QUEENSLAND PUBLIC INTEREST LAW CLEARING HOUSE INCORPORATED

INCAPABLE OF JUSTICE:

Capacity and Self-Represented Civil Litigants

SUBMISSION TO THE PUBLIC TRUSTEE OF QUEENSLAND

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About QPILCH

QPILCH is an independent, not-for-profit incorporated association bringing together private law firms, barristers, law schools, legal professional associations, corporate legal units and government legal units to provide free and low cost legal services to people who cannot afford private legal assistance or obtain legal aid. QPILCH coordinates the following services:

- The **Public Interest Referral Service** facilitates legal referrals to member law firms and barristers for free legal assistance in public interest civil law cases.
- The **QLS Pro Bono Scheme** and **Bar Pro Bono Scheme** facilitate legal referrals to participating law firms and barristers for legal assistance in eligible civil law cases.
- The **Homeless Persons' Legal Clinic** (HPLC) provides free legal advice and assistance to people experiencing homelessness or at risk of homelessness.
- The **Refugee Civil Law Clinic** provides free legal advice and assistance on matters other than immigration law to refugees and asylum seekers experiencing financial hardship.
- The **Administrative Law Clinic** provides legal advice and extended minor assistance in administrative law matters.
- The **Self-Representation Civil Law Service** (SRCLS) provides free, confidential and impartial legal advice to eligible applicants without legal representation in the civil trial jurisdictions of the Brisbane Supreme and District Courts.
- The **Court of Appeal Self-Representation Civil Law Service** (CA SRCLS) provides free, confidential and impartial legal advice to eligible applicants without legal representation in the civil jurisdiction of the Queensland Court of Appeal.
- **Intellectual Property and Technology Law Clinic** provides free legal advice and assistance to people with IP and technology law questions who cannot otherwise afford legal representation.

For more information about QPILCH services, please see the QPILCH website at www.qpilch.org.au under Services.

QPILCH was established in June 2001 as an initiative of the legal profession and commenced services in January 2002.

QPILCH is a member of the *Queensland Association of Independent Legal Services*, affiliated with the *National Association of Community Legal Centres*, and is a member of the PILCH network.

Executive Summary

The Self-Representation Civil Law Service ("SRCLS") is independently operated by the Queensland Public Interest Law Clearing House Inc. The SRCLS provides free, confidential and impartial legal advice to self-represented litigants in the civil trial jurisdiction of the Supreme and District Courts and the Court of Appeal in Brisbane.

Since its inception, the SRCLS has identified a number of litigants who appear to lack legal capacity, or at least have impaired capacity, and yet are proceeding with their litigation largely unassisted. This is of particular concern because these litigants can face such proceedings as summary judgment, default judgment and strike-out applications which do not necessarily reflect the merits of individual cases. The SRCLS has also witnessed the impact that a lack of reasonable assistance can have on a litigant who, for medical reasons, may not be able to adequately litigate their legal issue.

Under Queensland's civil procedure rules, a person with 'impaired capacity' may only start or defend a proceeding by the person's litigation guardian – an impartial 'next friend'. However, a litigation guardian must be a lawyer or be represented by a lawyer and bear the risk of an adverse costs order and foot the bill for their own legal representation. As a result, invariably, low income litigants who are identified as lacking capacity are unable to obtain a litigation guardian and their matters are frozen in the court process.

Queensland has well-developed mechanisms in place to identify capacity issues via a purpose-built tribunal, as well as services to assist litigants who lack capacity, such as the Public Trustee of Queensland. Using various frameworks, this paper examines the multi-faceted issues surrounding capacity and self-represented litigants. It proposes a number of practical and achievable solutions, to make better use of our existing institutions and facilitate litigants' access to justice.

Recommendations

The recommendations outlined in this paper include:

1. Adopt a single statutory scheme which applies to determining whether a civil litigant has capacity and, if not, provides for the appointment of a litigation guardian including the guardian's powers, duties and responsibilities.

2. GAAT (rather than the courts) be responsible for determining capacity and appointing litigation guardians for civil litigants.

3. Adopt a task-based test for capacity which responds to different causes and effects of incapacity, and the possibility that a litigant may lack capacity to undertake specific tasks required in their litigation.

4. Establish a system whereby the Public Trustee of Queensland is funded to assist low income litigants with impaired capacity as litigation guardian on a discrete task or full-representation basis.

5. Amend section 27(3) of the *Public Trustee Act 1978* to ensure that the Public Trustee does not unreasonably refuse to consent to act as litigation guardian where a self-represented indigent litigant's proceedings will stall without the Public Trustee's intervention.

6. Amend the law to protect a litigation guardian that acts in good faith from an adverse costs order.

7. The court be responsible for addressing the issue of capacity where there is a reasonable suspicion that a self-represented litigant appears to lack capacity, by referring the matter to GAAT for a determination and appointment of a litigation guardian if appropriate and be given specific power under the *Guardianship and Administration Act 2000* to do so.

The Costs of Untested Capacity: A Case Study

Since its inception, the SRCLS has received more than 400 applications for assistance from current or prospective self-represented litigants. As the first service of its kind in Australia, and with data on such a large number of self-represented litigants, the SRCLS is well-placed to comment on, and inform debate about, self-represented litigants.

This project was motivated by the significant issues faced by the SRCLS and its clients when capacity issues arise: in particular, whether the SRCLS is able to continue assisting some clients and if so how, and what options the client will have to resolve their civil proceedings if the SRCLS is not able to assist.

This section attempts to challenge some of the preconceptions that often accompany discussions about self-represented litigants. Drawing on case studies from the SRCLS's own experience, as well as an independent case study drawn from court records, we highlight the uncounted costs of the system's current failure to adequately address capacity issues for self-represented litigants and the practical difficulties which face these already vulnerable clients in achieving meaningful access to justice.

Busting the myths about self-represented litigants

It is an acknowledged right of all litigants to appear in person before the courts.[1] This right has legislative protection in Queensland.[2] Despite this, self-represented litigants are frequently understood to:

- Cause 'problems' or be an 'issue' for the courts;
- Be disillusioned, suspicious or resentful of the legal profession;[3] and
- Be vexatious, querulous and in pursuit of generally unmeritorious claims.

In fact, it is the experience of the SRCLS[4] that:

- Of those prospective litigants who are able to access legal advice prior to commencing proceedings, the majority do not, ultimately, commence the proposed proceedings;
- Of those who seek legal assistance after legal proceedings have commenced, it is just as likely that they will be a defendant or respondent as a plaintiff or applicant;
- The vast majority of self-represented litigants have an income which would preclude them from retaining a solicitor to act for the duration of civil proceedings; and
- For the majority of self-represented litigants, the inability to afford legal representation is one of the key reasons why they have 'chosen' to self-represent.

By self-representing, a litigant is likely to have greater difficulty in demonstrating the merits of their case effectively to the court. That does not mean that just because the litigant is self-representing, the matter does, in fact, lack merit.

SRCLS client profiles

In preparation of this submission, the SRCLS reviewed eight matters where the SRCLS had received an application for assistance in which it seemed that the litigant may not have the requisite capacity to

[1] *Collins (alias Hass) v R* (1975) 133 CLR 120 at 122.
[2] Section 209 Supreme Court Act.
[3] *Equal Treatment Benchbook,* page 176.
[4] These factors have been drawn from the SRLCS' 2007-2008 Evaluation Report, which is available from QPILCH's website at www.qpilch.org.au.

pursue their litigation. The eight cases were selected on the basis that they were the matters where it appeared to be *most obvious* that capacity was an issue.

These eight litigants were not individuals who simply appeared to struggle with understanding or remembering the nature of their court proceedings, or who made decisions which appeared to be odd or irrational. These eight litigants *clearly* suffered from a condition which *significantly* impaired their ability to make rational decisions or undertake essential tasks associated with their proceedings, even after the law and other relevant considerations had been explained to them.
The reasons which appeared to give rise to capacity issues in the cases were varied, and included:

- One matter involving a litigant with an acquired brain injury;
- One matter involving a litigant with a combination of acquired brain injury syndrome and dementia;
- Three matters involving litigants with a mental illness with psychotic features;
- One matter involving a litigant with a mental illness which did not involve psychotic features; and
- Two matters where the precise nature of the disability was unknown, but nevertheless very apparent.

Out of all of the eight case studies, only one involved court proceedings in which the litigant's medical condition was *not* relevant to the factual matrix giving rise to the proceedings.

In each of the other seven matters, the litigant's medical condition was directly relevant to the proceedings on foot, and capacity was brought to the attention of the SRCLS as a potential issue not only through the litigant's conduct, but also by the medical information available from the proceedings themselves. Indeed, in two of the cases, it was known to the other parties that the litigant was unlikely to be able to attend court in person due to their medical condition.[5]

The eight case studies involved proceedings which ranged from District Court to Court of Appeal.[6] The majority were the plaintiff/applicant. In two of the cases, the SRCLS obtained counsel's advice that their matter was meritorious and could be argued in the circumstances. In a third matter, the client had successfully applied to the Court of Appeal to overturn a summary judgment which had been made against her on the basis that her claim was merely suffering from inadequate pleadings and did, in fact, have merit.

In two of the matters, the litigants were being actively assisted by family members (which included using the family member's postal address as the address for service). In a third, the litigant had been assisted by a son until the two had a falling out (and in fact, the son's interests appeared to be in direct conflict with the litigant's). In one matter, the litigant was assisted by an employee of another community legal centre. In another, the litigant was assisted by a concerned job network provider. In the remaining three cases, there did not appear to be anyone available to assist the litigant.

Perhaps even more significantly, in all of the eight cases, the self-represented litigant's opponents were legally represented. In some cases, their opponent was a government body. In two of the cases, the opponent was a solicitor or firm of solicitors.

[5] In one matter, the SRCLS was advised that the client was unable to attend hearings in person because she was hospitalized under an involuntary treatment order. Hearings were adjourned on multiple occasions for this reason and service of documents was affected by posting the documents to the litigant's father. All of the parties involved were aware of these factors.
[6] The SRCLS does not currently assist self-represented litigants in the Magistrates Court jurisdiction.

The purpose of conveying this information is to highlight that, in cases involving self-represented litigants:

- Lack of merit is *not* a uniform feature of cases where a obvious capacity issue arises;
- There is commonly a wealth of information available to the opposing parties which ought to bring the issue of capacity to their attention; and
- It is *not* ordinarily the case that an opposing party will intervene or take steps to ensure that a self-represented opponent with clear capacity issues is afforded assistance with their litigation – to the contrary, it would appear that in most cases, the issue of capacity simply is not addressed.

A case study

This case study reviews the costs to various agencies when a lack of capacity is not adequately dealt with. Rather than examining SRCLS clients, it follows the proceedings which have been generated over time by a single particular litigant.[7]

Maguire was born in 1951.[8] He has a wife and two adult children. He commenced employment with Queensland Railways in 1967, where he continued to work until 1973. He then took a job with Queensland Transport. He resigned from this employment in 1990 and has since been diagnosed with paranoid schizophrenia.

Maguire initiated a workers compensation claim in respect to his employment with Queensland Transport in 2001. It appears that he has been involved in various proceedings ever since. He has initiated a number of court proceedings as a self-represented litigant in the Supreme Court and Court of Appeal since 2004. A summary of these proceedings is set out at Appendix A.

In the context of one of his court proceedings, the legal representative of one of Maguire's opponents made an application to GAAT to determine Maguire's capacity and appoint an administrator to act on Maguire's behalf. However, GAAT determined that the application had not been brought by an 'interested party' and so did not consider whether Maguire did, in fact, have capacity.[9] On that basis, it appears that Maguire's capacity has not been formally considered by GAAT or by the courts.[10]

In reviewing the decisions which have been published in respect to Maguire, it is apparent that the court (and presumably Maguire's opponents) has routinely had difficulty determining the nature of the alleged legal dispute. The courts have commented that there is a significant increase in time and resources that must be devoted to a particular claim where a litigant is unable to adequately express their claim via proper pleadings. In its recent Annual Report, and in a statement that could easily have been referring directly to Maguire's array of proceedings, the Supreme Court notes:

> "*Cases involving self-represented litigants sometimes take longer to hear and determine because the standard of preparation and presentation can be poor and the litigants may be unable to articulate clearly the real points of the case. The outlines of argument of self-represented litigants may be filed late and are sometimes not served on their opponents. This results in case management, court mentions, adjournments, wasted court time and unnecessary costs.*"[11]

[7] All of the information contained in this particular case study has been obtained from published court and tribunal decisions and court documents which are available to the public via the court registries.

[8] Although the background information regarding John Maguire is obtained from various public sources, most of this personal information has been drawn specifically from the judgment of Justice Fryberg in *Maguire v Leather* [2007] QSC 164.

[9] The issue of whether an opposing party has standing to apply for a determination about capacity does not apply where the application is made to the Court rather than to GAAT. For example, see *Pratt v Dickson* (below).

[10] Given the decision of *Fowkes v Lyons* and Maguire's diagnosis of paranoid schizophrenia, it seems likely that he would be found to lack capacity if such an examination were conducted by the courts.

[11] Supreme Court of Queensland, "*Annual Report 2007-2008*" at page 21.

In total, Maguire's proceedings have consumed:

- 5 days of Supreme Court trial time;
- 2 days of Court of Appeal trial time;
- 39 pages of Supreme Court judgments;
- 32 pages of Court of Appeal judgments;
- 11 new court files;
- At least 7 directions and caseflow review hearings; and
- At least 14 additional interlocutory hearings (predominantly summary judgment, default judgment and strike-out applications).

To the best of our knowledge, none of Maguire's proceedings have been successful.

There is also the unfortunate indignity that is suffered by litigants who lack capacity when decisions are published in these types of proceedings, as the judgment is inevitably required to convey the absence of any proper cause of action and the disorder of the claim. Some of these comments have been included in Appendix A.

It should also be noted that throughout his various proceedings, Maguire has been opposed by legal counsel in 6 of the 11 proceedings. It is unclear whether Maguire has satisfied the adverse costs orders which have been made against him, which undoubtedly amount to several thousands of dollars.

Maguire's case is also poignant because it highlights the inadequacy of the current services which should be available to identify and assist when legal capacity is an issue. In an interlocutory hearing in 3973/07, the transcript quotes an exchange between Justice Byrne and the legal representatives of Maguire's opponents:

> Byrne J: *You will have to find some way to get him help because the litigious process is going to prove extremely stressful for him if he…He seems quite incapable of understanding what is happening and incapable of listening. May I suggest that you consider most carefully getting him the best assistance you can.*
>
> AM: *We've tried that, your Honour. We have tried that. Just can't. We've just got to do everything ourselves, I'm afraid.*
>
> Byrne J: *I'm not talking about legal assistance.*

The frustration of everyone involved in this exchange, which took place in Maguire's presence, is palpable. It appears to have motivated the legal representatives to bring an application to GAAT for a determination regarding Maguire's capacity. Although Maguire did not attend the hearing, the Public Trustee did attend and made submissions (which were accepted by GAAT) that the legal representatives did not have standing to bring the application. The application was dismissed and Maguire's capacity was not considered.

Ironically, the application to GAAT motivated Maguire to subsequently bring a claim for damages for defamation against the solicitor who filed the GAAT application.

Shortcomings of the Current Options for Incapacitated Litigants

Strategies most often employed

The combination of procedural rules and the recent professional conduct decision of *Legal Services Commissioner v Ford*,[12] set out the stringent obligations that solicitors (including those providing advice from community legal centres, such as the SRCLS) have regarding capacity. Where a client is considered to have impaired capacity, a practitioner's obligation seems to be to withdraw assistance (or at least halt progress of a matter) until capacity has been adequately assessed and, if appropriate, a litigation guardian appointed. The test set out in *LSC v Ford* for what factors should cause a practitioner to turn their mind to capacity seems to set a relatively low threshold.

For community legal centres, this is a particularly onerous obligation. Although solicitors at community legal centres have the same professional obligations, they lack the resources available to other practitioners to adequately investigate issues like capacity. There may be very limited current medical information available to the centre regarding the client's capacity (if any), and the centre is unlikely to have the necessary resources (or instructions) to obtain or consider adequate information.

The combined effects of the legislation and the centre's available resources would prevent community legal centres from:

- Advising the client on how to obtain a stay or an injunction to protect the client's interests while capacity is assessed;
- Assisting the client to pursue a hearing through Guardianship and Administration Tribunal ("GAAT") to determine capacity.[13]

Where a community legal centre is assisting an indigent client and is alerted to a potential capacity issue, the centre may have an obligation to withdraw assistance until the client is able to satisfy the centre that they do, in fact have capacity (for example, by providing a medical report to that effect). Where assistance must be declined because of concern about capacity, the likely result for the client is that they will be precluded from obtaining *any* legal assistance with their court proceedings.

Alternatives

The question then arises, if the centre does withdraw assistance, what options are currently available to the litigant to progress their proceedings? The (at least theoretical) options for the litigant seem to be:

1. Obtain a medical report confirming that they have the capacity to proceed;
2. Appoint a friend to act as their litigation guardian;
3. Approach the Public Trustee to act as their litigation guardian; or
4. Refer the matter to GAAT for a determination about capacity.

We briefly address these options as follows:

1. Obtain a medical report

This option presumes that the client will be able to find a medical practitioner willing to report that the client has the capacity to pursue the court proceedings. Ideally, the report would come from a practitioner specifically qualified to comment on the client's legal capacity, such as a neuropsychologist – the cost of such a report would be prohibitive to most self-represented litigants.

Further, if the report concluded that the client lacked capacity, the centre would be obliged to withhold any further assistance until a litigation guardian was appointed. This would not necessarily lead to the

[12] [2008] LPT 12. The Legal Practice Tribunal recently considered the scope of a solicitor's professional duty to consider a client's capacity in the context of witnessing a Power of Attorney.

[13] Many community legal centres will not 'go on the record' or appear at court or tribunal hearings. Community legal centres also lack the resources to undertake medical investigations regarding capacity. Perhaps more importantly, it would undermine the necessary degree of trust which is placed in community legal centres by those who seek their assistance – it could devastate the effectiveness of a centre if the centre developed a reputation for having its clients declared 'incapacitated'.

litigant appointing a litigation guardian, and may simply result in an already disadvantaged litigant being left to pursue the matter without any help whatsoever.

2. Appoint a litigation guardian

Where a person lacks capacity, they may only pursue a claim by a litigation guardian. That person can be a trusted friend or relative. However, if the litigation guardian is not a solicitor, the litigation guardian must appoint a solicitor.[14] Further, the litigation guardian (rather than the litigant), will bear the costs risks if the litigant's action is unsuccessful. The cost of appointing a solicitor, coupled with the costs risks to be borne by the litigation guardian, make this an unrealistic option for most self-represented litigants.[15]

3. Approach the Public Trustee

This is the option which, at least in theory, offers self-represented litigants who lack capacity the best relief. If it is determined by the court that the client lacks capacity, the Public Trustee can be appointed to act as litigation guardian for the client. In its 2007/2008 Annual Report, the Public Trustee reported that it was appointed as 'administrator' for 6,700 adults who lacked capacity.

In practice, this option is unlikely to offer a solution to a self-represented litigant. According to its Annual Report, the types of matters which the Public Trustee commonly agrees to take on include:

- Buying and selling accommodation;
- Property issues following a separation; and
- Personal injury disputes.

For general civil litigation, the Public Trustee is unlikely to agree to act as litigation guardian and in those circumstances, the outcome for the client is likely to be the worst-case scenario. The case of *Fowkes v Lyons* illustrates the point.[16] In that case, the court determined that the plaintiff did not have capacity to proceed and that she would be required to appoint a litigation guardian. The court also noted that although the Public Trustee *could* act as litigation guardian, the Public Trustee had advised that "he is unwilling to do so in this case" (no reason was given) pursuant to s 27(3) *Public Trustee Act 1978*. On that basis, the court declined to appoint the Public Trustee as litigation guardian and the proceedings were stayed until a litigation guardian was appointed (i.e. indefinitely). See also Energex Limited v Sablatura.[17]

4. Refer the matter to the GAAT

Pursuant to section 12 of the *Guardianship and Administration Act 2000* ("Guardianship Act"), GAAT has the power to appoint a guardian or administrator for a person who lacks capacity. GAAT has exclusive jurisdiction for appointing guardians for adults with impaired capacity.[18] GAAT has the power to make inquiries about a person's capacity and receives applications from any 'interested person'.

However, pursuant to section 239 of the Guardianship Act, the *Uniform Civil Procedure Rules 1999* ("UCPR") provisions which require parties to obtain leave to proceed where issues of incapacity arise, are not affected. So, as in *Fowkes v Lyons*, even if GAAT makes a determination of incapacity, there is still recourse for the proposed guardian (particularly the Public Trustee) to 'opt out'. The Public Trustee has, in fact, previously made submissions to GAAT that even if it were appointed to act as administrator for a litigant with impaired capacity, it would not necessarily also consent to act as litigation guardian under the UCPR.[19]

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[14] UCPR, rule 93(3).

[15] See 'The Costs of Untested Capacity' below. See also the SRCLS 2007-2008 Evaluation Report which identified that more than half of all SRCLS clients were dependent on Centrelink benefits for their income, and 94% of clients had an annual income of $60,000 or less. The prospect that these same litigants might be able to find a wealthy friend willing to bear the adverse costs of the litigation, *as well as* the costs of appointing a solicitor, is entirely unrealistic.

[16] See 'Defining Capacity'.

[17] [2009] QSC 356

[18] Section 84 Guardianship Act.

[19] See 'The Costs of Uncontested Capacity'.

Defining Capacity

Statutory definition

In Queensland, legal capacity in respect to civil litigation is defined according to a litigant's ability to make decisions. Litigants who lack legal capacity[20] are defined at Schedule 2 of the *Supreme Court Act 1991* ("Supreme Court Act") as a person who:

> "*is not capable of making the decisions required of a litigant for conducting proceedings*".

The Supreme Court Act describes these litigants as a 'person with impaired capacity'. Although a litigant's decision-making skills will be dependent on a variety of factors, not the least of which is the complexity of the particular decision at hand, legal capacity is an absolute – civil litigants either have capacity or they do not.

The Supreme Court Act is particularly important to civil litigants because of the provisions of its subordinate legislation, the UCPR. Rule 93 of the UCPR provides:

> "*(1) A person under a legal incapacity may start or defend a proceeding only by the person's litigation guardian.*
>
> *(2) Except if these rules provide otherwise, anything in a proceeding (including a related enforcement proceeding) required or permitted by these rules to be done by a party may, if the party is a person under a legal incapacity, be done only by the person's litigation guardian.*
>
> *(3) A person's litigation guardian who is not a solicitor may act only by a solicitor*."

The 'all-or-nothing' effect of rule 93 on self-represented litigants in particular is discussed in more detail below. It is sufficient to note that the rules relating to civil litigants who lack capacity draws upon the definition of capacity provided for in the Supreme Court Act. Rule 93 applies to litigants who lack capacity (under the Supreme Court Act definition) at any stage of the proceedings.

There is a separate statutory scheme which also defines and deals with capacity for civil litigants in Queensland. The *Public Trustee Act 1978* ("Public Trustee Act") and the Guardianship Act both rely on the definition of capacity set out in Schedule 4 of the Guardianship Act, which provides:

> "Capacity, *for a person for a matter, means the person is capable of –*
>
> *(a) Understanding the nature and effect of decisions about the matter; and*
>
> *(b) Freely and voluntarily making decisions about the matter; and*
>
> *(c) Communicating the decisions in some way.*"

Like the Supreme Court Act, the Guardianship Act's definition of capacity centres on a consideration of the litigant's decision-making skills. The definitions are similar – but they are not the same.

The Guardianship Act definition of capacity is relevant to civil litigants for two reasons. First, if either party is under a legal disability, no settlement will be valid until it is sanctioned, either by the court or by the Public Trustee, applying the Guardianship Act definition of capacity (rather than the Supreme Court Act definition).[21]

A litigant must meet the capacity definition provided for under the Supreme Court Act in order to take any steps in civil litigation. The litigant must also meet the capacity definition provided for under the

[20] This paper only seeks to address the situation for adult litigants who lack capacity and does not apply to child litigants.

[21] *Public Trustee Act 1978* section 59(1).

Guardianship Act, in order for an informal settlement in those same proceedings to be valid. The situation can (and does) arise where a civil litigant may have capacity to litigate, but not to settle and presumably vice versa.

Second, the Guardianship Act's definition of capacity is relevant to civil litigants because the Act provides a scheme, independent of the courts and the Supreme Court Act, to make determinations about capacity and to appoint guardians for legal matters. The GAAT is established under the Guardianship Act and provides a forum for considering whether an individual has capacity and if not, appointing a guardian to act on the individual's behalf.

The 'Legal Matters' which fall within the Guardianship Act's scheme are set out at Schedule 2 and include:

> *(a) Use of legal services to obtain information about the adult's legal rights; and*
>
> *(b) Use of legal services to undertake a transaction; and*
>
> *(c) Use of legal services to bring or defend a proceeding before a court, tribunal or other entity, including an application under the* Succession Act 1981*, part 4 or an application for compensation arising from a compulsory acquisition; and*
>
> *(d) Bringing or defending a proceeding, including settling a claim, whether before or after the start of a proceeding.*"

In this sense, a civil litigant might fail to meet the capacity test set out in the Supreme Court Act, in which case a litigation guardian must be appointed and conform with the (fairly modest) provisions about litigation guardians under the Supreme Court Act and UCPR scheme. Alternatively, a civil litigant's capacity may be considered by GAAT by applying the Guardianship Act's definition of capacity, and a guardian might be appointed for the same civil litigation but be required to meet the (far more onerous) provisions which apply to guardians appointed under the Guardianship Act.

So, not only might different tests of capacity be applied to determine whether a civil litigant requires a litigation guardian, but it appears that the litigation guardian may have different risks and responsibilities depending on whether the guardian is appointed by the court or by GAAT.

The Public Trustee has previously made submissions to GAAT noting that even if a guardian were to be appointed by GAAT to assist a litigant with 'legal matters', there is no guarantee that the guardian would consent to being formally appointed as litigation guardian in any court proceedings that may be on foot (since giving that consent is a separate step to being appointed as guardian by GAAT).[22]

The Public Trustee has also declined to accept an appointment, pursuant to rule 95 UCPR, as litigation guardian by a court. [23]

Common law definition

The courts are called upon to make a determination about a litigant's capacity either by application of one of the parties pursuant to rule 93 of the UCPR (in which case, the Supreme Court Act's definition of capacity will be relevant), or to sanction a settlement pursuant to the Public Trustee Act (in which case the Guardianship Act definition of capacity will be relevant).

The courts will ordinarily draw upon medical evidence to assist in determining whether a litigant has capacity. In some instances, it appears that the court is willing to make determinations about capacity based exclusively upon a single medical report without any separate consideration of the conduct of

[22] In this regard, we refer to 'The Costs of Uncontested Capacity' below. See also, for example, *Re EEP* [2005] QGAAT 45 at [13] and *Re SE* [2005] QGAAT 66 at [18].
[23] See *Energex Limited v Bohuslav Sablatura* [2009] QSC 356.

the parties throughout the proceedings.[24] Further, a lack of current medical evidence about a litigant's capacity may be sufficient in itself for the court to dismiss an application for consideration of a litigant's capacity.[25]

However, the question of whether a litigant has capacity is ultimately a legal one. On top of the confusion already created by the two different statutory definitions, capacity is further mystified by the very different approaches taken by the courts and GAAT. The examples below highlight the difficulty of the decision, the varied approaches that can be taken, and the potentially inflexible outcome should the court determine that the litigant lacks capacity where there is no litigation guardian willing to assist:

- *Pratt v Dickson* [2000] QSC 314
  The respondent was diagnosed with an acquired brain injury following a motor vehicle accident. Medical reports confirmed that she suffered high level cognitive deficits, difficulty with sustained attention, slow mental processing speed and severely impaired memory (including insight and judgment). One report specifically concluded that she did not 'have the cognitive capacity to give instructions, nor handle any settlement monies'. Nevertheless, her solicitor swore an affidavit that he was satisfied she had capacity to provide instructions. The court determined that the respondent *did* have legal capacity.

- *Aziz v Prestige Property Services Pty Ltd & Anor* [2007] QSC 265
  In circumstances comparable to *Pratt v Dickson*, the plaintiff was involved in a personal injury claim and had instructed solicitors for some time prior to a mediation. The plaintiff had sustained a closed head injury, adjustment disorder with depressed mood and other injuries in a workplace accident. The plaintiff's solicitors were concerned about the plaintiff's level of anxiety at the mediation, and when the plaintiff accepted an offer from the defendants within days of the mediation, the plaintiff's solicitors advised the defendants that his acceptance was subject to confirmation of his capacity by a psychiatrist. The plaintiff's psychiatrist reported that the plaintiff's mental condition was 'significantly affecting' his decision-making ability, prevented him from making 'free and voluntary decisions', and so he lacked capacity. After considering expert evidence from multiple medical specialists as well as evidence from friends, family and acquaintances of the plaintiff, the court found:

  "*even despite explanations along these lines the evidence outlined above indicates that the plaintiff did not fully understand the nature and effect of his decision to settle which was communicated to the defendants on 9 February 2006. Whilst he understood that the consequence of the decision was that the litigation would end, he did not fully appreciate that this settlement had other consequences even though they were explained to him.*"

- *Re CAC* [2008] QGAAT 45
  This GAAT decision related to a 61 year old litigant who was involved in Supreme Court proceedings brought by an insurance company. The matter had been referred to GAAT by the Supreme Court after the litigant's solicitors filed a conditional notice of defence alleging the litigant lacked capacity. Two years prior, the Mental Health Court had ruled that the litigant was not (and would never be) fit to stand trial in respect to the same factual matrix which had given rise to the civil claim. Medical evidence provided to GAAT included reports from the litigant's treating neurosurgeon, a psychiatrist and a clinical neuropsychologist. Their combined reports indicated that the litigant had a neuropsychological disorder caused by prior brain surgery, which left the litigant with a range of impairments to his memory, processing speed and executive skills. Nevertheless, GAAT determined that the litigant did not lack capacity for the civil proceedings. It

[24] For example, see *Fowkes v Lyons* [2005] QSC 7 where a single 'letter' from the litigant's treatment provider was sufficient for the court to make a determination about capacity.
[25] For example, see *Pratt v Dickson* [2000] QSC 314 where medical reports that were 12 months old were considered 'too remote in time to be relevant.' Interestingly, the Supreme Court in that instance ordered that the application be dismissed, rather than making orders to obtain more current evidence.

appears that this decision was based primarily on the litigant's presentation before the tribunal, rather than the expert medical evidence which was available.

- *Fowkes v Lyons* [2005] QSC 7
  The parties were involved in de facto property proceedings. A letter from the defendant's treating psychiatrist confirmed that the defendant suffered from paranoid schizophrenia and was currently non-compliant with medication. The letter concluded that the defendant was intelligent, but lacked insight and so had a guarded to poor prognosis for recovery. The court determined that the defendant did *not* have legal capacity. The Public Trustee indicated that it was unwilling to act for the defendant and so the court ordered that the registrar take no further steps on the proceedings until a litigation guardian came forward.

Unfortunately, the disparate approaches of the court regarding its assessment of whether a litigant has capacity offer little assistance to legal practitioners who seek to make their own assessment of whether their client (or an opposing self-represented litigant) requires the assistance of a litigation guardian.

For some conditions, such as schizophrenia, it appears that a simple letter will persuade the court that there is a lack of capacity, while in other cases, a prior determination that the party is not fit to stand trial is not sufficient. If the condition is an acquired brain injury, it appears that the court could determine capacity either way, with the views of the solicitors potentially given more weight than medical experts. The cases certainly offer little certainty for any self-represented litigant who might choose to question their own capacity.

The South Australian case of *Dalle-Molle (by his next friend Public Trustee) v Manos*[26], applying similar procedural rules, offers insight into the broader issues that the court may consider in determining whether a litigant has the requisite capacity to defend proceedings. In that case, the court considered:

- The burden of proof rests on the person asserting the incapacity;
- The question of capacity is issue-specific, directed to the particular transaction or proceedings;
- Capacity requires that the person is able to give sufficient instructions to take or defend proceedings *and* to compromise legal proceedings (including understanding the nature of the proceedings, its purpose, its possible outcomes and the risks in costs);
- Capacity will be determined by consideration of the facts and subject matter of the particular litigation and the issues involved in that litigation;
- Capacity requires that a person, after careful advice and explanation and time to consider the advice and explanation, is able to give instructions.

In *Dalle-Molle*, the plaintiff had suffered brain damage in a motor vehicle accident which left him with neurological impairment, a loss of intellectual and cognitive ability and a range of emotional and personality changes. He was likely to perform badly in stressful situations and had poor memory. He had lost much of the settlement money through bad investment decisions (including investing in his brother's business). There was evidence that he would rely on advice from family rather than independent advisors and although he was independent and handled his own financial affairs, he lacked understanding of other significant (and serious) financial obligations.

In that case, the plaintiff was represented by the Public Trustee and applied to court for an order that he had sufficient capacity to represent himself. The court determined that, for the purpose of those particular legal proceedings, the plaintiff did not have the requisite capacity.

[26] [2004] SASC 102.

The common theme which runs through all of these approaches, at both common law and under the two statutory schemes, is that they concentrate on a litigant's ability to make decisions freely and voluntarily and to communicate those decisions effectively. We will refer to this as the 'decision-making model' of capacity.

It seems unlikely that, given the variety of approaches taken by the courts, any single medical report would ordinarily by conclusive of the question of capacity, except perhaps where the party suffers from schizophrenia as in *Fowkes v Lyons*.[27] There is certainly a practical difficulty which would be encountered by most SRCLS clients if, in order to determine their capacity, they were obliged to obtain multiple, up-to-the-minute expert medical reports.[28]

A uniform approach

The SRCLS considers that the current scheme for determining capacity, with the varying statutory and common law approaches, creates an unnecessarily complex system in an area which, by definition, should be made as simple as possible. Adopting a single, uniform definition of capacity, which applies to all stages of civil litigation, would be a simple way to improve the situation for litigants, practitioners and the courts by clarifying what standard of capacity will apply, how it will be measured, how and when guardians will be appointed and the scope of a guardian's duties and responsibilities

The SRCLS also considers that a uniform regime which offered a single forum for considering capacity and making orders with respect to litigation guardians would improve consistency in the application of the statutory definition of capacity. We consider that GAAT may be best-equipped to deal with the question of capacity and guardians in a user-friendly forum. Certainly the responsibilities which attach to a guardian appointed by GAAT, which are effectively codified under the Guardianship Act,[29] offer better (or at least more certain) protection to the litigant who is the subject of the order.

Recommendation 1: Adopt a single statutory scheme which applies to determining whether a civil litigant has capacity and, if not, provides for the appointment of a litigation guardian including the guardian's powers, duties and responsibilities.

Recommendation 2: GAAT (rather than the courts) be responsible for determining capacity and appointing litigation guardians for civil litigants.

[27] It is not clear whether all mental illnesses with psychotic features would be given the same treatment.

[28] More than half of the clients assisted by the SRCLS are dependent upon Centrelink benefits as their primary source of income. Eight out of nine SRCLS clients say that the costs of retaining a solicitor is a key reason as to why they have chosen to self-represent. It is likely that the cost of obtaining any purpose-specific expert report regarding their capacity would be, for most SRCLS clients, prohibitive. For more detail, see the SRCLS 2008-2009 Evaluation Report, available from QPILCH's website at www.qpilch.org.au.

[29] See Chapter 4 and Schedule 1 of the *Guardianship and Administration Act 2000*.

The Decision-Making Model and Self-Represented Litigants

As well as the complexity of the current capacity definitions, the decision-making model also appears to be skewed towards whether a client has capacity to provide a solicitor with instructions, rather than a more general consideration of whether the litigant has capacity to participate in civil litigation. The decision-making model of capacity is particularly unhelpful for self-represented litigants, not only because it does not fit their particular situation, but also because there is often no one who recognises a potential capacity issue or is able to act on it if they do.

Capacity for represented litigants

When practitioners make assessments of their client's capacity, they are not only assessing whether or not their client understands the ramifications of their instructions, but also at a more fundamental level, whether the client understands what is going on. In its publication 'Capacity Guidelines for Witnessing Powers of Attorney', the Adult Guardian lists possible indicators of incapacity which include:

- Easily influenced by others about their decision making;
- More likely to repeat themselves;
- Less able to grasp new ideas;
- More anxious about having to make decisions;
- More irritable or upset if they cannot manage a task;
- More forgetful of recent events;
- Less concerned with activities of other people;
- Less able to adapt to change;
- Often losing things or getting lost;
- Undergoing change in behaviour;
- Experiencing change in personality.

Although some of these indicators directly assess the person's decision-making capacity, others, such as 'often losing things or getting lost', appear to be directed towards a more general assessment of the person's grasp on reality. Interestingly, the proposed indicators do not appear to reflect (even a simplified version of) the medically-supported Mini-Mental State Examination ("MMSE"), which is used as a standard practice among a variety of non-legal professions to test 'capacity' in non-legal situations.

Nevertheless, it is apparent from a reading of the different statutory schemes and the various courts' decisions about legal capacity, that a litigant's decision-making ability remains the key to a determination about capacity. In the context of the client/solicitor relationship, this will be reflected in the client's ability to provide coherent and rational instructions to their solicitor.

Capacity for self-represented litigants

However, capacity for self-represented litigants cannot be measured by their ability to provide rational instructions as they do not have a solicitor to provide instructions to or to make assessments about whether those instructions demonstrate adequate capacity. Rather, capacity becomes a question of the litigant's ability to conduct their own proceedings, understand the civil litigation process and to effectively communicate their position to the court. For self-represented litigants, the question of capacity in a practical sense is more complex than simply whether the litigant is able to make free and rational decisions and communicate those decisions effectively because, as a self-represented litigant, there is a lot more than just 'decision-making' that is required of them.

Self-represented litigants must not only be able to understand the factual matters affecting their case sufficiently to make informed decisions about it, but they must also understand the legal issues and civil procedures which apply, and have the necessary skills (such as legal drafting skills and in-court advocating skills) to effectively communicate their legal position to the court and the other parties. As noted in *Dalle-Mole*, litigants should also be able to compromise their proceedings with their opponent. Failure to meet this requirement could have significant adverse costs consequences for a litigant, even if they are ultimately successful in their proceedings.

Further, the decision-making model of capacity may be a valuable way of ascertaining whether a litigant lacks capacity entirely. A litigant who cannot make rational decisions about their litigation lacks capacity completely under the current model, self-represented or otherwise. However, the SRCLS proposes that a lesser, task-based assessment be considered as an 'intermediate' measure of capacity, particularly for self-represented litigants. This is because, in our view, a self-represented litigant may be capable of making and communicating sensible decisions, but this does not necessarily reflect whether they may also have a condition which renders it difficult (or impossible) to conduct their litigation unassisted.

A task-based assessment of capacity could inquire about a litigant's ability to undertake specific tasks required in litigation, such as:

- Corresponding with parties (by telephone and in writing);
- Drafting pleadings;
- Reading and applying legislation and procedural rules;
- Adhering to short time limits;
- Participating in conferences / mediation in person or by telephone;
- Attending interlocutory hearings;
- Negotiating and compromising with other parties; and
- Conducting a trial.

Rather than assessing the more abstract notion of whether the litigant is able to make and communicate decisions, this test could specifically identify which tasks a litigant requires assistance to complete. A potential practical benefit of this model is that it would allow existing services (in particular, the Public Trustee) to provide more support to self-represented litigants, without necessarily taking over conduct of the entire matter or assuming the associated legal costs risks.

A further difficulty which is particularly pronounced for self-represented litigants is the 'all or nothing' approach to capacity contained in the UCPR. As discussed above, rule 93 of the UCPR precludes litigants who lack capacity from taking *any* steps, except by a litigation guardian.

The position for litigants who do not have capacity is absolute – they cannot pursue their own court proceedings if they lack capacity. They cannot file a defence if they are sued, they cannot appear in court if a hearing is set down and they cannot negotiate a settlement. Equally, they cannot bring proceedings against a person who owes them money or who has stolen their property, they cannot bring proceedings if they have suffered a loss from another's negligence and they cannot bring proceedings if they are duped by a scam or con artist.

There are no shades of grey, which might allow litigants with capacity issues to take some steps but not others, to take steps with assistance that falls short of full representation, or to at least take adequate steps (such as applying for a stay, an injunction or to have a judgment set aside) to protect their own interests. A litigant with impaired capacity finds themselves in a situation where their civil rights and powers are frozen completely until a litigation guardian agrees to act on their behalf.

The various forms of incapacity

Self-represented litigants experience conditions which are as varied as dementia and Alzheimer's, mental illness (which may or may not include a psychotic element), intellectual disability or acquired brain injury which may impact on their ability to undertake some tasks in civil litigation but not others. With a more sensitive concept of capacity in mind, it should be possible for the courts to accommodate degrees of capacity, or capacity for some tasks but not others.

A person suffering from a mental illness causing severe anxiety may well struggle to reach decisions about their court proceedings in the pressure-cooker atmosphere of a mediation, but that does not necessarily indicate that they cannot understand their own court proceedings, or undertake many of the

necessary steps to bring the matter to trial on their own or with some limited assistance.[30] Conversely, a person suffering from dementia may, for most of the time, have an excellent grasp of precisely what they consider to be a fair settlement of their dispute, but due to memory problems, may struggle to progress their court proceedings to trial in an effective way.

By way of example, the SRCLS received an application for assistance from a client wishing to appeal a decision of the Children's Court granting guardianship of her daughter to the child's foster parents. The client, who had been hospitalised for several months under an involuntary treatment order, clearly lacked 'capacity' to conduct her own court proceedings.[31] Quite apart from the physical limitations of her hospitalisation, the client's mental instability, which was marked by psychotic episodes, left her attending to her court proceedings on only a sporadic basis. However, there was no question about the sense behind her decision to bring the appeal, or of her ability to comprehend and consider potential alternatives and compromises which might be negotiated with the respondents.

Particular examples of the SRCLS's dealings with self-represented litigants who appear to lack capacity have been examined already in this paper. For now, it is sufficient to reflect that the decision-making model of capacity has been inadequate to assist those litigants, who nevertheless desperately required support for at least some of the components of their civil proceedings.

When a legal practitioner finds themselves opposing a self-represented litigant, or when the court is faced with a self-represented litigant, the question that should be asked in respect to legal capacity is not merely:

> *"Have this litigant's decisions been free, voluntary and well-communicated?"*

A set of more fundamental questions should be asked, such as:

> *"Does this person understand what is going on?"*
>
> *"Does this person appear to be suffering from a condition which might be affecting their ability to self-represent, or to undertake particular tasks associated with self-representing?"*
>
> *"Does this person appear to be suffering from a condition which may impede their chance at getting a fair hearing, or at getting their legal issue communicated effectively?"*

These questions are more fundamental to the issue of whether the litigant has true and meaningful access to our justice system. They also recognise that litigants may have 'impaired capacity' for any number of reasons, which may effect on their ability to adequately represent themselves, and have meaningful access to justice:

- To a degree, falling short of complete lack of capacity for the entire claim; *or*
- At particular times, or in particular circumstances or environments; *or*
- To undertake particular steps in their proceedings, but not others.

A human-rights based approach to capacity

The SRCLS submits that the current all or nothing approach is at odds with Australia's fundamental human rights obligations to litigants who have impaired capacity. These obligations have already been

[30] Indeed, in *Aziz v Prestige Property Services Pty Ltd & Anor* [2007] QSC 265, the court's assessment of the plaintiff's capacity to instruct solicitors for the entire life of the claim stemmed from a concern from the plaintiff's solicitor that the plaintiff had lacked capacity on the day of the mediation due to his extreme anxiety.

[31] In this case, scheduled court hearings were adjourned on the basis that the litigant was unable to attend because she was under an involuntary treatment order and confined to hospital. Her illness formed part of the factual matrix which led to the court proceedings. Nevertheless, the issue of her legal capacity to bring the appeal did not appear to be addressed at any stage of the matter, either by the court or the opposing (represented) parties.

discussed in detail elsewhere and it is not the intention of this submission to reproduce that material here.[32]

The obligations provided for under Article 12 of the United Nations Convention on the Rights of Persons with Disabilities calls for those with a disability to be provided with support and assistance which is:

> "*proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.*"

Pursuant to Australia's obligations under the United Nations Convention, litigants with impaired capacity are entitled to be provided with the necessary support to undertake the specific tasks that they are incapable of completing on their own.

The Victorian Supreme Court has recently examined Australia's obligations pursuant to Article 12 of the United Nations Convention, and found a place for them in our understanding of capacity, in the matter of *Nicholson & Ors v Knaggs & Ors*.[33] In that case, Justice Vickery stated:

> "*The common law traditionally recognises that a person with legal capacity is a person who possesses rights and obligations, and in such capacity may, for example, sue or be sued or enter into legally binding contracts. On the other hand, the idea of "legal capacity", as it is used in Article 12 of the CRPD, is a wider concept which entails the capacity to exercise rights and undertake duties in the course of individual conduct…The article recognises that some people with disability need support to make decisions in the exercise of their legal rights.*"

The SRCLS recommends a more dynamic approach to capacity which responds to the different forms (and degrees) of incapacity as well as the variety of tasks that self-represented litigants must undertake throughout their proceedings.

A dynamic approach to capacity could allow for 'levels' of capacity, rather than an 'all or nothing' approach. The level of support and assistance to be provided to a litigant with impaired capacity could be tailored to suit the needs of the individual, while allowing them to retain control of their civil rights and obligations. Litigants would not necessarily be deemed to lack capacity simply because they might struggle with a particular task, nor would they be left to 'fend for themselves' if they had impaired capacity falling short of a complete lack of capacity.

This particular approach would also potentially assist a more effective distribution of resources to self-represented litigants, by allowing for resources such as the Public Trustee to provide assistance to litigants without having to take over conduct of the entire claim and assume the associated costs risks.

Recommendation 3: Adopt a task-based test for capacity which responds to different causes and effects of incapacity, and the possibility that a litigant may lack capacity to undertake specific tasks required in their litigation.

[32] For example, see People with Disability Australia Inc and Blake Dawson Waldron, *Are the rights of People Whose Cpacity is in Question Being Adequately Protected?*, www.pwd.org.au/publications/capacity_submissions_final.pdf; see also Queensland Law Reform Commission, '*Shaping Queensland's Guardianship Legislation: Principles and Capacity*' Discussion Paper, September 2008.
[33] [2009] VSC 64.

A New Approach

Utilising our existing institutions

As outlined above, it is the experience of the SRCLS that impaired capacity, or the fact that a litigant has chosen to self-represent, does not always reflect the degree of merit in their case. In instances where a litigant has impaired capacity and their case does have merit or at least a potential argument, it is vital that the litigant be provided with sufficient assistance to ensure that they have meaningful access to justice.

Currently, in matters where the SRCLS identifies that a client may have impaired capacity, the professional and ethical obligation of the SRCLS is to cease providing assistance, even where the SRCLS considers that the litigant's case has merit. There is no mechanism currently available to the SRCLS to have the litigant's capacity formally assessed other than to encourage them to apply to GAAT, and, if the litigant is found to have impaired capacity, to ensure that they are provided with adequate legal support to accommodate that impairment.

The SRCLS is mindful of the resourcing, accountability for funding and liability issues which face the Public Trustee in these types of matters. Nevertheless, the Public Trustee remains the only body capable of assisting indigent self-represented litigants to progress their litigation if they lack legal capacity.

In the recent case of Energex Limited v Sablatura [2009] QSC 356, Atkinson J stated at page 6:

> It is, of course, a matter of some concern to the Court that, where the defendant is or becomes under a legal disability, an applicant or plaintiff may not be able to vindicate its rights if there is no-one who is able to act as litigation guardian, apart from the Public Trustee; the Court is of the view that the Public Trustee is the appropriate person to be appointed; the Public Trustee nevertheless has the statutory power to refuse appointment; and exercises that power to refuse appointment.

And at page 7:

> This is a topic which is in need of law reform to clarify when the Public Trustee must act as litigation guardian particularly where there is no-one else willing and able to act. Such law reform should consider if conditions may be attached to the Public Trustee's appointment particularly as to costs. The need for such law reform has been recognised, albeit in a different statutory context, in Western Australia by Pullin J in *Farrell v Allregal Enterprises Pty Ltd* [2009] WASC 65.

In this submission, the SRCLS has set out an argument in favour of a new test for capacity which provides for degrees of capacity by acknowledging that a litigant might have capacity for some tasks required by civil litigation, but not others. The SRCLS submits that if such a test were introduced, the Public Trustee would have the opportunity to assist litigants with particular tasks without having to incur the costs of conducting the entire claim or having to bear the adverse costs risks. However, in some cases, full representation may be needed.

The SRCLS sees the potential for a mutually beneficial partnership between organisations such as the SRCLS and the Public Trustee to ensure that self-represented litigants are provided adequate support to identify and address issues of impaired capacity when they arise, and to distribute the responsibility and financial burden of providing meaningful assistance to those litigants. Nonetheless, we believe that the Public Trustee should be better funded to assist in these types of cases.

Recommendation 4: Establish a system whereby the Public Trustee of Queensland is funded to assist low income litigants with impaired capacity as litigation guardian on a discrete task or full-representation basis.

Recommendation 5: Amend section 27(3) of the *Public Trustee Act 1978* to ensure that the Public Trustee does not unreasonably refuse to consent to act as litigation guardian where a self-represented indigent litigant's proceedings will stall without the Public Trustee's intervention.

Recommendation 6: Amend the law to protect a litigation guardian that acts in good faith from an adverse costs order.

Who should raise the issue of capacity?

The issue of capacity with respect to self-represented litigants is compounded by the absence of a legal practitioner, acting with the litigant's best interests in mind, to consider the litigant's conduct and take steps to address the issue if the litigant lacks capacity. In the absence of a legal practitioner to represent the litigant, it is not clear who (whether it be their opponent or the court) bears the responsibility of raising the issue.

It is apparent that the courts sometimes appear to be uncomfortable in initiating an inquiry into a self-represented litigant's capacity. There are occasions where the court has referred a matter to GAAT for a determination regarding a litigant's capacity.[34] There are other instances where the court has *not* referred the matter to GAAT, but has made overtures to the litigant's opposing counsel that perhaps such an application should be made.[35] The court can also encourage the Public Trustee to step in.[36] It is understandable that the courts, seeking to remain impartial, might be reluctant to initiate an investigation into a litigant's capacity or make their own judgments about capacity where no rule 93 application has been made.

It is the experience of the SRCLS that legal representatives who are opposing a self-represented litigant are unlikely to raise a capacity issue with the court regarding their self-represented opponent. This is not surprising, as the practitioner may have insufficient knowledge of or dealings with their opponent to properly ascertain whether capacity is in fact an issue. Further, the decision of *Fowkes v Lyons* demonstrates that raising the issue of capacity may have the effect of condemning their own client to an indefinite stay of the proceedings, with no certainty as to when (or if) there will ever be a final outcome.

The Public Trustee has, on more than one occasion, made submissions to GAAT that a party to civil litigation does *not* have standing to seek a determination about their opponent's capacity from GAAT.[37] That argument does not necessarily apply if capacity is raised by way of an application to the court pursuant to rule 93 of the UCPR.[38] Nevertheless, there is a question which ought to be considered in circumstances where there is sufficient material for the parties (sometimes including the court) to be on notice that a self-represented litigant in the proceedings may have impaired capacity.

As discussed above, in most of the circumstances where the SRCLS has become concerned about whether a client has the requisite capacity, the client has been suffering from a diagnosed medical condition. That same medical condition often forms part of the factual matrix which has given rise to the litigation at hand and there is an abundance of medical evidence which has been disclosed to the (usually represented) opponent and made available to the court.[39]

In the current climate, where raising capacity as an issue for an opposing self-represented litigant may lead to the type of outcome which occurred in *Fowkes v Lyons*, it would be unreasonable to impose an obligation on practitioners to apply for an assessment of a self-represented opponent's capacity.

[34] For example, *Re CAC* [2008] QGAAT 45 and *Re MAE* [2008] QGAAT 34.
[35] For example, see *Re MAD* [2007] QGAAT 46.
[36] For example, see Energex Limited v Sablatura [2009] QSC 356
[37] For example, see *Re MAD* [2007] QGAAT 46 and *Re EEP* [2005] QGAAT 45.
[38] In 'The Costs of Uncontested Capacity' below, a conflict emerges between the courts and GAAT over which forum has the obligation to address capacity for the purpose of litigation that is before the courts.
[39] The SRCLS undertook case studies of 8 recent matters where self-represented litigants, who appeared to lack capacity, sought assistance from the SRCLS. In 6 of the 8 cases (75%), the litigant's medical condition formed part of the factual matrix which gave rise to the litigation. In a seventh case, the litigant (with dementia) had previously acted via a litigation guardian, but had a falling out with the guardian and so had returned to being self-represented.

However, the SRCLS submits that if support services were available for self-represented litigants with impaired capacity, then it may be reasonable to impose such an obligation on the courts.

The SRCLS submits that it is the role of the judge in a proceeding to ensure fairness between the parties and ensure that the parties have access to justice. If there is reasonable suspicion that a party lacks capacity, it is incumbent on the judge to address the issue wether it is raised by a party or on their own volition. It is our experience that in many circumstances, there may be a considerable quantity of information available to a judge, in addition to their own observations of a litigant, which might reasonably raise a concern about capacity.

If our earlier recommendation is accepted, then it follows that it ought to be the judge's role to refer the matter to GAAT for an assessment and determination so that the Public Trustee can be appointed as litigation guardian in appropriate circumstances. Although it appears that the courts *have* made such referrals in the past, it is by no means the standard practice. The SRCLS considers that access to justice for self-represented litigants might be substantially improved by clarification of the court's role and responsibilities in this regard.

Recommendation 7: The court be responsible for addressing the issue of capacity where there is reasonable suspicion that self-represented litigant appears to lack capacity, by referring the matter to GAAT for a determination and appointment of a litigation guardian if appropriate and be given specific power under the *Guardianship and Administration Act 2000* to do so.

Appendix A

	Court File No.	Parties	Claim	History of Proceedings
1.	6018/04	2 defendants No entry of appearance by either of the defendants	The court file is made up of a single document, the claim and statement of claim. It appears that the claim is for $400,000 in damages for making false or negligent statements about Maguire.	It appears that the claim may never have been served. No defence was filed and no hearings were ever listed.
2.	10699/04	2 defendants with single legal representative	Maguire sought $400,000 damages for medical negligence against 2 practitioners, in an identical claim to 6018/04.	Judgment in this matter was delivered after 3 years of litigation, which included 5 unsuccessful applications for default judgment, an unsuccessful application for summary judgment and a two day trial. In a judgment, which was delivered at a further sitting, it was noted that the claim against one of the defendants had been abandoned on the first day of trial. Maguire's claim was dismissed with costs.[40]
3.	2570/05	1 defendant with representation	Maguire sought $350,000 in damages for medical negligence. His statement of claim was amended 7 times.	This matter was the subject of 2 unsuccessful applications by the defendant to strike out the statement of claim and 3 directions hearings. The trial was heard over 3 days and judgment was delivered on a fourth day.
4.	9323/06	1 defendant No entry of appearance	Maguire sought $250,000 in damages for alleged professional negligence.	No defence was filed and no hearings were set down.
5.	2476/07	1 defendant No entry of appearance	Maguire sought to recover veterinary records relating to the treatment of certain greyhounds.	The matter was set down a directions hearing which was adjourned. The matter was dismissed during a second hearing a month later.
6.	3973/07	1 defendant with representation	Maguire sought $400,000 damages for defamation against a solicitor who had made an application to GAAT, in relation to other proceedings, for a decision regarding Maguire's capacity.	The matter has been the subject of two caseflow hearings.
7.	4266/07	Unknown	The respondent of this appeal appears to the	It is not clear why these documents were filed in the court.

[40] From the transcript of proceedings, the trial judge is quoted as saying, "*I have no idea what* [the plaintiff's] *claim was about.*"

	Court File No.	Parties	Claim	History of Proceedings
			Registrar of the Court of Appeal. The document appears to relate to Maguire's default of his mortgage repayments.	No hearings were required.
8.	4425/07	1 defendant No entry of appearance	An appeal of the decision of 2476/07.	It appears the defendant may not have been served with the appeal documents, as no appearance was entered. The matter was heard before a full court of the Court of Appeal and was dismissed.[41]
9.	6056/07	1 defendant with representation	An appeal of the decision of 2570/05. Maguire had legal representation for part of the appeal.	The appeal was dismissed and Maguire was ordered to pay costs on the standard basis. The respondent was legally represented and brought an application for security for costs, which was dismissed with costs in favour of Maguire.
10.	8110/07	1 defendant with representation	Maguire sought $400,000 in damages against an organisation alleging the defendant had mistreated Maguire's greyhounds.	This matter was the subject of an unsuccessful strike-out application by the defendant. Maguire later sought summary judgment which was also unsuccessful.
11.	4745/08	1 defendant with representation	This appears to have been intended as an appeal of the decision of 10699/04.	It appears from the court file that although the respondent had legal representation recorded, no formal appearance was required of them. Maguire's appeal was dismissed with costs.

[41] In its judgment, the Court of Appeal stated, "*the only thing resembling an actual ground of appeal is a handwritten addendum to the effect that the learned judge at first instance dismissed the application because he deemed it was not linked with a claim, whereas it was an originating applicant.*"