Pro Bono Work at the Bar, Self represented litigants – Time for a different model

Introduction

1. Firstly, may I acknowledge the traditional custodians of the land upon which we meet and pay my respects to their elders, nation wide past and present.

2. Secondly, I am delighted to attend this conference and speak as President of the Australian Bar Association, and on behalf of each of the Independent Bars of Australia.

3. The ABA and the Independent Bars of Australia are and have been committed to assist the Courts, the profession and the community by providing professional advice and advocacy to otherwise unrepresented or self represented litigants. The moral obligation upon the Bars to assist those in our legal system who are most in need and ensure all litigants get proper access to justice is a corner stone of our profession.

4. This commitment is also analogous with the role of counsel and each barrister's duty to the Court. Our system depends upon a strong connection between the profession and the Courts and a high level of trust and good will. Being a professional at the Bar provides an amazing opportunity to give back to the community and make a real difference to those in society that are coming before our Courts for determination of disputes. In particular, representing an otherwise unrepresented or self represented litigant and ensure they get a fair trial is one of the most rewarding experiences in professional life and is embraced by our members.

5. It is with this good will in mind and an appreciation of the vast amount of work is done on a pro bono basis by the profession that it is alarming to see the amount of litigants appearing before our Courts without representation. To see the pressure it places on the litigants themselves, the Courts and the litigants on the other side is of great concern. Whilst the actual figures are not at this stage recorded of how many self represented or unrepresented litigants come before our Courts and the amount of pro bono work being provided by each Bar, the anecdotal evidence is that the amount of unrepresented litigants coming before our Court is becoming a national disgrace.

6. Whilst the State and Federal Attorneys General and Shadow Attorneys General appreciate the problems and want to provide further funding it is too easy for both side of politics generally to ignore the problem and consider it not to be a priority because from a finance point of view there are no votes in it. This is a national problem should go beyond

the portfolios and budgets of the Attorneys General and should be considered from both a direct and indirect economic and social point of view.

7. The discussion needs to be changed and innovative steps need to be considered to attract greater funding and be more effective with the precious resources we do have to provide pro bono work. In that regard we applaud the role the LCA is playing in it's Justice project and we look forward to assisting where we can.

8. For this reason the ABA is looking at practical steps that may be taken on a national basis to assist the Bars and the Courts in the provision of pro bono work. These include establishing a national data set of how many unrepresented are actually appearing in Courts, how much pro bono work is being done by the Independent Bars and encouraging new models including a national approach to a Duty Barristers Scheme and a new scheme for the Courts.

The Problem

9. To begin may I tell you a story. In October last year the ABA invited each State Chief Justice to speak at our National Legal Conference in Melbourne at our famous MCG. The scene of the 1956 Olympics, Boxing Day Test Matches and many AFL Grand Finals, an entirely suitable venue for such a panel.

10. The Chief Justices of every State and Territory attended and each of them spoke of the challenges facing their Courts. No matter if they were from Hobart or Darwin, Sydney or Perth the greatest challenge remained the same, the number of self represented litigants coming before the Court and its impact on the justice system. There was a general acknowledgement that these cases placed considerable pressure on our judges, the profession and the litigants themselves.

11. This panel discussion was unscripted, each participant was free to discuss their concerns and challenges. The significance of each and every one of the Chief Justice's highlighting the incredible difficulty that unrepresented litigants presented was immense. These challenges are affecting our profession and the administration of justice nation-wide.

12. The Northern Territory Chief Justice concluded this remarkable panel discussion with a story which I would like to relay to you today, should we have time at the end.

13. To begin, let me give you a few uncontroversial bases for this speech:

    (i) There is an ever increasing number of self represented litigants appearing in State and Federal Courts each year:

    (ii) Unrepresented litigants take a lot longer to deal with in interlocutory, trial and appeal hearings:

    (iii) This phenomenon is being experienced by courts all around the world, especially in the Common Law countries;

(iv) This increase in unrepresented litigants has a devastating effect upon stress faced by the litigant in person, his or her opponent, the Court and the administration of justice;

(v) There are now many more reasons why unrepresented litigants appear. We have strayed away from the simply querulous, and those unfortunate enough not to be able to afford representation in civil cases. There now exists a norm where no easy distinctions are made;

(vi) The lack of representation is having an effect on whether the litigant is successful.

(vii) Without a new system in place, this phenomenon will further stretch the monumental pressure of resources of the profession to an unsustainable level;

(viii) There is little, if any, hope of finding traditional means of funding from the major political parties the way they are currently posed to solve this phenomenon;

(ix) The number of unrepresented litigants coming before Courts is not being recorded in a consistent national basis to allow a proper appreciation of the volume of work being required.

(x) The individual Bars around Australia require better systems of recording the amount of pro bono work being undertaken.

(xi) Perhaps most importantly, we have to look at what has worked and new ideas to assist the Courts in coping with unrepresented litigants.

Increases in unrepresented litigants - Victoria as an example

14. As previously mentioned it is extremely hard to ascertain or rely upon credible data as to the real number of unrepresented litigants coming before the Court. This is understandable because given the strain on Supreme Court resources already, the burden of further recording data is hardly a priority. However, as will be demonstrated, by reviewing the annual reports of the Courts, a national approach is now needed to fully record data to assist deal with this crisis.

15. Some Courts have selective data and some no data at all. It is often the same way with barristers. Many prefer to simply perform days or weeks of pro bono work without seeking adulation or recognition. The problem with that is that it all too often allows the governments to assume the problems is less than it really is and efforts to go unappreciated until the system gets to a crisis point. In a reading of the annual reports of the Courts, it is obvious that each are doing amazing work but records of this work and the challenges they face needs to be improved a to the ABA to assist. The Australian Pro Bono Centre is being consulted in this regard in an effort to establish a national data set.

(i) In 2**014-2015 Supreme Court of Victoria Annual Report[1]:**

- The Supreme Court is one of the first courts in Australia to address the issue of SRL. By creating a dedicated Self Represented Litigant (SRL) Coordinator position in 2006, this has led to a significant rise of 'contact' with SRL (including mail, telephone, email and in person contact). I must say I have trouble with [this] particular term. Without diminishing the immense importance of the office in any way, to my mind the idea that someone is called a Self Represented Litigant is analogous to the contention that he or she has chosen such a status- rather than this status being forced upon them. In any event I will surrender to the use of the term as it has become popular amongst the judiciary and the profession at large.

- In the Principle Registry in 2014-15, 2,879 individual contacts were made between SRL and the Registry (increase of 23% from 2013-2014)

- During the same year, 421 SRL proceedings were initiated, defended or actioned in the trial division which totalled 5.2% of all cases

- A total of 39 referrals were made to the Duty Barristers Scheme of Victorian Bar (2014-2015) – 31 resulted in "one-off" representation

- The Court noted that over the last 5 years there has been a significant growth in the number of SRL who now signify over 8% of all probate applications – 1,665 applications initiated by SRL in 2014-2015

- Compare 2014 to 2009
  2008:460
  2015:2879 (377 SRL proceedings initiated, defended or actioned in the Trial Division representing 5.7% of all cases. 85 of those were mortgage default claims, 62 were SLR's seeking appeal or review.)

(i) NSW:

Supreme Court of New South Wales, 2015 Annual Review[2]

In 2014: The Court made 43 referrals under the Scheme
- 10 were in Court of Appeal cases
- 33 referrals were by Judges across Common Law and Equity Divisions
- Relies on the good will of barristers and solicitors supporting the Scheme

[1] http://assets.justice.vic.gov.au//supreme/resources/990af00c-0029-4122-8502-7bb74cab4b41/9776_scv_2014-15+annualreport+af.pdf

[2] **http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Annual%20Reviews%20+%20Stats/Annual_Review_2015.pdf**

The 43 referrals made indicates the high number of SRL (and 43 only signifies the number of SRL that were deemed to be deserving of the referral).

NSW District Court: No statistics available.

(ii) QLD:

Supreme Court of Queensland, Annual 2015-2016:[3]

- "The number of self-represented litigants in cases where judgment was delivered in the Court of Appeal this reporting year has increased from 82 matters last year to 94 matters this year."

- "At least one party was self-represented in 41 civil matters in which judgment was delivered this reporting year (22.9 per cent), compared to 32 last year and 45 in 2013 – 2014."

- "At least one party was self-represented in 53 criminal matters in which judgement was delivered in this reporting year (24 per cent), compared to 50 last year and 77 in 2013-2014."

- "This reporting year 234 matters involving self-represented litigants were finalised either, before or after the hearing (37 per cent of matters lodged this year). This included 118 civil appeals (53.2 per cent of matters lodged this year) and 116 criminal appeals (28.3 per cent of matters lodged this year).

- The Court noted that the Queensland Public Interest Law Clearing House (QPILCH) and its Self- Representation Service (SRS) again provided valuable assistance to self-represented litigants in the Court of Appeal."

- "Self-represented litigants had some success in the Court of Appeal. A total of 18.9 per cent of self-represented criminal litigants (compared to 24 per cent last year) and 4.9 per cent of self-represented civil litigants (compared to 9 per cent last year) were successful in their appeals. These figures continue to suggest a need for increased legal aid funding and pro bono assistance at appellate level."

- "The Court of Appeal criminal law pro bono scheme, first established in 1999 – 2000, continued to operate this year. With the assistance of the Bar Association of Queensland and the Queensland Law Society, the scheme provided unrepresented appellants convicted of murder or manslaughter, juveniles and those under an apparent legal disability, with legal representation for their appeals. This year 12 appellants were assisted."

(iii) QLD: District Court of Queensland;

No data

[3] http://www.courts.qld.gov.au/__data/assets/pdf_file/0006/498237/sc-ar-2015-2016.pdf

(iv) TASMANIA:

No data

(v) SOUTH AUSTRALIA:

SA Supreme Court Report:
No data but the Court noted:

- The average number of trials exceeding 5 days had dramatically increased, part of which may be inferred as a result of the number of unrepresented litigants appearing. (2010 8-2015-11).

- One could infer that trials on average are drawn out by the pressure of SRL

(vi) WESTERN AUSTRALIA

- "Partly as a consequence of the high cost of litigation, the Court is dealing with a large number of litigants in person. Around 30% of civil cases in the Court of Appeal currently involve a litigant in person.

- The Court noted further "Many litigants in person are genuinely trying to comply with the practice and procedure of the Court. Proceedings involving a litigant in person take additional time at all level- registry, case management and hearings. Registry staff are able to provide guidance on the processes of the Court, but are not able to give legal or tactical advice."
- "Litigants in person also challenge the judicial model in which the parties drive the case and the Judge is the impartial decision maker. There is a fine line between giving a litigant in person sufficient assistance to ensure that he or she has received procedural fairness and remaining, and being seen to remain, impartial."

(vii) ACT:

No data.

(viii) NORTHERN TERRITORY:

Supreme Court of the Northern Territory, Annual Report 2014-2015; [4]

- "The Territory Legal Aid Commission has informed the Court that it has entered into a new funding agreement with the Northern Territory Government for the coming 12 months and that the funding allocated is not sufficient for the Commission to continue to provide its current levels of service. Of great concern is that the funding allocated for crime referral matters will be reduced with the likelihood that worthy applicants for aid will be left unrepresented. The inevitable effect will be that injustices will result, delays will occur, hearings will be cancelled

[4] http://www.supremecourt.nt.gov.au/media/documents/SupremeCourt2014-2015-proof6.pdf

and there will be a significant waste of judicial time."

- "The work load of the Supreme Court continues to increase. Total lodgements have shown an increase over the 2013 – 2014 figures of some 25%. This, of course, has resulted in further demands being placed upon the Judges and the staff of the Court. The workload of the Court has now reached the point where a seventh Judge is required." - The Honourable Chief Justice Trevor Riley

- **"**The impact of the shortfall in judicial resources is reflected in the clearance rates which have now fallen from 100% to approximately 85%. This means that the waiting lists for hearings are becoming unacceptable. In June 2014 there were 177 matters awaiting hearing and, by June 2015, that number had expanded to 225 matters"

A possible factor contributing to waiting list growth may be efficient court time use partly on account of SRL

16. It is interesting to consider that the issue of data collection and its importance was raised 15 years ago in the Parker Report – Australian Institute of Judicial Administration , *Litigants in person management plans; Issues and Tribunals* (2001) AIJA Melbourne:[5]

"Justice outcomes for litigants in person

The data that has been collected in Federal Courts and Tribunals suggests:

- Representation is relevant to outcome;
- Settlement by negotiation is more effective with representation;
- The failure rate of litigants in person is significant.

"**Access to Data"**

Until recently little has been known about litigants in person in court litigation. Information on litigants in person is generally not readily accessible from court management systems and there have been few attempts by courts and tribunals to systematise or collect such data. This reflects an overall lack of statistical information about court users and their impact on court resources and time, which according to the Courts and the Public report is one of the contributing factors to the lack of a coordinated court system in Australia.

The effective management of litigants in person within a court or tribunal will require access to information on the impact of litigants in person on court or tribunal resources and the needs of litigants in person. Such information is necessary for deciding upon strategies for dealing with litigants in person and monitoring the effectiveness of such strategies. It is important that any court management plan to have built into them provisions for evaluation of that plan. There is also a broader public interest, including the interests of user groups, legal aid and government departments, in a better understanding of the impact of litigants in person on the legal system."

17. Further in 2001 in the Australian Institute of Judicial Administration and the Federal Court of Australia; Forum on Self Represented Litigants; Sydney, 17 September 2004, Report[6];

[5] http://www.aija.org.au/online/LIPREP1.pdf

[6] https://www.aija.org.au/online/SRLForumReport.pdf

- "Justice Murray Wilcox noted in his opening speech at this Forum, the numbers of self-represented litigants (SRLs) appearing in some courts now exceeds 50%."

- "The category of self-represented litigants (SRLs) is not a homogenous one. A distinction can be drawn between litigants who are forced to represent themselves (usually because they are unable to afford legal representation) and those who choose to do so, perhaps for a variety of reasons. There has also been much discussion in recent years about a small proportion of self-represented litigants who may be classified as "querulous" litigants, that is, litigants whose approach to advancing their cause or matter is irrational or obsessive."

- "**Impact of SRLs**: A number of senior members of the judiciary have drawn attention to the implications for the administration of justice of increasing numbers of SRLs.5 The increase in numbers of SRLs is said to affect the operations of courts and tribunals in various ways."

18. What is evident from the data above is that even the most simplistic of incidences, more and more self represented litigants are coming to our courts. This is being matched by an increased number of attendances and individual assistance provided by each of the Independent Bars around Australia.

Other Jurisdictions

19. As we all know, the UK has been subject to significant cuts in its legal assistance funding. Whilst the UK is somewhat of a different model to ours, in 2009 a staggering 322 million pounds was cut from its legal assistance budget. This decrease resulted in a substantial decrease across all areas of representation whereby it had been previously assisted. It also placed enormous strain on pro bono and community legal centres as well as the profession.

20. Canada suffered simular cuts in real terms.

21. In the USA the budget for publicly funded legal services has been reduced by almost one third of what it had been 15-20 years before. In real terms that was a decrease of over $700m USD and more came the following years.

22. All of these cuts were met with calls to the profession to step up and assist in filling in the gap in funding. This call has come from both the Courts and the profession itself. Those calls were in some cases for an increase in the hours and days of pro bono work to be done by members of the profession, to an increase in the overall percentage of pro bono work that should be done. As I will outline below, the profession has of course met the challenge but has taken steps to ensure that the increase in pro bono work done didn't lead to an even larger decrease in the justice spend by government. The UK National Pro Bono Centre is a great example of that.

23. The UK National Pro Bono Centre is a privately funded organisation that provides funding and representation through it's Bar's pro bono scheme. It provides assistance to justice centres across the UK. It negotiated with the Chancellor of the Exchequer to ensure that

any pro bono work undertaken was not taken into account by the Government when considering levels of legal assistance funding.

24. As part of it's operations a National Pro Bono Foundation was established. This Foundation sought to raise funds to assist to fund the 'justice gap'. One of its methods was brilliant.

25. With the assistance of the Attorney General and the Courts the Foundation established a rule whereby a barrister acting on a pro bono matter could ask for costs, not in his favour as with Order 80 of the Federal Court Rules or Order 66 of the NSW Rules but instead a costs order in favour of the Foundation. The taxing of costs was dealt with simply, an affidavit filed indicating the rate of costs on about 60-70% of what the ordinary taxed costs would be was filed. The judge would then make a costs order in favour of the Foundation to that amount.

26. The result has been:
    - that the Foundation has raised money pursuant to such an order,
    - it deterred litigants who had pursued groundless litigation considering that if the other side was represented on a pro bono basis they would not be exposed to costs;
    - and it lead to funds being granted to legal access centres.

27. However, whilst a great method, regrettably it has not recovered in any real sense the cuts in legal access funding in the UK.

Is the System Really Working?

28. Firstly, to address this one must remember, that there is no statutory obligation or right to be represented, only a right to appear. Section 78 of the Judiciary Act 1903 (Cth) provides:

> "In every court exercising Federal Jurisdiction the parties may appear personally or by such barristers or solicitors as by this Act or the laws and rules he practice of those courts respectively are permitted to appear in therein"

29. As confirmed by *Collins v the Queen*[7], even the provisions of Order 70 r 26 of the High Court Rules requiring an application for leave to be made to a Full Court by counsel were not repugnant to the requirements of s78 of the Judiciary Act mentioned and there is no right to be represented in normal circumstances.

30. However, for the Courts, the profession and the administration of justice we all feel there is an underlying need for those in our litigation process to be represented as far as possible. Some writers even go as far as saying that this is a reflection on our modern society and morality.

31. That obligation being accepted, one may ask, is the system failing?

[7] (1975) 133 CLR 120

32. I give you two illustrations of why this system, certainly in Victoria and probably extrapolated nationally is not working.

33. The first is that often, particular dealing with querulous litigants, it is extremely difficult to represent them. As we know self represented litigants can be the most difficult and at times, perhaps some of the most undeserving. Despite this, in the interests of justice and as a profession, we have and we feel a responsibility to assist them.

34. The second, and perhaps most alarming point to make, is that in certain matters litigants who are over indulged by both the court and the profession can act to their detriment. An example of this is Mr Slaveski. *Slaveski v State of Victoria &Ors* [2009] VSCA 6. Many of you may have heard of Mr Slaveski. He is a man well known for his paranoia, unpredictability and almost complete lack of respect of the legal profession itself, let alone the Court.

35. Unfortunately Mr Slaveski amongst the myriad of cases he was involved in, sued 23 Victorian Police officers seeking damages for, inter alia, battery, false imprisonment and negligence. The claims against the police officers were based on 13 separate incidents occurring over a period of more than 6 years, and included allegations of demanding money, unlawful arrest and unlawful ejection from the Children's Court. The trial proceeded for over 100 sitting days.

36. During the trial, his behaviour varied between reasonable to absurd. After 22 days, with the intervention of the Bar's pro bono services, Mr Slaveski agreed to be psychiatrically assessed. This took place and he agreed to appoint a litigation guardian. Unfortunately, he appointed his wife his litigation guardian and then directed her on what and how to address the Court and run the case, including giving her directions during his own evidence in chief about what to object to.

37. A summary of his behaviour in Court was outlined in Justice Kyrou's judgement which included a number of separate occasions in those 22 days in which he behaved erratically,, sought permission to wear casual clothing such as track suits and t shirts, asked for frequent breaks during each day, engaged in wild mood swings and behaviour ranging from tearful to threatening, made outbursts and long rambling speeches from time to time, became increasingly abusive and disrespectful to opposing counsel and the Court, frequently behaved inappropriately and lost self control. At one stage after a ruling was made against him Slaveski jumped on top of the Bar table and proceeded to tell the Court that he was going to put a large amount of pills in his mouth and if the Court didn't change it's ruling he would swallow the pills which would do him great harm or kill him. As part of his judgement Justice Kyrou returned to Mr Slaveski the pills he has eventually spat out despite the negative ruling.
38. It became very clear early in the proceedings that Mr Slaveksi was also totally incapable of appropriately representing himself. Not only did he have trouble understanding the legality of the proceedings, he was also almost entirely unable to act in any kind of appropriate manner before the Judge.

39. This behaviour became so bad, and included yelling at the Judge and threatening the Judge's family. The Judge was very upset and security were called. Mr Slaveski then

made an allegation that he had been assaulted by the same security. He was virtually in contempt of court.

40. He was then dealt with regarding his contempt of court. He was found guilty of contempt of court and was sentenced to 3 months in prison. He was also required to pay over $1m in costs. Eventually, Mr Slaveski, after being released from jail, sought to appeal, unsuccessfully to the Court of Appeal. He once again found himself charged with contempt and eventually absconded from the jurisdiction.

41. This was a case which clearly was off the rails and the system failed him. We were unable to properly provide a source of representation which would have protected him from himself. We also exposed the Court by this failure to abuse and additional burdens which we should not have been exposed to.

42. Another example, is Mr Vasilou. Mr Vasilou had a long history of litigation against a liquidator. In short, there was a small amount of debt he had to pay but refused to do so. This eventually blew out to an extraordinary amount of legal costs incurred by the liquidator as he fought at every turn and eventually his debt rose from something modest to over $6,000,000 resulting him losing almost all the properties he owned. Mr Vasiliou was eventually charged with Contempt of Court for threatening a solicitor on the other side in an email sent to the judge. In that proceeding, he failed to attend Court and a bench warrant was issued. He was eventually brought to Court and offered bail on a surety. He refused to provider the surety, accusing the judge of wanting the money for himself. He represented himself at the contempt hearing and was eventually sentenced to the five month as time served. In prison he declared his own state and his subjects, all inmates of Port Philip Prison signed his petition. He died before his civil litigation ended.

43. Another area I would like to discuss is the Federal Circuit Court. The FCC has over 100,000 listings every year! It's judges preside in jurisdictions as wide ranging as immigration to copyright, admiralty to domestic violence and industrial relations to misrepresentation. It deals with over 80% of all Family Law cases and each judge has a staggering 400-500 case load each per year. The work is unrelenting. At least half the matters the Court presides over involve at least one unrepresented litigant in all areas of the law. Considering the judges of this court have no pensions the work they done is extraordinary and the judges continue to provide a magnificent example to all in the profession.

44. The Court started recording the numbers of unrepresented litigants but I am told gave up after a year or two.

What the profession has done-
Duty Barrister's Scheme- Victoria

45. If I may I would like to mention a model of pro bono which is close to my heart. The Victorian Bar Duty Barrister's Scheme.

46. I should divulge the reason why this Scheme was first established. It came about as it was evident to me (and others) that the level of self represented litigants particularly in the Magistrates' Court was increasing. Much of this, was of course was in relation to Civil work, although there were Summary Crime and other matters which were besieging the Court also.

47. At the time my Clerk had told me only that day that young Barristers coming to the Bar were getting a half or a third of much time in Court as they would have been say 5 or 10 years before.

48. Coupled with this was the fact that I had the first ever Afghani woman coming to the Victoria Bar, sitting in my Chambers. She is an interesting woman, she is highly intelligent, she was the subject of an arranged marriage with an Afghani man, and was never meant to have done law. However, she got herself out of that very unfortunate marriage, and supported her two children whilst putting herself through a law degree. She came to my Chambers speaking six different languages and having a good understanding of the law. However, she did not have many connections in the law and she had virtually no work in Court. This was not dissimilar with many other Barristers who came to the Bar at that time.

49. What we did was to arrange a pilot of a Duty Barrister Scheme in the Melbourne Magistrates' Court two days a week. The idea was we would have at least one, if not three Barristers a day for those two days a week making themselves available to the Duty Lawyers provided by Legal Aid. They were of course appearing on a pro bono basis and there was no means testing being conducted. They were simply making themselves available to assist any anybody who needed a lawyer at that time.

50. On 18 November 2008, three barristers walked over to the Court and were the First Duty Barristers. By 11.30 the Scheme was a monumental failure. None had been referred work by Legal Aid despite the numbers of people waiting outside the Duty Lawyer's offices. By 1.00pm this was getting a bit ridiculous. It became apparent that the Duty Lawyers were not entirely aware of the Scheme at that stage. Accordingly, after a few phone calls and urging from the Chief Magistrate at 2.15pm, each one of the Barristers had a brief. One was to vary bail conditions for an armed robbery committal on behalf of 2 accused, having two barristers as it were, make a presence known in a Full Bar Table to seek the attention of the Magistrate. Another gave crucial evidence to a witness in a matter where she would otherwise have incriminated herself and a third conducted a plea in circumstances where otherwise a summary offence would have adjourned for the third time.

51. After three months the Scheme was such a success it became a five days a week schedule and was no longer a pilot. It has now gone to the Dandenong Court as well, being the second busiest Magistrates' Court in the Country.

52. The Scheme has also enjoyed significant success not only from a summary crime and small civil matters, but also right up the Victoria Supreme Court and Court of Appeal. In those cases initially Barristers were made available on an ad hoc basis. What we did was we invited Barristers who had participated in the Scheme to appear with more senior barristers in the Supreme Court. Occasionally a Court of Appeal matter would also come

up. The change in the Civil Proceedings Rules of the Supreme Court and the Court of Appeal required leave to appeal and dismissal of leave applications on the papers. The Bar organised with the Supreme Court to formalise Duty Barristers to appear on a regular basis in the Court of Appeal in appropriate cases. They would be given a junior and at least four weeks' notice prior to any appeal coming up. This would allow the Duty Barristers to actually meet with the Applicant/Client, give them advice and consider whether it was necessary to change from the Grounds of Appeal to something more focussed and fruitful. They would then either appear at the Leave to Appeal Application or in deed the Appeal itself, depending upon the needs of the Court. Even in the most difficult cases they were available to appear as amicus curiae.

53. Let me give you a few figures provided by the Supreme Court of Victoria's Court of Appeal Registry for the 6 months of operation of the Duty Barristers Scheme in that Court:

    - 27 unrepresented litigants had been referred to the scheme since it started in that court in September 2013.
    - Of 11 leave appeal applications made 5 were granted;
    - 6 extensions of time, 2 granted;
    - 3 Not be abandoned, 1 granted
    - 2 judgements set aside
    - 2 Referred for dismissal
    - 2 Stays granted
    - 1 adduce fresh evidence granted.
    - 27 heard, 9 granted

    The number of leave and extension of time applications normally granted to self represented litigants is 0%-5%

    When represented (41%-44%)

54. There are many more case I could speak about if we had time. There is no doubt that the Independent Bars along with the rest of the profession do an amazing job. It may however that this work is not enough without change.

55. In real terms being unrepresented has a massive effect on the possibilities of self represented litigants being successful. This is despite the great efforts judges go to ensure a fair trial and the efforts opposing counsel is required to go to assist the Court and ensure that the hearing is fair.

In view of the above, what on earth do we do?

56. It seems to me that we can continue to support the extraordinary efforts from the profession, particularly in relation to worthy courses such as the Duty Barristers Scheme and other methods of representing people without fuss or bureaucracy.

57. However, we need to do something to curb the amount of self represented litigants coming before the courts for the determination of their issues or disputes and need to do this early in the proceedings.

58. The ABA has approached each Court and is currently hoping to establish a national set of information including the type of case, the reason why the litigant was unrepresented, whether he or she had ever been represented, how long the case or hearing took and what would have been the difference if the person had been represented.

59. Another project we are working on is the establishment of a national approach in Court to unrepresented litigants. Taking a leaf out of the great work done by QPILCH and the Self Represented Litigant's Unit, it has been suggested:

60. Between the first and second occasion a self represented litigant comes before a superior court, he or she needs to do the following:

61. Attend a clinic or legal access centre which will perform the following tasks;

    (a) Ascertain whether any further funding or pro bono assistance is available to the litigants;

    (b) Provide the litigant and the other side, if possible, with an opportunity to have a mediation which may assist the litigant in being able to at least ventilate their dispute in a timely and efficient manner in front of either a pro bono mediator or someone being very close to being bono;

    (c) Provide the litigant with some precedents to be able to amend or plead out their case properly;

    (d) Not provide them with any merits or advice per se, but assist them in understanding the processes they are undertaking and some of the risks they are running, generally, in litigation if they continue;

    (e) Enable the profession to properly record some data in relation to this proceeding and what may be likely to be needed in the future.

62. That way the Court has a self represented litigant before them on the second occasion who has either settled the case or has been given every opportunity to avail him or herself with the benefits of the profession on an efficient bases. Those managing the justice centre could either be purely pro bono or, as suspected if the volume is too high may be junior barristers or junior solicitors who are paid a scale fee (low).

63. The above is simply an example of how we must think outside the square if we are going to succeed in being able to deal with this problem of an ever increasing level of unrepresented litigants.

64. Now do I have time to relay that story the Chief Justice of Northern Territory told us at the national Conference ….

65. I join with all of you in celebrating the great work and achievement of the Independent Bars, the Profession and of course the Judiciary dealing with self represented litigants and thank you for your time.

E.W Alstergren QC
President ABA
23 March 2017