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Foreword

This is the second edition of these guidelines. The preparation of the first edition reflected an increasing phenomenon of litigants appearing without legally qualified representation, which is a continuing phenomenon.

The courts have long recognised the considerable increase in numbers of self-represented litigants. In 2000, the Family Court issued a research report, *Litigants in Person in the Family Court of Australia,* which highlighted the difficulties caused by increasing self-representation before that court and, subsequently, the Australian Institute of Judicial Administration issued a report, *Litigants in Person Management Plans: Issues for Courts and Tribunals*, which also explored the issue.

The need for these guidelines was brought home to McColl JA when, in her role as president of the Bar Association, she was talking with barristers, particularly in the family law jurisdiction, who noted how stressful it was to deal with litigants in person. She hoped that a preparation of guidelines such as these would enable members of the Bar to identify clearly the parameters within which they should work when dealing with self-represented litigants.

The first edition of the guidelines was prepared under the auspices of the New South Wales Bar Association's Family Law Committee, but principally though a great deal of hard work by Brian Knox (now Knox DCJ). He consulted widely in undertaking the exercise. In addition, the penultimate draft of the first version of the guidelines was distributed for comment to the High Court, the Supreme Court of NSW, the NSW Industrial Relations Commission, the NSW Land and Environment Court, the District Court of NSW, the Compensation Court of NSW, the Local Court of NSW, the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Service for comment. The Bar Association is grateful to those courts for the input we received from them in relation to the guidelines. This second edition, which updates the guidelines by reference to some of the recent cases and changes to the barristers' rules, was prepared by Garry McGrath SC, Alastair McConnachie and Christopher Winslow.

I commend a thorough reading of these guidelines to all members. I congratulate McColl JA, the Family Law Committee and Knox DCJ on producing in the first edition a work of outstanding assistance to the bar and also thank those involved in preparing this second edition.

Bernard Coles QC

President

Objective and functions

1. Under the *Legal Profession Act 2004* (NSW) (the Act) practise as a barrister is subject to the 'barristers' rules', which comprise the rules made by the Bar Council and, in so far as they apply to a barrister, any joint rules made by the Bar Association and the Law Society Council.[1] The rules made by the Bar Council are the *New South Wales Barristers' Rules*. Those rules record the paramount duty of barristers to the administration of justice and set out duties and responsibilities of barristers to the courts or other bodies and persons before whom they appear, their clients and colleagues. These guidelines should be read subject to the barristers' rules, not as imposing additional obligations, but as a means of assistance where particular issues arise in a barrister's dealings with self-represented litigants.[2]

Duties of barristers

2. Subject to their paramount duty to the administration of justice, a barrister's primary duty is to their client.[3] A barrister should, however, exercise their own forensic judgment and give advice independently and in accordance with their paramount duty to the administration of justice, notwithstanding any contrary wishes of their client. The import of these guidelines is that the long term interests of barristers' clients are best served by the facilitation of a fair hearing. There is little or no point, for example, in achieving a successful result for a client which is set aside on appeal for want of natural justice or procedural fairness to a self-represented litigant.[4]

3. Several of the barristers' rules may give rise to potential problems for barristers in proceedings involving self-represented litigants. For example, there is general prohibition restraining a barrister from conferring or dealing directly with the party opposed to the barrister's client.[5] Further, a barrister must take reasonable steps to avoid the possibility of becoming a witness in the case.[6] Very real difficulties may arise where, for example, a barrister deals directly with a self-represented litigant in relation to settlement negotiations and an issue later arises as to what was or what was not said in the relevant discussions and whether or not an agreement was reached in those discussions.

Barrister's assessment of the self-represented litigant

4. In each case a barrister should assess the intelligence and other personal attributes of the self-represented litigant affecting the litigant's capacity to understand and conduct their own case. In large measure the way in which the barrister pursues their own duties will depend upon that assessment, together with the nature of the case, the stage to which the proceedings have progressed and the implications for the barrister's client of the course of action pursued by the litigant in person.

5. Such factors as the intelligence and personal attributes of the particular self-represented litigant are appropriate matters to be taken into account by a trial judge also in their dealings with a self-represented litigant.[7] The court will also take account of the requirement to prevent the unnecessary expenditure of public and private resources.[8]

Barrister's assessment of the impact of the self-represented litigant

6. It is almost impossible to predict the circumstances when a litigant in person's conduct might affect a case or the reactions of the various other parties to the case, but a barrister needs to be conscious of the impact that the self-represented litigant is having, or is likely to have, on other participants in the court processes. In most cases, the ability to understand and deal with these issues will depend on the experience of the particular barrister. A summary of some common areas of complaint and difficulty are set out below.[9]

Impact on the barrister's client

7. A barrister will usually be conscious of the reactions of her or his own client to the self-represented litigant, particularly where (as in the family law or domestic relationships jurisdictions) the proceedings may be seen as 'the continuation of war by other means'. Commonly that reaction is one of frustration and anger, particularly when the self-represented litigant seeks to cross-examine the barrister's client using knowledge gained over the years of the marriage or relationship which has honed the ability to 'press the buttons' of their former spouse or partner.

8. Particularly where inflammatory material has already been filed in the proceedings by a litigant in person, or where belligerent or offensive behaviour has previously been manifested by him or her, a barrister should explain the procedures of the court and prepare their client, well in advance, as to the desirability of not over-reacting to statements or questions that may be designed to antagonise or upset the client. Even where there is no emotional relationship between parties, a barrister should prepare their own client for the cross-examination by a self-represented litigant, which is likely to be quite different from cross-examination by a legal representative.

9. A barrister should also be aware that their client may resent having to pay legal fees (which can often be increased substantially by the attitude and conduct of the self-represented litigant), while the court is perceived by the client as doing more than it ought to do to help the self-represented litigant. Such issues, perceptions and questions that may be raised by the client, such as 'Why is the judge helping them so much?', can be minimised by the barrister explaining to their client at the earliest opportunity the court processes and the potential problems that may arise where the other party is a litigant in person.

10. There can also be frustration and annoyance on the part of the barrister's client by reason of the fact the prospects of reaching a settlement are likely to be significantly reduced in cases where the opposing party is a self-represented litigant. Costs orders may not always provide a remedy in such instances. In some jurisdictions, for example, the starting point is that each party is to bear their own costs.[10] It is suggested that, when faced with an unreasonable self-represented litigant, a barrister should take steps to become acquainted with those provisions of the relevant legislation that enable the court or tribunal to make costs orders against parties by reason of their conduct[11] or where the proceedings are frivolous or vexatious. Such factors may also be discretionary considerations in relation to costs orders in other jurisdictions.

Impact on the judicial officer

11. Where one or more of the parties is a self-represented litigant, the principal effect on the judicial officer is to increase the time spent on the case, both before and during the trial. Other effects on judicial officers may include more delays than is usual, more adjournments than usual, more judicial work, frustration, anger at staff (by reason of errors in documents, lost documents or other issues), increased stress and raised blood pressure.[12]

Impact on the court system

12. The general impact of a litigant in person upon the court system is one of an increased demand on time, costs and resources.[13] That impact is felt by all court personnel (ranging from judicial officers to registry staff and court officers) who, while not being able to give legal advice, are required of necessity to explain the court processes and procedures to the litigant. Further, decisions involving self-represented litigants often need to be documented to a greater degree than in other cases.

13. Self-represented litigants often have difficulty identifying and pleading a cause of action, which may result

in more interlocutory proceedings or confused and lengthier trials.[14] Proceedings involving self-represented litigants also frequently involve more mentions and return dates, as well as more administrative tasks, than other cases. When asked to estimate the length of a hearing or trial, a barrister should take into account that when the opposing party is a self-represented litigant, this will often add to the length of the hearing.

14. Barristers should consider whether the particular litigant in person is perceived to be or is likely to be vexatious or violent and, where necessary, the barrister should ensure that appropriate notifications are made and arrangements put in place through the proper channels and at the appropriate time. Most courts have a protocol which should be followed in such situations.[15]

15. Different courts and tribunals have different approaches to, and expectations of, self-represented litigants. Kirby P (as he then was) referred to the trend towards the 'creation of expert tribunals with specialised judges and other members, novel standing rights and modified procedures aimed to facilitate, if not actually encourage, persons to pursue, or defend, their legal rights without the necessity of securing legal practitioners to represent them'.[16]

16. Some bodies, such as the Administrative Appeals Tribunal, were established to deal with significant numbers of people who were not expected to obtain legal advice or representation. Such tribunals often have systems designed specifically for cases involving self-represented litigants. One of the rules of survival for any barrister is to be aware of the culture, systems, expectations and rules (written and unwritten) of the particular court or tribunal in which he or she appears. It is particularly important for a barrister who is intending to venture into a court or tribunal that is new to him or her to ascertain whether there are any different approaches or systems in that court or tribunal, which might affect the conduct of the case.

Impact on the self-represented litigant

17. Research indicates, not unexpectedly, that self-represented litigants experience stress, frustration, desperation and heightened emotions. They often feel intimidated and frightened, disadvantaged, angry, fearful, anxious and bitter.[17] A barrister must be aware that, in these circumstances, acting professionally and courteously – often to the extent of 'turning the other cheek' – may avoid unnecessary confrontation, complaint or delay.

18. Self-represented litigants may also be suspicious of the independence of judges and resentful that they are unable to receive assistance from legal aid or from the legal profession or the court itself (which may be perceived by the self-represented litigant as a publicly funded body that ought to be there to provide such assistance to him or her).

Impact on the barrister

19. Generally cases involving self-represented litigants are more difficult than other cases and require greater interpersonal skills of patience and adaptability on the part of the barrister. Barristers must retain their composure, objectivity and commitment to their duties and obligations, notwithstanding the frustration experienced where, for example, the motives of a self-represented litigant may appear to be other than the pursuit of justice. For example, the litigant in person may be seeking the extraneous benefit of delaying or frustrating any ultimate decision[18] and may be availing himself or herself of the fairness afforded to a self-represented person in order to advance that extraneous purpose.

20. Similarly, where the barrister's perception is that a self-represented litigant is obsessed by the litigation and is unable to exercise rational judgment in relation to it, great care needs to be taken by the barrister so as not to become embroiled in apparently personal attacks or criticisms which may emanate from the

litigant. In such circumstances, it is suggested that the refutations of any such inflammatory comments should be made by the barrister in as professional and non-personalised a way as is possible.

Assessment or comment on motive of a self-represented litigant

21. The reasons why the litigant in person has not employed a lawyer may be both complex and cumulative. In the majority of cases, at least one of those reasons is financial. There may be a tendency to draw a distinction between those litigants who choose to represent themselves, preferring to keep their money for other things, and those litigants who are forced to represent themselves because they are unable to fund legal representation, but that should not be done as there is no relevant difference between them.[19]

22. It is not the function of the barrister to be influenced in their conduct of the case by any judgment he or she might make about the motives the self-represented litigant may be pursuing in appearing at court without legal representation. Not all self-represented litigants are a problem and they should not automatically be seen as such. Such judgments and any consequential submissions, if they are to be made at all, should be left to an appropriate stage of proceedings – for example, on a costs application.

23. Self-represented litigants have a right to appear in that manner and capacity.[20] While the individual party may appear for himself or herself, a related party may not necessarily appear as of right for the litigant. For example, in commercial litigation, where an individual and their company are parties, he or she may require leave of the court to appear for the corporation.

Decline of offer of legal assistance: criminal cases

24. In a criminal context in particular, it must be kept in mind that an accused does not become disentitled to a fair trial just because he or she has declined (or even perversely declined) an offer of legal assistance.[21]

25. When considering an application for a *Dietrich*[22] stay, the court will take into account whether or not the defendant has made reasonable attempts to obtain legal representation.[23] If the defendant cannot satisfy the court that the absence of legal representation has occurred through no fault of their own, a stay will not be ordered.[24]

Dealing with self-represented litigants: stages of proceedings

26. Litigants may choose to be or may become self-represented or, on the other hand, may obtain representation at different stages of proceedings. That can cause difficulties for a barrister, for example, where the barrister has relied upon on an assurance or undertaking as to the conduct of the hearing given to him or her by a professional opponent (for example, that a particular witness need not be called at the trial for cross-examination), only to discover that their colleague no longer appears for the opposing party. The self-represented litigant may deny knowledge of any such assurances or undertakings, or claim not to be bound by them. Once a barrister learns that an opposing party is no longer represented, it would be advisable to review the brief and notes of proceedings and, if appropriate, to confirm any such undertakings or assurances or have available a copy of the transcript recording the assurance or undertaking if it was given (it is hoped with the now unrepresented litigant present) in court.

27. Various circumstances in which a barrister may be involved with self-represented litigants and which may lead to difficulties are discussed below.

Before hearing

Failure to comply with case management/procedural orders

28. Self-represented litigants often fail to identify a known cause of action in their pleadings.[25] Sometimes they may also be ignorant, or even contemptuous, of the importance of interlocutory orders made by way of case management. Such case management orders are no lesser orders than other orders of the court and 'it is not for litigants, appearing in person or otherwise, to pick and choose which orders they will obey, or when they may condescend to comply with them'.[26] In *Tate's Case,*[27] for example, the self-represented litigant's non-compliance with the orders for discovery of documents, together with other conduct, led to orders being made for the ultimate hearing to proceed on an undefended basis. When the self-represented litigant then sought to appear and cross-examine at the final hearing, that application was refused by the trial judge and the refusal was upheld on appeal.

29. Where a self-represented litigant refuses to comply with procedural orders, particularly where there is a demonstrable flavour of truculence or contempt in relation to that non-compliance, experience (as well as the barrister's client's interest) suggests that the non-compliance should be brought to the court's attention sooner rather than later. It is suggested that the barrister should firstly arrange for their solicitor to notify the self-represented litigant in writing of the orders which have been made, the alleged non-compliance, the impact of it on the litigation (both in respect of the barrister's client and the court program), and that costs will be sought against the self-represented litigant and the quantum of those costs.

30. As a general proposition, it may be prudent to conduct such correspondence by way of an open letter in order to minimise any potential dispute as to the content of communications and so that it can be tendered and quickly summarised in court.

Anticipation/notification of issues which may arise at hearing

31. The fact that an opponent is appearing in person and is a non-lawyer does not mean that the conduct of the case will be made easier or the issues less complex for the barrister. Often the reverse is the case. The best service a barrister can render to their client, when opposed to a self-represented litigant, is to ensure that every stage of the litigation is meticulously prepared and presented by the barrister. It is particularly important in such cases to avoid any suggestion, let alone reality, of a 'trial by ambush'.

32. There is probably, strictly speaking, no requirement for a barrister to notify a self-represented litigant before the hearing of the submissions which may be made by the barrister at trial or as to any evidentiary matters that are likely to arise at the trial. Similarly, in criminal trials, there is no obligation on a prosecutor to give advance notice to an accused of a legal issue which may arise during the trial.[28] Common sense would dictate, however, that a trial judge is likely to grant an adjournment where a particular submission or issue, when raised, catches the self-represented litigant by surprise. In that regard, it must be remembered that many submissions or issues will be 'new' or unfamiliar to the litigant in person. In order to ensure that the hearing proceeds as expeditiously as possible, a barrister should anticipate such an adjournment application by providing the self-represented litigant with reasonable advance notice of any major matters that the barrister anticipates may arise at trial. If, for example, a barrister intends to refer to an authority in the hearing, it is suggested that he or she should have their solicitor provide a copy of it beforehand to the self-represented litigant, with a view to forestalling the otherwise almost inevitable adjournment application to enable the self-represented litigant to consider the authority.

Service of material: criminal matters

33. In criminal matters it is necessary for a prosecutor to serve on an accused all material which may be relevant to their guilt or innocence.[29] However, when doing so, the prosecutor should be particularly careful to ensure that inappropriate material (such as the address of a witness who is under the witness protection scheme) is not given to a self-represented accused. Prosecutors should be careful also to ensure that a self-represented accused in custody will be able to readily gain access to the material provided by the prosecutor. For example, if compact discs or other audio media are provided as part of the prosecution brief or papers, then the accused must have access to suitable computing or audio equipment. Similarly, if a self-represented accused person does not speak English, then the documents should either be translated or the accused should have access to an interpreter.

Likely non-appearance of self-represented litigant

34. In some cases a reasonable anticipation may arise that a self-represented litigant will not appear at the hearing or that he or she will not comply with any judgment or final orders of the court. In such circumstances, consideration should be given by the barrister to seeking appropriate machinery provisions as part of any final orders made by the court. For example, it may be wise to seek an order appointing a registrar of the court to sign documents on behalf of the other party in the event of that party's default. In that event, it would be particularly advisable to notify a self-represented litigant of any proposed amendments to the final orders sought to include such machinery or enforcement provisions, as well as the effect of such orders, well in advance of the trial and be able to prove service of that notification at the trial.

Confirmation of non-representation: criminal matters

35. In criminal matters it is advisable for a prosecutor appearing against an unrepresented accused to have the matter listed for mention so that the accused can confirm that he or she does not desire legal representation. This enables the Bench to advise the accused of the desirability of obtaining legal representation and avoids an application for an adjournment on the day of the hearing based on that ground. For a practical guide to these matters, see R Cogswell and P White, *Prosecuting a Case Where There is an Unrepresented Defendant or Accused.*[30]

36. The prosecutor should also check that there has been no appeal against any decisions to withdraw legal aid, which could operate as a statutory stay of proceedings.

Interlocutory proceedings

37. Research shows that in cases involving self-represented litigants a great deal of time of the courts (and often that of the opposing party) is taken up at preliminary/interlocutory stages when the litigant in person's lack of legal knowledge and expertise and, on occasions, lack of judgment about the case and the necessary evidence, first become apparent.

38. It is suggested that to avoid future problems in the course of proceedings, the barrister should endeavour to ensure that the self-represented litigant is always sent a copy of any interlocutory orders or timetable made by the court. If there has been history of difficulties, either experienced or caused by the particular self-represented litigant – for example, non-compliance with existing orders – it may also be advisable to ensure that the copy of the interlocutory orders or timetable is accompanied by a letter setting out the relief, orders or timetable which will be sought on the next occasion when the matter is before the court.

39. In criminal matters a trial judge must inform an unrepresented accused person of their right to a *voir dire* where an issue arises that should be determined in the absence of a jury (such as voluntariness of a confession).[31] Prosecuting counsel should peruse the evidence carefully before the opening address, in order to ascertain whether there are any issues in the case that would be appropriately dealt with on a preliminary *voir dire*. This is more so the case in matters where the accused person appears for himself or herself.

40. Where a barrister comes to the view that the entire action by a self-represented litigant is misconceived or that there is no evidence to support it, the barrister may be asked to advise on whether an interlocutory application should be brought to dismiss or strike-out the proceedings.

41. A barrister should be aware that the reluctance on the part of some judges to entertain such applications is often increased when the opposite party is a litigant in person. A barrister should be aware also that, on a strike out/ summary dismissal application, the court may suggest to the litigant in person that an amendment to a pleading is necessary to establish a cause of action.[32] Depending on the circumstances, often it may be better in such cases to seek expedition of the final hearing.

42. In extreme cases, substantial difficulties may arise where the litigant in person is prepared to make extraordinary allegations (including alleging that there has been misconduct by lawyers or judicial officers), without particulars and in the absence of any fear of costs consequences because he or she is impecunious.[33] In seeking to deal with such issues, in *Morton v Vouris*, Sackville J granted a self-represented litigant leave to apply to amend a statement of claim, provided, however, that any such application for leave was to be accompanied by affidavits in appropriate form showing that there were facts which could probably be proved and which, if proved, would support the general statements made in the amended statement of claim.

43. Analogous situations may arises in commercial cases when a self-represented party files a dubious defence. It mighy be appropriate in such cases, in order to 'flush out' a defendant who simply wants to deny everything, to seek an order at an early stage requiring the defendant to serve an affidavit deposing to all of the relevant facts and circumstances comprising that defence. It has been suggested, as an alternative, that it may be appropriate to seek an order that the proceedings upon the objectionable pleading be stayed until an amended pleading, certified as having been settled by a legal practitioner, is served by the self-represented litigants. Such an application may well, though, conflict with the right of a party to appear on a self-represented basis.

Adjournment applications

44. Self-represented litigants often ask for an adjournment, either prior to the trial or during the trial, in circumstances where the barrister may believe that no adjournment is necessary or that the circumstances necessitating the adjournment are due primarily or wholly to the fault of the litigant in person.

45. In *Titan v Babic*[34] the full court of the Federal Court commented that where it is apparent a litigant in person has misunderstood procedural requirements, so that he or she is not in a position to complete the presentation of evidence, an adjournment might be considered in the interests of justice, provided that no irreparable substantive or procedural injustice is done to the other party. The granting of an adjournment is always a matter of discretion. In that case there was no intelligible explanation given at first instance for Mr Titan's failure to arrange his witnesses. The full court held that there had been no error on the part of the master, who (at a hearing for the assessment of damages in a personal injury action) had not granted the adjournment or inquired further, because Mr Titan's misunderstanding that he was precluded from

calling further witnesses was not apparent from anything he had said to the master. The failure flowed from the plaintiff's own misunderstanding of what he could and could not do at the hearing.

46. Some courts may more readily grant an adjournment when it is sought by a self-represented litigant.[35] Appellate courts are particularly concerned to ensure that self-represented litigants are given every opportunity to explore at trial the rights which they may have or appear to have.[36] However, all courts are also concerned to apply case management legislation, and past leniencies may not be repeated in that new climate.

47. A barrister opposing an adjournment application made by a litigant in person should be prepared to argue the merits of the application, in terms of: the notice that the self-represented litigant has had of the proceedings; any non-compliance by the litigant with the requirements to file their evidence; and the prejudice to the barrister's client that is likely to arise from the granting of any adjournment.

During hearing

48. The overarching obligation upon the court is to ensure a fair hearing.[37] In meeting that obligation in cases where one or more of the litigants appears in person, the role of the court is to prevent the destruction of the unrepresented person's case by the traps which our adversary procedure offers to the unwary and untutored party, while at the same time remaining astute to ensure that the court does not extend its auxiliary role so as to confer upon the litigant in person a positive advantage over their legally represented opponent.[38] An unrepresented party is subject to the applicable rules of court just as much as any other litigant.[39] The court will, however, carefully examine what is put to it by a litigant in person to ensure that he or she has not, because of the lack of legal skill, failed to claim rights or put forward arguments which he or she might otherwise have done.[40]

Raising irrelevant matters/submissions not justified on the evidence

49. A common complaint is that judges extend too much leniency to self-represented litigants in making submissions. There may be a perception that judges sometimes take the line of least resistance and let the self-represented litigant 'get it off their chest', in circumstances where the barrister's client has been advised that the very matters which are the subject of address by the self-represented litigant are irrelevant or inadmissible. In some instances a self-represented litigant may be seeking to evoke the sympathy of the court by referring to their extraneous life circumstances.[41] In appropriate cases, it is part of a barrister's function to draw the court's attention to an attempt to raise irrelevant issues or to adduce evidence which is outside the pleaded case or to make submissions which go beyond the terms of the pleadings.

50. The *New South Wales Barristers' Rules* prevent a barrister making any submission (which exceeds the evidence) on their client's behalf.[42] The rule is designed to protect the administration of justice, by ensuring that courts are not misled and that court time is not wasted. In appropriate cases, a barrister should seek to ensure that a similar obligation is observed by self-represented litigants. For example, the barrister may ask the court to remind the self-represented litigant that submissions, unless supported by admissible evidence, will not be taken into account by the court in reaching its decision. Where the submissions of a self-represented litigant go beyond the evidence, a barrister should ordinarily bring it to the attention of the court.

51. It is open to a judge to object to evidence on behalf of a self-represented litigant, rather than simply advising the self-represented litigant of their right to take an objection to the evidence.[43] Some legislation

expressly requires the court to assist a litigant in person in certain circumstances, by, for example, informing a litigant in person of their rights to make applications or take objections in relation to privileged materials.[44]

52. A judge may, on the other hand, elect to provide general advice to the self-represented litigant to the effect that he or she has the right to object to inadmissible evidence and inquire whether he or she does so.[45] As mentioned, the judge is not obliged to provide such advice on each occasion that circumstances give rise to a potential objection in the course of proceedings.

53. Similarly, a judge may indicate, in specific terms or generally, that parts of the self-represented litigant's own evidence are inadmissible. In *Re F: Litigants in Person Guidelines*, for example, the judge pointed out that the self-represented litigant's affidavit was replete with clearly inadmissible material, largely of a hearsay nature and gave examples. The judge said that, rather than go through the whole of the affidavit, he preferred to proceed upon the basis that he would take no notice of those matters that were clearly inadmissible. On appeal the self-represented litigant argued that he was entitled to know which portions of his affidavit were inadmissible. The full court of the Family Court held that the trial judge's obligations did not extend that far. It was held to be sufficient for a trial judge to advise the self-represented litigant generally as to the sort of evidence that would not normally be admitted into evidence. Nonetheless, a barrister confronted with an affidavit of a litigant in person that contains inadmissible material may consider it advisable to take both: a general objection at the commencement of the relevant part of the hearing; and, specific objections to any inadmissible parts of such evidence that are of substantial importance to the case, so that there can be no suggestion that the self-represented litigant did not know the evidentiary basis on which the case was proceeding at trial.

Harassment/embarrassment of a party/witness by a self-represented litigant

54. Situations frequently arise, particularly in the family law or domestic relationships jurisdictions, where self-represented litigants use the court proceedings as an opportunity to embarrass or harass their former partner. This may or may not be deliberate. Regardless of the intention of the self-represented litigant, in many cases cross-examination of the former spouse or partner is likely to have this effect or appearance.

55. Rules of evidence and the principles underlying the barristers' rules which prevent barristers from making unwarranted allegations or suggestions under privilege or from posing questions designed principally to harass or embarrass a witness[46] or from cross-examining on credit,[47] equally apply to the self-represented litigant. In appropriate cases, an objection should be taken to 'unduly annoying, harassing, intimidating, offensive, oppressive or repetitive' cross-examination of witnesses by a self-represented litigant.[48]

Excessive time taken in submissions or addresses

56. There are specific rules requiring barristers to limit evidence, including cross-examination, 'to that which is reasonably necessary to advance and protect the client's interests' and to 'occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake'.[49] It is suggested that the principles underlying those rules are equally applicable to litigants in person. It is, of course, a matter of judgment as to when the issue of delay, time wasting or excessive length of submissions by a litigant in person should be brought to the attention of the trial judge. The maxim concerning 'people who live in glass houses, not throwing stones' should be borne in mind by a barrister.

Failure to call evidence

57. Courts have commented from time to time that a barrister should bring to its attention the fact that the opposing self-represented litigant has not called evidence essential to their case, prior to the conclusion of the case.[50] It has been suggested, however, that this does not represent the law in NSW and should not be followed here.[51] A judge's sympathy for a litigant in person may be aroused, if the judge forms the view that the self-represented litigant may have a sound case but that there are some gaps in the pleadings or presentation of evidence caused by that party's lack of knowledge of legal procedures.[52] If such circumstances arise, it will be of benefit to the barrister's client if he or she can point out to the court that the gaps in the self-represented party's case simply cannot be filled.

58. In *R v Zorad*[53] the Court of Criminal Appeal held that the duty of a trial judge to give an unrepresented accused such information and advice as is necessary to ensure a fair trial would include: if it became necessary, explaining the form in which questions should be asked, but not to putting the questions in that form for the accused; giving advice that, notwithstanding a ruling on a *voir dire* as to the voluntariness of admissions, the accused is permitted to raise the same factual matters before the jury: such advice is necessary to ensure that the unrepresented accused is put in a position where they can make an effective choice as to the exercise of their rights (but does not extend to advising them how this may be done); and, where comment is going to be made in relation to the failure by the accused to comply with the rule, advice of the existence of the rule in *Browne v Dunn*.

59. An unrepresented accused is obliged in certain circumstances to comply with the rule in *Browne v Dunn*, but he or she must be warned about the existence of the rule before any adverse comment is made.[54]

60. A barrister is under no obligation to volunteer information favourable to a self-represented litigant unless, by not doing so, he or she leaves the court with an erroneous view of the evidence or the law. The *New South Wales Barristers' Rules* do, however, require a barrister to correct any express concessions made by an opponent (including a self-represented litigant) in relation to any material fact, case law or legislation, if the barrister believes the concession was in error and there is knowledge or reasonable belief of that error.[55]

61. A prosecutor's duty in a criminal matter is more stringent and requires a barrister to 'assist the court to arrive at the truth'.[56] Prosecuting counsel does have, by way of further example, a duty to correct any error made by an accused (represented or unrepresented) in submissions on sentence.[57]

Confusion between evidence and submissions

62. Many self-represented litigants do not appreciate the distinction between giving evidence and making submissions. The Court of Appeal has made it clear that the procedure of allowing a litigant in person, even without objection, to say in court what he or she wants to say by way of evidence, from the bar table and without oath or affirmation, is irregular and should not be permitted.[58] The court also said that the litigant should be made to understand that if the course of giving sworn evidence is adopted, he or she will be exposed to cross-examination to test whatever he or she has said by way of evidence.

Duty of a barrister

To the court and to their client

63. A barrister's paramount duty is to administration of justice. That duty may operate to the potential disadvantage of a barrister's client by, for example, requiring that the barrister should not mislead the

court or withhold from it documents and authorities which detract from the client's case.[59] Silence, in some circumstances, may amount to misleading conduct by a barrister.[60]

64. Difficulties can arise where a judge in a case involving a self-represented litigant asks a barrister representing an opposing party to explain to the court the self-represented litigant's case as well as the barrister's own client's case. In the course of litigation, a barrister is under no obligation to help a self-represented litigant run their case or to take any action on behalf of the self-represented litigant. Similarly a barrister is under no obligation to make submissions on behalf of the litigant in person, although those matters may often be accommodated within the barrister's own duty, to their client to meet and deal with the opponent's case, and to the court.[61] During the course of the litigation, although not obliged to assist self-represented litigants run their case, a barrister should, however, adopt a professional, accommodating and courteous approach at all times.

Conduct and language

65. A barrister should avoid conduct or language which indicates a familiarity with the judge to an extent that there is an appearance of unfairness or imbalance.[62] That duty must be observed punctiliously in cases where an opposing party is a self-represented litigant.

66. In similar vein, care should be taken to ensure that the language used by the barrister does not confuse a self-represented litigant. The use of abbreviated terms or legal jargon, suggesting a form of 'insider' knowledge, is inappropriate. A self-represented litigant may not only find it confusing, but may also resent the case being conducted in a way that means he or she cannot understand what is happening. It may, in turn, also give rise to resentment on the part of the barrister's own client, if the judge then undertakes the task of translating the jargon into comprehensible language for the litigant in person. Similar considerations apply where the self-represented litigant does not speak English fluently or is using an interpreter.

Role of the court in cases involving self-represented litigants

67. Various courts and tribunals have set out guidelines for judges or tribunal members at first instance in relation to their duties in cases involving self-represented litigants and the assistance that may be given to such litigants. One factor which will determine the extent of such duties or assistance is whether or not the court or tribunal is bound by the rules of evidence and procedure.[63]

68. In *Davidson and Aboriginal and Islander Child Care Agency,*[64] the full bench of the Australian Industrial Relations Commission set out guidelines as to the assistance that members could provide to parties. Depending upon the circumstances, such assistance may include: identifying the issues which are central to the determination of the proceedings; drawing a party's attention to the relevant legislative provisions and key decisions on the issues being determined; asking a party questions designed to elicit from him or her information in relation to the issues which are central to the determination of the particular proceedings; assisting a party to conform to the principle in *Browne v Dunn* or other procedural rules designed to avoid unfairness; and, drawing a party's attention to the relative weight to be given to bar table statements as opposed to sworn evidence. A member of the commission may also intervene, to an appropriate extent, by asking questions of witnesses on behalf of the litigant in person. In performing such a role it is appropriate for a member to clear up a point that has been overlooked or left obscure, to obtain additional evidence to better equip the member to choose between the witnesses' versions of critical matters, to exclude irrelevancies and discourage repetition, to ask admissible questions which a party is unable, for the moment, to formulate, or to facilitate expedition in the progress of the proceedings. A

member's role in asking questions of a witness may be 'greater where a party is unrepresented or ineptly represented'.

69. Often in self-represented matters, your opponent can in effect be the judge. Accordingly, barristers have to be careful to remember that the judge is the party that they are seeking to persuade and therefore it may not be necessary to take every point. In *Johnson v Johnson*[65] and *Re F: Litigants in Person Guidelines,*[66] the duties of trial judges in proceedings involving self-represented litigants were discussed by the full court of the Family Court of Australia. In summary only, the comments of the full court were to the following effect:

    a) In order to ensure a fair trial, a judge should ensure as far as possible that procedural fairness is afforded to all parties, whether represented or appearing in person.

    b) A judge should inform a litigant in person of the manner in which the trial will proceed, the order of calling witnesses and the right which he or she has to cross-examine the witness.

    c) A judge should explain to the litigant in person any procedures relevant to the litigation.

    d) A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation.

    e) If a change in the normal procedure is requested by the other parties, such as the calling of witnesses out of turn, the judge may, if he or she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and their right to object that course.

    f) A judge may provide general advice to a litigant in person to the effect that he or she has the right to object to inadmissible evidence and enquire whether he or she does so. A judge is not obliged to provide advice on each occasion that a right to object to particular questions or documents arises.

    g) If a question is asked or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, the judge should inform the litigant of their rights.

    h) A judge should attempt to clarify the substance of the submissions made by the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are ignored, obfuscated or given little attention.[67]

    i) Where the interests of justice and the circumstances of the case require it, a judge may: draw attention to the law applied by the court in determining issues before it; question witnesses; identify applications or submissions which ought to be put to the court; suggest procedural steps that may be taken by a party; and clarify the particulars of the orders sought by a litigant in person or the bases for such orders.

70. The full court of the Family Court did not intend the above to be an exhaustive list and there may well be other interventions that a judge may properly make without giving rise to an apprehension of bias. A barrister must be familiar with these matters, with a view to ensuring that a judgment in proceedings where the opposing party is a litigant in person is protected, so far as it is possible to do so, against the risk of being set aside on appeal.

71. This increasing trend towards self-representation has led in some quarters to the suggestion that a judge's role may need to change, from that of 'an umpire, presiding over an adversarial contest' to a more interventionist or inquisitorial role.[68]

72. The adoption by the court of a more inquisitorial role, in cases where one or more of the parties is a self-represented litigant, is more likely to occur where there is a specific duty imposed on the judge to look and protect interests beyond those of the parties to the proceedings. In children's matters, for example, the court must look to the best interests of the child and where there is no separate representative for the child, and particularly where one or more of the parties is a self-represented litigant, the court's role may need to go beyond that of 'the umpire in an adversarial dispute'.

Conduct of judicial officers in cases involving self-represented litigants

73. What a judge must do to assist a self-represented litigant depends on the litigant, the nature of the case, and the litigant's intelligence and understanding of the case.[69] Excessive intervention in a case by the trial judge, however, may breach the judge's duty to observe procedural fairness to both parties, so as to constitute an error of law.[70]

74. A judicial officer must ensure that he or she does not intervene to such an extent that he or she can no longer maintain a position of neutrality in the litigation.[71] A judicial officer should not give legal advice to a litigant in person. Doing so may not only give the appearance of unfairness to other parties, but the advice may be given without full knowledge of the facts.[72]

75. There is, of course, a distinction between the court explaining to a litigant the procedural choices available to him or her and, on the other hand, advising the litigant what decisions to make. For example, a judge may explain the form of questions to be asked, but should not put the questions into that form for the unrepresented party.[73]

76. Failure by a barrister to object to excessive intervention by the trial judge may constitute a waiver or may preclude subsequent complaint. The objection should be taken at the earliest opportunity.[74]

77. Taking objection to intervention by a judicial officer or making a recusal application can be among the most difficult and stressful tasks for a barrister. The difficulty may be exacerbated in a case where one of the parties is a self-represented litigant, as the judge may feel compromised (even to the extent of 'walking a tightrope') by the need to help the self-represented litigant and, at the same time, remaining, and appearing to remain, impartial.[75] If time and circumstances permit, a barrister might be wise to seek the guidance of a senior colleague before he or she makes a submission that the trial judge ought to recuse himself or herself from further hearing a case.

Settlement negotiations

78. The *New South Wales Barristers' Rules* do not contemplate a barrister normally conferring with or dealing with an opposing party.[76] However, it is extremely difficult for a barrister opposed by a self-represented litigant not to deal with the opposing party during the course of a hearing. On occasions, a barrister may be directed to do so by the judge, for example, to explain a matter to a self-represented opponent or to see if some aspect of the proceedings may be settled between the parties.

79. A barrister should ensure that a solicitor or clerk is present during any settlement negotiations with a litigant in person and that a careful record is kept of what was said in the discussions. There are particular difficulties in this area where a barrister appears on a direct access brief.

80. If there is any doubt about the self-represented litigant's understanding of the situation or where, for example, it appears to the barrister during settlement negotiations that there are misunderstandings as to the terms or any implications, it is suggested that the barrister raise those matters before the terms

are approved, so that the basis of the self-represented litigant's understanding can be recorded on the transcript.

81. A barrister should be aware, however, that a trial judge may be disqualified from further hearing the trial if a settlement on the proposed terms outlined in court ultimately breaks down. The barrister should also be aware of the need to draft terms of settlement in clear and unambiguous (and, if possible, lay person's) language, particularly where one party is a litigant in person.

McKenzie friends and other representation

82. Self-represented litigants may ask for a friend or other person to represent them or assist them. Depending on the personalities and issues involved, that may be of assistance in settlement negotiations. However, when that request extends to having a non-lawyer appear for a party at a hearing, different principles and issues apply. A court normally has the power to permit a self-represented party to be represented by a lay person as an element or consequence of the inherent right to regulate the proceedings in their court.[77] It is a discretionary power and the discretion may be less likely to be exercised in favour of a litigant in a superior court.[78]

83. In *Hubbard Association of Scientologists International v Anderson and Just*, the full court of the Victorian Supreme Court commented that 'it has long been regarded in the higher courts as proper to refuse to exercise the discretion in favour of allowing the appearance of non-qualified persons (other than on merely formal matters such as adjournments) when the assistance of qualified persons is available to give the courts help in the administration of justice'.[79] Whether those comments apply in cases where the litigant in person is unable to get the assistance of qualified persons, whether by reason of the unavailability of legal aid or otherwise, is beyond the scope of these guidelines.

84. The role of the 'McKenzie friend' is a limited role. The role has generally been limited to permitting the 'McKenzie friend' to 'take notes, quietly make suggestions and give advice' to the self-represented litigant.[80] It does not extend to taking part in proceedings. Whether a litigant in person should be allowed to have a 'McKenzie friend' present at his trial is a matter of practice and procedure and within the discretion of the trial judge to decide.[81] Courts have sometimes viewed such 'friends' as being 'potentially undisciplined and disruptive and beyond direct access in a disciplinary and controlling sense'.[82]

85. In the proceedings in the Family Court in *Cooke v Stehbens,*[83] however, the court permitted a party's mother to act as that party's advocate, both at trial and on appeal. In that case the represented party did not object to that course, it was clear to the court that the litigant in person (by virtue of her emotional state) was unable to represent herself, and for the court to have done otherwise may have necessitated an adjournment which would not have been in the best interests of the children who were the subject of the proceedings.

86. An example of the rejection of an application by a self-represented litigant for permission to be represented by another lay person in family law proceedings is provided by *KT v KJ and TH.*[84] The application was refused in that case, even though the self-represented litigant 'appeared unable to make any submissions whatsoever without [the other lay person] writing out word for word the submissions to be made'. It should be noted, however, that the other lay person in that instance had already been declared to be a vexatious litigant.

87. In deciding whether or not to advise their client to oppose such an application, a barrister will need to make a careful judgment as to how justice will best be served in the particular case, weighing up their own client's interests, the other options available, and the likely attitude of the court.

Endnotes

1. *Legal Profession Act* 2004 (NSW), s 81. The proposed national scheme, embodied in the *Legal Profession National Law*, is in similar terms but incorporates by reference the *Legal Profession National Rules*.
2. *Legal Profession Act* 2004 (NSW), s 81(2). Parts 9.1.2 and 9.1.3 of the *Legal Profession National Law* are in similar terms.
3. *New South Wales Barristers' Rules*, r 37.
4. See, for example, *Johnson v Johnson* (1997) FLC 92-764; (1997) 22 Fam LR 141; *National Australia Bank v Rusu* (1999) 47 NSWLR 309; *Santamaria v Administrative Appeals Tribunal; Department of Human Services* [1998] VSC 107.
5. *New South Wales Barristers' Rules*, r 51.
6. *New South Wales Barristers' Rules*, r 17.
7. *Abram v Bank of New Zealand* [1996] ATPR 41-507; *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438 (per Sackville, North and Kenny JJ).
8. *Corporate Affairs Commission of NSW v Eddie Solomon Holdings Inc.*, unreported CA NSW, 1 November 1989, per Mahoney AP at 8.
9. Much of the material in the first edition of these guidelines was taken from pp 49–54 of the Family Court of Australia research paper '*Litigants in person in the Family Court of Australia*' by Professor John Dewar, Barry Smith and Cate Banks – the substance of it is adopted also in this second edition.
10. *Family Law Act 1975* (Cth), s 117 (1).
11. *Family Law Act 1975* (Cth), s 117 (2A) (c).
12. *Litigants in person in the Family Court of Australia: Research Report No. 20*, by Professor John Dewar, Barry Smith and Cate Banks, p 51. See general discussion of these factors in *Cachia v Hanes* (1994) 179 CLR 403, per Mason CJ, Brennan, Deane.
13. See general discussion of these factors in *Cachia v Hanes* (1994) 179 CLR 403, per Mason CJ, Brennan, Deane, Dawson and McHugh JJ at 415. Note also that there are, in some courts, schemes enabling the court to inititate a pro bono referral of a litigant in person to practitioners (*Uniform Civil Procedure Rules* Part 7, Division 9, Rules 7.33-7.42; *Federal Court Rules 2011*, Division 4.2; *Federal Magistrates Court Rules* 2001, Part 12). In relation to such pro bono referrals, see also *Chi Chau Phu v Department of Education and Training (NSW)* [2011] NSWCA 119, per Young JA.
14. See the comments of McMurdo P in *Ross v Hallam* [2011] QCA 92 at [8]–[16].
15. See, for example, Supreme Court of NSW Fact Sheet '*Vexatious Litigants*'. See also *Vexatious Proceedings Act 2008* (NSW).
16. *Burwood Municipal Council v Harvey* (1995) 86 LGERA 389; 1995 NSWSC CA 51 at p 9.
17. See, for example, *Principal Registrar, Supreme Court of New South Wales v Katelaris* [2001] NSWSC 506, in which McLellan J heard an application for contempt arising from senior counsel for the plaintiff being hit in the face with a copy of the judgment by a self-represented defendant.
18. See, for example, the comments of the court in *Winn v Blueprint Instant Printing Pty Ltd (No 3)* [2011] FCA 742, per Dodds-Streeton J at [12].
19. *In re an Inquiry into the Mirror Newspaper Group Newspapers PLC* [2000] Ch 194, per Sir Richard Scott V-C at 218 – G.
20. *Judiciary Act 1903* (Cth) s 78; *Federal Court Rules 2011*, r 4.01; *NSW Supreme Court Rules* Pt 4 r 4.4. See also *Collins (aka Hass) v The Queen* (1975) 133 CLR 120 per Barwick CJ, Stephen, Mason and Jacobs JJ at 122.
21. *MacPherson v R* (1981) 147 CLR 512 at 525. See also L Byrne and CJ Leggat, '*Litigants in Person*' (1999) 19 Aust Bar Review 41.
22. *Dietrich v R* (1992) 177 CLR 292.
23. *Kay* (1998) 100 A Crim R 367.
24. *Batiste* (1994) 77 A Crim R 266.
25. See, for example, *Primrose v Cooloola Shire Council* [2007] QPEC 057; [2007] QPELR 596; see also *Du Boulay v Worrell* [2009] QCA 63 (Keane, Muir and Fraser JJA).
26. *Tate* (2000) 26 Fam LR 731 at 746.
27. *Tate* (2000) 26 Fam LR 731, at 741-744.
28. *Dietrich v R* (1992) 177 CLR 292.
29. *New South Wales Barristers' Rules,* r 86.
30. R Cogswell and P White, *Prosecuting a Case where there is an unrepresented defendant or accused,* unpublished paper, 3 November 1992 (copy in Bar Association Library).
31. *MacPherson v R* (1981) 147 CLR 512.
32. See, for example, *Wentworth v Rogers* (No 5) (1986) 6 NSWLR 534 at 536; *Morton v Vouris* (1996) 21 ACSR 497 at 513–4.
33. See the comments of the court in *Morton v Vouris* (1996) 21 ACSR 497, per Sackville J at 520. See *Du Boulay v Worrell* [2009] QCA 63, per Muir JA at [68]-[71].
34. *Titan v Babic* (1994) 49 FCR 546 at 554–555 (Northrop, Neaves, Ryan, French and O'Loughlin JJ); applied in *Schiffer v Pattison* [2001] FCA 1094 at [58]–[59].
35. See *Jarrett v Westpac Banking Corporation* [1999] FCA 425 (Unreported, Federal Court (Full Court) 16 April 1999).
36. See *Dawson v DCT* (1984) 56 ALR 367 at 368 (full court of the South Australian Supreme Court).
37. *Jeray v Blue Mountains City Council (No 2)* [2010] NSWCA 367, per Allsop P at [5].
38. *Rajski v Scitec Corporation Pty Ltd* [1986] NSWCA 1, per Samuels JA at 27; *Minogue v Human Rights and Equal Opportunity Commission* (1999) 166 ALR 129. See also *Du Boulay v Worrell* [2009] QCA 63, per Muir JA; *Wills v Australian Broadcasting Corporation* (2009) 253 ALR 228 per Rares J; *McMurtrie v Commonwealth* [2006] NSWCA 148, per Ipp J at [46]; *Malouf v Malouf* [2006] NSWCA 83, per Mason P (with whom McColl JA and Bryson JA agreed) at [94] and [100]; *Reisner v Bratt* [2004] NSWCA 22, per Hodgson JA at [4].
39. *Du Boulay v Worrell* [2009] QCA 63, per Muir JA at [69].
40. *Rajski v Scitec Corporation Pty Ltd* (Unreported, NSWCA, 16 June 1986), per Mahoney JA at 56.
41. See, for example, Meagher JA's comments in *Abriel v Bennett* [2003] NSWCA 323.
42. *New South Wales Barristers' Rules*, r 63.

43. See *National Australia Bank v Rusu* (1999) 47 NSWLR 309 at 311.
44. *Evidence Act* 1995 (NSW), s 132. Note also that s 120 of the Commonwealth and NSW Evidence Acts extends '*client legal privilege*' to litigants in person, by providing a specific privilege (in terms similar to ss 119(a) and (b)) in relation to relevant communications for the dominant purpose of preparing for or conducting an *existing* proceeding.
45. *Re F:Litigants in Person Guidelines* 27 Fam LR at 544 and 551.
46. *New South Wales Barristers' Rules*, rr 35(c), 37 and 38.
47. *Evidence Act* 1995 (NSW), s 41(1), in particular s 41(1)(b).
48. *Evidence Act* 1995 (NSW), s 41(1)(b).
49. *New South Wales Barristers' Rules*, r 57(d) and (e).
50. *Laferla v Birdon Sands Pty Ltd,* Unreported, SCNT, per Mildren J, 21 August 1998 at 14.
51. '*Litigants in person: procedural and ethical issues for barristers'*, Louise Byrne and Craig Leggat, (1999) 19 Aust Bar Rev 41.
52. 'Unrepresented litigants in the Land and Environment Court of New South Wales', a paper present by Neil Williams SC to the 2010 Environment and Planning Law Association (NSW) Conference at Kiama, 23 October 2010, at 36–39.
53. (1990) 19 NSWLR 91, per Hunt, Enderby and Sharpe JJ at p 99.
54. *R v Zorad* (1990) 19 NSWLR 91.
55. *New South Wales Barristers' Rules*, r 28.
56. *New South Wales Barristers' Rules*, r 82.
57. *New South Wales Barristers' Rules*, r 93.
58. *Randwick City Council v Fuller* (1996) 90 LGERA 380, per Handley JA at 3.
59. *Giannarelli v Wraith* (1988) 165 CLR 543 at 556.
60. *Commonwealth Bank of Australia v Mehta* (1991) 23 NSWLR 84 at 88; *Demagogue Pty Ltd v Ramnesky* (1992) 39 FCR 31 at 32.
61. In *Serobian v Commonwealth Bank of Australia* [2010] NSWCA 181, per MacFarlan JA at [42] comments, in terms of a duty to court, on the requirement of barristers to assist the court to understand the submissions of a litigant in person.
62. *New South Wales Barristers' Rules*, r 44.
63. See, for example, *Fair Work Act 2009* (Cth), s 591.
64. Unreported, AIRC, 12 May 1998, No. 534/98, at 9.
65. (1997) FLC 92-764.
66. (2000) 22 FamCA 348; 27 Fam LR 517.
67. *Neil v Nott* (1994) 121 ALR 148 at 150.
68. '*Litigants in person, unreasonable and vexatious litigants'*, Review of the Civil and Criminal Justice System, Law Reform Commission of Western Australia, at p 154.
69. *Abram v Bank of New Zealand* [1996] ATPR 41-507
70. *Burwood Municipal Council v Harvey* (1995) 86 LGERA 389 per Kirby P.
71. *Minogue v Human Rights and Equal Opportunity Commission* (1999) 166 ALR 129.
72. *Johnson v Johnson* (1997) FLC 92-764; (1997) 22 Fam LR 141.
73. *McPherson v R* (1981) 147 CLR 512; *R v Gidley* [1984] 3 NSWLR 168.
74. See *Vakauta v Kelly* (1989) 167 CLR 568 at 572 and 577; *Livesey v NSW Bar Association* (1983) 151 CLR 288.
75. Family Court of Australia research paper '*Litigants in person in the Family Court of Australia*', in, by Professor John Dewar, Barry Smith and Cate Banks, pp 45–49.
76. *New South Wales Barristers' Rules*, r 52.
77. *Federated Engine-Drivers and Firemen's Assn of Australasia v Broken Hill Pty Co Ltd* (1913) 16 CLR 245, per Griffith CJ at 249; *O'Toole v Scott* (1965) 65 SR (NSW) 113; [1965-66] 39 ALJR 15 at 19. See also the cases discussed in *Helmhout v Apostoloff* [2011] ACTSC 2, per Refshauge J at [33]–[46].
78. *Hubbard Association of Scientologists International v Anderson and Just* [1972] VR 340.
79. *Hubbard Association of Scientologists International v Anderson and Just* [1972] VR 340 at 343.
80. *McKenzie v McKenzie* [1970] 3 All ER 1034 at 1036.
81. *Smith v The Queen* (1985) 159 CLR 532 [PDF]; 71 ALR 631 Gibbs CJ at 534; 633.
82. *Re B* [1981] 2 NSWLR 372, per Moffit at 385–6.
83. (1998) 24 Fam LR 5.
84. *KT v KJ and TH* (2000) 26 Fam LR 289.

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