

# The Impacts of Self-Represented Litigants on Civil and Administrative Justice:

## ***Environmental Scan of Research, Policy and Practice***

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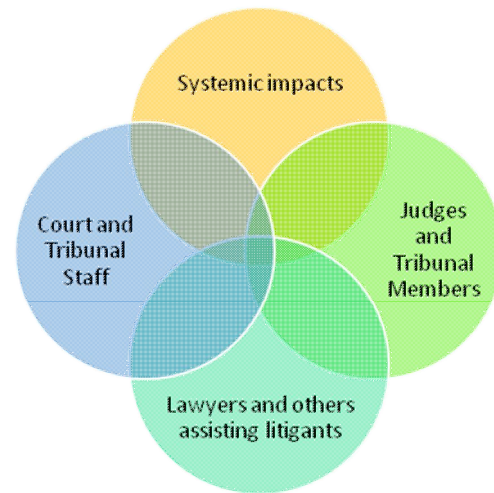


**MONASH** University

Australian Centre for Justice Innovation

# Background

- “ In 2017 the Australasian Institute of Judicial Administration (AIJA) commissioned the Australian Centre for Justice Innovation (ACJI) at Monash University to conduct an Environmental Scan of current research on Self-Represented Litigants (SRLs) in the civil and administrative justice system.
- “ The Environmental Scan provides a strategic overview of current research and evidence on
  - The impact of SRLs on the civil and administrative justice systems,



- The experiences and needs of SRLs in the civil and administrative justice systems, and
- Court and tribunal responses to SRLs, and evidence of their success.

# Key studies since 2012

E Richardson, T Sourdin and N Wallace, *Self-Represented Litigants: Gathering Useful Information – Final Report* (Australian Centre for Justice Innovation, 2012);

Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014)

Victorian Government Department of Justice and Regulation, *Access to Justice Review* (2016);

Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of NSW, 2012);

Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report* (May 2013).

Liz Trinder et al, *Litigants in Person in Private Family Law Cases* (Ministry of Justice, United Kingdom, 2014).

Denise Weybury, *Self-Represented Litigants in Australian Civil Courts* (Unpublished PhD Thesis, University of Melbourne, July 2014); and

Bridgette Toy-Cronin, *Keeping up appearances: Accessing New Zealand's Civil Courts as a Litigant in Person* (Unpublished PhD Thesis, University of Otago, New Zealand, 31 Jul 2015).

# Outline of Presentation

“ Dr Liz Richardson to outline key findings of Environmental Scan:

1. Evidence on SRLs
  - a) Who are SRLs?
  - b) What do we know about SRLs' experiences of self-representation?
  - c) What do we know about the prevalence of SRLs?
  - d) What do we know about the impact of SRLs on judges and tribunal members?
  - e) What do we know about the impact of SRLs on opposing parties and their lawyers?
  - f) What do we know about the impact of SRLs on court and tribunal staff?
  - g) What do we know about the impact of SRLs on court and tribunal processing time?
  - h) What do we know about the impact of SRLs on matter outcomes?
2. Leading Practices in SRL policy and programs in Australian courts and tribunals

“ Dr Janina Boughey to discuss tribunal-specific evidence/comparisons, and directions for future research

# Who are SRLs?

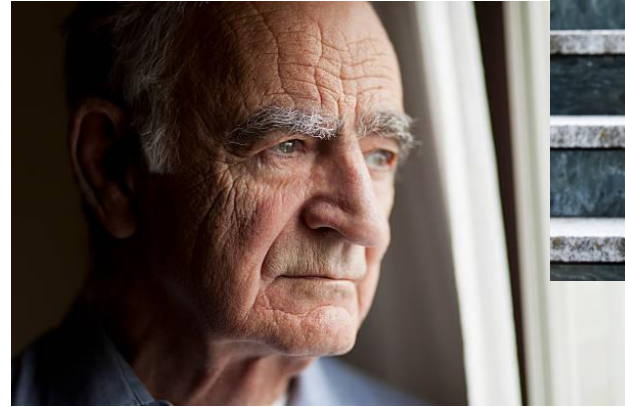
There is no 'typical' SRL.

SRLs have a diverse range of characteristics.

Each jurisdiction is different.

Studies from many jurisdictions show that SRLs are more likely to be male, unemployed or low income.

Many experience other barriers to accessing justice, e.g. age, disability, non-English speaking background.



# Why do SRLs self-represent?

- “ Cost of representation
- “ Not being able to obtain legal aid
- “ Believing they can handle the case themselves. This is especially the case with tribunals.
- “ Not trusting lawyers
- “ Not able to find a lawyer
- “ Time pressures
- “ Sufficient advice/information sought from CLCs, registry staff etc.

# What do we know about the experience of SRLs?

There has been a cultural shift towards recognising SRLs as a legitimate group that the justice system needs to accommodate.

Despite this, recent research shows that the experience of being an SRL is difficult and stressful.

This is especially the case for SRLs who are disadvantaged or vulnerable, eg those with a disability or limited literacy, and victims of family violence.

Being an SRL is stressful. SRLs have difficulty:

- Understanding legal terms and processes
- Completing legal forms
- Using online resources
- Understanding the distinction between information and advice
- Managing evidence
- Managing their conflicting roles of witness and advocate
- Understanding judgments and costs



# What do we know about the prevalence of SRLs?

- “ There is a perception that the number of SRLs is increasing in Australia’s civil and administrative justice system.
- “ Some data and studies support this perception.
- “ But the trend is not consistent across all jurisdictions/courts/tribunals.
- “ Persistent data challenges make it difficult to definitively determine whether numbers of SRLs are increasing.



# What do we know about the prevalence of SRLs?

20-30% SRLs  
approx. 50% SRLs.  
t variation within  
ictions.

**Federal Court:**  
Reported number  
doubled from 2011-  
2017. But data  
unreliable.



**Queensland:**  
SCQ: 2008-2011 ↑

**NSW:**  
Variation between plaintiffs and  
defendants. And by case type  
NCAT: non-legal reps permitted  
Varies between divisions

**High Court:**  
2005-2012. ↓  
2016-17, steady.

**Vic:**  
Unclear.  
SCA ↑  
County Court = fluctuation

# What do we know about the impact of SRLs on judges and tribunal members?

“ Interviews suggest that:

- SRLs increase the pressure and stress on judicial officers;
- SRLs take up more time in courts because judges have to explain procedures, rules of evidence, and assist the SRL.

“ Judges take different approaches to how much assistance they give to SRLs.

“ Providing assistance to an SRL can lead to a perception of bias.

“ Many judges have a negative perception of SRLs as problematic and lacking in competence.



# What do we know about the impact of SRLs on opposing parties and their lawyers?

- “ There is a widespread perception amongst lawyers and represented litigants that where the opposing party is self-represented, the cost and time of proceedings is increased.
- “ There is also a widespread view that judges provide more assistance to SRLs, resulting in unfairness to the represented party.
- “ Lawyers report many difficulties in facing an SRL. These include needing to assist the SRL while prioritising their own client’s interests, and difficulties in negotiating with SRLs.

# What do we know about the impact of SRLs on court staff?

SRLs are perceived to:

“Increase the workload of court and tribunal staff

“Take more time than represented litigants, eg because they need assistance completing forms properly

“Find it difficult to distinguish information from advice

“Take an emotional toll on court staff.



# What do we know about the impact of SRLs on court processing time?

- “ Widespread perception that SRLs increase time and cost of proceedings.
- “ Studies support this. However, most measure perception.
- “ There is no data to substantiate these perceptions.



# What do we know about the impact of SRLs on matter outcomes?

- “ General view that outcomes are not as good for SRLs
- “ But this is difficult to measure
- “ And there has been little attempt to do so in Australia
- “ Overseas studies and data show that the view seems to be true
- “ Limited Australian data also confirms this. Eg between 1992-2005 the success rate in special leave applications in the HCA was 1.5% compared with 27.7% for represented litigants.
- “ The evidence does suggest that SRLs are less likely to settle proceedings.



# Leading Practices in SRL Policy and Programs in Australian Courts and Tribunals

## Self-Help Tools

Improved information: websites, videos, handbooks

Court/Tribunal based services: SRL coordinator, pro bono advice programs, outreach (eg AAT)

Community-based services/advice: eg CLCs

## Resources for Judges and Tribunal Members

Handbooks, benchbooks: eg Qld Equal Treatment Bench Book, ch 12

Training programs: eg Judicial College of Victoria

## Recommended systemic changes

*(not yet adopted in Australia)*

Increased use of lay advocates/McKenzie friends

Unbundled legal services: eg Canada

Increased use of ADR



# SRLs in Tribunals

- “ There’s even less data and evidence re SRLs in tribunals than for courts!
- “ One of the key recommendations of the Environmental Scan is that we need more data and evidence. This is especially true for tribunals.
- “ The issues seem to be different from courts. This makes sense due to the SRL-friendly design of tribunals. But there are conflicting views.
- “ Tribunals should be easier to navigate for SRLs compared to courts.
- “ Tribunals take different approaches to representation. Some have a right to representation. Others have a rebuttable presumption against it.





## SRLs in Tribunals

- “ The Productivity Commission’s, *Access to Justice* Report found that some tribunals have “become too formal, with lawyers, expert witnesses and advocate dominating proceedings”. It also noted a “creeping legalism”. But these findings are based on anecdotal reports.
- “ The ALRC’s 1995 Review found that in the AAT, SRLs succeeded in 22.5% of applications compared with 51.3% for represented applicants.
- “ Anecdotal experience also shows that many applicants do find tribunals difficult to navigate.



# SRLs in Tribunals

- “ Model litigant guidelines present a particular challenge in the tribunal context. Eg *Legal Services Directions 2017*, Appendix B.
- “ A second challenge unique to tribunals is the discretion members have to take a more inquisitorial or more adversarial approach. Making this choice involves balancing a range of complex and competing factors.

# Conclusions

“ More data and more research is needed to:

- Understand the impact of SRLs on the civil and administrative justice system
- Develop effective measures to assist SRLs
- Develop effective measures to assist judges, tribunal members and court and tribunal staff in managing matters involving SRLs, and in interacting with SRLs
- Improve the fairness, effectiveness and efficiency of the civil and administrative justice system for SRLs.