



Précis Paper

Self-represented litigants and family violence

A discussion about a research project conducted at the University of Technology, Sydney exploring the impact and effect of self-representation by one or both parties in Family Law proceedings involving allegations of family violence. The research was funded by Australia's National Research Organisation for Women's Safety (ANROWS).

A full copy of the report is available at <https://www.anrows.org.au/publication/no-straight-lines-self-represented-litigants-in-family-law-proceedings-involving-allegations-about-family-violence/>

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Self-represented litigants and family violence

In this edition of BenchTV, Jane Wangmann (Senior Lecturer, UTS Law Facility, Sydney) and Jackie Jones (Clinical Practitioner, UTS Law Facility, Sydney) discuss a research project conducted at UTS exploring the impact and effect of self-representation by one or both parties in Family Law proceedings involving allegations of family violence. The research was funded by Australia's National Research Organisation for Women's Safety (ANROWS).

Why was it needed?

1. There were a number of things that sparked the interest of the research team. For quite some time the Family Law Courts were experiencing quite high levels of self-representation. The Family Court of Australia in a recent annual report for 2019-2020, noted that 17% of litigants were unrepresented at some stage and in 5% of matters both parties were unrepresented at some stage. At hearing, the Family Court of Australia found that 21% had one party without representation at final hearing and 17% neither party had representation at a final hearing.
2. In 2015, the Australian Institute of Family Studies did a report and found that 65% of matters that were judicially determined had allegations of family violence.
3. The purpose of the research was designed to find out what happens when there is both self-representation and family violence in matters.

Parameters of the project

4. The project was an empirical project that did not involve much doctrinal research. The researchers were fundamentally concerned with how self-represented people experience family law proceedings and how the professionals that engage with them also experience the proceedings.
5. The project had two main components. Firstly, interviews were conducted with 35 people who had represented themselves or faced a self-represented litigant. There were also interviews conducted with 68 professionals, involving 22 judicial officers, 34 lawyers and 12 other professionals.

6. The second part involved an intensive case study component in which the researchers visited 8 court sites (metropolitan and regional), both family court and federal circuit court across 3 Eastern Seaboard states and observed over 500 both represented and unrepresented proceedings and then they looked at court files.
7. The parameters of this report in some respects were quite broad even though there were some limitations due to some funding restrictions due to just being on the Eastern seaboard.

Who are self-represented litigants?

8. Researchers found that self-represented litigants are very slightly more likely to be male. They are more likely to be respondents, particularly if they are men. If women were self-represented they were more likely to be applicants.
9. Self-represented litigants were found to be much more likely to appear in parenting proceedings than financial matters.
10. The main reason for being without representation is financial. They may be ineligible for legal aid, and particularly in metropolitan centres, the means test and the equity they have in their home often means that people are not eligible for legal aid.
11. The other reason is that people simply cannot afford the high cost of a lawyer.
12. There was also some concerning evidence from some of the women interviewed who described what appeared to them to be a deliberate strategy by the other side to deplete their funds. This meant that when they did have a lawyer there would be voluminous correspondence which would burn through their money until they were self-represented.
13. This is what they described, and what the research literature is starting to describe, as legal systems abuse.

Variability

14. Self-represented litigants vary enormously. Some can cope and do really well, managing their proceedings, both paperwork and in court, whereas others struggle at every turn. Therefore, it is impossible to talk about them as an homogenous group.
15. At the same time there is that level of variability, they also encounter amazing levels of variability. The judges differ, the courts differ, the legal advice they receive differs and the availability of services differs.
16. In terms of availability of services, a good example is the Family Advocacy and Support Service which provides lawyers and a support service for men and women but it only operates in metropolitan courts.

Complexity

17. At present there are two Federal Family Law Courts which have different rules and procedures.
18. Family law is an area with highly complex legislation that has been amended many times and case law that is difficult for the untrained to find what is significant to their matter.
19. There are also fragmented responses as when family violence is involved many families are engaging in civil protection orders or criminal law and family law at the same time.

Misalignment of expectations

20. There is often misalignment of expectations in regard to what self-represented litigants expect in court. They generally expect something to happen on the first day.
21. For lawyers who are encountering people who are representing themselves, it is really important to be able to explain what this process is like to be able to manage expectations.

The need for quality lawyering

22. It is essential to have quality and competent lawyering in the family law jurisdiction. Many of the judges spoken to in the course of the research project emphasised that like self-represented litigants, there are some lawyers who also do not perform very well.

Main areas covered in the report

23. The self-represented litigants interviewed were incredibly resourceful in getting information and advice. They engaged lawyers, often paying lawyers for advice along the way and often followed lawyers on social media or followed their blogs and used AustLII and Court websites.
24. On the other end of the spectrum, other self-represented litigants relied on closed social media support groups. Therefore, there is significant variability, quality and reliability of the information they were relying on.
25. Procedural information is rather easy to come by however substantive advice that you can only get from a lawyer is much harder for people to get. One of the gaps found that there are numerous services that are generally at the front end of a matter but for those matters that continue to litigate, they become more complex and these people who are still representing themselves need much more in-depth, ongoing advice.
26. The variability in something that is meant to be a Federal system was extremely striking. There was also variability between courtrooms in the same registry.
27. One of the key findings is around the paperwork issue; paperwork is critical in family law. If self-represented litigants do not get assistance with their paperwork, their case can almost fall apart and it can become a point of cross examination.

28. A key gap and one of the project's recommendations is to fund some legal services that do some more assistance about documentation because if you go into court with good documentation, you are in a far better place as a self-represented litigant than if your documentation is all over the place. If a lawyer has someone who they know will be self-represented, giving them some information about what the procedures will be like and the importance of paperwork, that it is the paperwork where the critical evidence comes in. This will assist self-represented litigants manage the proceedings as well as their expectations, much better.

Processes that could be implemented to assist self-represented litigants

29. Some things that may make an immediate difference for self-represented litigants are a central, authoritative place where they can find information. At the moment, there is good information on the family court's website, various legal aid commission websites, Federal Attorney General website, community legal centers but self-represented litigants need to search across all of those and make assessments about reliability.
30. It is suggested that the Federal Attorney General's department is the best place to implement a centralised source of information with all the links.
31. The other thing that would assist self-represented litigants is an expansion of FASS (the Family Advocate and Support Service). This service has duty lawyers and men's and women's support workers; however it only operates in metropolitan areas. It would greatly assist self-represented litigants to extend this service out to rural areas.
32. Another process that would assist is for assistance with preparing documentation and some investigation of models of legal advice for matters that continue to litigate.

Negotiations

33. Another key area that self-represented litigants find trouble with is around negotiations. Self-represented litigants did not expect negotiations at court. As a result, when the lawyer from the other side approached them to start to talk about narrowing issues in dispute, they were either defensive or they did not know what to do.
34. Therefore, some information available about the fact that negotiations happen around family law matters and also information for lawyers about thinking about how to approach a self-represented litigant in terms of giving them time is essential.

Safety at court

35. The report wasn't just about self-represented litigants but was also about family violence. Some self-represented litigants, particularly those who were victims, came to court without the awareness of the types of measures the court could have put in place as they

did not receive advice before court. These include processes such as safe rooms, giving evidence via audio and visual link or having separate exits.

36. Lawyers perform an important role whether representing the alleged perpetrator or alleged victim to give advice to ask a court about their safety measures
37. The courts have now amended their Notice of Risk forms and it now has an item on those forms that asks whether there are safety concerns when attending court. The focus on risk assessment and triage and a dedicated list are all good things that will see matters involving family violence have a better response from the court.

Training

38. A clear finding of the research is the need for more training and education of legal practitioners and judicial officers. It is unlikely for somebody who goes through their undergraduate or JD law degree to have any content on family violence unless they do family law as an elective.
39. Knowing the law is one thing but actually being able to respond well to alleged victims and perpetrators is another thing. This is what is meant by trauma informed lawyering.
40. There is really no dedicated space in the undergraduate or the JD degree to do this. There is a need to look at both the undergraduate degree or the JD, PLT, CPD and what happens in the workplace.
41. Not only do the victims of family violence make comments about lawyers minimising family violence or not documenting it very well in their affidavits, judicial officers have also made similar comments. To what extent do affidavits contain material that is material and probative, the judges interviewed were quite scathing of some of the affidavits.
42. More needs to be done for junior lawyers so they are better equipped to carry out the work as this area of work is challenging and difficult area of work. We need to look more actively into how family violence can be across all levels of legal education

Tips for practitioners

43. The report has a great deal in it for lawyers about family law, self-represented litigants and family violence. Self-represented litigants are a regular feature of the family law environment.
44. It is highly unlikely that there will be enough funding for everyone to always have a lawyer and as such self-represented litigants are a feature that we need to respond effectively to.
45. Lawyers need to know how to give useful advice to people who are about to represent themselves and they also need to know how to deal with a self-represented litigant.
46. The report gives lawyers insight into the self-represented litigant experience particularly in those matters which involve family violence.

47. It also gives lawyers dealing with alleged victims or alleged perpetrators advice and assists them to be more attentive to the way in which the legal system might be used to further perpetrate abuse and how lawyers can play a role in stopping that abuse from taking place.

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BIOGRAPHY

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Dr Jane Wangmann joined the Law Faculty in February 2010. She completed her PhD in the Faculty of Law, University of Sydney in 2009. Her doctoral thesis explored the use of cross applications in domestic violence protection order proceedings in NSW. Jane has worked in the area of domestic violence and the law for over 20 years as a solicitor in a community legal centre, as a senior policy officer in the NSW Attorney General's Department and in research.

Jackie Jones

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Jackie is a clinical practitioner in the Faculty of Law at UTS teaching undergraduate and post graduate students. She has completed the Graduate Certificate in Higher Education. Jackie is an experienced family law practitioner with over 35 years in practice. She is on the NSW Law Society Specialist Accreditation Committee (Family Law) and is a regular presenter on 'Traps in Family Law' for LawCover. She is a former board member of Collaborative Professionals (NSW) Inc.