



Northern Ireland
Assembly



Knowledge Exchange Seminar Series (KESS)

Litigants in Person in Northern Ireland: barriers to legal participation

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1. Context

1. The School of Law at Ulster University and the Northern Ireland Human Rights Commission (NIHRC) are collaborating on a research study about people who are involved in legal proceedings in the Northern Ireland civil and family courts without legal representation from a solicitor or barrister. They are known as litigants in person and here are abbreviated to LIP.
2. The study started in April 2016 and will run until September 2018. The study is on-going and this paper presents an outline of the study with some of the main findings and their implications. The study is being guided by an external advisory group who will help to inform the report's final recommendations. The full report will be presented at a conference in September 2018.

2. Outline of the study and participants

1. The original motivation of the study arose from prior academic work on the concept of legal participation and how it aligns with current policy initiatives.¹ In particular, the study relates closely to themes and recommendations in

¹ McKeever, G. (2013) A ladder of legal participation for tribunal users, *Public Law*, July, pp575-598

the Access to Justice Reviews (2011² and 2015³), the Family Justice Review (2017⁴) and the Civil Justice Review (2017⁵).

2. The study is funded by the Nuffield Foundation, a UK-based grant body which funds research and analysis to advance social well-being. The funds were granted to understand how LIPs participate in civil and family proceedings; and to understand the impact of self-litigating on the individual litigant and the court system, to evaluate the impact of providing advice to LIPs both on their participation and on the court.
3. To meet the aims of the study, permission was granted by the Office of Lord Chief Justice to observe proceedings involving LIPs in the following business areas: Matrimonial (Divorce and Ancillary Relief); Family Proceedings, Family Care Centre and Domestic Proceedings; Family Homes & Domestic Violence; Civil Bills; Bankruptcy (Debtor's Petitions and Creditor's Petitions); various (Companies, Queen's Bench)
4. NICTS assisted in locating LIPs by providing access to weekly court lists which enabled the researchers to attend and observe proceedings between September 2016 and September 2017 in the following courts:
 - a. High Court - Royal Courts of Justice, Belfast
 - b. Magistrates' Courts - Laganside, Newtonards, Newry, Lisburn, Derry/Londonderry, Coleraine and Dungannon
 - c. County Courts – Belfast (Laganside)
5. 179 LIPs contributed data to the study: 51 women, 127 men, and one group of 16. 59 court actors contributed data to the study: 13 members of the judiciary; 27 legal representatives; 11 members of NICTS; 5 Court Children's Officers; and 3 people who act as McKenzie Friends
6. Data collected from LIPs were interviews, observations of court proceedings and a questionnaire; and interviews from court actors. The LIP questionnaire contained the General Health Questionnaire 12, which is a standardised inventory for measuring mental well-being.
7. From January to June 2017, LIP participants in family and ancillary relief proceedings were invited to attend a procedural advice clinic provided by an experienced solicitor based at NIHRC. The advice informed LIPs about how to conduct their proceedings and did not attempt to influence a LIP's decision (as legal advice would be expected to do). 25 LIPs (9 women and 16 men) attended the clinic and were interviewed and observed again. The findings from the procedural advice clinic will be made available at a later date.

3. Interim findings and implications

The main findings from this study are that LIPs do not fit the court norm of fully represented cases and they do not conform to any one type but are various with wide ranging capabilities and needs.

The overarching recommendation emerging from this study is that **the court system needs to be reoriented to accommodate LIPs and needs to include LIPs in that re-design process.**

1. Characteristics of LIPs:

The 179 LIPs in the study came from diverse backgrounds, represented a range of capabilities and attitudes towards self-representation and in no way conformed to a 'type'.

- a. Data provided by NICTS on the civil and family litigants in Northern Ireland showed that in the years 2012 to 2016, between 15,000 and 19,000 litigants whose cases were disposed of were LIPs, around 19-20% of all litigants. Small Claims had the largest number of LIPs – around 10,000 to 14,000 participants. LIPs in other civil and family business areas amounted to 4,500 to 5,000 per year, remaining steady at approximately 5.5% of all litigants.

² <https://www.justice-ni.gov.uk/publications/report-access-justice-2011>

³ <https://www.justice-ni.gov.uk/publications/access-justice-review-part-2-final-report>

⁴ <https://www.judiciary-ni.gov.uk/publications/review-groups-report-civil-justice>

⁵ <https://www.judiciary-ni.gov.uk/publications/review-groups-report-family-justice>

- b. The business areas with the highest volume of LIPs were: Divorce, Probate, Bankruptcy, Family Proceedings and Family Homes & Domestic Violence.
- c. Across all areas within our study, there were 3 male LIPs for every 2 female LIPs, and there were slightly more LIPs who were the respondents in a case compared to issuing parties (55% to 45%).
- d. No other demographic details on LIPs were available in the NICTS data.
- e. 123 participants in the study sample completed a questionnaire which contained questions about their demographic background. The sample had diverse backgrounds. There were more men than women, 73% male LIPs to 27% female. Their ages ranged from early 20s to retirees, with most LIPs aged between 36 and 45 (39%). There were roughly the same numbers of people who were single, separated and married/cohabiting/civil partnership, but fewer divorcees, probably reflecting that many of the LIPs were in the middle of family or divorce proceedings. A high proportion of the sample had studied to degree level (40%) and 11% had no qualifications. Similarly, a high proportion of the sample were in employment (85%).

Implications

As a reflection of the wider population, any measure put in place to support self-representation would have to take into account a range of abilities and needs.

2. Reasons for self-representing

The LIPs' reasons for self-representing were rarely singular, but instead they spoke of a complex mosaic of reasons including inability to afford legal representation, a preference to self-represent, a negative experience of legal professionals and a distrust of the system.

- a. An inability to afford legal representation was the reason most frequently given but it was often combined with a personal preference to self-represent, pragmatism, a distrust of lawyers and the court system, or a prior negative experience of legal professionals.
- b. Many had applied for and did not qualify for Legal Aid.
- c. Several LIPs had been represented at some stage but stopped when their funds ran out or the costs had reached a certain level without any resolution in their case.
- d. Based on experience, some LIPs were able to make a cost-benefit analysis of representation and decided they could not justify the cost for the benefit or value they felt it offered.
- e. Some LIPs considered self-representation to be within their capability and so preferred to act in person, to be in control of their own case and with a sense of empowerment.
- f. Many LIPs wished they were represented and regretted they were not. Some of the LIPs who were ineligible for Legal Aid were involved in complex proceedings and were severely hampered by not having legal advice.
- g. 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 happy with how their cases had been conducted, with a lack of progress in their cases over a long period of time, errors being made or with how their legal representative communicated with them.
- h. For their part, court actors reported their view that LIPs' dissatisfaction with past legal representation was sometimes due to poor representation but mostly because LIPs were unwilling to follow the advice from their lawyer.

Implications

- a. Providing representation for all is not a 'solution' to litigating in person because there will be some people who wish to self-represent. There is no right to representation, which suggests the opportunity to self-represent must be available.
- b. The LIPs' dissatisfaction with past legal representation suggested deficiencies in how some legal professionals communicate with their clients and keep them involved with and informed of progress of the case. Improved communication and involvement may encourage more people to seek representation.
- c. A review of how the criteria for legal aid responds to complex cases may be instructive.

3. Attitudinal barriers in how court actors view and are viewed by LIPs:

The presence of LIPs challenges the court norm of fully represented parties, and even though their presence is regarded as acceptable, they are considered by many court actors as problematic, with some expressing negative views of them. LIPs too displayed distrust of some court actors.

- a. Some court actors expressed strident and sometimes negative views about LIPs, and some LIPs similarly expressed negative views of them, particularly of legal representatives and/or legal costs.
- b. Court actors' frustrations appeared to depend on how well a LIP fitted the norm. They qualified their views by noting LIPs are not a homogenous group, but still referred to broad characteristics, such as having a controlling nature, suffering from mental illness, lacking emotional intelligence, suspicious, vulnerable, distraught parents, LIPs who acted as if they were lawyers, 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 a positive attitude towards LIPs. Some legal representatives reported bearing the brunt of some LIPs' more demonstrative emotional outbursts and at times had feared for their safety or put up with allegations of incompetence or corruption.
- c. Most LIPs viewed the judge favourably and said they felt supported or reassured in court. However, some LIPs reported a sense of unfairness and of not being respected in court because they were unrepresented. Negative experiences with legal representatives led some LIPs to express a negative attitude towards the legal profession. Costs of representation were often at the centre of LIPs' resentment. Most LIPs were positive about the help they received from court staff, but some had experienced errors or conflicting advice which had caused them anxiety and delay.

Implications

- a. 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.
- b. 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, along with better legal and procedural information for LIPs.

4. Practical and informational barriers LIPs faced:

The LIPs demonstrated and self-rated their knowledge of the procedure and law in their proceedings as low. They repeatedly reached the limits of their knowledge and came away wishing they had known more. Almost all of them took several steps to prepare their case but were frustrated by the limited amount of information and advice available about their type of proceedings or about how to self-represent.

- a. Gaps in LIPs' knowledge of procedure were frequent and wide. They ranged in complexity, for example: not knowing how to address the judge, what an affidavit is, how to complete the court forms, serve a summons, deal with witnesses, lodge an appeal or prepare a skeleton argument.
- b. Most LIPs actively prepared their cases, with only a handful doing nothing - out of paralysis, unawareness, lack of time, limited IT ability or feeling defeated by operating in a foreign system. However, it was difficult to find information, apart from Divorce and Debtor's Petition cases which are supported by advice agencies or NICTS staff.
- c. Dealing with paperwork was problematic for LIPs, especially those in Family Proceedings and Ancillary Relief. 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 overly-long documents.
- d. The LIPs went to many different sources for advice and support, particularly online, but few had specialist advice suitable for LIPs or Northern Ireland-centric information. 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, who worried they may give inappropriate advice. 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.

- e. Half of the sample of LIPs contacted a lawyer at some point, either for advice or to seek representation.
- f. Many LIPs reported virtually no contact with the opposing side, including with the legal representative. Many did not know they could have direct contact, how to contact the opposing side or that negotiations could take place out of court. For their part, legal representatives were often wary of contacting LIPs, having experienced difficult exchanges in which they felt the LIPs were emotional and hostile towards them. LIPs benefited from the expertise of legal representatives when the judge ordered the legal representatives to prepare court bundles or perform other actions.
- g. 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 evaluating how well McKenzie Friends serve LIPs.

Implications

- a. User-focused information in multiple formats on different proceedings and on self-representation is required. Language used in court documents needs to be in lay-terms, and templates may help LIPs to complete them. LIPs need access to relevant Northern Ireland legislation, procedural guidance and case-law. Dedicated procedural advice or support for LIPs is required to help manage expectations, understand the significance of self-representation and the responsibilities that come with it. An orientation course for LIPs may assist with this.
- b. The distinction between procedural and legal advice needs to be more fully defined to reduce the anxiety court staff felt about advising LIPs.
- c. Action to involve LIPs in out of court negotiations is required.

5. Emotional barriers for the LIPs:

The LIP's heightened emotions and difficulty in detaching their emotions from their proceedings presented barriers to legal participation. The prevalence of possible mental ill-health is higher in the LIP sample (59%) compared to findings from the general population from the NI Health Survey 2016-17 (17%).

- a. LIPs had difficulty separating their emotions from their proceedings. The LIPs in protracted cases indicated frustration, exhaustion, despair and sometimes rage.
- b. Judges were aware LIPs have to cope with their emotions whilst self-representing and recognised that LIPs do not benefit from hearing alternative views or challenges to their perspective from an objective adviser.
- c. Legal representatives sometimes avoided 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 unable to have the LIP's inappropriate behaviour dealt with formally.
- d. The study measured the general mental health and well-being of LIPs using the standardised screening instrument called the General Health Questionnaire 12 (GHQ-12). The proportion of LIPs with a high (4 or above) GHQ-12 score, where a score of 4 or more indicates possible mental ill-health, was 59%. This was high compared to findings from the general population from the NI Health Survey 2016-17 (17%).
- e. LIPs did not always present the appearance of having a high GHQ-12 score, which could be masked by them presenting their case well in court, but revealed in subsequent interview as feeling crushed by the experience and scoring a high GHQ-12. Outward appearances can mask hidden anxiety or other indicators of mental ill-health.

Implications

- a. Heightened emotions and mental ill-health is a real and tangible issue for LIPs, and probably for all litigants. However, LIPs do not benefit from the buffer provided by a legal representative, so their capacity to participate in court proceedings is affected by their heightened emotions.

- b. The court is not currently oriented to deal with this by way of support needs, policy or guidance.
- c. Measures to prepare LIPs may assist in quietening some of the emotional turmoil, but the court needs to adapt to the needs of LIPs if they are to continue to pursue their cases unrepresented.

6. Issues for the court when there are LIPs:

Many court practices are already in place which are intended to accommodate LIPs, but there was considerable variation in judicial approaches to implementing them. Some legal representatives felt the leeway offered to LIPs might be unfair to represented litigants. If a LIP is absent, it can be difficult for them to find out what happened in their absence or influence any decisions made. Also, there is no mechanism to notify the LIP of what happened, other than the judge requesting court staff or the legal representative for the other party to contact them.

- a. Courts do not know if a litigant is unrepresented until the case is called into the court room.
- b. Many practices are already in place intended to accommodate LIPs who are recognised as being unfamiliar with court procedures and require more time. Practices included clearing the court, providing additional explanation, modifying language and in some business areas, more inquisitorial approaches and the expanded use of additional court actors, such as Court Children's Officers or McKenzie Friends. There was considerable variation in judicial approaches, with some regarding inquisitorial approaches as a natural step, while others were more resistant to them.
- c. Other court actors regarded the leeway given to LIPs, such as the support and additional time afforded to them, as potentially unfair to represented parties, and as having an impact upon public funds in the form of the legally aided representation on the other side covering the displacement costs.
- d. Some LIPs felt overlooked, ignored and even bullied in court.
- e. Some LIPs demonstrated a contradiction between how they appeared in court as following, coping and participating when, privately, they felt that they were doing none of these things, and reported they were confused or had misunderstood what had occurred in court. They did not want to admit to a lack of understanding for fear it would irritate the judge or make the LIP look bad.
- f. Cases where LIPs do not attend can present a difficulty both for the court, particularly where non-attendance is persistent, and for the LIP. There was no obvious systemic approach to notifying LIPs about the outcome of a hearing unless they attended. Judges often requested court staff and sometimes the representative for the other party to notify the LIP of the decisions, usually in relation to the date of the next hearing, and to include a statement on the implications of a failure to attend. Dealing with cases where the LIP is absent means the LIP does not have the opportunity to test new evidence presented to court. We observed where this can have significant implications for the LIP.
- g. Court Children's Officers (CCOs) were sometimes relied upon by family court judges to assist the court to communicate with LIPs in attempts to move towards negotiated agreements. The reliance on CCOs to step into family disputes where they are making assessments of parenting arrangements while simultaneously being expected to communicate court directions to LIPs, leaves CCOs vulnerable to accusations of bias.
- h. 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. There was variation in the criteria judges applied for accepting McKenzie Friends in to the court.

Implications

- a. 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 LIPs to be ready to do this. While not impinging on the discretion and autonomy of judges, there should be some reflection on what treatment of LIPs is acceptable.
- b. Care should be taken not to put CCOs in the position of potentially over-stepping their neutrality when asked to explain something to or follow up with LIPs. It may be beneficial to have clearer guidance on the criteria and process for seeking permission for a McKenzie Friend to accompany a LIP.

- c. Combined, it may be appropriate to create a designated support person or unit to both support LIPs and assist the court which 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 court timeslots.

