstanding this, the complexity of Family Court practices, listing arrangements, case management and trial management rules constitute a Gordian knot which many of the Courts in America have sliced through with commendable determination. The efficiency of the disposition of cases by the docket system is, in our opinion, a matter which would warrant further study from the relevant committees in the Family Court.
40. In addition the emphasis in the proceedings before many of the Courts represented at the conference of dealing promptly with customer's requirements (for example in the provision of a new hearing day or something of that sort) is to be admired and, in our opinion, should be copied in the Australian context.
41. The Family Court's integrated processes where conciliation and mediation and counselling are constant companions of litigants in their journey down the path of litigation is in its formal application apparently in advance of most of the Court systems which were represented at the conference. However, the marrying of such processes to stages in a formal path rather than individual requirements of the cases would seem (from the United States perspective at least) to be unreasonably cumbersome. What arises from this is perhaps a need to examine these processes in the context of the Family Court in Australia, with a view to seeing whether some of the practices may be varied or amended in the interests of both economy and the concerns of the Court's clients.
42. One illustration of this is the fact that in Maricopa County Courts, the concept of a differentiation between privileged counselling and reportable counselling is not maintained. This means that the parties do not have the same opportunity to discuss their concerns without those concerns possibly becoming evidence before the Court. But by the same token where both parties are present at the counselling and have an opportunity to know what is to be said and how it is said, perhaps our concerns about this privilege¹³ are perhaps unreasonably sensitive.
43. Although it was recognised that *pro se* litigation was manifesting itself principally in domestic relations areas, the universality of the phenomenon leads us to recommend that the Family Court should initiate contact with **other Courts** so that there can be a State wide and ultimately nationally unified approach to a phenomenon which we are convinced should be viewed as a challenge rather than as a threat. It should operate to inspire us to consider all aspects of our judicial and court processes for the new millennium.
44. Lest this approach be considered to be too daunting and too substantial to warrant the application of time and energy at this point it is, we think, fair to say, as was made clear at the conference, that many Courts already undertake programs relating to *pro se* litigants without necessarily labelling, identifying or evaluating them.
45. This is unquestionably true of the Family Court in Australia and probably true of other Courts (for example Magistrates Courts dealing with domestic violence applications) at the present time. Many programs which consider, evaluate and

¹³ (recognising that it is statutorily generated)

review Court processes are not expensive to either review or to change. In many cases it is **the re-organisation of resources rather than a generation of new resources that is necessary.**

46. At the same time it is to be acknowledged that there are initiatives which will require money. However by redirecting resources there may be an overall saving in the money required to be spent. For example if at present the involvement of *pro se* litigants requires an extension of hearing time by 30% then a more effective presentation by *pro se* litigants will free Judge time and enable a more efficient docket/utilisation of judge time to be maintained.
47. Incidentally of course, such a change would have the effect of benefiting those litigants who have lawyers because the delay in reaching their matter would be reduced. In addition the unfairness perceived by some represented lawyers in an approach which provides some assistance to *pro se* litigants would be in some measure reduced or eliminated.
48. More importantly however, in our view and in the view of those attending the conference than any saving either to the Court's budget or the tolerance and time of Judges or the sense of outrage which may be felt by lawyers or by represented litigants **is the overall need to do justice to all who seek to use the service of the Court.**

VISIT TO MARICOPA COUNTY COURT

49. As an afterword, we are pleased to report that we had the significant advantage of visiting the Maricopa County Court on the Monday after the conference. The amazingly courteous, welcoming and competent Judge Myers who is the presiding Judge, while espousing and confidently asserting his Court's commitment to the provision of justice to all showed us what could be done with relatively limited resources with an appropriate and directed will.
50. A Self-Help Centre modelled on the Maricopa example is capable of replication in Australia quite readily.
51. There are a number of Court forms which are produced and sold to litigants, copies of some of which we have brought back with us. These materials enable litigants to identify the major matters which will need to be proved in Court cases and give them the necessary documents. These are arranged in a fashion which makes it easy to follow the relevant processes and also assist the Court in understanding the stage that the litigation has reached. In addition the Self-Help Centre provides registers, names of attorneys and the fees that they charge or are prepared to charge for different sorts of matters. The Self Help Centre refuses to recommend or endorse any attorneys of course. The advantage of having this information available to those who have attended at the Self Help Centre, is that they can use the free telephones provided to make immediate contact with an attorney who is close to them or someone that one of their friends have used in the past.
52. Other facilities provided include photocopying and access to on line information through computers. There is also some help provided by staff as to procedural

matters and so forth. When we visited the Self Help Centre there was a constant stream of clients of the Court using the materials provided and the orderliness of the process and the obvious benefit to them was apparent to even the most hardened outside observer.

53. The Courtrooms themselves were interesting although unremarkable. A number of the courtrooms and the newer courtrooms to be built, were set up with what were described as “corner benches”, where the bench was set into a corner rather than across the room. This was designed to provide better lines of communication with the Jury box and the Bar tables of the Counsel appearing. In our opinion, there were some elements of the courtrooms which might well be incorporated into new structures but none which would suggest that we should discard the existing courtrooms or modify them significantly.
54. Although Judge Myers happily answered any questions we put to him, we did not have an opportunity to evaluate the listing systems operating there although they appeared to be on an individual docket basis on a month to month arrangement. From what we could gather, the hearing delays were really quite minor by comparison with ours and it was hard not to be impressed by the dedication, hard work and conscientiousness of the Judges operating in that environment. Judge Myers confirmed that there would be with some new appointments to bring the number of judges in the County, to about 84. When it is considered that this County has a population of some 3 million people and that the Judges handle all matters within the jurisdiction, the direct comparison of judicial resources with (for example Melbourne) is not perhaps as marked as might be thought.
55. Comment should also be made about our inspection of the Ventura County Bus which had been driven for 10 hours to the conference from Ventura County in California.
56. This amazing example of taking the law to the people would be a wonderful model for Legal Aid Offices and would permit, in many respects, the provision of Legal Services or information to a wide group of people in the community who might be disadvantaged by lack of transportation. The bus provided computer facilities, photocopying facilities, access to library, area in which (admittedly not very private) interviews could be conducted and displays of appropriate self-help pamphlets and information. Such a vehicle represents an opportunity for partnership between Government, Court and perhaps Legal Aid Offices or even Community Service Organisations within our society for a redirection of some resources in a more effective way.

RECOMMENDATIONS

1. That the Family Court of Australia should recognise the need to make proper provision to cater for the needs of self-representing litigants.
2. That need will be both immediate and extensive.
3. That there should be a proper plan developed for the assistance of self representing litigants which would include:

- a consideration of how information could be made available to those who are alienated by Court procedures from pursuing their appropriate legal remedies;
 - how to provide for those who are unable to obtain or afford legal representation sufficient and appropriate information to begin and possibly conduct their litigation; and
 - to consider the processes and procedures and information provided to litigants during the process of the hearing itself, to ensure that there is appropriate access to justice for all those who seek it before the Courts.
4. That the Family Court should initiate contact with other Courts in each State and in each Jurisdiction to suggest and recommend, and if necessary lead, a process for a integrated and comprehensive approach by all Courts to the challenge of litigants in person.
 5. That arising from that process of consultation and liaison there should be a national plan integrating and recognising the individual State requirements derived from the previous recommendation.
 6. As a preliminary to the establishment of a national plan and to operate concurrently with the evaluation of State requirements there should be a task force set up nationally in consultation with the Federal Attorney General's Department and those of the States Attorney Generals and other relevant stakeholders including the Legal Aid Commissions to facilitate and assist the development of a national plan. It is not contemplated or recommended by us that such a task force should involve all stakeholders or be representative of all of those stakeholders in some way. However, a national approach to avoid duplication and waste is highly recommended.
 7. Within the Court itself it is recommended that there should be an evaluation of Court processes to take into account the requirements of self representing litigants and that it should be a standard term of reference for any committee of the Court for the future that the processes and changes recommended should be considered in the light of the needs of self representing litigants.
 8. That the Court should maintain the contacts already developed as a result of our visit with the AJS and SJI and in particular should both monitor and contribute to the web site, collecting, collating and evaluating the processes arising from the conference that we attended.
 9. That both of us should continue to develop the networks which we have established personally with Judges and Administrators from different Jurisdictions and maintain an interaction providing information to them and receiving information from them about the development of their various projects and plans.
 10. That any committee which the Court may establish for the purposes of reviewing its processes and furthering some of the other recommendations if accepted ought to work in close liaison with the Future Directions Committee.