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Dr James Popple
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Dear Dr Popple,

LITIGANTS IN PERSON PRACTICE NOTE

Thank you for the opportunity to provide feedback to the Law Council to inform its submission to the Federal Court's (**Court**) consultation on a proposed Litigants in Person Practice Note (**Practice Note**). The Law Society's Human Rights, Public Law and Business Law Committees contributed to this submission.

Long-term under-resourcing of the legal assistance sector and a limited availability of legal aid in civil matters means that there will be a cohort of people who appear unrepresented because of unmet legal need. While we appreciate that legal assistance funding does not fall within the Court's purview, in the context of case management for litigants in person, it is important to recognise that many of the challenges arising in these matters would be overcome by increased support for legal assistance. As pointed out by Dr Warren Mundy as part of the *Independent Review of the National Legal Assistance Partnership*, it is well established that 'legal assistance generates a range of avoided costs to the justice system' and 'improves operational capacity and efficiency of civil and criminal courts'.¹

The 2023/24 Annual Report of the Court set out that in the reporting year, 430 proceedings were commenced in the Court by litigants identified as litigants in person, and 48 per cent of the proceedings were appellants in migration proceedings (including appeals).² The Court is therefore dealing with a substantial cohort of litigants who are likely to be unfamiliar with the Australian legal system and the processes and procedures of the Court.

We support the intention to draft the Practice Note in plain English. Further, we suggest that it is translated into a range of community languages, given the large number of litigants in person appearing in the migration jurisdiction. Even if this occurs, however, it should not be assumed that the Practice Note will be read and understood by all litigants in person. There may be additional barriers, for example poor literacy skills or disability, which make the information difficult to understand. Even in the absence of such barriers, the Court is a procedurally complex and unfamiliar environment to most members of the community.

¹ Warren Mundy, *Independent Review of the National Legal Assistance Partnership* (Final Report, March 2024), 14.

² Federal Court of Australia, *Annual Report 2023/24*, 75.

For these reasons, there will always be a role for the Court in assisting litigants in person. We suggest that Registrars and Judges should be trained to use the Practice Note as a means to actively engage with unrepresented litigants and assist with clarifying any queries arising in relation to the processes of the Court. We suggest that it would be helpful for the Practice Note to be provided to litigants in person, before the first case management hearing, and used as a reference point throughout the proceedings when engaging on particular issues of procedure and practice.

In addition, it should be acknowledged that in some cases the Practice Note, while serving as a helpful touchpoint, may not be sufficient to provide the more intensive support required by some litigants in person to navigate the complex processes of running a matter, particularly in a superior court. The Court may wish to consider other avenues through which it can directly engage with litigants in person and tailor its management practices to engage more fully with the needs of this cohort. Again, we acknowledge that additional case management burdens on the Court are a result of the persistent under-resourcing of the legal assistance sector, and a more systemic and effective response would address the underlying causes.

Filing an application

The consultation page notes that the Practice Note will explain various aspects of the Court process, including 'starting or defending a case if there is an arguable legal claim'. It also proposes that the Practice Note will include information on 'filing an originating application that clearly sets out the legal basis for the claim and the relief sought, preparing an additional document explaining what happened and connecting those facts to the relevant law'.

An inevitable difficulty arising in the case of litigants in person is that, without the benefit of legal training or advice, they may be unclear as to whether they have an 'arguable legal claim or defence' and may struggle to prepare their evidence. There are particular challenges associated with administrative reviews, such as those in the migration jurisdiction, where a litigant in person may struggle to make a distinction between a review on the merits of a case, which will not be reviewed by the Court, and a review to determine whether a decision is infected by jurisdictional error.

We suggest that the Practice Note contain examples of what constitutes jurisdictional error (e.g., identifying a wrong issue, ignoring relevant material). The Registrar or Judge, as part of the first case management hearing, could emphasise this material with the litigant in person. This could assist in focusing their attention on relevant issues so that, as far as is practicable, they may appropriately particularise their claim.

We suggest that this section of the Practice Note could contain advice around where to find Court forms, and the difference between general forms versus specific area practice forms. Considering the high proportion of litigants in person in the migration jurisdiction, it may be helpful to provide additional guidance on any particular challenges that have been identified in relation to the proper completion of these forms. Consideration could be given to a procedural checklist to be annexed to the Practice Note which could lend further clarity to the process.

It would also be useful to explain in this section the difference between filing and service, as these distinct processes are often conflated by litigants in person.

Case management and conferences with Registrars

We suggest that the Practice Note clearly explain the difference between procedural versus substantive listings. In the experience of our members, many litigants in person do not realise the purpose of the case management hearing and incorrectly assume that they will be presenting the substance of their matter.

It may also be helpful for the Practice Note to convey that the case management process may run more smoothly if both parties can agree on orders in advance of the hearing, which then can be handed to the Registrar or Judge for their consideration. Depending on the impact of the Practice Note, consideration may also be given to whether more extensive, 'front-end' case management of matters involving litigants in person is appropriate, such as a conference between the parties and Registrar upon filing to narrow the issues in dispute.

As many litigants in person will be unfamiliar with the process within the courtroom itself, it would be worthwhile for the Practice Note to explain this, for example, the need to wait for a matter to be called. It may be useful to develop audio-visual resources which could be linked to the Practice Note, for example to explain case management and the formalities of the Court. This may assist litigants to be better prepared before their first appearance and improve the efficiency of proceedings.

Possible consequences if a litigant does not meet their responsibilities

It is important that the Practice Note clearly sets out the risks if a litigant does not meet their responsibilities, including financial repercussions, impacts on the outcome of their matter and, in certain circumstances, contempt of court.

As costs orders are often misunderstood by litigants in person, it would be helpful for the Practice Note to contain information on this issue and for the Registrar or Judge to reinforce that information before the parties proceed to a substantive hearing.

Further inclusions

It may also be useful to point out in the Practice Note that a corporation must normally be represented by a lawyer, and that directors cannot appear for a corporation.³ There have been a number of cases in state and territory courts where proceedings have been dismissed with costs, where there is a lack of explanation as to why the corporation is unrepresented.⁴

If the Practice Note is introduced, we recommend that its implementation is reviewed, including as regards its impact of the overall management and efficiency of proceedings. It may be useful for the Judicial Commission or another body to undertake research on whether tools such as a Practice Note improve the experience of litigants in person and impact their perception of the judicial process.

³ Rule 4.01(2) of the Federal Court Rules 2009 (Cth).

⁴ See, for example, *Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd* [2016] NSWCA 23.



THE LAW SOCIETY
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Thank you for the opportunity to comment. Questions at first instance may be directed to Sophie Bathurst, Senior Policy Lawyer, at (02) 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely,

Jennifer Ball
President