



Erosion of Legal Representation in the Australian Justice System

A research project and report undertaken by the Law
Council of Australia in conjunction with:

Australian Institute of Judicial Administration
National Legal Aid
Aboriginal and Torres Strait Islander Legal Services

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Executive Summary

1. In 1994, the Law Council of Australia expressed its concern that insufficient levels of public funding would progressively alienate more and more disadvantaged Australians from the justice system. It predicted that the failure of public funding to keep pace with the actual cost of providing legal representation would provide a fundamental challenge to the principles and delivery of justice in Australia.
2. In 2002, the Law Council decided to test its earlier prediction. It undertook some research, in conjunction with the Australian Institute of Judicial Administration, National Legal Aid and the Aboriginal & Torres Strait Islander Services to examine whether there had been an erosion in the level of legal representation since 1994 and if so, the consequences of that erosion.
3. The report shows that there has been an erosion in the level of legal representation and that this has had a detrimental impact on the legal system and the delivery of justice. The report provides further evidence that:
 - there is a rise in the number of self-represented litigants for a variety of reasons, one of which is a significant lack of available publicly funded representation;
 - there is an inequity in access to representation;
 - legal aid fees are below the real cost of generally providing the necessary legal service and increases are needed to at least meet costs;
 - there is a significant withdrawal of experienced lawyers from publicly funded legal work;
 - there is some diminution in the quality of publicly funded legal representation;
 - the courts are disadvantaged by the increased number of self-represented litigants;
 - a greater investment in the public funding of legal representation is likely to result in cost savings to the court system and to the justice system as a whole.

4. The report did not seek to undertake a defensibly statistical analysis of the position. The lack of data available on the precise number of self-represented litigants appearing in courts and tribunals makes this impossible. Rather, the Law Council built on the data available by collecting the views of experienced legal practitioners, providers of publicly funded legal services and the courts to draw a picture of the difficulties experienced by disadvantaged Australians in accessing the justice system and the consequences for that system.
5. The report draws a series of conclusions and makes a number of recommendations. In particular, it concludes that the erosion of legal representation is having a major impact on the Australian legal system resulting in:
 - pressures to plead guilty or abandon cases due to lack of representation;
 - a serious ethical dilemma for private practitioners who desire to provide proper representation for disadvantaged clients but cannot do so within the fee restraints of legal aid;
 - delays in court proceedings and prolonged cases;
 - increased non compliance with court directions and procedures;
 - increased demands placed on judicial officers;
 - increased tension for judicial officers and lawyers between the desire to see justice done, and the need to remain impartial in the delivery of justice;
 - cost increases to the courts;
 - increased costs for represented parties;
 - increase in frustration and violence from clients in the courts;
 - the 'best interests of the child' in family matters not being served.
6. The report recommends that:
 - urgent attention be given to providing increased and secure funding for those bodies responsible for managing and delivering publicly funded legal representation;
 - a national task force be established from representatives of bodies providing publicly funded legal services to develop national guidelines and priorities for the delivery of those services;

- the Commonwealth Government modify the Commonwealth/State jurisdiction demarcation for federal legal aid funding to facilitate a more client-centred approach;
- as a matter of priority, the Australian Law Reform Commission conduct a detailed study of self-represented litigants and their effect on the Australian justice system;
- the coordination of regional services delivery by legal aid commissions, Aboriginal and Torres Strait Islander Legal Services, community legal centres and the private profession be strongly encouraged;
- there be innovative scholarship and subsidy schemes to encourage young people from rural and remote regions to become lawyers and that lawyers be encouraged generally to practise in rural and remote regions;
- a strategy be developed to implement an independent and regular review of legal aid fee scales which takes into account in a transparent way the actual cost to lawyers of providing private legal services and allows for those fees to be appropriately adjusted to a level which at least meets cost and is sufficient to retain the involvement of the more experienced lawyers to ensure equity of representation;
- there be a streamlining of the administration of grants of legal aid;
- Federal and State Courts be encouraged to continue to develop schemes to reasonably assist self-represented litigants and to collect, analyse and publish data on self-represented litigants and their impact on the courts.

Table of Contents

Chapter 1	1
Introduction	1
1.1 Background to the report.....	1
1.2 Research methodology	3
Chapter 2	6
Context and Key Issues	6
2.1 What is meant by erosion in legal representation?.....	6
2.2 Key findings from reviewed literature	9
2.2.1 Quantity without Quality	10
2.2.2 Results of Research	12
2.2.3 Causes of Self-Represented Litigants	14
2.2.4 Impact of Self-Represented Litigants.....	15
2.2.5 Responses by the Courts	17
Chapter 3	20
The History of Public Funding	20
3.1 Key Developments	20
3.1.1 The 1970s.....	20
3.1.2 The 1980s.....	21
3.1.3 The 1990s.....	21
3.1.4 The 2000s.....	24
3.2 Changes in funding from 1994-2002	24
Chapter 4	27
The Real Cost of Providing Legal Representation.....	27
4.1 Legal practice costs.....	27
4.2 Legal aid rates.....	29
4.3 Other cost and funding pressures	31
4.4 The Aboriginal and Torres Strait Islander Legal Services	32
4.5 Community Legal Centres.....	34
Chapter 5	35
Comments From Lawyers “at the front”	35
5.1 Numbers of self-represented litigants.....	35
5.1.1 Criminal Law	35
5.1.2 Family Law.....	35
5.2 Complexity of legally aided cases	36
5.3 Quality of representation	37
5.4 Strategies to maintain standards of representation	38
5.4.1 Withdrawing or refusing to take on legally aided cases because the ‘fees are so miserable’	38
5.4.2 Restricting the amount of work undertaken to reflect the actual amount of legal aid fee paid.....	40
5.4.3 Younger or less experienced lawyers taking on legally aided work - ‘juniorisation’	41
5.4.4 Increase in pro bono services	42

Chapter 6	45
Diminution of legal rights	45
6.1 Legal rights.....	45
6.1.1 Family law.....	45
6.1.2 Criminal law	45
6.1.3 Civil and administrative law	47
6.1.4 Rights to review in migration.....	48
6.1.5 Impact of the ‘indemnity crisis’	48
6.1.6 Simplification in review procedures.....	48
6.2 Regional variation.....	49
Chapter 7	51
Factors Contributing to the Erosion of Legal Representation	51
7.1 Legal aid and related issues.....	51
7.2 Changes to the resources of community and public legal advice bodies.....	55
7.3 Characteristic of self-represented litigants	56
7.3.1 Individuals who perceived that they could not afford legal representation	56
7.3.2 Individuals who felt that they could do better than a lawyer, or had a dislike of lawyers	56
7.3.3 Individuals who continued to act despite advice that their case was without merit ie ‘they knew better’	57
7.3.4 Individuals who wished to exact vengeance, or exercise power against another party, especially ex partners in family law matters	58
7.3.5 Individuals who chose to represent themselves no matter what “so that they can let fly in an unfettered manner” (F17).....	58
7.3.6 Individuals who worked out that they could manipulate the system.	59
7.3.7 Individuals who received advice from advocacy groups and proceeded with their support.....	59
Chapter 8	60
Consequences of the Erosion of Legal Representation	60
8.1 Lack of access to advice and representation in criminal matters	60
8.2 Pressures to plead guilty or abandon cases.....	60
8.3 Inadequately prepared cases	61
8.4 Delays and prolonged cases	62
8.5 Inequity in outcomes	65
8.6 Courts and court procedures.....	67
8.6.1 Cost transferral	67
8.6.2 Judicial officers and court staff.....	68
8.6.3 Pressure on judicial officers to ensure justice is done	69
8.6.4 Party non-compliance	71
8.7 Pressure on represented parties and their lawyers	72
8.7.1 Increase in costs for represented party.....	72
8.7.2 Sense of injustice.....	72
8.7.3 Impact on child representatives and children.....	73

8.7.4	Anger, frustration and violence	74
8.7.5	System difficulties	75
Chapter 9	.....	76
Conclusions and Recommendations	.....	76
9.1	Conclusions.....	76
9.2	Recommendations	78
Bibliography	.....	81
Appendices	.....	84
Appendix 1 - Activity Outline Statements	.....	i
Appendix 2 - Practitioner Interview Schedules	ix
Appendix 3 - Reports Summary	xiv

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Introduction

1.1 Background to the report

1. In 1994, the Law Council of Australia (“the Law Council”) voiced its concerns about the future of legal representation in Australia. In its publication *Legal Aid Funding in the 90s*, the Law Council foreshadowed that limited public funding of legal services would lead to an erosion of legal representation.
2. This particular report is the result of a research study initiated by the Law Council in 2002 to explore whether the situation anticipated in 1994 had been realised. The Law Council identified key participants in the justice system and in the provision of legal representation and obtained their support for undertaking this research. This study is a product of the work of the Law Council and its Legal Practice Section and Access to Justice Committee, the Australian Institute of Judicial Administration, National Legal Aid and Aboriginal and Torres Strait Islander Legal Services.
3. By bringing together evidence from major reports, inquiries and research studies, and information from those people who are at the forefront of providing legal services and legal representation in Australia, this report provides a unique insight into the fundamental challenges to the principles of justice raised by an identified erosion of legal representation in the period between 1994 and 2002.
4. The report has combined a range of research strategies to explore a number of key concerns the Law Council has about the possible impact of an erosion in legal representation on the access and delivery of justice. The Law Council believes:
 - that the provision of justice to the Australian community is fundamental to the continuing acceptance of the rule of law and to the stability of the community at large;
 - that in a predominantly adversarial system, justice and a fair result usually require access to skilled assistance;
 - while alternative dispute resolution has been trialled and to some extent implemented, consumers should be free to choose which dispute resolution option best suits them. It is still the case that many disputes have to be resolved through the court system;

- Australia has prided itself on being able to state that it has a fair and just system of law. Where legal representation is not available or used by a litigant, the integrity of the justice system is challenged.
5. Although the Law Council was careful not to prejudge the outcome of its research, a number of other key inquiries, commentaries and reports (a review of which is provided at Table 1 in paragraph 2.2) indicated that there was a strong foundation for its concerns that there had in fact been an erosion of legal representation in the eight years between 1994 and 2002.
 6. Since 1994, there has been a perceived rise in litigants in person in the court system. The impact of this has been seen to be detrimental to the legal process, resulting in delays and increased costs to both the court and the other parties in cases before the court, and in inequitable outcomes for both represented and unrepresented parties.
 7. The rise in litigants in person has occurred during a period when the law has become more complex, when there has been an increase in the number of potential 'legal events' for individuals and when there has been a consequent rise in legal need.
 8. In addition, there has been a perception that the public funding of legal services and representation has not kept pace with community need and real cost.
 9. It is a situation which has led Chief Justice Murray Gleeson to comment that:

“the expense which governments incur in funding legal aid is obvious and measurable, but what is real and substantial is the cost of the delay, disruption and inefficiency which results from the absence or denial of legal representation. Much of the cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid.” (Hon Chief Justice Murray Gleeson of the High Court of Australia, *State of the Judicature Speech* Australian Legal Convention Canberra 10th October 1999)
 10. This report explores the issues outlined above by establishing what is meant by erosion of legal representation and by reviewing recent Australian literature on the subject. It examines changes in public funding of legal services and representation over the relevant time period, the rise in pro bono work and the actual costs involved for

private legal practices providing legal representation for disadvantaged clients.

11. Finally, the report provides private practitioners with a voice. Their views about legal representation are presented through extracts from their responses to questionnaires distributed nationally by the Law Council.

1.2 Research methodology

12. In order to measure the extent and impact of the erosion of legal representation and rights before the courts from 1994–2002, the Law Council devised a research strategy which employed four main research tools.

13. **First**, a review was undertaken of the key reports, research studies and commentaries produced during the designated time period that dealt with the issues relating to the erosion of legal representation.

14. **Secondly**, the Australian Institute of Judicial Administration, National Legal Aid, the Law Council's Legal Practice Section and Access to Justice Committee and the National Aboriginal and Torres Strait Islander Legal Services were invited to provide information on a number of issues. These included:

- changes in the real costs of delivering publicly and privately funded legal representation including an examination of such matters as legal aid fees, court fees, overhead rates for private practitioners and fees for counsel;
- growth in overall costs of providing public and private legal representation including salaries, administration, information technology and other overheads;
- changes which may have affected the extent and quality of provision of publicly funded legal services to consumers including means and merit tests, policy and procedural guidelines, legal aid case funding caps and funding generally;
- the extent and nature of pro bono work engaged in by private practitioners;
- identifying or commenting on any erosion or diminution in legal rights;
- identifying any changes in demand for legal representation.

15. The information received from these key bodies has been incorporated into the main body of this report. The Activity Outlines, setting out the information requested from the participants in this project, are attached at Appendix 1.
16. **Thirdly**, the Law Council's Legal Practice Section engaged FMRC Legal Pty Ltd (FMRC Legal) to undertake an analysis of small to medium-sized firms in country, regional and city areas from 1994 to 2002. The purpose of this analysis was to conduct an examination of the cost of running a private solicitor's practice together with any increases to those costs over the period and the impact (if any) on the ability of lawyers who owned such practices to continue to accept publicly funded work and to provide pro bono services. There was a focus on legal practices that in the past had traditionally provided community services. The Activity Outline for FMRC Legal's survey is attached at Appendix 1.
17. **Fourthly**, an open-ended questionnaire was distributed nationally to experienced private legal practitioners in civil, family and criminal law. The questionnaire was designed to provide an opportunity for practitioners to provide their views on whether there had been an erosion of legal representation and rights, the effect on the courts, represented and self-represented parties, legal practitioners and on fundamental principles of legal justice. The schedules for the questionnaires are attached at Appendix 2.
18. One hundred questionnaires were distributed by members of the Law Council's Access to Justice Committee to private practitioners who were known to have a particular expertise in the jurisdiction. There was a high return rate with 37 family law questionnaires, 17 criminal law and 18 civil law questionnaires returned. This provided a response rate of 72%. Survey respondents provided detailed answers and case studies, which have provided a unique insight into what it is like for frontline practitioners and their clients involved in cases where parties are partially, or completely, unrepresented.
19. This report makes no claim that the responses to the questionnaires were from a representative sample of lawyers across Australia. However, the questionnaires were distributed to practitioners known to have particular experience in the practice area, a number of whom are recognised leaders in their field. The views expressed are those of practitioners who deal on a daily basis with the "peoples' courts" and their consumers. They are views of practitioners with substantial experience. Their views are important. They are in essence the people who make the justice system work.

20. The respondents are identified by codes referring to the practitioner's specialty: **Cr- criminal, F-family, C-civil**. Where it is relevant, the State or Territory where the practitioner works has been identified.
21. It should be noted that whilst the original research period was 1994-2002, where important reports, research findings or commentaries have become available between January and September 2003 during the writing of this report, they have been included.
22. The report draws together the elements of each of the above research strands to provide a significant contribution to a discussion crucial to the future of justice in Australia.

Context and Key Issues

2.1 What is meant by erosion in legal representation?

23. In looking at the issue of erosion of legal representation, the report refers to and encompasses a number of key elements outlined below:

- The **quantity** of legal representation ie the rise in self-represented litigants, at any or all stages of proceedings before a court. The evidence indicates that there is an increase in litigants obtaining partial representation in court proceedings at various stages throughout the whole process.
- The **quality** of representation. Some commentators have expressed their concern that there may have been a diminution in the quality of legal representatives available to publicly funded litigants. This can be the result of increasing pressure of work for in house legal aid solicitors, increasing complexity of cases for all legal representatives, and the withdrawal of more experienced senior solicitors and counsel from publicly funded work. This last situation has been termed 'juniorisation'. The report acknowledges that junior practitioners should be encouraged and supported in gaining experience and that many do have excellent skills. However, the issue is that a vital legal aid system depends on a range of practitioners being available to consumers, so that the freshness and enthusiasm of younger lawyers can be balanced with those who have had years of experience.
- **Inequity** in access to legal representation experienced by Australians, depending on where they live. It has been argued that those people living in rural, regional and remote areas do not have the same capacity to exercise their legal rights as those people living in metropolitan areas. This is due to the smaller number of private firms, the lack of readily accessible legal aid offices, the lack of community legal services and the increased costs associated with accessing these services. Variation in policies and procedures amongst the State and Territory legal aid commissions can result in differential access to legal services and representation across the country.

- For **indigenous Australians**, this situation is exacerbated by the very inadequate funding of Aboriginal and Torres Strait Islander Legal Services and the barriers communities face in accessing mainstream services.
 - Australians who suffer from a **disability** or **mental health** problem experience particular difficulty in understanding the issues confronting them and in knowing how to obtain representation.
 - **Erosion** in procedural rights and the right to representation. The research examines and reports on the climate of diminishing rights which has occurred over the period 1994-2002. It provides an added dimension to the notion of erosion of legal representation.
 - Erosion of potential **equity in outcomes**. Although it is acknowledged that citizens have the right to represent themselves in court – and that this is an important cornerstone of the justice system – self-representation nevertheless produces issues of fairness and justice for those who represent themselves out of necessity rather than choice.
24. One of the respondents to the questionnaire distributed to private practitioners for this research highlighted one of the key problems associated with the rise in self-represented litigants:
- “The court system does not cope well with this situation and is designed to function with two advocates putting the case for either side before a disinterested tribunal. It has been my observation that, when a party is unrepresented, the tribunal - be it judge or magistrate or court of appeal - has ‘entered the arena’ in an effort to even things up. In these circumstances the tribunal finds itself persuaded by its own reasoning. Unjust results can follow.”(Cr10)*
25. Justice Robert Nicholson of the Federal Court of Australia has identified that one reason the right of people to represent themselves before court can be regarded as a “problem” is because there is another fundamental principle which is in conflict with it. This principle arises from the system of adversarial litigation which is built on duties owed by members of the legal profession to the court in the way they conduct themselves and the litigation for which they are responsible (R Nicholson 2003: *Can Courts Cope with Self-Represented Litigants*:6)

26. These duties, which are fundamental, mean that the court is dependent on legal practitioners acting professionally in accordance with these duties. These duties include duties of disclosure to the court, of avoidance of abuse of the court process, to not corrupt the administration of justice and to conduct cases efficiently and expeditiously. These duties require the presence of very high levels of professionalism and are the foundation on which the Australian court system is able to operate. A conflict arises the moment a self-represented person appears, as that person is someone unqualified in the law and therefore not subject to any duties applicable to a solicitor or barrister. (R Nicholson 2003:67)
27. There has been considerable self reflection within the court system leading to progressive changes in court procedures which should benefit all litigants. As Justice Perry of the South Australian Supreme Court identified:
- “A central question to be addressed is whether the litigant in person represents a problem for the court system, or whether the true problem is the inaccessibility and incomprehensibility of the court system and its procedures to ordinary people.”*
(Perry 1998: *The Unrepresented Litigant* ALRC:319)
28. Over the years, there has been a shift in approaches to dispute resolution procedures and practices that have facilitated parties to ‘go it alone’ or have endeavoured to accommodate the needs of those parties who, for whatever reason, do not have representation. This shift has included:
- increasing use of tribunals;
 - shift to alternative dispute resolution including mediation;
 - simplification of review procedures for administrative decisions;
 - an attempted simplification of procedures in family law.
29. Although a number of legal matters are being directed away from traditional court procedures to alternative methods of resolution, research has indicated that representation in these matters still provides for more optimal outcomes for consumers, greater consumer satisfaction and a more efficient disposal of matters (Matruglio 1994; Delaney & Wright 1997).
30. This trend may also have had the consequential effect for other parties involved in court proceedings by sometimes causing them to believe that it is possible to ‘go it alone’, even in complex matters.

31. These key issues of quantity and quality of legal representation, diminution of rights and issues of access and equity, are themes common to much research in this area. The following section and the content of Appendix 3 provides an overview of the main findings of reports, inquiries and research of legal representation for the period 1994-2002. They identify their relevance to the contextual and key issues of this report.

2.2 Key findings from reviewed literature

“Anecdotal evidence and qualitative research suggests that cuts to legal aid funding have led to an increase in unrepresented parties before federal courts and tribunals, and a diminution in the numbers of skilled and specialised lawyers undertaking legal aid work.” (ALRC 2000:301)

32. From as early as 1994, the Law Council was predicting the impact of reduced legal aid funding and increased costs of legal services (*Law Council 1994*). It noted that the limited aid in family law matters meant that many people had to appear on their own behalf and that the current remuneration of the private profession was inadequate but accepted by the profession in deference to the public good. The Law Council argued that the growing gap between market rate and legal aid fees meant that fewer practitioners would be willing to work for legal aid rates. It argued further that fees should not be held down to the extent that more experienced and competent lawyers felt it necessary to refuse to do legal aid work.
33. Since 1994, there has been a growing number of reports, commentaries and research into self-represented litigants in Australian courts. An annotated list of reports considered for the purposes of this study is at Appendix 3 as well as a summary of the comment in relation to self-represented litigants.
34. The following Table provides a graphic representation of the timeline of significant reports over the period 1994-2003.

Table 1: Timeline of significant events, research and comment in relation to self-represented litigants, 1994-2003.

1994	Commonwealth Access to Justice Advisory Committee: Access to Justice: an Action Plan Law Council of Australia Submission Legal Aid Funding in the '90s Mason, CJ in Cachia v Hanes (1994) 120 ALR 385 at 391
1995	Attorney General Lavarch – The Justice Statement
1996	Attorney General Williams –announcement of changes to legal aid funding arrangements. National Legal Aid: Meeting Tomorrow's Needs on Yesterday's Budget
1997	Australian Law Reform Commission. Review of the Adversarial System of Litigation Senate Standing Committee on Legal and Constitutional Affairs: Inquiry into Legal Aid
1998	Dewar, J, Giddings, J. & Parker, S The Impact of Changes in Legal Aid on Criminal and Family Law Practice in Queensland ("Griffith Legal Aid report". Faculty of Law. Griffith University Queensland. 1998. Gamble, H & Mohr, R Litigants in Person in the Federal Court of Australia and the Administrative Appeals Tribunal- A Research Note. Paper presented to the Sixteenth Annual AIJA Annual Conference Melbourne. 4-6 September, 1998 Smith, B Study of the effects of legal aid cuts on the Family Court of Australia and its litigants. Family Court of Australia. Research Report No. 19 1998
1999	Gleeson Chief Justice, M., The State of the Judicature, Paper presented to Australian Legal Convention. Canberra 10 October, 1999. Australian Law Reform Commission. Review of the Federal Civil Justice System. Discussion Paper No. 62. AGPS, Canberra, 1999.
2000	Dewar, J; Smith, B W; Banks, C. Litigants in person in the Family Court of Australia. Family Court of Australia Research Report No. 20 2000. Australian Law Reform Commission. Managing Justice – A Review of the Federal Civil Justice System, Report No. 89. AGPS. Canberra, 2000. Family Law Council. Litigants in Person: a Report to the Attorney-General, 2000. Canberra. NCOSS Going it Alone: Law and Justice Foundation of NSW. 2000
2001	Chief Justice Nicholson in T v S [2001] Fam CA 1147. Australian Institute of Judicial Administration. Litigants in Person Management Plans: Issues for Courts and Tribunals. AIJA. 2001.
2002	Hunter, R et al The Changing face of litigation: unrepresented litigants in the Family Court of Australia (Research Report) Law and Justice Foundation. 2002 West Heidelberg Community Legal Service. Unrepresented Litigants at What Cost? A report on the implications of unrepresented litigants in the Magistrates' Court, Victoria. November, 2002.
2003	Hunter, R et al Legal Aid and Self-Representation in the Family Court of Australia. Socio-Legal Research Centre. Griffith University. May 2003. Justice Robert Nicholson Can Courts Cope with Self-Represented Litigants? September 2003.

2.2.1 Quantity without Quality

35. The perceived increase in the number of self-represented litigants and commentary on the issue has been broadly expressed by various commentators. However, there has been a particular focus on the growth of self-represented litigants in the federal courts. It has been the subject of routine comment in the Annual Reports of the High Court, as well as by individual Chief Justices of the High Court over the period. In 1994, Chief Justice Mason said:

“While the right of the litigant in person is fundamental, it would be disregarding the obvious to fail to recognise that the presence of litigants in person in increasing numbers is creating a problem for the court ...all too frequently, the burden of ensuring that the necessary work of the litigant in person is done falls on the court administration or the court itself” (Mason CJ Cachia v Haines (1994) 120 ALR 385 at 391).

36. In 1999, Chief Justice Gleeson in his paper *The State of the Judicature* presented to the Australian Legal Convention in Canberra, commented that the number of self-represented litigants in the High Court was 28% and that this represented a serious problem in terms of justice, cost and efficiency, disruption and delays (Gleeson CJ 1999).
37. The Australian Law Reform Commission Inquiry into the Federal Civil Justice System which reported in 2000 (ALRC 2000), raised the issue of the increase in self-represented litigants in discussion papers, submissions and in its final report. It concluded that there was a perception that the number of self-represented litigants was increasing, but that no clear statistical data confirmed this perception. The need for more comprehensive and consistent data collection was recommended by the Inquiry, a call which has been echoed in many research reports over the period.
38. The difficulty in obtaining good statistical information in relation to litigants in person for the period 1994 – 2002 was confirmed in the current study. The Australian Institute of Judicial Administration agreed to endeavour to obtain information in relation to a range of issues, including the identification of courts which had good statistical information in relation to self-represented litigants for the period. Although a number of courts were reported to have some good statistical information available, none of it dated back further than 1998. Several courts were in the process of implementing new case management systems that eventually will enable them to improve their data collection, including in relation to self-represented litigants.
39. The review of reports over the period also revealed that there was no consistent notion of what it meant to be “a self-represented litigant”. In many cases, statistics were kept on self-represented litigants defined as parties who were self-representing for the whole duration of their case. However, in many cases litigants were self-represented for parts of their case.

40. Although there is a dearth of consistent and reliable data about the change in numbers of self-represented litigants, there is sufficient data to chart some changes in the High Court, Family Court and Federal Court. The following graph (Figure 1), which is indicative of change only, reflects a growth in numbers and confirms the commonly held perception that there has been an increase in self-represented litigants.

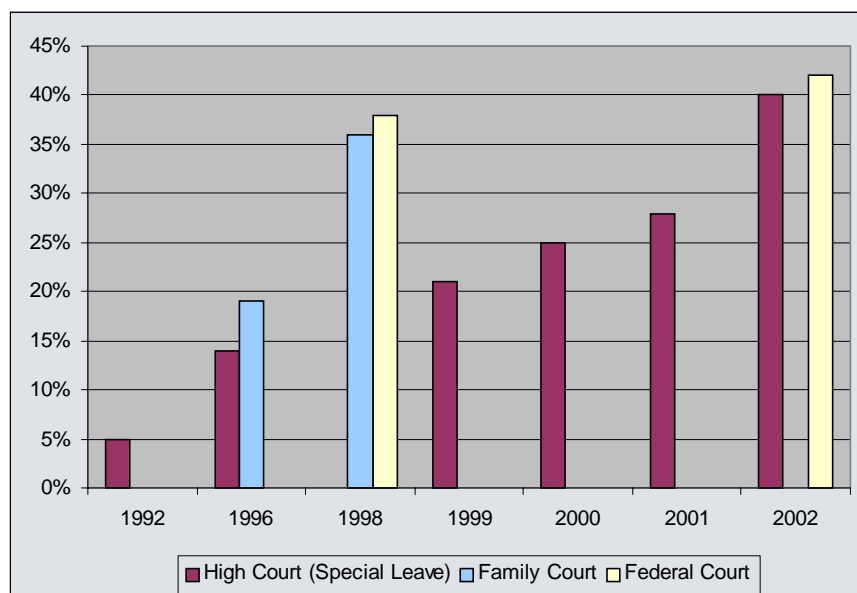


Figure 1: Change in numbers of self-represented litigants 1992-2002. (Sources: High Court:2001, 2002; Smith:1998; ALRC:1999; AIJA 2003)

2.2.2 Results of Research

41. Some available data in relation to self-represented litigants in the courts reveals:
- Magistrates' Courts:** on one day studied in the Magistrate's Court in Victoria, 50% of cases which proceeded involved a self-represented litigant. From an interview with a Magistrate, it was estimated that 30% of criminal matters, 20% of civil matters, 60% of family violence matters, 3% of children's matters and 50% of victims of crime matters had no representation (West Heidelberg Community Legal Service 2002). South Australian figures provided to the Australian Institute of Judicial Administration showed the increase of self-represented litigants in criminal matters over the period 1993-2002 to be 135%.
 - Civil Courts:** in South Australia the numbers were reported as fluctuating and in some years actually declining, but that overall there had been an increase of 10% (Australian Institute of Judicial Administration 2003).

- **Federal Court:** the Federal Court figures show that the percentage of people who commenced an action as self-represented litigants (mainly in bankruptcy and immigration matters) increased from 31% in 1998 to 42% in 2002 (Australian Institute of Judicial Administration 2003).
- **Administrative Appeals Tribunal:** 33% of AAT cases are reported to be by self-represented litigants (ALRC 2000:73 n74).
- **Family Court:** in 1994/95 there were 28,133 applicants in person compared to 32,886 in 1995/96 (ALRC Nov 1997). In 1997/8, 35% of Family Court matters were reported to include at least one party who is unrepresented at some stage (Smith 1998; Cashen 1998). By 2000, the estimate was that 41% of Family Court cases involved at least one party who was unrepresented, and 6% might involve two (ALRC 2000). The data indicates that respondents are more likely to be self-represented than applicants.
- **High Court:** in 1999, the High Court reported 28% of the litigants appearing before a single judge were unrepresented (High Court 1999). In 2000, the High Court reported 29% of civil special leave applications and 18% of criminal applications were by self-represented litigants. Proceedings before a single judge by self-represented litigants dropped from 28% to 13%, but there was a large increase in order nisi applications reported as explanation (High Court 2000). In 2002, the High Court reported that applications involving self-represented litigants for special leave rose from 33% to 40% and that in proceedings before a single judge, the increase was to 31% (High Court 2002).

42. In addition to the increasing numbers of self-represented litigants, the reports over the period 1994-2002 also document growing concern about the quality of legal representation in publicly funded matters indicated by a developing juniorisation of practitioners undertaking that work. The Law Council predicted in 1994 that the burgeoning gap between market rate and legal aid fees meant that fewer practitioners would be willing or able to work for legal aid rates. It argued that fees should not be forced down to the extent that the more experienced and competent practitioners could, or would, no longer do legally aided work (Law Council 1994). The Family Law Council commented that there was a trend towards 'juniorisation' throughout Australia, which was being attributed to public funding cuts, and a perception that this resulted in poorer quality legal services (Family Law Council 2000).

43. A national survey of legal firms which undertook legal aid family work found that 52% of firms surveyed did less legal aid work in 1998/99 than 5 years previously; and that there was a noticeable decline in the number of practitioners with over 10 years experience doing legal aid work. (Family Law Council 2000).
44. A survey conducted of family law practitioners by National Legal Aid in 2002 also found that 28% of respondents had decreased the amount of legal aid work they did in 2000/2001 compared to 1999/2000. The main reason for this trend was identified as the low level of legal aid fees, although a number complained about the high level of bureaucracy of the legal aid commissions (NLA 2002:2). A major concern identified in this survey was the higher rate of withdrawal from publicly-funded work by practitioners in rural areas as compared to those in urban areas – 40% compared to 21% (NLA 2002:1).
45. Other issues in relation to quality were raised by the Griffith Legal Aid Report (Dewar et al 1998). Fixed fees and capping of legal aid payments resulted in practitioners having limited time to prepare a legally aided case. It was found that a private client with sufficient means may pay for between two and four times as much preparation as a legally aided client; and that legally aided defendants in criminal matters had limited resources to pay for investigations, tests and expert advice.

2.2.3 Causes of Self-Represented Litigants

46. The causes of the increase in self-represented litigants are not simple, nor distinct. However, an overwhelming majority of the research, comments and reports refer to reductions in legal aid being a significant cause in Family Court and Federal Court jurisdictions (for example, Dewar et al 1998; Smith 1998; West Heidelberg Community Legal Service 2002) or that there is an identifiable link between the unavailability of legal aid and self-representation (Dewar et al 2000).
47. A recent study makes an even more conclusive connection between the increase in self-represented litigants in the Family Court and the unavailability of legal aid funds (Hunter *et al* 2003).
48. Other causes identified included the simplification of procedures, the emergence of men's support groups (ALRC:2000); changes brought about by the Family Law Reform Act 1995 and the consequent shift in expectations brought about by the language of rights in relation to residence and contact issues (Family Law Council 2000).

2.2.4 Impact of Self-Represented Litigants

49. As well as the causes, the impact of the increasing number of self-represented litigants has been the subject of extensive comment. Measures have been introduced by courts to respond to effects on judicial officers, court staff and practitioners and to the needs of the self-represented litigant.
50. The increased demand on the judiciary most commonly presents in the challenge to maintain impartiality at the same time as delivering 'justice' where one party is clearly disadvantaged because of a lack of legal representation. This tension has led to 'guideline' judgments such as *In the Marriage of Johnson* (1997) 22 Fam LR 141 and the development of management plans for courts (AIJA 2001).
51. Self-represented litigants are reported to take up more time of court staff in explaining procedures and providing assistance and support. Court staff expressed difficulty in walking the line between legal and procedural advice. In a paper presented to a 1998 conference, Registrar Cashen of the Family Court commented on the range of difficulties faced by Registrars, the most outstanding issue being time:
- "I hate to think how many times Registrars have had to explain to such unrepresented litigants that they cannot provide them legal advice, that they cannot run their case for them, that they cannot prepare their application and affidavits nor negotiate nor write letters for them."*
(Cashen 1998)
52. A serious consequence for self-represented litigants is that they are less likely to be successful than represented litigants. In the Federal Court, self-represented litigants have been found less likely to be successful (54% compared with 31% dismissed); more likely to discontinue (24% compared with 20%); and more likely to be ordered to pay costs (68% compared with 38%) (Gamble et al 1998). In High Court applications for special leave, 0.7% of self-represented litigants were successful compared with 21% of represented parties (High Court 2002:7-8).
53. The impact is most starkly illustrated in the case of *T v S* [2001] Fam CA 1147 where a woman who had suffered serious domestic violence was faced with great difficulties presenting her case unaided (Pavone 2002). At the conclusion of the judgment, Chief Justice Nicholson delivered a further 24 paragraphs entitled "*Additional reasons for judgment*" in which he noted that "*this case highlights a serious problem affecting the administration of justice in family law*

proceedings ... women who have suffered serious domestic violence may be unable to present their cases unaided in family law proceedings". (Pavone:55)

54. Self-represented litigants are reported to cause delays in both the length of proceedings and the actual time in the hearing of a case in court. Hearings, however, can be shorter where one or more parties are self-represented. This is most commonly reported in relation to family law proceedings (Hunter 1999; Family Law Council 2000). One commentator noted that:

"Sometimes an unrepresented litigant can cause considerable lengthening of the proceedings. At other times they are less loquacious than lawyers. Whilst you will only be able to ascertain anecdotal information at this stage it may indicate a trend that should warrant further investigation." (Australian Institute of Judicial Administration Activity Response)

55. Court procedure including the purpose of directions hearings, case management systems generally, and willingness or capacity to negotiate a settlement caused difficulties for self-represented litigants leading to adjournments and consequent delays in the process. Self-represented parties often do not appear in court because of every day problems such as a flat tyre or problems with child care (Cashen 1998) further delaying the process.
56. Self-represented parties were found to either settle early, or go through to a hearing. The most significant difference was the extent to which self-represented parties were able to resolve their case by negotiation (Family Law Council 2000). Self-represented litigants in the Family Court seemed to have difficulty negotiating a settlement once proceedings were commenced (ALRC 2000). In the Federal Court and Administrative Appeals Tribunal, self-represented litigants were also found to be unfamiliar with the concept of settling their case (Gamble et al:1998). The consequent increased use of court resources was reported to have a multiplier effect on the time and costs of other parties, lawyers, court staff and judges (Family Law Council 2000).

57. The cost of running a court is significant. In South Australia, the cost of court hearings during the 2001/2002 year was as follows:

Magistrates Court – criminal	\$3910 per day
Magistrates Court – civil	\$4485 per day
District Court – criminal	\$4430 per day
District Court – civil	\$3210 per day
Supreme Court – criminal	\$7268 per day
Supreme Court – civil	\$5653 per day

[South Australian Courts Administration Authority Annual Report 2002]

58. It is clear that the cost of a day in court far outweighs the cost of providing public funding for representation for that day in court (data later in this report shows legal aid hourly rates generally range from \$70 - \$120 per hour). It also outweighs the cost of adequately funding that representation. The daily cost of court administration is undoubtedly significant, and the increased use of court resources during the whole length of the proceedings by self-represented litigants is an inefficient way of providing assistance.
59. Other research supports the argument that greater investment in public funding of representation will result in cost savings to the court system (Dewar et al 2000). Further data and analysis is required to be undertaken before it can be said conclusively that the savings to be made by providing publicly funded legal representation would outweigh the extra cost to the court system of managing the self-represented litigant.
60. The increase in self-represented litigants also impacts on other litigants in the court and their representatives, who experience increased costs, delays, frustration and often an expectation or a necessity to assist the self-represented party. This, in turn, can cause the represented party to feel hard done by.

2.2.5 Responses by the Courts

61. The reports refer to a number of initiatives undertaken by the courts to respond to the rise in self-represented litigants. The Family Court recognised early that this was an issue of concern and developed a research strategy in order to identify and respond to any challenges. Over the past nine years, the Family Court has commissioned a number of research studies that have examined amongst other issues the increasing numbers of self-represented litigants. In 2000, the Court undertook a research project which resulted in a range of initiatives to make the Family Court more accessible. It also

introduced a new case management computer system (*Casetrack*) to enable the Court to develop improved data about the impact on the court of self-represented litigants. The Federal Court and Federal Magistrates Service introduced court-referred pro bono schemes to assist with the number of self-represented litigants.

62. Justice Robert Nicholson has recently summarised a number of initiatives taken by the court by way of response in an endeavour to strike the balance between essential principles in the context of the impact of appearances by self-represented litigants. These include:

- judicial delineation of the court's responsibilities of all involved in the curial process where litigants are parties;
- examination of the way courts deal with the public;
- development of self-represented litigants management plans;
- addressing the impact on staff of self-represented litigants;
- collection of data;
- initiation of particular projects that focuses on self-represented litigants;
- better control of meritless litigants;
- unbundling of legal services, breaking down a case into its sequential parts;
- developing the principle of lay representation – the “McKenzie Friend”;
- clarify the duties of barristers where they appear in a case with self-represented litigants;
- re-thinking adversarial procedures. (R Nicholson 2003:8-20)

63. The Family Court of Australia has laid down a set of nine principles to be observed by a judge acknowledging the limits on how far the court can go in hearing self-represented litigants whilst still avoiding compromise of impartiality or the appearance of partiality (Full Court: *In the Marriage of F*: (2001) 161 FLR 189).

64. The reports reflect a growing concern and urgency about the issue of increasing numbers of self-represented litigants. In 1996, there was a wide perception that the legal system was veering towards a crisis. Sir Gerard Brennan at the 15th Annual Conference on Judicial Administration claimed that:

“[t]he courts are overburdened, litigation is financially beyond the reach of practically everybody but the affluent,

the corporate or the legally aided litigant; governments are anxious to restrict expenditure on legal aid and the administration of justice. It is not an overstatement to say that the system of administering justice is in crisis.” (Brennan 1996)

In 1998, the position was expressed in these terms:

“Within the constraints of time, budget and a qualitative methodology, we believe that this study paints a picture of a worsening situation with worse to come” and “We think that the system may be moving from crisis to calamity.” (Dewar et al 1998)

65. In 2003, on the centenary of the High Court, Justice Michael Kirby in an article prepared for the press summed up the issue:

“The large numbers of self-represented litigants illustrates an institutional failure in the way we organise legal services in Australia. Whilst legal aid in criminal trials has been improved since the High Court’s decision in the Dietrich case in 1992, civil legal aid in family law for refugees and representation in criminal appeals is by no means guaranteed. There are still people who miss out on their legal rights. The law is often needlessly complicated. There is still much injustice.” (Kirby 2003)

CHAPTER 3

The History of Public Funding

3.1 Key Developments

66. The story unfolding of self-represented litigants and the increase in their numbers over the period 1994-2002 has been so closely linked to the legal aid system that it is useful to trace the recent history of legal aid as part of the context to this study.

67. A detailed account of the development of legal aid in Australia and the roles played by government and the profession is set out by the National Legal Aid Advisory Committee in its report *Legal Aid for the Australian Community* (NLAAC 1990). Aspects of that history provide a context for the impact of some of the changes to the legal aid system over time.

3.1.1 The 1970s

68. State based legal assistance schemes and legal professional bodies took an early lead role in providing legal aid services. However, since 1973, the Commonwealth government, through its national arrangements for legal aid funding, has acknowledged its obligation to fund legal aid programs.

69. The Australian Legal Aid Office was established in 1973 by the Commonwealth. For constitutional reasons, it only provided assistance in cases involving federal law or to individuals in federal and State law cases where the Commonwealth Government was deemed to have a special responsibility, for example to migrants, indigenous people, veterans and social security recipients. State based legal assistance schemes continued to assist others who were not eligible for assistance from the Australian Legal Aid Office.

70. During the years of the operation of the Australian Legal Aid Office and State based legal assistance schemes, fees to the private profession were based initially on 100% then on 90% and then 80% of a court based fee scale.

71. In 1976, the Commonwealth Government initiated the establishment of independent legal aid commissions in each state to be jointly funded by the State and Commonwealth Governments.

3.1.2 The 1980s

72. Between 1987 and 1989, the Commonwealth Government entered into agreements with the States and Territories which provided for the maintenance in real terms of the 1987/88 legal aid funding levels. These agreements contained a dual index for inflation to be applied to the base 1987/88 funding levels and an agreement that Commonwealth and State Governments would generally share legal aid funding in the ratio of 55% / 45% respectively.

3.1.3 The 1990s

73. In the early 1990s, there was growing concern about the adequacy of legal aid funding. The National Legal Aid Advisory Committee was critical of the funding arrangements. It claimed that the funding formula was based on historical levels of expenditure, concluding that past demands did not equal future needs. Increased complexity in legal matters and the inadequacy of the consumer price index and average weekly earning indices were raised as relevant to the developing legal aid crisis (NLAAC 1990).
74. In 1994, the Law Council produced a report into the inadequacy of legal aid funding (Law Council 1994). A range of issues were identified including an increase in real needs; growth in population; increased legislation; a depressed economy; an increase in crime rates and the effect of the *Dietrich* decision (*R v Dietrich* [1992] 177CLR 292). The consequence of this decision of the High Court is that a trial judge ordinarily should exercise the discretion to stay serious criminal proceedings if legal representation is essential to a fair trial and if the accused, without fault, has been unable to obtain such representation. The conclusion drawn in the Law Council's report was that demand for legal aid had increased significantly, the level of funding had remained constant and that to restore funding to 1987/88 capacity, an injection of \$50 million was needed.
75. In its 1994 submission, the Law Council asserted that the remuneration to the private profession for legal aid work was too low – but that it was accepted by the profession for the public good. The Law Council, in acknowledging at that time that about one third of professional fees were profit, suggested that a legal aid fee based on 80% of a reasonable fee meant covering costs with a very small profit. At the same time, the National Legal Aid Advisory Council noted that 100% of a reasonable fee should be investigated as an appropriate legal aid fee basis. (Law Council 1994:27)

76. The Law Council noted that it needed to be recognised that fixing legal aid fees at too low a level compared with market rate meant that few practitioners would be willing to do that work. The Council argued that fees should not be set at a level where more experienced and competent practitioners would refuse to do legal aid work.
77. Also in 1994, the Commonwealth Government requested the Access to Justice Advisory Committee, under the Chairmanship of the then Ronald Sackville QC, to consider ways in which the legal system could be reformed in order to enhance access to justice and make the legal system fairer, more efficient and effective. The result was *Access to Justice, An Action Plan*, submitted in May 1994. '*Access to Justice: An Action Plan*' recorded, among other things, that legal aid funding was insufficient to meet the identified demand in the community. The then Attorney-General, the Hon Michael Lavarch, issued the *Justice Statement* in response, which indicated the steps that the Labor Government would take to implement some of the recommendations contained in the Access to Justice Report.
78. The Labor Government lost office at the next election in early 1996. As part of its pre-election policy, the Opposition indicated its commitment to maintain funding for legal aid in real terms at existing levels and to introduce other access to justice initiatives such as a legal expenses insurance task force and a national litigation disbursements fund.
79. On achieving office, the new Government did not maintain legal aid funding in real terms and decreased it markedly. The initiatives outlined in the pre-election policy were not implemented.
80. From 1 July 1997, the Commonwealth Government entered into new funding agreements with the legal aid commissions which introduced:
- a reduction in legal aid funding on a national basis by \$33.158 million each year for the following three years;
 - a restriction on the spending of Commonwealth money to matters which arose under Commonwealth law;
 - Commonwealth guidelines and priorities; and
 - lump sum stage funding and funding caps for grants of legal aid
81. One of the most critical changes was the Commonwealth's abandonment of its commitment to people to whom it had earlier accepted a special responsibility and the associated introduction of a jurisdictional divide between State and Commonwealth law matters which did not rest easily with a 'client centred' approach to legal

services. For example, a woman escaping domestic violence with family law proceedings for residence and contact, and child protection concerns which bring in the State Child Welfare Authority, has a range of legal problems involving Commonwealth and State laws. However, she will, or will not, qualify for legal aid under possibly three different guidelines.

82. This new funding philosophy runs counter to modern service delivery practices by other human services agencies, including other Commonwealth Government departments. In every field except legal aid, research and evidence leads to a focus on breaking down program barriers, both within and between departments, and on pooling their funds with the intention of providing a service that fits the client (NACLC 2003).
83. The Commonwealth guidelines and priorities were preclusive and inflexible. A particular problem was the restriction on legal aid to fund challenges to Commonwealth Government decisions such as in immigration and social security matters, areas which traditionally have been seen as appropriate for legal aid funding. Aid for appeals to the Administrative Appeals Tribunal in social security cases and representation in refugee matters before the Refugee Review Tribunal was stopped. Refugee appeals to the Federal Court and High Court were limited to cases where there was a difference of judicial opinion only; the capacity to fully represent consumers in veterans' matters was reduced by the introduction of an inadequate stage of matter lump sum rate; fee caps on the amount of funding available to each applicant in family law matters and restrictions on funding family law property disputes were introduced. Not all children's representatives appointed by the Family Court (where there is an entrenched dispute between the parties and which can involve allegations of child abuse) were able to be funded.
84. The stage of matter model for funding family law cases was not well received by private practitioners and their increasing reluctance to accept legally aided family law cases can be attributed in part to that fee system. In some areas of Victoria, this has reduced the availability of legal aid services (Victorian Legal Aid Response to Activity Outline).
85. Significantly for this study, the caps, which applied particularly in family law and veteran cases, were seen to be too low and inflexible and lump sums inadequate and inappropriate. For example, in veterans' matters Stage 1 funding represented 10 hours work, but most commonly 30-40 hours work was done, and the allocation of hours for hearings was grossly inadequate (Law Council 2001).

3.1.4 The 2000s

86. Legal aid funding was maintained at the same level per annum for a period of three years, from 1 July 1997 until 30 June 2000. In the 1999/2000 financial year, a further allocation of Commonwealth funds was made to legal aid with an increased contribution of \$46 million, increased by cost of living factors over the next four years to \$63 million. In 2003/2004, the Commonwealth's contribution to legal aid funding was \$130.4 million, compared to its contribution in 1996/1997 of \$159.2 million. The current four year funding agreements are due to expire on 30 June 2004.
87. The States all contribute different amounts for 'State-based' legal aid. The States have adopted various approaches in deciding whether funding is in any way tied to any particular priorities or guidelines.

3.2 Changes in funding from 1994-2002

88. The changes in legal aid funding from 1994-2002 are represented in Table 2.

Table 2: Commonwealth and State/Territory allocations of legal aid funding, 1994-2002

1994	NSW	VIC	QLD	SA	WA	TAS	ACT	NT	Total
Commonwealth	\$38,019	\$34,325	\$18,692	\$8,989	\$10,869	\$4,842	\$2,400	\$2,111	\$120,247
State/ Territory	\$28,905	\$23,942	\$10,036	\$3,296	\$7,874	\$2,239	\$1,351	\$818	\$78,461
Commonwealth %	57%	59%	65%	73%	58%	68%	64%	72%	
State/ Territory %	43%	41%	35%	27%	42%	32%	36%	28%	
2002	NSW	VIC	QLD	SA	WA	TAS	ACT	NT	
Commonwealth	\$36,337	\$28,074	\$22,306	\$9,901	\$9,741	\$5,319	\$3,512	\$3,002	\$118,192
State/ Territory	\$58,074	\$31,457	\$20,568	\$9,412	\$13,530	\$2,852	\$2,019	\$2,009	\$140,200
Commonwealth %	38%	47%	52%	51%	42%	65%	63%	60%	
State/ Territory %	62%	53%	48%	49%	58%	35%	37%	40%	
% Increase									
Commonwealth	-4.4%	-18.2%	19.3%	10.1%	24.5%	9.9%	46.3%	42.2%	
State/ Territory	100.9%	31.4%	104.9%	194.0%	23.7%	27.4%	49.4%	145.6%	
per capita	\$5.70	\$6.00	\$6.10	\$6.75	\$5.26	\$11.64	\$11.25	\$14.25	
Commonwealth funds popn. census '01	6,371,745	4,644,950	3,655,139	1,467,261	1,851,252	456,652	311,947	210,664	

Notes: NSW data includes public purpose fund allocation. Victoria, Queensland data excludes public purpose fund allocation. Public purpose fund allocation not specified by other States/Territories. Western Australia figures exclude funding provided for special purposes from time to time (eg expensive case funding). Table based on figures supplied by National Legal Aid in response to its Activity Outline, pages 34-35.

89. Legal aid fees to private practitioners were initially based on 100% of the relevant court scale; then 90% and then 80%. Over time, this has changed to a "legal aid scale". Since 1997, legal aid fees have been subject additionally to lump sum stage of matter funding and capping.

For example, in family law matters, Stage 1 funding is for Primary Dispute Resolution and Stage 2 funding for initiating proceedings in Court. From 1 July 2000, a national “stage of matter” model was adopted in family law. This model is not “national” in the sense that it is the same across all jurisdictions. Practices vary across court registries and have been taken into account in the development of the model in each jurisdiction.

90. Legal aid fees to private practitioners who undertake legal aid work vary from state to state and also in relation to “matter type” or jurisdiction. Accordingly, while there may be a uniform national funding cap in some matters, in a jurisdiction where there is a low or high hourly rate, the result is that more or less work is able to be done within the cap.
91. The changes in the common ranges of hourly fees, charted over time from 1994 to 2002, are contained in Table 3.

Table 3: Comparison of Legal Aid Hourly Fee Rates by State and Territory, 1994-2002

	NSW	VIC	QLD	SA	WA	TAS	ACT	NT
1994 Civil	\$84	\$70	\$70	*	\$115	\$86	\$80	*
1994 Criminal	\$86	\$70	*	\$72	\$115	\$86	*	\$100
1994 Family	\$100	\$91	\$88	\$78	\$88	\$86	\$100	\$103
2002 Civil	\$92	*	\$70	*	\$115	*	\$100	*
2002 Criminal	\$110	\$74	*	\$96	\$115	*	*	\$100
2002 Family	\$120	\$120	\$100	\$104	\$115	*	\$120	\$135
Increase 1994-2002								
Civil	\$8	*	\$0	*	\$0	*	*	*
Criminal	\$24	\$4	*	\$24	\$0	*	*	\$0
Family	\$20	\$29	\$12	\$26	\$27	*	\$20	\$0

Notes: * it was not possible to determine a relevant figure from data provided by State agencies. All data is indicative only, and is not comparable between the States. Most legal aid commissions pay by way of lump sum rather than hourly rate but that lump sum is usually calculated on the basis of the number of hours anticipated for a standard matter or stage. Many legal aid commissions are no longer able to undertake civil matters.

92. It is noted that some legal aid commissions have increased their hourly fees in 2003, particularly in relation to family law. For example, in Queensland the rate is \$110.00 and in New South Wales, it is \$130.00 per hour. An increase in the hourly rate without an increase in overall funding will result in a decrease in the number of applications able to be approved.
93. It is clear that there is a strong, causal connection between the funding cuts, consequential restricted legal aid guidelines and priorities, and the increase in self-represented litigants. This has been expressed by National Legal Aid and is supported by the

predominance of comment and experience of an increasing number of self-represented litigants in the federal jurisdictions affected by the changes, including the practitioners interviewed for this study.

The Real Cost of Providing Legal Representation

4.1 Legal practice costs

94. As part of this research, the Law Council decided to examine the cost of running a private legal practice and the effect cost might have on the capacity, or willingness, of private lawyers to continue to undertake publicly funded work and to provide pro bono services.
95. The analysis was undertaken by FMRC Legal Pty Ltd (FMRC Legal) at the request of the Law Council's Legal Practice Section. Every year for over 20 years, FMRC Legal has conducted a financial performance survey of legal practice in Australia. It should be noted that the sample of firms participating in the survey varies and in any one year, the sample of firms participating is not highly representative of the profession at large. There are proportionately larger and more successful firms participating in the survey than would be found in the profession as a whole. Further, barristers do not participate in the FMRC Legal surveys.
96. The FMRC Legal analysis undertaken for the purposes of this report concluded that the nature of legal practice had changed substantially over the last decade. A clear structure had developed of a small group of large national firms; a second tier of smaller but substantial commercial practices; and then a large array of small to mid-sized practices providing a more community based service. These are the firms which traditionally have provided legal aid and pro bono services and worked in the "people courts". These firms were the focus of this study.
97. The study looked at the changes to the cost of practice for five groups of practices: mid-sized CBD; small CBD; major regional city; suburban and country practices. The focus of the FMRC Legal report was cost per solicitor chargeable hour. The figures made no allowance for profit to the principal, nor any allowance for write-down of chargeable hours for work in progress.
98. The study showed that the cost of delivering a chargeable hour of legal time per moderately experienced employed solicitor and per experienced principal in a mid-sized CBD practice was \$155 and \$232; in a major regional city was \$140 and \$212; in a suburban practice was \$153 and \$226; and in a remote country region was \$132 and \$194.

99. These costs and changes are shown in Table 4.

Table 4: Changes in Total Charge Hour Costs, 1994 to 2002

	Mid CBD Solicitor	Mid CBD Principal	Small CBD Solicitor	Small CBD Principal	Reg.City Solicitor	Reg. City Principal	Suburban Solicitor	Suburban Principal	Country Solicitor	Country Principal
1994	\$129	\$183	\$135	\$157	\$109	\$143	\$138	\$196	\$124	\$155
1998	\$134	\$186	\$128	\$171	\$135	\$164	\$131	\$154	\$116	\$144
2002	\$155	\$232	\$155	\$232	\$140	\$212	\$153	\$226	\$132	\$194
Increase	\$26	\$50	\$20	\$75	\$31	\$69	\$15	\$30	\$8	\$39

FMRC Legal Pty Ltd: Erosion of Legal Representation Study 2003. Table based on paragraphs 5, 6 and 7.

100. The figures for an employed solicitor were based on average annual income ranging from \$55,000 to \$68,000. The figures were also based on the identified production of chargeable hours for the various locations.

101. The following table demonstrates the basis for the calculation. The study found that the reality is that undertaking legal aid work is likely to be a loss making proposition for an average legal firm, unless work is performed by the most junior practitioners.

Table 5: Combination of Practice Costs and Salary Cost for Solicitors and Equity Principals, 2002

	Midsized CBD	Small CBD	Major Reg. City	Suburban	Country	Ratio Number
Average (empld) Solicitor Salaries	\$68,654	\$65,564	\$56,782	\$67,763	\$55,454	1.10
Practice Cost per Solicitor Equivalent	\$123,367	\$121,367	\$109,303	\$145,328	\$114,877	1.53
Total Cost per (empld) Solicitor	\$192,021	\$186,931	\$166,085	\$213,111	\$170,331	1.10+1.53
Ave. (empld) Solicitor Salary/Charge Hr	\$58.57	\$56.18	\$49.79	\$53.37	\$53.19	1.12
Practice Cost per Chargeable Hour	\$96.46	\$98.66	\$89.76	\$101.19	\$78.83	1.43
Cost/(empld) Solicitor Charge Hour	\$155.02	\$154.84	\$139.55	\$152.54	\$132.02	1.12+1.43
Notional Equity Principal Salary	\$158,658	\$140,907	\$116,799	\$129,022	\$129,790	1.13
Practice Cost per Solicitor Equivalent	\$123,367	\$121,367	\$109,303	\$145,328	\$114,877	1.53
Total Cost per Equity Principal	\$282,025	\$262,274	\$226,102	\$274,350	\$244,667	1.43+1.53
Not. Equity Principal Salary/Change	\$135.97	\$133.13	\$122.54	\$124.55	\$114.76	1.15
Practice Cost per Chargeable Hour	\$96.46	\$98.66	\$89.76	\$101.19	\$78.83	1.43
Cost/Equity Principal Charge Hour	\$232.43	\$231.79	\$212.30	\$225.74	\$193.59	1.15+1.43

FMRC Legal Pty Ltd: Erosion of Legal Representation Study 2003:8.

102. This table shows that in a mid-sized firm practice, costs are approximately \$155 per chargeable hour, of which the salary component is \$58.57. Other overhead costs are relatively fixed, whereas salary overheads fluctuate depending on the seniority of the lawyer doing the work.
103. If a legal aid fee of \$120 per hour is assumed, of which \$96.46 is consumed in non-salary overheads, only \$23.54 is left to cover the solicitor's salary overhead before the firm starts to lose money. Even assuming a solicitor rendered 1350 chargeable hours per annum (which is more than the figures disclosed in the FMRC Legal analysis), the break-even point for firms is at a solicitor salary of \$31,779 (\$23.54 per hour x 1,350 hours per annum).

In reality, salary rates for even the most junior solicitors generally commence at well above that figure. Legal aid is a losing proposition unless the solicitor doing the work is paid at a very low rate. As a result, "juniorisation" occurs of those private practitioners who undertake legal aid work.

4.2 Legal aid rates

104. The research posed two questions - how does the actual cost of legal service and its growth over the years compare with the rates paid by legal aid commissions? How has this changed over time?

Legal aid hourly rates for civil, criminal and family work ranged from \$70 to \$120 per hour (except in the Northern Territory, which had an uncharacteristically high rate in 2002 of \$135 per hour).

Between 1994 and 2002, the mid-sized CBD practice showed an increase in hourly cost of \$26 for employed solicitors and \$49 for more experienced principals. However, the increase in the hourly rate paid to solicitors by legal aid ranged nationally from \$0 to \$32 per hour.

105. These figures show that there is a significant difference between the hourly rate paid to the private profession to undertake publicly funded work and the actual cost of providing the service. The poor hourly rate has always been a feature of this work. However, as this report reveals, other factors have also contributed to the pressures on the private profession.
106. The lump sum 'stage of matter' funding is a significant part of the problem. Because stage of matter funding is conservatively calculated and usually inflexible, solicitors have to do more hours than allowed for in lump sum funding with the result that this effectively

pushes down the hourly rate. Chapter 5 reveals how many practitioners have difficulty managing the ethical tension between doing the work for which, in theory, the stage of matter funding pays - and doing the work that, in reality, is required to be done by their clients, the process and the complexity of the issues. Because legal aid is now more difficult to obtain, recipients of legal aid tend to be the more disadvantaged with the more complex or serious problems.

107. During the period examined, there has also been a reduction in the areas in which legal aid is available. This reduction, combined with low fees and lump sum stages of matter funding, has made it even less attractive for private practitioners to continue to accept legal aid work.
108. There has also been a decline in the work which traditionally subsidised the legal aid work carried out by community based practitioners. This work includes personal injury litigation (declining due to legislative changes) and conveyancing (declining due to competition and abandonment of the *ad valorem* scale of fees).
109. The problem will not go away. The FMRC Legal study indicates that costs are likely to increase, exacerbating the problem for the future. The anticipated increases to the cost of practice in the areas will be caused by:
 - increasingly sophisticated management information systems;
 - increased hardware and software costs per solicitor;
 - increased reporting procedures for clients;
 - increased access to electronic libraries, legal data base information services;
 - increased communication capacity required to comply with changing methods of procedures in the court system;
 - increasing requirement to operate in an e-commerce environment;
 - increasing cost of professional indemnity insurance;
 - increasing cost of general insurance;
 - increasing compliance costs for a regulatory regime.

These developments are all likely to raise the expenditure base of all lawyers. Such increases in the cost of practice will mean that the ongoing performance of publicly funded work at present rates will result in even more of a loss than is presently the case.

110. The question arises as to how fees for publicly funded legal work should be calculated.

During the years of the operation of the Australian Legal Aid Office and State based legal assistance schemes, fees to the private profession were based on 100%, 90% and then 80% of a court based fee scale. The deregulation of legal costs has meant that there are no longer court based fee scales in all States, making reference to such a scale impossible on a national level. However, other more independent mechanisms could bring consistency and efficacy into the national determination of fee scales for publicly funded legal work. In various pronouncements, the Commonwealth Government has indicated its intention to determine a national fee scale to attract the more senior members of the profession back to service legal aid clients. Such a national fee scale has never eventuated. (Law Council of Australia Submission to the Senate Inquiry into Current Legal Aid and Access to Justice Arrangements, August 2003:11)

4.3 Other cost and funding pressures

111. National Legal Aid reported that the legal aid commissions had experienced an increase of 4% per annum in expenditure or overhead cost of delivering one hour of legal services. The likelihood is that the cost of conducting a legal practice within a legal aid commission will not differ greatly from the cost of conducting a private legal practice.
112. This study was not able to identify or chart any growth in parliamentary, judicial and court official salaries over that same period of time. However, judicial remuneration generally declined considerably in the 1970s and 1980s, failing to increase as fast as Average Weekly Earnings (AIJA 1995) but has increased significantly since 1988.
113. Between 1991 and 2001, the total employment costs of a Family Court Judge rose 58% from \$225,127 to \$354,016.

Chief Justice Nicholson has stated:

"For the judiciary to be independent remuneration has to be set at a level which will attract and retain people of good standing, reputation, experience and skills; remuneration should be determined independently of Government; and tenure of office must be guaranteed. Regrettably all of these factors have been eroded by Governments of all political persuasions over a period of at least 30 years." (Family Court 2003)

"In recent decades judicial remuneration has neither kept pace with inflation nor with the salaries of people serving

at the Senior Bar, the traditional pool from which judges are appointed.” (Family Court 2003)

4.4 The Aboriginal and Torres Strait Islander Legal Services

114. The Aboriginal and Torres Strait Islander Legal Services (ATSILS) are chronically underfunded and overstretched.
115. Of the ATSILS able to provide information on changes in salaries from 1997 – 2002 paid to first year, 7th year, senior solicitors and Chief Executive Officers, increases ranged from 8% per annum to, in one ATSIL, a 3% rise in one year but then 0% per annum for all other years (this effectively translating into a decrease of 0.6%).
116. North Australian Aboriginal Legal Aid Service (NAALAS) reported that brief-out fees had increased only marginally over the period, with the number of firms willing to take on briefs at the agreed fees reduced due to the fee being below what most firms would accept. NAALAS also reported that because its brief-out budget was so inadequate, it was forced to seek pro bono representation for its clients when the in-house practice was unable to act. The Victorian Aboriginal Legal Service reported that it adopted the Victorian Legal Aid fee structure and had not increased its rates since 1992. Tharpuntoo (Queensland) reported that where matters were briefed out due to a conflict of interest, \$150.00 per hour was paid, although an indication of fees over time was not provided.
117. NAALAS reported that over the previous two years, it had been unable to employ a policy officer, an articled clerk and an Aboriginal cadet officer; and it was unable to travel to bush courts and provide assistance other than criminal law representation. At the Second National Pro Bono Conference in Sydney in October 2003, a representative of NAALAS reported that it was only able to provide regular services to the Darwin indigenous community and that the outlying communities were only visited once per month. NAALAS also reported that since 1994, eligibility guidelines were more restrictive, especially in relation to civil and family law. Currently all ATSILS are on six month contracts pending the result of newly introduced tendering processes. The amount of resources required to fulfil changing administrative and funding requirements places extra strain on limited resources, and diverts time away from much needed legal services.
118. An ATSIL in Queensland reported that its funding had not increased at all during the period 1994-2002, and that its service had been reduced by three staff members over the period. It reported a diminution in civil and family work.

119. Victorian Aboriginal Legal Services reported that its family law service had expanded from one solicitor in 1994 to three solicitors in 2002, but that the civil law section remained unchanged during the period. It reported a diminution in the service able to be provided in the criminal law section due to an increase in demand over the period, and the inability of the service to fill all the vacant solicitor positions. Salaries lower than Victoria Legal Aid, and the need to travel extensively to service regional courts, meant that recruiting new staff was difficult. Legal aid cuts in 1997 were also reported to have put pressure on the Victorian Aboriginal Legal Services and a decline in the level of service from Victoria Legal Aid. Aboriginal clients who were referred to legal aid by the Victorian Aboriginal Legal Services had a reduced chance of being represented in less serious criminal matters. The “tough on crime” political climate had also resulted in longer sentences and reduced scope to argue bail breaches, worsening the situation for clients.
120. Tharpuntoo reported that its funding had increased from \$875,818.00 in 1995/96 to \$905,076.00 in 2001/02 - an increase of 3.3% over the whole period, or an average of .56% per annum. It reported that for the Magistrates and District Courts in Cape York Peninsula communities, all pre-court visits, workshops and legal awareness programs had been discontinued since 1998/99; and that all family law work had been discontinued. Serious service delivery issues in remote areas were of particular concern. The response to the Law Council Activity Statement stated, among other things,:
- “It has always been of concern to Tharpuntoo and the Magistrates that justice is rushed during the Magistrates Court Circuits. To some extent the common law rights of our clients to have their day in court has diminished due to budget allocations that are not sufficient to undertake this extremely high cost role.”*
121. Most of the ATSILS reported high turnover rates of junior professional staff. Tharpuntoo reported that it was unable to retain first year solicitors for more than 12-18 months, claiming that it was continually used as a training ground for young lawyers who sought experience predominantly in criminal law. Another reported junior solicitor turnover of two to three years. NAALAS identified this as a major problem with turnover rate of six to twelve months.

4.5 Community Legal Centres

122. Community legal centres have also recently published reports of funding and cost pressures in the community legal centre sector (NACLC 2003). Community legal centres are an important gateway to legal services for the community, particularly for socially and economically disadvantaged people. Their services also provide early intervention opportunities so that consumers are able to access information and advice about their legal problems at an early stage. This often leads to the early resolution of problems and avoidance of costly court cases.
123. In July 2003, a survey of 80 community legal centres revealed that the average centre manager's salary was \$42,147 and that most centres were only able to pay their senior solicitors, who had professional responsibility for the legal practice of the community legal centres, \$40,000 to \$50,000. The National Association of Community Legal Centres claims that the gap between community legal centres and private sector salaries is now so large that serious staff recruitment and retention problems threaten the effective and efficient operation of centres (NACLC 2003).
124. For community legal centres, most of the increase in total Community Legal Centres Funding Program funds had been allocated to new services or initiatives, rather than supporting existing services. For the period 1997 to 2002, the majority of centres received an increase in funding of 1% or less. After adjustments for new activities, Commonwealth funding for community legal centres has increased by 2.45% per annum over five years from 1997 to 2002. During this same period, Average Weekly Earnings have risen by 4.5%. This translates into a 10.25% cumulative shortfall (NACLC 2003).

Comments From Lawyers “at the front”

125. One feature of the Law Council’s research which sets it apart from other studies is that it has endeavoured to find out from private practitioners who work every day in court rooms around Australia their perspectives and experiences of changes in legal representation.

The following section of the report explores the main themes raised in the preceding findings by examining in detail responses to the Law Council’s questionnaire.

5.1 Numbers of self-represented litigants

126. The Law Council survey findings on the topic confirmed an increase in self-represented litigants over the subject period.

The majority of experienced private practitioners who responded to the Law Council questionnaires distributed nationally were certain that there had been an increase in self-represented litigants in their area of expertise. This included those self-represented litigants who did not have representation for all or part of a court case.

5.1.1 Criminal Law

127. Of the 17 criminal law practitioners who responded to the questionnaire from Brisbane, Melbourne and regional NSW, 14 considered that there had been a definite increase in self-represented litigants at particular points in the criminal justice procedure or in specific matters. These included the Magistrates Court and summary matters, family violence matters, traffic matters, and appeals generally.

Two solicitors from regional NSW considered that there had been a considerable increase in self-represented litigants in rural areas of western NSW.

5.1.2 Family Law

128. There were 38 respondents to the family law questionnaire. Respondents came from major metropolitan and regional areas of Western Australia, Tasmania, Victoria, Northern Territory, Queensland and NSW. Of these, the overwhelming majority considered that there had been an increase in self-represented

litigants in property matters. Only seven respondents felt that the numbers had remained the same.

All family law respondents had been involved in cases where they had dealt with a self-represented client for part or all of the case.

However, in children's matters, especially contested matters, all respondents (except one who considered the rate had remained the same) stated that there had been increase in self-represented litigants with over half believing the increase had been substantial.

129. One solicitor from western NSW provided statistics relating to his open files that demonstrated that one third of his cases involved a self-represented party. Another respondent observed that there appeared to be at least 50% of self-represented litigants on some days in family court proceedings:

“At least half of the list each day has self-represented litigants and there are usually 28-30 matters in a general list each day.” (F33)

130. Those family law specialists who acted as children's representatives more often than not were dealing with cases where one of the parties, or in some instances both parties, were unrepresented.
131. This is one of the key findings from the report that is of great concern. The lack of legal representation for parents in contested residency matters has a detrimental impact on all parties, especially children and could lead to tragic outcomes for them and their parents.

5.2 Complexity of legally aided cases

132. It is not just the rise in the number of self-represented litigants which leads to difficulties in representation and management of cases before the court. For the respondents to the Law Council questionnaire, self-represented litigants' and legally aided clients' cases can prove to be more complex and protracted than those of self-funded clients.
133. In particular, in family law, legally aided cases can reveal a myriad of problems, many of them related to a client's socio-economic disadvantage and/or the special needs or particular vulnerabilities of clients. In research conducted by Rosemary Hunter profiling family law cases, legal aid cases were found to display the following characteristics:

- 60% of community legal centre and private solicitors' legal aid cases and 40% of legal aid commission cases included allegations of domestic violence, compared with 25% of self-funded cases;
- 28% of private solicitors' legal aid cases and 22% of legal aid commission cases included allegations of child abuse, compared with 12-14% of self-funded cases;
- 27% of community legal centre clients and 26% of legal aid commission clients were from a non-English speaking background, compared with 12% of self-funded cases.

(Hunter 1999:186, 187, 179)

134. These cases require proportionately more input from legal representatives in order to deal with the potential difficulties that may arise. Yet, as stated earlier, the legal aid "flat fee" does not recognise the increase in work that such cases demand.

5.3 Quality of representation

135. Respondents to the questionnaires distributed to practitioners were divided on the question of whether the quality of representation had diminished during the research period.

136. Many considered that legal aid commission staff and private practitioners had endeavoured to maintain the standard of representation in adverse circumstances, but this had come at great cost to both groups.

137. Survey respondents believed that the pressure of work had also led legal aid commission solicitors to restrict the amount of time they could give to their clients, especially duty solicitors at court:

"A large number of people who can't afford representation or are refused legal aid either appear unrepresented or use duty solicitors who have minimal time to prepare appropriately."(Cr5)

138. One respondent pointed out that since access to a duty solicitor does not require a means test, those defendants who could otherwise afford private representation were eating into tight resources, reducing opportunities for those people who cannot afford to self-fund (Cr5).

139. Private practitioners were very concerned about what they considered to be static funding or reductions in public funding for criminal, civil and family matters. They believed this had had an adverse impact on the availability, and/or quality of legal representation.

“This has mainly been driven by the fact that legal aid funding to those participating in the legal aid scheme is extremely limited, while the cost of operating a legal practice is continuing to rise. To my knowledge there has only been two 5% increases in legal aid funding since the early 1980s and it therefore follows that firms will employ or instruct younger solicitors for such matters which obviously reduces the costs to the law firms themselves. It is very difficult for experienced partners of firms to do any legal aided work considering their practising certificate cost significantly more than an employed solicitor.”(Cr12)

5.4 Strategies to maintain standards of representation

140. Survey respondents frequently mentioned the ethical dilemma facing legal aid commission solicitors and private practitioners over the desire to maintain quality legal representation for disadvantaged clients in the face of spiralling financial constraints.
141. For private practitioners, this ethical dilemma is exacerbated by the financial imperative that they have to make a living out of their work. Private practitioners have for a long time expressed concern about the gap between legal aid fees and the real value of their work. Most of the legal aided cases they receive are complex and involve disadvantaged clients. Responses to the Law Council questionnaires indicate that this dilemma has intensified.
142. In response, private practitioners have adopted a number of strategies for dealing with increasing restrictions in legal aid funding in order to maintain standards.
- 5.4.1 **Withdrawing or refusing to take on legally aided cases because the ‘fees are so miserable’**
143. There was overwhelming agreement by private practitioners that many lawyers were withdrawing from legally aided work because the fees were inadequate:

“There is no doubt that many able practitioners who used to accept legal aid work no longer do so and less able practitioners have been forced to fill the breach.” (F17)

“I stopped doing legal aid work over 5 years ago due to the very low remuneration and the prolonged disputes with the Legal Aid Commission as to bills rendered. My firm which is the biggest family law firm only does legal aid work as a child representative and only because two practitioners enjoy the work.” (F33)

“You can’t do a halfway reasonable job for a client on what you get from legal aid.” (F26)

144. These perspectives are supported by data from the Australian Law Reform Commission’s *Managing Justice* Report, where submissions to the inquiry agreed overwhelmingly that inadequate fees made it less viable for practitioners to do legally aided work. A survey conducted of family law practitioners by National Legal Aid in 2002 also found that:

“Practitioners who have already ceased to perform legal aid work, or have reduced the amount of legal aid work they are prepared to do, have made that decision on the basis that legal aid work is not cost effective for them. The low fees paid by the legal aid commissions (in contrast with private fees) were most often cited as the reason for ceasing or reducing legal aid work.” (NLA 2002 Family Law Practitioner Survey:1)

145. A survey conducted by National Legal Aid showed that there was a significant exit from legally aided work in 1999. The survey showed that 52% of firms did less legally aided work than they did in 1994/5 and many firms reported that they did not do any legally aided work at all. In addition, there was a notable decline in partners doing legally aided work and in the number of solicitors with over 10 years experience doing so (Reported in ALRC 2000:345).

146. In New South Wales, a change in fee scales in civil matters was not enough to entice private practitioners back into legally aided work. As one commentator noted it was “met with an underwhelming response” (Slade:1998:58).

147. One respondent who had acted as a child representative had withdrawn from the work because he/she could not afford to continue to carry on with the increased pressure that dealing with self-represented litigants imposed (F7).

5.4.2 Restricting the amount of work undertaken to reflect the actual amount of legal aid fee paid

“In summary hearings the fees allowed are extremely low (\$261 per day for contested matters no matter how complex or serious) and no fees are paid for conferences or preparation.”(Cr7)

148. In Queensland, where duty solicitor work is tendered out, the tender price is seen to offer no profit for the firms involved and it is mainly seen as a way to self refer further work (Cr 12).

149. Reductions in availability of legal aid also confined the extent of representation for clients to the early stages of case negotiation or court proceedings. Survey respondents believed that this led to publicly funded clients not receiving the same quality of representation as privately funded clients:

“By far and away though the greatest disadvantage thrown to publicly represented litigants is the ongoing inability of the Legal Aid Office to continue to fund representation of parties beyond, in most cases, the earliest stages of the proceedings. Practitioners are provided with inadequate funding to properly prepare for interim hearings and are then provided with a pittance to represent people at those hearings. This means that those litigants receive incomplete or hurried advice at an early stage and are then left to their own devices for the balance of the resolution of the dispute.”(F3)

150. In the Northern Territory, where legal aid funding for mainstream representation and in house work had not diminished (especially in Darwin), one questionnaire respondent felt that the quality of advice and representation provided by legal aid solicitors was similar to that of the private profession (F10).

151. Indigenous communities are not so well served. The funding situation facing ATSILS is perpetually at crisis point and now more so than ever. In places where there is a higher ratio of indigenous people, with a substantial number in regional and remote communities as is the situation in the Northern Territory, public funding for representation is totally inadequate.

5.4.3 Younger or less experienced lawyers taking on legally aided work - 'juniorisation'

152. A major concern expressed by survey respondents was that publicly funded clients were being denied access to the full range of legal professional experience and skills. The rate of legal aid fees was prompting more experienced and senior lawyers to withdraw from publicly funded cases.

153. Other survey respondents felt that the legal aid commissions' legal representatives were overworked, and in some cases, dealing with matters beyond their experience.

154. This was also seen to apply to junior counsel who may well be very skilled, but did not have a range of experience to fall back on:

"The failure of legal aid fees to match the full costs of the work undertaken for trial has meant the juniorisation of counsel appearing in legal aid matters especially at trial and appeal levels." (Cr 7)

155. At trial it was felt that the reduction in the quality of representation was partly due to the fact that inexperienced junior counsel were more likely to take on legally aided matters when funding was inadequate. This, it was argued, could have an adverse impact on the carriage of justice (*R v Carter* 2002 QCA 431)(Cr14).

156. Almost all criminal lawyers responding to the Law Council questionnaire believed that there had been a juniorisation in counsel engaged by solicitors for the lower courts. It was believed junior barristers took on the work in the hope that they would then be briefed for District or Supreme Court work. This was seen to be the case particularly in children's court matters.

157. In family law, juniorisation was seen in a similar way:

"Generally only inexperienced lawyers can afford to do legally aided work. This costs legal aid, represented parties and the court a lot. Clients tend to take little heed of junior representatives whereas their conduct can be influenced by senior practitioners."(F22)

"Approximately a year ago, my firm was in receipt of legal aid instructions. Because of the poor remuneration available and the overwhelming amount of other work, my

firm has elected not to continue taking instructions in relation to legal aid matters.”(F34)

158. FMRC Legal comments at page 17 of its report:

“... The key factor influencing the small to medium-sized firms continuing to service publicly funded and pro bono work will be the increasing opportunity cost of solicitors. As market rate increase over time the already considerable gap can only increase unless steps are taken to raise the hourly rate on offer for publicly funded legal work. Salary and overhead costs will continue to rise and the profit margin will be reduced unless there is a corresponding increase in income.”

The Law Council agrees with this observation, save that there is already no “profit margin” in undertaking legal aid work.

5.4.4 Increase in pro bono services

- The Australian Law Reform Commission in its *Managing Justice* report recognised the importance of the amount of support that lawyers provide to litigants in order for them to be able to continue in actions:

“Their pro bono assistance and continuing goodwill in providing the same is an essential factor in maintaining an effective legal system.... Although lawyers are often seen as self serving, they have a strong record of pro bono service.” (ALRC 2000:299)

“It is difficult to quantify the extent of pro bono work undertaken by lawyers. Much of the work is by private arrangement, often undocumented. Firms and legal professional associations often do not keep statistics on the quantity or value of the pro bono work they or their members coordinate. There are also different definitions of pro bono work.” (ALRC 2000:305)

159. Pro bono work is commonly undertaken by private lawyers and also by legal aid commission lawyers, community legal centre lawyers and ATSILS, who often work extra hours for little or no extra remuneration.

160. Using data from the NSW Law Society and a National Legal Aid survey, the Australian Law Reform Commission provided some details of the extent of pro bono assistance. The New South Wales Law

Society, using data from a 1997/98 practising certificate survey, estimated the amount of pro bono work at 63,000 hours, or roughly, \$74 million in value. The National Legal Aid survey of 260 solicitors who undertook legally aided family law work across Australia estimated that in 1998/99, lawyers provided a subsidy of at least \$17.5 million. If figures take into account solicitors who agreed to accept 80% of the professional rate for their work, the figures rose to in excess of \$20 million (ALRC 2000: 306).

The President of the Law Council, Bob Gotterson QC, in his recent address to the Second National Pro Bono Conference, pointed out that in the financial year 2002/2003 ABS statistics showed that lawyers had contributed 2.3 million pro bono hours (ABS 2001-02:12,24).

161. Pro bono assistance and support are provided in a variety of ways, including:
- contributing work beyond the legal aid fees provided
 - in-kind assistance to community legal centres
 - subsidising legal services through contingency and speculative funding and carrying risk of litigation
 - advice to self-represented litigants during court cases
 - taking on public interest cases for no fee
162. Survey respondents to the Law Council questionnaires pointed out that their pro bono contributions were considerable.
163. In the criminal jurisdiction, respondents felt that private practitioners were endeavouring to maintain standards of justice by assisting self-represented litigants. As one practitioner commented *"the amount of pro bono work going on is staggering."* (Cr1)

This was seen to be particularly true in criminal appeals:

"More and more counsel are appearing pro bono in the Court of Appeal to ensure litigants are given a fair chance."(Cr 3)

164. Although lawyers have a strong commitment to pro bono work, practitioners do not want to be taken for granted:

"The need for legal assistance for individuals in relation to issues which have no broad public interest implications in themselves are matters which should be publicly funded"

through an appropriate state-funded legal aid system ...We do not believe that the legal profession should assume responsibilities of the State.” (Freehill Hollingdale & Page Submission 339 ALRC 2000: 306)

CHAPTER 6

Diminution of legal rights

6.1 Legal rights

165. From the information gathered from consultations with National Legal Aid and responses from the Law Council questionnaires, it became clear that there had been a diminution of legal rights in some areas. The diminution was seen to stem from a number of factors including legislative and procedural changes at Commonwealth and State/Territory levels, combined with restrictions in the availability of legal aid for certain matters. The following section explores these issues further.

6.1.1 Family law

166. National Legal Aid considered that in relation to family law matters, legislative and procedural changes may have made it easier for litigants to commence proceedings in the Family Court than in the past. It believed that rights in this area had not been diminished.

167. However, National Legal Aid also considered that although it had become simpler to initiate family law proceedings, the lack of access to representation (for whatever reason) had produced a situation where self-represented litigants had to face the myriad complexity of the law without assistance. This usually caused difficulties for the Court and the other party, especially in contested children's matters.

168. In addition, the language of rights (eg S 60B(2) *Family Law Act*) incorporated into the legislation, may well have encouraged peoples' expectations of a remedy through the expression of a child's rights to know and be cared for by both parents. This in turn may have led to an increase in self-representing litigants.

6.1.2 Criminal law

169. It was considered by National Legal Aid and private practitioners that the politics of 'law and order' had led to a legislative reduction in citizens' rights.

170. In New South Wales, the increase in the powers of the police to detain suspects for questioning without a corresponding balance in access to legal advice, rights to obtain evidence, and restrictions in the right to

bail had led to the situation where more people remained in custody for longer periods without the balance of ready access to legal advice and representation.

171. Criminal law practitioners were extremely concerned about the combined impact of legislative changes relating to committals alongside the restrictions in legal aid funding. They considered that the restrictions limited the right of the accused to a fair trial and the lack of legal aid funding for serious offences led to serious omissions of evidence, and costly, lengthy trials.

Generally, in Victoria, legal aid funding for committals is limited to two days, even in murder trials:

“The effective loss of the full committal process has significantly reduced the right of the accused to a fair trial.” (Cr 7)

This point was highlighted in the following experience:

“Three years ago I appeared in a legal aid committal where the defendant was charged with murder, abduction and heroin trafficking. Funding was limited to 2 days with no preparation or conference fees. I did my best to deal with some of the most obvious issues.

Other counsel was briefed for the trial in the Supreme Court. The trial ran for several months. Many significant issues arose in the trial which neither the prosecution nor the defence had “discovered” during the truncated committal. These issues ended up being the basis for the appeal. Had the committal been more adequately funded in the first place, much time and expense would have been avoided in the trial and the appeal process.” (Cr7)

‘The real result of this is that there are occasions where matters are committed to the higher courts where if a proper committal was conducted it may be the case that the Court would find that there was no case to answer.’ (Cr12)

172. One Melbourne criminal lawyer considered that access to legal advice was even more crucial during an era when rights such as that of right to silence were under attack while at the same time police powers were being extended to obtain evidence including blood samples:

“This results in the cards being stacked against accused persons right from the start of the investigation.” (Cr9)

173. Although a private practitioner in Queensland pointed out that committals were still run in that State, the practitioner was concerned that there was a significant lack of funding and that the police and DPP saw committals as a waste of time. In addition, in relation to gathering of evidence, the Crown and the police have a policy of not providing the video of interview to the accused person because they argue that they may make their way onto the internet and are then distributed round the jails (Cr11).
174. In New South Wales, it was felt that those who were unrepresented do not even try to run committals (Cr17).
175. Although the High Court decision in *Dietrich* entitles a court to stay proceedings until funds can be found for legal representation for an accused person facing a serious crime, this principle does not extend to appeals (Law Council 2003:15).
176. Respondents to the criminal law questionnaire in the eastern States considered that the restriction in access to legal aid for appeals was in effect a diminution of the legal right to appeal.
177. In Western Australia, where the local bar association provides a pro bono assistance scheme in the Court of Criminal Appeal, a substantial percentage of appeals were successful (Law Council 2003). This indicates that there is a fundamental compromise to fundamental principles of justice where individuals are forced to represent themselves, or may forego their right to appeal due to lack of access to a legal representative.
178. Over half of the criminal law respondents believed that there had been an erosion in the right to silence in the eastern States and that the courts had little sympathy with those self-represented litigants who exercised the right by not giving evidence (Cr13).

6.1.3 Civil and administrative law

179. One of the key factors affecting consumers' ability to exercise their legal rights is their ability to fund an action. Nationally the reduced availability of legal aid for many civil and administrative matters such as employment matters, trade practices actions, accident compensation small debt, migration and refugee review has in effect diminished the ability of individuals to exercise their rights.

180. It should also be noted that respondents to the civil law questionnaire identified instances where changes to administrative review procedures had enhanced individual rights.

6.1.4 Rights to review in migration

181. National Legal Aid and Law Council survey respondents identified the restrictions in the right to review decisions under the Migration Act as a fundamental attack on the legal rights of migrants and refugees.

6.1.5 Impact of the 'indemnity crisis'

182. In New South Wales, the introduction of the Civil Liability Act 2002 and the associated amendments to the Legal Profession Act 1987, were seen to have had a major impact on the rights of individuals to access legal advice in personal injury matters.

As one survey respondent from New South Wales commented:

"The power of the insurance lobby and the arrogance of the state government have ensured that a significantly decreased number of people are able to claim any damages/compensation for work, motor vehicle and other common law related injuries." (C15)

Although there is at the time of writing a major national debate on medical indemnity insurance, it was not an issue identified in this report's research activities and questionnaire responses.

6.1.6 Simplification in review procedures

183. In Queensland, respondents to the civil law questionnaire supported the State's liberalisation of review proceedings in administrative law:

"In my opinion judicial review is regularly invoked by and is readily available to any citizen with a genuine grievance and a sufficient interest in advancing a challenge to administrative decisions." (C5)

"From my personal experience I think there has been a growing ability in Queensland for persons to pursue judicial review proceedings. At the Commonwealth level there has been for once in twenty years the availability of judicial proceedings under the Administrative Decisions Judicial Review Act 1977. In Queensland that right has only generally been available since the 1990s. There is

now an effective system of judicial review in Queensland which is part of the legal scene and framework.” (C9)

In addition, the relaxation of rules relating to standing was seen to have opened judicial review proceedings to parties who had sufficient interest in a case to take action. (C5,C8,C9)

6.2 Regional variation

184. The 2001-2002 ABS Survey on Legal Practices recorded that 79% of all solicitor practices were located in capital cities. (ABS 2001-02 Legal Practices:13)

185. There are variations in the funding of legal aid commissions. As a result of funding levels and differences in local need, commissions develop and apply different policies and procedures and the hourly rate paid to private practitioners varies. Differing State based hourly rates with uniform national case funding caps can result in more or less work being able to be provided within the funding limit.

186. Hunter *et al*'s findings on self-representation in the Family Court also pointed to the fact that there were differences in the application in the merits test between legal aid commissions. Legal aid file data suggested that Legal Aid Queensland, in particular, applied the merits test both more extensively and with greater rigour than other commissions. This was presumed to be attributable to funding constraints (Hunter *et al* 2003:27).

187. In regional and remote areas of the country, there are constraints in access to private practitioners. In some areas where there may exist a small pool of solicitors, conflict of interest issues further limits the availability of solicitors who are willing to take on legally aided cases:

“This area has struggled to employ long term solicitors in numbers. Therefore without a huge pool of interested practitioners the quality will suffer.”(Cr14)

188. For indigenous communities, regional isolation has led to reductions in service delivery:

“Eight of the nine Magistrates and District Courts that Tharpuntoo attend are in the remote Cape York Peninsula Communities. All programs, pre-court visits, workshops and legal awareness programs have been discontinued due to insufficient funding. These systemic programs were cut during the 98/99 financial year.

Previously Tharpuntoo undertook Family Law work in 94/95 however this was discontinued as the service was not in a position financially to provide this service to our client base.”

“Throughout our service region (Cape York Peninsula) many issues impact negatively on our clients. Many of these issues of concern are due to the remoteness of the communities and costs required by all involved in the delivery of Justice in the Cape.” (ATSILS’ Response to Activity Statement).

Factors Contributing to the Erosion of Legal Representation

7.1 Legal aid and related issues

189. The *Managing Justice* report argues that the growth in legislation, regulations and litigation has placed great pressure on legal aid expenditure, and that restraints in legal aid in the form of caps, tighter means and merits tests are a response to potentially open-ended demand driven rises (ALRC 2000:73/74). This situation is echoed around the world (ALRC 2000:73).
190. The “means test” refers to the assessment of an applicant’s financial status to determine whether he or she is eligible for legal aid. The “merits test” addresses the merits of the actual case for which legal aid is sought to determine whether or not the case will fall within the limited category of matters for which legal aid is provided.
191. The *Managing Justice* report did not feel that the rise in the number of self-represented litigants was simply the result of legal aid changes alone (ALRC 2000:302). It identified a number of other factors which had contributed to the rise including:
- rising and uncertain costs of litigation;
 - reduced opportunities for contingent assistance;
 - a small number of people choosing to represent themselves;
 - perceived simplification and informality of proceedings (ALRC 2000:303).

However, the report recognised that changes in guidelines and the application of the means and merits test was a significant factor in the numbers of self-represented litigants (ALRC 2000:302).

192. Research undertaken by Hunter *et al* on self-representation in the Family Court also confirmed that there was an extensive relationship between the unavailability of legal aid and the number of self-represented litigants (Hunter *et al* 2003:v). The report found that the means test was not set at a realistic level and a rigorous interpretation of the merits test within some jurisdictions was presumed to be driven by existing funding constraints:

“The data suggests that the level at which the means test is currently set does not accurately reflect the level at which people can and cannot afford to pay for their own lawyers, but rather creates a group of people who are not eligible for legal aid but who are unable to afford private representation. Those people become self-representing.” (Hunter et al 2003:v)

193. Respondents to the Law Council questionnaires identified a range of reasons for the increase in the numbers of self-represented litigants. A summary of the issues they raised are outlined below.

194. One respondent to the civil law questionnaire outlined the multiplicity of factors which contributed to the rise in self-represented litigants, especially in building and planning tribunals and environment courts where courts were seen to be more user friendly:

“... the general public are becoming more educated, more sophisticated and more confident to represent themselves (eg some of the Tribunals and Courts issue information brochures or documents to demystify the processes).

“... the procedures and informality in forums such as QBT (Queensland Building Tribunal) are conducive to litigants in person being more comfortable in representing themselves.

“... the cost of legal representation has increased very substantially over the past eight years and the imposition of the GST has further exacerbated the effects of those increases” (C8).

195. Many self-represented litigants were believed by survey respondents to have no choice in appearing before the courts without legal representation since:

- they simply could not afford legal representation;
- legal aid was not available for their type of matter;
- they failed the means or merits test.

196. Many of the practitioner respondents to the Law Council questionnaire considered that a increasing number of people were failing eligibility tests for legal aid.

197. The *Managing Justice* report argued that it was very difficult to measure the attrition rates in accessing legal aid, since there were no reliable data on the following:

- the number of people applying for legal aid;
- those who apply and are then wrongly denied legal aid;
- those to whom legal aid has been granted and then exhausted before the matter reaches court;
- the number of agencies such as community legal centres, ATSILS, welfare agencies which provide legal or in kind services (ALRC 2000:324).

198. A 2003 study of self-represented litigants in the Family Court attempted to measure the above, and found only half of the self-represented litigants had applied for legal aid; only one quarter who had not applied preferred to represent themselves; and that the other three quarters had not applied because of issues relating to the means test (Hunter *et al* 2003:19).

Of those who had been refused legal aid (about two thirds of all applicants), a quarter were refused because of failing to satisfy the means test; a quarter were rejected according to guidelines; 5% due to funding caps; and 15-20% 'other reasons'. 30% were rejected because of their failure to satisfy the merits test (Hunter *et al* 2003:24). It was also clear that between one third and one half who had originally been given a grant of aid had the aid withdrawn part way through the case (Hunter *et al* 2003:24).

199. Private practitioners from the Law Council survey strongly believed that any erosion of legal representation was due primarily to reduced availability of legal aid funding. This was seen to be the result of actual cuts to funding and changes made to policy and procedural guidelines which tightened the availability of legal aid for a range of matters and clients.

200. Survey respondents believed that the tightening of access to legal aid in appeals, for instance, meant that meritorious cases were being overlooked. One respondent cited the case of *Maroney* (2000) 114A Crim R 364, where, after conviction under the Drugs Misuse Act, Maroney was denied legal aid even though a legal argument which supported his case carried sufficient weight to form the basis of a dissenting judgement from a senior and respected Appeal Court Justice Thomas (Cr 10).

201. In criminal matters, most respondents considered that cuts or stagnation in the legal aid budget had reduced access to high quality representation:

“Public funding has basically remained unchanged in summary jurisdiction for 15 years and is arguably less. In the superior courts it is much less for solicitors than it was 15 years ago.”(Cr 5)

202. Respondents to the Law Council survey considered that one of the key reasons underpinning the rise in self-represented litigants was the tight legal aid means test:

*“There is a very large class of defendants who just fail the means test, but still cannot afford to pay full fees to a private firm for representation. In my experience there are often times when we as private practitioners are expected to lower our fees to assist clients in these circumstances.”
(Cr12)*

203. The imposition of caps in family law case expenditure was frequently mentioned by respondents to the Law Council survey. They considered that self-represented litigants often exploited this situation by exhausting the capped funds at an early stage by:

“writing a plethora of letters and filing numerous applications.” (F11)

“The husband filed applications on a regular basis and threatened to file more if he didn’t get what he wanted. He said in the court room on one occasion “I’ll file an application everyday if I want to...”

“His affidavit for the final hearing was received very late and was about 120 pages in length dealing with children’s issues only. Most of the contents of the affidavit were irrelevant and inadmissible. He was given leave after the first day of hearing to prepare a further affidavit regarding property issues, which I received five minutes before the second day of hearing.” (F11)

204. The tight application of funding rules meant that there were situations where clients with special needs were particularly disadvantaged, for example, in the following criminal case:

“A young man who was previously placed upon a Probation and Community Service Order had suffered a serious mental illness and as a result was unable to continue with his community service.

The department notified the Court that they would seek a variation of the order rather than a breach. Legal aid will only fund breach matters and not variations of Community Service Orders. The young man who was 19 years of age and could hardly speak and was clearly suffering a disability but legal aid was continuously refused. It came to the point where he appeared before the district court and the District Court adjourned the matter again with a recommendation to the Legal Aid Office that aid be granted.

The young man’s mother contacted my office and I voiced my concerns about how this young man was unrepresented and I agreed I would represent him on a pro bono basis if legal aid was not ultimately granted and that I would make severe adverse comments in Court for the benefit of any media present about the unfairness of the matter. It transpired that legal aid was finally granted on the day of the hearing.”(Cr12)

205. All respondents to the criminal law survey were deeply concerned about the limits in legal aid funding for committals. They felt that the restrictions meant they were unable to prepare cases adequately, yet the committal was crucial for identifying the issues and the quality of evidence. Reduction in time given to preparation of committals can lead to the situation where criminal trials are prolonged unnecessarily since the details of the evidence are deferred to the time of the trial.

7.2 Changes to the resources of community and public legal advice bodies

206. A complementary range of legal representation and legal services need to be available to meet the diversity of demand in legal needs.

Cuts to public and community funded services such as legal aid commissions, community legal centres and ATSILS can seriously affect an individual’s access to legal representation. These services act as gateways or pathways to legal representation through referral and pro bono work. They identify meritorious cases and, in addition, offer a range of representation services especially where there are significant gaps such as victims’ compensation matters, services for

particularly disadvantaged groups, services to remote, regional and remote areas, and for indigenous communities.

7.3 Characteristic of self-represented litigants

207. Although the majority of self-represented litigants were seen by survey respondents to have little or no choice in appearing unrepresented, they also believed that there were a number of individuals who were motivated to act without legal representation for a range of other reasons which are set out below.

7.3.1 Individuals who perceived that they could not afford legal representation

208. A number of people who fail the legal aid means test believe that they are unable to afford a legal representative. They fear the costs of legal representatives or refuse to pay and continue in their action unaided (Hunter *et al* 2003:28).

209. Submissions by family lawyers to the Australian Law Reform Commission Inquiry into *Managing Justice* (ALRC 2000:17) believed that elements of the case management system had contributed to consumer costs, and that consumers had become more apprehensive about costs believing they could not afford lawyers.

210. This Inquiry highlighted that there were a substantial minority of cases where a quarter of applications for final orders had more than five case events, and 7% had 10 or more case events. It was these repeat cases which caused much aggravation, and huge increase in costs. (ALRC 2000:17)

211. Respondents to the Law Council family law questionnaire indicated that when self-represented litigants were involved in cases, proceedings become unnecessarily complex and protracted, with case events becoming too prescriptive and costly for the represented party.

7.3.2 Individuals who felt that they could do better than a lawyer, or had a dislike of lawyers

212. Survey respondents pointed out that a number of litigants considered wrongly that they could do better than a lawyer in representing their own interests:

“The explanation was that the litigant could not afford legal representation and could not qualify for legal aid. On some occasions it is dissatisfaction with the service

already provided by a lawyer cited by the litigant as a reason. On some occasions, a lawyer who had been involved in the matter at early stages disclosed that the client had decided to proceed with no legal representation as he/she was displeased with or did not accept the lawyer's advice as to prospects or as to settlement of the proceedings.” (C8)

213. One respondent to the family law questionnaire considered that self-represented litigants were encouraged to take action alone because they had been led to believe that it was easy to do so by court produced literature.

7.3.3 Individuals who continued to act despite advice that their case was without merit ie 'they knew better'

214. Survey respondents believed that some self-represented litigants continued to pursue cases despite the fact that they had received advice that their case was without merit:

“A self-represented litigant is determined to take the case all the way through every step despite a total lack of merit causing a significant increase in legal costs and stress to the lawyer's client.”(F30)

It was thought that these individuals were often driven by their own ideas of what was fair, such as ideas based on a moral or righteous interpretation of the issues, rather than on legal justice.

215. In these cases, litigants could be motivated to right *“the wrongs and cause of breakdown of marriage it [could] become something of a personal crusade.” (F28)*

The following case offers a good example of this:

“A self-represented father was seeking contact with a child that he had had no physical contact with for six years. He was asking the Court to make orders inter alia that this child travel from NSW to spend four weeks in the Christmas holidays with him....

This man in 1994 had abducted his child and had gone on the run with her and she was only returned to her mother some four months later after a member of the public spotted the father in Melbourne....

The result of the hearing ... was the federal Magistrate exercising caution in the orders that he made and basically ordering that no physical contact take place until such time as a Family Report had been ordered as to the effect on this child being reintroduced to her father. In the event the effect was positive he ordered that four periods of supervised contact take place for no more than three hours at a time.

When the father was made aware that he had to travel to Sydney for this report, and that the contact would be supervised he informed the court that it would not be happening because he would not be going, closed his file and walked out of the Court.

*The matter took almost two hours to hear and the end of the day it was a glorious waste of time as the father spat the dummy because he wasn't given what he wanted.”
(F8)*

7.3.4 Individuals who wished to exact vengeance, or exercise power against another party, especially ex partners in family law matters

216. There were also seen to be individuals who were driven to pursue cases to exact revenge on another party:

“The most extreme example in twenty years was a lawyer who represented himself in contact proceedings in the Family Court. He may not have achieved the stated outcome but he did succeed in reducing the other party to relative poverty.”(F5)

“The power of being in charge seemed more important than the issues involved in the matter.” (F10)

7.3.5 Individuals who chose to represent themselves no matter what “so that they can let fly in an unfettered manner” (F17)

“Some self-represented litigants feel empowered because they have people listening to their grievances (the bench, the other party, the public gallery), others feel disempowered because they have been denied legal aid and they are intimidated by the court process and have to face the other party.”(F33)

217. Two survey respondents to the civil law questionnaire said that some self-represented litigants were driven by a sense of moral outrage, or had a psychological obsession. (C10,C11)

7.3.6 Individuals who worked out that they could manipulate the system.

218. It was also believed that some individuals who were pursuing personal campaigns saw that being without representation was a way of manipulating the legal system to suit their needs:

“Sometimes I think it is tactical and usually by men. ‘I am incurring no legal costs whereas you must pay for a lawyer- therefore settle on my terms’”. (F21)

7.3.7 Individuals who received advice from advocacy groups and proceeded with their support

219. Individuals acting alone do have recourse to support groups to help them with legal action. The quality of the support and legal advice provided was seen to vary.

220. One respondent (F13) felt that although Lone Father’s Groups had access to a wealth of information, they could also incite individuals to take litigation further than necessary or than was warranted by merit, for politically motivated reasons.

Consequences of the Erosion of Legal Representation

221. From the responses to the Law Council survey of practitioners, it was clear that private practitioners considered that there had been an erosion of legal representation and that this had had a major impact on their own work, on the courts, judicial officers, legal representatives and their clients, children in family law proceedings, and on the principles and delivery of justice.

8.1 Lack of access to advice and representation in criminal matters

222. In criminal matters, respondents were concerned that the lack of access to legal advice meant that the accused were not able to exercise their full rights in the criminal justice process:

“Many clients who have been interviewed by police have done so because they have not had funds to obtain legal advice and are not able to have a legal aid lawyer at arrest stage. It is common from what clients tell me that they only spoke to police because they believed that they either had no choice or it would be better to do so. It is still the case that the only evidence against a person is their confession.” (Cr 8)

223. In crime confiscation and drug misuse legislation, it was thought that clients without representation did not have the resources to meet the Crown allegations:

“In time, items and monies are forfeited in situations where if the client had been better resourced the Crown would not have been able to proceed with the charges.” (Cr11)

8.2 Pressures to plead guilty or abandon cases

224. Private practitioners in civil, criminal and family law were concerned that the difficulties faced by self-represented litigants in dealing with the court system led to many giving up their action in frustration, or in criminal matters, pleading guilty to avoid a court case and the associated time and expense:

“A defendant sought to plead guilty to all offences the prosecution laid. It was clear that the defendant simply

wanted to plead guilty to save the expense and embarrassment of running his own matter. The prosecution did not accept his plea on the basis that his only indication of guilt was that 'I just want to get this over and done with, I can't afford a solicitor.'” (Cr 16)

“Overall changes are not allowing the defendant to fairly put his case and position. He or she is overwhelmed by the resources available to the prosecution and as such a lot of defendants give up and take the easy way ie plead guilty.” (Cr2)

“The very poor plead guilty.” (Cr17)

These views are backed by the findings of the *Managing Justice* report:

“Represented parties are more likely to reach consensual settlement whereas unrepresented parties may inappropriately abandon proceedings or unnecessarily prolong proceedings with additional expenses.” (ALRC 2000:304)

225. In intervention, or apprehended violence orders, one criminal law respondent felt that there was a great deal of pressure on self-represented litigants to give up or consent to orders. *“The alternative is that the Magistrate must undertake a heavier burden to see that the trial is conducted fairly.”* (Cr 12)

8.3 Inadequately prepared cases

226. From the details provided in the responses to the Law Council questionnaires, it was clear that many self-represented litigants did not really understand what they were doing in preparing and proceeding with cases. This meant that in many civil, family and criminal matters, their lack of knowledge of court procedures, the law, and legal procedures, self-represented litigants were not able to obtain the best outcome for themselves.

Self-represented litigants were seen in the majority of cases to be inexperienced, lacking in legal skills, often inarticulate and ill prepared.

In criminal and in family law matters, they were unable to cross examine witnesses without the help of the judge or magistrate.

227. In contested children’s residence matters, survey respondents voiced their concerns that the Court was not being provided with adequate information by self-represented litigants to make decisions that were in the best interests of children.

228. Either through lack of understanding of procedural rules or deliberate abuse of the system, self-represented litigants were seen to engage in inappropriate, time wasting or repetitive behaviour which delayed and/or prolonged proceedings and caused inconvenience to the court and all parties. For example, in a family law matter in the Federal Magistrate’s Court, one practitioner related that:

“Mother was not represented. Existing residence order in the father’s favour (a six months prior). Mother filed fresh residence application without a change in circumstances and three Form 8 applications and three contravention applications. After a two day hearing they were all dismissed. The mother then filed a fresh Form 8 application the very next week.” (F23)

229. The lack of experience of the self-represented litigant can lead to simple matters becoming more complex and lengthy procedures than necessary. For example, in the following cases involving self-represented litigants:

“The outcomes have been predictable and had the person been represented the trial might have been avoidable.” (F35)

“Simple matters which might have been negotiated between solicitors prior to a hearing are not discussed.” (F36)

Even where the self-represented litigant was being as diligent as possible, lack of experience could lead to complications.

230. This was also seen to be true in criminal matters, where intervention orders and apprehended violence orders were not properly resolved and ended up taking unnecessary court time.

8.4 Delays and prolonged cases

231. One of the key concerns demonstrated in responses to the Law Council’s private practitioner questionnaires was that the delays in the court process, which resulted from the difficulties experienced by self-represented litigants, meant that in effect justice was being denied.

232. In criminal matters, the presence of a self-represented litigant was seen to cause delay, or to prolong proceedings;

“The hearing or mention of the matters have been prolonged due to being put to strict proof and for the need to explain the process to the unrepresented party through the Magistrate.” (Cr16)

233. Survey respondents to the Law Council questionnaires identified a number of reasons for delays and prolonged cases:

- deliberate action by the self-represented party to delay proceedings;
- lack of ability to understand and execute required actions;
- repeated irrelevant or unnecessary affidavits or applications;
- filing the wrong sort of applications;
- filing affidavit material which is deficient;
- failed to comply with directions to file particular documents and not filed them in time;
- expectation that the court will make final orders on the first return date;
- lack of understanding of the principles of negotiation and lack of negotiating skills.

One practitioner’s experience was:

“Over the past four years I have been dealing with a self-represented husband in property settlement proceedings. The matter is shuffled from sitting to sitting due to the litigant’s total lack of activity between adjournments.” (F1)

Or due to inexperience and lack of confidence, self-represented litigants created more work:

“Self-acting litigants are usually more likely to file applications over issues which would otherwise be simply the subject of trial evidence.” (F3)

234. Private practitioners considered that in family law, the lack of legal representation at the early stages of a case made it much more difficult to reach a negotiated settlement. Cases appear before the

court that would not have done so if the other party had been legally represented.

235. Many family law practitioners considered that one of the major problems they experienced in dealing with self-represented litigants was their inability or refusal to negotiate an early settlement.
236. This view was also taken by the Family Law Council in its report *Litigants in Person* submitted to the Attorney General in 2000. The report highlights the fact that self-represented litigants would either settle early or resolutely proceed to a hearing. Cases took longer to settle and there was less chance of those who decide to continue to reach a settlement before hearing. This was mainly due to self-represented litigants not having the required legal negotiating skills:

“The srl (sic) made a number of frivolous, incorrect and lengthy interim applications.” (F32)

237. In family violence intervention orders, the presence of a self-represented litigant was considered by a number of respondents to inhibit early settlement. Due to the emotional investment of parties in the case the hearing ended up becoming more complicated and lengthy.
238. In civil and administrative matters, delays and adjournments were seen to be caused by parties' lack of knowledge or deliberate attempts at protraction or non-compliance:

“Firstly it is not uncommon for there to be a series of adjournments and for matters to be delayed because the unrepresented litigant is not familiar with the court processes and usually struggles to comply with specific directions given by the court. In one recent case, a commercial operator who brought a judicial review challenging the decision of a government regulator was delayed in effecting a settlement of the matter, because the third party complainant who was not represented refused to participate in and/or acknowledge the relevant court processes.

Another difficulty which has often arisen for government agencies when judicial review type proceedings have been brought by a litigant in person is that often the case that is being put against them is poorly formulated and in some instances at trial there can be surprising developments. This is particularly the case if an issue

which was not fully described in the pleadings “comes out of the woodwork” and this may then require an adjournment of trial.” (C9)

Time was also seen to be wasted *“simply identifying the real issues; then (usually) more time is taken up by the Court having to explain the relief sought is not available or inappropriate.” (C2)*

8.5 Inequity in outcomes

239. Practitioners were concerned that self-represented litigants were placed at a disadvantage when faced with experienced lawyers:

“I am the child representative, mother is represented, Department of Health and Human Services is represented, father is not represented as the legal aid limit has been reached. The Department’s case against the father is weak but the Department is very well represented. Father is a poor advocate and unlikely to represent himself well. Children are in the Department’s care.” (F25)

240. One practitioner pointed out that when a legal aid office terminates funding to parties where the other party is self acting, this can have serious consequences for cases where there are allegations of domestic violence:

“This frequently leaves the victim of domestic violence to represent themselves against the very perpetrator of that violence.” (F3)

241. In a key Family Court case *T v S* (Fam CA 1147), the Chief Justice expressed his deep concern about a woman who was subjected to domestic violence having to represent herself:

“This case highlights a serious problem affecting the administration of justice in the Family Court proceedings...women who have suffered serious domestic violence may be unable to present their cases unaided in family law proceedings. The present legal aid system does not appear to be able to cope with these problems.”

242. Whilst the principles of natural justice are fundamental to the Australian legal system, many respondents believed that the increase in self-represented litigants posed a particular problem for the courts.

Respondents felt that judges were caught between a rock and a hard place in trying to ensure that justice is done. Many respondents considered that judicial officers were too tolerant of self-represented litigants, yet were subject to review of the appeals courts if they were deemed to have failed to provide natural justice in conducting the case.

243. The High Court provides details of the success or otherwise that self-represented litigants have in their cases. Its 2002 Annual Report notes that in applications for special leave to appeal, only 0.7% of self-represented litigants were successful compared to 21% of those who were represented (High Court 2002:7-8).

In the Federal Court, self-represented litigants are less likely to be successful, with 54% of their cases dismissed compared to 31% of represented parties. Their cases are only slightly more likely to discontinue: 24% compared to 20% of represented parties (Gamble *et al* 1998). However, self-represented litigants are more likely to have to pay costs than represented litigants: 68% compared to 38% of represented litigants.

244. Criminal law practitioners considered that legally aided defendants were at a disadvantage in the criminal trial when inexperienced counsel took on their cases. It was considered that there was a real risk that some inexperienced junior counsel may be conducting trials in ways that did not necessarily achieve the best outcomes for defendants:

“Experienced and competent senior members of the junior Bar are less inclined to accept briefs for legal aided clients and from the DPP because of the inadequate fees paid by both legal aid and the DPP. ..It is simply the case that otherwise meritorious matters are settled by a plea of guilty because inadequate funding precludes appropriate preparation.” (Cr9)

“It is not in the best interests of legally aided clients – most of whom come from disadvantaged backgrounds to be represented by inexperienced practitioners.” (Cr9)

245. Other criminal law practitioners pointed out that in cases where parties were unrepresented, or were represented by more junior lawyers, irrelevant issues may be aired, or there was a danger that relevant issues were not raised. In some cases, parties were in danger of self-incrimination.

8.6 Courts and court procedures

8.6.1 Cost transferral

246. The increase in self-represented litigants has a consequential effect for courts and represented clients in terms of a transfer in costs. Research conducted into litigants in person in the Family Court indicates that greater investment in publicly funded legal representation would result in cost savings to the Court. However, the research could not prove conclusively that the efficiency gains arising from greater investment in legal aid would outweigh the actual costs of the aid provided (Dewar et al 2000).
247. It is clear that there are significant costs to the legal system of dealing with impecunious unrepresented parties.

Chief Justice Gleeson has stated that:

“..costs to government of providing legal aid cannot be assessed without considering the costs incurred by not providing legal aid.” (Gleeson 1999 at ALRC 2000:304)

The Law Reform Commission of Western Australia claimed

‘The presence of the self-represented litigants in the civil justice system has the potential to increase costs for all court users... from more pre trial procedures, poor issues definition and clarification; greater time and expense in responding to unclear or irrelevant evidence, and excessive time spent in hearings.’

(Law Reform Commission of Western Australia *Review of the Criminal and Civil Justice System in Western Australia* Project 92 LRCWA Perth September 1999 para 18.3 at ALRC:304)

248. It was pointed out by a number of survey respondents that the withdrawal of legal aid did not necessarily mean that public purse expenditure was reduced. The point was made repeatedly that the lack of legal representation imposed extra costs on the court and other government funded bodies through such things as prolonged proceedings, increased costs on court staff and judicial officer time and the increased number of case events. Cutting back on publicly funded representation could, in effect, be a false economy.

249. The following case provides an example of this cost transfer:

“A father has been applying to the family court for orders relating to his children (who are state wards). The court has dismissed each application telling him it cannot make orders while there are wardship orders. He applied last year to the Children’s Court to have the wardship orders revoked. There was no merit to his application. After 9 hearing days his application was dismissed. The Legal Aid Commission is funding the child representative. The Department of Community Services has been a party in all proceedings. And so the ‘public purse’ is also funding the matter. The father has now made a further application this year to revoke the wardship order (but again there has been no change in circumstances.) He has failed to comply with directions as to filing of documents and the matter is constantly being listed for further directions.” (F33)

250. One of the problems for represented parties in family law is the increase in costs to them precipitated by the number of adjournments and case events prompted by the self-represented litigant.

This is supported by the Australian Law Reform Commission *Managing Justice* report:

“The Commission’s empirical research showed that the complexity of cases, the number of court or tribunal case events and lawyers’ changes practices were the most significant influences in determining the amount of private costs.” (ALRC 2000:11)

251. Respondents to the Law Council survey also saw that costs increased because self-represented litigants engaged in large amounts of correspondence:

“Such communication is usually either because the self acting litigant initiates more communication than is appropriate, or chooses to communicate in an overly verbose manner, or does not have the benefit of advice.” (F3)

8.6.2 Judicial officers and court staff

252. A number of respondents considered that the rise in self-represented litigants increased the workload for judicial officers. The High Court

Annual Report for 2002 estimated that more than 50% of Registry staff time is taken up with helping self-represented litigants.

253. In a study of the Administrative Appeals Tribunal, it was calculated that its staff devoted five times as much of its time to self-represented litigants than represented parties (Gamble et al 1998).
254. Not only are judicial officers required to provide extra support and information to self-represented litigants, which means that they are working longer hours, but they also have to deal with the increasing frustration that court users may display:

“Accordingly from time to time they look somewhat frazzled.” (F3)

Part of the problem was seen to stem from self-represented litigants’ lack of knowledge about such things as the preparation of documents, legal procedures, legal technicalities, how to address the court and submission of evidence.

Judicial officers were compelled to explain, then correct and provide further information.

255. As one survey respondent succinctly explained:

“They do not understand the process nor do they understand the rules of the court nor do they understand the importance of complying.” (F8)

The court was asked for advice and explanation about procedures and the content of documents, and to listen to cases with little merit.

8.6.3 Pressure on judicial officers to ensure justice is done

256. Judicial officers were seen to be under pressure to ensure that justice was served for self-represented litigants by providing assistance and information. Survey respondents considered that in some cases this was reaching beyond their traditional impartial role:

“The conduct of a case by a litigant in person creates additional responsibilities and work for individual judges. It is not easy to balance the obligation to assist a litigant who is without legal representation on the one hand with the need to ensure that the other party (who is represented) is not disadvantaged or given reason to perceive some disadvantage in the way that the case is

conducted. Resources available for the administration of justice are scarce. Dealing with litigants in person who may not understand the interlocutory or trial processes that are designed to identify and limit issues, with a consequent savings of scarce resources, is a very difficult task indeed." (Chief Justice Malcolm of the Supreme Court of Western Australia 2000. Submission to the Western Australian Salaries and Allowances Tribunal)

"Judicial officers have to balance being impartial against ensuring a party understands the procedures." (F38)

"Judicial officers and particularly some registrars need to have clearer guidelines in the explanation of concepts in simple language that people understand. They also need to be trained to remove any bias towards favouring the unrepresented litigant." (F14)

257. One respondent from Queensland (F5) said that although judges on the whole went out of the way to help self-represented litigants and 'demonstrated patience and compassion beyond all reasonable expectations', they had also seen judges 'lose it completely' in the face of exasperating litigants.

258. A number of survey respondents believed that self-represented litigants were treated much more favourably than litigants with a legal representative. In one case it was believed that the judicial officer had:

"been too timid and cautious and allowed them effectively an advantage in the process and overcorrected the playing field. A court of law is a court of law and the principles should be applied equally to all." (F14)

And in another:

"The bench usually leans over backwards to assist them. Your legal objections are useless and in the end you help the opponent get through the case so that you can finish the matter- your client feels aggrieved."(Cr16)

259. Other respondents considered that the self-represented litigants were allowed to get away with far too much. This was identified in all areas of law:

"I formed the view or at least wondered that a litigant who had been legally represented may not have achieved as

good a result from the Court in terms of what the particular litigant achieved.” (C8)

“I have a perception that with a number of judges such litigants get greater latitude far in excess of what they really ought to be allowed.” (C7)

260. In criminal matters, one respondent believed that the latitude shown to self-represented litigants could prejudice cases.

For example, in a case where the practitioner appeared against an unrepresented litigant - *Butcher v Woods* (1996) QCA 465 - material was filed with the court after argument but before judgment. No copy of the material was ever sighted by the Crown, but nevertheless was influential in the court’s decision not to order a re-trial (Cr17).

The same respondent felt that judicial officers should be trained to deal with self-represented litigants:

“District Court all grounds appeal. Defendant unrepresented. Defendant had no idea the procedure. Other side forced to assist by not continually objecting. The judge assisted the defendant who was eventually successful. The other side were very unimpressed by the cost plus the outcome. Nagging feeling that the result might well have been different if he had been represented ie objections, proper evidence and procedure would have been followed.” (Cr17)

8.6.4 Party non-compliance

261. A majority of survey respondents were concerned that the courts not only provided a great deal of leeway to self-represented litigants, but also did not act to ensure compliance with court directions and orders.

This not only prolonged cases, but also meant that some litigants abused the situation and ‘took the law into their own hands’ reckoning that there would be little repercussion for breaches of orders.

In other situations, orders may not be fully understood and be subject to contravention or repeated attempts at variation.

8.7 Pressure on represented parties and their lawyers

8.7.1 Increase in costs for represented party

262. Repeatedly respondents to the family law survey highlighted the fact that delays and prolonged proceedings not only led to an increase in costs, but also had an adverse impact on represented parties and their legal representative in many other ways.

One respondent told of a case in which he had been involved where the deliberate actions of the self-represented litigant left the children with less financial security as the unwarranted costs of resolving the matter ended up eroding the assets under dispute.

In criminal matters, legal representatives felt the extra pressure to be vigilant when there was a self-represented litigant to ensure that the person understood the court process and related procedures.

The increase in costs for clients was also of concern to civil practitioners, especially with the increase in interlocutory hearings and the time spent by legal representatives explaining procedures to the self-represented litigant.

8.7.2 Sense of injustice

263. Represented parties could be left feeling aggrieved by the process, wondering why their lawyer wasn't able to act in the same way as the self-represented litigant, and why the judicial officer seemed to help the self-represented litigant more:

“Represented parties are increasingly commenting that they feel the unrepresented litigant is receiving free legal advice from the Bench or being given too much allowance for not complying with directions as to filing of documents etc.. they can also see how their costs are being increased by cases with no merit being litigated and some self-represented litigants have commented to the other party and solicitors they are proceeding so that the other party ‘runs up a legal aid bill’ and since costs are rarely awarded in children’s matters we are seeing applications being made that have no chance of being successful and the self-represented litigant has no legal costs.” (F33)

264. Due to the inexperience and lack of understanding of the self-represented litigant, private practitioners considered that they had to do far more work in ensuring proceedings ran smoothly:

“Often there has been a need for interlocutory applications to force the other party to comply with procedural orders.” (F26)

8.7.3 Impact on child representatives and children

265. Respondents who acted as child representatives in family proceedings, or those who frequently worked with child representatives, were extremely concerned about the impact on cases where legal aid funding had been withdrawn for parents, or interested parties on the appointment of the child representative.

Child representatives were placed under enormous pressure by unrepresented parents. As one respondent said, child representatives become the “meat in the sandwich” subject to two lots of attacks (F5); or they have to find a balance between representing the children’s interests and assisting the other parties to understand the procedures.

266. It was perceived that child representatives have had to deal with an increased volume of communication with the self-represented parent(s) and feel constrained to assist in preparing affidavits and providing information for the court in order for matters to proceed smoothly. The self-represented litigants appeared not to understand that the children’s representative could not give them legal advice.

Usually legal representatives for parents in these matters were able to act as ‘voices of reason’ and provide a buffer between parents and children.

267. In cases where parties were self representing, survey respondents felt that:

“Parties often with deeply entrenched negative personal feelings towards their former partner are forced to deal with that person supposedly in a child focused way and in a way which attempts to minimise the need for court intervention.....It follows that almost invariably children in matters where one or both parents is self acting become more enmeshed in the dispute between their mother and father than in other matters and far more than is desirable.” (F3)

268. Concern was expressed that self-represented litigants who were parents in contested residence matters tried to involve their children inappropriately, interviewing them, questioning them inappropriately in

court, getting the children to write letters to the court, and/or holding on to children at contact visits or returning from contact visits.

269. One of the indirect outcomes of the delays in proceedings resulting from parents being unrepresented was that children involved in cases were left in limbo. This was particularly worrying when the child was in need of counselling or other forms of therapy.

As one respondent pointed out:

*“Therapists will often not commence therapy with a child until the dispute between the parents has been settled.”
(F7)*

270. Other survey respondents considered children were badly affected in proceedings where one or both parents were unrepresented:

“I think they suffer from the fact that their parents are involved in a more expensive, more protracted and more complex process of dispute resolution.” (F22)

“Badly affected because extra time matters take to resolve, disagreements and tension between parties increases where with assistance from solicitors we can often decrease the dynamics and assist people to resolve parenting attitudes or matters which don’t fall within the orders.” (F38)

“The children are always last to be considered. Maybe the whole discussion should be turned upside down and seen from their perspective.” (F5)

8.7.4 Anger, frustration and violence

271. The delays, constant appearances and variations and breaches of orders in family law matters were seen to have a profound emotional impact on all parties and the children involved in contact and residence disputes.

A substantial number of respondents to the family law survey indicated that they had witnessed an increase of anger, violence and threats in the Court directed at judicial officers, other parties and in some cases legal representatives by self-represented litigants.

This was attributed in most part to the frustration that self-represented litigants felt in the face of legal proceedings which didn’t necessarily

go their way, but also due to the lack of the calming effect that lawyers may have as they act semi-independently from the client.

272. The escalation in pressure and frustration can have tragic consequences as the following case sadly demonstrates:

“The mother had been represented whilst her self-acting former husband presented application after application usually over inane issues with no prospect of success whatsoever. The failure on the part of the Federal Magistrate to make any costs order against the husband, the ongoing pressures of regular court appearances and the withdrawal of legal aid funding resulted in the mother killing two children the subject of the dispute.” (F3)

A Tasmanian private practitioner stated that in his experience, the represented party had increasingly to seek police protection in court due to the anger and frustration expressed by the self-represented litigant.

273. In another case, a child representative reported attacks by a self-represented litigant:

“I was assaulted by the LIP (sic) because I didn’t support their case. Throughout the proceedings she was unpleasant and hostile towards me. The residence trial proceeded on an undefended basis because the father was unable to attend the trial due to lack of finances and living interstate. It took one full week of court time due to the LIP pursuing her case which had little merit. The litigant in person was difficult and unwilling to listen to the presiding Judge and blamed me for the outcome of the decision.” (F18)

8.7.5 System difficulties

274. Family law survey respondents also raised the issue that the managed court procedures had come to dominate proceedings so completely, that innovative responses to difficult cases were no longer utilised. In these circumstances, adherence to the system had become the be all and end all of the process, and seemed in some cases to have become more important than achieving justice. The outcome for the parties took second place.

Conclusions and Recommendations

9.1 Conclusions

275. The research undertaken for this report has confirmed that there has been an erosion in legal representation since 1994 and that this has had a detrimental impact on the legal system and on the delivery of justice. The stories and views of experienced legal practitioners confirm the available data and previous research which has indicated a growth in the numbers of self-represented litigants. Their experiences bring a human dimension to the loss of rights experienced by many citizens as litigants in the courts.
276. The characteristics of the erosion have been identified as:
- a rise in the number of self-represented litigants;
 - a reduction in rights before the law;
 - inequity in access to representation;
 - a significant withdrawal of experienced lawyers from publicly funded legal work;
 - some diminution in the quality of legal representation;
 - legal aid fees often being below the real cost of providing the necessary service.
277. Courts have endeavoured to cope with this increasing phenomenon by blending various guidelines and systems designed to reduce the impact on the process if a self-represented litigant is involved. However, the reality is that the courts' role to efficiently and fairly adjudicate a dispute is almost inevitably compromised by an unrepresented party. The cost of resolving that dispute is almost inevitably increased.
278. Although the erosion has been caused by an interplay of factors including increased demand, increased legal need, the Commonwealth/State funding divide, the limitations placed on a number of jurisdictions in which legal aid can be provided, the failure of public funding of legal representation to keep pace with the actual cost to a lawyer of providing legal services has been a significant issue identified in this report. The acceptance by the legal profession of inadequate remuneration is deference to the public good identified

back in 1994, seems to have been exploited to such an extent that increasing numbers of experienced practitioners are withdrawing from publicly funded legal work. The goodwill has worn thin.

279. The lump sum 'stage of matter' funding is a significant part of the problem. Because the allocated levy on which the fee is based is often insufficient, private practitioners undertaking publicly funded legal work find they do more hours than the funding allows for. This effectively reduces the hourly rate and increases the financial loss. Many practitioners find it difficult to cope with the ethical tensions between doing the work at the level for which funding provides, and doing the work which is actually necessary to do the task properly. The easy solution to that problem is to stop doing publicly funded work. Because legal aid has become so much more difficult to obtain, recipients of legal aid tend to be very disadvantaged and / or their problems very complex or serious.
280. There is no regular and objective assessment of a proper fee upon which to base the payment for publicly funded legal work. Legal aid hourly rates vary widely between the States and Territories and between type of legal matter or jurisdiction. The rates are not regularly reviewed with some fees not changing in the eight year period covered. Presently, funding is inadequate to meet demand. Regrettably, it often takes a serious crisis in service delivery for a fee review to be undertaken.
281. This report has demonstrated that the erosion of legal representation is having a major impact on the Australian legal system. It is resulting in:
- pressures to plead guilty or abandon cases due to lack of representation;
 - a serious ethical dilemma for private practitioners who desire to provide representation for disadvantaged clients but cannot do so within the fee restraints of legal aid;
 - delays in court proceedings and prolonged cases;
 - increased non compliance with court directions and procedures;
 - increased demands placed on judicial officers;
 - increased tension for judicial officers and lawyers between the desire to see justice done, and the need to remain impartial in the delivery of justice;
 - cost increases to the courts;
 - increased costs for represented parties;

- increase in frustration and violence from clients in the courts;
- the ‘best interests of the child’ in family matters not being served.

282. Although there has been some difference of opinion whether the current situation is at crisis point, there is no doubt that there is an urgent need to provide a coordinated response to a worsening situation.

9.2 Recommendations

Recommendation 1: Improved funding for service providers

Urgent attention should be given to providing increased and secure funding for those bodies responsible for managing and delivering publicly funded legal representation including legal aid commissions, Aboriginal and Torres Strait Islander Legal Services and community legal centres.

Funding provisions should take account of the increased costs associated with delivering legal services to remote communities.

Recommendation 2: Future planning

A national task force involving representatives of those bodies providing publicly funded legal services should be established to develop national guidelines and priorities for the delivery of those services.

Recommendation 3: Client centred approach

The Commonwealth Government should modify the Commonwealth/State jurisdiction demarcation for federal legal aid funding to facilitate a more client-centred approach where the major legal issue is one that falls within the presently accepted Commonwealth responsibility.

Recommendation 4: ALRC Inquiry into the increase in self-represented litigants

As a priority, the Commonwealth Attorney-General should provide a reference to the Australian Law Reform Commission to conduct a detailed study of self-represented litigants in the Australian justice system, the reference to report on any rise in numbers, causes of any reported rises, impacts on the legal system, costs to the legal system and other parties, and possible remedies.

Recommendation 5: Access to legal representation

Co-ordinated regional service delivery by legal aid commissions, Aboriginal and Torres Strait Islander Legal Services, community legal centres and the private profession (as being piloted by NSW Legal Aid Commission) should be strongly encouraged in all States and Territories.

Recommendation 6: Rural and remote regions

Innovative scholarship and subsidy schemes should be established to encourage young people from rural and remote regions to become lawyers and lawyers should be encouraged generally to practise in rural and remote regions.

Recommendation 7: Fees for publicly funded legal work

A strategy should be developed to carry out and implement an independent, transparent and regular review of legal aid fee scales which takes into account the actual cost to lawyers of providing private legal services and allows for those fees to be appropriately adjusted on a regular basis to a level which at least meets cost and is sufficient to retain the involvement of the more experienced lawyers to ensure equity of representation.

Recommendation 8: Reduction in bureaucracy

There should be a streamlining of the administration of grants of legal aid (including a broader use of practitioner assessment methods such as that trialled in Victoria).

Recommendation 9: Courts

Federal and State courts should be encouraged to:

- continue to develop protocols for court staff and judicial officers for the conduct of cases which involve self-represented litigants;
- facilitate duty lawyer services;
- keep detailed statistics on self-represented litigants in whole or in part;
- participate in an inquiry to be conducted by the Australian Law Reform Commission.

Recommendation 10: Improved national data collection on self-represented litigants

In 2000, the Australian Law Reform Commission recommended a number of initiatives to be undertaken to gain a more accurate picture of self-represented litigants.

Recommendation 39 in the *Managing Justice* report called for legal aid commissions to standardise data collection nationally, and to publish the data in their annual reports, with respect to both inhouse and assigned cases on:

- statistical trends in outcomes of matters trends in application, approvals and refusals of aid (applicant type gender, ethnicity rural/regional);
- duration of grant and outcomes;
- outcomes of conferencing, and alternative dispute resolution services;

- use of legal aid services other than those granted under legal aid.

The *Managing Justice* report also outlined the need for a consistent standard to be employed in the definition of unrepresented litigant to provide a more reliable method of data collection (ALRC 2000:326). Recommendation 40 called for the federal courts and tribunals to publish data using a standardised measure of unrepresented litigants and to provide annual information on case outcomes and case duration in matters where there is an unrepresented party.

The *Managing Justice* report also called more generally for further research to be undertaken in developing better measures of legal need (ALRC 2000:74).

The Law Council of Australia supports these recommendations and proposals. It recommends further that the details contained in Recommendation 40 be extended to all Australian courts and tribunals.

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APPENDICES

APPENDIX 1 - ACTIVITY OUTLINE STATEMENTS

LAW COUNCIL OF AUSTRALIA:

Erosion of Legal Representation and Rights Project

Activity Outline

Australian Institute of Judicial Administration

1. The identification of selected courts, including Family Court, Criminal Court and Civil/Administrative Court, where it is of the view that the relevant court has available good statistics for the period 1994-2002.
2. The provision of an overview of the activity within those courts compared against the standard activity of the court identifying:
 - (a) any growth in litigants in person and plotting that growth over the period of time;
 - (b) any apparent effect of that growth in terms of:
 - delay
 - cost
 - security issues
 - other issues
3. Any perceived reduction, juniorisation or other erosion of legal representation in those courts by the judges and any perceived consequences of that juniorisation in terms of cost or other effects. For example, it may be that a juniorisation in the criminal court might lead to an increase in appeals and retrials.
4. Identifying the dollar cost per day of running each court, ie what is the cost to the court budget of a day of court time, for each of the courts in Family, Crime and Civil/Administrative.
5. The degree to which the court support staff mechanisms, registries etc have had to accommodate litigants in person over the given period; whether there has been an increase in assistance required; if so, the costs associated with this assistance.
6. Consideration and comment on the effect of litigants in person in the Court of Criminal Appeal and before single instance judges. A consideration of the same issues as they might apply in a Magistrate's Court.
7. Consideration and comment on the effect of a litigant in person, if any, on any court annexed mediation processes.

LAW COUNCIL OF AUSTRALIA:

Erosion of Legal Representation and Rights Project

Activity Outline

National Legal Aid

National Legal Aid will provide a review and overview of the following performance indicators from 1994-2002:

1. the growth in salaries of:
 - a first year solicitor
 - a seven year or senior solicitor
 - a chief executive officer
2. the hourly rate paid for legal aid services to the private profession over that period 1994-2002, setting out changes that have occurred over that period;
3. the fee paid for a plea in the magistrate's court or lowest criminal court, and how that has changed over the period;
4. the counsel fee paid for a first day of hearing in both a criminal trial court and a family trial court, and how that has changed over that period of time;
5. the areas or activities in which legal aid has reduced or eliminated its involvement since 1994, having regard to family law, criminal law and civil/administrative law. When and why did such reduction or elimination occur;
6. an overview as to the means test during that period and whether there have been any changes of significance in it since 1994;
7. an overview of the eligibility criteria or guidelines since that time and whether there have been any changes that have made it harder for applicants to obtain publicly-funded legal representation or have eliminated their rights in some areas of law;
8. the growth or diminution in funding provided over that period of time to the commissions by (a) the Commonwealth (b) the states;
9. any perceived erosion or diminution of legal rights that might (a) affect the capacity for the issue to be judicially reviewed (b)

effect an increase or decrease in the cost of disposition of a matter;
and (c) effectively limit or diminish previously long-established
common law rights.

LAW COUNCIL OF AUSTRALIA:

Erosion of Legal Representation and Rights Project

Activity Outline

General Practice Section (now Legal Practice Section)

It is anticipated that the General Practice Section will conduct or arrange for a review to be conducted of small to medium-sized firms in country, regional and city areas from 1994 to 2002, to enable the provision of comment as to:

1. the expenditure or overhead cost of delivering one hour of legal services including principal salaries over the requisite period, setting out any changes that have occurred during that period;
2. the overhead cost of producing one hour of legal services before principal salaries, over the same period;
3. the identification of how that overhead expenditure cost has grown or diminished since 1994 and identifying any obvious factors associated with that;
4. the identification of and charting the growth or diminution in principal salaries in selected firms from 1994 to 2002;
5. the identification (if possible) of whether those firms participate in publicly-funded legal work or pro bono work;
6. the identification of the increase in the cost of living over that same period and calculating what increase would need to occur in a principal's salary to enable that principal to maintain the lifestyle he or she enjoyed in 1994, over the relevant period;
7. the identification of the growth over the relevant period in:
 - professional salary costs
 - accommodation
 - information technology
 - any other key components of overheads
8. the identification of other factors that are perceived as likely to impinge now or in the next several years on the costs and overheads of small to medium-sized 'community servicing' legal firms, eg:

- cost of insurance, professional and otherwise
 - loss of areas of business such as public liability, personal injury
 - other
9. the identification of any other factors likely to affect the capacity of those small to medium-sized community servicing firms to continue to undertake publicly-funded or pro bono legal work;
 10. the identification and charting of any growth in parliamentary, judicial and court official salaries over that same period of time.
 11. The identification and setting out of the formula or methodology used to calculate the hourly overhead/expenditure component:
 - before principal salaries
 - after principal salaries

It was noted that the anticipated sources for this base information would be the FMRC, the Australian Bureau of Statistics, the Law Societies and Bars (in particular New South Wales Law Society and Law Institute of Victoria), and possibly the Australian Institute of Judicial Administration.

LAW COUNCIL OF AUSTRALIA:

Erosion of Legal Representation and Rights Project

Activity Outline

Aboriginal & Torres Strait Islander Legal Services

Identifying through information retained over the 1994-2002 period the following matters:

1. Any growth in salaries paid by ATSILS to their professional employees and in particular as follows:
 - for a first year solicitor
 - for a seven year or senior solicitor
 - for a chief executive officer
2. The hourly rate paid for private legal services outsourced by the ATSILS;
3. The fee paid by way of a lump sum for a plea in the lowest criminal court;
4. A counsel fee paid to the private profession for the first day in a district court level criminal trial and in a family court trial;
5. The areas of support or coverage which have reduced since 1994 in criminal, family and civil/administrative law and how they have reduced, when and why;
6. Identifying whether there is any means test applied that has altered since 1994 and if so, how;
7. Identifying whether there are any eligibility guidelines or criteria that have applied since 1994, and whether or not they have changed. If so, how and why;
8. Identifying and recording the growth or diminution in funding provided over that period to ATSIC by the Commonwealth, and to ATSILS by ATSIC;
9. Identifying and commenting on any perceived erosions or diminution of legal rights (a) affecting the capacity for a judicial review to be conducted in relation to the decision, (b) that are

likely to increase or decrease the cost of disposition of a matter by the court and (c) that amount to an erosion of long-established common law rights;

10. Identifying any growth in the number of ATSILS over the relevant period;
11. Identifying the turnover rates of junior professional staff employed by ATSILS and giving some estimate as to the length of time that ATSILS can expect a first year solicitor to remain with the organisation;
12. Identifying the growth in any demand for legal representation and providing statistics on the number of people legally represented before the courts or tribunals.

LAW COUNCIL OF AUSTRALIA

EROSION OF LEGAL REPRESENTATION AND RIGHTS PROJECT

Civil/Administrative Law

1. Please confirm that you have worked in the jurisdiction extensively during the period 1994-2002.
2. Do you practise in the country, regional centre or major city?
3. Have you a view as to whether or not there has been an increase in unrepresented litigants in the jurisdiction in the same period (include specific areas within jurisdiction if appropriate)?
4. Have you been involved in cases where there has been a litigant in person on the other side, and what have been the consequences of that to your client, the court and the process?
5. Following on from (4), was any explanation given to you as a practitioner representing the other party as to why the other person was unrepresented?
6. Has there been any apparent diminution over that time in the extent or quality of legal representation available to parties who you knew to be publicly-funded, and with what consequences?
7. Have you noticed over the past eight years any obvious erosion or loss of rights in relation to:
 - the ability to judicially review an administrative decision;
 - any changes to the onus of proof;
 - any other changes to long-established processes or rights.

Please comment on your perception of the consequences of such changes.

LAW COUNCIL OF AUSTRALIA

EROSION OF LEGAL REPRESENTATION AND RIGHTS PROJECT

Criminal Law

1. Please confirm that you have worked in the jurisdiction extensively during the period 1994-2002.

2. Do you practise in the country, regional centre or major city?

3. Have you a view as to whether or not there has been an increase in unrepresented litigants in the jurisdiction in the same period (include specific areas within jurisdiction if appropriate)?

4. Have you been involved in cases where there has been a litigant in person on the other side, and what have been the consequences of that to your client, the court and the process?

5. Following on from (4), was any explanation given to you as a practitioner representing the other party as to why the other person was unrepresented?

6. Has there been any apparent diminution over that time in the extent or quality of legal representation available to parties who you knew to be publicly-funded? Please comment on what you perceive to be the consequences of any such diminution.

2.

7. Could you please give examples of the effect of

- (a) litigants in person
- (b) restricted legal representation

in:

- summary matters
- appeals from magistrates
- committals
- trials
- appeals
- avos and/or domestic violence matters

Please provide a short summary of examples. Please give at least one example of a matter in which you have been involved in the last year, and its consequences.

8. Have you noticed over the past eight years any obvious erosion or loss of rights in relation to such core matters as:

- the right to silence; or
- reversals of onus of proof; or
- the loss of a full committal process; or
- any other long-established common law rights.

Please comment on your perception of the consequences of such changes.

LAW COUNCIL OF AUSTRALIA

EROSION OF LEGAL REPRESENTATION AND RIGHTS PROJECT

Family Law

1. Please confirm that you have worked in the jurisdiction extensively during the period 1994-2002.
2. Do you practise in the country, regional centre or major city?
3. Have you a view as to whether or not there has been an increase in unrepresented litigants in the jurisdiction in the same period (include specific areas within jurisdiction if appropriate)?
4. Have you been involved in cases where there has been a litigant in person on the other side, and what have been the consequences of that to your client, the court and the process?
5. Following on from (4), was any explanation given to you as a practitioner representing the other party as to why the other person was unrepresented?
6. Has there been any apparent diminution over that time in the extent or quality of legal representation available to parties who you knew to be publicly-funded, and if so with what consequences for the court and other parties?

2.

7. In your experience, what changes have there been in the level of self-representation since 1994:

in:

- (a) **Children's Matters** Much less Less Same More Much more
- (b) **Property Matters** Much less Less Same More Much more

8. What has been the effect of self-represented litigants on:

- the court process (timeliness, compliance, rules of court)
- judicial officers
- represented parties
- self-represented litigants
- children's representatives
- the children

Please give one recent example of the effect of a self-represented litigant on a case in which you have been involved in the past year.

APPENDIX 3 - REPORTS SUMMARY

Chronological Summary Main Reports

- 1994 **Law Council of Australia Submission Legal Aid Funding in the '90s**
- Demand for legal aid has increased significantly and level of funding remains constant. \$50mill is needed to restore funding to 87/88 levels.
- Causes:* more expensive cases; failure to link funding to demand; increase in costs of legal services including government charges, interpreter fees, expert witness costs, case management/ court delay reduction schemes, new technology.
- Impact:* limited aid in family law matters means people must appear on their own behalf. Current remuneration of private profession is inadequate but accepted by the profession. The gap between market rate and legal aid fees means few practitioners will be willing to work for legal aid rates. Costs shouldn't be forced down to the extent that the more experienced and competent refuse to do legal aid work.
- 1994 **Mason, CJ in Cachia v Hanes (1994) 120 ALR 385 at 391**
- “while the right of the litigant in person is fundamental, it would be disregarding the obvious to fail to recognise that the presence of litigants in person in increasing numbers is creating a problem for the court ...all too frequently, the burden of ensuring that the necessary work of the litigant in person is done falls on the court administration or the court itself”.
- 1995 **Australian Law Reform Commission Annual Report for 1995/96.**
- In the previous year the number of judgments delivered in which at least one party was unrepresented rose by 46.8%.
- 1996 **Williams, D. Commonwealth Attorney General** – advice to legal aid commissions basis for legal aid funding changing into Commonwealth/State split. Priorities and guidelines introduced as schedules to the new legal aid agreements.

- 1997 **Australian Law Reform Commission. Review of the Adversarial System of Litigation – rethinking the federal civil litigation system. Issues Paper 20**
- Judges of the Federal Court have expressed concern about the growing number of litigants in person in cases before the Federal Court, both at first instance and on appeal. The extent of the problem is not known – statistics not kept by the Court.
- 1997 **Australian Law Reform Commission. Review of the Adversarial System of Litigation – rethinking family law proceedings. Issues Paper 22**
- Numbers:* Family Court Annual Reports provide statistics on the number of applicants in person. In the 1995/96 reporting year there were 32,886 applicants in person compared with 28,133 in the 1994/95 year.
- Impacts:* adversarial culture; cost and delay; limits on the development of the law.
- 1997 **Law Council of Australia. Submission to the Australian Law Reform Commission Review of the Adversarial System of Litigation – rethinking the federal civil litigation system (Issues Paper 20). 25 November, 1997.**
- Concern about insufficient empirical evidence as to numbers of litigants in person, but agrees that the number is likely to be increasing, probably as a result of a failure to qualify for legal aid.
- Impact:* anecdotal evidence suggests length of proceedings and therefore increased costs incurred by other party and court. There are increased demands on judiciary
- 1998 **Dewar, J, Giddings, J. & Parker, S The Impact of Changes in Legal Aid on Criminal and Family Law Practice in Queensland (“Griffith Legal Aid Report”). Faculty of Law. Griffith University Queensland. 1998.**
- Numbers:* a marked increase in the number of litigants in person and unrepresented defendants.
- Growing gap between legal aid funding and demands on the system.
- Growing gap between remuneration paid to lawyers by Legal Aid Queensland and amounts paid by private clients to their lawyers.

Quality: fixed fees and capping result in practitioners having limited time to prepare a legally aided case. Private client with sufficient means may pay for between 2 and 4 times as much preparation.

Legally aided defendants in criminal matters have limited resources for investigation, tests and expert advice.

Causes: clear that reductions in legal aid are a significant cause.

Impact Large number of practitioners have formed the view that legal aid work is uneconomical and have withdrawn. "We do think that the system might be moving from crisis to calamity because of the low levels of remuneration".

There is evidence that the legal aid system is being kept afloat by a mixture of the profession's good will, inadequate access to information, and uncertainty about their own motivation and best interests.

1998

Cashen, C. Legal aid and unrepresented litigants: a registrar's perspective. Conference Paper. Third National Conference Hotel Sofitel Melbourne. 20-24 October, 1998.

Numbers: Estimated 35% litigants may be unrepresented in duty lists.

Causes: increasingly anecdotal evidence suggests that lawyers are declining to act for legal aid clients.

Impacts: range of difficulties for Registrars, most outstanding is time; "I hate to think how many times Registrars have had to explain to such unrepresented litigants that they cannot provide them with legal advice, that they cannot run their case for them, that they cannot prepare their application and affidavits nor negotiate nor write letters for them"; "unrepresented litigants often don't appear in court for everyday problem reasons such as a flat tyre"; perception of bias; impact extends to other litigants in the court.

1998 **Gamble, H & Mohr, R Litigants in Person in the Federal Court of Australia and the Administrative Appeals Tribunal- A Research Note. Paper presented to the Sixteenth Annual AIJA Annual Conference Melbourne, 4-6 September, 1998.**

Impacts: Federal Court litigants in person are less likely to be successful (54% / 31% dismissed); more likely to discontinue (24% / 20%) more likely to be ordered to pay costs (68% / 38%); unrepresented applicants spend less time in AAT and Federal Court. In AAT and Federal Court unrepresented cases are more likely to discontinue or settle by the first appearance. No assessment of use of judicial resources could be made of data. AAT staff devoting 5X as much time to unrepresented litigants. Federal Court lawyers reported carrying burden of the unrepresented party's case – defining the issues. Litigants in person not familiar with concept of settling. Better data is needed.

1998 **Perry, J W. The unrepresented litigant. Paper presented to the Sixteenth Annual AIJA Annual Conference Melbourne. 4-6 September, 1998. A judge of the Supreme Court of South Australia.**

Numbers: general comment on increase in appearances of unrepresented litigants in recent years.

Causes: central question is whether the litigant in person represents a problem for courts or whether true problem is court system.

Impacts: length of proceedings; perception of the evenhandedness of the court; increased demands on court administration. Given current trends, challenges are likely to intensify.

1998 **Smith, B Study of the effects of legal aid cuts on the Family Court of Australia and its litigants. Family Court of Australia. Research Report No. 19 1998**

Numbers: 35% family Court matters involve at least one party who is unrepresented at some stage. Significant increase since 1996.

Causes: legal aid cuts.

Nicholson Chief Justice, A. The State of the Court. Australian Family Lawyer, 1392 Summer 1998, pp 9-17.

Causes: calls on government to increase funding for legal aid in family law matters to address the problem of increasing numbers of unrepresented litigants.

1999 **Hunter, R. Family Law Case Profiles. Justice Research Centre, 1999.**

Impacts: cases involving one or more unrepresented litigants are shorter.

1999 **Justice Research Centre, Part 2: The Costs of Litigation in the Family Court of Australia. Australian Law Reform Commission. June, 1999.**

Impacts: comparison of case duration of unrepresented litigants and represented parties does not indicate any significant difference.

1999 **Gleeson Chief Justice, M., The State of the Judicature, Paper presented to Australian Legal Convention. Canberra 10 October, 1999.**

Numbers: 28% of litigants in High Court were unrepresented.

Impacts: Unrepresented litigants are a serious problem in terms of justice, cost and efficiency; disruptions and delays.

1999 **Family Law Council meeting , Brisbane, August, 1999.**

Quality: There is a trend towards 'juniorisation' throughout Australia, which is being attributed to legal aid cuts. A perception that this results in poorer quality legal services.

1999 **National Institute of Governance. National Legal Aid survey of legal firms re: Legal Aid Family Work, Preliminary Charts, University of Canberra, October, 1999.**

Numbers: 52% firms surveyed did less legal aid work in 1998/99 than 5 years previously.

Quality: noticeable decline in number of practitioners with over 10 years experience doing legal aid work.

- 1999 **Australian Law Reform Commission. Review of the Federal Civil Justice System. Discussion Paper No. 62. AGPS, Canberra, 1999.**
- Numbers:* number of unrepresented litigants on appeal increased from 19% in 1995/96 to 36% in 1998/98.
- 1999 **High Court Annual Report 1999.**
- First mention of litigants in person (not mentioned in 1998 Annual Report).
- Numbers:* The number of unrepresented litigants appearing before the Court remained high during the past year. In proceedings before a single judge 28% were unrepresented.
- 2000 **Dewar, J; Smith, B W; Banks, C. Litigants in person in the Family Court of Australia. Family Court of Australia Research Report No. 20 2000.**
- Causes:* an identifiable link between the unavailability of legal aid and self representation.
- Impacts:* SRLs use up more of the Court's resources; judiciary and registry staff experience difficulties because of SRLs lack of legal and procedural knowledge; need to help SRLs compromised the impartial role of judges and registrars. SRLs have a range of needs.
- The research findings support the argument that greater investment in legal aid funding will result in cost savings to the Court system. There is an identifiable link between unavailability of legal aid and self-representation; and litigants in person consume more Court resources. However, cannot prove conclusively that the efficiency gains arising from greater investment in legal aid would outweigh the costs of providing the aid itself.
- 2000 **Australian Law Reform Commission. Managing Justice – A review of the Federal Civil Justice System, Report No. 89. AGPS. Canberra, 2000.**
- Numbers:* a perception that the number of unrepresented litigants is increasing, but no statistics confirm a general increase in Australia. There has been an increase in unrepresented litigants in many common law Family Law jurisdictions. Number of unrepresented litigants on appeal has increased. 6% applicants

and 21% respondents are unrepresented throughout their case. An additional 10% applicants and 11% of respondents for part of their case, 41% Family Court cases involve 1 or more unrepresented litigants and 6% involve 2.

Causes: no empirical information exists to link the cuts to legal aid in Australia. Simplified procedures. Men's support groups.

Impacts: Family Court matters more likely to settle where both parties represented. Unrepresented litigants seem to have difficulty negotiating a settlement once proceedings are commenced.

2000 **Family Court of Australia. Self-represented litigants – a challenge. Family Court research project commenced 2000.**

Family Court early to recognise the challenge of increasing numbers of litigants in person.

Numbers: 30-40% first instance cases involve litigants who are self-represented at some point. Perception in the literature that the number of self-representing litigants is increasing in the court system, both in Australia and internationally.

2000 **Family Law Council. Litigants in Person: a Report to the Attorney-General, 2000. Canberra.** Report of the Litigants in Person Committee.

Numbers: Reports produced in 1998/9 by community organisations – based on cases studies, no persuasive empirical evidence data was provided. National Legal Aid survey – 52% firms doing less legal aid work in 1998/99 than 5 years previous. Despite gaps in data and detailed evidence, no doubt that number of unrepresented litigants is increasing

Quality: consistent trend showing that legal aid work is increasingly being done by inexperienced practitioners. Experienced practitioners withdrawing usually because of reduced rates. Gap in rates is being blamed for forcing law firms to restrict legal aid work to junior practitioners.

Causes: most plausible reason is changes to legal aid. Changes to the Family Law Reform Act 1995 – big increase in the number of residence and contact orders sought from a shift in expectations (language of rights); and simplified procedures (divorce and consent orders). The background literature and

empirical evidence make it clear not one distinct cause. Changes to legal aid and ability to afford lawyers are significant.

Impacts: Delays, longer hearings, cases take longer to settle. Defended hearings may be shorter with unrepresented litigants, but resources such as court time and registry staff are increased. There is less chance of settlement before hearing. Unrepresented litigants either settle early or go through to a hearing. Major difference is extent to which unrepresented litigants were able to resolve case by negotiation. Economic impact is said to have a multiplier effect on the time and costs of other parties, lawyers, court staff and judges.

2000 **NCOSS Going it Alone – report into the impact of legal aid cuts. Law and Justice Foundation of NSW. 2000**

Practitioners and community workers surveyed

High Court Annual Report 2000

Number of unrepresented litigants remained high. In 29% of civil special leave applications, and 18% of criminal applications. Proceedings before a single judge SRLs fell from 28% to 13% (but large increase in order nisi applications with only 5% unrepresented).

2001 **High Court Annual Report 2001**

Number of unrepresented litigants remained high. In applications for special leave increase from 25% to 33%. Proceedings before a single judge increased to 19%.

2002 **Hunter, R et al The Changing face of litigation: unrepresented litigants in the Family Court of Australia (Research Report) Law and Justice Foundation. 2002**

Numbers: Charts the growth in the number of unrepresented litigants between 1995 and 1999 -there is a steady increase in the proportion of fully unrepresented litigants at first instance. The % of SRLs who are fully unrepresented is very low; most SRLs have some representation at different stages; respondents are more likely to be unrepresented than applicants, etc.

2002 **Family Court of Australia** implemented new case management computer system (casetrack) which will enable the Court to develop improved data about and impact on court of SRLs.

2002

Pavone, R. Do Self-represented Litigants receive a Fair Trial? The challenge of the Family Court. The Law Institute Journal June, 2002 Melbourne.

Numbers: Refers to Dewar's noting that 35% of Family Court matters involve at least 1 unrepresented party. Given the increasing numbers of self-represented litigants in the Family Court ... either through choice or legal aid refusal.

Impacts: T v S [2001] Fam CA 1147. Chief Justice notes that "this case highlights a serious problem affecting the administration of justice in Family Court proceedings... women who have suffered serious domestic violence may be unable to present their cases unaided in family law proceedings. The present legal aid system does not appear to be able to cope with these problems."

2002

West Heidelberg Community Legal Service. Unrepresented Litigants at What Cost? A report on the implications of unrepresented litigants in the Magistrates' Court, Victoria. November, 2002.

Numbers: No stats kept. On 9/10/02 21-22 out of 53 cases appeared unrepresented (50% of cases that actually proceeded on the day).

One Magistrate estimated proportion as crime 30%; civil 20%; family violence 60%; children 3%; victims of crime 50%.

Causes: Legal aid unavailable or refused; not applied for legal aid because of advice not eligible; high cost of legal services; choice; no lawyer willing or able to act; cultural.

Impacts: range of impacts discussed.

2002

High Court Annual Report

Self-represented litigants present special difficulties for the High Court.

Numbers: In applications for special leave increase was from 33% to 40%. Proceedings before a single judge increased to 31%. Estimated that more than 50% of Registry staff time is take up with SRLs. In 1992 only 5% of special leave applications were by SRLs; in 1996/7 it rose to 14% and has doubled again in 2001/02 to 28%. Trend worsens with increase to 40% in new filings by SRLs.

Impacts: Applications for special leave: 0.7% SRLs are successful vs 21% of represented parties