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NOT FOR THE FAINT OF HEART: THE RIGHT TO SELF-REPRESENTATION IN NEW ZEALAND

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Abstract

The approach of common law jurisdictions to the right to self-representation is contradictory. Although strongly upheld, in practice its exercise is challenging and frowned upon. Discourse around self-represented litigants is often negative and frames these individuals as problematic for the civil justice system. This paper seeks to reframe the self-representation debate. Firstly, I explain the context behind the self-representation phenomenon and explore why this rise in self-represented litigants is viewed negatively. I then evaluate options for reform, before acknowledging that there will always be some disparity between parties to a civil dispute. Nonetheless, I reaffirm the importance of the right to self-representation in New Zealand despite recent calls for its removal or restriction. The self-representation phenomenon is indicative of a wider issue of access to civil justice, which must be addressed for meaningful change to occur.

Key words

Self-representation; self-represented litigants; access to justice; civil justice; courts.

Contents

Word count

The text of this paper (excluding table of contents, non-substantive footnotes, and bibliography) comprises approximately 12,081 words.

I Introduction

In 2010, Randall Shepard, Chief Justice of Indiana, cautioned that:[1]

> A courtroom is a fine place for discovering the truth of a given matter, resolving a seemingly intractable problem, or untangling a complicated issue to come to a just result. One thing it is not is a place for the faint of heart.

Whilst accurate, Shepard's statement has significant implications for the right to self-representation. Recognition of the increase in self-representation – and the myriad complexities and challenges posed by and to the legal system – has been forthcoming from a variety of stakeholders, including judges, lawyers, politicians, policy workers, court staff, librarians, citizens, media, and self-represented litigants themselves. The rapidly growing number of self-represented litigants in civil proceedings is one of the most pressing issues currently facing our justice system.[2]

This paper evaluates the nature of the right to self-representation. The first section explores the contemporary phenomenon of self-representation and argues that framing self-represented litigants as the problem is unhelpful and masks larger systematic issues within civil justice institutions. The second section canvasses possible avenues for reform to better accommodate the unique needs and position of self-represented litigants in New Zealand, drawing on scholarship and studies. I conclude that, regardless of the extent to which the justice system is reformed to suit self-representation, self-represented litigants can never be fully guaranteed an equal opportunity to access justice. The third section argues that the right of access to justice encompasses a human right to self-representation. I go on to address Rabeea Assy's recent call for mandatory representation in civil proceedings in common law jurisdictions,[3] and challenge Assy's stance that banning self-representation would solve the issue of limited access to justice. Finally, I consider the growing trend towards mandatory self-representation and note that this limitation is only appropriate in low-cost, low-stakes litigation.

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[1] Randall Shepard "The Self-Represented Litigant: Implications for the Bench and Bar" (2010) 48 Family Court Review 607 at 607.

[2] Margaret Castles "Self represented litigants: A major 21st century challenge" (2015) 37 Bulletin (Law Society of South Australia) 14 at 15.

[3] See Rabeea Assy *Injustice in Person: The Right to Self-Representation* (Oxford University Press, Oxford, 2015), in particular, ch 1.

I ultimately argue that, despite our legal system's imperfections and inequities, the right to self-representation forms a fundamental part of the common law and should not be departed from lightly.

II Self-represented litigants

This section provides contextual information regarding self-representation across common law jurisdictions, with a particular focus on New Zealand.

A Definition

Self-represented litigants are defined as "litigants who are not represented by legal counsel."[4] This description leaves much to be desired. In her recent thesis, Bridgette Toy-Cronin identifies that self-represented litigants are always characterised by reference to represented litigants, and are therefore positioned as abnormal, inadequate and disadvantaged.[5] This deficiency is not unique to the term 'self-represented litigants' and has been noted in respect of other popular terms, such as 'litigants in person', 'unrepresented litigants', 'pro se litigants', 'lay litigants' and 'Do-It-Yourself litigants'.[6] These labels encompass various circumstances, including litigants who:[7]

- choose to represent themselves;
- are represented by a lay person;
- are unable to access legal representation (perhaps because of costs or not knowing that legal aid exists);
- have been declined legal aid;
- cannot find or retain a lawyer to take their case; and
- have had representation but chose to dispense with their counsel.

As this list suggests, self-represented litigants can, and do, come in all shapes and sizes. Although actors within the justice system tend to "lump" self-represented litigants together,[8] individuals falling within this category are extremely diverse, with different

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[4] Melissa Smith, Esther Banbury and Su-Wuen Ong *Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions* (Ministry of Justice, July 2009) at 14.

[5] Bridgette Toy-Cronin "Keeping Up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person" (PhD Thesis, Faculty of Law, University of Otago, 31 July 2015) at 2.

[6] See Toy-Cronin, above n 5, at 10–11 (explaining her preference for 'litigants in person'); Smith, Banbury and Ong, above n 4, at 14; United Kingdom Civil Justice Council *Access to Justice for Litigants in Person (or self-represented litigants): A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice* (November 2011) at [26].

[7] Smith, Banbury and Ong, above n 4, at 14.

[8] Hazel Genn "Do-It-Yourself Law: Access to justice and the challenge of self-representation" (transcript of Atkin Memorial Lecture, United Kingdom, October 2012) at 3.

backgrounds, income and education levels, ages, genders and ethnicities. Further, self-represented litigants encounter or engage with the justice system for many reasons, and may lack representation by choice or necessity. As Jona Goldschmidt warns, "there is no one type of self-represented litigant."[9] They are "ordinary folks"[10] and, as such, commonly appear in specialist courts and tribunals that deal with everyday issues, such as employment and tenancy disputes, divorces, child custody and domestic violence proceedings, and estate administration.

B Statistical trends (or lack thereof)

There is a disappointing lack of empirical evidence indicating self-represented litigant numbers, characteristics, success rates, claim types and motivations. This deficiency makes it difficult to engage in meaningful conversation without resorting to anecdotal stereotypes.[11] The lack of data relating to self-represented litigants' courtroom experiences has been lamented in recent scholarship,[12] however, as yet, qualitative studies have shed limited light on the scope of the phenomenon. It is vital that self-represented litigants' perspectives are considered in proposals for reform, however consistent quantitative figures are also needed. In New Zealand, the Ministry of Justice has recently amended its collection of courtroom information to include self-representation.[13] This offers promising potential for future analysis of self-representation trends.

Indications from professionals and "piecemeal" [14] available evidence strongly suggests a dramatic increase in the incidence of self-representation in New Zealand.[15] In 2009, the Ministry of Justice published interviews and data collected in 2006–2007 across

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[9] Jona Goldschmidt "Strategies for Dealing with Self-Represented Litigants" (2008) 30 NC Cent L Rev 130 at 131.

[10] Julie Macfarlane "Time to Shatter the Stereotype of Self-Represented Litigants" (2013) 20 Dispute Resolution.

[11] Genn, above n 8, at 3.

[12] Toy-Cronin, above n 5, at 13–14; Julie Macfarlane *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants: Final Report* (Canada, May 2013) at 15; Sean Brennan "Self-litigants in the Family Court: how they are compromising access to justice" (2015) 8 NZFLJ 150; Winkelmann J "Access to Justice – Who Needs Lawyers?" (2014) 13 Otago Law Review 229 (writing extrajudicially) at 8; Chris Gallavin "The self-represented litigant" *LawTalk* (16 March 2015).

[13] See Brennan, above n 12; James Greenland "Mind the Gap – closing the justice gap" *LawTalk* (19 November 2015), quoting a Ministry of Justice spokesperson.

[14] Toy-Cronin, above n 5, at 13.

[15] See Winkelmann J, above n 12, at 8; Smith, Banbury and Ong, above n 4, at 11; Brennan, above n 12; Gallavin, above n 12; Matt Stewart "Cash-strapped, web-savvy litigants pushing rise of legal self-representation" *Stuff* (New Zealand, 18 January 2016), quoting a Ministry of Justice spokesperson.

eight courts in five cities, deliberately chosen to provide a diverse sample.[16] This was the first in-depth research into self-representation in New Zealand, and regrettably remains the most current report published by a government agency, despite being nearly a decade old. With regards to family claims, the study found that the majority of court staff, lawyers and judges believed self-represented litigants had increased in number over the past five years.[17] Across the different courts, self-represented litigants appeared in between seven to 17 per cent of hearings.[18] Other figures emerge on an ad hoc basis. Winkelmann J notes that, in 2014, self-represented litigants were party to 25 per cent of open Court of Appeal civil cases, and filed approximately 50 per cent of Supreme Court appeals.[19] In August 2015, Venning J stated that self-represented litigants constituted 40 per cent of applications for judicial review and 30 per cent of appeals to the Auckland High Court.[20] In January 2016, the Ministry of Justice reported that approximately 50 per cent of Employment Court litigants were self-represented.[21]

This rise in self-representation is corroborated by data from overseas common law jurisdictions. In 2005, a British study found that litigants lacking representation during some or all of their case made up 67 per cent of individual parties claiming in the County Court and 34 per cent of individual defendants in the High Court.[22] Moreover, self-represented litigants presented in 48 per cent of sampled family law cases.[23] This number has grown substantially; a 2014 Ministry of Justice report estimated that 76 per cent of family law cases involved at least one self-represented litigant.[24] The Civil Justice Council's prediction – that self-representation would become "the rule rather than the exception" in the wake of severe legal aid reductions[25] – has crystallised. The proliferation of self-represented litigants due to legal aid reform has also been criticised extrajudicially by Lord Neuberger.[26] In Australia, 37 per cent of Family Court cases[27]

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[16] Smith, Banbury and Ong, above n 4, at 10.

[17] At 11.

[18] At 6.

[19] Winkelmann J, above n 12, at 8.

[20] Venning J "Access to Justice – A Constant Quest" (extrajudicial address to the New Zealand Bar Association Conference, Napier, 7 August 2015) at 5 (see n 14).

[21] Stewart, above n 15, quoting a Ministry of Justice spokesperson.

[22] Richard Moorhead and Mark Sefton *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (Department for Constitutional Affairs Research Series 2/05, March 2005) at 37.

[23] At 25.

[24] Liz Trinder and others *Litigants in person in private family law cases* (United Kingdom Ministry of Justice, November 2014) at 2.

[25] United Kingdom Civil Justice Council, above n 6, at [15].

[26] Clive Coleman "Lord Neuberger, UK's most senior judge, voices legal aid fears" *BBC News* (United Kingdom, 5 March 2013).

[27] Family Court of Australia *Annual Report 2014 – 2015* (2015) at 66 (see Figure 3.21).

and 46 per cent of High Court special leave applications[28] in 2014–2015 involved at least one self-represented litigant. Macfarlane estimated that approximately 80 per cent of litigants in Canadian family cases are self-represented.[29] A similar proportion (80–90 per cent) of family cases in the United States involve self-represented litigants.[30]

The significant increase in self-representation is merely the tip of the iceberg. As Winkelmann J rightly cautions, we have limited knowledge about those with genuine legal grievances who do not make it to court and therefore cannot enforce their rights.[31] A 2006 survey found that 10 per cent of citizens had encountered a "non-trivial problem" in the previous year without accessing, or intending to access, the courts to obtain recourse.[32] This number has likely increased markedly over the past decade in accordance with the rise in self-representation. Self-representation is, therefore, symptomatic of a wider social crisis regarding citizens' access to justice in contemporary New Zealand and across comparable jurisdictions. This phenomenon cannot, and should not, be viewed in isolation. Rather than painting self-representation as the problem, suggestions for reform should address the bigger picture of an unmet need for accessible and affordable civil justice.

C Motivations

This part discusses the most commonly cited factors driving self-representation – cost and choice – but does not purport to offer an exhaustive list. Each litigant's circumstances will give rise to a specific set of considerations for that individual. It must be borne in mind that self-represented plaintiffs and appellants exercise a degree of choice over bringing or continuing a claim, whilst self-represented defendants and respondents are generally not brought into civil proceedings of their own volition (except, of course, to the extent that their behaviour generates an arguable suit). Furthermore, it would be simplistic to assume that self-representation is motivated solely by one factor; Toy-Cronin's interviewees provided "multiple and overlapping" justifications.[33] The oft-cited distinction between necessity and choice is therefore less black and white than commonly proposed in self-representation scholarship.

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[28] High Court of Australia *Annual Report 204 – 2015* (2015) at 19.

[29] Macfarlane, above n 10.

[30] Shepard, above n 1, at 611. See Deborah Rhode *Access to Justice* (Oxford University Press, New York, 2004) for an extensive analysis of the "rapid growth in self-representation" (at 14) in the United States.

[31] Winkelmann J, above n 12, at 11.

[32] Legal Services Agency *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* (2006) at 27–28.

[33] Toy-Cronin, above n 5, at 86.

1 Cost

Research overwhelmingly shows that the primary reason for self-representation is the considerable expense of litigation.[34]

The main cost generated by a civil case is billable hours charged by legal professionals. Unsurprisingly, most self-represented litigants are unable to afford a lawyer. The growing disconnect between the average price of representation ($309 per hour for equity partners)[35] and the median income ($621 per week)[36] is becoming increasingly apparent. Although there is no shortage of lawyers, standard charge-out rates are simply out of the average New Zealander's price range. One participant in Toy-Cronin's study noted the connection between sky-high legal fees and self-representation, stating: "you can't pay $500 per hour when you earn $500 per week".[37] Frances Joychild estimates that at least half of New Zealanders cannot afford legal fees.[38] Studies reveal that many self-represented litigants initially retain a lawyer but subsequently run out of funds.[39] One mother:[40]

> … applied for custody in [her] first legal battle with the children's father and [she] spent about $80,000 and… [she is] still paying the other lawyer from [her] first case. So in this one [she] just could not, absolutely could not afford it.

Most self-represented litigants are caught in a civil justice "catch-22"[41] – earning too much to qualify for legal aid and too little to afford a lawyer. This gap mainly affects middle-class litigants,[42] which is reflected by Macfarlane's finding that 57 per cent of participants earned less than $50,000 per year.[43] An increasingly high number of litigants fit within this group, as recent years have seen significant reductions in civil

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[34] See Macfarlane, above n 12, at 39; Smith, Banbury and Ong, above n 4, at 11 and 42; Toy-Cronin, above n 5, at 87. For further comment, see also Winkelmann J, above n 12, at 8; Venning J, above n 20, at 2; Genn, above n 8, at 5; Gallavin, above n 12; Jennifer Blishen "Self-Represented Litigants in Family and Civil Law Disputes" (2006) 25 Canadian Family Law Quarterly 117 at 117; Castles, above n 2, at 14; United Kingdom Civil Justice Council, above n 6, at [31].

[35] University of Waikato and New Zealand Law Society *New Zealand Law Firm Practice Comparison* (2011).

[36] Statistics New Zealand *New Zealand Income Survey: June 2015 quarter* (2 October 2015). This number includes individuals receiving a benefit.

[37] Toy-Cronin, above n 5, at 87.

[38] Frances Joychild "Continuing the conversation: the fading star of the rule of law" ADLSI (5 February 2015) <www.adls.org.nz>.

[39] Smith, Banbury and Ong, above n 4, at 42; Toy-Cronin, above n 5, at 88.

[40] Smith, Banbury and Ong, above n 4, at 42.

[41] As one self-represented litigant phrased it: see Macfarlane, above n 12, at 104.

[42] Gallavin, above n 12; Castles, above n 2, at 14; Smith, Banbury and Ong, above n 4, at 11.

[43] Macfarlane, above n 12, at 8.

legal aid funding in New Zealand and a decrease in the eligibility threshold. Further, litigants receiving legal aid are required to repay some or all of that amount to the state.[44] The 2016 Budget increased funding for civil legal aid by approximately $18 million.[45] This is a promising step towards addressing the situation, but is unlikely to assist the full scope of self-represented litigants motivated by monetary concerns. Conversely, there is a distinction, albeit unclear, between being forced to self-represent through financial necessity and choosing to self-represent to save money. The proportion of self-represented litigants in each category is unknown.

Court fees represent a further cost of litigation that may render legal services unaffordable to some. Earlier this year, the Law Society partly attributed the rise of self-representation to "spiraling court costs".[46] The judiciary has also expressed discontent at the high rates of court services. In comparing court costs from 1992–2013, Venning J identified that filing a statement of claim has risen from $140 to $1,350, and hearing a case over five days has risen from $3,960 to $15,680.[47]

The exorbitant increase in costs is indicative of a shift towards a privatised, market-driven approach to the institutional management of the courts. It is increasingly common for litigants to be viewed as customers, as opposed to citizens.[48] This 'user pays' model harms the transparency and representative nature of judgments. If only the wealthy can test their disputes in courtrooms, the social worth of judicial determinations diminishes.[49] The application of market imperatives to the courts as a public body also undermines the judiciary's democratic legitimacy as a branch of government and raises issues relating to the separation of powers. Court costs are ultimately fixed and collected by the executive, which also controls the courts' organisation and funding.[50] This model works to further disadvantage individuals who might otherwise afford representation.

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[44] See Ministry of Justice *Legal Aid Services Grants handbook* (July 2016) at 125. Calculated in accordance with the Legal Services Regulations 2011, regs 10–12 and schs 1 and 2.

[45] The Treasury *2016 Budget: Estimates of Appropriations – Justice Sector* (B5 Vol 7, 26 May 2016) at 94.

[46] Stewart, above n 15, quoting Law Society president Chris Moore.

[47] Venning J, above n 20, at 2. Figures calculated in accordance with the High Court Fees Regulations 1992 and the High Court Fees Regulations 2013 (taking inflation into account).

[48] John Greacen "Self-Represented Litigants: Learning from Ten Years of Experience in Family Courts" (2005) 44 Judges J 24 at 33; Drew Swank "In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation" (2005) 54 Am U L Rev 1537 at 1574–1575; Winkelmann J, above n 12, at 4: judges and lawyers are increasingly labeled as "stakeholders" and courts as "franchises".

[49] Winkelmann J, above n 12, at 4.

[50] Winkelmann J, above n 12, at 4; Venning J, above n 20, at 2.

A consumer system for civil litigation functions to the detriment of access to justice by granting greater rights to those who can afford them.

This concern must be balanced against the difficult position in which courts are placed regarding the provision of justice. Realistically, the courts must "promise and limit access simultaneously".[51] Although a mechanism for resolving disputes between individuals, courts would be overwhelmed if all grievances could be freely litigated. The justice system, and the taxpayers who fund it, therefore have an interest in discouraging frivolous or vexatious suits, claims that ought properly to settle, and applications for appeal that do not warrant attention from a higher court.[52] Some cost or burden is needed to disincentivise actions that lack merit and disrupt the system's efficient functioning. Court fees also form 15 per cent of total judiciary funding,[53] and must therefore be set at a rate that enables the system to continue to administer justice. Further, in the realm of civil law, litigants receive a mainly-personal benefit for a successful action, so the requirement of some payment is appropriate to avoid the public as a whole funding private disputes.[54]

Although some cost is appropriate, the striking increase in self-represented litigants – and the high proportion identifying money as their primary rationale – suggests that balance is not being struck between the provision of high quality professional and institutional services and the need for access to justice.

2 Choice

Some self-represented litigants, including a portion of those citing economic justifications, are swayed by other considerations. These include negative perceptions of lawyers or the legal system, and a rise in 'do-it-yourself' rhetoric.

Individuals may self-represent due to their dislike for, or mistrust of, the legal profession or system. This originates from unhappy prior experiences[55] or beliefs that lawyers and the system are corrupt.[56] The system suffers from bureaucratic delays and does not always operate in ways that non-lawyers can understand. Lawyers are consistently rated by the public as untrustworthy, perhaps due to sensationalised reporting of poor conduct and the profession's aforementioned fees. Interestingly, New

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[51] Toy-Cronin, above n 5, at 252.

[52] See Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 10 and 36.

[53] See Venning J, above n 20, at 2, quoting the Minister of Justice. The remaining 85 per cent is state-funded.

[54] Winkelmann J, above n 12, at 6.

[55] Brennan, above n 12; Smith, Banbury and Ong, above n 4, at 11; Gallavin, above n 12.

[56] Swank, above n 48, at 1574–1575.

Zealand compares favourably with other nations in respect of legal corruption.[57] It is predictable that lawyers and courts are associated with negativity, given their intervention at upsetting times in people's lives. Self-represented litigants may also reject the adversarial approach that hiring counsel intimates, believing it may prolong their case or aggravate the other party.[58] This derives from wrongful assumptions regarding the system's aims and the standard legal payment model, which reduces lawyers' incentives to resolve cases quickly.

Litigants may view representation as an unnecessary waste of resources. They may be overconfident in the system and believe the truth will prevail,[59] or the simplicity of their case may render legal assistance of little benefit.[60] Self-represented litigants commonly assert that their thorough knowledge of the facts places them in the best position to litigate.[61] Steven Berenson posits that this ambiguity towards lawyers is emblematic of a contemporary movement towards 'disintermediation', an increasing desire to 'do-it-yourself' and dispense with middlemen in fields traditionally governed by professionals.[62] This is aided by the Internet, which enables anyone to access statutes, cases and self-help legal publications (often, however, of limited scope and dubious quality), which are ironically often produced in response to the self-representation phenomenon. Representations of lawyers in popular culture may also play a part in cultivating this perception.[63] Mike Ross, one of the main characters in American television drama *Suits*, demonstrates excellent courtroom advocacy skills while in fact posing as a lawyer without having attended law school.

Self-represented litigants may forego representation to have their 'day in court'. Self-representation is attractive because it is empowering and enables litigants to exert greater control over their case.[64] As one Ministry of Justice study participant concluded, "you can speak from your heart".[65] More concerning is the belief held by several

[57] Greenland, above n 13.

[58] Brennan, above n 12; Bridgette Toy-Cronin and Kim Economides "Justice Forum: litigants in person v legal representation?" (27 December 2011) *NZLawyer* 176; Smith, Banbury and Ong, above n 4, at 45.

[59] Swank, above n 48, at 1574–1575.

[60] Smith, Banbury and Ong, above n 4, at 11.

[61] At 46.

[62] Steven Berenson "A Family Law Residency Program? A Modest Proposal in Response to the Burdens Created By Self-Represented Litigants in Family Court" (2001) 33 Rutgers L J 105 at 121.

[63] See Dorothy Wilson and Miriam Hutchins "Practical Advice from the Trenches: Best Techniques for Handling Self-Represented Litigants" (2015) 51 Court Review 54 at 57, which refers to the effect of shows such as *Judge Judy* and *Boston Legal* on public perceptions of courtroom proceedings.

[64] Catherine Caruana "Meeting the needs of self-represented litigants in family law matters" (2002) 62 Family Matters 38 at 39.

[65] Smith, Banbury and Ong, above n 4, at 64.

litigants surveyed that self-representation skews the result in their favour. They thought the judge would afford them greater leniency and trust due to their inexperience and resultant lack of 'tactics' that a lawyer might employ.[66] This manipulation of the system is one of several complaints voiced regarding the recent increase in self-representation.

D Negative impacts

Self-represented litigants are perceived to pose a problem for the justice system. It is said that "he who represents himself has a fool for a client".[67] Although the common law strongly upholds the right to self-representation, exercise of this right is viewed negatively.

This part discusses issues commonly attributed to self-representation. It is viewed as a drain upon court resources, a complication to the traditional roles of judges and lawyers, and an emotional burden for self-represented litigants. Scholarly articles and media reports frequently frame the rise in self-representation as a "flood", "tsunami", "tidal wave" or "sea".[68] The use of this metaphor, which denotes an overwhelming natural disaster, promotes and (re)produces a narrative of crisis. This discourse assumes that the increase in self-representation limits access to justice. Furthermore, it places blame upon self-represented litigants. Fault might more constructively be placed upon the system, which promises the right to self-representation but cannot deliver fair outcomes in practice.

1 Courts

Judges, lawyers and court staff agree that self-represented litigants consume greater amounts of courtroom time and resources.[69] This has the flow-on effect of delaying other hearings and therefore denying other individuals' access to the courts. It also contributes to an increase in court costs and legal fees for represented parties appearing against self-represented litigants. Unfortunately, there is no evidence as to whether self-representation does take up excess time and lengthen proceedings. It may actually produce the opposite result, since self-represented litigants often lack knowledge of

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[66] At 64–65.

[67] Attributed to Abraham Lincoln.

[68] See, for example, Ronald Staudt and Paula Hannaford "Access to Justice for the Self-Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers" (2002) 52 Syracuse L Rev 1017 at 1019; Richard Zorza "Self-Represented Litigants and the Access to Justice Revolution in the State Courts: Cross-Pollinating Perspectives Toward a Dialogue for Innovation in the Courts and the Administrative Law System" (2009) 29 Journal of the National Association of Administrative Law Judiciary 63 at 64; Goldschmidt, above n 9, at 131; Zoe Saunders "How can lawyers learn to love litigants in person?" *The Lawyer* (London, 11 April 2013).

[69] Winkelmann J, above n 12, at 9; Smith, Banbury and Ong, above n 4, at 12; Toy-Cronin, above n 5, at 202.

appropriate applications, causes of action, and strategies to better their case, whilst lawyers are equipped to use the system to overwhelm the other side and plead every possible ground. If true, this is not a positive outcome of the self-representation phenomenon, as procedural unawareness reinforces self-represented litigants' unequal position and acts as a barrier to success.

Assuming self-represented litigants disproportionately burden courts, this is due to the nature of the civil justice system. Most self-represented litigants are eager to understand their dispute and how to resolve it.[70] For most, this proves extremely difficult and, at times, near impossible. Self-represented litigants must learn to operate in a complex system "designed by and for lawyers",[71] a handicap that one interviewee described as "going into a gunfight armed only with a knife."[72] That they do not always succeed, resulting in the overuse of court resources, is unsurprising. As elaborated upon below, the odds are stacked against them.

The common law is frequently criticised for its lack of accessibility. This is a systemic problem that emanates throughout all levels and meanings of 'access'. Finding the law has mercifully become simpler in New Zealand, since current legislation is available online.[73] This presupposes that potential self-represented litigants have Internet access, which is not necessarily the case, particularly in rural and low socio-economic areas. Cases are harder to locate; notable judgments are available through the Ministry of Justice website, however databases such as LexisNexis are expensive and tend to be purchased only by law firms and universities. Once the law on a particular subject is located, relevant sections and tests may be hard to distill because the law is cloaked in Latin phrases, legal jargon, medieval language and antiquated drafting. Harder yet is the ability to apply legal knowledge to facts, assess key arguments and distinguish material and irrelevant facts. Once legal action is taken, self-represented litigants must file written submissions, undergo negotiations, fill out forms, and conduct themselves appropriately in court. This is easier said than done; courtroom protocols and etiquette are often hard to understand.

It is understandable that procedural delays caused by self-represented litigants frustrate judges, lawyers and court staff. However, it would be inappropriate to ignore the above systemic deficiencies, which majorly contribute towards self-represented litigants' inability to present their case quickly, relevantly and correctly. If the recent rise in self-representation is indeed wasting resources, it is not fully incumbent upon self-

[70] Macfarlane, above n 10.

[71] Rhode, above n 30, at 5.

[72] Macfarlane, above n 12, at 97.

[73] See Parliamentary Counsel Office "New Zealand Legislation" <www.legislation.govt.nz>.

represented litigants to upskill or refrain from entering the courts. Rather, these issues present a new challenge for the system.

2 Judges

When adjudicating disputes involving self-represented litigants, judges are placed in a difficult position. They must maintain a careful balance between objectivity and assistance to address imbalances in proceedings, for example, when self-represented litigants fail to articulate key aspects of their case. Judicial attitudes towards self-represented litigants vary, however the majority are sympathetic to the difficulties these individuals face and treat them with patience and respect.[74] There is a concerning lack of clarity regarding the extent of judicial discretion to "lean over the bench".[75] The Court of Appeal has directed judges to "assist lay litigants as far as is practicable",[76] however what this means in practice is unclear. Judicial assistance is also hampered by the court's corresponding duty to ensure any help given does not prejudice the other party's interests.[77] This ambiguity means self-represented litigants are treated inconsistently across the courts.

This judicial tightrope arises from a clash between the right to self-representation and the common law adversarial system. The system is premised on the assumption that an impartial third party, after hearing arguments presented persuasively from the perspectives of both sides, can most effectively rule upon an appropriate solution.[78] Judges in common law jurisdictions must therefore remain neutral and passive for the system to work, compared to civil law jurisdictions where judges assume an active, inquisitorial role.[79] Self-represented litigants threaten judicial impartiality. They may be unable to present all relevant evidence in a compelling manner, precluding judges from reliably reaching a just conclusion. Further, if judges attempt to rectify this by questioning and aiding self-represented litigants, they risk actually or apparently jeopardising their objectivity. The adversarial system was built around lawyers. It was not designed with self-represented litigants in mind.

3 Lawyers

Barristers and solicitors face ethical dilemmas when appearing against self-represented litigants. This is a common situation; 75 per cent of self-represented litigants in

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[74] Toy-Cronin, above n 5, at 188; Macfarlane, above n 12, at 13.

[75] Genn, above n 8, at 15.

[76] *Young v Police* [2007] NZCA 339 (CA) at [27].

[77] *Lee v Composite Cladding & Signage Manufacture and Installations Ltd* HC Whangarei CIV-2009-488-828, 16 December 2010 at [38].

[78] Assy, above n 3, at 11.

[79] At 1.

Macfarlane's study faced a represented individual.[80] Lawyers, as qualified professionals, are subject to duties and face disciplinary action if these are breached. Lawyers owe an overriding duty to the court "to uphold the rule of law and to facilitate the administration of justice."[81] In upholding this obligation, lawyers may be required to address points missed by self-represented litigants to avoid misleading the court.[82] This disadvantages their client, who may perceive the extra guidance given to their opposition as unfair. It also prevents lawyers from upholding their duty to "protect and promote the interests of the client".[83] In addition, lawyers must treat self-represented litigants with "integrity, respect, and courtesy" and ensure they understand their right to seek legal advice.[84] Lawyers, like judges, navigate difficult waters in managing their duties to the court and their client. By virtue of their training, lawyers' experience and knowledge exceeds that of most self-represented litigants and they must be careful not to take advantage of this imbalance.

This ethical quandary is compounded by self-represented litigants not being subject to the Rules of Conduct and Client Care.[85] They are not held to the same standard as lawyers and do not owe the same obligations to the court and the opposition. Self-represented litigants may perceive lawyers negatively, and behave aggressively and non-cooperatively towards them. This leads to strained relations between self-represented litigants and opposing counsel, and can create unfairness and bad faith between the parties. To combat this issue, Drew Swank argues that all advocates should be bound by the same rules to promote consistency and legitimacy within the courts as an institution.[86]

4 Self-represented litigants

Self-representation also presents significant issues for self-represented litigants. Litigation is time-consuming, stressful and difficult to comprehend, even for lawyers who have training, experience and greater access to resources. Although some self-represented litigants are serial litigants, most self-represent during major transitions in their lives, such as divorce, bereavement or loss of employment.[87] Many therefore interact with the system during traumatic and difficult times. Some face further barriers such as limited English, financial stress, health issues and disabilities. Macfarlane

[80] Macfarlane, above n 12, at 31.

[81] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rules 2–2.2.

[82] Winkelmann J, above n 12, at 11.

[83] Rule 6.

[84] Rules 12 and 12.1.

[85] Lawyers and Conveyancers Act, s 107(1).

[86] Swank, above n 48, at 1590–1592.

[87] United Kingdom Civil Justice Council, above n 6, at [27].

reported participants were "terrified about the prospect of appearing in court", to the extent that some were:[88]

> … unable to sleep for several or many nights before their appearance; shaking with nerves as they stood up to speak; leaving court feeling upset, shaken and even humiliated; and experiencing stress-related symptoms for days afterwards.

The emotional impact of self-representation likely affects individuals' performances in court and overall chances of success. Their closeness to the issues being litigated may also hinder self-represented litigants' ability to remain composed and rationally objective, whereas represented litigants rely upon counsel to advocate on their behalf in an emotionally removed manner.[89] This is particularly concerning when self-represented litigants are required to examine individuals they are emotionally connected – or, more often, disconnected – with, and vice versa. In the civil context, this means interacting with former employers, partners, or even abusers. As touched upon above, the system's complexity and formality alienates self-represented litigants. Macfarlane's interviewees became "disillusioned, frustrated, and in some cases overwhelmed" by their experiences.[90]

Despite the significant toll self-representation takes on most individuals, the New Zealand courts do not currently award costs to self-represented litigants for time and effort expended in bringing their case, save in "exceptional circumstances".[91] William Fotherby argues against this, attributing the orthodox position to New Zealand's "slow" recognition of the self-representation phenomenon.[92] This denial of costs is another means by which the system deflects blame towards self-represented litigants, and away from itself, for the negative consequences discussed throughout this section. It is nonsensical to affirm the right to self-representation whilst erecting barriers to render it an undesirable option.

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[88] Macfarlane, above n 12, at 95.

[89] Winkelmann J, above n 12, at 9; Chris Bevan "Self-represented litigants: the overlooked and unintended consequence of legal aid reform" (2013) 35 J Soc Welf Fam Law 43 at 46–47.

[90] Macfarlane, above n 12, at 9.

[91] *O'Neill v Accident Compensation Corporation (No 3)* [2011] NZAR 97 (HC) at [50]; see also *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (CA): courts do have discretion to award "reasonable disbursements".

[92] William Fotherby "Taking Self-Represented Litigants Seriously" (2010) 2 NZLSJ 353 at 371.

III Reform

In light of the issues highlighted above, the need for change is evident. The shape in which change should take place, however, is difficult to determine. Options for social and legal reform can be summarised into three categories: improving self-represented litigants' knowledge of the system, facilitating self-represented litigants' access to non-lawyers, and facilitating self-represented litigants' access to lawyers.

In contrast to framing the self-representation phenomenon as a natural disaster, discourse surrounding systemic reform paints a more positive picture. Academics refer to the need to assist self-represented litigants in their "quest for justice",[93] during which they must overcome the "maze"[94] or "labyrinth"[95] of civil justice. This terminology positions self-represented litigants as heroic protagonists battling against a man-made bureaucratic system, and shifts blame for the resulting issues onto the system. It is a more desirable discourse in that it promotes the right to self-representation, yet also highlights the difficulties self-represented litigants face.

This section explores possible options for reform, organised into the above three categories. It ultimately concludes that a fully equal playing field is virtually impossible to achieve. However, this does not mean that the civil justice system should remain as it is; the following suggestions could help to realise the right of access to justice more fully in New Zealand and overseas. My conclusion does not mean that the right to self-representation should be cast aside, merely that there will always be some disparity between civil litigants.

A Assisting self-represented litigants

The following proposals aim to ameliorate the negative consequences of self-representation by up-skilling self-represented litigants or simplifying the justice system, thereby reducing the distinction between advocacy by a lawyer and advocacy by a non-lawyer. No matter how many resources are tailored or how much the system is altered, I suggest this distinction will remain.

1 Up-skilling self-represented litigants

Helping self-represented litigants is primarily achieved through providing information, but New Zealand is disappointingly slow on the uptake in this regard. The Ministry of

[93] Jona Goldschmidt "Judicial Ethics and Assistance to Self-Represented Litigants" (2007) 28 Justice System Journal 324 at 324.

[94] Linda Fieldstone "Ensuring a Place for Family Court Services in the Family Court of the Future: Do or Die" (2014) 52 Family Court Review 627 at 628; Law Commission, above n 52, at 10.

[95] Goldschmidt, above n 93, at 324.

Justice has a self-representation webpage containing links to publications about bringing or defending a case.[96] This resource outlines key terms, and recommends other ways to find more detailed information. It emphasises the inherent difficulties of self-representation, and encourages self-represented litigants to apply for legal aid or seek legal advice. The Ministry of Justice also administers online, plain English forms for making a Care of Children Act 2004 or Disputes Tribunal application.

Initiatives such as these are certainly a positive step towards helping self-represented litigants access the justice system, particularly where the legal issues involved in their dispute are relatively straightforward. Self-represented litigants in the Ministry of Justice study believed that the availability of information about how the system operates, how to bring a case, and which template forms to fill out, would have helped their chances of success significantly.[97] Increasing self-represented litigants' understanding of the civil system is likely to improve their confidence in the courtroom environment, and, more widely, grow overall public knowledge of the court system.

However, providing general information to self-represented litigants cannot, in isolation, function as a valid substitute for representation. It is one thing to educate someone about the most applicable cause of action, the legal principles governing that cause of action, and which form to fill out. It is quite another to equip someone with the research, analysis, written and oral advocacy skills necessary to apply that basic framework to their specific facts. Most 'how to' information offers procedural advice, rather than substantive guidance on making legal arguments. This is not to say that information packs and publications are unhelpful; rather, they can point self-represented litigants in the right direction but cannot fully replace the triaging role of a lawyer.[98] A partial solution to this deficiency would be a courtroom case management system[99] that 'sorts' disputes by their nature and complexity, and refers them accordingly. The imposition of a triaging function for courts would weigh down an already resource-constrained institution, but offers scope to provide initial consultation to self-represented litigants. Even so, providing yet more information (even through face-to-face consultation with experienced courtroom staff) can only go so far and cannot place self-represented litigants on equal footing with lawyers in terms of relative experience and practical working knowledge.

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[96] Ministry of Justice "Going to court without a lawyer" (9 August 2016) <www.justice.govt.nz>.

[97] Smith, Banbury and Ong, above n 4, at 83.

[98] Winkelmann J, above n 12, at 12; Venning J, above n 20, at 6.

[99] This solution has been proposed by several academics, in particular Margaret Castles: see Castles, above n 2, at 14.

Further, the contents of information packs may provide an imbalanced view of available options. Jim Hilbert criticises the overemphasis of adversarial litigation in publications tailored to self-represented litigants, since this ignores the growing role of informal dispute resolution.[100] This focus on litigation is understandable, since the courts bear the brunt of difficulties caused by self-representation, however it may cause outcomes detrimental both to the courts and the individuals concerned. Failing to encourage self-represented litigants to settle through mediation and negotiation is likely to result in overextension of court resources, as well as avoidable expenditure of time, money and effort by self-represented litigants, which may come at the expense of personal relationships. Alternative dispute resolution is a far better means of addressing many grievances brought by self-represented litigants and should be explored further.

2 Simplifying the civil justice system

The other raft of suggestions focus on removing or demystifying traditional procedures found within the civil justice system. This was a core recommendation of the United Kingdom Civil Justice Council, albeit prefaced with a warning that simplifying the system is not enough to meet self-represented litigants' needs.[101] This sentiment was echoed by Macfarlane's interviewees, who found apparently-simplified online forms confusing in the absence of practical advice and "coaching" on what was applicable to their case.[102] In reality, plain-English written guidance, although helpful, is not an appropriate substitute for face-to-face interaction with someone experienced.

There is also movement towards removing courtroom formalities, particularly in forums that cater to areas of law that attract self-represented litigants. New Zealand has achieved this to an extent. Litigants pursuing employment claims are first heard in the Employment Relations Authority, an independent body that operates in an informal and somewhat inquisitorial manner: the issues are determined and discussed at group conferences, before an Authority member makes a legally binding determination. Further, the number and jurisdiction of tribunals in New Zealand has risen substantially. Tribunals govern many legal spaces in which people (as opposed to entities) are likely to claim, such as accident compensation, human rights breaches, immigration, and housing (both in respect of earthquake and leaky homes claims). Formalities are significantly relaxed in tribunals, which enables self-represented litigants to navigate the system more adeptly. However, this only simplifies self-representation if the issues are straightforward, otherwise the dispute is likely to travel up the judicial hierarchy and encounter the formalities inherent in New Zealand's higher courts. A further step

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[100] Jim Hilbert "Educational Workshops on Settlement and Dispute Resolution: Another Tool for Self-Represented Litigants in Family Court" (2009) 43 Family Law Quarterly 545 at 546–547.

[101] United Kingdom Civil Justice Council, above n 6, at [20].

[102] Macfarlane, above n 12, at 9–11.

might be establishing a separate body to hear claims where both parties are self-represented, as in Ontario.[103] This solution is undoubtedly better suited to a larger country, since only a small minority of disputes in New Zealand would suit such a service: the majority involve one represented party.

A further difficulty with simplifying courtroom hearings is that the addition of helpful processes may have the opposite effect. Winkelmann J notes that reforms trialled unsuccessfully in the District Court to make discovery and submissions easier were widely criticised for overcomplicating the system and deterring self-represented litigants.[104] Richard Zorza has similarly written on this topic, stating that "every attempt at reform in the courts (and particularly the family courts) has added something", since new ideas are implemented to address a specific issue without analysis of their impact on the system as a whole.[105] Reform may therefore appear to resolve targeted systematic difficulties, but creates new issues in doing so. The courtroom is a foreign place for many, and while the concept of making it more familiar is attractive, this may hinder self-represented litigants' chances of success rather than increasing them. Procedural components to the adversarial process – such as discovery, evidence, witness examination, and submission deadlines – exist to ensure fair and due process. Removing too many formalities risks jeopardising the inner workings of the civil system.

Provision of aid and reduction of formalities may well help self-represented litigants to navigate the justice system; I do not suggest that such efforts are fruitless. The limitations on assistance from afar merely mean that these cannot be effective on their own. Self-represented litigants require personalised assistance to succeed or feel they have had the best possible chance of success.

B Improving access to non-lawyers

Consultation need not necessarily come from a lawyer; there are other support networks available to self-represented litigants during their interaction with the civil system. However, I argue that each alternative actor or infrastructure has its own limitations that prevent it from providing a fully equal substitute to legal representation.

The interface between judges and self-represented litigants is uncertain. To remedy this, it is desirable to achieve clarity regarding the scope of a judge's ability to advise self-represented litigants or investigate further to ensure no relevant facts, evidence or legal authorities have been missed. Based on developments in California, Bonnie Hough and

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[103] Brennan, above n 12.

[104] At 12.

[105] Richard Zorza "An Overview of Self-Represented Litigation Innovation, Its Impact, and an Approach for the Future: An Invitation to Dialogue" (2009) 43 Family Law Quarterly 519 at 535.

Justice Zelon recommend standardised judicial training on how best to manage the unique challenges presented by self-representation.[106] Proposed techniques include explaining procedural matters and summarising material facts and legal issues at the start of the case,[107] to ensure that self-represented litigants do not focus on irrelevant matters and to reassure them that they are being understood by the court.

Implementing similar training for judges in New Zealand would go a long way towards ensuring consistency in judicial approaches to self-represented litigants, which vary considerably according to Toy-Cronin's study.[108] The issue remains, however, that our common law system mandates judicial impartiality. There will always be a limit on how far judges may go in lending a hand to self-represented litigants. Further, the point at which self-represented litigants most need help is prior to entering the courtroom. Their need for advice and guidance is at its strongest when preparing their case and, even before that point, deciding whether their case is worth litigating. By the time self-represented litigants appear before a judge, they have already expended significant time and effort upon their claim. Although there is room for improvement upon current judicial practices, providing legal advice and general assistance is not the role of a common law judge and any training provided would likely emphasise that.

Since judges are bound to remain neutral, there may be a role for other courtroom actors to play in assisting self-represented litigants or filling 'gaps' in their submissions. With leave of the court, a McKenzie friend[109] may sit beside a self-represented litigant and give advice. A McKenzie friend may only advocate with leave of the court. This emotional and legal support may be extremely beneficial to self-represented litigants, particularly given the nervousness many naturally encounter in court. The degree of assistance afforded to a self-represented litigant by a McKenzie friend varies considerably depending upon the person and their relationship with the litigant. If a McKenzie friend is, in fact, a friend or family member, it may be difficult for that person to remain unbiased and objective. In saying that, professional McKenzie friends pose their own issues, since they may require payment for services rendered. Provision of state-funded McKenzie friends would address both potential problems, however such a service would require careful regulation to ensure McKenzie friends were subject to similar duties to those expected of lawyers. Unless McKenzie friends are effectively acting as lawyers, it is difficult to imagine their presence putting self-represented litigants on equal footing with represented parties.

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[106] Bonnie Hough and Justice Zelon "Self-Represented Litigants: Challenges and Opportunities for Access to Justice" (2008) Judges' Journal 30.

[107] At 31.

[108] Toy-Cronin, above n 5, at 188.

[109] See *McKenzie v McKenzie* [1970] 3 All ER 1034.

Another option is the appointment of amici curiae where it is clear that a self-represented litigant is incapable of fully articulating or locating the law. An amicus curiae is a member of the profession independently appointed by the court to provide missing factual or legal context.[110] The presence of an amicus may significantly impact the outcome, especially where a self-represented litigant is struggling to explain the merits of their case. Unfortunately, it is impractical for amici curiae to appear on every occasion where a self-represented litigant's inexperience may negatively affect their claim. There is also a danger that self-represented litigants' reliance on amici curiae might lead to the role becoming one of argumentation in their favour, effectively constituting pro bono representation. This threatens the equality of proceedings, because an amicus advocating for a self-represented litigant may disadvantage the represented party. A further complication in the Family Court is the contested role of lawyer for the child where one or both parents are self-represented. Although appointed to ensure the welfare and best interests of the child are considered, it is unclear whether they should also raise arguments pertinent to self-represented litigants, particularly where the absence of those arguments might benefit or harm the child's interests. The growing prevalence of self-representation requires a more robust solution that can be offered to all self-represented litigants in need of assistance.

Other legally-trained professionals are better placed to assist self-represented litigants, both in court and earlier in the process. Courtroom staff are currently limited to internal administration, and judge's clerks are employed to undertake research. Either or both support roles could be extended to cover a certain number of hours spent giving guidance to self-represented litigants. The practical implication of this would be to place extra pressure on the courts as an institution, as both positions are already fulltime. If it could be managed, even in a limited capacity, this extension of duties could provide invaluable, free help from individuals experienced in negotiating the system.

Another underutilised resource with the ability to help self-represented litigants is senior university students. The untapped potential of matching law students with people in need of basic legal help was recommended by the Law Commission in 2004,[111] but has not yet reached fruition in New Zealand. There is a reciprocity and mutual benefit present in this exchange that does not exist between self-represented litigants and any other category of non-lawyers. In my experience, many students would relish the opportunity to gain legal experience for the furtherance of both their education and career prospects. Steven Berenson suggests the implementation of a legal residency program at the end of a law degree, run similarly to the equivalent medical training

[110] See *Visser v Whangarei District Council* HC Whangarei M95/96, 4 March 1997 at 9.

[111] Law Commission, above n 52, at 35.

program, to help budding lawyers apply their theoretical knowledge to real situations and, in so doing, assist self-represented litigants.[112] This would change the legal landscape in New Zealand, increase awareness within the profession of the significant difficulties faced by self-represented litigants, and reduce courtroom stress and delay. Again, it could only represent part of the solution due to the high number of self-represented litigants entering the justice system.

The difficulty in envisaging a substantial advisory role for any of the parties mentioned above is that none are subject to the same level of regulation as practising lawyers. For that reason, much of the discussion around reform centres on the availability of legal services.

C Improving access to lawyers

Promoting the accessibility of legal services prima facie undermines the right to self-representation, but underlying the viability of representation is a fundamental right to choose. If the only feasible option is to self-represent, the right is diminished because litigants who cannot afford a lawyer have no realistic choice. Full recognition of the right would allow all citizens to decide whether to retain a lawyer or self-represent, so that only those wishing to self-represent do so. Cost may still factor in that decision, as with many social choices individuals make, however it should not prohibit the majority of the population from exercising their ability to choose.

The most commonly suggested way of making lawyers available to the general public is subsidising, waiving, or reducing chargeable fees. The subsidy of legal costs occurs in New Zealand through legal aid. As noted above, the Government has recently increased funding for civil legal aid. The entitlement threshold is still quite high, which means legal aid is, quite rightly, targeted towards citizens most in monetary need of state support. Although a worthy scheme, this limitation must be acknowledged; legal aid is not intended to help self-represented litigants caught between legal aid criteria and legal market prices. It is never likely to benefit this sector of the population, since the threshold is tightly controlled to avoid overuse and abuse of funding.

Pro bono work is another attractive avenue for promoting accessibility of lawyers. Winkelmann J points out that the profession's incentive to volunteer is the potential diminishment of its dominant market share, due to the prominence of other advisory personnel in the civil arena.[113] Free legal advice in New Zealand is available to an extent, however Toy-Cronin and Kim Economides critique our "ad hoc… minimal

[112] Berenson, above n 62.

[113] Winkelmann J, above n 12, at 15.

national coordination" and suggest we look to the United Kingdom for guidance.[114] The allocation of pro bono cases must be fair to retain public confidence in the justice system. Given the scarcity of resources, self-represented litigants would need to be sorted by the 'worthiness' of their dispute to prioritise those most 'deserving' of assistance. Application of this concept in practice would prove problematic and discriminatory; the distressing nature of grievances is highly subjective.

Many lawyers volunteer at community law centres, citizens' advice bureaus and online advice services such as LawSpot. Although useful, these are limited to certain physical or digital spaces that not all New Zealanders can access. Further, government funding for these initiatives is extremely low. To address this, a central state-funded body could oversee pro bono services across New Zealand.[115] This initiative aims to assist the middle band of self-represented litigants that cannot receive legal aid, however this portion of litigants is growing so rapidly that it is unlikely pro bono assistance could ever comprehensively satisfy their needs.

The most promising solution is overhauling the delivery of professional legal services. Currently, lawyers are engaged from start to finish and legal fees correspond to time spent on the matter. Members of the profession have called for a new payment model that matches fees with expected damages recoverable upon success, both to address imbalances and incentivise lawyers to act efficiently.[116] Most self-represented litigants would prefer representation but cannot afford to hire a lawyer for the full duration of their case.[117] Providing 'unbundled' representation offers greater choice and control to self-represented litigants in this position. Unbundling is a service delivery model in which, similarly to a dining buffet, clients direct lawyers to handle some, but not all, of their caseload.[118] Shifting towards this fluid, accommodating market model would empower self-represented litigants to seek guidance regarding aspects of their case they cannot manage on their own. It encompasses the face-to-face consultation and coaching missing from the current system, and caters to those who cannot afford full representation but do not qualify for legal aid. It would increase market competition by enabling firms and practitioners to offer deals and packages to attract and retain clients. The limits of advice given would need to be clearly demarcated in retainer contracts,[119]

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[114] Toy-Cronin and Economides, above n 58.

[115] Law Commission, above n 52, at 13.

[116] Winkelmann J, above n 12, at 15; Jim Farmer "The Increase in Unrepresented Litigants and their Effect on the Judicial Process" (11 February 2015) <www.jamesfarmerqc.co.nz>.

[117] As evidenced in Macfarlane's study: see Macfarlane, above n 10.

[118] Rhode, above n 30, at 100.

[119] As previously noted, lawyers are subject to significant professional and ethical obligations. The lawyer / client relationship is a privileged, fiduciary one; furthermore, rule 3.5(c) of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 states that any limitation on the

however that should not prove an insurmountable barrier to what represents an innovative method of rendering lawyers more affordable.

D Inherent inequality

A full-scale consideration of how access to civil justice in New Zealand might be improved is beyond the scope of this paper. However, even in the absence of detailed analysis, it is clear that any combination of the above reforms cannot constitute a 'silver bullet' to resolve the issues embodied in, and produced by, the self-representation phenomenon. The fact remains that our common law system is predicated on the existence of lawyers and has become so fundamentally complex that non-lawyers face extensive difficulties in attempting to engage with it. This concern does not affect New Zealand in isolation; it is reflected in the United Kingdom Civil Justice Council report, which pragmatically concludes: "it may remain the truth, and not just the perception, that there is inequality of arms where one party is represented and another is not."[120]

The unlikelihood of ever completely realising the right to self-representation and the broader right of access to justice does not mean these suggestions are redundant or pointless. Very rarely can any human right be attained and fulfilled to its highest potential. Section 5 of the New Zealand Bill of Rights Act 1990 explicitly acknowledges this by allowing human rights and freedoms to be curtailed where "reasonable" and "demonstrably justified" to do so. I argue it is incumbent upon the state and its citizens to work towards the highest possible standard of human rights reasonably practicable. Conceptualised in this way, New Zealand and its people are obligated to implement the above reforms in accordance with what is realistically possible, particularly since the right to self-representation is strongly upheld by the courts and Parliament.

Equality between self-represented litigants and represented litigants is unlikely to come to pass, yet that does not mean the right should be dismissed or diminished. Swank argues that no two parties to a dispute are ever balanced, regardless of their representation status.[121] The presence of lawyers aims to ameliorate power imbalances between litigants, but even lawyers possess differing levels of experience, knowledge and resources. Rather than striving for blanket equality, the goal of reform should be to secure meaningful access to justice for New Zealanders to the greatest possible extent.

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provision of legal services must be "fair and reasonable". However, similar duties have not prevented the trialling of unbundling mechanisms in overseas jurisdictions.

[120] United Kingdom Civil Justice Council, above n 6, at [52].

[121] Swank, above n 48, at 1577–1582.

In writing about self-representation in the Family Court, Sean Brennan argues that implementing reforms to assist self-represented litigants is "risk[y]" because litigants may choose self-representation even though the price of representation is within their means.[122] I challenge that statement. Brennan assumes that self-representation is detrimental to litigants and the system. He fails to consider the social and democratic benefits promoted by the right to self-representation in New Zealand. His assertion belies an underlying fear of the displacement of lawyers' central role in common law courts in the face of a growing movement to forego them. The following section explores the basis of the right to self-representation and defends its value in response to criticisms such as Brennan's, with a focus on Rabeea Assy's suggestion that the right should be revisited and removed.

IV In defence of the right to self-representation

This section firstly outlines how self-representation is preserved in New Zealand law, before positing that, in addition to bearing statutory legitimacy, self-representation is a human right protected under the New Zealand Bill of Rights Act 1990 and must be protected as such. Finally, I argue against mandatory representation and mandatory self-representation on the basis that both breach the right to self-representation, since its proper exercise requires individual choice.

A The right to self-representation

The right to self-representation is a fundamental constitutional element of the common law.[123] It was standard in medieval England when disputes were resolved through trials by combat or ordeal, but waned in popularity when the traditional adversarial model rose to prominence during the 13th century as lawyers became necessary 'translators' of increasingly complicated laws.[124] Litigants' rights to give evidence and advocate were only explicitly recognised in the mid-1800s.[125] The courts have long upheld that it is for litigants to decide whether to appoint counsel, despite judicial comment regarding the foolishness of choosing otherwise.[126]

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[122] Brennan, above n 12.

[123] Assy, above n 3, at 2 and 15.

[124] At 16.

[125] Genn, above n 8, at 10.

[126] In Australia, see *Cachia v Hanes* (1994) 179 CLR 403 at 415, and *Burwood MC v Hervey* (1995) 86 LGERA 389 at 395; in the United States of America, see *Iannaccone v Law* 142 F3d 553 (US Court of Appeals of Washington, Division 2, 2007); in the United Kingdom, see *Bremer Vulkan Schiffbau und Mashinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 (HL), *R v Board of Visitors of HM Prison* [1988] AC 379 (HL), and *R v Leicester City Justices ex p Barrow* [1991] 2 QB 260, [1991] 3 All ER 935 (CA).

In New Zealand, the Court of Appeal has strongly affirmed the right of individuals "of sufficient age and capacity" to self-represent.[127] Self-representation is also a statutory right. Although non-lawyers are prohibited from appearing,[128] the Lawyers and Conveyancers Act 2006 s 27(1)(a) preserves the ability of "any person [to represent] himself or herself in proceedings before any court or tribunal". The right "to present a defence" to criminal charges is afforded further protection in the New Zealand Bill of Rights Act 1990.[129] Civil self-representation does not receive the same explicit recognition, but I believe it can be read into the right to justice.[130]

B The right of access to justice

The right to self-representation is most frequently couched within the human right of access to justice. A participant in Macfarlane's study cynically remarked that access to justice was a "fairy tale" he no longer believed in.[131] Despite its centrality to the common law, the nature and scope of the right are contested and difficult to define.

Access to justice is, at its core, about fairness and equality in and under the law. For the law to function as "the ink that underlines our social contract"[132] with the state and other citizens, everyone must have access to the law and legal institutions that make, pass and enforce the law. In the New Zealand context, James Greenland articulates a feeling amongst the legal profession that the purpose of law is to change society for the better: "I think most people do what they do because they think it contributes something good to society."[133] Similarly, the Human Rights Commission links the right of access to justice to the colloquial Kiwi concept of giving everyone a "fair go".[134] Although applicable to each individual by virtue of their humanity, access to justice is most often referenced in a broader sense that is applicable to the relationship between citizens / citizens and citizens / states.

This right has a longstanding history within the development of the common law. Its most notable articulation lies in the Magna Carta, signed in 1215 to curtail monarchical power. Clause 40, still in force today, famously proclaims that "[t]o no one will we sell, to no one deny or delay right or justice."[135] Although most provisions have since been

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[127] *Re G J Mannix Ltd* [1984] 1 NZLR 309 (CA) at 312.

[128] See Lawyers and Conveyancers Act 2006, s 24 and s 6 "reserved areas of work" (b)–(c).

[129] Section 25(e).

[130] Section 27(1).

[131] Macfarlane, above n 12, at 51.

[132] Greenland, above n 13.

[133] Greenland, above n 13; see also Winkelmann J, above n 12, at 2: access to justice is "uncontroversial" and undeniable.

[134] Human Rights Commission *Human Rights in New Zealand 2010* (HRNZ 10) at 89.

[135] British Library "English translation of the Magna Carta" <www.bl.uk>.

repealed, the Magna Carta's constitutional importance remains. Part of its legacy is the well-established concept of the rule of law, which mandates equal treatment, accountability and access for all under the law.[136] This ideology facilitates the promotion of democratic ideals and is an important safeguard upon the rights of individuals against state power. Two fundamental principles of the rule of law are: affordable and timely processes to address civil disputes, and fair dispute resolution systems.[137] Equal and meaningful access to the courts is therefore considered to form part of the right of access to justice, since the judiciary administers dispute resolution via adversarial hearings. The Law Commission indicates that the state is empowered to regulate social conduct between individuals and, conversely, when it does so it must ensure citizens can access the information and institutions necessary to live by those rules and enforce their rights when those rules are broken.[138] The denial of individuals' rights of access to the courts has severely detrimental implications for the overall existence and maintenance of the rule of law in any nation.

This facet of the right of access to justice is enshrined in the New Zealand Bill of Rights Act 1990. Section 27, entitled "right to justice", protects individuals' rights to "natural justice" in respect of decisions affecting their interests made by any public body,[139] as well as the right to challenge those decisions via judicial review[140] and the right to bring and defend civil claims against the state.[141] The ambit of "natural justice" is relatively wide; it does not extend to substantive merits[142] but codifies and emphasises established common law principles.[143] These can be condensed into two key requirements: a fair hearing in which both sides have the opportunity to be heard, and an unbiased, objective decision.[144] Breach of s 27(1) has only been litigated on occasion in New Zealand,[145] however the wider principle of access to the courts was recently emphasised by the

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[136] Lord Bingham "The Rule of Law" (2007) 66(1) Cambridge Law Journal 67 at 67–69.

[137] Sub-rules 5 and 7 of Lord Bingham's eight sub-rules that make up the rule of law, cited in Human Rights Commission, above n 134, at 89.

[138] Law Commission, above n 52, at 10.

[139] Section 27(1).

[140] Section 27(2).

[141] Section 27(3).

[142] Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Oxford, 2003) at 755–757.

[143] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 61; see also *Combined Beneficiaries Union v Auckland COGS Committee* [2009] 2 NZLR 56 (CA) at [21].

[144] *Combined Beneficiaries Union*, above n 143, at [11].

[145] Most notably in *Combined Beneficiaries Union*, above n 143: see Butler and Butler, above n 143, at 1481.

Court of Appeal in a different context.[146] Human rights jurisprudence suggests that the right of access to the courts requires not merely fulfillment of procedural criteria but, further, effective and meaningful justice that caters to individuals' differing circumstances.[147]

Following this line of scholarship, there is significant scope to include in s 27(1) the opposite, but nonetheless linked, rights to legal representation and self-representation. This possibility has been explored regarding representation, whereby the Court of Appeal suggested in obiter that the right fits within the provision's purview.[148] If a right to representation in civil litigation is sometimes necessary to uphold the right of access to the courts and, by extension, the right of access to justice, it follows that a right to proceed with a civil claim in the absence of representation is also necessary to fulfil those rights. This is particularly so in New Zealand, given that lawyers are unaffordable to most.

Academic debate on the merits or otherwise of the self-representation phenomenon tends to conflate the rights of access to justice and to the courts with the right of access to representation. It is important to reframe this discussion in acknowledgement of the reality that these rights do not always marry up. It would be a thoroughly undesirable interpretation of the right of access to justice to predicate its realisation on the presence of a lawyer when the right, at its heart, guarantees fairness and equality. As it stands, our system cannot possibly hope to guarantee the availability and affordability of lawyers for all those with viable civil claims. Interpreting s 27(1) to exclude the right to self-representation from its ambit also goes against the need for a "generous interpretation"[149] of rights at first instance, since any limitations should properly fall to be justified by the state under s 5. It would render access to justice and the rule of law illusory pursuits.

By that same token, I argue that s 27(1), which encapsulates the right to self-representation, places a positive duty[150] upon the state to implement measures enabling

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[146] An effective denial of access to the Environment Court: see *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601 at [136]–[149].

[147] See, for example, Rhode, above n 30, at 5–6; Law Commission, above n 52, at 4; Human Rights Commission, above n 134, at 97; Petra Butler and Campbell Herbert "Access to Justice Vs Access to Justice for Small and Medium-Sized Enterprises: The Case for a Bilateral Arbitration Treaty" (2014) 26 New Zealand Universities Law Review 186 at 196.

[148] *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).

[149] Butler and Butler, above n 143, at 1485.

[150] Human rights give rise to corresponding duties on the part of the state, where the right is stated in the affirmative: see the example given by Claudia Geiringer and Matthew Palmer "Human rights and social policy in New Zealand" (2007) 30 Social Policy Journal of New Zealand 12 at 15.

the effective exercise of that right. The wording of the provision is framed positively: it guarantees the right to natural justice, as opposed to a (negative) right not to be unfairly treated by the justice system. This indicates the state is required to actively protect the right, as opposed to merely ensuring it is not infringed upon. Meaningful access to justice is not achieved by opening courtroom doors to self-represented litigants, but rather by enabling them to effectively engage with the system so they may participate in resolving their grievances. The above reforms should therefore be undertaken to facilitate the exercise of self-representation, unless they pose unreasonable costs to society. Relatedly, the full realisation of s 27(1) also hinges on reform of and within the legal profession, so self-represented litigants have a viable alternative and are not forced to forego representation due to cost.

My interpretation of s 27(1) is also influenced by other, associated rights operating in the civil justice space. Deciding whether to self-represent gives effect to individuals' autonomy and dignity,[151] which underlie the New Zealand Bill of Rights Act 1990 as in other national and international affirmations of rights. The right to choose is an empowering and enabling device that promotes flexibility and openness within the system. This is especially important where parties to a dispute do not identify with the common law's Anglocentric nature, since self-represented litigants exercise greater control and 'voice' with respect to their claim. An unfortunate result of New Zealand's historical roots as a British colony is that our judicial system does not reflect the rich, multicultural nation we have become. Any opportunity to step closer to an inclusive civil system that promotes access to justice for all is a valuable chance to remedy past injustices and harmonise New Zealand's diverse cultural makeup. Particularly relevant are ss 13 and 14, which affirm the "right to freedom of thought, conscience, religion and belief" and the "right to freedom of expression" respectively. Surely the courts – the key institution charged with upholding ideals of justice and fairness – are one of the most influential platforms available to citizens for the purposes of voicing an opinion. Significant civil decisions, while not championed by self-represented litigants, speak to the importance of open access to the courts and the power of litigation to spark social change.[152] Restriction of access and expression in courts should therefore not occur without good cause.

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[151] As suggested also by Genn, above n 8, at 4; and Fotherby, above n 92, at 353.

[152] For example, in *Donoghue v Stevenson* [1932] UKHL 100, the negligence suit was brought by a poor woman with extremely limited resources against a product manufacturer; *Bryson v Three Foot Six Ltd* [2005] NZSC 34 was filed by a modelmaker on an hourly rate of $22 (albeit the case attracted significant union support due to its wider implications for workers in the film industry); *Surrey v Surrey* [2008] NZCA 565 was brought by a female victim of domestic violence.

I contend that the right to self-representation is a fundamental thread within the wider right of access to the courts, as protected by s 27(1), and, broader still, within the right of access to justice. It would undermine the fabric of the rule of law to remove the right (as Rabeea Assy proposes), or force litigants to exercise the right by removing their ability to choose (per s 7A of the Care of Children Act 2004). The following part challenges these threats to the realisation of the right to self-representation and argues that, regardless of their various merits, other systemic improvements cannot justify disposing of this right. Referring to self-representation, Deborah Rhode sees to the right of access to justice as "deeply rooted but unevenly observed" across common law jurisdictions. Perhaps, through a deeper understanding of the purpose and importance of the right to self-representation, the right of access to justice might be more evenly upheld and applied in New Zealand.

C Mandatory representation

Rabeea Assy argues that the right to self-representation has escaped examination for too long, because it has traditionally sheltered under the protection of the right of access to justice.[153] Assy's recent contribution adds significantly to self-representation dialogue; our fundamental rights must be tested and challenged to sustain robust constitutional debate. Where I diverge from Assy is the strength of the right and its place in contemporary common law jurisdictions. Assy concludes the right has no solid foundation in the common law as it stands, while I believe the opposite to be true. This part unpacks Assy's key assertions and assesses their applicability in New Zealand.

1 Distinction between criminal and civil law

According to Assy, the right to self-representation is erroneously associated with the rights of access to justice and to the courts for three reasons. First, the right has particular significance in criminal proceedings, which has spilled into the realm of civil justice. Criminal trials are inherently unequal, since they involve state prosecution of an individual citizen. Self-representation is considered a safeguard on the exercise of state power where a citizen's liberty is in peril – criminal sanctions extend to imprisonment.[154] Assy's corresponding argument is, therefore, that self-representation bears less weight in civil lawsuits, since the threat to citizens' rights does not reach that severe standard. However, as Assy himself admits,[155] this distinction is less than ideal. Criminal offences may incur minor penalties, such as small fines for traffic infringements, and, equally, civil actions may have major consequences for plaintiffs and defendants, such as losing child custody, losing employment and a reference, deportation, or commitment to a mental facility. If it is the resulting impact of judgment

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[153] Assy, above n 3, at 2.

[154] At 17.

[155] At 41–42.

that justifies the right to self-representation, its objective is less about controlling abuse of power and more about giving greater choice to citizens pursuing an outcome that will affect their lives. Therefore, the right is relevant in both criminal and civil proceedings where potential outcomes are of great importance to the parties. Even purely economic claims will alter the lifestyles of the individuals involved.

2 Autonomy

Assy's second hypothesis regarding the close link between the right to self-representation and the wider rights of access is that rights are personally held and personally enforceable by each individual. He argues that the entitlement of access to justice is only conferred upon individuals because they are ultimately affected by and liable for legal claims, so the personal right of access does not equate to a right to self-representation.[156] The mere fact of a personal right does not guarantee associated personal actions. However, it also does not mitigate against the existence of a right to self-representation within the rights of access. I propose that the status of autonomy and dignity as a basis for all human rights tips the scales in favour of self-representation.

Assy strongly believes autonomy to be a poor foundation for the right to self-representation, and devotes a chapter to its shortcomings.[157] He asserts that the justice process necessarily limits litigants' choices through a series of rules designed to ensure the system operates fairly.[158] I categorise the right to self-representation differently. As a procedural rule, mandatory representation could never be justified like other restrictions. While court processes – witness examination, causes of action, burdens of proof, evidence admissibility and so forth – certainly limit the options available to any litigant, removing the right to self-representation goes further than regulating civil claims. It removes access to justice for self-represented litigants caught between legal aid and legal fees.

Assy states that any civil claim compromises a litigant's autonomy to respect the interests of the judge and the other claimant.[159] Although some sacrifice of litigants' freedom is warranted for the good of the system, as above, that cannot come at the price of litigants' own access to the courts. Removing the right to self-representation is disproportionate to the need for procedural expendiency, given that access to justice is at stake. Ensuring a fair and efficient system perhaps justifies limiting the right where self-represented litigants are extremely out of their depth, vexatious or mentally incompetent, but it does not require complete removal of the right. Furthermore, New

[156] At 17–18.

[157] See ch 7.

[158] At 140.

[159] At 142.

Zealanders are typically apathetic regarding politics so it is counterintuitive to prevent litigants from engaging directly with the judiciary. Any discussion of public good should consider how best to instill and maintain confidence in the civil system, which is surely through meaningful participation as opposed to consigning self-represented litigants to the position of passive arbiter.

Further, Assy argues that representation promotes autonomy, since lawyers must follow their clients' instructions.[160] This may provide ample control for most litigants. However, some find self-representation personally empowering, believe a lawyer's presence will not benefit their case, or feel they are best placed to advocate because the outcome is important to them. Assy's claim also presupposes existing access to lawyers as an alternative to self-representation. Anecdotal and empirical indications render this patently unrealistic. He reasons that many social freedoms can only be exercised through professionals such as doctors and pilots.[161] In New Zealand, healthcare and travel are relatively affordable, priced so the majority can pay. Representation, however, is unaffordable to most. The overwhelming majority self-represent for financial reasons rather than by choice. Self-representation also bears social justice imperatives in comparison to personal rights like health and movement. This is especially so in New Zealand, a nation that prides itself on its egalitarian, community focus.[162] It is therefore illogical to restrict litigants' rights of access because other rights cannot be meaningfully fulfilled without professionals.

Assy also states that the decision to sue brings with it the decision to accept boundaries of litigation, including representation.[163] This assumes the choice to litigate is genuine and realistic, which is often untrue. As he accepts, lawsuits are appropriate to remedy social injustice, and deciding against enforcing one's rights is "irrational" in most instances.[164] It does not follow from 'choosing' legal recourse that litigants accede to playing by the system's rules. Equally idealistic is the argument that autonomy is better upheld by enhancing access to lawyers than access to courts through self-representation.[165] This paper acknowledges limitations of the system for self-represented litigants; the vast majority are more likely to succeed if represented. However, removing the right to self-representation would leave an even larger justice gap; it is hard to imagine social forces changing so substantially and immediately that

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[160] At 145.

[161] At 147–148.

[162] The comprehensive entitlement to cover for personal injuries is premised on the notion of community responsibility.

[163] Assy, above n 3, at 151.

[164] At 151.

[165] At 167.

legal aid or representation could simply replace self-representation. It is more just to enable individuals to claim, albeit with a decreased chance of success, than to effectively bar them from doing so.

Assy's final concern regarding autonomy is that we risk endorsing self-representation by allowing it to continue.[166] Yet the civil process warns self-represented litigants at every turn that their choice may disadvantage their lawsuit. Practically speaking, no prospective litigant views self-representation as a safe or simple option. Even if some do, is that perception really problematic? Provided litigants make informed decisions, it is overly paternalistic to prevent them from pursuing civil justice. The reality that some individuals choose paths we might consider unwise does not justify removing those choices altogether. In fact, as Genn puts it, "the right to self-representation is the ultimate expression of access to justice".[167] It is my contention that taking away the right for litigants' own protection would do considerably more harm than good.

3 Protecting vulnerable citizens

The third limb of Assy's reasoning is that the right is believed to protect financially and socially vulnerable individuals, when in fact monetary considerations underscore many important decisions citizens make.[168] This is correct, but the relevance of financial needs to all major social institutions does not validate removing the right to self-representation. In other areas of social welfare in New Zealand, state aid supports the most vulnerable; those not entitled to any benefit have a structured system to turn to. Without self-representation, litigation would be reduced to a luxury commodity. With no alternative to assist those who cannot afford counsel, it would be remiss to alter the right.

This links to Assy's further assertion that mandatory representation, the status quo in European civil jurisdictions for all but small claims, would serve common law jurisdictions better than retaining the right to self-representation.[169] The major difference between civil and common law is the distinction between inquisitory and adversarial proceedings respectively. Some calls for common law reform suggest that shifting to an inquisitorial system would assist self-represented litigants.[170] However, the notion that common law jurisdictions approach court hearings one way and civil law jurisdictions another is flawed in and of itself. The difference is better

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[166] At 156.

[167] Genn, above n 8, at 4.

[168] Assy, above n 3, at 19–21.

[169] At 196.

[170] As noted by Winkelmann J, above n 12, at 13.

conceptualised as a spectrum from inquisitorial to adversarial,[171] which different countries borrow from in different courtroom settings to different extents. Merely suggesting a shift towards civil practices is ambiguous and does not necessarily encompass the radical change it appears to.

Assy notes this change would be a "dream come true" for academics that support increased judicial involvement, yet even in civil law nations where inquisitorial proceedings are standard, self-representation is not permitted.[172] He fails to recognise that civil jurisdictions suffer from the same malady as the common law: the right has never truly been questioned. Mandatory representation has always existed in Europe, evidenced by the European Court of Human Rights' consistent treatment of the relevant Convention right,[173] in the same way as self-representation, once developed, has retained its status within the common law. It is not evident that mandatory representation is better in civil or common law nations, since it is unknown whether self-represented litigants would fare differently under an inquisitorial approach. There are also discrepancies between civil and common law countries that militate against a uniform approach to the right, such as membership of an international regulatory body (the European Union), cultural origins (most common law nations were born as colonies), social welfare policies, and legal differences such as the extensive codification common in Europe. We cannot assume removing the right would affect the common law in the same way as never allowing that right has affected civil nations.

Rabeea Assy's argument for removing the right to self-representation is compelling. Although I agree with many of his observations, I argue that his conclusion cannot stand. His contentions are sensible if applied to appellate courts only; if a case has reached the Court of Appeal or Supreme Court the issues and law involved are complex, so representation seems appropriate, if not necessary. The majority of self-represented litigants in New Zealand do not appear in the upper echelons of the court hierarchy, rather they encounter the civil system through specialist courts which have been created and moulded to be fit for purpose for citizens to access. Given our specific civil justice model, we should reject Assy's suggestion to abolish self-representation.

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[171] Law Commission, above n 52, at 6.

[172] Assy, above n 3, at 123–124.

[173] European Convention on Human Rights 213 UNTS 221 (signed 4 November 1950, entered into force 3 September 1953), art 6: for an outline of European Court of Human Rights' case law on the right to self-representation, see Assy, above n 3, at 189.

D Mandatory self-representation

In New Zealand, self-representation is compulsory in certain forums. For example, litigants must appear in person in the Disputes Tribunal[174] and the Tenancy Tribunal[175] (with limited exceptions). These restrictions on the right to self-representation are justified due to the small sums being contested, which would render legal services more expensive than the dispute is worth. Further, tribunals are significantly more informal and straightforward than our higher courts, and, as such, are well equipped to manage self-represented litigants.

My concern lies with an increasing creep of mandatory self-representation into high-stakes litigation. Inserted in 2014, s 7A of the Care of Children Act 2004 prohibits lawyers from acting in initial stages of family hearings and "essentially institutionalises self-representation".[176] In doing so, it takes a sizeable step away from the right to self-representation. Self-represented litigants face significantly lessened chances of success and, particularly in family cases, self-representation is often painful. In high-risk contexts such as this, I believe it should be each litigant's choice to retain counsel or self-represent. The inequalities and emotional qualms existing between civil parties may be tempered by use of a lawyer if that litigant so desires. The system should cater to self-represented litigants but not manufacture them, especially since no manner of reform can ever truly resolve the negative aspects of self-representation.

V Conclusion

Litigation is not an endeavour for the faint of heart. For that reason, and because reform can only ever go so far towards adversarial equality, self-representation is not appropriate or suitable for many citizens in their pursuit of justice. The difficulties posed by self-representation and self-represented litigants have provoked substantial disquiet across New Zealand society and in other common law jurisdictions, and for good reason. Much as our civil justice system lauds the right to self-represent, it has developed in such a way that the right is out of reach for most. Arguing one's case without a lawyer is to the litigant's detriment – and, arguably, to the system's detriment – in the majority of situations.

Despite this, it is my contention that the right to self-representation must retain its central position within the common law. In the midst of negative rhetoric and innovative

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[174] Disputes Tribunals Act 1988, s 38(2). See (3) for a list of parties that may be represented if the Tribunal allows.

[175] Residential Tenancies Act 1986, s 93.

[176] Brennan, above n 12.

scholarship rethinking the nature of the right, there is a tendency to forget the wider goals at stake where self-representation is concerned: access to justice, the rule of law, democratic governance, fairness and equality are likely to be compromised if the right's importance is downplayed or denied.

Our civil justice system is naturally flawed; injustices are somewhat inevitable. It is time to accept the self-representation phenomenon for what it is: a symptom of an affordability crisis within the right of access to justice. The right to self-representation must continue to command respect and relevance in New Zealand. After all, any of us might one day require civil justice, and it should be our right to decide whether to pursue a claim through a legal representative or engage with the system ourselves.

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