

## SUBMISSION TO THE JOINT RULES ADVISORY COMMITTEE

### Introduction

JusticeNet SA welcomes the opportunity to provide input to the Joint Rules Advisory Committee (JRAC) review of the Supreme and District Court Rules concerning how the rules might better address the needs of Self-Represented Litigants (SRLs) and the issues they raise for the administration of justice.

JusticeNet SA has a particular interest in SRLs. JusticeNet SA runs the Self-Representation Service (SRS) for SRLs who have matters (actual or prospective) in the civil jurisdiction of the Supreme and District Courts. The SRS provides legal advice and 'task assistance' to low-income and disadvantaged SRLs. The SRS commenced in the Supreme Court in 2013 and expanded to include the District Court in 2015. The SRS was established in recognition of the high, and probably increasing, number of SRLs in South Australian courts. The broad aims of the SRS are to improve access to justice for disadvantaged SRLs while contributing to the efficient use of publicly funded court resources.

We note that the role of JRAC is to prepare, review and revise the rules of court made under the Supreme Court Act 1935 and the District Court Act 1991, and that it is JRAC's responsibility to ensure that the rules (including supplementary rules) are adequate to deal with the requirements of contemporary litigation, and to assist in the efficient running of the courts. This submission makes some recommendations about how the court rules (including the supplementary rules) might be amended for the benefit of SRLs and the administration of justice. While mindful of JRAC's remit, we also briefly identify some issues and suggestions that go beyond the scope of the rules, regarding how the courts respond to the presence of SRLs.

JusticeNet considers that it is a fundamental right to appear before a court in person. While we acknowledge that the right must be balanced against the rights of other parties to have litigation conducted efficiently and the community's interest in having courts operate in a cost effective way, it is our view that much remains to be done to ensure that SRLs have a fair opportunity to present their case. In our view, SRLs should be regarded as legitimate consumers of court services, just as much as professional advocates and their clients. We consider that this approach should underline the approach taken by the courts for the benefit of all users and the community.

### Issues of relevance to SRLs

#### 1. Address for service

SCR 58(4)(b)(ii) effectively provides that a person who is not represented must provide an address for service within 50km of the Adelaide GPO. SCR 58(4)(b)(i) allows for represented parties to give as their address for service the address of their lawyers anywhere in South Australia.



We are unsure why the rule exists but on its face SCR 58(4)(b)(ii) appears onerous and unfair by treating SRLs who live in rural / regional South Australia differently to represented parties. However, we understand that non-compliance with the rule is not grounds for the registry to refuse to accept a Notice of Appearance for filing. We are also unaware of any case law in which non-compliance with SCR 58(4)(b)(ii) has been raised.

Nonetheless, the presence of SCR 58(4)(b)(ii) has the potential to cause confusion and inconvenience for SRLs and even lawyers. The SRS was recently asked by a Community Legal Centre (CLC) in rural South Australia whether the SRS could accept service for a party to District Court proceedings. The CLC was providing minor assistance to the party but could not act for them, and could not, therefore, accept service.

We note that the Victorian Supreme Court (General Civil Procedure) Rules 2015 (VSCR) at r 6.06 provide that an unrepresented plaintiff's address for service is "*the plaintiff's address in Victoria indorsed on the originating process.*" Similarly, the address for service for defendants is "*where the defendant appears in person, the address of the defendant in Victoria stated in the notice of appearance*", r 8.06.

### **Recommendation**

SCR 58(4)(b)(ii) should be amended to remove the requirement for an address for service within 50km of the Adelaide GPO.

## **2. Filing of documents**

Parties who live outside Adelaide are not required to use the services of a town agent to file documents in the Adelaide registry. We understand that it is not uncommon for parties to file by post. Alternatively, court documents can be lodged at a country court. (There is currently limited provision for electronic filing of certain documents, such as urgent applications to chambers and so on).

However, SRLs in rural or regional SA can experience difficulties filing documents. There is little if any guidance for SRLs in the court rules or court website as to how documents can be filed. SRLs in rural /regional areas sometimes file documents by delivering them to the country courts. We understand that country courts do not stamp documents for filing but rather forward them to the registry in Adelaide. If the document is rejected under supplementary rule 46(5) for example, then the document is sent back to the SRL by ordinarily post. This may take in excess of a week given current postal delivery times. Even where documents are compliant, and accepted for filing, the time for documents to be filed in this way means that SRLs may have difficulty meeting court imposed deadlines. We also note that country court opening hours range widely as most are circuit courts only.

### **Recommendations:**

- That consideration be given to how to make it easier for SRLs to deliver documents to the court for filing. In any event, when e-filing is introduced it should be available to SRLs;



- That consideration should be given to amending the supplementary rules to give SRLs more guidance on how they can file court documents;
- Court website could be improved to give greater guidance to parties about when country courts are open.

### **3. Case Management**

Many SRLs experience great difficulty understanding and navigating Supreme and District Court procedures. In a system designed for professional advocates, SRLs can be denied the opportunity effectively to advocate their case. We submit that the court's general powers to manage litigation (chapter 6, SCR) could be used proactively to case manage matters involving SRLs. The Supreme Court of Queensland's 'Supervised Case List for cases involving self-represented litigants' (SRL Supervised Case List) is an example of such an approach. The SRL Supervised Case List applies to matters where one or more of the parties is a SRL. It was established by Supreme Court Practice Direction 10 of 2014. Key features of the SRL Supervised Case List include:

- all SRLs are provided with an information kit, including a copy of the practice direction, referral to a Community Legal Centre (CLC), a questionnaire and other information;
- it provides for 'Review Hearings' to facilitate the resolution of matters involving one or more SRLs.

The SRL Supervised Case List was introduced after consultation with the Queensland Public Interest Law Clearing House (QPILCH).<sup>1</sup> We understand from QPILCH that the Practice Direction is generally well received by SRLs as providing a 'road map' for their case. SRLs generally comment positively on the 'Review Hearings' and the opportunity that they provide for obtaining information concerning court procedure.

A copy of the SRL Supervised Case List can be found at:

[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0008/225638/sc-pd-10of2014.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0008/225638/sc-pd-10of2014.pdf)

### ***Recommendation***

- Consideration should be given to adopting a supervised case list similar to the Supreme Court of Queensland's 'Supervised Case List for cases involving self-represented litigants'.

### **4. Facilitating limited appearances / unbundled legal services**

The SRS provides legal advice and help with discrete legal tasks rather than traditional full service representation. Clients of the SRS remain responsible for the conduct of their legal matter. There are three broad categories of 'unbundled' legal assistance:

1. general counselling and legal advice;
2. preparation or assistance with drafting of documents or pleadings;

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<sup>1</sup> JusticeNet's SRS is modelled on the Self-representation Service operated by QPILCH since 2007.



3. limited appearances before the court.

In the case of the SRS, assistance is currently limited to categories 1 and 2 (and we have no current plans to expand into providing category 3). However, JusticeNet SA also makes referrals to lawyers to represent clients on a pro bono basis. While the ideal is to connect a client with a lawyer who can represent the client to the completion of their matter under a traditional full service retainer, the reality is that we routinely seek to refer clients with assistance with part of their matter. The use of limited scope retainers generally appears to be growing.

The court rules do not presently allow a lawyer to appear for a party without formally going on the record. However, in practice lawyers do appear for discrete appearances at settlement conferences or interlocutory matters without filing a notice of appearance and the courts are generally flexible about this. However, given this is not provided for in the rules there is a risk that the court or the other party to the proceeding will object to this course. Accordingly, there is a legitimate perception or concern for pro bono lawyers that they may be required to go on the record, even if they only want to appear on an ad hoc basis, and they fear that they may not be able to be easily removed from the record.

Furthermore, if a lawyer assists a party by preparing and filing a document for them this results in them automatically being on the court record: see r 23(1) of the *Supreme Court Civil Rules 2006* (SA). The expectation is usually that they will remain on the record and will appear for that party when the matter is listed for a hearing or conference.

If a lawyer files a document or is required formally to go on the record for a discrete appearance and later wishes to withdraw there is a currently a process that needs to take place. That process requires either the party to file a notice informing the court they are no longer represented or for the pro bono solicitor to make an application to the court for an order that the court's records be altered so that the solicitor no longer appears as the solicitor acting for the party: see s 23(2) of the *Supreme Court Civil Rules 2006* (SA). Such an application can be time consuming and inconvenient and there is a risk that the court will not be willing to make those orders.

The UK Uniform Civil Procedure Rules specifically allow for counsel to appear for discrete hearings without formally going on the record. The following is taken from UK Law Society Practice Note on 'Unbundling civil legal services':

*According to [CPR 42.2 \(1\) \(b\)](#) it is not necessary to serve notice to the court where the solicitor is 'appointed only to act as an advocate for a hearing'. Similarly [Practice Direction 42.1 \(1.3\)](#) states that a solicitor appointed in these circumstances 'will not be considered to be acting for that party within the meaning of Part 42'. Accordingly, discrete acts of advocacy can be undertaken without going on the record provided it is not combined with litigation conducted on your client's behalf. For the sake of clarity you should hand a letter to the judge stating that you have been instructed specifically as an advocate for that particular hearing and that you are not on the record as acting and do not intend to go on the record. Download [a specimen letter to the judge \(Word 17kb\)](#).*

A copy of the specimen letter is annexed to this submission.



A similar approach could be considered in relation to both appearing as an advocate as well as for filing a discrete, one-off document. A specimen letter could also be included when filing a document, which explains that the solicitor has been instructed specifically to prepare and file the enclosed document and that they are not on the record as acting and do not intend to go on the record.

**Recommendation:**

- Consideration should be given to amending the rules to cater for limited scope legal assistance, including limited appearances.

**5. Other matters**

In our view the challenge of improving the civil justice system for the benefit of SRLs requires a system-wide approach to reform. Many of the issues are, therefore, beyond the ambit of JRAC. Nonetheless, we have briefly commented on some areas in which improvements could be made for the benefit of SRLs (and the courts) that may be of interest to members of JRAC.

**a. Continued resourcing of legal task assistance services for SRLs (the Self-Representation Service)**

The SRS provides legal task assistance to SRLs in the Supreme and District Court. In the 6 months since the service expanded to the District Court, it has assisted approximately 78 SRLs with advice and legal tasks.

Based on our experience working closely with SRLs in the Supreme and District Court for over 2 years, the key assistance that SRLs require is practical step-by-step help with the specific task that is required at any particular time, including:

- General advice (including prospects, risks, discontinuance)
- Procedural advice (including service of documents, court procedure, compliance with court rules)
- Drafting or amending court documents (including pleadings, affidavits, consent orders, interlocutory applications, submissions)
- Drafting/responding to correspondence
- Advice about evidence and/or disclosure
- Advice or assistance regarding settlement
- Preparation for mediation
- Preparation for hearing/trial
- Advice about appeals (including drafting appeal notice)
- Advice/assistance with enforcement

The service uses pro bono lawyers in addition to staff lawyers to provide more assistance to clients. The service is currently funded by one-off donations and grants up until approximately September 2016.



#### **b. Increased information for SRLs**

While information alone will not solve all the problems facing SRLs, it is important that they have access to plain English information about the court processes and the law. In South Australia, there appears to be limited information for SRLs with cases in the District and Supreme Courts. Some other jurisdictions have substantial information resources available for SRLs. For example, the Victorian Supreme Court has a range of Self-Help Information Packs and other resources for SRLs:

<http://www.supremecourt.vic.gov.au/home/going+to+court/representing+yourself/>

The SRS is in the process of preparing certain factsheets for SRLs. The availability of fact sheets would be helpful generally to clients but are not likely in our view to decrease the overall assistance required at the SRS. Even when litigants have access to a computer and are reasonably computer literate they still need specific guidance at each step of the litigation process.

#### **c. Judicial guidelines and education**

The Supreme Court of Queensland has a section on dealing with SRLs in their Equal Treatment Bench book: [http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0004/94054/s-etbb.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0004/94054/s-etbb.pdf)

We encourage the Supreme and District Court to introduce judicial guidelines for dealing with SRLs. Informal feedback from QPILCH highlighted that an important factor in the effectiveness of the SRL Supervised Case List was the experience and ability of the judicial officer responsible for Review Hearings to communicate effectively with SRLs.

#### **d. Guidelines for lawyers**

In many jurisdictions the relevant Law Society has published practical resources for lawyers who face SRLs in civil courts and tribunals. It appears there are no such guidelines available for South Australia. The UK Law Society has published 'Litigants in person: new guidelines for lawyers' which discuss the relationship between the client's interest and the interests of the administration of justice, and the extent to which a lawyer can properly provide assistance to a litigant in person. The guidelines are supplemented by notes to explain a lawyer's duties to their client and their responsibilities to the court, which members are designed to be given to a client or to a litigant in person. Some examples from other jurisdictions are set out below:

##### **NSW**

Solicitors: 'Guidelines for solicitors dealing with self-represented parties', The Law Society of New South Wales, April 2006:

<https://www.lawsociety.com.au/cs/groups/public/documents/internetcostguidebook/008731.pdf>

Barristers: 'Guidelines for barristers dealing with self-represented litigants', New South Wales Bar Association,

2011: [http://www.nswbar.asn.au/docs/webdocs/self\\_reps\\_14112011.pdf](http://www.nswbar.asn.au/docs/webdocs/self_reps_14112011.pdf)



## **Qld**

'Self-represented litigants: Guidelines for solicitors', The Queensland Law Society:  
[http://www.qjs.com.au/files/ea0c020c-9a46-47e0-ad40-a08b00fc21c9/Self-represented\\_litigants.pdf](http://www.qjs.com.au/files/ea0c020c-9a46-47e0-ad40-a08b00fc21c9/Self-represented_litigants.pdf)

## **UK**

'Litigants in person: new guidelines for lawyers', The Law Society (UK):  
<http://www.lawsociety.org.uk/support-services/advice/articles/litigants-in-person-new-guidelines-for-lawyers-june-2015/>

We encourage the relevant South Australian professional bodies to adopt their own guidelines for working with SRLs.

March 2016

Tim Graham  
**Executive Director**



## Appendix E

### Specimen letter to the judge confirming status as 'unbundled' advocate

The following letter should be handed to the judge at any hearing you attend where you have been instructed only as an advocate for that particular hearing. We suggest this letter should also be handed to the judge at any subsequent adjourned hearing.

To The Judge

In the Court

Case reference:

Date of hearing

Type of hearing

We have been instructed by [name of client] the [claimant / defendant / respondent] in the above proceedings. Our instructions are limited to providing advocacy for this specific hearing only [including any adjournments]. We are not instructed to conduct litigation on behalf of the [claimant / respondent] and have not placed ourselves on the court record as acting solicitors and, on the basis of our current instructions, we do not intend to do so. According to [CPR 42.2 \(1\) \(b\)](#) it is not necessary to serve notice to the court where a solicitor is 'appointed only to act as an advocate for a hearing'. Similarly [Practice Direction 42.1 \(1.3\)](#) states that a solicitor appointed in these circumstances 'will not be considered to be acting for that party within the meaning of Part 42.'

Save for the advocacy we are providing today, the [claimant / defendant/ respondent] remains responsible for the conduct of these proceedings. In these circumstances we cannot be responsible for any failure by the [claimant / defendant/ respondent] to comply with any procedural requirements of the court in respect of which we are not instructed. Any further correspondence, documents and pleadings should be served directly on the [claimant / defendant / respondent]

Name of advocate

Name of firm

Signature

Date