

NATIONAL ACCESS TO JUSTICE AND PRO BONO CONFERENCE

SYDNEY 2008

STREAM 4 – WORKING TOGETHER – SELF-REPRESENTATION

Even in good economic times, if you can't afford a lawyer, the hardest legal service to find is representation for civil litigation:

- there is very limited legal aid in civil law;
- pro bono is generally restricted to public interest matters and litigation is the hardest to place. Since 2002, only 18% of all QPILCH referrals have involved litigation;
- most community legal services are not geared for litigation except in specialist areas.

It is not surprising then that many people with civil law problems will DIY.

Since QPILCH began in 2002, a number of self-represented litigants were seeking our help, but we did not have the capacity to assist as many were not public interest matters, even though the QPILCH committee regards self-representation as a public interest issue.

Modern business practice suggests that if you don't know your customer and what their problems are and what they value, you will not be successful. Law firms have adopted this approach to their clients. In Australia, we are only now starting to fully understand the

needs of litigants who self-represent or who have difficulty understanding and navigating the legal system.

For these reasons, in 2006, QPILCH embarked on a project to assist self-represented litigants in the Court of Appeal (a manageable number) by conducting research with Brisbane's QUT on the needs and attitudes of litigants in person. We also conducted a seminar with judges of the Queensland Court of Appeal and members of the bar and law society on their experiences with self-represented litigants.

The findings of this research, along with visits to the Citizens Advice Bureau at the Royal Courts of Justice in London and self-help services in Minnesota informed the development of QPILCH's self-representation civil law service

Findings of the research and data from first 10 months of operation

Our initial research confirmed the research that has occurred primarily in USA.

QUT survey of litigants in the Court of Appeal

Respondents to a survey of self-represented litigants in the Court of Appeal indicated that the primary reason for not retaining a lawyer was financial. 85% of respondents indicated that they applied unsuccessfully for legal aid at some stage of the litigation.

One respondent stated that the main reason for her self-representation was “I knew the case personally” and would only have accepted representation “depending on what quality and sincerity it was”.

Several respondents commented that a lawyer would either not adequately ventilate their issues or would be unable to see the real issues in their claim. One respondent said they had obtained a pro bono lawyer but had dismissed the lawyer because they were not aggressive enough in pursuing the litigant’s grievances.

Some litigants expressed deep suspicion of publicly funded pro bono lawyers on the grounds that we (I include myself in that class) will put in an effort commensurate with what we are paid rather than what we are ethically required to do.

Four respondents indicated that previous lawyers were involved in conspiracies and professional misconduct.

About 50% of respondents had been self-represented in other litigation – one had self-represented on four occasions, and one on six occasions.

15% of respondents were represented at the trial but self-represented at the appeal stage because they were financially unable to continue the professional relationship.

Our experience in the first 10 months of operation of our dedicated self-representation service, has given us a slightly different perspective.

Experience of the Self-Representation Civil Law Service

The image of the self-represented litigant as a grumpy, middle-aged man with an improbable story of an appalling injustice entitled to millions in compensation from a shopping list of government departments, politicians and corporations is quite different from the reality that we have encountered over the past year.

Just over a quarter of our clients have indicated that they have a disability. However, this is only marginally higher than the national average, which is 20%. Some of our clients have required an interpreter to assist them, but only a few. We have clients who identify as Aboriginal, but once again, only a few. We have some clients who are in prison and we have one or two clients who are in and out of hospital.

Our clients are also evenly distributed between men and women and range in age from young adults to retirees. The majority of our clients live in the greater Brisbane and Gold Coast area, however one in four of them live outside the south-east corner. And although we certainly see our share of dubious claims, of the two thirds of applications that we receive where proceedings are already on foot,

our client is just as likely to be the defendant or respondent, as the plaintiff or applicant.

In fact, the only unifying feature, which is common to more than 90% of our clients, is that their stated income precludes them from being able to afford a lawyer. And while 85% of our clients state that their annual income is less than \$40,000, nearly half have, nevertheless, already obtained legal advice about their matter from a solicitor or barrister prior to seeing us.

Feedback obtained from nine past clients shows that eight were self-represented because they could not afford a lawyer. The remaining client stated that she did not retain a lawyer because she does not trust lawyers – she has since been back in contact with our service and is receiving more assistance as her matter approaches trial.

So, despite the common preconceptions, self-represented litigants are an extremely diverse group. Perhaps the only common theme is that they are almost all under financial pressure, and most of them would have a lawyer advocating for them if they could afford it.

And if the economy continues to decline, and CLCs are reporting an increase in repossessions etc, it is likely that the number of litigants in person will rise.

The SRCLS attempts to address the needs of litigants in these circumstances.

With the support of the Chief Justice of Queensland, the Honourable Paul de Jersey AC (who had previously visited the RCJ CAB), our service was funded and launched by the Queensland Attorney-General, the Hon Kerry Shine MP, in December 2007 as part of the new *accessCourts* initiative.

accessCourts

accessCourts has a three tiered approach based on best practice in dealing with LIPs:

- a registry based service to assist people to access forms and procedural requirements, use the internet for research and to copy cases
- the Court network for Humanity, to give litigants emotional and other support through the proceedings, and
- QPILCH's legal service.

In the time allotted to me, I will cover how the QPILCH part of accessCourts operates, how we interact with the courts and why I think it is working effectively.

Mechanics

The service operates in the civil trial jurisdictions of the Supreme and District Courts. We have an office in the courts complex, and give

some limited assistance by email to litigants in regional areas. We have an annual budget of \$111,000 for:

- a three-days per week paralegal, who:
 - ensures applicants meet our criteria
 - organises the file
 - obtains court documents
 - prepares a summary for the lawyers
 - oversees appointments
 - organises the volunteer roster and
 - liaises with the registry service and the Court Network.

- a full-time solicitor:
 - interviews clients in three hour-long appointments
three mornings per week
 - supervises volunteer work
 - monitors all files
 - undertakes follow-up work
 - organises training and
 - is the primary contact with on-going clients.

There are 130 volunteers from 12 firms who provide advice three afternoons per week. Firms commit to one session per month.

The ability of the service to provide such productive appointments and assist even in very complex matters is due to the quality of our volunteers. The volunteer appointments are ordinarily attended by a

senior and junior practitioner, with a partner or senior associate available to them by telephone for assistance if required.

For the most part, the volunteers have significant litigation experience and, having received background information about each of the appointments 2 days in advance, are well prepared to provide an exceptionally high standard of advice. Unlike many community legal centres, where the volunteer practitioner may be required to provide assistance on the spot with little or no information in advance, our volunteers always attend well-prepared and as a result, the one hour appointments are extremely productive.

To support the volunteers, expert practitioners are on call by phone if needed, and a panel of 21 barristers can assist in complex cases.

We have also established a panel of 7 barristers and 2 retired solicitors to help litigants in the Court of Appeal.

We provide an attenuated form of legal assistance, called in various jurisdictions – limited retainers; unbundled services; discrete task assistance. We do not represent the client. We provide step by step assistance to enable the litigant to continue to represent themselves through the proceedings. This has primarily taken the form of drafting and amending pleadings and other court documents.

This may sound straight forward, but we have had some teething problems. Most solicitors are used to providing full representation to

their clients and can be uncomfortable with the change of role to providing restricted assistance. Some volunteers are anxious to give clients the full assistance the client needs, but this is not possible given the time and resources we have.

Another important aspect of the service is that we will see anyone with a civil law problem at a first meeting. This initially troubled some member firms who believed our service should only assist clients with meritorious cases and with insufficient means to afford a lawyer.

However, it was always envisaged that if a matter lacks legal merit we should try to divert the client towards more appropriate remedies.

Of 86 applicants assisted from last December to the end of June 2008, 26 approached us before filing a claim and 21 of these did not commence proceedings. Of the five who proceeded, two continue to receive assistance from us, two are now being represented by member firms and one has continued without our help.

We will not provide ongoing assistance to clients who have sufficient funds for a solicitor.

While the cost of legal representation is a significant factor contributing to the high number of unrepresented litigants in the civil

jurisdiction, the provision of impartial legal advice at the time we see them can therefore play an important role in reducing that number.

Where we cannot divert an unmeritorious matter, we can at least help the client get their case in order. Importantly, we are not encouraging them to proceed, just recognizing that as some are determined to continue in any event, it is better that they have some assistance than none at all, although nothing that gives them false hope or facilitates the court being misled or causes undue delay.

I think the most valuable service that we are able to provide, valuable for our clients and the courts, is that we are able to directly assist clients to amend their pleadings and draft other court documents so that they accord with the rules and state the material facts as clearly and concisely as possible.

Our Files

Clients seek our assistance with any and every type of civil claim imaginable: from planning and environment actions, judicial review of government and tribunal decisions, disputes over the ownership of cars, retaining walls and multi-million dollar riverfront properties, negligence claims, an unusually high number of defamation claims, de facto property disputes, franchising disputes, trust disputes, credit and debt proceedings, and wills and estates matters.

For the majority of our clients, proceedings are already underway when they seek our assistance, some having been on foot for more than a decade.

Unfortunately, we sometimes receive requests for assistance at the 11th hour, days before a trial, a summary dismissal hearing or the expiration of a limitation date. In a very small number of instances, we are unable to assist the client at such short notice – sometimes, because we simply don't have an available appointment.

Fortunately, even where clients seek our assistance in the days before a trial, we are ordinarily able to schedule at least one appointment to discuss the trial process with the client and to help them be better prepared to argue their case.

For the most part, we receive applications for assistance either when the money for a solicitor has run out, or shortly after the client has commenced proceedings and becomes aware that getting their side of the story across is not as simple as filing a statement of claim or defence which closely resembles *War and Peace*.

Appointments are conducted in an office where clients have their own computer screen which allows them to follow the court documents as they are being drafted by the solicitor. Wherever possible, volunteers are told in advance exactly what procedural step the client requires assistance with at their appointment so that a particular step is achieved at each appointment.

Of course, in some of our more complex matters, drafting an amended pleading in a one hour appointment is simply not possible. As part of our client intake process, we inspect the key documents on the court file and ascertain exactly what the dispute is about and what state the pleadings are in. This allows us to provide a concise summary of the matter to the volunteer to ensure that the maximum can be achieved in the one hour appointment. Sometimes, clients will have several appointments to discuss and amend one particular pleading.

In one case, involving 11 years of proceedings over a life insurance policy, the client has attended 4 separate appointments over a month to amend his statement of claim.

Other times, complete court documents can be finalised in one sitting.

The extent of assistance provided varies on a case by case basis according to the client's needs and the complexity of their dispute. In several matters, we have assisted the client from the commencement of their proceedings, seen them through disclosure and a directions hearing and assisted them to prepare for trial. We have also assisted several clients to finalise their matter.

Randomly, we received three files from defendants who had the same plaintiff. In the first, the plaintiff had made an application for summary judgment. Over a number of meetings, we helped the

defendant draft the defence which had a good ground for at least part of the amount claimed and also assisted the client to commence settlement negotiations. The second and third clients had a similar defence, but the plaintiff had already obtained a default judgment in one and a summary judgment in the other. Subsequently, the plaintiff went into liquidation. We then referred the clients to a member firm for negotiating settlement with the liquidator. Two have now settled at extremely favourable terms for the clients and the third is still in train.

Regardless of whether we provide a single appointment or have sustained contact with the client throughout their proceedings, clients are always given information, encouragement and assistance with pursuing informal resolutions wherever possible. Particularly bearing in mind the financial pressures facing most of our clients, the general experience is that our clients are extremely receptive to being provided with the information and assistance necessary to initiate informal settlement dialogue with the opposing side.

The financial resources of our clients can be as much a deterrent to obtaining mediation as it is to full representation.

One client was offered mediation by the plaintiff at shared cost. Our client was unable to meet that cost, so we found a solicitor from a member firm willing to mediate the dispute on a pro bono basis and our client approached the other party who readily agreed to the

mediation. Four clients have been referred to member firms to assist with settlement negotiations since June.

Of nine clients recently surveyed as part of our file closure process, only one indicated that they had been offered any form of mediation during the proceedings, yet six of the nine said they would have attended mediation if it had been offered.

We have now established a mediation panel and referrals for mediation and settlement negotiations are likely to become an increasing feature of our service.

The earlier we see potential litigants, the greater likelihood of diverting cases to other avenues of assistance or ADR and the earlier we see clients whose cases are already on foot, the better the chance of getting their case in order.

Training and oversight

To ensure continuous improvement, we held a volunteer feedback session in September and we have an ongoing training program. In March, we held a seminar for volunteers in dealing with difficult clients. Since April, we have had four drafting seminars and will soon be holding a seminar to hone interviewing skills in dealing with clients in the one-hour appointments.

The service is supported by a reference group lead by retired Supreme Court justice Mr Martin Moynihan AO QC to give guidance

on our policies and procedures. At the reference group's instigation, a barrister prepared a detailed opinion on our procedures and documentation.

We have carried out a first evaluation of the service. I have brought copies for you if interested.

The Supreme and District Courts have appointed Justice White and Judge McGill respectively to liaise with our service, and our staff members meet regularly with court registry staff and staff of the Court Network to ensure good communication between the services.

Challenges

Some challenges remain.

- As I mentioned earlier, we had 86 clients in the first seven months of operation to the end of June. In the four months from July to October, we have had 93. The courts are increasingly referring litigants to us, yet we have only a three day per week position to intake and administer the files.
- And of course, with clients, managing expectations of the service can be difficult as we cannot necessarily get any better results than if they are not assisted.
- And the clients' worst enemy, themselves, is something that we have to contend with. I had a client last week who I drafted a

notice of appeal for and sent it to him to check and file. He sent it back after filing and he had changed it significantly, adding some incomprehensible paragraphs.

- Matters have been adjourned by courts in the morning till the afternoon session for clients to consult with us, when even a seven day adjournment cannot be sufficient for assistance in complex cases, especially as we can be booked up weeks in advance.
- Some jurisdictions have amended professional rules to provide protection for practitioners undertaking limited retainer work and some jurisdictions have amended court rules to take account of this type of legal assistance, for example, making it easier for solicitors to go on and off the record. Such developments are probably some time off in Queensland.
- Some specific issues such as environmental law are difficult to service because few of our volunteers have that expertise. As more people become concerned about environmental protection, this is a need that is also likely to increase. The need for specialisation poses a challenge to make an effective response, so we are developing some specialist panels in order to meet this challenge.

Conclusion

The Queensland accessCourts initiative is achieving real and positive outcomes. Some very deserving clients who were confused and feel hopeless are getting quality assistance and excellent results, some are heeding early advice about the futility of proceeding, and hopefully the courts are benefitting from a reduction in unmeritorious cases and the better organisation of the cases that continue.

accessCourts is another good example of different agencies 'working together' – funding from government, coordination by a community legal service, support from the profession, complementary services by the courts, support from the judiciary, and involvement with other community agencies to deliver a holistic service to clients.

Thank you for listening.

Tony Woodyatt and Judith Douglas

14 November 2008