# Five ways to make civil justice cheaper

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In jurisdictions that have adopted the English system of law, there has been a huge increase of litigants in person. The main reason is obvious: most people can't afford to pay the costs incurred with conventional common law litigation.

I was recently reading about litigants in Family Court proceedings in the fourth-largest trial court system in the USA. There, as many as 70% of all litigants in Family Court proceedings are said to act for themselves. And in Canada, figures from 2012 reveal that 40% to 57% of parties involved in family law cases were self-represented and in the five years following, it was estimated the proportion had increased to between 50% and 80% of all parties to civil/family actions.

I have heard anecdotally of similar statistics in Australia and New Zealand. I think it can safely be concluded that the legal system we and other countries have inherited from England is largely unworkable for a majority of people.

I have wondered whether part of the problem lies with the common law system we have inherited from England. There are two main legal systems in the world today. According to *The Economist*, the common law system is said to underpin the legal systems of 80 or so countries and the Code Napoléon from France and the civil law system in Germany are said to underpin the legal systems of about 150 countries.

Although I have no detailed knowledge of civil law systems, I have not read topical reports about the mass of citizens in the civil law countries being disenfranchised in family law litigation. Some comparable jurisprudence about the effectiveness of the civil law regime for these disputes would obviously be helpful.

In the meantime, what should be done in our common law system?

The problem could be solved by taxpayers paying large sums in legal aid, but this would not be considered affordable. Another solution would be mandatory mediations. This is being adopted in some places, but it is disadvantageous to many litigants in that it doesn't enable them to be advised on the strength or weakness of their case and on the best ways of achieving their desired objectives.

A third solution would be for Parliament to enact different forms of legislation that contains bright-lines which remove the need for lengthy evidentiary investigations. In this way, when oral disputes about contracts for the sale and purchase of land clogged the courts in England, Parliament enacted a bright-line test that no such dispute would be entertained unless a contract for the sale of land was in writing. The rule would create unfairness for many people but it would also dispose of a large number of disputes without the need for litigation.

A fourth solution would be for the courts to be more aggressive in their adoption of procedures where judges have far more control over all aspects of civil litigation. We have been moving steadily down this path in recent years and it seems likely we will continue to do so.

A fifth action would require the courts to produce more information for litigants about the court system, including the support services that exist for litigants in person and the provision of information that explains the courts' procedures.

In a major report on this topic in Australia in 2020, *Litigants in person in the Family Court of Australia* by Professor Dewar and two others, it was recommended that the courts should develop policies which set out clearly the courts' approach to litigants in person, together with details of practices and procedures for assisting them. The authors said any such policy must deal explicitly with the balance to be struck between the provision of information on the one hand and the provision of legal assistance on the other.

The report said the state should take a proactive role in coordinating the provision of services by various agencies. Such steps should "be regarded as necessary to ensure that all litigants, irrespective of means, would be given the meaningful opportunity to be heard" and that "principles of equality, fairness and legitimacy should prevail".

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