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Centre for Innovative Justice

Report for Fair Work Commission

Review of General Protections Pilot

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Centre for Innovative Justice

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Centre for Innovative Justice
RMIT University
Building 98, Level 1
102 Victoria Street
Melbourne VIC 3000
Ph: (03) 9925 1139
Email: cij@rmit.edu.au
Web: rmit.edu.au/innovativejustice

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Executive Summary

Australia's national workplace relations tribunal, the Fair Work Commission ('the Commission') has a range of functions and responsibilities under the *Fair Work Act* 2009, one of which is resolving disputes under the general protections provisions. These provisions aim to protect workplace rights and freedom of association, as well as to provide protection from workplace discrimination and other forms of victimisation. Employees who feel that they have been adversely treated under these provisions may apply to the Commission to help resolve their dispute.

The Commission has noted that in recent years the composition of its work has fundamentally changed - from collective to individual dispute resolution. The Commission attributes this shift in part to legislative change (such as unfair dismissals and general protections) and also to declining union membership.

Aware of the significant number of applicants seeking to bring a claim without legal or other representation, the Commission initiated a pilot program in Western Australia in which self-represented applicants could be referred to the Employment Law Centre of Western Australia ('the ELCWA'), where eligible, for advice on the merits of their application and assistance in the drafting of the relevant form.

Just under half of those referred to the pilot (48 out of 109 unrepresented applicants) were deemed eligible for assistance by the ELCWA, with 41 attending an appointment. Of those, 76% took a different course of action upon receipt of advice, either by discontinuing (27%) or amending (49%) their application.

Data in relation to the outcomes of applications indicated that applicants who received advice or assistance from the ELCWA were more likely to finalise or resolve their matters than those self-represented applicants who were ineligible for assistance: ultimately 53% of assisted eligible applicants finalised their matters through discontinuance or settlement (compared to 35% for ineligible applicants), they were less likely to have their matters dismissed (5%, compared to 10%), or to be issued with a certificate following conciliation indicating non-resolution (27%, compared to 41%).

Participants who responded to a survey about their experience of the program indicated high levels of satisfaction, although some indicated concerns regarding the sufficiency of information provided about eligibility, the ease of contacting the service, and the need for ongoing assistance later in proceedings.

RMIT's Centre for Innovative Justice ('the CIJ') was asked by the Commission to provide an assessment of the program. The CIJ examined the data provided by the Commission, including the survey conducted by the Commission as well as feedback from the ELCWA and Commission Members and staff. It also examined external research concerning the experience of self-represented litigants. Overall, the material reflected the significance and benefits - both to parties and to the wider legal process (including for respondents) - of self-represented applicants receiving advice on the merits and structure of their claim at an early point in proceedings.

For this reason, the CIJ has recommended that, with certain improvements and some possible modifications in structure, the Commission's program be continued and expanded to other States and Territories.

Background

Legislative framework

The Fair Work Commission is Australia's national workplace relations tribunal and is established under the *Fair Work Act* 2009. Commencing operation in its current form in 2009, and known until 1 January 2013 as Fair Work Australia, the Commission is independent from government and has a range of responsibilities relating to wages and employment conditions, industrial action and other workplace matters.

Amongst these functions, the Fair Work Act enables the Commission to deal with disputes under the legislation's general protections provisions. The general protections provisions apply to employees in the national workplace relations system, which covers the majority of businesses in Australia and all employees in Victoria, the Northern Territory and the Australian Capital Territory. These provisions have a broad application and aim to protect workplace rights, including entitlements under awards or workplace laws; as well as entitlements to freedom of association, such as belonging to or participating in a union. The provisions also aim to protect employees from discrimination on the basis of a range of attributes; and from dismissal in circumstances such as where an employee has been temporarily absent from work because of illness, or where employment status has been misrepresented.

The power for this function lies under Part 3-1 of the legislation, with sections 365 and 372 respectively providing that, where a person alleges that there has been a contravention of the general protections provisions, they may make an application to the Commission to deal with the dispute. Where the matter concerns a dismissal, the application must be lodged within 21 days of the dismissal taking effect. There is no time limit for applications that do not relate to dismissal. A fee of $65.50[1] is payable upon the making of an application under the provisions, although this fee may be waived if its payment would cause serious financial hardship to the applicant. Applicants may only make an application under one section of the legislation at a time, with the general protections and unfair dismissal provisions addressing slightly different circumstances, and the unlawful termination provisions applying to employees not covered by the national workplace relations system.[2]

Dispute process

The role of the Commission in general protections matters is to assist the parties to resolve their dispute. The Commission does not have an adjudicative role.

Once an application under the general protections provisions has been made, the Commission convenes a private conference to deal with the dispute. Where this concerns a dispute other than a dismissal dispute, this conference is conducted only if the parties agree. Where it involves a dismissal, the parties must attend. A Commission member helps the parties reach resolution and can make a recommendation or express an opinion, but cannot make a binding order or decision.

[1] Fee payable as at 1 July 2013. The fee is indexed annually in accordance with Regulation 3.03 of the *Fair Work Regulations* 2009.

[2] It should be noted here that, while applications relating to dismissal and made under the general protections and unlawful termination provisions numbered 2,303 in the years 2011-2012, the Commission received over 14,000 unfair dismissal applications in the same period.

If attempts to reach a resolution are not successful, the applicant may progress the matter by making a separate application to the Federal Court of Australia or the Federal Circuit Court of Australia (formerly known as the Federal Magistrates' Court). Where the matter involves a dismissal, the Commission must issue a certificate as proof that it has been to conference, after which application to the Court must be made within 14 days of this certificate being issued. Where the matter does not involve a dismissal, an application to Court does not require a certificate. If the Commission considers that such an application would not have a reasonable prospect of success it must advise the parties accordingly.

Other potential outcomes of an application include an applicant electing to discontinue their application, the Commission considering any legal obstacles to the application's progression, such as time limits or concurrent applications; or an agreement being reached between the parties to resolve the matter. The kinds of agreement reached include payments for compensation, employment reinstatement, or amended work arrangements.

The Commission publishes a Guide to its general protections jurisdiction on its website. The Guide explains the nature of the jurisdiction, how an application is made, and the conference process. The Guide states that Commission staff cannot advise parties about whether or not to make an application, or how best to run their case, but they can provide information about Commission processes, how to fill out forms, where to find useful documents such as legislation and decisions, and other organisations which may be able to provide further assistance. The Commission advised the CIJ that the current guidance material is soon to be updated to include further information and a link to contact details for community legal centres in each State and Territory.

General Protections Pilot Project

The Commission has observed that claims brought by individual employees (being unfair dismissal claims and general protections matters) are an increasing part of its work, with 16,330 such applications in 2011-2012, an escalation of 10 per cent on the previous year.[3] Of particular importance, the Commission has indicated that an increasing number of applicants in these matters are self-represented.[4] In these cases, inexperience and unfamiliarity with a jurisdiction can mean that an applicant does not seek redress through the most appropriate avenue, or that an application has not been framed to capture the real issues in dispute. This in turn can hamper the applicant's access to justice, as well as the efficiency of the Commission's processes.

Accordingly, in its recent publication, *Future Directions for Australia's National Workplace Relations Tribunal: Our Plan for the Year Ahead*, the Commission emphasised the importance of providing information and assistance to unrepresented parties. The Commission has undertaken to promote fairness and increase access to justice by implementing a suite of strategies to improve the information and assistance available to parties, including in multimedia formats; a 'virtual tour' of the tribunal on its website; simpler forms; a cooling off period for self-represented parties in conciliations of unfair dismissal applications; and the development of a pro bono program in the unfair dismissal jurisdiction to assist applicants in determining threshold issues of jurisdiction and eligibility.

[3] *Future Directions for Australia's National Workplace Relations Tribunal: Our Plan for the Year Ahead,* October 2012, 2-3.

[4] For example, in the program the subject of this review, 59.89% of those individuals lodging an application within the pilot period were unrepresented.

In addition to these efforts, however, the Commission was eager to facilitate greater access to early advice and assistance for self-represented parties in general protections matters and initiated a pilot program in collaboration with a specialist community legal centre, the Employment Law Centre of Western Australia (the ELCWA). Commencing on 2 July 2012, the pilot had the following aims:

- to assist self-represented applicants to understand the general protections provisions of the Fair Work Act
- to encourage self-represented applicants to think about refining their applications to ensure that a contravention under the general protections part of the Act can be established
- to facilitate the provision of timely legal advice that may lead an applicant to discontinue an application where there is a more appropriate avenue to redress their grievance, thereby minimising inconvenience for respondents and encouraging efficient handling of matters by the Commission
- to bridge the gap between the procedural function of the Commission (the registry), which can only provide information, rather than legal advice; and its formal functions as carried out by Commission Members.

Under the pilot, upon receiving a general protections application and before providing a copy of the application to the respondent, the Commission asked applicants if they would like to be contacted by the ELCWA and had 3 days to respond, the timeframe being designed to minimise delays. Those who agreed were then contacted by the ELCWA's free Advice Line to establish whether they met the criteria for assistance. The ELCWA is an independent body funded to help clients who are deemed vulnerable and who would not otherwise have access to legal assistance. The ELCWA assesses eligibility of prospective clients on the basis of income and a set of vulnerability factors. Those applicants who were deemed eligible then had an appointment arranged at which they received free advice on the merits of their application, as well as assistance with the relevant Form F8.

Following their appointment with the ELCWA, eligible applicants could discontinue or amend their applications, or proceed with their original application. Any unamended original application or amended application was then served on the respondent.

Where applicants did not fit the ELCWA's criteria, or did not wish to participate in the pilot, their matter was allocated to a Commission Member and proceeded in the usual way.

The Commission developed a Procedures Manual to assist staff in responding to the various outcomes and responses from parties. Detailed templates outlined the correspondence that should be directed to potential participants in the program, as well as to the ELCWA, at each stage of the process. Flowcharts indicated the alternate correspondence that should be directed to applicants or the ELCWA dependent on the outcome of each previous communication. Initially intended to run for three months, the pilot program was then extended to run for 12 months.

Review Process

The CIJ was asked by the Commission to conduct an assessment of the General Protections pilot program, in particular to examine participants' response to the pilot, and the impact the pilot program had on their applications.

In conducting this assessment, the CIJ examined a range of data provided by the Commission, including responses from a survey of a number of pilot participants conducted by the Commission; as well as observations from Commission Members about the experience of self-represented applicants in the general protections jurisdiction, and feedback from the ELCWA, Commission Members and staff about the pilot.

The CIJ also reviewed relevant research about the experience of self-represented litigants in the legal process, patterns of advice seeking behaviour, and the value of receiving early advice about the merits and structure of their claim.

Data from the Commission

The Commission provided data in relation to the pilot for the period 2 July 2012 - 30 April 2013. During this period the Commission received 202 general protections applications in Western Australia. Of these, 20 fell outside the scope of the pilot because the ELCWA office was closed over the Christmas period. Of those matters within the scope of the pilot, 73 applicants were represented and 109 were unrepresented.

The Commission referred 91 out of 109 unrepresented applicants to the ELCWA, with 41 being assessed as eligible and receiving advice, 8 other eligible applicants not attending their appointment at the ELCWA, and the balance (42 applicants) assessed as ineligible and returned to the Commission to proceed in the usual manner.[5]

Of the applicants who received advice or assistance from the ELCWA, 27% (or 11 applicants) elected to discontinue their application, while 49% (or 20 applicants) amended their applications. Of those applicants who received advice from the ELCWA under the program, therefore, a total of 76% changed their application or took a different course of action from that originally proposed.

These figures are set out in the following tables.

Applicants	**Number**	**% of total number**
Number represented	73	36
Number unrepresented	109	54
Number outside pilot (Christmas period)	20	10
Total number of applications	202	100

[5] The ELCWA also indicated that some applicants deemed ineligible for assistance as part of the pilot did qualify for some telephone advice through their Advice Line, or for an appointment due to exceptional reasons. For these reasons some of the data provided by the ELCWA to the Commission following the pilot differed from the Commission's internal data.

Pilot participants	Number	% of unrepresented applicants
Number referred to ELC	91	83%
Number referred who were eligible for assistance from ELC	49	45%
Number who have received advice	41	38%
Number who did not attend appointment	8	7%
Number who were ineligible	42	39%

Actions taken by applicants who received assistance

Result	Number	% of applicants who have received advice
Amended	20	49%
Discontinued	11	27%
Unamended	10	24%
Total	41	100%

The Commission also provided data regarding the outcome of applications once they had proceeded through the Commission's processes (see **Appendix 1: Outcomes of General Protections Applications**). Of those referred to the ELCWA who received advice, ultimately 34.15% elected to discontinue their applications (indicating that a further 3 applicants withdrew their application at another stage in proceedings); while 19.51% (8 applicants) had their matter settled; 26.83% (11 applicants) were issued with a certificate by the Commission; 4.88% (2 applicants) had their matter dismissed and 14.63% (6 applicants) had their matter ongoing at the time the information was provided.

This contrasts with the outcomes for those self-represented applicants who were deemed ineligible for ELCWA assistance, with only 14.29% (6 applicants) electing to discontinue; 21.43% (9 applicants) settling, 40.48% (17 applicants) being issued with a certificate, 9.52% (4 applicants) having their matters dismissed and 14.29% (6 applicants) having their matters ongoing. While a similar percentage of applicants settled their matter once it proceeded or had their matter ongoing at the time the information was provided to the CIJ, it is notable that a significantly larger percentage of unrepresented applicants in this sample were unable to resolve their matter at the Commission stage, or had their matter dismissed for jurisdictional reasons. This indicates that, of the smaller number of unrepresented applicants who did not elect to discontinue their application, the result did not translate into settlement, but into protracted or unsuccessful proceedings.

Survey results

The Commission conducted a survey of a number of applicants who had participated in the pilot program. Ultimately, 17 people provided responses to the survey, a total of 41.5% of the pilot participants. Not all participants answered every question, meaning that some answers are more illustrative than others. The CIJ considers the information sufficient to provide a reasonably indicative portrait of the participants' experience of the process, however notes that caution should be exercised when interpreting or applying these results.

In summary, quantifiable responses to the survey revealed that:

- Participants were spread evenly across both genders, with one electing not to answer this question;
- The majority fell either into the 30-39 age bracket or the 50-59 age bracket, with the next largest age bracket being 22-29 years;
- None identified as Aboriginal or Torres Strait Islander;
- 12.5% did not have English as their first language;
- Occupations ranged from cleaning, retail and secretarial/administrative roles through to caring or nursing roles and operators of heavy machinery;
- Employment status was 43.8% full-time, 25% casual, 18.8% part-time and 12.5% other (fixed term full-time and casual with part time roster consistency);
- Over a third (37.5%) had a gross annual income of under $30,000, 35.3% an income of between $30,000 and $50,000, none between $50,000 and $70,000 and 29.4% had an income of more than $70,000. The latter figure presumably reflects the flexibility of the ELCWA eligibility criteria, in which clients are still eligible for assistance, despite having a higher than average income, if they satisfy two or more other 'vulnerability criteria';
- Just under half (47.1%) indicated that they had sought legal advice or other assistance before they lodged their application;
- Of those who had sought advice, 37.5% had done so from the Commission, another 37.5% from a law firm, 12.5% from the Fair Work Ombudsman and another 25% from either a community legal centre or legal aid;
- Of those who had sought advice, 37.5% had sought advice about the sort of application they should make; 25% about their entitlements, with the remainder opting for 'other';
- Of the respondents that did not seek legal advice prior to lodging their application, 66.7% were not able to indicate any particular factors that contributed to this; while 11.1% indicated that they did not know who to ask, and another 22.2% indicated 'other';

- Following their appointment with the ELCWA, 47.1% of survey participants indicated that they had amended their application, 6.3% that they had left it as it was, and 41.2% that they had discontinued their application. This sample indicates an even higher percentage of action taken by program participants than the overall figures provided by the Commission.

- Of those who continued their application, 40% reached a private settlement, 10% were issued with a certificate, 40% had their application ongoing and 10% were awaiting finalisation of paperwork.

- Of the seven people who answered the question 'why did you discontinue your application?', three indicated that they were advised they were in the wrong jurisdiction, one was told that they did not have a strong case, one that 'I had no rights', one was not sure, and one indicated that, after discontinuing the application, the ELCWA took up the case separately and 'ran with it', presumably under another provision.

- Significantly, when asked whether they found the advice from the ELCWA helpful, 82.4% agreed that it was.

Survey participants were also asked to provide responses to some open-ended questions, including whether they found that the process of being referred to the Commission to the ELCWA had run smoothly. The vast majority agreed that it had, with two indicating only that it was difficult to make contact with the ELCWA on occasion and one that the time lapse between when they were first offered the referral and when an amended application was submitted was frustrating.

Two participants had more significant concerns, one relating to the fact that s/he had been referred to the ELCWA for advice, only to learn that s/he was not an employee in the national system and was therefore precluded from pursuing a general protections claim at the Commission. Another felt aggrieved because after lodging an application s/he was dismissed by his/her employer, but was advised to continue with his/her general protections application and not pursue an unfair dismissal application. Ultimately the party was advised that the original application was unlikely to be successful, and felt that s/he had been ill-advised about the correct application to pursue.

Elaborating on the question of whether they found the advice from the ELCWA helpful, many indicated that the ELCWA had assisted them by simplifying their application and clarifying the requirements of the jurisdiction. Additional comments from a minority of survey participants included that, again, it was hard to make contact with the ELCWA on occasion and that ELCWA staff seemed inexperienced; while others indicated that, regardless of how helpful the advice was, they would have benefited from further assistance, advice or even representation at a later stage in the proceedings.

Although 'yes or no' responses provided to the CIJ were not directly linked to the comments also provided, it is reasonable to conclude from the evidence available that, of those who indicated that they did not find the advice helpful, two included those whose circumstances are described above, and another who was advised s/he had not satisfied the requirements for time served in employment to lodge an application in the jurisdiction. Given there is no minimum period of service for a general protections claim, it may be that the circumstances of this latter applicant's case were more aligned with an unfair dismissal claim.

This means that two survey respondents had an expectation of assistance that could simply not be met within the scope of the legislation, raising the question of whether steps might have been able to be taken to determine these preliminary matters before the applicant was referred. Another may well have benefited from legal advice being provided before the application was lodged, thereby determining the merits of the existing claim and avoiding escalation of the matter and/or a sense of frustration with the jurisdiction.

Finally, survey participants were asked to provide a range of other suggestions and feedback about the pilot. A number had no further suggestions to make, describing the service as 'pitched just right', or noting that they were 'just really happy with how it went'. However, of the suggestions made, several survey respondents indicated that they had found it difficult to make contact with the ELCWA, and one that the address was not easily accessible. More substantively, the comments of survey participants reflected a need for greater awareness about additional places of referral where the application is not able to be pursued, the need for representation and further assistance at the conciliation stage, and, as indicated above, frustration on the part of a minority of participants that their factual circumstances had not warranted their referral to the scheme.

Feedback from the ELCWA

Feedback from the ELCWA confirms the benefits of the program, with applicants who received assistance described as 'likely to be better prepared, more focused on relevant factors and in a position to negotiate a settlement agreement'. The ELCWA did recommend, however, that adequate funding be provided in the future (under the pilot, no additional funding was provided to the ELCWA to service the referrals from the Commission).

Also emphasised was the need for applicants to be clearly informed of the criteria for assistance and that not all applicants referred through the pilot would be eligible. This recommendation arose as a result of some applicants being under the misconception that referral to the ELCWA automatically qualified them for assistance.

Finally, the ELCWA expressed a concern that those who did not qualify for assistance in terms of a formal appointment, but who nevertheless received free advice over the Advice Line, were unable to lodge an amended application according to the same process applied under the pilot program if the original application had already been served on the respondent.[6]

Feedback from Commission Members and Staff

The Commission sought feedback from Commission Members and staff in relation to the pilot. This feedback did not comment directly on the benefits of the pilot but rather focussed on some of the challenges associated with self-represented parties, and issues that had arisen during the pilot. Broadly these issues fell into four categories:

1. Effects of self-representation

   One Commission Member observed that self-represented parties, whether they are employees or employers, can be confused about both substantive and procedural matters, leading to

[6] As noted further below, it is open to the Commission to allow amendments to applications at any time, however in the ordinary course it is likely that, compared to the circumstances of the pilot, the respondent will already have received a copy of the original application and may therefore wish to oppose the proposed amendments.

anxiety and irrelevant argument. Applicants often confuse general protections applications with unfair dismissal applications, and regularly fail to identify the causal link between the adverse action and the workplace right said to have been breached. Similarly, respondents raise arguments relevant only to defending unfair dismissal matters, for example that the applicant had been on probation, or that the opportunity to have a support person present at a meeting had been provided. In general, self-represented parties often focus on the surrounding circumstances of the dispute, rather than on the specific elements of the application.

The Member also observed that self-represented parties do not understand the precise nature of the conference they are about to attend, including whether it is a formal hearing, a mediation or a conciliation.

2. Availability of the ELCWA and managing applicants' expectations

It was noted that the closure of the ELCWA office over the Christmas period, and occasional staff absence had an impact on the time taken to provide advice to applicants referred to the pilot.

It was also noted that some applicants who received advice from the ELCWA were disappointed that they were unable to be referred by the Commission for an additional appointment, or to be provided with any further assistance by the ELCWA. In addition, the view was expressed that applicants who had had the benefit of advice from the ELCWA in relation to their application may subsequently be less inclined, as a result of that advice, to negotiate a settlement at conciliation. The pilot data would suggest, however, that this concern was not necessarily borne out, with substantially similar settlement rates recorded for both eligible and ineligible applicants and higher rates of non-resolution for ineligible applicants as indicated by the higher number of certificates of non-resolution issued for ineligible applicants.

3. Consequences of filing an amended application

A number of procedural issues arise if an applicant lodges an amended application following advice provided by the ELCWA. Where an applicant is referred to the ELCWA his or her application is not served on the respondent until the referral process is completed. If the application is not amended, the original application, which has already been lodged, is then served on the respondent. If the application is amended as a result of advice from the ELCWA, only the amended application is served on the respondent.

Where this occurs, three issues arise:

- The respondent will be served with a cover letter from the Commission bearing the original application receipt date, and the amended application bearing the date on which it was lodged, which is likely in some dismissal cases to be outside the time limit in which an application must be lodged. As the respondent will be unaware an earlier application was lodged, this may prompt an objection to the application on the ground that it was out of time.

- The original application remains on the file and is accessible to the Commission member dealing with this matter. This raises the question of whether the respondent ought, as a matter of procedural fairness, be provided with the original application in order to respond to any relevant material it may contain. In addition, the application may be regarded as a contemporaneous account of events and therefore an important document in the proceeding.

- The applicant assumes that the amended application has been accepted by the Commission as the version upon which the matter will proceed. However, it is in fact ultimately at the discretion of the Commission Member dealing with the matter as to whether the amended application will be accepted. (Section 586 empowers the Commission to allow a correction or amendment of any application on any terms that it considers appropriate.) This leads to some uncertainty about the status of the amended application, and whether the respondent's consent to the amended application is required.

It was also suggested that the prospect of being able to lodge a subsequent amended application could be used by some applicants as a means of extending the lodgement time limits, by permitting them in effect to lodge an incomplete form, giving them a further opportunity to refine their application.

4. Administration and file management

Commission staff in the Melbourne and Perth Registries made a number of observations about some of the administrative processes used to track matters through the pilot process, to generate communications and to allocate files to Commission members. Suggestions were made for possible improvements to remove some of the administrative steps associated with the referral and allocation processes.

Discussion and Findings

Policy context

The number of self-represented litigants across the Australian legal system is demanding increasing attention, both out of concern for the litigants themselves who may place their substantive and procedural rights at risk if they lack the skills and knowledge required to present their cases effectively, and for the burden they can place on the effective and efficient functioning of the court system.[7]

Although a number of jurisdictions, in particular tribunals, are designed to accommodate self-representation, the legislative requirements and procedural complexity of some proceedings can still necessitate the provision of different forms of assistance for parties who do not have the benefit of comprehensive legal representation. Such assistance may range from the provision of written or audio-visual materials explaining relevant procedures, to the availability of individual legal advice about the merits of a party's case and/or their various options for pursuing their claim and resolving their dispute. Such assistance may assist in preparing a party to run his or her own case, in determining the most appropriate forum for the claim, or in explaining that a case lacks merit and ought not be pursued, or should be pursued through a different avenue.

In 2009 the Senate Legal and Constitutional Affairs References Committee noted the value of early intervention, or 'triage', in terms of diverting litigants from unmeritorious proceedings which would most likely result in high personal and financial costs and which cannot be remedied by a duty lawyer once the parties have reached the court door.[8]

Similarly, the UK Civil Justice Council in a 2011 report concluded that:

> *The most important thing for self-represented litigants is access to objective advice that can be trusted. Above all, advice about merits, and risks (including costs), but also about process. As a result every effort should be made to increase the availability and accessibility of early advice of this type*.[9]

There is also value to the other party to a dispute when an unmeritorious claim does not need to be defended, or, alternatively, when the issues in dispute are effectively articulated and identified. Similarly, courts and tribunals benefit from efficient conduct of proceedings. While estimates vary, the discontinuation or refinement of an application can result in significant savings of a court's time and resources – both in the courtroom and at the registry counter - in turn easing the strain on the justice system.[10]

[7] See Victorian Law Reform Commission, *Civil Justice Review Report*, 2008, 565.
[8] Senate Legal and Constitutional Affairs References Committee, *Access to Justice,* 8 October 2009, xvii.
[9] 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, 9.
[10] As to data in relation to the impact of self-represented litigants, see Richardson, E, Sourdin, T & Wallace, N, Australian Centre for Court and Justice System Innovation, Monash University, *Self-Represented Litigants: Literature Review*, 2012, and Richardson, E & Sourdin, T, 'Mind the gap: Making evidence-based decisions about self-represented litigants' (2013) *22 Journal of Judicial Administration*, 191, 193.

Assisting self-represented litigants, then, is increasingly acknowledged as a constructive, and necessary, investment across the legal system. This is particularly the case when the parameters for qualifying for legal aid within the civil sphere are extremely narrow.

As a result, alternatives are being sought, with pro bono services, and 'discrete task' or 'unbundled' assistance being identified as part of the solution. Stepping away from the traditional notion of legal representation which runs from the issuing of a claim to the conclusion of a hearing, 'discrete task' work involves a legal adviser providing assistance at a particular stage, or intermittently, during the progress of a dispute.

In Queensland, the Self-Representation Service run by the Queensland Public Interest Law Clearing House (QPILCH) offers clients pro bono discrete task assistance at the early stages of a self-represented party's civil litigation (in a range of jurisdictions) – from initial advice and explanations of the court process, to the drafting of specific documents, access to information technology and, more recently, a free mediation service. The service does not represent clients in court.

The results of this Service have been extremely positive, with significant savings estimated to have been made and all parties, including the courts, benefiting from the more efficient conduct of proceedings.[11] The Service also discourages self-represented parties with unmeritorious cases from instituting or continuing proceedings, and has had considerable success in diverting clients with unmeritorious matters away from the court system.[12] Further, evaluations reveal overwhelming support from participants and court staff alike, with registry personnel pleased to refer applicants to a source of assistance, and applicants delighted to receive free legal advice that they perceive as both expert and genuinely impartial.[13]

The CIJ endorses efforts such as these which provide assistance to self-represented litigants at an early point in proceedings, often before proceedings have been commenced. By investing in an efficient use of limited resources when self-represented parties first present to the court, savings can be made to the system down the track. Perhaps more importantly, this approach attempts to address a real need in a growing number of participants in the legal system, treating self-represented litigants not as an afterthought, nor as an inconvenience to be 'dealt with', but as legitimate users of the system with a range of needs.

It is, however, noted that as much as the value of 'discrete task' or early forms of legal assistance is acknowledged, it is likely it will still need to complement, rather than replace, other forms of assistance which can be provided to self-represented litigants throughout the litigation process as circumstances require, such as pro bono mediation, pro bono legal representation at hearings, provision of simple procedural guides (in writing or audio-visual form) and referrals to other, non-legal sources of support or points of ongoing contact. The challenge for any court or tribunal is to determine its role in facilitating such assistance, and at which points in the proceeding these efforts can be targeted to maximum effect.

[11] See Woodyatt, T, Thompson, A & Pendlebury, E, 'Queensland's self-represented services: A model for other courts and tribunals.' (2011) 20 *Journal of Judicial Administration* 225; de Smidt, A & Dodgson, K, 'Unbundling our way to outcomes: QPILCH's Self Representation Service at QCAT, two years on.' (2012) 21 *Journal of Judicial Administration,* 246–255.

[12] de Smidt, A & Dodgson, K, 253.

[13] An evaluation of the service estimates that, in a 9 month period, the service diverted three matters away from a hearing in the court and a further seven from being commenced, resulting in an approximate saving to the court of over $175,000. Dr Cate Banks, *Evaluation of effectiveness of Queensland Public Interest Law Clearing House Self-Representation Service in Federal Court and Federal Magistrates Court Brisbane*, June 2012, 14-15 at www.qpilch.org.au/_dbase_upl/QPILCH_Federal_Court_Pilot_Evaluation_June_2012.pdf (viewed 31 May 2013).

Contributing to this challenge is the complexity associated with the ways in which people seek out assistance for their legal problems. The recent Legal Australia-Wide Survey conducted by the Law and Justice Foundation of NSW investigated, amongst other things, the advice-seeking behaviour of the Australian population in relation to a range of legal problems. In employment matters, 60.8% of survey participants sought some advice in relation to their problem, 24.7% handled their problems without advice, and 14.5% took no action at all.[14] When they did seek advice for employment problems, they most often contacted trade unions or professional associations (45.3%), health or welfare advisors (35.6%), employers or supervisors (23.7%) and legal advisors (22.1%). They less often sought advice from government departments or agencies (13.3%).[15]

Assessment

With these considerations in mind, the CIJ endorses the Commission's collaboration with the ELCWA as a valuable addition to its general protections jurisdiction, and its commitment to access to justice. Given that 59.89% of those individuals lodging applications within the pilot period were unrepresented, there is clearly a need, and a likely burden for the Commission, which ought to be addressed. In particular, the provision of advice on the merits of a claim including any relevant legal obstacles, rather than just procedural information, as well as assistance in articulating the issues in dispute, has the potential to reap significant benefits for all parties and the Commission itself, however far the application proceeds. As noted by one Commission Member, the distinctions between the general protections jurisdiction and the unfair dismissals jurisdiction, and the requirements of each, are often confused by self-represented parties, commonly leading to argument on a range of irrelevant matters.

The data received by the CIJ undeniably reflects that referral to the ELCWA was beneficial to the majority of eligible applicants, with 76% of program participants either discontinuing or amending their application before proceeding with their claim. While it is difficult to draw irrefutable conclusions from a reasonably small sample of survey respondents, it was nevertheless clear that the advice received by the ELCWA assisted applicants - either by dissuading them from pursuing an unmeritorious claim or one that should have been conducted in another jurisdiction; or by helping them to clarify the issues in their application or to understand the requirements of the Commission's processes. Feedback from the ELCWA supports these conclusions.

Further, the data set out in Appendix 1 indicates that applicants who received advice or assistance from the ELCWA were more likely to finalise or resolve their matters than those self-represented applicants who were ineligible for assistance: ultimately 53% of assisted eligible applicants finalised their matters through discontinuance (34%) or settlement (19%) (compared to 35% for ineligible applicants), they were less likely to have their matters dismissed (5%, compared to 10%), or to be issued with a certificate following conciliation indicating non-resolution (27%, compared to 41%).

Coupled with the positive experiences revealed by the survey results, this data suggests the pilot program had significant benefits for eligible applicants, with likely benefits for respondents and the Commission as well.

[14] Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey: Legal Need in Australia*, 2012, 102.
[15] Legal Australia-Wide Survey, 114, and Table 6.3, 115.

In determining whether the pilot ought be implemented on an ongoing basis in Western Australia and/or more broadly, however, a number of factors arise for consideration.

Nature and scope of the service provided

First, the referral program is only able to assist a limited number of applicants, and in a relatively limited way. As outlined above, of 109 unrepresented applicants included in the pilot review period , 91 (or 83%), of unrepresented applicants were referred to the ELC, with only 41 deemed eligible for assistance. Further, several participants expressed frustration that they were unable to contact the ELCWA for any follow up advice or assistance. The CIJ notes, of course, that the number of applicants who can be assisted under the pilot procedure was not within the control or direction of the Commission.

The ELCWA is an independent organisation with limited resources and, as such, determines and measures its eligibility criteria independently. In its feedback on the pilot, the Centre recommended that adequate funding should be provided for the future operation of the program. Based on the limited capacity of the ELCWA to assist applicants, the Commission may wish to explore the development of an arrangement or relationship with other, appropriate, sources of expert advice, such as a pro bono advice provided by the private profession to supplement the ELCWA arrangement.

Related to this is the fact that the pilot program was run in one of only two jurisdictions in Australia that operate a specialist employment law community legal centre, the other being Victoria.[16] If the pilot were to be implemented in States and Territories other than Western Australia, therefore, consideration would need to be given to what legal services might be available to provide advice and assistance, for example existing specialist or generalist community legal centres, private law firms offering pro bono assistance, or possibly a union or professional association.

It should be acknowledged that applications made under the general protections provisions are a reasonably small, albeit important, proportion of the claims brought to the Commission by individual applicants. The Commission has also established a pilot pro bono assistance program to facilitate access to advice for unrepresented parties in unfair dismissal matters, specifically in relation to the technical jurisdictional requirements of the legislation. The outcomes of this pilot are likely to provide the Commission with a useful basis upon which to assess the relative value of an advice service provided by members of the private profession on a pro bono basis, and a service provided by a community legal centre.

Referral process

Secondly, the process by which parties were referred to the ELCWA, assessed for eligibility and provided with assistance could be refined to avoid some of the frustrations experienced by those parties referred to the service.

[16] JobWatch is a community legal centre based in Melbourne providing advice and assistance to Victorian workers about employment law matters. No assessment has been made for the purposes of this report of the comparability of the services provided by the ELCWA and JobWatch.

Despite commendable efforts to minimise delay via reasonably tight timelines for response, it may be that the time lapse can be further mitigated. For example, currently applicants are asked whether they would like to participate in the program, at which point they have 3 days to respond. They then must wait again while the Commission advises the ELCWA, after which they are then contacted by the ELCWA's Advice Line. Following the outcome of this (and determination of their eligibility), the applicant must wait for the ELCWA to advise the Commission of this determination, and the result of any ensuing appointment, before the application can be progressed any further.

In addition, the CIJ suggests that the letter provided to participants which advises them about the process may be confusing in its attempts to cover all contingencies. As important as it is to manage expectations, it is equally important to be clear and accessible. Consideration could be given, therefore, to a review of the correspondence provided to participants in the program.

The CIJ also queries whether further information could be provided to applicants prior to referral to the ELCWA about its eligibility criteria, to avoid the referral of those parties who will ultimately be assessed as ineligible for assistance.

Another approach which could alleviate some of the concerns associated with the referral process conducted during the pilot would be to establish an arrangement where a representative of the ELCWA attends the Commission at certain times during the week so that preliminary issues and eligibility for the scheme – ie the issues that are currently determined only once an applicant has agreed to be referred – are determined at first instance. As well as eliminating potential frustration and unnecessary delay, immediate referral such as this would better manage expectations of applicants who, having been advised that they may qualify for the scheme, currently wait for a period of time to learn whether they actually do.

Timing of referral

Thirdly, the referral program aims to assist applicants only once they have lodged an application. A number of survey participants were frustrated that their factual circumstances clearly did not fit the criteria for a general protections application, but were advised of this only after their appointment or phone call with the ELCWA. The fact that many applicants withdrew their applications after receiving advice also indicates that several applicants had lodged misconceived applications.

Interestingly, the survey results indicated that many applicants did not seek any advice or assistance before lodging their application. Of the few who did state that they had sought advice, three did so from the Commission, three from law firms, two from Legal Aid and one from a community legal centre.

While the pilot program provides effective assistance to applicants, it may also be possible for the Commission to play a role in encouraging prospective applicants to consider, or seek advice about the appropriateness of commencing a general protections application prior to filing the application. For example, the registry could provide prospective applicants with a checklist (such as the eligibility checklist that already exists for unfair dismissal matters) to help applicants establish whether their factual circumstances fit the necessary criteria. This is particularly important given the broad scope of the general protections provisions, as well as of the Fair Work legislation overall in which an employee who has been dismissed may be eligible to make an application under the general protections provisions, the unlawful termination provisions, or the unfair dismissal provisions, depending on the circumstances of the claim.

The Commission could also enhance the general information it provides to prospective parties about the various sources of legal advice available through community legal centres, the private profession, trade unions and professional associations and online legal information sites. Such information could emphasise the importance of understanding threshold issues such as eligibility to make claims within particular divisions of the Commission's jurisdiction.

As pointed out by some Commission Members, however, it is important to bear in mind that for those general protections matters involving a dismissal, applications must be lodged within 21 days of the dismissal and there is limited time for parties to seek legal advice. It was stated that currently, applicants commonly cite seeking legal advice as a justification for lodging an application out of time, and it would undermine the intentions of the legislation were the Commission expected to grant extensions on a routine basis for this purpose. For these reasons, any endeavours to improve access to advice and assistance prior to lodging an application need to facilitate compliance with the statutory time limits.

Status of amended applications

Finally, if the pilot is to be implemented on an ongoing basis, the Commission will need to clarify the various issues that flow from the lodgement of amended applications, namely, whether the respondent ought receive a copy of the original application, and/or an explanation for the delayed lodgement of the application that is subsequently served, and whether there is any requirement to advise the applicant that the amended application will only be treated as the final version of the document upon acceptance by the Commission member assigned to deal with the matter.

Options for resolving these issues include:

- Providing an explanation in the covering letter sent to the respondent about the referral process and the potential discrepancy in application dates
- Sealing the original application so that the Commission Member who ultimately deals with the matter does not have access to its contents, thereby removing the necessity to provide a copy to the respondent
- Establishing a process whereby the Commission indicates in advance that it will accept amended applications filed as a result of the referral program as long as the original application has not been served on the respondent.

Conclusion

The CIJ endorses the Fair Work Commission's ongoing commitment to increasing access to justice for unrepresented parties and, in particular, its efforts to do so by referring eligible applicants for receipt of pro bono legal assistance from the Employment Law Centre of Western Australia. The CIJ notes the efforts the Commission has made to strike a balance between maintaining a jurisdiction that is accessible to self-represented parties, and ensuring that access to justice by such parties is not compromised as a result of their lack of legal representation.

Certainly, the proportion of parties who are unrepresented when bringing general protections applications suggests that any mechanism which increases the effectiveness of the process is to be encouraged. Equally, the number of applications amended or discontinued following referral to the ELCWA - as well as the feedback from survey participants, the ELCWA and Commission staff alike - strongly suggests that there is value to self-represented applicants, and to the Commission process as a whole (including for respondents), in the provision of discrete legal advice at the earliest possible stage.

The CIJ therefore sees merit in cementing the program, or a version of it, as an ongoing part of the Commission's processes and, where possible, in expanding its reach to other state and territory jurisdictions. The CIJ has identified potential refinements that could be made to the procedure, and to the broader suite of information available regarding the jurisdiction, which would increase its efficiency for the Commission and maximise the benefits to applicants and respondents alike. These considerations are reflected in the following recommendations.

Recommendations

1. That the Commission implement an ongoing, formalised program in which self-represented applicants in general protections matters are referred for assessment for pro bono legal advice and assistance in all States and Territories.

2. That the Commission consider whether the ongoing program continues as one where applicants are referred to:

    - a community legal service for advice
    - the private legal profession for pro bono assistance
    - a drop-in or duty lawyer service located at the Commission but provided by a community legal centre, private pro bono assistance, or possibly a union or professional association, or
    - some combination of these approaches.

3. That the Commission introduce information, tools and resources to encourage prospective applicants to confirm the appropriateness of a general protections application for their particular circumstances before lodging an application. Such initiatives could include an eligibility checklist similar to that which has been implemented for unfair dismissal matters, and enhanced referrals to the range of sources of legal advice and assistance.

4. That the Commission clarify the status of any applications amended as a result of a referral program conducted by the Commission, to ensure applicants have confidence that any amended application will be accepted by the Commission, and to ensure respondents' rights to procedural fairness are not compromised.

5. That any information provided to applicants about the referral program be expressed as clearly and simply as possible.

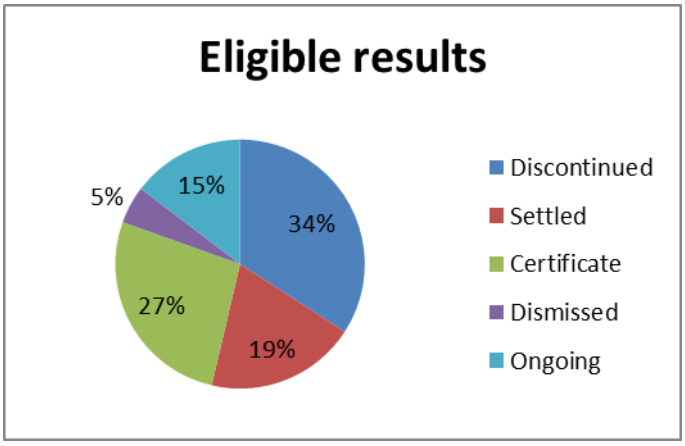
6. That the Commission continue to monitor any ongoing referral program to ensure its effectiveness and to identify and resolve any unintended consequences.

Appendix 1: Outcomes of General Protections Applications

Outcomes of GP pilot matters referred from the Commission to the ELCWA from 2 July 2012 to 30 April 2013 inclusive[*]

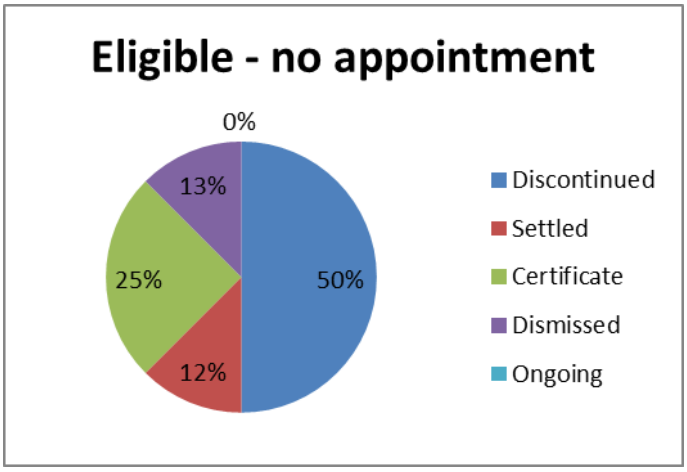
Referred - eligible - had appointment

Outcome	Number	%
Discontinued	14	34.15
Settled	8	19.51
Certificate	11	26.83
Dismissed	2	4.88
Ongoing	6	14.63
Total	41	100



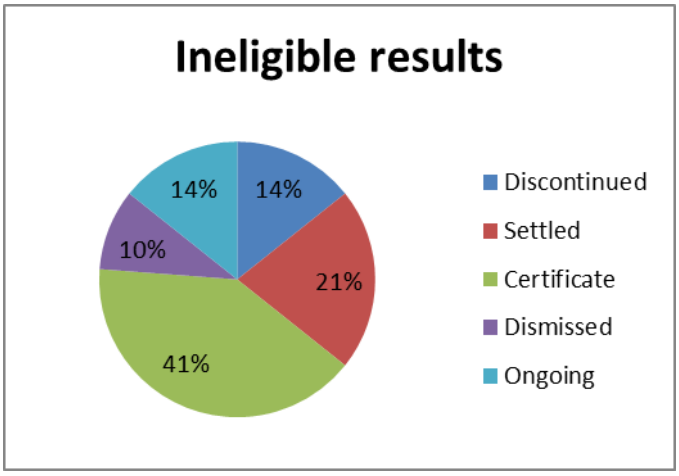
Referred - eligible - didn't have appointment

Outcome	Number	%
Discontinued	4	50.00
Settled	1	12.50
Certificate	2	25.00
Dismissed	1	12.50
Ongoing	0	0.00
Total	8	100



Referred - ineligible

Outcome	Number	%
Discontinued	6	14.29
Settled	9	21.43
Certificate	17	40.48
Dismissed	4	9.52
Ongoing	6	14.29
Total	42	100.00



[*] The Commission did not refer any matters to the ELCWA between 18 December 2012 and 14 January 2013 inclusive.

Not referred - represented

Outcome	Number	%
Discontinued	9	12.33
Settled	25	34.25
Certificate	16	21.92
Dismissed	2	2.74
Ongoing	21	28.77
Total	73.00	100.00