

THE SELF-REPRESENTED LITIGANT IN THE COURT OF APPEAL, SUPREME COURT OF QUEENSLAND [∇]

AIJA Assisting Unrepresented Litigants: A Challenge for Courts and
Tribunals Conference, Coogee Beach, Sydney, 16 April 2014

The Queensland Court of Appeal hears criminal appeals against conviction and applications for leave to appeal against sentence from the District Court and from the Trial Division of the Supreme Court. It hears civil appeals from the Trial Division of the Supreme Court and civil appeals and applications for leave to appeal from the District Court. It hears applications for leave to appeal from the Planning & Environment Court. Appellants from the Magistrates Court who have lost an appeal to a District Court judge can apply for leave to appeal to the Court of Appeal. The Court of Appeal also hears some appeals, but primarily applications for leave to appeal, from QCAT. Apart from the tiny percentage of cases which get special leave to appeal to the High Court, it is Queensland's final appellate court.

Last year in the Queensland Court of Appeal 11 per cent of civil matters and 21.5 per cent of criminal matters involved applications and appeals where one or both parties were self-represented litigants. I will use the acronym SRLs when referring to self-represented litigants. SRLs are often impecunious so that filing fees can prevent access to justice. Last year, of the 50 applications for filing fee reductions I civil appeals, all but one were granted.

The high numbers of SRLs have lead to the development of several initiatives in my jurisdiction. In recent years, the Queensland Court of Appeal and SRLs have been assisted in civil matters by the Queensland Public Interest Law Clearing House Incorporated (QPILCH) and its self-representation service (Court of Appeal) (SRSCA). The fall in SRLs in civil matters in the last financial year may be attributable to this service. Last financial year, the SRSCA received 15 applications for assistance from potential and current litigants: 10 related to potential appeals and five to appeals already commenced. Of those commenced, three were assessed as having merit: one resulted in a negotiated settlement and the appeal was discontinued; one was referred to a member firm for legal representation and was decided by the court in the client's favour¹ and one was not yet finalised at the close of the financial year. SRSCA gave advice to the remaining two applicants which was not accepted. Of the 10 potential appeals the SRSCA assessed only one as having merit; it assisted that client to commence an appeal and to successfully apply for a stay of enforcement of the judgment below. The remaining nine applicants were advised they were unlikely to succeed. Four accepted that advice and the remaining five commenced appeals. Of those five, in the three cases heard in the financial year all were unsuccessful.

[∇] The Hon Justice Margaret McMurdo AC, President, Court of Appeal, Supreme Court of Queensland

¹ *O'Sachy v O'Sachy* [2013] QCA 212.

The Queensland Court of Appeal criminal law pro bono scheme was established in 1999. With the assistance of the Bar Association of Queensland and the Queensland Law Society, the scheme provides unrepresented appellants convicted of murder or manslaughter, juveniles and those under an apparent legal disability with legal representation for their appeals when legal aid has been refused. Last financial year, nine appellants were assisted.

During the second half of the last financial year, the Criminal Matters Legal Clinic (CMLC), a project initiated by the University of Queensland for its advanced undergraduate students with the assistance of Caxton Legal Centre and the support of LAQ and the Court of Appeal, assisted two unrepresented appellants.² The CMLC presently operates only in second semester on an ad hoc basis and is therefore of limited assistance, but it provides useful training for UQ law students and assists some SRLs.

Other legal practitioners regularly appear on an ad hoc pro bono basis for parties in both civil and criminal appellate matters.

Most SRLs try hard to comply with court procedure and practice. Indeed, they tend to comply with time limits better than legal practitioners, but they generally place heavy burdens on court staff. As you would expect, phone enquiries from SRLs are much more frequent and take longer than enquiries from lawyers. Generally speaking, SRLs have many questions and need to have the appeal process, particularly the requirement for leave, explained in simple terms. These days, initiating appeal documents are filed in the general registry where staff are not always familiar with appellate practice and procedure. SRLs often file the wrong or incomplete initiating documents. Inexperienced staff sometimes accept notices of appeal for filing when leave to appeal is required or when the time limit has expired so that an application for an extension of time is needed. Appeals registry staff have identified the need to reinstate the position of a highly trained SRL coordinator who would be the primary and consistent contact point for and provide direct assistance to SRLs.

In criminal matters, applications for legal aid in appeals are not only means tested by Legal Aid Queensland (LAQ) but also merit tested. Many appellants and applicants do not obtain legal aid and go on to represent themselves. They are often in custody which adds a further dimension of difficulty in communicating with the registry and in preparing for hearing. SRLs in custody do not have ready access to resources like computers, internet or telephone. They often have particular difficulty in preparing documents and filing them within the specified time frames. Effective communication between the registry, correctional facility staff, and the SRL is vital. The registry has recently arranged to have telephone links with SRLs in custody. This has proved a more effective form of communication than the past practice of relying solely on written correspondence.

² *R v Andrews* [2012] QCA 266 and *R v Roberts-O'Keefe* [2012] QCA 260.

The courts website provides useful appellate information sheets and guidelines which are of particular assistance to SRLs. The Court of Appeal Practice Direction³ is readily accessible via the courts website. But discussions with registry staff in preparing for this session have made us realise we need to and can do more to simplify things for SRLs.

We plan to revise our information sheets and guidelines and consolidate them into an information pack for SRLs, inspired by the Victorian Supreme Court, Court of Appeal Self-Represented Litigants Information Pack. I particularly liked its introduction which reminds self-represented litigants

- court should be a last resort for settling a civil dispute;
- parties should try to settle outside court through ADR, mediation or arbitration;
- research indicates that statistically litigants are less likely to obtain a successful outcome without legal representation; and
- before deciding to pursue an appeal with or without legal representation, be aware that ordinarily an unsuccessful appellant is ordered to pay the other party's legal costs in the appeal, often many thousands of dollars.

We anticipate preparing separate information packs for civil and criminal SRLs which would include information like:

- When do I have a right of appeal?
- Time limits.
- When must I file an application for an extension of time?
- How do I apply for a filing fee reduction?
- How do I apply for an appeal record book fee waiver?
- What is an application for leave to appeal?
- Are legal assistance programs available?
- A simple, step by step process for preparing appeals and applications.
- All contact must be through the registry, not through judges' chambers.
- Court procedure explained in simple terms.

There is also a need to simplify forms, particularly applications to extend time and applications for leave to appeal which require supporting affidavit material.

Registry staff usually have to closely manage preparation of SRL matters for hearing. There are constant phone calls and emails seeking guidance. SRLs often find preparation of the appeal record book difficult. They may refuse to purchase or cannot afford the transcript. Last financial year, 19 appeal record book fee waivers were granted in civil matters. Some SRLs will not agree with other parties as to the draft index for the appeal record book. They have difficulty understanding why evidence which was not before the primary court cannot be included in the appeal record book and why they must apply to adduce further evidence of those matters. They then have difficulty preparing the affidavits containing the further evidence they wish to lead. Mentions in

³ Practice Direction 3 of 2013.

court before me or another judge of appeal are often needed. Despite all these efforts, occasionally cases are adjourned on the day of hearing because SRLs are not ready to proceed.

Associates need to take more time preparing the material for their judges before the hearing as SRLs often file large quantities of confusing, repetitive and irrelevant material. Judges, too, have to waste time sorting through this material before and after the hearing in an attempt to ensure that a meritorious appeal point is not overlooked in the mire of confusion sometimes placed before them.

At the appeal hearing, SRLs are sometimes overwhelmed by the occasion and say little, relying primarily on their written material. Others will have prepared a written speech which they deliver or hand up. They may apply for a lay person to assist them. This can be helpful but the Queensland experience has shown that caution should be exercised before granting such applications. Some lay people, apparently contactable through the internet, have exploited SRLs by encouraging them to raise hopeless arguments already authoritatively rejected many times by the courts. And, of course, a lay-advocate, unlike a lawyer, has no duty to the court. Most SRLs are respectful in court, but some question the legitimacy of the court and its judges – always a problem for an appellant or applicant! The constant attacks on the judicial system by some media elements are not helpful in ensuring that disgruntled or querulous SRLs have confidence in and respect for the justice system and its officers. The long-winded SRL will need firm guidance in the court room so that their submissions have some structure and relevance. But sometimes court intervention may result in even more irrelevant, rambling submissions. For those SRLs, setting firm time limits for all parties is the only way to fairly confine and conclude the hearing.

If the SRL may be a security risk, the court arranges for a security officer to be present. Associates in my court know that if they feel threatened or uncomfortable in the presence of an SRL, they can avoid the public areas and return to chambers using the otherwise sacrosanct judges' lift.

Even post-appeal and post-judgment, SRLs can be problematic, attempting to file further material or contacting the judges' chambers.

For all the challenges that some SRLs present, as judicial officers we must never lose sight of our judicial oaths and affirmations: that we will at all times and in all things do equal justice to all persons and discharge the duties and responsibilities of the office according to law to the best of our knowledge and ability without fear, favour or affection. Every appellate judge, indeed, every judicial officer, is concerned to ensure that an SRL with a good point can identify it and have it considered.

As has been noted so many times during this conference, numbers of SRLs are likely to increase, not decrease, as the cost of access to justice rises and legal aid budgets shrink.

With this in mind, the Australian Government Productivity Commission draft report, *Access to Justice Arrangements*, was delivered earlier this month. It recognises the obvious: that SRLs can be at a disadvantage in the more adversarial settings in higher courts.⁴ It notes that the civil justice system needs to better accommodate SRLs and that the changes needed to do this would also benefit other court users.⁵ While simplifying forms and procedures and providing more information will assist SRLs, there are limits to the extent to which such measures can assist, especially in complex cases in higher courts. The draft report states:

"Self-represented litigants in higher courts need more direct and personalised forms of assistance. Equipping judges and court staff through training and clearer rules and guidelines is essential to give them the confidence to assist self-represented litigants while meeting their obligations of impartiality. Duty lawyer schemes can help, but legal assistance with basic, discrete tasks that could be offered to SRLs before their matter reaches court (or used to divert them away from the court system) also hold promise. SRLs should also be able to rely on assistance from non-lawyers, with appropriate protections in place."⁶

The draft report also notes that SRLs will be assisted by Commonwealth, State and Territory governments being required to act as model litigants.⁷

It makes a number of draft recommendations relevant to SRLs, including:

- parties represented on a pro bono basis should be entitled to seek an award for costs in a fixed amount set out in court scales;⁸
- governments, courts and tribunals should work together to implement consistent rules and guidelines on lay assistance for self-represented litigants;⁹
- jurisdictions should allow holders of all classes of practising certificates to work on a volunteer basis and introduce free practising certificates for retired or career break lawyers, limited to the provision of pro bono services, either through a community legal centre or a project approved by the National Pro Bono Resource Centre modelled on the approach currently used in Queensland;¹⁰
- jurisdictions should adopt the Victorian government's use of a pro bono "coordinator" to approve firms undertaking pro bono action.¹¹

Although we can and will do more in the Queensland Court of Appeal to better assist SRLs in preparing and presenting their cases and to encourage further

⁴ 19.

⁵ 20.

⁶ 20.

⁷ 20.

⁸ 61.

⁹ 63-64.

¹⁰ 73.

¹¹ 74.

extension of pro bono representation, I am comforted that our SRLs enjoy some measure of success. In the last financial year they were successful in 16 per cent of their civil matters.

In criminal matters last financial year, they were successful in just over 10 per cent of their matters, but in 2010-2011 a success rate was a whopping 25 per cent.

After a meeting with LAQ's CEO and the Chair of its board, I have arranged for our research officer to send copies of judgments where SRLs who were refused legal aid were successful, in case this assists LAQ in improving its assessment process. Overall, SRLs in the last financial year were successful in 11.3 per cent of their matters, but in 2010-2011 they were successful in almost 25 per cent of their matters overall.

These figures suggest our present system is not entirely dysfunctional as far as SRLs are concerned.

Some unsuccessful SRLs will never be satisfied, but I am always the optimist. Thanks to this conference, which has focussed so many clever, experienced people of goodwill on the issue, and the energy, experience and initiative of the Queensland Court of Appeal judges and registry staff, I am hopeful that in the future more SRLs, even unsuccessful ones, will be satisfied with their Queensland Court of Appeal experience.

APPEALS INVOLVING SELF-REPRESENTED PARTIES

Number of cases in which judgment was delivered where one or both parties unrepresented	2010-11	2011-12	2012-13
Civil	32 (12.8%)	46 (17.3%)	31 (11%)
Criminal	64 (19%)	81 (19.9%)	75 (21.5%)
TOTAL	96 (16%)	127 (19%)	106 (17%)

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SUCCESS RATE OF SELF-REPRESENTED PARTIES

Civil Matters

	2008-09	2009-10	2010-11	2011-12	2012-13
Successful	5	3	3	8	5
Unsuccessful	31	34	29	38	26
Total Civil Matters:	36	37	32	46	31
Percentage Successful	14%	8.1%	9.4%	17.4%	16%

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SUCCESS RATE OF SELF-REPRESENTED PARTIES

Criminal Matters

	2008-09	2009-10	2010-11	2011-12	2012-13
Successful	11	16	16	20	7
Unsuccessful	65	51	48	61	68
Total Criminal Matters:	76	67	64	81	75
Percentage Successful	14.5%	23.9%	25%	24.7%	10.3%

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SUCCESS RATE OF SELF-REPRESENTED PARTIES

Overall

	2008-09	2009-10	2010-11	2011-12	2012-13
Successful	16	19	19	28	12
Unsuccessful	96	85	77	99	94
Total Matters:	112	104	96	127	106
Percentage Successful	14.3%	18.3%	24.7%	22%	11.3%

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