

# Litigants in person in Northern Ireland: barriers to legal participation

Gráinne McKeever, Lucy Royal-Dawson,  
Eleanor Kirk and John McCord



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# Foreword

## Lord Justice Stephens

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This is a welcome first major study of personal litigants, their circumstances and experiences in the courts in Northern Ireland. Outside of the small claims court, there are around five thousand individuals going through the courts each year without legal representation. The research focuses on private family law and bankruptcy where a significant number of personal litigants are to be found. The research shines an important light on an issue that has become increasingly significant to the daily work of the courts.

Personal litigants come from a variety of different backgrounds and seek to navigate the legal system and court procedures as best they can. Going to court is stressful for individuals, particularly so where a person does not have a lawyer to assist with the legal requirements and procedures.

The research evidences many examples of good practice among court staff, lawyers, judges and others yet the practice is not uniform. The court system remains most comfortable when both parties are legally represented. It is clear that many personal litigants are unaware of what is expected of them and obtaining the necessary information can be difficult. The research highlights the communication gap between personal litigants and lawyers and other court actors engendering a level of mistrust which operates to the detriment of everyone.

The research is valuably underpinned by a rights-based approach including the right to participate effectively to ensure access to justice and the guarantee of a right to a fair trial provided under Article 6 of the European Convention of Human Rights. Northern Ireland has not replicated the reduced scope of legal aid introduced in England and Wales. Nonetheless, many of the research participants wanted legal support but simply could not afford to pay for services or failed to meet the tests for legal aid, while others chose to represent themselves. This poses a fundamental challenge to all of us involved in the legal system when seeking to ensure personal litigants receive and feel they have been treated fairly. It is particularly interesting that research elsewhere suggests that a person's sense of a fair and just legal procedure when moving through the courts is as important as his or her view of a just outcome.

The findings and recommendations support the relevant parts of Lord Justice Gillen's recent civil and family justice reviews which acknowledged the importance of this forthcoming research. The findings and recommendations of this research provide a pro-active, detailed and integrated road map, which require deep and thoughtful consideration by all those involved in court proceedings, administration and policy development. They should be examined alongside the recommendations put forward in the civil and family justice reviews.

The research benefitted from an advisory group which I chaired and included both parts of the legal profession, judges, court service officials, legal academics, advice sector human rights, NGOs and the Northern Ireland Human Rights Commission. I want to extend my personal thanks to all the members of the advisory group for their support, wisdom and insight. Finally, I would like to thank the School of Law at Ulster University, their researchers and the Human Rights Commission for undertaking this initiative and the Nuffield Foundation for their financial support.



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Our thanks to the Office of the Lord Chief Justice and the Northern Ireland Courts and Tribunals Service, whose support was fundamental to the design of the study and to the success in recruiting research participants. NICTS central and regional management teams patiently explained the processes and systems, adding to their own workloads so we could target our research more effectively. NICTS counter staff, court officers, and tipstaff at the Royal Courts of Justice, Laganside, Newtownards, Newry, Lisburn, Derry/Londonderry, Coleraine and Dungannon all welcomed us when we observed in court and facilitated our visits, and we are extremely grateful to them. We would particularly like to thank the senior managers of NICTS whose generosity and good humour guided us through the data collection, and whose support we greatly valued. We are also very grateful to the G4S and security staff in the different court buildings who helped us identify LIPs, kept us right on how cases were progressing on the day and kept us going with sweets.

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Dr Nigel Balmer, Professor of Law and Social Statistics, School of Law, University College London  
Dr Catrina Denvir, Director, Legal Innovation Centre, Ulster University  
Professor Brice Dickson, School of Law, Queen's University Belfast  
Eileen Ewing, Chair, Family Law Group, Law Society Northern Ireland  
David Hawkins, Director, Public Interest Litigation Support Project  
Gerald McAlinden QC, Chair, Bar Council Northern Ireland  
Laurene McAlpine, Deputy Director, Civil Justice Policy Division, Department of Justice  
Cathal McCorry J, High Court judge  
David McFarland J, Family Court Judge  
Gráinne Murphy, Chair, Family Bar Association  
Ursula O'Hare, Director, Law Centre NI  
Colin Reid, Policy and Public Affairs Officer NSPCC and Chair, Northern Ireland Association of Social Workers  
Cathy Scollan, RCJ Business Manager, Northern Ireland Courts and Tribunals Service  
Ursula Toner, Legal Advice Services Manager, Housing Rights

Membership of the group does not constitute an endorsement of the research and its recommendations, which are the responsibility of the authors alone.

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and Sara Donnelly for her skill in establishing and running the procedural advice clinic. A note of thanks also to Professor Liz Trinder, University of Exeter, for her encouragement and feedback on the research and for sharing valuable lessons that assisted greatly with our data collection.

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The report, and any errors, remain the responsibility of the authors.

## About the authors

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Professor Gráinne McKeever is a Professor of Law and Social Justice at Ulster University. Gráinne’s research and teaching interests are in social justice, focused in particular on social security law, access to justice and administrative justice, and the development of a theoretical framework of legal participation. Gráinne has published extensively in these areas and been awarded over £370,000 in grant income from the British Academy, the Nuffield Foundation and other funders, predominantly for empirical research on access to justice. She is the Assistant Editor for the *Journal of Social Security Law*, a member of the Social Security Advisory Committee, and a member of the UK Administrative Justice Institute. Gráinne is also an Executive Director and Vice-Chair of Law Centre (NI) and Co-Director of the Ulster University Law Clinic.

Dr Lucy Royal-Dawson worked as a research associate on the Litigants in Person in Northern Ireland research study. Her research interests lie in applying the human rights framework to social contexts, which formed the basis of her PhD completed in 2015 on the right to higher education in a situation of conflict, focusing on Palestine. Prior to that, she worked for 25 years in the education sector in developing countries and the educational assessment sector in the UK.

Dr John McCord is a Lecturer in Law and Course Director for the LLM Access to Justice at Ulster University. He obtained his PhD in Law from Ulster University in 2010 which examined intractable contact disputes in family proceedings. John’s research and teaching interests are in Family law, Children’s Rights, Access to Justice, Legal Research Methods, Property law, Housing & Real Estate, Urban security, Policing and Conflict Studies. John has undertaken a wide range of commissioned research and consultancy in these areas and has published widely on property and housing, children’s rights and family law. He has also been successful in a number of European Commission EC FP7 and H2020 Secure Societies projects and reviews for a number of international journals.

Dr Eleanor Kirk worked as a research associate on the Litigants in Person in Northern Ireland research study. Eleanor is a socio-legal researcher interested in legal consciousness, access to justice and dispute resolution. Prior to joining the project, Eleanor’s research was focused upon employment tribunals. In her PhD study, Eleanor examined grievance formulation processes and expressions in comparative workplace settings, exploring the extent of the juridification of employment relations. Eleanor has published her work in *Economic and Industrial Democracy*, *Capital and Class*, and *Work, Employment and Society*.

# Abbreviations

## Codes used for study participants:

LIPs' business area of their proceedings

AR	Ancillary Relief
Bank	Debtor's Petitions
Div	Undefended Divorce
CB	Civil Bills
CP	Creditor's Petitions
Dom	Family Homes and Domestic Violence
FP	Family Proceedings, Family Care Centre and Domestic Proceedings
Oth	Other business areas (Companies, Queen's Bench, Chancery)

Court actors

CS	Court Service Staff
Ju	Judges
LR	Legal Representatives
MF	McKenzie Friends
Off	Court Children's Officers

## Interview codes:

I	Interviewer
P	Participant
M	Man
F	Woman

## Other abbreviations:

CAB	Citizen's Advice Bureau
CCO	Court Children's Officer
CLIP	Litigant in person in the study who attended the procedural advice clinic
DHSSPS	Department of Health, Social Services and Public Safety
DOJ	Department of Justice of Northern Ireland
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
FNF	Families Need Fathers
FH&DV	Family Homes and Domestic Violence
GHQ-12	General Health Questionnaire 12
ICOS	Integrated Court Operating System
LIP	Litigant in person

NGO	Non-Governmental Organisation
NICTS	Northern Ireland Courts and Tribunals Service
NIHRC	Northern Ireland Human Rights Commission
Obs	Observation record
OLCJ	Office of the Lord Chief Justice
PfG	Programme for Government
PSNI	Police Service of Northern Ireland
PSU	Personal Support Unit
RCJ	Royal Courts of Justice



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# Overview of the study and key findings

## Overview

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This study, funded by the Nuffield Foundation, was conducted to address deficits in research on the experiences of litigants in person in the civil and family justice system in Northern Ireland. It builds on empirical studies and justice policy reviews on litigants in person in civil and family law in other jurisdictions.<sup>1</sup>

The research focuses on unrepresented litigants involved in civil proceedings in Divorce, Ancillary Relief,<sup>2</sup> Family Homes and Domestic Violence, Family Proceedings, Bankruptcy and Civil Bills. The aims of the study are four-fold:

- (a) to understand how litigants in person participate in their case proceedings;
- (b) to evaluate the impact of litigants in person on the Northern Ireland court system;
- (c) to assess the human rights implications of the absence of legal representation;
- (d) to evaluate the impact of providing advice to litigants in person both on their participation and on the court.

Using qualitative and quantitative data gathered from litigants in person, the study presents an analysis of the extent to which they participate in their legal proceedings, the obstacles to their legal participation and the measures that could be adopted to overcome the obstacles. As key to this analysis, the views of other individuals within the court system are also explored. Qualitative data were gathered from members of the judiciary, the Northern Ireland Courts and Tribunals Service (NICTS), solicitors, barristers, McKenzie Friends and Children's Court Officers to develop a holistic perspective of how litigants in person not only experience the court system but have an impact upon it.

Informing this analysis is the right of access to justice, most clearly understood in the human rights frame of reference as the right to a fair trial. This right specifically encompasses a need for litigants to participate effectively in the litigation in which they are involved, either as respondent or applicant. To support the analysis of our empirical data, an analysis of case law on access to justice for litigants in person as a human right was completed by the Northern Ireland Human Rights Commission (attached to the main report as Appendix 1). An experimental element of the research was included to understand better the nature of the support needs of litigants in person and to trial a particular model of support. A procedural advice clinic, developed and staffed by the Northern Ireland Human Rights Commission, was offered to a cohort of personal litigants within the study sample who were involved in private family law and matrimonial proceedings. The objective of providing this assistance was to assess the impact of the procedural advice on the personal litigant's ability to participate in subsequent court hearings, and to understand the value of this non-legal support.

Overall, the report provides an empirical interpretation of the robust dataset and contributes to the theory of access to justice, which is defined through the concept of legal participation as encompassing effective participation inherent within the right to a fair trial. Here, in the summary of the report, there follows an overview of the method and data collected, the main findings and the recommendations that flow from them.

## Method and data collected

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From September 2016 to September 2017, 179 litigants in person in the targeted proceedings were recruited to the study on the day of their court appearance. With no prior notification of whether an individual listed for

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<sup>1</sup> Northern Ireland, see Department of Justice, 2011 and 2015; Office of the Lord Chief Justice, 2017a&b. England and Wales, see Woolf, 1995; Civil Justice Council, 2011; Trinder *et al.*, 2014; Garton Grimwood, 2016; Lee and Tkacukova, 2017. Scotland, see Scottish Civil Justice Council, 2014. New Zealand, see Toy-Cronin, 2015. Australia, see Dewar, Smith and Banks, 2000; Hunter *et al.*, 2002. Canada, see Macfarlane, 2013. USA, see Knowlton *et al.*, 2016.

<sup>2</sup> Ancillary Relief proceedings concern the financial matters related to divorce proceedings, such as the family home, investments and pensions.

appearance in court on any given day would be represented or not, the method of sampling the litigants was to approach the litigants in person on the day of their proceedings: in other words, opportunistic. The litigants were observed in court and asked to be interviewed and to complete a questionnaire.

From January 2017, litigants in person in family and matrimonial proceedings were offered the services of a procedural advice clinic provided by a legally qualified case worker at the Northern Ireland Human Rights Commission. Additional data in the form of notes on their advice sessions, interviews and questionnaires were collected from the 25 individuals who attended. A further 59 court actors were interviewed: they were court staff, legal representatives, the judiciary and McKenzie Friends. Court actors and litigants in person in each of the targeted business areas were sampled until 'saturation' was reached, that is, until it became clear no previously unstated points of view or phenomena were being advanced by the participants. The use of qualitative methods does not require the sample to be representative of the population, but instead it is required to demonstrate the depth and breadth of experience of the target population in the chosen context.

## Main findings

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The overall finding is a reflection on the *status quo* of the court system, namely, that it was not designed with litigants in person (LIPs) in mind. There was an implicit understanding that the court norm is one in which all litigant parties are represented by professional legal representatives. As legitimate court users, many LIPs therefore felt out of place, like outsiders. This contradicts the purpose of the courts to serve all people in search of legal remedies and threatens the right to a fair trial. There have been some adaptations to the needs and presence of LIPs in the Northern Ireland court system and there is some good practice to build on, but it is not system-wide and it does not go far enough. We found the LIPs in the study faced several barriers to progressing their cases, which ultimately were barriers to effective participation. The main barriers were:

- (a) the expectation that LIPs are lawyer-like and will fit into the system;
- (b) difficulty in obtaining information, advice and resources;
- (c) the limits to their knowledge and understanding of legal issues, regardless of their efforts to prepare; and
- (d) negative or debilitating emotions and high levels of anxiety.

The lack of fit and other barriers to self-representation had an inevitable impact on the court system, with court actors reporting their frustration at the extra time and support needed in court and at the court counters, which were experienced as challenges to impartiality.

Many of the LIPs in the study had sought legal representation or expressed a desire for it, but were unable to secure it either because they did not meet the threshold criteria for publicly supported legal assistance or they could not afford it. Some LIPs had been represented before and were now representing themselves. The appetite for legal representation exists and, although our study does not test this, broader threshold criteria for publicly funded legal assistance may result in fewer people attempting to self-represent. However, this overlooks a fundamental principle of the court system that it is there to serve litigants regardless of their representation status. Clearly, there are many instances where the complexity of the proceedings or the capacity of the litigant make representation essential, and it does not mean that lawyers are not needed. Rather, it is a reminder that the court's duty is to serve litigants and not solely their representatives. The acceptance of the right of litigants to self-represent legitimises their place in the court system but does not dictate that they must be turned into lawyers to pursue their cases. Instead, a change in the orientation of the court service is required which places

the needs of all court users on a more equal footing. This attitudinal change compels subsequent changes to some administrative procedures, the development of LIP-oriented sources of support and information, specific judicial techniques and professional legal education.

The necessity of reorienting the system to accept LIPs as legitimate court users flows from the analysis of their experience through the human rights lens. The study examined the LIPs' experience against fair trial guarantees of LIPs as interpreted by the Northern Ireland Human Rights Commission from its analysis of case law from the European Court of Human Rights on Article 6, the right to fair trial (see Appendix 1). The innovative analysis of the experience of LIPs in the Northern Ireland civil and family justice system through the human rights lens pulls existing case law on LIPs' right to a fair trial into the light. The analysis indicated two core elements of the right were under threat: effective participation in which the right of access to a court implies that the LIP is able to participate effectively in the proceedings to a level where he or she is able to influence them so that the court can assure procedural and substantive justice; and equality of arms which is the fair balance between the parties in the opportunities given to them to present their case in a manner that does not disadvantage them with respect to the other side. These findings endorse the study's recommendations to implement measures that would help LIPs to participate more effectively in their proceedings to realise substantive and procedural justice.

There follows a summary of the findings under headings related to the chapters in the main report.

### LIPs in the NICTS system

1. The data provided by NICTS show that the number of LIP participants taking part in civil and family proceedings in Northern Ireland in the years from 2012 to 2016 decreased from 19,000 to 15,000, but they formed a steady 20% of the litigant population. LIPs in Small Claims proceedings make up the majority of people representing themselves, and when they are excluded from the figures, 5,000 people a year participated in other business areas – around 5.5% of all litigants. After Small Claims, the largest numbers of LIPs were seen in Divorce, Bankruptcy, Family Proceedings, Family Homes and Domestic Violence and Civil cases. Based on the LIPs observed in the study, it is safe to say they are diverse in their socio-demographic profile, in their approach to self-representation, personality type and capability to self-represent.
2. The court service and judiciary have adapted to some extent to the presence of non-legally trained participants in court proceedings, such as the provision of a printed guide for proceedings in the High Court, and inquisitorial-type judicial approaches in court. However, the adaptations attempt to fit the LIPs into the system which is designed for legal representatives, rather than fit the system to the litigants it is supposed to serve.
3. The presence of LIPs was a source of irritation or frustration for some court actors (mainly, legal representatives on the opposing side, but also some court staff and judges). The irritation arose both as a result of insufficient accommodation of their needs in the system and in response to a few difficult LIPs who presented particular behavioural and procedural challenges. The irritation influenced their perceptions of LIPs, and, in turn, the perceptions LIPs had of court actors. LIPs and legal representatives often had negative views of each other. Some legal representatives had experienced abusive encounters with LIPs. LIPs, court staff and the judiciary, tended to have more positive views of each other, although there were still problems of communication and trust. These perceptions could be an attitudinal barrier to LIPs' participation in court proceedings.
4. Some court actors categorised LIPs as either being self-represented from choice or having no choice. They regarded the latter group with more sympathy and deserving of more latitude while the former group

were regarded with suspicion. There was a suggestion that the former group should be treated differently. The differential treatment would contravene the principle of equal access to justice for all regardless of motivation to litigate.

5. 'Vexatious' or difficult LIPs were reported to present severe difficulties to courts and court staff. Even though they were understood to be rare, they were reported to take up a disproportionate amount of court and court staff time and were often a focus of our discussions with court actors. There was a suspicion that some LIPs present unmeritorious claims and so contribute to slowing down the system needlessly. Also, some court actors associated the behaviour of difficult LIPs with all LIPs. Our observations of LIPs were at odds with the emphasis placed on difficult LIPs, but it should be noted that we were not party to repeated phone calls and prolific emails to the courts and did not include business areas in which vexatious LIPs were reported to frequently appear. Furthermore, while we did observe a very small number of LIPs behaving inappropriately in court, we were not in a position to determine whether it constituted vexatious behaviour. What we saw were individuals who were continually frustrated within the process and desperately pursuing an issue of great importance to them. Also, the study was not designed to assess the merits of cases, so was not positioned to make the call on unmeritorious claims. Thus, the absence of data on vexatious or difficult LIPs in this report does not mean that LIPs do not cause problems. They can present great difficulties and then cast a long shadow over the majority of 'run of the mill' LIPs.
6. It is difficult to identify LIPs within the court system. Northern Ireland Courts and Tribunals Service (NICTS) collect data for their Management Information System, but it is only accessible by court staff. Only on the day of the court appearance does it become clear that a litigant is unrepresented. This had implications for contacting LIPs about their next appearance in court or court orders or other matters, and subsequent impact on the courts' readiness to hear LIPs' cases. Often the legal representative for the other party was relied upon to relay the information to the court and/or the LIP.

### Reasons for self-representing

7. There were many reasons why people self-represent, and the main one was unaffordability. Many of the LIPs had applied for and did not qualify for publicly funded financial assistance for legal representation, but could not afford the cost of representation. Many LIPs expressed a preference to be represented and dissatisfaction that they were not. Some LIPs made an analysis of the costs and benefits of representation and decided they could not justify the cost for the benefit or value they felt it offered. Others had had negative experiences with previous representatives and reported being kept at arm's length from their own proceedings, so declined to seek legal representation. Lawyers interpreted LIPs' dissatisfaction with the legal profession to be due to them not getting the outcome they wanted or not wanting to accept the advice from the legal representative.

### LIPs' preparedness for their cases

8. LIPs generally took steps to prepare their cases. Their expectations of having information and support available were not met. There is a dearth of information and advice on the practical, procedural and legal issues relating to their court proceedings and on how to self-represent. While some procedures were straightforward for some LIPs, many faced procedural barriers with completing and submitting the appropriate paperwork.
9. LIPs were often unclear about the law or procedure in their cases and some were even unaware of their lack of knowledge. They often reached the limits of knowledge only to find a new gap had emerged. Uncertainty



about their proceedings was a source of worry for some. Some LIPs were more disadvantaged than others, especially those in complex proceedings, and this was recognised by judges. LIPs may appear to cope in court but were not always able to follow proceedings. Negotiating with or even contacting the representative of the opposing party was often problematic for LIPs or not done at all. Some LIPs were observed to flounder in complex proceedings and may have benefited from representation. Particular difficulties arose if a LIP was absent from court proceedings. There is no systematic means to contact them; they are particularly disadvantaged if evidence is produced and they are therefore unable to contest it. Cross-examinations were a particular source of difficulty: LIPs found them difficult to conduct; cross-examinations between parties with history of domestic abuse were fraught.

10. Many LIPs perceived themselves at a disadvantage, not only from not knowing how to operate in the system but also from a sense of being treated unfavourably as an unwelcome usurper. This was often perceived as a source of unfairness and was a potential threat to the perception that justice is served.

### Support for LIPs

11. Court staff at the counters or on the phone did what they could to help LIPs but often felt constrained by the time they could spend helping LIPs with the information and support they needed. They found LIPs held misconceptions about their role, which was sometimes challenging to deal with. Particular administrative problems arose when errors were made in LIPs' cases or when they were from other jurisdictions. Systems were not adapted to yield to their non-lawyer status.
12. Many LIPs appreciated the support they received from McKenzie Friends who were varied in ability and role. No mechanism exists for assessing their value or performance. There is no consistency in the procedure for McKenzie Friends to be admitted to court with a LIP.
13. Judicial practice to accommodate the needs of LIPs is already in place in some courts but it is variable, depending on individual discretion to assist LIPs or adopt inquisitorial approaches. Some court actors feared that judicial assistance of LIPs may be unfair to represented parties. An over-reliance on Court Children's Officers (CCOs) to help LIPs by some judges could place CCOs in a compromised position and threaten their impartiality in the proceedings. Cases involving LIPs were perceived to take much longer. In court, they tended to take longer than a fully represented case, but the perception was that this was not acceptable because they did not conform to the guise of a lawyer. LIPs were often left to the end of proceedings and had to wait a long time without being informed.

### Emotional investment and stress of litigation

14. LIPs had difficulty separating their emotions while self-representing which presented a barrier to legal participation. The emotional reactions of some LIPs were reported to extend as far as being abusive towards legal representatives which deterred some legal representatives from discussing the case with the LIP and could hinder the LIP's case progression.
15. The LIPs' scores on the self-rated, standardized inventory General Health Questionnaire 12 (GHQ-12) indicated that the prevalence of possible mental ill-health was much higher in the LIP sample (59%) compared to findings from the general population from the Northern Ireland Health Survey 2016-17 (17%). It was not clear whether the high rate of possible mental ill-health was attributable to self-representation, the circumstances of the legal matter or a combination of the two. Other studies report a high prevalence of high GHQ-12 scores for litigants regardless of representation status (Buchanan *et al.*, 2001; Trinder *et al.*, 2005). These findings point to the need for accommodations to be made by court actors when dealing with all litigants, represented or not.

## The procedural advice clinic

16. Of the 56 LIPs invited to the procedural advice clinic piloted in the study, 25 attended it. The clinic advised them on how to prepare their cases and how to conduct themselves in court. It did not advise on legal merits or strategy. The clinic advisor noted that there was a blurred line between procedural and legal advice, and that constant vigilance was required to avoid overstepping the line, with the litmus test being whether the advice would influence a LIP's decision (as legal advice would be expected to do) or whether it would inform their decision (as procedural advice could do). The LIPs' responses to the clinic were positive, with almost all of them recommending such a clinic for all LIPs. They said they felt better equipped than before and the advice gave them more confidence. Some said they appreciated being taken seriously. Not all LIPs who attended the clinic demonstrated the advice they received when they were later observed in court, but some attempted to put it into practice. They reported the main limitations of the support were 'too little' or 'too late'. 'Too little' meant that the support was too limited, or not of the right type. 'Too late' meant they would have benefited from advice much earlier in the course of their disputes. The difficulties faced by LIPs who were participating in court proceedings varied widely and there is no single solution that will overcome them. Several solutions are needed.

## The human rights lens

17. The analysis of the LIP experiences through the human rights lens suggests two main areas of the right to a fair trial are under threat: effective participation and equality of arms.
- (a) Effective participation implies the opportunity to have a voice within the proceedings that can influence the outcomes, which relies on access to good information about proceedings and self-representation; being present when decisions about the case are being made; and support to overcome the emotional barriers that exist when self-representing. Therefore, when it is difficult for LIPs to find information, when they are absent when decisions are made and when they cannot distance their emotional involvement from their case, effective participation is impaired.
  - (b) Equality of arms is the fair balance between the parties in the opportunities given to them to present their case in a manner that does not disadvantage them with respect to the other side. In proceedings with a LIP, the judge has to ensure equality of arms as far as practically possible without disadvantaging the other side. S/he can do this by directly asking the LIP questions about the case, simplifying language, explaining procedure, making sure the LIP understands what is going on, relaxing some procedural requirements and relying on the represented party to do some of the paperwork and explanation. Ultimately, it is up to the judge to ensure that an equality of arms is reached. We found some judges went further than others in trying to reach this balance.
18. In addition, the guarantee of a fair trial could be threatened by delays in proceedings and administrative errors. This includes where a LIP refuses to follow the rules of court and deliberately blocks the progress of a case: the guarantee of a fair trial is threatened, not only for the LIP but also for the other party.

## Recommendations

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Corresponding to the main findings, we have made a number of recommendations in Chapter 13. They are presented here in brief. To improve the experience of LIPs and the effectiveness of the court system the recommendations need to be adopted in a holistic rather than piecemeal way.

## Cultural change

1. The overarching principle for our recommendations is that future reforms should be inclusive of multiple perspectives, including court users who should be facilitated to contribute to re-orientation and development. For example, expand the membership of the shadow Civil Justice Council and Family Justice Board to include litigants, McKenzie Friends, CCOs, NGOs and academics and appoint independent Chairs to promote transparency, to ensure that no single stakeholder group is dominant and a plurality of stakeholders is represented.
2. Offer training for all court actors on litigants' perspectives and how they encounter the court system, including recognition of the implications of the possibility of mental ill-health.
3. Establish a task force to create a Charter of Rights and Responsibilities which sets out roles, responsibilities, expectations, acceptable standards of behaviour and sanctions, which all litigants and court actors are required to comply with, and with redress for breach of the Charter regulated through an independent complaints mechanism.
4. Develop and publish operational guidance on dealing with unacceptable standards of behaviour and prolific applications.
5. Changes to the system, including information materials, advice models and the Charter should be developed as a co-production between LIPs, NICTS, the judiciary and the legal profession to maximise coherence, relevance and effectiveness.
6. Explore and secure funding streams for the development and evaluation of initiatives to support LIPs across different business areas, including new models of advice provision.

## Administrative changes

7. Identify LIPs within the court system at successive stages of their court proceedings, to provide an accurate data count of the number of LIPs in the court system at any one point and to facilitate direct contact with them.
8. Pilot the scheduling of court hearings for LIPs as individual appointment times.
9. Make online provision for the submission of some court documents, in addition to traditional hard copy methods.
10. Explore how court apps, interactive online forms, online bundle creation and case management could be developed to support LIPs and the work of the NICTS.

## Support – access to legal services

11. Conduct a review on whether individuals on low incomes are being excluded from entitlement to legal aid, and its access to justice implications.
12. Explore how litigant vulnerability might better be supported by the State, either through expanding legal aid eligibility on an exceptional basis, or the Official Solicitor scheme, or through case-by-case judicial recommendation based on the considerations highlighted in the Equal Treatment Bench Book.
13. Examine the full potential of offering unbundled legal services within different business areas, drawing on international comparative experiences.

## Support – information

14. Develop a basic orientation course for LIPs that introduces them to the court system and personnel: it can include training and information on what is expected of them as LIPs, their expected engagement with the court system, what they can expect from court actors and time-frames for litigation.
15. Develop user-focused design principles to guide the redesign of litigant-friendly information and web interface. This should include easily accessible information provided through a variety of different media on how to litigate in person and the procedural requirements of their case. At a minimum this should cover procedural information relevant to the different business areas, answers to frequently asked questions, and signposting to support services that have capacity and expertise to assist.
16. Develop a repository of relevant Northern Ireland legislation, procedural guidance and key case law for litigants to access.
17. Conduct a language audit on court documents to identify where terms and syntax could be made more reader-friendly.
18. Identify data-security solutions that would allow LIPs to access the online Court Orders, CCO reports and other relevant communications that are available to other court actors.
19. Develop standard templates for court forms, court bundles, affidavits and skeleton arguments that LIPs can access, selecting business areas most in demand or in need of reform.
20. Establish NICTS's role as the primary source of information on litigation without any threats to its impartiality and with realistic resource allocation.

### Support – advice

21. Evaluate the best location, availability and ownership of a LIP liaison/support unit with regards to proximity to court houses, independence of the court service and potential uptake.
22. With reference to the pilot NIHRC procedural advice clinic, create a LIP liaison/support unit, with new funding from the Department of Justice, to provide face-to-face information and advice for LIPs, staffed with a professionally qualified lawyer. In establishing this unit, provide career development opportunities for NICTS staff to enable them to develop their capacity to provide procedural advice to LIPs.

### Support – judicial

23. Develop specific judicial training on judgecraft for LIPs.

### Support – in-court

24. Develop publicly-available guidelines on when a LIP will be able to be accompanied in court by a support person, and the extent to which an in-court support person can assist the LIP, such as taking notes.
25. Develop a means of assessing how well McKenzie Friends serve LIPs and how they might be included within the court system to assist LIPs.

### Engaging the legal profession

26. Train solicitors and barristers on how to represent clients against LIPs as a core part of professional legal education, with continuing professional development supporting this training.
27. Provide continuing professional legal education and training for solicitors and barristers on the pastoral/emotional support needs of litigants, on the value of procedural justice as seen from the litigant's perspective and on ways in which communications with LIPs could yield more rapid case conclusion.
28. Provide training in lawyer self-care and professional support services to deal with abuse/trauma experienced by lawyers.

## Policy development

29. Collect data to understand current demand for court services, for example by conducting a legal needs survey to identify the nature and extent of legal problems in Northern Ireland, to ensure that the legal needs of people who do not engage with the court system are also assessed.
30. Develop a strategic plan for health-justice partnerships in Northern Ireland, where legal support services are co-located with social and health services. This should include identifying how a pilot health-justice partnership could be implemented and evaluated.
31. Investigate the use of the GHQ-12 to identify mental ill-health for litigants, in line with the Northern Ireland Executive Office's implementation of the Programme for Government objective to identify and measure mental ill-health in the population and provide support services. The potential for integrating the GHQ-12 with a legal needs survey should also be explored.

## Integrating changes

32. Ensure that future Practice Directions take into consideration what should happen when one/more of the parties is a LIP.
33. Identify and share exemplars of good practice in dealing with LIPs, including those within the tribunal service. For example, guidelines on providing written reports for LIPs; clearing court rooms when LIP cases are being heard; exercising caution to avoid reliance on CCOs to inform LIPs about the legal proceedings; out of court negotiations.
34. Adopt action research cycles to evaluate the impact of changes guided by fair trial guarantees, effective participation and procedural justice.

## Further work consequent to the study

35. Develop the data from this study to identify the differences in length of proceedings, the potential for undue delay, and use of court time in different business areas to assist with resource management.
36. Develop the quantitative data from the study related to anxiety, confidence and legal participation, and its relationship to the qualitative data from court observations.
37. Incorporate the GHQ-12 within a legal needs survey to identify the relationship between legal need, methods of resolution and psychiatric ill-health, to inform a strategic approach to health-justice partnerships.
38. Conduct interdisciplinary research on the affective and cognitive demands of self-representation to understand the dimensions of emotional detachment that permit effective participation.
39. Collect data from LIPs in the Court of Appeal, Chancery, Judicial Review, Small Claims and Queen's Bench proceedings to investigate the issues specific to these business areas.

# Chapter 1 - Introduction

“The users are identified as the legal profession. That is the problem. That needs to change...” (MF01)<sup>3</sup>

## Background to the study

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This is a study of litigants in person and the barriers that they face in securing their right to a fair trial. The study is located in Northern Ireland where the legal system largely mirrors that of Britain and other common law jurisdictions (Dickson, 2018). It is based on the principle of parliamentary sovereignty, so that laws made by the legislature – either the UK Parliament or the Northern Ireland Assembly – are the supreme form of law. The role of the courts is to interpret these laws to give effect to the intention of the legislature. Equally, the courts have a role to determine what the law is in the absence of specific legislation and to identify what the legal position should be, with Parliament or the Assembly retaining the power to legislate to confirm or change the legal interpretation that the courts develop. The Northern Ireland court system operates its own hierarchical structure, similar to most other common law jurisdictions. This structure provides that the vast majority of cases are determined by the lower level courts and are predominantly focused on issues of fact, with appeals to the higher courts on issues of law, reviewing the legal interpretation applied to particular facts by the lower courts. In Northern Ireland, the highest court is the Northern Ireland Court of Appeal, and appeals from here go to the UK Supreme Court, and in practice there is a great deal of symmetry between decisions in each jurisdiction.

The substance of the law is also broadly similar to that of Britain, often with mirror-image legislation, but there are some differences in both substance and procedure. For example, in relation to procedure, the Civil Procedure Rules 1998 which set out the procedural code for the civil courts in Britain, and which have an overriding aim to enable the courts to deal with cases justly, do not apply in Northern Ireland. Instead, Northern Ireland has a series of Court Rules that apply to different areas of law (hosted on the Northern Ireland Courts and Tribunals Website at <https://www.justice-ni.gov.uk/publications/court-rules-publications>), and which are much more complex to navigate and understand, particularly for non-lawyers. In effect, there are disparate court rules for different court tiers, and much scope for confusion within those unifying rules. For example, the Family Proceedings Rules (Northern Ireland) 1996 apply to both Matrimonial Causes (NI) Order and Children Order Proceedings in the High Court and County Courts, with separate statutory rules – the Magistrates Courts (Children (NI) Order 1995) Rules (Northern Ireland) 1996 – applying only to the Family Proceedings Court. In family law the primary substantive legislation also has some differences from Britain. In relation to the care and welfare of children, for example, Northern Ireland operates under the Children (Northern Ireland) Order 1995, which largely brought the law here in line with the Children Act 1989 that applies in England and Wales, while also incorporating the principles of the UN Convention on the Rights of the Child 1989.

The structural and substantive similarities between the Northern Ireland legal system and other common law jurisdictions generate advantages for research, in that findings and recommendations made in this report will have broad reach across other systems, rather than simply being confined to Northern Ireland. The disadvantage of the distinctive elements of the Northern Ireland legal system, however, is that where litigants seek to ascertain for themselves what the relevant law is – both case law and legislation – their lack of awareness of the need to distinguish between different common law jurisdictions can present problems and lead to reliance on resources and legal precedent that are not relevant or applicable in Northern Ireland. For litigants, particularly those who do not have legal support, there is a need to have regard to where the law is similar and where it is different from Britain, an issue that many litigants will not be aware of.

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<sup>3</sup> Throughout this report, direct quotations from study participants are used to illustrate findings. They are coded according to participant type and the codes follow the layout given in the Abbreviations.

The structure of legal advice and representation is the same in Northern Ireland and Britain, with the legal profession split between solicitors who provide direct legal advice to the public, with limited rights of representation in court, and barristers who act on instruction from solicitors and who can represent clients at any court level. In addition, both Northern Ireland and Britain provide access to state funded legal assistance, under the same principles of means and merits testing. Legal aid policy in Northern Ireland falls to the Department of Justice for Northern Ireland; in England and Wales legal aid policy is determined by the Ministry of Justice; and in Scotland the Scottish Executive Justice Department sets the legal aid policy.

In 2011 the Department of Justice (DOJ) in Northern Ireland published a review of access to justice (DOJ, 2011), reflecting the ambition of the newly devolved Department to identify ways in which access to justice could be best protected within the finite budget available. The review recommended a series of reforms which stopped short of radically cutting back on the scope of what was covered by legal aid, eschewing the approach that was adopted in England and Wales under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which removed swathes of legal problems from the scope of legal aid. The scope of legal disputes that the state will legally assist in Northern Ireland therefore remains more extensive than currently provided under legal aid provision in England and Wales, and prior to the 2012 Act the extent of legal aid was broadly similar between these two jurisdictions. Reform recommendations in Northern Ireland focused instead on a series of other measures to control costs, with the prospect of reducing scope maintained as a fall-back position. The cost savings sought were ultimately not realised and a second Access to Justice Review was published in 2015 (DOJ, 2015), with an eye to taking account of funding pressures, including those focused on dealing with the impact of litigants in person. The second review proceeded from the basis that the number of litigants in person was increasing, and would continue to increase, and recommended that the Northern Ireland Courts and Tribunals Service, in consultation with the Northern Ireland judiciary, develop an action plan to facilitate access to justice for litigants in person.

The perception of increasing numbers of litigants in person was not tested. There was no baseline figure from which to measure any increase, or decrease, and no modelling conducted to predict future trends. Nor was there a detailed map of actions needed to facilitate access to justice for litigants in person. The adversarial system, premised on litigants being represented by lawyers, was seen as inhibiting the inclusion of unrepresented litigants but it was unclear whether this meant that access to justice was compromised for litigants in person as a result. The review recognised – as this report does – that there was no evidence to suggest a fully inquisitorial legal system would be more effective or efficient at providing access to justice for unrepresented litigants, and so the proposed ‘action plan’ was seen as an adjustment to existing legal practice focused on information needs along with practical and emotional support rather than a new or innovative legal system.

## The research gap

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In the context of understanding what was needed to improve access to justice for litigants in person, the research gap became clear. There was no empirical data on the extent to which litigants in person inhabited the Northern Ireland legal system, beyond the data recorded for management information purposes by the Northern Ireland Courts and Tribunals Service. There was no information on whether the number of litigants in person was fluctuating or remaining steady. Nor was there any information on whether litigants in person were experiencing barriers in accessing justice, the extent to which this might be the case, or the nature of the barriers that might exist to determine how to facilitate or improve access to justice. And there was no empirical data to assess whether there were any specific risks which might block the access to justice rights for litigants in person,



that could impinge on their right to participate in legal proceedings, as part of their human right to a fair trial. Measures that had been developed to assist litigants in person were much more limited than those that had been developed for litigants in Britain, and the British information and support materials were not applicable to Northern Ireland given the jurisdictional differences in legal content, structures and processes. Reforms to legal aid in Northern Ireland had limited benchmarks for measuring the impact of reforms in relation to potential increases in the litigant in person population, and consequent impact on the court system, and there were limited advice sector initiatives that could provide support for unrepresented litigants. Critically, there was no framework to understand the extent to which access to justice could be assessed for litigants in person, and no way of testing justice innovations to establish their effectiveness.

This research, funded by the Nuffield Foundation, was developed to address that deficit. Building on the existing research on litigants in person throughout other common law jurisdictions, this report examines the experiences of litigants in person in the civil and family justice system in Northern Ireland. Specifically, the research focuses on proceedings involving unrepresented litigants in Divorce, Ancillary Relief,<sup>4</sup> Family Homes and Domestic Violence, Family Proceedings, Bankruptcy and Civil Bills. Using qualitative and quantitative data, the report analyses the extent to which litigants in person participate in their legal proceedings, the obstacles to their participation and the measures that could be adopted to overcome these obstacles to participation. As key to this analysis, the views of other individuals within the court system are also explored. Qualitative data were gathered from members of the judiciary, the Northern Ireland Courts and Tribunals Service (NICTS), solicitors, barristers, McKenzie Friends and Children's Court Officers (CCOs) to develop a holistic perspective of how litigants in person not just experience the court system but impact upon it. Framing this analysis is the right of access to justice, most clearly understood in human rights terms as the right to a fair trial, specifically encompassing a need for litigants to participate effectively in the litigation in which they are involved, either as respondent or applicant. Supporting this is the doctrinal analysis of access to justice as a human right, completed by the Northern Ireland Human Rights Commission and attached to this report as Appendix 1. Overall, the report provides an empirical interpretation of the theory of access to justice, which is defined through the conceptualisation of legal participation as encompassing effective participation inherent within the right to a fair trial.

The quantitative data gathered for this research provide an insight into how many litigants in person have moved through the Northern Ireland court system from 2012-2017 and give a clear perspective on the relative size and stability of this population. In addition, the research identifies the socio-demographic profile of the litigants in person within our study sample and, using a standardised questionnaire that provides a general measure of psychiatric well-being – The General Health Questionnaire 12 – provides a score to measure the psychiatric well-being of 120 litigants in person within our study sample, which can be compared against the scores for the general population in Northern Ireland.<sup>5</sup>

An experimental element of the research was developed to understand better the nature of support needs of litigants in person and to trial a particular model of support. A procedural advice clinic, developed and staffed by the Northern Ireland Human Rights Commission, was offered to a cohort of personal litigants within our study sample who were involved in family law proceedings and Ancillary Relief. The objective of providing this assistance was to assess the impact of the procedural advice on the personal litigant's ability to participate in subsequent court hearings, to understand what value (if any) this non-legal support could provide.

4 Ancillary Relief proceedings concern the financial matters related to divorce proceedings, such as the family home, investments and pensions.

5 GHQ-12 is shortest version of the GHQ standardised inventory suite produced by the commercial assessment company GL Assessment.

The report makes a series of findings relating to why individuals self-litigate, the participative experience of litigating in person, the triggers that exist within the court system that can stymie or enhance participation, and the support needs of litigants in person. Flowing from these findings, the report provides a set of recommendations aimed at making the court system better able to cope with litigants in person, not just as a matter of protecting their right to effective participation, but as a means of creating greater procedural efficiency to avoid many of the problems that currently exist and re-orienting the culture of the legal system to recognise litigants in person as part of that system rather than an aberration within it. It should be noted that the report is not focused on finding a court ‘solution’ for vexatious, obstructive or difficult litigants, who have been variously defined by legislation,<sup>6</sup> by court actors from their own perspective of having to manage such litigants, and by empirical analysis which provides a further definition of such litigants as being determined, resilient and committed (see Chapter 5). The report does not seek to define such litigant behaviour or make specific recommendations in relation to this group, focusing instead on the vast majority of LIPs who move through the Northern Ireland courts without attracting highly negative reactions. It is anticipated that helping the majority of LIPs will have a positive impact on court actors, and may also assist with isolating the more difficult behaviours of vexatious litigants.

The findings of how LIPs fit into the norm of fully represented parties are interpreted through the theoretical concepts of the right to a fair trial and effective participation. A brief overview of the court norm, the human rights perspective and legal participation follow.

## The court ‘norm’

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The Northern Ireland court system, itself a product of centuries of evolutionary change, is now premised on the ‘norm’ of litigants being represented by lawyers before a judge, constructing a legal narrative that applies particular facts to particular laws. The system of adjudication is formally understood to be an adversarial one, with opposing parties presenting different legal narratives and the judge adjudicating to determine the ‘correct’ version of the legal truth. The system of legal education in the UK (and in other common law jurisdictions) follows this norm, so that lawyers and judges are trained to respond to the variations within this model, rather than beyond it. This study explores how the Northern Ireland legal system has responded to unrepresented litigants, termed here as litigants in person (LIPs), who exist outside of this model.

According to data supplied by NICTS (presented in Chapter 3), the number of LIPs in Northern Ireland (excluding those in Small Claims cases) represents approximately five per cent of the litigant population. This figure has remained fairly constant in the last six calendar years although the perception of court actors (judges, solicitors, barristers, court staff) is that the LIP population has been increasing. For some, therefore, there is an argument that reforms to the court system should not be determined by the needs of a relatively small population, and that other considerations need to be weighed in the balance:

“I quite like the system we have. I might be biased because it’s what I’ve been brought up in and now I’m a part of. I happen to think we have a very good system. I mean every system has its flaws, but I just worry that because we have a few personal litigants that that should cause us to change our whole legal system and I worry that personal litigants should be the driving force then to tinker with the system. I just worry because there are many other issues at play here, personal litigants are one feature of our legal system ....” (Ju07)

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6 Judicature (Northern Ireland) Act 1978, section 32

The over-arching standards applied to how LIPs fare within the system are human rights standards, particularly the principles of equality and non-discrimination, which require a system to serve all its users in such a way that they all have the opportunity to have their legal needs met. Our research demonstrates that litigating in person generates a number of problematic experiences, not just for personal litigants, but for court actors and the coherence of the system as a whole. The dual perspectives of those who work within the system and of the LIPs show where barriers and deficiencies inhibit LIPs' equal access to justice and where reforms to the system may be required.

Part of the incoherence of the system for LIPs may be seen to arise from the fundamental 'norm' of having represented parties. This establishes a system of public access to justice which is contingent on accessing a (frequently private) legal service as the gateway. The history of legal aid speaks to the State's recognition of the significance of this gateway service and the development of publicly funded support for those accessing their social, civil and political rights (Genn, 2013). The development of legal aid in the UK has focused increasingly on the need to rationalise this support, limiting access to legal advice and representation only to those with the most limited means while maintaining a general commitment to the principle of open access to justice. Notably, the level of access to legal aid remains significantly higher in Northern Ireland than in Britain, where the Legal Aid, Sentencing and Punishment of Offenders Act 2012 substantially reduced the scope of work covered by legal aid funding. While a commitment to the principle of open access to justice is clearly in the public interest, it is also the case that the current gateway to the legal system is not exclusively about supporting public interests – there are private interests at stake here as well, both for litigants and lawyers – and there are litigants who do not wish (and are not required) to go through a gateway service to access courts. This can create a tension between the actors and the users:

"The whole system is set up on the basis that the customer of the court is a solicitor or a barrister... To set up a public structure in such a way that it serves private interest exclusively, ... is not a public service... And the thing is, it's not just like any other arbitrary public service, like museums, or libraries, which yes, are important, but they're not an aid to the functioning of a free society. The idea of making something so fundamental as the justice system contingent upon private wealth, it's baffling, and it's wrong. It doesn't serve the interests of people who use it..." (MF01)

Whether this conceptualisation of the legal system holds true or not, it remains clear that LIPs are having an impact on a system that is based on access being provided through legally qualified intermediaries and that has not been designed with LIPs in mind. As Lord Woolf put it in his interim report on civil justice in England and Wales (1995):

Only too often the litigant in person is regarded as a problem for judges and for the court system rather than the person for whom the system of civil justice exists. The true problem is the court system and its procedures which are still too often inaccessible and incomprehensible to ordinary people. (Ch17, para 2)

This report details the findings of how the legal system has attempted to 'fit' LIPs within its rules. In essence, two points of view are presented. The central perspective is provided by LIPs who enter a system with the understanding that they have the freedom to do so but which is a system unfamiliar to them. The second perspective highlights the adaptations to the system to accommodate LIPs. These points of view span the legal proceedings both inside and outside the courtroom, encompassing the work of the court service to accommodate

unrepresented litigants, the adaptations lawyers make when opposing them and the adjustments made by judges when LIPs are before them. These two perspectives are woven together through the report in its description of LIPs and the activities they undertake to progress their cases, in order to show both the efforts made to accommodate LIPs, who plainly do not conform to the norm, and the obstacles that remain.

A question underlying the research and put directly to all court actors interviewed asks what should be done about LIPs in Northern Ireland: get them a lawyer, turn them into a lawyer or change the system (Faulks, 2013). Largely, the legal professionals, including judges, recommended getting them a lawyer and some court staff felt the system could be changed to assist them a little. However, what we observed were LIPs trying to turn themselves into lawyers and judges changing the system by adopting strategies to accommodate LIPs in their courtrooms in a move away from the 'norm'. Changes are, in effect, already in operation. Our analysis of these accommodations suggests that not enough has been done to level the playing field between represented and unrepresented parties. While getting them a lawyer may be the preferred option for many (including some LIPs), it is unlikely to happen – either for want of funding or because LIPs have reason to reject having lawyers – leaving the option of further changes to the system.

With a view to those potential changes, we included an experimental intervention in the study to evaluate the benefits or otherwise of providing one-to-one procedural advice. Some LIPs were invited to attend a legal assistance clinic based at NIHRC to receive procedural advice related to their cases. It thus speaks to the 'turn them into a lawyer' option for LIPs. No such service currently exists in Northern Ireland. It was developed as a bespoke model by the NIHRC, based on the Citizen's Advice clinic and the Personal Support Unit in the Royal Courts of Justice in London, designed to help LIPs understand the procedural logistics of their case rather than the specifics of legal advice for their individual circumstances. Largely, the LIPs found the clinic helpful and receiving advice early on their case could benefit not only the LIP concerned but also the court service with regards to reducing the time they would need to spend with LIPs. However, such a service may prepare the LIP better but it would not turn LIPs into lawyers and could not address all of the ways they currently mismatch the 'norm'.

## The human rights lens

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The report is focused not just on gathering the empirical data to understand how LIPs experience the Northern Ireland legal system, but on how that experience evinces their human rights regarding access to justice. In particular, given the methodological approach of centring the experiences of the court hearing as a determinant, the report considers the right to a fair trial as it flows mainly from Article 6 of the European Convention on Human Rights (ECHR), as incorporated by the Human Rights Act 1998, as well as the treaty obligations of the Council of Europe, European Union and United Nations (UN) systems. The relevant core international treaties in this context include:

- the European Convention on Human Rights
- the International Covenant on Civil and Political Rights<sup>7</sup>
- the International Covenant on Economic, Social and Cultural Rights<sup>8</sup>
- the UN Convention on the Elimination of Discrimination against Women<sup>9</sup>

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7 Ratified by the UK in 1976.

8 Ratified by the UK in 1976.

9 Ratified by the UK in 1986.

- the UN Convention Against Torture<sup>10</sup>
- the UN Convention on the Rights of the Child<sup>11</sup>
- the UN Convention on the Rights of Persons with Disabilities<sup>12</sup>
- the EU Charter for Fundamental Rights

Appendix 1 sets out the detailed analysis of the rights pertaining to a fair trial, a brief discussion of which follows.

Inevitably, given the preferential status of the ECHR in domestic legislation, much of the detail and core guidance on the right to a fair trial in the UK are drawn from Article 6(1) which addresses civil claims.<sup>13</sup> The article and case-law, both explicit and implied, outline the protections afforded to all litigants in pursuit of a legal claim, making no distinction between unrepresented and represented parties. The European Court of Human Rights (ECtHR) insists that the rights contained in the ECHR are neither theoretical or illusory. Indeed, they are intended to be practical and effective.<sup>14</sup> The overall objective of the right to a fair trial is to ensure the proper administration of justice. This includes the protection and guarantee of the duty of the court to make a just decision. The court and its associated administrative, procedural and legal mechanisms must operate to achieve this aim for all litigants, whether represented or not. There is no right to legal representation although it may be provided depending on the circumstances of the case and the litigant in person.

Article 6(1) consists of two broad elements, each with their constituent elements. Box 1 below summarises them but a fuller description with reference to case-law is given in Appendix 1. The first element is the right of access to a court. It requires that procedural guarantees are in place for individuals to institute legal proceedings in a non-discriminatory manner. It is left to States Parties to decide how best to fulfil the obligation to provide access to a court, which may include the provision of legal aid or the simplification of procedure. The State, in individual circumstances, may be required to provide a LIP with legal assistance if the case is of too great legal or procedural complexity to ensure effective access to a court. Legal aid provision should be administered in a non-discriminatory manner. Administrative and legal procedures should be affordable and coherent with the provision of sufficient information and assistance to make them implementable, including by LIPs. The right of access to a court is not absolute and can be limited in some situations, such as when a litigant is vexatious or lacks the mental capacity to proceed without a lawyer, provided that the essence of the right is not lost. Specific to LIPs, the right of access to a court implies that the LIP is able to participate effectively in the proceedings to a level where he or she is able to influence them so that the court can assure procedural and substantial justice. This refers to the capacity of the LIP to participate effectively, including whether anxiety impairs capacity. This report focuses particularly on understanding the participative capacity of LIPs within the Northern Ireland court system.

The second element of Article 6(1) relates to fair trial guarantees. A distinction is made between protections for parties in criminal cases and civil cases. The former are more explicit than those in civil cases, whose guarantees form the focus of this report (see Appendix 1). They include the equality of arms, which is the fair balance between the parties in the opportunities given to them to present their case in a manner that does not disadvantage them with respect to the other side. In the absence of a legal representative for one party, accommodations to reach equality of arms are permissible. If the procedures and law underpinning the case are too complex for equality of arms to be achieved, the court may direct legal assistance from the State or the judge may exercise judicial latitude towards the LIP to ensure balance. The amount of judicial latitude should

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10 Ratified by the UK in 1988.

11 Ratified by the UK in 1991.

12 Ratified by the UK in 2009.

13 The remaining sub-articles of Article 6(2) and 6(3) address criminal proceedings and are not the focus of this report.

14 For example, *Golder v UK* (1975) Application no. 4451/70 1 EHRR 524.

not interfere with judicial impartiality and neutrality. To ensure access to a fair trial, the State must be diligent to ensure there are no procedural omissions or barriers that impinge on the ability of the LIP to participate and be heard in their proceedings. This refers to the duties placed on the State to ensure compliance with procedures to guarantee a fair hearing. Allowances can be made for LIPs, such as extra time to prepare, but within reason. The right to a public hearing is protected to ensure transparency, but not necessarily for all business areas. Proceedings are expected to take place expeditiously with no undue delay. This obligation rests on both the State and the parties to the proceedings. Domestic case-law demonstrates that LIPs are expected to operate within the existing court procedures and they should not deviate from procedural rules. They may be offered more time to prepare or be guided to assistance, but they are expected to conform to the rules of court. The complexity or coherence of the rules or the LIP's capacity to participate effectively may be a relevant consideration. However, there is no indication of when Article 6 might trigger a requirement for a judge to identify concerns around the LIP's legal capacity, or any indication of what the process is for judges to address potential legal incapacity; *Airey* provides limited guidance here as the issue was the LIP's emotional rather than legal capacity.<sup>15</sup> The court must be independent and impartial and there is a requirement on the court to provide written reasons, albeit brief, for a judgement within good time.

**Box 1:** Elements of the right to fair trial Article 6(1) of ECHR

1. Access to a court
  - (a) Access to a court ensures no individual is deprived of the right to claim justice
  - (b) Ensuring access to a court through the provision of legal aid
    - i) In the face of legal and procedural complexity
    - ii) Non-discriminatory access to legal aid
  - (c) Circumstances in which access to a court should not be prevented:
    - i) Prohibitive costs / excessive court fees
    - ii) Strict or incoherent procedural rules
    - iii) Absence of information and assistance
  - (d) Lawful restriction on access to a court may be applied to:
    - i) Vexatious litigants
    - ii) Mental incapacity
  - (e) Effective participation given the stress, demand and complexity of proceedings
2. Fair trial guarantees
  - (a) Equality of arms
    - i) Access to legal aid or other legal support in the face of complexity
    - ii) Judicial latitude to ensure equality of arms with respect to complexity, unfamiliarity and stress
    - iii) Balancing judicial assistance with judicial impartiality

<sup>15</sup> *Airey v Republic of Ireland* (1979) Application no 6289/73. 2 EHRR 305

- (b) Access to a fair hearing
  - i) Allowances for LIPs: time and particular arrangements
- (c) The right to a public hearing
- (d) Fairness and no undue delays
- (e) Holding LIPs to the same standard as a legal representative
- (f) Independent and impartial tribunal or court
- (g) Written reasons and fairness

There is no attempt in the report to identify definitive breaches of LIPs' rights to a fair trial in the proceedings that we observed: that legal analysis is beyond the remit of the report, not least because the legal outcomes of the LIPs' proceedings were not examined. What the report can offer, however, is an understanding of the strengths and weaknesses of the legal system to respect and protect LIPs' rights, looking particularly at the legal processes that protect Article 6, identifying the advantages to the legal system as well as the LIP in providing robust protection of these rights, and the risks created by poor protection. With this intent in mind, occasional commentary is provided in the text of this report, titled 'Human rights considerations', on the aspects of or incidents in the LIPs' proceedings observed during the data collection phase which related to fair trial protections. It is not intended to be exhaustive but offers reflection for consideration.

## The right to self-represent

The analysis of the LIPs' impact on the court system reflects on their right to a fair trial outside the 'norm' of legal representation, which reveals an inherent and related right to self-representation and the extent to which the legal system can facilitate or accommodate the rights of self-represented parties to a fair trial. The right to self-represent is a long-standing feature of common law as an expression of the universal right of all citizens to access court (Webb, 2007), and is recognised under Article 6 ECHR, where the LIP has capacity to act. Measures to require representation, so limiting the right to self-representation, are in place in many jurisdictions under certain circumstances, such as when the litigant is too poor to buy legal services or the case is too complex for a lay person to present.<sup>16</sup> Arguments for mandatory representation have been made where the LIP is unable to present his or her case effectively, to avoid disproportionate costs on the other party or redress power imbalances (Engler, 2010; Assy, 2015). Empirical evidence suggests there are many situations where self-representation is a compelling and rational choice (Toy-Cronin, 2017). The right to self-represent is underscored by the fact that litigants do not have a universal right to State-funded legal representation, or an obligation to be legally represented. However, an unfettered right to self-representation is not, at least at present, recognised as a requirement of the right of access to court (Assy, 2011). But it does remain an option. Any removal of the right to self-representation might reduce the inconvenience and improve the efficiency of the court system, but does so at the expense of the rights of litigants in person to access court: prioritising and promoting the status quo of the system, rather than viewing the court system as being unable to accommodate and yield to the needs of the LIP. The Civil Justice Council of England and Wales recognised this point in its report on *Access to Justice for litigants in person (or self-represented litigants)* in 2011:

<sup>16</sup> See for example *Shamoyan v. Armenia*, Application no. 18499/08. The general circumstances in which State Parties can require a litigant to be represented are when a litigant is vexatious, of unsound mind, a bankrupt or a minor.

Thus there are many links between access to justice, access to the courts and access to lawyers. But this does not mean that access to justice is identical to access to the courts or access to lawyers. In current circumstances we will need to be more rigorous in our readiness to recognise this reality. At the same time there are many cases where access to lawyers, or to lawyers and the courts, is crucial to access to justice. (para 59)

The right to self-represent is not absolute and it is not tested in law. However, self-representation should not be to the detriment of the LIP. This balance must be weighed, including by focusing on the disadvantages arising from self-representation. Where such disadvantage is significant, as in *Airey*, it may be that the only way the disadvantage can be removed is by the State giving the litigant access to legal representation, but there will be many more instances where the disadvantage can be addressed in other ways, and which the State is also under a duty to attend to in order to redress that disadvantage. This report is concerned with understanding that potential disadvantage, to identify ways in which it can be removed or mitigated that go beyond providing State-funded access to legal representation.

Recognition of the difficulties faced by self-representing litigants and the sometimes devastating consequences of their poor navigation through the court system in some jurisdictions led to recommendations for action and the implementation of innovations and programmes oriented at assisting LIPs (Owen, Staudt and Pedwell, 2004; Zorza, 2009; Engler, 2010; Hough, 2010; Zorza and Udelf, 2014; Victoria State Government, 2016; See Appendix 2 for further examples). However, it was beyond the scope of this study to evaluate the impact and uptake of these initiatives.

## Effective participation

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The right to a fair trial centres on the ability of the litigant to participate effectively in the court processes. Participation itself, however, is not a legally defined concept, although elements of participation can be drawn from the human rights instruments that inform the right to a fair trial. Under Article 6 ECHR, for example, the State has a duty to ensure that the litigant has participated to a level where he or she was able to influence the proceedings, and so be ‘heard’.

Conceptualisations of participation have been created in different contexts, most notably in relation to political participation which is considered to be an essential element of democracy, and where Arnstein’s seminal model of participation seeks to measure the gaps between citizens’ opportunity to participate and the effectiveness or outcome of these opportunities (Arnstein, 1969). The concept of participation by those on the margins of democratic processes of decision making – most notably, children – has also been the subject of significant research. Lundy’s modelling of the rights of children to be heard, as guaranteed by Article 12 of the UN Convention on the Rights of the Child, is instructive here (Lundy, 2007). She articulates the rights of children to have their voices heard in decisions that affect them as requiring additional rights beyond ‘voice’ and encompassing ‘space’, ‘audience’ and ‘influence’. In this analysis, ‘space’ requires children to be given the opportunity to express a view; ‘voice’ requires that children are facilitated to express their views; ‘audience’ requires that the child’s view must be listened to; and ‘influence’ requires that the child’s view must be acted on, as appropriate. This interplay of elements is critical in understanding that the right to be ‘heard’ goes further than simply allowing an individual access to the opportunity to speak and underpins a more substantive involvement that addresses gaps in children’s knowledge and opportunities that would inhibit their ability to participate.



This substantive approach to participation can be extended to other domains, including legal processes. The concept of legal participation has been examined in relation to tribunal proceedings, where the 'norm' of legal representation is observed in some areas, such as employment tribunals, but not in others, such as social security tribunals (McKeever, 2013). Drawing on the literature on political participation and procedural justice, McKeever sets out a range of participative experiences that reflect how tribunal users experience tribunal proceedings, modelled as a 'ladder' of participation. A pilot study, forming the empirical rationale for this report on LIPs, applied that model to court user experiences (McKeever, 2015). The findings of the pilot study were that the characterisation of participative experiences of court and tribunal users was substantively similar, so that the model of participation could be applied equally to court users.

This model of legal participation reflects the intellectual, emotional and practical barriers to participation faced by individuals in bringing legal disputes to a court or tribunal. Intellectual barriers are those which prevent the individual from understanding how the legal process works. This relates both to the information required for legal proceedings – such as the relevance and role of documentation to verify or rebut claims – and to the hearing process, including the terminology used by court actors. Practical barriers also included documentation, relating to difficulties in knowing where to access the relevant documents or understanding the need to provide duplicate copies of these, as well as the practical barriers relating to legal procedures, such as how to address the judge, the running order of the hearing and when or whether to speak. In the empirical studies that established the model of legal participation, legal or lay representation could also create practical barriers: for represented users a practical barrier arose where representatives did not keep litigants informed of what to expect. Conversely, for unrepresented users, not having access to legal representation to know what information should be provided within the legal hearing was itself a practical barrier. Emotional barriers arose from the feelings of fear and apprehension about the proceedings, manifesting themselves as nausea, anger, agitation, with the legal formality of the venue and the proceedings adding increased pressure and anxiety.

Taking account of these barriers, McKeever's model of legal participation categorises the court and tribunal experiences as non-participatory, tokenistic or participatory, and identifies different types of experience within each of these categories. Non-participatory experiences are defined as isolation, which includes feeling excluded and unable or unwilling to engage with legal proceedings; and segregation, which includes feeling segregated from the legal process, or secondary within it, without sufficient account being taken of the difficulties in participating. Tokenistic experiences are defined as obstruction, where the individual's journey through legal proceedings is obstructed, by delays or inadequate information, or through fatigue at having to search for assistance; and placation, where support that is provided, or referred to, is ineffective in assisting the individual. Participative experiences encompass engagement, where users can navigate the process and communicate with the actors to understand everyone's role in the process; collaboration, where individuals are supported in their journey through the process, with their understanding of proceedings taken as the starting point, and difficulties dealt with as they arise; and being enabled, where individuals are put in the position where they feel supported and equipped to engage in the process as equals, with an element of self-determination within recognised limits.

For the purpose of this report, the value of understanding the range of different participative experiences is, first, in reflecting the diversity of the litigant population and recognising that participation should accommodate the different levels of desire, willingness, or ability to participate, as well as any inherent failure of the mechanisms designed to facilitate participation. Secondly, an understanding of the different ways in which LIPs participate in court proceedings allows us to understand the extent to which their participation is effective, as required under Article 6(1) ECHR and the related human rights provisions, identifying ways in which LIPs respond to

interventions designed to facilitate them. It also allows us to identify the different responses of court actors to the intellectual, practical and emotional barriers that LIPs face.

## View points in the report

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As with all qualitative research, the purpose is to hold a mirror up to reflect the perspectives of the research participants, rather than substitute their voices for those of the researchers or others. This report acts as a mirror for LIP perspectives, reflecting the diversity and intensity of views that they hold about court proceedings and court actors. Similarly, the report reflects the views that court actors hold about LIPs, and how LIPs impact on their work within the legal system. These views are presented here as the subjective perceptions of interviewees, through which interviewees develop their own understanding of their engagement with others. Given the diversity of views reflected in this report, it is inevitable that there will be both positive and negative images conveyed, which may themselves be the product of misperceptions or selective experiences but which remain valid as research findings that need to be understood and responded to.

Quite quickly into the data collection, it became apparent that legal representatives and LIPs had some strong, and often negative, views about the 'other' group. Generally, though not unanimously, neither constituency held the other in high esteem. LIPs' views of judges and court staff tended to be more positive, while judges' views of LIPs tended to be equitable and dispassionate. Court staff regarded LIPs as aberrant in the system, but were generally sympathetic to the difficulties LIPs faced. The different perspectives of one group on another are of interest because they indicate some underlying preconceptions which may influence how the different groups interact and respond to the other. An understanding of the role, rationale and responsibilities of the other group may go some way to break down the barriers and blockages in the LIPs' path through a system not designed for them, and yet one in which they have the right to operate.

## Conclusion

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LIPs have the right to access a public legal system and to do so directly through self-representation. This does not dilute their human right to a fair trial, conceptualised through this report as their ability to participate effectively in court proceedings. The report identifies the obstacles – intellectual, practical and emotional – that make this right more difficult to access, focusing on the measures that need to be taken within the legal system to accommodate LIPs, rather than focusing on LIPs as the problem for the system. LIPs present a significant challenge to the legal system in Northern Ireland, but this report identifies that the legal system presents a significant challenge for LIPs. A system that disadvantages its users cannot continue without the expectation of being challenged and this report reveals the nature of the challenges that can be addressed to better facilitate the rights of LIPs to access justice. This 'audit' of legal processes highlights the ways in which system efficiency and effectiveness can be enhanced, reducing some of the layers of frustration that are generated for LIPs and court actors which lead to misunderstandings, complaints and potential appeals. The legal system has evolved over many years, proving its ability to adapt to changing circumstances, including the adaptations that are beginning to be made for litigants in person. This report builds on the strength of the legal system to meet the access to justice needs of its users, providing empirically-based recommendations of how it should continue to develop in relation to litigants in person.

The structure of the report reflects the research journey that follows the experiences of LIPs and court actors. Following this Introduction, Chapter 2 provides a discussion of the methodological approach adopted by the

research team, highlighting the research questions and the means by which these questions were addressed. Chapter 3 identifies the prevalence of LIPs in the civil and family justice system in Northern Ireland from 2012 to 2017, using data extracted from the NICTS's Management Information System that were made available for this study. These data are presented alongside the analysis of the qualitative data on the perceptions of the prevalence of LIPs, drawn from interviews with court actors. The research collected quantitative data on the socio-economic and demographic characteristics of 179 LIPs who participated in the research, and Chapter 4 provides the analysis of these data. Chapter 5 sets out the findings from the qualitative data on how LIPs are perceived and their perceptions of others within the court system. The reasons why individuals litigate in person are explored in Chapter 6. Chapters 7 and 8 examine the experiences of LIPs outside and inside the courtroom, respectively, identifying the actions taken by LIPs to prepare, their knowledge of what the court required them to do, their sources of support and their overall capacity to participate, drawing on the interview data with LIPs and court actors as well as the questionnaire data on LIPs' views of their ability to participate. These chapters highlight the disconnect between how LIPs feel they should be supported and the availability of support and advice services, and the consequential impact on their knowledge and levels of confidence in their ability to participate effectively. The analysis also identifies the adaptations that are already in play within the court system to make some accommodation for LIPs, particularly in relation to judicial behaviours, and the impact that LIPs have on the court system. Chapter 9 explores the emotional status and mental health of LIPs, drawn from the measurement of the general mental health and well-being of LIPs using a standardised screening instrument called the General Health Questionnaire 12 (GHQ-12), alongside the qualitative data from LIPs and court actors. The impact of the procedural advice clinic on the ability of LIPs to participate in subsequent court hearings is analysed in Chapter 10, setting out the nature of the clinic's remit, the engagement by LIPs and the assessment of the strengths and weaknesses of this form of support. Highlighting the personal narratives that formed the vast bulk of the research data, Chapter 11 sets out five different case studies of LIPs within our research sample, providing a holistic overview of how litigating in person impacts on individual people, to counteract any view of LIPs as mere elements of research data. Chapter 12 brings together the research evidence that addresses the potential to 'get them lawyers, make them lawyers, change the system' in order to identify proposals for effective reform across each of these categories, noting that the majority of the data points towards changing the system. The Conclusion sets out the recommendations that flow from the research, taking account of the context in which holistic reform needs to take place to protect the access to justice rights of LIPs.



# Chapter 2 - Method

## Introduction

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The study is situated in the theoretical area of access to justice, in particular access to justice for people without representation. As discussed in the introductory chapter, two linked conceptual frameworks are used to explore access to justice: the human right to a fair trial and legal participation. They provide the theoretical basis from which the study's aims, objectives and methods flow.

The aims of the study were four-fold: to understand how LIPs participate in their case proceedings; to evaluate the impact of LIPs on the Northern Ireland court system; to assess the human rights implications of the absence of legal representation; and to evaluate the impact of providing advice to LIPs both on their participation and on the court.

The research objectives flowing from the aims, and their associated research questions, outlined in the original proposal funded by the Nuffield Foundation, were as follows:

1. To map the range of LIPs and understand their paths to litigation
  - (a) What are the demographic characteristics of LIPs?
  - (b) What are the reasons people self-represent? What are their behavioural motivations for appearing as LIPs?
2. To understand the support needs of LIPs
  - (a) What support services do LIPs use?
  - (b) How much assistance have these different forms of support provided?
  - (c) How appropriate are the existing support materials for Northern Ireland LIPs?
  - (d) What barriers do LIPs face in accessing support services?
  - (e) What expectations do LIPs have of court processes?
  - (f) To what extent are LIPs able to participate in court processes?
  - (g) What barriers to participation do they face?
  - (h) Is there evidence of any human rights breach where support is not available?
  - (i) Are LIPs who have received procedural advice better able to participate in court processes than those who have had no access to procedural advice?
  - (j) What support needs do LIPs identify as being (potentially) helpful?
  - (k) What support services do courts signpost LIPs to?
3. To understand how LIPs impact on the court
  - (a) What impediments do courts face in dealing with LIPs?
  - (b) To what extent do LIPs impact on the nature or duration of court hearings and conclusion of cases?
  - (c) How do legal representatives deal with cases where the 'other side' is not represented?
  - (d) What processes have courts implemented to try to support LIPs?
  - (e) How successful have these been?

4. To assess the extent to which basic legal assistance can support LIPs
  - (a) What impact does the provision of assistance to comply with court procedures and basic legal assistance on their case have on the LIP's experience of the court process?
  - (b) What impact does this basic support have on the court's ability to deal with the LIP?
  - (c) Does procedural support help ensure the human rights of LIPs are protected?

To achieve these objectives, the study was designed to combine four methodological elements:

1. Qualitative: analyses of LIPs' experience of self-representation, their support needs, their impact on the court through observations of LIPs in court, interviews with LIPs, and interviews with court staff, legal representatives, the judiciary, collectively referred to as court actors;
2. Quantitative: a description of LIPs' demographic characteristics and an analysis of their views of their experience of self-representation, including an inventory to measure mental well-being (GHQ-12);
3. Inductive: an analysis of LIPs' legal participation and human right to a fair trial as aspects of their access to justice using the quantitative and qualitative data;
4. Action-research: an evaluation of the procedural advice clinic.

The intended method for the study was outlined in the original proposal to the funding body, the Nuffield Foundation. It remained largely the same, as described below. Any changes from the intended plan are highlighted with explanations as to why. The description follows the main phases of the study: inception, data collection, procedural clinic, analysis and validation.

## Research design

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The study employs a mixed methodological approach to generate multi-dimensional data capable of addressing the research questions from a number of perspectives. The data set that has been amassed is enormous, involving contextualised case studies of LIPs' paths through the court system their experiences of court, and the courts' experiences of them. LIPs' own accounts are triangulated by researcher observations, and the views of other court actors, and data gathered as part of the procedural advice clinic.

The starting points and methods associated with qualitative and quantitative research are quite distinct, but are widely recognised to be complementary when used together in an appropriately designed study (Flick, 2009). The key value of qualitative research is the opportunity to provide in-depth understanding of complex social phenomena and relationships, in this case the nature of LIP experiences, the extent to which LIPs can participate in their proceedings and the impact of receiving procedural advice for the LIP sub-sample who attended the advice clinic. Qualitative data were triangulated with quantitative data from a questionnaire, allowing us to gain a sense of the proportions of the sample who felt a certain way, or how they prepared, as well as more systematic comparisons of LIP views, pointing towards relationships between key variables. However, such data cannot tell us a great deal about why LIPs hold certain views, how they might change over time or under different circumstances. The qualitative, particularly interview data, allowed us to explore how and why LIPs expressed particular views, for example about their knowledge of the law, or experience of their most recent hearing. The design, involving repeated observations and data collection over time, allowed us to chart LIPs' journeys through their proceedings. This gave the data a vantage point from which to view how LIPs experiences of the court system evolved and were shaped.

The key strength of the study comes from the depth of the data set including privileged access to courts which yielded rich fieldwork notes, the variety of perspectives gained from interviews with all major stakeholders and a unique action research element, which allowed the research to pilot an intervention aimed at addressing some of the issues under investigation.

## Inception phase

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The research team was convened by mid-April 2016 with the recruitment of a research associate for Ulster University and a case-worker for NIHR. The inception phase ran from April to September 2016. It involved obtaining ethical approval from Ulster University's Research Ethics Committee, convening an advisory board to offer guidance to the research study team, raising awareness of the study amongst the stakeholders in access to justice in Northern Ireland, the development of consent forms and the data collection tools, the preparation of the doctrinal analysis of the right to a fair trial and the development of the protocols for the procedural advice clinic.

Cooperation with the senior management team of the Northern Ireland Courts and Tribunal Service (NICTS) had been established during the proposal preparation stage, and the continuation of this cooperation helped the team to develop the study to accommodate the reality of the day to day business of the courts.

## Ethical approval and access approval

All research conducted by members of Ulster University which involves members of the public cannot proceed unless and until it has the approval of the University's Research Ethics Committee. The proposed method for the current study was submitted for approval in May 2016. The assessment takes into consideration that adequate steps are taken to: obtain the informed consent of participants; ensure confidentiality of personal data of participants and their secure storage; ensure anonymity of all participants; ensure the research does not cause distress to participants and measures are in place on what to do if participants' well-being and safety are at risk; ensure intellectual property rights to the data are clear to the participants. Approval for the study was given in July 2016.

A Privileged Access Agreement was drawn up to ensure the research study adhered to conditions of conduct and data protection imposed by NICTS. The conditions required that parties to proceedings could only be contacted directly on site or through their voluntary application in response to the publicity; no identifiers of parties to proceedings (for example, court file numbers) would be extracted by the researchers from the court records and all data would be held anonymously; data obtained could only be used for the purposes of research; any scrutiny of court files would be done under supervision of a member of NICTS; and NICTS will be provided with a copy of the information extracted by the researcher.

## Guidance for the study

The Advisory Board for the study was convened. The members were invited to sit on the board on a voluntary basis to provide guidance and commentary to the research team on the method, issues and, latterly, the findings of the study. They were asked to meet three times a year. The members were:

### Chair:

The Right Honourable Lord Justice Stephens – Lord Justice of Appeal

**Members:**

Paul Andrews – Legal Services Agency  
 Dr Nigel Balmer – University College London  
 Dr Catrina Denvir – Ulster University  
 Prof Brice Dickson – Queen’s University Belfast  
 Eileen Ewing – The Law Society Northern Ireland  
 David Hawkins / Melissa Murray – Public Interest Litigation Support Project  
 Debbie Maclam – NICTS  
 Gerry McAlinden QC – The Bar Council of Northern Ireland  
 Laurene McAlpine – Department of Justice  
 Presiding Master McCorry – Master of the High Court  
 His Honour Judge McFarland, Recorder of Belfast – County Court Judge  
 Gráinne Murphy BL – Family Bar Association  
 Ursula O’Hare – Law Centre (Northern Ireland)  
 Colin Reid – NSPCC  
 Cathy Scollan – NICTS  
 Ursula Toner – Housing Rights

**Stakeholder engagement**

Permission to observe in court had been obtained from the Office of the Lord Chief Justice during the development of the original proposal. Extending the awareness of the study was undertaken through a series of meetings with the main stakeholders: The Department of Justice, senior members of NICTS, the Bar Council of Northern Ireland and the Law Society of Northern Ireland, Housing Rights, Legal Services Agency and the Commissioners of the NIHRC. Background documents were provided to all stakeholders and publicity of the study was published in the legal professionals’ online networks. Posters and leaflets advertising the study were put in the corridors and counters of the Royal Courts of Justice and Laganside Court House to inform LIPs about the study.

**Development of consent and information forms**

Consent forms with information sheets about the study and the requirements of participation were produced, one each for LIPs, court actors and LIPs who attended the advisory clinic. See Appendix 3a.

**Development of data collection tools**

The bulk of the data were qualitative data gathered from interviews and observations. Semi-structured interview schedules were prepared for: LIPs, legal representatives, the judiciary and court staff. They contained open-ended questions related to the participants’ experiences and attitudes. The topics covered in all the data collection tools are in Appendix 3b.

An observation tool was developed to capture the details of the court appearance, such as the date, court, applicant/respondent status of the LIP. An observation prompt with an aide-memoire of human rights elements was also developed to guide reflection on observed proceedings (see Appendix 3b).

Questionnaires to record LIPs’ views on their experiences, their demographic details and their current state of mind were also prepared. For the latter, we used the General Health Questionnaire 12 (GHQ-12), which is the shortest version of the GHQ inventory suite produced by the commercial assessment company GL Assessment.



A secondary questionnaire for LIPs who attended the procedural advice clinic was prepared. It contained the same core questions as the initial questionnaire, excluding data already gathered on LIP demographics and the sources of information and support they had used, with additional questions about their impressions of the clinic. The questionnaires are contained in Appendix 3c.

It was originally envisaged the initial questionnaire would be available electronically on a tablet with automatic upload to a cloud-based repository. It proved quicker and more convenient to create a paper-based version.

All of the data collection tools were piloted during the first few weeks of the data collection phase and amendments made to questions which did not work well.

### Human rights analysis

A doctrinal and case law analysis of the right to a fair trial was conducted by the Northern Ireland Human Rights Commission. Article 6(1) of the European Convention on Human Rights formed the pillars of the analysis and commentary on them was gathered from case law of the European Court of Human Rights and domestic case law. The analysis is given in full in Appendix 1.

The analysis is essentially a rendering of the legal standard of the human right as it is expressed in case law providing a clearly defined standard for the right. The potential also presented itself for us to provide practical and theoretical commentary on the content and meaning of the legal standard beyond the restrictions of what had been or could be tested in a court. Commentary is peppered throughout the report where it is relevant, titled 'Human Rights Considerations'.

### Development of the clinic model

The development and study of the procedural advice clinic was intended to fulfil the fourth research objective: to measure the effectiveness of a legal assistance clinic for LIPs. The clinic was designed by the NIHRC following a three-day field trip to the Royal Courts of Justice in London to observe the procedural advisory service offered by Citizens Advice as well as the pastoral support provided by the Personal Support Unit. Additional insight was gained from previous, unsuccessful attempts to establish an advisory service at the Royal Courts of Justice in Belfast, which was designed to be delivered by junior barristers on a *pro bono* basis. The remit of the project's advice clinic was to offer procedural rather legal advice, and the specific protocols of the clinic and guidelines for the adviser were refined in the early phase of the research (see Appendix 4).

## Data collection phase

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The data collection phase ran for 12 months from September 2016 to September 2017. It was originally proposed seven months would suffice, but sampling for the study was more difficult than anticipated. Some litigants listed as self-representing would appear represented or not at all resulting in days with no recruitment. To increase the opportunities for sampling, an additional research associate was recruited to the study on a part-time basis to ensure the team could cover as many courts as possible. This phase involved court room observations of LIPs, interviews with LIPs, legal representatives, judges, court staff and McKenzie Friends.

### Business area selection

NICTS data on the number of LIPs in the different civil and family areas were made available to the team during the preparation of the proposal. On the basis of prior prevalence of LIPs, the following five business areas were

initially selected for study: Civil Bills, Divorce (High Court and County Court), Family Proceedings, Family Homes and Domestic Violence, Bankruptcy (Debtor's Petitions). Other civil and family areas (Adoption, Bankruptcy (Petitions from any Person), Chancery, Companies, Court of Appeal, Domestic Proceedings, Equity, Family Care Centre, Judicial Review and Probate) had low numbers of LIPs, and so were not considered for the study. Small Claims had a large number of LIPs but the system has been adapted specifically to facilitate LIPs and was not considered to be a problem by NICTS. Queen's Bench too had a sizable number of LIPs, but the majority of cases were related to Foreign Judgement cases which were determined to be outside the research objectives. Public Law family cases are eligible for legal aid so were not considered for the research.

The initial selection of five business areas was reviewed and altered during the early part of the data collection phase for three reasons. Firstly, two of the selected areas, Bankruptcy (Debtor's Petitions) and Divorce were considered by NICTS and the judiciary to be very straight-forward for LIPs and of little concern to NICTS. They suggested we expand our business areas to include Bankruptcy (Petitions from any Person, referred to from now on as Creditor's Petitions) and Ancillary Relief in the Matrimonial Division. Secondly, we became aware of LIPs in Domestic Proceedings and the Family Care Centre either because we met them in court or because they contacted us directly. These two areas were added too. Thirdly, relatively few LIPs were listed for Civil Bills and their appearance was too ad hoc to be able to recruit effectively. We recruited only three LIPs in this business area. The final selection of the business areas under study, therefore, was:

1. Civil Bills
2. Divorce
3. Family Proceedings
4. Family Homes and Domestic Violence
5. Debtor's Petitions
6. Ancillary Relief
7. Creditor's Petitions
8. Family Care Centre
9. Domestic Proceedings

The expansion of the number of business areas risked diluting the sample composition. However, sampling was difficult and the expansion increased the incidence of recruiting LIPs to the study. The study was contacted by some LIPs who were not involved in proceedings in any of the nine areas above.

While the exclusion of Small Claims and Queen's Bench was both a pragmatic and strategic decision, there may have been opportunities to explore additional dimensions of the LIP experience and their impact on the court, and value could be added to this research by further examination of the LIP experiences in these areas. Furthermore, some of the commentary about LIPs from the legal professionals came from their experience from business areas we did not observe, such as the Court of Appeal, Chancery, Companies and Office of Care and Protection – Patients. It would not have been possible within the resources of the study to include any additional business areas, but given the differences in experience according to business areas recorded in the study, it is likely these other unstudied areas would yield informative results.

### Identifying where LIPs were likely to appear

The proceedings of the business areas selected for study mapped on to different tiers of courts and therefore on to different teams of NICTS court staff. The main geographical focus was the Belfast area where the number

of LIPs was reported to be highest. However, the geographical area was later widened to both follow recruited LIPs who were appearing in a different court and to increase the chance of identifying LIPs. This change had the additional advantage of observing different courts.

Each week, the court staff of the targeted business areas gave the research team access to the court lists indicating the week's cases. The lists are confidential and are not available publicly (apart from Civil Bills, Debtor's Petitions and Creditor's Petitions). The study team had the permission of the Office of the Lord Justice to see the lists for recruitment purposes. They were made available to the study team to view and make note of the likely appearances of LIPs for the coming week. This enabled the team to prioritise where to focus for each week's recruitment.

The NICTS information management system collects the representation status of all participants. The default status is 'unrepresented' and is updated to 'represented' when NICTS is informed that representation has been instructed. People who have not yet instructed a solicitor are indicated as 'unrepresented.' Even though some of these people might instruct before their court appearance, the lists gave the team a good indication of where we were most likely to locate LIPs for recruitment to the study and a schedule of observation each week was drawn up by the team. Below is a table showing the courts where observations were targeted and actually took place during the data collection phase.

Business area	Courts targeted	Courts observed
Bankruptcy: Debtor's Petitions and Creditor's Petitions	High Court: Royal Courts of Justice, Belfast	High Court: Royal Courts of Justice, Belfast
Family Proceedings Family Care Centre	High Court: Royal Courts of Justice, Belfast	High Court: Royal Courts of Justice, Belfast
Domestic Proceedings Family Homes and Domestic Violence	Magistrates' Courts: Laganside, Newtownards, Newry, Lisburn, Derry/Londonderry, Coleraine, Dungannon, Omagh, Ballymena	Magistrates' Courts: Laganside, Newtownards, Newry, Lisburn, Derry/Londonderry, Coleraine, Dungannon
Matrimonial: Divorce and Ancillary Relief	High Court – Royal Courts of Justice County Court Laganside	High Court – Royal Courts of Justice County Court Laganside
Civil Bills	County Court Laganside	County Court Laganside

## Sampling

The qualitative sampling method for recruiting LIPs was purposive, in that it targeted a specific population, that is LIPs, and based upon convenience, in that we recruited those we encountered in court buildings. We situated ourselves so that we would come into contact with LIPs across a variety of business areas. This procedure allowed the research team to review decisions during the data collection phase based on the emerging reality. Representative sampling could not be undertaken as there was and is little pre-existing evidence of the characteristics of the LIP population that should be represented. The initial criteria for inclusion in the sample was simply that a litigant was a LIP, litigating within one of the business areas of interest. It was originally envisaged that the researchers would be able to contact LIPs before their court appearance. However, this was not possible because NICTS could not release personal data about LIPs without breaching its own confidentiality standard; it did not have the permission of the litigants concerned to give out their personal data to a third party. Any breach

of confidentiality was clearly an insurmountable obstacle, but logistically it may also have been difficult to identify LIPs in advance of their hearings, given that so many of those initially registered as ‘unrepresented’ instructed legal representatives by the time of their court hearing. The implication of this was that the researchers could only sample LIPs in the fast-moving court environment. A tally was kept of the number of LIPs per business area to keep abreast of the total number of LIPs per business area. However, more important than the number in any one area was the degree to which ‘conceptual saturation’ had been reached, that is where new data, such as experiences and viewpoints, no longer significantly altered existing conceptualisations (Bryman, 2004). Data from LIPs in Divorce and Debtor’s Petitions proceedings, for example, reached saturation quickly and recruitment from these areas was stopped.

There were 179 individual LIPs in the study sample – see Figure 5 in Chapter 4 for the break-down per business area. There were four instances of a case where both parties were LIPs.

The sample size was originally set at 130 LIPs, but over-sampling occurred in Family Proceedings, Family Care Centre and Domestic Proceedings and Ancillary Relief during the recruitment to the procedural advice clinic – see below.

## Observations and interviews with LIPs

On arrival at the court, the researchers made themselves known to the court staff and took up position in or outside the courtroom identified in the observation schedule. Depending on the nature of the proceedings, the researcher would either enter the court and sit at the back waiting for the LIP appearances or wait to be called by the court officer to enter. The security staff in the court were aware of our presence and often informed us if they had spotted a LIP. When a LIP appeared, the researcher observed the court proceedings and made notes by hand which were typed later.

Once a LIP was identified, the researcher asked him or her to participate in the research study. The researcher explained the purpose of the study and their involvement. They were asked to provide their consent to take part and to complete the initial questionnaire. They were interviewed immediately or a time was arranged at their convenience to conduct the interview over the phone.

There were some days when no LIPs appeared or agreed to take part. The posters and word of mouth resulted in some LIPs contacting the study team directly.

## Interviews with court actors

Legal representatives practising in a variety of business areas were asked to give their views and experience of LIPs. Similarly, appointments were made with members of the judiciary, court staff and McKenzie Friends from a variety of business areas. All participants gave their consent before proceeding with the interview. The study included 59 court actors: members of the judiciary from a variety of tiers: District, Magistrates’, County, High Courts; legal representatives, barristers and solicitors; members of NICTS; Children’s Court Officers from a health and social care authority; and people who act as McKenzie Friends. The five CCOs were interviewed together, as were two groups of solicitors, making the number of interviews with court actors 51. Figure 6 in Chapter 4 shows the break-down of the study sample.

## Transcription

All interviews were transcribed by a professional transcription service operating under strict confidentiality. The transcribed interviews were returned as encrypted files.

## NICTS management information data

NICTS made available court participant data from 2012-2016 and part of 2017 extracted from the court's data management system – ICOS, Integrated Court Operating System. The Excel files contained no personal information about participants only selected fields: issuing or responding party status, business area and case type, application and disposal dates, court office and personal litigant status.

## Court file review

Towards the end of the data collection phase, NICTS staff made available some court files. The aim was to understand the paperwork routinely collated for each business area and to assess whether there was anything we were overlooking. The team looked at about a dozen of the sampled LIPs' court files. We determined the contents of the court files would not add anything to the data already collected.

## Other people who contacted the study

We were contacted by several people who did not become part of the study sample. People who were aware of the study and were in proceedings against a LIP contacted us to offer their insights on the difficulties they were experiencing. Others who had been involved in protracted and difficult cases in the past contacted us to share their experiences. The researchers paid close attention to these callers because it was evident they were experiencing frustration and hurt. However, they were beyond the remit of the sampling criteria and any data they contributed were not included. It suggested to the researchers the need for pastoral support beyond what is currently available.

## Procedural clinic and data collection phase

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During the first phase of data collection, it was decided that the procedural advice clinic would be for family cases (Family Proceedings, Family Care Centre and Domestic Proceedings, Family Homes and Domestic Violence) and Ancillary Relief cases only. The reasons were because these were the most prolific business areas with LIPs and the findings would concentrate on a limited number of business areas rather than yield patchy results across several. Additionally, these were also areas that were commonly dealt with by generalist legal practitioners and so potentially presented fewer procedural or legal complexities than areas such as insolvency law, which generalist practitioners tend not to advise on. The opportunity to export learning from these areas in comparison to others was therefore regarded as higher.

Sampling for the clinic started in earnest in January 2017. Family and Ancillary Relief LIPs became the priority. LIPs who were recruited to the study in these business areas between January to July 2017 were invited to attend the clinic for procedural support. LIPs could only be referred to the clinic when all data elements had been collected from them. In all, 56 LIPs were invited to attend, but only 25 attended. They were given the clinic's freephone number to call to make an appointment with the clinic adviser who was based at NIHRRC. The clinic adviser advised them of the process and sought their consent. The adviser then conducted triage which involved finding out about the LIPs' case and informational needs. The LIP could attend the clinic three times for up to 45 minutes for each session. The clinic adviser wrote up a clinic record per session. The clinic LIPs were observed again. At the end of the data collection period or at the end of their proceedings, whichever was sooner, the clinic LIP was interviewed again about their experience and views of the clinic. They were asked to complete the second questionnaire.

It was difficult to recruit LIPs to the clinic. Many LIPs were not interested in attending or were close to the end of their proceedings. The deficit in the sample required the team to re-double its efforts to identify likely clinic participants. In all, 25 Clinic LIPs (CLIPs) were in the sample: 20 from family cases, five from Ancillary Relief. However, the eventual sample over all was dominated by LIPs from family cases. There were 20 LIPs who were observed, interviewed and completed the initial questionnaire who said that they were interested in the clinic but then did not take it up. We followed them up to find out why and they gave various reasons: accepted for legal aid; LIP felt comfortable acting alone; felt the advice would not make any difference to the case outcome; language may have been a barrier for one LIP who lost contact with the project; in several cases, we simply could not find out the reason.

The difficulty to sample for the clinic proved to be a limitation to the study. With only 25 CLIPs from whom we obtained 16 secondary questionnaires (see Table 1 below), we did not have sufficient data to conduct some of the anticipated analysis – this point is discussed further below.

## Analysis phase

### Data elements collected

Each of the 179 LIPs contributed at least one of the three main data elements – observation, interview, questionnaire. The LIPs who attended the clinic contributed additional data elements.

**Table 1:** The number of data elements contributed by LIPs and clinic LIPs per business area

Business area	Interviews	Observations	Questionnaires: Initial and Clinic	
Ancillary Relief	25	41	Initial	21
Divorce	11	11		10
Debtor's Petitions	6	8		7
Creditor's Petitions	20	28		20
Family: Family Proceedings, Family Care Centre and Domestic Proceedings	60	122		55
Family Homes and Domestic Violence	8	15		6
Civil Bills	2	3		3
Other areas	4	5		1
CLIP Ancillary Relief	7	9	Clinic	2
CLIP Domestic	3	3		3
CLIP Family Proceedings and Family Care Centre	17	30		11
Total	163	275	Initial	123
			Clinic	16

In addition to the 163 LIP and CLIP interviews, another 51 interviews were provided by the other court actors – See Chapter 3. The adviser at the procedural advice clinic contributed a further interview and completed 49 written records on advice given which were incorporated as research data. In all, there were 539 items of qualitative data. The quantitative data were contained in 123 initial questionnaires, 16 post-clinic questionnaires and the six years of NICTS participant data.

Other data were collected which were not included in the analysis. There were an additional 38 courtroom observations of LIPs who were either absent from their proceedings or refused to take part. The project was contacted by a further 18 people who had completed or were mid-way through court proceedings, but whose circumstances did not meet the criteria to participate in the study. A number of the individuals were in great distress and were looking for support. We were also contacted by an individual who was in proceedings against a LIP who want to share the experience and frustration.

### **Data entry and cleaning**

The responses to the two questionnaires were keyed into Excel spreadsheets. The number of responses per item are given in Appendix 7a for the initial questionnaire and Appendix 7b for the post-clinic questionnaire. Responses which did not fit the parameters of the item responses were checked for accuracy. GHQ-12 items were rescored to a binary score where 0 was assigned to responses of 'not at all' or 'same as usual' (i.e. 1 or 2 on the original questionnaire) and 1 was assigned to responses of 'more than usual' or 'much more than usual' (i.e. 3 or 4). A total GHQ-12 score was calculated.

### **Qualitative data analysis**

Interview transcriptions, observations and clinic records, a total of 539 separate items, were uploaded into NVivo for Windows 11 (QSR International). All data items related to individuals (or individuals in the same proceedings) were arranged as cases, resulting in 227 cases.

The data analysis then took a two-tier approach. The first tier was the descriptive, content analysis. The first step in this tier of the analysis was an inter-rater reliability exercise to review the four analysts' approaches to coding: amount of text per code, level of detail, level of abstraction between description to interpretation. All analysts coded the same four items of qualitative data. Differences in approach were found and a common approach was agreed. A common coding framework was used which was regularly expanded and discussed. Then each member of the research team was assigned a quota of cases to analyse, taking each case in turn and reviewing all items within it. The descriptive codes were created and applied to sentences and paragraphs of items. Given the wide variety of participants, business areas and individual experiences, the eventual final coding framework was very large. It contained 1,113 separate codes organised under 20 separate headings.

The second tier was the inductive, thematic analysis directed at answering the research questions. Each team member was assigned separate research questions. They then drilled into the codes related to the research questions to consolidate and identify themes within them. This phase of the analysis provided the study's results.

### **Quantitative data analysis**

#### ***Questionnaires***

Descriptive statistics, frequencies and percentages, for the items of the questionnaires were obtained using SPSS. Questions in the questionnaires used a five-point Likert scale running from negative to positive. The middle point responses were interpreted as or 'neither easy or difficult' etc. This was understood to mean that the participants were not able to overtly state a positive or negative response.

#### ***Clinic data***

The intention to measure a treatment effect from the clinic data was hampered by the small number of responses to the secondary questionnaire. The use of the difference-in-difference method was not possible with the limited data.

### **NICTS data**

Using PIVOT tables in Excel, the management information data were re-composed to show the number of participants disaggregated by business area, personal litigant status, sex and applicant status.

### **Case studies**

The final analytical step was the development of case studies by triangulating all data sources for each LIP. This was done during the qualitative analysis stages. Commentaries on each LIP were written using memos in NVivo. Four were selected on the basis of how indicative they were of the findings. They were written up for presentation in Chapter 11.

## **Validation of findings**

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Validation exercises were conducted to establish the interpretive validity of the findings, that is the extent to which the findings accurately reflect the research participants' viewpoints and experience (Maxwell, 1992).

The initial draft of findings was given to the members of the Advisory Board for their views on how well it covered the situation of LIPs in Northern Ireland. Commentary was provided to the research team.

The chapter summaries of the findings were sent to 24 LIPs who had expressed interest in being consulted further about the study. They were asked to read the summary and reply to the questions: 'Does the summary accurately reflect your own experience of self-representing? If not, why not?' Five LIPs returned responses. All five reported the summary was an accurate representation of their experience, and then went on to comment on how the summary resonated with their particular cases:

"Certainly from my experiences your report is accurate. My thoughts and feelings of everything from preparing and how then the clinic helped me, to the attitude of the judge and other legal representatives has all been covered very well." (FP29)

"I feel your draft findings are generally accurate and representative of the situation." (FP08)

Some of the participants also elaborated on specific points in their cases not included in the summary which we might wish to expand upon or consider more deeply. Both elements of validation fed into our final draft of the report.

## **Methodological limitations**

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### **Sampling and estimating the number of LIPs**

In many jurisdictions, courts have not established effective ways to identify LIPs in their case management systems, and representational status is not necessarily static, making it difficult to gain access to the total number of LIPs in the system at any one point in time (Hannaford-Agor and Mott, 2003). However, these difficulties were not anticipated to have resulted in any particular biases with respect to sampling. In court, we met litigants who had been listed as a LIP but were unexpectedly represented and also litigants listed as represented but actually acting alone.

The method of sampling required us to approach LIPs who were listed for a court appearance. The invitation to take part was turned down on numerous occasions. There are two implications of this. The first is that the



sample may be biased towards people who were comfortable to take part in research or had something to say, and did not reach people who were reticent to participate. This was particularly noticeable in people who were not native speakers of English: at least five such individuals refused to take part. It is possible that the findings are not reflective of aspects of the LIP experience that may be specific to people who refused to take part. The second is that the hit and miss response to the invitation resulted in feast or famine recruitment outcomes. On feast days, which were not regarded as a limitation to the sampling method, the researchers may have been following one LIP only to miss another LIP as they went into court. Famine days were those when no LIPs on the list appeared or the LIPs who were present all refused to take part. We could not see any way round this waste of time and resources, and factored in extra days to recruit participants.

With regard to the clinic data in particular, the unanticipated difficulties in recruiting LIPs to the clinic resulted in too few responses to the second questionnaire for meaningful statistical analysis. The difference-in-difference method had been anticipated but was not possible to conduct. The low recruitment to the clinic revealed a finding in itself, underlining the diversity of needs and preferences among our LIP sample with respect to support and assistance.

## Qualitative

### ***Observer effect***

On a number of occasions, we were told that court proceedings when we were in attendance differed greatly to when we were not, implying reactivity between proceedings and observer presence. These reports came from G4S staff, legal representatives and LIPs. The suggestion was that the judiciary were aware they were being observed and consequently gave less attention or time to LIPs or were dismissive of the LIP when we were not in court. Obviously, we were unable to verify this suggestion ourselves. Mitigating against a possible observer effect was the large number of observations conducted, over a 12 month period, and the wide range of attitudes towards LIPs from the judiciary observed. This provided us an indication of the range of receptions that LIPs may experience, from welcoming to hostile.

## Quantitative

### ***Measuring participative experiences***

The original proposal stated the intention to measure and compare the participative experiences of LIPs attending and not attending the clinic. This was prevented by two limitations to the methods. Firstly, not enough LIPs were recruited to the clinic to make any meaningful statistical comparisons. Instead, the qualitative data from CLIPs were the primary source to inform on the participative outcomes which allowed us to detail why the clinic was very effective for some CLIPs but not for others (as reported in Chapter 10). Secondly, the initial questionnaire was developed to yield a measurement of participative experience. This was a first attempt at such a tool, and its potential has not been fully explored in the analysis offered here due to time restrictions.

### ***Limitations of self-reported questionnaires***

With regard to the nature of data we collected, a significant component of the research was the use of questionnaires and interviews to examine the self-reported knowledge and experience of LIP. This type of instrument is not without limitations, as Denvir, Balmer and Pleasence (2013) have outlined in the context of legal needs surveys. Self-reported knowledge of legal rights is a problematic where it is devoid of any validation of the accuracy of the stated knowledge by research participants. Denvir *et al.* (2013) illustrated how there is

a common tendency for survey participants to claim that they understand their rights, but struggle to articulate them when faced with open-ended questioning. In this study, there might be a parallel liability in terms of LIPs' self-reports of not only their knowledge of the law and procedure, but of how effectively they performed in court, or participated in proceedings generally as examined in questionnaire items. Arguably there could be a blind-spot with regard to situations where LIPs do not know that they are mistaken or perhaps unaware of their rights. Yet, again, we should have been able to ascertain whether such situations occurred through observation of LIPs' in court. We further mitigated these potential liabilities by probing LIP understandings and viewpoints during open-ended questioning in semi-structured interviews, which were often able to refer to observational data capturing how LIPs actually performed in court. We could ask LIPs to elaborate upon what made them think that a hearing had gone well or that a judge had listened to them.

### ***The administration of GHQ-12***

The use of the GHQ-12 and the scores of participants bears some reflection. The inventory tends to identify 'state anxiety' rather than 'trait anxiety', which suggests there could be some difference in results dependent on the exact timing of administration of the questionnaire (James, Yates and Ferguson, 2013). Repeated administration of the questionnaire at different times during the civil proceedings would be recommended to clarify this temporal aspect of the data. The study did not collect sufficient data to draw conclusions from the GHQ-12 scores on whether legal area, type of hearing, timing of GHQ-12 administration and motivation for self-representing have an influence on GHQ-12 score. More research on the potential of the GHQ-12 score for people involved in litigation is recommended.

# Chapter 3 - Prevalence of LIPs in Northern Ireland

“Probably been a slight increase since, inside the last couple of years maybe, but it ebbs and flows.” (Ju04)

## Summary

The NICTS data on which our assessment of the LIP population is based relate to the number of cases disposed within any one year, in which the litigant was recorded as ‘unrepresented’ at the time the case was disposed. On these data, the number of litigants in the Northern Ireland court service has decreased from 2012 to 2016, and the number of LIPs has also decreased, but the proportion of LIPs (excluding those in Small Claims) has remained constant, representing approximately 5% of the litigant population, which is approximately 4,600 LIPs on average, from a total litigant population of approximately 84,500 per year.

The volume of participants without representation varies in each business area year on year. Adoption, Divorce (County Court) and Probate are the only areas which indicate an upward trend in numbers of LIPs, while all other areas are steady, fluctuating or indicate a downward trend.

There were more male LIP participants whose cases were disposed of than female LIPs. The proportion of male LIPs was around three-fifths of all LIPs across all business areas.

The perception of most court actors was that the LIP population was increasing. It is possible that there are more ‘live’ LIP participants in the system which would support the impressionistic view of the other court actors. Also, their period of recollection may extend past the available data to a time when there were fewer LIPs.

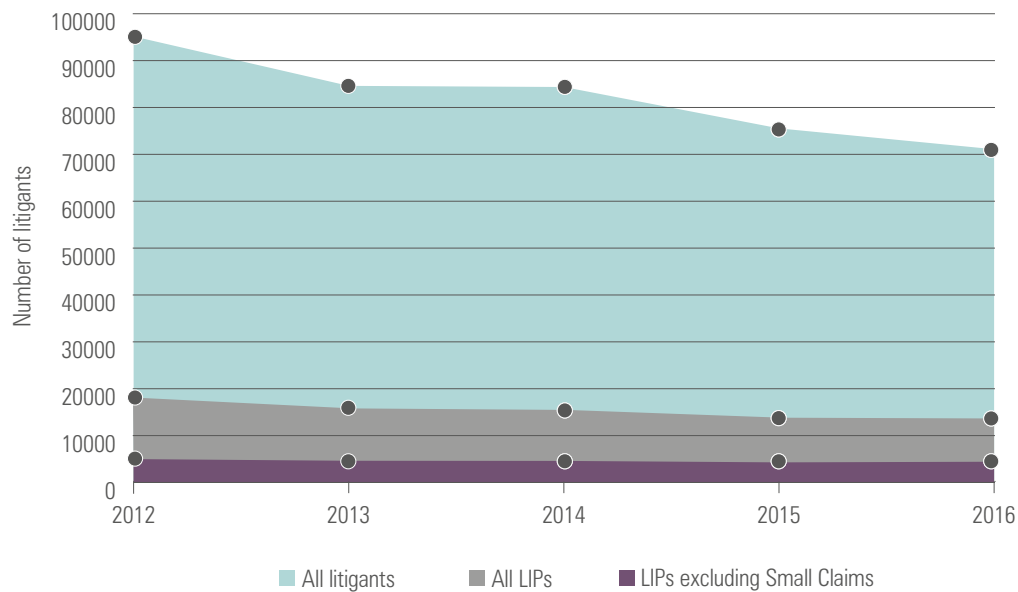
## Prevalence of LIPs in civil and family proceedings from 2012 to 2017

Data relating to participants in civil and family cases dealt with during six calendar years, 2012 to 2017, were extracted from NICTS’s Management Information System and made available to the study. It is important to note that the data reflect information used for management purposes and may differ to the annual statistics published by NICTS.

The data contain all participants who were involved in proceedings which were disposed of in the six years. Reported here is the number of litigants whose cases concluded in the given year. The data are not the number of cases, but the number of individuals. The data include a field to indicate whether individual participants in court proceedings had a LIP status at the time of disposal. There is no field in the data management system to indicate whether LIP status changed at any point during proceedings. The key limitations of the data are therefore that it does not indicate those litigants who were unrepresented prior to the disposal of their case, who were represented by the time the case was disposed even though they may have been unrepresented prior to this point, or the number of LIPs involved in cases that have not yet been disposed and who remain within the system.

The total number of people involved in court proceedings decreased annually from 2012 to 2016 and the number of LIPs followed suit. Figure 1 shows the total number of participants and LIPs whose cases were dealt with in the years 2012 to 2016.

**Figure 1:** The number of all litigants, all LIPs and LIPs excluding Small Claims<sup>17</sup> taking part in civil and family proceedings whose cases were dealt with in years 2012-2016



The number and proportion of LIPs out of the total number of participants are given for all six years in Table 2. The number of all LIPs decreased in volume over the years, but the proportion of LIPs of all participants remained steady from 2012 to 2017 at around 20%. However, the proportion of LIPs of all participants reduces markedly when Small Claims participants are not included. When Small Claims LIPs are removed from the total number of participants, the proportion of LIPs of all participants was around 5% to 2016. The number of LIPs, not including Small Claims, has remained relatively constant from 2012 – at its peak, in 2012, there were 4,984 participants whose cases were disposed, reducing to 4,421 in 2016 (the last complete year for which figures are available), a difference of 563. In percentage terms, litigants who were unrepresented at disposal has risen from 5.26% to 5.88% (Table 2).

**Table 2:** Number of participants taking part in all civil and family proceedings disposed of in years 2012 to 2016 and part year 2017 with number and proportion of LIPs (including and excluding Small Claims)

Year	All participants	Number and % of all LIPs		Number of Small Claims participants	Number of Small Claims LIPs	Number of LIPs (excluding Small Claims) & as a % of all participants	
2012	94802	19067	20.11	21282	14083	4984	5.26
2013	86577	17100	19.75	19176	12472	4628	5.35
2014	86661	16806	19.39	18143	12209	4597	5.30
2015	79489	15458	19.45	16996	11170	4288	5.39
2016	75202	15163	20.16	14813	10742	4421	5.88
2017*	39097	7659	19.59	8364	5715	1944	4.97

\*January to June 2017 only

<sup>17</sup> The business area of Small Claims has been adapted to encourage litigants to proceed unrepresented.

The prevalence of LIPs varied across the business areas. Table 3 contains the proportions of participants who were indicated as a LIP at the time of disposal and the total number of participants for all civil and family business areas. For example, roughly two-thirds of all Small Claims participants were LIPs, while no more than 1.5% of participants were LIPs in Chancery proceedings in any of the years shown. Appendices 5a and 5b contain the numbers of LIPs and represented litigants respectively per business area for the six years.

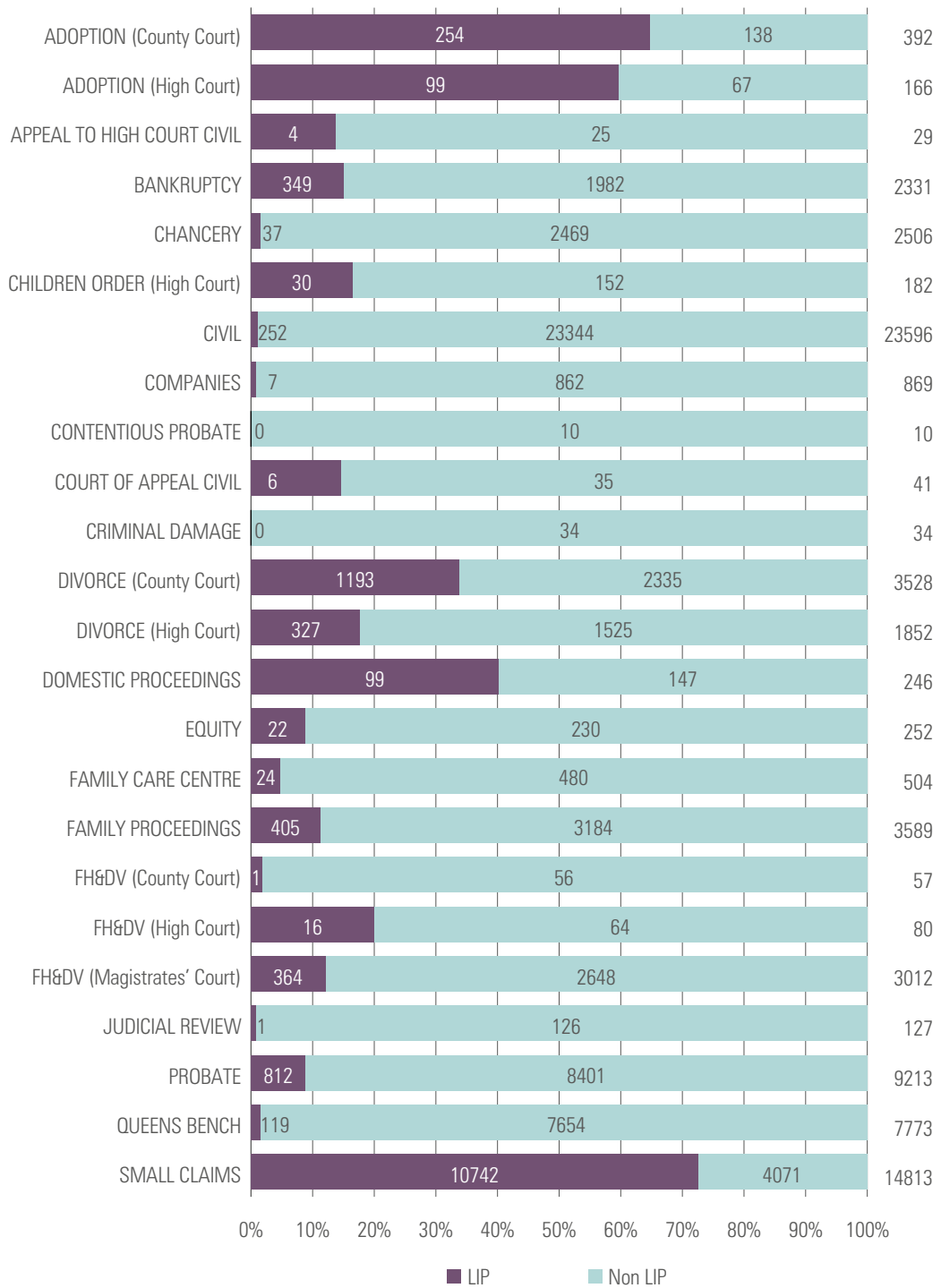
**Table 3:** Percentage of participants who were LIPs of the total number of participants in all civil and family business areas from 2012 to 2016 and part of 2017

	2012	2013	2014	2015	2016	2017*
	% of LIP participants at disposal Number of all Participants					
ADOPTION (County Court)	52.5% 223	45.3% 245	72.4% 203	44.8% 337	64.8% 392	35.6% 104
ADOPTION (High Court)	50.0% 200	55.7% 203	58.2% 122	59.3% 140	59.6% 166	57.1% 56
APPEAL TO HIGH COURT CIVIL	8.5% 47	0% 21	6.3% 16	8.3% 12	13.8% 29	0% 4
BANKRUPTCY	19.3% 3495	22.0% 3176	22.2% 2935	20.6% 2444	15.0% 2331	12.5% 1019
CHANCERY	0.8% 8181	1.0% 6793	1.0% 5436	1.4% 3540	1.5% 2506	0.7% 1286
CHILDREN ORDER (High Court)	20.8% 207	18.6% 167	20.3% 138	20.0% 150	16.5% 182	21.4% 103
CIVIL	1.8% 25349	1.7% 22509	1.4% 23776	0.9% 23575	1.1% 23596	1.1% 13575
COMPANIES	0.9% 1161	1.1% 1034	0.8% 960	0.6% 869	0.8% 869	0% 470
CONTENTIOUS PROBATE	0% 6	0% 4	0% 12	0% 2	0% 10	-
COURT OF APPEAL CIVIL	29.8% 47	18.2% 66	7.3% 82	20.8% 24	14.6% 41	40.0% 15
CRIMINAL DAMAGE	4.3% 46	11.8% 17	2.4% 41	5.3% 38	0% 34	0% 12
DIVORCE (County Court)	31.8% 2844	32.8% 2870	33.9% 2808	35.1% 3004	33.8% 3528	34.0% 1310

	2012	2013	2014	2015	2016	2017*
	% of LIP participants at disposal Number of all Participants					
DIVORCE (High Court)	19.4% 2342	17.5% 2108	18.8% 2348	17.2% 1908	17.7% 1852	16.2% 868
DOMESTIC PROCEEDINGS	37.6% 585	41.1% 496	48.6% 389	50.8% 329	40.2% 246	45.2% 115
EQUITY	1.3% 466	1.7% 300	1.2% 258	2.9% 276	8.7% 252	2.4% 212
FAMILY CARE CENTRE	6.0% 499	5.1% 428	9.7% 381	3.7% 493	4.8% 504	6.2% 226
FAMILY PROCEEDINGS	9.2% 4338	9.1% 4113	9.3% 4515	11.6% 3758	11.3% 3589	11.8% 1801
Family Homes and Domestic Violence (County Court)	1.4% 72	3.0% 67	9.6% 52	2.1% 48	1.8% 57	0% 26
Family Homes and Domestic Violence (High Court)	19.4% 72	22.2% 63	20.3% 69	10.2% 59	20.0% 80	21.9% 32
Family Homes and Domestic Violence (Magistrates' Court)	12.5% 3794	11.9% 3536	11.1% 3530	11.0% 3043	12.1% 3012	13.8% 1560
JUDICIAL REVIEW	2.1% 146	0% 186	2.8% 145	0.9% 112	0.8% 127	2.3% 88
PROBATE	7.6% 8655	7.8% 9212	8.4% 8370	9.0% 8994	8.8% 9213	8.9% 4746
QUEENS BENCH	3.3% 10745	1.2% 9787	1.1% 11932	1.0% 9338	1.5% 7773	1.7% 3105
SMALL CLAIMS	66.2% 21282	65.0% 19176	67.3% 18143	65.7% 16996	72.5% 14813	68.3% 8364

\*January to June 2017 only

The distribution of LIPs across the different business areas is not homogenous, with some areas having a very low proportion of LIPs out of all participants. Figure 2 below gives an indication of the variation in proportion of LIPs per business area for 2016 data only. Table 3 and Figure 2 only report the business areas and not the type of application within each business area, which also vary with respect to the prevalence of LIPs. Appendix 6 contains a description of the prevalence of LIPs per business area with commentary on the numbers per application type where appropriate.

**Figure 2:** The proportion of LIPs per business area in 2016. (Data labels show number of litigants)

## Volume of LIPs

The highest volume of all participants in any one year was in Civil proceedings (see Table 3), while the highest volume of LIPs was in the Small Claims Court – see Table 4. The Small Claims proceedings have been adapted to support and encourage litigants to act without representation, and the high proportion of LIPs suggests the adaptations have been successful. Small Claims did not form part of the current study because of these adaptations.

When Small Claims LIPs are excluded, the volume of LIPs in any of the years presented was less than 5,000. The enumerated LIPs here are only those whose cases were disposed of and it is possible there are more LIPs in the system. These 'live' data are not presented here.

**Table 4:** Volume of LIPs in all civil and family business areas from 2012 to 2016 and part of 2017

	2012	2013	2014	2015	2016	2017*
ADOPTION (County Court)	117	111	147	151	254	37
ADOPTION (High Court)	100	113	71	83	99	32
APPEAL TO HIGH COURT CIVIL	4		1	1	4	
BANKRUPTCY	676	698	653	503	349	127
CHANCERY	62	71	54	49	37	9
CHILDREN ORDER (High Court)	43	31	28	30	30	22
CIVIL	444	393	335	207	252	143
COMPANIES	10	11	8	5	7	
CONTENTIOUS PROBATE						
COURT OF APPEAL CIVIL	14	12	6	5	6	6
CRIMINAL DAMAGE	2	2	1	2		
DIVORCE (County Court)	905	941	953	1053	1193	445
DIVORCE (High Court)	454	369	441	328	327	141
DOMESTIC PROCEEDINGS	220	204	189	167	99	52
EQUITY	6	5	3	8	22	5
FAMILY CARE CENTRE	30	22	37	18	24	14
FAMILY PROCEEDINGS	401	375	421	436	405	213
FH&DV (County Court)	1	2	5	1	1	
FH&DV (High Court)	14	14	14	6	16	7
FH&DV (Magistrates' Court)	473	421	392	334	364	215
JUDICIAL REVIEW	3		4	1	1	2
PROBATE	654	720	703	810	812	422
QUEENS BENCH	351	113	131	90	119	52
SMALL CLAIMS	14083	12472	12209	11170	10742	5715
Total	19067	17100	16806	15458	15163	7659
Total without Small Claims	4984	4628	4597	4288	4421	1944

\* January to June 2017 only



The volume of participants without representation varies in each business area year on year (see Table 4). Adoption, Divorce (County Court) and Probate are the only areas which indicate an upward trend in numbers of LIPs, while all other areas are steady, fluctuating or indicate a downward trend.

### Sex and status of LIPs

In all of the six years of NICTS data presented here, there were more male LIP participants whose cases were disposed of than female LIPs – see Figure 3. The proportion of male LIPs was around three-fifths of all LIPs across all business areas.

Looking again at LIPs only, there were slightly more LIPs who were a responding party than those who issued proceedings in the six years – see Figure 4. Again, it needs to be emphasised that these figures correspond to individual litigants, not cases, and so do not show whether a LIP responding party was responding to a represented or unrepresented applicant.

The sex and applicant status proportions reported here are aggregate figures across the separate business areas (excluding Small Claims). Any differences between the business areas are masked. Given the specialised nature of litigation in which each business area is governed by different procedures and law, a description of the number of LIPs per business area is presented in Appendix 6. Appendix 5a gives a fuller account of the number of LIPs per business area disaggregated by application status and sex and Appendix 5b gives a fuller account of the number of represented litigants per business area disaggregated by application status and sex.

### Research participants' views on the volume of LIPs

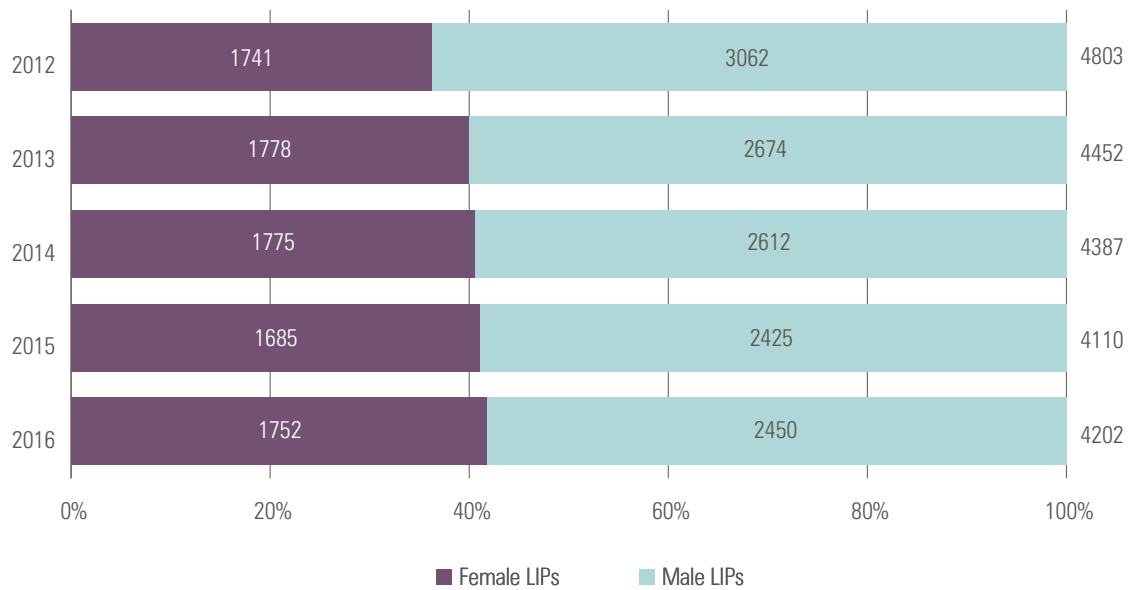
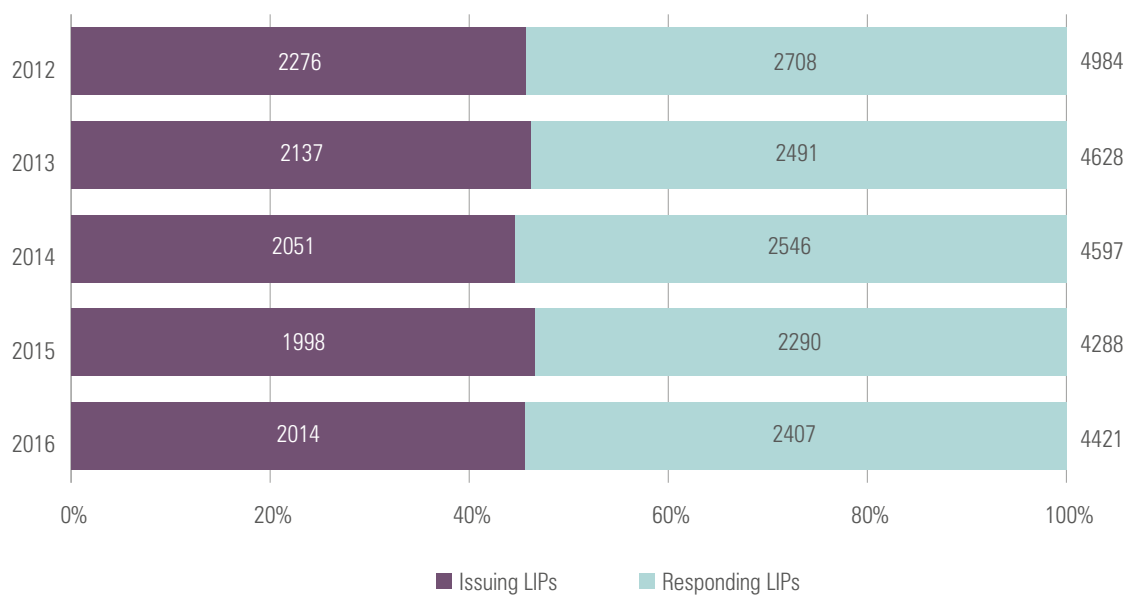
The enumerated volume of LIPs dealt with in the past six years is not consistent with the impression of the number of LIPs in the system reported by the study's participants from the legal profession and court service. Almost all of these participants reported that their impression of the number of LIPs was that it has been increasing over the last few years. Many were quick to add that they did not have statistics available and that this was only their impression. It should be pointed out that the volume of LIPs reported in Table 4 is only of LIPs dealt with within that year. It is possible that there are many more LIP participants in the system which would support the impressionistic view of the court actors. Also, many of the participants were taking a longer view than the six years presented here, thinking back to earlier on their careers. For example, the recession is cited as a cause for the increase in LIPs which was well before the period covered in Tables 2-4. There follow some impressions from court actors:

"we're not flooded, or inundated, with them at all, but there are definitely more." (Ju02)

"I would say gradually, but when I think about when I really started to see them, I have probably seen more of them over the past five years. Prior to that, there would have been the odd one." (LR12)

"Well, there just is more, by, just people coming in, especially for divorces. There's more, there seems to be more unrepresented divorces. We seem to be getting more queries. Just over my twenty or so years of experience in courts, it's just getting more people." (CS01)

"Well, in the [business area], we've a large number of personal litigants so I think most days I have a personal litigant, at least one, usually more than one. Now, that's for review hearing and then in terms of hearings, it's hard to judge and I haven't got the proper stats, but I think it could be upwards of 50% of the cases that run involve personal litigants." (Ju07)

**Figure 3:** LIPs only – the number and percentage of male and female LIPs in years 2012-2016**Figure 4:** LIPs only – the number and percentage of LIPs who were issuing and responding to proceedings from 2012 – 2016

“Since the recession, it’s got to be much more marked. I have never come across personal litigants in this court until really you were at the height of the recession, with negative equity on properties, and no money to buy out equity. And then you would have people representing themselves.” (LR15)

Some of these participants had impressions consistent with the data presented above:

“I’m wondering has there been an increase. Probably been a slight increase since, inside the last couple of years maybe, but it ebbs and flows.” (Ju04)

The perception that there are more LIPs now than before may have arisen because of the attention LIPs are receiving both in the recently concluded Review of Civil and Family Justice in Northern Ireland (OLCJ, 2017a & b) and the present study. A further possible explanation of the perception is that dealing with LIPs is more memorable for these court actors.

Less than 5,000 LIPs in any one year may appear to be too small a number to warrant attention or adaptations to the system. However, the qualitative research findings indicate that the experience of self-representation for LIPs (see Chapters 7, 8 and 9) is diverse and often problematic.



# Chapter 4 - Characteristics of the study sample

“There’s very different types of people out there”. (CS01)

## Summary

179 LIPs contributed data to the study: 49 women, 126 men; and counted as one LIP each, 3 couples and 1 group.

25 LIPs attended a procedural advice clinic established as an experimental part of the study: 9 women and 16 men.

59 court actors contributed data to the study:

13 members of the judiciary (from District, Magistrates’, County, High Courts);

27 legal representatives (barristers and solicitors)

11 members of NICTS

Five Children’s Court Officers

Three people who act as McKenzie Friends.

## The study sample

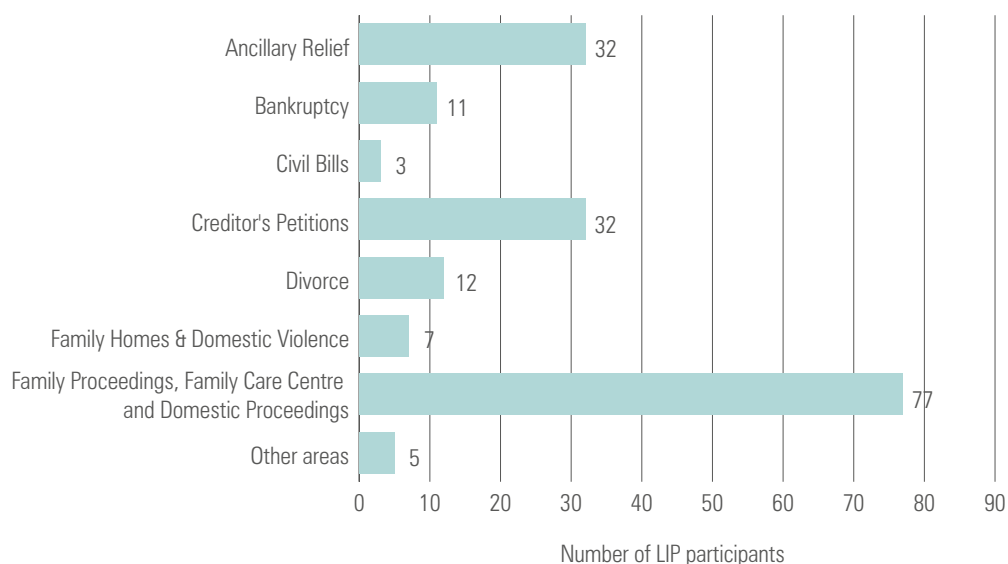
From September 2016 to August 2017, data from participants in the research study were collected in civil and family courts in Northern Ireland. The participants include litigants in person, legal professionals, the judiciary, court staff and McKenzie Friends.

The court houses from where data were collected are: Royal Courts of Justice (RCJ) in Belfast, Laganside, Newtownards, Lisburn, Newry, Derry/Londonderry, Coleraine and Dungannon.

## LIPs

There are 179 individual LIPs in the study sample. It includes LIPs who attended the clinic. Figure 5 below sets out the business areas in which the LIPs were involved. It is inclusive of the LIPs who went on to participate in the procedural advice clinic.

**Figure 5:** The number of LIPs in the sample per business area



The sample is dominated by LIPs in Family Proceedings, Family Care Centre and Domestic Proceedings. As discussed earlier in Chapter 2, over-sampling occurred in these areas during the data collection phase in which LIPs were recruited to the procedural advice clinic, and when more attention was paid to the business areas selected for the clinic, namely family cases and Ancillary Relief. LIPs could only be referred to the clinic when all data elements had been collected from them. In all, 56 LIPs were invited to attend, but only 25 attended.

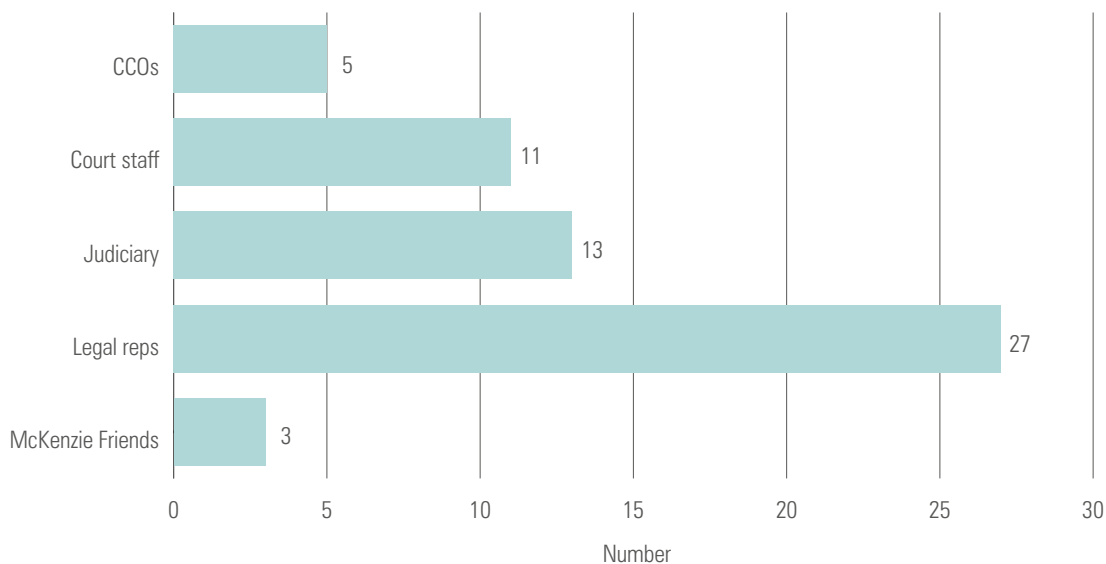
### LIPs who attended the procedural advice clinic

From January 2017, litigants in person in the Ancillary Relief, family and domestic courts were invited to a procedural advice clinic at the NIHR. They are referred to as Clinic LIPs (CLIPs). In all, 25 CLIPs are in the sample: 17 from Family Proceedings and Family Care Centre, five from Ancillary Relief and three from Domestic Proceedings. See Chapter 10 for more details.

### Court actors

In addition to litigants in person, the study included 59 court actors. We interviewed members of the judiciary from a variety of tiers: District, Magistrates', County, High Courts; legal representatives, barristers and solicitors; members of NICTS; Children's Court Officers from a health and social care authority; and people who act as McKenzie Friends. Figure 6 shows the number of each group interviewed for the study.

**Figure 6:** Court actors interviewed for the study



## Demographic background of the LIP questionnaire sample

The initial questionnaire contained 13 questions on the demographic background of the participant. Of the 179 LIPs in the sample, 123 completed the initial questionnaire. The following sections summarise the responses and the demographic details of the questionnaire sample are presented in Table 5 below.

**Gender**

There were more male participants to the questionnaire than female, with 90 men and 33 women. Almost three-quarters (73.2%) of the sample were men. The NICTS data in Chapter 3 indicated a smaller proportion of male LIPs in the population, closer to three-fifths (ranging between 58.3% and 63.8% across the six years). The difference in the sample may be attributable to the business areas selected for the study or to the readiness of male LIPs to complete the questionnaire or participate in the research.

**Age**

Most of the questionnaire participants were aged between 36 and 45, with 48 of the LIPs in this range. There were very few participants younger than 25 or older than 65.

**Marital status**

There was a preponderance of separated and divorced people in the sample, with 35 and 19 of each constituting 43.9% of the sample. This probably reflects the sample's focus on business areas characteristically involving people going through marital or family break-up.

**Dependents**

Less than half (43.9%) of the participants had children under the age of 18 living with them, and 39.4% had children under 18 living elsewhere. Again, this reflects the business areas selected for the sample. Almost a quarter (22.8%) of the participants said they had other family who depended on them.

**Ethnicity**

All of the LIPs who completed the questionnaire described themselves as White apart from two Black Africans and one Roma. There were 11 LIPs in the whole sample who were not native English language speakers: six Eastern European, two Asians, two Africans and one other European. A number of non-native English-speaking LIPs who were observed in court refused to be involved in the study.

**Disability**

Only seven of the questionnaire sample stated they were registered as disabled, and the rest stated they were not.

**Accommodation**

There were nearly as many LIPs buying their home as renting it, with 42.3% of the sample buying and a further 12.2% having bought it outright. Of the 49 LIPs in rented accommodation, almost half (49%) of them were renting from a private landlord and a further 24.5% renting from the NI Housing Executive.

**Home location**

The sample is dominated by city or town dwellers, making up three-quarters of the sample. Only 18 lived in a rural area and even fewer, 13, lived in a village. This is probably reflective of the choice of courts for data gathering, most of which took place in Belfast courts.

***Highest qualification attained***

The LIPs were asked about their educational attainment. Only 13 had left school without any qualifications and a further 33 had left with GCSEs. Almost two-fifths had a degree, and further fifth had completed a diploma or apprenticeship or a professional qualification.

***Employment***

Nearly 85% of the sample were in employment. Only six stated they were unemployed. Ineligibility for means-tested support for legal assistance was cited as a reason for not having a legal representative in Chapter 6, which may explain the high number of people in employment in the LIP sample.

***Religion***

There roughly a third each of Roman Catholics and Protestants in the sample and a further 27.3% who declared they followed no religion. There were three Agnostic LIPs, one Muslim, one Buddhist and three unspecified.

***Political opinion***

Almost two-thirds of the sample (62.6%) did not identify with the two dominant political persuasions of Northern Ireland and instead stated they followed another political belief or none at all. There were roughly similar numbers of Unionists and Nationalists, 20 and 23 respectively. Eight people chose not to answer this question.

***Sexual orientation***

The majority of the sample stated they were heterosexual and only three LIPs declared themselves as lesbian or gay. A further three preferred to not say.



**Table 5:** Characteristics of LIPs scoring greater than or equal to 4 on GHQ-12

	N	%	N	N	%
<b>Gender</b> n= 123			<b>Marital Status</b> n= 123		
Male	90	73.2	Single	32	26.0
Female	33	26.8	Married/civil partner/co-habit	36	29.3
<b>Age Group</b> n= 123			Separated	35	28.5
17-25	4	3.3	Divorced	19	15.4
26-35	20	16.3	Widowed	1	0.8
36-45	48	39.0	<b>Dependents</b>	Yes/No	Yes
46-55	35	28.5	Children living with LIP	54/69	43.9
56-65	14	11.4	Children living elsewhere	46/77	37.4
> 66	2	1.6	Family who depend on LIP	28/95	22.8
<b>Employment Status</b> n= 123			<b>Accommodation</b> n = 123		
Unemployed	6	4.9	Own it outright	15	12.2
Employed/Self employed	104	84.6	Buying it	52	42.3
Full time study	0	0	Part rent & part mortgage	2	1.6
Off work	1	0.8	Renting	49	39.8
Registered as unable to work	2	1.6	<i>NI Housing Executive</i>	12	24.5
Looking after family home	2	1.6	<i>Housing Association</i>	5	10.2
Full time carer	3	2.4	<i>Private</i>	24	49.0
Retired	5	4.0	<i>Relative/friend/employer</i>	8	16.3
<b>Qualifications</b> n= 121			Paying board	2	1.6
No qualifications	13	10.7	Live rent free	3	2.4
GCSEs	33	27.3	<b>Urban/Rural</b> n= 123		
A Levels	5	4.1	Rural area	18	14.6
Professional qualification	22	18.2	Village	13	10.6
Degree	48	39.7	Town or city	92	74.6
<b>Disability</b> n= 123			<b>Political Opinion</b> n= 115		
Has Disability	7	5.7	Unionist	20	17.4
No disability	116	94.3	Nationalist	23	20.0
<b>Religion</b> n= 121			Other	58	50.3
Roman Catholic	38	31.4	None	14	12.2
Protestant	42	34.7	<b>Sexual orientation</b> n = 120		
None	33	27.3	Heterosexual	114	92.7
Other	8	6.6	Gay/Lesbian	3	2.4
			Rather not say	3	2.4



# Chapter 5 - Perspectives: how LIPs are viewed and their views of others

“Just, everything is just ruined by a personal litigant.” (LR13)

“Just because I’m representing myself, does that mean I can be ignored? If I’m not a solicitor, does that mean you don’t have to reply to my email within five days, because I make sure I reply to your email within five days. So, you know, I think that’s, well, I think that’s rude... I think maybe rude, and marginally unprofessional, and disrespectful for people that don’t want to use a solicitor.” (AR06)

## Summary

Considering that LIPs in the court system challenge the court norm of fully represented parties, their presence in court was largely regarded as acceptable but problematic by LIPs, judges, legal representatives and court staff alike. Some court actors expressed strident and often negative views about LIPs, and LIPs similarly expressed negative views of them, particularly of legal representatives. The strength of feeling between the parties suggested a lack of appreciation of the circumstances, role or responsibilities of the ‘other’ which led us to question how hardened attitudes might present a barrier to effective participation.

Levels of frustration amongst court actors appeared to depend on how well a LIP fitted the norm. Given that most LIPs do not fit the norm, and enter into proceedings with scant knowledge of what to do or of the roles and responsibilities of others, it is questionable why a system continues to operate with some of its actors continually being frustrated. Measures to recalibrate the norm or manage expectations may be necessary. Nevertheless, standards of conduct in court proceedings exist and should be respected. A charter or code of conduct could help to inform on the behaviour in court and interactions between parties.

## Introduction

Research studies conducted in other jurisdictions have categorised the LIPs under study in some way. Most describe LIPs according to their demographic backgrounds, such as gender, age, ethnicity, income, either of the sample or the wider LIP population where the data are available (Dewar, Smith and Banks, 2000; Macfarlane, 2013; Toy-Cronin, 2015). We have done the former as presented in Chapter 4. Some studies used or developed typologies of competence, vulnerability and/or performance in their court proceedings (for example, Hunter *et al.*, 2002; Trinder *et al.*, 2014). Within our study, however, a different analytical framework arose while examining the qualitative data. It pertained to LIPs deviating from the court norm of fully represented parties. The presence of a LIP in proceedings was generally regarded as acceptable by LIPs but problematic by legal representatives. Quite strident, and often negative views were expressed by LIPs and legal representatives about each other. The context of the breached norm is key to understanding their views and the views of and about other court actors. LIPs’ views of judges and court staff tended to be more positive, and judges’ views of LIPs tended to be equitable and dispassionate. Court staff expressed frustration with their interactions with some LIPs, but they were generally sympathetic towards them.

The Northern Ireland Civil Justice Review reminds us that the legal system was not designed with LIPs in mind:

The present justice system is premised on most people being legally represented. The combination of complex law, complicated procedures and the adversarial approach of courts and some tribunals means that litigants in person present as much of a challenge to the system as the system does to litigants in person. (Office of the Lord Chief Justice, 2017a, para12.13)

LIPs enter the court system as uninitiated novices. They are permitted entry and receive a limited degree of support to operate without representation, and while court actors may advise on the merits of legal assistance, LIPs are not told they cannot enter. The pressure on the courts to get through the daily list of civil and family cases can dictate an often cursory explanation of the significance of self-representation at best, and rarely is there time in court hearings for a full discussion on the implications of it. There is no requirement for LIPs to follow a 'crash course' on self-representation to explain the basics and it is up to the individual to navigate a path through the proceedings. The seemingly opaque, esoteric procedures and formal roles performed by court actors will be alien and unfamiliar to them. Tactics and treatment familiar to seasoned court users may feel aggressive or nasty to LIPs (Lee and Tkacukova, 2017) and unfamiliarity with standard procedures may leave LIPs feeling that the judge sees them as a nuisance or an irritation (Macfarlane, 2013). LIPs have been found to hold a low opinion of the legal profession (Dewar, Smith and Banks, 2000) and those in contact with opposing counsel reported negative experiences more frequently than those who were not in contact with them (Knowlton *et al.*, 2016). LIPs may not be aware of how ill-fitting of the norm they are or of the barriers they face in attempting to self-represent.

To the court actors versed in court norms, LIPs deviate from the norm and present problems for conducting business as usual. LIPs will be a source of irritation. Judges may experience feelings of frustration, stress and annoyance with the dilemmas of how to proceed and maintain procedural fairness when there is a LIP before them (Dewar, Smith and Banks, 2000). Court users may frame their reactions towards and experience of LIPs in terms of how difficult, vexatious or obsessive LIPs are even though few actually meet this description, and some may associate obsessive behaviour with mental ill-health (Dewar, Smith and Banks, 2000; Moorhead and Sefton, 2005).

Perceptions of bias and unfairness have been reported by LIPs in the close relationship they observed between the judge and legal representative for the opposing party (Knowlton *et al.*, 2016). They reported feeling side-lined or that there was 'an old boy' system. Macfarlane (2013) reported the familiarity between the lawyer and judge as a result of speaking a common language made some LIPs feel like outsiders, and was a cause of anxiety and a suspicion that the lawyer received preferential treatment from the judge.

Differences in perspective in how LIPs are treated by the court from litigants and lawyers is not new. Birnbaum, Bala and Bertrand (2012), in their study of two Canadian states, found over half of the lawyers thought LIPs were treated 'very well' by judges, while less than 15% of the LIPs thought that. So, it was no surprise that the different constituents within the court service have developed distinct perspectives and attitudes towards the other groups, but what struck us was the strength of feeling and, for some, a lack of appreciation of the circumstances, role or responsibilities of the other. The inability to step into someone else's shoes suggested to us there was, at best, a lack of appreciation of the other group and, at worst, a resistance to or rejection of their place within the system. This led us to question how hardened attitudes might present a barrier to effective participation.

This chapter explores LIPs' views on the actors in the system and then the different court actors' perspectives of LIPs' presence in the system. Both positive and negative perspectives came from the study participants. Some of the views may be misconceptions or stereotypical but are treated here as valid expressions of the individuals' stand points. They are presented here to depict the underlying attitudinal demarcations which need to be understood if the norm is to take account of LIPs.

## Fairness

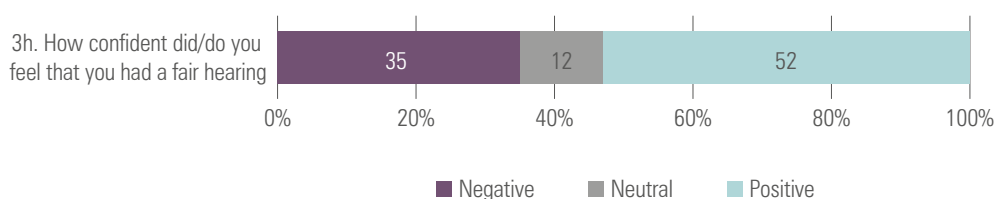
The context of the LIPs' attitudes is rooted in their perceptions of 'fairness'. Litigants' reactions to the fairness of their proceedings vary, and this will apply to represented as well as unrepresented litigants. Not being represented, however, opens up the potential of the additional perception of unfair treatment attributable to the lack of representation. The LIPs who met a difficulty or confusion were concerned for how fairly they were being treated in the system. Fairness of the LIPs' proceedings was explored in both the questionnaire and the interviews. The notion of fairness is a combination of participants' reactions to the procedural and substantive fairness in their proceedings. The study did not follow all participants to the conclusion of their case, so for the most part, the LIPs' views relate to procedural fairness.

Not all of the LIPs in the sample felt they were treated unfairly. Indeed, many were satisfied with how their case progressed. They felt the judge in their case treated them fairly, listened to them, explained procedure to the LIP, reassured the LIP and took them seriously.

"Yes. I felt, like, both sides... [judge] listened to both sides. I didn't necessarily agree with everything the judge had to say, but I think it was...it was free-flowing enough that I felt I could speak up whenever I wanted to."  
(FP12)

The questionnaire asked whether the LIPs *were confident they had had a fair hearing* (Question 3h), directing the LIP to consider their more recent court appearance - see Figure 7. Over half (52.2%) were confident they had, 35.4% were not confident they had, and 12.4% were neither. There were 23 LIPs in Undefended Divorces and Debtor's Petitions proceedings, both of which only had one party and tended to be granted immediately. All bar one of them said they felt confident their hearing had been fair. When these LIPs are taken out of the sample leaving two-party proceedings only, the proportion of LIPs who felt confident their hearing was fair reduced to 40.7%, with 44.0% felt it was unfair; and 15.4% felt it was neither fair or unfair.

**Figure 7:** Questionnaire question 3h responses



The interviews probed LIPs on their views on the fairness of their legal proceedings, not just their most recent hearing. Many LIPs described their proceedings as fair, and the ones who felt otherwise touched on three different aspects of unfairness. For some, fairness extended beyond their own proceedings to a systemic fairness or unfairness inherent in the legal system and, for a few, in the social services. These were the unfamiliar principles and practice of the law and limitations experienced as novices in an arcane process, where lack of familiarity with an aspect of the system was associated with unfairness. The conclusion of unfairness in their proceedings arising from a lack of familiarity or confusion is hardly surprising without the presence of the mediatory influence of a legal representative who can explain or prepare the litigant for the process.

For the majority, unfairness was framed by LIPs with regards to their own proceedings. They referred to particular aspects of their proceedings or the progress or outcome of their case or both. We did not look at the outcomes of the LIPs' cases and can only surmise LIPs' sense of unfairness may have arisen from unfair treatment or outcome, or from their perception of the same. Where the LIPs reported unfairness in their proceedings, it arose from three sources: a lack of legal training, being treated differently to a legal representative or a sense of bias against LIPs, such as an inherent unfairness or disadvantage attributable to self-representation.

Thirdly, many LIPs raised being treated differently to legal representatives as a source of unfairness. For example, a LIP can only enter the court when called, whereas the legal representative on the other side has the opportunity to be in court and raise the case before the judge in the LIP's absence. Not knowing what had happened in their absence gave rise to insecurity and a sense of being treated unfairly. Some courts leave LIPs to the end of the list, which again was a source of frustration for them. In some courts, LIPs were required to sit at the back of the court and not at the benches used by the legal representatives at the front of the court. Other instances of being treated differently related to non-attendance of the legal representatives for the other party, and instances of feeling like a nuisance:

“But I think I would have been given a bit more chance to speak, and I would like to be treated a bit more with, you know, rather than as a nuisance. I got the feeling all along, through these proceedings, that you're actually just a nuisance.” (AR09)

It may be that modifications to the current court norms to inform LIPs of what to expect and be better prepared would induce a greater sense of fairness. However, the point of principle here is whether procedural justice is seen and understood to be done in the eyes of LIPs, or whether it is a matter for the court to reassure itself that procedural justice is done within tolerance of due process standards. The former will have to be demonstrated more clearly to convince LIPs while they operate without guidance on what to expect. One judge commented to a LIP during the proceedings that ‘we cannot go running after everyone’ (AR30 – Obs). This is true when both parties are fully represented, but the findings from the study suggest that LIPs can fall between the cracks, be overlooked or feel side-lined, which suggests a different approach to dealing with them is required.

## LIPs on court actors

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The perspectives of the sample LIPs were mostly those of a novice in the legal system. Even though most of them had taken steps to prepare their case (as described in Chapter 7), they were not able to bridge the gap in their knowledge and experience of court proceedings. Their capacity to participate in their proceedings was consequently jeopardised by their lack of familiarity and knowledge. Many of the LIPs said they did not know what to expect, thought it would be different or used television dramas as a point of reference.

“I really didn't know. I thought I was going to be scrutinised, and pulled over coals, and that sort of thing, but no, it doesn't seem like that's the way it's happening.” (CP23)

“Obviously, I had no clue. I found myself, like, watching episodes of QC and stuff on the TV just to try and get the pattern down.” (FP18)

LIPs who had an experienced McKenzie Friend tended to have a better idea of what to expect. The experience of litigation for many LIPs was one-off. Most of them prepared for it but they are not steeped in the culture and practice of litigation in the same way court actors are.

## LIPs on judges

Most LIPs interviewed viewed the judge favourably. They reported the judge as being supportive or reassuring, listening to their points and commanding an authoritative presence in court.

P: “Just having dealt with the same judge before, you know, I knew that [s/he] was, you know, [s/he] was patient with a personal litigant, and, you know, obviously, as you heard there... s/he did say that, you know, if you’re speaking out of turn, you know, I will stop you. Or, you know, sort of, I’ll keep you right as to how things are proceeding.

I: Okay. Was that useful?

P: Aye. Yeah. I think that was useful. You know, [s/he] does say too that, you know, [s/he] doesn’t want to be, you know, to appear to be offering too much assistance.” (Family LIP)

LIPs with experience of more than one judge were aware that judges have individual characteristics and their practice is not homogenous. Their experience meant they could compare judicial practice and express opinions about the type of practice they found more helpful.

“[S/He] was helpful, and [s/he] talked about a position paper, and [s/he] tried to help me, and I walked away thinking, what a nice judge [s/he] was. And then this last one was the complete opposite. [S/He] was so, sort of, staunch, and harsh, and I didn’t know what was happening.” (RCJ LIP)

Inevitably, some LIPs’ views of the judge were unfavourable, centring around both a sense of unfairness and a feeling of not being respected. There were LIPs who felt the judge was aggressive towards them or gave them a hard time, and some who felt the judge took a dim view of the LIP simply because they were unrepresented and the represented party was ‘playing the game.’

“You should have a wee bit more respect for people who are self-litigating, so you should. I think [s/he] tried to be courteous to a point, but, really, then, to me it wasn’t enough. [S/He] wasn’t courteous enough, so [s/he] wasn’t, you know, and I’m not looking [him/her] to sit and flipping well agree with me, you know, “Yes, you’re right here”. I’m just looking for a little bit more patience, maybe. Patience would be the word. A bit more patience.” (Civil LIP)

“I think how it’s set up, and how you are on the outside looking in, and you’re joining, you’re almost like a usurper, and I think a lot of judges would look on you as if, like, well, hang on a minute here, why are you here?” (RCJ LIP)

Most of the LIPs in the sample were interviewed at the beginning of or somewhat into their cases. Their reactions towards the judge were therefore focused on the judge’s treatment of them in the courtroom rather than reflecting on the outcome of their case, which (in most cases) was unknown at the time of interview – apart from Undefined Divorces and Debtor’s Petitions. The ‘outcome effect’, by which the views of litigants are influenced positively or negatively depending on whether they won or lost their case, was therefore not a significant influencing factor.

Trinder *et al.* (2014) observed LIPs’ hearings and assessed them as ‘working’ or ‘not working’ which included an element of how fair they were. They characterised the inconsistency in the amount judges assisted LIPs as a source of unfairness. This study did not attempt to assess the cases we observed, but took account of LIPs’ views of the fairness of LIPs’ proceedings. Human interactions cannot be expected to proceed without some conflict or abrasion. The point here is that LIPs operate without the familiarity of judicial practice that a legal

representative accrues. The cultural tenet of fair treatment before the law runs deep within the legal system, and the LIP will naturally compare his or her treatment with that expectation. If there is a perception that fair treatment is not afforded to those without legal representation, either LIPs need to understand they are being treated fairly even though it does not look like it to them or their actual treatment in court has to be homogenised so that is perceived as fair.

### LIPs on court staff

As will be seen in Chapter 7, LIPs' first port of call for help with their cases was NICTS. Their perspective on court staff was mostly positive. LIPs' impressions were of dedicated and attentive court staff who try their best to give the support asked of them.

"They're really lovely. I've emailed several times for different things, and when I've called in they've always shown me the form, explained what I need to fill in. Yes, they've gave me the help." (AR26)

However, not all LIPs were so positive and, in particular, LIPs involved in lengthy, complex proceedings, who had a wider experience of dealing with court staff, reported errors or negligence in the administration of their cases or having received advice which caused them further distress and delay. The reactions of LIPs on their particular issues, such as obtaining information and the expectation of obtaining legal advice, are dealt with in more detail in Chapter 7 in the section 'How do LIPs prepare'.

### LIPs on legal representatives

The experiences of some LIPs engendered a jaundiced attitude towards the legal profession. It arose from their direct experience of their previous legal representative (explored further in Chapter 6) or from their experience of dealing with the other party's legal representative, or both. They suspected bias and a closing of ranks against them as LIPs, sometimes with the judge seen as part of this 'closed shop':

"I think they just want to keep it a closed shop. They don't want everybody representing themselves, you know, because they were all barristers at one stage themselves, and they're thinking of their, you know, their yachts lying off the coast of France, and their holiday homes, and they're thinking of the money, I think." (AR18)

Costs of representation (discussed in detail in Chapter 6) was often at the centre of the LIPs' resentment. One LIP commented that the system is made to keep legal representatives in jobs, while questioning what they add:

"It is absolutely so intimidating. I wouldn't class myself as Einstein, but for Mr Average, and I'm only Mr Average, it's very intimidating. There is no, no-one has a chance. It seems like the system is set up to keep the system in jobs, you know. Why does anyone need a lawyer? Why can't I go and tell the truth, and have it sworn that it's the truth, instead of these solicitors and barristers playing games with people's lives." (Dom04)

A number of LIPs had tried to bring cases against their previous legal representatives and had found it very difficult to do so. They could not find another solicitor to take on their case and, in some cases, sensed a reluctance to hear any criticism of the Northern Ireland legal profession. Some of the LIPs interviewed confirmed that they had made a complaint to the Law Society of Northern Ireland or Office of the Lord Chief Justice regarding the legal representative or judge, often about costs, incompetency, unfairness and other conduct, such as lying. Another litigant had taken a claim for negligence. The depiction of the legal profession as being a closed shop is hardly new, and some LIPs in the study endorsed it. Where we saw a particular issue arising, however, was in the lack of a complaint and dispute resolution mechanism that could be used by LIPs to resolve



complaints against legal representatives on the other side, and equally by legal representatives against LIPs whose behaviour was unacceptable. This also applies to NICTS staff, who felt there was no mechanism to deal with abuse or intimidation by difficult customers, and who need to be protected, for example by having access to protections similar to those within the NHS which allow staff to refuse to assist aggressive or violent customers.

Notwithstanding the sceptical views held by many LIPs, there were some who had a good relationship with the legal representative on the other side or appreciated their role and handling of their case.

“I’ve had no problem with her. Obviously, she has the element there to a certain degree of, you know, with her client, or well, she does have her client’s interest. But she’s also very matter of fact in relation to what can, and can’t be done, or what can, and can’t be asked for, so, I didn’t find it any problem.” (FP29)

Many LIPs in the sample contacted solicitors about their cases and some said they would have preferred to have been represented, indicating an appreciation of the expertise of the legal profession. These points are discussed further in Chapter 6 on reasons for being unrepresented and Chapter 7 on how LIPs prepare their cases, but it shows the variety of attitudes towards the legal profession. As is shown later, the nature of the relationship between LIPs and legal representatives is not clear to all parties and it is not straight-forward to navigate. Legal representatives would not routinely deal directly with the client on the other side in a case, but they have to in the absence of a legal representative. LIPs for their part do not know what to expect or how relate to the other party’s representative. These procedural and intellectual barriers can lead to further misunderstanding and mistrust.

## Court actors on LIPs

Court actors are well-versed in the practice of litigation and its norms. LIPs in the system deviate from the norms and, inevitably, court actors’ perspectives coagulate around these deviations.

Judges, court staff and, to a lesser degree, legal representatives, often qualified their views on LIPs by noting that they are not a homogenous group but differ in terms of their ability, capacity and tenacity:

“it’s a range, a whole range from people who are perfectly competent, capable of dealing with the case, to people who are just completely out of their depth.” (Ju08)

“There is definitely, like all cases, a spectrum of people that you’re very happy to go to their case, and some cases you’re not.” (LR05)

Court actors attributed various characteristics to LIPs: a controlling nature, mental illness, lacking emotional intelligence, suspiciousness, vulnerable, men assisted by Families Need Fathers, distraught mums, LIPs who put on the air of a lawyer, LIPs who are obsessive about their case or have their own agenda, Freeman who are hostile to the system and LIPs who are easy to deal with. It was rare to find a court actor with an overwhelming positive attitude towards LIPs. They did not centre on any common traits, and they often referred to the multiple varieties of LIPs:

“the majority are perfectly decent people, and they’re just very time consuming. But then you’ve got that core of personal litigants who may be obsessive. They may have mental health issues. They may distrust lawyers. They may not want to pay money to lawyers who they dislike, and distrust. They think the courts are part of the establishment. It’s only the core, and even of the core difficult ones, a lot of them are only difficult deliberately.” (Ju09)

Again and again, the interviewees noted the range of types of LIPs but then commented more extensively on 'difficult' LIPs. The attitudes to LIPs can therefore be influenced by this perception of them as spanning a wide spectrum, but focused on the worst behaviours, the "minority of the worst" (Toy-Cronin, 2015: 116). As with Moorhead and Sefton's (2005) findings, a few of our interviewees conflated LIPs with vexatious litigants:

"Ninety percent of the personal litigants, maybe more, that I come across are male. They treat the court, their spouse, and the lawyers, with contempt, bad language, bad approach." (LR07)

Bad behaviour is not limited to LIPs, as Ju13 noted, "Litigants who are legally represented can sometimes be as difficult as personal litigants." However, some court actors pointed out that the LIPs who are difficult for them to deal with are not the norm, and they risked skewing the general perception of LIPs:

"I think the assertive ones make more of an impact on you." (Off01)

"It's just the fact that every now and again you will get someone that is very difficult, but they're not the norm. They're just the ones that, you know, get the bad press." (LR05)

While there was widespread recognition that LIPs needed additional help to navigate the court process, there was an obvious frustration for court actors in having the 'norm' disrupted in this way. For the most part, there was evident frustration that LIPs impacted negatively on how the system 'should' run.

It has been found that court actors have associated LIPs whose behaviour is deemed as obsessive with mental ill-health (Moorhead and Sefton, 2005). The suspected prevalence of mental ill-health in the LIP population came up during the preparation stage of the study with some court actors posing the question of whether LIPs self-represent because they are mentally ill, and occasionally posing the view that self-litigation might have a detrimental impact on mental health. Our interviews too revealed that some court actors perceive an association between self-representation and mental ill-health, including with obsessive behaviour:

"I think that there is a belief, that it's probably not misconceived, but that quite a number of the very obsessive personal litigants have demonstrated that there are mental health issues there too." (Ju09)

Views on whether the experience of litigating – represented or unrepresented – had contributed to obsessive behaviour or whether LIPs started off with obsessive tendencies were both expressed by some court actors:

"I think some individuals, honestly, have their own mental health issues in dealing with cases. Others are perfectly competent people, but the nature of their proceedings affects them so deeply that they become absolutely obsessed with the whole thing, and any clear thinking just goes out the window. They become so deeply embroiled in the case that logical thinking doesn't, you know, doesn't comply, and no matter what, they have a certain so ingrained belief, no matter what they are told, by whom they're told the information, they will not get away from their own belief that they are right, and they are doing the right thing." (CS04)

"... vexatious ones tend to, they really do tend to be the ones maybe with a personal illness disorder, or, of some shape or form, or a mental health problem. I'm just thinking, you know, of one case in particular, you know, I'm sure if the person's assessed there would be, you know, that they're just determined to keep the case going on." (LR14)

Some court actors associated LIPs' lack of trust in the system (and the people who run it) with a psychological type:

"There are those whose psychological, or mental make-up makes them more disposed to represent themselves, and not trust lawyers." (Ju06)

None of the court actors had access to medical assessments bar a couple who had seen psychiatric assessments but they were comfortable associating LIPs' behaviour with mental ill-health. Their suppositions may be correct. Indeed, as will be seen in Chapter 9, there was a high proportion of LIPs who completed the General Health Questionnaire 12 with a high score, which is an indication of possible mental health disorder. The proportion of LIPs with a high score was much greater than the national average. Whether court actors are able to identify the mental health issues experienced by LIPs accurately or whether they associate behaviours out of the norm as indicative of mental health issues is difficult to discern. Furthermore, there appeared to be an assumption that mistrust of the system was innate rather than learned, indicative of a 'personality type'. These perspectives suggested to us an attitudinal intransigence where LIPs are considered difficult solely because they self-represent. They may well be difficult but they may have good reason to be so. Or they may appear difficult but are actually ill. LIPs will continue to self-represent, and the mental ill-health they come to court with is part and parcel of who they are at that time. They do not fit the norm and so there needs to be awareness or sensitivity to their differences to the norm and their difficulties.

### **Rude or abusive behaviour**

Legal representatives appreciated that LIPs cannot easily separate their emotional investment in their case during the legal proceedings, and that they are involved in difficult and emotional proceedings. Indeed, many LIPs were responding to other legal actions simultaneously, particularly in Family Proceedings with the underlying trauma of family breakdown, an issue that could add to the emotional stresses of LIPs and their interactions with legal representatives. The legal representatives often bore the brunt of some LIPs' more demonstrative emotional outbursts and at times have feared for their safety or put up with allegations of incompetence or corruption. While some take this in their stride, others draw a line at what they find insupportable and, as a rule, will no longer deal with LIPs directly or alone:

"And I had to deal with some extremely unpleasant phone calls from a personal litigant who just rang me, and ventilated a lot of issues that were ongoing in their particular lives out on me, and that was a very difficult phone call. And that's the sort of exposure when you don't have somebody with a filter, that you are being opened, or being exposed to, and I'm very reluctant now to take any phone calls from personal litigants. If I see that, once I got that person's number, I didn't answer the phone." (LR21)

Where LIPs behaved in ways that were threatening or aggressive, there was often no-one to curb this behaviour, especially outside the court, leaving legal representatives feeling exposed and personally vulnerable. LIPs whose behaviour is beyond reasonable should not be exposed to the courts without some form of intermediary measure. Some extremely worrying instances were reported by legal representatives, from repeated phone-calls that were experienced as harassment (LR02), to "correspondence ... telling me my days are numbered and showing me pictures of bombs they have made" (LR01), to legal representatives having to make changes to their daily behaviours to avoid threats made by LIPs.

While some of this clearly amounts to criminal behaviour and in which police involvement may have been required, it is difficult for legal representatives who do not have a means to protect themselves from lower level

aggression or abuse, and no access to a complaints mechanism leaving them to manage the difficulties on their own:

“I rang the Law Society yesterday [about the harassment via abusive phone calls] and they said they had no advice for me .... So, I’m just going to ring the police if he continues like this ... That was the first time I met him, yesterday. So, now he knows what I look like, and I do have concerns ... I wouldn’t take it off a client of ours, he would have been sacked long ago and told to go elsewhere because of his attitude, but I have to take it because he’s the other side, you know.” (LR02)

The absence of a framework to model LIP behaviour meant that legal representatives might look to the judges to intervene, an issue which could complicate the case. In one family law case that was observed, the legal representative’s arguments to the court about the LIP’s contact rights was muddled by the representative alleging her own sense of insecurity in response to the LIP’s behaviour towards her. It is difficult to be critical of this position when the representative has nowhere else to raise a complaint, but it also leaves judges in a position where an allegation is made without evidence or interrogation of the allegation, which is not strictly relevant to the judge’s determination. Legal representatives recognised the judicial hesitancy to intervene in disputes between a LIP and a representative:

“They might be happy to deal with it in terms of the substance of the case, but they’re not going to get involved in ... what went on outside court ... and ... that can present a difficulty for representatives.” (LR09)

One legal representative regretted that judges were not more willing to intervene, particularly when the LIP’s threatening behaviour was evident to the court, describing how “that can make us feel pretty shocked, and small, because [LIPs] shouldn’t be allowed to get away with that.” (LR12). For lawyers, this again pointed to the lack of buffer for LIPs, where a represented litigant’s behaviour could be managed by their own legal representative and the negotiations in the case were carried out by and with the lawyers in their professional capacity rather than the agitated or emotionally involved parties.

One area where solicitors identified some protection was in relation to the Law Society’s policy to only accept complaints from a solicitor’s client, and because of this there was some degree of feeling “sheltered” from LIP complaints (LR02). This indicates, however, that LIPs have no mechanism to complain about solicitors on the other side, reinforcing the problem that the LIPs bring their complaints – and any associated aggression or frustration – directly to the solicitor whom the LIP considers to have been rude or abusive, including what is seen as ‘threatening’ correspondence. There are clearly difficulties for any workplace or public service where acceptable standards of behaviour are not adhered to and there is an absence of internal dispute resolution which could deal with problems as they arise and to avoid further escalation. This creates problems for those working within the system as well as those who use the system, and these problems reinforce each other, pointing to a need for some form of complaints process that includes LIPs – both as the complainant and the subject of complaints by legal representatives and court staff.

### **‘Vexatious’, obsessive or difficult litigants**

Some judges, legal representatives and court staff raised the phenomena of ‘vexatious’, obsessive or difficult litigants. They characterised them as prolific litigants who submit multiple claims, including claims without merit, and make high demands on the court, staff time and resources, being likened by one court actor to ‘an industry’. Some were reported as needing to vent their frustrations at someone or behaving unreasonably and often court staff bore the brunt of this. While the court actors recognised they were the minority of LIPs, they reported that

they stuck in the memory because of the negative experience or stress caused. It was reported that NICTS was under-resourced to cope with the additional time they needed. Some of the court actors felt there was little that could be done about them because they were obsessive in nature or, if support was provided, these LIPs would only blame the support for their failures. Other court actors alluded to the danger of the handful of difficult litigants colouring the perception of all LIPs, the majority of whom were not difficult.

The long shadow cast by difficult LIPs appears to dominate some of the literature despite their small numbers (Goldschmidt, 2008). Previous research studies identified very small numbers of LIPs as difficult, obsessive or vexatious (Hunter *et al.*, 2002; Moorhead and Sefton, 2005; Trinder *et al.*, 2014). Moorhead and Sefton (2005) remarked on how court actors in their study were quick to refer to difficult LIPs, often conflating them with LIPs in general. To aid their analysis, they took three measures as signs of difficult or obsessive behaviour: making meritless claims; making repeated claims of the same type, often against the same opponent; behaving abusively or uncooperatively.

In the day-to-day work of the court, court actors recognised difficult behaviour, but it was not a uniform definition nor was it clearly defined for them.

“They’re entitled to have access to justice, but it’s when that crosses the line, and becomes vexatious, and it’s difficult to, sort of, pin that down.” (CS06)

Furthermore, avenues open to court actors to deal with them were not clearly defined. Balancing access to a court to ensure any merit in a claim is heard with protecting staff and opponents from prolific litigation or unreasonable behaviour was reported as the necessary but unwelcome and difficult duty of the court.

The researchers did not observe any LIPs whom we considered vexatious, obsessive or difficult. This does not mean that none of the LIPs in the study were not considered as such by others. Indeed, some of them may well have been deemed difficult by others but we were not party to such behaviour or we considered their behaviour in a different light or we were not in a position to assess the merits of what would be considered unmeritorious claims. The following example illustrates. One LIP was involved in several applications and was finding progress in the cases very difficult. S/he was passionate about the cases because of their importance to his/her family and life. Running repeatedly into difficulty elicited from his/her prolific correspondence with NICTS, including complaints about alleged errors in the administration of the case, and obstructive and inappropriate behaviour in court. In the eyes of the court and NICTS, this LIP probably met the criteria (whatever they may be) for vexatious, obsessive or difficult, but from our perspective, we saw a reasonable descent into rage and frustration, resulting in unjustifiable, unreasonable behaviour. The intention here is not to play down the court’s and NICTS’s management of extremely difficult circumstances, but rather to point out that as researchers, we were not viewing behaviour with the same practiced insider’s eye as NICTS and instead were taking a longitudinal view of this LIP mapping the journey from reasonable to unreasonable. The evident frustration and dismay of NICTS staff, who called for support from the Police Service of Northern Ireland, indicated the limited options open to them to resolve the situation. Whether this LIP would have reacted differently had there been support mechanisms in place to aid the passage through the court from the start, we cannot say.

There is no doubt that a small number of LIPs present significant difficulties for the courts and NICTS (as discussed further in Chapter 7, Court Staff), deserving of attention and measures to ensure both access to a court and protection for staff from disruptive behaviour and opponents from obsessive claims. In Northern Ireland, the behaviour of difficult litigants can be referred to the Office of the Attorney General but it is a channel rarely used in Northern Ireland. A legal standard exists to protect the subject of the applications from harassment

and the courts from prolific, unmeritorious litigation. In the Family Proceedings Court, the researchers observed four proceedings in which an Article 179 (14) (Children’s Order) was issued by the judge to prevent further applications being made without the permission of the court.<sup>18</sup> The reasons given were to allow time for the latest arrangements to settle in the best interests of the child and to stop the parties from issuing incessant applications. It is impossible to say whether the judges perceived the litigants in these cases as vexatious, obsessive or difficult, but one McKenzie Friend suspected the use of this article was to prevent some LIPs from making repeat applications, that is, as a means of curbing obsessive LIPs. Judicial orders may have a role in curbing excessive behaviour but it is a measure of last resort. Suggestions such as dedicated LIP liaison officers or in-court support may be worthwhile exploring as means of assisting LIPs to plot their course through the courts more reasonably. Some court staff members wondered whether the existence of a procedural advice unit would take some of the burden off the NICTS but felt there would always be some difficult people. It must be said, however, that they are only a small proportion of LIPs, and while they may dominate some of the discourse, they are not the mainstream LIPs and so should not be the only impetus for any reforms.

## Freemen

Several court actors spoke about the difficulties of dealing with ‘freemen of the land’, a group of people who believe all statute law is contractual and therefore only applicable if an individual consents to it, with the consequence that they believe they are not bound by laws that came after Magna Carta in 1215. The direct outworking of this belief is that Freemen have refused to recognise the authority of the court, despite being litigants within it. Many court actors therefore felt there was no point trying to deal with such unrepresented litigants:

“That’s just a category all on their own... an aberration out there, where I am just not sure how you could ever do anything to help them engage in the court process, because, fundamentally, they think the courts are a fraud.” (LR12)

Our research sampled cases involving LIPs within defined business areas, selected because of the projected volume of LIPs in these areas and the potential therefore to be able to recruit sufficiently to our sample. ‘Freemen’ were involved in proceedings beyond the original business areas identified by the research. While recognised as a distinct group, it became clear when talking to court actors that the group of LIPs known as ‘freemen of the land’ presented particular challenges within the court system, and their impact on the court actors who dealt with them had the potential to impact detrimentally on more generalised views of LIPs. The Freemen were generally active in Chancery cases involving repossession of land or housing, and who drew on non-traditional arguments to make their case, and rejected most of the norms and legal basis of standard legal proceedings. These LIPs were seen as being “hard core” (LR17), refusing to adhere to the rule of law, and adopting what court actors regarded as “a very warped view ... of how they can defend their case.” (LR20)

Two primary concerns were raised in relation to the Freemen and their approach. The first was the impossibility of accommodating individuals within a system who refused to accept the validity of fundamental aspects on which the system was based: “you literally are arguing about everything ... You’re arguing about ... your name ... [W]hen you start getting into that, it’s almost impossible to keep any focus on an argument ...” (LR23). While this created inevitable frustration for court actors, it was regarded as tactical, giving rise to the second concern that vulnerable individuals could be advised and influenced by the Freemen, “to their detriment” (LR20). Our research provides clear evidence that many LIPs in our sample did not trust lawyers. The phenomenon of

18 The Children (Northern Ireland) Order 1995.

Freemen extends this to a fundamental distrust of the law:

“They don’t want a lawyer. They won’t listen to what a lawyer is saying. They want to handle it their way, because they think the law is wrong.” (LR17)

The specific issue of the Freeman is beyond the scope of this research, but what is highlighted by the specificity of the issue here, is that LIPs are not a homogeneous group, and so there is no single solution that will assist the courts, the legal representatives, the court staff, CCOs, McKenzie Friends or LIPs to facilitate the inclusion of LIPs within a court system that is focused on long-standing legal principles designed to be upheld through the medium of solicitors and barristers. Where the traditional expectation meets the reality of LIPs, the impact on the court system is seen most strongly.

### Human rights considerations

#### Fair trial guarantees: Access to a fair hearing

The fair trial guarantees of access to a fair hearing require that the court is able to ascertain all of the facts of the case to enable a just decision. The duty of the court is to objectively adjudicate on the facts within the relevant law as presented according to the rules of court by the parties involved. Where a litigant in person is not observing the rules of court by refusing to adhere to them or by purposefully obstructing the normal process, it becomes difficult for the court to abide by its duty to reach a just decision and ensure the proper administration of justice. The fair trial guarantees are disturbed for both parties, but particularly for the other party.

The right of access to a court is not absolute and limitations can be applied in some situations provided that the essence of the right is not lost.

It is important to point out that legal representatives, court staff and CCOs deal directly with LIPs outside of the courtroom, as well as inside it. Their exposure to LIPs is greater than that of judges. The following sections highlight the perspectives of the separate court actors.

## Judges on LIPs

Separate from the frustration of the additional time LIPs take in proceedings, judges were largely sympathetic to LIPs, understanding LIPs were before them without the buffer provided by the expertise and detachment of a legal representative.

“I suppose the first, and main frustration, is what we’ve just talked about. That they’re coming in largely with one hand tied behind their back. They come with a huge emotional investment, but not necessarily having done any back reading, or any understanding of what’s involved.” (Ju11)

Most of the judiciary we spoke to indicated that the vast majority of LIPs they see were ‘not difficult’ but took up much more time than fully represented cases:

“I would say, ninety-five percent of them, are grand, they’re just enormously time-consuming, you know.” (Ju09)

For judges, the difficulties of dealing with difficult or vexatious litigants were the concern of missing an important point in their case and the court time they swallow:

“I’m always very conscious if you have a litigant in person who is being obstructive and difficult, they’re delaying the case, they’re not assisting me. My life is more difficult in terms of my job and there’s this sense that there’s an unfairness then to not just me, which is very important that I have to listen to this for long hours, but there’s also an unfairness to the other party in having to sit for five days listening to nonsense and then having to respond to nonsense and then having an appeal to the Court of Appeal and potentially dealing with, they don’t usually get to Supreme Court, but even have to oppose their leave application to the Supreme Court. We don’t like our time being wasted and knowing that other important cases then are being put back as a result of that.” (Ju07)

Ju07’s dislike of having his or her time wasted is understandable. It is unlikely this dislike is only reserved for LIPs regarded as vexatious, obsessive or difficult, and also strays towards LIPs who are seen to be wasting time because of their lack of expertise.

## Legal representatives on LIPs

Legal representatives framed their view of LIPs as sitting within a system not designed for people without representation:

“The system is drawn up pre-personal litigants, not with personal litigants in mind. I mean, if you sit out with me now and devise the court system, but factor in personal litigants, that would not be the model you would come up with.” (LR21)

Their frustration with LIPs disrupting the system norm was evident and they objected to the principle of this disruption as well as the consequential difficulties that they then had to deal with:

“I just hate dealing with personal litigants. It’s, like, one of the worst parts of my job.” (LR02)

“[[I]f I was dealing with a litigant in person twice, three times a week, I wouldn’t be practising family law, I’d be getting back into conveyancing ... [I]t’s quite a novelty when it happens once in a blue moon, but to constantly to have and try educate some random who won’t pay a lawyer, I couldn’t be bothered, and to justify to them that I’m not out to get them, because ... their immediate reaction is suspicion ... I’m not a teacher, I’m not a law lecturer, I don’t want to give someone a crash course on family law, and the family court system in Northern Ireland.” (LR03)

It is hardly surprising that the people who meet LIPs in their work will see them according to how easy they are to deal with on a day-to-day basis:

“There are a bulk of personal litigants who can be dealt with in a very easy, you know, normal fashion, you know, there’s no untoward difficulties with them. Then you have these more difficult people.” (LR22)

For some, the sentiment went beyond frustration that court processes were being disrupted and became much more derogatory and insulting:

- I: “When you say see more, you mean just see more, like, difficult...  
 P: See more crazies... [R]easonable [people] try their best to try and get legal representation and, you know, these poor mums are on working tax credits, and they’re just not qualifying for legal aid, and



they just struggle to pull the funds together to hire a solicitor because they want to comply fully and be fully co-operative with a court process. Whereas, these other guys are just mental.” (LR02)

P: “I would like you to record that we have human rights also, so has the judge, and so has my clients, and I think they’re totally ignored. I feel very strongly . . . Abuse, length of the process, how we’re dealt with by the court as a result of having to deal with . . . you’ll not find one barrister in this building who says, great day today, I’m going to deal with a personal litigant. Not one. Now, there’s got to be a reason for that. We can’t all be wrong.

I: But they’re not going away, though, are they?

P: No. They’re breeding.” (LR05)

While personalised antagonism is regrettable, legal representatives were also clear that they had not been trained in how to deal with LIPs, beyond peer support and personal experience. In light of this, it is perhaps inevitable that there is such a negative perception of LIPs. If training and professional expectation are focused only on lawyer-to-lawyer interactions, representatives will inevitably see LIPs as aberrations within the system. Without professional training and support in how “normal” practice can be adapted, representatives are left feeling exposed and vulnerable.

It is also the case that we had evidence from legal representatives of positive experiences with LIPs. LR07 identified a breadth of experience in dealing with LIPs, including being:

“able to get things sorted out very quickly, and resolved, and everybody has been happy, and there’s been a big hug from the personal litigant at the end. It’s actually, it can actually be quite a rewarding thing.” (LR07)

Overall, however, the dominant finding from legal representatives was that “system works in a certain way, and ultimately the best result for everyone will be achieved if everyone is represented.” (LR05)

Any deviation away from what is expected of working relationships, negotiations between parties and processes is acutely noticeable. Until LIPs are accepted as having their own ‘norm’ within the system, it will be difficult for lawyers to not be professionally frustrated by LIPs and view LIPs more positively.

## Court staff on LIPs

Court staff are used to dealing with LIPs in the system and they usually viewed them as within the court service’s remit:

“ . . . the vast, I’ll repeat again, the vast majority provide no problems. They’ll come in and they’ll say to a member of staff, you know, what form, can you give me a form, or what form do I need to lodge an appeal for an Ancillary Relief matter. The staff give them the appropriate papers and they go away. There’s no problem.” (CS04)

However, they recognise that LIPs do not fit the norm of a legal representative and need more time and attention.

“Your legal reps, they complete the forms, they lodge the forms, they lodge the fees, they contact you when it’s listed, and let you know what date to turn up to court, you know, whereas, personal litigants, there is a lot more involved.” (CS11)

Furthermore, court staff reported that they are acutely aware of the limitations in the range of advice they can offer LIPs and are wary of giving the wrong advice for fear of being liable. Some too reported feeling jaded when

dealing with LIPs who are considered difficult or obsessive. While they are few in number, the difficulties they present colour the court staff's view of LIPs. Court staff are sensitive to the difficulties that LIPs face but struggle to see how they can better accommodate their needs in the current system and with stretched resources.

Chapter 7 on LIPs outside the court discusses further the interactions between LIPs and court actors.

## Conclusion

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This chapter draws out the ways in which LIPs and court actors regard each other. The constituents' views are not homogenous and are contingent on experience. Overall, they suggest a lack of appreciation of the others' stand point. The description of LIPs as the "minority of the worst" (Toy-Cronin, 2015: 116) arises in the perspective offered by the court actors, but is also counterbalanced with the view that the most assertive LIPs are the most remembered and that there is a risk that they will skew the general understanding. Only one court actor saw no particular difficulty with LIPs, while all of the others had experienced a variety of LIPs. The level of sympathy depended on how easy the LIP was to deal with. LIPs' goodness of fit in the system in the eyes of court actors was thus informed by how close to the norm they were and the adjustments court actors have to make to accommodate them. Given that LIPs are unlikely to fit the norm, the irritation felt by many court actors at having to adjust their day to day modes of working to accommodate LIPs is understandable. From the point of view of LIPs, they are unfamiliar with the system and with the roles and responsibilities of the court actors. Business as usual to them may be disorienting or puzzling. Negative experiences may contribute to being pushed further away towards alienation or distrust, pushing LIPs' participation further down the ladder towards obstruction or isolation. Furthermore, it is questionable whether it is reasonable to operate a system that tolerates some of its prime actors being continually frustrated, and similarly for some of its users feeling like a nuisance or unwelcome. The participation of LIPs in the system might be more meaningful if the interactions between some parties were not a source of frustration. As one court staff member pointed out, there are training courses that offer strategies for dealing with 'difficult customers' that could be adapted for customers who do not fit the norm:

"Yeah. Well, there are, sort of, training courses for dealing with difficult customers that staff should really be going on those. It's a very helpful course ...it tends to spin it around to say that all the time you should be looking at it from the viewpoint of the person coming in, because you know all this stuff. They don't know anything. They're stressed out. So, if you try and look at it that way then you tend to not get as stressed. There's no point in me standing in here shouting at the person. You've just got to be, sort of, more detached."  
(CS03)

Parallel orientation and preparation for LIPs may go some way to aid their understanding and appreciation of the court's processes and the roles played by its actors.

The seemingly easy association of self-representation and mental ill-health for some court actors deserves further consideration. The study was not able to discern whether the association was verifiable or whether mental ill-health was simply an easy label to pin on LIPs whose behaviour was out of the bounds of acceptable for court or not compliant in some way. Also, there was little appreciation that the distrust in the system which led to some LIPs being difficult may have arisen through repeated alienating experiences acting alone, rather than as an innate trait. As discussed further in Chapter 9, there was a larger than average proportion of LIPs in the sample with a high GHQ-12 score indicating some form of mental ill-health. Again, we cannot verify whether court actors' identification of LIPs with mental ill-health coincides with LIPs' high scores on GHQ-12. Nevertheless, the possibility that some LIPs are experiencing mental ill-health further reinforces the need

for a re-think on how they proceed through the court. Toy-Cronin (2015) suggests that obsessive behaviour viewed through a different lens may appear justifiable. Obsessive litigation may be an enthusiastic pursuit of justice when viewed for its importance as a political or personal struggle. In the context of Canada, Macfarlane recommends a cultural change in how LIPs are “regarded, welcomed and treated in the courts by staff, lawyers and judges” (2013: 127). She suggests several measures including changes to legal professional education to include litigation models different from the fully represented norm. There is also the possibility that the few difficult LIPs distract the discussion away from the majority because of the drain on resources they present or because they are a good story to tell (Moorhead and Sefton, 2005).

Standards for conduct in court exist and should be respected. Behaviour which is detrimental to the court process should not be tolerated. The potential for the development of a clear code of conduct for LIPs, with mechanisms for breach of that code, and similarly clarified or expanded codes with regard to the treatment of LIPs by legal representatives. This might include the creation of a Charter, and consideration of appropriate means of redress, for example through an Ombudsman to investigate complaints or maladministration.

The broad perspectives depicted in the data suggest attitudinal barriers may exist which hinder the appreciation of the role and responsibilities of others within the system, and may construct negative stereotypes of the other. Whether they are created through experience or identification with one group or another is not fully explored in this study, but the findings suggest that they may hinder litigation, and in particular, LIPs’ effective participation in their proceedings.

It is thus important to consider whether some perspective training for all parties, including LIPs with regard to dealing with the other side, and appreciating their legitimate role within the court system, might aid the smooth and efficient progress of cases through the system, including an increased potential for negotiation outside of court. We refer to this as one of the benefits of the procedural advice clinic piloted as part of the research in Chapter 10.



# Chapter 6 - Reasons why people litigate in person

“You’re caught in the middle where you don’t qualify for legal aid because you’re working, and you can’t afford to pay for it yourself because you’re not earning enough when you’re working.” (Div06)

## Summary

The reasons LIPs give for self-representing presented in previous studies were reflected in the study sample. The LIPs in the sample spoke of a complex mosaic of reasons, often combining the inability to afford legal representation with personal preference, pragmatism, distrust of lawyers and the court system, and negative experience of legal professionals. Many LIPs had applied for and did not qualify for publicly funded financial assistance for legal representation, but could not afford the cost of representation. Some LIPs made an analysis of the costs and benefits of representation and decided they could not justify the cost for the benefit or value it offered. Many LIPs expressed a preference to be represented and dissatisfaction that they were not. On the other hand, many LIPs reported that part or all of their motivation for litigating in person was due to dissatisfaction with the legal services they had received previously. These LIPs were not merely objecting here to the limits of the law’s power, but to the failure of the legal representatives to communicate in a way that allowed them to be a participant in their case when they were represented, rather than feel frustrated at having their voice excluded. It is this source of powerlessness to which some LIPs in our study objected.

Court actors’ perceptions of why people self-represent largely concurred with the LIPs’ headline reasons but differed with regard to the reasons for LIPs becoming dissatisfied with prior legal representation. They felt it arose from LIPs not being willing to accept advice from their lawyer rather than from poor communication, a lack of progress in the case or errors being made. There was a view that some LIPs could afford to pay for legal advice and they were deterred by the influence of negative public attitudes of lawyers, rather than LIPs making a cost-benefit analysis.

Court actors often differentiated LIPs according to whether they were self-representing out of choice or not and suggested this as a basis for differential treatment. LIPs with no choice were to be given more latitude than those acting in person out of choice.

## Introduction

Studies from a number of common law jurisdictions detailing the reasons why individuals represent themselves are remarkably consistent. They present similar multiple, and often overlapping, reasons for litigating in person, which are often presented as a dichotomy between financial reasons and personal choice, or a blend of the two. There is also a ‘push’ factor of not being able to find a legal representative prepared to take on the LIP’s case and ‘pull’ factors, such as improved access to support and information to act alone.

The most common financial reasons given are: an inability to afford legal representation, not qualifying for legal aid, or eligibility for legal aid changes or ceases (Sales, Beck and Haan, 1993; Goldschmidt *et al.*, 1998; Dewar, Smith and Banks, 2000; Hannaford-Agor and Mott, 2003; Hunter *et al.*, 2002; Langan, 2005; Moorhead and Sefton, 2005; Law Council of Australia, 2004; Williams, 2011; Trinder *et al.*, 2014; Macfarlane, 2013; Toy-Cronin, 2015; Equal Treatment Bench Book, Judicial College, 2018). Often, it appears there is a blend of ineligibility for legal funding and unaffordability of legal representation proportionate to disposable income. In other studies, some LIPs have reported that while cost considerations dominated their reasoning, they also took into account the value for money they felt were getting for legal services (Dewar, Smith and Banks, 2000; Macfarlane, 2013) or felt they had other more demanding spending priorities (Knowlton *et al.*, 2015).

Personal choice reasons relate to a perception that legal representation is not needed, rather than not being able to afford it. One such personal choice reason is the perception that representation was unnecessary because the case is straightforward or simple (Genn, 1999; Williams, 2011; Macfarlane, 2013; Trinder *et al.*, 2014). Some LIPs believe that lawyers are not best positioned to advance their interests as the LIP knows the case detail (Sales, Beck and Haan, 1993; Dewar, Smith and Banks, 2000; Greacen, 2003; Hannaford-Agor and Mott, 2003; Langan, 2005; Moorhead and Sefton, 2005; Smith, Banbury and Ong, 2009). Disaffection or negative experiences with legal representatives have also been found as a motivation for self-representation (Dewar, Smith and Banks, 2000; Moorhead and Sefton, 2005; Smith, Banbury and Ong, 2009; Macfarlane, 2013).

Some LIPs were unable to secure legal representation because the solicitor did not wish to represent them based on the merits or arguable nature of the case or the reputation or attitude of the litigant (Trinder *et al.*, 2014; Toy-Cronin, 2015).

Additional (international) research points to an improving culture of litigant friendliness, support, simplified procedures in the court system, buttressed by widening access to legal information and better advice and support services as 'pull' factors in some litigants' decisions to represent themselves (Mather, 2003; Smith, Banbury and Ong, 2009; Macfarlane 2013; Toy-Cronin, 2015).

Most of these reasons were reflected in the study sample. However, while such reasons can be generalised into one or the other, the narratives offered by LIPs for litigating in person were multifaceted, congruent and blended. Many LIPs spoke of a complex mosaic of reasons, often combining the inability to afford legal representation with personal preference, pragmatism, distrust of lawyers and the court system, and negative experience of legal professionals. They tended to see self-representation as acceptable and their justifications for it centred around their individual experience and what seemed possible to achieve once the decision to move forward without legal representation had been made. Court actors' perceptions of why people self-represent largely concurred with the LIPs' headline reasons but tended to cite different reasons for LIPs becoming dissatisfied with their prior legal representation.

Some studies differentiate LIPs according to whether they self-represent out of choice or not (for example, Dewar, Smith and Banks, 2000). The decision to self-represent is accompanied by the willingness to accept the consequences of not having a legal representative and signals understanding of the proceedings (Bell, 2010). In our study, court actors often differentiated LIPs according to whether they were self-representing out of choice or not and suggested this as a basis for differential treatment. LIPs with 'no choice' were to be given more latitude than those acting in person out of choice.

This chapter starts with LIPs' justifications for self-representing and whether they believe it is acceptable to self-represent. It then outlines the main rationales and explanations advanced by LIPs justifying their decision to litigate in person. It further offers the corresponding perceptions from interviews with judges, lawyers and NICTS court staff.

## LIPs' reasons for self-representing

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### Acceptable to self-represent

It is hardly surprising that many of the sample LIPs who were in the middle of self-representing said that it was acceptable for people to do so. Their reasons mirrored several of their own rationales for self-representing, namely cost, empowerment and the ability to put their case forward.

"I think it should be acceptable. I think it was challenging just because the way the laws are written, it can be very difficult to understand. But, yeah, people should be able to represent themselves. They shouldn't need to pay thousands and thousands just to get something legally done for themselves." (Div10)

They pointed to the need for guidance and self-confidence. That said, a number of the LIPs were aware of the difficulties of self-representation and cautioned that it was wise to take legal representation. They tended to be the people who would have preferred to have representation.

I: "Do you think it's acceptable for people to represent themselves in court cases?"

P: I think it's unfortunate if they have to, and that there isn't some, sort of, you know...if you've got a pet, and you can't afford to have an operation, there is a place you can go. You can go to the Blue Cross. Somebody will put that animal out of its pain. They don't do the same for humans when it comes to a legal system.

I: And put them out of their pain.

P: Yeah." (CP26)

## Financial reasons

The majority of participants referred in some way to financial reasons for representing themselves and repeatedly cited the issue of cost and/or affordability. There were many nuances around the cost reasons advanced by LIP participants. Some had either initially engaged a lawyer, or made attempts to access legal advice to the value they felt they could afford. Many cited the high cost of these services and that they had run out of money as a reason why they then decided to litigate in person.

### **Unaffordable**

Many LIPs did not qualify for legal aid and did not feel able to afford the cost of legal services because the initial retainer was prohibitive or the hourly rate was unaffordable. They were 'caught in the middle':

"I mean, a lot of people are caught, sort of, in the middle, where, like myself, where I work, but I only work part-time because I had to...I actually had my own business, and I had to give it up... So, I work part-time now. So, you're, sort of, caught in the middle where you don't qualify for legal aid because you're working, and you can't afford to pay for it yourself because you're not earning enough when you're working. Do you know what I mean? So, you're caught in the middle. So, what do you do?" (Div06)

Some litigants were surprised that, given their status and circumstances, they did not qualify for legal assistance which led them to self-representation. A student nurse with two children living on a bursary was just above the legal aid threshold (FP64). She said she would have to quit her job to get legal aid for legal representation.

Some LIPs looked at their savings, income and outgoings and made a calculation on whether they could afford to pay for legal services:

"whatever savings I have left, I don't want to go on paying serious amounts of money on a solicitor, you know. The children need stuff, and things like that. I didn't say that in court, but my thinking on that was... I have five thousand pounds in savings, and I'll have to use that. And then after that, I don't... I actually don't even have enough really coming in, because the rent here is five hundred and eighty-five pounds per month... You know, I counted up really, I would only have enough to really pay the rent, you know, but to run a car and everything after it, it will be really, really, really difficult." (AR14)

“I really couldn’t afford to pay for...I mean, I got a quote to do the Ancillary Relief, and to sort everything out, the mortgage, and everything out, well, basically, what I was told, if she didn’t contest it, maybe two grand, and if she did contest it, it would be ten grand...And I just wasn’t in a position, because I know she will contest it.” (Div06)

Some LIPs could calculate that self-representing would save them money. However, this was only in proceedings which were relatively straight-forward, such as an Undefended Divorce, Bankruptcy or paying off a Creditor’s Petition.

“This was an option that was open to me, and it would have been...yes, okay, there was more paperwork on my side, but money wise, it was a lot less...It was going to be the same end result. So, this way, it was probably a third, maybe a quarter of the money that would have been spent, if I had had a solicitor involved.” (Div13)

It was a common pattern among the LIPs that they had originally engaged legal representation but then let it go when their funds were exhausted or when the bill of costs reached a particular level without resolution. Some of these LIPs had the means or could raise funds from family to continue to instruct a legal representative but decided not to.

“I had been asking what the costs were, and then they told me it was nearly eight thousand, and I nearly collapsed...And I had to stop and, basically, I...as soon as I got the agreement, thinking the agreement was going to be okay, I just put that all onto the credit card to pay them to stop any further costs, because, obviously, at this stage my ex, still hadn’t paid the money. So, there was still a lot of communication, and stuff getting racked up at both sides, and I had to stop it, because there was no way I could let that go up to ten or eleven thousand pounds.” (AR21)

### Human rights considerations

Access to a court should not be prevented by prohibitive costs or excessive court fees

The cost of legal representation has not been found as yet by the ECtHR as a meritorious argument for the obstruction of Article 6(1). The State is left to decide how best to ensure the right of access to a court, which may include the provision of legal aid in accordance with financial thresholds and a legal merits test. The provision of legal aid is a matter of policy and not an absolute right. Upholding the right of access to a court depends on either the individual’s ability to afford the fees of representation and so hire a lawyer or the individual’s capacity to represent him- or herself. The contingency of the right of access to a court on the individual’s ability to pay is not total if the alternative of self-litigation is available.

Access to a court: effective participation

Article 6(1) does not oblige State Parties to provide legal aid and thus leaves them to decide how best to ensure the right of access to a court. Many study participants fell short of the threshold requirements to qualify for State-aided legal assistance and could not afford the fees commanded by legal representatives. The absence of a right to be represented leaves some people caught between these two situations with no option but to self-represent. We cannot comment on the people who have not exercised their right of access to a court in the first place because they are too daunted to institute proceedings.



Appendix 1 notes that the UN Human Rights Committee encourages States to provide legal aid where individuals cannot afford to pay for representation and to consider circumstances when the State may be obliged to provide legal aid. In *Airey v. Ireland* (1979 Application no. 6289/73), the ECtHR determined the State's obligation on grounds including the complexity of the case and procedure and the difficulty of emotional detachment which meant it was improbable that the applicant would be able to present her case effectively before the High Court of Ireland. There may be occasions when the judge may wish to direct some form of State-supported legal assistance in cases where the complexity of the procedural rules is too great for the LIP or the LIP is unable to detach him- or herself from the proceedings and present the case objectively. Any freedom to direct assistance will likely be hindered by resource constraints and concerns over judicial allocation of such resources.

Appendix 1 also notes that cuts to the budget for legal assistance may result in discrimination if they disproportionately affect a protected group.

## Cost-benefit assessment

Although a substantial group had some capacity to pay privately for legal representation, some LIPs made a pragmatic cost-benefit assessment and concluded that they could not justify the cost of representation or that it was a waste of money. They assessed the legal fees against the value of the service they would receive, as they saw it:

"I had legal representation that I paid for in January when we went through the consent order. And I feel that now I could have that ten thousand pound in my pocket ... And I should have represented myself then, because all we did was sat down in the main hall downstairs, and talk, and agree, write it on paper, and sign it, and I could have done that myself. Well, that's exactly what I did. I did that myself, and somebody just finished off a couple of extra paragraphs, and that was ten thousand pound gone." (AR06)

"Because, on reflection of the last fifteen months, when I did have legal representation, I felt that everything that I came in writing with, I was handing a sheet to my barrister who read it off, and I either ticked with a yes or a no, and I just felt that I think I could do that myself." (FP21)

The perception of many LIPs was that the cost of legal representation was unacceptably high. One LIP said he was quoted 'from twenty thousand up as far as eighty thousand in legal fees' (AR02). Several LIPs said that the expense was unjustifiable.

The cost of representation is a major factor in deciding to self-represent. Very few LIPs in the study felt lawyers' fees were justifiable which contributed to the jaundiced view LIPs held of legal representatives (see Chapter 5). The study did not look at costs of representation or how they are explained to potential or actual clients. Clearly, legal representatives deserve to be paid but as one individual in the study commented, there was perhaps some work to be done on improving the image of legal representatives and explaining their costs:

"Lawyers have got very bad press, and some of them deservedly so, for being greedy, taking too much money, etcetera, etcetera, so the PR for us is bad, we're atrocious at PR, and that does not help. And I fully understand why the public think what they think about us. They will joke about the dead hedgehog and the dead lawyer lying in the road, well, there's skid marks in front of the hedgehog. I understand that." (LR07)

The issues here point not just to the costs but to understanding the value for money arguments.

### ***Preference to be represented***

Many LIPs who could not afford representation expressed dissatisfaction with their situation and considered they would have been much better off with a lawyer.

“I think if somebody had been on the ball, and obviously had a lawyer, or a barrister, who was, this was their bread and butter, and knew it all inside and out, this could have all, hopefully, had been sorted earlier... So, it’s a wee bit annoying that I didn’t have the money to keep it going, and all the finances, or the ability to keep it going. I think it could have been, and should have been, resolved a long time ago, but at the other hand though, I had to draw a line somewhere and, like, I mean, that twenty-seven and a half thousand pounds that I spent on legal fees, that bankrupted me, literally. I went bankrupt there this summer, in an attempt to try and draw a line there, and start again.” (FP18)

It is also a feature that many of the LIPs interviewed who became unrepresented did not do this out of choice or because they considered that they could do better than the legal representative. Indeed, many referred to feelings of intimidation, fear and lack of confidence and nerves at the prospect of self-representation. The emotional load of self-representation is discussed further in Chapter 9.

## **Personal choice reasons**

### ***Dissatisfaction with their legal representative***

Many LIPs reported that part or all of their motivation for litigating in person was due to dissatisfaction with the legal services they had received previously. Some felt they were getting nowhere with their case or their legal representative did not take their views into consideration. Others had experienced what they regarded as incompetency, or they had developed distrust in the lawyer-client relationship. In some instances, this despondency was related to a cost-benefit decision on how much they had spent and what they perceived they had gained. Other LIPs reported they believed their lawyer had made errors on the file. This included LIPs believing the lawyers missed filing deadlines, made errors in settlement documents that made them unenforceable, or submitted documents with spelling and grammatical errors that demonstrated incompetence. There was also a clear thread of dissatisfaction at lawyers not keeping clients informed about their cases, and LIPs described being isolated or excluded from their own case.

### ***“Doing nothing” or “getting nowhere”***

Some LIPs considered they had paid large sums of money over a period of time and achieved nothing or relatively little, and this was an influencing factor on the decision to represent themselves, but it also aligned with LIPs’ dismay or frustration at the lack of communication or contact and the outcome achieved for their money.

“I wasn’t happy with the current solicitor. I felt that it wasn’t moving forward enough... At that period, I hadn’t seen my daughter for about five or six months straight, and I just didn’t feel it was moving. I didn’t feel that it had progressed any... And I just decided that enough was enough, that I wanted to represent myself, and hopefully get some, sort of, a movement on the case, rather than someone else doing the work for me, I decided that a solicitor maybe wasn’t the best person to do it. The court needed to hear from me, and needed to hear my position, and needed to hear my thoughts and feelings on the contact with my child.” (FP38)

“I spent an awful lot of money, and I was seeing nothing back for that money, and that is a driver. And, thirdly, I was, like, I was just completely frustrated at the lack of progress.” (FP23)

Others believed that legal representatives were ‘milking’ the system.

“I work, so I wouldn’t get [legal aid]. Even though I could afford to pay for a solicitor, I chose not to because my experience with solicitors is that generally they’re here to make money. Now, I’m not saying that... I think that as I go into a certain level of this type of case it wouldn’t do to represent myself. There have to be some times where the solicitor has to come in. I think at this type of level there are a lot of solicitors milking the system.” (FP38)

However, other LIPs did not always blame this on their legal representative but rather the tactic or the intransigence of the opposing party, the court system or that resolution of the case was highly unlikely.

### **Legal representative not listening or explaining or making errors**

Many of the LIPs’ frustrations may be related to uncertainty or lack of understanding of the legal process. Indeed, some LIPs clearly struggled with the uncertain nature of the legal process, why they were at court and why they could not be told the likely outcome. Consequently, some LIPs were highly critical of legal representatives who they felt did not listen to them or ignored their instructions or did not explain the approach in the case or communicate effectively what was happening.

“the only person who was there to represent me was a barrister who I’d never met before, who was supporting about five different people on the day, she didn’t have two minutes to talk to me and she was actually really rude. I actually turned round and I said to her, ‘I’m actually paying you to represent me and you won’t even listen to me’, and I had a representative from Women’s Aid with me and she said to me, you know, she was so shocked about how blunt the woman was. So, after that day when I got another bill I just thought that’s it, I’m not paying for this anymore.” (Dom20)

Other LIPs also considered their legal representatives had side-lined them or failed to act on their instructions. Some LIPs went further and complained that the legal representative made mistakes or was incompetent. For example, FP16 complained that although she instructed legal representation because the matter was beyond her ability, Counsel had not followed her instructions and made an error which resulted in her taking the case to appeal. She further complained of a lack of communication from her legal representative.

This lack of communication was a critical issue for some LIPs and at odds with their expectations of how they could reasonably engage with their representative.

“...it’s impossible to get hold of your solicitor, by the way. I don’t mean to be rude but I don’t know how they bill their time, or what they bill for, but they never have time to talk to you. He’s always in a case. He’s always in a meeting. He’s always at court. I’ll leave a message for him to call you back, and, of course, they never do.” (CP21)

If one of the concerns around litigating in person is the risk posed to the effective participation of the LIP in the court proceedings, it must also be a concern that represented LIPs feel that their participation is being blocked by their legal representatives.

There is also a tension between the LIP’s view that legal representatives do not listen to them and follow their instructions, and the views from legal representatives that LIPs in turn do not listen to legal advice and either do not understand or accept that the representative cannot make the argument the LIP wants them to make. At its most basic, this is a fundamental issue of communication, which relies on a relationship of trust. Legal representatives have a duty to advise their clients if a course of action is not possible, and may be detrimental,

but they must also be able to convince their clients why this is the case. LIPs are not merely objecting here to the limits of the law's power, but to the failure of the legal representatives to communicate in a way that allowed them to be a participant in their case when they were represented, rather than feel frustrated at having their voice excluded. It is this source of powerlessness to which LIPs in our study objected.

### ***Knowledge of the case***

Some of the LIPs expressed a personal determination to take their matter forward themselves because, in addition to financial constraints, they firmly believed that their legal representatives did not hold mastery of the facts required to win the case and that they could present such facts better and as such were better placed to handle the matter.

“Because I know the case so well and I know my outgoings and I know how to present it to the court, I didn't see the point of going to a third party to represent me. Some young person who is going to represent me and doesn't understand, has no emotional attachment towards this. It's better coming from me than anyone else.” (FP06)

In this analysis, the usual advantages put forward for legal representation providing a dispassionate view of the issue is seen as a negative, with emotion regarded as a critical factor in making the case. This may seem naïve from a legal perspective, which values the capacity of the legal representative to argue the salient legal points rather than the emotional impact, but the literature on how individuals view their legal problems supports this type of LIP analysis (Denvir, Balmer and Pleasence, 2013). Individuals who experience justiciable problems do not construct them as legal issues, but rather as part of what usually forms a cluster of other life problems (family, health, employment, finances, housing, etc). The idea that litigants will accept the prioritisation of the legal framing of their problems views the issue from the perspective of the lawyer rather than the litigant. For those self-litigating who had previously been represented it is important to note that the positive views they expressed about their former representatives were about feeling supported, included and having a lawyer who understood and cared about their situation.

### ***Straightforward or unnecessary***

One group felt that legal representation was unnecessary because the matter was uncontested or straightforward, and did not call for legal expertise. In some situations, particularly Debtor's Petitions and Undefended Divorce, they found that they could get the assistance they required from advice giving organisations.

“I looked online and it looked easy to do by yourself. And then Citizen's Advice told me what to do, so I didn't need to go to a lawyer.” (Bank05)

Others also believed that the presence of lawyers would complicate an otherwise straightforward issue.

“I don't think it's necessary if you have someone, I mean, as long as the CAB is there. I would say to people, go and do that, because my experience of legal advice hasn't been good. Now, I know that that's a personal experience, and I think I've probably been quite unlucky to a large extent. I hope it's that. But what I find, or what I have found, over the last, and it is ten years now, having to deal with legal issues is that when you get a solicitor involved it just seems to become very complex, protracted. Very stressful as well, actually. . . . Maybe this particular process is a very straightforward one anyway, but I just found that, you know, [CAB officer] would sit down and explain, and say exactly step by step, look, this is what happens now, this is what you need. You know, really blow by blow, and I think that's what people need, particularly when they are dealing

with legal issues, because it's just...it's so emotive as well, as you can see by me, you know. It really is. It just brings all sorts up and, you know, all that shame, and all too." (Bank14)

However, it is important to highlight that there appears to be some tension within the LIPs' narratives. On one hand they refer to the preference to run their case which is straightforward or does not require legal representation; yet, on the other, many describe how distressing and difficult it can be, and that they are facing experienced lawyers.

"This time I was nervous; I was sitting there banging, banging with all this stuff and just tried to get it to bullet points. I was nervous, but I didn't want her to take control of the court because of me not being legally educated. I don't see what happened in there as rocket science. I see that the judge needed to listen to her case and my case and then judge." (FP01)

This inherent contradiction was often present in discussions with LIPs, who moved position on whether they would prefer to have a lawyer depending on what aspect of their case or legal experience was being evaluated. The contradictions are therefore best understood as reflecting the complexity of the LIP's journey, which at times was manageable, straightforward and empowering, and other times was bewildering, stressful and disabling. What was consistent, however, was the desire for some form of support. This did not necessarily have to be legal support, although that was also regarded by many as valuable. It included a consistent desire for a more user-friendly experience, not just in terms of the court process but of engagement with solicitors and barristers, with judges, with court staff and with support at the different stages where proceedings became more complex.

### ***Have nothing to hide***

Some LIPs pointed to the belief that they had done nothing wrong or had nothing to hide. They felt they could simply explain their situation to the judge and so there was no need for a legal representative:

"I think fairly confident in myself, because, like I said, in my eyes, I've done nothing wrong... I wouldn't necessarily say I know how to navigate my way through the system. My view is, I was just going to go in, and I'm just going to be completely honest with them, you know. And I'm just going to tell them exactly what I think." (FP56)

However, on reflection some LIPs indicated that such an approach may be naive.

"To be honest with you, because I didn't know what to expect. I, in my naivety, thought I would go in and tell the truth, and let them decide because that's what they're going to do in the end anyway. And I didn't think, now, that's very naïve of me that there are some loopholes, or other legalities associated with it that I wouldn't be aware of, as I thought I would turn up, and tell the truth, and take what was coming." (CP11)

The personal choice reasons posed by some LIPs were sometimes blended with financial reasons, but there were a handful of LIPs who said they would not instruct a lawyer even if they had the means or were offered it without cost. This suggests that a proposal for blanket representation would not be acceptable to some litigants and speaks to a right to self-represent.

### **From unrepresented to represented**

Many of the LIPs who were unrepresented also identified a number of reasons for returning to legal representation. Some were advised by the judge to obtain legal representation and others felt they lacked the capability to deal with issues or the complexity of the case or wanted a legal representative to seek a settlement.

### ***Told to hire a lawyer***

Once they had begun to litigate in person, some participants were strongly encouraged to obtain legal representation by the judge. The researchers observed this often in the proceedings of Ancillary Relief and Creditor's Petitions. Some LIPs wanted to instruct a legal representative but could not afford to but many of the LIPs we spoke to then subsequently instructed. However, a few LIPs continued to self-represent because they could not find a legal representative prepared to take on the case or decided they could manage on their own:

"So, [judge] then said, 'I'm amazed men like you come to the court unprepared,' and un-this and that. Well, I was prepared, but I wasn't prepared for such a hostile reception. So, [judge] gave me two weeks to find a solicitor and come back. So, I went to the solicitor, who I had met in the hallway waiting for my case, and he seemed a nice enough chap, and I went to see him, and I explained that I had been advised to see a solicitor. So, he listened to my case, and he very briefly read over my thing, and he said, I don't mean to be disingenuous, he said, but basically, I have a very good relationship with the judge, and I can't see on what grounds this could be [found in LIP's favour]. In other words, there was no appeal, chance of appeal. So, I then thought to myself, well, I don't know quite know why I've spent six hundred pounds to come and see you, because actually it would appear there's no benefit from coming to see you, because you're no better at finding a reason to get, you know, to [sort this out] than I have got." (CP21)

A number of LIPs also spoke of bewilderment or exasperation when a judge, legal representative or member of court staff advised them to engage representation. In some instances, the LIP highlighted that they would like representation but that their financial circumstances simply did not permit this. Some felt that such reproaches and statements of it being 'money well spent' implied that they could in fact afford representation with some LIPs indicating this generated feelings of anger and frustration.

### ***Beyond capability***

Some LIPs pointed to the realisation that they needed to instruct legal representatives because the proceedings were complex, beyond their capability or they were confused or out of their depth.

"it was getting a bit confusing, and I didn't know about a prohibited steps order. All I knew was a residence order, and contact order, and it was a bit confusing, and I was, like, right, let's just get the solicitor and we'll take it from there really." (FP41)

This reflected a different experience and/or a different part of the LIP journey which may have begun with some confidence, optimism or naivety that the litigant could handle the case themselves, but adjusting their responses to reflect their experiences or capacity. Again, this speaks to the complexity of reasons why individuals are represented or not, and why there needs to be a multiplicity of responses to LIPs that do not merely categorise them as deserving or undeserving of support.

### **Difficulty finding legal representative to take their case**

A number of LIPs described how they tried to obtain legal representation but could not find a legal representative to take their case even though they were willing to pay for legal services. Others could not afford to pay the retainer fee up front. In many instances, participants described calling around numerous law firms and leaving messages but their calls were not returned.

"Going through a divorce as a litigant in person, with access to no money, because my bank accounts are frozen with a Mareva injunction. I find it very difficult to get representation, and to find out where I stand, and to be taken seriously in a courtroom unrepresented. . . . every time I ring a lawyer and I say, will you represent

me, they'll want money up front, which I haven't got, and then I find out that my wife's legal team are telling them not to represent me." (AR07)

The research did not attempt to evaluate the legal merits of cases where LIPs stated they were unable to secure representation. The issue is perhaps less prominent for those LIPs who were required to pay a retainer fee in advance, unless this was a means used by solicitors to deter what may have been regarded as unmeritorious cases, or troublesome litigants. It is, of course, entirely legitimate for solicitors to decline cases, for a variety of reasons, but again the issue that arises from our findings relates to communication with litigants on this issue – either that the litigant understands that their case has no legal merit, that the solicitor is unable to take on the case because of expertise or capacity, or that there is a legal block to being able to take on the case where legal fees to a prior representative have not been settled. Less obvious in communication terms, but an issue that was clearly suspected by some LIPs, was the unwillingness of solicitors to take legal action against another legal professional.

### Supported to self-represent

As discussed above and in Chapter 7 under How do LIPs Prepare, some LIPs felt sufficiently supported by advice services or McKenzie Friends to self-represent. The support may not have been the original motivational factor to self-represent, but once they had started on that route, the support encouraged them to continue.

## Court actors' views on why people litigate in person

Court actors were asked for their understanding of the motivations of LIPs to self-represent. Many of them did not know the specific reasons in any one case, but were able to put forward their impressions. The reasons for self-representation given by court actors were varied and largely mirrored the reasons given by LIPs, but with some different emphases and alternative views.

### Financial reasons

Court actors thought financial reasons were a common motivational factor for self-representation, accurately reflecting the stated reasons of LIPs. Amongst the variety of views, some court actors mentioned the various financial reasons given by LIPs, such as not receiving legal aid and being unable to afford to pay for legal representation or having exhausted savings on prior legal representation. The court actors did not tend to see the issue of legal representation from the same perspective of the cost-benefit analysis that LIPs described, though there were some allusions to this, premised more on the view that legal representation was an investment or a valuable asset that LIPs needed to be advised of, to overcome any sense of legal advice not being worth the cost. Some court actors also mentioned that some LIPs were unwilling to pay for legal representation even though they could afford it, but did not reach the conclusion that it was because they could not see the value of it and recognised the influence of negative public perceptions of lawyers as influencing this decision:

"They feel it's not going to be a particularly complicated case. Why should they spend a lot of money on fat cat lawyers, as they see them? They're not all fat cat lawyers, but that's the perception, if you like, of them from Joe Public on a lot of occasions, but those would be the main reasons for it." (Ju02)

Again, this may speak to a need to communicate more clearly what the advantages (and disadvantages) of legal representation might be, but the idea conveyed in the above quotation indicates some legitimacy to an analysis by LIPs that it may not be financially worthwhile to instruct lawyers.

## Personal choice reasons

Court actors also recognised the personal choice reasons cited by LIPs, including an awareness that LIPs may have had negative experiences with legal representation in the past. When court actors proposed dissatisfaction with prior legal representation as a motivation for self-representation, they did not offer the same reasons for the dissatisfaction as those stated by LIPs, which were a sense of getting nowhere, not being listened to and frustration with not being able to contact their lawyer or with errors made on file. Some court actors, instead, proposed that the dissatisfaction was down to LIPs being unwilling to accept advice from a lawyer. This might be because the litigant wanted to make certain submissions or rely on certain evidence that could not properly be put before the court. LIP dissatisfaction was therefore attributed to a refusal by legal representatives to advance the LIP's arguments:

“the problem that sometimes lawyers don't want to do what the clients want them to do and, therefore, you know...if you've got a counsel, and you say to them, I want you to run argument X, and they say, there is no merit in argument X. The problem is, counsel owe a duty to the court, as well as to the client, and, therefore, they may say, I am sorry, I cannot run that argument, I'm not allowed to under the rules. And so, you know, even that, in itself, may drive someone to be a personal litigant, because they want to make the argument, you know.” (Ju03)

“They don't like hearing what they don't want to hear. And when they don't hear what they don't want to hear, then they get stuck in... And if they start with a lawyer that's another pattern of behaviour, and they don't like what they hear, even though that person's on their side, they will then disengage and go it alone.” (LR04)

LIPs and court actors seemed to place different emphases on dissatisfaction with legal representation as a motivation for self-representation. LIPs in the sample pointed to not getting anywhere, negligence and poor communication with their legal representatives in the past, while court actors pointed to LIPs not being prepared to listen to the advice given to them. These disparate points of view on the same phenomenon echo the contrasting perspectives discussed in Chapter 5 further reinforcing a weak mutual understanding of each other's stand point.

Some court actors recognised the view from LIPs that their cases were straight-forward and they could handle it unrepresented. However, this sentiment was sometimes coupled with a concern that LIPs thought they knew better than legal representatives - one judge described a LIP as someone “who clearly considers himself to be above legal representation” (Ju09). This could be due to a failure to appreciate the ‘intangible’ value of advice, or for strategic reasons:

“Well, it may be a thing about, you know, the legal system, and I just think it's inherently unfair the way the family system is set up. It might be just their perception about, you know, I'm not paying for something intangible in terms of legal advice, and they may just get frustrated with the legal process, and think that they can do better by themselves, you know.” (LR02)

“then there are those difficult people, who are encouraged by fireside lawyers, and I think in the family courts, there's, you know, there are groups that encourage, particularly fathers, to represent themselves. So, some do it because they think they're cleverer than the lawyers, and that they can do a better job... And then, I think, society, has given people this idea that they can, you know, that they're as clever as the next person, and that they can represent themselves. Because some of the personal litigants, of course, you see, think that they are cleverer than their solicitors, with their McKenzie Friends, and things like that.” (Ju05)



Some court actors perceived some LIPs as being motivated to self-represent in order to manipulate the proceedings.

“however, most of the personal litigants I meet have started with lawyers. They are personal litigants for a reason. There are many reasons. One of the reasons would be, literally, just to play the thing out, and make things so difficult for their former spouse, because there’s a huge amount of emotion involved in these cases. That they play the system hoping that the person will go away. They may be sitting in the house, and that I’m married to you, and you’ll go away if I keep making life impossible for you. That’s one type of person.” (LR07).

Whether their perceptions are grounded in fact is not possible to discern. We came across one LIP who admitted he was purposefully extending proceedings for as long as possible to ensure the other side incurred high costs as a form of punishment (Dom06), but this was not his reason for self-representing. Other than this individual, manipulation was not identified as a motivation to self-represent.

Court actors identified encouragement from other LIPs or support organisations as a reason for individuals to self-litigate, reflecting to some extent the views of LIPs who felt sufficiently supported to self-represent:

“I think the more litigants in person there are, and the more the judiciary in the court service system, then they’re going to explain their experiences to the man in the pub, or the woman in wherever, and then they’ll go back and represent myself, and then, you know, if they’ve a good experience of it...I’m not saying you should set out to give people a bad experience, but if the litigants in person feel empowered they’re likely to say, if I can do it, you can do it to their friends, family.” (LR03)

Some court actors felt that, for a small number of LIPs, there was a personal characteristic of obsessive self-representation exhibited by those who were blind to reason or had a careerist attitude to their cases:

“there are some other people who are frankly un-representable because they are so blinded or so obsessed or focused on their case that they don’t see any other approach and therefore they don’t accept any advice.” (Ju12)

“I think the fact that they’re in the High Court, or the Court of Appeal, there’s a certain amount of kudos in getting there that is, to some extent, feeding their need to be heard, for their grievances to be aired. Whether, or not, it’s going to get them to where they want to be, in terms of a legal solution, you know, it’s a forum for them by that stage. I think they relish it, being in court, and appearing in front of all these lawyers, and some of them it just becomes an obsession, an absolute obsession.” (LR21)

As discussed in Chapter 5, some court actors associated obsessive litigation with mental ill-health. The choice for these LIPs to self-represent led some court actors to advocate for differential treatment of them in court.

## Treatment of LIPs ‘choosing’ to self-represent

Court actors repeatedly divided LIPs according to whether they were self-representing out of choice or not. Many of the legal professionals were of the opinion that the litigants who chose to self-represent were seen as better prepared, more determined, more able and but also more likely to abuse the system or be difficult in some way than LIPs who had not ‘chosen’ to self-represent. The ones who were seen to have no choice in self-representing, however, were seen as trying to comply with the procedures, fit in with the system, responding well to the system demands and possibly petrified of being alone in court. The distinction suggested to a small number of legal representatives and judges that the ‘by choice’ LIPs should be treated differently:

“it depends which range of litigant, I mean if you’re a litigant in person because you can’t get legal aid because there’s no merit to your case, well that’s entirely fair that you’re subject to that rigour and those demands because it’s self-inflicted. If you’re one of the un-representable people because you want points advanced that no proper lawyer could advance; well, there’s nothing unfair about that. It’s different for people maybe who do have points to make and are struggling to make them and that’s a tension... Some litigants in person I’ve got a lot of sympathy for, some I’ve got a lot less sympathy for.” (Ju12)

“...having obtained the legal advice, or have been told to get the legal advice, they decide now I’m going to plough on with this myself. And that, I think, is where I would welcome greater judicial intervention in the area where there are litigants in person by choice, or by their own design. The latitude perhaps could be somewhat contracted on the basis that, look, you’ve had the opportunity to get legal advice, you don’t want to do that for whatever reason, and you’re entirely entitled to do that, but as a result we’re not in a situation where you’re going to be given endless latitude. You are now going to have to meet these deadlines...” (LR23)

There was considerable evidence that the ‘choice’ being validated here was the ability or willingness to pay for legal representation. That meant that there was little recognition that other choices were valid, particularly the LIP’s view that the expense was not justified or proportionate, with judges more likely to see legal representation as an investment rather than an avoidable expense. While judges make clear that the choice to be unrepresented is for the LIP, we observed cases where LIPs were put under considerable pressure to accept that they were in the wrong for not taking legal advice, with one judge scolding a LIP that “[t]his is not a time to try and save some money. You might need to stick your hand in your pocket” (RCJ LIP - Obs). Yet, it was not always clear whether court actors knew the specific reasons why individuals self-represent in any one case. It has been noted above that here are multiple reasons for choosing to self-represent.

The suggestion that LIPs should be treated differently according to their motivation for self-representing implies separate tracks or standards for case management which may be material to the outcome of the case. This would require finding out first the LIP’s motivation for self-representing before making such a determination. For some judges, there was a clear approach to determining “whether they are personal litigants by choice, or by, genuinely by necessity” (Ju09), which itself would determine how the judge would respond to them. Where LIPs were seen to be unrepresented by choice, a judge might make clear to the LIP that “you’re basically choosing to be your own advocate, and you have responsibilities to the court,” and that they would be required to know the legal practice and procedures for their case. Our observations also indicated that some judges told LIPs that out of fairness to both sides, they expected them to run the case as a legal representative would and to not use being unrepresented as an excuse for not following procedure. However, for other judges, there was seen to be a need to treat those who were personal litigants by “necessity” in a different way, recognising their vulnerability and the faith that they have in the legal system and the judge. For LIPs who had unrealistic expectations or were “obsessive” the difficulty was seen to be the LIP’s mind-set, “that there’s no expertise involved” (Ju09) and so necessitated a different approach by the judge:

“you’re going to take a different approach, potentially, with each of those, because there are going to be different issues that manifest. One is simply saying, for example, I would like to have a lawyer, but I can’t afford a lawyer. Then they’re coming in, I think, with less of a perception of what they can expect in the court ... I think they’re more open to the guidance that you give. They are more interested in what you have to say, and how you have to say it. I find that those who come in, I’m not trying to say this in a pejorative way,

but as they come in with something more of an agenda it can be much harder to try and get some objective interaction going with that person, because they can come in with so many preconceived ideas about how they're going to be treated, or what the issues are, or how you ought to deal with those issues, it is harder to get through." (Ju11)

Not all judges expressed such strong views, and although judges often encouraged LIPs to consider getting representation there were judges who did not regard the reasons for self-representation as relevant. There was some limited evidence of a much more positive view of the increase in the numbers of LIPs as indicative of improvements in access to justice:

"I think there is a general impression that there are more [LIPs] than there used to be which is partly a good thing in the sense that people's fear of representing themselves is maybe breaking down a bit. So, I'm sure it's daunting but it might not seem quite so daunting as it would have down to somebody 20 or 30 years ago." (Ju12)

The study did not have the benefit of seeking judicial views on the range of reasons outlined in this chapter as to why individuals self-represent, and it may be that there would have been greater evidence of understanding and acceptance of these particular views if this exercise had been conducted. What remains interesting, however, is the stark difference in attitude that some judges will hold, that will translate into treating different LIPs differently.

### Human rights considerations

Fair trial guarantees: independent and impartial tribunal or court

A requirement for a fair trial are the impartiality and neutrality of the court, that is the absence of prejudice or bias. Appendix 1 explains that the ECtHR assesses impartiality using a two-stage test of subjective and objective impartiality. Subjective impartiality relates to the subjective prejudice or bias of the judge, and objective impartiality relates to the steps taken to ensure the appearance of impartiality. Personal prejudice is not necessarily present if a judge has a strong negative view of an applicant's case or character or treats them harshly provided objective impartiality is maintained in that the judicial view is not prejudicial of the facts of the case. Whether the standard for subjective impartiality is met in the case of a judge who treats harshly LIPs who appear through choice and perhaps without merit has not been subject of ECtHR jurisprudence.

## Conclusion

The main reasons suggested by self-represented litigants, and echoed by legal personnel, for appearing without representation was cost and legal aid ineligibility. Another common reason given was a bad experience with, or distrust of, lawyers. Many had used lawyers previously but became self-represented because they ran out of money, or lost trust and confidence in their legal representative and the court system. Other reasons included litigants saying they knew their case better than a lawyer and were capable of representing themselves. Legal personnel recognised that self-represented litigants often felt dissatisfied with their previous legal representatives but suggested it was because LIPs were not prepared to take the advice offered and so, in some cases, were unable to find a lawyer to act for them.

While the issue of cost is expected, it was notable that this was often complex and concomitant with various choice-based reasons, such as the litigant's perception and experience of legal representation, the court system and ultimately case progress and outcome. Therefore, the reasons for litigating in person appear to be the combined cost and choice-based reasons. Further, within the costs reasons there appear to be nuances by business area with some litigants in Divorce proceedings and Debtor's Petitions highlighting that the outcome is inevitable or can be achieved for significantly less expense whereas in Family Proceedings it tended to relate to the sizable quantum of fees, retainers and longevity of the proceedings.

These findings are broadly consistent with previous research. Abridging the reasons for litigating in person into a number of broad categories, such as cost and choice, may however be too simplistic and overlook the interconnected lattice of multi-faceted motivations and reasons related to the expense, the court system, distrust, past experience and choice. Indeed, while cost reasons are clearly a major factor, it was not always the sole catalyst but related to the experience and/or perception of legal professionals and the court system. However, such overlapping, but divergent and nuanced explanations for litigating in person have a number of attendant consequences for the court system, legal profession and LIPs themselves.

While there are clearly synergies between the reasons offered by LIPs and legal personnel as to why people litigate in person, a key difference relates to the motivations and outcomes with LIPs promoting a 'truth' and 'justice' or they know best agenda against what they suggest is a biased and unfair system and distrust of legal representatives. In contrast, legal personnel point to court rules, etiquette and unmeritorious cases where LIPs refuse to accept, or dispense with, legal advice. This points to a fundamental difficulty in the perception, expectations and reality of the key relationships between legal representatives and clients, which is further strained by affordability, online information and the increasing role of support groups and lay networks. A further, but significant, finding which cannot be underestimated is that the reason underpinning the LIP's decision to appear in person may in fact determine how the judge would respond to them during the proceedings.

## Chapter 7 - LIPs outside the courtroom

“Sometimes you don’t even know the question you need to ask... You just need help.” (FP51)

“As I say, the vast, I’ll repeat again, the vast majority provide no problems. They’ll come in and they’ll say to a member of staff, you know, what form, can you give me a form, or what form do I need to lodge an appeal for an Ancillary Relief matter. The staff give them the appropriate papers and they go away.” (CS04)

### Summary

As with other aspects of the study, the LIP participants presented a variety of activities to progress and prepare their cases outside the court room. They were generally united in their efforts to take steps to prepare their cases and some of their activities were common in some business areas, but beyond that, there was plenty of variety.

Most LIPs actively prepared their cases, with only a handful doing nothing out of paralysis, awareness, lack of time, limited IT ability or feeling defeated by operating in a foreign system. Finding information and help was easier for people in Divorce and Debtor’s Petition cases, but less so for other business areas. Dealing with paperwork was problematic for LIPs, especially those in Family Proceedings and Ancillary Relief. Divorce and Debtor’s Petition LIPs were supported by advice agencies or NICTS staff. LIPs reported the forms were not easy to follow and contained jargon unfamiliar to them. When the LIPs prepared statements they did so with uncertainty that what they were doing was correct, so would often produce over-long documents.

The LIPs went to many different sources for advice and support. NICTS counters were contacted most frequently and found to be useful. LIPs sometimes had the expectation they could obtain more from the counter staff than procedural information, which frustrated LIPs and was a source of anxiety for staff members. Court staff also felt constrained and frustrated by the amount of time LIPs needed. Particular sources of frustration for LIPs lay in reported errors in the administration of their cases and jurisdiction issues when the LIP was resident outside Northern Ireland.

Half of the sample of LIPs contacted a lawyer at some point, either for advice or to seek representation. These LIPs did not rate them as a useful source of advice but this may be a reaction to the cost or by representatives not agreeing to take on the LIP’s case. LIPs in Divorce and Debtor’s Petitions proceedings tended not to contact a lawyer because they were well-served by existing advice. Many LIPs reported virtually no contact with the opposing side, including the legal representative. Many did not know they could have direct contact or how to do it. For their part, legal representatives were often wary of contacting LIPs from having experienced difficult exchanges in which they felt the LIPs were emotional and hostile towards them. Despite not being in contact with the legal representative for the opposing side, LIPs benefited from their expertise when the judge ordered the legal representatives to prepare court bundles or perform other actions.

Some of the LIPs were accompanied by McKenzie Friends, who were either experienced in the proceedings, or family or friends there to support the LIP. Some LIPs depended fully on their McKenzie Friends while others only wanted someone to sit beside them. No mechanism exists for assessing how well McKenzie Friends serve LIPs. Family and friends were a common source of pastoral and emotional support.

The LIPs contacted a wide variety of advice services, but apart from the dedicated advice services on Debtor’s Petitions and Divorce proceedings, there was no central hub to support their advice needs. It is telling that more than half of the LIPs were not confident they were adequately prepared.

## Introduction

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When faced with a legal problem, people go to a variety of advice-givers (Genn, 1999). The support-seeking strategies of LIPs in particular have been studied in several jurisdictions and it has been shown that LIPs approach many different types of advice-giver or source of support, including lawyers, court counters, McKenzie Friends, networks of LIPs, advice agencies, family and friends, online sources and law centres (Dewar, Smith and Banks, 2000; Moorhead and Sefton, 2005; Mulherin and Coumarelos, 2007; Toy-Cronin, 2015; Knowlton *et al.*, 2016; Lee and Tkacukova, 2017). LIPs may engage with seeking support in different ways, categorised by Trinder *et al.* (2014) as proactive, reactive and passive. Furthermore, advice-seeking behaviour has been associated with different personal characteristics (Genn, 1999) and with levels of disadvantage (MacDonald and Wei, 2016), though these were not investigated in this study.

LIPs take many steps to prepare their cases with the court appearance as the tip of the iceberg of their activity (Trinder *et al.*, 2014; Toy-Cronin, 2015). However, paperwork can be overwhelming to LIPs and they make mistakes in completing forms often because they are not clear about what to include and are unfamiliar with the legal language (Macfarlane, 2013; Knowlton *et al.*, 2016). Moorhead and Sefton (2005) reported that LIPs were reluctant to speak to the lawyer for the opposing side out of fear that they would take advantage of them, while the lawyers felt LIPs insisted on speaking only in front of the judge so they could spring new information on the court. LIPs often have uninformed expectations of what court staff can do for them and court staff find dealing with LIPs sometimes stressful (Macfarlane, 2013). Of particular pertinence is the definition and practical, workable understanding of the dividing line between legal and procedural advice. It is elusive and there is little clear guidance for court counter staff who rarely have any formal legal training and so find it difficult to navigate and feel anxious that they may give the wrong advice (Greacen, 1995; Dewar, Smith and Banks, 2000; Macfarlane, 2013; Toy-Cronin, 2015). Studies in other jurisdictions have found advice aimed specifically at self-representation to be sparse (for example, in New Zealand, Toy-Cronin, 2015) and people who self-represent need free or low-cost advice (in the UK, Genn, 1999), pointing to a contradiction between being told you can exercise the right to self-representation and the difficulty of being able to do it (Toy-Cronin, 2015).

Related to advice-seeking is how informed LIPs feel about their proceedings. LIPs have been identified as having little or no understanding or knowledge of the procedure or law involved in their cases. They have difficulty completing forms or knowing which ones to complete (Faulks, 2013; Macfarlane, 2013; Trinder *et al.*, 2014). They often stray from procedural requirements (Hunter *et al.*, 2002; Moorhead and Sefton, 2005; Trinder *et al.*, 2014; Toy-Cronin, 2015). They cannot translate a grievance into legal claims or understand the remedy sought against them (Moorhead and Sefton, 2005; McKeever, 2013). Their lack of understanding and procedural knowledge puts them at a disadvantage because they cannot present all of the evidence required by the judge to decide (Knowlton *et al.*, 2016). Lack of familiarity with procedure prompted Hunter *et al.*, (2002) to categorise the majority of the LIPs they met in their study as 'procedurally challenged', demonstrating a common characteristic of experiencing procedural difficulties and a lack of knowledge or experience with litigation. They noted in particular that appeals lodged by LIPs ran into problems because LIPs did not understand the purpose of appeals and were unable to meet the procedural requirements. Procedural difficulties were not found to be dependent on level of education (Macfarlane, 2013). A lack of understanding and the complexity of the procedures were cited by many LIPs as a source of anxiety (Macfarlane, 2013; Trinder *et al.*, 2014).

This chapter examines the findings from our study sample to identify the specific preparatory actions LIPs took, how well prepared they felt as a result of the actions they had taken, including their ability to deal with the

necessary paperwork. Having reached the court in readiness for a hearing, the LIPs' levels of knowledge of procedure and the law were canvassed and are reported on here. Finally, the sources of advice and information accessed by the LIPs are described. Of interest is the nature of the barriers they faced in accessing support before they reached the court hearing. Data from all sources are drawn on, including the questionnaire. Overall, the chapter reveals that LIPs access a wide range of sources in order to prepare for litigating in person prior to their court hearings but that considerable barriers exist that prevent LIPs from being able to fit easily within the norms of the court system before they get to court.

## How do LIPs prepare

### Preparing their case

As Chapter 6 identifies, some LIPs decided to go without legal representation because they felt they could prepare and present their case adequately themselves. The majority, however, recognised the barriers that they faced in being able to understand the legal position, the court procedures and being able to argue their case in front of a judge. The majority of LIPs reported in the interviews making an effort to prepare their case and indicated a high level of activity directed at this preparation. They exemplified a wide variety of abilities, interest, determination and strategies in preparing to represent themselves. The only two safe generalisations to be made are that first, LIPs engage and make an effort to prepare their cases; and second, LIPs involved in lengthy, complex cases undertook a large amount of preparation to a sophisticated level. However, beyond these, the LIPs' preparation efforts were diverse:

"I just made sure that I'd got all the papers that I thought I should... well, everything that I filled in to them, and I've kept copies of, took that with me. I just wrote a few things down, because I thought if I have to give them the sheet of paper that I'd taken with me, just a few words to remind me of their terminologies for things, because when you don't use them every day you don't necessarily remember." (AR26)

I: "Before you came in this morning or over the weekend did you prepare yourselves for what you were going to say?"

F: No, I didn't know what to expect.

M: We didn't know. It's hard to prepare for something when you have no idea what's ahead of you." (Bank10\_11)

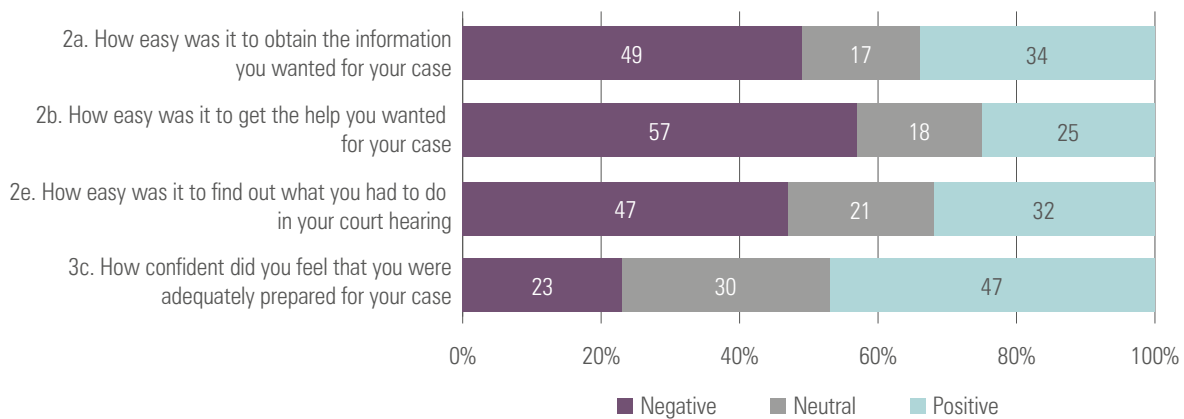
"[B]ut you just, you, because there's no booklet or anything out there, you just, you just don't know what you're meant to be doing, I'm just trying my very best and learning from my mistakes but, it's not a good way to be operating." (FP08)

The diversity of responses itself tells us much about the types of advice resource that would be required, and, predominantly, that there is no single advice or support solution that will help all LIPs.

Our research was interested in identifying the ease with which LIPs could access information that they needed, and the extent to which barriers existed. Four questions in the questionnaire addressed obtaining information they needed for their case and on how to run it – see Figure 8. Question 2a asked how easy it was for the LIP to *obtain the information* they needed about their case. Only around a third (34.5%) said it was easy, while half (48.7%) said it was not easy, and 16.8% said it was neither easy or not easy. There were differences in the

balance of positive and negative reactions to this question across the different business areas. There were 13 LIPs involved in Creditor's Petitions in the sample, 11 of them said it was not easy. Similarly, of the 20 people in the sample in Ancillary Relief proceedings, 13 of them said it was not easy. On the other hand, of the 11 people in Divorce cases, 10 said it was easy to get information, and 7 of the 12 Debtor's Petitioners in the sample said it was easy. The sample contained 47 LIPs in Family Proceedings, and were split in almost equal measure between those who found it easy and not easy to get the information they needed.

**Figure 8:** Questionnaire questions 2a, 2b, 2e and 3c



Question 2b asked how easy it was to *get the help* they needed for their case. Over half (56.9%) said it was not easy, and only a quarter (24.8%) said it was easy. The remaining 18.3% said it was neither. Again, the business area differences are worth noting. None of the 19 Ancillary Relief LIPs rated obtaining the help they needed as easy, and 14 of them said it was not easy (the other 5 rated it as neither). Similarly, only one of the 13 Creditor's Petitions LIPs found it easy, with eight saying it was not easy (and the other 4 saying it was neither). The 40 Family Proceedings LIPs in the sample were less unequivocal but still on the negative side, with 24 rating it as not easy to obtain the information and 11 saying it was easy. The LIPs who had a more positive reaction to this question than negative were in Divorce proceedings. Of the ten in the sample, seven rated it as easy, one as not easy and two as neither.

Question 2e asked how easy it was to *find out what they had to do in a court hearing*. Almost half (47%) said it was not easy to find out and a third (32.2%) said it was easy. The remaining 20.9% said it was neither easy or not easy. There were fewer differences in the balance of positive and negative reactions to this question between the LIPs in different business areas. Again, Divorce LIPs were predominantly positive about finding out what to do in court, with seven of the ten participants saying it was easy. Again, more Ancillary Relief participants did not find it easy, with 10 such responses from the 18 participants, and four rating it as easy and four as neither. Also, more Family Proceedings LIPs in the sample did not find it easy, with 23 of the 44 in the sample rating it so, and 12 said it was easy. Debtor's Petitions and Creditor's Petitions LIPs in the sample were distributed equally as finding it easy and not easy.

We also wanted to understand how confident or reassured LIPs were as a result of the actions they had taken to prepare. When asked about being *adequately prepared for their case* (Question 3c), under half of the questionnaire participants (47.5%) said they were confident they were, while 22.9% said they did not feel confident they were



adequately prepared; the rest were undecided. Ten of the 11 LIPs in a Divorce case reported they felt adequately prepared and 25 of the 48 Family Proceedings participants said the same. The LIPs in Creditor's Petitions, on the other hand, were less positive with only two of the 14 participants saying they felt confident. The responses in the other business areas were less unequivocal. These responses suggest that many LIPs walk into court without confidence that they are adequately prepared for their case. This mirrors the self-assessment of the study's LIPs of their low level of knowledge of the process and law in their cases, discussed below in LIPs' Knowledge.

The relatively positive responses to the questions about obtaining information from LIPs who prepared for cases in business areas of Divorce and Debtor's Petitions are probably attributable to the accommodations made in these areas to make them more LIP-friendly and to the support available, both at NICTS offices and from the voluntary sector (see below in Sources of Support).

From the interviews, it was also evident that the majority of LIPs in the sample made efforts and engaged with the requirements of their case at some level. Some dug into the issues of their cases, conducted thorough internet searches, critically assessed the quality of online advice, referred to case law and law books, prepared the required statements and documents, anticipated likely questions and different scenarios or made bullet points for the court procedure. As one LIP remarked:

"If you're going to go as a litigant [in person], you need to do your homework. You need to research it." (AR09)

The LIPs reported in the interviews making an effort to prepare their case and only a few in the sample reported not doing any preparation or seeking any advice. Their reasons for not doing so are instructive for determining the parameters of a support service targeted at LIPs. Mental paralysis was admitted to by a couple of LIPs; others said they worked, were a single parent and simply had no time to spend on the case; another was a foreign national and was unsure of the system or where to go to ask; another foreign national felt "it's too much job to do" (FP37) after a consultation with Citizen's Advice and gave up trying to obtain advice; another LIP gave the impression that he did not understand his own advice needs nor the utility of advice; others said they did not know what to expect so did not know what to prepare; one LIP said he did not use the internet, so did no preparation; some Divorce LIPs said the issues were straightforward and apart from filling in the forms, there was little else to be done; and a couple of other LIPs knew their cases were straightforward and that full knowledge of the details of the case or by telling the truth meant there was nothing to prepare:

I just really didn't feel I needed it. I just...you know, I knew I was coming in, I knew the question I was going to be asked, I knew what the answer was going to be and, you know, it didn't need, you know, it really didn't need any outside help to go through with that. (FP11)

The plausible reasons given by these LIPs for not preparing their cases give an indication of some personal barriers that some individuals have to overcome when they are faced with a court appearance. Paralysis and avoidance, time constraints, lacking awareness of their own needs, limited IT ability and being defeated by operating within a foreign system are issues that a support system will need to negotiate to be able to support LIPs through their cases. The reasons given by these LIPs for not seeking advice or support suggest that advice-seeking is not an automatic response amongst all LIPs, a characteristic that is evidenced across the literature on advice seeking behaviours.

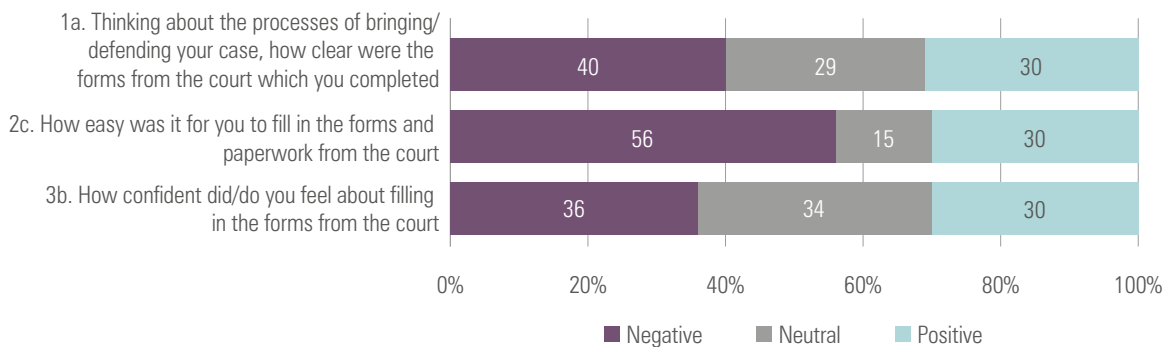
While many of the LIPs were proactive in seeking information and preparing their cases, they did not find it easy. The following sections examine how they dealt with paperwork and then look at their interactions with different sources of support.

## Dealing with paperwork

Part of the preparation that LIPs in our study had to deal with was the paperwork required to progress their cases. By paperwork, we mean applications, affidavits, statements, bundles, discovery and other papers required to expedite the LIPs' proceedings. These are standard court documents that lawyers produce with regularity and relative ease, and which the court system depends on for the smooth running and administration of cases. The completion of the paperwork is therefore a procedural requirement, and the absence of such paperwork impacts not just on the LIP's case but on the court actors involved.

The ability to deal with the range of paperwork required by court proceedings was explored in the study, beginning with the forms created by NICTS for litigants to issue proceedings. Our questionnaire contained three questions about completing court forms addressing their *clarity* (Question 1a) and *ease of completion* (Question 2c) and the LIP's *level of confidence in filling in the forms* (Question 3b). These questions were applicable to two-thirds of the questionnaire participants (n=82), while the remaining participants were participants in their cases and not required to complete these forms – see Figure 9.

**Figure 9:** Questionnaire questions 1a, 2c and 3b



The forms were unclear to 40.2% of the sample, while only 30.5% found them clear. The rest said they were neither clear nor unclear. Disaggregating the participants by business areas results in small cell sizes, but there is a discernible pattern suggesting that more Family Proceedings and Ancillary Relief participants found the forms unclear than LIPs in other business areas.

More than half of the questionnaire sample (55.5%) did not find the forms easy to complete, and less than a third found them easy (29.6%), with the remainder saying they were neither easy or not easy. Again, it was Family Proceedings and Ancillary Relief participants who tended not to find the forms easy to complete.

Debtor's Petitions petitioners often had help with the application forms from an advice agency, and Divorce petitioners frequently referred to the court office staff to check the accuracy of their application, had their forms returned several times for the LIP to amend errors or attended the Personal Petitioner Interview costing £50:

"[I] sent the English forms and they, basically, sent me back the forms and said, look, you know, you need to change them all back onto, you know, the NI courts forms, which I found really difficult. More, same questions, just the way they were worded." (Div07)

Even with the high level of support available for these two legal procedures, the LIPs in the sample still did not find the forms either particularly clear or easy to complete. Only three of the 11 Divorce LIPs said they were clear, and five said they were easy to complete. Of the eight Debtor's Petitions LIPs, five said they were clear and 4 said they were easy to complete.

Only 30.1% of the participants said they felt confident about filling in the forms, while 36.1% said they did not feel confident. The remaining third said they felt neither confident or not confident. While these results portray the underlying variation in the sample's experience, the lack of an overall positive response to the clarity of the forms, ease of completing them and sense of confidence when completing them suggests LIPs are under-served in this area. However, the LIPs' efforts to complete the forms by themselves should not be under-estimated.

The questionnaire only addressed completing forms from the court, but the interviews covered the broader range of paperwork relevant to the LIPs' self-representation. The LIPs reported that they did their best to provide the written information requested. Some prepared court bundles, statements, skeleton arguments and affidavits. However, many expressed their uncertainty over whether their efforts were adequate or met expectations. A recurring comment was the 'belt and braces' approach to statements and affidavits where LIPs were unsure or were unfocussed about what to include, so included everything for completeness, and so produced over-long written submissions. Some LIPs who were involved in lengthy, complex cases were fully engaged in providing the required paperwork, including court bundles, but again expressed uncertainty over whether they were doing it right.

Court actors recognised LIPs' industry but also the flaws in their preparation. The inability to distinguish between relevant and irrelevant information was a continuing concern raised by court actors, where the problem was not a lack of research having been done by LIPs but an inability to conduct effective research. Court service staff also described LIPs as not knowing what they want: "They just know they want to do something, so, they're pushing me and my staff to, sort of, tell them what they should do, which is what we can't do" (CS03). LR13 noted that a LIP in a case she was involved in had a suitcase of information, printed from the internet, "not one bit of it relevant." Court actors readily pointed to LIPs' lack of focus, the length of their submissions, inappropriate remarks, lack of argumentation:

"Yes, and also the nature of the correspondence. I mean the correspondence I receive from personal litigants is very different to that received from lawyers. In fact, lawyers shouldn't really be writing to me anyway, but personal litigants have no difficulty doing that and they write in inappropriate ways, they're very good at making complaints as well, usually unsubstantiated." (Ju07)

"I think they prepare their cases very well, but they don't have the legal nuances to know how to prepare their cases, and to know what the court is looking for. So, usually, you're dealing with a lot of irrelevant information that you have to wade through. So, it's almost like for, you know, the solicitor on the other side, it's double a job because they're having to deal with their client wading through their information, or weeding out their audit information, and then whenever you're negotiating with the other side, you know, they're talking about a lot of irrelevant stuff." (LR02)

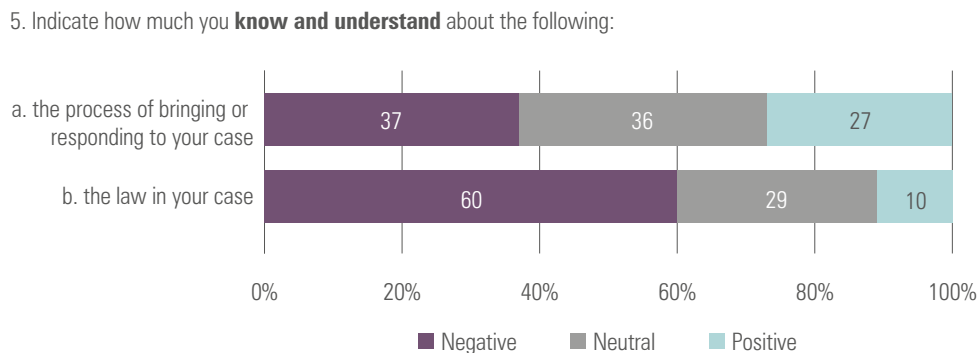
Judges could also resent the additional burden of work that fell to them as a result of failure by LIPs to provide the court with the necessary paperwork. Judges noted that if there were legal representatives the paperwork would be ready for the judge to view, but in the absence of this the judges felt that they were being required to undertake file analysis on the behalf of LIPs, something they did not regard as being the court's role.

Overall, the LIPs' industry directed at preparing for their cases was done in earnest, but without any reassurance of its appropriateness or accuracy.

## LIPs' Knowledge

The LIPs rated their *knowledge of the process of bringing or responding to their case* in the questionnaire (Questions 5a & b – see Figure 10). Roughly a quarter (27.4%) of the LIPs gave a positive rating to their knowledge of the process of bringing or responding to their case (Question 5a), while 36.8% said they knew little or nothing, and another third rated themselves at the mid-point.

**Figure 10:** Questionnaire questions 5a and 5b



Only the LIPs in Divorce proceedings in the sample unanimously rated themselves as having some knowledge of the process with none of these 11 individuals rating themselves as having no or very little knowledge. The 46 LIPs in FP were divided in their self-assessment, with 14 saying they knew nothing or very little and 14 saying they knew something; 18 put themselves at the mid-point. The LIPs in other business areas tended to rate themselves with no or low knowledge.

These ratings indicate the LIPs' self-assessment of their knowledge. The LIPs in Divorce proceedings who indicated they knew something about the process may have been reassured by the preparation they had done and the support they received.

The interviews delved into the detail of the gaps of the LIPs' perceived knowledge. No business area was without queries, irrespective of the how straight-forward the process was. For example, LIPs undertaking Divorce or Bankruptcy proceedings, both regarded as being relatively straight-forward procedures, had queries or expressed puzzlement about the procedure. Queries and gaps in knowledge of procedure across the business areas ranged in complexity, from not knowing where to go in the court building, how to address the judge, what an affidavit is, to how to serve a summons, deal with witnesses and how to lodge an appeal or how to prepare a skeleton argument.

"Entering into the buildings, and finding out where to go. Now, people were helpful, but there was just so many people in such a hubbub, and you don't know what way things run, and I was afraid of being late and, you know, going to the wrong place, or all of those type of things." (CP01)

"You need to know the process from start to finish. This is what's going to happen. You're going to court. I didn't know what a directions hearing was. I didn't know that other hearings were, like, there was a hearing where you were to be put on the stand, and the final hearings, and stuff... Am I on this stand today? I don't know. Or, have I to get evidence. I just didn't know what to do." (FP24)

There was a recurring theme of continually reaching limits of a LIP's knowledge or expectation of procedure. A LIP might have prepared for their court procedure only to come away with the boundaries of their unawareness widened: some of their unknown unknowns becoming known unknowns.

"I wish I had have sat down and done my homework, and done it all again. It's hard. It's hard to know what to expect. I'll know what to expect the next time I go in. If I had the money, I'd have a lawyer. I don't have the money, but because I'm a litigant, I know what to expect the next time I go in. For anybody that hasn't been in there before, you're going in with your eyes wide open, and you haven't a clue what, to be honest, what's going to happen to you." (FP24)

The self-reported *level of knowledge of the law* in their case canvassed in the questionnaire (Question 5b – see Figure 10) was even lower than that of the process, with only 10.3% of participants stating they knew some or a lot about the law in their case. The majority of questionnaire participants, 60.3%, reported they knew very little or nothing, while the remaining 29.3% rated themselves at the mid-point. Of the 12 LIPs in the sample who professed to having some knowledge of the law, no business area dominated.

Often the LIPs were not aware of what they did not know, which was itself a source of stress:

I: "So, what's been the greatest source of difficulty in coming here on your own, or bringing this, or answering this case by yourself?"

P: "It's not knowing if I'm doing the right thing or not." (FP12)

Legal representatives too were aware of the gaps in LIPs' knowledge and inability to act alone.

"It's a big ask to expect a litigant in person to know what it's taken me ten years, and I'm still making mistakes." (LR03)

It is alarming that there are people going through court processes who feel they know little about the law or process they are undertaking. Some LIPs could identify how their lack of legal training disadvantaged them. As we have seen, some went to great lengths to overcome these intellectual barriers but there was very little acceptance that anyone but the most skilled LIP would be able to do so, or that there were substitute procedures or training that could fully level the playing field.

## Sources of advice and information

The study does not provide an overview of all of the available sources of advice and information that are available to LIPs; such a task is beyond the scope and capacity of the report although there would be considerable value in mapping the advice landscape. What the research does examine, however, is the frequency with which LIPs accessed different advice sources – some general and some specific to the business areas we were examining – and the degree to which they felt these sources to be useful.

Overall, LIPs in this study expected that there would be advice on how to self-represent, and found the available resources offered by the court system and voluntary sector to be lacking:

"I thought there would be somebody you could, sort of, phone up, or get advice on it, or maybe a breakdown of what should be in it, but I don't know." (AR07)

The questionnaire (Question 9) asked LIPs about the *sources of information and advice* they sought for their proceedings and about how useful they were. As Table 6 (below) shows, the LIPs in our sample consulted a

variety of sources for information and advice. The most commonly consulted source was the NICTS desk or court office with 82 of the 115 participants saying they used it. LIPs also consulted family, friends or colleagues, advice services, various online sources, lawyers and others.

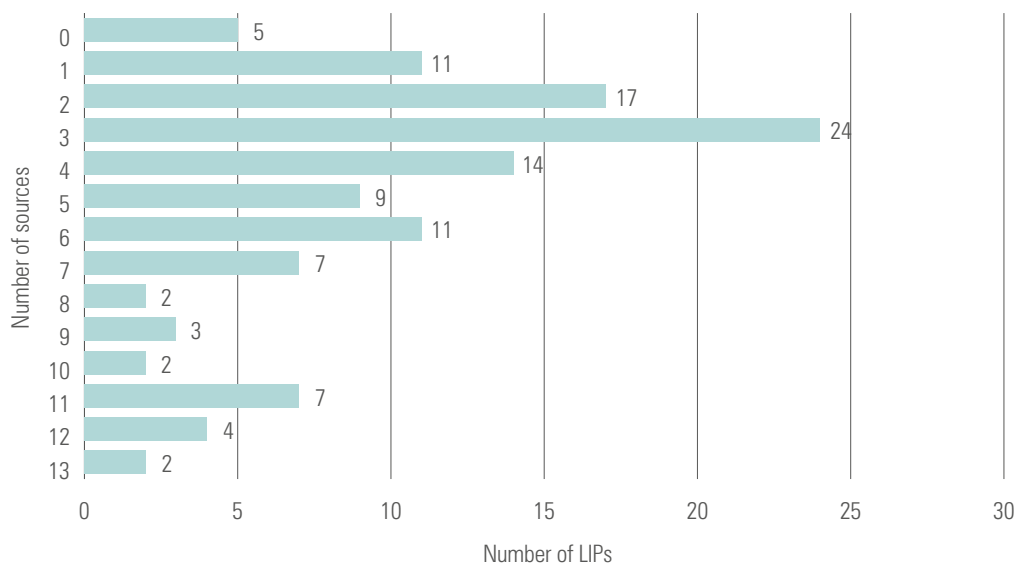
**Table 6:** Sources of information and advice consulted by LIPs who responded to the questionnaire with the number of ratings for their usefulness per source

	Number of participants	Number of ratings				
		NOT useful	←————→			VERY useful
		1	2	3	4	5
Court service desk or court office	82	12	11	14	23	22
A friend, colleague, member of your family	72	3	3	11	21	34
ADVICE SOURCES:	72	24	6	11	7	24
<i>Local advice agency – eg Citizen’s Advice</i>	51	24	6	9	3	9
<i>Families Need Fathers</i>	11	0	0	1	2	8
<i>Women’s Aid</i>	4	0	0	1	0	3
<i>Christians Against Poverty (Debt advice)</i>	3	0	0	0	1	2
<i>Housing Rights</i>	1	0	0	0	1	0
<i>Advice NI</i>	1	0	0	0	0	1
<i>Step Change (Debt advice)</i>	1	0	0	0	0	1
Court service website	67	16	16	17	10	8
INTERNET SOURCES:	63	5	3	14	14	27
<i>Internet – General</i>	49	3	3	11	11	21
<i>Internet – ‘help for fathers’</i>	6	1	0	2	3	0
<i>‘relevant legal websites’</i>	4	0	0	1	0	3
<i>‘YouTube’</i>	2	0	0	0	0	2
<i>Case law, judgements</i>	1	0	0	0	0	1
<i>Citizens Advice online pages</i>	1	1	0	0	0	0
A lawyer	56	28	8	11	6	3
Police, social worker, doctor	35	20	2	7	4	2
Employer	24	13	2	2	2	5
Local council	21	20	0	0	1	0
Trade union or professional body	21	17	2	0	1	1
Insurance company	18	13	1	3	1	0
McKenzie Friend	6	0	0	1	0	5
Equality Commission	2	1	1	0	0	0
Previous case reports	2	0	1	0	0	1
Probation officer	1	0	1	0	0	0
NIHRC	1	0	1	0	0	0
Law society	1	0	1	0	0	0
Bar library	1	0	0	1	0	0
Job Centre	1	1	0	0	0	0
Bank manager	1	0	0	1	0	0

Table 6 also shows the LIPs' ratings for the usefulness of various sources of information and advice. The court service desk received largely positive responses while the court service website was found to be less useful. Specific advice sources (such as debt advisers) tended to receive higher usefulness ratings than general ones, while internet sources in general were rated as more useful than other advice services. Family, friends and colleagues received high ratings. Lawyers were consulted by several LIPs, but they were not rated as useful, while the other main source of specialist support, McKenzie Friends, were rated as very useful. Non-specialist sources, such as other professionals, employers, council, trade union and insurance company were not found to be useful sources of information or advice by the LIPs.

Five of the questionnaire participants said they did not consult any sources for information or advice on their case. However, the majority of questionnaire participants consulted at least one source and some consulted as many as 13 (see Figure 11).

**Figure 11:** Number of sources consulted by LIPs who responded to the questionnaire



Many LIPs in the questionnaire sample consulted multiple sources of advice and support, for example 61 (52%) had contacted four or more. There is no single source that satisfied all enquiries. Indeed, the variety and number of different sources consulted by the LIPs, as shown in Table 6 and Figure 11, suggests a scattergun approach to some LIPs' advice-seeking behaviour. The interview responses further reveal that even though LIPs were largely proactive in seeking support, they were not necessarily satisfied with the service they received. The next section discusses the LIPs' reactions to the different sources of support they consulted.

## Court staff

Court staff form the frontline for LIPs, as the public face of the NICTS and the official contact point for the administration of LIP cases. The court service desk was the primary source of information and support for LIPs. Staff were given a largely positive rating, although written communications from NICTS were regarded less positively. The staff themselves are acutely aware of the tensions that can arise when dealing with LIPs.

The questionnaire contained two questions relating to dealing with NICTS – see Figure 12. Question 1c asked *how clear written instructions from the court* were. Of the 117 participants, only half (51.3%) said the written instructions they received from the court were clear, while 29.1% said they were unclear, and 19.7% said they

were neither clear or unclear. Some LIPs reported they did not receive any correspondence about their case or court appearances. One LIP had repeated experience of miscommunication about court appearances and as a result missed several appearances. However, it was not always clear whether they were actually due to receive any correspondence, or were expected to take note during the hearing of the next court date.

“I got a bit off the court, but very little, it’s like the court orders and stuff and information and direction orders, you know. I had to go and get them myself off them, because sometimes, like the last one, they never sent it out. The time I went to it I was in court, they didn’t tell me that things were adjourned. So, I was going to court, oh, this has been adjourned last week, you should have been told. I never received any information, letters and stuff from them regarding it.” (FP24)

LIPs’ lack of awareness of dates of their next appearance arising either from their lack of attendance, inattentiveness or from an error on the court’s part is concerning. They may not know it is their responsibility to keep abreast of their case development or how to do it, and have an expectation the court will proactively keep them informed.

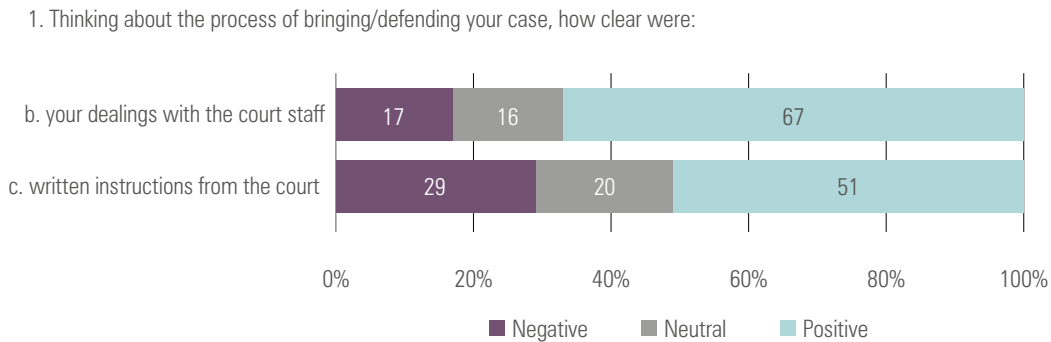
Some LIPs were very satisfied with the written communications from NICTS:

“They said to go, you know, they tell you exactly what to do, so, as far as getting here today, it was very easy. They say, show up at nine-thirty, what office to go to, then I was brought down here. The letter tells you that you address either My Lady, or My Lord, and then she’ll say, you know, at the very end, you know, you’ll go back and whatever. I mean, that, I knew exactly what to do.” (Div10)

The high degree of support given for Divorce cases by NICTS, as discussed earlier with regards to LIPs preparing their cases and dealing with paperwork, may account for this positive experience.

The second question was Question 1b which asked how *clear the LIP’s dealings with court staff* were. Of the 115 participants who answered it, 67% said their dealings had been clear or very clear. Only 17.4% said their dealings had not been clear and the remaining 15.7% said they were neither clear or unclear.

**Figure 12:** Questionnaire questions 1b and 1c





The interviews with LIPs corroborated the positive views towards court service staff, with LIPs and their McKenzie Friends acknowledging that court staff often went out of their way to assist:

“if you phone the court office staff, if you have any uncertainty, they’re more than helpful. If you were down in the court office they’ll show the forms, and most times put the form in your hand, and they’re very helpful in that regard.” (MF02)

While there was some variation in LIP responses, the picture that arises from LIPs’ impressions is of dedicated and attentive court staff who try their best to give the support asked of them:

“Just at the [court office], at the wee window there, they were fine. Anything I ever asked they answered for me, and anything that I submitted they were happy enough to take, and give me copies of. Yeah, they were good.” (AR12)

Some LIPs also received advice about self-representation from court staff:

“... I didn’t care if people thought I was torturing them but I phoned the court and I asked to speak to the Court Clerk and the Court Clerk advised me that I was actually capable of taking it forward myself and she did say when I turned up on that day, you know, there are certain things you can’t do in court but because you’re a person who is representing themselves, you are going to be treated differently probably than if you were a solicitor.” (Dom20)

Most LIPs contacted the court service for information on their case or on what to do and found the service helpful. However, LIPs were often hindered by their lack of knowledge of what to ask:

“...They’re not helpful... they’re not unhelpful. If you knew the question to ask them, they would give you the answer, but sometimes you don’t even know the question you need to ask... You just need help... Do you know what I mean? It’s like an open question. I need help, can you help me? What do you need? They’d say, what department do you need to speak to? It’s, like, I don’t know... I don’t know who I need to speak to. I don’t know.” (FP51)

Only a small handful of LIPs came across the handbook prepared for LIPs in the High Court ‘*A guide to proceedings in the High Court for people without a legal representative*’ (NICTS, 2013), but it was found not to be helpful and pitched at people with some knowledge of the law and procedure.

### ***Misalignment between expected and actual service provided***

Some LIPs’ expectations of what they could ask or expect to be provided with by court staff were misaligned with the usual practice of the court. For example, some LIPs expected to be able to communicate with court staff, and sometimes with the judiciary, about the particulars of their case without understanding the need to disclose all correspondence with the other side. Or there was an expectation that the court would provide transcripts of court hearings or documents from their case file without awareness of the procedure for obtaining them. The unfavourable reports of dealing with court staff were thus often related to the LIP’s lack of awareness of what NICTS staff can and cannot do or of what information they could expect to receive, with one LIP expecting to get comparable information provided by the court service to what would normally be provided by the health service:

I: “What did you get from the court?”

P: Nothing. A very, very, it was a very vague letter saying there was an inter-parte hearing heard today. Nothing about what it was about. I would have been expecting information on what was the content,

what was his proposal, so I could have prepared my argument... So, I felt that leaves you very, I think that leaves you at a disadvantage. Anything you go for, even for a doctor's appointment, or a hospital appointment, you know what your procedure is, and you get information about it, and the pros and cons, and all that. So, I think there should be more information on that letter saying, this is why you're going to court, this is what the inter-parte hearing means, this is what will happen, this is the topic for discussion." (FP21)

LIPs' lack of understanding of the role of NICTS staff in providing them with information is known to the court service itself:

"if you go into the tax office to get your car taxed, you know, you expect a certain level from people. But I think there's not a distinction in the perception of the public between the judiciary and the court staff. And we're there to support the judiciary. That's our job. Our job is to be the administrators, and to make sure the papers are in order, and are in front of the court.... All we're doing is the admin function, and I don't think that's clear at times." (CS10)

Whether a deeper appreciation of the role and limits on what the court service can do for LIPs would refine LIPs' expectations is uncertain, particularly given their low assessment of their knowledge of the procedure and law and their low confidence at being adequately prepared.

### ***Reported difficulties with administration of cases***

At the less favourable end of the reactions to dealing with court staff were some very dissatisfied LIPs, including those involved in lengthy, complex cases who had a wide range of experience dealing with the court staff. We encountered some LIPs who reported negligence or errors in the administration of their cases or advice given which had caused them further distress and delay. One such LIP felt she had been wrongly advised but could see the advice was given in good faith:

"... the court clerks had told me to use that process. I was, actually, using the right process, and they had told me, no, no, no, you've got it wrong, use this process. So, I went along and followed what they had told me to do. Now, they're not qualified to give you advice, so, you can't pull them on anything, but that's, again, what causes the problems. Now, it was, the person who did that, he was doing that in good faith, so, I'm not, I can't hold anything." (AR19)

Errors reported by LIPs included incorrect orders, not being notified of a hearing, the court using a former address despite being told it was no longer used, recorded deliveries going a-miss, not receiving notification in the post, and difficulty obtaining parking for a disabled litigant. While some of these errors produced one-off problems, for long-running, complex cases the errors compounded the difficulties in progressing the case and created understandable anger and frustration for LIPs.

LIPs living in other jurisdictions but litigating in Northern Ireland ran into some specific difficulties. For example, the process of arranging a Skype link for witnesses to appear without having to travel to Northern Ireland was unclear. One LIP attempted to make the link via one court in Northern Ireland and another in the other UK jurisdiction. The two sites required different authorities to set it up, one requiring a legal representative to make the request, a requirement which the LIP could not satisfy. The link was eventually established elsewhere, but only after a considerable amount of time and worry expended by the LIP. This situation highlighted an absence of compatible systems between the two jurisdictions, and no facility with the court services to adapt to the different nature of a LIP's status in proceedings.

Another issue for LIPs who travelled to Northern Ireland for their cases was turning up to court only to find out the case was to be adjourned, and that they had wasted time and money on travelling. While the requirement for an adjournment is rarely a court request, the case management issues for LIPs who travel are different to litigants from other jurisdictions who are represented. Some LIPs said they did not receive notification from the court of a court date until the day before, leaving them little time to organise travel and work responsibilities.

### ***The distinction between legal and procedural advice***

Some LIPs became frustrated when they were told by court staff that they could not assist with particular issues because it would be giving the LIP legal advice:

“I asked them first if it was possible to change the order without coming to court, and they said, we can’t say, we can’t answer that question, because what if they got it wrong. You know, they’re not, they said, we’re not legally trained, we can’t give you legal advice, we suggest you speak to a solicitor, which was the right thing to do, and I did speak to a solicitor.” (FP28)

While this was accepted by LIPs who, to some extent, recognised the need for staff to avoid liability, it remained a frustration and could sometimes be read as indifference to the difficulties that LIPs faced.

The frustration worked both ways, with court staff frustrated at being seen by LIPs as alternatives to legal advice when that was not their role. The idea that staff could act as substitute advisers was rejected on grounds that they were not trained to do this, and that LIPs did not appreciate the limitations of what they were there to do:

“I’m not legally qualified ... I’m a civil servant, I’m here to put stuff on a computer, and make sure things are right whenever they’re on there ...” (CS06)

Court staff were clear that they could not offer legal advice to LIPs and had strategies to ensure this was clear to LIPs seeking information. The dividing line between procedural information and/or advice and legal advice was clear to them.

“I think that your opening line is always, we’re not legally qualified, and we cannot give you legal advice. We can tell you procedurally, you know. I think everybody within this building, you know, in all the teams I’ve worked in, people are very clear on what they can say, and what they can’t say.” (CS09)

There are two points here about the dividing line between legal and procedural advice. Firstly, LIPs do not know what to expect to be able to obtain from court staff and that there is a dividing line. Secondly, court staff are administrators for the court and their remit to provide a service to someone seeking to make or answer a claim is clearly defined but the demand and expectation challenges the remit. They are neither in a position to offer the kind of advice LIPs seek, even if that was their remit, nor do they have the opportunity to explore what this might be beyond their remit. Being constrained by fears of giving the wrong advice and traversing the dividing line acts as a brake. Whether there is scope for closing the gap between LIPs’ expectation and the current remit of court staff deserves further exploration. As Greacen (1995) points out, the distinction is unclear and contested. A dividing between procedural advice and/or information and advice on legal merits and strategy was trialled in the Procedural Clinic (see Chapter 10) and offers commentary on this point.

Staff also felt vulnerable to what was seen to be an unpredictability to dealing with LIPs. Staff spoke about a fear of being audio- or video-recorded, or getting something wrong and being blamed for giving the wrong advice. Given that the problematic consequences of the ‘wrong advice’ was evident in our study, as noted above, the fear expressed by court staff is understandable. While this may point to a need to empower staff to be able stand over their advice, there is still a sense of feeling exposed when dealing with LIPs.

On a more mundane level, court staff felt they did not have the time to provide additional assistance to LIPs. Staff recognised that some LIPs wanted to be taken through “the whole process of a form” (CS05) but there was insufficient staffing capacity to manage this. There was an expectation that LIPs should not be absorbing more of the service resources than other court service customers – principally legal representatives. Staff were advised to give LIPs no longer than 15 minutes – the same length of time a solicitor would be given (CS07). Where staff were dealing with LIPs who took up more time than this, they were encouraged to refer the LIP up the management chain.

### ***Dealing with LIPs who are difficult***

There was a consistent acknowledgement that not all LIPs generated problems for court staff but that “the notorious ones... sour it for everybody else” (CS03). It was difficult for staff to deal with ‘difficult’ LIPs, who were often described as ‘obsessive’. The experience could leave staff feeling very jaundiced, with contradictory views on the extent to which these ‘difficult’ LIPs pervaded the system, swinging from the perspective that “there’s more unreasonable than there are reasonable” to concluding that “ninety-nine percent of the time they’re fine” (CS03). Whatever the reality, however, the subconscious response of court service staff was that hearts would sink when a LIP came in, and there was a need to fight against the assumption that the LIP was going to be difficult. The fine line between difficult and not-difficult customers was not always clear to staff, and there was a sense that there needed to be a more systematic approach to when and how LIPs should be ‘referred up’ or when managers should intervene to deal with disputes or difficulties. There was concern also that staff did not want to be seen as too weak to deal with difficult people.

Overall, the picture was one of staff coping well with the majority of LIPs, but under considerable strain in dealing with the ‘difficult’ customers, and of LIPs feeling generally satisfied with the service they provide, notwithstanding some sources of considerable difficulty, such as errors and issues for LIPs travelling from other jurisdictions.

This points to a need for training for staff in identifying and dealing with difficult LIPs, creating an ability to be more resilient and empowered, and to be able to counterbalance the emotional energy being expended on lengthy and difficult correspondence. Part of the frustration arises from the clear tension between the view that LIPs should not be absorbing more of the service resources than other users – who will be predominantly legal advisers – and the recognition that LIPs as a cohort do not appreciate the limitations on staff and are themselves under stress in dealing with their cases. As CS11 says, “[litigating in person] can be a strain if you don’t know what you’re doing. There’s no support there. There’s no advice. There’s no guidance. There’s no nothing.” There would seem to be a need for additional staff and a training need for all staff to be upskilled in managing individuals in a system with which they have little familiarity. It would seem sensible that there should be a particular role developed within the court service for dealing with LIPs, particularly with frustrated, difficult, vulnerable or obsessive LIPs. As CS11 says, “there’s no one person allocated to dealing with personal litigants.” What the evidence indicates is that a specific role might focus on personal skills as being as important as civil service knowledge, which may also help to address the loss of institutional memory and expertise that has resulted from a more frequent turnover of staff – attributed by some court actors to the greater options within the civil service to transfer between different departments – and that appears to be a contributory factor in staff not feeling confident enough to give or stand by their advice.

If the root of the difficulties faced by court staff lies with LIPs’ lack of familiarity with the procedural requirements of their cases, it would also suggest that some of the problems court staff face may be reduced if there was a

dedicated support hub for LIPs and an increased awareness of each other's roles and responsibilities. It may also suggest the need to recruit a professionally qualified lawyer as a staff member who is adept at navigating the dividing line between procedural information and/or advice and legal advice. The particular problems experienced by some LIPs living in a different jurisdiction also suggest the need for consideration on how to engage more directly with the LIPs' cases when adjournments or other case management events arise.

### Human rights considerations

Access to a court should not be prevented by an absence of information or assistance

Effective participation given the stress, demand and complexity of proceedings

Appendix 1 discusses the requirement of the court to ensure the litigant is aware of the documentation he or she needs to submit. The wider implication of this is the requirement for sufficient information available to LIPs to enable them to conduct their cases. The requirement also arises from the requirement for the LIP to be able to participate effectively in the proceedings.

NICTS currently provides information and guidance, but its actual mandate is to serve the courts. The steps taken to support Small Claims and Divorce by NICTS and Bankruptcy by the voluntary sector suggest that if more information is available, the easier the LIP's progress through the courts.

Access to a court should not be prevented by strict or incoherent procedural rules/fair trial guarantees:  
Access to a fair hearing and the States' obligation to exercise diligence in the administration of justice

The instances where LIPs received conflicting advice or there were errors in the administration of their cases suggests a failure to ensure coherence in the procedural rules and to meet the obligation to exercise diligence in the administration of justice. LIPs tend to operate within a great deal of uncertainty and the lack of firm guidelines or advice may leave them guessing whether they have done something wrong or whether something has been done wrong to them. The sometimes patchy guidance available to them and the absence of a facility where they can check whether they are following the correct procedure and what they can expect to happen exposes them and the courts to failures in the administration of justice.

## Lawyers

### **Contacting lawyers for advice**

Exactly half of the LIPs who responded to the questionnaire said they contacted a lawyer for information about their case. However, it is possible that this question is confounded with some participants answering about whether they contacted a lawyer for representation. The interviews provided a more detailed picture of how LIPs sought help from the legal profession, building on the evidence presented in Chapter 6 on why LIPs self-represent. It will be seen that there are inevitable overlaps here, with LIPs recognising a need for legal advice but not being able to access it because of costs, complexity of their case, the advanced stage of their hearing or because solicitors did not regard the case as worth getting involved in. Nevertheless, LIPs did regard lawyers as a source of advice and were required to interact with them outside the court hearing. Once again, however, the role of LIPs as being outside the court 'norms' meant that engagement with lawyers was often problematic, for both LIPs and legal representatives.

The first issue to note is that there were marked business area differences regarding whether LIPs felt a need to contact a lawyer prior to their court hearing. Of all LIPs in Debtor's Petitions and Divorce, only one in each business area said they contacted a lawyer. The existing support in these two areas seems to have signalled to LIPs there was no need to consult a lawyer about their case, either for advice or representation purposes, and it was not the case that any of them initially contacted a lawyer for these business areas and then realised they could self-represent.

Most Creditor's Petitions LIPs contacted a lawyer at some stage. Often the reason they were self-representing was because they were waiting to hear back from the lawyer and hoping for an adjournment, or they had delayed instructing anyone because they were deterred by the expense. A handful of Creditor's Petitions LIPs turned up to court unprepared, not knowing what to expect or, in one case, not knowing that s/he might need legal representation. They were either unaware that they were involved in legal proceedings or they had been trying hard to ignore them. LIPs were routinely advised in the Insolvency court to get legal representation, so many of the Creditor's Petitions in the sample were on the road to becoming represented. The study did not follow these cases to their conclusion.

Only a small number of Creditor's Petitions cases observed had taken legal advice and then proceeded unrepresented. They were in cases which could be immediately concluded, such as being advised to settle the order or having the order dismissed by the judge (CP10), or it was hopeless that the LIP would be able to pay for representation. Some Creditor's Petitions LIPs remarked that they resented being told to instruct a legal representative when they had no funds to pay for one.

Most Ancillary Relief LIPs had consulted a legal advisor at some stage, while there were many LIPs in Family Proceedings who had not contacted a solicitor at all, either for advice or representation. In both of these business areas, some LIPs maintained contact with previous solicitors or with family and friends who were solicitors and could advise them. They would draw upon them for support to check over statements or points of procedure. A couple of LIPs asked solicitors present in the waiting area of the court for advice on the hoof.

Some LIPs said they drew support from solicitors they paid for advice on a piecemeal basis, similar to unbundled services observed in Trinder *et al.* (2014) and widely available in Canada and USA. They found this expert, professional support in the background enabling.

"But [my previous solicitor]'d said to me, like, this is going to cost you way too much money for to go into court with a solicitor. You will be better off doing it on your own, and if you've got a good idea of what you want to do, you can do it. So, I was, like, right okay, I'll try it. And then I went in, with all my stuff. Like, she's helped me out a wee bit, like, but she's just, like, more giving me, like, advice over the phone. But I've actually leaned on the Women's Aid worker more than my own solicitor." (FP47)

The picture of LIPs as not attempting to inform themselves is therefore not wholly accurate. For some business areas, the existing support either expected from the court or accessed in advance meant that there was no pressing need to contact a lawyer. In areas where the legal complexities were regarded as greater, including Ancillary Relief, the lack of a legal representative did not necessarily mean there was a lack of legal support outside of court.

The questionnaire indicated a largely negative rating of the usefulness of the information that LIPs received from lawyers, with 36 out of the 56 LIP participants rating it negatively (see Table 6). At face value, this gives a skewed impression of LIPs' views of the advice from lawyers. Several of the participants had not taken advice but had sought representation and were deterred by the cost or were not taken on by the solicitor for various

reasons, which may account for the negative responses. Indeed, many LIPs wanted legal advice and took it from other quarters for free. While judges often mentioned the availability of *pro bono* services, particularly the Bar Pro Bono Unit, this rarely came up in interviews with LIPs. CB02 was an exception:

- P: “So, I went in to the Bar Library and both girls on reception told me, no, you’ll not get the help. That isn’t suitable for you. And then, only recently, I went back to it, and it was, like, do you know what, I think they may be able help me because there’s a form you fill in online, but the girls on the desk down at the Bar Library says, no, you’re getting no help here. And I had mentioned pro bono, and they says, no, you’re not entitled to *pro bono*.
- I: Right.
- P: And they sent me away, and I was, like, deflated yet again. No, because one person’s telling you a *pro bono* might be able to help you, and...” (CB02)

The infrequency with which the service was mentioned suggests either a lack of awareness of any such *pro bono* services or an advice mirage that such services seemed to exist but did not materialise. While the Pro Bono Unit of the Bar Council of Northern Ireland takes on occasional civil cases and offers informal advice and guidance to others (OLCJ, 2017a), the availability of its services is not as extensive as the impression given by judges when they cite it as a possible source of advice or support.

### **Benefiting from the work of lawyers**

The fact that LIPs were not relying on the traditional support mechanisms of solicitors and barristers, meant that a wider range of support was sought and required by them. This could have consequential impacts on legal and judicial personnel, however, placing additional work burdens on them compared to what they might be expected to do under the ‘norm’ of represented cases, with LIPs seen to be benefiting from this support. This includes the expectation that the lawyers on the ‘other side’ would draw up orders, prepare the court bundles and paperwork for the judge, even where this was a task that, procedurally, should fall to the LIP. It was a common finding in our study that legal representatives on the other side were asked or expected to take this on:

- P: “[T]he judge put the onus on us, even though our client was also privately paying for us to prepare all the documents, and there was about five hundred pages of documents, you know, it wasn’t a small case.
- I: Okay. Did you try to suggest perhaps that wasn’t the best thing to do?
- P: Yes.
- I: And what happened?
- P: Well, I think the judge was of the view it would make his job a lot easier if the documents were properly prepared, so then he took the view that we should do that.” (LR02)

“There’s a different burden placed on public funding because another tendency amongst judges, certainly, I admit to it, is that you will place more responsibility on the represented party. So, you will do more. If you do prepare a position on that, can we put that, could you organise that report for me. You’ll ask them to do more. So, that’s going on by the back door, I suppose, but you’re trying to get things moving, and they’re accepting that responsibility.” (Ju11)

This basic fact is accepted by these court actors and tolerated by some as an aspect of public service or a necessary prerequisite to the smooth running of the case and the interests of justice. The pragmatic reality for some legal representatives was that preparing the bundle themselves was easier than either not having a bundle and trying to navigate the case without one, or getting one “at the last minute ... a bundle which wouldn’t be right. And then you have to dismantle it, and re-do it anyway” (LR10). For some legal representatives, however, this practice was deeply resented because of the additional burden it placed on them and the displacement costs that their client would have to bear. In addition, some were concerned with the ethical issues that this created, balancing their duty to their client against their duty to the court. As LR21 noted, there was a feeling of being compromised, “because I am preparing ... and bringing coherence to a case which is against my client, and I’m very uncomfortable with it.”

Beyond this, the costs generated in securing agreement with the LIP beyond the ‘norm’ of two lawyers being able to negotiate an agreement between themselves, was also seen to add to the lawyer’s workload and costs:

“[I]f I do something on consent with the opposing council, and we go in and we put the document through, and it’s agreed ... [With a LIP] there is never consensus. So, you have to wait to a break in the list, when there’s a closed court, and everybody has left, you have to bring them in, and you have to go through the procedure again. The judge may say, now, I’m giving [the barrister] time to speak to you again to see if you can agree a way forward, and come back to me. We’ll come back again. Those reviews can take half a day, and I have to bill that time. And so, it feels to the client who’s doing the right thing that ... the other party is running rings around the system, because it takes so long to get to the point where you get out to the end. And then they tend to appeal, and then they don’t file appeal bundles, or a proper appeal notice, and it starts all over again ... And I don’t think what’s seen, as well, is the big loss to everybody else waiting to get in to court, and some of them on legal aid certificates, and the waiting costs that are billed.” (LR04)

This study aims to identify potential support mechanisms for LIPs, with a clear eye to the cost implications of any proposals. The financial costs of supporting personal litigants, however, should be seen in its broadest context, where displacement costs are already evident within the court system.

Most LIPs were not aware of the work done by the legal representatives on their behalf and in the cases where they were, they not particularly appreciative of it. The acquiescence of legal representatives to do the extra work is in part because they are directed to by the judge and in part the knowledge that it will benefit the progress of the case, not solely the LIP.

### **Corridor discussions, negotiations and settling cases**

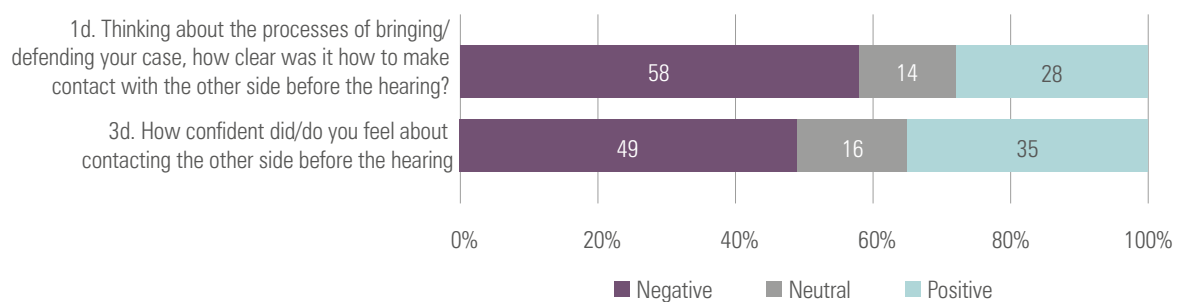
The process of litigating in person is clearly not just connected to the court hearing, but to the issues and developments that precede and succeed the hearing. One vital part of resolving civil and family law cases is negotiation, to establish between the parties what issues can be agreed and what disputes remain outstanding. Negotiations in the ‘shadow of the law’ are usual practice in many business areas. Family Proceedings, in particular, promote settlements out of court with the understanding that family disputes are best dealt with face to face, rather than through the court, as a means of facilitating long-term solutions and non-litigious, future dispute resolution. It would therefore be appropriate for LIPs to be able to contact the other side and participate in negotiations before coming to court.

The questionnaire contained two questions about how clear it was to the LIP *how to make contact with the other side* (Question 1d) and *how confident the LIP felt about making contact with the other side* (Question 3d) – See



Figure 13. Contacting the other side was applicable for 98 of the questionnaire participants. Over half of them (58.2%) said it was not clear how to make contact with the other side before the court appearance. It was clear for a quarter of them (27.6%), and the rest said it was neither clear or unclear. There were 43 Family Proceedings LIPs who answered this question, and 27 of them responded that it was not clear how to make contact with the other side, which is worrying considering Family Proceedings' focus on out of court settlements or negotiations. Similarly, only 35.4% said they felt confident about contacting the other side, while 49% of the questionnaire participants said they did not feel confident about contacting the other side; the rest said they felt neither confident or not confident. Again, the Family Proceedings participants were predominantly lacking in confidence with 25 of the 41 Family Proceedings participants saying they did not feel confident contacting the other side.

**Figure 13:** Questionnaire questions 1d and 3d



The work which is done in the 'shadow of the law' is a fundamental part of the administration of justice and is part of the fabric of the court system. The value of this work is well recognised, even if it is a much less visible part of the court process:

"There is so much good work that's done out in the corridor, and that cattle market that exists out there, where people are trying to thrash out as much as they can, or narrow issues, before they get into court." (Ju11)

What the research indicates however, is that LIPs may not be able to take advantage of this vital process, either because they are hostile to it, unaware of it as an integral part of litigation, lack the confidence to initiate or respond to it or, as Ju04 noted, not immediately accepting "how important it is to communicate with the other side to engage."

For their part, legal representatives regarded LIPs as "very defensive. They don't particularly want to go into court but they don't want to be seen to be backing down, which is how they see it" (LR11). This then made the "whole aspect of the process, which is done by liaison and agreement... much more difficult to achieve with personal litigants, because they don't embrace somewhat a detached approach that legal opponents would with each other, where we can be on opposite sides of the fence, but still have very good working relations" (LR21).

The consequence of this is that legal representatives may be unwilling to engage in these corridor discussions with LIPs. The lack of emotional detachment and potential hostility towards the legal representative as the 'other side' comes with a further risk that LIPs are not familiar with the concept of discussions that lawyers regard as being 'without prejudice':

- P: "I know the judiciary are very keen to encourage them, but we're in a very difficult position with regards to negotiations. Number one, they misrepresent what we tell them; and number two, as I said, you know, I don't know how far I'm covered in terms of if he relies on something I say, and something goes wrong with him, am I in a position where I can get sued for that, you know. So, I feel very uncomfortable dealing with them.
- I: So, from your point of view, the better situation would be to bring it to court to let it happen there?
- P: Yes.
- I: So, that way, that takes out your liability?
- P: Yes, very much so." (LR02)

The management of this perceived risk means that, in practice, pre-hearing negotiations will not (or are much less likely to) happen.

The interviews with LIPs indicate very few having meaningful discussions with the legal representative for the other party or with the other party themselves. The most positive responses were from LIPs involved in Crown Creditor's Petitions who met the Crown Solicitor in the corridor prior to entering the court room. This was for most of them the first opportunity to meet the other side and, in most cases, the LIPs reported feeling better informed and calmed having spoken to the Solicitor. The channel of communication had been opened and the LIP knew how to make contact in future. One or two other LIPs in other business areas reported workable relationships with the legal team of the other party which involved discussing the case and sometimes agreeing on the way forward, but other than these, there were very few LIPs who reported having meaningful discussions with the other side other than a quick chat on the day of the court proceeding. Some were in contact, but it was tense; others had tried to negotiate but had been unable to reach an agreement and were waiting for a court decision. Some LIPs were not even aware they could contact the other side. One LIP admitted to not trying to contact the other side out of stubbornness. Others still felt wary or suspicious of the legal representatives or that the legal representatives were reluctant to contact the LIP, as this LIP hinted:

"I'm always up to chat to people, you know, even outside of the court, before we go in, you know. As you'll see barristers, and solicitors always meeting before they go in, and they try to reach some sort of a compromise or, you know, and they're going to say, well, I'm going to say this, you know, what do you think. Or, is there any way we could get this worked out between us. They never come near me on any occasion." (AR18)

LIPs can see legal representatives talking in the corridor and when they are not approached they can feel excluded from that aspect of the proceedings. What becomes evident from our research, looking at the issue from the perspectives of both the LIP and the legal representative, is a failure to understand the other's position and to communicate accordingly.

As an example, we observed a barrister following up on court directions to provide the LIP with an email address. The barrister told the LIP to allow two weeks to get it. The LIP questioned why it would take two weeks, and called it a 'legal trick.' The barrister responded curtly to state that it was not a legal trick and offered no further communication. Her solicitor intervened to explain that the two weeks were to allow the solicitor to do the necessary office work to obtain the email and that it would be two weeks at the latest. The LIP was grumpy and critical, pointing out the address could be obtained from a third party, but he acquiesced.

It is easy to see how this kind of off the cuff remark can be wearing for the barrister. The LIP made a valid point but he used a derogatory, accusatory turn of phrase – legal trick. In his mind, the two week wait might be a ploy designed to frustrate him. He remarked on something that looks over-long and bureaucratic, albeit in a thoughtless way. The barrister heard an accusation of ‘dirty play’. It was easy to assume the worst; the statement did the LIP no favours in the barrister’s eyes. On the other hand, there was an assumption on the part of the barrister that the LIP would see why it needed to take this long without offering an explanation. If the explanation had come first – ‘we will need to get hold of the and speak to [the child] and make sure it is the correct one; we can’t ask a third party without checking with him. Once we have the information, we will pass it on to you. We are busy in the office, and might not be able to deal with it immediately, so I would like to suggest we say that at most, it will be with you in 2 weeks.’ For legal representatives, the ease of being able to speak the same language as other legal representatives means they do not have to attempt to translate what they see as a straightforward detail in a way that LIPs will understand and accept. For LIPs, the inability of legal representatives to contemplate, much less accommodate, the LIPs’ lack of awareness of a legal process is both baffling and frustrating. These polarised positions become more entrenched when LIPs take the view – as some in our study did – that it was not in the interests of the legal representatives to try to reach a settlement, for example through prior mediation or out of court negotiation, because of the income they stood to make by keeping the case in court.

Consequently, reaching a settlement out of court was not a common expectation of the LIPs; it was not seen as a principle or as a starting point for resolving their case. It is as if once the case has reached court, the only tenable solution in the minds of LIPs is a judgement from the bench. This sits at odds with what judges expect to happen, based on what happens in fully represented cases. The encouragement by judges to LIPs to engage in this pre-hearing negotiation – to reach an agreed position between parties rather than a court-imposed solution – is understandable, and serves a function in educating LIPs that this is an expectation in litigation. It may help manage the risk of failure that legal representatives highlight but does not address the practical barrier that legal representatives raise of the risk of LIPs placing undue reliance on pre-hearing discussions or indeed the risk that LIPs raise that they lack the legal protection of the court in upholding their rights. Suggestions to overcome this barrier might be guidelines on parties’ roles, responsibilities and expected rules of engagement, such as the guidelines produced by Queensland Law Society (2017) addressed to solicitors and those produced in England and Wales by the Law Society, The Bar Council and the Chartered Institute for Legal Executives (2015) aimed at solicitors, their clients and LIPs.

## McKenzie Friends

There were 29 LIPs in the study who were accompanied by a McKenzie Friend at some stage of their proceedings, and sometimes throughout them. It was clear that not all LIPs knew what a McKenzie Friend was or whether they could ask the court to allow someone to accompany them in court. The McKenzie Friends were either ‘professional’ McKenzie Friends, that is, people who offer their support to LIPs for free or for a fee, and who have extensive court room experience; or were someone known to the LIP, such as a family member or a friend and were there to provide note-taking or emotional support on a one-off basis. They were observed in court proceedings in 22 of the LIPs’ cases, mainly in Family Proceedings, but also in Ancillary Relief, Civil Bills, Other and Creditor’s Petitions.

LIPs’ reactions to McKenzie Friends were mixed. For some, they were a crucial source of support and advice and made the process of self-representation a realistic prospect. The McKenzie Friend could offer advice on court

etiquette, help the LIP to control their emotions, take notes, provide moral support, advise on strategy, content of statements and what to say in court.

I: “Was it helpful having your dad there?”

P: Yeah.

I: For what reasons?

P: Just moral support.

I: And he’s there, he can see what’s going on?

P: It doesn’t really matter. He’s just there to back me up. He didn’t put any words in my mouth. He didn’t, you know, tell me what to say. He was just there, because he had my back.” (FP62)

A few LIPs relied on their McKenzie Friends as if they were solicitors, and so took a backseat role in self-representation. In one observed case, both the client for the other side and the LIP remained outside the court while the counsel for the other side and the McKenzie Friend were in court with the judge. It appeared that in the eyes of the court, the McKenzie Friend was acting as a legal representative. In this case, the LIP expressed his sense of reassurance:

“It’s taken a lot off my shoulders, and basically, he knows what he’s doing, and I didn’t, and he obviously knows where to look for stuff, and where to find stuff.” (AR07)

Another LIP relied so much on his McKenzie Friend, that when she did not appear in court and the proceedings went ahead, he felt embarrassed and let down. The non-appearance of a McKenzie Friend was held by a judge in another case as no reason to adjourn proceedings, and s/he expected them to continue even though the LIP was not prepared.

However, there were some LIPs who found individual McKenzie Friends less reliable and prone to inappropriate communication. This was unacceptable to the LIPs, as this one recalled:

“I found him very heated. He would fly off the handle very easily, but not just at me, which I could maybe accept, but at [the other side’s] solicitor, barrister, and the children’s court officer. I didn’t tell him this, I just basically didn’t make any more contact with him. But, you know, when I’m being accused of being the aggressive one, and controlling, and so on, there’s no way I could associate with that. Out of principle, I just said no, you’re not going to have this person representing me, as it were, but he may have had the key to unlock certain doors.” (FP08)

Some McKenzie Friends charge a fee, others require LIPs to sign up to be a member of an online group for a set one-off fee and others still are free. LIPs might pay for the travel expenses of free McKenzie Friends, but it depends on the relationship as many are family members and do not expect it.

While most LIPs were happy with the support from their McKenzie Friends, others were not. There is no mechanism for holding them to account for their actions or for knowing whether they are able to fulfil the role required of them. Indeed, the role varies enormously. Taking notes may be one of the more straight-forward roles, but it still requires some understanding of the terminology and court procedure. A more in-depth role, such as having a right of audience or advising on strategy, requires familiarity with the litigation concerned, yet no mechanism exists for reassuring the LIP of the McKenzie Friend’s expertise. Currently, it appears to be by word of mouth and evaluation on face to face contact.

McKenzie Friends are discussed again in Chapter 8 with regards to their role in the court room and how they are viewed by the judiciary and legal profession.

## Family, friends and colleagues

Some LIPs reported that they avoided talking to family and friends about their court cases. This was either to protect them from the worry or as a self-preservation measure to minimise fruitless and taxing enquiries. A small number of LIPs reported their family did not want to get involved for fear of being seen to take sides or being 'tarnished' by social services, leaving the LIP somewhat isolated. However, for many LIPs, family and friends were a major source of support through their legal proceedings. The support lent by family and friends ranged from substantive advice where the person concerned has professional legal knowledge or experience of the proceedings to simply providing a listening ear. Having a sounding board and someone to check over paperwork was important to many LIPs:

"[She] has a great way of recording, and keeping things, and reminding me, because, you know, what about that, don't forget about that, and one thing and another, because you just melt in there. It's important to have someone to, a third party, to read over your ..., you know, and I would have said, is my response, does it sound fair, does it sound reasonable, and have I covered everything, because you're so mixed up." (FP63)

Drawing on the experience of people close to the LIP who had gone through similar proceedings was another important source of support for LIPs.

"...if I hadn't have had the insight from someone that had gone through, you know, the whole thing, from start to finish, it maybe would have been a bit more tricky." (Div13)

As noted above, McKenzie Friends were often family or friends, so their support extended further than pastoral. The support LIPs received from family and friends sometimes stretched into the detail of the proceedings, of which they may or may not have expert knowledge, but it is the emotional, pastoral support they offer that was evident from the interviews. It is probably the same for parties who have representation, that they would find family and friends a crucial source of support. One LIP who attended the clinic noted that she found access to the clinic good because the adviser was completely objective and made her think about what she was doing, but the additional layer of support did not diminish her appreciation of the support from friends or family. Indeed, most LIPs were able to rate how useful they found the support and advice they received on a continuum suggesting they are capable of saying what suits them and what does not. Whether this distinction stands up to objective analysis of what is actually useful is uncertain. One legal representative felt that advice from friends was not necessarily reliable or applicable, and that LIPs could not always make this distinction:

"But usually, they think, they've been misguided by other people who maybe have done it themselves, and they're hearing lots of fireside advice. That is a big thing which I find is really difficult, and even with some of my own clients who were mine, they were saying, oh, I spoke to this person, and they said this, and that, and I should do this, you say, yes, that's okay, but that isn't relevant to your case." (LR51)

As in studies in other jurisdictions, family and friends formed an important source of pastoral and emotional support for most LIPs in the study. Some were able to provide procedural advice if they were experienced or trained. If they are to accompany LIPs into the court room, they and the LIP involved may benefit from some guidance on what to expect and what they can do to support the LIP.

## Advice services and support groups

The interviews further indicated the wide range of sources LIPs tapped for advice either about the specifics of their case or how to self-represent. In addition to the ones collated in the questionnaire (see Table 6), there were several others mentioned in the interviews: Wikivorce, Fathers for Justice, Men's Aid, Bailii, YouTube videos of how to self-represent, 'Google', Black's Law Dictionary, legislation.gov.uk, law books, Ulster University Law Clinic, Children's Law Centre, church, bank manager, community advice centres, MPs, MLAs and local councillors.

Many of the sources tapped by LIPs do not necessarily offer advice specific to self-representation or legal advice. The plethora of sources is partly attributable to the wide variety of business areas in the study, but it is also a function of the absence of an obvious hub for information for LIPs beyond NICTS, and necessitating a scattergun approach by many LIPs:

- P: "You see the first form, so, when they sent out the first letter, which was the civil bill for court to say they're taking me to court, I then had to do a notice to defend, and that, I was pulling my hair out over that. See, trying, I was on to Citizens Advice. No, we don't do, we can't help you with filling in them forms. In here, no advice either. No. Look online. Look online. Look online where? Where do I look, and no-one would help me.
- I: And how did you do it?
- P: I figured it out myself. I had to go online. I had to... there was county court rules, and I went into county court rules, and, I don't even know how I done it, really. Seriously, I was just looking, and looking, and looking, and looking, and spending hours, and hours, and hours on the internet trawling through it."  
(CBO2)

LIPs' reactions to the advice sources are very mixed. The study was not set up to investigate help-seeking behaviour nor the criteria people use to follow one source of advice over another. It aimed to simply canvass where LIPs go for advice, and the findings show that while the sources of advice utilised were varied, there was a significant advice gap between generalist advice services, which were not set up to provide advice on civil and family justice, and legal professionals who LIPs were not accessing for the reasons set out in Chapter 6.

Some business areas indicated a consistent reaction from LIPs in terms of advice-seeking behaviour, reflecting where the advice gap has been addressed most successfully. LIPs in Debtor's Petitions sought help from Christians Against Poverty, Debt NI, Citizens' Advice or community advice services which had a financial specialist. LIPs were overwhelmingly positive about the help they received. One described how he went to both Debt NI and Citizens' Advice with the same financial problem and they both suggested identical options, giving him the reassurance that his decision would be made on sound advice. The specialist advice received served to reassure LIPs in this business area. Divorce LIPs too, as mentioned earlier, were happy with the support they received from NICTS's matrimonial office and the website. What is interesting is that there are multiple fully functioning advice services for money matters but fewer for other business areas, such as family matters.

Several LIPs across different business areas mentioned they had tried Citizens' Advice, including for financial matters, but had been told they should get a solicitor through legal aid or that the next available appointment was four to six weeks away. One LIP commented that the cut backs in funds for advisory services meant that more LIPs were attending court and ending up costing the State more due to lengthy, ill-informed and poorly prepared proceedings.

Many women involved in Family Proceedings went to Women's Aid for support and were very positive about it. Several female LIPs were accompanied at court by a representative from Women's Aid, with some entering the court room too, and some also received legal advice from a duty solicitor at a 10-minute drop-in service. This was found to be largely positive and informative, but there was no guarantee that the same solicitor would there a second time, requiring the LIPs to explain their circumstances again, and possibly receiving conflicting advice:

"I was actually having to start from scratch each time, to explain what was going on, and because it was such a very limited amount of time that she could provide, then it was very rushed, and I wasn't, you know... so, it was useful, but at the same time too, it was limited to what it could provide. And also, because it was a different person each time, sometimes I got conflicting advice." (FP16)

The drop-in service was welcomed, but the needs of these LIPs were such that a case-worker approach might be more appropriate for some LIPs.

Similarly, many men, and a few women, involved in Family Proceedings found the Belfast-based Families Need Fathers (FNF) group valuable. Not only does the group offer the accompaniment of a McKenzie Friend in family cases, but it has a weekly meeting where people involved in family cases can discuss their cases and receive peer advice and support. Several LIPs who are involved in FNF said they were encouraged to self-represent and the group meetings offered them reassurance to continue.

"I was still going to the meetings, and I had a solicitor, but then the more information I gained, and the more, you know, listening to the group, was, like, okay, I'm going to try. There was two of us, out of probably twenty people who had solicitors, that actually sacked their solicitors, and went as a self-litigant. And I know, of the two cases, that we had gained, within six months, threefold [*with regards to progress in their cases*], do you know." (FP32, male)

Marked gender lines appeared in the advice landscape in family cases. Female LIPs tended to approach Women's Aid and very few approached Families Need Fathers. Many male LIPs approached Families Need Fathers for support. While Women's Aid is aimed at offering support to women, and not men, Families Need Fathers, despite its name, welcomes women going through Family Proceedings. There was suspicion among LIPs in one group that the other group was exclusive and sexist against them.

"I'm not quite sure that I would appreciate one of those [*Families Need Fathers*] meetings, because, you know, I have to say that at times I have felt a bit angry when I read those websites, that this idea that's put out there, that, you know, it's dads that are at an injustice, and up against it, and actually my experience of family court is, actually, it's a lot harder for mums." (FP16, female)

"I think fathers are left to their own devices really when they go to the court. There does seem to be a one-way system running, where ladies get a lot of support there. You've Women's Aid, and you've a lot of things ongoing, they get all the support, where fathers are, sort of, left, and they don't get the support. It can lead you a mentality, or an understanding, that fathers are treated as second class parents, and we're not entitled to equality, and that's very, very sad." (FP38, male)

A small number of male LIPs approached organisations aimed at fathers, such as Fathers4Justice or Families Need Fathers, but then backed away when they felt the group was unable to offer the detached or neutral support they wished for.

“...it’s very easy to get into the wrong sites. You can look online, and get bogged down in, you know, rants, the sort of sites, Fathers4Justice, all those things that don’t really add, kind of, shrewd means to negotiate, and it can work you up into a stupor. It really can.” (FP23, male)

Some LIPs involved in Families Need Fathers talked about the interests of the child being the guiding principle for the advice they received, aligning with the non-adversarial principles of the proceedings. Furthermore, the sense of safety and protection that some female LIPs said they felt from contacting Women’s Aid, especially those who had experienced physical abuse, underscores the importance of having gendered advisory services. However, it is concerning that the divided advice landscape may unwittingly reinforce the notion that Family Proceedings are adversarial, pitting parents against each other.

As shown in Figure 11, many LIPs explored multiple sources but some LIPs were streamlined in their advice seeking behaviour and once they found a source they were happy with, they stuck with it. The need to talk to others with similar experiences mentioned above drew many LIPs to support groups, such as Common Law NI and Families Need Fathers, which are predicated on sharing experiences and offering advice based on them. These groups not only offer advice on practical matters, such as preparing an affidavit, and give LIPs confidence to self-litigate, they also provide emotional support:

M: “People come in here, and they sit down, and after a while they feel like laughing, because their debts, listening to somebody else, I only thought I was bad, you know. But it really is. We’re sitting here cracking jokes, and having a laugh, and people genuinely walk out the door feeling better that there’s a group of people that are in the same position as them, and feel as low what they do.

W1: Yeah. You do feel better.

M: I’ve seen dozens of people walk out of here, that were in a really bad place, they’d just this weight. Your financial problems are still there, but the weight is lifted off, that you’re not on your own.

W1: You’ve got hope with this.

W2: Yeah. And you make really good friends.” (Oth07)

These voluntary groups provide a particular supportive, pastoral role that drop-in services would not.

The scattergun approach of some LIPs to seeking advice was most probably a result of an absence of a consolidated hub for relevant and targeted information on self-representation and the specific business area procedures. The advice-givers in the current landscape are specialised according to business areas, which facilitates depth of knowledge and experience. However, the study did not attempt to evaluate the quality or accuracy of the advice given to LIPs and given the disparate and numerous sources, this would be a topic of research in itself. Furthermore, LIPs who are involved in proceedings across two or more business areas have particular needs not catered for in the current advice available. It may be helpful to consider how links between services can be made to create a more coherent advice landscape.

## Internet

The use of the internet to search for information about their case or how to self-represent was for many LIPs an obvious and easy step to take: “Google is my best friend” (FP22). Some were happy that they were able to locate what they were looking for, and praised certain websites dedicated to particular business areas, such as



Wikivorce or Fathers4Justice. Five LIPs in Family Proceedings specifically mentioned YouTube videos they found on how to self-represent, such as the ones set in Bristol,<sup>19</sup> and said they found them instructive:

“it gave me an idea of what the court room looked like, and I wouldn’t have known not to interrupt. You can raise your hand when you want to make a point. So, I did do that today, so I did.” (FP21)

However, other LIPs sounded several cautionary notes. A LIP needs to know what they are looking for before they can start looking, which implies a basic level of understanding or knowledge of the procedure they are entering:

“all the Googling in the world won’t tell me what sort of summons is needed.” (AR06)

Some LIPs found online advice to be contradictory or distorted or not relevant to the Northern Ireland jurisdiction and they aired the need to be critical of the sources accessed. The accessibility of the internet was praised but the digital divide for people in rural areas where connections are slower or for people who are not comfortable with using it was also noted.

With particular regards to the NICTS website, only a few LIPs held it in high esteem. Those involved in Divorce proceedings felt the website provided all the necessary information. In other areas, LIPs found it hard to navigate and limited in content, which for some, made them feel at a disadvantage:

“I just find that any information that’s available on the court website is quite limited, and very difficult to navigate. So, I suppose I’m not presenting my case within necessarily the context of law, or, for example, having the knowledge, or resources to be able to source maybe case precedents to draw upon. So, that would be, I think, a big limitation representing myself, in comparison to maybe what a solicitor might offer.” (FP15)

Some court staff too recognised the difficulty of finding information on the NICTS website:

“We did used to have stuff on the website, and yet when I went into it...I couldn’t find [it].” (CS10)

The difficulties for LIPs in navigating the court website and accessing the relevant materials is something that judges may need to be more aware of in their advice to, or expectations of LIPs:

P: “Even our own website, you know, has broken down all the various divisions.

I: The court service website?

P: Yeah, yeah, yeah. And so, there’s a lot of information that’s very easily accessible, and digestible. And I’ll point them there, and point them to the [other relevant] websites as well.” (Ju09)

On a brighter note, a LIP who is an IT consultant commented that it was not the worst website he had seen.

## Self

Some LIPs felt self-reliant in preparing their cases. Their ability to manage the paperwork, look up legislation, keep on top of proceedings and speak in court came from knowledge and experience from their professional background, such as civil servant, police officer, insurance claim assessor, teacher, from a past grievance or tribunal experience or from a determined personality with organisational skills. This did not make the process any easier, but it made it manageable, and for some empowering:

“It’s been empowering for the short period of time I’ve done it. It’s given a far more clearer insight into the system, and how it works, and the law. It definitely has.” (FP38)

19 A family court without a lawyer, <https://www.youtube.com/watch?v=cgAVMahl7Y&t=230s>

“It’s really self-driven. You know, and when you do go to court, and you present something, you know, is factual, and can be backed up on paper, and it’s accepted, you know, that’s a great sense of achievement, you know.” (AR18)

Some LIPs appreciated that they were learning throughout the process. Some had become familiar with court procedures through their multiple appearances:

“I’m nervous at the start, but the more I’ve went on with it, you know, the more confident I’m becoming, you know, standing up and saying what I need to say. Again, getting case points of law, and things like that, I would struggle on at times, but I would try and bring it to my own level, if you like, to where I’m comfortable. . . . With the help of the support group I’m confident enough, you know. As I say, I can go in now, and I can stand up. I have no problem, you know, three years later, you know, I’m still learning, you know, but I am confident.” (FP62)

However, learning by doing may mean making mistakes along the way, and LIPs accepted that this was not ideal but, in the absence of any instruction manual, it was the best they could do. Furthermore, some LIPs will never feel confident or comfortable in court:

“I think no matter how many times you’re in court, when you’re having to represent yourself, because you’re going up in front of a judge, and you don’t know what way it’s going to go. Or, you’ve no knowledge of the whole legal, you know, the ins and outs of it. So, you feel anxiety regardless. Like, I say, we’ve been in court twelve times, probably in the last year, and I still feel as nervous. Do you know what I mean?” (FP71)

Individual characteristics may make a difference to how amenable a LIP is to self-representation. The study did not look at the outcomes of the LIPs’ cases, so there is no evidence from this study that the professional skills LIPs bring to their cases will make any difference to the outcome. It appeared that most LIPs regardless of their background still found the task onerous.

## Conclusion

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This chapter identifies the practical barriers that LIPs face in accessing suitable advice and information, both in relation to the legal rules and procedures applicable to the area of law relevant to their case and on how to litigate in person. The LIPs in our sample accessed a wide range of advice sources and for many there was no discernible strategic approach, echoing the advice seeking behaviour of the general population (Genn, 1999). There were some general behaviours observed in LIPs starting with well-known advice services, either to get clarity on what was involved in litigating their case or to be signposted to other relevant services. Equally, there was extensive evidence of LIPs trawling the internet to identify aspects of relevant information and advice, with more success for some than others. Success was further compromised by the inability to locate support materials specific to Northern Ireland, particularly for areas like family law which differs from the law in England and Wales. For those who were able to adopt a more targeted approach, this tended to be because there were more targeted advice services to assist them. Despite their efforts to inform themselves, many of them felt they knew little about the procedure and law in their cases.

The study reveals, however, that there are clear limitations to the majority of the advice and information sources that were accessed, and no single source or person who LIPs could rely on to support them. The support provided by the NICTS staff was generally well regarded, but staff were limited in what they could do to assist, and could also be apprehensive and weary as a result of difficult engagement with some LIPs. Court service literature was

less well regarded, including the website where the information may have been available but was frequently considered to be inaccessible. Lawyers were also a critical source of advice and information, and LIPs did receive some secondary support when judges directed legal representatives on the other side to take on procedural tasks that would have otherwise fallen to the LIP, to improve the efficient administration of the case. Where LIPs struggled to access legal support was in the out of court negotiations, a critical aspect of court proceedings where legal representatives and LIPs expressed mutual distrust of the other, and frustration at not being able to communicate effectively in their own lay or legal languages. This represented a considerable barrier for LIPs in fitting into the court norms, a problem that judges were not necessarily aware of. A more mixed bag of support came from McKenzie Friends and from the LIP's personal support network – family, friends and colleagues. The main advantage to these advice sources was the emotional support that was provided, though for some LIPs there was a clear sense of relief that a McKenzie Friend could take on the burdens of the litigation, despite the absence of any means by which to evaluate McKenzie Friends in advance. Personal networks were helpful for most in managing the emotional load that LIPs carried, although for some this was an easier burden to carry themselves either to insulate against well-meaning but ultimately hopeless interventions, or to avoid family members getting caught up in the negative aspects of the case, including investigations by social services. Advice services could also be hit or miss, with a recognition that there was no single advice service dedicated to assisting LIPs, and the LIPs' issues being a more peripheral focus for most of the advice services that were accessed. Those advice services designed or perceived to be for one gender rather than another were useful in providing support for men and women experiencing domestic or family problems, but this division could then be projected onto the court proceedings, with consequential perceptions of bias towards one or the other. Unsurprisingly, the internet was a frequent source for advice, but unless LIPs knew what they were looking for or were lucky enough to find useful websites, they could get lost among a mass of information, without any basic knowledge to progress an effective search.

Ultimately, the chapter reveals not just the advice seeking behaviour of LIPs, which we see is generally extensive and in earnest, but the limitations of these widely varied advice sources and the difficulties faced by LIPs in not having clearly identifiable pathways to relevant advice services. General directions, given in good faith by court and legal personnel, for LIPs to seek legal advice fail to appreciate the limitations of this or the reasons why, as Chapter 6 outlines, legal advice is not possible or appropriate for LIPs. The study also observed the same personnel giving equally general advice on contacting generalist advice services, or *pro bono* legal services, neither of which tended to be realistic or effective for LIPs. The limitations and difficulties faced by LIPs present practical barriers to their effective participation in their proceedings. As Chapter 8 reveals, this has particular connotations for the LIP in the courtroom, but this chapter makes clear that even before the LIP gets to court they are already in a disadvantaged position.



## Chapter 8 - In the court room

"I'll never be a Petrocelli, like, you know.... Or a Perry Mason." (AR05)

"Some of these cases have to be brought and these issues have to be dealt with. There are too many cases where you're left hearing personal litigants making arguments and points which really have no merit to them at all." (Ju12)

### Summary

We found that there was a range of support mechanisms that assisted LIPs to participate effectively in the court hearing. However, we also found that various supports for LIPs were not consistent across the board, either in principle or practice.

Courts may only become aware that a litigant is a LIP when the case is called into court. This means it is not possible for the court to be in contact with LIPs prior to their court appearance and offer support on self-representation. There was no immediately clear solution to this problem, but there might be routes to assist LIPs to self-identify as in need of support and different treatment if such facilities were available. An allotted 'LIP time' to attend court, advice or support services that could point LIPs, including those who have recently parted ways with a legal representative, towards particular resources and routes could assist in this.

Once court is aware that a litigant is a LIP, a range of accommodations are usually set in motion, most of which rely upon judicial discretion: to clear court of uninvolved parties; providing additional explanation of procedure and legal significance; taking time to ensure LIPs are following proceedings, modifying language, and adopting approaches that are more inquisitorial in terms of questioning parties. However, such judicial leeway is far from consistent, even within LIP cases. The judiciary are not united in their views as to how far they should assist LIPs, and some are more adept at supporting LIPs by, for example, providing explanations and ascertaining whether a LIP is following proceedings. Furthermore, even where court actors do intend to offer considerable modifications for LIPs, we found evidence that they do not go far enough for some LIPs who still do not follow jargon that judges take for granted as common sense. We found evidence that some LIPs are loath to admit to the judge in court that they are struggling to follow and participate in proceedings.

We observed the importance of other court actors such as Court Children's Officers (CCOs) in family cases, or McKenzie Friends, who may play important roles with respect to supporting LIPs in court. Such roles were viewed as potentially extremely valuable, but also fraught with difficulties for those individuals and for court itself. CCOs were sometimes relied upon by family court judges to assist the court with respect to LIPs cases in particular, and in some cases, to communicate with them and to attempt to move towards negotiated agreements. Similarly, McKenzie Friends were seen as extremely useful by some judges and legal representatives, but were often perceived as unruly, sometimes even as obstructive, vexatious former-litigants with their own agendas.

We also found that there were issues for other court actors regarding the 'special treatment' of LIPs, such as additional time afforded to them, including the suggestions by some judges, legal representatives and court staff that allowing LIPs too much leeway was potentially both unfair to represented parties, and had an impact upon public funds in the form of legally aided representation on the other side covering the displacement costs.

Ultimately, some LIPs, though present and appearing to get by in court, experienced multiple barriers to participation. There are significant difficulties for court actors, perhaps most obviously judges, in evaluating the extent to which LIPs, who appeared to be coping in court, were participating effectively. Equally, it may not be clear to LIPs what the court norm is, and therefore, the accommodations being made for them may not be obvious, something that might leave them lacking a sense of procedural justice, participation and ultimately closure in their disputes.

## Introduction

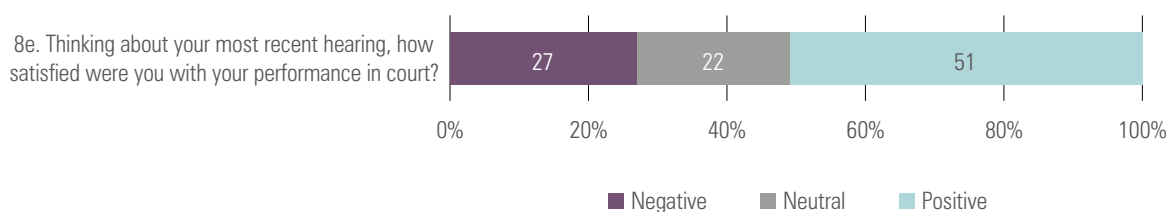
LIPs challenge many of the traditional judicial skills and expectations (Moorhead, 2007; Henschen, 2018). A judge can attempt to level the playing field by assisting the LIP but must take care not to over-step the mark and offer too much assistance which might disadvantage the other party (Moorhead and Sefton, 2005; Goldschmidt, 2008; Bell, 2010; Faulks, 2013; Trinder *et al.*, 2014). Bell warns that judicial latitude should be in step with the needs of the LIP and the complexity of his or her case (2010). This requires the judge to make a call on the LIP's capacity, the case complexity and the nature and demands of the case, which should be done fairly, not prejudicially, and not incurring additional costs to the other side. The judge is on the horns of a dilemma:

Give the personal litigant no help and he will complain: take too active a role and the other side complains. There is no easy way out of that dilemma. It is left to the individual good sense of the judge to decide how and when to intervene, the circumstances varying infinitely. (Bell, 2010: 10)

In Moorhead's analysis, the classic paradigm requires the judge to act as the passive arbiter, letting the two sides contest the case without intervening, but he questions whether this can be a valid approach where LIPs are involved. LIPs are the 'outsiders' and their attempt to participate in court processes challenges the substance and procedures of justice. Moorhead suggests an alternative approach to judging that focuses on "principle-based communication, a simpler, more empathetic and cognitively open approach to managing hearings prior to the actual judicial decision" (Moorhead, 2007: 405). In system terms, this indicates the potential for judicial training, examining the specific challenges that LIPs present and finding ways to adapt current judgecraft to respect impartiality beyond the traditional paradigm. Such a change in the system finds support from Deputy Chief Justice Faulks (2013) who suggests a less adversarial system in the Family Court of Australia is needed to reflect the needs of LIPs.

Official guidance provided to the judiciary in the form of the Equal Treatment Bench Book (Judicial College, 2018) contains extensive recommendations to the judiciary regarding what to bear in mind and how to conduct court when a LIP appears before them. The contents are presented as recommendations to the judiciary rather than practice directions, but contain inducements towards extensive accommodations to allow LIPs to participate effectively, while balancing the interests of represented and unrepresented parties in court. The 2018 version of the Bench Book contains practical advice on offering explanation and phrasing questions, to more general recommendations such as "adopting to the extent necessary an inquisitorial role to enable the LIP fully to present their case" (2018: 1-17). In this study, we found many examples of exemplary practice that drew upon or echoed such instructions. However, we also saw examples where such supports were lacking.

The study emphasised performative aspects of self-representation. A question in the questionnaire related to *how satisfied the LIPs felt with their performance in court* (Question 8e – see Figure 14). Half of the LIPs were satisfied (50.9%), while 26.7% were not, and the rest (22.4%) were neither satisfied or not satisfied.

**Figure 14:** Questionnaire question 8e

A small number of LIPs spoke about feeling good about having self-represented: that they were standing up for themselves or able to manage the proceedings; others said it was an empowering experience.

“Do you know what, do you see if I’m being honest with you, I actually think I did okay. I did well. I did what I needed to do, and I think I stood up for myself. And in all honesty, you know, I went in, and performed on my own, in front of all those people who are meant to be barristers, and whatever, they couldn’t go in and do my job. So, I actually came away from it feeling okay.” (FP62)

While this sense of achievement may be empowering for the LIP, it does not give the full picture of how s/he is actually performing. We have resisted the practice taken in other studies to categorise LIPs’ performance for two reasons. Firstly, the court is open to all-comers so it has to be prepared for whoever walks through the door. The characteristics displayed by the LIPs in Northern Ireland were broadly similar to those displayed by LIPs in other empirical studies in other common law jurisdictions and so there is a limit to the value to be added in re-categorising LIPs. In addition, a typology of LIPs may be of limited use in practice, unless judges can determine which ‘type’ of LIP they are dealing with, which itself is limited by the second reason for resisting a typology of LIPs: an assessment of how well a LIP is performing only takes in the outward appearance and cannot gauge comprehension, inner frustration or levels of stress. Instead, we aim to describe the performative aspects of self-representation from the points of view of the court and of the LIP, and to focus on the nature of the barriers to LIP participation rather than the nature of the LIP. This chapter focuses on judgecraft, court approaches to LIPs and LIP’s own and our observations of their performance.

## Identifying LIPs in court

Court hearings are built on the premise of having the representatives for each party alert the court to their presence and any issues on the day of the hearing. The process for unrepresented parties attempts to mimic this but LIPs are not present generally at the ‘call-over’ which is the pre-hearing process where judges identify the status or progress of the cases before them. LIPs will be reliant on others to alert the court that they are there and to remind the judge about the case. LIPs are told to notify the court clerk either before the court sits or when the court is not sitting or when there is a lull, but family and divorce courts are mainly closed hearings or behind doors through which visibility is obscured so LIPs are unable to look in and see when there is a lull. Certain assumptions appear to be made that LIPs will know where to go, and what to do when they get there. For example, some courts operate a ‘red/green light’ system to signal to those outside the court whether they can enter or not, but there was no evidence that this system was explained to LIPs or how they would know when to enter the court. Overall, there is no discrete system for LIPs, as distinct from legal representatives, to notify the court clerk that they are there:

“The LIP had spotted the sign on the wall and could see that she needed to both inform the matrimonial office that she was here and wait to be called. She asked her partner to go to report her presence while she waited in case she was called. She said that up until now the process had been very straight-forward but this was perplexing. She had no idea of protocol or what was expected. She felt respectful of the process and did not want to show any disrespect by barging in inappropriately. On his return, her partner said that the court officer told him that she should make herself known to the court clerk when there was a lull in proceedings... [The LIP] says that she is nervous of doing this because she might do something wrong and refers to the sign on the wall. It says to wait outside. She feels there is a system there and it should be respected.” (AR26 - Obs)

LIPs are largely left to their own devices outside court, waiting to be called, with no formal source of support. They may have to be active in finding out when their case will be called but will not be able to speak to the court clerk while the court is in session. There was clear evidence that waiting times could lead to anxiety and frustration among those unfamiliar or uncomfortable appearing in court, particularly when LIPs had no expectation of how long that waiting period was likely to be. Reflecting on the general instruction issued to all litigants to come to court at, say, 10.30am, problems became apparent:

- P: “They think their case is going to be heard at half ten, and then they say, I’ve an appointment at twelve o’clock. And you’re, sort of, well, because we know, well you’ll probably say, well why on earth did you make the appointment for twelve o’clock, you should have known it’s all day. But, I suppose, how would they suppose know that they have to allow a full day for it. So, if they’re a personal litigant, I would think that would be my biggest ... you know, to be sitting down there for hours, and hours, and nobody, and, of course, they’re always left to the last.
- I: And does anyone tell them?
- P: No. You see, this is the thing. How could, well, could we know they’re unrepresented, until their case is called?” (CS01)

The interviews with LIPs confirmed that they often had no idea of timeframes and could become more anxious and frustrated as they waited:

“it’s personal perspective. But, you know, for me, that has been the only downfall the whole way through the whole system.” (Div07)

Our research observed one particular case that fell through the cracks of this *ad hoc* arrangement where there was no call-over, no check on whether parties were present, and no attempt to bring the LIP in early. The LIP in this case sent an email to her friend in NICTS from the waiting room to say that she was still waiting. Her friend sent a message to the clerk in the court room who appeared to have informed the judge that the LIP was waiting. The LIP had been there for over 90 minutes, and the barrister for the other side was not in court to ask for the case to be called. Obviously, not all LIPs have friends who work for NICTS, suggesting that a system for identifying LIPs in court could be implemented to ensure none are left waiting unaware of their situation.

The lack of a specific systems approach also applies to identifying LIPs on the daily court list. The process for identifying LIPs relies on litigants or their lawyers identifying the legal representative who will be responsible for the case. In the absence of such notification, litigants are recorded as unrepresented, with the understanding that this position may be fluid and that, by the day of the hearing, the litigant may have secured representation. Weekly court lists that were shared with the research team to identify LIPs in the system were vulnerable to this



fluidity, so a court list that indicated there were several LIPs could (and frequently did) end up with none. Equally, litigants who were listed as represented could, on the day, be revealed as LIPs. This means that any impact LIPs are likely to have on court time, or judicial preparation, is not managed in advance, and leaves judges and other court actors having to be reactive:

“you’ve no idea who’s coming through the door. I mean, personal litigants just appear ... you don’t know until the case is called whether there’s somebody to represent them, or not, on a lot of occasions.” (Ju05)

It is difficult to know how else to identify LIPs who are currently within the system, and it is a shortcoming that the NICTS is aware of, but a resolution to this issue could be helpful in managing how LIP cases are scheduled or heard, and in progressing some forms of support for LIPs.

## Do courts change their approach for LIPs?

### Clearing the court

Our research identified that there were some successful efforts made by court actors to accommodate LIPs. One that was observed most frequently in the family courts was to clear the court so that the LIP’s case was not being heard in front of others. Family courts are not open to the public and the solicitors and barristers representing the cases on the day’s list wait in court until their case is called or they have the opportunity bring their case to the court’s attention. Usually, all of the seats in the court room would be occupied by legal representatives with some having to stand, all waiting their turn. When a judge cleared the court for a LIP, all of the legal representatives not involved in the case were required to exit the court room and wait outside in the corridor. This afforded the LIP some privacy and made the hearing less intimidating and was found to have a positive effect:

“sometimes you get a bit nervous, like, obviously, but when they clear the court it’s a bit better.” (FP41)

Indeed, it was not always the case the court would be cleared and some LIPs found it difficult to air their private matters in front of strangers.

“[The judge] said, well, read it, hurry up. Well, I says, Your Honour, I feel that I don’t think I can articulate it in front of an open court, because she didn’t clear the court. There was up to fifteen people in the court. And she said, this is a closed court. And I said, well, Your Honour, I don’t think I would able to do that out in front of them. Well move on then, [she said].” (FP13)

It would seem to be an important consideration, reflected by the views of one of the CCOs, towards respecting the privacy and dignity of LIPs, rather than have strangers (albeit legal representatives) observe the very personal proceeding:

“I was just really angry sitting in the court, really angry, because it was like a Jeremy Kyle show, to be honest, and everybody sat on, and I just thought, why don’t you clear the court? [Judge X, who always clears the court] ... is very respectful to those personal litigants.” (Off01)

More generally, the adaptations made by court actors, which are expanded below, encompassed providing explanations of legal proceedings and requirements, the adaptation of legal language, and the use of an inquisitorial form of questioning to draw out the issues from the LIPs.

## Providing explanations and LIPs' understanding

### *Providing explanations*

There was a recognition that LIPs would often be unfamiliar with what judges might regard as the most basic knowledge about court procedures:

“they come in, and they may not understand that they’re in the summons court, and that each case normally takes about three minutes. Or, they’re in a review court, and it may take five minutes to review. That’s the normal standard ... It’s so hard for them to understand that they’re there for a limited purpose on that date, and they need to take out of all that they know, the little bits that are relevant to this one application, and give that here and now, and save the rest for the main event ... assuming they get there.” (Ju03)

Often, however, the LIPs lack of knowledge is even more fundamental than this, with the LIPs in our study sample revealing a range of misunderstandings:

- LIP believed they would be able to negotiate the amount they owe the HMRC in court;
- Debtor’s Petition LIP expected there to be a representative from the Official Receiver in court;
- LIP finds it incredible that legal representatives are adversarial in court but then chat like friends in the corridor;
- When questioned about their application in the Matrimonial Court, the LIP felt like a criminal;
- LIP expects there to be someone overseeing their case(s) through the system who takes an interest and an account of how the case(s) progress and might be connected;
- LIPs expect all the details of Family Proceedings cases to be aired fully and discussed in front of the judge;
- LIP questions why in a Family Proceedings contact case the LIP’s new partner is mentioned by the other side;
- The LIP is appalled the judge won’t take account of the LIP’s straitened circumstances and illness, and expects the LIP to pay the amount due in the application;
- LIP was not aware that his/her legal representative has a duty to the court as well as him/herself (prior to coming off record);
- LIP writes directly to the judge;
- LIP scoffs at legal representatives for believing the judge is above question and regarded as faultless.

Some judges saw this knowledge gap as something that they were required to fill, regarding it as the judge’s role to take the lead in trying to try to familiarise LIPs with how the case would be run and checking their understanding as the hearing progressed to enable the court process to move forward:

“Ideally, what you would be able to do at the start of each case is say to a litigant in person, here are the general rules, here are the rules of procedure. This is a contact case, so, here’s something short that sets out the basic legal principles involved in a contact case. So, I want you to take those, go away, look at all of

those, read those so you understand how this process works, and then come back. But those documents don't exist. That's the role of the judge. Generally, he is on an *ad hoc*, case by case basis, saying, this is what I'm focused on, this is what I have to decide." (Ju11)

The researchers observed cases where the judge spoke directly to LIPs about not being represented, giving guidance on turn-taking and the necessity of keeping proceedings confidential, helping to explain what was happening, including in relation to why the parties are being brought into the courtroom to review the case. They often explained terminology, repeated themselves and read out the orders twice for the benefit of the LIP. While many of these explanations were rooted in the 'norm' of fully represented cases, there was nothing mentioned that seemed to perplex or confuse the LIP, although some LIPs indicated that they understood while revealing in subsequent interviews that they did not. The views of court service staff reinforced this positive finding, with staff seeing judges as being constructive in their approach to LIPs:

"So, if [LIPs] had to lodge a statement of evidence the judge would say, look, just write your evidence out briefly, in... short brief points, clearly outlining... what your statement of evidence is going to be. And he'll say... your evidence needs to contain what you think of the father, what you think of contact, what you think of the children, you know, and he will say that... I had somebody that came in as a personal litigant, the judge actually wrote down everything for him. He was foreign, and he didn't quite understand what was happening, and he didn't have an interpreter with him, so she actually took the time to write everything down. All the information that she required for him to bring with him on the next day." (CS11)

Inevitably, some judges were better than others at taking on this role: there were also cases observed where judges adopted a 'sink or swim' approach, providing little in the way of assistance, making it difficult for parties to do justice to their case. In some cases, as legal representatives also recognised, the basic explanations were absent, with consequential difficulties for LIPs:

"I haven't often seen a judge explain at the beginning of proceedings... now, Mr Bloggs, you will present your story, and then you'll sit down, and the other side will have an opportunity, and I don't want you to interrupt during that time, but at the end of that, you will have an opportunity to respond. I haven't often heard that, except perhaps maybe in more informal proceedings elsewhere. So... maybe we'll all need to bring ourselves down to the level, and explain it, although it seems... the basic procedure to us, it's not often you actually hear that process explained just the way it's going to be done." (LR21)

Concerns over whether the LIP understands what has been explained, and the time pressure to get through the case list, means judges may feel there is little opportunity to check for understanding:

"You can explain to them how they mustn't disclose documents to other people, and explain to them to some degree what orders you're making, why you're making them, and what they must not do in consequence. But because you've got so many other cases on, you're never sure whether or not you've fully got through to them, or do they fully understand all that. You try and keep the procedures as straightforward as possible, but because of the pressure of time, and other cases, it is possible to miss something." (Ju02)

Being able to identify the LIPs on the court list in advance may therefore assist in scheduling hearings, if additional time needs to be allocated to LIP hearings to ensure that they can understand and participate in the process, or to direct them to alternative sources of support and information.

### ***LIPs' understanding and keeping up***

The care and attention evident in much of the observed judicial treatment of LIPs may well be lost on most LIPs. Generally, their unfamiliarity with the 'norm' and how badly they fit it obscured awareness or appreciation of the efforts taken to accommodate LIPs. Those with experience of previous representation or multiple judges were more attuned to the differences, but not necessarily how the change in approach is intended to facilitate LIPs and fill the gaps created by them not fitting the norm; they have no such baseline. Many LIPs were at sea in court and while they wanted to respect the court procedures, they did not know what to do or how to behave.

"The thing I struggled with the most, actually, when I was in court was, when is my time to talk? Whenever her barrister got up and started howling at you, and his little speeches and all, I actually asked the judge... at one point, look, could you just give me a wee cue that I'm allowed to talk. So, he would, literally, just nod at me, and say, you're allowed to talk now... and when I'm allowed to challenge things." (FP18)

Some LIPs were worried that not knowing court etiquette might be perceived as bad attitude or that being assertive might lead to them being held in to be in contempt of court, and ended up feeling that they may have under-asserted their case:

"I suppose, if I was to go in again to self-representing myself, some of the support going into that would have been language in layman's terms. A bit more guidance actually from the judge in terms of what to expect and what's not, because it's a delicate balance when you know that time is limited in front of the judge, and she's explicit with her frustration over sometimes it taking longer than what she would like it to... am I going to get a warning for being in contempt of court at some point, and it does silence me. It's trying to put the point across without frustrating, and that then being an influencing factor in the outcome." (FP15)

Not knowing what to do in court was sometimes compounded by the difficulty of keeping up with the proceedings and keeping a record of them. Making notes while engaging with proceedings was very difficult.

"I'd given my dad one job, which was just to listen, and write things down. It is important, because when you're in there, you can't listen, and be writing things down... you're just focussed on what is being said, and things are happening so quickly that there's no way that you could actually, you can't actually do both." (FP62)

The inability to keep up sometimes extended to not making a note of the directions given by the judge as the end of the proceeding or mis-construing what was ordered. LIPs sometimes expected that Court Orders would provide more detail of what was said in court, but had no way of verifying this for themselves or for the purpose of querying the Order when it was issued:

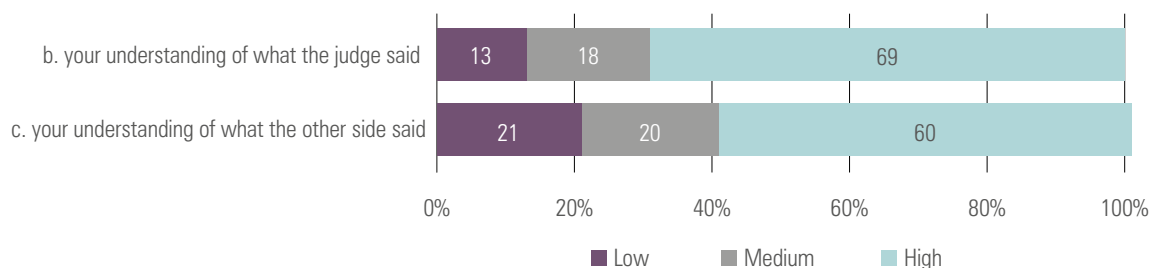
"They'll say, 'But the judge said that in court and it's not on the Court Order.' That seems to be a bit of an issue" (CS04).

When the LIPs were asked about *their understanding of what the judge said in their most recent hearing* (Question 7b – see Figure 15), 68.9% rated their understanding as high or very high; 12.6% rated it as low (and none rated it as having no understanding); 18.4% rated it in the middle.

Similarly, LIPs were asked about *their understanding of what the other side said in their most recent hearing* (Question 7c – see Figure 15). Slightly fewer rated their understanding of the other side as highly as they did of their understanding of the judge, with 59.8% rating their understanding of what the other side said as high or very high; 20.6% rated it as low or very low; 19.6% rated it in the middle.

**Figure 15:** Questionnaire questions 7b and 7c

7. Thinking about your most recent hearing, rate:



The higher ratings for understanding given to judges may reflect the efforts judges took to make themselves understood, or the lower ratings given to the other side may be a knee-jerk, negative reaction towards the other side. The legal representatives speak through the judge. One observed case stood out with regards to the legal representative taking pains to use layman's terms and simplified English. The LIP was a non-native English speaker and had an interpreter, who was not legally trained. The legal representative took care to ensure the interpreter understood so that the interpreter could render the meaning in the foreign language. With both the judge and legal representative using simplified English, it appeared to the observer as good practice of how to engage a non-legally trained person in the proceedings which could be extended to all LIPs.

At the other extreme were the small number of LIPs who said they had no idea as to what was going on in court or feeling that they had 'messed up' because of what they said.

- P: "I've said stuff that's probably got me in trouble, and if I had a solicitor they probably could help me.  
 I: Oh right. Okay. What kind of thing do you think got you in trouble?  
 P: I don't know, like, the way I word it wrong. Like, I don't know." (FP82)

The emotional engagement with proceedings could also have a negative impact on comprehension for some LIPs.

"Most importantly, that they are allowed to give their sequence of events. And, you know, a lawyer just rabbits off to the judge, and sometimes the judge is, that you're not given enough time to, firstly, listen to what, because it's so intimidating, and you go, sorry, what was actually said there, and what language are you speaking. You know, because it goes into this, and we're seeking this order, this order, and it's all muddled up. You don't know what's going on. The law needs to be brought down to who it's meant to protect, so that the people that it's meant to protect can understand it." (Dom04)

While not understanding what was being said in court presented an intellectual barrier for the LIP to effectively participate in the proceedings, s/he was additionally thwarted by an emotional barrier that arose through feeling intimidated. The efforts taken by judges to provide explanations to address LIPs' lack of familiarity with court procedures address the fair trial guarantee of equality of arms. The unevenness and sometimes absence in the judicial attention paid to this duty indicated a lack of a uniform approach, and it would seem beneficial – for the LIP who may not be in a position to appreciate that a better approach is possible, and for the judiciary who could share best practice in engaging LIPs in court hearings – for there to be more consistency in dealing with the language and knowledge deficit that LIPs have.

### Language

Language is clearly an important factor to enable understanding, and the legal system uses specialist terms that are clear to its actors but foreign to those who are not regularly within the system. There was considerable evidence that the everyday language of the courts caused confusion for LIPs, and that court actors did not regularly substitute or explain this language for LIPs. While researchers observed examples where judges did *not* use the practised, shared professional language that they use with the legal representatives, there was also strong evidence that the language used by court actors was so familiar to them that they no longer recognised it as anything other than mundane and well understood:

[LIP] is sitting alone, [other side] hasn't yet appeared. Judge asks her, "Do you appear in the case?" – LIP says, "I'm not sure what that means." (FP14\_FP15 – Obs)

LIP is asked by the judge "Are you ready to go on this morning?" He has used this phrase with legal representatives many times before, but out of that context, directed at a LIP, it seems unclear. LIP says she doesn't understand what the judge means. Judge explains that what he is asking is whether the LIP needs more time. LIP says she is OK for the case to proceed. (FP21 - Obs)

[Judge] said this was First Directions – with no attempt to explain what that means. (AR10 – Obs)

This hearing is related to 'consequential instructions' but [judge] doesn't explain what that means. (AR03 - Obs)

Judge explains that 35 days are allowed for LIP to submit an affidavit, and then 6 weeks for discovery – lists off the valuers, the joint letters, co-operation... and says that the FDR hearing comes later after the discovery has been thrashed out. Core issues are filed and a proposal and a list of assets. There is no attempt to explain what any of this means – came out in the interview that LIP doesn't know what the judge is talking about, even though she said [to the judge] that she understood everything. (AR14 - Obs)

The failure to explain the procedure and what some of the most basic court language means caused confusion for LIPs. The clearest example of this was the phrase uttered innumerable times by court actors that the judge has decided to 'pass' the case, a term which meant nothing to LIPs, and could lead to them mistakenly believing that the case has been dealt with:

LIP makes to leave the building and I (researcher) approach him and ask if all is done. He says yes... Then the legal representative comes up and tells him that he has to go back into the court and the judge only passed it, and is not finished. (FP84 – Obs)

Language in the courtroom was a problem for a few LIPs who either let the specialised terminology go over their head or who asked for an explanation.

P: "There was bits that I just wasn't quite a hundred percent on. You know, my English, and big words, wouldn't be the best, and some of the words used in the courts are, you know..."

I: Legalistic?

P: Legalistic, and yeah, difficult to understand sometimes. When you're under pressure as well it's in one ear and out the other." (FP17)

In contrast, when language was simplified the LIP's ability to understand was enhanced.

The conflict between LIPs' self-rating of their understanding of what was said in court (as discussed above) and the observed lack of understanding may be an indication that the LIPs felt they had understood the main gist of the proceedings, but not the specific language. There is, however, a danger of a false positive result in the LIPs' ratings in that they may not recognise what they missed. The lack of understanding of what was said in court due to its specialist nature thus presented an intellectual barrier to some LIPs' effective participation.

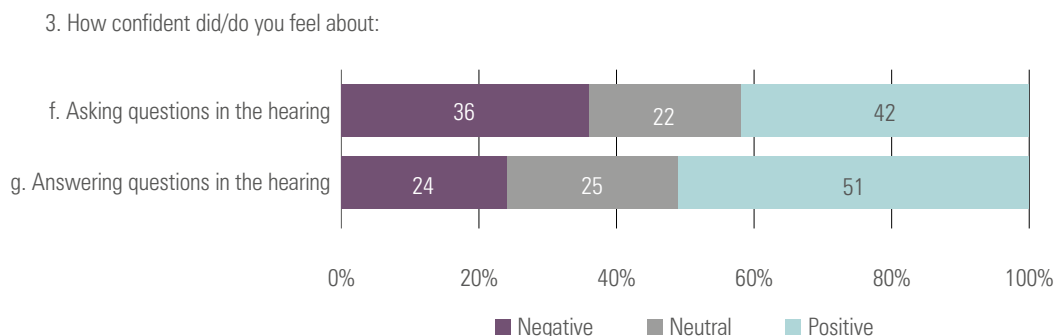
### **Asking and answering questions**

Judges often made clear to LIPs that they were free to ask questions and to say when they did not understand something, but this relies on LIPs feeling confident enough to be able to say they do not understand, and capable enough to know what they do not understand and able to appreciate that not understanding (or clarifying what is meant) can be important for the case overall:

“the most serious thing that a judge can do is to hold lay litigants to the same standard of language, and understanding of language, that legal professionals would use... [A] judge asked a question as to whether there were any housekeeping issues. That was a terminology that meant nothing to a lay litigant, and actually deprived them of an opportunity to present a defence. And then [the judge] used a very fine line rigid interpretation of procedure to block [the LIP] from raising any argument subsequent to that point.” (MF01)

The proportion of LIPs who felt *confident about answering questions* (Question 3g) in their hearing was higher than those who felt *confident about asking questions* (Question 3f), with 50.8% saying they felt confident answering questions in court; 23.7% did not feel confident; 25.4% said they felt neither confident or not confident. Fewer felt confident about asking questions with 41.6% saying they felt confident; 36.3% did not feel confident asking questions; and 22.1% said they felt neither confident or not confident. See Figure 16.

**Figure 16:** Questionnaire questions 3f and 3g



In the interviews, LIPs expanded on their ability to act in their hearing and their comprehension of it. Many LIPs said they felt able to address the court and self-represent without any difficulty, especially the Divorce LIPs. They felt engaged and able to ask and answer questions. Some of them attributed their ability to familiarity through lengthy proceedings or their own ability, and some attributed it to the judge's treatment of them:

“because all the proceedings stayed in the magistrates’ court for so long, the judge had been, the whole way through it, he recognised that I had to stop having representation because I couldn’t afford it any more. So, he did help me a lot. There was also a couple of clerks down there in [court] who helped me a lot, filling in forms, and things like that there. So, they were very helpful. The representing in court, down in the magistrates’, I, kind of, did feel as if I had that down. I didn’t feel as if I was... I wasn’t overwhelmed, or worried about it really, because the judge gave me a wee bit of leeway because I was a self-litigant.” (FP18)

Some LIPs felt they were not given the chance to speak. In some extreme cases, the LIP felt they were being bullied or side-lined:

“I appreciate that courts are very busy, and they’re dealing with a lot of cases, and I understand that representing yourself sometimes can prolong these issues. But to be totally ignored, talked over, talked to you as if you weren’t even... the case has been talked about whenever you’re in court, as if you’re not even there. And then more, or less, being given ultimatums if you don’t agree to this, then this is what’s going to happen. Or, I could do this to you.” (FP13)

Some courts kept a tight rein on proceedings and maintained a strict policy of allowing only issues relevant to the application to be discussed.

“No. It was hard to get your point across. You were just in to sort out that specific issue, and they didn’t want to hear really anything else. It wasn’t, you know, the judge wanted to know what he wanted to know, and that was it.” (FP62)

The observations of LIPs who felt they did not have the chance to say all they wanted indicated that the judge was not allowing LIPs time to elaborate on issues not pertinent to the application. The strict adherence to relevance to the case ensured proceedings were succinct and on topic, but it left the LIPs feeling they had been overlooked or side-lined.

The use of legal language, and the failure of litigants to speak it accurately, is a well documented feature of legal proceedings (O’Barr and Conley, 1985; Lee and Tkacukova, 2017) and can create a communication barrier that works both ways, meaning that judges may miss interpretative opportunities to translate the LIP’s social narrative into a legal one. The research observed this phenomenon where litigants who were calm, engaged, able to ask and answer questions, were not able to convey their view of the situation in a way that made sense to the judge:

Judge states: ‘It’s not making sense to me. You aren’t using language that makes sense to me.’ (RCJ LIP – Obs)

Our observations document the inability of LIPs to participate in court procedures and their frustration stemming from an inability to make their voice heard by the judge. One technique that judges used to check LIP understanding was to get the LIP to repeat back what the judge had been saying. It would seem that this would be a useful technique to use the other way around, where judges would verbalise what they were hearing from LIPs, so that instead of focusing on the (often unsuccessful) task of making a lawyer out of a LIP, judges might instead be able to extract the legal narrative from the social one. Overall, however, the ability of the courts to respond to the language barriers is not the only consideration: there was an evident failure to recognise some of the language barriers and to overcome them.



### Human rights considerations

Fair trial guarantees: equality of arms and judicial latitude to ensure it with respect to complexity, unfamiliarity and stress

The efforts taken by judges to provide explanations to address LIPs' lack of familiarity with court procedures address the fair trial guarantee of equality of arms. The unevenness and sometimes absence in the judicial attention paid to this duty indicates a lack of uniform approach. For there not to be breaches to this duty, sufficient attention should be paid to LIPs. The responsibility to ensure equality of arms is achieved rests with the judge. In a fully represented case, opportunities for objections from either represented party would be forthcoming if it were not. The study suggests that LIPs are unlikely to be in a position to challenge inequality of arms because they are unlikely to recognise it.

Access to a court: effective participation

LIPs should be able to participate effectively in the proceedings to a level where they are able to influence them so that the court can ensure procedural and substantive justice. Comprehension of proceedings is one aspect of effective participation. An affirmative response from a LIP to a judge's question about his or her comprehension of the proceedings may be a false positive. Ensuring comprehension may require alternative strategies such as asking LIPs to explain their understanding.

The findings suggest that on occasions LIPs were present in their case but unable to effectively participate in such a way that could influence the outcome. Not clearing the court was one such barrier to effective participation for some LIPs reluctant to air their issues in front of legal representatives not involved in the case.

### Inquisitorial approaches

Trinder *et al.*'s (2014) research on LIPs in family law cases in Britain identified that judges often adopted an inquisitorial approach to draw the necessary evidence from the LIP, a technique employed with greatest effect where there were two unrepresented parties. An inquisitorial approach should be distinguished from a fully inquisitorial model as employed in the French system. Here, we are referring to the general use of the term 'inquisitorial' rather than the legal sense, and mirroring more closely the advice set out in the Equal Treatment Bench Book (Judicial College, 2018) on what can constitute an inquisitorial approach. In Trinder *et al.*'s analysis, a fully inquisitorial role is defined as the judge:

- Identifying the issues in dispute.
- Actively seeking agreement in the courtroom where appropriate by eliciting positions, looking for common ground and attempting to broker a settlement.
- Identifying the evidence needed to resolve remaining contested issues.
- Determining and arranging interim measures.
- Ensuring the necessary evidence is obtained, which may be from the parties themselves, but might also require commissioning expert reports or alcohol/drug/DNA testing and obtaining police disclosure.
- In final hearings giving a very strong steer or taking over cross-examination from the LIPs, to give both LIPs a fair opportunity to ask questions, and to prevent either party from being harassed or intimidated by direct cross-examination by the other. (2014: 121)

Very few of the cases included within our study involved LIP v LIP. Most cases in our sample involved a represented party on the 'other side', and overall what was observed was different judicial approaches on the inquisitorial/adversarial spectrum which encompassed some of the elements in the list above, rather than a defined inquisitorial model.

The move towards an inquisitorial style was clearly observed in family law cases, where judges and legal representatives accepted that the judge needed to be more active in getting clarity on the LIP's position, to elucidate the facts or to move the case forward:

"It's an almost unconscious use of it, frankly, with litigants in person, because that's almost irreparably where you end up. You are going to be more involved in the process, rather than sitting and allowing things to play out, to a degree, and keeping control, and making sure that what needs to be done is done. You have to be more in the arena." (Ju11)

The approach was seen not just as "inevitable" (Ju02) but as efficient. LR11 stated that the inquisitorial approach is very helpful for all parties as it helps to identify the issues and focus on them rather than on the side issues that the LIP is distracted by. An inquisitorial model was also seen as fair, in part to make sure that LIPs are "able to get everything across" (Ju05) but more significantly in relation to the principle of protecting the best interests of the child:

P: [The judges are] very good with [LIPs]... To bring them back to the relevant issues... I don't want to say the judge would nearly run their case for them, but certainly the judge would question them in a nice way to try and get out of them, and if they were upset, they would get them time. And, effectively, and the judge would... turn to us and say, Mrs Whatever is saying this, this, and this, this is what her argument is, what do you say about that? We'd be very used to that... to, sort of, having to defend something that hasn't really been put, because... lawyers don't want unfairness... so I really have seen judges intervene a lot.

I: Okay. Is that fair to the other side?

P: Do you know what, fair, or not fair, you know, I mean, yes, it is. It's fair to the child. It's fair to the outcome." (LR10)

Not all judges were successful in utilising an inquisitorial approach, however, with limitations evident in both judicial technique and in the capacity of LIPs to hear what the judge was saying. Cases where judges were inquisitorial in posing the questions that the LIP should be posing or asking questions of the LIP in order to get to the statement that the LIP would have made if s/he had been represented were sometimes derailed by the same judges asking lots of questions all at once, not giving LIPs a chance to reply or gather their thoughts, and with the judge not nailing down particular issues, leaving the exchange as confusing and ragged. In addition, as LR12 notes, questions directed to get to the key points of the case "only then converts into help if the personal litigant listens, and takes on board what the judge has asked, and answers the question they were asked."

The acceptability of an inquisitorial approach was not a consistent view from the bench, and while this was often related to the business area, there was also an objection to the concept itself. Judges were alive to the distinct parts of the legal system and that what worked in one part of the system might not be the case for others. Tribunals were accepted as being "more inquisitorial" in requiring judges to address the legal issues in the case even where the legal arguments have not been made by the parties (Ju10). In Family Proceedings, while still coming within an "overarching framework of an adversarial process" (Ju07), there was still room for an inquisitorial approach, an approach that was endorsed by court judgments. The objections to an inquisitorial

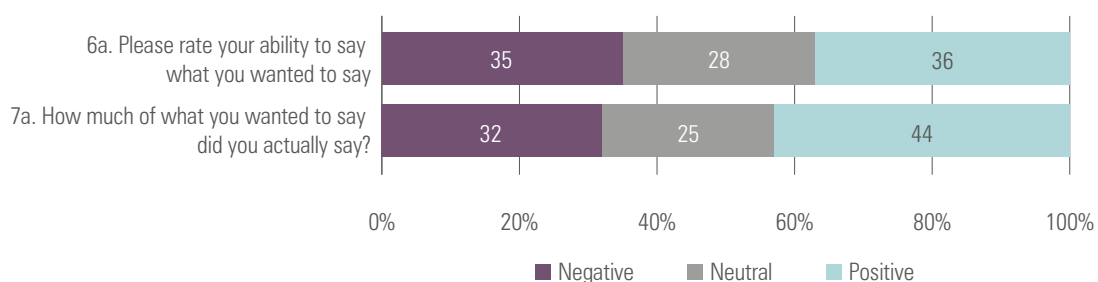
approach could therefore be more specifically aligned to particular business areas, such as Chancery, where it was felt that a fundamental change to the role of judges would be required, including their training, the role of counsel and support services, but the core objection – regardless of business area – was that an inquisitorial approach would change the role of the court completely

“[I]f arguments are not raised in the pleadings then it’s not for the court to go off and raise those points generally. Now, sometimes the court can raise a point that is missed but the onus is on the parties to bring to the court the issues they want to be adjudicated upon and if the parties don’t bring a matter to the court then it’s not the role of the court to have an inquisitorial role to find out what the issues may be.” (Ju07)

The judicial response to LIPs who have not marshalled their evidence or arguments may therefore depend on the business area, the extent to which the judge feels an inquisitorial process is appropriate and the ability of the LIP to respond effectively to the inquisitorial process.

The efficacy of the inquisitorial approach will depend on the LIPs’ capacity and confidence to interact with the judge. Question 7a of the questionnaire asked about LIPs’ *ability to say what they wanted to say* generally and not specifically related to inquisitorial approaches: 36.2% rated their ability to say what they wanted to say in their most recent hearing as high or very high; 35.3% rated their ability to say what they wanted to say as low or non-existent; 28.4% rated it at the mid-point between high and low. All of the Divorce LIPs apart from one rated their ability to say what they wanted to say as high or very high. Several LIPs said they left without having said all they had prepared to say. A different questionnaire question tackled whether LIPs felt they had *actually said all of what they wanted to say* (Question 6a). Less than half felt they had said a lot (43.6%), while 24.8% feeling they had said some of what they wanted to say; leaving 31.6% felt they had said a little or nothing. See Figure 17.

**Figure 17:** Questionnaire questions 6a and 7a



Some LIPs commented on how hard they found it to say all they had intended to say.

“I thought it would have been maybe, had more time, you know, like, if I thought you would get a chance to put your own side across, but sometimes they don’t. It side-tracks and then you don’t get to say exactly what you were going in to say.” (FP02)

Nervousness at being in front of a judge accounted for some of the negative responses.

- P: "I'm not really confident now, because when I went in there I was a bit... I didn't know what to say, and I was a bit nervous, so I, kind of, like, just... whereas, when I'm talking to my solicitor I'm able to say, look, this is how it needs to go because I can't let the kids down again. He's let them down so many times, you know, I feel like I can put my view across there, because it's just me and her, one and one. But when I was in there sitting in front of a judge, and with his solicitor and all there, it just makes you feel a bit nervous and intimidated. So, I don't really know if I said what I wanted to say, you know.
- I: Yeah. And the judge asked you quite a lot of times, do you have any questions.
- P: I think he seen it in my face. I think he seen in my face that I just wasn't too sure." (FP12)

For others, it was difficult to keep track of what was going on in the hearing and so losing the thread, then leaving regretting that they did not say all they wanted.

"I prepare what it is, the key points that I want to be able to say in the court in relation to how things are going, and there isn't the opportunity for that. I get cut short at some point, and that's been my experience in every hearing. So, I don't always get the opportunity to be able to share the information." (FP15)

The LIPs who felt less able talked about not being able to express themselves as well as they wished, or being fully prepared and then missing their chance in the churn of the hearing. Or they went blank:

"Yeah, and the judge gives you an opportunity to speak, you know. He'll say, look, is there anything you want to say today. The only problem is that you feel under a bit of pressure. You know, you can draw a blank in a situation like that, because you might have umpteen things to say, and you just draw a blank. And then you realise this judge has got eighty other people to see today, and you need to get out of the court, you know." (FP77)

The leeway taken by judges to introduce the inquisitorial approach may allow for more extensive gathering and uncovering of the facts s/he needs to be equipped to make a decision. However, any reticence, mind-blocks or forgetfulness on the part of the LIP will be difficult to overcome. There is still the danger that some uncovered significant fact lies unavailable to the judge.

The judicial practice of modifying court room procedure in order to obtain the facts required to support a just decision was observed in the study. Variation in judicial practice exists, suggesting some judges are more willing to "go hunting in the undergrowth for possible arguments"<sup>20</sup> than others. Additional measures may still be required, however, for the judge to satisfy him or herself that he or she is in possession of the facts required to make a just decision.

20 Mr Justice Mark Horner in *The Matter of 34 Lomond Avenue* [2016] NICh 16. Chancery Division of HC of Justice in NI. Case ref 2015 No 117874, decision delivered 8 Nov 2016.

### Human rights considerations

Fair trial guarantees: equality of arms and judicial latitude

The judicial practice of modifying court room procedure in order to obtain the facts required to support a just decision was observed in the study. Variation in judicial practice exists, suggesting some judges are more willing to 'go hunting in the undergrowth for possible arguments' than others.

Whether the questioning by the judge actually reaches the arguments sought is not known. It is up to the judge to satisfy him or herself that he or she is in possession of the facts required to make a just decision.

### Judicial neutrality

Closely connected to the concerns raised about moving to an inquisitorial approach are the concerns over judicial neutrality or impartiality – not just the ability of judges to remain independent but the appearance and perception of such. Judges were alive to this concern and identified actions that they took as a result:

"Every case where you have a litigant in person, I step back, and have to think again about what I'm doing, and why I'm doing it. You have to make yourself consciously think of things like unconscious bias, that you may not do in a routine run of the mill [case]." (Ju11)

Being able to be (and to appear to be) neutral is a skill that requires careful management of difficult individuals, under difficult circumstances. It is not clear what training judges receive on this, but the study found that there were variations in skill and technique here as well, with some impressive techniques employed successfully by judges. The researchers observed judges being considerate and gentle with LIPs, being patient and unconcerned with formal court processes, and questioning LIPs in a neutral manner, only revealing the disapproval of a LIP's attitude and rationale in the judgment at the end. Inevitably, however, not all judges were able to present as neutral. An appearance of bias could be conveyed through the attitude of a judge – a disapproving stance, or questions that appear to attribute blame or culpability to the LIP's actions, or, in one notable case, a judge sitting with their head in their hands while questioning the LIP.

In some instances, it was clear that the judicial reactions were those of understandable human frustration that strayed from an appropriate professional approach, but there were other examples where there appeared to be a lack of consideration for the LIP's particular circumstances. This could be because judges expected the LIPs to give priority in their lives to the court proceedings, failing to appreciate the other aspects that impinge on their lives or their cases, or simply due to impatience or frustration, which bordered on rudeness. One judge, dealing with two unrepresented parents in a contact dispute where there was a history of serious domestic violence, and between whom there was no contact, was clearly frustrated with the inability of the applicant to specify dates of contact that were being requested, asking the parties "Do you want us to shove dates down your throat?" (FP14\_FP15 - Obs). In another case, a judge made some effort to explain the format and procedure to the LIP, but it was as if he was not used LIPs in his court, so treated any variation from form or procedure as a contempt of court. When the LIP explained to the judge that she had been stymied in her ability to progress the case because of "family issues" (she was a single parent with four children) the judge was instantly dismissive, telling the LIP that "we all have family issues" (CB02 - Obs). In a further case, a LIP who continued to ask questions after having been told by the judge to be quiet, was shouted at by the judge who said, "do not interrupt me again otherwise you will get nothing" (Dom01 - Obs). While the exchange reflects the heat of the moment, such a statement from the judge is not an appropriate use of power.

Requiring judges to manage what can be highly charged emotional exchanges, without the assistance of legal representatives to filter those emotions, does raise questions over how the judge should respond and whether it is the judge's role to manage the high emotions that LIPs can display. Where a LIP is not following court procedures and this is causing difficulties for other court actors, there is a role for the judge to correct the LIP, to convey the message that the LIP's actions or behaviour is not appropriate. It is clear this is not something that can be done by court staff who would get drawn into the argument and blamed for taking sides. The impartiality of the judge is supposed to act as a vehicle for correctives such as these, but it risks the LIP perceiving the correction as an attack, with one LIP in this position describing the judicial approach as a "character assassination" (AR21 - Obs). The further difficulty then arises for the judge in dealing with the LIP's response, which may be one of anger. We have observed cases where judges seem unprepared for the outburst of anger that is triggered by judicial remarks, and unable to diffuse this anger which is then further exacerbated by the absence of an opportunity for the LIP to explain their position, ultimately adding to their frustration and anger and triggering even worse behaviour. In one observed case, the court reprimanded a LIP for inappropriate action which triggered in the LIP a heated emotional outburst and the decision to audio-record the proceedings, which in turn led to the LIP's removal from the court. While emotions ran high, it was not feasible for the LIP to address the court again or for the court to admit the LIP again because of concerns over security. The court was in a difficult position to act as neutral arbiter in the LIP's eyes because it was perceived as prejudiced. The lack of a neutral mediator stranded the LIP and delayed proceedings.

Legal representatives act as a buffer both for the judge and for the litigant (removing the litigant from the varying levels of judicial impatience or frustration). Legal representatives are also more comfortable with what LIPs may perceive as bias, having faith that judgments would take account of the law and facts rather than the personalities involved. Judges may need to consider the LIP's level of sensitivity and awareness in understanding relative views on the appearance of bias.

## Absent LIPs

Absent LIPs inevitably formed a relatively small part of our research – we recruited participants as they attended court and so those LIPs who did not attend were not available to be recruited. Nonetheless, a number of our LIPs had more than one court hearing and so we were able to incorporate the experiences where they were absent for any of their hearings, both by observing the hearing in their absence and through interviews that elucidated the reasons for their absence. We observed the importance of attendance, reinforced by the emphasis judges placed on being able to examine oral evidence from LIPs to interrogate the issues.

Cases where LIPs do not attend can therefore present a difficulty for the court, particularly where non-attendance is persistent. Absence can also present numerous difficulties for LIPs and it is an issue that gives rise to some of the most substantive concerns over the Article 6 ECHR rights for LIPs. There were some issues related to absence that were process-driven, including making sure that LIPs get notification of adjournments. There was no obvious systemic approach to notifying LIPs about the outcome of a hearing unless they attended. We observed instances where judges requested that court staff would send a communication to the LIP, usually in relation to the date of the next hearing, and often including a statement on the implications of a failure to attend. We also observed the opposing legal representatives receiving the same request. There is no obligation on legal representatives to discharge this service (although they are unlikely to refuse a judge's request) or any means of checking that this is done in a timely manner.

Other concerns raised by absenteeism are related to the substance of the hearing, and what has been determined in the LIP's absence. Some of the issues that are determined are required to move the case forward, and can relate to relatively benign or procedural issues. While these may not have a fundamental impact on the outcome of the case or the LIP's Article 6 ECHR rights, nor did they seem to be issues that could not be communicated to LIPs as part of a systemic approach. In one of our observed cases, the respondent LIP had not attended a previous hearing at which the judge had made a direction that an estate agent would provide a report to the court on the value of a house under dispute. At the subsequent hearing, the LIP made the point that she had not been at the previous hearing and knew nothing about the direction until an estate agent attended the house stating the purpose of the visit. Her stated reason for not attending was she could not afford to take time off work to come to court. The judge's response was that it was not the court's job to follow up with the LIP on this and that the LIP needed to attend court. The reasons for absence may or may not be valid, but it does raise an issue about how absent LIPs can keep themselves informed if they cannot attend court on every occasion, whether their absence is an adequate reason for the court to keep LIPs out of the loop or whether there is any obligation on the court to keep parties fully informed.

The research did uncover worrying evidence, however, of where a LIP's absence appeared to result in his or her rights being unprotected. The starkest example of this is where a review relating to varying a contact agreement went ahead without the respondent LIP and quickly escalated beyond the original issue of varying a contact agreement to issuing a new Interim Contact Order. In this case, the applicant (the parent with care) informed the barrister that social services had told the parent with care that they had concerns about the LIP. At the hearing, the barrister suggested to the judge that if social services were investigating the LIP's suitability for contact that the police might need to be involved. The alleged statement by social services, as conveyed by the parent with care, was not tested, contrasting strongly to a previous, fully represented hearing before the same judge in which hearsay allegations were challenged robustly. Instead, the barrister's statement was accepted, and the judge agreed to remove unsupervised contact by the LIP through a new Interim Contact Order. The potential involvement of the police was then given as a reason to postpone the next hearing for two weeks longer than it would otherwise have been, despite an absence of corroboration or independent evidence from the CCO or social worker that there were concerns about the LIP's contact that would require PSNI involvement. While the judge expressed initial concerns about issuing an Order in the LIP's absence, there were no observed safeguards in place to ensure that the Order that was made was based on firm evidence. The LIP had indicated in advance to the court that he could not attend. This case highlights the tension between protecting the best interests of the child, which must remain the paramount concern of the court, and the rights of a parent to have decisions based on reliable evidence, even when – as a LIP – they are not in a position to put that evidence to the test. In this case, the duty on the court to make sure the evidence was tested and reliable did not appear to have been met, an issue that seems to be directly connected to the disadvantage of being a LIP.

### Human rights considerations

#### Fair trial guarantees: access to a fair hearing and to be heard

The court must exercise its diligence to ensure LIPs are heard. This is clearly problematic when LIPs are absent. In the case referred to above, the interdependence of ECHR Article 6 and the principle of the best interests of the child may explain the judge's decision, but the duty to ensure adequate steps were taken to hear the absent LIP's responses to the allegations were set aside. The absence of legal representation when the LIP is absent risks leaving the interests of the LIP unprotected without diligence from the bench.

## Absent legal representatives

As this report has noted, there is an issue of expectation on the judiciary's part that LIPs will behave just as legal representatives would, which includes attending court. Within our sample, however, we observed hearings where either the LIP or the legal representative did not attend and the hearing was adjourned to allow them to attend on a future date, or time. In addition, we observed the ability of legal representatives to manage this absence by relying on their colleagues to at least 'mention' a case on behalf of 'their learned friend'. The difference for legal representatives is that their reasons for being absent may be regarded as more valid than those of a LIP, and there is a systemic accommodation, particularly in lower courts, to forgive the absence of legal representatives who are attending a different court at the same time, even where this may cause frustration for the forgiving judge. Legal representatives seemed to regard this inevitable overlap as part and parcel of the job (though there was no indication they saw it as contributing to the inefficiency of court proceedings) so that missing a hearing was not necessarily regarded as significant, depending on what the hearing concerned. This may differ from the response of the LIP who objects to delay, procrastination and absence, or is disempowered by the absence of the other actor in the proceedings. In one observed hearing, the applicant's (legally-aided) solicitor did not attend. The judge could do little to progress the case and asked the LIP if he could attend the following week when the judge hoped the solicitor could also attend. The hearing was adjourned for a week and the LIP left the courtroom. The absent solicitor then turned up, and the LIP asked if they could go back in and tell the judge that all parties were now there. There followed a discussion about the outstanding issues and evidence which concluded with the LIP agreeing to provide information but noting that would it not be available for the next hearing, and asking if they should go back to the judge and ask for a different date when the information would be ready. The solicitor told the LIP that 'we wouldn't want to let that date go'. The LIP did not push it, though he seemed hesitant in accepting the solicitor's plan. Another observed hearing evidenced how disempowered a LIP is when the representative for the respondent is not there. The LIP did not feel bold enough to enquire from the court what was happening with her case, or ask if it could be adjourned in the absence of the solicitor. Instead, she waited passively for two hours until the judge called her case. No one suggested calling the solicitor and there was no acknowledgement that the LIP had wasted her morning waiting. The case was rescheduled for a later date.

Where legal representatives attend hearings, they do so as part of their job, and so are not layering court attendance on top of another job as many LIPs are. Absences by representatives for the other side can therefore create an additional disadvantage for LIPs.

## The role of CCOs

Given the (relative) prevalence of LIPs in Family Proceedings, the role of the Court Children's Officer (CCO) in LIP proceedings was examined, to understand the specific issues arising here. It is clear from the evidence of judges that the CCO role was helpful in dealing with LIPs in contact disputes, as "another objective voice" (Ju11) to help the court make its decision, but while the CCO intervention can assist the court, there is an impact on how they see their role as being affected. Where one or more of the parents is a LIP, CCOs felt that the judge would almost always direct them to report on the child's view, but that this came with an expectation on the judge's part that the CCO would be able to explain the proceedings to the LIP. For CCOs this could have the effect of compromising their impartiality. As Off01 explained, "you're expected to act in a way that you're legally representing the other person's view. So, you've be so, so careful, and it's a very difficult line to walk ..."

Where LIPs, perhaps understandably, took the same view of the CCO's role as the person who could explain court proceedings to them, the concerns around impartiality increased. For CCOs, the system itself creates a potential perception of partiality. This could be a result of very basic, practical issues, such as arranging appointments or



sharing information, where there was no legal representative to act as the point of contact. Phone calls to LIPs to cover these basic arrangements then put the CCO at risk of hearing information from one parent that would not be equivalent to the nature of information, or the length of time taken, where the parent is legally represented. Layered on top of this difficulty are the systemic 'glitches' that arise because LIPs are not featured in the system design: the sharing of CCO reports via a secure email server that legal representatives and other court actors have access to, but LIPs do not. The issue this creates is how LIPs can see the report:

"I had one there where I said to the judge... about sending... the report out and I think, no, it's not our Trust policy to send it out, to do this by post. So, [the judge] had actually directed the court office to do it... But then [NICTS] had said to me, we don't actually do that. The person did get it in the end, but, you know, these are things that just, they, kind of, need ironed out." (Off01)

For CCOs, there is a need for system change to protect their role so that rather than seeing CCOs as the solution, there should be a demarcation of their focus on the child from the general mediation between parties:

"I think there has to be someone else who can do some of that liaison in whatever capacity... we can't be seen to be representing that adult. Our view is, we don't represent the adults, we represent the child in this. It's the focus of the child, and the voice of the child." (Off01)

This need for a buffer, to protect against the risk of (perceived) bias relates back to the court's ultimate focus on protecting the rights of the child who is the subject of the contact dispute.

## McKenzie Friends

Not all judges or legal representatives in our sample had experience of dealing with McKenzie Friends. Of those who had, the experiences varied considerably, reflecting the fact that, like any 'group', there is wide variation in how McKenzie Friends behave and consequently how helpful judges feel they are to the court. At their worst, views of McKenzie Friends as badly behaved shaped perceptions of their value in court and to the LIP. Judges described some McKenzie Friends as "really rude, really, really rude", in a way that legal representatives would never be, in part because similarly bad behaviour could be reported to the Bar Council or Law Society, whereas McKenzie Friends were given more leeway "because they don't know how to behave..." (Ju05). While this behaviour was of concern, judges also felt there was a danger that LIPs were being used to progress an external, personal or 'political' agenda, where McKenzie Friends were grinding their own axe at the risk of damaging the LIP's case. Ju09 described some McKenzie Friends as "agitators" who "did real harm to the litigant", while Ju07 felt that "[m]ost of them don't act as a buffer ... they have an agenda" (Ju07). Some court service staff echoed this sentiment, and felt that McKenzie Friends could be too invested in their own agendas to be of assistance to LIPs, observing that the same individuals were "LIPs in one case and McKenzie Friends in the next" (CS07).

The observations of court room proceedings indicated a variety of judicial practice with regards to McKenzie Friends. Some judges permitted them in court but were adamant they could not address the bench. Some judges asked for applications for McKenzie Friends to be present, one required a curriculum vitae and a written explanation of her understanding of the role and implications of a McKenzie Friend being in court. Others still forewent these formalities and permitted the McKenzie Friend to enter and speak directly. Individual judges were not necessarily consistent in their approach to McKenzie Friends, sometimes permitting them only on application and sometimes freely. Furthermore, there were LIPs whose McKenzie Friend was granted a right of audience in one case, but not in another, indicating inconsistency within a litigant's case profile.

The observers did not come across any instance where the permission to allow a McKenzie Friend to accompany the LIP was dealt with in advance of the commencement of proceedings. In each case, it was done on the day of the court hearing. On some occasions, seeking permission delayed proceedings. In one observed case, a judge heard objections from the other side that the McKenzie Friend knew their client and did not wish the McKenzie Friend to be party to personal information. On this occasion, the judge asked for case law relating to the neutrality of McKenzie Friends, necessitating a delay in the commencement of proceedings. This case did go ahead with the McKenzie Friend present but it also serves to highlight the need for the judge to be mindful of both the LIP's support needs and the sensitivity towards the other party's privacy.

Legal representatives who had a negative perception of McKenzie Friends often saw them as potentially damaging to LIPs, with LIPs being "poorly advised" (LR11) by "backroom lawyers, who don't have a knowledge of the law, and tend to guide the person in the wrong direction... in something that's... relatively straightforward... in terms of what the law is." (LR20) This was seen not only as making life difficult for the legal representatives but also for the LIP, and in these circumstances legal representatives tended to conclude that McKenzie Friends "do not do their clients, or their friends, any favours on the whole" (LR20). One judge commented that these practices do not assist the court but could see they might assist the LIP.

This was particularly the case where McKenzie Friends adopted an "aggressive" approach which impeded the possibility of negotiation, and led to a more adversarial approach between parties (Off01). In family cases, this could mean losing sight of the best interests of the child:

"[I]t's not a fight, or a win, lose, situation for families. You know, it's about... what does the child need, and it's trying to move people from polarised positions. But it also depends on the advice you're being given... and you hope that that is very child centred, and it's not about a win, lose, situation for that individual client... And I don't think that's always captured sometimes when you're working with a McKenzie Friend. It's about a win for that person." (Off01)

Two judges lamented that the concept of the McKenzie Friend is good, but the practice is lacking, as if an opportunity was being missed:

"It hasn't been a great experience, but the notion of McKenzie Friends, I think, you know, is a good, should be, in theory, it should be good. You know, it should be a positive thing." (Ju04)

The judges are aware of the lack of guidelines on McKenzie Friends.

The other end of the spectrum of experience of McKenzie Friends was very positive, however, particularly where the McKenzie Friends assisted the court in terms of enabling the LIP to present his or her case. One judge described a "model" McKenzie Friend who assisted a LIP to present their case and related evidence in court:

"Which is to assist the personal litigant to find the documents, to remind them of points quietly that they haven't made, whispering in the ear of the personal litigant. She was very good at doing that and she really did assist... she had the documents, when he was looking for something, she found it. She was able to give us references, she was able to remind him when he hadn't said a point or showed him a document to remind him to make that point and I thought she was a really a model McKenzie Friend." (Ju07)

Whether this type of behaviour from a McKenzie Friend is regarded as 'model' by other judges was not explored in the interviews.

Judges were also conscious that McKenzie Friends could act as a buffer, managing LIP expectations and providing an objective perspective, and that “McKenzie Friends can take the emotion out of it.” (Ju13) The value of McKenzie Friends was recognised, but it was also clear that McKenzie Friends as a group were not consistent in their role or capacity to assist the LIP or the court.

While seasoned McKenzie Friends might be familiar with individual judge’s preferences, a LIP bringing a McKenzie Friend who is uninitiated to the preferences of the individual judges would not know whether the judge will permit entry. Some McKenzie Friends are accepted in one court but not another, and at the moment, the LIP cannot be certain the McKenzie Friend will be permitted entry until the day of proceedings.

The ambivalent acceptance of McKenzie Friends taken in court aligns with the desultory or unsystematic stance taken with LIPs generally. There is an acceptance they exist and come to court, but there is no effort to ensure they have the appropriate knowledge and skill to fulfil the role required of them. The process to permit them entry or right of audience is unsystematic.

## Additional time it takes

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The court actors in our study were almost unanimous in their view that hearings involving LIPs took more time than those that were fully represented. The “time-consuming” (Ju09) nature of LIP proceedings was evaluated in comparison to the ‘norm’, leading to a view that “the personal litigant hogs the time” (Ju01). In this analysis, LIPs were not merely taking more time than represented cases, but they were taking court time at the expense of others. This view of LIPs as potentially selfish and getting more than they deserve was reinforced by the frustrations of court actors who had to accommodate the additional time and any consequent delay in court proceedings. Our research examined the reasons why additional time might be needed for LIP hearings.

### Explanations

As is clear from the findings so far, court actors recognised that LIPs often failed to understand either the proceedings or the substantive issues, and that explanations were required to enable the LIP to follow the proceedings. The evident impact of this is that hearings that require additional explanations to be provided will take longer than those in which the issues, processes and terminology are already understood. As Ju02 stated, “we try and keep the procedural demands as straightforward as possible in the family courts, but it does often take a fair amount of time to explain... things, and I think you’ve got to take time to do this.” Where LIPs are unable to grasp the explanations and require them to be repeated or developed at a subsequent hearing, then judges may have to decide whether or not to provide further, additional explanations. This decision is influenced by the time that the judge has available and our research observed judges advising LIPs they would not have time to explain everything more than once.

The knock-on effect is seen to impact on all aspects of the case, from the attempts to resolve the case before hearing to the time it takes for cases to proceed through the courts, to the length of time each hearing takes:

“[Judges] take things very, very slowly. They explain everything. So, for example, say it’s an adjournment until the 8th March, but if it’s a personal litigant, say it’s an adjournment, and this is why we’re adjourning it. And this is what you’re going to have to do while we adjourn, and this is what I expect when you come back. And then this is what I expect from the solicitor here, and this is what I’m asking her to do. You know, a five-minute adjournment could take fifteen minutes when it’s a personal litigant.” (LR13)

The additional time was explained by CS01 that the judges have to pull the legal story out of the LIP, directing them on what can or cannot be said or done: “By lots of directions, and keep saying they can’t say this, please say that. It just takes forever sometimes.” Similarly, Ju11 makes clear that additional time can be required for LIPs to absorb, process and respond to information that they are not familiar with, which can also mean that there are additional hearings scheduled “that you wouldn’t necessarily have with represented parties, because, you would again, the lawyers would be talking to their clients outside.”

An interesting analogy was put forward by Ju04 (without judgement or conclusion) that giving additional time to LIPs was like giving special treatment to a child in class:

“I suppose, there can be a complaint that people who are represented are treated unfairly, because you take time explaining everything with personal litigants. And if parties were present... they would feel, in the same way as if you were giving attention to a child in a classroom... It might be because there’s a feeling that that child needs attention... but other children, I suppose, would feel that they’re getting special treatment.” (Ju04)

It is generally considered appropriate to provide additional support if a child has particular needs or a disability or is disadvantaged in some way, to create a level playing field, so it may be that we can view this additional support as appropriate in relation to their needs, rather than as getting undeserved, additional attention and support that puts them at an advantage (and the others at a disadvantage). To extend the analogy back to LIPs, however, the recognition by court actors that additional time is required and necessary is not the same as recognising that it is acceptable, particularly where it has an impact on the ‘norm’.

It is also important to note that not all court actors felt that LIPs necessarily added time to the court proceedings, and could in fact move through more quickly by breaking the ‘norm’:

“Well, when they attend court... if anything it’s quicker, because as you probably know, a counsel and solicitors can maybe drag the case out a wee bit, and argue a lot.” (CS08)

There was some indication in our data that the time premium for LIP cases was illusory in some business areas but could exist in others. This data would require further development, however, in order to draw robust conclusions on this issue.

### Human rights considerations

Fair trial guarantees: access to a fair hearing and allowing extra time

The allowance of extra time for LIPs has been considered by the domestic courts (See Appendix 1: 238) as a necessary requirement for the court to ensure access to a fair hearing. The deviation from the norm of the full represented case that results is one that should be accommodated within the practice of the courts, rather than seen as spurious or an inappropriate deviation.

### Deliberate delays

Not all LIPs were seen as lacking in knowledge and needing additional time to understand how the court process works. Instead, some LIPs were seen as having sufficient knowledge of the system to initiate deliberate delays in proceedings, and with court actors seeing themselves and represented litigants as having to pay the price for this. A deliberate delay in proceedings could be regarded as the LIP’s objective, more so than the outcome of the hearing, and there was some evidence that this is a strategy that can be employed:

I: “Have you ever seen a successful lay litigant?”

P: Well, it depends on definition of success. You have to see it within those conditions, within that context, because many successes come in the form of, if you like, somebody having a very strong, or a very embarrassing, or possibly very costly argument for a bank.” (MF01)

We came across one LIP who admitted he was purposefully extending proceedings for as long as possible to ensure the other side incurred high costs as a form of punishment (Dom06), but this was the only LIP in the sample who gave any hint of intention to delay proceedings unnecessarily.

Evidence of litigants instigating deliberate delays however, is not something that is confined to LIPs, despite it being a behavioural trend that many of our court actors associated with LIPs:

“The fact that they’re running up their opposite numbers costs, which I have to tell you, I think, on occasions, is very deliberate.” (LR07)

LR01 described a scenario where, just prior to a hearing, a represented litigant would sack their solicitor in order to protract the proceedings, and would be granted time to instruct a new solicitor. This would then be further protracted by a delay in instructing a new solicitor and a need to adjourn to get the new solicitor up to speed on the case. While this behaviour was attributed to LIPs, it was perhaps more accurate to recognise it as the behaviour of a representatives litigant, even if it was one who was taking advantage of the care that courts exercise to allow litigants to instruct representatives. Delays may instead be less strategic and more prosaic, and there was evidence of judicial resignation to the fact that LIPs may not have followed the courts’ directions. Whether strategic, deliberate or unintentional, however, delay remains a feature of court proceedings, including those involving LIPs.

### Human rights considerations

Fair trial guarantees: no undue delays

The expeditiousness of proceedings is of importance to the administration of justice. All parties to a case and the court are subject to it.

### Inefficient use of lawyers’ time

One of the consequences of judicial techniques to assist LIPs by taking more time with their hearings is that subsequent hearings on the list may be delayed. This was a consistent complaint by legal representatives who saw the inclusion of extended hearing slots within the court list as being inefficient for lawyers who have to ‘hang about’ until the LIP cases are dealt with. The first point to note is that our research found that there was no consistent approach to where LIP cases would be taken in the list and instead there was clear evidence that judges differed in their approaches, within their own practices and/or in comparison to their judicial colleagues. Some judges heard LIP cases as early in the list as possible; others left the LIP hearings until the end; while others took the hearings in a relatively sequential manner, more or less following the order set out in the court list. This finding does not match the perception, or indeed the sense of unfairness to legal representatives or their clients:

“the judges, I have found, will try and prioritise getting them heard, which I don’t know is necessarily fair to other people who are represented, who have waited all morning as well for their case. But often the judges

will try and have the personal litigant cases in once the call-over has gone through. So, they tend to get their cases heard a little bit more quickly on the day.” (LR09)

This perceived unfairness was acknowledged, and shared by Ju05:

“[I]f I go out there today, and there are, I don’t know, say sixty cases on the list, and there are lots of lawyers there, I’m going to deal with the lawyers’ cases first. Whereas, if somebody has paid a lawyer, and they’re paying them by the hour, or whatever, I think that they should be dealt with first. But, every so often, you know, somebody will, you know, will say, oh, there’s an unrepresented person who has to get away to collect their child at twelve o’clock, and... once it rears its ugly head I feel... okay, I’ll do that, but it... in some ways it seems unfair to the lawyers, and the people who have bothered to pay lawyers.” (Ju05)

Not all judges expressed a view on this, and it is also important to note that the majority of LIP cases within the study also involved a legal representative.

The second point in relation to the argument on inefficient use of lawyers’ time is that this evaluates the problem from the wrong perspective. If the problem is delay, it is the current system that creates this, and indeed it is designed to be inefficient, as evidenced by the need for lawyers to ‘hang around’ until the judge calls their case. Whether a LIP case is listed or not, lawyers will still have to turn up at 10am for the call-over, wait around for their case to be heard, wait again if it is passed, wait for reviews, and wait for hearings. Putting LIPs into this inefficient system may exacerbate some of the inefficiencies but does not cause it. At most, as LR51 says, LIPs “can really slow down a very slow process anyway.” The primary cause of delay for lawyers is the design of the system that requires everyone to begin at the same time, and then potentially jockey for position to get their case heard earlier, and only to be able to leave when they have got the attention of the judge, which in some courts sometimes resembled a real life version of whack-a-mole, and which speaks to the design of a system that sees lawyers rather than litigants as the users. The potential solution to this problem – which affects LIPs as well as lawyers and their clients – is to allocate slots for hearings so everyone turns up at specific times rather all together. This might be a more efficient way to deal with legal aid cases in particular, allowing these hearings to be fixed within more time-limited parameters.

Other systemic solutions have been regarded as successful by legal representatives for LIPs in the higher courts, where cases are listed for review rather than going straight to hearing. The court is able to get some clarity on the LIP’s application which allows the representative on the other side to understand the issues before responding, which itself is seen as “quite a front-loaded process” (LR21). This study has no evidence of how this initiative has been evaluated from the position of the bench, or whether this alleviates or merely transfers the inefficiencies that legal representatives see in dealing with LIP cases.

## Consistency of treatment by judges

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Inevitably, there was some inconsistency of treatment of LIP cases by judges. In a system that gives autonomy to judges to manage cases, and caseloads, this is to be expected and may be welcomed as enabling a more individualised response to the variety of circumstances presented in each case. While CS11 felt that judges “tend to be all the same” with LIPs, other research participants identified variations in approach, both in relation to the management of individual cases and the ability to deal with problematic LIPs.

The study also found that there was variation from the 'norm' among judges in the sequencing of proceedings within the hearing. In fully represented cases the applicant's case will lead and the respondent's case will follow. In cases where one of the parties is a LIP, the sequence of proceedings may change, where judges may invite, or agree to, the respondent's legal representative opening the case. This may be with the agreement of the LIP or it may be just for the convenience of the court to expedite raising the pertinent legal issues. In the cases within the study, alternative approaches were also observed: some applicant LIPs were asked to set out their case at the start of the hearing, but this was not a guarantee. The inconsistency here was not found necessarily to be prejudicial, although there is the potential for it to be perceived as such by applicant LIPs if they do not understand why the 'other side' is getting to speak first. There is also potential resentment by legal representatives who are not keen to lead the applicant's case, but feel they have no option in the face of a judicial request for them to do so (LR11). The lack of consistency may need to be taken into account when advising LIPs – either through general channels or within specific cases – that the standard sequence of hearings may not be observed in their case, and to understand why this deviation in approach is adopted. If this is to be a policy choice, it may be something that legal representatives should also be involved in considering.

Within the hearing, further variation in judicial approach was found. As LR19 stated, "some of [the judges] will open things up more than others ... Allow more air time ...". The judges who 'opened things up' a little less, focusing tightly on the issues to be adjudicated and preventing LIPs from going into detail on the issues, were able to keep cases on track but the balance between being expedient and ensuring the LIP is keeping up was not always maintained. Where judges gave considerable 'air time' to LIPs, so LIPs were able to say what they needed to say, even where all of the issues may not have been legally relevant, this could present difficulties where LIPs were seen as taking advantage of this approach – the 'difficult' LIPs who some judges would not be able to rein in. The inconsistency in dealing with 'difficult' LIPs was seen to be a problem and it was suggested that "it would certainly help the running of the case if one judge could speak to another judge about the approach they took in handling a particularly difficult personal litigant", particularly where the skill-set of a judge in dealing with difficult LIPs was poor (CS04).

## Conclusion

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This chapter has outlined findings in relation to LIPs' performance in court, and how accommodations made by judges, court staff and other court actors may facilitate more effective LIP participation in proceedings. We found that there are already many practices in place intended to accommodate LIPs, from clearing courts, providing additional explanation and modifying language towards more inquisitorial approaches in some business areas and the expanded use of additional court actors, such as CCOs or McKenzie Friends. There was considerable variation in judicial approaches, with some seeing the move towards inquisitorial approaches with LIPs as natural and almost unconscious, while others were more resistant to the term or intention of such approaches. There is a general sense among those judges who believe in supporting LIPs in court that those support mechanisms are working. For some LIPs, it did. As with other areas of examination in this report, there were business area distinctions with Divorce and Debtor's Petitions LIPs feeling more able to represent themselves in court without difficulty.

However, some LIPs felt overlooked, ignored and even bullied in some cases. Our data, particularly where we could observe as well as interview LIPs, revealed that there was sometimes incongruence between how a LIP appeared in court as following, coping and participating when, privately, they felt that they were doing none of these things, and displayed signs that they were confused or had misunderstood what had occurred in court.

There was a tendency for some LIPs towards 'keeping up appearances' that they were following what occurred in court and were agreeable rather than admitting to a lack of understanding for fear it will make them look bad to the judge or cause irritation. The qualitative evidence on this supported the questionnaire data showing that LIPs reported feeling much more confident answering questions than asking them in court.

Specific practices already used by some judges, such as asking LIPs to repeat back what they have understood in court, can help ensure that judges are alert to situations where LIPs lack comprehension. Arguably, more thorough preparation, support and orientation of LIPs in some form *before court*, would enable them to be ready to do this, and to understand the lengths the court service and judiciary go to in efforts to assist LIPs. In relation to the wide variation in judicial approaches, while not taking away from the discretion and autonomy of judges, there should be some reflection upon what standards are acceptable, with regard to their treatment of LIPs in court, inquisitorial approaches and the rights of audience for McKenzie Friends. It is a difficult balancing act for judges to simultaneously manage highly charged emotional exchanges in court while remaining neutral and impartial. Inevitably, some judges are more adept than others but perspective training and clearer guidelines building on existing resources, such as the Equal Treatment Bench Book (Judicial College, 2018), could be used to ensure that there is a baseline standard across the judiciary.

Other practices that are currently in use may be beneficial for courts but generate problems for others, such as the use of CCOs to attempt to inform and support LIPs in family courts. The reliance on CCOs to step into family disputes while simultaneously being expected to communicate with LIPs who they are assessing as parents leaves them vulnerable to abuse and accusations of bias. Similarly, McKenzie Friends were viewed variously as good in principle, as vexatious litigants who do not know the law, or as understanding of the procedure, though the more 'unruly' tended to be viewed as furthering their own agendas. By the same token, such individuals are being viewed as and are often products of the court system, and the lack of support and information available to LIPs may mean that such individuals, who have learned as they go, have learned incorrectly or been demoralised by poor experiences in the system themselves. While there might be clearer guidelines around the rights and responsibilities of McKenzie Friends, there is an argument that the court system should provide alternative means of support to avoid reliance on 'backroom lawyers.' Where problematic, it was sometimes concluded that McKenzie Friends did not know how to behave, suggesting again the need for a charter or code of conduct to which all court actors must be held, to respect the integrity of the court. It may also speak to the need for regulation of McKenzie Friends, to ensure that the risks of an unscrupulous McKenzie Friend are not borne exclusively by the LIP or the court (Smith, Hitchings and Sefton, 2017).

For some judges and legal representatives, LIPs already receive a great deal of leeway and extra allowances. In particular, they are viewed as taking up too much additional time in court and where this is the case there are likely to be cost implications for the public purse. There were also arguments made regarding the displacement of the costs in the civil justice system from legal aid to court. Resources might be better targeted at preparing and orientating LIPs to court, instead of the only emphasis being 'special treatment' in court, which is not entirely supported across the judiciary and legal profession.

Despite the accommodations made for LIPs, some LIPs experienced barriers to their effective participation in their proceedings. The main one was the intellectual barrier posed by their lack of understanding of the legal process or law. In many cases, explanations or other efforts to increase understanding helped overcome this, but not always and not always with a confirmatory check whether the efforts were successful. Absence from one's proceedings posed a threat to fair trial guarantees through the denial of access to a fair hearing and to be heard.



Combined, these issues might be taken to suggest that the creation of a discrete role (a designated support person or unit) with respect to supporting LIPs and assisting court would be required that is neither involved in cases (like CCOs) or a potential liability to the court as unregulated McKenzie Friends can sometimes be. Such support might be better targeted by improving systems for identifying LIPs in the system (potentially aided by digitalisation, online case management and information flows) and allotting smaller court timeslots so as to reduce delay and the inefficient use of lawyers' time, which may be an unnecessary drain upon legally aided representation.

These recommendations, and the reflections of the court actors on various proposals are developed further in Chapter 12.



# Chapter 9 - The emotional status and mental health of the LIPs

“Every time I think about it, it just really gets me down.” (CP24)

“But when I was in there sitting in front of a judge, and with his solicitor and all there, it just makes you feel a bit nervous and intimidated. So, I don’t really know if I said what I wanted to say.” (FP12)

## Summary

The study provides a measurement of the general mental health and well-being of LIPs using a standardised screening instrument called the General Health Questionnaire 12 (GHQ-12), alongside the qualitative data. The LIPs in our study reported a toll on their emotional or mental health. This was supported by high proportion of LIPs with a high (four or above) GHQ-12 score, where a score of four or more indicates possible psychiatric ill-health. The prevalence of possible psychiatric ill-health is significantly higher in the LIP sample (59%) compared to findings from the general population from the NI Health Survey 2016-17 (17%).

LIPs did not always present an appearance of having a high GHQ-12 score when they had one. They presented their case well in court, but revealed in the subsequent interview feeling crushed by the experience. Outward appearances can mask hidden anxiety or other indicators of mental ill-health.

LIPs had difficulty separating their emotions from their proceedings. The LIPs in protracted cases indicated frustration, exhaustion, despair and sometimes rage.

Judges were aware LIPs have to cope with their emotions whilst self-representing and recognised that LIPs miss the benefit of hearing alternative views or challenges to their perspective from an objective adviser.

Legal representatives sometimes took measures to avoid dealing with LIPs who they feared were unable to moderate their emotional outbursts or personal attacks. Some reported that it was sometimes inappropriate to raise such issues before the judge and the lack of a complaints mechanism left them with no avenue for the LIP’s inappropriate behaviour being dealt with formally.

The LIP’s heightened emotions and difficulty in detaching their emotions from their proceedings presented barriers to legal participation.

The findings are relevant to how various legal actors view and interpret both the ordinary and litigation conduct of LIPs. Programme for Government and joint departmental strategic policy should identify and measure mental health prevalence and support people with mental health and vulnerabilities within civil proceedings.

## Introduction

The ability to self-represent is very often affected by the emotional load litigants are dealing with, a characteristic which is well-documented (Dewar, Smith and Banks, 2000; Hunter *et al.*, 2002; Macfarlane, 2013; Trinder *et al.*, 2014; Toy-Cronin, 2015; Knowlton *et al.*, 2016). The role played by legal representatives in constructing and managing their clients’ reactions and sense of injustice into legal arguments is missing for LIPs. This role is also played when a judgement goes against them and helps to shape the subsequent decision whether to appeal, but again is missing for LIPs (Moorhead and Sefton, 2005). Research has also highlighted the links between litigation, social and emotional strain and related mental health problems (Moorhead and Sefton, 2005; Trinder *et al.*, 2006,

2014; Pleasence and Balmer, 2009, 2014; Toy-Cronin, 2015). LIPs have reported feeling a range of negative, stress-related emotions which have been attributed to self-representation (Dewar, Smith and Banks, 2000; Macfarlane, 2013; Knowlton *et al.*, 2016), while other studies have reported the same emotional profiles but, without the counter-balancing evidence from represented litigants, they do not attribute emotional responses solely to self-representation (Toy-Cronin, 2015).

Trinder *et al.* (2014) have identified that LIPs are often vulnerable, lack capacity and that personal and circumstantial disadvantages often add to the challenge for LIPs in the court environment. Such “vulnerabilities variously made it more difficult for LIPs to understand proceedings, to respond in a timely manner, to advocate for themselves, to focus on the proceedings, or to give them priority in the face of other serious problems they were experiencing” (Trinder *et al.*, 2014: 26). In assessing such vulnerabilities, Trinder *et al.* highlight that LIPs suffered from, *inter alia*, physical disability and ill-health, behavioural disorders and learning difficulties, with approximately half of their sample suffering from one or more of the vulnerabilities. In the context of the emotional burden of litigation, they also revealed LIPs’ difficulty of dealing with both emotional and legal relevance, resulting in inefficiency and lack of effectiveness in court, findings echoed by Toy-Cronin (2015). Trinder *et al.* (2014) found that LIPs wanted and needed emotional and moral support within the legal arena and that they relied on family and friends and, where available, volunteers from the Personal Support Unit where available in courts for such emotional support. Consequently, they recommend emotional and moral support in the form of accompaniment and a code of conduct for ‘professional’ McKenzie Friends.

Moorhead and Sefton (2005) identified and explored the relationship between a number of different indicators of vulnerability in their sample of unrepresented litigants, including depression, alcoholism, drug use, illiteracy and mental illness. In the context of civil proceedings, they highlighted that it was difficult to simplify and summarise the relationship, although they note that 15% of unrepresented litigants in family cases (Children Act 1989) had a specific indication of some vulnerability which included depression or mental illness. In adoption proceedings they estimate that at least 30% of cases had an unrepresented litigant with some kind of vulnerability and for injunction proceedings the figure was 20%. Notably, they highlighted that these figures may underestimate the extent to which there was vulnerability on the part of unrepresented litigants. The Civil Justice Council of England and Wales (2011) cited estimates from the Personal Support Unit, which is located at the Royal Courts of Justice in London, of 30-40% of its clients have some form of mental ill-health.

Various international and national legal needs surveys have pointed to the coincidence of legal problems with stress-related and mental ill-health. Stress-related ill-health as a consequence of legal problems was particularly common for lower capability participants, and that demographic characteristics, including age and academic qualifications, are also influential (Pleasence and Balmer, 2007, 2009, 2012). Pleasence and Balmer (2009) examined links between rights problems and mental illness, finding significant associations between them, both when experienced in isolation and in combination with physical illness. They further identified that the rights problems could also result in stress-related illness. As a consequence, they contend that effective coordination of mental health and legal services is likely to improve both health and justice outcomes.

Similarly, Balmer, Pleasence and Buck (2010) explored the relationship between psychiatric ill-health and people’s experience of rights problems, finding that the prevalence of rights problems increased with psychiatric ill-health, as did the experience of multiple problems. It was also found that the likelihood of inaction in the face of problems increased with psychiatric ill-health, while the likelihood of choosing to resolve problems without help decreased. Overall, their findings highlight that psychiatric ill-health has been shown to be associated with the increased reporting of a range of social problems involving legal rights and suggest that integrated and

'outreach' services are of particular importance to the effective support of those facing mental illness. They also highlight that legal problem outcomes are associated with, *inter alia*, 'mental health', 'physical ill-health' and 'fear' in particular and 'psychological factors,' such as 'emotional stability' (Pleasence and Balmer, 2014).

Other research has employed the use of the standardised inventory General Health Questionnaire 12 (GHQ-12) in the assessment of psychological stress in the context of family law litigation.<sup>21</sup> Buchanan (2001) measured GHQ-12 scores of parents involved in family court welfare report process, finding that 84% of parents scored above the threshold determined to indicate mental ill-health. Trinder *et al.* (2006) also measured and assessed adult well-being using the GHQ-12 in the family legal process. Exploring the GHQ-12 scores of parents in legal disputes over contact following divorce, they found comparably high levels of distress reported by parents who had attended in-court conciliation in contact/residence cases, with three quarters (77.5%) of the parents in their study scoring above the threshold of indicating mental ill-health. Further, in the context of family law proceedings in Northern Ireland, findings from research by McCord (2018) further highlights that LIP status and mental health are predictors attributable to contact disputes and litigation. Balmer and Pleasence (2012) investigated welfare related legal problems and the mental well-being and needs of young people using the GHQ-12. Their findings revealed that the clients of youth advice agencies had very high rates of mental illness; much higher than any comparative cohort identifiable in their legal need survey data. Indeed, their sample revealed that 80.3% of participants had a GHQ-12 score of two or more and 66% scored four or more on the GHQ-12, highlighting the prevalence of mental ill-health amongst this group and the need for advice agencies to serve a uniquely vulnerable group.

The recognition of emotional stability, stress and mental health issues provides an element of clarity to understanding LIPs' experience of the court system, particularly the heightened emotional load of litigation and the difficulty for LIPs to be 'objective' about emotive and significant life events. Indeed, the absence of the filter provided by legal representatives leaves both the LIP and the court exposed to 'raw emotion' and, in some cases, serious mental ill-health problems. Our report explores the emotional burden of self-representation, and the way the courts in Northern Ireland deal with it, through interview, observation and the administration of the GHQ-12. Accordingly, this section considers the emotional burden of litigation on LIPs, the perspectives of court actors on the emotional pressure points of litigation and the wider implications for other court actors and the court system. It considers the mental health of LIPs within the study in Northern Ireland, drawing comparison with previous research and survey data.

## Mental health in Northern Ireland

Mental illness is a major public health issue in Northern Ireland and is the single largest cause of ill health and disability. Northern Ireland has higher levels of mental ill-health than any other region in the UK with one in five indigenous adults with a mental health condition at any one time, which is a 25% higher overall prevalence of mental illness than in England (Department of Health, Social Services and Public Safety, 2014). A range of social, psychological and biological factors have been identified as contributing towards the development of such illness. These include stressful or traumatic life events including abuse, lifestyle behaviours, deprivation, conflict, unemployment, financial concerns and physical illnesses. In addition, particular mental illnesses are more commonly found within certain groups. However, epidemiological data on mental health/mental illness generally are far more limited in Northern Ireland in comparison with England, Scotland and Wales. There is also a paucity of information and data on mental health across various courses of life stages and events, and for different groups and populations.

21 GHQ-12 is the shortest version of the GHQ inventory suite produced by the commercial assessment company GL Assessment.

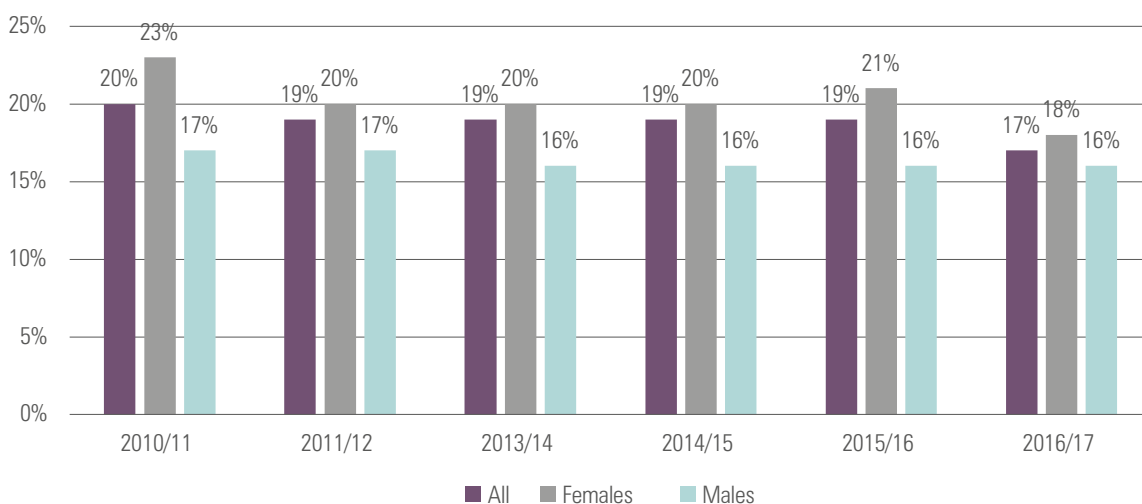
In 2002, the then Department of Health, Social Services and Public Safety (DHSSPS) initiated a review of the law, policy and provisions affecting people with mental ill-health or a learning disability (DHSSPS, 2014). What followed in the Bamford Review and subsequent systematic evaluations, were key recommendations and challenges pertaining to the provision of mental health services. Of relevance in the context of court users was the recommendation to develop ‘a number of specialist services, to include children and young people, older people, those with addiction problems and those in the criminal justice system’ (DHSSPS, 2012). More recently, *Making Life Better 2012–2023* (DHSSPS, 2014), a ten-year public health strategic framework for NI, outlines that a key long-term objective is “Improved Mental Health and Wellbeing, Reduction in Self Harm and Suicide.” To achieve this, priority actions for the first few years include the development of new policy to promote positive mental health and, as part of the joint healthcare and criminal justice strategy, work to identify and support people with mental ill-health or other vulnerabilities who have offended.

At governmental level, the draft Programme for Government 2016-2021 (PfG) of the Northern Ireland Executive (2016) made ‘Improving Mental Health’ ‘indicator 6’ citing the rationale that:

Mental wellbeing can be a key factor in determining physical wellbeing. It can also influence social circumstances such as employment, family relationships and community participation. Addressing mental wellbeing is, therefore, a consideration in a range of government objectives. Mental health issues are often particularly acute with those on the margins of society... (NI Executive, 2016: 55)

In assessing mental health, the principal measure proposed for indicator 6 is the percentage of the population with GHQ-12 scores greater than or equal to four to be identified annually through the Northern Ireland Health Survey. Figure 18 below presents the proportions of high GHQ-12 scores from 2010 to 2016.

**Figure 18:** Northern Ireland Health Survey high GHQ-12 scores disaggregated by sex, 2010-16



Source: Department of Health (2017) *Health Survey Northern Ireland 2016-2017*. Questions not asked in 2012/13.

In the 2016-17 NI Health Survey, almost one-fifth (17%) of participants scored highly (greater than or equal to four) on the GHQ-12, suggesting they may have a mental health problem. This is slightly more likely to be the case for women (18%) compared with 16% of men, with the former falling from 21% in the previous survey. Respondents in the most deprived areas were also twice as likely to record a high GHQ-12 score (27%), as those

in the least deprived areas (14%) (Department of Health, 2017). Additional findings from the health survey further highlights that 45% of those who had mental health concerns felt that their normal activities were affected.

## The General Health Questionnaire, GHQ-12

The General Health Questionnaire 12 (GHQ-12) is a well-known tool for measuring the mental health status of the participant subjects. It is a screening device for the detection of common mental illnesses in the community and non-psychiatric clinical settings (Goldberg and Williams, 1991). The twelve-item General Health Questionnaire (GHQ-12) is intended to screen for general non-psychotic, psychiatric ill-health. The questionnaire contains 12 questions about recent general levels of happiness, depression, anxiety and sleep disturbance. The 12-item version of the GHQ has comparable psychometric properties to the longer (60-item and 28-item) versions, and is often used in research studies where it is impractical to administer a longer form.

### **GHQ-12 scoring**

The GHQ-12 comprises 12 items describing mood states, six of which are positively phrased and six negatively phrased. Each of the 12 items is rated on a four-point response scale to indicate whether symptoms of mental ill health are 'not at all present', present 'no more than usual', present 'rather more than usual' or present 'much more than usual.' For the purpose of the research, a bi-modal scoring approach was adopted, with item scores coded according to the GHQ method - a score of zero for the first two responses above, and a score of one for the third and fourth responses. Using this method, the maximum score for any individual study participant is therefore 12.

The practice of GHQ-12 suggests that individuals who do not have psychiatric ill-health may score around one or two (GHQ scoring), with scores near 12 rare and corresponding to clinical depression. There has been some examination of the use of GHQ-12 scores as a case screening detector of potential mental illness or 'caseness' (Furukawa *et al.*, 2001). Different studies use different cut-off points between two and four to define a case of common mental disorder (GHQ scoring), with scores of three or more (Kelly *et al.*, 2008) or four or more suggested as an indicator of 'caseness' (Miller *et al.*, 2003). Indeed, no formal threshold exists for identifying probable mental ill health, with optimal values likely to be specific to the population under study. However, in keeping with previous research and surveys, participants' scores are grouped according to three categories: zero (indicating no evidence of probable mental ill health), one to three (indicating less than optimal mental health), and four or more (indicating probable psychological disturbance or mental ill health). In the current research, an overall score of between zero and twelve is constructed, with a score of four or more being classified as a participant with a possible psychiatric disorder, and referred to as a 'high GHQ-12 score'. This allows for some comparability with data from previous Northern Ireland Health Surveys which also use a threshold of four or more.

The GHQ-12 was distributed as part of the overall questionnaire to all LIP research participants.

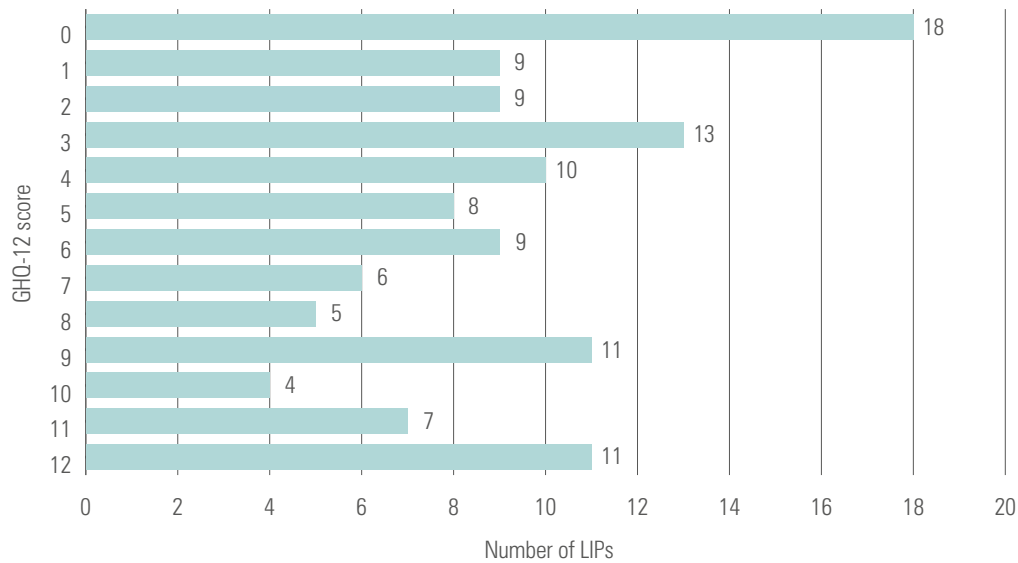
### **Descriptive and GHQ characteristics**

Of all the LIP participants, 59% scored greater than or equal to four on the GHQ-12. When the GHQ scores are grouped, only 15% of the LIP participants scored zero – see Table 7. A quarter (25.8%) scored between one and three. Looking at higher thresholds, 32% of the sample had scores of eight or more and 9% scored 12, which is indicative of clinical depression. Overall, the findings indicate that the mental health of the study participants was in poor condition. Figure 19 shows the distribution of these scores.

**Table 7:** LIP participants' grouped GHQ-12 scores (n=120)

Grouped score	n	%
0	18	15.0
1 - 3	31	25.8
4 or more	71	59.2
8 or more*	38	31.7
12*	11	9.2

\*Falls within the 4 or more group

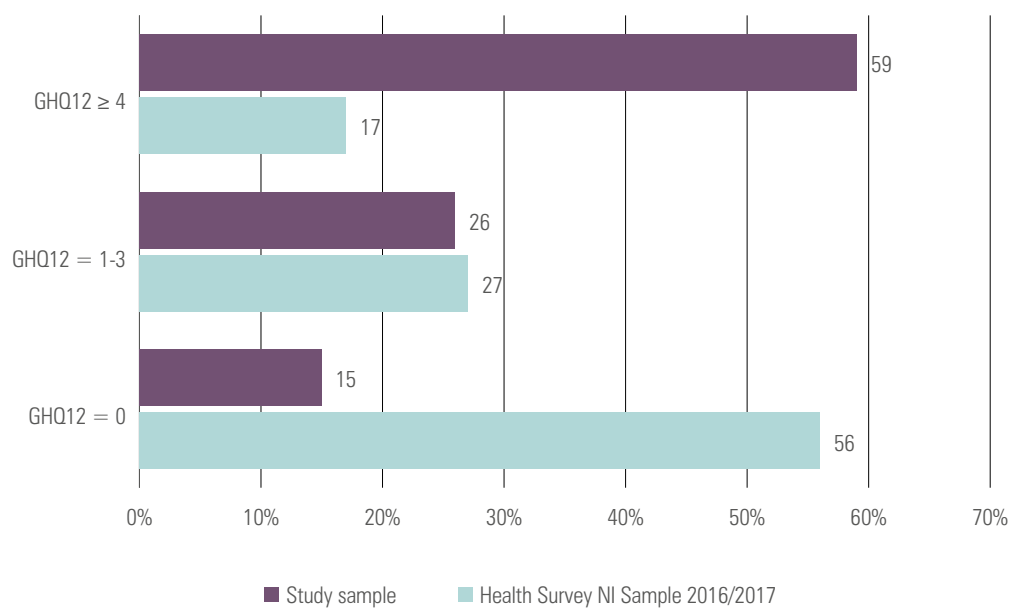
**Figure 19:** Histogram for GHQ-12 scores for the sample of LIPs (n=120)

As noted above, the GHQ-12 screening tool is often used within general population studies and research. As a general reference base, the LIP sample is compared with the Health Survey of Northern Ireland 2016-17 general population GHQ scores. The proportion of LIP participants (59%, n=120) scoring four or more, signifying possible mental health problems, is notably higher than the normal population score of 17% (n=2347). At the other end of the spectrum, 56% of the general population had a GHQ-12 score of 0, higher than the LIP sample (15%). Figure 20 displays the distribution of GHQ-12 scores of the LIP sample against the population sample from 2016/2017 to show the disparity. At a general level, the results highlight the comparatively high extremes in mental health scoring between the LIP participants and those of the general population in terms of psychiatric ill-health. Whilst the high scores measured in the study's LIPs cannot be attributed to causal factors such as self-representation, other issues related to the legal proceedings, or personal circumstances (or a combination of all), the high proportion of LIPs with a high GHQ-12 score is a matter of concern, particularly when it is considered that there is a lack of attention or policy in this area. It can also be noted that when a litigant is represented, the legal



representative acts as an intermediary both for the litigant against the court procedures and for the court against the litigant's fragilities, states of mind, capabilities and ability to participate. In the case of LIPs, there is no such buffer or intermediary. Generally, the LIP is exposed to unfamiliar court procedures regardless of their mental health and the court is exposed to the LIP in that state.

**Figure 20:** Distribution of GHQ Scores of LIPs in sample and Northern Ireland population



### **Sample characteristics of LIPs with GHQ-12 score greater than or equal to four**

There were 71 LIPs who scored four or more on the GHQ-12, representing 59% of the sample. When the sample is disaggregated by the different demographic characteristics, we might expect the proportion of 59% to be repeated for all characteristics – see Table 8. The sample sizes are too small to conduct statistical analyses, but it is interesting to note that some demographic characteristics seemed to be associated with a high GHQ-12 score more than others. For example, of the seven participants who said they were registered as disabled, six of them scored highly on GHQ-12 (85.7%). Similarly, 15 out of the 18 participants (83.3%) not in employment scored a high GHQ-12 score, far higher than the sample. These two demographic characteristics, disability and unemployment, may be contributing factors to mental ill-health. Similarly, more of the youngest and older (56-65 years old) LIPs scored highly on GHQ-12, and a higher proportion of rural LIPs scored highly on GHQ-12 than LIPs from villages or town or cities. Conversely, a lower proportion of LIPs with a degree scored highly on GHQ-12 than LIPs with other qualification profiles. While no statistical inference is possible with small sample sizes, it is noticeable that high scoring LIPs may be more prevalent in some demographic groupings than others.

**Table 8:** Characteristics of LIPs scoring greater than or equal to four on GHQ-12 ( $n \geq 4 = 71$ ) with percentage of high scorers as a proportion of whole sample with that characteristic

	All	$\geq 4$	%		All	$\geq 4$	%
<b>Gender</b> n=120				<b>Religion</b> n=118			
Male	88	54	61.4	Roman Catholic	37	22	59.5
Female	32	17	53.1	Protestant	40	25	62.5
<b>Employment Status</b> n=120				None	33	17	51.5
Unemployed	6	4	66.7	Other	8	7	87.5
Employed/Self employed	102	56	54.9	<b>Urban/Rural</b> n=120			
Other	12	11	91.7	Rural area	18	15	83.3
<b>Qualifications</b> n=118				Village	12	6	50
No qualifications	12	8	66.7	Town or city	90	50	55.5
Qualified below degree level	58	40	69	<b>Marital Status</b> n=120			
Degree	48	23	47.9	Single	31	16	51.6
<b>Age Group</b> n=120				Married, civil partner, living with partner	35	22	62.9
17-25	4	3	75	Separated	35	20	57.1
26-35	20	11	55	Divorced	18	12	66.7
36-45	47	25	53.2	Widowed	1	1	100
46-55	33	20	60.6	<b>Disability</b> n=119			
56-65	14	11	78.6	Has Disability	7	6	85.7
>66	2	1	50	No disability	112	65	58

### GHQ-12 Scores of LIPs who attended the procedural advice clinic

The GHQ-12 was administered to all LIP participants and re-administered to those litigants who took up the procedural advice clinic (referred to as CLIPs). In all, 16 of the CLIPs completed the GHQ-12 for a second time. The data show that 58% of CLIPs (prior to their attendance at the procedural clinic) had a GHQ-12 score of four or more. The proportion of CLIPs scoring four or more reduced slightly to 50% following the procedural advice. However, the sample of CLIPs is too small for statistical inference.

### LIPs' views on their emotional state

Self-representation necessarily means there is an absence of a filter through which the LIP experiences the court and the court experiences the LIP. Both sides of the coin are discussed here. In the interviews, the LIPs elaborated on their state of mind. Unsurprisingly, their responses are varied, ranging from the experience of self-representing barely impinging on their mind to it inducing suicidal thoughts. The few LIPs who said their experience of self-litigation was fine also scored a low GHQ-12 score. Many of them were involved in Undefended Divorce proceedings. The other LIPs who elaborated on this question said their experiences were causing them to feel nervous, anxious or stressed. The difficulty of dealing with both the circumstances of the

case and self-representation was highlighted by some LIPs, underlining the difficulty of detaching themselves from the facts of the case:

P: "It is a brutal process.

I: What do you mean by that?

P: What, effectively what you're doing is, you're taking a human being at a time in their life when they're probably at their lowest. They're probably less able to deal with stress, confrontation, deadlines. Taking a person at their lowest, and then subjecting them to these challenges. Like, having to go in and face a judge in a court, it can be reasonably difficult to do, even when they're feeling good. When you're not feeling so good, and you haven't been able to see your [child] in two months, it's hard. It is hard. You find out how much you can take." (FP51)

Sleepless nights were reported by many LIPs, as were strains on relationships and work. Nine LIPs said they had consulted a doctor about their state of mind, had received counselling or were on medication to relieve anxiety.

"My anxiety is up to high doe. I'm on medication to control my anxiety. If I didn't have that medication I might not be here, and I find the whole experience traumatic. It's not necessarily about the court, it's about what's being said about you. That's what I find the most difficult to manage, and the fact that a mother can seem to say anything at all, and the court immediately engages, even though they've seen for the last X number of months that the mother says, is not borne out in reality, or in what the children say. So, I'm dealing with my anxiety. I've actually, I've had ten weeks of counselling, as well, to try and help me deal with it." (FP63)

At their most stressed, LIPs talked about giving up their cases, conceding to the other side and walking away, being at their wit's end and even feeling suicidal, "just about ready for the rope, more or less" (Oth07). We came across one case where the LIP felt so hopeless about being able to see his child, he disengaged from his contact proceedings.

The study only looked at LIPs who were engaged in their proceedings and it is unknown whether there are people who cannot get representation and do not self-represent because the task is too daunting, and live with their legal needs unmet.

Perhaps this amount of despair in the courts is understandable given the difficult personal situations people are going through, but the added weight of self-representation was clearly insupportable for some LIPs. Feelings of isolation, abandonment and despair were particularly strong for the people involved in lengthy, complex cases. Their occasional appearances in court masked the persistent struggle to find out what to do, who could help and how to prepare. Regardless of whether their case had any merit or not, they were invested in the proceedings.

"It's my, I mean, not that I want to go into my mental health and stuff like that there, but this has absolutely consumed me, and it killed me. I now think of myself as the guy I was before this started and then the guy that I am now. I am done at this stage of this. This has affected me more than anything I've ever thought could... It's a massive effect on my mental health, with the stress, and the anxiety, of having to represent myself in court, coming to court, and I'm fit for nothing after these days. Like, I mean, I'm supposed to go and teach kids this afternoon, and I'll be sitting in my class letting them work away on other things. And, also, a massive impact on every relationship I've had since as well." (FP18)

The observations of this individual would not lead anyone to think he was so affected by self-representation. He was smartly dressed, articulate, prepared, able to address the court unprompted and he followed the proceedings. To the observer, he came across as coping well with the proceedings. Yet, his GHQ-12 score was 11. This LIPs' outward appearances did not reflect his state of mental well-being.

Observing the progress of some individual LIPs through their cases over a longer period indicated exhaustion, frustration and, in some cases, eventual alienation, capitulation, despair or rage. Whether the LIPs would have reached the same depths of despair with representation is impossible to know, and it is not appropriate to lay all of the blame at the foot of the system. Some LIPs found it hard to accept a judgement and persisted with litigation. However, the articulated incredulity and incomprehension of the system, and the frustrations of engaging with it were indicative of a cause for the observed downward spiral into despair.

Very few LIPs in business areas other than Divorce and Debtor's Petitions commented on how impressed they were with the system as a whole. They may have had positive experiences of individual court staff, judges and legal representatives, but few had any of the system as a whole.

### Human rights considerations

#### Access to a court and effective participation

While judges employ methods to diffuse emotional outbursts in court, there is little they can do to alleviate the stress experienced by many LIPs beyond the moment. It may also be difficult to gauge the emotional load a LIP is carrying because appearances may be deceptive. If, as in the rare cases observed, a LIP reaches a point of despair or rage, it is difficult for the court to then take action and it is too late to prevent the escalation of the problem. Effective participation, which the court is obliged to ensure, cannot simply be assessed at face value as it may yield a false positive reading. Judges may need additional measures to determine where the vulnerability of the LIP is such that their effective participation is absent or falls below a level for the court to function.

## What court actors say about emotional load

It is clear from our evidence that judges advise LIPs to consider getting legal representation, and in some cases will be very insistent on this point. It is also clear that they offer this view to LIPs based on concerns that the emotions surrounding the issues have the potential to cloud the LIP's judgement. The stress and, frequently, depression associated with the events at the root of the legal proceedings are well known to them. We observed cases in which judges stated very clearly that LIPs are damaging their own case by not having arm's-length advice, both in relation to having someone to vent to and to guard against blurring the issues, recognising that self-litigation can be "a desperate strain" for some people (Ju08). This problem was a well-recognised one, particularly in the business areas of family law, with one judge observing that:

"I mean, it's a complex area. It's difficult for anybody to try and come to grips with, and family in particular, there's so much emotion tied up, it is incredibly difficult to be objective. So, we've got to bear that in mind when somebody's in representing themselves, that they have so much invested in this, and there's nobody else there who's outside, who's giving them a different perspective, or challenging their views in a way that it's difficult to do in court." (Ju11)

As discussed in Chapter 7, court staff are aware of the difficulties LIPs face and that sometimes their frustrations can blow up into an emotional outburst. They noted the need to refer some LIPs up the management chain and

the need to be mindful of their own resilience. Legal representatives too recognised the influence of emotions on a LIP's behaviour, and reported having to bear the brunt of LIP frustrations in ways that, as Chapter 5 highlights, are often unacceptable. The absence of any structural mechanism to allow lawyers and court staff to deal with, or refuse to assist aggressive or violent customers, emerged as particular problem, but so too is the absence of structural support to deal with individuals who may have a mental health illness.

Depicting LIPs as a burden on the court because of vulnerabilities or mental health problems (e.g. Trinder *et al.*, 2014) or an ability to detach themselves from their emotions is the viewpoint that measures LIPs against the standards expected of legal representatives, as the norm currently positions LIPs. The emotional detachment required in self-representing is probably impossible or at best very difficult. As we have seen, the emotional turmoil in which LIPs swirl arises from both the facts of the case and the demands of self-representation. The norm that positions LIPs as malfunctioning lawyers has to be replaced by a norm that positions LIPs as people dealing with a legal matter without any training, and therefore operating from behind an emotional barrier. Steps to ensure they can participate fully with their proceedings despite the emotional barrier could include allowing them to have personal support in the court, preparation on what to expect, or guidance in answering questions and presenting evidence.

As discussed in Chapter 5, behaviour which is detrimental to the court process and to the safety of court actors should not be tolerated. Codes of conduct, a complaints mechanism for LIPs and legal representatives or possibly the institution of an Ombudsman to investigate complaints are suggestions to seek redress for inappropriate behaviour. A limitation on access to justice should be reserved for extreme cases which suggests several steps have to be reached before recommending it.

## Conclusion

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Overall, the findings highlight that mental health is a real and tangible issue for LIPs, not just in terms of their effective participation in court proceedings but also in relating to their mental well-being during difficult and emotive life events. Mental ill health presents a particular challenge in relation to intellectual and emotional barriers to legal participation that the court is ill-equipped to deal with by way of support needs, provision or policy and guidance. This is likely to have profound repercussions for the active participation, anxiety and capability of LIPs.

The study has some clear implications for practice and research. The findings provide further evidence of the significant mental health needs of unrepresented litigants involved in civil litigation and confirm the findings of Moorhead and Sefton (2005) that the extent to which there is vulnerability on the part of unrepresented litigants is underestimated. In some ways, the precise level of GHQ-12 score is less important than the overall finding that the scores are substantially elevated among unrepresented litigants. While the headline figure identifying probable mental ill-health in civil proceedings is certainly high, this is not overly surprising. The findings are broadly in the range and comparable to studies of litigants who were in the midst of highly stressful legal proceedings (Buchanan, 2001; Trinder *et al.*, 2006; The Low Commission, 2015) or those experiencing welfare-related legal problems (Pleasence and Balmer, 2012). Further, of those LIPs involved in Family, Domestic and Ancillary Relief proceedings, the current sample indicates that the proportion of LIPs in terms of mental ill-health increases to 61% of LIPs.

The stark findings further suggest that there is a clear gap in knowledge and awareness of emotional stability and mental health within civil legal proceedings in Northern Ireland, with limited or no help or information available. This confirms that stress related ill-health urgently requires targeting by joint policy and support for those most

vulnerable to mental illness within the legal system. Effective co-ordination of mental health, legal services and advice is likely to improve both health and justice outcomes for litigants in terms of information provision, support and legal empowerment, capability and participation. This could include a cost-benefit analysis of psychological screening of litigants for early detection or flagging of possible mental health issues, legal anxiety and legal capability, in order to direct appropriate support to individuals in need and to enable court actors to respond to these particular needs.

The findings of the survey of LIPs GHQ score is suggestive that procedural advice may assist in improving the mental well-being of litigants through advice and support. Although not statistically significant, the findings echo the research that points to the value of support and advice in improving mental well-being (Balmer, Pleasence and Buck, 2010, Trinder *et al.*, 2014). Further, the findings are also intuitive when considering the uptake of referrals to the procedural advice clinic. Existing research highlights that people suffering from mental health problems can be reluctant to seek advice, particularly among young people and men (Oliver *et al.*, 2005) and the preference to seek help and support from friends and relatives, where support networks may be less available or reliable or unknown. Therefore, the high prevalence of a high GHQ-12 score within both the overall and CLIPs sample (the majority of whom were male) may have contributed to the limited uptake of the procedural advice clinic in this study.

# Chapter 10 - The impact of providing advice to LIPs

“... the opportunity to get somebody else’s perspective on the thing, and looking at it from a different angle... I found even talking about the thing, she’d maybe bring something to your attention, something to that point you haven’t noticed.” (Dom03)

“I feel I’m better equipped than I was before I went.” (FP31)

## Summary

The procedural advice clinic was included in the study to assess the impact of giving procedural advice to LIPs. The research sought to measure the participative outcomes of LIP experiences with and without clinic assistance to (1) establish if there is any variation in their participative experiences, and (2) if any such difference has an impact on LIPs’ ability to participate in court proceedings.

The clinic was designed by the NIHRC to offer procedural rather than legal advice, that is neutral advice that focused on informing a client’s decision rather than influencing it. The objective of the clinic was to get the LIPs to think through their options, so that they could decide their best approach to the problem. There was a need to remain vigilant to ensure the grey line between procedural and legal advice was not crossed.

LIPs whose cases were listed between January to July 2017, known as CLIPs, were invited to attend the clinic and 25 CLIPs attended. The advice included how to prepare for court, contacting the other side, and encouraging LIPs to think about using evidence or argument and how the judge would view their submission. The clinic adviser reported that the clinic largely offered advice that would have otherwise been given by the court service, such as documentation required for litigation.

CLIPs’ responses to the clinic were positive, with almost all of them recommending such a clinic for all LIPs. They said they felt better equipped than before, and some whose cases were continuing beyond the study period still had unanswered questions. Not all CLIPs demonstrated the advice they received when they were later observed in court, but some attempted to put it into practice. Many CLIPs said the advice gave them more confidence and they appreciated being taken seriously. The main limitations of the support were regarded as ‘too little’, that is not enough or of the right type, or ‘too late’, that is, it came too late in their proceedings. It was doubtful that providing procedural advice could bring about equality of arms in cases with one LIP.

Recruiting clinic candidates was not straight-forward. In total, 56 LIPs were invited to attend the clinic. Some LIPs were sceptical of the value of what they understood as ‘procedural advice’ focusing on the researchers’ disclaimer that the clinic did not provide legal advice, rather than on the benefit they might obtain from it.

Framing reforms to improve the potential for equality of arms in the civil court system as ‘get them lawyers’, ‘make them lawyers’, or ‘change the system’, the clinic’s activities aimed at the second, putting people on a more equal footing with lawyers. Yet, the data from the clinic also suggest that many possible reforms would fall into the ‘get them lawyers’ and ‘change the system’ categories.

## The Procedural Advice Clinic

The clinic was proposed as part of the research design to assess the impact of giving procedural advice to LIPs. This fourth research objective involved measuring the effectiveness of a legal assistance clinic for LIPs, based

at the NIHRC. LIPs whose cases were listed between January to July 2017 were invited to attend the clinic for support. The research sought to measure the participative outcomes of LIP experiences with and without clinic assistance, to (1) establish if there is any qualitative or significant variation in their participative experiences, and (2) if any such differences has an impact on LIPs' ability to participate in court proceedings, as an aspect of their human rights in court proceedings.

The clinic was designed specifically by the NIHRC for this project, following a three-day field trip to the Royal Courts of Justice in London to observe the procedural advisory service offered by Citizens Advice as well as the pastoral support provided by the Personal Support Unit. Additional insight was gained from previous, unsuccessful attempts to establish an advisory service at the Royal Courts of Justice in Belfast, which was designed to be delivered by junior barristers on a *pro bono* basis. The remit of the project's advice clinic was to offer procedural rather legal advice, and the specific protocols of the clinic and guidelines for the adviser were refined in the early phase of the research (see Appendix 4).

The distinction between legal and procedural advice was critical. Being a professionally qualified solicitor, the clinic adviser was able to reflect on the distinction. Legal advice was defined as merits-based strategic advice, that was capable of actively influencing a client's decision. Procedural advice was focused on informing a client's decision by providing neutral information – framed passively in the more neutral language of relevant legislation rather than set out as pros and cons of different legal positions. The objective of the procedural advice was to get the LIPs to think through their options, so that they could decide for themselves what they felt their best approach to the problem would be. The clinic advisor noted that there was a grey line between procedural and legal advice, and that constant vigilance was required to avoid overstepping the line, with the litmus test being whether the advice would influence a LIP's decision (as legal advice would be expected to do) or whether it would inform their decision (as procedural advice could do). A further means of distinguishing between specific legal advice on the LIP's case and general procedural advice was that clinic did not offer any representation service, or any accompaniment to court. In this sense, the clinic remained focused on the separation between providing information on available options and advice on next-steps in the LIP's case. The clinic was also designed to be reactive to the LIP's level of understanding, supporting the development of their ability to understand the options they were considering.

This chapter draws predominantly from the clinic adviser's records of sessions with LIPs who attended the procedural advice clinic provided by an adviser, a solicitor based at the NIHRC, and questionnaire and interview data from the LIPs. Participants attending the clinic, who we refer to in this report as 'CLIPs', were observed, interviewed and asked to complete a questionnaire before and after they had received advice which are also drawn on in this chapter, alongside the views of the clinic adviser.

Advice offered at the clinic was intended to assist LIPs in presenting their cases effectively and being able to approach a more equal footing with represented parties, to see if this enabled more effective participation in the legal process. However, the research was also motivated by the need to consider and ameliorate any negative impacts that LIPs may have on court norms (see Chapters 7 and 8). As the clinic adviser reflected, the idea of the clinic was to assist the court service, with any such funded service being economical in the long run:

"I think it would be the court service helping themselves, because if they had this facility they wouldn't necessarily get the, kind of, level of questioning that they get. And it would also mean for their staff, I know a lot of their staff are uncomfortable answering questions, because they don't want to give wrong information, or they don't want to give legal advice by accident." (Clinic adviser).



The clinic adviser reflected that the clinic advised the CLIPs on issues that would have otherwise fallen upon the court service, such as assisting litigants who needed advice about appeals to higher courts. The clinic did not advise up to the level of the Court of Appeal, since these cases are appeals on points of law specific to the individual's case rather than procedural issues.

In all, 26 LIPs completed an initial consultation interview with the clinic adviser and 25 received advice, which means that there are 25 CLIPs in the study. Of these, 21 had ongoing proceedings, and the other four were contemplating further action in future. Of the 21 with on-going proceedings: 19 were observed in court; 19 were interviewed; and 16 completed questionnaires before and after clinic advice.

Recruiting clinic candidates proved taxing. In total, 56 LIPs were invited to attend the clinic. There were 11 refusals to attend on the spot. Reasons given included that the LIP was at the end of proceedings, too far in to explain and get someone on board with their case, that they were happy with the support they currently had (for example, a McKenzie Friend, a friend with legal expertise, or a support worker from Women's Aid), or had no time to speak to anyone. Then another 20 LIPs said that they were interested in the clinic but did not take it up. Reasons given were that the LIP ended up being accepted for legal aid, so got legal representation; occasionally LIPs felt comfortable going it alone, particularly where they described their cases as straightforward, or they perceived that advice would not make any difference to the case outcome; language may have been a barrier for one LIP who lost contact with the project; in several cases, we simply did not know the reason.

During invitations by researchers, there was a tendency for LIPs to be sceptical of the value of what they understood as 'procedural advice' on offer to them, with many focusing on the researchers' disclaimer that the clinic did not provide legal advice, rather than any benefit they might obtain from it. Often this had a temporal dimension (discussed further below):

"How it was described to me initially, or how I heard it described... that the facility could offer procedural advice, it couldn't offer legal advice, and it was a free facility, and it was up to three appointments, that was available as part of the research project. I suppose, I initially thought, well, probably what I'd benefit more from is legal advice, so I'm not sure how much this would be useful to me." (FP15)

## LIPs attendance at and use of the clinic

Once enrolled into the clinic, one or two participants were very keen, and perhaps slightly reliant on the clinic adviser, calling frequently with updates and fresh queries. The adviser did what she could to stretch the allotted appointments but the model adopted was that CLIPs were offered a maximum of three sessions of 45 minutes each:

Prior to our third appointment, [CLIP] had contacted me to say he was aware that he only had one appointment left and would like to split it into shorter time periods so as to maximise the clinic's usefulness to him. I was happy to do so and proceeded on the basis that this appointment would not last the whole 45 minutes. (Clinic record, FP78).

Furthermore, as discussed in the preceding chapters, those LIPs, including those who attended the clinic demonstrated the need for some very basic advice about procedural matters, such as how to clarify court dates, directions and whether proceedings are ongoing or not.

CLIPs appreciated being able to use a range of methods of contact. For some, face to face was ideal, but for others, phone contact was very helpful where it was difficult to reach the offices, or if they needed a quick bit of advice. Indeed, many CLIPs greatly valued being able to follow up in-person sessions with phone calls as cases

developed. Ultimately, CLIPs found that having someone knowledgeable and professional to discuss their cases with and check their understanding was:

“Extremely helpful. First of all, [clinic adviser], she knows a lot, and she could advise me on the legal proceedings. She helped me with the forms. She answered all my questions. It’s helped. I felt much more confident than the books, it’s a different thing talking just to the right person than finding information on the internet.” (FP78)

The following section outlines the advice given to CLIPs by the clinic adviser, before considering the impact of that advice on LIPs, and finally, limitations to what the clinic could achieve.

## Advice given at the clinic

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The remit of the clinic was to provide procedural advice, extending to explaining a CLIP’s available legal options and how to pursue them, but stopping short of making recommendations about which option CLIPs should take.

I advised [CLIP] that what he was talking about was a property adjustment order (PAO) under section 24 of the Matrimonial Causes (NI) Order 1978 (MCA). I brought up the relevant section on my computer screen to show [CLIP]. (Clinic record, Div06)

The clinic adviser offered to review forms, court orders and to help prepare bundles and more generally armed CLIPs with tools to build their own cases, to utilise legal resources and to focus their arguments around key legislation or legal principles.

I informed [CLIP] of the welfare checklist under s3(3) of the Children’s Order and told him that this was how the court would make their decision on any new/varying contact arrangements. I said I would email this out to him. We chatted through the checklist; [CLIP] feels his child’s wishes & feelings are key to his arguments here as his son wants to have contact with him. (Clinic record, FP13)

Some CLIPs had a vague understanding of key legal principles, but benefitted from some further detail and guidance.

[CLIP] was aware of the concept of ‘best interests’ but had not had sight of the welfare checklist and stated it was interesting to see it ‘broken down’ in the legislation. I advised [CLIP] I would forward him out the welfare checklist by email so he could structure any future arguments around it, although it may not be strictly relevant at his next review. (Clinic record, Dom03)

Some CLIPs noted that they did not know where to find key legislation, case law or how to use it. The clinic adviser directed them to relevant sources, but also coached them in applying key principles.

[CLIP] is still keen to ensure that any overnight contact is done in a phased in manner rather than immediately. I noted that when making this point, [CLIP] should try to ensure all his arguments are ‘best interest’ focussed. Why is phased in overnight contact in the best interests of his child? Why is doing otherwise detrimental/contrary to her best interests? [CLIP] listed a few reasons as to why he felt this would be the case and seemed relatively confident with these arguments. (Clinic record, FP41)

With another CLIP, the adviser encouraged the avoidance of tangents and personal issues:

On a few occasions, [CLIP]’s arguments were not ‘child-centric’ in that they were based on issues to do with her and her ex. We discussed the ‘best interest principle’ and that this is how the court will make these

decisions. I asked her if she could re-phrase her arguments in a child centric way. [CLIP] was able to do this. (Clinic record, FP31)

CLIPs, similarly, felt that the clinic adviser was able to refocus them in a way that was helpful to them:

“She made me aware what the court will be concentrating on. Brilliant advice, and I think I do concentrate on that.” (FP32)

Focusing on prepared arguments was intended to help CLIPs be brief and concise when in court.

### Advice on how to prepare and conduct self in court

The clinic adviser spent much of the appointment time explaining expectations of behaviour in court. CLIPs were generally advised to be brief, courteous and respectful to the judge and other side. In one instance, the adviser persuaded a CLIP that “speaking about M[other]’s solicitor would probably not endear him to the judge and we discussed the benefits of playing the ‘ball’ rather than the ‘man.’” (Clinic record, FP41)

CLIPs often raised issues about managing their nerves or attempting to suppress emotional outbursts in court. Some CLIPs documented some extreme reactions to the pressure of self-representing in court, such as one female who had previously collapsed in court:

During our discussions, several times, [CLIP] expressed the belief that she would be unable to go before the judge. (Clinic record, AR21)

The adviser offered some practical tips which often drew on procedural advice in order to prepare and reassure CLIPs, such as taking notes (to manage emotion as much as record information and prepare counter-arguments), ultimately so that she would have the presence of mind to formulate sentences in court:

I suggested that when the other side is speaking, she should write down their arguments primarily to give her something to focus on and so as not to be so shaken by their adverse comments towards her. She can then use these notes to put her counter-argument to the judge. (Clinic record, AR21)

Other interventions were to help CLIPs keep their thoughts straight, such as using an *aide memoire* to take into court and use as a check-list or preparing a small number of papers to bring to avoid becoming overwhelmed. As with preparing cases, CLIPs were advised to focus and be specific in presentations to court:

I advised [CLIP] to keep her arguments short. I noted that sometimes she gives lengthy reasons and factual scenarios to detail why she is in the right. I suggested she keep her points short, to a sentence if preferable and if the judge requires more information s/he will ask for it. (Clinic record, AR19)

Sometimes the adviser used role-play to coach CLIPs to focus on the issues of the hearing and then giving feedback on areas for improvement.

I was the judge and [CLIP] appeared before me. Did well initially however he has a tendency to go off on tangents in the middle of sentences. Advised him to be specific re times/dates and tell the judge clearly exactly what it is that he would like the judge to do. (Clinic record, AR05).

‘Be your own barrister’ was a piece of advice offered to a few CLIPs to help them try to remove themselves emotionally and model their behaviour. Indeed, the adviser suggested that thinking of yourself as a LIP might be limiting, perhaps because the personal element may cloud rational thinking about the focus of the hearing.

We discussed how the other side have an advantage as they have a barrister who can emotionally remove themselves from the case and remain dispassionate. I suggested that he try to do the same/put himself in that mind set. I also suggested he keep all arguments welfare related – i.e. best interests of the child. (Clinic record, FP77)

All of these functions could be seen to provide a foundation for CLIPs to think about how they could progress their cases.

### Advice on how to progress the case

The clinic adviser can be seen to have helped CLIPs progress their cases in a number of ways. Crucially, she was able to direct them to the right place to confirm vital information, such regarding potential fee exemptions, estate agents in Ancillary Relief cases, checking legal aid status, contacting the Children’s Law Centre regarding a child potentially taking proceedings in his own name. CLIPs were also encouraged to make full use of the help and advice that are available through NICTS’s website.

### Advice on contacting other side

CLIPs were often reluctant to contact the other side, and the clinic adviser explained the potential benefits of, for example, obtaining an affidavit, discussing the potential for mediation between the LIP and the other party, or simply negotiating outside of court. The latter involved very basic instruction in how they could or should contact a representative on the other side as well as negotiating tactics.

I advised that the family courts always look for resolution by consent – that is preferable & he should feel free to try to negotiate. We discussed how to negotiate – I said [CLIP] should consider what his bottom line is but also be aware that most negotiations end with neither party happy. He should approach the other barrister which ‘his ideal scenario’ but be prepared to move on this/concede some ground. (Clinic record, FP08)

The clinic adviser dispelled some anxieties about dealing with the other side.

[CLIP] was concerned that by negotiating he was ‘giving away’ his tactics or arguments. We discussed how he could phrase these negotiations so as not to identify all of his reasons behind his arguments. I also advised [CLIP] that he could ask questions and lead the negotiations if he wished to. (Clinic record, FP41)

### Advice on presenting the case

CLIPs were encouraged to see the perspective of the court, or to consider the prospect of success or otherwise of actions, such as bringing the conduct of the other side to the judge’s attention, or seeking an adjournment for some reason.

[CLIP] asked me if there was anything he do could do about his ex-wife’s solicitor. He feels she has been instrumental in advising his wife to carry out ‘bad behaviour’. I suggested [CLIP] should think about this matter strategically. I asked him how he thought the judge would view attempts to bring the behaviour of his ex-wife’s solicitor into the proceedings. [CLIP] did not think the judge would view this favourably. (Clinic record, FP78)

The adviser warned of tactics CLIPs might have been considering that might be taken as contempt of court:

[CLIP] also questioned if her ex isn’t complying with the agreement, how she could possibly frustrate it too e.g. by not complying with it. I advised her to be cautious in respect of this as there could be contempt issues. I advised her that the proper person to regulate her ex’s conduct is the court and not her. (Clinic record, AR21)

CLIPs were encouraged to think about how to use evidence or demonstrate arguments and how they would phrase cross-examination questions.

“I advised [CLIP] that this meant no leading questions and gave an example of how a leading question differed from a question allowed under [Evidence in Chief]. I suggested she write down her line of questioning and review these questions to ensure that they are compliant. I did note that if the judge was unhappy with a question he/she would likely say so.” (Dom20)

Another area of advice was how to read the judge.

We discussed the way the judge can sometimes give a ‘steer’ or an indication of what their views of a matter are. I suggested [CLIP] think about her arguments strategically and if there is any way she can present her views to the judge whilst also complying with his ‘steer’. (Clinic record, FP16)

In undertaking all of this work, the adviser, a trained solicitor, felt that she was in new territory, unlike a typical lawyer-client relationship:

“How to act on your own advice, is maybe more presentational, you know, and a bit about how to, kind of, speak in court, and things like that... more explaining to people how to engage with the system, as well... who you can contact [etc]... whereas, people might not necessarily be aware that they can do that... If you were a solicitor in private practice you might, well, you probably wouldn’t [have] the time to explain to your client what it is that you’re actually doing for them.” (Clinic adviser)

The adviser is echoing many of those LIPs who had previously engaged solicitors who were frustrated by the lack of explanations from legal representatives with regard to this very information.

## Impact

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The advice needs, and content of advice provided at the clinic have been outlined and our qualitative and quantitative data allow us to provide an assessment of the impact of giving procedural advice to LIPs. There were limitations on this assessment, however, arising from attribution and sample size. Attributing a change in a CLIP’s approach to their proceedings to the clinic was difficult because of the additional and varied advice sources that CLIPs might have additionally drawn on. Also, as observers, we often felt uncertain as to what impact the clinic advice had made: “I can’t see whether the clinic made any difference – too little for [the CLIP] to do!” (FP31 - Obs). Similarly, it was not always easy for CLIPs to isolate what had helped them: “it’s hard to pin down specifics, because [clinic adviser] gave me other procedural advice as well. I think it all helped” (FP62).

Secondly, the small number of CLIPs in the sample prevented a comparison between pre- and post-clinic responses to the questionnaires. In particular, the intention was to apply a difference-in-differences method to the quantitative data. The potential remains for such a methodological approach to be applied to measure the impact of other interventions which we feel would be worth pursuing.

### Post-clinic questionnaires

CLIPs responses to the post-clinic questionnaire were overwhelmingly positive. Out of 16 valid usable responses: 12 said that the advice was relevant or very relevant to their cases; 12 said that the advice was relevant or very relevant to representing their cases; and similar proportions found the advice useful or very useful in progressing their cases; 13 CLIPs found the advice to be clear or very clear; nine CLIPs found the advice easy or very easy

to apply in their case, and 10 felt supported or very supported in self-representation by the advice. Ten CLIPs felt that they had learned a lot about representing themselves, and that the advice made a difference or great difference to their ability to self-represent. Perhaps predictably given that the clinic was focused on procedural advice, fewer CLIPs reported that they had learned a lot about the *legal* issues in their case (seven of 16). Only six of 14 useable responses indicated that the advice had made a difference or a great difference to their cases. As expanded below using the qualitative data, some of the CLIPs felt they needed legal rather than procedural advice, and there was a view that there was only so much that preparing themselves would help as they did not feel they were listened to. However, overall, 15 of 16 CLIPs would recommend or definitely recommend such a service to LIPs, and 14 of 16 felt that such advice is worthwhile or very worthwhile. The remainder of this section reviews the qualitative data which illustrate the impact of advice on the CLIPs in this study.

### CLIP comments on impact

Many CLIPs described the help they received as “totally invaluable for yourself... for your health, to keep you calm, depending on whether it’s a marital situation, or whatever, you know, it’s going to make such a difference” (AR21).

CLIPs often rationed their sessions, being unsure when to use the last one where they conceived the need to appeal later, or attempting to split up sessions into smaller chunks, to assist them as issues arose. Sometimes, the case was progressing at a steady pace, and the CLIP only thought they would use more sessions if a difficulty arose, such as an unfavourable order that they needed to appeal. Asked if they would recommend the clinic, one CLIP lamented that the clinic was only available for an experimental period.

“I still have more questions, and I still have more issues that are ongoing. So, yeah, it’s just a bit of a shame that I can’t utilise that, sort of, as a point of contact, going forward, you know, because if I do have questions, it would be nice to have somebody that I knew.” (FP62)

The majority of CLIPs, like one litigant in a family case, felt “I’m better equipped than I was before I went” (FP31). CLIPs expressed how much they had gained from the advice to organise and streamline their arguments, and from rehearsing arguments and scenarios that could arise,

“It made it so much easier, you know. It made it so much easier because I was putting things just into blocks that were concise, whereas before, no matter how much I had tried to narrow things down, it was very, very difficult.” (AR21)

One CLIP tended to be easily distracted during the hearings, and had a tendency to ramble and go into tangential discussion, working himself into anger. Feedback on being able to focus was particularly critical for this CLIP:

“She puts you right at what’s worth saying ... It’s absolutely brilliant, because she tells you if you’re on the wrong track, if you’re going to go the wrong...like, I could have wasted time there this morning, instead of concentrating on the costs.” (AR05)

What the procedural advice provided here was not just a way to avoid the CLIP getting distracted in making his points and offering critical context on what was relevant, but on helping him develop emotional detachment, to avoid the hearing becoming heated and emotionally charged.

CLIPs were sometimes reluctant to accept the advice given at the clinic but did so, feeling that they trusted the advice, even when it went against their instincts, such as the desire to include, and for the judge to hear about all manner of issues which the litigant views as important or injurious:

"I don't think a judge will want to hear, you know, the likes of the shortfall... I could have said that too, you know, but I don't know, what's the point." (AR05)

CLIPs reported that they were directed to the right forms and how to fill them in, or to useful legislation, and prior errors and misdirection in preparation were sometimes rectified: "Sometimes when I am looking at the legislation myself it turns out that I'm looking at UK legislation, rather than Northern Ireland legislation" (AR19).

### Retaining and acting upon advice

In addition to the testimonies of CLIPs themselves, there were clear demonstrations of where advice was retained or applied by CLIPs, who demonstrated a greater understanding of procedure, appreciation of how the judge might think or how to manage emotions and remain calm, potentially diffusing interactions that otherwise might have been more hostile:

Solicitor [name], arrives at 11.15. Speaks to LIP and is nice and conciliatory. He goes into the court. LIP turns to me and says this is the worst of it – he can go in and she cannot know what he says to the judge. She then refers to the Clinic adviser's advice that the judge has to be fair to both sides. (AR21 - Obs)

Simple advice such as contacting NICTS as advised often proved effective in obtaining important information, such as court dates or the nature of order the other side is seeking, and many CLIPs appeared to have taken on some lessons, such as brevity in presentation:

The LIP was more succinct, but still rambled a bit and in his effort to get his perspective across, was less focussed. He didn't get angry this time. (AR05 - Obs)

Ultimately, feeling prepared and knowledgeable were related to emotional support and reassurance as much as the provision of information and skills, and to the CLIPs' ability to stay calm and articulate themselves in court. The adviser was "very reassuring of the process to take" in relation to what CLIPs were trying to achieve and allowed them to rehearse how they might react to various outcomes (FP15). One CLIP encapsulated how she was still very nervous about her upcoming court hearing but that having the procedures explained to her steadied her somewhat, like when "you're going into an exam, and you find out what's going to be in the exam" (Dom20).

### Emotional support

A very common outcome among CLIPs was the feeling of having their confidence boosted with regard to self-presentation and greater peace of mind as many anxieties were allayed:

"They empowered me to be able to go back with confidence... she spoke logic to me... at the end of the day, it was down to me to make the decision, but she was able to give me the advice that I needed, definitely." (FP13)

Many experienced their clinic sessions as reassuring, reducing their anxiety about their upcoming court appearances, with new confidence to articulate their case in court:

"It made such a difference with what was going on in the court, because there was times previously when I had been in with his solicitor, and I should have spoken up, you know, and I had the stuff with me, and I actually just sat there... it is quite stressful being in there, and you're scared of saying the wrong thing, you know, and you don't want to offend the Master or anybody. So, no, it definitely, it did give me the good guideline there of when I should speak and, you know, what to do, and, you know, it was such good advice. So, so, good." (AR21)

CLIPs sometimes described how the sessions made self-ligating possible, and credited the clinic with having got them through it.

“I don’t think I could have done it without her. I don’t think I could have, you know. I have to say I’m more prepared now.” (AR05)

At a very basic level, some CLIPs greatly appreciated being taken seriously, and having someone listen, often when they felt isolated and intimidated by the prospect of court.

“There’s a human element, whereas, going through this process, there doesn’t seem to be a human element at all... A wee bit of empathy, and a bit of sympathy. Listening is always good.” (FP13)

Relatedly, CLIPs often described shifts in mindset as a result of the advice they had received. This could reflect injecting some realism into expectations of what was achievable via litigation, encouraging consideration of negotiated settlements, or some perspective on how to view a decision. Some CLIPs said that they took the advice on board more than if it had come from friends or family because it was a neutral party with no stake in the outcome.

“The useful thing about [clinic adviser] not being in court is that then she was coming from a very impartial place. So, she hadn’t been in court to, kind of, see how it had played out. That was then, for me to be able to say, look, here’s some of how the court is proceeding, here’s some of the issues in relation to it, and I think that was useful actually to have her not present in court. I think if she was present in court then it’s almost like a qualified solicitor representation.” (FP15)

LIPs also developed greater self-awareness of and skills in managing their emotional responses, particularly in court.

“In advance of getting the advice, I was almost working on my own instincts, in terms of previous experience of having being solicitor represented, and what I wanted to achieve from the case. And, I suppose, then, following, I think there was a slight shift on how I presented myself in court whenever I had those last few months with the guide and support appointments, and really just to remain very, very focussed on the outcome.” (FP15)

## Limitations

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While experiences of the clinic were overwhelmingly positive for the majority of CLIPs, there were a number of limitations identified in terms of impact that have important implications for any proposed reforms and for agencies involved in advice and legal assistance more broadly. The main limitations of the support provided by the clinic might be categorised as either ‘too little’ or ‘too late.’ ‘Too little’ encompasses perceptions that support provided was too limited, or not of the right type. ‘Too late’ refers to the situation in which many CLIPs felt they would have benefited from advice far earlier in the course of their disputes. Relatedly, particularly to the extent and type of support (rather than timing), there is a less tractable limitation, namely that such legal assistance, rather than representation, by a highly qualified legal professional can never lead to an equality of arms between an unrepresented and represented party unless there are specific interventions by the judge, including a move towards a more inquisitorial approach, or more systematic support mechanisms for LIPs.



## Too late

LIPs in the study often reported that they had learned as they went how to navigate the court and manage courtroom appearances. There was a view among some CLIPs that they would have benefitted far more from early advice.:

“It would have been lovely to have availed of the service months, and months, and months previous to that. I think I’d learnt by my own mistakes... I was so far into the proceedings, I don’t know when I first spoke to her maybe, but at least nine months I think, I’d gone it alone. So, I kind of knew about the C2 forms, and I knew where to find what appeal forms there are on the internet.” (FP08)

Arguably, ‘mistakes’ and gaps in LIPs knowledge can impact on the court service, causing delay and vex the judiciary and legal profession.

From the LIP’s perspective, to use a tired cliché, hindsight is wonderful thing. CLIPs often reflected upon their learning curves: “I can plot clearly now where my mistakes were” (FP08). Yet, more prosaically, timing, from the accounts of CLIPs in this study, was important.

“I would have tended to have the appointments midway between each of my hearings, and that seemed to work very well.” (FP25).

A related argument is that some form of early legal advice might sift justiciable elements of the case, filtering out more cases with little prospect of success, whether through merits-based legal assessment criteria, or through the decision of a lawyer accepting private finance:

“You probably would start off on a stumbling block of whether or not a solicitor would have brought the case for them in the first place. And you have to ask the question, if they’re bringing the case, if you’re a litigant in person, with no holds barred, and you can just bring a case, and there’s nobody there to, kind of, give you merits, advice, or say this is a bad case, and you just think, this is what the response should be, how far are you going to get with a bad case.” (Clinic adviser)

Merits advice was beyond the remit of the clinic, but the advisor was also clear that there were cases which did not appear to have legal merit on which the adviser could only provide procedural advice, and was not in a position to steer the LIP away from litigation. The adviser continued that in such circumstances, LIPs may be “hampered, because they’re litigants in person,” but ultimately, “they are hampered as well because they’re trying to argue an inarguable case” which would have been better managed if early advice had been received. In one or two CLIP cases, the adviser suspected that individual really required legal counsel to progress the case and lead to some kind of resolution:

“I think, in the end, it became frustrating for [the CLIP] as well, because, you know, I have to keep to telling [him/her] in every conversation, you need representation.” (Clinic adviser)

## Too little

### **Parameters of the service**

CLIPs in the main accepted the parameters of the procedural advice clinic and why legal advice was not offered and why certain questions could not be answered.

“I was very clear, you know, from the beginning, from the outset, and [clinic adviser] was very clear from the outset that she was not giving me legal advice. So, that was fine. I didn’t expect her to.” (FP62)

However, CLIPs fairly frequently perceived that there was a difference between the clinic's procedural advice and the legal support that they might receive, and that the latter was preferable.

"Please don't feel that I'm saying that the solicitor was any better, it was just different." (FP62)

"It was, but to be honest with you, it was very limited. [clinic adviser] couldn't say, well, I would advise you to do this, or you need to do this... [clinic adviser] was very helpful, in as much as she's allowed to. Did it help me any? No." (Dom04)

They appreciated and understood the clinic's advice remit in most cases but on reflection, most would have preferred legal advice and in some cases representation in court, echoing the finding in Chapter 6 that many LIPs would have preferred to have been represented.

For her part, the clinic adviser felt that she was limited in what she could do for CLIPs and wished she could offer more:

"Whenever you're doing clinic advice you let go of a level of control that you would definitely have over a case if you were a solicitor, and sometimes it can be frustrating whenever you want to tell the person, this is what you should do... if you know what the right answer is, and as a solicitor you generally tend to know what the right answer is, and what a person should do." (Clinic adviser)

This limitation is also set against the clinic adviser's additional point that at times there is no 'right' answer on questions of how to conduct a case, a point of difficulty and frustration noted by many LIPs. For example, the idea of one 'right' course of action goes against the view of outcomes in family cases as relating to a range of possible outcomes.

Occasionally, CLIPs pressed the clinic adviser for her opinion on what to do.

[CLIP] asked me if I was 'telling her to do' x, y or z. On each occasion, I was clear with [CLIP] that all decisions are ultimately for herself and that each comes down to her best judgement. I told her that the purpose of this clinic is hopefully to give her a sounding board and someone objective to discuss matters with so she can think through the options. (Clinic record, AR19)

Other court actors, including legal representatives, discerned that in certain business areas, it was less easy to delineate procedural from legal advice, or to offer something of value on that basis:

"Insolvency, for my mind, there's too much going on. There's too many possibilities of how things could go. You wouldn't really be able to advise on procedure without advising on the law... Family, there's not a massive procedure. Once you file your C2, your F1, all those sorts of things are usually okay... It's just attending court... I just don't see how you could touch with the insolvency because it's just too vast." (LR05)

A few LIPs' frustrations with the service suggested that they did not understand the limits of the advice offered, which meant it was also difficult to manage how that advice would 'land':

"You're very limited as well because, obviously, she's saying that, she said that she couldn't discuss with me, without going into the case or stuff that was... something to do with the family court anyway that she couldn't discuss."<sup>22</sup> (FP29)

<sup>22</sup> FP29 is referring to court papers which the clinic adviser did not have the permission to review.

Some CLIPs had shifting perceptions of the potential or actual usefulness of the clinic, with some initially perceiving procedural, or perhaps more accurately 'not legal' advice, as virtually useless, but then finding that there is more to 'procedural advice' than they had envisaged. Perhaps, this relates to an under-estimation of the complexity and importance of rules, procedures, etiquette to their ability to present their case in court.

### ***Lack of fit between the parameters of the clinic and the CLIP's needs***

Other perceived limitations of the advice clinic related to whether the advice was new or relevant to the current status of the CLIP's case.

"There's only so much they can do, and when you go there on that day, really all you can discuss is what's relevant on that day... [Adviser] discussed with me, you know, how I should conduct myself, and a certain issue I should prepare myself about, you know, before that, at the time. So, really, in the end, it wasn't relevant anyway, because the other side didn't even have their statement in." (FP77).

Advice provided at the clinic was thought of by some CLIPs to be on a par with 'unbundled services,' that a legal professional in private practice might provide:

"If [Clinic adviser] hadn't have provided the help that she did... I probably would have, not instruct a solicitor, unless I would have, you know, made an appointment and went in and seen a solicitor, and maybe got an hour or two from them, throughout the whole case. And I would have been asking questions that I asked [clinic adviser]." (FP41)

There were situations in which the clinic adviser perceived that legal advice was probably required as the CLIP was struggling severely. Sometimes "someone asks you something, and the response is going to require legal advice. So, that was, kind of, a limit of the clinic" (Clinic adviser). She felt that while basic instruction and emotional support were important, in some cases, "the actual help that they need is someone to take their case on."

The adviser acknowledged that she could only get a "snapshot" of the case, given the limited time she could spend with each CLIP. "You're not involved in it in the same way that you would be if you were representing them, or probably even if you were acting as a McKenzie Friend for them." This made it difficult to be sure where a CLIP was within court processes and hence what she was advising on:

I queried this as, as described, it sounded like a residence order but without further information I could not clarify. I did alert [CLIP] to the fact that as I have not had sight of any papers in his case and as he is also uncertain of the previous court processes when he was represented, it made it difficult for me to be absolutely sure of the procedures I was advising him of. [CLIP] accepted this. (Clinic record, FP78)

Even where a CLIP brought their papers, the adviser was not always permitted to look at them without the permission of the court (for example, in a Children's Order matter). It was also frequently difficult to get a straight answer or clear picture from CLIP, sometimes because of their limited understanding:

Prior to our appointment, [CLIP] had been unable to tell me at what level his court case was in in the family court. From the NICTS letter he provided me with, I was able to tell that the matter was in the FCC and that it involved the Children's Order. (Clinic record, FP30)

In some circumstances, the CLIP had several legal matters, was in a complex legal situation or was far into a long running dispute. This made it extremely difficult for the adviser to grasp the contours of the case within the parameters of a short initial consultation:

Chatting the above through [matters not central to case] took up a large amount of time so I extended the appointment time to an hour. (Clinic record, AR19)

The adviser also felt that she sometimes had to leave decision-making to CLIPs, even though they probably did not have much knowledge upon which to base that decision.

### ***Advice on the hoof***

Due to the limited nature of the clinic's staffing, some CLIPs felt stranded when the adviser was not immediately available:

"Unfortunately for me, when everything happens, is leading up to the case itself, leading up to the hearing itself, and that week [clinic adviser] was on annual leave." (AR19)

Here, some CLIPs felt that they needed immediate advice and quick reactions to case developments, in the thick of it:

"It's great at the start... she turned out the legislation to look at and, you know, give you ideas on how to manage your case. But when something, it's when that doesn't go according to plan... Things can change quite dramatically in the couple of days before... that's when all the action happens, and I've seen that quite a lot in a lot of different cases." (AR19)

Another CLIP echoed this, saying, "procedure only comes in in the moment." There is often a "split second where I need to know if I can or can't challenge something or ask a question or what the implications of something are" (FP16). She expanded upon how perhaps she needed someone to accompany her in court.

"What I have found is that things can quickly shift in the court room. So, there was a few occasions in the lower court, where the upholding party came in with what felt like a bit of a curve ball, and I didn't know how to respond to them. And then afterwards, finding out that I could have maybe have said this, or requested this, from the judge, but not having any, kind of, prior legal knowledge I didn't know that I could do that... sometimes I got caught up in agreeing to things that I didn't actually necessarily want to. And if I had had another person there, and been able to ask the court for a break to reflect on what was happening, you know." (FP16)

Her experience was that even when before judges who gave her time and space, and checked that she was following what was said and could agree to it, she was not in charge of the situation or properly representing her case:

"Both the appeal judge, and the lower court judge, on a few occasions, asked me was I agreeable to something, and actually, it was a bit silly asking me that, because I didn't fully understand what was going on for me to provide informed consent. And so, I felt put on the spot sometimes, and felt compelled to agree with something that I didn't fully understand." (FP16).

This recognition of not being well enough informed to give informed consent echoes the clinic adviser's wariness that LIPs were inadequately informed to be able to make a decision about how to take their case forward. We saw in Chapter 7 how the lack of information and lack of knowledge were practical and intellectual barriers

to self-representation and how the extent of LIPs' lack of knowledge was repeatedly widened the further into their cases they went. This limitation would have to be a caveat in any eventual service, namely it cannot be substitute for full and professional representation.

### ***No substitute for legal representation***

Ultimately, while many CLIPs felt that the clinic boosted their confidence and supported them, the help was not sufficient for an equality of arms when facing a represented party on the other side. One CLIP felt "annoyed" about their court hearing.

- P: "I didn't think it went in my favour, for the sheer fact that I didn't have a solicitor myself.  
 I: And you didn't feel like the help that you got from [clinic adviser] was enough to enable you to match...?  
 P: No, no. She just, basically she tried to explain some of the legal terms, but I'm sure that she couldn't really give me legal advice... the[ir] solicitor was using terms that I wouldn't understand and just the way they were speaking to me, and stuff. I just think if I had had a solicitor myself it would have been a completely different case." (FP56)

CLIPs often struggled to act on the advice themselves. Some could only partially apply or appreciate clinic advice in retrospect. Some realised too late that they did not have what they needed on the day, despite Clinic support on this. For some, it was only when the judge admonished them for irrelevance that they realised this. Many CLIPs felt they simply could not note the significance of what was being said in court and respond to it:

- P: "In the moment, you know, you forget things... these barristers, you know, they, sort of, know the issues. He was bringing up stuff that was completely irrelevant, and not, you know, which shouldn't have been dealt with on that day, but he had the know how to, sort of, to get that, you know, inadvertently, brought up, whereas, I wouldn't have known that.  
 I: Or you could have objected to him bringing it up.  
 P: Yeah. Yeah. Which I probably should have done." (FP62)

The clinic adviser was herself quite aware that, "there is no substitute in the kind of system that we have for having a lawyer. There just isn't." She also felt that it was not possible for LIPs to acquire a similar level of knowledge or skill. However, in simpler cases, LIPs could be helped to become much better equipped to represent themselves. Skills like cross-examination were particularly difficult to pick up for most CLIPs in the short amount of time they had to prepare:

- "So, when I went to court I had... the hardest thing, I think, was basically, being able to frame your questions so that they weren't leading... [clinic adviser] had given me some advice on that, but it's just impossible. And then she was trained, now the judge kept making me aware, you can't ask that, and it's standing in your way when you're trying get some answer... I was trying to represent me, and I had to ask my own questions too, which was really difficult, you know." (Dom20).

The obvious and perhaps urgent need for legal advice was only really identified by the adviser in the case of one CLIP who attended the clinic, because of the complexity of the case, and the level of emotional distress involved. For some CLIPs, difficulties managing their emotions in their handling of their cases and presentation at court meant that they cannot apply advice, no matter how well they understood it within the clinic appointment. Most CLIPs, but not all, said they would have availed of the service of an adviser in court to confer with if available:

- "[The clinic] is a basic service, it's still not as good as having your own solicitor. I don't think anybody could argue with that. Even the fact that I'm the person that has to interact with the judge." (AR19)

Underlining the point that there is only so far such a service can go to prepare a LIP, observations of CLIPs in court following the receipt of advice indicated that while some learning was demonstrated, CLIPs often struggled to put the advice into practice.

LIP had written out few points to make, but he did not refer to them. He did not pick up the judge's hint about the argument he could make about costs. He remained silent. I suspect all he could hear in his head was roaring rage. If he could have done with a dispassionate representative at any point of this case, it was now. He got tangled up in issues that have made him angry in the past, and could not get to the points that may have brought his share of the costs down. But perhaps not. Perhaps the judge had already decided irrespective of what he was going to say. But s/he gave him a hint and he did not pick it up. (AR05 - Obs)

One CLIP explained this very problem as experienced by them:

"Sitting with [clinic adviser], it all seemed to be simple... you have it all written down, explaining to me how to do it, and it seems so easy, you know. And I was very comfortable, and I was very happy whenever I'd left her that day, you know, after sitting going through all my stuff with her. Obviously, the nerves take over whenever you're going back into court." (AR21)

However, there is an argument that if judges employ a fully inquisitorial approach, this should be able to overcome the nervousness or going blank, to a certain degree. In evaluating the post-clinic performance of CLIPs in the study, there were times where the judge was persuaded by the unrepresented party, or not persuaded by the other side, despite the CLIP struggling in court, and not demonstrating the application of advice given at the clinic:

[CLIP] wasn't able to manage the papers she had taken with her. This was one of [clinic adviser]'s areas of discussion but [CLIP] hadn't been able to take it on board.

[CLIP] did not bring up conduct [another topic discussed with the adviser].

In terms of what [CLIP] wanted to achieve, I would say that she is on the way to getting it. The judge wants proof and has disregarded payments made.

There will be another observation. [CLIP] said that she will talk to [clinic adviser] again. However, she is very distracted and might not be able to get back to her. (AR19 - Obs)

The final limitation that emerges from the data is the belief that providing advice to LIPs could not make up for the limitations of the court system itself, whether viewed as unfair, biased or overly complex.

### **Clinic advice cannot make up for limitations of the system**

While many CLIPs would have liked legal advice in an ideal world, only two in the sample eventually took up legal representation. Their reasons were: not having faith in their ability to manage the case and the burden of managing the case alone. This suggested there are limits on what a clinic can provide. Some other CLIPs re-considered self-representation after difficult court appearances where they were not given the opportunity to influence the outcome of their case:

"The sessions made me think that I'm doing the right thing. So, what makes me think that maybe I should get a solicitor is, like, like today then, when I wasn't listened to at all at court." (FP78)

Another CLIP too felt the advice could not make up for a perceived inherent bias in the system against her as an unrepresented party.

“To be honest, I don’t know why they have to take one side, and don’t want to hear anything about my side. I’m not the only one, because I have a friend, I know of another two cases like that. . . That advice was not effective in the court room. . . apparently, it should have been really useful, but actually, they didn’t really care, I mean, it’s like ‘we don’t care what’s the law, what’s your rights.’” (FP39)

Another CLIP was surprised not have the opportunity to cross-examine the Court Children’s Officer. She reflected that being self-represented made no difference in the face of deficiencies of the court to deal with specific issues, such as coercive control.

“Was I wise to represent myself? Could there have been a different outcome had I been solicitor-represented? And I concluded that, actually, I think it’s just the limitations of the court system. I don’t think it’s anything to do with self-representation, or solicitor representation. I just think the courts are very limited when it comes to issues of coercive control.” (FP15)

One CLIP did not “want to sing the praises” of the clinic too much as she viewed it as a sticking-plaster solution that was insufficient to ensure LIPs like her would be listened to. She felt her case would not have gone on for as long as it had if there had been a legal representative who could have addressed errors in her case, when acting alone she was not taken seriously. She felt the clinic would not be able to furnish her with the skills or influence to undo the errors.

“I don’t want to criticise the [clinic]. If that’s what we’re going to get, fine, put it to use for it - it does help. But a more fundamental thing is, look what’s going on in the existing courts. Look at what the court clerks are doing. Look at how the cases are being managed. Brutally honestly doing it, not just taking their word for it, because they will lie, and they will cover up for what they’ve done, and they are protecting their own jobs.” (AR19)

For another CLIP, that there did not appear to be clear guidance on how to lodge an appeal, either from the clinic adviser, other solicitors or the courts themselves. This made him question the fairness of the whole system, and he wondered that, “it may just be the stubbornness of the judiciary” (FP08). Furthermore, he felt that if qualified solicitors could greatly differ in opinion about matters such as in which court his appeal lay, “then the system is just far too complex.” (FP08).

A related area of concern was lack of judicial continuity or consistency which might hamper LIPs’ ability to present their case effectively, with or without the clinic advice:

“I had four hearings in a row which had four separate judges. So, again, the initial judge, she had been working on the, she’d been hearing the case for pretty much the first year, and then it had been. . . now, I wasn’t aware until I actually attended court that it was being transferred. That wasn’t information that I was given an advance warning on. . . that was a challenge for me, in terms of how much to re-hash, to make sure that the judge was aware of the critical issues, or how much to trust that they had read over the case when they said they had.” (FP15).

However, such comments about the system should be balanced against the finding that some LIP participants declined to take up a clinic invite because they felt it unnecessary and were comfortable to act alone.

- P: "I'm comfortable enough with the way things are going at the minute... If I thought I was being treated unfairly in any way, you know, due to the fact that I'm representing myself, I'd be the first person to call but I don't think I am at the minute, it's a pretty straightforward case that I'm pursuing here. It's not as if it's anything too illegal or life changing. It's just to put to bed a few things about access to my daughter.
- I: Do you think that you're going to come up with an agreement or something, that you can both accept?
- P: Yeah, I'm confident." (FP36)

CLIPs and LIPs in the study often felt that they had little power to influence proceedings, no matter how well-versed or prepared they were. Similarly, in post-clinic court appearances where the CLIP did not get the opportunity to say much, it may have appeared that the clinic advice was of little help.

Outside court, [CLIP] said that she had found today frustrating. She seemed (understandably) irritable. She said that she had waited ages for what appeared to be no progress. I checked that she had been to see [clinic adviser] at the NIHR. She confirmed that she had. I asked if it had been useful. She said, "not really." I reflected that she might have felt it was insufficient to assist her in what occurred today, even if it had been helpful at the time. (FP56 - Obs)

A lesson to take away from the clinic is that it cannot fill all the knowledge gaps that LIPs may have, especially with regards to procedures or information that are known areas of systemic weakness, nor can it sensitize other court actors to the difficulties LIPs face, such as when trying to rectify errors or lodge an appeal.

## The clinic in an ideal world

CLIPs and the clinic adviser were questioned with regard to how the clinic would operate in an ideal world. CLIPs almost universally would have liked legal advice, which was usually defined as more direction in how they should handle their cases, but sometimes extended to having someone in court.

A number of CLIPs stressed that it was important that they had spoken to the same adviser across sessions, so that there was continuity, allowing the adviser to build on the snapshot of the case that they might otherwise get. CLIPs liked both face-to-face and telephone access to the clinic, with the latter being particularly helpful where they were seeking relatively quick snippets of advice, for example in response to ongoing case developments.

The clinic adviser spoke of the resource constraints she was under, finding it difficult sometimes to provide as much support as the CLIPs needed within her allotted working hours. Other difficulties were more related to her ability to access information she required to verify the details of CLIPs' cases, and as such, she felt that a link to NICTS in some way, so that she could check key information, for example via the ICOS system, would be extremely valuable. This might be facilitated by improved online case management systems and processes that could further assist LIPs with form filling and communicating with the court service (discussed further in Chapters 12 and 13).

Interestingly, while for some CLIPs, that the service was completely free was important, but many others stated that they would pay for such a service, so long as it was cheaper than a solicitor, and/or a more predictable charge, for example, per session, or for a block of sessions, not an undisclosed amount as was perceived as a risk of taking on legal representation. This finding has implications for 'unbundled' legal services that might be provided by the legal profession as well as for any prospective advice clinic of the sort piloted here.



## Conclusions

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The clinic proved to be helpful for most CLIPs overall. However, digging more deeply, while the clinic was invaluable for some, it was barely helpful for others. It is important to note that the latter were usually LIPs who had been in the system a long time, so had already learned a good deal as they went, and were now in rather complex territory with their cases. This finding bolsters the argument for the need for advice early on in the process. Such triage would help prospective LIPs make a realistic assessment of whether they are capable of 'going it alone' or whether legal assistance would be more appropriate for them. Those who do decide to self-represent can be better supported, in terms of preparation, focus and emotional management.

It is clear that a well-resourced service could have major benefits, not only helping LIPs become better equipped to represent their cases but lessening any detrimental impact they may have on the court service. The potential impact of encouraging negotiation with the other side, which many CLIPs had previously misunderstood or not fully considered, may result in progressing LIPs' cases more quickly and so easing their impact on the court service. Other potential positive outcomes of providing advice and support are the reduction in the volume of queries, quicker court appearances and preparing LIPs to approach the court in a better frame of mind, as well as increasing LIPs' efficacy and directness with their queries, outside and inside court.

The findings from the clinic suggest that such legal assistance, even when provided by a highly qualified legal professional, can never lead to an equality of arms between an unrepresented and represented party unless the presiding judge takes steps to redress the balance or other support mechanisms for LIPs are in place.

Ultimately, such a clinic cannot make up for deficiencies of the present system. As argued in previous chapters, there is a need for reforms to the court system to bring this closer towards a LIP's current and potential capacity to self-represent, for example, more support from judiciary by the clearing court, using inquisitorial approaches and giving explanations. These conclusions are drawn together and their implications explored in the final chapters.



# Chapter 11 - Case studies

Some vignettes of the experience of litigating in person are given here. They are intended to provide detail and narrative of the experience of some LIPs which were somewhat lost in the abstraction of the qualitative and quantitative analyses. They were constructed from the interviews and observations.

## 'Anne'

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GHQ-12 = 0

**Despite being a straight-forward procedure, the LIP was nervous and did not understand some of the things the judge said.**

A woman seeking an undefended divorce at the county court level.

Anne was unrepresented because she knew the option to self-represent was available and she could save herself about half of the expense if she had instructed a solicitor. She had not approached any solicitors and had got the impression it would be cheaper to self-represent from friends and family.

She opted for the county court route instead of the high court. She was not aware there are two routes.

A friend had done the same procedure and she took advice from the friend. She did not look for other sources of advice, even though she knew where to go for it because her friend's experience was sufficient help.

She downloaded the forms herself but took three runs at completing them and then had them returned to her once by the county court matrimonial office to amend an error – a missing date. She found the wording and lay-out of the forms a bit misleading, but overall she found the process straight-forward and did not contact the matrimonial office.

Anne did not do other preparation before the hearing date.

She waited over an hour to be called before the judge. She felt nervous because this was a new experience for her. She was put at ease by chatting to the researcher. The judge's tipstaff was friendly and also put her at her ease and kept her informed of when she would be called.

Once before the judge, Anne was asked a list of questions to verify her application. She answered clearly and was attentive. She said she found this very straight-forward. The questions included some details about how the child of the marriage was coping at school and about the care arrangements. The judge also asked about maintenance and mortgage payments. She replied that she makes the mortgage payments by herself but receives maintenance. The house is in joint names. The judge explained that the property matters were adjourned to a district judge. In response to the question about who paid for the court fees, the judge referred to a civil bill being laid down.

On leaving, the LIP reported feeling as though she was gabbling before the judge because of being nervous. She looked nervous to the researcher.

Later on in the interview, the LIP says that she did not know why the judge referred to adjourning the property matters or what the implications were or what was meant by a civil bill being laid down. She was not going to try to find out and was happy to wait for the Decree Absolut to arrive in the post.

## Commentary

The LIP found the preparation for her case straight-forward but still made errors in the paperwork.

She was nervous before going before the judge but found the court staff reassuring and they put her at ease.

The judge raised some questions about her mortgage and used some legal terms that the LIP did not understand. She did not raise this in court and did not follow up afterwards.

## 'Piotr'

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GHQ-12 = 6

### **Language, personal circumstances and lack of familiarity with court procedures make self-representation difficult and assistance from the barrister on the other side help to redress some of the difficulties.**

A man from another country responding to an application to discharge a contact order in the Family Proceedings Court.

Piotr lived 70 miles away from the court-house and works shifts. He was able to communicate in English easily, but in the interview, he sometimes struggled to understand, especially technical or legal terms which needed to be explained a couple of times or in different ways. He admitted he did not understand everything that took place in court.

Piotr did not have representation because he could not afford it, but indicated that even if he could afford it, he would prefer to self-represent partly because he felt having legal representation risked prolonging the case and partly because he felt the matter in dispute was not serious and he could manage alone.

He went to Citizen's Advice for help but found it was too difficult to get help, so gave up trying. He received help from a contact but he did not look further for information or advice. He found the court staff helpful when he spoke to them. He did not take up the offer of the clinic.

Four reviews were observed. At the first one, prior to entering the court, the case involving Piotr was raised by the barrister for the mother before the judge. When the LIP entered, the judge asked the LIP whether he intended to get a lawyer and did not ask him why not. There was no discussion about the LIP's proficiency in English.

The judge explained to the court the purpose of the application and in so doing, appeared to take the applicant barrister's role. The judge asked Piotr if this was his first time in court, which it was, and asked him to present his views. Piotr tried to explain his work commitments but it was not clear what he meant. The barrister stepped in and attempted to explain what was discussed in the corridor but the judge stopped her and explained that she cannot speak for the LIP. The judge went on to explain that discharging the contact order means the LIP no longer has the protection of the court. The judge appeared to be signalling the consequence of the application and its significance to the LIP, but it was unclear whether the LIP understood what was said. After some careful questioning about work schedules and contact with the child, the judge asked Piotr whether he was happy to discharge the contact order, and the LIP said, 'It is OK.' Rather than go ahead and discharge it, the judge asked the CCO to speak to both sides and the child. At the end of the proceedings, the judge asked the LIP whether there is anything else. Piotr said he really wanted to see his child.

It appeared the judge was not content to discharge the order without checking whether this was actually the wish of the LIP. The final statement of the LIP backed up the judge's intuition. We had observed other cases

where the LIP appeared to be unaware or uncaring of the consequences of orders which would go against the LIP's interests, such as discharging extant court protection or establishing a prohibitive steps order.

At the second court appearance we observed, which took place two months after the first one, Piotr had met the CCO. He entered the court after a wait of 90 minutes. It was established between the judge, the barrister and the CCO that the parties had agreed that contact would be held between Piotr and the child in a contact centre. The judge appeared to understand the LIP was not following proceedings completely. He attended to Piotr's body language and appeared to sense his confusion and made efforts to clarify matters. Piotr did not verbalise his level of understanding and was not asked to indicate it. The judge instructed the CCO and barrister to ensure they communicated with the LIP so that he was not missing vital information or waiting for something that might never come. The date for the next review was set.

After the proceedings, the CCO spoke to the LIP. She explained that the contact centre would contact him. She also suggested some tips on parenting because he had not seen the child for a while.

The CCO appeared to be taking the role of explaining the proceedings to the LIP, as directed by the judge, and thus stretching her remit beyond that of a Children's Court Officer.

At a third observation, the LIP did not attend. A new date was set without further discussion.

At a fourth observation, the LIP was in attendance. The barrister for the other party reminded the judge that the LIP was absent at the previous court hearing. The LIP spoke out and explained that no-one had sent him a letter. The judge asked him whether he was in court the last time when the date was set. The LIP appeared unsure whether he should have known and said nothing. The judge moved on to the matters related to contact with the child. After discussion, a new date for the CCO's report and the next review were set. The barrister said she would communicate with the LIP to inform him of the dates. The judge turned to the LIP and said, 'if you do not attend, an order will be made in your absence.' The LIP then asked whether he would get a letter about the date of the next review. The judge checked the LIP's address and discovered an error in it. The barrister again said that she would explain to the LIP what had occurred in court.

The LIP initially felt at ease with representing himself. He appreciated the direct contact with the judge. However, he also expressed uncertainty about what he was doing.

### **Commentary**

The LIP gave up on looking for information or support with his case. His work commitments and distance from the town in which the court proceedings took place made it difficult for him to pursue obtaining support.

The judge took steps to explain the proceedings to the LIP because language proficiency was an issue in this case. Even with this intervention, it appeared to the observer that much of the court proceedings 'happened to' the LIP rather than him engaging with them or being able to influence them.

The offer of the barrister to explain the proceedings to the LIP appeared to be a welcome intervention because it saved the court having to spend more time explaining further than already had been explained to the LIP. The LIP reported in the interview that he had found this barrister very helpful. However, in the past, he had not found the relationship with a previous barrister helpful. The additional load taken on by some opposing barristers can make a case run more smoothly but it adds to the legal representatives' workload, can put them in a difficult situation with regard to their client's interests and is not conducted consistently. Furthermore, there is no check that the out of court discussions take place.

The reliance on the CCO to convey information to the LIP may have confused the role of the CCO in the eyes of the LIP.

The LIP expected to receive notification of the next review date in the post. It was not clear that he left the court room knowing the date of the next review.

## 'Sarah'

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GHQ-12 = 8

Attended the clinic.

### **Despite receiving advice, the speed of proceedings and lack of familiarity with court proceedings result in frustration over a relatively straight-forward matter.**

A woman responding to specific issues order (SIO) application in the Family Proceedings Court.

Sarah was a respondent in a specific issues order application from the father of their children. She had been represented in a prior family case because she had been in receipt of legal aid. She was now working. Her reasons for self-representing were a combination of three things. First, she could not afford to hire a solicitor. Second, she had been happy with one of her past solicitors but not with all of them and did not feel it was worth the money to hire one for this case. Third, she did not want to give the other party the satisfaction of seeing that the court proceedings were taking a financial toll on her.

When looking into the cost of representation, she asked her previous solicitor for help with a couple of legal terms in the summons letter she had received, and then followed up with further research online, but had found it hard to find an explanation. She tried contacting Women's Aid and CAB for advice but could not get through to them in time for the court appearance. She continued to research the issues online. She took up the invitation to attend the clinic.

The researchers observed two of her reviews.

In the first observation, Sarah entered the court with her father and asked the judge if it was OK for him to come in with her as her McKenzie Friend. The judge agreed and said it was not usually a good idea to have a family member as a McKenzie Friend. He did not give further guidance or instruction on what the McKenzie Friend could do in court. During the discussion of the matters of the application, Sarah made her arguments clearly. The judge cut her off when too much detail was offered. The proceeding was inquisitorial in that the judge controlled the questions. The judge ordered the applicant party to provide information to Sarah and ordered her to provide the subject of the SIO to the applicant.

In the second observed proceeding, during the call-over, the barrister for the other side mentioned he did not think the LIP would be present because it was a straight-forward matter. The G4S guard stood up and informed the court Sarah was present. The judge informed the barrister that if it is straight-forward, the matter can be dealt with in the corridor. The barrister approached Sarah in the waiting area and raised three issues with her.

Sarah was called and entered the court with her father as McKenzie Friend. The judge raised the matter of the previous directions hearing and Sarah reported that she had complied with the order but the applicant party had not provided her with the information as directed. The barrister said that he was not aware that he had to provide this information and would have done so if he had known. The barrister raised additional issues and the judge pointed out they were not on file. There followed rapid discussion about the three additional issues led by the

judge. Sarah responded to his questions but did not ask the judge to adjourn them. The judge refused to accept two of the issues and passed the last one, asking the parties to sort it out in the corridor.

In the corridor, Sarah reported to the observer that she felt despondent and frustrated. She found the proceedings too rapid and had not known until that morning that the barrister would mention the three new issues. She did not seem to know that she could have a more active role in influencing whether the issues could be raised in court. Sarah and the barrister then discussed the outstanding matter in the corridor.

When before the judge again, the judge directed the questioning and eventually determined that the SIO was dealt with. Sarah asked the judge, 'What happens now?' The judge informed her that she can make a further application if necessary. She then left. The judge then asked the barrister whether his client was in breach by not providing the information, and why was the information was not given to the LIP as directed, to which the barrister remained silent.

Clinic advice touched on obtaining directions of the court related to the matter of the SIO. Other issues related to additional business outside the current application were also discussed.

In the interviews, Sarah reported feeling frustrated and confused about what happened and why the court did not seem to care whether the other party had complied with the order. She felt it was not her job to tell the court what was at stake in the court and instead expected the judge to be on top of the case by reading the notes. She thought she had explained the breach of the applicant but it was not clear to the judge what was supposed to have taken place. Sarah felt disillusioned by the lack of lucidity in the court over her case. From her perspective as a medical professional, she believed the court should be mindful that for LIPs each case is a one-off and the pressure to get through the towering pile of cases did not give her case breathing space or the time to keep up with the proceedings. She framed it as a matter of professional perspective - it should be re-positioned to the litigants' view, and away from the oppressive awareness of the towering pile of cases to be dealt with. She reported that she felt isolated and an outsider. She felt there was impunity for the applicant when he did not comply with the agreement for contact, but she had to come to court and take time off work to redress his negligence. Despite this, she said she felt some satisfaction in taking control of how she is represented in court. She was glad of the moral support from her father.

### **Commentary**

The LIP's reasons for not hiring a solicitor were nuanced and complex.

She found it difficult to find definitive information to aid her self-representation.

The presence of the LIP in court was flagged by the security staff. There is formalised mechanism for LIPs to make their presence known to the court.

The speed of the proceedings were difficult for the LIP to keep up with – she is educated to the third level and is a professional working woman. She was unable to take on a more proactive stance in representing herself or challenging the barrister's strategy because she did not know how to or that she could. The advice from the clinic helped her to clarify some points about her case but could not prepare her for the unexpected turns in the court room on the day.

She left feeling frustrated with and by the system and that the current practice is not sensitive to the perspective of LIPs who have no familiarity with court processes.

## 'Jane'

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GHQ-12 = 3

**Despite finding the procedural advice from the clinic helpful, the LIP struggled with her court appearances and felt hampered by her lack of knowledge regarding procedure, particularly court etiquette and the difficulties that related to having a number of different judges hear her case.**

A woman is the respondent to a contact case within Family Proceedings, brought by the father of their child.

Jane had concerns that the father of her child was using the litigation to harass her, as part of a continuation of violent abuse which had been the subject of a previous court order. In this prior case, Jane had been represented by a solicitor. The opposing party had self-represented, and Jane felt she was paying her solicitor, in part, to keep her self-represented ex-partner up to date on the case. Jane found this egregious and it formed part of the reason she chose to act as a LIP in this case:

"I suppose, part of the payment was to support him through the process... him not being represented, he would have had a bit more leeway in terms of the length of time he was able to present himself within court... this time around, it nearly feels as if it is balanced, because then I'm being given as much air time as what the applicant has."

The cost of further legal representation was too great to bear. As a mother who works full time, Jane also did not feel she had the time for appointments with a solicitor. Yet, Jane found her own case preparation very hard. Trying to find support for her arguments in terms of case-law or appropriate evidence was "incredibly difficult, like trying to find a needle in a haystack." Jane expected that the NICTS website would have a dedicated webpage for LIPs, or some links to information but found a dearth of resources. The greatest difficulty was "not having a working understanding of the legislative framework." She felt that the information provided with her summons was very limited. Jane prepared herself as best she could on her own but was conscious that there was much she did not know about law and procedure. She had an evident respect for the court, and strong grasp of fundamental legal principles.

Jane's case went before four different judges, creating concerns for her about continuity and consistency. The first judge displayed obvious frustration with Jane and her former partner. Jane described how the judge had an "abrupt dynamic with me." Jane felt that she needed more information and guidance on how to present her case assertively without irritating the judge.

"It's a delicate balance when you know that time is limited in front of the judge, and she's explicit with her frustration over sometimes it taking longer than what she would like it to... There's no guidelines around that... [it is] kind of a delicate balance between, am I going to get a warning for being in contempt of court at some point, and it does silence me."

Jane said that her appearances never went as expected. She said that for every hearing she prepared her key points but never got the opportunity to deliver them.

"I get cut short at some point, and that's been my experience in every hearing. So, I don't always get the opportunity to be able to share the information. The judge forgets what has previously been discussed, which means then agreements that have previously been resolved are then undermined at future times. So, that's always very dissatisfying, and whenever I try to remind the judge of what was previously discussed and resolved, it's generally dismissed."



On one occasion, Jane was informed by the CCO on the morning of an appearance that the case was being transferred to another judge. Jane felt disorientated and had little time to consider or take advice on “how much to re-hash, to make sure that the judge was aware of the critical issues, or how much to trust that they had read over the case when they said they had.” Jane’s impression was shared by a researcher observing one of her appearances before the second judge who noted:

Judge doesn’t appear to be familiar with the detail of the case, or the procedures required. Keeps stopping the LIPs from packing up/leaving to check on points, finalising them. (Obs)

Jane was happier with the third judge, but when they were off on leave, a fourth judge presided over the final hearing. Jane was again concerned that this judge ignored or was unaware of important aspects of the case history, pressing Jane to respond to emails from her former partner, when there was a history of abuse in the relationship. A court order had previously been made specifying very clear terms about contact between the parties to the litigation for this reason, including email contact. Jane attempted to raise this objection in court, having discussed how to do this during clinic appointments. However, the judge was quite brisk and rude with both LIPs in the hearing, only engaging Jane to a very limited extent.

Jane was surprised at not being given the chance to cross-examine the CCO and was not sure if she had the right to or not. She felt this was unfair but was unsure about how to challenge this because of the way in which the judge had berated both parties for their inability to resolve the case, resulting in the use of court time. She felt that the judge has gone much further than the CCO has recommended with regard to contact. The first judge on the case had stressed that the CCO needed to intervene to resolve disputed facts in the case. Jane felt that a lawyer would be able to politely “jog the judge’s memory, but whenever I do that the judge was frustrated with me.”

The judge seemed to view awarding the father extensive additional contact as a means of expediting or avoiding further applications, but did not seem to appreciate the history of serious domestic violence. The judgment included an Article 179(14) order to prevent the parties from bringing further litigation in relation to the matter. Jane considered an appeal but was concerned that the judge’s attitude might influence any decision on whether an appeal would be granted – if a view was to be taken that it was just ‘these two’ still arguing.

Jane reflected that litigating in person against her former abuser was very challenging. Her advice, consequently would be, “if there was domestic abuse, I would recommend that they’re solicitor-represented.” Jane described the main benefit of representation as providing an emotional buffer to proceedings. However, she would have preferred advice as part of an unbundled service rather than representation in an ideal world.

Having the right to self-represent was important to Jane. However, she felt that the court system had not “caught up with itself” in terms of supporting LIPs:

“There could be a lot more information available on the website... if there was somebody within the court system that could potentially help and advocate through. Or answer questions in relation to a case procedurally, and in terms of where they’re fixed within the law, what the opportunity might be to be able to influence through case law, etcetera... a point of contact for self-litigants.”

Jane revealed her initial reticence about attending the clinic, because she was unsure of the value of procedural advice which she was latterly glad that she overcame. Reflecting on the impact of the clinic in her ability to represent herself, Jane noticed:

“... a slight shift on how I presented myself in court whenever I had those last few months with the guide and support appointments, and really just to remain very, very focussed on the outcome. Now, the outcome wasn't in my favour in any shape or form, however, I don't think that that, I think that's just a decision on the day by the judge... I don't think it's necessarily how I presented the case... I don't think that being solicitor-represented would have necessarily have changed the outcome.”

### Commentary

Despite being highly capable, and by no means meek, Jane felt unable to represent herself effectively in court. In particular, she felt unable to keep a rather hostile judge in check by reminding them of the case history. Jane felt distracted by issues to do with her personal safety and was concerned about being harassed by the other side and was unsure if or how best to raise this in court. Jane wished to be well-prepared for court but found it difficult to obtain resources to allow her to do the kind of research and preparation that was required. Jane found that the clinic was helpful in re-focusing her arguments, learning about court etiquette and tactics for presenting and supporting the points she wanted to make. Ultimately, she described having problems with the nature of the judicial system rather than self-representing *per se*. The judge who presided over the final hearing seemed dismissive, and keen to impose an order for extensive contact. Whether a legal representative would have been able to resist this outcome cannot be conclusively evaluated, but Jane was definitely held back by her lack of experience, knowledge of procedure and court etiquette. She feared frustrating the judge further if she misspoke which might influence the decision.

## 'David'

GHQ-12 = 7

**While confident and assertive, David was often emotional and frustrated, leading to his interrupting the judge on numerous occasions. The judge became frustrated and prone to interrupting David, which prevented the issues central to the case from being drawn out logically. David ended up instructing a solicitor, as he felt that he needed it to ensure fair treatment from the judge.**

A man is the respondent to a non-molestation application by his former partner, and the applicant in a contact case regarding their child.

When David received a non-molestation order (NMO), he “had no idea what this was.” He initially sought legal advice. He was ineligible for legal aid, but felt unable to afford a lawyer. He said, “[t]hat was that. I had to represent myself... I'm working a minimum wage job, 40 hours a week.” Nevertheless, he felt, “To be honest, I'm glad I got to do it myself. I feel it's more personal and I'm just happier.” He added however, that “if I had £500 I would go and get legal advice, to be fair!”

David came to court without any supporters. He was very nervous and quite agitated, saying that he had not slept more than a few hours a night since being served with the NMO. He spoke of regaining child contact after his upcoming appearance. However, the purpose of the appearance was for the judge to hear about David's alleged breach of the NMO, not contact. He recorded in his questionnaire that while he had found filling out forms and dealing with court staff fairly clear, how he should contact the other side before court was ‘not at all clear’ to him.

Initially, David was optimistic about resolving the matters, "I'm glad to get it sorted. My child's young, so we'll get this all out of the way." However, he found preparing for court and appearing there more challenging than expected:

"Every single bit of information regarding non-molestation orders were regards the applicant... There was no advice out there for the respondent... Nothing from the court... There was nothing official. There was no help to go down and speak to someone, no information... There was a wee clip on separateddads.com: just write your points down, say your points, don't get emotional, try your best to be clear. Basically all wee points."

His questionnaire responses confirmed that David had difficulties finding information for his case, and the help he wanted or to locate forms and paperwork. He was stressed by the situation and also having to self-represent, "This has just been constant. Blinkers on, just concentrating on that, to the exclusion of everything. You should see the state of my house. I'm working 11-hour days and I just don't have a second." In his GHQ, he reported 'losing sleep because of worry' 'much more than usual,' and being 'much less' 'capable of making decisions' and 'able to enjoy normal day to day activities.' David's difficulties led to him being unnecessarily burdensome to the court:

"I must have gone through... 30 pages. They were scrumpled, you should have seen it... I was trying to write my points and bring them all together. Jesus, it was chaos... I made three copies of the statement; one for myself, one for the judge and one for the applicant. I gave one to the applicant yesterday, so I didn't have a copy for myself because I had to give it to her solicitor... I don't know what I wrote... This wasn't a page or two, I wrote 30 pages. Hand wrote."

Still, David's first appearance at court went relatively smoothly. Though quite capable of speaking to and engaging with the judge, David was either unable or unwilling to observe court etiquette. The judge asked the solicitor for the other side to outline the case and as the solicitor began to speak, David spoke to her directly. The judge asked him not to and had to repeat this warning several times. Nevertheless, the judge's inquisitorial approach moved matters along. They explained the purpose of the appearance and the adversarial approach, including the need to gather information, share it and then challenge versions. David explained his situation, and even though the judge had said that this was not the time, they listened. The judge asked David if he understood on a number of occasions. David said "Yes," but this was not clearly established. He appeared bewildered at points, asking if the matter would be resolved the following week, along with the contact issue. The judge told him that this is not possible if he is contesting. After this appearance, David said that despite the limited information available to him regarding acting as a LIP, "I think I've done okay anyway," adding, "[t]hat judge was fair, now. He explained things." He had hoped for more direction from the judge and spoke of how he would need to prepare again, but seemed uncertain how, "I've put all my effort into today's hearing and I haven't done anything regarding the contact hearing. I'm going to have to go back and start all over again and read and write." His questionnaire revealed that he felt 'very confident' that he had prepared adequately, albeit he was 'not at all' confident about appearing alone in court. With regard to 'how satisfied with bringing or defending case overall,' David had replied, 'very much.' At this point, he felt, "I don't think it's that difficult. If you understood the terminology, it's basically just telling your point and using evidence to back up your point."

However, David's sense of ease wore off as the case progressed, and as he went before another judge. Interactions between the LIP and the judge appeared to be equally frustrating for both. David appeared difficult for the court to deal with at times when he interrupted, or talked directly to the solicitor for the other side. This LIP developed a reputation among the legal professionals, clerks and ushers, so that there was often some trepidation about how appearances would go. As the number of errors in court etiquette or procedure by him

mounted, the judge reprimanded and increasingly berated David for his handling of himself. The solicitor for the other party alleged that David was constantly telephoning them, causing concerns for their safety dealing with the LIP. When this brought up before the judge, they stated, “that’s harassment.” No evidence was produced or interrogated with regard to this, but the judge warned the LIP to moderate his behaviour.

At points David appeared lost or confused, interrupting and speaking out of turn, in a desperate tone. However, the judge also interrupted the LIP, cutting him short and leaving his questions unanswered, or talking over him. This muddled the direction of proceedings and the researcher observing found it hard to follow the progress of the two cases being dealt with, feeling that the judge did not draw the issues out logically. It was evident that David did not understand the nature of the allegations against him or their relation to child contact. At one stage, the judge lost their temper, shouting on one occasion, “do not interrupt me again otherwise you will get nothing!”

The judge asked David at points whether he saw the effect he was having on the court. David acknowledged that his behaviour was sometimes irrational or inappropriate but stemmed from frustration at not getting information he needed. Furthermore, he did not see this as a reason to reduce his contact with his child. Following several more appearances in which the judge and LIP clashed, David felt that the judge “was very hostile towards me.” Eventually, David instructed a solicitor, “to try and show a fairness.” David was struggling to meet the payments for legal representation and was anxious about the seemingly numerous court appearances, adjournments and delays. He was not convinced that paying for representation was worth it, “I didn’t believe my solicitor had any influence in matters whatsoever... I think it’s down to [the judge]’s mood.”

### **Commentary**

David moved in and out of representation. He found it difficult to obtain information about the proceedings in which he was involved. His assertive personality grated on the court and made exchanges between him and the judge tense and unclear. Communication with the legal representative on the other side was very difficult because of his personality. He was often unable to follow court etiquette. His impression of his performance in court did not appreciate the negative effect he had on the court. The length of the proceedings and numerous appearances wore on his sense of fairness and procedural justice. He eventually instructed a legal representative to distance himself from the proceedings.

# Chapter 12 - Proposals for effective reform

“Like, I mean, are you allowed to say that in court? Just a wee instructional video about do’s and don’ts about what way you are to be in court would be great.” (FP18)

“I think there needs to be somebody in the court trained psychologically and legally that can actually sit and give support both ways with a self-litigant.” (AR21)

## Summary

Drawing from the collective knowledge and experiences of LIPs, legal representatives, court staff, the judiciary, CCOs, McKenzie Friends and the clinic adviser, it is abundantly clear is that the support needs of LIPs are many and varied, and there are no simple solutions as to how to support them, or ameliorate any negative impacts they have on the courts.

Assurance that self-representation gives effect to the right to a fair trial rests on respecting and protecting the various elements of the right. Of critical importance is ensuring LIPs can participate effectively in their proceedings. The main barriers to participation were found in LIPs’ negative or debilitating emotions and levels of anxiety, the difficulty in obtaining information, advice and resources, and the limits to LIPs’ knowledge and understanding of legal issues, regardless of their efforts to prepare. The removal or minimisation of the barriers to participation are required to enhance effective participation. Attention to the equality of arms rests with the judge. Steps to remove the barriers can additionally help to ease the burden on the judge to ensure equality of arms. The three broad categories of potential reform – get them lawyers, make them lawyers, change the system – are interrelated rather than existing as ‘either/or’ solutions, and specific reforms are identified within each category to alleviate or overcome LIPs’ barriers to legal participation.

## Introduction

This chapter focuses on the reflections of various actors on potential reforms to support LIPs and to lessen any negative impacts they may have upon the Northern Ireland court system. It is organised around three very basic propositions with regard to assisting LIPs that have helped frame the academic literature and associated policy development, as well as our data collection, namely whether to ‘get them lawyers, make them lawyers or to change the system’ (Faulks, 2013).

‘Get them lawyers’ aims at ensuring LIPs have access to a level playing field, with lawyers seen as better equipped than LIPs to navigate the legal process, manage the demands and influence the outcome, and – more significantly – to equalise the arms between parties where one is represented and the other is not. This solution recognises the value that legal representatives bring not just to litigants but to the court system where the ‘norm’ is based on both parties to a legal action being represented. It also recognises the complexity of law and the need for specialist assistance to ensure that relevant evidence and arguments are deployed to greatest effect. There is generally a cost implication to this solution, borne either by the individual litigant, or by the State (or a combination of both), or in some instances funded through charitable or philanthropic donations. Even *pro bono* legal representation bears a cost: perhaps not to the individual litigant but the service provided by a legal representative is not free of costs either in direct financial terms or in relation to their individual human resource. This cost implication tends to act as a limitation on the ‘get them lawyers’ solution. However, human behaviour is not always determined by cost implications (including value for money assumptions) but by other factors that further limit the applicability of this solution. Some LIPs prefer to act alone for various reasons (as we saw in Chapter 6) and so ‘getting them lawyers’ will be an answer for many LIPs, but not for all.

'Make them lawyers' focuses on empowering LIPs to be able to access their right to self-litigate, moving towards making the playing field more level. At its most basic, this approach recognises the information gap that exists for LIPs in advising them how to litigate in person, including information on the law and procedure governing their dispute, the nature of court proceedings and the expectations that will be placed on them. The focus is on filling as much of this information gap as possible in order to educate and provide skills for an individual to be able to manage self-litigation to better effect. This solution accepts that many LIPs have some legal capability, defined as the "knowledge, skills and attitudes to deal effectively with a law related issue" (Collard *et al.*, 2011: 3) and addresses the gap that exists between what LIPs know and what they need to know. Such an approach is relatively uncontroversial in relation to areas of law or legal procedure that are regarded as more straightforward, such as uncontested divorce proceedings. The gap that exists here relates to information and knowledge that is seen as possible for non-lawyers to assimilate, with a low level of skill required for LIPs to engage with the court hearing, and with court actors, including judges, familiar with engaging LIPs in these legal proceedings. This solution becomes more controversial where the knowledge and skills gap is seen to be too significant to bridge, and the idea of empowerment instead becomes a concern about deceiving the LIP by giving them false confidence that they can litigate effectively for themselves. Within the 'make them lawyers' solution, the difficulty is in understanding where the line might be drawn between what is and what is not empowering, recognising also that for some LIPs part of the empowerment will come from their preference to manage their own case as a direct participant and their acceptance that while they may not be able to bridge the knowledge and skills gap, they will be better placed to self-litigate if there are support structures in place to help them. It also recognises that while LIPs may not be fully equipped to self-litigate, there is value to the legal system in making them better equipped. A further weakness in the 'make them lawyers' proposition is that it focuses on the knowledge, skills and attitudes of the LIPs without reference to parallel adaptations by the court actors with whom they interact. Preparing LIPs in isolation may make little difference to them or the system if the attitude with which they are received and the skills to accommodate their non-lawyerly guise are not also changed in some way. Providing skills to a child to deal with bullies, for example, will only work in an environment where the child is supported and bullying universally condemned. This leads to the more holistic approach to reform of 'change the system'.

'Change the system' involves recognising the extent to which the system itself inhibits the effective participation of LIPs and making changes within that system to accommodate them. At its most extreme, this would involve building a new system which is specifically designed to include LIPs, in contrast to the current system which is not designed in this way. Less extreme – and more likely – is that the current system is adapted in a variety of different ways to address the specific barriers faced by LIPs and to make a series of adjustments to enable their participation. This version of the solution can involve tweaking the system so that it at least appears to be more LIP-friendly or uses a more substantive understanding of the participative barriers for LIPs to implement solutions that have a positive effect. The range of possible reforms relates to the variety of barriers that exist for a varied LIP population, for whom one single solution is not available. It also acknowledges the extent to which barriers exist across the legal spectrum and the need to address the cumulative effect of these barriers which may take time to overcome. The potential difficulties with this solution are any cost implications that change might require, the lack of agility within the legal system to make the necessary changes, and the need to overcome cultural and behavioural barriers to change, including those of court actors who regard LIPs as the aberration in the system and who may not embrace change.

We have seen that LIPs face multiple barriers when they self-represent. Furthermore, we have seen how their presence in the system challenges the norm of fully represented cases putting strain on the court and court

service. During the interviews, proposals for reform to both alleviate the LIPs' struggle and strain on the court were raised by all participants. These proposals are discussed here under the three broad reform propositions with regard to how they might remove the barriers and alleviate current pressures on the court system.

One thing that is abundantly clear is that the support needs of LIPs are many and varied, and there are no simple solutions as to how to support them, or ameliorate any negative impacts they have on the courts:

"Each case will be different, and individual, and there's all the personalities involved as well. It's not an easy thing to, sort of, one size fits all for it. It just doesn't work... There should be all of those, you know, pointers, the whole way along, which might help them a wee bit. I mean, some of them may go and find that advice out, others might, they're not going to bother with it. They might just arrive on the first day regardless, but at least it's all there to try and help everybody. It's going to help on the whole, I think, because a self-litigant is going to be there, and it's going to be, some are just going to have to bite the bullet and see can we make it work for everybody, you know." (LR51)

'Making it work for everybody' is what gives effect to the right to a fair trial, including the right within that to self-represent, particularly where there is no right to legal representation. The critical element that operationalises these rights for LIPs is that of effective participation, and so this chapter sets out the extent to which 'getting them lawyers, making them lawyers, or changing the system' can address the participative barriers that LIPs face, based on the key findings of our research. The proposals for reform therefore flow from this empirical evidence base. Examples of initiatives to reform or improve access to justice in other jurisdictions are presented in Appendix 2.

## Key findings

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1. The court system is not designed to accommodate LIPs. The norm of the fully represented case dominates. While some adaptations have been made they do not go far enough and LIPs need further support to help them deal with the obligations of litigating in person and to realise the right to self-represent.
2. The dominant norm of the fully represented case allows limited opportunity for LIPs to participate effectively. The main barriers to participation LIPs face are:
  - (a) difficulty in obtaining information, advice and resources;
  - (b) the limits to their knowledge and understanding of legal issues, regardless of their efforts to prepare;
  - (c) negative or debilitating emotions and high levels of anxiety.
3. There is a substantial information gap for LIPs. They struggle to get access to relevant information and advice on the practical, procedural and legal issues relating to their court proceedings and on how to self-represent.
4. The presence of LIPs is a source of irritation and frustration for some court actors. This irritation influenced their perceptions of LIPs, and the perceptions LIPs had of court actors. LIPs and legal representatives often had negative views of each other. LIPs, court staff and the judiciary, tended to have more positive views of each other, although there were still problems of communication and trust. These perceptions present an attitudinal barrier to LIPs' participation in court proceedings.
5. It is difficult to identify LIPs within the court system. NICTS collects data for Management Information System purposes, but it is only accessible by court staff. It is only on the day of the court appearance that it becomes clear that a litigant is unrepresented and there is no systemic means of identifying LIPs throughout the duration of their court proceedings.

6. The LIPs' scores on the self-rated General Health Questionnaire indicated that the prevalence of possible mental ill-health was much higher in the LIP sample (59%) compared to findings from the general population from the Northern Ireland Health Survey 2016-17 (17%).
7. The difficulties faced by LIPs in participating in court proceedings are multifaceted and there is no single solution that will assist in overcoming these difficulties.
8. There is some variation in the level and nature of difficulties faced by LIPs across different court business areas but barriers to participation exist across all areas.

### **Barriers to participation**

The second of the key findings is central to this report's understanding of the right to access justice – it rests on effective participation by litigants, including LIPs. We saw earlier (in Chapter 1) that the conceptual model of participation developed in relation to the experiences of tribunal users, and adapted for litigants in court proceedings identifies the intellectual, practical and emotional barriers to effective participation in legal proceedings (McKeever, 2013).

- Intellectual barriers relate to the difficulties litigants have in understanding and assimilating complex legal information and applying it to their case, but it also includes the intellectual barriers that litigants face in understanding the common legal terms and processes that legal proceedings involve, which are presented without translation.
- Practical barriers relate to issues of access and the practical demands of process: where to get relevant information, who to direct queries to, how to comply with court expectations, when to sit or speak or stand.
- Emotional barriers arise from the anticipation or experience of the legal proceedings, that can amplify existing – usually negative – emotions.

The study also identified attitudinal barriers. They are tentatively defined as negative or recalcitrant points of view held by actors of others within the legal arena that hinder the smooth progression of a case.

It is important to acknowledge that there are numerous measures already in place within the Northern Ireland court system to help LIPs overcome these barriers. Some have been initiated as formalised processes such as the scheme to assist applicants for divorce complete the required documentation, and others that have developed organically including adaptations in judicial behaviour to help LIPs feel more comfortable within the legal process. Inevitably, however, barriers still remain and so the focus must be on what is needed to address these to ensure effective participation, and how the different solutions of 'getting them lawyers, making them lawyers, changing the system' might address these barriers.

### **Emotional barriers**

As we saw in Chapter 9, the LIPs in our study sample detailed a range of emotions which acted as barriers to participation, including frustration, anger, confusion, anxiety and fear, with relief acting as the corollary to these negative emotions. While many LIPs described feeling supported by some court actors, this was in contrast to descriptions of a system that does not care and lacks sympathy for the difficulties they faced. This in turn had resulted in some LIPs becoming alienated or despairing of their situation. For others, it resulted in incredulity and the suspicion of unfairness, which could then elide into practical and intellectual barriers.



### Practical barriers

Chapter 7 describes how many LIPs expected that once they decided to self-represent there would be advice and support readily available to them but were disappointed or frustrated when they found information and resources either non-existent, irrelevant or difficult to find, and points of contact, such as court staff, unable to advise. For their part, judges and legal representatives sometimes held a vague sense that pro bono services and voluntary sector advice agencies were already offering basic assistance to those who want it. However, this study has found that available resources, information and advice are woefully inadequate in meeting demand. The practical barriers described by LIPs were not knowing where to go, who to talk to, what to do, or what to expect and this lack of practical assistance impeded their ability to participate.

### Intellectual barriers

There was strong evidence that LIPs had exhausted the limits of their knowledge or understanding of the legal issues, sometimes regardless of how much preparation they had done, as discussed in Chapters 7 and 8. This came through the experiences of LIPs not understanding the legal language, what the forms require, or how to apply law to facts. It was common for LIPs to say that they thought that the court system should be more supportive of them. The theme of 'not knowing' was prevalent among LIPs throughout the study and raises concern about how LIPs can participate in a process that they do not understand.

The remainder of this chapter examines how the barriers to participation may be alleviated by the three propositions for reform and thereby resulting in a decrease in the strain on the court system. It should be noted that the solutions ultimately funnel towards the need to 'change the system', but that proposals for effective reform emerge from each of the three propositions.

## Get them lawyers

While there were some LIPs in our study sample who did not want lawyers, for the most part LIPs would have liked legal advice (which, for many, included legal representation) at some point during their legal dispute. Perhaps naturally, legal representatives would also like them to be represented, as would judges:

"My preference is for giving them lawyers . . . I mean, the system is a reasonable system, but it's predicated on the basis that people have lawyers." (Ju03)

What was reflected in the responses of most legal representatives and judges was not merely self-interest in maintaining the current norm of the court system but rather a recognition of the barriers that need to be overcome to enable legal participation, and the difficulties faced by LIPs in practice in overcoming these barriers.

### 'Get them lawyers': dealing with the emotional barriers

In justifying their preference for 'getting them lawyers', participants often referred to the difficulties associated with acting as one's own representative. The intermediary role of a legal representative not only manages the expectations, legal arguments and emotional reaction to their case, but also acts as a buffer in the courtroom, providing it with arguments not obscured by emotion.

As we saw in Chapter 9, certain business areas, such as Family Proceedings and Family Homes and Domestic Violence, generate high emotional involvement, adding to existing tensions within the adversarial atmosphere

in court. Court actors could identify that LIPs tend to lack the arm's length objectivity needed to articulate their cases effectively, and that this was an obstacle not just for the LIP but something that impacted negatively on the court's ability to engage the LIP. Legal representatives sometimes bore the brunt of emotional or abusive outbursts, as described in Chapter 5.

LIPs were often self-aware about their liabilities in representing their best case and others also recognised that having a representative would lift an emotional burden, if not doing a better job overall:

"[Having legal representation] would certainly be an emotional support, because obviously representing yourself, you're trying to set aside any personal impact that it's having on you. So, that was always a useful thing whenever a solicitor was speaking on your behalf that you didn't have to, kind of, really juggle that aspect of it. But in terms of, I'm not sure that legal representation would have made any difference to the outcome." (FP15)

The potential for a legal representative to take on the emotional burden of the case, then, points to 'getting them lawyers' as an effective means of overcoming that emotional barrier to participation. Yet, this relies on the legal representative – either solicitor or barrister or both – being able to perform this function, and LIPs expressed doubts as to the capacity of legal professionals to do this. There was evidence from LIPs who had previously engaged legal representation that this support was missing, not in all cases, but where it was lacking it was regarded as a significant limitation of the legal service being provided and for some it was a motivation to go it alone. The procedural advice clinic adviser identified a potential deficit in legal training which overlooks including pastoral care with the legal and procedural role in the legal service being provided:

"[With a legal representative] I don't think you would naturally get it. I don't think it would naturally happen, and I don't necessarily know how comfortable other [solicitors] would be with being told, you know, and you're also maybe here to provide a shoulder to cry on, or, you know, somebody to comfort them." (Clinic adviser)

'Getting them lawyers' as a participative solution will therefore need to take account of the emotional barriers litigants need help in overcoming, and strengthening the capacity of legal representatives to provide this support.

### **Proposals**

- Training and continuing professional development for solicitors and barristers in managing the pastoral/emotional support needs of clients.
- Professional support and training for solicitors and barristers in lawyer self-care and resilience.
- Training and continuing professional development for solicitors and barristers in dealing with difficult litigants, including LIPs.

### **'Get them lawyers': the practical barriers**

'Getting them lawyers' would remove many of the practical barriers that LIPs face, but as a solution, it actually presents further practical barriers. Chapter 6 describes how a small proportion of the LIPs in this study were opposed to the idea of being legally represented. A further practical barrier to them would be in persuading them to accept legal representation, which seems unlikely, and an unnecessary step given the right to self-represent.

For those LIPs not opposed to the idea of legal representation, the biggest practical barrier – identified by LIPs and court actors – to ‘getting them lawyers’ was cost, whether borne by the State or the individual litigant.

***Cost of legal representation: borne by the LIP***

Within our study sample there were LIPs who found the upfront costs of a retainer to be prohibitive, or the ongoing costs to be rising beyond their means, and there were LIPs who regarded legal representation as not giving value for money. For the latter group, this may have been because of dissatisfaction with previous legal services they had paid for, and/or a lack of awareness of what it was the lawyers could do for them, beyond what the litigant could see happening on the surface of their case. Comments from LIPs on former legal representatives not making any difference to the progress or outcome of their case obviously could not be verified, but the perception of lawyers as not adding value was tangible. The practical barrier of cost, for these LIPs, points to how lawyers might seek to avoid this perception among their clients going forward, making them more aware of what it is the legal representative is doing, enhancing the client’s ability to collaborate in their own case.

The practical barrier of cost can also be considered in relation to our finding that some LIPs would have been happy to pay a fee for advice and assistance, as long as the cost was predictable and within set limits. For LIPs willing to pay for basic advice and legal services, their concerns were about their lack of control of legal costs where they signed up with a legal professional. Some thought that providing a realistic estimate of the total costs of a case should be part of “a duty care, almost an ethical code from solicitors to present that to people as they walk through the door” (FP23).

Some LIPs shared positive impressions of paid-for services as consultations offered by the matrimonial office of the court service:

“For the divorce, you pay for, like, fifty quid for the pre-consultation, and fair enough... I would say anybody can apply for a divorce, because the lady sat me through the process, and said, look, do this, do this, do this, and everything went through, no bother whatsoever. So, that’s well worthwhile... But any other questions I had, nobody ever turned around and said, no, I can’t answer that question. They were always very helpful.” (AR17)

Significantly, some of the CLIPs in our study regarded the procedural advice clinic as on a par with ‘unbundled services’ that a legal professional in private practice might provide.

The prospect of moving towards offering ‘unbundled services’ has not been embraced by the legal profession. In addition to wider concerns about the protection of the status of the legal profession, there are concerns about the quality of legal assistance that can be provided within ‘unbundled’ arrangements. The clinic element of the research described in Chapter 10 offered some insight also into the ‘unbundling’ problem. Under such arrangements, it is difficult to get a sense of the case when the adviser is only able to react to what the LIP is telling them, and especially if the LIP may not have grasped the issues properly.

For legal representatives in our study, the barrier that was often raised was professional insurance not covering unbundled advice, which would defeat the efficacy of offering such services, and which itself justifies the value provided by legal representation. Again, the veracity of this view was not tested, and contrasts with other jurisdictions where unbundled legal services are offered, but given the driver of client need it would seem that the value of unbundled services should not be dismissed.

### **Proposals**

- Create more effective means of involving represented litigants in decision-making in their cases, including improving lawyer/client communications so clients are kept informed of the developments (or lack of) in their cases, and the reasons for this; giving consideration to non-legal priorities that clients want to address; and improving customer care.
- Examine the full potential of offering unbundled legal services within different business areas, drawing on international comparative experiences.

### **Cost of legal representation: borne by the State**

For LIPs who would have liked access to legal representation, or advice, but either could not justify or afford the cost, there was an obvious question over whether the State should cover the cost of this support (see Hirsch, 2018). While participants spoke of the benefits of legal representation, few believed that it was feasible that access to legal aid generally would be widened:

“I don’t think there’s any public money for getting them lawyers. I think, practically speaking, that’s not an option in terms of economics. There’s no money for that.” (LR21)

However, some did think that there was an argument to be made for alternative criteria for legal aid or a wider discretion to judges to rule that a LIP *needs* legal representation, paid for by the State where merited, in certain circumstances. Echoing the ruling of *Airey*, discussed in Chapter 1 and Appendix 1, some legal representatives spoke about ‘trigger’ points for entitlement for legal aid based on things like the complexity of a case or proceedings or the capability of the litigant:

“I think there are certain areas where the complexity is such that perhaps there should just be, you know, automatic entitlement to legal aid, or to advice, or assistance from a solicitor or a barrister. Because, ultimately, I mean, ultimately, the cost benefit could be in, you know, the public purse’s favour, because you don’t have lengthy hearings, and, you know, members of the judiciary’s time being taken up, and, you free up the court process a little bit more. So, I mean, potentially, there should be a, sort of, a trigger level of complexity.” (LR09)

“I think there has to be, you know, a better threshold test than money, for people who are, kind of, bringing all this emotional baggage, bringing all of these issues. Sometimes, there’s no getting around it. It does impact on their ability to represent themselves.” (Clinic adviser)

The clinic adviser involved in the procedural advice clinic felt that one of the CLIPs who came to her really needed a legal representative because of the “complexity of how many other issues there were surrounding [the case].”

The potential of expanding schemes like the office of the Official Solicitor to a wider band of people than simply those deemed to be ‘incapable’ of representing themselves was raised for “whenever people lack capacity ... something along those lines” (LR09). There may be value in this proposal given the high GHQ-12 scores of LIPs within our study. Alternatively, the gravity of consequences of proceedings was proposed as a trigger point:

“If you have a situation where there’s social work involvement, if a CCO involvement, you might say to them, maybe you should get a solicitor, you know” (LR20).

In such circumstances, however, it might be difficult to define precise eligibility criteria.

There might be clearer guidelines recommended for judges to identify exceptional cases which build upon existing codes of practice, such as the Equal Treatment Bench Book (Judicial College, 2018). One member of court staff proposed that judges might be best placed to make a recommendation regarding such a need:

“If there was some legal change that if a judge thought that it was in the best interests of the person to enforce them to get legal professional help, I think that would be the way to go, but it would be a change in the law... I think that’s an important point, and again, this idea of a judge compelling somebody to get legal [assistance]. If there is merit in their case, because it’s not presented properly, they could be losing out, you know.” (CS04)

However, at present, some judges struggle with how far to stress the need for representation to LIPs:

“I had concerns about their... I actually thought that they needed representation, you know. They actually, if ever there was a case that they needed representation, they needed it. But I couldn’t quite understand how I would be able to, you know, encourage them to get the benefit of it, because they were, you know, they were making all sorts of points, none of which were relevant to what was going to be decided.” (Ju04)

“[LIP is asking questions of me] I can’t answer that, because that would be giving you legal advice, you know, and I can’t do that. And then in the next breath I say to him, you know, I really honestly recommend you get legal advice. Oh, so you’re giving me legal advice now. That is what he’ll say. I said, no, I’m recommending that you take legal advice.” (Ju09)

There are additional practical problems that arise from giving judges the responsibility of determining what constitutes an exceptional case for legal aid purposes, including a potential lack of consistency in how guidelines on this might be interpreted and the potentially damaging charge that ‘unaccountable’ judges are making determinations on public spending. Nonetheless, judges also have an overriding responsibility to ensure that a LIP’s access to justice rights are protected, and it may be helpful for them where a LIP is exceptionally in need of legal assistance to be able to make such a recommendation.

### Proposals

- Evaluate whether the current funding criteria for legal aid gives sufficient consideration to the complexity or gravity of an applicant’s case.
- Explore how vulnerable litigants might better be supported by the State, either through expanding legal aid eligibility on an exceptional basis, or the Official Solicitor scheme, or through case-by-case judicial recommendation based on the considerations highlighted in the Equal Treatment Bench Book.

## ‘Get them lawyers’: the intellectual barriers

The intellectual barriers faced by LIPs were often significant, both inside and outside the courtroom, as this report has evidenced in Chapters 7 and 8. Assistance that was provided, either through the Clinic or other means of support, was not always enough to overcome the critical barrier of being able to situate the relevant facts of the LIP’s case in the legal framework within which the court’s decision would be made. As one legal representative saw it:

“in my experience, none of the personal litigants that I have been against have had any detriment to their case because of the forms ... The detriment has come from the lack of legal advice, or from not being represented.” (LR09)

The ‘get them lawyers’ solution may provide one of the most obvious means of overcoming this barrier to legal participation for LIPs. However, even if the costs of getting everyone lawyers could be met, it is not a solution for all LIPs, particularly those wishing to exercise their right to self-representation.

Research on legal participation for tribunal users shows that good legal advice and representation can break down the intellectual barriers for users, by helping them understand what information decision-makers need and how the relevant legal provisions can be interpreted in light of that information (McKeever, 2013). It is important to recognise, however, that legal representation does not automatically equate to litigant participation. At its most basic, good representation enables the litigant to participate while bad representation blocks their participation, and can impede this beyond what would happen if the individual had no representation. Poor representation masks the intellectual, practical and emotional barriers to participation that exist, rather than overcoming them. Good representation, therefore, does not necessarily, or exclusively relate to successful case outcomes. The participative value of representation relates to the ability of the representative to translate their client’s case from a social narrative to a legal narrative that both the client and the legal system can still recognise, ensuring the litigant’s voice is heard within the legal process. The research on procedural justice reinforces this finding, where the individual’s perception of fair and just legal procedures are as (or more) important as their perceptions of the substantive outcome of the case (Lind and Tyler, 1988; Tyler, 2000). This is significant because most of the LIPs recognised the additional intellectual barriers that they faced, and felt a legal representative could help overcome these barriers, but that this could not be separated from the need for emotional and practical support.

### Proposals

- Training and continuing professional development for solicitors and barristers on the value of procedural justice, as seen from the litigant’s perspective.

## Make them lawyers

Litigants have a right to self-represent but this right can only be made effective where LIPs are supported to meet the demands of self-representation. These demands are considerable, and for many LIPs, created the desire to be represented. As a realistic compromise where affordability remained a practical barrier, most LIPs preferred some kind of support to allow them to represent themselves, giving them the tools to run their case and articulate it in court. Significantly, LIPs wanted to retain “control over their case... they were clear about the direction they wanted the case to go in” (Clinic adviser). The issue of control is central to the idea of legal participation. Viewed constructively, it facilitates litigant engagement and collaboration, ensuring that they are enabled at successive stages of the legal process. Without allowing the litigant to have control, they experience the legal system as an isolating or segregated system, or one in which their participation is obstructed. Effective participation therefore recognises the litigant’s autonomy and enables them to build knowledge and skill that will support them to influence the proceedings.

## **'Make them lawyers': the emotional barriers**

As chapter 9 demonstrates, LIPs carry a heavy emotional load that they often find difficult to manage. In recognition of this, legal representatives regarded the solution of 'making them lawyers' as unrealistic in enabling LIPs to overcome the emotional hurdle of self-representation:

"a lot of people don't want to do it ... I mean, I've had clients, for example, today, that didn't want to be called into court to sit at the back because she was petrified, you know. So, I don't think it's, even if you have a bit of forewarning about procedure, about how to manage things, I think it goes beyond that. I think some people just simply, if they're called into court they want to sit there, they don't want to speak." (LR19)

Certainly, there was evidence from LIPs that self-representation could be a terrifying experience, but they did not necessarily regard their position as hopeless and instead identified support that they felt would help. For some, having a realistic preview of what to expect could act as a form of triage, to allow LIPs to make an assessment of whether self-representation was likely to be manageable or overwhelming:

"[It] would allow people to understand what they were getting in to, and some people would say 'yes, I think I could do this' and others might say 'this isn't for me, I think I would need help'." (AR04)

The clinic adviser noted that some LIPs were very nervous and figuratively needed a "hand to hold", a conclusion that was reinforced by LIPs:

"It would have been great if I had somebody there to hold my hand ... the reason I'm always here on my own is because I felt it would just complicate things. Like, you know, they can't really have too much of an input ... like, the reason I didn't bring my mum, or my brother, or any of those people, they can't really have a positive influence on it. A lot of the time people make decisions with their emotions, and they say things based on their emotions, and there's no place in there for emotions, really ... Now, if you had somebody like a consultant, say somebody from Fathers 4 Justice, well versed in law, who's not being your representative, just to give you support, that would have been fantastic." (FP51)

In-court support should therefore be evaluated for its ability to help manage emotional barriers. For this reason, it might be argued that LIPs could be further assisted, if not by lawyers, by some kind of in-court supporter: a friend or family member, a McKenzie Friend, a member of court staff designated to assist LIPs, or individual assistance similar to the Personal Support Unit model in Britain that provides emotional support and some practical assistance to LIPs for their court hearings.

Earlier in Chapters 7 and 8, the wide range of views of McKenzie Friends was presented, from them being regarded as useful in helping LIPs to articulate their cases, to being obstructive and manipulating LIPs to pursue their own agendas. The McKenzie Friends that we interviewed felt that they partially fill an unmet gap in the current system and provide an important buffer for LIPs:

"There are many instances where a McKenzie Friend, who is at least moderately capable, could better present the case of someone that they have worked closely with, than the person themselves can present it. There's many times where a court requires someone who is either inarticulate, hugely anxious or just aren't able to present their arguments but yet has arguments they want to present and is maybe able to discuss them outside of those proceedings. And even if it was only a case of, say, two litigants in person assisting each other, and even speaking for each other, someone is a lot less nervous defending their friend's position, than defending their own." (MF01)

Some legal representatives and judges sometimes saw McKenzie Friends as invaluable. From such accounts an image of the model McKenzie Friend can be discerned as helpful, supportive, cooperative, trustworthy and reliable:

“When I have ordinary cases, I have clients that I say, now, who are you bringing with you?... I say only somebody that’s going to make you feel better, rather than worse. Somebody that will go and get you a cup of coffee. Somebody who’ll chat to you while all these conversations are going on. And I think that McKenzie Friends assist, and I think personal litigants would do well to bring a friend with them as well. As long it’s a friend who’s going to be somebody who was going to be a help, rather than hinder. So, I’m happy with McKenzie Friends.” (LR09)

“I’m told [the McKenzie Friend] is really helpful to those who feel alienated, and don’t want a lawyer. So, there clearly is a category there, who might benefit from a kind of standardised resource, and then that would assist the court to know, for instance, the way if [the McKenzie Friend] turns up, the court would go, ‘Oh, we’re familiar with you and we know your way and we know you will work co-operatively’, and that’s really positive... Here is a resource that the court service trust... [but] there is no standardisation and I do worry about people who contact people and hold themselves out to be some messiah that replaces lawyers.” (LR04)

The ideal support mechanism described here – whether McKenzie Friends or not – is one that will help LIPs manage the emotional load of self-representation, that respects the integrity of the court process and is seen by all parties to be beneficial. It is not entirely clear to LIPs whether they are allowed such support or under what circumstances, although in the course of data collection we observed a variety of practices. Here there might be clearer and more prominent guidelines outlining what kind of support should be allowed or even provided by the court service.

### Proposals

- Provide litigants with a preview of what is involved in self-representation, to inform their decision on whether to self-represent.
- Develop guidelines on what form of in-court support LIPs can access.
- Develop a means of assessing how well McKenzie Friends serve LIPs and consider whether McKenzie Friends should be regulated, to ensure the risk of engaging McKenzie Friends does not fall exclusively on the LIP or the court.

### ‘Make them lawyers’: the practical barriers

For all court actors, there is an interest in making LIPs more ‘lawyer-like’ in order to conform to the court ‘norm’. LIPs generally wish to be helped to engage more effectively in their cases. Legal representatives, judges and court staff wish for LIPs to act professionally, without becoming overly emotional, to communicate effectively and negotiate. Without any or very little targeted orientation to the principles or practice of legal procedure, LIP perceptions develop through experience, with negative experiences possibly contributing to a sense of unfairness. Apart from the Divorce and Debtor’s Petitions cases, it was rare to meet a LIP who embraced the task of self-representation and said they found it manageable: only three LIPs in the sample said they found the task manageable and everyone else was somewhere on Hunter *et al.*’s ‘procedurally challenged’ scale (2002: 105).



The most basic and fundamental recommendation which relates to facilitating LIPs as actors in court is providing them with clear information and instruction, to deal with the considerable practical barriers to self-representation. The information gap that currently exists for LIPs in Northern Ireland is enormous, and the ‘make them lawyers’ solution can help address this gap in a number of ways. This includes developing user-friendly information for LIPs and making this easily accessible; providing training or orientation for LIPs; and one-to-one support on how to meet court expectations, with the NIHRC procedural advice clinic providing a potential model for this form of assistance.

### **Information materials**

Given that all actors acknowledged the dearth of information available to LIPs, and that existing information is insufficiently integrated and user-friendly, it is not surprising that many LIPs feel unprepared and find it difficult to conform to expected court norms. As we saw in Chapter 5, LIPs often base their ideas of how to act in court on fictional dramas depicting accounts unrepresentative of reality. It seems a very basic expectation to provide individuals using the legal system with information on how to do so, and would be of considerable practical benefit to LIPs. In relation to ‘making them lawyers’, an overhaul of existing information and resources is a relatively inexpensive and non-invasive reform that could be made to improve LIP participation.

Support materials that could be developed were identified by LIPs as covering everything from how to access the court building, to what to expect in a court hearing, to what documentation is required to file or support a claim. The focus should not just be on written documentation, with LIPs noting that some of the existing written materials were too dense or heavily jargoned to be of use. While existing materials could be improved to make them more accessible, audio-visual information should also be considered, such as the YouTube videos of ‘what to expect in the family court’, mentioned in Chapter 7, or targeted animations. Other LIPs had not found such resources, but described them in their wish-lists, suggesting that it would be useful if there were official resources, in a well-connected internet site:

“There should maybe be some, sort of, advertisement made that, to make the law more easy for people to understand, because after all it’s people that it’s meant to protect” (Dom04).

Inevitably, some of these materials would involve referring to the legal position, either enshrined in statute or common law. The practical barrier that arose in relation to direct legal sources, including court rules, was how to access them. LIPs were often told by court actors that the information was available “online” or on the NICTS website, but in itself this is insufficient to direct LIPs to the precise source(s) in question. LIPs were typical of the general population in their inability to retrieve legal information (Collard *et al*, 2011), with additional problems facing LIPs in Northern Ireland who were unaware of the need to access jurisdiction-specific legislation. Web-based information that is publicly available needs to be located in a place where LIPs are specifically directed to look, and there needs to be a recognition that LIPs are unlikely to have access to subscription-only legal databases and so should not be expected to access or utilise this information as a matter of course.

### **Proposal**

- Provide litigants with information on how to litigate in person, using a variety of different media.

***In-court support***

As we saw in Chapter 8, LIPs often complained, including in the clinic, that they were unable to keep notes of what was said in court, and then had no real record to rely on, something that points to the need for in-court support. This extended to not always keeping track of the court order or directions made by the judge:

“Even just taking notes... I’ve sometimes missed out on important bits of information because I’ve been too focussed on, trying to comprehend all the way what’s being said. Yeah. So, just even to note things down.” (FP08)

In the absence of any transcript or recording of the hearing being automatically provided, it would seem an appropriate compromise to allow additional support for LIPs to note the general content of the hearing and subsequent orders or directions.

**Proposal**

- Provide information on when LIP support personnel can take notes in the hearing.

***In-person support***

In line with the finding that LIPs sometimes just needed a ‘hand to hold’ for emotional or moral support, there was a clear sense that practical support, delivered in person, would help guide LIPs through the practical demands of the legal process too.

“I wasn’t always necessarily sure about, kind of, you know, how to construct that into a skeleton argument, exactly what was needed, and things like that. So, you know, if there was a service that you could go to that, you know, could provide you with advice on how to, you know, construct your statement for court.” (FP16)

This would seem to address the parallel concerns of court actors, that LIPs needed to know what was required of them in order for the court process to be more effective.

“Procedure is, mind you, it’s one part of it, and certainly if there was some sort of a clinic, at least personal litigants, if in that clinic they were advised of the need to communicate with the other side, and do all of those things and put trust, you know, or mistrust to one side, and try and be focussed on the assets, and all the rest of it.” (Ju04)

One of the key lessons was that, while not suited to every LIP’s needs, the procedural advice clinic was enormously valuable to some. It demonstrated the capacity for an intervention to make LIPs more lawyer-like in terms of their understanding of the legal process and feeling self-assured. ‘Making them lawyers’ in this way dealt with some of the frequent frustrations that court actors raised about LIPs’ behaviours, including engaging with the other side, the nature of out of court negotiations, and how they would be expected to behave. As our evaluation of the procedural advice clinic makes clear, there are limits to what can be achieved with regards to training LIPs and giving procedural advice, but there was strong evidence that such support assisted greatly with managing both emotional and practical barriers to participation.

### Proposals

- Identify Department of Justice funding that can be used to develop an in-person support service to assist LIPs.
- Use the model of the NIHRC procedural advice clinic as a reference point for what can be achieved in providing procedural advice and what additional innovations would support this development.

### Setting standards of behaviour

One of the practical objections by court actors to the idea of ‘make them lawyers’ related to the fact that LIPs were not bound by any code of ethics or practice, either to the court or to the other side. This was seen to be in stark contrast to the professional ethics that lawyers were obliged to comply with, that encompassed their duty to the court as well as to their clients. For legal representatives, this meant that LIPs could never be regarded as lawyer-like:

“We’re told, our guidance from the Family Bar, treat them as if they are lawyers and, you know, except be aware they’re not bound to the same professional ethics. So, say you’re a lawyer, so in the same way I’ve had to draft this for my client, you’ve to produce an identical document. We all have to play by the rules, but the fact that you’re not legally qualified means, I need to get a signed minute of what we’ve agreed and, you know, extra protection because you don’t have the professional ethics.” (LR04)

Judges also identified this concern, which they saw as manifesting itself in court hearings where LIPs did not comply with acceptable court etiquette as lawyers were required to do. The lack of a code of conduct for LIPs, and of available sanctions beyond contempt of court – which was regarded as something to be used sparingly in extreme incidents of obstruction or violence – was seen to limit the extent to which LIPs could be made into lawyers:

“[As lawyers] you’re also a member of a professional body and you owe certain duties to the court, and personal litigants and McKenzie Friends don’t owe those duties ... I can’t rely on certain things that I can rely on with lawyers because they’re bound by a code of conduct and ethics and if they breach it, I can do certain things. I can’t do that with personal litigants and McKenzie Friends.” (Ju07)

Inevitably, this has implications for how LIPs can participate, and was a source of frustration for the LIPs in our study who noted the different weight that was attached to their evidence compared to the statements made by legal representatives. Such frustrations were particularly prevalent where LIPs felt that legal representatives were themselves obstructing the LIP’s participation causing some to argue that there is a need for a shift in perspective from the legal professional and judiciary regarding LIPs too: “Rather than providing [some form of support], I think the court should respect the personal litigant... and take us seriously.” (FP29)

Some legal representatives, however, expressed the view that the professions do enough to support LIPs on the opposing side:

“I think enough of the profession have a sufficient moral compass, and moral conscience, that they do give of their time if they can. And similarly, those of us who find ourselves against litigants in person, do try and do our very best. You know, if they feel that there’s a point that’s there, they say, look, this is where I think you

should go. I can't tell you to do that, because obviously my client's case is different. But, I feel if you focussed on that, that would be something that would be of help to you, whether the litigant decides to listen to you or not, of course..." (LR23)

The problem was seen to be that LIP behaviours were not being formally directed, which undermined any attempt to 'make them lawyers':

"There's no rules regarding them. It's not governed. There's no policy. There's no practice direction. There's no nothing." (LR21)

The lack of guidance was seen as problematic by LIPs as well, with those in our sample generally expressing respect for the court and wanting to know how to behave, as seen in Chapter 8.

Certainly, one of the obstacles that LIPs face is the stereotypically negative view of their behaviour, which may be related to the poor behaviour of another LIP rather than a reflection of their own. Equally, there were LIPs who were strident in their views about legal representatives based on negative experiences that they had had. These could be described as attitudinal barriers. The dominance of such views suggests a need for perspective training for both lawyers and LIPs to better understand the other side. Any behaviour that blocks the ability of LIPs to participate effectively needs to be addressed holistically, with LIPs and lawyers bound equally by acceptable behaviour and practice towards each other. If LIPs are to overcome the practical barriers to 'make them lawyers' they need clear direction and orientation, as well as legitimate expectations of what the other side should do. A code of conduct that applies to all court users, bolstered by practice directions for judges, guidelines for court staff, complaints procedures and sanctions for transgressions, may therefore be required. It should also take account of existing codes of practice for barristers and solicitors to ensure consistency of standards and expectations.

### Proposals

- Create a Charter of Rights and Responsibilities to set out acceptable standards of behaviour, which LIPs and court actors are required to comply with, and with redress for breach of the Charter regulated through an independent complaints mechanism.
- Develop perspective training for all court actors on how LIPs encounter the court system. This could also include resilience training.
- Train solicitors and barristers on how to represent clients against LIPs as a core part of professional legal education, with continuing professional development supporting this training.

### 'Make them lawyers': the intellectual barriers

Arguably, the biggest obstacle to the 'make them lawyers' solution is the intellectual barriers that LIPs face in trying to understand and apply complex legal rules to their own case. This barrier was recognised by lawyers and LIPs alike. Understandably, lawyers were particularly sceptical about the prospect of making LIPs more lawyer-like:

"I have legal training for four years, and then I had to do other training on the job, effectively, for six months. It's not just a case of saying let's do a crash course and to make them lawyers. That doesn't work." (LR19)

"[I]t's certainly a worthwhile exercise, and I think it would work for a certain proportion of cases. However, I feel that for a certain other proportion of cases, it would not work... for the same two reasons as they are

litigants in person. They either aren't capable of understanding it, which is unfortunate, but that's all the more reason that they get assistance. Or they don't want to understand it, and it's, you take the horse to water, you can't make it drink." (LR23)

Lawyers particularly drew analogies with other professional or vocational services that required skill and experience, noting that their own inability to perform these services was directly comparable to LIPs' inability to represent themselves. For LR21, "asking a personal litigant to submit a skeleton argument in advance of a hearing... it's like asking me to submit a set of accounts... I'm not an accountant, so I don't know how to." This was echoed to some extent by others, but seen through a more critical perspective that rejected the narrow parameters of what the system regarded as 'fair':

"I would see myself particularly disadvantaged in a situation where I was required to be involved in some kind of mechanical processes that I knew nothing about... I wouldn't know where to begin. But insisting on the appearance of a level playing field when it can't possibly be one, and yet placing the same expectations on lay litigants puts them in situation where judges are trying to operate within their definition of fair." (MF01)

For this McKenzie Friend, the playing field can never be level and the expectation – either by court actors or by LIPs – that LIPs must act like lawyers is therefore itself seen to be disadvantaging LIPs.

Some of this scepticism by lawyers was mixed with a sense of self-preservation and concern for the status and standing of the profession:

"I would be getting them lawyers, but I am a lawyer so I'm aware how self-serving that sounds." (LR03)

The 'make them lawyers' solution does not advocate for the removal of legal advice or representation; rather it exists as a response to the experiences of those who struggle to participate within the legal system without legal representation while recognising that the solution itself is imperfect. The experiences of CLIPs in the procedural advice clinic reflected the limitations of legal assistance, rather than representation by a qualified legal professional, which did not alone equalise the arms between an unrepresented and represented party, even where emotional and practical barriers to LIP participation could be overcome. What was identified in the data was the need for significant reforms of the civil and family justice system, including addressing the proposals to 'make them lawyers', that could have the cumulative effect of enabling LIPs to participate more effectively. These may not overcome the most significant intellectual barrier – that of being able to interpret and apply complex legal information – but there are other intellectual barriers that could be addressed that would facilitate a better understanding of the information required for legal proceedings.

Several LIPs proposed that some sort of training information session or orientation would be of benefit, helping them understand the role of documentation, the legal language that was commonly used and the need for relevant evidence. For some court actors, training was just "a plaster, where maybe a bandage or stitches are needed" (LR14) and so could never go far enough to assist LIPs while others suggested there was a need for some kind of training in basic legal literacy or competency, akin to being licensed to self-represent, a suggestion that was echoed by some LIPs:

"You wouldn't go in to your driving test [unprepared], and now I think they stipulate that you need to have X amount of training with a qualified instructor... and say, look, from now on, we'll take you through the steps... for this, you need to know this, and this, you need to know this." (AR17)

“At least, perhaps even almost like a one hour of mandatory advice, where you have to, at least, listen to the advice given by an independent individual and if you then choose not to take it, well it’s, you know, on your own head be it.” (LR09)

The idea of mandatory training was not one that achieved consensus, in part because not all LIPs were seen to need it, but there was broad agreement between court actors and LIPs who endorsed a training/orientation approach that this support be offered early on in the litigation process. Whatever the form or focus, there remains a clear deficit in informing LIPs about how the legal system works and addressing practical and intellectual barriers that could help LIPs navigate a more effective pathway to self-representation.

‘Making them lawyers’ can therefore be a step forward, without needing to be an ideal solution:

“I’m not saying to make them a lawyer. I’m simply saying, if they can’t afford legal representation, if they’re a personal litigant, then they can be educated better in terms of how to manage the system, in terms of what’s expected, in terms of trying to approach your opposite number in a more appropriate manner in terms of when they’re called into court, not opening up things from what happened when you met to the present day.” (LR19)

Any form of training or background advice is not seen as something to replace law schools or lawyers, or to fundamentally alter the nature of the current system but could be one among many reasonable adjustments that can be made to accommodate LIPs, bringing those who would avail of support closer to something like an equality of arms.

### Proposal

- Develop an orientation course for LIPs, that can include basic procedural information as well as training/information on what is expected of them as LIPs and what assistance they can expect from the courts.

## Change the system

Participants’ views were perhaps most divided when it came to the suggestion that the answer to the issues associated with LIPs in the court system was to ‘change the system’, because of the wide range of interpretations that this phrase conjured. There tended to be greatest resistance from judges and lawyers where this was interpreted as fundamental change. However, LIPs and court staff were more likely to envisage and support changes that were often simple and involved minor reforms to existing procedures, resources and communications:

“To change the system, I worry that we will tinker with it in a way that we think will address the disadvantage that personal litigants face and I think we could actually create problems. I think there’s a lot of quick fixes being thought about, I’m not sure that it’s really going to address the deficits that personal litigants have. I’m not sure that we should change the system just because we have some personal litigants, I’m not sure that’s a good reason to change a system that I think has worked very well for many centuries and it could give rise to unknowns and consequences that we don’t actually know about.” (Ju07)

“I think it should be as easy as possible for them. I don’t think you should have to say to someone, you need to go off and read this legislation to make sure you know what you’re doing is right. You know, I think it should be a step by step, easy, quick job.” (CS09)

Based upon the findings in this study, we believe that change to the system is indisputably necessary, at least to some degree. Many of the reforms suggested by participants and others that flow from our analysis of the data are relatively uncontroversial, such as improvement to information and digital resources, as already discussed under ‘make them lawyers’. Others, however, relating to issues of ‘judgecraft’ and judicial consistency, the creation of a designated court liaison, support unit or clinic, practice directions or codes of conduct for parties have the potential to be more contentious, but are driven by the data from LIPs and court actors and therefore merit discussion as a means of understanding and overcoming barriers to participation as well making a positive impact on the court system.

### ‘Change the system’: the emotional barriers

The emotions LIPs described related to fear and apprehension about the court process, largely based on not knowing what they should expect. Many of these emotional barriers can be overcome very easily by adapting the system to provide the information LIPs need.

LIPs described feeling at a loss for very basic information such as how to access and navigate court buildings:

“Where do I go?! I was in the wilderness. I didn’t know where to go. I didn’t know what to do. I asked the security guy, where do you go, he told me, and I think the security guy realised I was, like, a, what do you call it, a rabbit in the headlights.” (Dom04)

When asked about points at which they felt that they needed help, one LIP described the need for basic support and guidance to deal with primary concerns:

“Just somebody to say, look, come down ... We’ll show you where to come to, we’ll listen for process, allow enough time to get through reception. They don’t have enough staff on there, it gets backed up. People are confused. They bring the wrong documents. Bring some water with you. There’s nowhere to get a drink of water. There’s no tea, no coffee. If you can bring a friend who can sit and mind your place in case you need to go to the toilet.” (CP26)

At the moment, the provision of such information is *ad hoc* rather than systemic, either assuming that court users will know where to go or what facilities are available, or not appreciating the impact that sharing such information would have. It is unlikely that there would be any objections to creating an information source to provide the answers to some of the basic questions LIPs have, but at the moment there is no provision for this to happen. Such guidance could be provided as part of the documentation issued by the NICTS, or online, or as virtual tours given as web- and/or court-based short videos.

Going further than this would be a dedicated LIP support worker – a proposal that is discussed in more detail as a means of dealing with practical and intellectual barriers – to whom LIPs can address such basic queries. This function is currently performed by court service staff but, as LIPs recognise, staff have other work demands to deal with and there is no designated individual or support to deal with the particular needs that LIPs have. This would also potentially apply to those LIPs who were highly demanding and in need of additional support:

“I think we do need a process to nip in the bud those people that are, not that their case is without merit, but they need some support, and me, or my colleagues, don’t have the time, or professional training, to give them that support. I think we need some sort of other mechanism to deal with those small group of personal litigants that are the most time-consuming, and difficult to manage.” (CS04)

This would require an explicit recognition of the role of LIPs within the court system and respond specifically to their needs, without treating them as a breach of the 'norm'. The extension of this approach is explored further below, but could permeate all aspects of the court process, from identifying how LIPs get to the relevant court room right through to information on what to expect in court, all of which could help to overcome emotional barriers. As one judge explained, giving LIPs allotted hearing times, in addition to further explanation and support, might ease their anxiety which would then ease the strain on court staff who may otherwise have to deal with 'difficult' LIPs:

"I think just some means of setting proper expectations, because I think a lot of the heat comes into these things. People get tense when they feel this is a curve ball, this is, you know, an ambush, this is an unexpected thing blowing up in my face, this is not at all what I expected. So, just to set and temper expectations so that they know what the range of possible outcomes are, and, you know, if they're coming thinking they'll get a conclusion at the end of the day that they're in court, whereas, it's just to fix a date for a hearing, or something like that, or an early directions hearing, or something. So, tempering expectations, and setting them appropriately, if some facility were available for that." (Ju06)

The possibility of system change to provide this information to LIPs in advance of their court hearings seems feasible, either as a minimum model of documentary information or more holistic model of multi-media information and personal support.

The emotional load and the high GHQ-12 scores of LIPs in this study should also be addressed, but more data are required to understand the scale of the problem and the resources that are needed to tackle it. At the very least, the Northern Ireland Executive Office should implement the objective of the Programme for Government to identify and support mental ill-health within the Northern Ireland population. Taken together, the research findings with LIPs and the GHQ-12 results further highlight the need for a scaled up research project which investigates the mental health of court users in the Northern Ireland Courts and Tribunals Service and indeed comparatively in other legal jurisdictions of the United Kingdom. In addition, given the current findings, such an investigation could make use of other developed legal scales to investigate legal anxiety (general measure of anxiety concerning legal dispute resolution), legal confidence (general measure of legal confidence) and equality of justice for court users (general measure of perceived equality of justice process and outcomes) to obtain a more rounded identification of mental health and concomitant legal issues and problems for court and tribunal users.

### Proposals

- Provide accessible information about all aspects of a litigant's potential engagement with the court system, giving consideration to a variety of media through which this information could be shared.
- Pilot the scheduling of court hearings for LIPs as individual appointment times.
- The joint strategic policy of the Northern Ireland Executive Office, through the Programme for Government, and the Department of Justice should identify and measure mental ill health prevalence and support needs of people with mental ill health and vulnerabilities within civil proceedings, particularly in the context of legal need, capability, empowerment and participation.



## ‘Change the system’: the practical barriers

LIPs’ experience within the court system could be improved through some simple reforms, such as developing and updating information and guidance, much of which could be tackled by integrating assistive resources online, on paper and in person. Despite the expectation that there would be advice on how to self-represent, LIPs found a dearth of available resources offered by the court system and voluntary sector. Relying on LIPs to find their own way can slow things down, and misunderstandings by LIPs can accumulate if they are not given accurate advice or information early on:

“If I had knew the legal system, maybe a bit sooner, I think things would be a lot more resolved by now at this time” (FP02).

Furthermore, in most cases, LIPs would benefit from being forewarned rather than told in court.

### **Identifying LIPs within the system**

One of the difficulties with implementing reforms for LIPs is that court staff do not always know whether litigants are represented or not until they arrive at court, as discussed in Chapter 8. LIPs can move in and out of legal representation. The default for newly opened cases is that litigants are listed as unrepresented if no solicitor has contacted the court service to state that they are on record for that litigant. In between opening and closing the case, the LIP may instruct legal representatives, or their representative may come off record, but there is no systemic mechanism to capture this movement to be able to identify the point(s) at which a litigant is unrepresented and therefore to target appropriate resources to them.

This inability to capture accurate, real-time data on LIPs is problematic, not just in terms of being able to identify trends in the LIP population but to adapt system management as required. We heard a number of calls for there to be allotted times for LIP court sessions so that court is ready to support them. This would require a mechanism to identify LIPs in advance but would generate benefits, including being able to target information to those who needed it and manage their expectations. We saw in Chapter 8 that waiting times too could lead to anxiety and frustration among those unfamiliar or uncomfortable appearing in court, particularly when LIPs did not know how long the waiting period was likely to be.

The interviews with LIPs confirmed that they often had no idea of timeframes and could become more anxious and frustrated as they waited. NICTS is aware of the gap in identifying LIPs within the system and recognise it as an information deficit. This suggests that changing the system to capture this data is likely to be a reform that is already on their radar, and one that could have significant benefits.

#### **Proposal**

- Identify LIPs within the court system at successive stages of their court proceedings, to provide an accurate data count of the number of LIPs in the court system at any one point.

### **Basic procedural information**

The change to the system relates to providing greater transparency and information on all aspects of the court process. LIPs were unsure about what they had to do and wished there had been someone to tell them.

“I wasn’t aware what a directions hearing was. I know it sounds stupid, and all, but if somebody had told me, just to be told, like, this is what we want you to do, it makes things a lot easier, where you’re going to court, you’re at a hearing.” (FP24)

Court staff recognised this information and advice desert, and could see opportunities existed to plug the information gap.

“That’s the thing, you see, if somebody comes in and lodges an application for contact and they are a personal litigant, they’re given the court date, but there was nothing else that we would say to them. Like, if there was a leaflet that could be handed to them. The way they come in doesn’t lend itself to you saying, oh yes, I’ll process this now, this is the date for it, and this is a wee leaflet for you to look at.” (CS09)

It was also argued that further information should be added to forms, which could itself compensate for the absence of a ‘wee leaflet’:

“How you serve, how you send them, is it postal, how you lodge these forms, how to do it, especially in the electronic world, you know, because I don’t... and if it’s done by post, how’s it done, how’s it served?” (FP22)

Again, none of these proposals are radical but their implementation would go some considerable way to filling the information gap that exists and removing the practical (and emotional) barriers that impede LIPs’ ability to participate in the court proceedings. In light of the Supreme Court’s 2018 decision in *Barton v Wright Hassall LLP*<sup>23</sup> on the need for a LIP to comply with the precise format for serving documentation, this is no longer something that can be assumed LIPs can cope with, without assistance.

Our study also identified that LIPs struggled more with procedural requirements in some business areas than in others. The data on this are very thin and so it is not possible to make specific recommendations on which business areas should receive priority action. It would be a straightforward exercise, however, to generate additional data on those areas indicating the greatest procedural obstacles, to determine exactly what the procedural reform priorities should be.

### Proposals

- Ensure that LIPs have access to clear and coherent information on the procedural requirements for their case, with a particular focus on procedures that will have a critical impact on their case.
- Collect additional data on the procedural requirements and barriers in the different business areas in order to determine where the priority for procedural reform lies.

### Digital/online information

Some of the information that currently exists is on the NICTS website, but, as we saw in Chapter 7, staff and LIPs felt it was difficult to navigate and that key information and forms were difficult to find, if they were online at all. Where information was felt to be useful, the limitation was that it was just available in hard copy, for example NICTS’s ‘*A guide to proceedings in the High Court for people without a legal representative*’ (2013), and only distributed to LIPs in person:

“The booklet is very, very good. It has the process as they go along, and I think that that should be on the website. It should be quite close to where the forms are... My wish list is that that is on the website, and quite clearly seen, or we have loads of them in the office that we can say, well listen, I’ll send you out one of these booklets.” (CS05)

Adding existing information to an already opaque website, however, is unlikely to be very effective. This was acknowledged by court service staff who noted that if colleagues simply referred LIPs to ‘nicts.gov.uk’ it was unlikely that the LIP would find what they are looking for, given that staff themselves are often unable to find the documents they require.

There is clear potential for digitalisation to assist with LIP’s pre-court preparation, perhaps directing LIPs to resources relevant to their proceedings, automating some of the procedural aspects of day-to-day case management, potentially reducing common procedural errors, such as missed time limits (which could be notified), and helping LIPs understand their procedural obligations.

The development of digital assistance is inevitable and could be highly beneficial from both a system and LIP perspective. The creation of court apps, online forms that offer ‘hover-over’ instructions and simple procedural explanation, and online bundle creation and case management are all technological advances within reach; some initiatives are being trialled as part of England and Wales civil justice review and may offer a lower cost way of assisting the IT-literate with forms (Denvir, Balmer and Pleasence, 2013). For those who are not IT literate, there needs to be alternative means of accessing the same information (on paper, in person and by phone). One LIP explained: “I’m not very good at websites or using computers. I was brought up in the days of pencil and paper” (Dom02).

Digitalisation might more efficiently share key documents and notifications with LIPs, in the same manner as with legal representatives, but the system design needs to include LIPs having access. A member of court service staff explained the process at present:

“[T]he Court Orders now... go online. So, if you are a solicitor, you will have online access and you get in, and we used to have to post everything out. So, now we don’t post them out to the solicitors, you see it on the system, but we still post to personal litigants. So, our clearing function has, you know, it has decreased, because a lot of the stuff is online, but then we have to be overly sure that, you know, what we’re posted out, we’re posting out to personal litigants, and you can’t miss that, just because everything is going online. So, they’re, sort of, very vigilant to check the files to make sure is this a personal litigant, are they represented, no, well then, I have to make sure they get a copy of that Court Order. They get a copy of the direction telling them to come in again in two weeks’ time, or whatever it is, you know, and staff would be conscious of that, and know to do that.” (CS10)

While such vigilance is reassuring, it relies on an automated system that does not automatically identify litigants as unrepresented and is vulnerable to human error where this status is overlooked or unclear. By regarding LIPs as outside the ‘norm’ it also defeats the efficiency of the digital system. There are clearly concerns that would need to be addressed regarding the security of data that LIPs could have access to but, in attending to these, it seems likely that such a system could be made interactive, allowing two-way communication for the benefit of LIPs and court actors. The outcome would be to create a smoother, more orderly and efficient case management system within which LIPs are included as participants in their own case.

### Proposals

- Develop a more user-friendly web interface for LIPs, with dedicated tabs or sections for information that LIPs require.
- Explore how court apps, interactive online forms, online bundle creation and case management could be developed.
- Identify data-security solutions that would allow LIPs to access the online Court Orders that are available to other court actors.
- Ensure that the information provided to LIPs is available in alternative formats.

### ***A LIP support unit***

A number of stakeholders thought that setting up a unit, clinic or designated contact for LIPs was a worthwhile and feasible intervention that would address the practical (and other) barriers that LIPs described:

“A dedicated unit . . . quite clear to them where to go to, is a very good practical solution” (LR21).

“It’s grand reading it on the internet and you, sort of, Google it, and you get all sorts of information, but it’s a minefield about what’s relevant. And I think if there was a legal clinic where someone could go and actually . . . could chat to someone through an appointment, and be told, this is likely to be the process in family law in Northern Ireland. This is likely what you may experience. The people you will encounter, that it could be a Court Children’s Officer appointed, this is what their, you know, because there’s leaflets for Court Children’s Officers, and there’s a role for them, and they could know that before they go. There may be a legal person on the other side who you may have to talk to, or whatever.” (Off01)

At its most basic, therefore, the unit would act as the central information point to which LIPs could go (or be referred to) to provide the necessary information on what to expect from court proceedings, complementing the development of information outlined above. This would have the added advantage of relieving the demands reported by CCOs to explain the nature of court proceedings.

Beyond this basic function, a liaison function might be extended to provide basic procedural advice:

“A single point of contact and, like, a court liaison officer for personal litigants or for anybody for that matter who knows about the procedures, about how you do this, and how do you that, and one thing and another, where you can, where you know you can comfortably go and speak . . . if you had a court liaison officer, who is for that purpose and it’s about information and the sign-posting.” (FP63)

Other LIPs emphasised the facility for a debrief after court to be provided by someone who had been in the courtroom, such as a clerk, or a member of court staff who has access to records the clerk has made:

“I think there needs to be somebody after to say, right, do you understand what has just happened. You will get this writing, you won’t get this in writing . . . so, you do know that [child] will be returned now at eight o’clock, to your door, by somebody that’s not [father]. So, it’s just like you’re left on a cliff hanger. So, it happens that quickly . . .” (FP21)

Some LIPs felt that an appointed adviser would need to be in the court building from whom they could obtain immediate, on the spot advice. This was an issue raised by participants in the NIHRC procedural advice clinic, who felt that procedure happened ‘in the moment’ and that they would have needed the clinic adviser to be present to help them make more informed decisions than they were able to in the abstract environment of the

clinic. The extent to which this was envisaged certainly went beyond the remit of the NIHRC clinic:

“It would be useful to have somebody in court who could maybe run something by... say I’d really, really disagreed with a lot of the things that were said yesterday, I, you know, I would have liked to have been able to go away and speak to somebody, and then come back. But, luckily enough, it wasn’t totally unacceptable to me, but worst case scenario, I would have been, felt pressured to agree to something that I really couldn’t.” (FP31)

Such recommendations begin to sound increasingly like legal representation, the further the wish-list strays toward in-court support from someone other than the judge. Not only does this represent a step away from providing purely procedural advice but it also moves the solution back to ‘get them lawyers’ within the existing system.

For their part, lawyers tended to envisage a more discrete role for a LIP support unit in assisting with bundle preparation, or other documentation, and they felt this could conceivably be part of the court service:

“It all sounds very sensible . . . because a smooth running of the court isn’t a matter for us. It is within the remit of the court as to how the court is run, and whether or not it is run smoothly or not. It’s not our job.” (LR51)

The compromise would seem to be a clinic, much like that trialled in this study, that better integrated into the court system providing an official point of contact and information, that was offered to LIPs early on in the process, but did not involve offering LIPs cut-price in-court support.

The priority for a central advice point or unit being provided by the court service was that the information provided would be “official,” “set in stone” or “proper” (FP24) because litigants may not know whether to trust the integrity of other sources of advice, and the myriad of online pages that may or may not be relevant to LIPs in Northern Ireland. However, arguments were also made for ensuring that a support unit was independent:

“I don’t think it’s right to put it onto the court administration to try and deliver that. I think that’s unfair, and I don’t think that helps, and I think it also creates false perceptions for parties about bias or unfairness or why are they doing that. Whichever party they are, why are they getting help, or why am I not getting more help. DOJ could do it through their own agencies if they wanted to. I don’t see a great difference between a voluntary sector and DOJ, other than I think it probably lends itself more to a voluntary sector organisation with support from DOJ than it does maybe for the DOJ to try and set something up in-house.” (Ju11)

The judge’s concern seemed to be that the delivery of procedural advice would be too much to ask court staff to do, which emphasises that a LIP support unit or clinic would need to be staffed by a highly trained, probably legally trained person or persons:

“It’s not fair to ask the court staff to start to analyse claims coming in to say, ‘these appear to be the issues that we need to address.’ Or are you going to hand out a text book on Children’s Order cases and say, ‘I’m not sure what you’re doing, but here is everything there is to know about a Children’s Order’, which isn’t going to help.” (Ju11)

Certainly, one of the lessons from the procedural advice clinic was the value of having a qualified legal practitioner providing procedural advice. The ability of the clinic adviser to be able to distinguish between legal and procedural advice was, in part, due to her awareness of where the line between the two lay. This provided a very different and much more informed perspective of the dividing line than court service staff had, which was itself limited by

their role and function, but also by not having experience of providing legal advice on the other side of the line.

The need for some form of accessible, procedural assistance was consistently identified by judges, very often through quite generalised recommendations to LIPs that they should seek help from a voluntary sector organisation. Some judges and lawyers assume that advice agencies are providing support that could benefit those LIPs who have the wherewithal to seek help. However, for most business areas in our study (with the exception of debt advice), advice agencies are not equipped to provide the level of legal or procedural advice required. That is not to say that, if they were properly resourced, voluntary sector organisations could not provide effective advice, although the nature and level of advice required may vary depending on the legal speciality or complexity. The value of specialist voluntary sector advice within the court service was identified within our data:

“I would say, without caveat, I would say, groups like Housing Rights should be given more funding. They should be more available to people. Groups like Citizens Advice Bureau should have, again, they should be better funded, and they should have better trained staff. The people that work there tends to be very well motivated, but just not very well trained, and they’re limited in what they could do.” (MF01)

Some participants stressed that NICTS could not offer a clinic, but procedural advice by properly trained staff was a possibility (CS07). More prosaically, it might be helpful for the court service to review what the parameters of procedural versus legal advice are, as exemplified by the procedural advice clinic in this study, to assist staff to manage LIP queries that may cross this fine dividing line. Court staff themselves did not seem completely opposed to the idea, so long as boundaries were clear:

“Your court clerks in England are different, and they are legally trained... maybe we just need to get better about putting out there what it is we do, what our functions are.” (CS10).

This would involve some changes to the roles within the NICTS, but given the reliance by LIPs on court service staff, it is also one that has the potential to make a significant impact:

“The biggest single change inside the court system themselves could make, could be to train the clerks to give procedural information.” (MF01).

Furthermore, some members of court staff questioned whether NICTS has done enough to let LIPs know what they can do for them.

For many participants, a central liaison point that could act as the first port of call for LIPs was seen as a robust solution to the practical and emotional barriers that LIPs face. Such a service could manage LIPs’ expectations and inform them of what is involved in self-representation. Information provision may be sufficient for some LIPs, but most require more direction, help and support tailored to their particular needs and situation. In addition, a central liaison point could assist the Courts and Tribunals Service to collect better data on LIPs within the system. It could also be used to collect data on the potential psychiatric ill-health of LIPs, who could be invited to complete a GHQ-12 while accessing the service.

### **Proposals**

- Create a LIP liaison/support unit, to provide face-to-face information and advice for LIPs.
- Identify how a procedural advice clinic could be delivered, in-house and/or via a voluntary sector organisation.
- Provide career development for NICTS staff to enable them to develop their capacity to provide procedural advice to LIPs.
- Evaluate the potential for a central liaison/support unit to act as a data collection point on the number of LIPs within the court system and on the GHQ-12 scores of those accessing the service.

### ***Delay and unmet legal need***

As we saw in Chapter 8, one of the central frustrations of legal representatives and other court actors with LIPs was the perception that LIPs created delay in the system, with individual hearings prolonged to deal with their lack of knowledge and with the need for more hearings to generate agreement and compliance. For their part, LIPs were also frustrated with the length of time court proceedings took, often having little understanding that there were staged processes within the system that meant cases progressed incrementally rather than at one sitting. Both sides felt there was manipulation of the system by the other to elongate proceedings. Our study provides some indicative but not validated data on delay within the different business areas, which suggests that some business areas are more prone to delay than others. Further research is needed to validate this finding, which could generate policy solutions to target LIP support in those areas with the greatest levels of delay.

The study purposefully examined LIPs actively involved in proceedings. We came across some LIPs who disengaged from their proceedings which suggested to us there may be other people who similarly or for different reasons had decided not pursue a legal need through the courts. In effect, we are talking about an unknown group of people with unknown legal needs. It is possible that the result of additional support mechanisms for LIPs may be an increase in the number of LIPs deciding to take up proceedings. It is recommended that a legal needs survey be repeated in the Northern Ireland jurisdiction (the last one was by Dignan, 2006). Given the perception that LIPs are associated with causing delay in the system, it will be possible to establish any such association between high levels of legal need and the impact of LIPs on the court system, and to direct legal support to particular areas with a view to providing early solutions to justiciable problems. As noted above in relation to changing the system to deal with LIPs' emotional barriers, a more informed view is needed of the possible psychiatric ill-health of litigants in the civil and family courts, and joint action by the Department of Justice and the Northern Ireland Executive Office to marry the identification of mental ill health with legal needs would provide a strong evidence base on which to determine how State resources could be used most effectively to support legal needs, including those of the LIPs within the court system. This could also be achieved by incorporating the GHQ-12 index within a Northern Ireland legal needs survey. This would allow further targeting of legal and mental health resources where legal need and potential psychiatric ill-health overlap.

### Proposals

- Establish the extent to which delay and elongation of court proceedings is a feature of court hearings with one or more LIP parties.
- Identify the differences in court business areas that can contribute to delay and other practical barriers to participation.
- Conduct a legal needs survey to identify where and what type of legal problems are most prevalent.
- Incorporate the GHQ-12 index into a Northern Ireland legal needs survey.
- Target legal and mental health resources where legal need and potential psychiatric ill-health overlap.

### ‘Change the system’: the intellectual barriers

As this report has made clear, the main intellectual barrier faced by LIPs is in constructing legally relevant, evidentially-based arguments. For many LIPs, this barrier can only be overcome with the assistance of a legal representative, acting within the system as it currently exists. There are, however, a series of smaller intellectual hurdles that LIPs must clear in order to participate effectively in their case, including understanding the legal language and terminology that courts and lawyers use with frequency, the relevance or role of documentation, and what information is required to complete legal forms or comply with court directions. Relatively minor adaptations to the current system would enable LIPs to tackle these barriers, opening the participative potential beyond where it now sits.

### Access to legal information

An argument put forward by one of the judges in our study was that not all LIPs want to consult the law, and that some just want to arrive in court and ‘say their piece’:

“They also do not want to look at the law. That’s the hardest job, by the way, I would say for personal litigants, is they do not want to have to consult the law. They don’t want to look up the rules. They don’t want to look up the statutes. They don’t want to know that... They want to have their argument, but they don’t understand that the court has to apply the law to their argument.” (Ju09)

It may be that this is the case for some LIPs, but in our study we found that the majority felt underprepared for court and wanted further information to help them prepare. For some LIPs, therefore, it may not be that they do not want to know the law, but rather that there are too many barriers for them to be able to do so, and so they revert to their default understanding of ‘justice’ by simply ‘telling the truth’.

The need to make key information more accessible to litigants to enable them to prepare their cases more thoroughly (should they wish to) was a recurrent theme from our study participants. There was a clear benefit identified to LIPs being able to access basic Northern Ireland legislation and case law that is relevant to their proceedings:

“There’s no composite of what legislation is relevant, in terms of children’s cases, in terms of family law cases, and things like that, domestic homes... they don’t necessarily know that that is a piece of legislation that applies here, and to go and look that up. And there’s nothing there directing, and it would be so simple,



because it's not legal advice. If someone is in contact proceedings, all you need is somewhere, some piece of information online that just says, this is the overarching piece of legislation for contact proceedings, and then just have it there. The person can go and read through it themselves and see." (Clinic adviser)

Modifying or adapting the current legal system to provide clear access to relevant legal information is something that LIPs and court actors have identified as necessary to deal with some of the intellectual barriers that LIPs face. While making law more accessible is an issue that stretches far beyond LIPs, there is a role here for the Department of Justice in Northern Ireland to make Northern Ireland law, rules, and procedure more easily accessible for court users, which will be of particular benefit to LIPs.

### Proposals

- Develop a repository of relevant Northern Ireland legislation, procedural guidance and key case law for LIPs to access.

### Legal language

For those who exist outside the legal system it seems incredible in the 21st century to have to recommend that language that is used every day in court proceedings should have regard to the ordinary person's linguistic understanding and usage. Law is, of course, an ancient creature, with considerable status which provides protection that has been honed through centuries of legal change and language development. While it is important to respect the integrity that legal terminology has, it is equally important to understand when this legal terminology is useful and when it is redundant. This should be an unsentimental scrutiny process that recognises the value of 'plain English', particularly for litigants (including those who are represented) and that promotes transparency and accessibility over tradition. Current legal terminology, including that contained within court forms and types of court submission, draws upon dead languages and centuries of tradition in a way that is arguably unnecessary and unhelpful:

"A Queen's Bench writ is still, the terminology it uses is still stuff from nineteenth, eighteenth century sometimes even... 'What's an affidavit?' is one of the biggest questions. What is that? What is that word, what does it mean? Whereas, then they just have statements of truth in England, which makes a lot more sense to me... If you're calling a witness in a High Court case, the document you issue is called a subpoena, just call it a witness summons, or just a, witness invite... That takes away all the mystery behind it. I know lawyers always look like protecting things like this, and they don't like change... But I think they're going to have to bring something like that in, especially with focus on human rights that there's been over the years. I'm just surprised it's taken this long to actually get something more simple in. So, I think changing the system, out of the three options, would be the one I would go for." (CS03)

The fact that such simple reforms are conceived as 'changing the system' may indicate some reticence within the system to change, but the inability of LIPs to comprehend the legal terminology indicates the need for change. The Civil Procedural Rules 1998 for England and Wales have been highlighted by the Supreme Court in *Barton v Wright Hassall LLP* [2018] as in need of updating so that LIPs are not caught out by it. The case for providing clear, accessible and current procedural guidance for court proceedings that LIPs can access for Northern Ireland would therefore seem to be a strong one.

### Proposals

- Conduct a language audit on court documents to identify where terms and syntax could be made more reader-friendly.
- Provide training to court actors on the standards of spoken and written English within the general population, identifying ways in which communications with LIPs could be more user-friendly.

### Templates

As the discussion on the practical barriers that are implicated in changing the system suggested, the potential to provide online, user-friendly, instructive guidance for court documents is obvious. Developing this potential to identify more precisely the information required for the documents was recognised by court staff who reported providing templates to assist people in form-filling:

“You can print them up, and we supply precedents for people to fill in... explaining where your name goes, where the person you’re suing name goes, where you have to put certain information, because the forms obviously to a personal litigant are sometimes bewildering in the way they’re set out... We can’t tell them what to actually put in it.” (CS03)

Unfortunately, however, this did not seem to be universal practice, and many LIPs would have liked to have been able to access such resources. Some had managed to secure this assistance from elsewhere. One LIP had help from a solicitor relative who provided template answers and the LIP felt that this was very valuable and should be more widely available. Other LIPs noted that such assistance could be made more readily available and would be extremely helpful. It was suggested by a McKenzie Friend that this was a service that they could usefully provide, which would fill a current gap in support provision. His view was that this should be a fairly standard service that LIPs could access:

“[P]erhaps, yes, a dummy application to show, here’s what the finished item looks like, to make sure they’ve filled in all the boxes, made the application in the right format, and made the application on the right forms. All that sort of idea probably would be of benefit to them, but I honestly don’t see it being welcomed with open arms in the legal profession. I really don’t.” (MF02).

There was no evidence that the legal profession was resistant to such an initiative and indeed it would seem to be something that could be of benefit to legal professionals acting against a LIP. Asking LIPs to submit forms and submissions within word-limited templates could force them to be brief, smoothing their interactions with other court actors:

“I’ve frequently ended up in cases where a skeleton argument has been directed, and at, you know, five to three in the morning, your opposite number emails. You’ve done a two-pager, you get fifteen pages then and you’re suddenly left, you know, trying to field that at 6am.” (LR23)

Finding a way to manage this process for LIPs could therefore have consequential benefit for legal representatives.

### Proposals

- Develop standard templates for court forms, court bundles, affidavits and skeleton arguments that LIPs can access.
- Make online provision for the submission of such documents, in addition to traditional hard copy methods.

### Judgecraft

Case complexity, as one legal representative explained, is not static. It is not a simple task to evaluate a case at any given point in time as complex or straightforward:

“Individuals don’t necessarily identify that their case is complex or it doesn’t start complex, and it becomes complex... an advisory system that filtered individuals towards legal advice, or away from legal advice, would be very risky... I don’t think I could tell any individual, yes, you’ll be totally fine, just do it yourself... I think it would potentially be open to some real queries, in that if that individual then gets caught in a mire and is, you know, down a long road of, you know, difficult issues, or there’s an impact on their lives in some way, that they wouldn’t then be saying, well, hang on a minute, I was told I didn’t need a lawyer in this case.” (LR09)

What is ultimately required, in the current system as much as within any utopian vision of a changed system, is the skill of judgecraft: being able to guide LIPs through their cases in a way that helps alleviate, if not overcome, some of the intellectual barriers that they face.

In terms of judicial support of LIPs, we heard many reports of and observed first hand much that we considered exemplary practice. However, we also found that there was variation in judicial support for LIPs. In the course of their work, we observed judges clearing courts, simplifying procedures and language and making generous accommodation for LIPs in some instances. The variation between judges is, in part, an inevitable consequence of judicial autonomy. This report makes no argument against judicial autonomy; indeed, the ability of judges to adapt and be flexible to the circumstances of the cases before them is regarded as being of particular benefit for LIPs and goes to the core of judgecraft. Where there may be room for consistency, however, is in judges themselves understanding what can be considered good, or best, practice in dealing with LIPs, and in applying some consistency of approach that enables LIPs to have their expectations set. This was seen as an important issue by both judges and lawyers:

“I think we do need an approach that’s consistent with regard to personal litigants. I have a sense at the moment that they’re treated differently dependent on the identity of the court, there’s no guidelines as to how we treat them, and my approach is to treat them in the same way, well maybe not, but I have one approach how I treat them, and I don’t know but I have a sense that maybe they’re treated differently by different judges.” (Ju07)

LIPs inevitably looked to judges for support or direction. One LIP spoke of how he felt that a judge could have saved him, and the court service, time by explaining an aspect of procedure to him: “It’s not really giving me

advice as such, it's just telling me what the rules are" (FP08). The inconsistency on this and other aspects of case management was particularly problematic for LIPs who had more than one case, either the same issue moving through different layers of the court system, or within different business areas. Different approaches from different judges is not in itself problematic, provided LIPs are made aware of the extent of support they can expect, and understand the different ways in which this can be delivered by different judges.

The examples of good (or bad) practice that we observed, or heard about, in this study may well be regarded as being part of the current system; locating the discussion of judgecraft within the change the system section may thus be misplaced. Nonetheless, these are changes that have been made by the judiciary to the existing adversarial system that has as its 'norm' the presentation of arguments by legal representatives. They have been crafted in response to the difficulties faced by LIPs and the court, particularly in relation to the intellectual barriers that inhibit the full participation of LIPs in arguing their case. As such, they represent changes to the system that are worth reflecting as being of value, and as something that provides a basis for further development of judgecraft skills.

In order to assist LIPs, judges often encouraged written statements and position papers:

"I think those are very useful for a litigant in person, because it gives them a chance away from the maelstrom of the court to think about what they want, and think about what they need. But, there are times you have to be careful, because some people are not comfortable with trying to put something in writing, and they prefer just to tell you what's going on. So, you've got to find that balance as well." (Ju11)

"[judge] asks for written reports as standard with personal litigants, I actually find that really helpful, in terms of personal litigants, because it is in writing... I'm not looking for more work, or to create more work for anyone, but it probably saves a lot of effort in the end, that the personal litigant can see in writing what you've said, and then they can challenge it. Whereas, I think it's much more difficult if it would be an oral report. I mean, it's keeping us right." (Off01)

Different LIPs did comment on both strategies as helpful to them: "I am not professional in this. They should put their arguments before me in writing, and well in advance" (FP34). However, others did emphasise being seen and heard by the judge in court and were less confident in producing written accounts. The ability of judges to guide LIPs to overcome these intellectual barriers is critical, and would work best against the backdrop of other, complementary support mechanisms that are identified in this report.

The application of law to facts was clearly something that LIPs struggled with, not least because, as this report highlights, the legal position was unclear or unknown to LIPs and relevant case law was inaccessible. Some judges addressed this by identifying the specific case law LIPs needed to read and apply:

"I'll give them a copy of the decision of the Court of Appeal in a case called [case name] and say when the court is deciding to extend time, these are the eight factors that we pay attention to. For instance, how far out of time are you?... I give them a copy of the [case] decision and then say I want a paper or a note from you within a week setting out, or within two weeks whatever is appropriate, setting out why time should be extended, and you need to deal with each of the points in [the case]. So, as best I can, I try to bring them along, sometimes people respond well, sometimes people don't or can't listen." (Ju12)

The ability to focus LIPs on the relevant issues was also seen as critical by legal representatives, albeit that they saw this a way to control LIPs as well as support them:

“I think what the more senior judges... did with pinning them down, and making them say what they want at each review, and not letting things mushroom, and spiral out of control, is really important. Because that can happen when you’ve got someone who’s not legally trained, and isn’t having any legal advice. It can really mushroom out of control, and that’s what they always did, and it worked.” (LR15)

As we saw in Chapter 8, many of the judiciary described, or were observed, providing inquisitorial approaches to hearings involving LIPs, using more extensive, open questioning based on close reading of the court file and being responsive to the capacity of the LIP before them:

“My fear with the personal litigant and part of the reason for really scrutinising the papers a bit more closely is I don’t want the case to be dismissed because a point that should have been brought out better, and would have made a difference, hasn’t been appreciated by the personal litigant. So, I’ll try to make sure that doesn’t happen. It’s particularly serious, of course, if you risk losing a child over something because of a point that was missed. That would be very rare but that’s what we try to do anyway.” (Ju11).

However, there is of course a limit to what judges can do:

“[[I]t is quite difficult when you’re sitting, you know, up there and it’s not like talking, you know, to somebody face to face. I think it is quite difficult for a judge to be absolutely sure that somebody understands, or to put everything across to them, because, you know, you have to be careful what you say as well in certain circumstances. But, I mean, you try your best. This is part of... we’re supposed to be able to communicate. I mean, it is a big part of your job.” (Ju05)

Judges also stressed that LIPs had taken the decision to make themselves lawyers as far as possible and that the judiciary could not disadvantage represented parties, as we saw in Chapter 8.

Some legal representatives in the study were resentful of the degree of latitude afforded to LIPs, with one suggesting her client would be better off without her so that her client could benefit from the leeway being afforded to the LIP on the other side. The point was made that it is sometimes difficult for a legal representative to object if they consider the judge had over-stepped the mark. As Moorhead (2007) questioned, the role of the judge as passive arbiter may not be valid when one party is unrepresented, and instead, the situation necessitates an alternative mode of arbitration, such as inquisitorial approaches. What is needed is a support system within which judges play a vital role, that provides a holistic response to the different needs and capabilities of LIPs, who can no longer be regarded as an aberration but as part of the system. Judges themselves recognise this, understanding that the demand for balance is made more difficult by the absence of information or support to which they can direct LIPs, as we saw in Chapter 8.

Some judges and legal representatives pointed to their experiences of more informal tribunals that include and involve LIPs and lay representatives. While there are still participative barriers faced by tribunal users, if the civil and family court systems are inevitably opening up to LIPs, they could look towards exemplars in the tribunal system, particularly the conceptual approach that seeks to make the lay person more central to system design rather than an aberration.

**Proposals**

- Develop specific training on judgecraft for LIPs.
- Identify and share exemplars of good practice in dealing with LIPs, including those within the tribunal service. This would include consistent directions on providing written reports for LIPs; clearing court rooms when LIP cases are being heard; and exercising caution to avoid an over-reliance on CCOs to inform LIPs about the legal proceedings.
- Ensure that Practice Directions consider what should happen when one/more of the parties is a LIP. This would include, for example, the Practice Direction on trial bundles notes in the December 2017 minutes of the Shadow Family Justice Board. Consideration should also be given to how any consequential costs should be met.

# Chapter 13 - Conclusions and recommendations

“If someone operated a business that wasn’t in any way compliant with disability, big stairs, and all the sort of stuff there, the whole building was ran like that, and nobody seen a problem with it until someone pointed out the obvious, like wanting [to use] a wheelchair one day... I believe that the whole court system is oblivious to lay-litigants. It needs a complete overhaul.” (Oth07)

## Introduction

This report gives visibility to many LIPs within the system, not just those who represent the ‘difficult’ customers, against whom other LIPs are judged, but those who make their way quietly through the system, often bewildered, lost, confused, frustrated and unsupported. The LIPs who did not engage with their proceedings are admittedly absent from the study and give us pause for consideration that their reasons for non-engagement remain unexplored and that it is uncertain whether the proposed reforms would meet their needs. The overriding finding of this report is that perspectives towards LIPs need to change, and there needs to be system change to accompany that, including a recognition of the duty to fill the huge information gap that currently exists. The resistance to change is strong, but the arguments against change – in the face of the empirical evidence examining barriers to effective participation – are weak. Part of the resistance to change is premised on the view that enough has been done and LIPs should not expect anything more:

“When they become personal litigants, they take a certain responsibility for the way that they are running the case. I think that the courts... have tried to do everything that they can to accommodate that, and to facilitate the personal litigants. So, from a professional point of view, I think that everything that’s been done so far, to my mind, is all that is needed” (LR20)

Our evidence contradicts this perspective. While this report acknowledges the good work that has been done – including support and adaptations that LIPs may not even be aware of – there is considerably more that could and should be done. The analogy of ‘reasonable adaptations’ that are made for individuals whose physical or intellectual needs are not accommodated within the system seems a valid one, particularly in light of our findings that 59% of our LIP sample had high GHQ-12 scores.

Beyond some exceptional circumstances (detailed in Appendix 1 to this report) access to justice is not conditional upon access to legal representation. It is a right that applies regardless of the existence of legal representation. As such, the range of circumstances in which individuals attempt to access justice need to be accommodated. Lord Reed’s judgment in *Unison* makes clear that “[t]he constitutional right of access to justice is inherent in the rule of law” and the courts have a critical role in maintaining the rule of law:<sup>24</sup>

Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. (para.68)

While the qualitative and quantitative evidence supports the argument that changes are needed, the view through the human rights lens adds further weight to it. The legal route to test the human rights compliance

24 R (on the application of UNISON) v Lord Chancellor, UKSC 51 on appeal from [2015] EWCA Civ 935 26 July 2017

of the court is performed only after a case is concluded. Such tests are necessarily case-specific, and the application addresses a particular aspect of the case. The provisions arising out of case-law, whether at the domestic or European level, are the results of such tests of compliance against specific elements of the law, and, as such, form a patchwork of protections within the over-arching statutory legal provision since not all tests will have been exhausted.

Even though Article 6 is the most prolifically violated article in the ECHR (European Court of Human Rights, 2017), the compliance of courts with respect to litigants in person has not received as much attention as it could have. With the increase in the number of LIPs in some jurisdictions, the potential for there to be more applications submitted to the European Court of Human Rights (ECtHR) in the coming years is increased but it should be noted that we offer no assessment on the viability of individual applications to the Court arising from this study.

Applications on fair trial grounds are necessarily post-hoc and the commentary throughout this report focuses on what the court system needs to do to comply with Article 6 ECHR when dealing with LIPs, providing reflection on the content and meaning of the right. In summary, the commentary noted the following:

- Access to a court may be hindered if a LIP is unable to participate effectively and so influence the outcome of the proceedings;
- The absence of information about procedure and litigating in person may impair a LIP's access to court and effective participation;
- The judicial duty to ensure equality of arms is not applied evenly by all judges which may result in insufficient diligence paid to the proceedings to ensure access to a fair hearing;
- There may be a threat to judicial impartiality if different treatment is applied to LIPs who are perceived to be self-representing by choice;
- Ensuring a LIP's effective participation and equality of arms relies on their comprehension of the proceedings, and therefore the language used in court and relevant court documentation;
- Administrative errors or conflicting advice delivered to LIPs which result in delay or other failures in the administration of justice may be indications of a lack of diligence on the behalf of the State to guarantee a fair trial;
- There may be degradation of the fair trial guarantee for access to a fair hearing for both parties if a LIP refuses to adhere to the rules of court;
- LIPs who are absent in their proceedings have no means to influence them and decisions taken in their absence risk impairing their access to a fair hearing;
- Applying to all parties to a case is the requirement to not delay proceedings deliberately or unintentionally.
- Access to a court should not be prevented by prohibitive costs or excessive fees and the State is left to decide how best to ensure access for those who cannot afford to pay for legal representation, which may be through the provision of publicly funded legal assistance. Self-representation for those who cannot afford to pay and are not in receipt of financial assistance may be effective as an alternative if there are measures in place to ensure all of the other standards of a fair trial.

The study has drawn particular attention to the meaning of effective participation and equality of arms with respect to LIPs, both essential components of the right to a fair trial. As illustrated throughout this report, effective participation is given effect by access to and presence in court, access to information about relevant legal and procedural issues and guidance on how to self-represent, and comprehension of proceedings. Equality of arms too depends on comprehension but also on judicial diligence to ensure as level a playing field as possible



when one side is represented and the other is not. The application of the human rights lens thus gives some scope and meaning to the right to self-represent within the overall right to a fair trial. The opportunity for litigants to represent themselves is not simply a matter of access to the court room if their right to a fair trial is to be fully enjoyed. It relies on the State obligation to ensure the LIP is supported to participate effectively and be able to influence the outcome of their case. Furthermore, we would argue that the obligation stretches to a positive duty to protect LIPs from harming their case through their own incompetence and from discrimination by others on the basis of not being represented.

The difference between disadvantage and discrimination on the basis of lack of legal representation needs ventilation. The findings depict a situation where LIPs are at a disadvantage not simply by not having legal representation, but also by not being fully accepted as legitimate court users, not having access to the information they need to support their efforts to self-represent, their lack of understanding of law and procedure and how emotionally involved they are in their proceedings. The retort that this disadvantage is of their own making and they sink or swim at their own peril promotes the norm of the fully represented case and overlooks the rights of all litigants to self-represent and the incumbent duties that flow from ensuring access to a court and equality of arms. There will be cases when representation is necessary, such as when the case is too complex or the litigant's capacity to self-represent is insufficient. The European Court of Human Rights case of *Airey v. Ireland* (1979) provides some guidance here, highlighting the complexity of the LIP's case and her lack of objectivity in the emotional legal matter as reasons why she was unable to self-represent.<sup>25</sup> The judgment, however, does not indicate when fair trial guarantees provided by Article 6 might require a judge to address concerns around the LIP's legal capacity, or any indication of what the process is for judges to address potential legal incapacity. The system cannot hide behind the necessity for the proceedings to end before a breach is claimed – there should be efforts to pre-empt potential breaches, and this study identifies the trigger points that put the right to a fair trial in jeopardy.

There is no doubt LIPs are disadvantaged compared to represented parties. However, this does not always or necessarily lead to a disadvantage in how they are treated or with respect to the proper administration of justice, where such disadvantage could result in a LIP receiving a standard of a hearing which falls short of fair. The courts are designed for fully represented cases, and deviation away from this norm created by the gap in knowledge and experience requires the court itself to be diligent to ensure the deviation does not disrupt its capacity to make a just decision. The role of the judge is key to this. They bear the additional burden of ensuring that a LIP's knowledge gaps, stress and unfamiliarity are mitigated to ensure a fair hearing. This duty is additional to their role in adjudicating the facts of the case and represents a considerable challenge for judges.

We have seen that some judges are more adept than others at being able to manage this additional duty but that inevitably it will be a struggle to make sure the LIP has understood and that relevant points have not been missed. The LIP is not necessarily well placed to assist the judge in discharging this obligation, and the lack of information available to LIPs is a direct contributor to this problem: when a LIP has little or no expectation of litigation or the judge's role, it is unlikely any doubt over the diligence paid will be queried by the LIP, in contrast to a legal representative, leaving all of the burden with the judge. Overt and direct steps are required to ensure LIPs can pass through the civil justice system without the danger of disadvantage descending into discrimination against LIPs.

Representation is preferable for most people but for the small number of people who cannot afford it or prefer to self-represent, their right to access a court obligates the State to ensure the disadvantage of self-representation

<sup>25</sup> *Airey v Republic of Ireland* (1979) Application no 6289/73. 2 EHRR 305.

does not result in unlawful discrimination. The disadvantage is unlikely to be fully removed but it can be managed to a level at which fair trial guarantees are intact. The achievement of equality of arms for the litigant in person goes arm in arm with effective participation: the ability to influence proceedings requires an understanding of what is expected, being given opportunities to be heard, being prepared, being present and being emotionally supported. Alongside the participatory aspects of self-representation lie the layperson's sense of fair and just legal procedures as experienced during the legal proceedings, which are as important as their sense of a just outcome (Lind and Tyler, 1988; Tyler, 2000). The study demonstrated barriers to legal participation for LIPs and their reported sense of unfairness. Recognising the interdependence of effective legal participation, procedural justice and fair trial guarantees, a number of recommendations are made in response to the issues uncovered in the study.

We note that the Northern Ireland judge-led Civil Justice Review (OLCJ, 2017a) and the Family Justice Review (OLCJ, 2017b) were aware that this study was taking place and that it would provide empirical data on the needs and experiences of LIPs which would be informative to their respective consultative bodies. Our findings and recommendations validate several of the reviews' recommendations, and we make additional recommendations to address needs identified in our data. Appendix 2 contains some examples of initiatives in other jurisdictions directed at reforming or improving access to justice.

## Recommendations

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In Chapter 12, we presented the reflections of various actors on potential reforms to support LIPs and to lessen any negative impacts they may have on the Northern Ireland court service. The reflections were condensed into proposals for recommendation; they are presented here against the broad headline findings of the whole study.

The recommendations that follow are based predominantly on the data gathered for this report: from LIPs and a wide range of court actors and stakeholders. The Advisory Group established to assist with the progress of the research were also involved in reviewing the recommendations, and while some issues did not achieve consensus the recommendations benefited from exposure to such diverse responses. The final recommendations reflect not just the data, therefore, but the identification of issues arising from the data, the consideration given to diverse perspectives and the insights from academic knowledge of access to justice solutions in other common law jurisdictions.

### Cultural change

The outsider or usurper status of LIPs is at odds with the purpose of the civil justice system to serve litigants. The presence of litigants in person in the civil and family courts needs to be seen not as an aberration or an anomaly, but accepted as a legitimate right.

For there to be acceptance of LIPs' place in the system, the expectations of all parties need to be better managed. This entails re-orienting the *status quo*, which currently puts legal representatives at the forefront of court procedures, to give the interests of all litigants, including LIPs, a higher profile than they currently have. The perspective of acting alone in the system needs to be brought to the forefront so that LIPs' specific needs are taken into consideration. Future reforms should therefore be inclusive of multiple perspectives, including

those who are served by the courts. Expanding the membership of the consultative bodies of the Civil Justice Council and Family Justice Board to include litigants, McKenzie Friends, CCOs, the advice sector and academics would be one way to allow multiple perspectives to contribute to re-orientation and development. An example of lay membership of a reform body is the Scottish Civil Justice Council's discretionary acceptance of consumer representatives who can represent the interests of litigants (see Appendix 2).

1. The overarching principle for our recommendations is that future reforms should be inclusive of multiple perspectives, including court users who should be facilitated to contribute to re-orientation and development. For example, the membership of the shadow Civil Justice Council and Family Justice Board should be expanded to include litigants, McKenzie Friends, CCOs, NGOs and academics, as is the case in other jurisdictions. This would include appointing independent Chairs to promote transparency and ensure that no single stakeholder group is dominant, and that a plurality of stakeholders is represented.

Any development of systems or changes to current practice may incur new costs which would require additional funds. While it is the responsibility of the State to fund access to justice, other sources of funds should also be explored with stakeholders involved in supporting LIPs and with interests in access to justice initiatives. An exploration of funding mechanisms, both of the State and the legal/advice sector, needs to be conducted to support the recommended changes.

2. Explore and secure funding streams for the development and evaluation of initiatives to support LIPs across different business areas, including new models of advice provision.

The findings indicate frustration among the various court actors when LIPs were involved in cases, often arising from LIPs not knowing what to do, taking longer than fully represented cases and some making high demands on court staff. Re-orienting the norm to the legitimate presence of LIPs requires an acceptance that they behave differently and have different requirements to solicitors and barristers, including the additional time they take, their lack of familiarity and understanding, and the possibility of the presence of mental health issues. While court staff and some judges were often sympathetic to the circumstances and needs of LIPs, not all other court actors were. Worryingly, some court actors were comfortable with differentiating LIPs according to whether they were acting alone through choice or not, treating the former with suspicion. Conversely, many LIPs were unaware of the behaviour expected of them or of the roles of others in proceedings. To gain insight into how LIPs experience the court system, we recommend perspective training for all court actors. Furthermore, to manage litigants', including LIPs, expectations, we recommend a charter that clearly sets out their role and responsibilities and what to expect of others. Its contents need to be developed as a co-production between the various stakeholders, but it could include items tailored to different business areas, such as the role of the court staff, CCOs, means of communication, contacting the other side, the possibility of an out of court settlement, expected timeframes, code of conduct and court etiquette. It should also take account of existing codes of practice for barristers and solicitors to ensure consistency of standards and expectations. It may also include sanctions to be applied and mechanisms for complaint in case of breach by any stakeholder. Guidance can be included on levels of tolerance of what constitutes vexatious behaviour to advise court actors and LIPs on acceptable standards of behaviour and limits on prolific applications. The primary function of the Charter should be as a communicative tool to set out agreed behavioural standards.

3. Offer training for all court actors on litigants' perspectives and how they encounter the court system, including recognition of the implications of the possibility of mental ill-health.
4. Establish a task force to create a Charter of Rights and Responsibilities, which all litigants and court actors are required to comply with, and with redress for breach of the Charter regulated through an independent complaints mechanism.
5. Develop and publish operational guidance on dealing with unacceptable standards of behaviour and prolific applications. This should include a policy on how to support staff who have been complained about.
6. Changes to the system, including information materials, advice models and the Charter should be developed as a co-production between LIPs, NICTS, the judiciary and the legal profession to maximise coherence, relevance and effectiveness.

### Administrative changes

The study showed that NICTS had no reliable means of knowing whether a litigant was represented until their court appearance. An opportunity needs to be created in which LIPs can be oriented to their role and responsibilities and ensuring they are recognised as having a legitimate place in the system before they enter a court for the first time. Consistent and reliable methods for contacting LIPs are needed, particularly when they are absent, live in other jurisdictions or encounter errors in the administration of their case. Relying on ad hoc measures such as asking the legal representative for the other party or the CCO sends confusing signals to the LIP and undermines his or her standing in the system. Means to keep track of LIPs within the system would also allow their cases to be timed and inform resource allocation.

7. Identify LIPs within the court system at successive stages of their court proceedings, to provide an accurate data count of the number of LIPs in the court system at any one point and to facilitate direct contact with them.

An additional measure to advance the smooth progression of LIPs through the court system would be the provision of scheduled court hearings allocated to LIPs.

8. Pilot the scheduling of court hearings for LIPs at individual appointment times.

The tendency of many LIPs in the sample to go online to look for information suggests there is potential for making more of online provision of court processes, such as submitting documents. These would benefit not only LIPs but all court users.

9. Make online provision for the submission of some court documents, in addition to traditional hard copy methods.
10. Explore how court apps, interactive online forms, online bundle creation and case management could be developed to support LIPs and the work of the NICTS, drawing on international evidence of justice innovations.

## Access to legal services

Many LIPs in the study stated a preference to have been represented but could not afford it. Others decided to act alone due to negative experience with previous legal representation. For some of them, the sense of not being involved in their own case by their solicitor contributed to a feeling of distance or alienation. This relates to improvements in lawyer-client relationships and communications, for example, involving them more in decision-making in their cases, as way to maintain trust in the value and benefit of representation and so possibly encourage some disenchanted, previously represented litigants to opt for representation again. Measures should be instituted to ensure LIPs who are above the threshold for legal aid are not being disadvantaged by their incapacity to represent themselves, either due to case complexity or emotional attachment. We do not feel it is our place to recommend lowering the fees charged for legal services, but the cost-benefit analysis which some LIPs undertook when deciding whether to instruct a solicitor suggests that discrete pieces of work charged at a published tariff may have encouraged some LIPs to seek fee-paying services of legal professionals.

11. Conduct a review on whether individuals on low incomes are being excluded from entitlement to legal aid, and its access to justice implications.
12. Explore how vulnerable litigants might better be supported by the State, either through expanding legal aid eligibility on an exceptional basis, or the Official Solicitor scheme, or through case-by-case judicial recommendation based on the considerations highlighted in the Equal Treatment Bench Book.
13. Examine the full potential of offering unbundled legal services within different business areas, drawing on international comparative experiences.

## Support - information

The overwhelming finding is that information for litigants in Northern Ireland, including LIPs, on how to self-represent and on procedures for different business areas is under-developed and difficult to access. This points to several measures to fill the gap and enable LIPs to better prepare their cases. LIPs were often unsure of what to expect from running their cases alone and did not know what to do. The efforts LIPs took to prepare their cases suggested that they would use available information and that its availability in multiple formats would satisfy different user needs. One of the barriers to legal participation is the incomprehensibility of existing forms and guidance to the lay reader. Of particular value would be access to court orders and CCO reports which currently are difficult for LIPs to access.

14. Develop a basic orientation course for LIPs that introduces them to the court system and personnel: it can include training and information on what is expected of them as LIPs, their expected engagement with the court system, what they can expect from court actors and time-frames for litigation.
15. Develop user-focused design principles to guide the redesign of litigant-friendly information and web interface. This should include easily accessible information provided through a variety of different media on how to litigate in person and the procedural requirements of their case. At a minimum, this should cover procedural information relevant to the different business areas, answers to frequently asked questions, and signposting to support services that have capacity and expertise to assist.
16. Develop a repository of relevant Northern Ireland legislation, procedural guidance and key case law for litigants to access.

17. Conduct a language audit on court documents to identify where terms and syntax could be made more reader-friendly.
18. Identify data-security solutions that would allow LIPs to access the online Court Orders, CCO reports and other relevant communications that are available to other court actors.

Assistance in the form of guidance on standard procedural documentation, such as court forms, would assist the advice sector and LIPs. However, given the multitude and variety of court procedures across the different business areas, efforts to simplify procedures should be targeted on areas most in demand by LIPs or in need of reform.

19. Develop standard templates for court forms, court bundles, affidavits and skeleton arguments that LIPs can access, selecting business areas most in demand or in need of reform.

NICTS is the primary resource for any information about litigation processes. If it increases its role as information-giver, any potential threats to the actual and perceived neutrality of NICTS towards any party needs to be identified and managed to preserve the service's impartiality as administrators of justice. Resources to service such an information hub need to be allocated to maintain a long-term commitment to procedural justice and legal participation.

20. The management of information and any portals needs to be overseen by the NICTS to ensure they are responsive to amendments in procedure and the emerging needs of litigants. NICTS should be allocated appropriate resources to support this and to preserve the service's impartiality as administrators of justice.

## Support - advice

In addition to more information, both about litigation in various business areas and self-representation, LIPs indicated their need for early and on-going, responsive support from trained and experienced legal professionals. There is a basic need for a hub that can provide advice, information and guidance. There are advantages to it being staffed by a qualified lawyer, rather than a court administrator, who would be able to navigate the line between procedural guidance and legal advice. The pilot procedural advice clinic in the study offers clear insight on how this could be developed. The findings on the type of advice that should be available suggested that information and advice that informs but not influences the litigating decisions of LIP was appropriate. Obtaining advice early on the process was deemed to be essential. The ownership of such support is suggested to be with NICTS given its centrality to litigation processes, but the perception of independence and distance from the courts needs to be tested and assured. While face-to-face or telephone advice was or would have been preferred by many LIPs in the sample, the availability of information and resources online was also desirable to suit people who cannot easily access a physical support unit.

21. Assess the best locations, availability and ownership of a LIP liaison/support unit with regards to proximity to court houses, independence of the court service and potential uptake.
22. With reference to the pilot NIHR procedural advice clinic, create a LIP liaison/support unit, with new funding from the Department of Justice, to provide face-to-face information and advice for LIPs, staffed with a professionally qualified lawyer. In establishing this unit, provide career development opportunities for NICTS staff to enable them to develop their capacity to provide procedural advice to LIPs.

## Judicial support

Once in court, the role of the judge is paramount in ensuring equality of arms between LIP and unrepresented parties and promoting LIPs' effective participation. The study showed that judicial approaches to obtaining the balance between judicial neutrality and getting to the facts of the case to adequately inform judgement were already practiced by some judges, but not all. There should be opportunities to establish what good practice is and to disseminate this to the judiciary.

- 23. Develop specific judicial training on judgecraft for LIPs.

## In-court support

The other type of support reported to be of great help to some LIPs was someone to accompany the LIP into court, either simply to be an emotional support, to take notes or to seek right of audience when the LIP was unable to address the court. Currently, the practice of accepting McKenzie Friends is not standardised and there is little advice for LIPs on choosing McKenzie Friends who will not hinder or harm their case.

- 24. Develop publicly-available guidelines on when a LIP will be able to be accompanied in court by a support person, and the extent to which an in-court support person can assist the LIP, such as taking notes.
- 25. Develop a means of assessing how well McKenzie Friends serve LIPs and review how McKenzie Friends might be included within the court system to assist LIPs, including a consideration of codified rules and/or regulation for McKenzie Friends.

## Engaging the legal profession

The study showed that many LIPs were not in direct contact with the legal representative for the other party and consequently opportunities for settling out of court were not explored. For their part, some legal representatives chose to avoid dealing with LIPs because of the difficulty of dealing with people unfamiliar with court proceedings, or occasionally because of negative or abusive encounters with LIPs. There is an opportunity to mediate this gap in communication to promote procedural justice and more rapid conclusions to cases.

- 26. Train solicitors and barristers on how to represent clients against LIPs as a core part of professional legal education, with continuing professional development supporting this training.
- 27. Provide continuing professional legal education and training for solicitors and barristers on the pastoral/emotional support needs of litigants, on the value of procedural justice as seen from the litigant's perspective and on ways in which communications with LIPs could yield more rapid case conclusion.
- 28. Provide training in lawyer self-care and professional support services to deal with abuse/trauma experienced by lawyers.

## Policy development

One of the limitations of a study of current court users in the system are the unknown consequences of any subsequent change. The current difficulty of obtaining support and information about self-representation may have deterred some people who still have a legal need. During the data collection phase, a number of LIPs who were not native English speakers refused to participate, and some litigants did not attend their proceedings at

all, prompting the question of whether these LIPs have needs different to the sampled LIPs. The re-orientation of the system to re-balance the perspective of litigants and the provision of advice and support may encourage additional use of the system. The last survey of legal need in Northern Ireland which looked at the uptake of legal processes to address legal needs was conducted over a decade ago (Dignan, 2006). An updated measure would furnish the NICTS with up-to-date estimates of the potential additional uptake of court resources and so inform resource allocation and investigate whether people with legal need are currently deterred from self-representation.

29. There is a need for data to understand current demand for court services, particularly whether all individuals who could litigate are currently doing so, and their reasons for not engaging with the court system. One way to address these data needs is to conduct a legal needs survey to identify the nature and extent of legal problems in Northern Ireland, to ensure that the legal needs of people who do not engage with the court system are also assessed.

The findings related to the GHQ-12 indicated a high proportion of LIPs in the sample with mental health issues. It was beyond the study's remit to establish whether this was a result of the legal matters they were involved in or a result of self-representation or a combination of the two. Other research has demonstrated that the relationship between mental illness and rights problems is such to warrant the close coordination between mental health services and legal advice services to improve health and justice outcomes (Pleasence and Balmer, 2009).

30. Develop a strategic plan for health-justice partnerships in Northern Ireland, where legal support services are co-located with social and health services. This should include identifying how a pilot health-justice partnership could be implemented and evaluated.
31. Investigate the use of the GHQ-12 to identify mental ill-health for litigants, in line with the draft Programme for Government objective to identify and measure mental ill-health in the population and provide support services. This could be done for example, by integrating the GHQ-12 within a legal needs survey for Northern Ireland.

## Integrating changes

There needs to be an integrated approach to reform, involving all court actors. Systems need to be in place to integrate practice involving LIPs across the board, to evaluate the impact of changes and capture good practice for dissemination. Action research models rooted in problem-centred, client-centred and action-oriented methods for implementing, reflecting on and evaluating continuous development are recommended. The overarching standards of the right to a fair trial, effective participation and of procedural justice are recommended as the evaluation framework.

32. Ensure that future Practice Directions take into consideration what should happen when one or more of the parties is a LIP.
33. Identify and share exemplars of good practice in dealing with LIPs, including those within the tribunal service, and from other jurisdictions. For example, guidelines on providing written reports for LIPs; clearing court rooms when LIP cases are being heard; exercising caution to avoid reliance on CCOs to inform LIPs about the legal proceedings; out of court negotiations.
34. Changes that are implemented should be subject to evaluation, guided by the principles of fair trial guarantees, effective participation and procedural justice, for example by adopting action research cycles.



## Further work consequent to the study

During the course of the study, gaps and issues deserving of further exploration were encountered. They were not part of the study's immediate remit but align closely with it. Firstly, it was reported that cases involving LIPs take longer to conclude than fully represented cases and use up more court time. This may be the case, but the underlying assumption is that LIPs should fit the norm of the fully represented case or obtain representation to maintain the *status quo*. It also equates all delay with undue delay. Acceptance of LIPs into the court system should be accompanied by the acceptance that they do not litigate in the same way as a legal professional and may well spend longer in the system. Obtaining a current estimate of length of proceedings would provide a baseline against which changes in the system could be assessed as support mechanisms are developed.

35. Develop the data from this study to identify the differences in length of proceedings, the potential for undue delay, and use of court time in different business areas to assist with resource management.

A further unexplored territory in the quantitative dataset is the relationship between anxiety, confidence and legal participation, and how these relate to the qualitative observations of court performance. The two questionnaires used with our sample study captured responses relating to anxiety, confidence, participation and engagement in court proceedings, along with the GHQ-12 responses. In addition, rich qualitative data was captured through detailed narratives of LIPs' court performance which were recorded during observations. Time has not permitted an exploration of the underlying variables in the quantitative data and how they are manifested in individuals' performance.

36. Develop the quantitative data from the study related to anxiety, confidence and legal participation, and its relationship to the qualitative data from court observations.

As already noted, it was beyond the study's remit to establish whether the high proportion of LIPs in the sample with a high GHQ-12 score was a result of the matters they were involved in or of self-representation or a combination of the two. A study to determine causation or correlation would be pertinent to the legal needs of the wider population and the demand for mental health services by addressing the question: do procedurally just outcomes to legal problems in both represented and self-represented proceedings promote mental well-being?

37. Incorporate the GHQ-12 within a legal needs survey to identify the relationship between legal need, methods of resolution and psychiatric ill-health, to inform a strategic approach to health-justice partnerships.

The understanding of the right to self-represent rests on the assumption that the litigant's capacity for emotional detachment can be sufficient for effective participation. The assumption bears testing given that some LIPs in the study were demonstrably upset by their litigation and others were not, but almost all reported feeling anxious regardless of their outward behaviour. In-court behaviour may not be a suitable indicator to determine whether emotional engagement is too great for a LIP. An interdisciplinary approach to explore the affective and cognitive domains in self-representation is recommended to address the question: when can a LIP be sufficiently detached from his or her proceedings to participate effectively?

38. Conduct interdisciplinary research on the affective and cognitive demands of self-representation to understand the dimensions of emotional detachment that permit effective participation.

The exclusion of LIPs in proceedings in the business areas of the Court of Appeal, Judicial Review, Small Claims and Queen’s Bench was both a pragmatic and strategic decision, but we acknowledge that there may have been opportunities to explore additional dimensions of the LIP experience and their impact on the court. Value could be added to this research by further examination of the LIP experiences in these areas.

39. Collect data from LIPs in the Court of Appeal, Chancery, Judicial Review, Small Claims and Queen’s Bench proceedings to investigate the issues specific to these business areas.

## Conclusion

The needs of LIPs stretch across the three general solutions of get them lawyers, make them lawyers, change the system. The extent to which each of the reforms identified within these parameters represent ‘reasonable’ adjustments must take account of legal, economic and political realities, but the *status quo* does not respond adequately to any of these realities.

The legal reality is determined by the need to ensure effective participation by LIPs. The need to address the intellectual, practical and emotional barriers that LIPs face within the current court system are framed by the fundamental legal reality of access to a fair trial, as exemplified by Article 6 ECHR, and advanced by related human rights standards. The coherence and force of this argument is made clear in Appendix 1. The current legal reality is that a substantial information and support gap exists which threatens the potential for Article 6 ECHR rights to be realised for LIPs, and this needs to be addressed.

The economic reality is a more difficult circle to square, and is not one that this report can offer substantive analysis on. It was, however, a consistent theme within the qualitative data. We asked interviewees to imagine their wish-list for reform unconstrained by costs implications, but these still crept into accounts. Court actors in particular often returned the discussion to the question: who is going to pay for this? There was a strong awareness of the limits of legal aid, and of Departmental funding, which acted as an initial brake on the development of individual wish-lists, but the discussion of what was needed did then move past this crude costs-based analysis and into a more considered strategic approach.

“The issue is everything nowadays with the funding. Who’s going to fund it? Who’s going to provide the training? ... [but] I don’t see why it wouldn’t be feasible. I mean, I think that people may take, personal litigants would take umbrage that I’m being potentially criticised that I can’t do X, Y, and Z, you know, but I don’t see why it would be a bad thing. And I think that the court would probably welcome it, as well, because, you know, I know that sometimes court can become a bit annoyed at maybe how long things are taking with personal litigants.” (LR19)

“If litigants in person are saying that the reason that they’re doing that is purely because they can’t get any support to have lawyers involved, I think that that’s a false economy. It may be that one particular budget saves, but everywhere else it’s being spent. It’s being spent on the length of court cases, the administrative role, etc.” (Ju11).

“I think it would be the court service helping themselves, because if they had this facility they wouldn’t necessarily get the, kind of, level of questioning that they get ... the court service could point litigants in person to it, without fearing that they were giving them wrong information, that they were going to give them legal advice by accident, and cause an issue, you know. So, I think that would be of benefit to them.” (Clinic adviser)

This report does not offer a cost-benefit analysis, mapping potential cost savings against possible investment or expenditure. What it does provide is the opportunity for others to take that work forward, identifying the range of different measures that address the particular needs of LIPs that can form the initial basis of a business case for addressing a fundamental legal need. Of relevance to these discussions are the recent reviews of civil and family justice which considered the current procedures for the administration of civil and family justice, with a view to improving access to justice; achieving better outcomes for court users, a more responsive and proportionate system; and making better use of available resources, including through the use of new technologies (OLCJ, 2017a & b). A key aspect of both reviews included personal litigants and what the reviews described as a number of glaring problems in the current system relating to personal litigants such as insufficient data and research, the reasons and effect of self-representation on the administration of civil and family justice (para.s 19.4-19.6) and the critical lack of accessible information, guidance and litigation support (para.s 19.7-19.9). Arising out of this judicial-led exercise, and set within the context of open justice, the civil and family reviews set out progressive recommendations designed to adapt to developments in practices and technologies. In many ways, the reviews advance a number of complementary recommendations relating to LIPs, which are similar to those of the current research. These fit into a pattern of those relating to practical, intellectual and emotional barriers identified within the current research which necessitate changes to practice and procedure; improved availability and accessibility of information; and litigation advice and support for LIPs. This includes the development of an online hub or web interface, a user support service for LIPs, improved online provision and accessibility of forms, training and support to legal professionals and support for vulnerable litigants.

The political reality is one that is undoubtedly beyond the reach of this report. At the time of writing, the Northern Ireland Executive and Assembly have been suspended for 16 months, and there is little value in this report speculating whether or when that position might change. Ministerial approval may well be required for some of the recommendations made within this report, but there are many recommendations that do not depend on this, that could be actioned by the legal profession, the judiciary, the NICTS, the academic community and others – including LIPs. We believe that a task force could be established to determine who should take responsibility for the range of recommendations that have emerged from this report, as a way of providing the necessary work-around to any political obstacles, and in the hope of Ministerial action in the near future.

The report outlines the barriers that have the potential to impact on LIPs' Article 6 ECHR rights. As the introduction makes clear, it cannot establish whether any breaches have occurred, given the need for cases to run to completion and for factors beyond effective participation to be considered. We do, however, highlight the risks to effective participation as a core element of Article 6 ECHR, the measures necessary to deal with those risks and the moral imperative to do so.



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# Appendix 1

## An analysis of the right to a fair trial and litigants in person

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Northern Ireland Human Rights Commission

### 1. Introduction

### 2. The right to a fair trial

2.1 When do fair trial rights apply?

### 3. Elements of the right to fair trial

3.1 Access to a Court

- A. Access to a court ensures no individual is deprived of the right of access to justice
- B. Ensuring access to a court through the provision of legal aid
  - i. In the face of legal or procedural complexity
  - ii. Non-discriminatory access to legal aid
- C. Circumstances in which access to a court should not be prevented
  - i. Prohibitive costs or excessive court fees
  - ii. Strict or incoherent procedural rules
  - iii. Access to information or assistance
- D. Lawful restrictions on access to a court
  - i. Vexatious litigants
  - ii. Mental incapacity
- E. Effective participation

3.2 Fair Trial Guarantees

- A. Equality of arms
  - i. Access to legal aid or other legal support and the effect on equality of arms
  - ii. Judicial latitude to ensure equality of arms with respect to complexity, unfamiliarity and stress
  - iii. Balancing judicial assistance with judicial impartiality
- B. States' obligations to exercise diligence for access to a fair hearing
  - i. Allowances for LIPs: time and particular arrangements
- C. The right to a public hearing
- D. Fairness and no undue delays
- E. Holding LIPs to the same standard as a legal representative
- F. Independent and impartial tribunal or court
- G. Written reasons and fairness

### 4. Summary

# 1. Introduction

The aim of this paper is to set out the human rights framework on access to justice, through the prism of fair trial rights. The framework will cover the full range of internationally accepted human rights standards, as signed and ratified by the United Kingdom (UK) Government. This includes the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE), European Union (EU) and United Nations (UN) systems. The relevant core international treaties in this context include:

- the International Covenant on Civil and Political Rights (ICCPR)<sup>1</sup>
- the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>2</sup>
- the UN Convention on the Elimination of Discrimination against Women (CEDAW)<sup>3</sup>
- the UN Convention Against Torture (UNCAT)<sup>4</sup>
- the UN Convention on the Rights of the Child (UNCRC)<sup>5</sup>
- the UN Convention on the Rights of Persons with Disabilities (UNCRPD)<sup>6</sup>
- the EU Charter for Fundamental Rights (CFR)

The Northern Ireland Executive (NI Executive) is subject to the obligations contained within these international treaties by virtue of the UK Government's ratification and the provisions of the Northern Ireland Act 1998. The NI Executive and other public authorities, such as the Courts, in NI are also bound by the rights of the European Convention on Human Rights (ECHR) pursuant to section 6 of the Human Rights Act 1998 (HRA). The HRA also provides an individual remedy in the domestic courts for those who allege a breach of their ECHR rights. The CFR can be enforced in domestic law when applying EU law.<sup>7</sup> Additionally, the other international standards referenced have been utilised by domestic courts when interpreting the ECHR, although they are not directly enforceable. This approach has been affirmed by both the European Court of Human Rights (ECtHR)<sup>8</sup> and the Supreme Court of the United Kingdom.<sup>9</sup>

Human rights standards require that every person that comes before a court receive a fair and public hearing.<sup>10</sup> With people coming before the Northern Ireland courts without legal representation, this research looks at the legal requirements and needs of litigants in person. As the focus of this project has included only civil areas of law, this analysis will only consider fair trial rights in the context of civil rights and obligations rather than in criminal proceedings. Protections for defendants in criminal trials are more explicit than those provided for litigants in civil proceedings.<sup>11</sup> This analysis examines the right to fair trial requirements of the international human rights framework with a particular focus on litigants in person, access to a court and how or when there is a requirement to assist those who are unrepresented through the legal process.

The analysis will also consider the extent to which human rights standards require litigants in person to be able to participate in a hearing and how that participation should be realised. There is also a brief discussion on the right of a person to represent themselves in court, the positive obligations on the State to provide a fair civil trial; the circumstances when legal aid must be provided and when the right to self-represent can be limited.

1 Ratified by the UK in 1976.

2 Ratified by the UK in 1976.

3 Ratified by the UK in 1986.

4 Ratified by the UK in 1988.

5 Ratified by the UK in 1991.

6 Ratified by the UK in 2009.

7 It therefore can be said to provide a less complete system of protection in comparison to the ECHR, although in contrast to the Article 6(1) ECHR, Article 47 CFR applies to all rights and freedoms recognised by EU law.

8 *Demir and Baykara v. Turkey*, Application no. 34503/97.

9 *R (SG) v. Secretary of State for Work and Pensions*, [2015] UKSC 16, [2015] 1 WLR 1449.

10 Article 14 ICCPR; Article 47 CFR; Article 6 ECHR.

11 Aside from the guarantees contained in Article 6(1), the right to a fair hearing of civil rights and obligations contains none of the explicit guarantees afforded to criminal matters by Article 6(3). What constitutes a fair hearing for the purposes of civil proceedings has emerged from the case law of the ECtHR through its interpretation of Article 6(1).

## 2. The right to a fair trial

The right to a fair trial is an important standard as it ensures that other human rights and fundamental freedoms can be protected and enforced. The right to fair trial is expressly guaranteed by Article 14 ICCPR and Article 6 ECHR. It is also referenced in other instruments, for example in the protection afforded under Articles 13 and 14 UNCAT.

Article 14(1) of the ICCPR states:

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”

Article 6(1) of the ECHR states:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

Article 47 of the CFR states:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

Additionally, Article 14 ECHR and Article 2 ICCPR guarantee individuals the enjoyment of the right to a fair trial without distinction of any kind particularly based upon “*race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*”<sup>12</sup>

Article 6(1) ECHR makes no distinction between a litigant in person and a represented party. The right to a fair trial and its extended guarantees will apply to litigants in person where a State has deemed that persons may act on their own behalf.<sup>13</sup> What is clear in this regard is their right to participate in the trial process.

<sup>12</sup> Article 2(1) ICCPR.

<sup>13</sup> The jurisprudence of the ECtHR is indicative of this by the fact that the presence of a lawyer at a case and the presence of the client are often referred to as one in the same. See for example *Kremzow v. Austria*, Application no. 12350/86 para 63, where, as the applicant was legally represented, his absence at the ‘pleas of nullity’ hearing did not breach Article 6(1). There are some instances where the absence of the litigant themselves will breach Article 6 ECHR, such as where questions of fact are to be decided or where the personal nature of the applicant’s experience will require them to be ‘heard’: see *Goc v Turkey*, Application no. 36590/97, para 48.

The clearest link between participation and procedural legal rights is found within Article 12 of the Convention on the Rights of the Child (UNCRC) which requires that children *“be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body.”*<sup>14</sup>

The international standards<sup>15</sup> reference participation and demonstrate its importance in areas of public life, however, they do not provide a definition. Article 6 ECHR does not contain the word ‘participation’ within its substantive wording nor has any definitive criteria of what Article 6 ECHR requires emerged from the ECtHR.<sup>16</sup> The word participation has been utilised in the judgments of the ECtHR on a number of occasions.<sup>17</sup> Although a definition has not emerged, it is possible to discern a link between the right to a fair trial, participation and the ability to influence outcomes from ECtHR case law.<sup>18</sup>

By analysing case law, it is possible to identify various factors of Article 6(1) ECHR that might be said to require the participation of a litigant in the court process. Before we examine the substantive elements of the right to a fair trial, we must first determine under what circumstances it will apply.

## 2.1 When do fair trial rights apply?

Article 6(1) applies to an individual’s civil rights or obligations. It will apply where the following components are present:

1. The case must concern a dispute or contestation over a right or obligation;<sup>19</sup>
  - i) The word ‘dispute’ should be construed in a substantive rather than formal manner.
  - ii) ‘Dispute’ may relate to both the existence and scope of a right or the manner in which it is exercised.
  - iii) The dispute may concern a question of law or of fact.
  - iv) The dispute must be of a genuine and serious nature.
  - v) The proceedings must be decisive for the right in question.
  - vi) A tenuous connection to the right or remote consequences for it will not suffice for Article 6 purposes
2. The dispute must relate to “rights and obligations” that are recognised under domestic law;<sup>20</sup>
3. The right in question must be ‘civil’;
  - (a) This question will be answered by looking at the substance and effect of the right as opposed to its classification under domestic law.<sup>21</sup>

14 Article 25 of the International Covenant on Civil and Political Rights (ICCPR) refers to the right to vote in elections and the right to participate in public affairs. Other international treaties have made reference to political participation and participation in public life in their Committee’s general recommendations, such as the Committee on the Elimination of All Forms of Discrimination against Women, 1981, see for example, General Recommendation 23, Political and Public Life (Sixteenth session, 1997, UN Doc. A/52/38/Rev.1), para 5.

15 ICCPR, CEDAW & UNCRC.

16 Aichinger, Petritz & Reich, ‘Interim Measures and the Applicability of Article 6’, European Judicial Training Network, pg 11.

17 See *Kress v. France*, Application no 39594/98 and *Kerojarvi v. Finland*, Application no. 17506/90.

18 In *Martinie v. France*, Application no 58675/00, the ECtHR found a breach of Article 6(1) ECHR on the basis that the ‘State Counsel’ was *“present at the hearing, [was] informed beforehand of the reporting judge’s point of view, hear[d] the latter’s submissions (and those of the counter-reporting judge) at the hearing, fully participate[d] in the proceedings and [could] express his own point of view orally,”* (at para 50.) This was in contrast to the applicant in the case who could not attend the proceedings in the lower court as they were held in private and he was not informed that they would take place. As a result of this, the applicant could not comment on the observations submitted by the State Counsel. This allowed the State Counsel to influence the bench’s decision, despite the fact the applicant could not respond to his observations. The above judgment therefore suggests that participation in a hearing is linked to the ability to influence the outcome of proceedings.

19 *Benthem v. The Netherlands* Application no. 8848/8, at para 32.

20 See *Roche v. the United Kingdom* Application no. 32555/96, see para 117 and *Szucs v. Austria* (1997) 26 EHRR 310 at para 32.

21 See *Konig v. Germany* Application no 6232/73 at para 89.

Article 6(1) therefore applies where the matter before the Court or Tribunal will determine the civil rights or obligations of the individual. Broadly speaking, this means that Article 6(1) will apply to proceedings in the main courts<sup>22</sup> in Northern Ireland, including the family and bankruptcy courts. Case law also suggests that Article 6(1) will apply to proceedings concerning social security appeals<sup>23</sup>, sickness benefits<sup>24</sup> and the right to planning permission.<sup>25</sup>

Article 6(1) has been held not to apply in cases of special education provision<sup>26</sup>, asylum<sup>27</sup> and employment disciplinary processes in the public sector.<sup>28</sup>

Reports suggest that where litigants in person are part of proceedings, the proceedings are likely to take longer and may include more interim hearings than may usually be the case.<sup>29</sup> The question therefore arises of whether or not Article 6(1) will apply to these interim proceedings.

Case law indicates that Article 6(1) safeguards apply to proceedings other than that of the main hearing and may consequently be the forum of any such breach. Article 6 will apply to interim measures where the criteria laid down in *Micallef v. Malta*,<sup>30</sup> are met<sup>31</sup> namely;

1. The right at stake must be civil;
2. The object and purpose of any interim measure should be scrutinised;

Where the proceedings include an interim arrangement, if the arrangement determines the civil right, Article 6 will be applicable.<sup>32</sup> In its reasoning, the Grand Chamber held the 'considerable backlogs' in the justice systems of many Contracting States to be decisive when viewing interim measures as determinative of civil rights or obligations. The court stated that as a result of these backlogs and the ensuing length of proceedings, *"a judge's decision on an injunction will often be tantamount to a decision on the merits of the claim for a substantial period of time, even permanently in exceptional cases. It follows that, frequently, interim and main proceedings decide the same "civil rights or obligations" and have the same resulting long-lasting or permanent effects."*<sup>33</sup>

Importantly the ECtHR has been clear that whether a case before a court has been conducted in compliance with Article 6(1) will involve an overview of the whole proceedings rather than a view of one particular element of the case.<sup>34</sup>

22 Including the Court of Appeal, the High Court etc.

23 See for example, *Schuler-Zraggen v Switzerland*, Application no. 14518/89 and *Wood v Secretary of State for Work and Pensions* [2003] EWCA Civ 53.

24 See for example, *Feldbrugge v Netherlands*, Application no. 8562/79.

25 *Bryan v United Kingdom*, Application no. 19178/91.

26 *DD's application* [2006] NIQB 19.

27 *Maaouia v France*, Application no. 39652/98.

28 *Mattu v University Hospitals of Coventry and Warwickshire NHS Trust* [2012] EWCA Civ 641.

29 Civil Justice Council, 'Access to Justice for Litigants in Person (or self-represented litigants)', A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice, November 2011, see for example pg 17 – 18, footnote 21.

30 Application no. 17056/06.

31 The Grand Chamber did acknowledge that where the effectiveness of the measure in question depends on a rapid decision making process, some of the requirements of Article 6(1) may be dispensed with as long as the Judge/Tribunal remains independent and impartial. In any subsequent proceedings, the burden would then fall to the Government to illustrate that such modification was necessary.

32 The above approach to proceedings where civil rights are at stake may be contrasted with the Article 6(3) safeguards provided for in criminal matters. The 'reasonable time' requirement guaranteed by Article 6(1) begins to apply from the moment the person is charged, according to the 1982 case of *Eckle v. Germany*, Application no. 8130/78. In *Eckle*, the Court also noted that *"this may occur on a date prior to the case coming before the trial court... such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened,"* see para 73. In *Zaichenko v. Russia*, Application no. 39660/02 the court reiterated that *'Article 6 of the Convention comes into play as soon as a person is "charged"'*, see para 42. Accordingly, Article 6 may apply in certain pre-trial proceedings regarding criminal matters as well as prior to the case coming to court, depending on the features and circumstances of the case. See also *Imbrioscia v. Switzerland*, Application no. 13972/88 (24 November 1993) para 36.

33 Application no. 17056/06 at para 79. It is worth noting that as per *Shamoyan v. Armenia*, Application no. 18499/08, the ECHR does not require that Contracting States set up Courts of Appeal or Cassation however where such courts exist, Article 6 will apply.

34 see *Centro Europa 7 S.R.L. and di Stefano v. Italy*, Application no. 38433/09 wherein the Court stated that their *"...sole task in connection with Article 6 of the Convention is to examine applications alleging that the domestic courts have failed to observe specific procedural safeguards laid down in that Article or that the conduct of the proceedings as a whole did not guarantee the applicant a fair hearing,"* see para 197.

## 3. Elements of the right to fair trial

The ECHR and ECtHR decisions provide specific detail and clear guidance on the core protection under Article 6(1). These components, both explicit and implied, ensure a person's proper participation in the legal process. These include:

1. Access to a Court
  - (a) Access to a court ensures no individual is deprived of the right to claim justice
  - (b) Ensuring access to a court through the provision of legal aid
    - i) In the face of legal and procedural complexity
    - ii) Non-discriminatory access to legal aid
  - (c) Circumstance in which access to a court should not be prevented:
    - i) Prohibitive costs / excessive court fees
    - ii) Strict or incoherent procedural rules
    - iii) Absence of information and assistance
  - (d) Lawful restriction on access to a court may be applied to:
    - i) Vexatious litigants
    - ii) Mental incapacity
  - (e) Effective participation given the stress, demand and complexity of proceedings
2. Fair Trial Guarantees
  - (a) Equality of arms
    - i) Access to legal aid or other legal support in the face of complexity
    - ii) Judicial latitude to ensure equality of arms with respect to complexity, unfamiliarity and stress
    - iii) Balancing judicial assistance with judicial impartiality
  - (b) Access to a fair hearing
    - i) Allowances for LIPs: time and particular arrangements
  - (c) The right to a public hearing
  - (d) Fairness and no undue delays
  - (e) Holding LIPs to the same standard as a legal representative
  - (f) Independent and impartial tribunal or court
  - (g) Written reasons and fairness

The next section will look at these elements in more detail. Although using the framework of the ECHR, each section will also outline what the international instruments and treaty bodies protect under fair trial.



## 3.1 Access to a Court

### Summary

Access to a court is an important and implicit part of right to a fair trial. When ensuring compliance with Article 6(1), State parties must:

- Provide legal aid where a case is legally and procedurally complex and the individual would not be able to effectively represent him or herself;
- Ensure that costs and court fees required are not excessively prohibitive so as to impair the right of access;
- Ensure that the procedural rules are not incoherent and so strictly applied that an individual could not comply with their requirements;
- Ensure that courts assist individuals where they fall foul of procedural rules by explaining what is required to properly comply;
- Ensure that the right of access to a court is enjoyed without discrimination;
- Ensure that individuals can effectively participate in their own case.

However, the right to access a court is not an absolute right and can be limited, provided those limitations pursue a legitimate aim and are proportionate to the aim to be achieved:

- There is no requirement on State Parties to always provide unlimited legal aid;
- Where an individual is vexatious, of unsound mind, a minor or bankrupt, the court may restrict access to the courts.

### A. Access to a court ensures no individual is deprived of the right of access to justice

The ECtHR considers access to a court is a central feature of Article 6(1). Equally, the Human Rights Committee has noted:

“Article 14 [ICCPR] encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law. Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice.”<sup>35</sup>

An early case is *Golder v. the United Kingdom*<sup>36</sup> in which the ECtHR noted that:

“Article 6 para. 1 (art.6-1) does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term.”<sup>37</sup>

<sup>35</sup> ICCPR, UN Human Rights Committee, General Comment No. 32, ‘Article 14: Right to equality before courts and tribunals and to a fair trial,’ CCPR/C/GC/32, 23 August 2007, para 9.

<sup>36</sup> (1975) 1 EHRR 524.

<sup>37</sup> *Ibid*, at para 28.

The ECtHR went on to say that:

“it would be inconceivable... that Article 6 para. 1 (art.6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court.”<sup>38</sup>

The ECtHR concluded that:

“right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (art.6-1),”<sup>39</sup>

and that Article 6

“secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, the Article embodies the “right to a court”, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only.”<sup>40</sup>

However, the above right as interpreted does not guarantee unfettered access to a court under any circumstance. Case law from the ECtHR has stated that Contracting States may limit the right of access as long as the essence of Article 6(1) itself is not diminished. As the ECtHR observed in *Philis v. Greece*,<sup>41</sup>

“This right of access, however, is not absolute but may be subject to limitations since the right by its very nature calls for regulation by the State. Nonetheless the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.”<sup>42</sup>

The ECtHR has also considered the issue of access to a higher court, such as a Court of Appeal or Supreme Court. In *Shamoyan v. Armenia*,<sup>43</sup> the applicant complained to the ECtHR as she could not afford an advocate to act on her behalf and therefore could not appeal to the Court of Cassation in Armenia, which required litigants to instruct a licensed advocate. The ECtHR examined the issue and noted that,

“...the requirement that an appellant be represented by a qualified lawyer before the court of cassation, such as applicable in the present case, cannot, in itself, be seen as contrary to Article 6. This requirement is clearly compatible with the characteristics of the Supreme Court as a highest court examining appeals on points of law and it is a common feature of the legal systems in several member States of the Council of Europe.”<sup>44</sup>

## B. Ensuring access to a court through the provision of legal aid

### *i. In the face of legal or procedural complexity*

Access to a court can be affected by the provision or lack of provision of legal aid, for example in *Airey v. Ireland*.<sup>45</sup> In this case, the applicant wished to obtain a decree of judicial separation from her husband however, at the time Ireland did not provide legal aid for civil matters and decrees for judicial separation could only be heard in the High Court. The Government of Ireland argued that there was no breach of Article 6(1) as Mrs. Airey was free to go before the High Court without the assistance of a lawyer. The ECtHR did not consider this argument to be conclusive and therefore considered whether or not “*Mrs. Airey’s appearance before the High*

38 *Ibid.*, at para 35.

39 *Ibid.*, at para 36.

40 *Ibid.*

41 (1991) 13 EHRR 741.

42 *Ibid.*, at para 59.

43 Application no. 18499/08.

44 *Ibid.*, at para 30.

45 (1979) 2 EHRR 305.

*Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.”<sup>46</sup>*

When answering this question, the ECtHR noted several features of the case; namely,

- That it seemed certain that Mrs. Airey would be at a disadvantage if her husband was represented by a lawyer and she was not.<sup>47</sup>
- That it was unrealistic that Mrs. Airey would be able to effectively conduct her own case in litigation of this nature quite apart from any assistance that the Judge would be able to offer her.<sup>48</sup>
- This was so given that a decree of judicial separation was only available in the High Court in Ireland, as opposed to the District Court where the procedure was ‘relatively simple’. The Irish High Court was described by experts as the ‘least accessible’ court due to the high fees payable for representation and the complexity of the procedure involved.<sup>49</sup>
- A decree of judicial separation not only involved complex points of law but also proof of either adultery, unnatural practices or cruelty which may have required experts and witnesses to be called and examined in order to establish the facts.<sup>50</sup>
- That marital disputes were emotional matters which consequently did not contribute to the degree of objectivity required by advocacy in court.<sup>51</sup>

The ECtHR therefore concluded that it was ‘improbable’ that a person in Mrs. Airey’s position would be able to effectively present her or his own case.

In certain circumstances, such as where the procedure of a case is too complex, the State may be required to provide an individual with funding towards representation in order to ensure an effective right of access to a court.<sup>52</sup> Yet, the ECtHR has highlighted that access to a court without a lawyer would not always represent a breach of Article 6(1) even where the case had to be heard in the High Court. The ECtHR has noted that much would depend on the particular circumstances of each case. It was further noted that Article 6(1) left each State free to decide how best to fulfil the obligation to provide access to court<sup>53</sup> and that a possible simplification of procedure constituted a way in which to facilitate access aside from the provision of legal aid.<sup>54</sup>

Nevertheless, the ECtHR was clear that it was not its function to indicate or dictate what measures should be taken to ensure effective access and clarified that *“the conclusion...above does not therefore imply that the State must provide free legal aid for every dispute relating to a “civil right”.”<sup>55</sup>*

The Court of Justice of the European Union (CJEU) has also considered access to legal aid in the context of Article 47 of the CFR. Taking into consideration the case law from the ECtHR, including Airey, the CJEU ruled that:

“...it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.

46 Ibid, at para 24.

47 Ibid.

48 Ibid.

49 Ibid.

50 Ibid.

51 Ibid.

52 (1979) 2 EHRR 305, at para 26.

53 In that the Article did not specify that each state must provide legal aid for all areas of law.

54 (1979) 2 EHRR 305, at para 26.

55 Ibid.

In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts.<sup>56</sup>

The international treaties do not make express provision for free legal aid in civil proceedings. However, a number of the treaty bodies have commented on legal aid provision and other forms of support mechanisms required to ensure a fair trial.

The Human Rights Committee has noted that *"the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way."*<sup>57</sup> To that end, the Committee has encouraged States to provide legal aid where individuals cannot afford to pay for representation and has noted that in some cases, it may be obliged to do so.<sup>58</sup> It also recognises that in some cases, the State may be obliged to provide legal aid, although it does not provide a full list of situations where this would apply.<sup>59</sup> However, the Committee also notes that the right to legal aid is only explicitly guaranteed in criminal proceedings.<sup>60</sup>

## **ii. Non-discriminatory access to legal aid**

The issue of access to legal aid can also be considered under the discrimination provisions of the international treaties where budget cuts to legal assistance in certain areas of legal proceedings will disproportionately affect one protected group.

The CEDAW Committee identifies, in its general recommendation on the economic consequences of marriage, family relations and their dissolution, that *"free legal aid should be provided to women who do not have the means to pay for court costs and attorney fees, so as to ensure that no woman is forced to forgo her economic rights to obtain a divorce."*<sup>61</sup>

The CRPD Committee has commented that state parties must ensure that persons with disabilities *"have access to legal representation on an equal basis with others"*.<sup>62</sup> In relation to the recent legal aid reforms<sup>63</sup> in England and Wales, the CESCR Committee was concerned that *"the reforms to the legal aid system and the introduction of employment tribunal fees have restricted access to justice in areas such as employment, housing, education and social welfare benefits."*<sup>64</sup>

56 CJEU, C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland, 22 December 2010, paras. 52–54.

57 ICCPR, UN Human Rights Committee, General Comment No. 32, 'Article 14: Right to equality before courts and tribunals and to a fair trial,' CCPR/C/GC/32, 23 August 2007, para 10.

58 Ibid.

59 UN Human Rights Committee, General Comment No. 32 on the Right to equality before courts and tribunals and to a fair trial (23 August 2007) CCPR/C/GC/32, para 10.

60 Ibid. For further discussion on access to legal aid and equality of arms, see section 3.2 'fair trial guarantees'.

61 UN CEDAW Committee, General Recommendation No. 29 on the Economic consequences of marriage, family relations and their dissolution, (30 October 2013) CEDAW/C/GC/29, para 42.

62 UN CRPD Committee, General Comment No. 1 on Equal recognition before the law (19 May 2014) CRPD/C/GC/1, para 38.

63 Legal Aid, Sentencing and Punishment of Offenders Act 2012.

64 UN CESCR Committee, Concluding Observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, (14 July 2016), E/C.12/GBR/CO/6, para 20.

The Committee recommended that:

“the State party review the impact of the reforms to the legal aid system with a view to ensuring access to justice and the provision of free legal aid services, in particular for disadvantaged and marginalized individuals and groups. The Committee takes note of the information provided by the State party on the ongoing review of the employment tribunal fees and recommends the elimination of such fees.”<sup>65</sup>

### C. Circumstances in which access to a court should not be prevented

It is within the State’s discretion (referred to as the ‘margin of appreciation’) to restrict access to a court.<sup>66</sup> These restrictions will be lawful where they are shown to be proportionate and in pursuance of a legitimate aim.<sup>67</sup>

The Human Rights Committee has also noted that the right of access to a court is not absolute but any restrictions on the right must be based on law and justifiable on objective and reasonable grounds.<sup>68</sup> The Committee has further noted that:

“The failure of a State party... to allow access to such a tribunal in specific cases would amount to a violation of article 14 if such limitations are not based on domestic legislation, are not necessary to pursue legitimate aims such as the proper administration of justice... or if the access left to an individual would be limited to an extent that would undermine the very essence of the right.”<sup>69</sup>

Additionally, the right of access to a court will be violated where the restriction is based on “...race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>70</sup> Under ICCPR, this forms part of both the right to equality before the law and the provisions on non-discrimination and is intended to ensure that both parties before the court are treated without discrimination.<sup>71</sup>

In a number of instances, however, the ECtHR has found certain restrictions to have been disproportionate. These restrictions may be directly relevant to litigants in person who come before the courts.

#### i. Prohibitive costs or excessive court fees

In previous cases, the ECtHR has ruled that financial requirements may be imposed upon persons seeking access to court in the fair administration of justice.<sup>72</sup> However, depending on the circumstances of each case, the amount of fees imposed may amount to a restriction of the very essence of Article 6(1).

In *Weissman and others v. Romania*,<sup>73</sup> the ECtHR ruled that the amount of fees imposed will be assessed in the light of the particular circumstances of the case, namely the applicant’s ability to pay the fees and at what phase of the proceedings the fees have been imposed.<sup>74</sup>

65 Ibid, para 21.

66 See above at footnote 42.

67 *Ashingdane v. the United Kingdom*, Application no. 8225/78, para 57.

68 ICCPR, UN Human Rights Committee, General Comment No. 32, ‘Article 14: Right to equality before courts and tribunals and to a fair trial,’ CCPR/C/GC/32, 23 August 2007, para 9.

69 Ibid, at para 18.

70 Ibid, at para 9 and Article 14 of the ECHR.

71 Ibid, at para 8.

72 See *Tolstoy Miloslavsky v. the United Kingdom*, Application no. 18139/91. In this case, the court found that a security for costs order of £124,000, payable within 14 days of attempting to appeal to the Court of Appeal, was imposed in the fair administration of justice given that; the order pursued a legitimate aim (to protect the other party from an irrecoverable bill of legal costs), the original hearing had taken around forty days, the figure of £124,000 was a reasonable estimate of the other party’s potential costs in the Court of Appeal and the order was made with the view that the applicant had failed to show real and substantial grounds for his appeal.

73 Application no. 63945/00.

74 The facts of *Weissman* record that the proceedings had been cancelled after the applicants had failed to pay €323,264 in stamp duty, which was required so that the case would be heard. The amount was calculated on the basis of a set percentage of the amount at stake in the proceedings rather than by reference to the applicant’s personal financial circumstances. The ECtHR considered that the amount was excessive and had implicitly forced the applicants to abandon their action, depriving them of their right to have the case heard by a court. The Court particularly took into consideration that the stamp duty had been required at the very start of the proceedings. There had therefore been a breach of Article 6(1).

In *R (on the application of UNISON) v. Lord Chancellor*,<sup>75</sup> the Supreme Court of the United Kingdom considered employment tribunal court fees in the context of access to justice. Although the judgment was grounded in English common law, the judgment considered the proportionality of the applicable fees under Article 6(1). The judgment noted the fundamental importance of the right of access to a court under both English common law and EU law.<sup>76</sup> It further noted that *"the amount of the fees assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them, and the phase of the proceedings at which that restriction has been imposed, are factors which are material in determining whether or not a person enjoyed the right of access to a court."*<sup>77</sup>

The Supreme Court subsequently came to the conclusion that as the fees were unaffordable to some people, and *"so high as in practice to prevent even people who can afford them from pursuing claims for small amounts and nonmonetary claims,"*<sup>78</sup> they were disproportionate and unlawful under EU law.

Prohibitive costs and excessive court fees have also been considered by the ICCPR Committee who noted that the *"imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under article 14, paragraph 1. In particular, a rigid duty under law to award costs to a winning party without consideration of the implications thereof or without providing legal aid may have a deterrent effect on the ability of persons to pursue the vindication of their rights under the Covenant in proceedings available to them."*<sup>79</sup>

Nevertheless, as article 14 ICCPR is not absolute, the Committee has ruled that it is permissible to impose fees where they are for the purpose of ensuring the administration of justice.<sup>80</sup>

The Human Rights Committee further notes that other forms of assistance may be required in exceptional circumstances, citing the example of an interpreter where otherwise a party could not participate in proceedings.<sup>81</sup>

## **ii. Strict or incoherent procedural rules**

In certain circumstances, the ECtHR has found that strict procedural rules may breach article 6(1) by depriving an applicant of their right of access to a court. In the case of *Pérez de Rada Cavanilles v. Spain*,<sup>82</sup> the applicant's appeal was refused as she had failed to lodge the appeal within three days of the service of the decision of the lower court.<sup>83</sup> The applicant was unable to do this as the Court of Appeal was located more than 200 miles away from her home. The ECtHR found that although the applicant had posted her appeal on the third day of receipt of the decision, it was unlikely to have reached the appeal court more quickly even if she had prepared the appeal and posted it on the same day that she received it. The applicant had further attempted to lodge the appeal in her local court within the time limit. Given these attempts, the ECtHR found that the applicant had not acted negligently and to require her to travel the distance required to lodge her application within the time limit would have been unreasonable. Additionally, given that the Appeal Court had already been made aware of the applicant's intention to lodge an appeal the ECtHR considered that *"in this instance the particularly strict application of a procedural rule by the domestic courts deprived the applicant of the right of access to a court."*<sup>84</sup>

75 [2017] UKSC 51.

76 See for example at para 68.

77 *Ibid*, at para 112.

78 *Ibid*, at para 117.

79 ICCPR, UN Human Rights Committee, General Comment No. 32, 'Article 14: Right to equality before courts and tribunals and to a fair trial,' CCPR/C/GC/32, 23 August 2007, para 11.

80 *Casanovas v France*, HRC Communication 1514/2006, UN Doc CCPR/C/94/D/1514/2006 (2008), para 11.3.

81 UN Human Rights Committee, General Comment No. 32 on the Right to equality before courts and tribunals and to a fair trial (23 August 2007) CCPR/C/GC/32, para 13.

82 Application no. 28090/95.

83 The appeal had arrived at the court two days after the time limit expired.

84 Application no. 28090/95, at para 49.

In *Shamoyan v. Armenia*,<sup>85</sup> the applicant attempted to lodge an appeal to the Armenian Court of Cassation. In the proceedings in the lower courts, the applicant had represented herself. Her appeal to the Court of Cassation was refused on the grounds that her appeal had not been submitted by an advocate who was licensed to act before the Court of Cassation<sup>86</sup> as per Armenian domestic law. Legal aid was also not available for this particular civil case.<sup>87</sup> The ECtHR found a breach of Article 6(1) because, as in *Airey*,<sup>88</sup> the procedure of the Court of Cassation made the assistance of a lawyer indispensable in circumstances where the applicant could not afford one and was ineligible for legal aid.

Where a procedural rule is particularly incoherent, the ECtHR has also found that this may breach article 6(1). In the case of *de Geouffre de la Pradelle v. France*,<sup>89</sup> the applicant applied to judicially review a decision taken by a government department, which declared part of the applicant's property an area of conservation. The application for judicial review was ruled to be out of time and inadmissible. The applicant subsequently complained of a breach of his right of access to court under article 6(1). In assessing the case, the ECtHR noted the 'extreme complexity' of the law of conservation of places of interest along with the case-law on the classification of administrative acts. In order to view the pertinent judgment<sup>90</sup> giving him the time limit to appeal, the applicant would have had to travel 500km from his home. The ECtHR also noted that the domestic proceedings concerning the applicant took place over a period of two and a half years. Given both of these factors, "*such complexity was likely to create legal uncertainty as to the exact nature of the decree... and as to how to calculate the time-limit for bringing an appeal.*"<sup>91</sup>

The ECtHR concluded that "*the applicant was entitled to expect a coherent system that would achieve a fair balance between the authorities' interest and his own; in particular he should have had a clear, practical and effective opportunity to challenge an administrative act that was a direct interference with his right of property... all in all, the system was therefore not sufficiently coherent and clear.*"<sup>92</sup>

### **iii. Access to information or assistance**

In the case of *Blumberga v. Latvia*,<sup>93</sup> the applicant instigated domestic proceedings for damages against the police as a result of her property being stolen whilst she was in police custody. She asked to be exempted from court taxes owing to her poor financial situation and submitted documentation to illustrate this. On two occasions, the domestic court informed the applicant that the documents she had submitted were insufficient forms of evidence. The court therefore asked her to amend the deficiencies. On the third occasion, the domestic court considered that the deficiencies had not been rectified and returned the claim to the applicant without examination on the grounds that it had not been properly submitted.

The ECtHR declared that there had been a violation of Article 6(1) given that the domestic courts "*did not indicate to the applicant what additional documents it was necessary to submit in order to prove her financial situation and the circumstances on which her claim was based.*"<sup>94</sup> The ECtHR noted that the refusal of the domestic courts to

85 Application no. 18499/08.

86 The ECtHR have noted that the Convention does not require Contracting States to set up courts of appeal however where these courts do exist, they must be Article 6 compliant. See *Airey v. Ireland*, above, at part 3.1 B i.

87 Civil legal aid was only available in Armenia in cases involving alimony payments, infliction of damage to health or loss of a breadwinner. The applicant's claim concerned a dispute with her neighbour over ownership of a construction at the entrance of their multi-flat house which the applicant wished to replace with a ramp to allow her to use her wheelchair to gain access to her home.

88 See above at footnote 46.

89 Application no. 12964/87.

90 The ECtHR noted that this was an 'isolated' judgment of which only an extract had been published in the relevant legal journal.

91 Application no. 12964/87, at para 33.

92 *Ibid*, at para 35.

93 Application no. 70930/01.

94 *Ibid*, at para 78.

examine her claim was manifestly unwarranted as it considered that the applicant did submit sufficient evidence as regards her financial situation and basis for her claim. Therefore, “*while she had formal access to a court, the refusal of the court to examine the merits of her claims deprived that access of any substance.*”<sup>95</sup>

In this case the applicant represented herself before the domestic courts.<sup>96</sup> Although her status as a personal litigant is not explicitly given as the reason why her Article 6(1) right was breached when the court refused to provide her with guidance as to what documentation to submit, it is unlikely that the specific set of circumstances outlined above would have arisen had she been legally represented.<sup>97</sup>

## D. Lawful Restrictions on Access to a Court

Where a litigant falls into a certain category, case law has suggested that restrictions on their access to court may be proportionate. If the litigant is vexatious, of unsound mind, bankrupt<sup>98</sup> or a minor, limitations on their access to court will likely be found to be Article 6(1) compliant as long as any restriction pursues a legitimate aim and is proportionate to the aim sought to be achieved.<sup>99</sup>

### i. Vexatious litigants

In *H. v the United Kingdom*,<sup>100</sup> the applicant claimed a breach of his Article 6(1) right to access a court as a vexatious litigant order had been made, which stated that the leave of a Judge was required before he could commence proceedings. His application was declared inadmissible by the Commission as the imposition of the vexatious litigant order did not restrict the applicant’s right of access to court, but rather, provided for a review by a senior judge of any case that he wished to bring. The Commission noted, “*some form of regulation of access to court is necessary in the interests of the proper administration of justice and must therefore be regarded as a legitimate aim.*”<sup>101</sup>

### ii. Mental incapacity

Restrictions on access to a court where a person is mentally incapacitated will not fall foul of Article 6(1) automatically; however, where such restrictions completely deprive persons who lack capacity of their Article 6 right, the ECtHR has declared these restrictions to be in violation of the Convention.

In *Winterwerp v. The Netherlands*,<sup>102</sup> the applicant was committed to a psychiatric hospital on an emergency basis. In accordance with Dutch law, he then automatically lost the capacity to administer his property which meant that he could not enter into contracts, legally transfer property or operate a bank account. His affairs were at first managed by his wife and then, as detention continued, by an appointed guardian. The applicant submitted to the ECtHR that as a result of this loss of capacity, there had been a determination of his civil rights and obligations without the procedures required by Article 6(1).

95 Ibid.

96 Paragraph 2 of the judgment states: “*Although the Applicant was granted legal aid, she submitted her observations on the admissibility and merits of the application by herself.*”

97 The applicant sought costs from the Latvian government in respect of her legal representation in the European proceedings and “*for legal advice she sought during the examination of her case by the domestic authorities.*” The advice was given by a ‘private person’ who was not a lawyer. The ECtHR considered that “*an applicant is entitled to reimbursement of costs and expenses in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum.*” With regard to the circumstances of the case, the ECtHR therefore rejected the claim for costs.

98 In *Luordo v. Italy*, Application no 32190/96, a bar on the bankrupt applicant’s ability to litigate was seen to pursue the legitimate aim of protecting the rights of his creditors.

99 In *M v. the United Kingdom*, Application no. 12040/86 the Commission noted, “*In the majority of the contracting states, the right of access to court is regulated in respect of minors, vexatious litigants, persons of unsound mind and persons declared bankrupt. Such regulations are not in principle contrary to Article 6 (Art. 6) of the Convention, where the aim pursued is legitimate and the means employed to achieve the aim is proportionate.*”

100 Application no. 11559/85.

101 Ibid, at p 285.

102 Application no. 6301/73.



The ECtHR concluded that there had been a violation of Article 6(1), noting that:

“neither in law nor in practice was Mr. Winterwerp afforded the opportunity of being heard, either in person or through a representative.”<sup>103</sup>

The ECtHR went on to state:

“whatever the justification for depriving a person of unsound mind of the capacity to administer his property, the guarantees laid down in Article 6(1) para. 1 (art. 6-1) must nevertheless be respected. While... mental illness may render legitimate certain limitations upon the exercise of the ‘right to a court’, it cannot warrant the total absence of that right as embodied in Article 6(1) para. 1 (art. 6-1).”<sup>104</sup>

The position under ECHR law can be contrasted to the position in the international standards, particularly under the UNCRPD which requires that persons be provided with access to support to exercise their legal capacity.<sup>105</sup> Under the UNCRPD, a person with a disability has the right to expect equal recognition before the law<sup>106</sup> and access to justice.<sup>107</sup> The CRPD Committee recognises the interrelationship between the two rights as the recognition of legal capacity is “*essential for access to justice*”.<sup>108</sup>

The CRPD Committee has identified that the “*type and intensity of support will vary significantly from one person to another owing to the diversity of persons with disabilities*”.<sup>109</sup> It does provide some examples of support, including choosing a trusted person to assist them in exercising their legal capacity, peer support, advocacy or assistance with communication.<sup>110</sup>

Article 13 UNCRPD entitles effective access to justice through the provision of “*procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings*”. The CRPD reinforces that such support can take various forms including communication methods, sign language or other assistive methods and procedural accommodations.<sup>111</sup>

Article 13(2) UNCRPD expressly refers to the promotion of relevant training for those in the field of the administration of justice. The CRPD Committee also outlines the importance of training the judiciary so that they are “*made aware of their obligation to respect the legal capacity of persons with disabilities including legal agency and standing*”.<sup>112</sup>

## E. Effective participation

There has been some consideration by the domestic courts of whether or not a litigant in person’s ability to participate in a case effectively will affect the right to access a court. The issue was considered in the case of *Perotti v Collyer-Bristow (a firm)*<sup>113</sup> where the English Court of Appeal was asked, amongst other applications, to allow an appeal against the lower court which refused to order representation for a litigant in person. Lord Justice Chadwick concluded that:

103 Ibid, at para 74.

104 Ibid, at para 75.

105 Article 12(3) UNCRPD.

106 Article 12 UNCRPD.

107 Article 13 UNCRPD.

108 UN CRPD Committee, General Comment No. 1 on Equal recognition before the law (19 May 2014) CRPD/C/GC/1, para 38.

109 Ibid, at para 18.

110 Ibid, at para 17.

111 Ibid, at para 39.

112 Ibid.

113 [2003] EWCA Civ 1521.

“The test under Article 6(1), as it seems to me, is whether a court is put in a position that it really cannot do justice in the case because it has no confidence in its ability to grasp the facts and principles of the matter on which it has to decide. In such a case it may well be said that a litigant is deprived of effective access; deprived of effective access because, although he can present his case in person, he cannot do so in a way which will enable the court to fulfil its paramount and over-arching function of reaching a just decision.”<sup>114</sup>

The above interpretation demonstrates a number of factors regarding participation. In contrast to cases where parties are represented, it is not enough to satisfy Article 6(1) that a litigant in person is merely ‘present’ in the case. The judgment acknowledges that a litigant in person will have to do more and undertake the functions of a lawyer by assisting the court to ‘grasp’ the facts and principles of the case. If the litigant in person is not able to participate by doing this, then the Court cannot reach a just decision.<sup>115</sup> This recognises that in order to ‘participate’, the litigant in person must have the opportunity to affect the outcome of the case.

Almost ten years later, the judgment in *Perotti* was considered by the English Court of Appeal again in *R (on the application of Gudaviciene & ors) v The Director of Legal Aid Casework and The Lord Chancellor*.<sup>116</sup> In this case, the English Court of Appeal considered the compliance of the guidance for granting exceptional case funding with Article 6. When coming to its conclusion, the judgment expanded the phrase of ‘a just decision’ to include “*both procedural justice (fairness) and substantive justice (reaching the correct result)*.”<sup>117</sup> The Court concluded that:

“...the greater the complexity of the procedural rules and/or the substantive legal issues, the more important what is at stake and the less able the applicant may be to cope with the stress, demands and complexity of the proceedings, the more likely it is that article 6(1) will require the provision of legal services (subject always to any reasonable merits and means test).”<sup>118</sup>

The Court therefore decided that the guidance was too restrictive in light of Article 6(1). Analysing this judgment from the perspective of participation suggests that a litigant in person must be able to ‘cope’ with the proceedings. In effect, he or she must be able to handle the ‘stress, demands and complexity’ of his case in order to participate effectively. These factors will be highly case specific but suggest that where a litigant in person will be so overwhelmed by the features of a case that he or she cannot effectively participate, Article 6(1) will be violated unless legal aid or other legal support is provided. The ability to participate is therefore of central importance to the right to access a court.

114 *Ibid*, para 32.

115 It is interesting to note that Lord Justice Chadwick described this as a ‘relatively high threshold’ to meet, see para 31.

116 [2014] EWCA Civ 1622.

117 *Ibid*, at para 55.

118 *Ibid*, at para 56.

## 3.2 Fair Trial Guarantees

### Summary

- There should be ‘equality of arms’ between the parties though this does not extend to the provision of legal aid in every scenario. Therefore, a litigant in person appearing against a government department represented by a full legal team will not necessarily breach Article 6(1);
- Cases which are procedurally and legally complex, lengthy and pose extensive requirements on a litigant in person may require the provision of legal aid so as to not breach the equality of arms principle. In these cases, even extensive assistance by Judges and extensive latitude granted to litigants in person will not be enough to ensure that the principle of equality of arms is respected;
- Domestic Courts must ensure that litigants in person are properly ‘heard’. In certain cases, this will necessitate the Court taking steps to assist the litigant in person, such as notifying them of their right to make comment on the other side’s submissions. This will particularly be the case where the Court is aware of the fact that a litigant in person is unrepresented and will not be in possession of the same procedural and legal knowledge as a lawyer;
- There is a limit to this judicial assistance, which must not subvert the judge’s impartiality and will not extend to assisting the litigant in person with their substantive arguments.
- As well as the right to comment on the other side’s submissions, litigants in person are entitled to time to prepare these comments;
- Article 6(1) guarantees must be enjoyed without discrimination. Domestic Courts will need to make reasonable adjustments for disabled litigants, particularly where they are unrepresented. The Equal Treatment Bench Book should be consulted and referred to for guidance;
- Domestic Courts should ensure that litigants are involved in the decision-making process to a sufficient degree to protect their interests;
- Litigants in person should exhibit diligence and timeliness when participating in proceedings as their own conduct will be examined by higher courts if any breach of Article 6(1) is alleged;
- Unduly harsh behaviour by a judge towards a litigant in person will not necessarily be indicative of bias;
- There is no requirement for judges to respond to every argument that a litigant in person makes in their case however, the judgment must give sufficient reasons so as to allow any party to make use of their ability to appeal.

### A. Equality of arms

The principle of equality of arms requires a fair balance between the parties. Each party should be afforded a reasonable opportunity to present their evidence and to present their case in a manner that does not create a substantial disadvantage in relation to their opponent.<sup>119</sup> The features of equality of arms overlap with those of the adversarial principle, in as much as there must be adequate procedural safeguards to ensure that one party is not allowed to give evidence in court in the absence of the other and where the absent party has no opportunity to comment or reply to that evidence.<sup>120</sup>

<sup>119</sup> *Dombo Beheer B.V. v. the Netherlands*, Application no. 14448/88, para. 33.

<sup>120</sup> *APEH Üldözötteinek Szövetsége and Others v. Hungary*, Application no. 32367/96, at para 39.

In effect, there will be a breach of Article 6(1) where the procedures of the domestic court have given rise to a “*detrimental imbalance*”<sup>121</sup> between the parties. However, where there has been a minor inequality<sup>122</sup> which does not affect the fairness of the proceedings in general, Article 6(1) will not have been breached.

***i. Access to legal aid or other legal support and the effect on equality of arms***

Although previously considered in respect of the right to access a court, legal aid provision can also engage equality of arms issues. Two ECtHR cases have each dealt with personal litigants who were deprived of legal aid and as result had to defend themselves against defamation actions by plaintiffs with substantial legal resources.

*McVicar v. the United Kingdom*<sup>123</sup> came before the ECtHR after the applicant lost an action of defamation taken against him by the athlete, Linford Christie.<sup>124</sup>

During the majority of proceedings in the High Court, the applicant represented himself because he could not afford to pay legal fees and defamation was not covered by legal aid.<sup>125</sup> Whilst unrepresented, Mr McVicar did not comply with an order for directions and serve an expert report but rather served a ‘summary’ of expert evidence, which he mistakenly believed would comply with the order.<sup>126</sup> Mr McVicar eventually secured representation around two months before the trial and his lawyer attempted to secure witness statements, which would comply with the earlier order. These witness statements were then served upon Mr Christie’s lawyers an hour before the trial was due to commence. The trial judge refused to allow the evidence to be admitted.<sup>127</sup>

Mr McVicar appealed this ruling to the Court of Appeal who upheld the trial judge’s findings on admissibility.<sup>128</sup> The applicant was subsequently found to have defamed Mr Christie and was ordered to pay costs and made subject to an injunction preventing him from repeating the defamatory statements.<sup>129</sup>

Mr McVicar complained to the ECtHR stating that the United Kingdom had violated his Article 6(1) right to a fair trial by refusing to provide legal aid. The ECtHR considered Mr McVicar’s complaint in light of the equality of arms principle.<sup>130</sup>

When finding that there was no violation of Article 6(1) by the exclusion of the evidence, the ECtHR noted that:

- The applicant was “*a well-educated and experienced journalist who would have been capable of formulating cogent argument. His position in this respect can be contrasted with that of the applicant in Airey.*”<sup>131</sup>
- The rules which resulted in the exclusion of his witnesses’ evidence were “*clear and unambiguous.*”<sup>132</sup>
- The law of defamation was not sufficiently complex to require a person to have legal assistance.<sup>133</sup>

121 *Yvon v. France*, Application no. 44962/98, para 37.

122 See, for example, *Verdú Verdú v. Spain*, Application no. 43432/02, wherein whilst the applicant was not served with written submissions and could not comment upon them, the submissions merely reproduced the Public Prosecutor’s arguments. As such there was no violation of Article 6.

123 Application no. 46311/99.

124 Mr McVicar had written in an article for a magazine alleging that Mr Christie used banned substances to enhance his athletic performance.

125 Application no. 46311/99, at para 11.

126 *Ibid.*, at para 14.

127 *Ibid.*, at para 18.

128 *Ibid.*, at para 20.

129 *Ibid.*

130 Mr McVicar originally complained that the lack of legal aid had denied him access to a court. The ECtHR distinguished Mr McVicar’s situation from that of Mrs. Airey’s, above at part 3.1 B i, noting that the question was not whether the applicant had access to a court, as he had been a defendant in the earlier proceedings, but rather, whether or not the proceedings had been fair and allowed him to present an effective defence, Application no. 46311/99, at para 50.

131 *Ibid.*, at para 53.

132 *Ibid.*, at para 54.

133 *Ibid.*, at para 55.

- Whilst the nature of a defamation action is to protect one's reputation, it *"is clearly to be distinguished from an application for judicial separation, which regulates the legal relationship between two individuals and may have serious consequences for any children of the family."*<sup>134</sup>
- Finally, the ECtHR believed that the applicant should have understood what was expected of him under the rules and the order for directions. *"If he was unsure as to any particular issue, he could have sought guidance during the hearing...at which he was present."*<sup>135</sup>

The Court took into consideration the applicant's capacity to present his case, the clarity and coherence of the rules, the complexity of the law underpinning the application and the ability of the applicant to seek clarification. The case appears to place a duty on litigants in person to seek assistance from the presiding judge in cases where they are not clear as to the directions of the court. Where this is not done, it may be more difficult to argue that there has been a breach of the right to effectively present a defence. Additionally, in *McVicar*, the ECtHR distinguished *Airey* 'family' cases from other types of action with respect to requiring a legal advocate to effectively present your case. To that end, it may be difficult for a litigant in person in some civil law cases to argue that they were incapable of coherently arguing their case purely due to personal investment in the matter.

The equality of arms issues and the absence of legal aid was also considered in *Steel and Morris v. the United Kingdom*,<sup>136</sup> which arose after the 'McLibel' case where two members of London Greenpeace were sued for defamation by McDonald's.<sup>137</sup>

The applicants represented themselves throughout the trial and the appeal although they received donations from the public, and some help from lawyers acting pro bono who appeared for them on three occasions throughout the trial.<sup>138</sup> This was in contrast to McDonald's who were represented by senior and junior counsel, both experienced in defamation law, two solicitors and other assistants.<sup>139</sup> When the trial ended, the judge ruled that the applicants had defamed McDonald's and awarded the company £60,000 in damages.<sup>140</sup>

The applicants appealed the ruling to the Court of Appeal who rejected the submission that the trial was conducted unfairly but noted that:

*"litigants in person who bring or contest a High Court action are inevitably undertaking a strenuous and burdensome task."*<sup>141</sup>

The Court observed that although the trial lasted 313 days,

*"the timetable had proper regard to the fact that the [applicants] were unrepresented and to their other difficulties...we have invariably been impressed by the care, patience and fairness shown by the judge. He was well aware of the difficulties faced by the [applicants] as litigants in person and had full regard to them in his conduct of the trial."*<sup>142</sup>

134 Ibid, at para 61.

135 Ibid, at para 54.

136 Application no. 68416/01

137 Damages of £100,000 were claimed by the restaurant.

138 Application no. 68416/01, at para 16.

139 The facts of the case record that there were twenty-eight interim applications before the start of the trial, some which lasted as long as five days. The trial itself lasted for 313 days, 40 of which were focussed on legal argument; the transcript of the trial was 20,000 pages, there were 40,000 pages of evidence and 130 witnesses gave oral evidence, see application no. 68416/01, at paras 16 – 19.

140 Ibid, at para 29.

141 Application no. 68416/01, at para 33.

142 Ibid.

The Court further observed that:

“...the [applicants] were shown considerable latitude in the manner in which they presented their case and in particular in the extent to which they were often permitted to cross-examine witnesses at great length.”<sup>143</sup>

The applicants complained to the ECtHR claiming they were denied a fair trial owing to the lack of legal aid.<sup>144</sup> When assessing the case, the ECtHR noted that:

“it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side.”<sup>145</sup>

The ECtHR further reiterated the findings from Airey<sup>146</sup> and McVicar;<sup>147</sup> that whether legal aid is necessary for a fair hearing will depend on the facts and circumstances of each case including what is at stake for the applicant, the complexity of the law and procedure involved and the applicant’s ability to represent themselves effectively.<sup>148</sup> Nevertheless, the Court stated that:

“it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage.”<sup>149</sup>

When deciding that there had been a violation of Article 6(1), the ECtHR took into account:

- The extensive legal and procedural issues that had to be decided in the original hearing with some 100 days devoted to legal argument.<sup>150</sup>
- That some of the legal issues presented were held by the court to be too complicated for a jury to understand.<sup>151</sup>
- That in contrast to the McVicar case, the applicants had to prove the truth of several, highly complex allegations.<sup>152</sup>

The ECtHR therefore considered that:

“in an action of this complexity, neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in person was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel.”<sup>153</sup>

143 Ibid.

144 They noted in their submissions that this was the longest trial, either civil or criminal, in English legal history, lasting nine years from the issue of the writ to the refusal of the House of Lords to hear their appeal. The applicants did not have sufficient funds for “*photocopying, purchasing the transcripts of each day’s proceedings, tracing and proofing expert witnesses, paying the witnesses’ costs and travelling expenses and note-taking in court*,” *ibid* at para 51. On several occasions they had to seek adjournments due to physical exhaustion. Their lack of experience and legal training meant they had made a number of procedural mistakes which had a direct effect on their success at trial, *ibid* at paragraphs 49 – 52. In response, the Government noted several features of the case that came about as a result of the applicants lack of representation: the trial judge “*assisted the applicants by reformulating questions for witnesses and did not insist on the usual procedural formalities, such as limiting the case to that pleaded; the Court of Appeal took note in its judgment of the need to safeguard the applicants from their lack of legal skill, conducted its own research to supplement the submissions made by the applicants and allowed them to introduce the defence of fair comment at the appeal stage, even though it had not been raised at first instance*,” *ibid* at para 57. The Government further submitted that “*the hearings before the High Court and the Court of Appeal took so long because the applicants were afforded every possible latitude in the presentation of their case; their evidence and submissions took up the great bulk of the time*,” *ibid*, at para 57.

145 *Ibid*, at para 59.

146 Above at part 3.1 B i

147 Above at part 3.2 A i.

148 Application no. 68416/01, at para 61.

149 Application no. 68416/01, at para 62.

150 *Ibid*, at para 66.

151 *Ibid*, at para 65.

152 *Ibid*.

153 *Ibid*, at para 69.

**ii. Judicial latitude to ensure equality of arms with respect to complexity, unfamiliarity and stress**

The Steel and Morris case importantly clarifies the limits judicial assistance may be to litigants in person where the legal resources of the other side are vast and the extent of legal argument required is complex. The Court of Appeal, in this case, commended<sup>154</sup> the trial judge for his careful assistance of the two litigants in person and, indeed, appears to have extended the same type of assistance itself. Submissions by the United Kingdom Government suggest that the reason the trial lasted 313 days was because, as litigants in person, the applicants took longer to make submissions, conduct examinations in chief and cross examinations and in general because of the extensive latitude afforded to the applicants by the trial judge.<sup>155</sup> Nevertheless, this latitude was not enough to ensure that unfairness did not arise in the proceedings and therefore the ECtHR found a violation of Article 6(1).

• **Judicial assistance in domestic case-law**

Where a litigant in person is one party to a case the principle of equality of arms is likely to become more difficult to protect and guarantee. In domestic case law concerning litigants in person there is often discussion concerning to what extent the Judge is required to assist unrepresented parties with a case. A notable example in Northern Ireland can be found in *HK v. The Department of Justice*,<sup>156</sup> where Mr Justice Stephens, as he then was, noted that;

“...in a case...where one party has no legal representation then the court is required to give consideration to the appropriate procedure to enable the litigant in person to present her case effectively before the court so that she is able to enjoy equality of arms with the opposing side.”<sup>157</sup>

This reasoning suggests that where one party is unrepresented, the judge in the case will have to at least consider if any modifications are required to ensure equality of arms.<sup>158</sup>

Further considerations will likely arise in proceedings where both parties are unrepresented. There is limited case law on this scenario, but consideration will have to be given as to how judges ensure equality of arms when assisting two unrepresented litigants. The judicial task of assisting two unrepresented parties was commented on in the case of *Re C (A Child)*.<sup>159</sup> In this case, both parties acted as litigants in person at ‘various significant points’ before the lower court. Lord Justice Ryder commented that the case:

“presents a salutary lesson to us all to put in place procedures and practices which can accommodate litigants in person who do not know the rules and practice directions of the court. Since the commencement of the relevant provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) on 1 April 2013 the majority of parents in private law children disputes are litigants in person and the obligation upon the court to identify and implement due process should not be underestimated. That will take time and that means a greater share of the court’s limited resources.”<sup>160</sup>

154 *Ibid*, at para 33.

155 *Ibid*, at para 57.

156 [2015] NIQB 90

157 *Ibid*, at para 5.

158 In this particular case, Mr Justice Stephens, as he then was, concluded that a procedural modification was necessary in order to ensure equality of arms and allowed the matter to be opened by Counsel for the Respondent so that the appellant was aware of the case being made and could respond to it, see para 5.

159 [2013] EWCA Civ 1412.

160 *Ibid*, at para 4.

It is therefore likely that where two parties are unrepresented, the court will have to spend extra time and resources assisting both parties. Whilst this will no doubt stretch the courts 'limited resources', it will likely be required in order to ensure Article 6(1) is respected and that the court arrives at the "*correct legal answer*".<sup>161</sup>

The domestic case law demonstrates that some judges may be willing to assist litigants in person depending on the facts of the case and so long as that assistance does not prejudice the other side. In *Re Thompson*<sup>162</sup>, a litigant in person made an application to be represented by her father, stating that she was too shy to appear on behalf of herself. In rejecting the application, Judge Treacy concluded;

"...Shyness or getting tongue tied are nothing that the Court has not seen before in the context of personal litigants who can and in any event will be assisted by the Court in being put at ease insofar as this is possible... the Court will assist the applicant as far as possible in presenting her case and in a manner which takes due account of the inherent stress for a personal litigant."<sup>163</sup>

The view of the judiciary as regards assisting unrepresented parties was summarised by Mr Justice Stephens in *Toomey v Boylan-Toomey*<sup>164</sup> when he noted that;

"It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side... Litigants in person who bring or contest an action are undertaking what can be a strenuous and burdensome task. The work required of litigants in person at trial may be very considerable and has to be done in an environment which, at least initially, could be unfamiliar to them... A degree of latitude should be allowed to litigants in persons dealing with the complexities of cases. The exact degree of latitude will depend on the circumstances of each individual case. For instance an unrepresented litigant can be allowed a greater degree of time for preparation. In view of the lack of legal training assistance can be given by the trial judge by reformulating questions for witnesses, by not insisting on the usual procedural formalities, such as limiting the case to that pleaded. No doubt there can be other ways by which a trial can be conducted fairly where there is a lack of legal skills."<sup>165</sup>

Where one party is unrepresented it creates an inequality; Article 6(1) requires the judge to assist the litigant in person to ensure that the principle of equality of arms is upheld. The extent and nature of this assistance will depend on the facts and circumstances of the case and the particular assistance required by the litigant. It is important to note that this assistance is unlikely to extend to altering or disregarding the usual rules and court procedures as can be seen by considering the judicial approach to procedural equality.<sup>166</sup>

### **iii. Balancing judicial assistance with judicial impartiality**

It is also important to note that offering assistance to a litigant in person will be seen to engage the issue of the judge's neutrality, as demonstrated by Mr Justice Mark Horner in *The Matter of 34 Lomond Avenue*.<sup>167</sup>

<sup>161</sup> The extra assistance required where two litigants in person are before the court was remarked upon in *Lindner v Rawlins* [2015] EWCA Civ 61 at para 34 when Lord Justice Aikens commented that "*the court was without any legal assistance and had to spend time researching the law for itself then attempting to apply it to the relevant facts in order to arrive at the correct legal answer. To do the latter exercise meant that the court itself had to trawl through a large amount of documents in the file. All this involves an expensive use of judicial time, which is in short supply as it is... this way of dealing with cases runs the risk that a correct result will not be reached because the court does not have the legal assistance of counsel that it should have and the court has no other legal assistance available to it.*"

<sup>162</sup> [2010] NIQB 120.

<sup>163</sup> *Ibid*, at paras 23 – 24.

<sup>164</sup> [2008] NIFam 15.

<sup>165</sup> *Ibid*, at para 14.

<sup>166</sup> For further discussion on this area, see section E.

<sup>167</sup> [2016] NICH 16.



“The judge has to treat carefully in the assistance he offers to a personal litigant. For the judge to be seen to assisting one of the parties is to compromise his or her neutrality and to leave the judge open to accusations of bias.”<sup>168</sup>

On the view of Justice Horner, there is a limit to the judicial assistance that can be offered to a litigant in person given the importance of preserving the judge’s impartiality. An example from this case included the suggestion that the judge might explore the possible arguments available to the litigant in person:

“...But it is not the role of a judge to go hunting in the undergrowth for possible arguments that might be made on behalf of the personal litigant. That is to go too far. It imperils the judge’s independence.”<sup>169</sup>

The Supreme Court has recently considered the interlinking issues of judicial impartiality, compliance with the rules by litigants in person and any assistance or ‘leeway’ to be given to persons self-representing by the court. In *Barton v Wright Hassall LLP*,<sup>170</sup> the court noted that “*lack of representation will often justify making allowances in making case management decisions and in conducting hearings,*”<sup>171</sup> but that “*it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court.*”<sup>172</sup> The Supreme Court noted that expecting litigants in person to comply with the rules was justified as a “*matter of basic fairness.*”<sup>173</sup>

The Court additionally noted that “*unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take.*”<sup>174</sup> The Court did not go on to define what it considered ‘particularly inaccessible or obscure’ however it noted that the particular rules at issue in this case were “*accessible on the internet,*”<sup>175</sup> and clearly marked. The information the litigant obtained from the court service also directed him to the rules and to where he could find them on the internet. Whilst the Supreme Court did not consider this case under Article 6(1),<sup>176</sup> it is useful to note that the availability and accessibility of relevant rules on the internet; the clear language of the rules and the court services’ direction<sup>177</sup> to the rules were important considerations for the Supreme Court in deciding on the litigant’s appeal.

## B. States’ obligations to exercise diligence for access to a fair hearing

The Human Rights Committee identifies that the principle of equality of arms applies to civil proceedings and requires that each side has the opportunity to contest all arguments and evidence adduced by the other party.<sup>178</sup> In short, each party has the right to adversarial proceedings where they can have knowledge of and comment on all evidence before the court with a view to influencing the outcome in their favour.<sup>179</sup> In *Kraska v. Switzerland*,<sup>180</sup> the ECtHR stated that Article 6(1) places tribunals under a duty to “*conduct a proper examination of the submissions, arguments and evidence adduced by the parties.*”<sup>181</sup> This effectively means that in order for a

168 *Ibid*, at para 12.

169 *Ibid*, at para 13.

170 [2018] UKSC 12

171 *Ibid*, para 18.

172 *Ibid*.

173 *Ibid*.

174 *Ibid*.

175 *Ibid*, para 19.

176 The judgment makes a brief reference to Article 6(1) at para 24. The Court considered that the arguments made by the litigant under the ECHR were without merit.

177 The claim form that the litigant in person was required to fill out contained the words “*Rules relating to the service of documents are contained in Part 6 of the Civil Procedure Rules (www.justice.gov.uk) and you should refer to the rules for information.*” – see para 19 of judgment.

178 UN Human Rights Committee, General Comment No. 32 on the Right to equality before courts and tribunals and to a fair trial (23 August 2007) CCPR/C/GC/32, para 13.

179 *Nideröst-Huber v. Switzerland*, Application no 18990/91, at paras 26 – 27.

180 Application no. 13942/88.

181 *Ibid*, at para 30.

fair hearing to take place, each party must be 'heard'. To ensure that a party has been 'heard', the Contracting States must exercise "diligence".<sup>182</sup>

Cases have come before the ECtHR detailing the diligence that states must exercise in order to comply with Article 6(1) and ensure the applicant is heard, receives an adversarial hearing and therefore receives a fair trial. The ECtHR has looked at procedural issues, which might affect the applicant's ability to participate in their trial.

- In *Kerojarvi v. Finland*<sup>183</sup> there was found to be a violation of Article 6(1) as the applicant had not been informed of documents received by the domestic court, which affected the final decision. The applicant was a litigant in person who could not be expected to be aware that the documents would have been received by the lower court. The ECtHR further commented that the Supreme Court would have known that the applicant was without a lawyer and made no efforts to communicate the existence of the documents to him. As a result, "*the procedure followed before the Supreme Court was not such as to allow proper participation of the appellant party.*"<sup>184</sup>
- Similarly, in *Krcmar v. The Czech Republic*,<sup>185</sup> the applicants were denied a fair trial as the decision of the domestic Constitutional Court had been based on documents sought out by the Constitutional Court of its own volition, which were not communicated to the parties before or during the hearing. There had been no breach in the equality of arms principle as neither of the parties had been made aware of these documents; however, the applicants had been denied an adversarial hearing as they had no opportunity to comment on the documents. The ECtHR further noted that even if the documents had been brought up by the domestic court during the hearing, Article 6(1) would not have been satisfied as "*a party to the proceedings must have the possibility to familiarise itself with the evidence before the court, as well as the possibility to comment on its existence, contents and authenticity in an appropriate form and within an appropriate time, if need be, in a written form and in advance.*"<sup>186</sup>
- The applicant must be allowed to participate meaningfully. In *Cruz De Carvalho v. Portugal*<sup>187</sup> the applicant was not allowed to question witnesses or participate actively in the proceedings of a civil case. The ECtHR held that this placed the applicant at a disadvantage and breached the obligation to offer all parties the right to reasonably present their cases. As a result, a breach of Article 6(1) had occurred.
- The right to access a fair hearing must be enjoyed without discrimination.<sup>188</sup> In *Galo v. Bombardier Aerospace UK*,<sup>189</sup> the Court of Appeal in Northern Ireland considered an appeal from the Industrial Tribunal from a person with Asperger's Syndrome who had his contract of employment terminated. When considering his appearance before the Industrial Tribunal, the Court of Appeal noted that for part of the proceedings the appellant was unrepresented,<sup>190</sup> there appeared to be no reasonable adjustments made for the appellant in assisting him to present his case or comply with procedure<sup>191</sup> and there were no references made to the Equal Treatment Bench Book (ETBB) which considers how best to accommodate disabled litigants in the court process.<sup>192</sup> The Court of Appeal concluded that early enquiries should have been made regarding necessary

182 The Court has stated in *Colozza v. Italy*, application no. 9024/80, that Contracting States must exercise diligence to ensure that the rights guaranteed under Article 6 are effectively enjoyed by citizens.

183 Application no. 17506/90.

184 *Ibid.*, at para 42.

185 Application no. 35376/97.

186 *Ibid.*, at para 42.

187 Application no. 18223/04.

188 As per Article 14 ECHR. It should be noted that Article 14 ECHR is not a freestanding right and can only be utilised when attached to another Convention right.

189 [2016] NICA 25.

190 *Ibid.*, at para 62.

191 *Ibid.*, at paras 19, 29 and 42.

192 *Ibid.*, at para 53(4).

adjustments to assist the appellant to participate in the proceedings.<sup>193</sup> This would likely have led to the implementation of sufficient measures to assist the appellant with evidence-in-chief, cross-examination and timeframes.<sup>194</sup> Importantly, the Court of Appeal noted that “*it is not a sufficient argument to state that, even when the appellant was represented, no application for adjustment was made on his behalf. The duty is cast on the Tribunal to make its own decision in these matters.*”<sup>195</sup> As a result of these factors, the failure to refer to the ETBB<sup>196</sup> and the failure to explore alternative representation for the appellant,<sup>197</sup> the appellant did not receive a “*fair procedural hearing*”.<sup>198</sup>

- The procedural rights guaranteed under Article 6(1) can touch upon decisions made by the Court in connection with other Convention rights. In *Elsholz v. Germany*,<sup>199</sup> the ECtHR ruled that there was a violation of both Article 6(1) and Article 8<sup>200</sup> where the domestic authorities did not involve the applicant in the decision-making process, regarding contact with his child, to a sufficient degree so as to protect his interests.<sup>201</sup> When considering the case, the ECtHR noted that:

“a fair balance must be struck between the interests of the child and those of the parent . . . and that in doing so particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parent. In particular, the parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child’s health and development.”<sup>202</sup>

The ECtHR then reviewed the decisions taken by the domestic courts in light of the Convention. The ECtHR noted that the domestic court had not ordered an independent psychological report examining the child’s refusal to see his father and had not conducted an appeal hearing after the applicant had challenged the lower court’s decision not to award him access to his child, instead relying on written submissions.<sup>203</sup> The culmination of both of these decisions resulted in the applicant being insufficiently involved in the decision-making process; the State had therefore overstepped the margin of appreciation in relation to Article 8<sup>204</sup> and had not provided the applicant with a fair and public hearing as required by Article 6.<sup>205</sup>

It is important to note that the right to adversarial proceedings is limited and the extent of the right will depend on the specific circumstances of each case. In *Yvon v. France*,<sup>206</sup> the ECtHR considered that the principle of adversarial proceedings does not require a party to civil proceedings to transmit documents to the other party where those documents are not before the court. Additionally, where the party has not been given sufficient time to prepare a response to documents, if the party successfully applies for an adjournment there will be no breach of the adversarial principle.<sup>207</sup>

193 The Court made particular reference to the ETBB’s recommendation of ‘ground rules’ hearings, see para 56.

194 *Ibid.*, at para 57.

195 *Ibid.*, at para 59.

196 *Ibid.*, at para 61.

197 *Ibid.*, at para 62.

198 *Ibid.*, at para 66.

199 (July 13 2000) [2000] 2 FLR 486.

200 The right to private and family life.

201 (July 13 2000) [2000] 2 FLR 486, para 52.

202 *Ibid.*, para 50.

203 *Ibid.*, para 53.

204 *Ibid.*

205 *Ibid.*, para 66.

206 Application no. 44962/98.

207 *Ibid.*, at para 39.

### **i. Allowances for LIPs: time and particular arrangements**

In some cases, special allowances may have to be made in order to facilitate a litigant in person's participation in the adversarial process, which, for a number of reasons, may take longer to prepare than a represented party. In *Re B*,<sup>208</sup> Mr Justice Jackson considered the impact of the late service of documents where a litigant in person is involved. The judge considered the issue and noted that *"the right to a fair trial includes the right to know the case one has to meet."*<sup>209</sup> Mr Justice Jackson further noted that *"Court hearings are already difficult for LIPs, but many, being inexperienced, are hesitant to complain about matters such as late service."*<sup>210</sup>

*Re B* concerned the case of a mother who was defending wrongful abduction proceedings in the family courts as a non-English speaking litigant in person. On the day of the hearing, the mother was provided with a copy of the applicant's position statement and relevant law reports. Noting that the relevant practice directions for service of documents were 'minimum requirements', Mr Justice Jackson advised that they *"should be adapted in individual cases to protect the rights of LIPs."*<sup>211</sup> When considering the impact of this on the represented party, the judge opined that *"the need for earlier preparation and service places obligations on advocates and those who instruct them, but that is necessary to prevent the intrinsic unfairness to LIPs that may arise from late service."*<sup>212</sup>

This judgment took into account that a litigant in person will require longer to prepare a case and to comment on the evidence that the other party has produced, both of which are key facets in Article 6(1).

## **C. The right to a public hearing**

In relation to public hearings, the ECtHR has also recognised the right to a public hearing as a 'fundamental principle' which:

*"protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society..."*<sup>213</sup>

The Human Rights Committee has commented that:

*"All trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of the oral hearing."*<sup>214</sup>

However, the Human Rights Committee has further noted that *"the requirement of a public hearing does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations, or to pre-trial decisions made by prosecutors and other public authorities."*<sup>215</sup>

<sup>208</sup> *Litigants In Person: Timely Service of Documents* [2016] EWHC 2365 (Fam).

<sup>209</sup> *Ibid.*, at para 3.

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid.*, at para 12.

<sup>212</sup> *Ibid.*

<sup>213</sup> *Werner v. Austria* [1997] ECHR 92, para 45.

<sup>214</sup> ICCPR, UN Human Rights Committee, General Comment No. 32, 'Article 14: Right to equality before courts and tribunals and to a fair trial,' CCPR/C/GC/32, 23 August 2007, para 28.

<sup>215</sup> *Ibid.*

Both the ECtHR and the ICCPR<sup>216</sup> have recognised that the right to a public hearing may be limited in a number of circumstances, so long as the limitation pursues a legitimate aim and is proportionate to that aim.

In *B and P v. the United Kingdom*,<sup>217</sup> the ECtHR concluded that the exclusion of the public in a case involving the residence of a child pursued a legitimate aim, given the highly personal issues involved.

#### D. Fairness and no undue delays

Parties in civil proceedings are entitled to be heard within a reasonable time. The international standards do not proscribe timescales under which cases must be heard, but they do each consider the nature of the delay.

Under the ICCPR, the Human Rights Committee has identified the importance of ‘expeditiousness’ and further commented that “*delays in civil proceedings that cannot be justified by the complexity of the case or the behaviour of the parties detract from the principle of a fair hearing*”.<sup>218</sup>

The CEDAW Committee has also identified that the issues of delay and excessive length of proceedings as a deficiency in the quality of a justice system can prevent women from gaining access to justice.<sup>219</sup> The Committee observes that the ‘quality’ of a justice system is one of six interrelated and essential components needed to ensure access to justice for women under CEDAW.<sup>220</sup>

When considering if the proceedings have been conducted within a reasonable length of time, under the ECHR, the ECtHR will look at the proceedings as a whole<sup>221</sup> along with three specific factors; (1) the complexity of the case; (2) the conduct of the applicant; and (3) the conduct of the authorities.

The ECtHR has stated that only delays attributable to the conduct of the State will lead to a finding that the reasonable time requirement was breached.<sup>222</sup> Nevertheless, in ensuring that proceedings are conducted within a reasonable time, the ECtHR considers that applicants hold certain duties. They must show diligence in carrying out the procedural steps required of them; they must refrain from using delaying tactics and they must “*avail [themselves] of the scope afforded by domestic law for shortening the proceedings.*”<sup>223</sup>

The applicant is under no obligation to take any action which does not accord with the above three duties;<sup>224</sup> however, the ECtHR may take account of the applicant’s conduct when assessing whether the State is responsible for any delay. Therefore, where a litigant in person suggests that the proceedings breached Article 6(1) for not being heard within a reasonable time, the ECtHR will look at their own conduct when deciding if the State is at fault.

#### E. Holding LIPs to the same standard as a legal representative

Recent cases have demonstrated that a litigant in person will usually be held to the same standard as representatives when carrying out procedural necessities,<sup>225</sup> including where the litigant in person is unaware of the procedure. In *Bakir v. Downe*<sup>226</sup> in 2014, Mr Justice Mostyn noted that:

216 Both recognise the authority of courts to exclude all or part of the public from a hearing for reasons of morals, public order, national security, the protection of the private lives or to avoid prejudice to the interests of justice.

217 [2001] ECHR 298, para 38.

218 UN Human Rights Committee, General Comment No. 32 on the Right to equality before courts and tribunals and to a fair trial (23 August 2007) CCPR/C/GC/32, para 27.

219 UN CEDAW Committee, General Recommendation 29 on the Economic consequences of marriage, family relations and their dissolution, (30 October 2013) CEDAW/C/GC/29, para 13.

220 UN CEDAW Committee, General Recommendation 29 on the Economic consequences of marriage, family relations and their dissolution, (30 October 2013) CEDAW/C/GC/29, paras 14.

221 Including whether any fault was cured on appeal.

222 *Proszak v. Poland*, Application no. 25086/94.

223 *Unión Alimentaria Sanders S.A. v. Spain*, Application no. 11681/85, at para 35.

224 *Ibid.*

225 See for example *Tanner v. Miller* [2013] EWCA Civ 1463, at para 6 & *Scriven v. Scriven* [2013] EWHC 4223 (Ch) at para 9.

226 [2014] EWHC 3318 (Fam).

“The courts are now being visited with an increasing number of informal applications made by litigants in person...the court does not afford any indulgences or deviations to the litigants in person from the clear procedure that is prescribed for all applications that are made to the court. The court is not some kind of advice bureau for the benefit of litigants in person who do not understand how orders have been made. If a litigant in person wishes to make an application to the court, then he must do so in accordance with the procedure laid down by the law of the land.”<sup>227</sup>

This approach was affirmed in the English Court of Appeal by Lord Justice Moore-Bick, who in *R (Hysaj) v. Secretary of State for the Home Department*,<sup>228</sup> considered whether the Court should adopt a ‘different approach’ to litigants in person:

“... I do not think that the court can or should accept that the mere fact of being unrepresented provides a good reason for not adhering to the rules... if proceedings are not to become a free-for-all, the court must insist on litigants of all kinds following the rules. In my view, therefore, being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules.”<sup>229</sup>

When coming to this conclusion, the judge noted that the English Civil Procedure rules were available online and therefore ‘widely available’. As a result, Lord Justice Moore-Bick was of the view that “*what the ordinary person requires, however, is more help in discovering and understanding the rules and some basic guidance about the way in which proceedings should be conducted.*”<sup>230</sup>

The above principles have been followed by the Northern Irish courts in several cases. In *Magill (Mary Bernadette) v. Ulster Independent Clinic and others*,<sup>231</sup> Lord Justice Girvan equated the need to ensure the rules and procedures are correctly followed with the judicial duty to oversee a fair trial;

“The application of legal principles poses a duty on the court to examine cases objectively without fear or favour to any party, represented or unrepresented. While courts are conscious of the difficulties faced by a personal litigant representing herself and will strive to enable that person to present her case as well as they can, the dictates of objective fairness and justice preclude the court from in any way distorting the rules or the requirements of due process because one party is unrepresented.”<sup>232</sup>

This approach was cited in *NS (No 2)*<sup>233</sup> when Judge Keegan noted the difficulties the court is faced with when a litigant in person does not participate in the correct way;

“The court process becomes unwieldy when a litigant does not accept that there is a process. The litigant should understand that matters are determined and decided and should not be re-litigated upon other than in an appellate court. Applications should be properly made. Witnesses should be properly questioned. The process of evidence cannot be prolonged to allow for the litigants to make speeches. The court arena is not a ‘free for all’.”<sup>234</sup>

The case law demonstrates the current judicial view that litigants in person must be allowed to fully participate but only in line with court procedures. To that extent, it appears that allowances for litigants in person will be made where these can be accommodated within pre-existing procedural rules. However, litigants in person will

227 *Ibid*, at para 8.

228 [2015] 1 WLR 2472.

229 *Ibid*, at para 44.

230 *Ibid*, at para 45.

231 [2010] NICA 33.

232 *Ibid*, at para 16.

233 *Enduring Power of Attorney: Inherent Jurisdiction* [2017] NIFam 3.

234 *Ibid*, at para 14.

not be allowed to deviate from or disregard the procedural rules even where this is done because of a lack of knowledge.

It is interesting briefly to compare the above cases with the ECtHR case of *Airey*.<sup>235</sup> In *Airey*, the fact that the Irish Government had made the procedural rules for judicial separation so complex that a litigant in person could not apply or interpret them led to a breach of Article 6(1). The ECtHR noted that, aside from providing the applicant with legal aid, it was open to the government to simplify the applicable procedural rules. The view of Lord Justice Moore-Bick in *Hysaj* was that assistance needed to be provided to help the 'ordinary person' discover and understand the applicable rules.<sup>236</sup>

The case law does not consider whether the rules in specific legal arenas are too complex to reach the *Airey* standard but does seem to acknowledge that a gap exists in understanding, finding and applying the rules where litigants in person are concerned. In *Hysaj*, the availability of the applicable rules online was considered important<sup>237</sup> as in the more recent case of *Barton*.<sup>238</sup> Therefore, consideration needs to be given by the courts as to how litigants in person access the applicable rules, and access assistance when they are unable to understand how to apply them. Whether the relevant rules are incomprehensible to a litigant in person to the extent that Article 6(1) will be engaged will depend on the facts of each specific case.

## F. Independent and impartial tribunal or court

The express requirement for a competent, independent and impartial tribunal is found under Article 14(1) ICCPR. The same language is used under Article 40(2)(b)(ii) UNCRC. The Human Rights Committee states that this requirement "*is an absolute right that is not subject to any exception*".<sup>239</sup>

The Human Rights Committee explains that independence refers to the:

"procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature."<sup>240</sup>

The Committee further explains,

"The impartiality of the court and the publicity of proceedings are important aspects of the right to a fair trial within the meaning of article 14, paragraph 1. "Impartiality" of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider ex officio these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14."<sup>241</sup>

235 Above at part 3.1 B i.

236 [2015] 1 WLR 2472, at para 45.

237 [2015] 1 WLR 2472, at para 45.

238 See above at footnote 171.

239 UN Human Rights Committee, General Comment No. 32 on the Right to equality before courts and tribunals and to a fair trial (23 August 2007) CCPR/C/GC/32, para 19.

240 Ibid.

241 Communication No. 387/1989, *Karttunen v. Finland*, para. 7.2.

The language of the ECHR is slightly different, with Article 6(1) providing that proceedings must be heard before an independent and impartial tribunal. This means that the court must be independent from the executive, the parties and the government.<sup>242</sup> For the purposes of litigants in person, it is perhaps the impartiality of the tribunal, which is more critical.

The ECtHR has noted that the normal meaning of impartial is “*the absence of prejudice or bias*”;<sup>243</sup> however, where impartiality is in issue, the ECtHR will assess it via a two-stage test: subjective and objective impartiality. The subjective test will examine any actual prejudice on the part of the judge or tribunal and the objective test will consider whether the judge has offered sufficient guarantees to exclude any legitimate doubt over their impartiality.<sup>244</sup>

On the subjective test, the personal impartiality of the judge will be presumed unless there is proof of the contrary.<sup>245</sup> When commenting on this presumption, the ECtHR has noted that:

“the mere fact that a judge takes a strongly negative view of an applicant’s case or indeed character does not in itself amount to bias or personal prejudice. The trial judge is required to make an assessment of the witnesses before him... unduly harsh or even oppressive behaviour by a judge is not necessarily a reflection of personal prejudice.”<sup>246</sup>

When considering objective impartiality, it is important to note that appearance is as important as reality. The ECtHR has consistently declared that the domestic courts must inspire confidence in the public in a democratic society.<sup>247</sup> To that end, “*any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw*.”<sup>248</sup> Judges must also exercise maximum discretion to preserve their public image of impartiality.<sup>249</sup> Examples of instances where courts have breached the objectively impartial test are:

1. Where the judge was involved in the passage of the planning matters at issue in proceedings, through extra-judicial functions in government.<sup>250</sup>
2. Instances where the judge has acted as Counsel<sup>251</sup> or an expert<sup>252</sup> for the opposing party in the first instance proceedings.
3. Where there is a close family tie between the judge and one of the party’s representatives.<sup>253</sup>

## G. Written reasons and fairness

The international standards do not expressly refer to the requirement to provide reasons under the right to a fair trial. The Human Rights Committee does interpret this as the need for the judgment of proceedings, including “*the essential findings, evidence and legal reasoning*” to be made public.<sup>254</sup>

242 Ringeisen v. Austria, Application no. 2614/65, at para 95.

243 Piersack v. Belgium, Application no. 8692/79, at para 30.

244 Ibid.

245 Ibid, para 30(a).

246 Ranson v. the United Kingdom, (dec.) Application no. 14180/03, under ‘The Law’ heading.

247 Piersack as above.

248 Ibid, at para 30.

249 Buscemi v. Italy, Application no. 29569/95, at para 67.

250 McGonnell v. the United Kingdom, Application no. 28488/95.

251 Mežnarić v. Croatia, Application no. 71615/01.

252 Švarc and Kavnik v. Slovenia, Application no. 75617/01.

253 Micallef v. Malta, Application no. 17056/06.

254 UN Human Rights Committee, General Comment No. 32 on the Right to equality before courts and tribunals and to a fair trial (23 August 2007) CCPR/C/GC/32, para 29.



Under the ECHR, the ECtHR explains that the concept of fair trial requires that a domestic court address all essential issues in pronouncing its decision.<sup>255</sup> The ECtHR has determined that the need to give reasons is required in the interests of the proper administration of justice.<sup>256</sup> Importantly, the domestic court must give sufficient reasons that will allow the party to make use of any ability to appeal.<sup>257</sup>

Nevertheless, there are limits to this requirement;

“Article 6 § 1 obliges courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision... That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case.”<sup>258</sup>

Where reasons are given but they are incoherent, the ECtHR may conclude that the decision is arbitrary. Such cases will be highly fact specific and dependent on the domestic law of the Contracting State. They are therefore few and far between.<sup>259</sup>

The ECtHR and the Human Rights Committee<sup>260</sup> both consider that the right to a timely judgment forms part of the right to a fair hearing within a reasonable time.

In *Caleffi v. Italy*,<sup>261</sup> the ECtHR noted that:

“under Article 6 para. 1 of the Convention everyone has the right to a final decision within a reasonable time in the determination of his civil rights and obligations. It is for the Contracting States to organise their legal systems in such a way that their courts can meet this requirement.”<sup>262</sup>

255 *Boldea v. Romania* [2007] ECHR, para 30, available in French only.

256 *Suominen v. Finland*, Application no. 37801/97 at para 37.

257 *Hirvisaari v. Finland*, Application no. 49684/99.

258 *Ibid*, at para 30.

259 See *Tatishvili v. Russia*, Application no. 1509/02 wherein the ECtHR concluded that there had been a breach owing to the “manifestly deficient reasoning” of the domestic court.

260 See *Gonzalez v. Republic of Guyana*, HRC Communication 1246/2004, UN Doc CCPR/C/98/D/1246/2004 (2010), para 14.2.

261 [1991] ECHR 31.

262 *Ibid*, para 17.

## 4. Summary

Under Article 6(1) ECHR, Article 47 of the CFR and various international standards, the right to a fair trial, whilst acting as a litigant in person, is guaranteed and protected. There is no absolute right to legal representation however there may be a requirement under Article 6(1) for legal aid to be provided depending on the circumstances of the case. The factors that will be taken into consideration include:

- The complexity of the case;
- The issues at stake;
- The capacity of the person to represent himself or herself.

The above factors are likely to be exacerbated and of more importance where the litigant does not speak English as a first language or where the litigant has mental health issues. Additional support may be required where the law and procedure of the case is of such a level that an unrepresented party could not interpret or understand it, such as in bankruptcy matters, or where the party has such an emotional stake in the case that they cannot advocate the case effectively, such as in family proceedings. Though none of these issues are automatically decisive, they do suggest particular attention needs to be given to such factors and to the litigants in person acting in these cases.

## Appendix 2

### Examples of initiatives towards access to justice for litigants in person

A systematic review of innovations regarding access to justice for LIPs has not been conducted for this study, but as the Civil Justice Council of England and Wales (2011) noted, this would be very worthwhile. There are some helpful reviews of initiatives across one country, such as Greacen's (2011) compendium of measures implemented across the USA, and some of them are mentioned briefly below. In the following, some examples of practices and accommodations that have been made for LIPs, or in relation to their presence in the system, in other jurisdictions are referenced. As will be seen, one does not need to look far in many instances for more supportive systems, processes or provisions.

#### 1. Civil justice system reviews and civil / family justice councils with lay membership

##### Scotland

The Scottish Civil Courts Review in 2009 covered litigants in person and was published in a two-volume report:

Volume 1 - <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4>

Volume 2 - <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-2-chapt-10---15.pdf?sfvrsn=4>

The Scottish Government's Response was published in 2010 - <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/scottish-government-response-to-the-report-and-recommendations-of-the-scottish-civil-courts-review.pdf?sfvrsn=2>

There was a consultation on the creation of a new body to take proposals forward in 2012 <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/scottish-government-proposals-for-a-scottish-civil-justice-council---consultation-report.pdf?sfvrsn=2>). The question of 'who should be on the Council?' was the most commented on subject in the consultation

'There was a commonly held belief that the composition of the proposed council should reflect the broad spectrum of people and interests who encounter the civil justice system. The weight of any lay component was discussed by many respondents, some favouring a lay chair or lay majority, others believing more in a heavily judicial and profession-based composition.' (page 4)

After consultation, the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 was passed - [http://www.legislation.gov.uk/asp/2013/3/pdfs/asp\\_20130003\\_en.pdf](http://www.legislation.gov.uk/asp/2013/3/pdfs/asp_20130003_en.pdf). Article 6 deals with membership of the Council and while no mention is made of LIPs specifically in relation to membership, the act gives discretion to the Lord President to elect two consumer representative members and six further members who need not be part of the judiciary or legal professions. One of the criteria of relevance is that such members have 'an awareness of the interests of litigants in the civil courts' (Article 6(1)(h)(iii)). The Council may also establish sub-committees to inform their working (Article 13(1)).

One of the current consumer members of the Scottish Civil Justice Council - <http://www.scottishciviljusticecouncil.gov.uk/council/current-council-members> - is the National Development Manager for Families Need Fathers Scotland (FNF). FNF is a charity chiefly concerned with the problems of

maintaining a child's relationship with both parents during and after family breakdown. FNF were a key source of support for some LIPs in this study.

### England and Wales

The Civil Justice Council of England and Wales published its review of litigants in person in civil justice system in 2011. <https://www.judiciary.gov.uk/wp-content/uploads/2014/05/report-on-access-to-justice-for-litigants-in-person-nov2011.pdf>

CJC has a national forum once a year to report on developments in the 10 year strategy on access to justice for those without means - <https://www.judiciary.gov.uk/wp-content/uploads/2011/03/cjc-fifth-national-forum-note.pdf>

The Civil Justice Council (CJC) of England and Wales has a wide range of perspectives represented in its membership including lay-members - <https://www.judiciary.gov.uk/wp-content/uploads/2018/05/cjc-membership-may-2018.pdf>.

In their 'diversity plan', the CJC state that the Council 'aims to reflect the diversity of the population of England and Wales – both in its membership and in the issues and concerns it addresses in its programme of work, as laid out in its annual business plan - <https://www.judiciary.gov.uk/wp-content/uploads/2012/02/cjc-diversity-plan-apr-15.pdf>

### Northern Ireland

Litigants in person have been both a main and tangential topic in the most recent access to justice reviews in Northern Ireland, namely the

Access to Justice Review 2011 - <https://www.justice-ni.gov.uk/publications/report-access-justice-2011>

Access to Justice Review 2015 - <https://www.justice-ni.gov.uk/publications/access-justice-review-part-2-final-report>

Family Justice Review in 2017 - <https://www.judiciary-ni.gov.uk/publications/review-groups-report-civil-justice>. The establishment of the Family Justice Board was recommended to drive improvements in the family justice system was recommended (Recommendation FJ168). Other than an academic member, lay membership was not proposed specifically, but members from the voluntary sector were recommended to join on a rotational basis (Recommendation FJ170).

Civil Justice Review in 2017 - <https://www.judiciary-ni.gov.uk/publications/review-groups-report-family-justice>. The establishment of a Civil Justice Council with lay membership was recommended to take forward the proposals of the review (Recommendation CJ225).

## 2. Collaborative systems re-design

### USA

Owen, Staudt and Pedwell (2004) at the Institute of Design and Chicago-Kent College of Law, Illinois Institute of Technology brought together expertise from the State Court service, system designers and computer and internet technologists to reduce the complexity of court processes for LIPs using a system, human-centred design process over four years.

<https://www.kentlaw.iit.edu/sites/ck/files/public/component/access-to-justice-meeting-the-needs.pdf>

### 3. Charter of Rights and Responsibilities

#### Canada

Slaw Online Legal Magazine posted a blog by John-Paul Boyd of the Rights and Responsibilities of Self-Represented Litigants - <http://www.slaw.ca/2015/08/28/the-rights-and-responsibilities-of-self-represented-litigants-2/>

### 4. Orientation materials or programmes for LIPs

#### England and Wales

Family Justice Council and AdviceNow have produced videos on what to do when self-representing in the family court. <https://www.youtube.com/watch?v=mwrA3ls27fg>

'No Family Lawyer' book and video produced by a mediator and barrister to orientate LIPs to the family courts - <http://www.nofamilylawyer.co.uk/>

Introduction to navigating the family court by Children and Family Court Advisory and Support Service (CAFCASS) - <https://www.cafcass.gov.uk/2017/02/28/cafcass-initiatives-help-litigants-person-navigate-family-courts/?highlight=mckenzie%20friend>

#### Canada

Mandatory Information Program – all parties in a family law case are required to attend an information programme before proceedings commence - <http://www.family-mediation.net/information-sessions/>

#### USA

Colorado (amongst other states) has introductory information on self-representation - [https://www.courts.state.co.us/userfiles/File/Self\\_Help/pro%20se%20sheet%20Word%2009%202009.pdf](https://www.courts.state.co.us/userfiles/File/Self_Help/pro%20se%20sheet%20Word%2009%202009.pdf)

### 5. Information on self-representation

#### Northern Ireland

NICTS for Small Claims <https://www.justice-ni.gov.uk/articles/small-claims>

#### England & Wales

AdviceNow – focuses on information. It is a repository of advice on multiple legal problems aimed at litigants - <https://www.advicenow.org.uk/>

Litigants in Person Network - <http://www.lipnetwork.org.uk/>

#### Canada

Supreme Court of British Columbia has videos, guides on self-representation, self-help and sign-posts to other sources of help - <https://www.supremecourtbc.ca/>

Self-help in British Columbia - <http://www.supremecourtselfhelp.bc.ca/>

Court of Appeal British Columbia has information such as process diagrams, definitions of terms and videos, for all litigants in criminal and family/civil matters - [https://www.courtofappealbc.ca/civil-family-matters?ct=t\(primary-menu\)](https://www.courtofappealbc.ca/civil-family-matters?ct=t(primary-menu))

Ontario's Superior Court of Justice has information for all litigants - <http://www.ontariocourts.ca/scj/family/>

## USA

Self-represented Litigant Network <https://www.srln.org/>

## 6. Information on litigating in different business areas

### Northern Ireland

Citizens Advice Bureau NI – offers basic advice on issues, with reference to seek specialist legal advice elsewhere. For example, making child contact agreements. <https://www.citizensadvice.org.uk/nireland/family/ending-a-relationship/making-agreements-about-your-children/making-child-arrangements/>

### England and Wales

HM Courts and Tribunals Service, Family Justice Council – has information about various topics including how to take forward legal claims without the help of a lawyer. <https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/fjc/guidance/>

HM Courts and Tribunals Service, Interim applications in the Chancery Division – a guide for LIPs. <https://www.judiciary.gov.uk/publications/guide-litigants-person-chancery/>

The Bar Council, Guide to representing yourself - <http://www.barcouncil.org.uk/media-centre/publications/2013/april/a-guide-to-representing-yourself-in-court/>

### Scotland

A guide to representing yourself in the Scottish Family Court by Families Need Fathers Scotland - <http://static1.1.sqspcdn.com/static/f/861186/24542841/1395073043610/Representng+Yourself+in+a+Scottish+Family+Court.pdf?token=elVa5ttv19Poafgl4gihqntvzf4%3D>

### Canada

Steps to Justice – Your guide to law in Ontario - led by Community Legal Education Ontario and funded by The Law Foundation of Ontario, Legal Aid Ontario and Department of Justice Canada. It offers advice on several legal topics. Live chat support available in office hours. <https://stepstojustice.ca/common-question-plus/family-law/how-do-i-bring-motion-to-change-court-order-child-custody-access-or-parenting>

People's Law School – offers online and classroom legal education for non-lawyers - <https://www.peopleslawschool.ca/>

Divorce in British Colombia - <http://www.familylaw.lss.bc.ca/guides/divorce/>

## 7. Advice models, support hub, liaison unit

### England & Wales

The Personal Support Unit – offers human, non-legal support to people attending court alone. <https://www.thepsu.org/>

Royal Courts of Justice Citizens Advice Bureau – helps people navigate the court system and comply with civil procedure rules, provides free legal advice and assistance to people taking a case alone. <http://www.rcjadvic.org.uk/>

LawWorks – supports and networks pro bono legal advice givers - <https://www.lawworks.org.uk/about-us>

## USA

Alaska Self-Help Legal Centre offers online support for LIPs in family cases - <http://www.courts.alaska.gov/shc/family/shcabout.htm#videos>

## Canada

National Self-Represented Litigants Project - <https://representingyourselfcanada.com/>

## 8. Support hubs for people with multiple legal and social needs

### England & Wales

Mary Ward Legal Centre - for people on low income with no capital who live in London. Free advice on legal matters related to debt, housing, employment, tax, personal injury, consumer, contract and small claims and welfare benefits. <https://www.marywardlegal.org.uk/>

South Yorkshire – Live Inclusive, one stop shop for advice for people living with disabilities - <http://www.sycil.org/access-advice/>

Law for Life – Foundation for Public Legal Education focuses on education. It ‘is an education and information charity that aims to increase access to justice by providing everyone with an awareness of their legal rights together with the confidence and skills to assert them.’ They provide multimedia information and education that explains how to manage legal situations in a straight-forward way. <http://www.lawforlife.org.uk/>

### Australia

New South Wales’ Law Access provides online advice for LIPs on a number of legal problems - <http://www.lawaccess.nsw.gov.au/>

## 9. Web interface for litigants

### The Netherlands

Rechtwijzer, an online dispute resolution for divorce and landlord-tenant proceedings - <https://rechtwijzer.nl/> (Info in English from the platform designer: <http://www.hiil.org/project/?itemID=2641>). Updated online divorce advice - <https://uitelkaar.nl/>

### Canada

British Columbia Supreme Court Family Forms <https://www.supremecourtbc.ca/supreme-court-family-forms>

MyLawBC is an online resource provided by the Legal Services Society which is the legal aid agency in British Columbia. MyLawBC helps litigants decide which pathway they which to take for their legal problems. <http://mylawbc.com/>

Families Change – an online guide to separation and divorce for parents and children - <https://www.familieschange.ca/>

### England and Wales

Can I get legal aid? Web-tool for checking eligibility: <https://www.gov.uk/check-legal-aid>

Less formal advice and comment can be found at online communities such as MumsNet - <https://www.mumsnet.com/> - and Wikivorce - <https://www.wikivorce.com/divorce/>

### UK-wide

Bright Sky online app providing support and information to anyone in an abusive relationship or concerned about someone else. <https://www.hestia.org/brightsky>

### Scotland

Online access to case files for simple procedures (Small Claims) - <https://www.scotcourts.gov.uk/taking-action/simple-procedure/civil-online>

### USA

Examples of various online services:

Maryland People's Law Library quiz to assess suitability to self-represent - <https://www.peoples-law.org/node/139/take?quizkey=01cd17b7ae25feb483cef1d32163d138> North West Justice Project applications for legal aid - <https://nwjustice.org/apply-online>

North West Justice Project's online screening tool for eligibility for legal aid or other assistance - <https://waoi.legalserver.org/modules/a2j/intake.php>

Illinois legal aid online - <https://www.illinoislegalaid.org/>

Massachusetts' Legal Resource Finder - <https://www.masslegalservices.org/FindLegalAid>

Connecticut Law Help information about self-representation and legal resource finder - <https://ctlawhelp.org/en/home>

Wisconsin Court Service has web-based forms for self-representing litigants - [https://www.wicourts.gov/forms1/circuit/ccform.jsp?FormName=&FormNumber=&beg\\_date=&end\\_date=&StatuteCite=&Category=51](https://www.wicourts.gov/forms1/circuit/ccform.jsp?FormName=&FormNumber=&beg_date=&end_date=&StatuteCite=&Category=51)

## 10. Repositories of law or court forms

### Northern Ireland

Department of Communities has a repository of social security law but without guidance for the lay-person - <https://www.communities-ni.gov.uk/services/law-relating-social-security>

### England and Wales

County court forms repository - <https://www.gov.uk/government/collections/county-court-forms>

### Canada

British Columbia has a repository of all its legislation (without guidance) - <http://www.bclaws.ca/>



## 11. Unbundled services

### England and Wales

Various law firms and legal services offer fixed rate tariffs for discrete tasks. For example The Co-operative Legal Services - <https://www.co-oplegalservices.co.uk/>

### USA

American Bar Association - Tips for offering limited scope representation (unbundled services) - [https://www.americanbar.org/publications/gp\\_solo/2015/july-august/tips\\_providing\\_limitedscope\\_representation\\_family\\_law\\_cases.html](https://www.americanbar.org/publications/gp_solo/2015/july-august/tips_providing_limitedscope_representation_family_law_cases.html)

Law Help Interactive is a web-tool that assists LIPs to complete forms for proceedings in a few business areas - <https://lawhelpinteractive.org/>

### Canada

Family Law Help unbundled services - <https://www.familylawhelp.ca/>

## 12. Online submission of documents

### England and Wales

Online divorce application - <https://www.gov.uk/divorce>

### Australia

Online divorce application <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/how-do-i-divorce/>

## 13. In-court supporter guidelines or directory

Legal Services Consumer Panel makes several recommendations about McKenzie friends. [http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/documents/2014%2004%2017%20MKF\\_Final.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2014%2004%2017%20MKF_Final.pdf)

An online directory of McKenzie Friends in England and Wales and Scotland - <http://www.mckenzie-friend.org.uk/index.html>

The Society of Professional McKenzie friends for England and Wales has a directory and standards of service - <http://www.mckenziefriends.directory/>

## 14. Training for judiciary on LIPs

### USA

Judicial Techniques for Cases Involving Self-Represented Litigants by Albrecht *et al* - <http://www.zorza.net/JudicialTech.JJWi03.pdf>

Delaware judicial guidelines for civil hearings involving self-represented litigants (2011) - <https://courts.delaware.gov/supreme/admdir/ad178guidelines.pdf>

Massachusetts judicial guidelines for civil hearings involving self-represented litigants (2006) - <https://www.mass.gov/judicial-guidelines-for-civil-hearings-involving-self-represented-litigants>

## Canada

Canadian Judicial Council's Statement of Principles on Self-represented Litigants and Accused Persons (2006) - [https://www.cjc-ccm.gc.ca/cmslib/general/news\\_pub\\_other\\_PrinciplesStatement\\_2006\\_en.pdf](https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf)

## 15. Guidance for legal profession on dealing with LIPs

### England and Wales

The Law Society published guidelines aimed at lawyers who face LIPs in civil courts and tribunals. They include notes for LIPs and clients - <http://www.lawsociety.org.uk/support-services/advice/articles/litigants-in-person-new-guidelines-for-lawyers-june-2015/>

Resolution (formerly Solicitors Family Law Association) produced Guide to Good Practice: Working with litigants in person in 2018 - [http://www.resolution.org.uk/site\\_content\\_files/files/good\\_practice\\_guide\\_litigants\\_in\\_person.pdf](http://www.resolution.org.uk/site_content_files/files/good_practice_guide_litigants_in_person.pdf)

Law for Life - Public legal education hub - <http://www.lawforlife.org.uk/>

AdviceNow – <https://www.advicenow.org.uk/>

### Australia

Queensland Law Society practice support - Self-represented litigants: Guidelines for solicitors (2013) - [http://www.qls.com.au/Knowledge\\_centre/Ethics/Resources/Communication\\_with\\_opponents/Self-represented\\_Litigants\\_Guidelines\\_for\\_solicitors](http://www.qls.com.au/Knowledge_centre/Ethics/Resources/Communication_with_opponents/Self-represented_Litigants_Guidelines_for_solicitors)

## 16. Language audits

### Microsoft Word

Microsoft Word Readability Tool – available in Spelling & Grammar Checking tool. Gives two ratings: Flesch-Kincaid Grade Level Test and Flesch Reading Ease Test.

### USA

Writing for Self-Represented Litigants – a guide for Maryland's courts and civil legal services providers <https://www.mdcourts.gov/sites/default/files/import/mdatjc/pdfs/writingforsrls.pdf>

## 17. Litigation ombudsman

### England and Wales

The Legal Ombudsman was set up in 2010 as an independent body to consider complaints about legal services from lawyers or treatment by claims management company in England and Wales. Its remit does not, however, extend to complaints from or about LIPs.

<http://www.legalombudsman.org.uk/>

## 18. Perspective training on LIPs

As above at point 15, various legal professional bodies, such as the Law Society, provide guidance to members regarding dealing with LIPs, much of which is sensitive to their needs, recognizing, for example, the heterogeneity of those self-representing, and promoting understanding of their viewpoints. For example:

<http://www.lawsociety.org.uk/support-services/advice/articles/litigants-in-person-new-guidelines-for-lawyers-june-2015/>

However, it is not evident that such perspectives are part of professional legal training or continuous professional development.

## 19. Apps for court processes

### USA

Greacen (2011: 20-22) describes a number of examples of document assembly software that leads users through a series of questions and then arranges their answers in appropriate boxes on the requisite legal forms. For example, Superior Court of Arizona's portal for preparing court documents:

<https://www.superiorcourt.maricopa.gov/ezcourtforms2/>

Turbo court in California:

<https://www.turbocourt.com/go.jsp?act=actShowState&tmstp=1529679734507&id=1282396>

## 20. Legal Aid criteria adapted to include complex cases or for vulnerable LIPs

### USA

California passed the Sargent Shriver Civil Counsel Act in 2011 which provides counsel in civil matters where litigants are indigent for the first time. Provision covers matters of 'basic human need' to the litigant, such as child custody and housing matters. Case complexity and the capacity of the LIP to represent themselves is considered alongside other factors such as the merits of the case and the gravity of potential consequences for the prospective client if representation is not provided: <http://www.courts.ca.gov/15583.htm>

## 21. Personal resilience training for legal professionals

There is plenty of advice online written by lawyers for lawyers with regards to dealing with LIP. For example,

<http://nationalmagazine.ca/Blog/December-2016/Tips-for-dealing-with-self-represented-litigants.aspx>

However, it is not clear that this reaches its intended audience. It is unlikely to go far enough in developing practical skills, such as resilience, recognised by professional bodies as a vital skill in self-care.

<http://www.lawsociety.org.uk/news/blog/are-you-an-emotionally-resilient-lawyer/>

### Australia

The Judicial College of Victoria has piloted a scheme to provide resilience training to the judiciary with plans to widen provision to court staff to help them manage the high level of stress their work presents. This programme is concerned with managing the 'vicarious trauma' which judges may experience in the course of dealing with serious criminal cases. However, the emphasis could easily be widened to include other stressors, such as difficult LIPs, and similar programmes would likely benefit court staff and legal professionals.

<http://www.judicialcollege.vic.edu.au/judicial-wellbeing/judicial-stress/programs>



# Appendix 3a

## Consent forms and information sheets

### Going to court without a lawyer?

#### INFORMATION SHEET FOR RESEARCH PARTICIPANTS (LIP)

You are being invited to take part in a research study on the experiences of people who come to a court hearing without a lawyer representing them. Please read the following information and ask any questions you have about your involvement in the study before you take part.

You will be helping us to understand what it is like for people to take a case to court on their own. We hope to learn from you how the system can be improved for people who represent themselves and other people involved in court cases. In this way, there may be benefits for future court procedures.

Thank you for taking the time to consider this invitation.

#### What is the purpose of the study?

There are many people who either bring or defend a legal case as a “litigant in person” or a “self-represented litigant.” This means they prepare some or all of their case, including appearing at court hearings, without a lawyer representing them. Very little is known about the experience of self-represented litigants in Northern Ireland. We want to research their experience of bringing or defending a case and going to court without legal representation for four reasons:

1. To understand why people bring or defend legal cases without a legal representative.
2. To see how well the current system works when people do not have legal representation.
3. To investigate the impact of self-representation on the right to a fair trial.
4. To consider ways to change or improve the current system.

This is a joint study between the School of Law at Ulster University and the Northern Ireland Human Rights Commission.

#### Why have you been chosen?

You have been chosen because you are involved in a legal case between September 2016 and June 2017 and you are representing yourself. We hope to talk to up to 130 people in this situation. We would like to talk to people who have a case in one of these five areas of law: bankruptcy, civil bills, divorce, family proceedings, or family homes and domestic violence.

#### Do you have to take part?

No. It is entirely voluntary. It is up to you to decide whether or not to take part, and you are being given this information sheet to help you decide. If you decide to take part, you will be asked to sign a Consent Form to show that you understand what is being asked of you and that you agree to take part. You can change your mind at any time and withdraw from the study.

## Litigants in person in Northern Ireland

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### What will happen if you take part?

If you decide to take part, a researcher will arrange a time and a place to meet you. You can meet in the waiting area or another public area in the court. The researcher will interview you for about 20-30 minutes about your experience of representing yourself in your case. Then you will be asked to fill in a short questionnaire. The questions are about yourself, including some questions about your general state of health taken from a standard health questionnaire (General Health Questionnaire 12).

You will be asked for your permission to record the interview digitally so that we have an accurate record of what you tell us.

Finally, to fully understand how well the current system works when people do not have legal representation, we will observe your court hearing and talk to other people who are involved in your case. We would like to talk to the judge, court staff and the lawyer of the other side, if there is one. We will not discuss with them your case or what you have told us. We will only ask them about their experience of working on a case in which there is a person who does not have a legal representative.

### What if you decide to take part but then later change your mind

Taking part in the research is entirely voluntary. You can change your mind at any time and withdraw from the study without giving a reason. Let the researcher know that you want to stop. Any information you have given to us will be removed from the study.

### What next if you want to take part?

If you agree to take part in this study, you will be asked to sign the Consent Form to show that you understand the purpose of the study and what is being asked of you, and that you agree to take part. The researcher will then arrange a time and a place to meet for the first interview.

### Are there any risks in taking part?

There are no risks to your case as a result of you taking part. You may feel a little uncomfortable talking about your experiences at a court hearing, especially if this was not a good experience for you. You might get upset about your case or how it was handled by the court, or get troubled by the questions that make you remember an unpleasant part of the court hearing. If this happens, we will stop the interview and will only continue with it if and when you feel you are able to do so. If you feel too troubled, we can stop completely. In this case, you might want to think about talking about your feelings to someone with professional training, such as your doctor, Lifeline (0808 808 8000) or The Samaritans (08457 909090 (UK) or 1850 60 90 90 (ROI)).

### Will your taking part in this study be kept confidential?

Yes. Only the researchers and perhaps the other people involved in your case will know that you are taking part in the study. But what you say to the researchers **will not** be discussed with the other people involved in the case. We will not reveal your identity in any of the reports on the research. We will use what you tell us in a way so that your identity is anonymous and it will not be possible to link your identity to anything you tell us.

This means that your rights will be protected as required by the Data Protection Act 1998. The information that you give us will be held securely by the researchers. You should also be aware that Freedom of Information legislation will allow access to certain non-personal or generalized data, and that the researcher has a duty to report to the police any research which reveals criminal behaviour likely to harm others.

### **What happens when the study ends?**

Towards the end of the study, the researchers will make a summary of the findings from the research. If you wish, this summary can be sent to you so you can see what the study found and comment on it. At the end of the study, the researchers will discuss some ways in which court hearings are felt to be difficult or helpful for those taking a case without legal representation. We will use this information to suggest improvements to the ways in which the court system can support people who do not have legal representation.

### **What happens if something goes wrong?**

It is very unlikely that anything will go wrong, and the risk of something going wrong is very low. However, if you are unhappy with how you have been treated by the researchers, you can make a complaint verbally or in writing to the Chief Investigator, Dr Gráinne McKeever – see contact details below. She will take your complaint seriously and be in touch with you within five days. If the Chief Investigator is not able to resolve the complaint with you, you can take your complaint further using the formal procedures. More information on the Ulster University procedure can be found here:

[https://www.ulster.ac.uk/\\_\\_data/assets/pdf\\_file/0011/75638/Complaints.pdf](https://www.ulster.ac.uk/__data/assets/pdf_file/0011/75638/Complaints.pdf).

Ulster University and Northern Ireland Human Rights Commission have separate procedures in place for reporting, investigating, recording and handling adverse events. If you wish to complain to the NIHRC you may write to Lorraine Hamill at Temple Court, 39 North Street, Belfast, Northern Ireland, BT1 1NA. More information on the Northern Ireland Human Rights Commission can be found here: [www.nihrc.org](http://www.nihrc.org).

### **What will happen to the results of the study?**

The information from our research findings will be presented at conferences to academics, government figures and professionals who help people at court hearings. Our research will also be published in academic journals. We hope that it will help to make some improvements in court procedures.

### **Who is funding the research?**

The research is funded by the Nuffield Foundation, which is a UK funding body that helps support different types of research, mostly done by staff working in universities.

### **Who has reviewed this study?**

This study has been reviewed by a committee of academics in law and public policy who conduct research in these areas. It has been approved by Ulster University's Research Ethics Committee, in accordance with University procedures. If you would like further information on these procedures you can contact the University Research Governance section (see: <http://research.ulster.ac.uk/office/rofficeeg.html>, or telephone 028 9036 6629)

## Litigants in person in Northern Ireland

L

**Contact details**

The contact details of the researchers involved in this research project are as follows:

- Chief Investigator: Dr Gráinne McKeever (tel: 02890 366340; email: [g.mckeever@ulster.ac.uk](mailto:g.mckeever@ulster.ac.uk)).
- Dr John McCord (tel: 02890 368802; email: [ja.mccord@ulster.ac.uk](mailto:ja.mccord@ulster.ac.uk)).
- Dr Lucy Royal-Dawson (tel: 02890 366564; mobile: 075 0344 7886; email: [l.royal-dawson@ulster.ac.uk](mailto:l.royal-dawson@ulster.ac.uk)).
- Dr Eleanor Kirk (tel: 02890 366564; mobile: 077 4370 1399; email: [e.kirk@ulster.ac.uk](mailto:e.kirk@ulster.ac.uk)).

They can be contacted at School of Law, University of Ulster, Shore Road, Newtownabbey, Co Antrim. BT37 0QB. Tel: 02890 366346. Project email: [lipni@ulster.ac.uk](mailto:lipni@ulster.ac.uk). Project website: [www.ulster.ac.uk/law/lipni](http://www.ulster.ac.uk/law/lipni)

- Sara Donnelly (tel: 02890 243987; textphone: 02890 249066; SMS text: 07786 202075; email: [Sara.Donnelly@nihrc.org](mailto:Sara.Donnelly@nihrc.org)).
- Rhyannon Blythe (tel: 02890 243987; textphone: 02890 249066; SMS text: 07786 202075; email: [Rhyannon.Blythe@nihrc.org](mailto:Rhyannon.Blythe@nihrc.org)).

They can be contacted at Northern Ireland Human Rights Commission, Temple Court, 39 North Street, Belfast. BT1 1NA. Tel: 02890 243987. [www.nihrc.org](http://www.nihrc.org)



## Litigants in person in Northern Ireland

L

**CONSENT FORM (LIP)****Name of Chief Investigator: Dr Gráinne McKeever**

Please tick the box  to show that you agree with the following statements:

- I confirm that I have been given and have read and understood the information sheet for the above study and have asked and received answers to any questions raised.
- I understand that my participation is voluntary and that I am free to withdraw at any time without giving a reason and without my rights being affected in any way.
- I understand that the researchers will hold all information and data collected securely and in confidence and that all efforts will be made to ensure that I cannot be identified as a participant in the study (except by other people involved in my case and except as might be required by law) and I give permission for the researchers to hold relevant personal data.
- I agree to take part in an interview for the above study.
- I agree to any interviews being recorded.
- I would like the summary of the findings of the research to be sent to me.

Send the summary to me at: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
**Name of participant**

\_\_\_\_\_  
**Signature**

\_\_\_\_\_  
**Date**

\_\_\_\_\_  
**Name of researcher taking consent**

\_\_\_\_\_  
**Signature**

\_\_\_\_\_  
**Date**

## Going to court without a lawyer?

### INFORMATION SHEET FOR KEY PERSONNEL

You are being invited to participate in a research study on the experiences of people who come to a court hearing without a lawyer representing them. Before you decide whether or not to take part, it is important that you understand what the research is for, why you have been chosen to take part and what you will be asked to do. Please read the following information and do not hesitate to ask any questions about anything that might not be clear to you. Make sure that you are informed before you decide what to do.

Thank you for taking the time to consider this invitation.

#### What is the purpose of the study?

There are many people who either bring or defend a legal case as a “litigant in person” or a “self-represented litigant”. This means they prepare some or all of their case, including appearing at court hearings, without a lawyer representing them. There has been no empirical study of the experience of self-represented litigants in Northern Ireland to date; only anecdotal evidence exists. We want to research their experience of bringing or defending a case and going to court without legal representation for four reasons:

1. To understand why people bring or defend legal cases without a legal representative.
2. To see how well the current system works when people do not have legal representation.
3. To investigate the impact of self-representation on the right to a fair trial.
4. To consider ways to change or improve the current system.

This is a joint study between the School of Law at Ulster University and the Northern Ireland Human Rights Commission.

#### Why are you being asked to take part?

You are being asked to take part because you have experience of court procedures involving litigants in person. We hope to talk to up to 130 litigants in person who had a hearing relating to either bankruptcy, civil bills, divorce, family proceedings, or family homes and domestic violence. We would also like to hear from judges, the counsel of opposing parties and court staff to obtain additional perspectives on litigants in person.

#### What will happen if you take part?

If you decide to take part, a researcher will arrange to meet with you at a suitable time and place. The interview will last about 20-30 minutes. You will be asked for your permission to have the interview recorded on a digital audio recorder so that we can accurately record what you say.

#### Do you have to take part?

Taking part is voluntary, and this information sheet is intended to help you decide whether to take part or not. If you decide to take part, you will be asked to sign a consent form. You can change your mind about being involved in the study at any time, and withdraw without giving a reason.

**What if you decide to take part but then later change your mind**

If you choose to take part in the research, you can change your mind at any time and withdraw from the study without giving a reason. Let the researcher know that you want to withdraw from the study.

**What next if you want to take part?**

If you agree to take part in this study you will be asked to sign a consent form showing that you understand the purpose of the study and what is being asked of you, and that you agree to take part. The researcher will arrange a time and place to meet for the interview.

**Are there any benefits in taking part?**

You will be helping us to understand what it is like for people involved in hearings where at least one litigant does not have legal representation. If it is possible to identify how the situation can be improved for both litigants in person and other people involved in their hearings, there may be benefits for future court procedures.

**Will your participation in this study be kept confidential?**

Yes. We will not reveal your identity in any of the subsequent reports on the research. We will use what you tell us in a way that maintains your anonymity. It will not be possible to attribute anything you say to your identity in the findings. This means that your rights will be protected as required by the Data Protection Act 1998. The information that you give us will be held securely by the researchers. You should also be aware that Freedom of Information legislation will allow access to certain non-personal or generalized data, and that the researcher has a duty to report to the police any research which reveals criminal behaviour likely to harm others.

If you are involved in a case which involves a litigant in person, what you say to the researchers will not be discussed with the other people involved in case and will only be used as part of the research data-set.

**What happens when the study ends?**

Towards the end of the study, the researchers will make a summary of the findings from the research. If you wish, this summary can be sent to you so you can see what the study found and comment on it. At the end of the study, the researchers will identify some ways in which court hearings are felt to be difficult or helpful for those taking a case without legal representation, and use this information to suggest improvements to the ways in which the court system can support an individual who does not have legal representation.

**What happens if something goes wrong?**

It is very unlikely that anything will go wrong, and the risk of something going wrong is very low. However, if you are unhappy with how you have been treated by the researchers, you can make a complaint verbally or in writing to the Chief Investigator, Dr Gráinne McKeever – see contact details below. She will take your complaint seriously and be in touch with you within five days. If the Chief Investigator is not able to resolve the complaint

## Litigants in person in Northern Ireland

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with you, you can take your complaint further using the formal procedures. More information on the Ulster University procedure can be found here:

[https://www.ulster.ac.uk/\\_\\_data/assets/pdf\\_file/0011/75638/Complaints.pdf](https://www.ulster.ac.uk/__data/assets/pdf_file/0011/75638/Complaints.pdf).

Ulster University and Northern Ireland Human Rights Commission have separate procedures in place for reporting, investigating, recording and handling adverse events. If you wish to complain to the NIHRC you may write to Lorraine Hamill at Temple Court, 39 North Street, Belfast, Northern Ireland, BT1 1NA. More information on the Northern Ireland Human Rights Commission can be found here: [www.nihrc.org](http://www.nihrc.org).

### What will happen to the results of the study?

The information from our research findings will be presented at conferences to academics, government figures and professionals who help people at court hearings. Our research will also be published in academic journals. We hope that it will help to make some improvements in court procedures.

### Who is funding the research?

The research is funded by the Nuffield Foundation (see: <http://www.nuffieldfoundation.org>), which is a UK funding body that helps support different types of research, mostly done by staff working in universities.

### Who has reviewed this study?

This study has been reviewed by a committee of academics in law and public policy who conduct research in these areas. It has been approved by Ulster University's Research Ethics Committee, in accordance with University procedures. If you would like further information on these procedures you can contact the University Research Governance section (see: <http://research.ulster.ac.uk/office/rofficeeg.html>, or telephone 028 903 66629).

### Contact details

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- Dr Lucy Royal-Dawson (tel: 02890 366564; mobile: 075 0344 7886; email: [l.royal-dawson@ulster.ac.uk](mailto:l.royal-dawson@ulster.ac.uk)).
- Dr Eleanor Kirk (tel: 02890 366564; mobile: 077 4370 1399; email: [e.kirk@ulster.ac.uk](mailto:e.kirk@ulster.ac.uk)).

They can be contacted at School of Law, University of Ulster, Shore Road, Newtownabbey, Co Antrim. BT37 0QB. Tel: 02890 366346. Project email: [lipni@ulster.ac.uk](mailto:lipni@ulster.ac.uk). Project website: [www.ulster.ac.uk/law/lipni](http://www.ulster.ac.uk/law/lipni)

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They can be contacted at Northern Ireland Human Rights Commission, Temple Court, 39 North Street, Belfast. BT1 1NA. Tel: 02890 243987. [www.nihrc.org](http://www.nihrc.org)

## Litigants in person in Northern Ireland

0

**CONSENT FORM (Key Personnel)****Name of Chief Investigator: Dr Gráinne McKeever**

Please tick the box [✓] to show that you agree with the following statements:

- I confirm that I have been given and have read and understood the information sheet for the above study and have asked and received answers to any questions raised. [ ]
- I understand that my participation is voluntary and that I am free to withdraw at any time without giving a reason and without my rights being affected in any way. [ ]
- I understand that the researchers will hold all information and data collected securely and in confidence and that all efforts will be made to ensure that I cannot be identified as a participant in the study (except as might be required by law) and I give permission for the researchers to hold relevant personal data. [ ]
- I agree to take part in an interview for the above study. [ ]
- I agree to any interview(s) being recorded. [ ]
- I would like the summary of the findings of the research to be sent to me at the email address below: [ ]

.....

---

**Name of interviewee**

---

**Signature**

---

**Date**

---

**Name of researcher taking consent**

---

**Signature**

---

**Date**

## Going to court without a lawyer?

### INFORMATION SHEET FOR RESEARCH PARTICIPANTS (Clinic LIP)

You are being invited to take part in a research study on the experiences of people who come to a court hearing without a lawyer representing them. Please read the following information and ask any questions you have about your involvement in the study before you take part.

You will be helping us to understand what it is like for people to take a case to court on their own. We hope to learn from you how the system can be improved for people who represent themselves and other people involved in court cases. In this way, there may be benefits for future court procedures.

Thank you for taking the time to consider this invitation.

#### What is the purpose of the study?

There are many people who either bring or defend a legal case as a “litigant in person” or a “self-represented litigant.” This means they prepare some or all of their case, including appearing at court hearings, without a lawyer representing them. Very little is known about the experience of self-represented litigants in Northern Ireland. We want to research their experience of bringing or defending a case and going to court without legal representation for four reasons:

1. To understand why people bring or defend legal cases without a legal representative.
2. To see how well the current system works when people do not have legal representation.
3. To investigate the impact of self-representation on the right to a fair trial.
4. To consider ways to change or improve the current system.

This is a joint study between the School of Law at Ulster University and the Northern Ireland Human Rights Commission.

#### Why have you been chosen?

You have been chosen because you are involved in a legal case between September 2016 and June 2017 and you are representing yourself. We hope to talk to up to 130 people in this situation. We would like to talk to people who have a case in one of these five areas of law: bankruptcy, civil bills, divorce, family proceedings, or family homes and domestic violence.

#### Do you have to take part?

No. It is entirely voluntary. It is up to you to decide whether or not to take part, and you are being given this information sheet to help you decide. If you decide to take part, you will be asked to sign a Consent Form to show that you understand what is being asked of you and that you agree to take part. You can change your mind at any time and withdraw from the study.

**What will happen if you take part?**

If you decide to take part, a researcher will arrange a time and a place to meet you. You can meet in the waiting area or another public area in the court. The researcher will interview you for about 20-30 minutes about your experience of representing yourself in your case. You will be asked for your permission to record the interview digitally so that we have an accurate record of what you tell us. Then you will be asked to fill in a short questionnaire. The questions are about yourself, including some questions about your general state of health taken from a standard health questionnaire (General Health Questionnaire 12).

Finally, to fully understand how well the current system works when people do not have legal representation, we will observe your court hearing and talk to other people who are involved in your case. We would like to talk to the judge, court staff and the lawyer of the other side, if there is one. We will not discuss with them your case or what you have told us. We will only ask them about their experience of working on a case in which there is a person who does not have a legal representative.

**Optional procedural advice**

You will be offered an information session on aspects of procedure in your case, for example, how to prepare the paperwork, how the court works, and what to expect in the hearings. It is a private session with someone who knows the processes of the court very well. Depending on how your case runs, you will be offered up to three information sessions. It is important to understand that it is not possible to give you any legal advice on your case. So, it will not be possible to guide you in how to argue your case or the legal points you should make. The sessions are only about procedural issues in your case. They will last about 45 minutes. It is a free service. It is up to you to decide if you want to attend the sessions. The procedural advice service is based at the Northern Ireland Human Rights Commission and if you decide to attend the sessions you can phone Sara Donnelly on 0800 028 6066 to set up an appointment.

The reason for offering the procedural advice is to see if it is helpful to people who are representing themselves. If you attend the sessions, we would like to know if it helped you in your case. We would like to interview you again later on, after you have attended your hearing. The second interview will be much shorter. We will contact you again to arrange a time.

Even if you do not attend the advice session, we would like to meet you once again to see if your situation has changed at all. The second meeting will be much shorter than the first because it will be an update on progress. We will contact you after a number of weeks or after you attend a hearing.

**Will your taking part in this study be kept confidential?**

Yes. Only the researchers and perhaps the other people involved in your case will know that you are taking part in the study. But what you say to the researchers will not be discussed with the other people involved in the case. We will not reveal your identity in any of the reports on the research. We will use what you tell us in a way so that your identity is anonymous and it will not be possible to link your identity to anything you tell us. This means that your rights will be protected as required by the Data Protection Act 1998. The information that you give us

will be held securely by the researchers. You should also be aware that Freedom of Information legislation will allow access to certain non-personal or generalized data, and that the researcher has a duty to report to the police any research which reveals criminal behaviour likely to harm others.

### **What if you decide to take part but then later change your mind**

Taking part in the research is entirely voluntary. You can change your mind at any time and withdraw from the study without giving a reason. Let the researcher know that you want to stop. Any information you have given to us will be removed from the study.

### **What next if you want to take part?**

If you agree to take part in this study, you will be asked to sign the Consent Form to show that you understand the purpose of the study and what is being asked of you, and that you agree to take part. The researcher will then arrange a time and a place to meet for the first interview.

### **Are there any risks in taking part?**

There are no risks to your case as a result of you taking part. You may feel a little uncomfortable talking about your experiences at a court hearing, especially if this was not a good experience for you. You might get upset about your case or how it was handled by the court, or get troubled by the questions that make you remember an unpleasant part of the court hearing. If this happens, we will stop the interview and will only continue with it if and when you feel you are able to do so. If you feel too troubled, we can stop completely. In this case, you might want to think about talking about your feelings to someone with professional training, such as your doctor, Lifeline (0808 808 8000) or The Samaritans (08457 909090 (UK) or 1850 60 90 90 (ROI)).

### **What happens when the study ends?**

Towards the end of the study, the researchers will make a summary of the findings from the research. If you wish, this summary can be sent to you so you can see what the study found and comment on it. At the end of the study, the researchers will discuss some ways in which court hearings are felt to be difficult or helpful for those taking a case without legal representation. We will use this information to suggest improvements to the ways in which the court system can support people who do not have legal representation.

### **What happens if something goes wrong?**

It is very unlikely that anything will go wrong, and the risk of something going wrong is very low. However, if you are unhappy with how you have been treated by the researchers, you can make a complaint verbally or in writing to the head of the research project, Dr Gráinne McKeever – see contact details below. She will take your complaint seriously and be in touch with you within five days. If the Chief Investigator is not able to resolve the complaint with you, you can take your complaint further using the formal procedures. More information on the Ulster University procedure can be found here:

[https://www.ulster.ac.uk/\\_\\_data/assets/pdf\\_file/0011/75638/Complaints.pdf](https://www.ulster.ac.uk/__data/assets/pdf_file/0011/75638/Complaints.pdf).



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### What will happen to the results of the study?

The information from our research findings will be presented at conferences to academics, government figures and professionals who help people at court hearings. Our research will also be published in academic journals. We hope that it will help to make some improvements in court procedures.

### Who is funding the research?

The research is funded by the Nuffield Foundation, which is a UK funding body that helps support different types of research, mostly done by staff working in universities.

### Who has reviewed this study?

This study has been reviewed by a committee of academics in law and public policy who conduct research in these areas. It has been approved by Ulster University's Research Ethics Committee, in accordance with University procedures. If you would like further information on these procedures you can contact the University Research Governance section (see: <http://research.ulster.ac.uk/office/rofficeeg.html>, or telephone 028 9036 6629).

### Contact details

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- Chief Investigator: Dr Gráinne McKeever (tel: 02890 366340; email: [g.mckeever@ulster.ac.uk](mailto:g.mckeever@ulster.ac.uk)).
- Dr John McCord (tel: 02890 368802; email: [ja.mccord@ulster.ac.uk](mailto:ja.mccord@ulster.ac.uk)).
- Dr Lucy Royal-Dawson (tel: 02890 366564; mobile: 075 0344 7886; email: [l.royal-dawson@ulster.ac.uk](mailto:l.royal-dawson@ulster.ac.uk)).
- Dr Eleanor Kirk (tel: 02890 366564; mobile: 077 4370 1399; email: [e.kirk@ulster.ac.uk](mailto:e.kirk@ulster.ac.uk)).

They can be contacted at School of Law, University of Ulster, Shore Road, Newtownabbey, Co Antrim. BT37 0QB. Tel: 02890 366346. Project email: [lipni@ulster.ac.uk](mailto:lipni@ulster.ac.uk). Project mobile: [www.ulster.ac.uk/law/lipni](http://www.ulster.ac.uk/law/lipni)

- Sara Donnelly (tel: 02890 243987; textphone: 02890 249066; SMS text: 07786 202075; email: [Sara.Donnelly@nihrc.org](mailto:Sara.Donnelly@nihrc.org)).
- Rhyannon Blythe (tel: 02890 243987; textphone: 02890 249066; SMS text: 07786 202075; email: [Rhyannon.Blythe@nihrc.org](mailto:Rhyannon.Blythe@nihrc.org)).

They can be contacted at Northern Ireland Human Rights Commission, Temple Court, 39 North Street, Belfast. BT1 1NA. Tel: 02890 243987. [www.nihrc.org](http://www.nihrc.org)

**CONSENT FORM (Clinic LIP)****Name of Chief Investigator: Dr Gráinne McKeever**

Please tick the box [✓] to show that you agree with the following statements:

- I confirm that I have been given and have read and understood the information sheet for the above study and have asked and received answers to any questions raised. [ ]
- I understand that my participation is voluntary and that I am free to withdraw at any time without giving a reason and without my rights being affected in any way. [ ]
- I understand that the researchers will hold all information and data collected securely and in confidence and that all efforts will be made to ensure that I cannot be identified as a participant in the study (except by other people involved in my case and except as might be required by law) and I give permission for the researchers to hold relevant personal data. [ ]
- I agree to take part in an interview for the above study. [ ]
- I agree to any interviews being recorded. [ ]
- I would like the summary of the findings of the research to be sent to me. [ ]

Send the summary to me at: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
**Name of participant**

\_\_\_\_\_  
**Signature**

\_\_\_\_\_  
**Date**

\_\_\_\_\_  
**Name of researcher taking consent**

\_\_\_\_\_  
**Signature**

\_\_\_\_\_  
**Date**

# Appendix 3b

## Interview schedules and observation topics

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### LIPs

- Prior experience of litigation
- Case details, applicant or respondent
- Expectations and importance of resolving case
- Reasons / route to self-representation
- Confidence to run the case along
- Preference to be represented
- Accessing information, help and advice
- Preparation and attempts to seek resolution prior to court
- Experience and understanding of the hearing(s) and outcome
- Sense of fairness of the proceedings
- What happens next?
- Levels of stress
- Acceptability to act alone
- Support needs for LIPs

### Judges and legal representatives

- Experience of LIPs
- Prevalence of LIPs
- Training or direction for dealing with LIPs
- Preparation and efforts to reach a resolution
- Reasons for self-representation
- Ability of LIPs to prepare and manage in court
- Differences between fully represented proceedings and ones with LIPs
- Disadvantages and advantages of self-representation
- Impact of LIPs on court and dealing/raising complaints about LIPs if they are abusive or delay proceedings
- Judicial leeway and LIPs
- Experience of McKenzie friends
- Human rights considerations
- Changes needed to accommodate LIPs
- Which of the three options: 'Get them lawyers, make them lawyers, change the system'...

### Court staff

- Experience of LIPs
- Prevalence of LIPS
- Steps taken to accommodate LIPs
- Training and support for dealing with LIPs
- Information and advice available for LIPs

- Giving advice and navigating the line between procedural and legal advice
- Support needs for LIPs
- Dealing with difficult LIPs
- Impact of LIPs
- LIPs' preparation and attempts to resolve case prior to coming to court
- Ability of LIPs to run their case and deal with paperwork and other demands of litigation
- Disadvantages and advantages of self-representation
- Impact of LIPs on court
- If LIP is absent, how are they informed of the next gearing date
- How do LIPs access CCO reports, GP reports, etc
- Experience of McKenzie friends
- Human rights considerations
- Changes needed to accommodate LIPs
- Which of the three options: 'Get them lawyers, make them lawyers, change the system'...

**Observation tool:**

- Pre-hearing activity
- Entering the court room
- Who is present in court
- Openings of proceedings
- Presenting the case
- Case complexity
- Arguments and relevance of contributions
- Cross-examination style
- Signs of preparation
- Comprehension and capacity to speak and engage
- Lawyers' strategies with LIP
- Judge's strategies with LIP
- Standard format to hearing
- Emotional responses, verbal abuse of bullying
- Outcome
- What worked well
- Reflection upon Human Rights considerations: equality of arms, fairness, expeditiousness, complexity, participation and accessibility, responsibility of the LIP to respect the court

# Appendix 3c

## Questionnaires for participants

### Questionnaire for participants (LIP)

#### Your experience of representing yourself

1. Thinking about the processes of bringing / defending your case, how **clear** were the following:

*Tick the boxes that match your experience*

	Not applicable to me	Not clear 1	2	3	4	Very clear 5
the forms from the court which you completed						
your dealings with the court staff						
written instructions from the court						
how to make contact with the other side BEFORE the hearing						
your most recent hearing						

2. How **easy** was it for you to do the following?

*Tick the boxes that match your experience*

	Not applicable to me	Not easy 1	2	3	4	Very easy 5
Obtain the information you wanted for your case						
Get the help you wanted for your case						
Fill in the forms and paperwork from the court						
Understand what was going on in court						
Find out what you had to do in your court hearing						

3. How **confident** did/do you feel about the following?

*Tick the boxes that match your experience*

	Not applicable to me	Not confident 1	2	3	4	Very confident 5
Winning your case						
Filling in the forms from the court						
That you were adequately prepared for your case						
Contacting the other side before the hearing						
Appearing in court alone						
Asking questions in the hearing						
Answering questions in the hearing						
That you had a fair hearing						



## Litigants in person in Northern Ireland

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**Information and advice**9. Where did you look for information? How **useful** was the information you obtained?

	Yes = ✓	Not useful ←————→				Very useful
	No = ✗	1	2	3	4	5
Court service website						
Court service desk or court office						
A lawyer						
Local advice agency – eg Citizens Advice NI						
Local council						
Trade union or professional body						
Employer						
Police, social worker, doctor						
A friend, colleague, member of your family						
Insurance company						
Internet – <i>please write which sites</i>						
Other sources – <i>please write</i>						

**Personal details (optional)**

10. What is your postcode?

\_\_\_\_\_

**11. Gender**Male  Female Other *please state* \_\_\_\_\_

## Litigants in person in Northern Ireland

Q

**12. Age group**

- 17 – 25       46 – 55   
 26 – 35       56 – 65   
 36 – 45       66 or older

**13. Marital status** *Tick all that apply*

- Single   
 Married / Civil Partnership /  
 living with partner   
 Separated   
 Divorced   
 Widowed

**14. Dependents** *Please tick all that apply:*

- Do you have...  
 children under 18 living with you?   
 children under 18 living elsewhere?   
 family who depend on you?

**15. Ethnicity**

- White   
 Chinese   
 Irish Traveller   
 Indian   
 Pakistani   
 Bangladeshi   
 Black Caribbean   
 Black African   
 Other *please write* \_\_\_\_\_

**16. Disability** **Are you registered as disabled?**

*Please circle one*      Yes / No

**17. Your accommodation**

Do you or others in your household rent or own your accommodation? *Please select one*

- Own it outright   
 Buying it with a mortgage or loan   
 Pay part rent and part mortgage   
 Rent it   
 Pay board   
 Live rent free

If you are renting your accommodation, who is your landlord? *Please select one*

- NI Housing Executive   
 Housing association   
 Private landlord or letting agency   
 Relative / friend / employer

- 18. Do you live in** a rural area?   
 a village?   
 a town or city?

**19. Qualifications** *Tick all that apply*

- None   
 GCSEs or equivalent   
 A Levels or equivalent   
 Diploma or apprenticeship   
 Degree or higher

**20. Employment situation**

- Unemployed   
 Full-time study / training scheme   
 Employed (including self-employed)   
 Off work (sick, maternity or laid-off)   
 Registered as unable to work   
 Looking after family home   
 Full-time carer   
 Retired

**21. Religion**

- Roman Catholic   
 Protestant   
 Other *please write* \_\_\_\_\_  
 None

**22. Political opinion**

- Unionist  Nationalist  Other

**23. Sexual orientation**

- Heterosexual /straight   
 Gay or lesbian   
 Other *please write* \_\_\_\_\_  
 Rather not answer



**GENERAL HEALTH QUESTIONNAIRE****GHQ 12****Please read this carefully:**

We should like to know if you have had any medical complaints, and how your health has been in general, *over the past few weeks*. Please answer ALL the questions simply by underlining the answer which you think most nearly applies to you. Remember that we want to know about present and recent complaints, not those you had in the past. It is important that you try to answer ALL the questions.

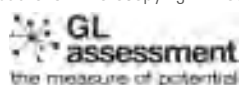
Thank you very much for your co-operation.

**HAVE YOU RECENTLY:**

1 - been able to concentrate on whatever you're doing?	Better than usual	Same as usual	Less than usual	Much less than usual
2 - lost much sleep over worry?	Not at all	No more than usual	Rather more than usual	Much more than usual
3 - felt that you are playing a useful part in things?	More so than usual	Same as usual	Less useful than usual	Much less useful
4 - felt capable of making decisions about things?	More so than usual	Same as usual	Less so than usual	Much less capable
5 - felt constantly under strain?	Not at all	No more than usual	Rather more than usual	Much more than usual
6 - felt you couldn't overcome your difficulties?	Not at all	No more than usual	Rather more than usual	Much more than usual
7 - been able to enjoy your normal day-to-day activities?	More so than usual	Same as usual	Less so than usual	Much less than usual
8 - been able to face up to your problems?	More so than usual	Same as usual	Less able than usual	Much less able
9 - been feeling unhappy and depressed?	Not at all	No more than usual	Rather more than usual	Much more than usual
10 - been losing confidence in yourself?	Not at all	No more than usual	Rather more than usual	Much more than usual
11 - been thinking of yourself as a worthless person?	Not at all	No more than usual	Rather more than usual	Much more than usual
12 - been feeling reasonably happy, all things considered?	More so than usual	About same as usual	Less so than usual	Much less than usual

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## Questionnaire for participants since receiving advice

### Your experience of representing yourself since you attended the advice clinic

1. Thinking about the processes of bringing / defending your case, how **clear** were the following:

*Tick the boxes that match your experience*

	Not applicable to me	Not clear 1	2	3	4	Very clear 5
the forms from the court which you completed						
your dealings with the court staff						
written instructions from the court						
how to make contact with the other side BEFORE the hearing						
your most recent hearing						

2. How **easy** was it for you to do the following?

*Tick the boxes that match your experience*

	Not applicable to me	Not easy 1	2	3	4	Very easy 5
Obtain the information you wanted for your case						
Get the help you wanted for your case						
Fill in the forms and paperwork from the court						
Understand what was going on in court						
Find out what you had to do in your court hearing						

3. How **confident** did/do you feel about the following?

*Tick the boxes that match your experience*

	Not applicable to me	Not confident 1	2	3	4	Very confident 5
Winning your case						
Filling in the forms from the court						
That you were adequately prepared for your case						
Contacting the other side before the hearing						
Appearing in court alone						
Asking questions in the hearing						
Answering questions in the hearing						
That you had a fair hearing						

## Litigants in person in Northern Ireland

CQ

4. If you were going to court again, how confident would you feel about the following?

	Not Confident	←————→			Very Confident
	1	2	3	4	5
I would know what to do					
I would know where to go to for help					

5. Indicate how much you **know and understand** about the following:

	Nothing	←————→			A lot
	1	2	3	4	5
the process of bringing or responding to your case					
the law in your case					

6. Thinking about your most **recent hearing**:

	None	←————→			A lot
	1	2	3	4	5
How much of what you wanted to say did you actually say?					
How many opportunities were you given to speak?					

7. Thinking about your most recent hearing, please rate...

	None	←————→			Very high
	1	2	3	4	5
your ability to say what you wanted to say					
your understanding of what the judge said					
your understanding of what the other side said					

8. Thinking about your most recent hearing, please rate...

	Not at all	←————→			Fully
	1	2	3	4	5
how supported you felt					
how much the judge listened to you					
how much the other side listened to you					
how seriously you were taken by the court					
how satisfied you were with your performance in court					
how much you were able to influence the hearing					
how satisfied with the process of bringing or answering your case					

Litigants in person in Northern Ireland

CQ

9. Thinking about the **advice session**, please rate...

	Not at all 1	2	3	4	Very 5
how relevant was the advice to your case					
how relevant was the advice to representing yourself					
how useful was the advice in progressing your case					
how clear was the advice					
how easy was it to apply the advice in your case					
how supported did the advice make you feel representing yourself					

10. Still thinking about the **advice session**, please answer these questions...

	Nothing 1	2	3	4	A lot 5
How much did you learn about the process of representing yourself?					
How much did you learn about the legal issues in your case?					
How much of a difference did the advice make to you being able to represent yourself?					
How much of a difference did the advice make to your case?					
How worthwhile is such advice to personal litigants?					
	No				Definitely
Would you recommend such a service to a personal litigant?					

**GENERAL HEALTH QUESTIONNAIRE****GHQ 12****Please read this carefully:**

We should like to know if you have had any medical complaints, and how your health has been in general, *over the past few weeks*. Please answer ALL the questions simply by underlining the answer which you think most nearly applies to you. Remember that we want to know about present and recent complaints, not those you had in the past. It is important that you try to answer ALL the questions.

Thank you very much for your co-operation.

**HAVE YOU RECENTLY:**

1 - been able to concentrate on whatever you're doing?	Better than usual	Same as usual	Less than usual	Much less than usual
2 - lost much sleep over worry?	Not at all	No more than usual	Rather more than usual	Much more than usual
3 - felt that you are playing a useful part in things?	More so than usual	Same as usual	Less useful than usual	Much less useful
4 - felt capable of making decisions about things?	More so than usual	Same as usual	Less so than usual	Much less capable
5 - felt constantly under strain?	Not at all	No more than usual	Rather more than usual	Much more than usual
6 - felt you couldn't overcome your difficulties?	Not at all	No more than usual	Rather more than usual	Much more than usual
7 - been able to enjoy your normal day-to-day activities?	More so than usual	Same as usual	Less so than usual	Much less than usual
8 - been able to face up to your problems?	More so than usual	Same as usual	Less able than usual	Much less able
9 - been feeling unhappy and depressed?	Not at all	No more than usual	Rather more than usual	Much more than usual
10 - been losing confidence in yourself?	Not at all	No more than usual	Rather more than usual	Much more than usual
11 - been thinking of yourself as a worthless person?	Not at all	No more than usual	Rather more than usual	Much more than usual
12 - been feeling reasonably happy, all things considered?	More so than usual	About same as usual	Less so than usual	Much less than usual

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# Appendix 4

## Procedural advice clinic protocol

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As part of the joint Ulster University and Northern Ireland Human Rights Commission's research study into Litigants in Person, the Commission is to set up and run a procedural advice clinic. The clinic will offer litigants in person advice on the procedural aspects of their case to assess the extent to which basic legal assistance can support litigants in person. The purpose of the clinic will be to support litigants in person to participate in the court process, and to represent themselves more effectively. Ulster University will measure the effect of the service by interviewing litigants before and after they have had access to the clinic.

The clinic will run from January 2017 until July 2017. It will be staffed and resourced by the Commission.

Below is the protocol that will govern the running of the clinic. It has been drafted based on the service of the London-based Citizens Advice Royal Courts of Justice litigants in person advice clinic as well as the Personal Support Unit's advice service.

### **Initial Contact**

1. The client will make initial contact with the project in the courts or via the telephone.
2. Leaflets will be provided by NIHRC to UU to disseminate to potential clients.
3. The client or the clinic adviser will make initial contact with each other through telephone.
4. Telephone contact will be used to sort the case for the clinic advisor's information/preparation.
5. Each client will be asked the following during the initial conversation:
  - (a) Name/Address;
  - (b) Information on case;
  - (c) Court proceedings/Orders/Deadlines already in place;
  - (d) Query if proceedings involve Children's Order;
  - (e) Any legal advice sought previously;
  - (f) Details of other party involved (conflict check & legal aid check);
  - (g) 'What would you like to discuss at appointment?'
  - (h) If they have completed the questionnaire prior to appointment.
6. Face to Face Appointment arranged.
  - (a) Advise client to bring most up to date documents in case;
  - (b) Advise client of purpose and nature of service;
    - i) Client will already be aware of this before telephone contact as information will be made available on webpage/appointment card.
  - (c) Where other, non-legal issues arise these will be signposted to appropriate agencies;
  - (d) Where the client raises a human rights issue which would ordinarily require the Commission to take action, this will be raised with the research group and referred to the human rights clinic where necessary;
  - (e) Advise client that their data will be held/passed to UU researchers;
  - (f) Client will be asked to sign consent form at initial appointment.
7. In exceptional circumstances, the telephone contact can be bypassed at the discretion of the Clinic Adviser.

### **Children's Order matters**

1. Where proceedings involve a Children's Order (NI) 1995 element, the clinic must have sight of permission from the court to view the papers.
2. When sight of papers are required to provide advice, a letter will be forwarded by the clinic, with the signature of the client, to the Court asking for permission.

### **Appointments**

1. Each appointment will normally last 45 minutes.
2. After the initial face-to-face appointment, telephone contact can be maintained to assist unless another face-to-face appointment is requested.
3. Further face-to-face appointments will be arranged where necessary.
4. Each client will be offered 3 appointments at a maximum.
  - (a) A fourth appointment may be offered in exceptional circumstances, at the Clinic Adviser's discretion.
5. The appointments will be based at the Northern Ireland Human Rights Commission.
  - (a) Where a cohort of clients is from a similar area in Northern Ireland that is not Belfast, office space can be sourced to schedule appointments close to their location;
  - (b) In exceptional circumstances, the Clinic Adviser may see clients in the Royal Courts of Justice or Laganside Court.
6. A case record will be maintained for each client. This will note procedural advice given and actions to be followed up on as well as any other relevant information.
7. Each client will be offered a 'de-brief' with the clinic adviser after their court appearance to discuss how the case went/what they did or didn't understand and matters arising.

### **Advice Offered**

1. The clinic will offer procedural advice only.
2. The clinic will not offer legal advice or advice on the merits of the client's case or strategy.
3. Each client will be informed of this verbally at their appointment and will be provided with a consent form which will detail the limitations of the service, which they will be asked to sign.
4. Each client will be made aware that they are responsible for the running of their case and that the clinic cannot represent them in court or be named as representatives on court documents.
5. The Clinic Adviser will not attend court with the client. The Clinic Adviser will not attend any other meetings with the client including but not limited to joint consultations.

### **Procedural Services Offered**

1. The clinic can provide standardised templates of court forms/affidavits etc to assist the client in how to lay out their paperwork.
2. The clinic can explain the forms to the client and assist with their understanding of what is required (see below for step-by-step process).
3. The clinic can assist clients in organising their paperwork.
4. The clinic can provide clients with sight of the relevant rules/websites and copies of practice directions for their case where needed.



5. The clinic can direct clients on how to find case law/legislation etc.
6. The clinic can provide advice on the content and submission of bundles. The clinic will not prepare these on behalf of the client.
7. The clinic will provide advice on how the court works and what may be expected of a litigant in person (see 'general assistance offered' below).
8. Information on how to appeal a decision to the Court of Appeal will be provided however the same level of assistance will not be offered to the litigant once their case has reached this stage.

### **Procedure governing forms**

1. Where the client requests assistance with forms or where the clinic adviser believes documentation needs to be lodged with the court office to action what the client wishes to achieve in the case, the clinic adviser will:
  - (a) Present the client with all the forms available in each court area they are in;
  - (b) Explain to the client in plain terms what each form does;
  - (c) Ask the client to choose which form they think they need;
2. After the form has been chosen by the client, the clinic adviser will:
  - (a) Explain to the client in plain terms what each section of the form requires;
3. The clinic will not fill out the form for the client.
4. The clinic can check over finalised forms/statements for the client and assist the client to think objectively about what information they have included.
  - (a) The clinic adviser will not tell the client to remove information or add information from their completed form, except for basic factual information that may be required for administrative purposes such as name, DOB, address, ICOS number, etc.

### **Data**

1. The clinic will not maintain or otherwise hold any original documentation belonging to the litigant.
2. The duty of confidentiality applicable to staff of NIHR shall apply to the LiPs clinic. The litigant will be informed of this and this will be set out in the consent form.
3. The consent form will contain a legal professional privilege clause. This will be explained to the client and will be signed off as understood by the client in the consent form.
4. It will be explained to the client that the notes of the meeting will be passed to Ulster University/held by Ulster University for a period of 5 years. This will be explained to the client and will be signed off as understood by the client in the consent form.

### **General Assistance Offered**

1. The clinic will offer each client generalist advice about how to present their case in court, including but not limited to:
  - (a) Where to stand;
  - (b) How to address the Judge/Master;
  - (c) How to engage with the other side;

- (d) Court procedure/what to do during the hearing;
  - (e) The expectations of the court.
2. The clinic can provide information on the Court itself, including but not limited to:
    - (a) Court visits before the hearing;
    - (b) Information on the Court Offices;
    - (c) Information on the court fees and how to apply for an exemption;
    - (d) Contact information for NI Courts Service and the court offices.
  3. The client will be offered a hardcopy information sheet detailing all the above information in brief.
  4. Signposting for clients reporting additional non-legal issues.

### **Disengagement**

1. Contact between the clinic and the client will end when:
  - (a) The client does not want the services of the clinic anymore;
  - (b) The client is abusive or threatening to the clinic adviser;
  - (c) The client's case reaches the stage of a hearing before Court of Appeal;
  - (d) The client's case continues after the length of the project or after the end of July 2017.
    - i) Referral/Signposting to different agencies including the NIHRC legal clinic should occur at this point.

### **Review**

The clinic and this protocol will be reviewed within the first month of operation to ascertain if any changes are required.

### **Data collection for the study**

The participants who take up the procedural advice will be observed after the session and will be asked to take part in a second research interview after a hearing and complete a second questionnaire. Both the interview and the questionnaire will be much shorter than the initial ones.

The data to be collected post-clinic will relate to:

- (a) The behaviour and conduct of the litigant in his or her proceedings with reference to the human rights elements under study;
- (b) Self-reported subjective experience of self-litigation after the clinic;
- (c) Responses to the shortened questionnaire.

# Appendix 5a

## NICTS Data: Number of LIPs per business area 2012-2017

LIPs' applicant status and sex for 2012-2017. The tables below only show figures for LIPs whose cases were disposed of in any given year.

Data source: ICOS, NICTS

### Key

M= male F= female N= field given in datafile U= field given in datafile Blank= no value given in field

### 2012 Number of LIPs per business area

LIPs only	Issuing Party					Responding Party					All LIPs	*All litigants	
	F	M	N	U	Blank	Total	F	M	U	Blank			Total
ADOPTION (CC)	48	49				97	5	5		10	20	117	223
ADOPTION (HC)	40	39				79	10	10		1	21	100	200
APPEAL TO HIGH COURT CIVIL	1	1			2	4						4	47
BANKRUPTCY	287	366			2	655	7	9	2	3	21	676	3495
CHANCERY	3	9			1	13	20	27	1	1	49	62	8181
CHILDREN ORDER HC	1	3			1	5	14	20		4	38	43	207
CIVIL	35	64		5	52	156	68	187	9	24	288	444	25349
COMPANIES		2			3	5		2		3	5	10	1161
CONTENTIOUS PROBATE													6
COURT OF APPEAL CIVIL	1	12			1	14						14	47
CRIMINAL DAMAGE	1					1				1	1	2	46
DIVORCE CC	100	66				166	284	452	3		739	905	2844
DIVORCE HIGH COURT	35	23				58	112	277	7		396	454	2342
DOMESTIC PROCEEDINGS	48	2		1	11	62	2	154		2	158	220	585
EQUITY							2	3	1		6	6	466
FAMILY CARE CENTRE		8				8	9	13			22	30	499
FAMILY PROCEEDINGS	5	15				20	179	201		1	381	401	4338
FH&DV (CC)								1			1	1	72
FH&DV (HIGH COURT)							3	11			14	14	72
FH&DV (MAG COURT)	3					3	52	418			470	473	3794
JUDICIAL REVIEW		2			1	3						3	146
PROBATE	325	328			1	654						654	8655
QUEENS BENCH	28	239		1	5	273	13	44		21	78	351	10745
SMALL CLAIMS	403	1019	1	91	4864	6378	1762	3820	652	1471	7705	14083	21282
<b>Grand Total</b>	<b>1364</b>	<b>2247</b>	<b>1</b>	<b>98</b>	<b>4944</b>	<b>8654</b>	<b>2542</b>	<b>5654</b>	<b>675</b>	<b>1542</b>	<b>10413</b>	<b>19067</b>	<b>94802</b>

\*Total number of participants dealt with this year, i.e. LIPs + represented participants

## 2013 Number of LIPs per business area

LIPs only	Issuing Party					Responding Party					All LIPs	*All litigants
	F	M	U	Blank	Total	F	M	U	Blank	Total		
ADOPTION (CC)	43	46	1		90	7	10	1	3	21	111	245
ADOPTION (HC)	46	44			90	8	10		5	23	113	203
APPEAL TO HIGH COURT CIVIL												21
BANKRUPTCY	317	369		2	688	2	6		2	10	698	3176
CHANCERY	2	6		1	9	25	33		4	62	71	6793
CHILDREN ORDER HC	1	2			3	7	18	2	1	28	31	167
CIVIL	39	66	7	45	157	86	120		30	236	393	22509
COMPANIES		3		4	7				4	4	11	1034
CONTENTIOUS PROBATE												4
COURT OF APPEAL CIVIL	3	5	1		9		2		1	3	12	66
CRIMINAL DAMAGE		1			1				1	1	2	17
DIVORCE CC	99	80			179	302	457	3		762	941	2870
DIVORCE HIGH COURT	24	17			41	103	220	5		328	369	2108
DOMESTIC PROCEEDINGS	41	7		10	58	5	139		2	146	204	496
EQUITY		2			2	2			1	3	5	300
FAMILY CARE CENTRE		2			2	4	16			20	22	428
FAMILY PROCEEDINGS	5	12			17	158	198		2	358	375	4113
FH&DV (CC)							2			2	2	67
FH&DV (HIGH COURT)	6				6	1	7			8	14	63
FH&DV (MAG COURT)	1	1			2	45	374			419	421	3536
JUDICIAL REVIEW												186
PROBATE	379	340	1		720						720	9212
QUEENS BENCH	11	34		11	56	6	25	1	25	57	113	9787
SMALL CLAIMS	421	1049	64	3837	5371	1613	3257	759	1472	7101	12472	19176
<b>Grand Total</b>	<b>1438</b>	<b>2086</b>	<b>74</b>	<b>3910</b>	<b>7508</b>	<b>2374</b>	<b>4894</b>	<b>771</b>	<b>1553</b>	<b>9592</b>	<b>17100</b>	<b>86577</b>

\*Total number of participants dealt with this year, i.e. LIPs + represented participants

**2014 Number of LIPs per business area**

LIPs only	Issuing Party					Responding Party					All LIPs	All litigants
	F	M	U	Blank	Total	F	M	U	Blank	Total		
ADOPTION (CC)	58	52			110	2	1	1	33	37	147	203
ADOPTION (HC)	30	28			58	8	4		1	13	71	122
APPEAL TO HIGH COURT CIVIL									1	1	1	16
BANKRUPTCY	295	350			645	3	5			8	653	2935
CHANCERY	2	3		1	6	15	30	1	2	48	54	5436
CHILDREN ORDER HC	3	3			6	5	12	1	4	22	28	138
CIVIL	17	34	3	42	96	70	124	19	26	239	335	23776
COMPANIES	1			3	4				4	4	8	960
CONTENTIOUS PROBATE												12
CT OF APPEAL CIVIL	3	3			6						6	82
CRIMINAL DAMAGE		1			1						1	41
DIVORCE CC	97	93			190	309	448	6		763	953	2808
DIVORCE HIGH COURT	33	23			56	132	249	4		385	441	2348
DOMESTIC PROCEEDINGS	37	3		17	57	3	129			132	189	389
EQUITY						1	2			3	3	258
FAMILY CARE CENTRE	2	5			7	13	15		2	30	37	381
FAMILY PROCEEDINGS	5	21		1	27	183	209		2	394	421	4515
FH&DV (CC)						2	3			5	5	52
FH&DV (HIGH COURT)						4	10			14	14	69
FH&DV (MAG. COURT)	5	3			8	53	329	1	1	384	392	3530
JUDICIAL REVIEW		1		2	3				1	1	4	145
PROBATE	358	340		5	703						703	8370
QUEENS BENCH	18	36		14	68	8	43	3	9	63	131	11932
SMALL CLAIMS	391	910	58	3639	4998	1526	3448	979	1258	7211	12209	18143
<b>Grand Total</b>	<b>1355</b>	<b>1909</b>	<b>61</b>	<b>3724</b>	<b>7049</b>	<b>2337</b>	<b>5061</b>	<b>1015</b>	<b>1344</b>	<b>9757</b>	<b>16806</b>	<b>86661</b>

\*Total number of participants dealt with this year, i.e. LIPs + represented participants

## 2015 Number of LIPs per business area

LIPs only	Issuing Party					Responding Party					All LIPs	All litigants	
	F	M	N	U	Blank	Total	F	M	U	Blank	Total		
ADOPTION (CC)	58	60				118	2			31	33	151	337
ADOPTION (HC)	33	33				66	10	2		5	17	83	140
APPEAL TO HIGH COURT CIVIL					1	1						1	12
BANKRUPTCY	237	265				502	1				1	503	2444
CHANCERY	6	4				10	11	27		1	39	49	3540
CHILDREN ORDER HC	3	3	1			7	7	13	2	1	23	30	150
CIVIL	12	21	2	25	60	60	30	69	30	18	147	207	23575
COMPANIES	1	2				3				2	2	5	869
CONTENTIOUS PROBATE													2
COURT OF APPEAL CIVIL	2		1	1	4	4	1				1	5	24
CRIMINAL DAMAGE					1	1				1	1	2	38
DIVORCE COUNTY COURT	134	103				237	323	487	6		816	1053	3004
DIVORCE HIGH COURT	29	26				55	82	182	9		273	328	1908
DOMESTIC PROCEEDINGS	30	3			8	41	4	122			126	167	329
EQUITY							3	2	2	1	8	8	276
FAMILY CARE CENTRE		1				1	11	5	1		17	18	493
FAMILY PROCEEDINGS	13	20				33	198	204		1	403	436	3758
FH&DV (CC)	1					1						1	48
FH&DV (HIGH COURT)							1	5			6	6	59
FH&DV (MAG. COURT)	4	2				6	50	278			328	334	3043
JUDICIAL REVIEW										1	1	1	112
PROBATE	378	431			1	810						810	8994
QUEENS BENCH	10	25	1	6	42	42		30		18	48	90	9338
SMALL CLAIMS	371	861	1	94	3435	4762	1453	3262	753	940	6408	11170	16996
<b>Grand Total</b>	<b>1322</b>	<b>1860</b>	<b>1</b>	<b>99</b>	<b>3478</b>	<b>6760</b>	<b>2187</b>	<b>4688</b>	<b>803</b>	<b>1020</b>	<b>8698</b>	<b>15458</b>	<b>79489</b>

\*Total number of participants dealt with this year, i.e. LIPs + represented participants

**2016 Number of LIPs per business area**

LIPs only	Issuing Party					Responding Party					All LIPs	All litigants
	F	M	N	U	Total	F	M	N	U	Total		
ADOPTION (CC)	110	105			215	7	10		22	39	254	392
ADOPTION (HC)	40	42			82	11	4		2	17	99	166
APPEAL TO HIGH COURT CIVIL	1	3			4						4	29
BANKRUPTCY	163	171		10	344	1	3		1	5	349	2331
CHANCERY	1	8		1	10	8	18		1	27	37	2506
CHILDREN ORDER HC	2	1			3	6	17		4	27	30	182
CIVIL	10	16		41	67	44	74	1	66	185	252	23596
COMPANIES	1	1		3	5		2			2	7	869
CONTENTIOUS PROBATE												10
COURT OF APPEAL CIVIL	1	1		4	6						6	41
CRIMINAL DAMAGE												34
DIVORCE CC	134	119			253	371	565		4	940	1193	3528
DIVORCE HIGH COURT	26	17			43	83	193		8	284	327	1852
DOMESTIC PROCEEDINGS	24	6		7	37	2	60			62	99	246
EQUITY	4	8		1	13	2	3		4	9	22	252
FAMILY CARE CENTRE		4			4	10	10			20	24	504
FAMILY PROCEEDINGS	16	21		3	40	174	190		1	365	405	3589
FH&DV (CC)							1			1	1	57
FH&DV (HIGH COURT)						4	12			16	16	80
FH&DV (MAG. COURT)	3	3			6	55	303			358	364	3012
JUDICIAL REVIEW				1	1						1	127
PROBATE	409	394		9	812						812	9213
QUEENS BENCH	21	42		6	69	8	23		19	50	119	7773
SMALL CLAIMS	308	773	1588	1688	4357	1401	3462	432	1090	6385	10742	14813
<b>Grand Total</b>	<b>1274</b>	<b>1735</b>	<b>1588</b>	<b>1774</b>	<b>6371</b>	<b>2187</b>	<b>4950</b>	<b>433</b>	<b>1222</b>	<b>8792</b>	<b>15163</b>	<b>75202</b>

NB No 'blanks' given in 2016 dataset

\*Total number of participants dealt with this year, i.e. LIPs + represented participants

## 2017 January to June 2017 Number of LIPs per business area

LIPs only	Issuing Party					Responding Party					All LIPs	All litigants
	F	M	N	U	Total	F	M	N	U	Total		
ADOPTION (CC)	17	15			32	1	3		1	5	37	104
ADOPTION (HC)	8	13			21	9	2			11	32	56
APPEAL TO HIGH COURT CIVIL												4
BANKRUPTCY	59	68			127						127	1019
CHANCERY		2			2	3	4			7	9	1286
CHILDREN ORDER HC		2			2	6	10		4	20	22	103
CIVIL	3	9		27	39	34	46		24	104	143	13575
COMPANIES												470
CONTENTIOUS PROBATE												
COURT OF APPEAL CIVIL	2	4			6						6	15
CRIMINAL DAMAGE												12
DIVORCE CC	44	44			88	153	203		1	357	445	1310
DIVORCE HC	7	12			19	38	84			122	141	868
DOMESTIC PROCEEDINGS	20	3		1	24	4	24			28	52	115
EQUITY				1	1	1	2		1	4	5	212
FAMILY CARE CENTRE	1				1	6	6		1	13	14	226
FAMILY PROCEEDINGS	6	9		1	16	91	106			197	213	1801
FH&DV (CC)												26
FH&DV (HIGH COURT)						1	6			7	7	32
FH&DV (MAG. COURT)	2	2			4	29	180		2	211	215	1560
JUDICIAL REVIEW		2			2						2	88
PROBATE	210	210		2	422						422	4746
QUEENS BENCH	4	16		2	22	4	16		10	30	52	3105
SMALL CLAIMS	175	401	874	991	2441	685	1831	201	557	3274	5715	8364
<b>Grand Total</b>	<b>558</b>	<b>812</b>	<b>874</b>	<b>1025</b>	<b>3269</b>	<b>1065</b>	<b>2523</b>	<b>201</b>	<b>601</b>	<b>4390</b>	<b>7659</b>	<b>39097</b>

NB No 'blanks' given in dataset

\*Total number of participants dealt with this year, i.e. LIPs + represented participants



## Appendix 5b

### NICTS Data: Number of represented participants per business area 2012-2017

Represented participants' applicant status and sex for 2012-2017. The tables below only show figures for represented participants whose cases were disposed of in any given year.

Data source: ICOS, NICTS

#### Key

M= male F= female N= field given in datafile U= field given in datafile Blank= no value given in field

#### 2012 Number of LIPs per business area

Represented only	Issuing Party					Responding Party					All Rep'd	*All litigants
	F	M	U	Blank	Total	F	M	U	Blank	Total		
ADOPTION (CC)	2	2		18	22	43	36		5	84	106	223
ADOPTION (HC)	26	30		7	63	24	13			37	100	200
APPEAL TO HIGH COURT CIVIL	2	10	1	7	20	1	2		20	23	43	47
BANKRUPTCY	190	454	3	761	1408	308	1004	14	85	1411	2819	3495
CHANCERY	87	180	9	2618	2894	2116	2953	45	111	5225	8119	8181
CHILDREN ORDER HC	29	28	1	8	66	59	37		2	98	164	207
CIVIL	3714	5381	222	1986	11303	3556	6117	389	3540	13602	24905	25349
COMPANIES	19	130	1	362	512	16	102		521	639	1151	1161
CONTENTIOUS PROBATE	1	1			2	1	3			4	6	6
COURT OF APPEAL CIVIL	3	1	1	3	8	3	1		21	25	33	47
CRIMINAL DAMAGE	6	14	1	7	28			1	15	16	44	46
DIVORCE CC	775	481			1256	267	409	7		683	1939	2844
DIVORCE HIGH COURT	776	336	1		1113	241	518	16		775	1888	2342
DOMESTIC PROCEEDINGS	163	24			187	16	162			178	365	585
EQUITY	92	105	8	20	225	91	126	5	13	235	460	466
FAMILY CARE CENTRE	43	80		6	129	208	128		4	340	469	499
FAMILY PROCEEDINGS	657	1254	4	20	1935	1408	593		1	2002	3937	4338
FH&DV (CC)	30	6			36	10	25			35	71	72
FH&DV (HIGH COURT)	29	7			36	3	19			22	58	72
FH&DV (MAG COURT)	1582	311	1		1894	244	1183			1427	3321	3794
JUDICIAL REVIEW	14	56	3	15	88			2	53	55	143	146
PROBATE	3533	4459	5	4	8001						8001	8655
QUEENS BENCH	1241	3234	34	688	5197	589	1693	96	2819	5197	10394	10745
SMALL CLAIMS	278	701	90	1788	2857	1173	2347	65	757	4342	7199	21282
<b>Grand Total</b>	<b>13292</b>	<b>17285</b>	<b>385</b>	<b>8318</b>	<b>39280</b>	<b>10377</b>	<b>17471</b>	<b>640</b>	<b>7967</b>	<b>36455</b>	<b>75735</b>	<b>94802</b>

\*Total number of participants dealt with this year, i.e. LIPs + represented participants

**2013 Number of represented participants per business area**

Represented only	Issuing Party					Responding Party					All	*All
	F	M	U	Blank	Total	F	M	U	Blank	Total	Rep'd	litigants
ADOPTION (CC)	4	4		24	32	50	32		20	102	134	245
ADOPTION (HC)	26	29	2	5	62	20	7	1		28	90	203
APPEAL TO HIGH COURT CIVIL	1	5		5	11				10	10	21	21
BANKRUPTCY	194	403	3	671	1271	252	832	12	111	1207	2478	3176
CHANCERY	60	132	2	2165	2359	1794	2401	42	126	4363	6722	6793
CHILDREN ORDER HC	33	16	1	6	56	43	35	1	1	80	136	167
CIVIL	3398	4441	178	1838	9855	3433	5138	356	3334	12261	22116	22509
COMPANIES	15	142	1	333	491	37	117		378	532	1023	1034
CONTENTIOUS PROBATE		1			1		3			3	4	4
COURT OF APPEAL CIVIL	4	7		10	21	6	10	1	16	33	54	66
CRIMINAL DAMAGE	3	4		3	10				5	5	15	17
DIVORCE CC	779	477			1256	255	414	4		673	1929	2870
DIVORCE HIGH COURT	710	302	1		1013	215	500	11		726	1739	2108
DOMESTIC PROCEEDINGS	126	13			139	14	139			153	292	496
EQUITY	56	79	2	6	143	52	87	1	12	152	295	300
FAMILY CARE CENTRE	37	47		2	86	193	124		3	320	406	428
FAMILY PROCEEDINGS	657	1106		18	1781	1331	622	1	3	1957	3738	4113
FH&DV (CC)	28	5			33	6	26			32	65	67
FH&DV (HIGH COURT)	23	5			28	4	17			21	49	63
FH&DV (MAG COURT)	1528	237	2		1767	241	1104	3		1348	3115	3536
JUDICIAL REVIEW	28	66	3	21	118				68	68	186	186
PROBATE	3671	4814	2	5	8492						8492	9212
QUEENS BENCH	1375	2641	32	556	4604	600	1688	129	2653	5070	9674	9787
SMALL CLAIMS	268	604	28	1655	2555	1123	2192	40	794	4149	6704	19176
<b>Grand Total</b>	<b>13024</b>	<b>15580</b>	<b>257</b>	<b>7323</b>	<b>36184</b>	<b>9669</b>	<b>15488</b>	<b>602</b>	<b>7534</b>	<b>33293</b>	<b>69477</b>	<b>86577</b>

\*Total number of participants dealt with this year, i.e. LIPs + represented participants

**2014 Number of represented participants per business area**

Represented only	Issuing Party					Responding Party					All	All
	F	M	U	Blank	Total	F	M	U	Blank	Total	Rep'd	litigants
ADOPTION (CC)	9	9	1	1	20	19	14		3	36	56	203
ADOPTION (HC)	13	18		1	32	12	6		1	19	51	122
APPEAL TO HIGH COURT CIVIL	1	3		3	7		3	1	4	8	15	16
BANKRUPTCY	135	337	3	489	964	311	917	17	73	1318	2282	2935
CHANCERY	60	129	2	1637	1828	1504	1900	47	103	3554	5382	5436
CHILDREN ORDER HC	26	10	2	2	40	36	32	1	1	70	110	138
CIVIL	3503	5149	483	1699	10834	2889	4633	793	4292	12607	23441	23776
COMPANIES	34	131		239	404	35	122		391	548	952	960
CONTENTIOUS PROBATE	1	5			6	3	3			6	12	12
CT OF APPEAL CIVIL	5	15		6	26	4	24	1	21	50	76	82
CRIMINAL DAMAGE	5	13	1	6	25				15	15	40	41
DIVORCE CC	719	495			1214	274	363	4		641	1855	2808
DIVORCE HIGH COURT	786	332			1118	224	554	11		789	1907	2348
DOMESTIC PROCEEDINGS	78	8			86	5	109			114	200	389
EQUITY	55	53	12	9	129	44	69	7	6	126	255	258
FAMILY CARE CENTRE	34	48		2	84	162	95	1	2	260	344	381
FAMILY PROCEEDINGS	610	1238		29	1877	1558	657		2	2217	4094	4515
FH&DV (CC)	16	10			26	10	11			21	47	52
FH&DV (HIGH COURT)	29	5			34	7	14			21	55	69
FH&DV (MAG. COURT)	1474	282	1		1757	237	1142	2		1381	3138	3530
JUDICIAL REVIEW	28	59		11	98				43	43	141	145
PROBATE	3459	4188	12	8	7667						7667	8370
QUEENS BENCH	1736	2749	48	528	5061	744	2306	110	3580	6740	11801	11932
SMALL CLAIMS	189	448	13	1665	2315	1008	1892	58	661	3619	5934	18143
<b>Grand Total</b>	<b>13005</b>	<b>15734</b>	<b>578</b>	<b>6335</b>	<b>35652</b>	<b>9086</b>	<b>14866</b>	<b>1053</b>	<b>9198</b>	<b>34203</b>	<b>69855</b>	<b>86661</b>

\*Total number of participants dealt with this year, i.e. LIPs + represented participants

**2015 Number of represented participants per business area**

Represented only	Issuing Party					Responding Party					All Rep'd	All litigants
	F	M	U	Blank	Total	F	M	U	Blank	Total		
ADOPTION (CC)	6	5		39	50	74	60		2	136	186	337
ADOPTION (HC)	14	20		4	38	11	7		1	19	57	140
APPEAL TO HIGH COURT CIVIL		4		2	6	2	1		2	5	11	12
BANKRUPTCY	109	279		279	667	278	893	15	88	1274	1941	2444
CHANCERY	71	133	3	916	1123	941	1308	26	93	2368	3491	3540
CHILDREN ORDER HC	21	16	1	3	41	42	36		1	79	120	150
CIVIL	3023	4813	1245	1773	10854	2512	3866	1447	4689	12514	23368	23575
COMPANIES	30	125		199	354	9	53	2	446	510	864	869
CONTENTIOUS PROBATE		1			1		1			1	2	2
COURT OF APPEAL CIVIL	1	6		2	9	1	4	1	4	10	19	24
CRIMINAL DAMAGE	4	6	4	8	22				14	14	36	38
DIVORCE COUNTY COURT	754	511			1265	287	396	3		686	1951	3004
DIVORCE HIGH COURT	615	284			899	225	449	7		681	1580	1908
DOMESTIC PROCEEDINGS	74	6			80	6	76			82	162	329
EQUITY	47	56	11	5	119	49	73	13	14	149	268	276
FAMILY CARE CENTRE	41	92		5	138	212	124		1	337	475	493
FAMILY PROCEEDINGS	518	1059	3	13	1593	1234	492		3	1729	3322	3758
FH&DV (CC)	15	7	1		23	8	15	1		24	47	48
FH&DV (HIGH COURT)	24	5			29	7	17			24	53	59
FH&DV (MAG. COURT)	1300	215	1		1516	219	974			1193	2709	3043
JUDICIAL REVIEW	20	52	1	7	80	1	1		29	31	111	112
PROBATE	3675	4491	11	7	8184						8184	8994
QUEENS BENCH	1463	2180	39	337	4019	548	1711	79	2891	5229	9248	9338
SMALL CLAIMS	166	297	15	1398	1876	1148	1987	87	728	3950	5826	16996
<b>Grand Total</b>	<b>11991</b>	<b>14663</b>	<b>1335</b>	<b>4997</b>	<b>32986</b>	<b>7814</b>	<b>12544</b>	<b>1681</b>	<b>9006</b>	<b>31045</b>	<b>64031</b>	<b>79489</b>

\*Total number of participants dealt with this year, i.e. LIPs + represented participants

**2016 Number of represented participants per business area**

Represented only	Issuing Party					Responding Party					All Rep'd	All litigants
	F	M	N	U	Total	F	M	N	U	Total		
ADOPTION (CC)	4	4		17	25	68	43		2	113	138	392
ADOPTION (HC)	21	24		2	47	13	7			20	67	166
APPEAL TO HIGH COURT CIVIL	1	5		1	7	2	5		11	18	25	29
BANKRUPTCY	91	258		239	588	336	971		87	1394	1982	2331
CHANCERY	84	130		607	821	661	882		105	1648	2469	2506
CHILDREN ORDER HC	33	13		6	52	54	45		1	100	152	182
CIVIL	2915	4610		3380	10905	2513	3898		6028	12439	23344	23596
COMPANIES	12	115		167	294	11	64		493	568	862	869
CONTENTIOUS PROBATE	1	2			3	4	3			7	10	10
COURT OF APPEAL CIVIL	8	5		5	18	5	5		7	17	35	41
CRIMINAL DAMAGE	3	9		11	23				11	11	34	34
DIVORCE CC	896	615			1511	361	460		3	824	2335	3528
DIVORCE HIGH COURT	621	260		2	883	191	443		8	642	1525	1852
DOMESTIC PROCEEDINGS	64	8		1	73	7	66		1	74	147	246
EQUITY	47	41		20	108	39	60		23	122	230	252
FAMILY CARE CENTRE	33	94		8	135	217	127		1	345	480	504
FAMILY PROCEEDINGS	473	1039		9	1521	1209	454			1663	3184	3589
FH&DV (CC)	23	6			29	9	18			27	56	57
FH&DV (HIGH COURT)	26	14			40	7	17			24	64	80
FH&DV (MAG. COURT)	1306	193		1	1500	203	944		1	1148	2648	3012
JUDICIAL REVIEW	14	57		13	84				42	42	126	127
PROBATE	3918	4453		30	8401						8401	9213
QUEENS BENCH	1155	1692		413	3260	467	1310		2617	4394	7654	7773
SMALL CLAIMS	87	211	284	799	1381	703	1266	25	696	2690	4071	14813
<b>Grand Total</b>	<b>11836</b>	<b>13858</b>	<b>284</b>	<b>5731</b>	<b>31709</b>	<b>7080</b>	<b>11088</b>	<b>25</b>	<b>10137</b>	<b>28330</b>	<b>60039</b>	<b>75202</b>

NB No 'blanks' given in 2016 dataset

\*Total number of participants dealt with this year, i.e. LIPs + represented participants

**2017 January to June 2017 Number of represented participants per business area**

Represented only	Issuing Party					Responding Party					All LIPs	All litigants
	F	M	N	U	Total	F	M	N	U	Total		
ADOPTION (CC)	4	4		4	12	32	23			55	67	104
ADOPTION (HC)		10		4	14	8	2			10	24	56
APPEAL TO HIGH COURT CIVIL		1		1	2				2	2	4	4
BANKRUPTCY	46	131		92	269	147	426		50	623	892	1019
CHANCERY	44	72		321	437	319	442		79	840	1277	1286
CHILDREN ORDER HC	15	17		1	33	31	17			48	81	103
CIVIL	1832	2751		1700	6283	1554	2453		3142	7149	13432	13575
COMPANIES	13	77		77	167	21	43		239	303	470	470
CONTENTIOUS PROBATE												
COURT OF APPEAL CIVIL		2		1	3	1	1		4	6	9	15
CRIMINAL DAMAGE		1		8	9				3	3	12	12
DIVORCE CC	333	234			567	126	170		2	298	865	1310
DIVORCE HC	289	126			415	102	207		3	312	727	868
DOMESTIC PROCEEDINGS	28	3			31	4	28			32	63	115
EQUITY	34	37		24	95	41	51		20	112	207	212
FAMILY CARE CENTRE	19	39		2	60	90	60		2	152	212	226
FAMILY PROCEEDINGS	254	494		6	754	593	241			834	1588	1801
FH&DV (CC)	9	4			13	4	9			13	26	26
FH&DV (HIGH COURT)	11	5			16	2	7			9	25	32
FH&DV (MAG. COURT)	664	110		2	776	115	453		1	569	1345	1560
JUDICIAL REVIEW	14	32		10	56				30	30	86	88
PROBATE	1960	2358		6	4324						4324	4746
QUEENS BENCH	492	651		161	1304	177	510		1062	1749	3053	3105
SMALL CLAIMS	49	109	100	572	830	451	817	14	537	1819	2649	8364
<b>Grand Total</b>	<b>6110</b>	<b>7268</b>	<b>100</b>	<b>2992</b>	<b>16470</b>	<b>3818</b>	<b>5960</b>	<b>14</b>	<b>5176</b>	<b>14968</b>	<b>31438</b>	<b>39097</b>

NB No 'blanks' given in dataset

\*Total number of participants dealt with this year, i.e. LIPs + represented participants

## Appendix 6

### NICTS Data: Prevalence of LIPs per business area

There follows a brief synopsis of the prevalence of LIPs according to their sex and status per business area in the last six years. The description is of the participants and not of cases. Thus the represented status of all parties to a single case is not included. The description includes references to the tables in Chapter 3 and the appendices:

Table 2: Number of participants taking part in all civil and family proceedings disposed of in years 2012 to 2016 and part year 2017 with number and proportion of LIPs (including and excluding Small Claims)

Table 3: Percentage of participants who were LIPs of the total number of participants in all civil and family business areas from 2012 to 2016 and part of 2017

Table 4: Volume of LIPs in all civil and family business areas from 2012 to 2016 and part of 2017

Appendix 5a: LIPs' applicant status and sex for 2012-2017 showing the number of LIPs whose cases were disposed of in any given year.

Appendix 5b: Represented participants' applicant status and sex for 2012-2017 showing the number of represented participants whose cases were disposed of in any given year.

#### Adoption

There were no more than 353 LIPs in any of the six years in both High Court and County Court (see Table 4). LIPs constituted at least 45% of the participants in Adoption proceedings (see Table 3). LIPs tended to be the issuing party with four-fifths or more of LIPs in Adoption proceedings at both tiers acting as the issuing party. The pattern was different for participants who were represented: at High Court tier between 63-70% of the participants were the issuing party, while at the lower tier, between 18-27% were the issuing party. The ratio of male to female LIPs in Adoption proceedings was even, as would be expected in proceedings involving heterosexual couples.

#### Bankruptcy

The volume of LIPs was between 350 and 700 in any of the years shown (see Table 4), making up less than a quarter of all Bankruptcy litigants in any one year (see Table 3). Under the umbrella of Bankruptcy proceedings, there are Debtor's Petitions, which do not have a responding party. Almost all of the LIPs in this business area were applicants in Debtor's Petitions. There were some LIPs who were a party in case types other than Debtor's Petitions (such as Any Originating Application, Application to Set Aside a Statutory Demand and Petition By Any Other Person) in the years presented (50 in 2012, 35 in 2013, 33 in 2014, 32 in 2015, 41 in 2016 and 16 in 2017). There were slightly more male LIPs than female in Bankruptcy proceedings in all of the years (56.1% in 2012; 54.0% in 2013; 54.4% in 2014; 52.7% in 2015; 51.5% in 2016 and 53.5% in 2017).

#### Chancery

The volume of LIPs concluding Chancery proceedings in the six years steadily decreased (see Table 4) with no more than 71 in any one year. They constitute a small fraction of all litigants, amounting to no more than 1.5% of all litigants in any of the six years. Of the few LIPs in Chancery proceedings, they tended to be the responding party (79.0% in 2012; 87.3% in 2013; 88.9% in 2014; 79.6% in 2015; 73.0% in 2016; 77.8% in 2017). There were more male LIPs in Chancery proceedings than female (61.0% in 2012; 59.1% in 2013; 66.0% in 2014; 64.6% in 2015; 74.3% in 2016; 66.7% in 2017).

### **Children Order (High Court)**

Around one fifth of all participants in Children Order (High Court) proceedings were LIPs in the six years presented (see Table 3). The volume of LIPs is low, with no more than 43 in any one year (see Table 4). More than three-quarters of the LIPs in these proceedings were the responding party, whereas between 59-66% of represented participants were the responding party, indicating fewer LIPs issue proceedings. Around two-thirds of LIPs in Children Order (HC) proceedings were men, while for represented participants, the proportions of male respondents were lower, between 40-45%.

### **Civil**

A small proportion of all participants in Civil proceedings were LIPs, with less than 2% of all participants acting in person in any of the six years (see Table 3). The volume is relatively high compared to the other business areas with between 250 and 444 participants who were LIPs across the six years. Around two thirds to three-quarters of all LIPs in Civil proceedings were the responding party. The proportion of participants who were responding was lower for represented parties, where the proportions for the six years was between 53-55%.

Where the sex of the participants was recorded (the data were not available for many participants), there tended to be more male participants than female in any of the years with the distributions being similar for represented and unrepresented participants (male LIPs made up 70.9% of all LIPs in 2012; 59.8% in 2013; 64.5% in 2014; 68.2% in 2015; 62.5% in 2016; 59.8% in 2017).

### **Companies**

There were only 41 LIPs involved in Companies proceedings over the six year period.

### **Court of Appeal (Civil)**

The volume of LIPs who concluded Court of Appeal cases appears to be decreasing since 2012 when there were 14; in 2013 there were 12; 6 in 2014; 5 in 2015; 6 in 2016; and by June in 2017 there were 6. Of these, almost all were the issuing party, with only 5 as respondents out of the 49 LIPs over the last six years. The sex of 9 of the LIPs over the six years is not available but of the remaining 40, 67.5% were men.

### **Divorce**

Around a third of all Divorce litigants at the County Court tier are LIPs, whereas LIPs constitute less than one fifth of participants at the High Court tier (see Table 3). At the County Court tier, between 18% and 23% of all LIPs were the issuing party; and at the High Court tier, the proportion was lower, with between 11% and 17% of LIPs as the issuing party. Around 65% of represented participants were the issuing party at County Court tier, and around 57-59% at the High Court tier. The prevalence of all LIPs as the issuing party may increase with the publication of NICTS's guide 'Getting a Divorce / Dissolution of a Civil Partnership: A guide for people who want to bring proceedings without involving a solicitor' (2017).

At the County Court tier, slightly more men than women act in person, with 42-44% of all LIPs being female. At the High Court tier, the proportions of women were slightly lower, with between 32-38% of all LIPs being female. The ratios of women to men for represented participants at both tiers were similar, with between 53-54% being female. The reason for the lower participation of female LIPs at the higher court tier is unknown.

Ancillary Relief proceedings are not disaggregated in the Divorce proceedings data so it is not possible to report on them separately.



### Domestic Proceedings

The volume of all litigants involved in Domestic Proceedings has been decreasing over the last six years (see Table 3), with the volume of LIPs following suit with 220 in 2012 falling to 99 in 2016 (see Table 4). In Domestic Proceedings *for some reason*, there were more responding participants than issuing participants in any of the six years. For example, in 2012, of all litigants, 57.4% were respondents (60.3% in 2013; 63.2% in both 2014 and 2015; 55.3% in 2016; and 52.2% in 2017).

LIPs continued to be a sizeable proportion of all litigants constituting as much as 51% in any one year (see Table 3). There were as many male as female participants in represented proceedings, but there were more male LIPs than female LIPs in unrepresented proceedings, with around three-quarters of all LIPs being male. Of all the LIPs in Domestic Proceedings, LIPs who were the responding party outnumbered LIPs who were the issuing party by as much as three to one (in 2012, 71.8% of all LIPs were the respondents; 71.6% in 2013; 69.8% in 2014; 75.5% in 2015; 62.6% in 2016; and 53.8% in 2017). While there were as many male and female represented participants in Domestic Proceedings, women dominated the issuing parties and men the respondent parties. Indeed, there were as many female issuing parties as there were male responding parties. This clear pattern was not replicated for LIPs, where there were fewer female litigants. There was a higher volume of male respondents who were LIPs than female issuing participants.

### Equity

There were only 49 LIPs in Equity proceedings over the last six years.

### Family Care Centre

There were no more than 37 LIPs in any one of the past six years (see Table 4), and they constituted less than 10% of all participants in FCC proceedings (see Table 3). Even though the volume of LIPs in any one year was low, the majority of LIPs were the responding party (73.3% in 2012; 90.9% in 2013; 81.1% in 2014; 94.4% in 2015; 83.3% in 2016; 92.9% in 2017). In all FCC proceedings, the respondents outnumber the issuing parties and the LIP population appeared to follow the same configuration. The gender balance for represented participants was fairly even with women in a small majority ranging from 52.4% in 2017 to 57.8% in 2014. The numbers of LIPs in FCC are too low for generalisations, but there was no fixed pattern in the gender balance with women sometimes outnumbering men and the other way around at other times.

### Family Proceedings

The volume of all litigants in Family Proceedings is high, and in 2014 and 2015, a downward trend in volume can be seen (see Table 3). The volume of LIPs has remained steady (see Table 4), and so the proportion of participants with LIP status has risen from 9% to 12% over the last six years (see Table 3). Amongst represented participants, there were roughly the same proportions of issuing parties as responding parties, but amongst the LIP participants, the large majority were respondents with only between 4.5% and 10% acting as the issuing party in any one of the years. The gender balance for represented and unrepresented participants also different, but not as drastically. There were slight majorities of unrepresented parties who were men (between 51.5% in 2015 and 56.3% in 2013) and in the represented population, there were slight majorities of women, around 53% across all years.

### **Family Homes and Domestic Violence**

There were low volumes of participants in FH&DV at County Court and High Court tiers, and the majority of proceedings were at the Magistrate's Court tier (see Table 3). At this tier, it appears the volumes of participants is set on a downward trend, with the volume of LIPs following the same trend constituting around 12% of all participants (see Table 3). For each issuing party there was a responding party in exact parity across the six years. However, LIPs were far more likely to be the responding party than the issuing party, with 2% or less of all LIPs acting as the issuing party. The gender balance for all participants indicated near parity, with women making up between 49.6% and 52.1% of all participants. In the LIP population, on the other hand, women made up no more than 16% in any one year. Overall, women tended to be the issuing party and men the responding party.

### **Judicial Reviews**

Over the last six years, 804 participants involved in Judicial Review proceedings concluded their cases and only 11 of the participants were LIPs (see Table 4).

### **Probate**

Of the high volume of Probate participants, up to 9% of them were LIPs in any one year (see Table 3). All participants are the issuing parties. The gender balance for the represented participants was slightly higher for male participants, ranging from 53% to 57% in the last six years. It was less consistent in the LIP population, where women sometimes outnumbered men, for example 53% LIP were women in 2013 but 47% in 2015.

### **Queen's Bench**

The high volume of Queen's Bench participants appears to be decreasing since 2014 (see Table 3), and the volume of LIPs is similarly decreasing (see Table 3). The highest proportion of LIPs was seen in 2012 when they constituted 3.3% of the participants but since then the proportion has hovered around 1-2% (see Table 3). Around two-thirds of all participants in this business area are men, but amongst the LIP population, the proportion of men is slightly higher (87.4% in 2012; 77.6% in 2013; 75.2% in 2014; 84.6% in 2015; 69.2% in 2016; and 80% in 2017).

### **Small Claims**

The huge volume of participants in Small Claims was around two-thirds unrepresented (see Table 3). The gender balance for both represented and unrepresented populations is around two-thirds male.

# Appendix 7a

## Initial questionnaire item frequencies

### Questionnaire for participants

\*Valid total is the total number of responses excluding 'Not appropriate', missing, blank.

#### Your experience of representing yourself

1. Thinking about the processes of bringing/defending your case, how **clear** were the following:

*Tick the boxes that match your experience*

	N/A	←————→					Valid total*
		Not clear 1	2	3	4	Very clear 5	
a. the forms from the court which you completed	40	14	19	24	14	11	82
b. your dealings with the court staff	5	10	10	18	31	46	115
a. written instructions from the court	6	12	22	23	23	37	117
d. how to make contact with the other side BEFORE the hearing	23	42	15	14	11	16	98
e. your most recent hearing	10	17	13	16	24	37	107

2. How **easy** was it for you to do the following?

*Tick the boxes that match your experience*

	N/A	←————→					Valid total*
		Not easy 1	2	3	4	Very easy 5	
a. Obtain the information you wanted for your case	4	41	17	20	16	25	119
b. Get the help you wanted for your case	10	41	21	20	12	15	109
c. Fill in the forms and paperwork from the court	37	28	17	12	12	12	81
d. Understand what was going on in court	2	23	16	28	18	31	116
e. Find out what you had to do in your court hearing	4	33	21	24	14	23	115

3. How **confident** did/do you feel about the following?

*Tick the boxes that match your experience*

	N/A	←————→					Valid total*
		Not confident 1	2	3	4	Very confident 5	
a. Winning your case	16	23	8	34	14	23	102
b. Filling in the forms from the court	35	18	12	28	16	9	83
c. That you were adequately prepared for your case	2	15	12	35	32	24	118
d. Contacting the other side before the hearing	23	30	17	15	17	17	96
e. Appearing in court alone	2	35	12	22	26	23	118
f. Asking questions in the hearing	6	27	14	25	25	22	113
g. Answering questions in the hearing	2	21	7	30	31	29	118
h. That you had a fair hearing	3	26	14	14	20	39	113

4. If you were going to court again, how confident would you feel about the following?

*Tick the boxes that match your experience*

	N/A	←————→					Valid total*
		Not confident 1	2	3	4	Very confident 5	
a. I would know what to do		7	17	35	31	20	110
b. I would know where to go to for help		17	15	18	39	17	106

5. Indicate how much you **know and understand** about the following:

	Nothing ←————→ A lot					Valid total*
	1	2	3	4	5	
a. the process of bringing or responding to your case	12	31	42	19	13	117
b. the law in your case	28	42	34	5	7	116

6. Thinking about your most **recent hearing**:

	None ←————→ A lot					Valid total*
	1	2	3	4	5	
a. How much of what you wanted to say did you actually say?	13	24	29	33	18	117
b. How many opportunities were you given to speak?	12	27	25	28	27	119

7. Thinking about your most recent hearing, please rate...

*Tick the boxes that match your experience*

	None ←————→ Very high					Valid total*
	1	2	3	4	5	
a. your ability to say what you wanted to say	12	29	33	25	17	116
b. your understanding of what the judge said	0	13	19	37	34	103
c. your understanding of what the other side said	7	15	21	38	26	107

8. Thinking about your most recent hearing, please rate...

*Tick the boxes that match your experience*

	None ←————→ Very high					Valid total*
	1	2	3	4	5	
a. how supported you felt	29	21	18	30	20	118
b. how much the judge listened to you	12	12	21	33	37	115
c. how much the other side listened to you	27	22	16	9	19	93
d. how seriously you were taken by the court	15	15	19	30	38	117
e. how satisfied you were with your performance in court	10	21	26	35	24	116
f. how much you were able to influence the hearing	31	16	32	22	13	114
g. how satisfied with the process of bringing or answering your case	15	18	30	27	23	113

## Information and advice

9. Where did you look for information? How **useful** was the information you obtained?

*Tick the boxes that match your experience*

	No rating	Didn't use	Not useful				Very useful		Total
			1	2	3	4	5		
a. Court service website	0	48	16	16	17	10	8	115	
b. Court service desk or court office	0	33	12	11	14	23	22	115	
c. A lawyer	0	56	28	8	11	6	3	112	
d. Local advice agency – eg Citizens Advice NI	0	62	24	6	9	3	9	113	
e. Local council	0	90	20	0	0	1	0	111	
f. Trade union or professional body	0	91	17	2	0	1	1	112	
g. Employer	0	89	13	2	2	2	5	114	
h. Police, social worker, doctor	0	78	20	2	7	4	2	113	
i. A friend, colleague, member of your family	0	45	3	3	11	21	34	117	
j. Insurance company	0	93	13	1	3	1	0	111	
k. Internet - <i>General</i>	0	64	3	3	11	11	21	113	
l. Dads help	0	14	1	0	2	3	0	20	
m. Case law, judgements	0	12	0	0	0	0	1	13	
n. Other sources – FNF	0	12	0	0	1	2	8	23	
o. Christians Against Poverty	0	10	0	0	0	1	2	13	
p. Bank manager	0	11	0	0	1	0	0	12	
q. Housing Rights	0	11	0	0	0	1	0	12	
r. Equality Commission	0	23	1	1	0	0	0	25	
s. McKenzie friend	0	1	0	0	1	0	5	7	
t. previous case reports	0	1	0	1	0	0	1	3	
u. Women's Aid	1	1	0	0	0	0	3	5	
v. YouTube	0	0	0	0	0	0	2	2	
w. 'relevant legal websites'	1	0	0	0	0	0	3	4	
x. Advice NI	0	0	0	0	0	0	1	1	
y. Step change (Debt advice)	0	0	0	0	0	0	1	1	
z. Probation officer	0	0	0	1	0	0	0	1	
AA. NIHRC	0	0	0	1	0	0	0	1	
AB. Law society	0	0	0	1	0	0	0	1	
AC. Citizens; Advice online pages	0	0	1	0	0	0	0	1	
AD. Job Centre	0	0	1	0	0	0	0	1	
AE. Bar library	0	0	0	0	1	0	0	1	

**Personal details (optional)****12. Gender**

Male	90
Female	33
Total	123

**13. Age group**

17 – 25	4
26 – 35	20
36 – 45	48
46 – 55	35
56 – 65	14
66 or older	2
Total	123

**14. Marital status** *Tick all that apply*

Single	32
Married / Civil Partnership / living with partner	36
Separated	35
Divorced	19
Widowed	1
Total	123

**15. Dependents** *Please tick all that apply:*

Do you have...	Yes	No
children under 18 living with you?	54	69
children under 18 living elsewhere?	46	77
family who depend on you?	28	95
Totals = 123		

**16. Ethnicity**

White	119
Chinese	0
Irish Traveller	0
Indian	0
Pakistani	0
Bangladeshi	0
Black Caribbean	0
Black African	2
Roma	1
Total	122

**17. Disability: Are you registered as disabled?**

Yes	7	No	115	Total	122
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**18. Your accommodation**

Do you or others in your household rent or own your accommodation? *Please select one*

Own it outright	15
Buying it with a mortgage or loan	52
Pay part rent and part mortgage	2
Rent it	49
<i>NI Housing Executive</i>	12
<i>Housing Association</i>	5
<i>Private</i>	25
<i>Relative/friend/employer</i>	9

Pay board	2
Live rent free	3
Total	123

<b>19. Do you live in</b>	a rural area?	18
	a village?	13
	a town or city?	92
	Total	123

**20. Qualifications** *Highest achieved:*

None	13
GCSEs or equivalent	33
A Levels or equivalent	5
Diploma or apprenticeship	22
Degree or higher	48
Total	121

**21. Employment situation**

Unemployed	6
Full-time study / training scheme	0
Employed (including self-employed)	104
Off work (sick, maternity or laid-off)	1
Registered as unable to work	2
Looking after family home	2
Full-time carer	3
Retired	5
Total	123

**22. Religion**

Roman Catholic	38
Protestant	42
None	33
Other	10
Agnostic	3
Muslim	1
Buddhist	1
'Christian'	1
Unstated	2
Total	121

**23. Political opinion**

Unionist	20
Nationalist	23
Other	58
None	14
Total	115

**24. Sexual orientation**

Heterosexual /straight	114
Gay or lesbian	3
Other	0
Rather not answer	3
Total	120

**GENERAL HEALTH QUESTIONNAIRE****GHQ 12****HAVE YOU RECENTLY:**

1	- been able to concentrate on whatever you're doing?	Better than usual	Same as usual	Less than usual	Much less than usual	TOTAL
	Frequencies	4	44	44	27	119
2	- lost much sleep over worry?	Not at all	No more than usual	Rather more than usual	Much more than usual	
	Frequencies	12	24	46	38	120
3	- felt that you are playing a useful part in things?	More so than usual	Same as usual	Less useful than usual	Much less useful	
	Frequencies	6	73	25	13	117
4	- felt capable of making decisions about things?	More so than usual	Same as usual	Less so than usual	Much less capable	
	Frequencies	8	75	28	9	120
5	- felt constantly under strain?	Not at all	No more than usual	Rather more than usual	Much more than usual	
	Frequencies	10	26	50	34	120
6	- felt you couldn't overcome your difficulties?	Not at all	No more than usual	Rather more than usual	Much more than usual	
	Frequencies	25	51	27	17	120
7	- been able to enjoy your normal day-to-day activities?	More so than usual	Same as usual	Less so than usual	Much less than usual	
	Frequencies	5	54	36	25	120
8	- been able to face up to your problems?	More so than usual	Same as usual	Less able than usual	Much less able	
	Frequencies	12	75	21	12	120
9	- been feeling unhappy and depressed?	Not at all	No more than usual	Rather more than usual	Much more than usual	
	Frequencies	22	40	29	27	118
10	- been losing confidence in yourself?	Not at all	No more than usual	Rather more than usual	Much more than usual	
	Frequencies	33	41	28	18	120
11	- been thinking of yourself as a worthless person?	Not at all	No more than usual	Rather more than usual	Much more than usual	
	Frequencies	66	26	13	15	120
12	- been feeling reasonably happy, all things considered?	More so than usual	About same as usual	Less so than usual	Much less than usual	
	Frequencies	10	62	26	22	120

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# Appendix 7b

## Post-clinic questionnaire item frequencies

### Questionnaire for participants since receiving advice

\*Valid total is the total number of responses excluding 'Not appropriate', missing, blank.

#### Your experience of representing yourself since you attended the advice clinic

1. Thinking about the processes of bringing / defending your case, how **clear** were the following:

*Tick the boxes that match your experience*

	N/A	←————→					Valid total*
		Not clear 1	2	3	4	Very clear 5	
d. the forms from the court which you completed	6	2	-	1	4	1	8
e. your dealings with the court staff	-	-	2	4	5	3	14
f. written instructions from the court	6	1	-	2	4	1	8
d. how to make contact with the other side BEFORE the hearing	2	1	4	2	3	2	12
e. your most recent hearing	2	2	2	3	2	3	12

2. How **easy** was it for you to do the following?

*Tick the boxes that match your experience*

	N/A	←————→					Valid total*
		Not easy 1	2	3	4	Very easy 5	
f. Obtain the information you wanted for your case	-	4	1	1	7	1	14
g. Get the help you wanted for your case	-	5	1	3	5	-	14
h. Fill in the forms and paperwork from the court	6	1	1	3	3	-	8
i. Understand what was going on in court	-	3	3	3	3	2	14
j. Find out what you had to do in your court hearing	1	2	2	4	4	1	13

3. How **confident** did/do you feel about the following?

*Tick the boxes that match your experience*

	N/A	←————→					Valid total*
		Not confident 1	2	3	4	Very confident 5	
i. Winning your case	1	3	2	5	3	-	13
j. Filling in the forms from the court	3	-	3	4	3	1	11
k. That you were adequately prepared for your case	-	1	3	2	6	2	14
l. Contacting the other side before the hearing	2	1	2	3	4	2	12
m. Appearing in court alone	-	2	-	5	5	2	14
n. Asking questions in the hearing	1	2	1	5	4	1	13
o. Answering questions in the hearing	1	-	1	7	3	2	13
p. That you had a fair hearing	1	5	2	2	3	1	13

## 4. If you were going to court again, how confident would you feel about the following?

*Tick the boxes that match your experience*

	Not confident ←————→				Very confident	Valid total*
	1	2	3	4		
c. I would know what to do	-	2	4	8	1	15
d. I would know where to go to for help	2	-	4	7	2	15

5. Indicate how much you **know and understand** about the following:*Tick the boxes that match your experience*

	Nothing ←————→				A lot	Valid total*
	1	2	3	4		
c. the process of bringing or responding to your case	-	3	4	8	-	15
d. the law in your case	1	5	4	4	1	15

6. Thinking about your most **recent hearing**:*Tick the boxes that match your experience*

	None ←————→				A lot	Valid total*
	1	2	3	4		
How much of what you wanted to say did you actually say?	4	3	3	4	1	15
How many opportunities were you given to speak?	3	3	4	1	3	14

## 7. Thinking about your most recent hearing, please rate...

*Tick the boxes that match your experience*

	None ←————→				Very high	Valid total*
	1	2	3	4		
d. your ability to say what you wanted to say	4	2	4	4	-	14
e. your understanding of what the judge said	1	1	2	6	5	15
f. your understanding of what the other side said	2	-	1	6	6	15

## 8. Thinking about your most recent hearing, please rate...

*Tick the boxes that match your experience*

	None ←————→				Very high	Valid total*
	1	2	3	4		
g. how supported you felt	5	1	3	6	-	15
h. how much the judge listened to you	5	1	2	5	1	14
i. how much the other side listened to you	7	4	1	2	-	14
j. how seriously you were taken by the court	5	2	5	2	1	15
k. how satisfied you were with your performance in court	2	1	4	6	2	15
l. how much you were able to influence the hearing	6	3	1	2	1	13
g. how satisfied with the process of bringing or answering your case	6	2	2	4	1	15

9. Thinking about the **advice session**, please rate...

	Not at all 1	2	3	4	Very 5	Valid total*
a. how relevant was the advice to your case	-	-	4	6	6	16
b. how relevant was the advice to representing yourself	-	-	4	4	8	16
c. how useful was the advice in progressing your case	-	2	3	3	8	16
d. how clear was the advice	-	-	3	4	9	16
e. how easy was it to apply the advice in your case	-	4	3	3	6	16
f. how supported did the advice make you feel representing yourself	-	2	4	1	9	16

10. Still thinking about the **advice session**, please answer these questions...

	Not at all 1	2	3	4	Very 5	Valid total*
a. How much did you learn about the process of representing yourself?	2	1	3	5	5	16
b. How much did you learn about the legal issues in your case?	1	3	5	5	2	16
c. How much of a difference did the advice make to you being able to represent yourself?	1	4	1	6	4	16
d. How much of a difference did the advice make to your case?	2	3	3	3	3	14
e. How worthwhile is such advice to personal litigants?	-	1	1	3	11	16
	No			Definitely		
f. Would you recommend such a service to a personal litigant?	-	1	-	3	12	16

**GENERAL HEALTH QUESTIONNAIRE****GHQ 12****HAVE YOU RECENTLY:**

1	- been able to concentrate on whatever you're doing?	Better than usual	Same as usual	Less than usual	Much less than usual	TOTAL
	Frequencies	1	5	6	4	16
2	- lost much sleep over worry?	Not at all	No more than usual	Rather more than usual	Much more than usual	
	Frequencies	1	5	6	4	16
3	- felt that you are playing a useful part in things?	More so than usual	Same as usual	Less useful than usual	Much less useful	
	Frequencies	1	10	3	2	16
4	- felt capable of making decisions about things?	More so than usual	Same as usual	Less so than usual	Much less capable	
	Frequencies	1	9	5	1	16
5	- felt constantly under strain?	Not at all	No more than usual	Rather more than usual	Much more than usual	
	Frequencies	-	7	5	4	16
6	- felt you couldn't overcome your difficulties?	Not at all	No more than usual	Rather more than usual	Much more than usual	
	Frequencies	2	8	4	1	15
7	- been able to enjoy your normal day-to-day activities?	More so than usual	Same as usual	Less so than usual	Much less than usual	
	Frequencies	1	7	6	2	16
8	- been able to face up to your problems?	More so than usual	Same as usual	Less able than usual	Much less able	
	Frequencies	2	10	4	-	16
9	- been feeling unhappy and depressed?	Not at all	No more than usual	Rather more than usual	Much more than usual	
	Frequencies	1	8	6	1	16
10	- been losing confidence in yourself?	Not at all	No more than usual	Rather more than usual	Much more than usual	
	Frequencies	3	9	2	2	16
11	- been thinking of yourself as a worthless person?	Not at all	No more than usual	Rather more than usual	Much more than usual	
	Frequencies	12	2	1	1	16
12	- been feeling reasonably happy, all things considered?	More so than usual	About same as usual	Less so than usual	Much less than usual	
	Frequencies	1	8	6	1	16

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