

Taking Responsibility? Legal Aid Reform and Litigants in Person in England

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Introduction

In April 2014, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) introduced sweeping reforms to legal aid in England and Wales. The impact was felt most severely on private family law cases, that is, divorce or civil partnership dissolution, property and finance and arrangements for children. Since April 2014, legal aid has only been available for a restricted range of private family law cases, primarily for victims of domestic violence.¹

The severe cuts to family legal aid reflect a combination of both financial and ideological drivers. On the financial side, the Ministry of Justice was seeking to reduce its budget by almost a quarter following the global economic crisis.² Public funding was therefore to be strictly targeted at ‘the most serious cases in which legal advice or representation is justified’.³ In current terms that meant the continuing availability of legal aid for victims (but not alleged perpetrators) of domestic violence, and subject to

¹ Eligibility is set out in LASPO, sch 1. Applicants must also satisfy a means and merits test.

² Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales* Consultation Paper, CP12/10 (Cm 7967, 2010) para 1.4.

³ *ibid*, para 2.2.

strict evidential criteria. A ‘safety net’ in the form of an exceptional funding scheme was also made available, again reiterating the residual nature of the state’s role.

The reforms also reflect a particular neoliberal ideology towards the state’s role in relation to families, emphasising individual responsibility rather than state intervention. Thus whilst the LASPO reforms restricted funding for litigation of family disputes, at the same legal aid remained available for mediation.⁴ Looked at more closely, however, this is not a straightforward withdrawal of the state, but one that reinforces norms of behaviour by other means. In this case, it is an example of what Diduck refers to as family law assigning responsibility for responsibility.⁵ The government’s consultation paper on the legal aid reforms made this quite explicit, referring to ‘the desire to stop the encroachment of unnecessary litigation into society by encouraging people to take greater personal responsibility for their problems, and to take advantage of alternative sources of help, advice or routes to resolution’.⁶ The withdrawal of legal aid and emphasis on ADR significantly extends long-standing trends in family law towards what has been variously termed ‘dejuridification’⁷ or ‘delegalisation’.⁸ In other words, a shift away from formal legal rules and norms to regulate the family and towards processes like mediation that simultaneously promise greater autonomy or responsibility for individuals but at the same time regulate the form that that responsibility should take, both in the processes used and in the guiding norms. Taking personal responsibility is therefore now mandatory as long as responsibility means opting for mediation rather than court.

⁴ Subject to a means test.

⁵ Diduck, A, ‘What is Family Law for?’ (2011) 64 *Current Legal Problems* 287.

⁶ Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales* (n 2) para 2.11.

⁷ Diduck, A, *Law’s Families* (London, Butterworths, 2003) 2.

⁸ Dewar, J, ‘The Normal Chaos of Family Law’ (1998) 61 *Modern Law Review* 467, 476.

In practice, however, the public have not exercised their responsibility quite as the government had intended. Rather than turning in large numbers towards mediation, the cuts in legal aid have prompted a significant increase in the numbers of litigants in person (LIPs) in the family courts.⁹

This outcome was not entirely unexpected. The government's consultation paper did anticipate that the legal aid reforms would be likely to lead in an increase in litigants in person.¹⁰ At the same time, the government recognised the possible negative consequences of an increase in LIPs envisaged in terms of 'delays in proceedings, poorer outcomes for litigants (particularly when the opponent has legal representation), implications for the judiciary, and costs for Her Majesty's Courts Service'.¹¹ It noted, however, that there was little 'substantive evidence' on the conduct and outcome of proceedings.¹² Others were less sanguine. The authors of the Family Justice Review, a major government-appointed but independent analysis at the time, expressed concern about the potential increase in LIPs and suggested that procedural reforms such as diversion to mediation were not a full answer.¹³

In this chapter I explore what the consequences of an increase in LIPs might mean. It explores why people self-represent, what impact self-representation has and what supports are available. Whilst clearly not the government's preferred mechanism by which people can exercise responsibility, how able are litigants to exercise responsibility as self-representing parties? What support is available to help them and how effective is it in facilitating access to justice? If LIPs are able to secure access to justice for themselves,

⁹ The details are presented below.

¹⁰ Ministry of Justice (n 2) para 4.266.

¹¹ *ibid*, para 4.266.

¹² *ibid*, para 4.268.

¹³ Norgrove, D, *Family Justice Review: Final Report* (Ministry of Justice, 2011) paras 4.180–4.183.

what impact does their presence have on other court users? Do LIPs result in delays for and blockages, frustrating access to justice for other litigants?

Answering these questions is challenging as the government has not conducted or commissioned any systematic analysis of the reforms, despite earlier commitments to do so.¹⁴ In the absence of robust independent evaluation data we are forced to rely on other sources to understand how LIPs and the courts might be coping currently in a post-LASPO world. The sources available include administrative data from the court service that maps trends in applications and representation. There is an existing body of empirical research on the experiences and impacts of litigants in person in family law on LIPs conducted in England and Wales some time before the introduction of legal aid reforms¹⁵

¹⁴ ‘We are undertaking further research into this area, and we will report our findings as part of the government’s response to this consultation. We will also be conducting a full post-implementation review of the impact of those reforms we decide to pursue following this consultation: Ministry of Justice (n 2) para 4.269. The Ministry of Justice did commission a study of how LIPs were faring *prior* to the implementation of LASPO. It was intended that this pre-LASPO research would provide evidence that would assist in mitigating any of the issues that might arise post-reform. The fieldwork for the study was carried out by a very experienced team led by the author between January and March 2013, prior to the implementation of LASPO. The fieldwork included observation of 151 private law children and financial remedy hearings across 5 different courts. For each of the 151 observed cases, the team also analysed the court file and conducted interviews with the parties (and any supporters), any lawyers and Cafcass. Focus groups were also held with judges, court staff, lawyers and Cafcass in each of the 5 courts. The report had not been published by late 2014.

¹⁵ Moorhead, R and Sefton, M, *Litigants in Person* (Ministry of Justice, 2005).

as well as other recent international studies.¹⁶ Whilst this research is not a substitute for detailed analysis of the impact of LASPO, the consistency of the findings from diverse jurisdictions does provide some clear indicators of what may be happening on the ground now. In addition, there are some clear themes emerging from a range of surveys of professional opinions and from published judgments since the implementation of legal aid reforms.¹⁷ This practitioner material is not a substitute for systematic evaluation and is likely to over-emphasise the problematic nature of LIPs. Nonetheless, whilst it cannot give any indication of prevalence of LIP-related problems, it does give an illustration of the range of problems being experienced on the ground.

Post-LASPO Trends: Self-representation not Mediation

We start by examining trends in the pattern of applications following the introduction of LASPO in April 2014. What is immediately evident is that the changes have meant a very significant and immediate drop in the number of publicly funded private law cases. These dropped from 60,000 cases in the (pre-LASPO) second quarter (April–June) of 2011 to

¹⁶ Notably Macfarlane, J, *The National Self-Represented Litigants Project* (University of Windsor, Canada, 2013) is a large recent study based primarily on interviews with LIPs in Canada. There are also two large-scale Australian studies: Dewar, J, Smith, B and Banks, C, *Litigants in Person in the Family Court of Australia* (Family Court of Australia, 2000) and Hunter, R et al, *The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia* (Law and Justice Foundation of NSW, 2002). There is also a very comprehensive review of the international evidence conducted by the Ministry of Justice: Williams, K, *Litigants in Person: a Literature Review* (London, Ministry of Justice, 2011).

¹⁷ The material includes submissions to the Justice Select Committee inquiry on the impact of changes to civil legal aid under the LASPO 2012, available at www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2010/laspo/?type=Written#pnlPublicationFilter.

10,000 cases in the second quarter of 2013. The number of publicly funded cases has not recovered and remained at 10,000 cases for April–June 2014.¹⁸

The question then arises as to what alternatives individuals have pursued to address their dispute now that legal aid has been so severely curtailed? What is evident is that mediation has not picked up the slack. There has been no major diversion of potential litigants from court to mediation. Indeed, the number of referrals to legally aided mediation and the number of mediation starts dropped by more than half between April–June 2012 to April–June 2014.¹⁹ Mediation agencies have also reported drops in privately funded mediation although reliable data is not available.

At the same time, there has also been a drop in those going to court. Private family law applications remained fairly steady immediately post-LASPO but have since declined. The number of applications dropped by 41 per cent between April–June 2013 and April–June 2014,²⁰ although recent figures published by Cafcass suggest that the numbers of applications may be starting to increase again.²¹ At present, though, the numbers are down. It is unclear at present whether individuals have indeed found their own private solutions to family problems without professional help from the courts or

¹⁸ Ministry of Justice, *Legal Aid Statistics in England Wales: Legal Aid Agency April to June 2014* (Ministry of Justice Statistics Bulletin, September 2014) 23.

¹⁹ *ibid* 24. Further measures have been introduced subsequently to encourage mediation, including extending legal aid funding beyond mediation assessment to a mediation session.

²⁰ Ministry of Justice, *Court Statistics Quarterly April to June 2014* (Ministry of Justice Statistics Bulletin, September 2014) 13.

²¹ The Cafcass private law demand statistics for October 2014 are running at a similar level to the October 2011 and 2012 figures. Cafcass: ‘Cafcass Private Law Demand: October 2014 Statistics from Cafcass’ (Cafcass, November 2014).

whether they represent an unmet legal need of individuals who have given up without resolving their problems.²²

That said, the drop in numbers of applications is far less than the reduction in cases eligible for legal aid. The gap is being made up by litigants in person. As widely predicted, and anticipated by the pre-LASPO Green Paper,²³ there has been a significant increase in the numbers of LIPs in England and Wales. Whilst LIPs have been fairly numerous in private family law cases in England and Wales for a while, they were given a significant boost by LASPO. Thus, in the first quarter of 2013, 42 per cent of private law Children Act cases disposed of nationally had one party unrepresented, and 11 per cent had both parties unrepresented. By the first quarter of 2014 this had increased significantly to 47 per cent with one party unrepresented and 26 per cent with both parties unrepresented, leaving just 27 per cent with both parties represented.²⁴ A request to the Ministry of Justice under the Freedom of Information Act also indicated that over 30 per cent of parties to financial remedy cases were now unrepresented.²⁵

Taking Responsibility? Reasons for Self-Representation

²² Genn's large-scale study of civil justice distinguished between the 'self-helpers' who took action privately and the 'lumpers' who did nothing at all to address a justiciable problem: see Genn, H, *Paths to Justice: What People Do and Think about Going to Law* (London, Bloomsbury, 1999) 69, 72.

²³ Ministry of Justice (n 2) para 4.266.

²⁴ Ministry of Justice, *Court Statistics Quarterly April to June 2014* (n 20) Main tables. Table 2.4, available at: www.gov.uk/government/statistics/court-statistics-quarterly-april-to-june-2014. Note that the main report does not include a breakdown of representation rates, rather these must be calculated from an excel spreadsheet available on the Ministry of Justice (MoJ) website. The MoJ data refers to completed cases. It is not possible to tell from the MoJ data whether or not the parties were represented (or not) for the entire duration of the case.

²⁵ Reported in *Family Law Week* 13 October 2014: www.familylawweek.co.uk/site.aspx?i=ed133862.

What does the increase in LIPs mean? Are LIPs choosing rationally to self-represent, as a new form of exercising responsibility? As yet there is no data on the reasons for self-representation post-LASPO. However, the message from previous studies is that it is more common for LIPs to self-represent primarily because they cannot afford legal representation, than because they think they can do a better job than a lawyer or because the task appears relatively straightforward. The Australian study by Dewar²⁶ and Canadian study by Macfarlane²⁷ both found between 75 and 80 per cent of litigants self-represented owing primarily to an inability to pay for legal representation. Moorhead and Sefton similarly concur that self-representation is primarily about necessity in the absence of an alternative rather than autonomy.²⁸ It seems highly likely therefore that the sudden increase in the number of LIPs following legal aid reform reflects an inability to pay for legal representation rather than a positive choice to self-represent.

Capacity to Self-represent

Whether a matter of choice or not, previous research has also raised issues about the potential capacity of LIPs to self-represent. That said, LIPs are not a homogenous group and will have varying capacity to self-represent. The Judicial Executive Board²⁹ noted in a submission to a parliamentary select committee inquiry that some LIPs are ‘competent and able’, but at the same time that many LIPs have little or no knowledge of their legal rights or of key processes and procedures.³⁰ This observation largely accords with the

²⁶ Dewar et al, *Litigants in Person in the Family Court of Australia* (n 16) 33.

²⁷ Macfarlane, *The National Self-Represented Litigants Project* (n 16) 49.

²⁸ Moorhead and Sefton, *Litigants in Person* (n 15) 64.

²⁹ The Judicial Executive Board is chaired by the Lord Chief Justice and includes the most senior judges in England and Wales, including the Master of the Rolls and the President of the Family Division.

³⁰ Judicial Executive Board, *Written Evidence – Justice Committee Inquiry: Impact of Changes to Civil Legal Aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (2014)

international research evidence. In a review, Williams notes a consistent finding that some LIPs were able to participate effectively in proceedings but that there were widespread difficulties with understanding legal and evidential processes.³¹

There are particular concerns about the minority of LIPs who are particularly vulnerable, or as itemised by the Judicial Executive Board, those with learning difficulties, psychological or psychiatric problems and/or dysfunctional lifestyles.³² Williams' review of previous research concluded that LIPs are more likely to be younger and have lower levels of education and income levels than represented parties.³³ Moorhead and Sefton found that 15 per cent of LIPs in Children Act cases showed evidence of vulnerability, including a background of domestic violence, drug and alcohol use and depression.³⁴ The latter study was conducted in England and Wales in the mid-2000s when it could be presumed that at least a proportion of vulnerable litigants would at that time have been represented through legal aid and therefore would not have featured in the 15 per cent of vulnerable LIPs. It seems highly likely that post-LASPO a higher proportion of LIPs will display these vulnerabilities than Moorhead and Sefton's 15 per cent and thus possibly precluding effective participation in proceedings.

LASPO introduced two safeguards to protect vulnerable litigants: continuing eligibility for legal aid for victims of domestic violence and an exceptional funding scheme. There are, however, concerns about the effectiveness of the safety net under both

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/written/9472.pdf>.

³¹ Williams, *Litigants in Person* (n 16) 5.

³² Judicial Executive Board, *Written Evidence – Justice Committee Inquiry: Impact of Changes to Civil Legal Aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (n 30).

³³ Williams (n 16) 5.

³⁴ Moorhead and Sefton (n 15) 70.

schemes. Legal aid remains for victims of domestic violence but the criteria are tightly drawn and evidential requirements stringent.³⁵ Research by Rights of Women (ROW) suggests that they have been tightly interpreted as well.³⁶ The ROW research found that around half of women surveyed did not have any of the prescribed forms of evidence, while others had been charged considerable sums to obtain copies of the required evidence, or had difficulty finding a legal aid solicitor specialising in family law to take their case.

Section 10 of LASPO also provides for an exceptional funding scheme to make legal services available in order to avoid a breach of their rights under Article 6 (right to a fair trial), Article 8 (right to respect for family life) or Protocol 1, Article 1 (right to protection of property) of the European Convention on Human Rights. The number of grants of exceptional case funding in family law to date has been very low,³⁷ with the number of applications and awards less than expected. The scheme has been subject to widespread criticism, including from the Joint Committee on Human Rights.³⁸ The government, however, insists that the scheme is working effectively.³⁹

Without systematic research it is not possible to identify how common vulnerable LIPs are or to assess the numbers of LIPs who are not able to conduct their cases

³⁵ The evidence requirements are set out in the Civil Legal Aid (Procedure) Regulations 2012, reg 33.

³⁶ Rights of Women, *Evidencing Domestic Violence: A Barrier to Family Law Legal Aid* (August 2013).

³⁷ In the year April 2013–March 2014, 821 applications for exceptional case funding were made in the area of family law, only nine of which were granted: Ministry of Justice, *Legal Aid Statistics in England Wales: Legal Aid Agency April to June 2014* (n 18) 27.

³⁸ Joint Committee on Human Rights, *The Implications for Access to Justice of the Government's Proposals to Reform Legal Aid, 7th report of session 2013–14* (2013–14, HL 100, HC 766).

³⁹ Lord Faulks, Minister of State for Civil Justice and Legal Policy, in response to a parliamentary question, noted that there had been fewer applications than the 5000–7000 that had been expected but denied that the application process was too onerous: HL Deb 11 February 2014, vol 752, cols 529–31.

effectively. What is clear, however, from some of the reported cases is that there are examples of highly vulnerable litigants, including those who have not qualified under the current exceptional funding scheme. A very stark example is the respondent mother in *Re H* who was described by the judge as having hearing, speech and intellectual difficulties and was unable to read or write. The mother had been refused exceptional funding to oppose the father's residence application. The father was represented. The local authority was also represented and also supported the father's application. The judge concluded that the mother had physical but not intellectual access to the court⁴⁰ in clear breach of her Article 6 rights to a fair hearing, not least as a vulnerable person against two advocates.⁴¹

Impact on Individual Case Outcomes

How does self-representation impact on case outcomes? Are LIPs necessarily disadvantaged or can judges ensure a level playing field? Based on detailed analysis of court files, Moorhead and Sefton concluded that LIPs were more likely than lawyers to make mistakes, including serious mistakes, and also found it difficult to cope with both substantive law and procedure.⁴² The types of problems that LIPs were reported to experience spanned almost every aspect of proceedings, including pursuing both a misconceived case and misconceived remedies, not understanding the substantive law, difficulties coping with evidence, difficulties in identifying relevant facts, poor or limited

⁴⁰ *Re H* [2014] EWFC B127 at [4].

⁴¹ *ibid* at [6].

⁴² Moorhead and Sefton (n 15) 130.

advocacy skills, not understanding court orders, not following directions, not appreciating the importance of negotiation and not understanding the purpose of appeals.⁴³

It is relatively easy to identify problems, particularly procedural problems, which LIPs might experience. It is more difficult, however, to identify whether or not those problems actually result in adverse outcomes for LIPs, in other words whether LIPs did worse than they would have done if they had been represented. There is no recent UK research evidence addressing the issue of impact. There are, however, examples of reported cases where clearly things had gone against the LIP at first instance where, on appeal, the lack of legal representation at an earlier stage of proceedings was flagged as an issue. In *Re C*,⁴⁴ for example, an appeal against an order for indirect contact was upheld, with Ryder LJ identifying a string of procedural irregularities at first instance that an LIP would have been unlikely to either to spot or to challenge without the benefit of legal advice.

Elsewhere some attempt has been made by researchers to quantify the extent of poorer outcomes for LIPs. In a review of the international literature on representation across case types, Williams concluded that ‘case outcomes were adversely affected by lack of representation’.⁴⁵ Specifically in relation to family law, Dewar’s Australian study noted that that only 34 per cent of judicial officers reported that, in their view, the LIP had handled the case competently.⁴⁶ Drawing on post-hearing ratings by judicial officers, Dewar reported that more than half (59 per cent) of LIPs were thought to have been disadvantaged by their lack of representation.⁴⁷

⁴³ *ibid*, ch 7.

⁴⁴ *Re C* [2013] EWCA Civ 1412.

⁴⁵ Williams (n 16) 6.

⁴⁶ The judicial officers were reporting after the hearing: Dewar et al (n 16) 2.

⁴⁷ *ibid* 2.

More research is needed to understand why LIPs may be disadvantaged. Williams notes that existing studies provide different explanations as to why represented parties might do better, including their lawyer's knowledge of the law or knowledge of procedures. That said, there are likely to be a range of factors that shape whether or not the LIP is disadvantaged or not in proceedings, including both the competence and capacity of the LIP and the approach or supportiveness of the court.

On the latter point, the support that LIPs receive from the judiciary in court appears to be quite variable, with some judges offering more information and explanation to LIPs than others.⁴⁸ Aside from possible pressures of time, part of the explanation for this variation might reflect ethical dilemmas about the judicial role. Moorhead and Sefton note that English judges recognise that the traditional 'passive arbiter' model is not necessarily appropriate in an LIP case, but judges vary in how interventionist they should become as a result.⁴⁹ Judges have the difficult task of striking a balance between supporting LIPs and being fair to any represented party, in other words ensuring a level playing field but without showing favouritism to LIPs.⁵⁰ Getting that balance right can be difficult. It is interesting to note that the judicial officers in Dewar's study also considered that 41 per cent of *represented* parties were reported to be disadvantaged by one party's lack of representation. Whether that was as a result of the judicial officer trying to support the LIP or the LIP's lack of representation causing additional tasks or delays for the represented party was not clear.

The balance between 'neutral arbiter' and substantive justice is particularly acute where either the LIP or the represented party is especially vulnerable. An example of the

⁴⁸ Williams (n 16) 7; Macfarlane (n 16) 95–107.

⁴⁹ Moorhead and Sefton (n 15) 192–93.

⁵⁰ Lawyers for represented parties can also face a moral dilemma.

former is the mother in *Re H*, described above. There are also several examples of recent private family law cases where the LIP has been accused of sexual violence against the represented party. In these cases, judges are understandably reluctant to allow the LIP to cross-examine the alleged victim, but at the same time consider that the judge cannot do justice to the LIP's case by attempting to cross-examine on their behalf. In *Q v Q; Re B; Re C*⁵¹ the President of the Family Division suggested, rather provocatively, that if Article 6 and 8 rights risked being breached and the court could not deal with the matter justly and fairly then the state should fund legal representation, if not through the exceptional funding mechanism then through the court service.

Impact of LIPs on the Court

Aside from whether LIPs are able to secure justice for themselves, there also issues about whether LIPs cause delays and consume a disproportionate amount of court resources, thus raising issues of justice for other litigants.

LIPs face two main challenges in trying to conduct litigation. The first is overcoming a lack of the knowledge and skills required to undertake the range of tasks needed for effective litigation. Examples of tasks include form completion and complying with evidential requirements (including preparing bundles). The second challenge is overcoming a lack of professional distance from the issues. Whilst LIPs have the advantage of knowing what has happened, they may find it more difficult than a lawyer in identifying the legally rather than the personally relevant. The lack of knowledge and skills and professional distance may mean either that essential tasks are not completed by the LIP or that essential tasks are attempted by the LIP but less efficiently and effectively than a lawyer. In both situations, it may well mean that tasks (and costs) are displaced

⁵¹ [2014] EWFC 31.

onto others, especially judges, opposing lawyers or court staff as they attempt to either coach the LIP through the task or have to assume responsibility for a task.

There is a strong perception amongst family justice professionals that LIPs add to their workloads owing to either lack of understanding or lack of professional distance. In its evidence to the Justice Select Committee, the Judicial Executive Board suggested that proceedings could be lengthened owing to judges having to take time to explain procedure and substantive law to LIPs, judges having to undertake their own research in the absence of lawyer-prepared skeleton arguments and judges having to draft orders rather than being able to rely on lawyers to do the drafting.⁵² The Judicial Executive Board also identified additional tasks for judges (and court staff). These included having to deal with extensive correspondence from LIPs and also LIPs not understanding the importance of negotiation, leading to more cases resulting in trials rather than settling before or during the course of proceedings.⁵³ The latter point was also identified in Maclean and Eekelaar's small observation study of LIPs pre-LASPO. They noted examples of (unnecessary) applications that had been made without having been filtered out by initial legal advice as well as cases where LIPs were less willing to settle in court, based on misunderstandings of what was legally possible.⁵⁴

Three recent Court of Appeal judgments provide further case studies of the types of delays caused by LIPs' lack of knowledge or skills and the task- and costs-shifting onto other professionals within the system. The case of *Re C*, noted above, resulted in an appeal that may not have been necessary if the applicant had been represented at the earlier hearing. In his judgment, Ryder LJ identified that in the absence of lawyers it was

⁵² Judicial Executive Board (n 30) 5.7, 5.9, 5.21.

⁵³ *ibid.*

⁵⁴ Maclean, M and Eekelaar, J, 'Legal Representation in Family Matters and the Reform of Legal Aid: A Research Note on Current Practice' (2012) 24 *Child and Family Law Quarterly* 223, 232.

up to the judge to provide both the legal analysis as well as maintaining ‘both the reality and perception of fairness and due process’. He acknowledged that was not an easy task without preparation or any additional time-allocation.⁵⁵

Two judgments by Lady Justice Black have highlighted the particular challenges faced by the Court of Appeal in LIP cases.⁵⁶ In *Re O-A*, the judge noted the difficulties the Court of Appeal had in understanding the case or “marshalling the arguments into a logical and readily intelligible form” if there had been no lawyers present in earlier proceedings to provide a summary of what had occurred.⁵⁷ In the absence of a summary, the result was the court ‘inching forward’ rather than proceeding robustly. In *Re R*,⁵⁸ Black LJ noted that LIPs were often not aware that it was their responsibility to prepare bundles or, if they did know, their bundles were often incomplete. The result was that the burden of preparing bundles was picked up by others, including the court office or, if it was involved, the local authority.

In addition to the extra tasks being undertaken by judges and court staff that the Judicial Executive Board identified, lawyers also perceive that LIPs place additional burdens on them as well as causing delays. A recent Bar Council survey identified a range of issues that lawyers reported when acting against an LIP, including the court’s expectation that the lawyer would undertake all the administration in the case instead of it being shared by both parties.⁵⁹ There is also a perception amongst family justice

⁵⁵ *Re C* [2013] EWCA Civ 1412.

⁵⁶ The Judicial Executive Board (n 30) also raised the issue of LIPs not understanding the appeals process or having sufficient knowledge of the law required to substantiate an appeal (at para 5.22).

⁵⁷ *Re O-A* [2014] EWCA Civ 1422, at [40].

⁵⁸ [2014] EWCA Civ 597.

⁵⁹ The Bar Council, *The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On. Final Report* (The Bar Council, 2014) 29.

professionals that LIPs lengthen cases. Thus 80 per cent of respondents to the Bar Council survey⁶⁰ reported increased delays following legal aid reform. These perceived delays were attributed to the action or inaction of LIPs, including non-disclosure, a lack of focus on the relevant issues, a reluctance to negotiate, and failure to adhere to court directions and court timelines.⁶¹ The Judicial Executive Board⁶² suggested that private law cases with two LIPs can take 50 per cent longer.⁶³ A survey by the Magistrates' Association reported that 62 per cent of its members thought that LIPs had a negative impact on the court's work most or all of the time and raised concerns about delays.⁶⁴

It is more difficult, however, to find hard quantitative data on whether LIPs do indeed result in longer proceedings, and even harder to quantify the amount of court resource used by represented and self-represented litigants. Williams, summarising the international research on case durations, notes that there is not a straightforward relationship between representation type and the length of proceedings. Her review highlights that the impact of LIPs on case duration is influenced by the type of case, the representation type (full, partially represented and unrepresented) and the level of involvement or participation of the LIP in the case.⁶⁵ That said, Williams concludes that

⁶⁰ *ibid.*

⁶¹ *ibid.* 29.

⁶² Judicial Executive Board (n 30) 5.4.

⁶³ The emotional toll on judges from having to support LIPs whilst ensuring a fair process cases should also not be overlooked: Maclean and Eekelaar, 'Legal Representation in Family Matters and the Reform of Legal Aid' (n 54) 232.

⁶⁴ The survey of 461 magistrates was undertaken by the Bureau of Investigative Journalism in partnership with the Magistrates' Association: McClenaghan, M, 'Family Courts: Self-representation Hinders Justice say Magistrates' (The Bureau of Investigative Journalism, 1 June 2014) www.thebureauinvestigates.com/2014/06/01/family-courts-self-representation-hinders-justice-say-magistrates/.

⁶⁵ Williams (n 16) 6.

specifically for family cases the weight of evidence is that self-representation is associated with longer durations as cases were less likely to settle.⁶⁶

In contrast, the only recent data on timeliness and representation that is in the public domain suggests that full representation is associated with longer case durations. Ministry of Justice data for concluded cases between January and March 2014 reports the longest case durations where both parties or only the respondent are represented (25 weeks and 22 weeks respectively) and the shortest durations for unrepresented applicants and neither party represented (15 weeks).⁶⁷ The difficulty with interpreting these figures is that they do not give any indication of the nature and severity of the cases. Full representation cases are now very much in the minority and are more likely to involve domestic violence and safeguarding issues that might be expected to take longer. It is worth noting that the average duration of fully represented cases has increased since the introduction of legal aid changes, quite possibly reflecting a greater concentration of domestic violence issues in the full representation population. The same may be said for the respondent only representation cases given that most respondents in private family law cases are women who are most likely to raise safeguarding issues. It is also worth noting that short proceedings are not necessarily a sign of success. In one large Australian study, fully unrepresented cases were more likely to end by being withdrawn, resolved by directions or interim orders, a default judgment or dismissal.⁶⁸ This suggests that greater

⁶⁶ *ibid* 6. Williams relies here on the UK study of Moorhead and Sefton (n 15), and the two Australian studies led by Hunter (n 68) and Dewar et al (n 16).

⁶⁷ Ministry of Justice, *Court Statistics Quarterly April to June 2014* (n 20) 20. It should be recognised that case duration is a partial indicator of court resource consumed. It does not indicate the number and length of hearings or the number of adjournments in sets of proceedings. Maclean and Eekelaar (n 54) noted that adjournment and relisting was required when LIPs did not attend a hearing and had not given any instructions for anyone to act on their behalf. They also noted that litigants were less likely to fail to attend if they had an adviser.

⁶⁸ Hunter, R, Genovese, A, Chrzanowski, A and Morris, C, *The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia* (Law and Justice Foundation of NSW, 2002) 71.

effort should be put on diverting cases from court or that more support is needed for LIP cases during proceedings. More detailed and systematic analysis of current cases in England and Wales is clearly needed to understand what accounts for variation in case durations.

The Support Needs of LIPs

It is unlikely that there will be a major restoration of legal aid in England and Wales. As a result we can expect the current high levels of LIPs to continue. If LIPs are to continue in large numbers then there is an urgent question of how they can be best supported, not just to ensure fair outcomes for themselves but also to minimise their impact on the court system. Providing effective support for LIPs is going to be a significant challenge, not least because the family justice system has been designed and developed based on a full representation model.⁶⁹ It is clear from previous research that LIPs have a wide range of support needs, although these will be at different levels of intensity given varying capacities and vulnerabilities. At minimum, Dewar identifies these support needs as a need for information (eg about court procedures), advice (eg document preparation, rules of evidence), and support (emotional and practical).⁷⁰ Similarly, Macfarlane suggests a requirement for orientation, education, emotional support, coaching and legal advice.⁷¹ However, it is clear that meeting these lists of needs is very challenging. Macfarlane's large Canadian study suggested that LIPs typically start the litigation process with diverse expectations, ranging from confidence to trepidation. She reports that most LIPs rapidly

⁶⁹ Judicial Executive Board (n 30) 1.

⁷⁰ Dewar et al (n 16) 45.

⁷¹ Macfarlane (n 16) chs 8, 9.

become disillusioned and frustrated with the process, and some become entirely overwhelmed.⁷²

There are a range of reasons why that might be the case. The first is the awareness of what support services are available. Dewar notes that in Australia few LIPs seek advice but that most LIPs were not aware of what advice or support was available.⁷³ Moorhead and Sefton also concluded that English courts were not confident at signposting LIPs to what help was available.⁷⁴

The second reason relates to the availability and accessibility of support services, or what Macfarlane identifies as a mismatch between the wide-ranging needs of LIPs and the supports that are available. Support services are typically limited in scope and availability and are not necessarily available in a form that all LIPs can utilise. This is a particular problem in England and Wales where, until recently, there was comparatively little demand for advice, support and orientation from support services as these were generally provided by family lawyers. The sudden removal of legal aid has provided relatively little time to allow the system to adapt in response to the dramatic rise in LIPs. There is a particular shortage of access to free legal advice for family cases. The most well-known advice agency in England and Wales is the Citizens Advice Bureau (CAB) but only four of the hundreds of bureaux offer a specialist family law advice service to deal with family legal issues in-house. Prior to the introduction of legal aid reforms the CAB was already expressing concerns about an increase in enquiries on family issues that they considered that they did not have the resources or expertise to deal with.⁷⁵ More

⁷² *ibid* 50–55.

⁷³ Dewar et al (n 16) 46.

⁷⁴ Moorhead and Sefton (n 15) 259–60.

⁷⁵ Citizens Advice Bureau, *Breaking up is Never Easy: Separating Families' Advice Needs and the Future of Family Justice* (CAB, 2011) 14.

recently the Law Centres Network has reported that one in six of their centres have had to close due to legal aid cuts. They also noted that their members have had a surge in enquiries on family issues but that there have been few if any alternative sources to refer enquiries onto.⁷⁶

The third problem with support services relates to their effectiveness or their ability to meet the clients' needs. In many respects, support services are trying to replace the advice and guidance offered by lawyers, based on many years of training, tailored to a specific client and typically delivered face to face. That is quite a formidable task. Not surprisingly it can prove difficult to achieve.

Considerable weight is being placed on the potential for online resources to provide effective information for LIPs. However, the multiplicity of sources available on the internet has both the potential to confuse and mislead as well as inform. Macfarlane's Canadian study suggests that LIPs often find online resources less helpful than they had anticipated. Information was reported to be incomplete and inconsistent. It was also difficult for LIPs to judge the reliability of information available online.⁷⁷ Many commentators, including Macfarlane in Canada and Zorza⁷⁸ in California, therefore recommend the creation of a single authoritative official website as the primary internet source that LIPs will know immediately can be trusted as a provider of accurate, comprehensive and unbiased information.

⁷⁶ Law Centres Network, *Written Evidence from the Law Centres Network* (LAS 57) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/written/8956.html>.

⁷⁷ Macfarlane (n 16) ch 7.

⁷⁸ Zorza, R, 'An Overview of Self-represented Litigation Innovation' (2009) 43 *Family Law Quarterly* 519, 525.

The California court website⁷⁹ and its self-help centre provide a useful model as a virtual one-stop-shop. This is in contrast to the court service website in England that appears to be oriented primarily towards lawyers and has no visible pathway for LIPs.⁸⁰ The Sorting out Separation website commissioned by the government is equally limited from an LIP perspective. Indeed a recent evaluation of the effectiveness of the site found that ‘users were often unclear about the purpose of the site and the range of information it offers’.⁸¹ A complementary analysis of traffic indicated that the app had attracted a fairly modest 91,469 unique users over a 13-month period, only 13 per cent of whom went beyond the home page.⁸²

Even if the English and Welsh websites could be brought up to the standard of the best available internationally, it is important to note that they are not a panacea. It should be recognised that not all LIPs are digitally literate or have regular access to online services. There are also limitations in making material accessible to all users. What might appear to be the more straightforward task of redesigning court forms to make them more

⁷⁹ At: www.courts.ca.gov. It is notable that the link to the online self-help centre is the first item on the homepage.

⁸⁰ The court service home page is entirely directed at professionals: www.justice.gov.uk/about/hmcts. The home page for the ‘family court guide’ also appears to only address professionals given that its opening page requires visitors to choose between public and private law matters without any explanation of what the terms mean www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/fjc/guidance/familycourtguide/. The court service form-finder <http://hmctsformfinder.justice.gov.uk/HMCTS/FormFinder.do> presents a dropdown list with no signposting for LIPs. If the LIP is sufficiently informed to select ‘Children Act’ from one of 77 categories they are then presented with a list of 51 different forms. A ‘Guide for separated parents’ (CB7) is listed at the very bottom of the long list of forms and accompanying leaflets.

⁸¹ Connors, C and Thomas, A, *Sorting out Separation Web App: Evaluation of Effectiveness* (Research Report no 863, DWP, 2014) 59.

⁸² Department for Work and Pensions, *Sorting Out Separation Web App: Analysis of Management Information* (DWP, 2014).

accessible has proved difficult. Macfarlane, for example, found LIPs had difficulties with form selection and completion even with specially redrafted online forms, and that is assuming that litigants are literate.⁸³

Looking Ahead

How might LIPs be better supported in future in a way that facilitates their access to justice and does not impinge on the rights of others? Rosemary Hunter⁸⁴ has very usefully identified three strategies that could be used to enable LIPs to function more effectively. The first consists of making available more tailored and accessible information and resources of the type identified above to help LIPs to represent themselves. In effect these types of resources are geared towards helping LIPs to become their own lawyers or what the Legal Services Consumer Panel calls rather optimistically ‘self-lawyering’.⁸⁵ Improved information will doubtless meet the needs of some but, as noted above, will not address all the needs of all litigants.

Hunter’s second element is to provide free or low-cost legal services, including law centres, pro bono and duty lawyer schemes, and unbundled and fixed price packages. Again, this is likely to make a contribution but it is very unlikely that the free legal advice in the form of law centres and pro bono schemes could ever meet demand. There are also doubts about whether pro bono schemes can provide the continuity required. Recent research⁸⁶ revealed that a pro bono advice scheme for family and civil proceedings was of

⁸³ Macfarlane (n 16) ch 6, app H.

⁸⁴ Hunter, R, ‘Access to Justice after LASPO’ [2014] *Family Law* 640.

⁸⁵ Legal Services Consumer Panel, *2020 Legal Services: How Regulators Should Prepare for the Future* (LSCP, 2014) 2.

⁸⁶ Sefton, M, Moorhead, R, Sidaway, J and Fox, C, *Unbundled and Pro Bono Advice for Litigants in Person: One Study* (ILAG Conference Paper, 2013).

limited effectiveness in terms of having a discernable impact on the progress of proceedings. Much was contingent on the ability of the LIP to follow up on advice and on factors beyond the control of the LIP and the pro bono adviser.

There has been something of a push recently to develop unbundled⁸⁷ and fixed price⁸⁸ legal services in England and Wales. There is some evidence that the summary advice model may not provide an adequate substitute for full representation. Albeit on housing cases, Greiner et al's randomised controlled studies in the US suggest that full representation offers significantly better outcome for clients than unbundled services, at least in some circumstances.⁸⁹ Macfarlane also cautions against over-reliance on a summary legal advice model. She reports that LIPs who accessed brief advice sessions could end up feeling more confused and stressed afterwards.⁹⁰

Hunter's third strategy is to modify the court process and, in particular, to move away from a traditional adversarial system predicated upon lawyers to a more inquisitorial approach.⁹¹ Such an approach would require significant changes in the role of the judge, most notably in cases where only one side is represented. The current

⁸⁷ The Law Society has recently issued a practice note on unbundling: www.lawsociety.org.uk/advice/practice-notes/unbundling-family-legal-services/.

⁸⁸ There is also a push for fixed pricing in financial remedy cases. See remarks by Mostyn J in *J v J* [2014] EWHC 3654 where the legal costs of £920,000 represented 32% of the parties' assets.

⁸⁹ Greiner, J, Wolos Pattanayak, C and Hennessy, J, 'The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future' (2013) 126 *Harvard Law Review* 901.

⁹⁰ Macfarlane (n 16) 122.

⁹¹ See also Zorza, 'An Overview of Self-represented Litigation Innovation' (n 78).

President of the Family Division is in favour of a more inquisitorial approach.⁹² What that might look like in practice is yet to be fully elaborated. A move to an inquisitorial process would not be resource free. It would require a considerable expansion in the number of judicial hours.

All of these strategies, if well thought through, are likely to bring some benefit, at least to those LIPs who are able to take advantage of the support offered. However, these types of interventions, particularly those offering to train LIPs to represent themselves, are predicated on a rational actor model requiring not just taking responsibility for one's own case but also taking responsibility appropriately by researching and utilising legal information as if one were a lawyer. That may be an appropriate model for some individuals, but it assumes an emotional readiness, intellectual and linguistic competence and organisational and logistical capacity that many LIPs may not possess. It also makes an assumption that some of the ethical issues about the appropriate role of the judge and court staff in supporting, but not advising LIPs, can be overcome.

In the meantime, there is little sign in England of a sustained policy response to the growth of LIPs. There were very little, if any, additional services put in place as LASPO was implemented other than a modest amount of extra funding for mediation services.⁹³ Rather belatedly, the government announced a new package of support measures in late 2014, but amounting to just £2 million. The package included a range of services – better online information, a six-month pilot telephone helpline run by Cafcass (the court social work service), funding for some local support services, a named person in each court to manage the 'new service' and an appointed judge in each centre with

⁹² Sir James Munby, 'View from the President's Chambers (12) The Process of Reform: Next Steps' (2014) www.judiciary.gov.uk/publications/view-from-presidents-chambers/.

⁹³ Even that additional funding was not used as the number of mediation starts halved, apparently due to the lack of family lawyers who had previously been the main supply/referral route to mediation.

particular responsibility for LIPs. Whilst none of those measures is likely to be unhelpful, they fall far short of what is likely to be needed. What is missing especially is any funding to make initial legal advice more widely available,⁹⁴ not least to enable people to resolve issues out of court either through solicitor negotiation or to encourage uptake of mediation.

What appears to be developing instead, whether by design or default, is a free for all in the supply of information, advice and ‘legal services’ in the broadest sense. Mavis Maclean⁹⁵ has identified, in particular, a multiplicity in the range of online sources springing up. These range from lawyers adopting new methods to attract and support clients, to not-for-profit organisations providing assistance, unqualified but nonetheless fee-charging McKenzie Friends together with other services charging a fee for a ‘lawyer-managed’ service the nature of which is not clear. Maclean notes that such diversification, fragmentation and (for some) lack of regulation is offering greater consumer choice, but at some risk. Prices for advice may go down as a consequence but there is little evidence of quality control or consumer protection. One of the newcomers to the field is the ‘Society of Professional McKenzie Friends’ whose Director stated in November 2014 that ‘Now that legal aid has all but gone from family proceedings, the consumer is king. The consumer now pays the piper personally out of his own pocket and is starting to call the tune’.⁹⁶ The problem, of course, is that the piper in this instance has very little information to go on to be sufficiently informed to shop around and make the most informed decisions.

Conclusion

⁹⁴ The funding included Personal Support Units which do not offer advice, just information and support.

⁹⁵ Maclean, M, ‘The Changing Professional Landscape’ [2014] *Family Law* 177.

⁹⁶ ‘McKenzie Friends’ trade association introduces new rules’ *Family Law Week* 16 November 2014 www.familylawweek.co.uk/site.aspx?i=ed136795.

Since the introduction of legal aid reform, individuals (or at least applicants) have increasingly taken responsibility for their disputes, but not quite as the government intended. Individuals have not been diverted to mediation to conduct a 'good divorce' but instead have accessed the courts in increasing numbers as litigants in person.

How well that is working, both for litigants and other court users, is not clear in the absence of systematic research. However, there are very clear indications from family justice professionals of problems being experienced on the ground, some raising very concerning issues about access to justice for the most vulnerable. We can also extrapolate from the findings from a body of international research on the likely support needs and impact of LIPs post-LASPO. The combined message from both bodies of evidence is that LIPs have a wide range of support needs, but that it is very difficult to provide accessible, consistent and effective support for all LIPs that will enable them to put their case forward effectively. It is even more difficult to provide support for LIPs without also disadvantaging represented parties or shifting tasks and costs that LIPs cannot shoulder to already stretched judges and court staff.

The difficulties that LIPs and justice systems have in adjusting to each other is perhaps not surprising given that justice systems have developed based on a full representation model that is now relevant to only a minority of cases in England and Wales. What is of particular concern is how little the government has done to ensure that the courts and LIPs can accommodate each other. There was very little preparation by the government before the introduction of legal aid reforms and a very limited response subsequently other than a reliance on mediation and the marketplace. As John Eekelaar⁹⁷ has pointed out, this frames the issues arising from individual decisions about partnering and parenthood as personal (and not very important) choices rather than matters

⁹⁷ Eekelaar, J, "Not of the Highest Importance": Family Justice under Threat' (2011) 33 *Journal of Social Welfare and Family Law* 311.

concerning rights and justice of both social and individual significance. In the meantime a brave new world of an increasingly deprofessionalised and unregulated advice and support sector is developing rapidly to supply legal consumers. The caveat emptor message that development brings sits uneasily with ideas about justice, fairness and the protection of the vulnerable that have long been the purpose of family law.