

# **Litigants in Person**

## **A Brief Perspective from the Bench by the Honourable Justice Paul Howard**

To the organisers and guests – my sincere apologies for not being able to attend in person. I returned last night from a Judicial Plenary in the Northern Territory. The meeting was a great success – but I was yarning so much out there that I have lost my voice.

I can at least type an email and hopefully some of the points included might be helpful:

1. There is no magic to dealing with litigants in person.
2. I always have to remind myself to be patient and courteous with all litigants and especially litigants in person. The more difficult a person is.....the harder the Judge has to work at remaining calm and patient. The most important thing is to remain patient.
3. You simply have to let them have their say. This is the case even if they are on the wrong track. After they have made their points you must, with firmness and fairness, get them back on track.
4. *Re F: Litigants in Person Guidelines* (2001) FLC 93-072 is the well-known Full Court decision where guidelines for Judges dealing with litigants in person are laid down. The overriding principle remains fairness – to both the represented and the unrepresented litigants. Assistance in relation to procedural matters is essential but legal advice must be avoided. These are general rules. It's essential for instance – to direct the parties to the provisions of Part 7 in a parenting case.
5. The enactment by the Parliament of Section 102NA of the Family Law Act in late 2018 brought about an historic change to the conduct of Family Law Cases in Australia. The provisions enacted will be well known to the

audience. It has meant that thousands of Australian families can now have real access to justice in the Family Law jurisdiction. It has made a significant difference to the conduct of litigation and cases which previously were the most complex can now have many issues resolved between the parties and often the cases will result in Final Consent Orders – because of the involvement of the Solicitors and Barristers who take on this work. Those practitioners and Legal Aid Queensland should be afforded the highest praise! As should the Commonwealth Government. I have been hearing cases in this jurisdiction for 16 years and believe me when I say that this legislation has made an historical improvement in this area of the law.

6. Not every party in a case where a 102NA order has been made is willing to access the Commonwealth Scheme. This is unfortunate. But it is their right. It is not mandatory that the scheme be accessed – but such a party is at a significant disadvantage because of the prohibition on cross examination of their former partner (or other family member as the case may be). There will always be an ICL in the case – but the unrepresented person in that case will have some significant hurdles to overcome. Unfortunately – despite clear and early warnings by Judges at Case Management Hearings months before the trial....the level of disadvantage facing such a person generally doesn't dawn on them until about Day 3 or 4 – when the horse has bolted.
7. Practitioners appearing against a litigant in person need only to engage the assistance of the Judge in the Court Room in circumstances where an unreasonable approach is being taken by a litigant in person. The Judge can then explain the situation and the process to the litigants and issue an appropriate direction. Most difficulties can be overcome that way.
8. I have heard thousands of cases in this jurisdiction. In my experience – parties in family law litigation just want to be heard. They want to have their say. They have waited and waited for their day in Court. These are matters

of the highest importance to people: their families; their children; their life's work. Matters of the human heart are always complex. New Judges must learn to listen, listen, listen. From some unrepresented people I have heard pearls of wisdom.....from others (of course) I have heard nothing but nonsense. In the latter cases – you still have to listen (within reason) – point out briefly why they are on the wrong track and gently but firmly bring them back to reality.

9. Finally, in a large number of cases involving litigants in person – it will be very beneficial to deliver a judgment ‘*Ex Tempore*’ – or at least read out the decision in Court when it's ready to be delivered. In this way the Judge can speak directly to the parties and I find that it is very helpful – because it assists the parties to understand and accept the outcome.

Best wishes for the Conference. A great initiative by the Law Council and all the other groups involved.

**The Honourable Justice Paul Howard**

**Federal Circuit and Family Court of Australia (Division 1)**

**Brisbane, 22nd June 2023. Law Council of Australia – Access to Justice Conference.**