

Litigants in person in private family law cases (Ministry of Justice, 2014):¹

Summary by the research team

1. Context (p1-2 of the Report)

The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 removed most private family cases from the scope of legal aid after April 2013. It was anticipated that the volume and proportion of litigants in person (hereafter LIPs) would increase as a result. The Ministry of Justice commissioned research to explore both the characteristics and support needs of LIPs in private family law cases and their impact on the courts prior to the implementation of legal aid reforms. It was designed to inform policy and practice responses to LIPs following the legal aid changes.

2. Research design (p3-10 and p136-164 of the Report)

The study was designed to develop understanding of the range of litigants in person in private family law cases, their behavioural drivers and support needs, and their impact on the court system. The research was designed as a primarily qualitative study focusing on understanding the range of experiences and perspectives, rather than a quantitative study seeking to measure variables.

The research included three linked studies:

- *Intensive Cases Study* (ICS). The largest element of the research involved detailed analysis of a sample of 151 cases heard in five courts over a three to four week data collection time frame in each court between January and March 2013. The approach was multi-perspectival, involving observation of the hearing in each case, interviews with the parties and professionals associated with the observed case (subject to consent and availability) and scrutiny of the court file.

¹ Liz Trinder, Rosemary Hunter, Emma Hitchings, Joanna Miles, Richard Moorhead, Leanne Smith, Mark Sefton, Victoria Hinchly, Kay Bader and Julia Pearce, *Litigants in person in private family law*, (Ministry of Justice Analytical Series), November 2014. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf

- *Local Contextual Study* (LCS). This involved a series of focus groups in each of the five courts with local stakeholders (judges, lawyers, Cafcass and court staff), interviews and observations with local LIP support organisations and observations of public areas such as court counters and waiting rooms.
- *Secondary Analysis Study* (SAS). This involved secondary analysis relating to LIPs of two large national datasets from two current studies led by members of the research team.

3. Main findings

3.1 Characteristics of LIPs (p11-34 of the Report)

The major reason for self-representation was an inability to afford a lawyer, with only around one quarter of LIPs indicating that their appearance in person was wholly or partially a matter of choice. Over half of the LIPs observed had had legal representation at some stage during the current proceeding and/or in previous family law proceedings.

Only a small minority of LIPs were able to represent themselves competently in all aspects of their family law proceedings. Even those with high levels of education or professional experience struggled with aspects of the legal process. The great majority of LIPs were procedurally (and, where relevant, legally) challenged in some way, with some having no real capacity to advocate for their own or their children's interests. A wide range of personal vulnerabilities were identified with around half of those observed experiencing one or more vulnerabilities which often added to their difficulties in self-representation and in some cases defeated their attempts to do so. A significant number were also trying to handle quite complex cases.

LIPs may create problems for the courts by reason of non-appearances, refusal to engage with proceedings, or, less often, violent and aggressive behaviour. While non-appearances may be quite common, the reasons for apparent resistance to court proceedings, as for violence and aggression, may often be related to litigants' vulnerabilities. Unmeritorious and serial applications did not appear to be brought any more often by the LIPs in the sample than by represented parties, although having to respond to these applications was another vulnerability faced by some women LIPs.

3.2 Pre-hearing preparations (p35-51 of the Report)

Much of the work in a family case is conducted before and between hearings rather than in the courtroom itself. The list of tasks to be accomplished in the pre-court and between-hearing phases is quite extensive and technically and practically demanding. The list includes determining legal merits and translating a dispute into legal form; consideration of mediation; making an application using the correct form and filing and serving correctly; possible negotiation with the other side in the waiting room and subsequent handling of the case (e.g. handling disclosure, preparing and filing statements).

The successful completion of these tasks was important for the smooth running of the case and for timely and effective hearings. The extent to which LIPs were able to complete those tasks was highly variable. Understandably, many LIPs struggled with a range of technical tasks, including understanding which application form to use, how to complete it and how to file and serve correctly. Some LIPs faced practical problems such as an inability to access or print out online forms. Many LIPs also did not grasp foundational legal principles or concepts such as the importance of disclosure or the expectation of negotiation or settlement.

A significant part of the problem is that the family justice system and the pre-court processes, procedures and tasks are predicated on a full representation model with two trained and experienced lawyers undertaking all these preparatory tasks. At least at the time of the fieldwork, there had been limited adaptation of processes to support LIPs and instead LIPs were largely required to comply with existing processes. There had been comparatively little adaptation of documentation (forms, guidance, letters from court etc) to meet the needs of LIPs. There was limited face-to face contact, advice and support at all stages of the pre-court process and on arrival in the court building before the hearing. The support available from court service staff varied locally but was constrained by concerns about straying into giving legal advice. The reduction in court counter hours and switch to an appointment system in some courts has reduced further the opportunities for face-to-face support.

The challenging and complex nature of the pre-hearing tasks, coupled with limited support and advice, was a source of anxiety and stress for many LIPs. It also had consequences for court service staff workloads as they had to deal with correspondence from LIPs or pick up the errors or omissions in LIP paperwork. Some of the problems also had a significant impact on the conduct of the hearing itself.

3.3 In the courtroom (p52-78 of the Report)

The court system is based on an adversarial, full representation model with two lawyers presenting their client's cases to an impartial arbiter – the judge – who will make a decision. The role of the lawyers is central.

Hearings where both parties were represented were generally patterned, predictable and efficient. All participants understood their roles without any need for explanation or behaviour management. LIP hearings were far less standardised. There was considerable variation in who picked up the tasks that a lawyer would normally perform in their absence – whether it was a LIP, the judge, the lawyer for the represented party or nobody. There was also variation in how effectively those tasks were done.

The data suggested that semi-represented cases had longer final hearings and required more hearings than fully represented and non-represented cases.² Cases with a LIP were more likely to require adjudication or be withdrawn or dismissed. Secondary analysis of a dataset of financial remedy contested hearings also suggested that LIP cases were less likely to settle and less likely to settle early than fully represented cases.

There was variation in how well LIP hearings appear to work or not work in court. Four types appeared relatively fair and efficient/effective: *umbrella semi* – the represented party's lawyer works on behalf of both parties; *third party (quasi) lawyer* – the children's lawyer acts as broker for both LIPs; *fully inquisitorial judge* – the judge takes on the role of lawyer(s) and judge *holding-their-own LIPs* – a competent LIP manages a simple hearing with support from the judge.

Four types of hearing appeared inefficient/ineffective or unfair: *“hot potato” hearings* - chaotic hearings with disruptive LIPs, adjourned or listed for contested hearings; *over-confident LIPs* - rambling hearings unable to restrict LIPs to legally relevant matters; *out of their depth LIPs* – LIPs unable to understand/accomplish tasks resulting in longer or extra hearings and *unprotected LIPs* - LIPs unable to explore concerns/present case.

A combination of factors appears to influence how well courts and LIPs cope. These include matter and hearing type (directions vs. substantive hearing), the approach of the judge and any legal representative, the availability of any facilitative third party and the

² 'Semi-represented' cases are those with one LIP and one lawyer. In 'non-represented' cases neither party is legally represented whilst both parties have lawyers in 'fully represented' cases.

capacity of the LIP(s). The availability of additional professional (legal) support for the LIP was often key to success. Three of the four types of 'working' hearings involved either a supportive lawyer or an activist/inquisitorial judge.

Causes of delay included LIPs' lack of understanding and experience meaning sometimes critical tasks were missed out, were done inadequately or were completed by the LIP only with considerable coaching and support from others, particularly judges.

Ensuring equality of arms between parties was a real challenge, notably when a LIP was unaware of their legal entitlements and/or unable to do justice to their case. Judges varied considerably in the extent to which they helped LIPs, in itself a source of potential unfairness. Judicial attempts to support LIPs could be seen as unfair to represented parties in semi-representation cases.

Two key 'legal' tasks - the preparation of bundles and cross-examination - were beyond the capacity of most LIPs unless they had considerable help.

3.4 The support needs of litigants in person (p79-100 of the Report)

The LIP experience was mixed, sometimes better than expected but often stressful and confusing. LIPs reported fear and anxiety about the process, feeling marginalised and bewilderment and confusion, regardless of educational level.

Factors that made the experience more positive were judges and sometimes opposing solicitors who took time to explain things and being able to draw upon previous experience of being at court. A degree of self-assurance or confidence was helpful, although over-confidence and an over-estimation of one's understanding of the process could cause difficulties.

The main support needs identified by LIPs were for information about process and procedure, emotional support, practical support and tailored legal advice including broad questions about their entitlements and specific questions about tactics and tasks.

LIPs varied enormously in terms both of willingness and ability to seek support and of the effectiveness with which support was sought. A minority of LIPs were proactive in searching for information without any prompting by the courts. The proactive LIPs could be divided into the *capable/organised* and those with a *scattergun/shot in the dark approach*, although even the *capable/organised* could find it difficult to find the information they

needed. Reactive LIPs responded to instructions or suggestions from family justice professionals, especially where those instructions were clear and precise. Passive LIPs relied on others to provide help, did not engage with the court process or had chaotic lifestyles.

Support for LIPs at the time of the study was disparate, variable and limited. The internet has potential for informing LIPs, as well as some very significant drawbacks in relation to relevance, accuracy as well as accessibility for all. Few of the LIPs interviewed reported using the HMCTS or MoJ websites and those who did reported they did not meet their needs. Further, not all LIPs have access to online resources and, even for those who do, websites cannot adequately substitute for the tailored legal advice that many LIPs require.

LIPs reported frustration that organisations like CABx, the court service and Cafcass were not able to offer advice and advised them to seek legal advice that could not be afforded. There is a dearth of free or low-cost legal advice in the community.

Family and friends could be very helpful acting as informal supporters, but the development of paid 'professional' McKenzie Friends was a source of real concern to judges, lawyers and Cafcass officers.

As previous studies have found, the courts did little signposting to sources of support. Professional training in how to support LIPs is needed.

The development of support services for LIPs and training for professionals should be informed by, and responsive to, the different needs and help-seeking approaches of LIPs.

4. Policy Implications and Recommendations (p101-125 of the Report)

4.1 LIPS after 1st April 2013: eligibility for legal aid and the 'new' LIPs

Chapter 6 of the Report considers the policy and practice implications of the findings reported above. The chapter begins with consideration of how far the findings are likely to apply after 1 April 2013. The available evidence suggested that the majority of represented parties in the sample who were in receipt of legal aid would no longer be eligible for legal aid after the LASPO reforms. In comparison with the observed pre-LASPO LIPs, the researchers would expect that LIPs post-LASPO would be less likely to be partially

represented and more likely to present with vulnerabilities which affect their capacity to represent themselves effectively and create challenges for the courts in terms of safety at court, testing, disclosure and safeguarding children

4.2 Recommendations

The report identified that LIPs have considerable needs for support across several dimensions. It also identified what the researchers consider to be best practices for meeting those needs, based on the team's review of the literature and the observations and interviews with LIPs and family justice system professionals. It has not been part of the research team's brief, however, to analyse the cost-benefit of these proposals or to produce a fully worked-up blueprint for change. This section, therefore, summarises the broad recommendations arising from the team's analysis of the literature and the research data. Further detailed policy and operational consideration will of course be required to determine how these recommendations could be implemented.

Information needs

- That all relevant family justice communications, including forms, leaflets, practice directions, templates and pro forma, are re-evaluated from the perspective of LIPs and (if necessary) redesigned with their various needs in mind.
- That a single authoritative 'official' family court website is established with all the resources that a LIP needs in one place.
- That the court's communication with parties prior to the first hearing is used more effectively to convey important information to LIPs.
- That judges are encouraged to give LIPs clear verbal instructions and guidance on process and procedure.
- That the court service provides increased opportunity for face-to-face inquiries with relevant court staff and that guidelines and training for court staff are devised to facilitate information-giving whilst avoiding giving advice.

Emotional/moral support

- That there is a presumption that a single family member, friend or volunteer may accompany a LIP in court to offer emotional/moral support without the need to submit a formal CV.
- That consideration is given to the development of a code of conduct, practice guidance or regulatory framework for paid/'professional' McKenzie Friends.

Practical support and legal knowledge

- That initial legal advice to facilitate dispute resolution and, where necessary, for initial preparation for court proceedings is made universally available.
- That providing support for LIPs in a consistent way in both semi-represented and non-represented cases is understood as a key element of the judicial role; and that judicial officers receive appropriate guidance and training to do so.
- That measures are introduced to ensure greater availability of and access to exceptional case funding in private family law matters.
- That a mechanism is introduced to enable judicial recommendation for the provision of publicly funded representation in the interests of justice.
- That the MoJ consider which other forms of legal and procedural assistance outlined in this Chapter for LIPs engaged in court proceedings can feasibly be supported or implemented.

Other issues

- Follow up independent research is needed to examine the impact of the legal aid reforms on the types and experiences of LIPs, their impact on the court system and the effectiveness of innovations and services to support LIPs.



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