



## Written evidence submitted by Professor Gráinne McKeever, Dr Lucy Royal-Dawson and Dr John McCord, relating to Department of Justice review of Civil Legal Services

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# Written evidence submitted by Professor Gráinne McKeever, Dr Lucy Royal-Dawson and Dr John McCord, relating to Department of Justice review of Civil Legal Services

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This response is based on research by academics at the School of Law, Ulster University, which examined the barriers to legal participation for litigants in person in civil and family courts in Northern Ireland. We use the term ‘litigants in person’ to refer to individuals who represent themselves in court hearings without a lawyer. This includes people who may have had legal advice prior to the hearing or will have had legal representation in previous hearings, or subsequently obtain representation for future hearings. The research was funded by the Nuffield Foundation and our findings and outputs are all publicly available at

<https://www.ulster.ac.uk/research/topic/law/impact/litigants-in-person>

Our research did not examine specific issues relating to the award or refusal of legal aid, or experiences of receiving legal aid, so we are unable to comment on the questions identified in the consultation document. What we can offer, however, is insight into why individual litigants were representing themselves, the impact of that lack of representation on the individual and the court system, and our recommendations that do not call for a removal of legal aid but rather for supporting reforms to take place to ensure the court system enables individuals who do not have legal representation to participate.

## Why do people self represent?

The first point to note is that people are entitled to represent themselves. Because they have a right to do so, the court system is required to respect and facilitate this right as part of the right to a fair trial under Article 6 ECHR. There will be times, however, where self-representation can put the individual’s right to a fair trial at risk, either because the case is too complex or because the individual lacks capacity. In such cases, the duty is on the state to assist the individual so that they receive a fair trial. This can include providing the individual with legal representation although other measures to achieve the same aim can also be used. In some cases it will not be clear when representation is necessary. Our research points out where the risks of breaching the right to a fair trial lie that will be particularly important for cases where the need for additional support is not always clear.

In our research, the main reason that litigants in person (LIPs) told us they did not have legal representation was unaffordability. Many of the LIPs informed us that they did not qualify for publicly funded financial assistance for legal representation, but could not

afford the cost of legal representation. Two important issues to note are that (1) we did not investigate the extent to which those who were unrepresented had sought and were unable to secure legal aid and (2) we did not examine the effectiveness of legal aid in supporting LIPs. Many LIPs expressed a preference to be represented and dissatisfaction that they were not. Some LIPs made a cost-benefit analysis in deciding whether to pay for legal representation and decided they could not justify the cost or value they felt it offered. Others had had negative experience with previous legal 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 LIPs not getting the outcome they wanted or not wanting to accept the advice from the legal representative.

Chapter 6 of our report on [“Barriers to legal participation for litigants in person”](#) provides more detail on the reasons why the LIPs we spoke to chose to self-represent.

## What is the impact of going to court without a lawyer?

When we asked LIPs about how they felt about self-representing, their responses were varied, including not being affected by it, anxiety, confusion and feeling distraught. Their emotional investment in their cases often meant they could not distance their feelings from the case and were unable to act dispassionately. Many LIPs felt they were coping with self-representation and were confident they were doing a good job. However, it appeared to the researchers that some of these LIPs were over-confident or unaware they were not coping as well as they thought. For some LIPs, any confidence drained away the longer their case took. The LIPs in lengthy cases spoke about their frustration, exhaustion, despair and sometimes rage.

While many LIPs negotiated their way through the system, they often faced difficulties related to finding information and getting help. Some adaptations in court helped LIPs to function in court, but the support was not applied consistently. In addition to being unable to emotionally detach themselves from their cases, many LIPs were in poor mental health. The court norm expects LIPs to behave as if they were trained lawyers when they clearly are not. Their right to be there compels changes in the system that accommodate their lack of training and expertise.

These problems LIPs experienced created barriers that prevented them participating effectively in court proceedings, therefore putting their right to a fair trial at risk. We defined these barriers as intellectual, practical, emotional and attitudinal.

### Intellectual barriers

Intellectual barriers are the difficulties litigants have in understanding legal terms and legal processes. This also includes difficulties in applying complex legal information to the facts of a case. LIPs in our study did not understand the legal language used in court proceedings and documentation and did not know what information to put on court forms. Many LIPs did not understand or know how to apply legal rules to their own case or understand the legal framework which the court would use to make a decision.

The theme of 'not knowing' was common among LIPs in the study. It raises concern about how LIPs can participate in a process that they do not understand. There was strong evidence that LIPs reached the limits of their knowledge or understanding of the legal issues, sometimes regardless of how much preparation they had done. It was common for LIPs to say that they thought that the court system should be more supportive of them, but their access to relevant and accessible legal information was lacking.

## Practical barriers

Practical barriers arise when a litigant struggles to manage the practical demands of his or her legal proceedings. This would include, for example, not knowing where to get relevant information, who to direct queries to, what to expect, when to sit or speak or stand during the hearing. The experiences described by LIPs reveal lots of practical barriers to being able to participate in court proceedings. One of the practical barriers LIPs identified was the cost of getting legal representation. They reported that they were not eligible for Legal Aid and that the cost of legal representation was too high. Many LIPs expected that there would be advice and support readily available to them. They were disappointed or frustrated with the lack of information and resources. Judges and legal representatives sometimes seemed unaware of the lack of advice and support for LIPs. They sometimes assumed that pro bono services and voluntary sector advice agencies were already offering this basic assistance. However, we found that available resources are woefully inadequate in meeting demand and advice agencies are not equipped to provide the level of legal or procedural advice required by LIPs. This lack of practical assistance blocked the ability of LIPs to participate.

LIPs did not know what advice sources could be trusted. There was no central information point that LIPs could access. Some of the existing information from sources such as the court service was not user-friendly, and the website was seen as difficult to navigate. LIPs were able to find lots of information online but not all of it was relevant or reliable, and LIPs may not have realised this. LIPs were also frustrated with the length of time court proceedings took, often having little understanding that there were staged processes that meant cases progressed incrementally rather than at one sitting. LIPs got very little information about the length of time court proceedings took. They did not understand that court proceedings often take weeks or months rather than being resolved in a day. Not having any information about the reality of how cases progress meant LIPs found it difficult to manage the repeated visits to court. LIPs also found it difficult to keep notes on what was said in court and there was no court record they could rely on to understand what was said or what they were expected to do next. This extended to LIPs not always keeping track of the court order or directions made by the judge.

The court service does not always know if a litigant will be represented or not until the day of the court hearing. This means the court is not able to make any advance arrangements to assist LIPs with their practical difficulties.

## Emotional barriers

Emotional barriers arise from the anticipation or experience of the legal proceedings that can increase existing – usually negative – emotions. LIPs experienced a range of emotions which acted as barriers to participation. These emotions included frustration, anger, confusion, anxiety and fear. The fear and apprehension about the court process was largely based on LIPs not knowing what they should expect, not knowing how to behave, or how other court actors were supposed to behave. Waiting times 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. Many LIPs described feeling supported by some court actors, but this was in contrast to the descriptions of a system that does not care and lacks sympathy for the difficulties they faced. These emotional barriers resulted in some LIPs becoming alienated or despairing of their situation. For others, it resulted in incredulity and the suspicion of unfairness. LIPs could struggle to be objective about their cases and this made it difficult for them to present their cases effectively. This was an obstacle for both the LIP and for the court's ability to engage the LIP.

Other research has shown that people tend to be anxious and under stress when they are dealing with a legal problem, whether they have representation or not, so it would not be surprising if the LIPs in our research felt the pressure too. We asked LIPs to complete a standardised screening instrument called the General Health Questionnaire 12 (GHQ-12). It provides a measurement of general mental health and well-being using a 12-point scale where a score of 4 or more indicates possible mental ill-health. The percentage of the Northern Ireland population scoring 4 or more was 17% when measured by the Health Survey in 2016/17. The percentage of LIPs in the sample scoring 4 or more was 59%. This high proportion is in line with other studies that have measured the GHQ-12 of people involved in legal issues. The significance of this high proportion is that when people are represented, they are protected from some of the stresses of litigation because the lawyer carries the case and can manage their clients' expectations and reassure them. This is not the case for the LIPs. In addition, the role played by a lawyer to act as a shield or buffer between their client and the court is also missing, so the court is exposed to the LIP's emotional distress.

The court proceedings are designed in a such a way that the litigant's emotional investment in the case or mental ill-health are managed by the legal representatives. It is difficult for LIPs to achieve emotional detachment or manage their state of mind on their own, which makes it very difficult to fit within the expected norm. This tells us that the norm does not consider LIPs as ordinary people who are dealing with a legal matter without any emotional buffer.

Finally, many LIPs reported to us that they felt they had been dealt with fairly by the judge, but many were suspicious of the established relationships between lawyers and the judge, and the system made them feel like an outsider or a nuisance. This contributed to suspicions of a lack of fairness in the system.

## Attitudinal barriers

Attitudinal barriers exist where court actors automatically adopt a negative attitude to LIPs and assume that they will be difficult to deal with. Barriers may also be created by LIPs where they automatically adopt a negative attitude to court actors. 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.

Dealing with the intellectual, practical and emotional barriers to participation will not be enough if the attitude towards LIPs continues to be strongly negative as shown by an unwillingness to accommodate their needs. Overcoming attitudinal barriers requires an explicit recognition of the role of LIPs within the court system and responding specifically to their needs, without treating them as individuals who disrupt the normal day to day running of the court system.

## Recommendations for supporting LIPs

While our research has led to some improvements in how some of the barriers to participation are mitigated – in particular, our Family Court Information website and pathfinder that responds to the practical barrier of not having accessible, relevant information and guidance on court proceedings – there is a considerable amount that can be done in addition to ensuring that legal aid remains available to those who need it.

The overall recommendations from our research can be summarised as follows:

1. Cultural change is required across the court system to debunk the expectation that LIPs should be able to fit into the existing system.
2. There is a need to audit systems in which LIPs engage, both as a risk assessment measure and as means of identifying the most effective adaptations that would ensure the court system meets the legal standards required under Article 6 ECHR which protects the right to a fair hearing.
3. Change processes should use multi-stakeholder, co-production approaches. Human-centred design has proved to be a highly effective form of co-production to support LIPs, both to enable buy-in and to develop responsive and sustainable solutions.
4. Human-centred design is recommended for tackling both small scale and wicked legal problems.
5. There should be system-wide consideration of LIPs to ensure their differences to legally represented litigants are acknowledged and acted upon. This can be broken down into discrete elements and would include:
6. Identifying LIPs in the system in real-time and capturing data on their protected characteristics and case duration.
7. Adaptations should be made to court forms to increase accessibility, for example: renaming court forms to reflect their purpose; auditing content for compliance with plain English and disability requirements; language translations; online submission options; document assembly of form templates.

8. Developing litigation information supports, including more navigation tools for other business areas, and promoting these supports to LIPs by including the relevant weblink as standard in correspondence with all litigants.
9. Awareness raising, training and supportive resources on managing cases with LIPs for judiciary, legal representatives, and court staff.
10. An aide-memoire for judges setting out the operational indicators of participation in court hearings, combined with training to promote consistency in dealing with LIPs.
11. Practice Direction for judges, legal representatives, Children's Court Officers, McKenzie Friends and LIPs outlining expectations of procedure, behaviour and case management where there is a LIP.
12. Co-produced Charter of Rights and Responsibilities and/or professional guidelines and a code of practice which all court actors and LIPs are bound by when at least one party is unrepresented.
13. Online case management supports including LIP access to case documents and e-bundles.
14. Review scheduling practices for LIP hearings.
15. There is a need for ongoing monitoring, evaluation and development of initiatives to promote LIPs' participation, from generalised support through to personalised support via unbundled legal services.
16. Future research – including government funded research – should be directed towards filling knowledge and evidence gaps of broader access to justice concerns.